



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

FINAL DECISION

May 31, 2022 Government Records Council Meeting

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

Complaint No. 2021-99

At the May 31, 2022 public meeting, the Government Records Council (“Council”) considered the May 24, 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 the requested outside activity questionnaires, to the extent they exist, are exempt from disclosure under OPRA. N.J.S.A. 47:1A-10; N. Jersey Media Grp, Inc. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 389 (App. Div. 2009); Dusenberry v. N.J. City Univ., GRC Complaint No. 2009-101 (April 2010). For this reason, the Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6; Carew v. Kean Univ., GRC Complaint No. 2020-41 (May 2021).

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 31st Day of May 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: June 2, 2022



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 31, 2022 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2021-99

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copy via e-mail of “all forms completed” by Jeff Toney informing Kean University (“Kean”) of his outside activities from 2020 to present.

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: March 23, 2021

Response Made by Custodian: April 1, 2021

GRC Complaint Received: May 12, 2021

Background³

Request and Response:

On March 23, 2021, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. The Complainant noted that he included a link to Kean’s “outside activity questionnaire” (“OAQ”), which he identified as “the form [Mr. Toney] would have completed.” On April 1, 2021, the Custodian responded in writing denying access to the requested records under the personnel exemption. N.J.S.A. 47:1A-10.

Denial of Access Complaint:

On May 12, 2021, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian violated OPRA by simply denying the subject OPRA request without first “examining the document.” The Complainant requested that the GRC “consider the document’s existence when considering this complaint.”

¹ No legal representation listed on record.

² Represented by Kraig M. Dowd, Esq., of Weber, Dowd Law, LLC (Woodland, 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.

Statement of Information:

On June 3, 2021, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on March 23, 2021. The Custodian certified that she responded in writing on April 1, 2021 denying the subject OPRA request under N.J.S.A. 47:1A-10.

The Custodian argued that the requested OAQs are exempt from disclosure under OPRA under N.J.S.A. 47:1A-10, as well as N.J.S.A. 47:1A-1. The Custodian contended that regarding the first exemption, the Appellate Division has already held that same are exempt from disclosure. N. Jersey Media Grp, Inc. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 389 (App. Div. 2009). See also Dusenberry v. N.J. City Univ., GRC Complaint No. 2009-101 (April 2010). The Custodian further argued that the N. Jersey Media Grp, Inc. court also held that OAQs were exempt for personal privacy reasons. See also Dusenberry, GRC 2009-101.

The Custodian further argued that she did not violate OPRA when not identifying whether any responsive OAQs existed upon denying access to them. The Custodian noted that the GRC has already held that an agency was not required to identify the existence of a record when same was exempt on its face. Carew v. Kean Univ., GRC Complaint No. 2020-41 (May 2021) (citing Green v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2018-218 (April 2020)). The Custodian notes that the facts here mirror those in the aforementioned decisions and thus no violation of OPRA occurred.

Additional Submissions:

On June 4, 2021, the Complainant e-mailed the GRC noting that Mr. Toney’s LinkedIn account identifies visiting positions at two (2) other universities.

On June 14, 2021, the Complainant e-mailed the GRC contending that the Custodian’s failure to identify the existence of responsive records amounted to a “Glomar” response. The Complainant argued that the Custodian could not rely on said response because she failed to meet the criteria necessary to apply same. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182, 188 (App. Div. 2016). The Complainant further argued that since the Council already rejected Kean’s “Glomar” response tactic in Carew, doing so here is a knowing and willful violation.

The Complainant also argued that he previously provided proof that Mr. Toney did not have a privacy interest in keeping the existence of completed OAQs from the public. The Complainant argued that Kean can deny him access to the actual OAQs, which would not allow him to determine the specific nature of work performed for the other universities in Mr. Toney’s LinkedIn account. The Complainant did, however, note that he filed an ethics complaint with the State Ethics Commission (“SEC”) and that the Custodian’s “use of the [‘]Glomar[‘] response . . . may be an attempt to cover-up the possibility that [Mr.] Toney did not complete the form(s).” The Complainant argued that if Mr. Toney did not complete an OAQ,⁴ then this evidence further confirms that a knowing and willful violation occurred.

⁴ The Complainant also copied the SEC on the e-mail and asked the GRC to seek the results of the ethics investigation.

Analysis

Unlawful Denial of Access

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 v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). 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 may apply to records that “. . . bear many of the indicia of personnel files.” North Jersey Media Grp., Inc., 405 N.J. Super. at 390. In Dusenberry, GRC 2009-101, the Council held that “the [c]ustodian has lawfully denied access to the requested [OAQs] because they are personnel records exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-10 . . .” Id. at 5 (citing N. Jersey Media Grp., Inc., 405 N.J. Super. 386).

Further, a custodian has an obligation under OPRA to definitively state that no records exist where applicable. See *e.g.* Paff v. Town of Guttenberg (Hudson), GRC Complaint No. 2014-112 (January 2015) (citing Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009)). However, Council decisions addressing a custodian’s insufficient response are predicated on a custodian’s SOI certification that no records existed after failing to state such at the time of their denial. However, prior Council decisions also support a custodian’s

denial of a request, absent a statement as to the existence of responsive records, where the subject request sought records exempt on their face. See e.g. Green, GRC 2018-218; Carew, GRC 2020-41.

Here, the Custodian responded to the subject OPRA request stating that “should any government record exist,” it would be exempt from disclosure under N.J.S.A. 47:1A-10. In the Denial of Access Complaint, the Complainant contended that the Custodian failed to examine[] the document and *then* deny access to it.” (Emphasis in original). The Complainant thus argued that the Custodian violated OPRA by “speculating as to the document’s nature.” In the SOI, the Custodian argued that the Council previously held that a custodian was not required to state whether records existed when denying access to an OPRA request seeking plainly exempt records. Carew, GRC 2020-41⁵ (citing Green, GRC 2018-218). The Complainant responded to the SOI contending that the Custodian’s response amounted to a “Glomar” response and that the Council previously held that a similar response in Carew was a violation of OPRA.

Initially, the GRC notes that the Council’s Carew decision is comprised of two (2) distinct issues. The first issue addressed by the Council involved the custodian’s SOI argument that she “appropriately employed the ‘Glomar’ response . . .” The second issue addressed by the Council involved the custodian’s denial of access under the personnel exemption without identifying whether any records existed. In viewing the arguments submitted by the parties here, the Complainant plainly is relying on the first issue in Carew, while the Custodian relies on the second issue in support of her actions here.

Upon careful consideration, the GRC finds that the facts and arguments here implicate the second issue addressed in Carew: the Custodian argued in the SOI that she was not required to identify the existence of records where it was clear that same were exempt from disclosure in the first instance. This is in apposite to the custodian’s SOI admission in Carew that she was employing the “Glomar” defense. Instead, the Custodian here simply stated that she did not have an obligation to advise of the existence of records when the requested records were plainly exempt under OPRA.

Having focused the confines of this complaint to the exact issue, the GRC finds that no unlawful denial of access occurred. The Custodian has not asserted here that she could neither confirm nor deny the existence of Mr. Toney’s OAQs; rather, that they would be exempt from disclosure under N.J.S.A. 47:1A-10. Like in Carew, 2020-41, the subject OPRA request clearly seeks access to personnel records that are exempt from access under OPRA. N.J.S.A. 47:1A-10; Dusenberry, GRC 2009-101. Further, the Complainant himself offers support for the denial through his June 14, 2021 e-mail statement acknowledging that “Kean can deny [him] access to the form . . .” Thus, and consistent with the Council’s decisions allowing for a denial of access where a request on its face seeks exempt records, the GRC is satisfied that the Custodian lawfully denied access to the subject OPRA request.

Accordingly, the requested OAQs, to the extent they exist, are exempt from disclosure under OPRA. N.J.S.A. 47:1A-10; N. Jersey Media Grp., Inc., 405 N.J. Super. 386; Dusenberry,

⁵ The Council decided Carew, GRC 2020-41 at its May 18, 2021 meeting, which was six (6) days after the filing of the instant complaint.

GRC 2009-101. For this reason, the Custodian lawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carew, GRC 2020-41.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the requested outside activity questionnaires, to the extent they exist, are exempt from disclosure under OPRA. N.J.S.A. 47:1A-10; N. Jersey Media Grp, Inc. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 389 (App. Div. 2009); Dusenberry v. N.J. City Univ., GRC Complaint No. 2009-101 (April 2010). For this reason, the Custodian lawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6; Carew v. Kean Univ., GRC Complaint No. 2020-41 (May 2021).

Prepared By: Frank F. Caruso
Executive Director

May 24, 2022