



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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TRENTON, NJ 08625-0819

PHILIP D. MURPHY  
Governor

LT. GOVERNOR SHEILA Y. OLIVER  
Commissioner

**FINAL DECISION**

**May 18, 2021 Government Records Council Meeting**

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

Complaint No. 2020-65

At the May 18, 2021 public meeting, the Government Records Council (“Council”) considered the May 11, 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 (Interim Order dated August 28, 2018).
2. Because the records sought are e-mails between Ms. Benedetto and Ms. Bezner regarding an attorney ethics “grievance” filed by the Complainant against Ms. Benedetto, same are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Yannone v. N.J. Dep’t of Corr., GRC Complaint No. 2016-73 (October 2017). Thus, the Custodian lawfully denied access to any responsive records to the extent they existed. 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 18<sup>th</sup> Day of May 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: May 20, 2021**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
May 18, 2021 Council Meeting**

**Luis F. Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2020-65**

v.

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

**Records Relevant to Complaint:** Electronic copies via e-mail of all communications between Geraldine Benedetto and Karen Bezner, Esq. of Scotch Plains between 2016 and present regarding the Complainant.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** January 16, 2020  
**Response Made by Custodian:** January 28, 2020  
**GRC Complaint Received:** March 13, 2020

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

**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 obtaining an extension of time to February 27, 2020 to respond to the subject OPRA request. On February 26, 2020, the Custodian responded in writing denying the Complainant’s OPRA request as seeking information related to any grievance by or against an individual. N.J.S.A. 47:1A-1.1.

**Denial of Access Complaint:**

On March 13, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian’s denial of access was incorrect because the records sought did not involve a “grievance.”

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

<sup>2</sup> Represented by Kraig M. Dowd, Esq., of Weber Dowd Law, LLC. (Woodland Park, NJ).

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

The Complainant noted that for background information, he filed an “attorney ethics grievance” against Ms. Benedetto for which Ms. Bezner was the investigator. The Complainant asserted that Ms. Benedetto’s response to his grievance was on Kean University (“Kean”) letterhead, thus rendering it a “government record” subject to access under OPRA. The Complainant contended that despite the use of the term “grievance,” the one he filed is not consistent with OPRA’s definition of the term, which applies only to collective negotiations. N.J.S.A. 47:1A-1.1; Farneski v. Hunterdon Cnty. Proecutor’s Office, GRC Complaint No. 2010-20 (Interim Order dated October 25, 2011). The Complainant also contended that in addition to her unlawful denial of access, the Custodian failed to provide a document index as part of her response.<sup>4</sup>

#### Statement of Information:

On May 26, 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 sending the subject OPRA request to the “Office of Record.” The Custodian affirmed that she was advised that any responsive communications would have been in connection with the Complainant’s filed ethics grievance. The Custodian certified that following a brief extension, she responded in writing on February 26, 2020 denying the subject OPRA request under N.J.S.A. 47:1A-1.1.

The Custodian argued that contrary to the Complainant’s assertions, she lawfully denied access to the records responsive to the subject OPRA request. The Custodian noted that the Complainant identified his filing as a “grievance” in the Denial of Access Complaint. The Custodian argued that a plain reading of OPRA provides that the term “grievance” is separate from “collective negotiations” by the presence of the word “or.” See Yannone v. N.J. Dep’t of Corr., GRC Complaint No. 2016-73 (October 2017). See also N.J.S.A. 47:1A-10 (exempting access to personnel records including “any grievance filed by or against an individual . . .”). The Custodian also contended that Farneski, GRC 2020-20 was inapposite to this complaint, as the complainant there asserted that no grievance existed.

The Custodian further contended that she was under no obligation to provide a document index to the Complainant at the time of her response. The Custodian argued that her only obligation under N.J.S.A. 47:1A-5(g) was to deny the request with a specific lawful basis therefor. The Custodian thus asserted that her response was sufficient and no violation of OPRA occurred. Halliwell and Pennant v. Borough of Brooklawn (Camden), GRC Complaint No. 2016-201 (Interim Order dated August 28, 2018).

The Custodian finally noted that although not asserted in her original denial, the GRC has previously denied access to ethics complaint records under N.J.S.A. 47:1A-10. See Rodriguez v. Kean Univ., GRC Complaint No. 2013-71 (July 2015). The Custodian also noted that the Council has upheld a denial of access even if the custodian did not cite every applicable statutory citation. See Fischer, III v. N.J. Dep’t of Corr., GRC Complaint No. 2005-170 (May 2006).

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<sup>4</sup> The Complainant included arguments as to why the requested records were not exempt under the attorney-client privilege. The GRC notes that the Custodian did not deny access to the subject OPRA request under that exemption.

### Additional Submissions:

On June 5, 2020, the Complainant e-mailed the GRC refuting the Custodian's SOI. The Complainant argued that the Appellate Division's decision in Asbury Park Press v. Cnty. of Monmouth, 406 N.J. Super. 1 (App. Div. 2009) supported his position that "grievance" only applied to collective bargaining issues. Id. at 8-9 The Complainant argued that the Council's decision in Farneski confirms the forgoing. The Complainant also argued that both cases share a common issue: the records in question were not considered personnel records and thus could not be considered part of a grievance. See also Wares v. Passaic Cnty. Sheriff's Office, GRC Complaint No. 2014-238 (April 2015).

The Complainant also argued that Halliwell, GRC 2016-201 did not address the document index issue; rather, complainants challenged the custodian's response that no records existed. The Complainant asserted that the Custodian did not state that no records existed, which implies that she denied the request without performing a search. The Custodian thus requested that the GRC should send this complaint to the Office of Administrative Law ("OAL") for a fact-finding hearing. The Complainant argued that should Kean argue that records were destroyed in violation of their records retention schedule, then the OAL can make a determination on whether that action was deliberate.

The Complainant subsequently noted that he filed his ethics complaint with "District 12." The Complainant asserted that this filing appears to be equivalent to the filings at issue in Asbury, 406 N.J. Super. 1.

## 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'Appolonia 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 also included a complete Vaughn Index, although it did not contain multiple individual entries. The Complainant subsequently argued that Halliwell did not address the document index issue. The Complainant also contended that the Custodian also failed to include a completed Vaughn index in the SOI.

However, the Custodian proffered a denial of access based on a specific lawful basis, N.J.S.A. 47:1A-1.1, which satisfies 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. Additionally, and contrary to the Complainant’s post SOI assertions, the Council addressed this exact issue in Halliwell and reached the same conclusion. See Halliwell, (Interim Order dated August 28, 2018) at 3-4.

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.

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 reasoning behind the distinction of Farneski, GRC 2010-20 has only been implied up to this point; however, the GRC will directly address same here. While the term "grievance" in N.J.S.A. 47:1A-1.1 is placed close to "collective negotiations," the Legislature bifurcated both terms in OPRA by including "or" between them. Further, the Legislature also chose to include the term "grievance" in the personnel exemption within N.J.S.A. 47:1A-10 ("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 . . ."). Thus, a plain reading of N.J.S.A. 47:1A-1.1 suggests that the term "grievance" should be given its literal meaning, *i.e.*, "a complaint due to injury, injustice, or wrong", and construed broadly. Black's Law Dictionary, <https://thelawdictionary.org/grievance> (last visited March 7, 2021); Turner v. First Union Nat'l Bank, 162 N.J. 75, 84 (1999); Bubis v. Kassin, 184 N.J. 612, 626 (2005). Further, the term's separate inclusion in N.J.S.A. 47:1A-10, and absent the presence of "collective negotiations" therein, further supports that Farneski applied a far narrower definition than plainly intended by the Legislature.

Having addressed the threshold issue of the term "grievance" and its meaning under OPRA, the GRC now turns to whether the Custodian lawfully denied access to the subject OPRA request under N.J.S.A. 47:1A-1.1. To this end, the GRC notes that the Office of Attorney Ethics ("OAE") specifically names its complaints "grievances." See Attorney Grievance Form.<sup>5</sup> In fact, the courts have also regularly referred to OAE filings as "grievances." See *e.g.* O'Boyle v. Dist. Ethics. Comm., 421 N.J. Super. 457 (App. Div. 2011).

Here, the records at issue in the instant complaint are communications between Ms. Benedetto and Ms. Bezner in connection with an attorney ethics grievance the Complainant filed against Ms. Benedetto with "District XII." both parties agree that the action filed against Ms. Benedetto was a "grievance." Thus, when applying the standard discussed above and supported in Yannone, Esq., GRC 2016-73, it is clear that the communications between Ms. Benedetto (the respondent) and Ms. Bezner (the investigator) are part of the OAE grievance process and are protected from disclosure under OPRA. For this reason, the GRC is persuaded that the Custodian lawfully denied access to the requested communications under N.J.S.A. 47:1A-1.1. Further, neither Asbury Park Press, 406 N.J. Super. 1 or Wares, GRC 2014-238 cited in the Complainant's June 5, 2020 response to the SOI apply here, as each dealt with a sexual harassment settlement agreement and public/internal complaints filed against a Sheriff's Officer.

Accordingly, because the records sought are e-mails between Ms. Benedetto and Ms. Bezner regarding an attorney ethics "grievance" filed by the Complainant against Ms. Benedetto, same are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Yannone, Esq., GRC 2016-73. Thus, the Custodian lawfully denied access to any responsive records to the extent they existed. N.J.S.A. 47:1A-6.

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<sup>5</sup> A copy of the appropriate form for filing an attorney ethics grievance can be found at <https://njcourts.gov/attorneys/oe.html#attydisc> (accessed May 7, 2021). The GRC notes that the form contains a section addressing confidentiality of a grievance investigation process.

## 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'Appolonia 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 (Interim Order dated August 28, 2018).
2. Because the records sought are e-mails between Ms. Benedetto and Ms. Bezner regarding an attorney ethics "grievance" filed by the Complainant against Ms. Benedetto, same are exempt from disclosure under OPRA. N.J.S.A. 47:1A-1.1; Yannone v. N.J. Dep't of Corr., GRC Complaint No. 2016-73 (October 2017). Thus, the Custodian lawfully denied access to any responsive records to the extent they existed. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso  
Executive Director

May 11, 2021