



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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PHILIP D. MURPHY  
*Governor*

LT. GOVERNOR SHEILA Y. OLIVER  
*Commissioner*

**FINAL DECISION**

**October 30, 2018 Government Records Council Meeting**

Bert A. Wailoo  
Complainant

v.

Kean University  
Custodian of Record

Complaint No. 2016-301

At the October 30, 2018 public meeting, the Government Records Council (“Council”) considered the October 23, 2018 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Complainant’s request requests sought lists of information and not specific, identifiable government records, it is invalid under OPRA pursuant to Turner v. Plainfield Mun. Util. Auth. (Union), GRC Complaint No. 2009-176 (January 2011). See also MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178-179 (App. Div. 2007). Based on this, the Custodian lawfully denied access to the Complainant’s request. N.J.S.A. 47:1A-6.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of October, 2018

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: November 1, 2018**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff  
October 30, 2018 Council Meeting**

**Bert A. Wailoo<sup>1</sup>  
Complainant**

**GRC Complaint No. 2016-301**

v.

**Kean University<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Hard copies via pick-up of a list of disciplinary consultations that the Human Resources (“HR”) Department undertook between September 1, 2014 and September 30, 2016.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** October 13, 2016  
**Response Made by Custodian:** October 24, 2016  
**GRC Complaint Received:** November 23, 2016

**Background<sup>3</sup>**

**Request and Response:**

On October 13, 2016, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On October 24, 2016, the Custodian responded in writing denying the request as invalid. The Custodian stated that OPRA did not require custodians to create records, respond to requests for information, or conduct research.

**Denial of Access Complaint:**

On November 23, 2016, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that after receiving the Custodian’s denial letter, he attempted to contact her multiple times. The Complainant asserted that in each instance, the Custodian was either not available or did not return phone calls. The Complainant included as part of his complaint templates of a “Weingarten Rights” letter and a “Complaint Reporting Form.”

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Deputy Attorney General Eric Apar.

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

#### Statement of Information:<sup>4</sup>

On April 18, 2017, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on October 13, 2016. The Custodian certified that upon legal review, it was determined that no record existed. The Custodian certified that she responded in writing on October 24, 2016 denying the request.

The Custodian argued that the Complainant’s OPRA request did not seek an existing record; rather, it required her to create same. The Custodian argued that OPRA did not “convert a custodian into a researcher.” Lagerkvist v. Office of the Governor, 443 N.J. Super. 230, 237 (App. Div. 2015). The Custodian further argued that New Jersey courts have routinely held that a custodian is not required to create records that did not exist at the time of the request. Sussex Commons Assoc., LLC. v. Rutgers, 210 N.J. 531, 544 (2012); Paff v. Galloway Twp., 444 N.J. Super. 495, 497 (App. Div. 2016). The Custodian argued that, as in Paff, the Complainant submitted a request that would require her to create a new record. The Custodian argued that the request thus exceeded OPRA’s scope; thus, she properly denied access to it.

Additionally, the Custodian certified that no list of disciplinary consultations existed. Further, the Custodian reaffirmed that she would need to create a “list” to respond to the request. The Custodian noted that the GRC previously dismissed complaints where a custodian certified that no records existed. See Pusterhofer v. N.J. Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005).

### Analysis

#### Validity of Request

The New Jersey Appellate Division has held that:

While OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records “readily accessible for inspection, copying, or examination.”* N.J.S.A. 47:1A-1.

[MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005) (emphasis added).]

The Court reasoned that:

Most significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the

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<sup>4</sup> On December 21, 2016, this complaint was referred to mediation. On March 23, 2017, this complaint was referred back to the GRC for adjudication.

Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

[Id. at 549 (emphasis added).]

The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records* not otherwise exempt . . . In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005);<sup>5</sup> N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178-179 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

In Turner v. Plainfield Mun. Util. Auth. (Union), GRC Complaint No. 2009-176 (January 2011), the complainant sought, among other things, two lists containing certain types of information without a specified time frame. The custodian initially responded stating that access could be provided to those lists; however, she argued in the SOI that request items were invalid (citing Herron v. Twp. of Montclair (Essex), GRC Complaint No. 2008-46 (April 2009)). The Council ultimately held that the custodian lawfully denied access to the items. In reaching this conclusion, the Council looked to its prior decision in Shain v. Ocean Cnty. Bd. of Taxation, GRC Complaint No. 2007-127 (November 2007) (holding that a request for a “list” containing certain information failed to identify a specific record).

Here, the Complainant sought “a list of disciplinary consultations” conducted by HR between September 1, 2014 and September 30, 2016. The Custodian denied the request as invalid, and subsequently argued in the SOI that the request required her to perform research and create a record. The Custodian further certified that no record existed reiterating that she would have to create a list to comply with the request.

The facts of this complaint are consistent with those in Turner except for the time frame issue, which is implicated in the instant complaint. Ultimately, there is no evidence in the record to suggest that the Custodian maintained a list containing information (whether date and time or otherwise) of disciplinary consultations held for a two (2) year period.

Further, the GRC must note that Paff v. Galloway Twp., 444 N.J. Super. 495 was subsequently overturned by the New Jersey Supreme Court. Paff v. Twp. of Galloway, 227 N.J. 24 (2016). Thus, the Custodian’s obligation to coalesce and provide electronic information could have played a significant role in this complaint. However, there is no evidence in the record to indicate that Kean maintained any basic information about disciplinary consultations electronically with the ability to locate and coalesce it into a list. As an example, neither of the forms provided by the Complainant in the Denial of Access Complaint contain electronic disciplinary consultation information that could be coalesced into the request list.

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<sup>5</sup> Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

Accordingly, because the Complainant's request requests sought lists of information and not specific, identifiable government records, it is invalid under OPRA pursuant to Turner, GRC 2009-176. See also MAG, 375 N.J. Super. 534; Bent, 381 N.J. Super. 30; N.J. Builder, 390 N.J. Super. 166. Based on this, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.

### **Conclusions and Recommendations**

The Council Staff respectfully recommends the Council find that because the Complainant's request requests sought lists of information and not specific, identifiable government records, it is invalid under OPRA pursuant to Turner v. Plainfield Mun. Util. Auth. (Union), GRC Complaint No. 2009-176 (January 2011). See also MAG Entm't, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Dep't, 381 N.J. Super. 30, 37 (App. Div. 2005); N.J. Builders Assoc. v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 178-179 (App. Div. 2007). Based on this, the Custodian lawfully denied access to the Complainant's request. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso  
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October 23, 2018