



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

February 22, 2022 Government Records Council Meeting

Luis F. Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2020-131

At the February 22, 2022 public meeting, the Government Records Council (“Council”) considered the February 15, 2022 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:

1. The Custodian complied with the Council’s September 28, 2021 Interim Order because she responded in the extended time frame providing nine (9) copies of the unredacted e-mails for *in camera* review and a document index. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Because it is determined that the Custodian did not unlawfully deny access to any of the responsive records here and did not commit any violations of OPRA’s provisions, the GRC declines to address whether a knowing and willful violation occurred.

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 22nd Day of February 2022

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: February 24, 2022

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
February 22, 2022 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2020-131

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all correspondence between Kean University (“Kean”) and Marquan Mutazz (also known as Ray Davis) on use of Kean’s facilities by the North Jersey Tigers from 2009 to present.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: January 16, 2020
Response Made by Custodian: January 28, 2020
GRC Complaint Received: July 16, 2020

Records Submitted for *In Camera* Examination: Two (2) e-mails between Mr. Mutazz and Kean employees dated February 22, 2013 and November 6, 2012 and an e-mail attachment.

Background

September 28, 2021 Council Meeting:

At its September 28, 2021 public meeting, the Council considered the September 21, 2021 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, found that:

1. The Custodian’s response to the Complainant’s OPRA request was sufficient in that it provided a specific lawful basis for denying access to the records sought. Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g). See D’Appolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Bellan-Boyer v. N.J. Dep’t of Cmty. Affairs, Comm’rs Office, GRC Complaint No. 2007-114 (October 2007); Halliwell and Pennant v. Borough of Brooklawn (Camden), GRC Complaint No. 2016-201 (August 2018).

¹ No legal representation listed on record.

² Represented by Kraig M. Dowd, Esq., of Weber Dowd, LLC (Woodland Park, NJ).

2. The GRC must conduct an *in camera* review of the responsive e-mails to determine the validity of the Custodian's assertion that the e-mails were exempt under the bases cited by the Custodian. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).
3. **The Custodian shall deliver³ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Conclusion No. 2 above), a document or redaction index⁴, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁵ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Procedural History:

On September 29, 2021, the Council distributed its Interim Order to all parties on. On October 6, 2021, Custodian's Counsel e-mailed the Government Records Council ("GRC") seeking an extension of time through October 7, 2021 to comply with the Council's Order. Counsel noted that they could send the records electronically if the GRC was willing to accept delivery through that method. On the same day, the GRC rejected Custodian Counsel's offer to delivery the records electronically, noting that it "prohibits an agency from sending *in camera* documents via e-mail where absolutely necessary."⁶ Thus, the GRC granted an extension of time through October 14, 2021 to respond to the Council's Order.

On October 8, 2021, the Custodian provided a partial response to the Council's Interim Order in the certification of compliance and document index. Therein, the Custodian certified that she was providing nine (9) copies of the responsive e-mails and a document index. The Custodian averred that the e-mails were "generated by public employees in connection with an ethics grievance" filed by the Complainant and relate directly to that investigation. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10. On October 12, 2021, the GRC received nine (9) copies of the *in camera* documents Lawyers Service.

Additional Submissions:

On December 9, 2021, Complainant e-mailed the GRC arguing that if the attachment was

³ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

⁴ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁵ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

⁶ The GRC's regulations prohibit Council members and staff from making copies of unredacted *in camera* documents. N.J.A.C. 5:105-2.8(e).

a decision from the State Ethics Commission (“SEC”), it should be disclosed. The Complainant noted that this is based on the SEC’s practice of posting its final decisions to its website. On December 16, 2021, the Complainant again e-mailed the GRC expanding on his request that if the attachment is an SEC decision, it should be disclosed to him. The Complainant noted that he asked the SEC for copies of their files on Mr. Mutazz and was told that none existed.

Analysis

Compliance

At its September 28, 2021 meeting, the Council ordered the Custodian to submit nine (9) unredacted copies of responsive e-mail correspondence withheld from disclosure for *in camera* review. The Council also ordered the Custodian to simultaneously provide certified confirmation of compliance, in accordance with R. 1:4-4, to the Executive Director. On September 29, 2021, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. Thus, the Custodian’s response was due by close of business on October 6, 2021

On October 6, 2021, the fifth (5th) business day after receipt of the Council’s Order, Custodian’s Counsel sought an extension of time to comply, which the GRC granted through October 14, 2021. Prior to the expiration of the extended time frame to comply, the Custodian submitted certified confirmation of compliance, a document index, and nine (9) copies of the responsive records. Thus, the Custodian timely complied with the Council’s Order.

Therefore, the Custodian complied with the Council’s September 28, 2021 Interim Order because she responded in the extended time frame providing nine (9) copies of the unredacted e-mails for *in camera* review and a document index. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

OPRA provides that:

A government record shall not include . . . information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer [or] with any grievance filed by or against an individual

[N.J.S.A. 47:1A-1.1.]

In Farneski v. Hunterdon Cnty. Prosecutor's Office, GRC Complaint No. 2010-20 (Interim Order dated October 25, 2011), the Council took a narrow interpretation of the term "grievance" as described in Asbury Park Press, 406 N.J. Super. 1; to wit, "the word 'grievance' has a known meaning in the contest of employer-employee relationships, especially when it is placed next to the words 'collective negotiations'." The Council thus held that the term "'grievance' as it appears in OPRA is a term of art and not the word it is commonly understood." Id. at 10. However, the Council subsequently signaled that Farneski was an outlier by upholding a custodian's denial of grievances under the commonly understood meaning. See e.g. Keyser v. Morris Sch. Dist. (Morris), GRC Complaint No. 2015-189 (January 2017). For instance, in Yannone, Esq., GRC 2016-73, the Council upheld the denial of a recorded interview because it related to a grievance filed by the complainant's client against New Jersey Department of Corrections' employees (citing Rodgers v. N.J. Dep't of Corr., GRC Complaint No. 2007-311 (June 2009)). The Council recently addressed this shift in application of the term "grievance" in Rodriguez v. Kean Univ., GRC Complaint No. 2020-65 (May 2021).

Additionally, and as noted above, OPRA provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access . . .

[N.J.S.A. 47:1A-10.]

OPRA begins with a presumption against disclosure and "proceeds with a few narrow exceptions that . . . need to be considered." Kovalcik, 206 N.J. at 594. These are:

[A]n individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[Id.]

Further, the personnel record exemption applies to records that ". . . bear many of the indicia of personnel files.'" North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J.

Super. 386, 390 (App. Div. 2009); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). In Rodriguez, 2013-296, the Council held that “disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA.” Id. at 5. The Council has also similarly determined that records involving employee discipline or investigations into employee misconduct and ethics violations are properly classified as personnel records exempt from disclosure under OPRA. See also Rodriguez v. Kean Univ., GRC Complaint No. 2013-197 (December 2013) (holding that a report related to an ethics investigation was the equivalent of a “personnel record” and exempt from disclosure under N.J.S.A. 47:1A-10).

Moreover, in Dusenberry v. New Jersey City Univ., GRC Complaint No. 2009-101 (April 2010), the complainant sought access to an “Outside Activity Questionnaire” (“OAQ”) for several employees. The custodian denied access under N.J.S.A. 47:1A-10, stating that the OAQs were personnel records. In the Denial of Access Complaint, the complainant disputed the custodian’s denial, arguing that he found no legitimate reason for it. In the Statement of Information, the custodian contended that he lawfully denied access based on the Appellate Division’s decision in N. Jersey Media Grp., 405 N.J. Super. 386 (holding that OAQs were exempt from disclosure as personnel records). The Council agreed and held that the custodian lawfully denied access to the responsive OAQs as, among other reasons, personnel records.

The GRC conducted an *in camera* examination on the submitted record. The results of this examination are set forth in the following table:

Record No.	Record Name/Date	Description of Record	Custodian’s Explanation/ Citation for Non-disclosure	Findings of the <i>In Camera</i> Examination⁷
1.	E-mail from Mr. Mutazz to Kean Vice President (“VP”) Philip Connelly dated February 22, 2013 (2:58 p.m.)	E-mail recounting details of a meeting stemming from a potential ethics complaint.	Record related to a grievance. <u>N.J.S.A.</u> 47:1A-1.1; <u>N.J.S.A.</u> 47:1A-10.	This e-mail recounts in detail a meeting between Mr. Mutazz and ELO Tripodi regarding a potential ethics complaint. The e-mail also includes explicit details regarding Mr. Mutazz’s outside

⁷ **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record and manually “black out” the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

				activities. As the content of this e-mail connected both to a grievance the Complainant acknowledged he lodged against Mr. Mutazz and contain information related to his OAQ, the e-mail is exempt from disclosure. <u>N.J.S.A. 47:1A-1.1</u> , <u>N.J.S.A. 47:1A-10</u> ; <u>N. Jersey Media Grp., 405 N.J. Super. 386</u> .
2.	E-mail from Michael Tripodi (Kean Counsel and Ethics Liaison Officer (“ELO”)) to Mr. Mutazz dated November 6, 2013 (2:39p.m.) with attachment identified below as Record Item No. 3.	E-mail providing a memorandum to Mr. Mutazz regarding his OAQ.	Record related to a grievance. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-10</u> .	Mr. Tripodi e-mailed Mr. Mutazz regarding his OAQ and attached the below memorandum. Thus, this record reasonably falls within the definition of a personnel record exemption from disclosure. <u>N.J.S.A. 47:1A-10</u> ; <u>N. Jersey Media Grp., 405 N.J. Super. 386</u> . Thus, the Custodian lawfully denied access to the responsive e-mail. <u>N.J.S.A. 47:1A-6</u> .
3.	Memorandum from ELO Tripodi to Mr. Mutazz dated November 6, 2013 (2 pages) (attachment to Record No. 2)	ELO Tripodi provides an analysis of and decision on Mr. Mutazz’s OAQ.	Record related to a grievance. <u>N.J.S.A. 47:1A-1.1</u> ; <u>N.J.S.A. 47:1A-10</u> .	The memorandum attachment, which is not a final decision of the SEC, describes Mr. Mutazz’s OAQ in detail and includes ELO Tripodi’s decision on whether it has been approved. As the Council has already determined that the physical OAQ is exempt from disclosure as a personnel record, this memorandum is viewed

				as similarly exempt. <u>N. Jersey Media Grp.</u> , 405 <u>N.J. Super.</u> 386; <u>Dusenberry</u> , GRC 2009-101. Thus, the Custodian lawfully denied access to the attached memorandum. <u>N.J.S.A.</u> 47:1A-6.
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Based on the forgoing, the Custodian lawfully denied access to the records responsive to the Complainant’s OPRA request because they are clearly personnel records, relate to a grievance filed by the Complainant, and address Mr. Mutazz’s OAQ. N.J.S.A. 47:1A-6.

Knowing & Willful

Because it is determined that the Custodian did not unlawfully deny access to any of the responsive records here and did not commit any violations of OPRA’s provisions, the GRC declines to address whether a knowing and willful violation occurred.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s September 28, 2021 Interim Order because she responded in the extended time frame providing nine (9) copies of the unredacted e-mails for *in camera* review and a document index. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. **The *In Camera* Examination set forth in the above table reveals the Custodian has lawfully denied access to the records listed in the document index pursuant to N.J.S.A. 47:1A-6.**
3. Because it is determined that the Custodian did not unlawfully deny access to any of the responsive records here and did not commit any violations of OPRA’s provisions, the GRC declines to address whether a knowing and willful violation occurred.

Prepared By: Frank F. Caruso
Executive Director

February 15, 2022



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

September 28, 2021 Government Records Council Meeting

Luis F. Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2020-131

At the September 28, 2021 public meeting, the Government Records Council (“Council”) considered the September 21, 2021 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:

1. The Custodian’s response to the Complainant’s OPRA request was sufficient in that it provided a specific lawful basis for denying access to the records sought. Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g). See D’Appolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Bellan-Boyer v. N.J. Dep’t of Cmty. Affairs, Comm’rs Office, GRC Complaint No. 2007-114 (October 2007); Halliwell and Pennant v. Borough of Brooklawn (Camden), GRC Complaint No. 2016-201 (August 2018).
2. The GRC must conduct an *in camera* review of the responsive e-mails to determine the validity of the Custodian’s assertion that the e-mails were exempt under the bases cited by the Custodian. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).
3. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Conclusion No. 2 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council’s Interim Order.**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 28th Day of September 2021

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: September 29, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 28, 2021 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2020-131

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all correspondence between Kean University (“Kean”) and Marquan Mutazz (also known as Ray Davis) on use of Kean’s facilities by the North Jersey Tigers from 2009 to present.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: January 16, 2020
Response Made by Custodian: January 28, 2020
GRC Complaint Received: July 16, 2020

Background³

Request and Response:

On January 16, 2020, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 28, 2020, the Custodian responded in writing stating that an extension of the response time frame through February 27, 2020 is necessary based on the time frame identified in the subject OPRA request. On February 26, 2020, the Custodian responded in writing denying access to any responsive records under the “inter-agency or intra-agency advisory, consultative, or deliberative [“ACD”] material” and “grievance” exemptions. N.J.S.A. 47:1A-1.1.

Denial of Access Complaint:

On July 16, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian violated OPRA by improperly denying access to the responsive records under the “grievance” exemption. The Complainant argued that he did not seek records regarding a “grievance” as “it is defined and

¹ No legal representation listed on record.

² Represented by Kraig M. Dowd, Esq., of Weber Dowd, LLC (Woodland Park, NJ).

³ 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 Executive Director the submissions necessary and relevant for the adjudication of this complaint.

understood under OPRA. The Complainant asserted that in Farneski v. Hunterdon Cnty. Prosecutor's Office, GRC Complaint No. 2010-20 (Interim Order dated October 25, 2011), the Council found that the definition of "grievance" within OPRA should mirror that described in Asbury Park Press v. Cnty. of Monmouth, 406 N.J. Super. 1 (App. Div. 2009) (holding that "[a] complaint filed with the Superior Court is not the same as a 'grievance' within the context of the employment relationship." Id.).

The Complainant further argued that the Custodian violated OPRA by failing to provide a document index identifying each responsive record to which she applied the exemption.

Statement of Information:

On September 8, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on January 16, 2020. The Custodian certified that her search included forwarding the subject OPRA request to the "Office of Record" for review. The Custodian certified that after obtaining an extension of time to respond, she was advised that the Tigers' use of Kean's facilities was the subject of an "ethics grievance" filed by the Complainant. The Custodian affirmed that she responded in writing on February 26, 2020 denying access to the subject OPRA request under N.J.S.A. 47:1A-1.1.

The Custodian argued that she properly denied access to the Complainant's OPRA request because the records pertain to an investigation into Mr. Mutazz, a former Kean employee, based on an ethics grievance the Complainant filed against him. The Custodian argued that contrary to the Complainant's argument, Farneski does not apply because nothing in OPRA ties the term "grievance" to collective bargaining negotiations. See Yannone v. N.J. Dep't of Corr., GRC Complaint No. 2016-73 (October 2017). The Custodian also contended that Farneski is inapposite to the instant complaint because the record at issue there was a tort claim, which the Council differentiated from employment-based "grievances." The Custodian argued that Asbury Park Press, 406 N.J. Super. 1 also related to court actions and not employee "grievances."

The Custodian further contended that she had no obligation to provide the Complainant a document index at the time of her response. The Custodian argued that N.J.S.A. 47:1A-5(g) only requires that a custodian provide a specific lawful basis for denying access to an OPRA request. The Custodian argued that because she identified a specific lawful basis here, her response was sufficient. See Halliwell and Pennant v. Borough of Brooklawn (Camden), GRC Complaint No. 2016-201 (August 2018).

Additional Submissions:

On September 13, 2020, the Complainant responded to the Custodian's SOI. Therein, the Complainant argued that, like a government employee reporting a potential criminal act by another employee, the allegation of a violation of the State Uniform Ethics Code ("UEC") cannot be considered a "grievance." The Complainant averred that he contacted Kean's Ethics Officer and the State Ethics Commission ("SEC") alleging an improper personal use of Kean facilities by a semi-pro team owned by Mr. Mutazz. The Complainant contended that the Tigers' use of Kean's facilities "had nothing to do with [Mr. Mutazz's] responsibilities as an employee;" thus, the ethics

complaint does not relate to an employee-employer relationship. The Complainant also asserted that he had no supervisory responsibility over Mr. Mutazz's use of Kean facilities or any role in approving such usage. The Complainant argued that the forgoing supports that he was not filing a "grievance" as defined in OPRA.

The Complainant further contended that the Custodian unlawfully denied access to those records that pre-dated his contacting the SEC on July 2, 2012. The Complainant contended that Kean did not have a basis to withhold any of the responsive records prior to the initiation of the investigation and could not retroactively apply same. Ganzweig v. Twp. of Lakewood, 2013 N.J. Super. Unpub. LEXIS 2537 (September 27, 2013). The Complainant requested that the GRC order disclosure of those responsive records, require the Custodian to certify if none exist, or require the Custodian "to state affirmatively" that Mr. Mutazz did not use Kean's facilities for the Tigers.

The Complainant further argued that the ACD exemption could not apply here because the public can access SEC final determinations. The Complainant thus contended that he should have at least been given access to that record because it was no longer part of the ACD process. The Complainant argued that the SEC's regulations allow it to entertain requests for investigation file information following a final determination. N.J.A.C. 19:61-3.1(c)(5). The Complainant thus requested that the GRC rely on the Asbury Park Press and Farneski definition of a "grievance" and order disclosure of all records responsive to the subject OPRA request.

On September 15, 2020, the Complainant e-mailed the GRC arguing that the Custodian's SOI assertion that he did not provide any evidence to contradict that a "grievance" had been filed against Mr. Mutazz was wrong. The Complainant contended that the SEC directed him to approach Kean's ethics liaison officer. The Complainant also argued that the SEC's own website states that ethics complaints can exist outside of the employment relationship. The Complainant again reiterated that the complaint he filed was not connected to any employment relationship with Kean.

On November 6, 2020, the Complainant e-mailed the GRC advising that N.J.A.C. 19:61-2.5 required the SEC to provide access to "pleadings related to a complaint, all final orders, decisions, and formal [SEC] opinions shall be . . . available to the public." Id. The Complainant thus requested that Kean be compelled to immediately disclose these records.

On June 22, 2021, the Complainant e-mailed the GRC advising that he located a statement made by the ethics liaison officer's attorney in a separate attorney ethics complaint (also filed by the Complainant). The Complainant noted that therein, the attorney stated that the ethics complaint brought against Mr. Mutazz was "appropriately investigated and ratified by the SEC." The Complainant again renewed his request for the Council to order disclosure of all documents contained in the investigation file.

Analysis

Sufficiency of Response

OPRA provides that if a "custodian is unable to comply with a request for access, the custodian *shall indicate the specific basis therefor . . .* on the request form and promptly return it

to the requestor.” N.J.S.A. 47:1A-5(g) (emphasis added). The Council has held that for a denial of access to be in compliance with OPRA, it must be specific and sufficient to prove that a custodian’s denial is authorized by OPRA. See D’Appolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Lear, III v. City of Cape May (Cape May), GRC Complaint No. 2014-426 (Interim Order dated November 17, 2015).

However, in Bellan-Boyer v. N.J. Dep’t of Cmty. Affairs, Comm’rs Office, GRC Complaint No. 2007-114 (October 2007), the complainant asserted that the custodian was required to provide a Vaughn index in accordance with Paff v. N.J. Dep’t of Labor, 392 N.J. Super. 334 (App. Div. 2007). The Council disagreed, finding that the requirements set forth in Paff applied to the Custodian’s SOI and accompanying certification under R. 1:4-4, and not at the time of the Custodian’s response to the OPRA request.

Here, the Custodian denied access to the subject OPRA request under N.J.S.A. 47:1A-1.1. In the Denial of Access Complaint, the Complainant contended, among other things, that the Custodian failed to include with her response a document index identifying each individual record. In the SOI, the Custodian argued that she was not required to include a document index in her response pursuant to Halliwell, 2016-201. The Custodian further argued that she proffered a denial of access basis a specific lawful basis, N.J.S.A. 47:1A-1.1, which satisfied the requirement under D’Appolonio, GRC 2008-62. Although the Complainant asserted that the Custodian’s failure to provide a Vaughn index for those withheld records is a violation, the Custodian was not required to produce the index at the time of the response. Bellan-Boyer, GRC 2007-114. Thus, the Custodian’s response, absent a document index, was nonetheless sufficient.

Accordingly, the Custodian’s response to the Complainant’s OPRA request was sufficient in that it provided a specific lawful basis for denying access to the records sought. Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g). See D’Appolonio, GRC 2007-272; Bellan-Boyer, GRC 2007-114; Halliwell, GRC 2016-201.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005), the complainant appealed a final decision of the Council⁴ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The court stated that:

⁴ Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

[OPRA] also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the matter before the Council, the Complainant sought access to e-mails between Kean and Mr. Mutazz regarding the use of Kean's facilities from 2009 through the date of the OPRA request. The Custodian denied access to responsive records under the ACD and grievance exemptions. N.J.S.A. 47:1A-1.1. This complaint followed wherein the Complainant contended that the Custodian's denial was unlawful pursuant to Farneski, GRC 2010-20. In the SOI, the Custodian reasserted her position that she lawfully denied access to those e-mails because they were part of an ethics "grievance" filed against Mr. Mutazz. The Complainant subsequently argued, among other issues addressed below, that his complaint with the Kean Ethics Office was not supervisory in nature and thus could not be considered a grievance. The Complainant also argued that the Custodian could not apply the asserted exemption to any records prior his July 2, 2012 contact with the SEC regarding his ethics concerns. The Complainant also argued that his complaint was not connected with an employment relationship at Kean.

Upon review of the evidence of record in the instant complaint, the GRC cannot determine whether the Custodian properly denied access to those e-mails deemed to be responsive to the subject OPRA request. The GRC has an obligation to perform an *in camera* review if it cannot glean enough information from the evidence of record to support the redactions. Specifically, there is a question as to whether the responsive e-mails were part of the ethics issue given the Complainant's explanation of the ethics investigation length. Further, it is typical for the GRC to conduct an *in camera* review of e-mails when the ACD exemption has been asserted. See Ehrenreich v. N.J. Dep't of Trans., GRC Complaint No. 2016-192 (Interim Order dated April 24, 2018). For these reasons, a "meaningful review" is necessary to determine whether the redactions

portions of the responsive minutes fall within the asserted exemptions. Paff, 379 N.J. Super. at 355.

Therefore, the GRC must conduct an *in camera* review of the responsive e-mails to determine the validity of the Custodian's assertion that the e-mails were exempt under the bases cited by the Custodian. N.J.S.A. 47:1A-1.1. See Paff, 379 N.J. Super. at 346.

Finally, the GRC notes that in submissions following the Custodian's SOI, the Complainant asserted that he should have been provided with additional records he believed were responsive to his OPRA request. Specifically, the Complainant argued that SEC "pleadings related to a complaint, all final orders, decisions, and formal opinions" and the investigation file should have been disclosed to him. However, the Complainant's OPRA request clearly does not identify any of these records; instead, he only sought correspondence between Kean and Mr. Mutazz regarding his use of Kean facilities from 2009 to present. Thus, it is evident that the Complainant attempted to expand the scope of his request as part of this complaint. For this reason, the GRC will only review *in camera* the communications for which the Custodian has exempted access and will not address the SEC documents the Complainant erroneously argued were responsive to the subject OPRA request.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's response to the Complainant's OPRA request was sufficient in that it provided a specific lawful basis for denying access to the records sought. Therefore, the Custodian did not violate OPRA under N.J.S.A. 47:1A-5(g). See D'Appolonio v. Borough of Deal (Monmouth), GRC Complaint No. 2008-62 (September 2009); Bellan-Boyer v. N.J. Dep't of Cmty. Affairs, Comm'rs Office, GRC Complaint No. 2007-114 (October 2007); Halliwell and Pennant v. Borough of Brooklawn (Camden), GRC Complaint No. 2016-201 (August 2018).
2. The GRC must conduct an *in camera* review of the responsive e-mails to determine the validity of the Custodian's assertion that the e-mails were exempt under the bases cited by the Custodian. N.J.S.A. 47:1A-1.1. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).
3. **The Custodian shall deliver⁵ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see Conclusion No. 2 above), a document or**

⁵ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

redaction index⁶, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁷ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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Executive Director

September 21, 2021

⁶ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."