



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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CHRIS CHRISTIE
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KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Commissioner

FINAL DECISION

June 30, 2015 Government Records Council Meeting

Luis F. Rodriguez
Complainant

Complaint No. 2014-106

v.

Kean University
Custodian of Record

At the June 30, 2015 public meeting, the Government Records Council (“Council”) considered the June 23, 2015 Supplemental 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 Complainant has failed to establish in his request for reconsideration of the Council’s April 28, 2015 Final Decision that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to provide sufficient evidence that the Custodian knowingly and willfully violated OPRA. Thus, the Complainant’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

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 30th Day of June, 2015

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: July 2, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
June 30, 2015 Council Meeting

Luis F. Rodriguez¹
Complainant

GRC Complaint No. 2014-106

v.

Kean University²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of résumés, job descriptions, and text of “external advertising” for each of the following positions relating to “Labor Condition Applications” (“LCA”) for an H-1B visa filed in 2011-2012 (No. 1 through 4) and a “Labor Certification” (“LC”) for a green card in 2011 (No. 5):

1. Managing Assistant Director II.
2. Acting Associate Director III.
3. WebCT Systems Admin (Professional Services Specialist).
4. Coordinator of Professional Education.
5. Computer Support Specialist.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: February 4, 2014
Response Made by Custodian: February 14, 2014
GRC Complaint Received: March 10, 2014

Background

April 28, 2015 Council Meeting:

At its April 28, 2015, public meeting, the Council considered the April 21, 2015 Supplemental 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 complied with the Council’s January 30, 2015 Interim Order because she responded in the extended time frame by providing access to those records that existed and certifying to those positions for which no records existed. Additionally,

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Angela L. Velez.

the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. Although the Custodian unlawfully denied access to résumés, job descriptions, and external advertisements, the Custodian timely complied with the Council's January 30, 2015 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Procedural History:

On April 30, 2015, the Council distributed its Final Decision to all parties.

Request for Reconsideration

On May 11, 2015, the Complainant filed a request for reconsideration of the Council's April 28, 2015, Final Decision based on a mistake. The Complainant asserted that the Council erred in determining that the Custodian did not knowingly and willfully violate OPRA based on its analysis of the responsive nature of Reenat Hasan's records.

The Complainant argued that the Council mistakenly equated Kean's decision to make Ms. Hasan permanent in the position of "Coordinator of Professional Education" as a change in her immigration status. The Complainant argued that the two are not related: permanent employment status is a State agency decision while permanent residency is a federal decision. Thus, when Kean made Ms. Hasan permanent in 2010, that decision did not affect her immigration status and she was still able to work on an H1-B visa at that time.

The Complainant argued that additional proof of the Council's mistake rests within the H1-B visa program. The Complainant asserted that H1-B visas are only valid for three (3) years. The Complainant noted that Kean submitted an LCA for Ms. Hasan in 2008; thus, the University would have needed to submit one in 2011 to renew her status. The Complainant contended that although the Council determined there was no evidence that Kean submitted an LCA in 2011, he provided that proof in the form of an LCA submitted for a "Coordinator of Professional Education" position. The Complainant also noted that a 2011 LCA for this position can be found on MyVisaJobs.com. The Complainant contended that the LCA is clearly for Ms. Hasan's position. The Complainant asserted that further proof rests in her signature, dated April 8, 2011, on the bottom of the LCA, which belies that the LCA was submitted prior to 2011.

The Complainant contended that, based on the forgoing, the evidence regarding Ms. Hasan's records clearly indicates that the Custodian knowingly and willfully violated OPRA.

Objections

On May 19, 2015, the Custodian's Counsel submitted objections to the request for reconsideration. Counsel contended the request for reconsideration should be denied. Counsel

stated that this evidence includes screen shots from MyVisaJobs.com of a list of 2011 LCAs and excerpts from the LCA for the “Coordinator of Professional Education” position. Counsel stated that the Complainant asserted that this evidence proves that the Custodian failed to provide him with responsive records.

Counsel stated that the Custodian has already certified that no résumés, job descriptions, or external advertisements for that position within the identified time frame existed because Kean did not hire anyone. Counsel noted that the Custodian interpreted the request as seeking records for filled positions. Counsel asserted that the Executive Order No. 26 (Gov. McGreevey, 2002)(“EO 26”) language requiring disclosure of résumés for successful candidates supports the Custodian’s interpretation. Counsel argued that the Council’s analysis of Ms. Hasan was correct.

Counsel reiterated that the Complainant submitted evidence to support the Custodian’s certification that no records exist. Specifically, Ms. Hasan became permanent in 2010, and the LCA indicated a continuation of previously approved employment with Kean. Counsel stated that the Complainant’s arguments on the “Coordinator of Professional Education” LCA posted on MyVisaJobs.com prove this fact. For this reason, Counsel asserted that the Complainant erroneously argued that because the LCA was filed in 2011 (as a continuation of employment without change), the Custodian failed to provide him with responsive records.

Additional Submissions

On June 1, 2015, the Complainant argued, via e-mail, that the Custodian never indicated that she did not provide records for the “Coordinator of Professional Education” because no one was hired in 2011 or 2012 until filing the objections. The Complainant asserted that, notwithstanding this argument, the Custodian disclosed several records for individuals that were not new hires in 2011 or 2012. Specifically, the Complainant noted that Jorge Sanchez held a “Computer Support Specialist” position since 2006, yet the Custodian disclosed his résumé, a job description, and external advertisements as part of her response to the Interim Order. The Complainant argued that the evidence appears to suggest that the Custodian knowingly and willfully misled the GRC about her interpretation of the request.

Further, the Complainant argued that the Custodian, and maybe Custodian’s Counsel, misled the GRC by claiming that the only way to comply with the Council’s October 28, 2014, Interim Order and avoid research was to provide all records for those positions within that time frame. The Complainant asserted that the Custodian certified to a search in the SOI that indicated that Kean employees were able to locate records specific to the Complainant’s OPRA request. Moreover, the Complainant noted that, in the Custodian’s request for reconsideration, she argued that H1-B and EB visas were inextricably linked to an individual worker’s personal information. The Complainant argued that both statements suggest that no research was necessary.

The Complainant next asserted that Kean hired several individuals for “Managing Assistant Director II” positions in both 2011 and 2012 with one supported by an H1-B.³ The Complainant

³ The Complainant requested that the GRC require the Custodian to certify to whether an individual was hired in the “Managing Assistant Director II” position that corresponds to a 2012 LCA identified on MyVisaJobs.com. The GRC notes that it already requested additional information regarding this posting on March 18, 2015, and received a timely response from the Custodian indicating that no person was hired. The Complainant responded to the Custodian’s submission on March 24, 2015.

argued that, had the Custodian produced records for all hires during the time frame, résumés for these individuals would have been included. However, he did not receive same. The Complainant also asserted that he was provided with several résumés for individuals filling “Professional Services Specialist III” positions, which he did not specifically request. The Complainant asserted that the Custodian’s disclosure of so many “Professional Services Specialist III” résumés, not directly responsive to the working titles he identified, is suspicious because this was Ms. Hasan’s position, and the Custodian failed to disclose her records.⁴

On June 18, 2015, the Custodian stated, via e-mail, that no LCAs for “WebCT Systems Admin.” were filed in 2011 and 2012. The Custodian stated that her February 24, and March 23, 2015, certifications addressed these titles. The Custodian states that notwithstanding the forgoing, in the interest of transparency and cooperation, she is providing résumés, job descriptions, and external advertisements for all employees hired under the “Professional Specialist IV” and “Managing Assistant Director II” between January 1, 2011, and December 31, 2012, with redactions. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-10.

The Custodian further stated that Mr. Sanchez’s State title is “Professional Services Specialist III.” The Custodian noted that although Mr. Sanchez’s hire date was February 21, 2006, a position was opened and advertised in 2011. The Custodian stated that this is why she disclosed his résumé, job description, and external advertisement as part of compliance. The Custodian stated that she did not provide Ms. Hasan’s résumé, job description, and external advertisement because Ms. Hasan was not hired within the identified time frame. The Custodian noted that she provided the Complainant with this information in response to OPRA requests dated March 11, and March 24, 2014.

Finally, the Custodian averred that this response is consistent with her prior certifications and compliance response. The Custodian further confirmed that she has provided the Complainant with all résumés, job descriptions and external advertisements for “Professional Services Specialist III,” “Associate Director III,” and “WebCT Systems Administrator” (Professional Services Specialist IV) filled during the identified time frame.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council, and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

⁴ On three (3) separate occasions thereafter, the Complainant submitted additional information supporting the arguments presented above. Specifically, the Complainant identified other individuals hired to fill positions he identified in his OPRA request.

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's April 28, 2015, Final Decision on May 11, 2015, seven (7) business days from the issuance of the Council's Order.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In the instant matter, the Complainant submitted a request for reconsideration, arguing that the Council erred in not determining that the Custodian did not knowingly and willfully violate OPRA. Post the Custodian's compliance with the Council's October 28, 2014, Interim Order, the threshold issue appears to revolve around the Custodian's failure to provide records relevant to Ms. Hasan and whether same ultimately proves that the Custodian knowingly and willfully violated OPRA. The Complainant has subsequently raised issues of consistency in the Custodian's assertions that she provided all position hires for 2011 and 2012 to avoid research and that she only provided new hires and not individuals already in positions. After a review of all relevant submissions, the GRC is not satisfied that the issue of a knowing and willful violation warrants reconsideration.

First, the Complainant has repeatedly provided confirmation that he was in possession of Ms. Hasan's résumé and a job description and external advertisement for her position pursuant to a March 11, 2014, OPRA request. This confirmation included copies of the records and screen shots within his submissions to the GRC. This admission and the Council's finding that the Custodian did not knowingly and willfully violate OPRA (while not previously correlated in the Council's April 28, 2015 Final Decision) are consistent with the Appellate Division's decision in Bart v. City of Paterson Hous. Auth., 403 N.J. Super. 609 (App. Div. 2008).

Next, the apparent gap between the Complainant's expectations of disclosure and Custodian's actual response garner some level of understanding as to the confusion that has resulted from the Custodian's interpretation of the subject OPRA request. While the Complainant raised some compelling arguments as to which records were or were not provided,

the Complainant's advanced research and knowledge of 2011 and 2012 Kean hires suggests that he could have reasonably narrowed his original OPRA request. Further, if the Custodian did not fully understand the scope of the Complainant's OPRA request, seeking clarification may have avoided the ensuing confusion the resulted from the Custodian's attempts to comply with the Council's Orders.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above: 1) the Council's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384. The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously, or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. Specifically, the Complainant failed to provide sufficient evidence that the Custodian knowingly and willfully violated OPRA. Thus, the Complainant's request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Complainant has failed to establish in his request for reconsideration of the Council's April 28, 2015 Final Decision that either 1) the Council's decision is based upon a "palpably incorrect or irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. The Complainant failed to establish that the complaint should be reconsidered based on a mistake. The Complainant has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, the Complainant failed to provide sufficient evidence that the Custodian knowingly and willfully violated OPRA. Thus, the Complainant's request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J.*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

June 23, 2015



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

April 28, 2015 Government Records Council Meeting

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

Complaint No. 2014-106

At the April 28, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 Supplemental 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 January 30, 2015 Interim Order because she responded in the extended time frame providing access to those records that existed and certifying to those positions for which no records existed. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to resumes, job descriptions and external advertisements, the Custodian timely complied with the Council’s January 30, 2015 Interim Order. Additionally, the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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 28th Day of April, 2015

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: April 30, 2015

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
April 28, 2015 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2014-106

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of resumes, job descriptions and text of “external advertising” for each of the following positions relating to “Labor Condition Applications” (“LCA”) for an H-1B visa filed in 2011-2012 (No. 1 through 4) and a “Labor Certification” (“LC”) for a green card in 2011 (No. 5):

1. Managing Assistant Director II.
2. Acting Associate Director III.
3. WebCT Systems Admin (Professional Services Specialist).
4. Coordinator of Professional Education.
5. Computer Support Specialist.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: February 4, 2014
Response Made by Custodian: February 14, 2014
GRC Complaint Received: March 10, 2014

Background

January 30, 2015 Council Meeting:

At its January 30, 2015 public meeting, the Council considered the January 20, 2015 Supplemental 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:

[T]he Custodian’s Counsel has failed to establish in her request for reconsideration of the Council’s October 28, 2014 Interim Order that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the complaint should be

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Angela L. Velez.

reconsidered based on a “mistake” or “illegality.” Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, Counsel failed to overcome prior precedence for the disclosure of resumes (with redactions), job descriptions and “external advertising.” Thus, Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **The Custodian must thus comply with the Council’s October 28, 2014 Interim Order.**

Procedural History:

On February 3, 2015, the Council distributed its Interim Order to all parties. On February 6, 2015, the Custodian sought three (3) weeks to comply with the Council’s Order. On February 7, 2015, the Complainant objected to the Custodian’s request for an extension, arguing that same would not allow anyone to provide alleged violations of policy to the Kean University Board of Trustees. On February 12, 2015, the GRC, noting that a three (3) week extension was unreasonable, granted an extension until February 24, 2015.

On February 24, 2015, the Custodian responded to the Council’s Interim Order. The Custodian certified that she received responsive records from Gina Kuenseler, Recruitment Unit. The Custodian affirmed that she was providing the following to the Complainant:

1. Managing Assistant Director II – No records exist.
2. Acting Associate Director III – 29 pages of resumes (with redactions), job descriptions and external advertisement.
3. WebCT Systems Admin (Professional Services Specialist) – No records exist.
4. Coordinator of Professional Education – No records exist.
5. Computer Support Specialist – 4 pages of resumes (with redactions per N.J.S.A. 47:1A-1), job description and external advertisement.

On February 24, and 25, 2015, the Complainant submitted objections to the GRC via e-mail. Therein, he argued that the Custodian failed to fully comply with the Council’s Order. The Complainant contended that the Custodian provided resumes for individuals obtaining a “Professional Services Specialist III” position, which he did not identify in his OPRA request.

The Complainant first asserted that he searched MyVisaJobs.com and found that Kean University (“Kean”) sponsored an H1-B for a “Managing Assistant Director II” position in 2012. Further, the Custodian stated that he was submitting records, including resumes and job descriptions, received from Kean and by other means showing that Reenat Hasan, Graduate Admissions, is currently holding a “Coordinator of Professional Education” position. The Complainant contended that although Kean employed Ms. Hasan in 2008, she was made permanent in 2010. The Complainant asserted that it was at this time that Kean sponsored Ms. Hasan for an H1-B visa and continued to support her during the three-year visa term.

Finally, the Complainant disputed the Custodian's assertion that locating resumes for the "Computer Support Specialist" position would require research. The Complainant asserted that the Custodian was able to locate the external advertisements and should have easily been able to identify the individual that was hired. The Complainant also contended that, in many ways, his OPRA request is similar to a request seeking for the resume of a successful candidate based on an external advertisement.

On March 11, 2015, the Complainant stated that in searching his e-mail folders, he located an LCA filed for a "WebCT System Administrator" that reflected an employment start date of April 8, 2011. The Complainant asserted that he believed that this LCA was submitted for Mohammad Rahman. The Complainant also provided to the GRC external advertisements, a "WebCT" and "Desktop Support/Helpdesk Analyst" job description, and resumes for Mr. Rahman.

On March 18, 2015, the GRC requested additional information from the Custodian. Specifically, in her compliance, the Custodian certified that no records responsive to the "Managing Assistant Director II" position existed. The GRC stated that the Complainant subsequently e-mailed the GRC on February 25, 2015, disputing that compliance was met. Further, the Complainant noted that according to MyVisaJobs.com, Kean filed a "Labor Condition Application" ("LCA") for this position in 2012 and included a screenshot of the website. Based on the foregoing, the GRC requested that the Custodian submit a legal certification in response to the following questions:

1. Whether Kean filed an LCA for the position of "Managing Assistant Director II" within the time frame of 2011-2012 as identified in the Complainant's OPRA request;
2. If so, whether Kean created a job description or external advertisement for the position relevant to the position; and,
If a candidate was hired, whether the individual submitted a resume.

The GRC required the Custodian to submit his legal certification by March 23, 2015.

On March 23, 2015, the Custodian responded to the GRC's request for additional information. The Custodian certified that Kean filed an LCA for the "Managing Assistant Director II" position with a term of January 1, 2011 to December 31, 2012; however, no person was hired. The Custodian affirmed that she interpreted the Complainant's OPRA request to seek job descriptions for filled positions. The Custodian certified that no records existed because no person filled the job and that there was no external advertisement.

On March 24, 2015, the Complainant noted that the Custodian was easily able to locate detailed information on the "Managing Assistant Director II" LCA. The Complainant asserted it is reasonable to suggest that the Custodian should have been able to easily locate information on the "WebCT" and "Coordinator of Professional Education" positions.

Analysis

Compliance

At its January 30, 2015 meeting, the Council ordered the Custodian to comply with the Council's October 28, 2014 Interim Order requiring disclosure of the responsive records (with redaction where appropriate) and certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On February 3, 2015, 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 February 10, 2015.

On February 24, 2015, the last day of an extension, the Custodian responded to provide the Complainant records for the "Acting Associate Director III" and "Computer Support Specialist" positions and certified that no records responsive to the remaining titles existed. Additionally, the Custodian submitted certified confirmation of compliance to the Executive Director.

During the next few weeks thereafter, the Complainant disputed that the Custodian fully complied because the Complainant believed he possessed evidence of the existence of responsive records for those positions to which the Custodian certified that no records existed. The Complainant asserted that he found an H1-B application for the "Managing Assistant Director II" position on the MyVisaJobs.com website and included a screenshot. The Complainant also attached resumes and job descriptions for Ms. Hasan, who he asserted was holding a "Coordinator of Professional Education" position and was made permanent in 2010. Finally, the Complainant asserted that he previously came into possession of external advertisements, job descriptions, and resumes for Mr. Rahman, who held a "WebCT System Administrator" position with a start date of April 8, 2011, that fell within the applicable request time frame.

The GRC has reviewed all evidence submitted by the parties regarding compliance. The screenshot showing a 2012 H1-B application for the "Managing Assistant Director II" position sponsored by Kean on MyVisaJobs.com prompted the GRC to request additional information from the Custodian regarding the existence of records for this LCA. The Custodian timely responded, certifying that no person was hired for the position and that no records existed. There is no evidence in the record to refute this certification.

Additionally, the other records relating to Ms. Hasan and Mr. Rahman do not provide competent, credible evidence that the Custodian failed to comply with the Council's Order. Specifically, the Complainant sought records of LCA positions filed by Kean in 2011-2012. However, Ms. Hasan was made permanent in 2010, and there is no evidence that Kean filed an LCA position within the Complainant's specified time frame. Additionally, although Mr. Rahman's start date was in 2011, the evidence supports that Kean filed the relevant LCA position in 2010. Thus, the GRC is satisfied that, notwithstanding that the Complainant was already in possession of certain records, those are not necessarily responsive to the OPRA request at issue here.

Therefore, the Custodian complied with the Council's January 30, 2015 Interim Order because she responded in the extended time frame by providing access to those records that existed and certifying to those positions for which no records existed. Additionally, the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

Knowing & Willful

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty . . .” N.J.S.A. 47:1A-11(a). OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states “. . . [i]f the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA] . . .” N.J.S.A. 47:1A-7(e).

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (*id.*; Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294-95 (Law Div. 1993)); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian unlawfully denied access to resumes, job descriptions, and external advertisements, the Custodian timely complied with the Council's January 30, 2015 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council's January 30, 2015 Interim Order because she responded in the extended time frame providing access to those records that existed and certifying to those positions for which no records existed. Additionally,

the Custodian simultaneously provided certified confirmation of compliance to the Executive Director.

2. Although the Custodian unlawfully denied access to resumes, job descriptions and external advertisements, the Custodian timely complied with the Council's January 30, 2015 Interim Order. Additionally, the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Reviewed By: Joseph D. Glover
Executive Director

April 21, 2015



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

January 30, 2015 Government Records Council Meeting

Luis F. Rodriguez
Complainant

Complaint No. 2014-106

v.

Kean University
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council (“Council”) considered the January 20, 2015 Supplemental 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 Custodian’s Counsel has failed to establish in her request for reconsideration of the Council’s October 28, 2014 Interim Order that either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the complaint should be reconsidered based on a “mistake” or “illegality.” Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, Counsel failed to overcome prior precedence for the disclosure of resumes (with redactions), job descriptions and “external advertising.” Thus, Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **The Custodian must thus comply with the Council’s October 28, 2014 Interim Order.**

Interim Order Rendered by the
Government Records Council
On The 30th Day of January, 2015

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 3, 2015



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
January 30, 2015 Council Meeting

Luis F. Rodriguez¹
Complainant

GRC Complaint No. 2014-106

v.

Kean University²
Custodial Agency

Records Relevant to Complaint: Electronic copies via e-mail of resumes, job descriptions and text of “external advertising” for each of the following positions relating to “Labor Condition Applications” (“LCA”) for an H-1B visa filed in 2011-2012 (No. 1 through 4) and a “Labor Certification” (“LC”) for a green card in 2011 (No. 5):

1. Managing Assistant Director II.
2. Acting Associate Director III.
3. Webct Systems Admin (Professional Services Specialist).
4. Coordinator of Professional Education.
5. Computer Support Specialist.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: February 4, 2014
Response Made by Custodian: February 14, 2014
GRC Complaint Received: March 10, 2014

Background

October 28, 2014 Council Meeting:

At its October 28, 2014 public meeting, the Council considered the October 21, 2014 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. Because Executive Order No. 26 (Gov. McGreevey, 2002) provides that the resumes of successful candidates shall be disclosed once the successful candidate has been hired, and because the Complainant sought resumes for the employees filling five (5) identified positions, the Custodian unlawfully denied access to same. N.J.S.A. 47:1A-

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Angela L. Velez.

6. The Custodian must disclose the responsive resumes, with redactions where necessary, to the Complainant. *See* Fallstick v. Haddon Twp. (Camden), GRC Complaint No. 2008-156 (Interim Order dated August 11, 2009).
2. The Custodian unlawfully denied access to the responsive job descriptions and external advertising. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. *See also* Lotito v. NJ Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014). The Custodian must disclose same to the Complainant for the five (5) positions identified in his OPRA request. If no records responsive to certain titles exists, the Custodian must certify to this fact.
3. **The Custodian shall comply with item Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,³ to the Executive Director.⁴**
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 October 29, 2014, the Council distributed its Interim Order to all parties. On November 3, 2014, the Custodian requested five (5) additional business days to comply with the Council's Order. On November 5, 2014, the GRC granted the Custodian's request for an extension until November 14, 2014.

On November 14, 2014, the Custodian's Counsel filed a request for reconsideration of the Council's October 28, 2014 Interim Order based on a "mistake" and "illegality." Therein, Counsel argued that the GRC failed to appreciate privacy afforded to a person's immigration information and the inextricable link between an H-1B and EB visa application and a person's personnel information. Further, Counsel asserted that the GRC also failed to fully consider that the Complainant utilized OPRA to circumvent said privacy interests afforded therein. Finally, Counsel contended that there is great risk of harm in the release of private immigration and personnel information of employees.

Regarding the link between personnel information and H-1B and employment-based ("EB") visa applications, Counsel stated that H-1B visas require that employers of non-

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 Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

immigrant workers⁵ submit an LCA application to the United States Department of Labor prior to submitting a visa petition to the Department of Homeland Security (“DHS”). Counsel stated that EB visas also require the employer to follow a similar process. Counsel argued that because both petitions are contingent on the non-immigrant worker’s employment status and the employer’s participation in the process, the application and granting of these visas is inextricably linked to an employee’s personnel information. Counsel argued that, in keeping with N.J.S.A. 47:1A-10, employment contingent H-1B or EB visa status is not specifically identified as disclosable personnel information.

Counsel also asserted that 5 U.S.C. § 552a of the Federal Privacy Act of 1974 exempts access to a person’s private information, whether a “U.S. citizen, Legal Permanent Resident, visitor or alien.” DHS Privacy Policy Memorandum, Memorandum No. 2007-1 (January 7, 2009). Counsel argued that DHS’s policy shows that information maintained, including H-1B and EB visa status of individuals, is not readily accessible and should also be exempt from disclosure under OPRA. Counsel also argued that, while LCAs are disclosable, the fact that each LCA is given a case number and is devoid of the non-immigrant worker’s personal information further reinforces their privacy rights in relation to H-1B and EB visa status.

Regarding privacy interest, Counsel stated that although OPRA requires disclosure of government records, an agency has an obligation to safeguard a citizen’s personal information when disclosure would violate their reasonable expectation of privacy. N.J.S.A. 47:1A-1; Burnett v. Cnty. of Bergen, 198 N.J. Super. 408, 414 (App. Div. 2009). Counsel contended that the Complainant’s OPRA request, in and of itself, violated OPRA’s privacy interest exemption. Counsel reiterated the Custodian’s Statement of Information (“SOI”) arguments that the Complainant submitted the subject OPRA request in an attempt to ascertain the visa status of each individual holding the positions identified in his request. Further, Counsel noted that the request narrowly sought records for those employees with H-1B or green card visas in the identified positions; thus, the Custodian would be required to conduct research to provide responsive records. Counsel asserted that requiring the Custodian to disclose records that would reveal the employees’ visa status violates OPRA’s privacy interest exemption.

Counsel noted that the Custodian has no issue disclosing resumes, job descriptions and “external advertising” for a list of positions at Kean without reference to immigration status. For instance, the Custodian could have provided all non-privileged information in response to an OPRA request for a broad list of positions and not narrowed his request to those employees for which Kean completed H-1B or EB visa applications. Counsel argued that the Custodian should not be required to disclose an individual’s immigration status simply because a requestor crafted their request in a manner similar to the Complainant.

Counsel asserted that because the Complainant sought information that is privileged, the Custodian properly denied the request. Counsel suggested that the Council could strike a better balance between privacy interest and the public interest in disclosure by simply requiring the

⁵ 8 U.S.C. § 1101(a)(15)(H)(1)(b) defines a non-immigrant worker as a person temporarily in the United States to perform a service in a particular “specialty occupation” as a “nonimmigrant alien.”

Custodian to disclose records for all persons holding the titles identified by the Complainant.⁶

On November 15, 2014, the Complainant submitted objections to the request for reconsideration. The Complainant first noted that job descriptions and “external descriptions” are tied to the position and not the individual employee; thus, same should be disclosed immediately. The Complainant also noted that disclosure of these records is in the public interest because it would ensure that Kean made a good faith effort to fill the positions from within the United States prior to hiring a non-immigrant worker and applying for an H-1B visa. The Complainant asserted that reviewing these records would give the public an idea of the position qualifications and how widely Kean marketed same. The Complainant also requested that the GRC consider that the Custodian is again relying on the personnel exemption in an attempt to avoid disclosing records that are clearly subject to disclosure.

In a subsequent e-mail to the GRC on the same day, the Complainant stated that if the GRC decided to consider Kean’s request for reconsideration, he would accept the responsive resumes with names redacted.⁷ Finally, on November 16, 2014, the Complainant noted that, in Burnett, 408 N.J. Super. 408, the Court stated that they do not generally consider the purpose behind OPRA requests. The Complainant asserted that his purpose for seeking the responsive records is thus not relevant to the question of disclosure.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian’s Counsel filed the request for reconsideration of the Council’s Order dated October 28, 2014 on November 14, 2014, or the last day of the extended time frame.

Applicable case law holds that:

“A party should not seek reconsideration merely based upon dissatisfaction with a decision.” D’Atria v. D’Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact

⁶ The Custodian’s Counsel also requested a stay of the Council’s Order and included an analysis of the factors as required under N.J.A.C. 5:105-2.12(f). However, procedurally, in instances where the GRC has received a request for reconsideration from a party, said request effectively stayed compliance pending the Council’s determination.

⁷ Thereafter, on November 16, 2014, the Complainant asked and was advised of the process for filing objections to a request for reconsideration as set forth in the GRC’s promulgated regulations. N.J.A.C. 5:105-2.10(d).

did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. “Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.” Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Regarding resumes, the GRC rejects Counsel’s argument that the request really sought information or required research, noting that the Custodian certified in the SOI that she located responsive records. *See* Bond v. Borough of Washington (Warren), GRC Complaint No. 2009-324 (March 2011); Inzelbuch v. Lakewood Bd. of Educ. (Ocean), GRC Complaint No. 2014-92 (September 2014); Burke v. Brandes, 429 N.J. Super. 169 (App. Div. 2012). Further, in its Interim Order, the Council cited to Fallstick, GRC 2008-156, in which the custodian disclosed a redacted resume. *See also* Wolosky v. Twp. of Harding (Morris), GRC Complaint No. 2010-221 (June 2012)(in the conducting a balancing test, the Council held that the custodian lawfully redacted a home address on a resume). Further, it should be noted that the Complainant expressed interest in allowing the Custodian to redact names. For these reasons, the GRC is satisfied that disclosure, with redactions, would not violate OPRA’s privacy interest exemption.

Regarding the application of Counsel’s arguments to job descriptions and “external postings,” the GRC rejects same. As noted by the Complainant, these records are obviously connected to the job and not the individual occupying same. Further, there is already adequate precedence regarding the disclosure of these records, as cited in the Council’s Interim Order.

As the moving party, the Custodian’s Counsel was required to establish either of the necessary criteria set forth above: either 1) the Council’s decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See* Cummings, 295 N.J. Super. at 384. Counsel failed to establish that the complaint should be reconsidered based on a “mistake” or “illegality.” Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See* D’Atria, 242 N.J. Super. at 401. Specifically, Counsel failed to overcome prior precedence for the disclosure of resumes (with redactions), job descriptions and “external advertising.” Thus, Counsel’s request for reconsideration should be denied. Cummings, 295 N.J. Super. at 384; D’Atria, 242 N.J. Super. at 401; Comcast, 2003 N.J. PUC at 5-6. **The Custodian must thus comply with the Council’s October 28, 2014 Interim Order as originally ordered.**

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian’s Counsel has failed to establish in her request for reconsideration of the Council’s October 28,

2014 Interim Order that either 1) the Council's decision is based upon a “palpably incorrect or irrational basis;” or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. Counsel failed to establish that the complaint should be reconsidered based on a “mistake” or “illegality.” Counsel has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. Specifically, Counsel failed to overcome prior precedence for the disclosure of resumes (with redactions), job descriptions and “external advertising.” Thus, Counsel’s request for reconsideration should be denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). **The Custodian must thus comply with the Council’s October 28, 2014 Interim Order.**

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Deputy Executive Director

January 20, 2015



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

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Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

October 28, 2014 Government Records Council Meeting

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

Complaint No. 2014-106

At the October 28, 2014 public meeting, the Government Records Council ("Council") considered the October 21, 2014 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. Because Executive Order No. 26 (Gov. McGreevey, 2002) provides that the résumés of successful candidates shall be disclosed once the successful candidate has been hired, and because the Complainant sought resumes for the employees filling five (5) identified positions, the Custodian unlawfully denied access to same. N.J.S.A. 47:1A-6. The Custodian must disclose the responsive resumes, with redactions where necessary, to the Complainant. *See Fallstick v. Haddon Twp. (Camden)*, GRC Complaint No. 2008-156 (Interim Order dated August 11, 2009).
2. The Custodian unlawfully denied access to the responsive job descriptions and external advertising. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. *See also Lotitio v. NJ Dep't of Labor, Human Res.*, GRC Complaint No. 2013-65 (March 2014). The Custodian must disclose same to the Complainant for the five (5) positions identified in his OPRA request. If no records responsive to certain titles exists, the Custodian must certify to this fact.
3. **The Custodian shall comply with item Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,¹ to the Executive Director.²**

¹ "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."

² Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

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 October, 2014

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: October 29, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
October 28, 2014 Council Meeting**

**Luis F. Rodriguez¹
Complainant**

GRC Complaint No. 2014-106

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of resumes, job descriptions and text of “external advertising” for each of the following positions relating to “Labor Condition Applications” (“LCA”) for an H-1B visa filed in 2011-2012(No. 1 through 4) and a “Labor Certification” (“LC”) for a green card in 2011 (No. 5):

1. Managing Assistant Director II.
2. Acting Associate Director III.
3. Webct Systems Admin (Professional Services Specialist).
4. Coordinator of Professional Education.
5. Computer Support Specialist.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: February 4, 2014
Response Made by Custodian: February 14, 2014
GRC Complaint Received: March 10, 2014

Background³

Request and Response:

On February 4, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 7, 2014, the Custodian responded in writing advising the Complainant that she would need until February 28, 2014 to appropriately respond to his OPRA request. On February 28, 2014, the Custodian responded in writing stating that she would need until March 13, 2014 to appropriately respond to the OPRA request. On March 5, 2014, the Custodian responded in writing denying access to the responsive records citing N.J.S.A. 47:1A-10.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Angela L. Velez.

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.

Denial of Access Complaint:

On March 10, 2014, the Complainant filed a Denial of Access Complaint with the GRC. The Complainant disputed the Custodian's denial of access to the responsive records. The Complainant argued that resumes of successful candidates are subject to disclosure under OPRA. Executive Order No. 26 (Gov. McGreevey, 2002) ("EO 26"). Further, the Complainant contended that job descriptions and external advertising are not personnel records because they do not refer to a particular individual; rather, said records solely refer to the position. The Complainant also noted that in November 2013, the Custodian provided him with similar records in response to another OPRA request.

The Complainant argued that the Custodian knowingly and willfully violated OPRA because previously provided similar records in response to previous requests and has suddenly decided that same are personnel records exempt from disclosure.

Statement of Information:

On April 4, 2014, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on February 14, 2014 and responded on March 5, 2014 after two (2) extensions of time.

The Custodian certified that upon receipt of the request, she sought the two (2) extensions to obtain legal advice on whether the responsive records should be disclosed. The Custodian certified that on March 5, 2014, Kean University ("Kean") determined that the records would be considered personnel records exempt under N.J.S.A. 47:1A-10 because disclosure of same would provide information on the individuals' employment status.

The Custodian asserted that she lawfully denied access to the responsive records. The Custodian stated that the Complainant's request sought resumes, job descriptions and "external advertising" for five (5) positions, four (4) of which were the subject of LCAs for H-1B visas in 2011 and one (1) that was the subject of a LC for a green card in 2011. The Custodian asserts that, although the Complainant framed his request as one for identifiable records, the Complainant was really seeking information; namely, the visa status of each individual holding that position. The Custodian contended that visa statuses of employees are a personnel record not subject to disclosure under OPRA.

Further, the Custodian argued that the Council has routinely determined that requests for information are not valid requests. *See Ohlson v. Twp. of Edison (Middlesex)*, GRC Complaint No. 2007-233 (August 2009); *Watt v. Borough of North Plainfield (Somerset)*, GRC Complaint No. 2007-246 (September 2009); *LaMantia v. Jamesburg Pub. Library (Middlesex)*, GRC Complaint No. 2008-140 (February 2009); *Rodriguez v. Kean Univ.*, GRC Complaint No. 2013-69 (March 2014). The Custodian contended that here, the Complainant's OPRA request was a request seeking answers to the question of which employees completed visa applications masquerading as a request for records. The Custodian asserted that the Complainant is not entitled to the employees' statuses because OPRA does not permit disclosure of same.

Additional Submissions:

On April 24, 2014, the Complainant stated that according to Wikipedia, LCAs are public record by “regulation.”⁴ The Complainant thus asserted that, if this is the case, Federal law appears to preempt Kean’s denial of access. Thereafter, the Complainant submitted a second e-mail containing an excerpt from CPG immigration Law Group’s website on maintaining public access files related to LCAs.⁵ The Complainant noted that LCAs do not require an individual to divulge personal information; however, this does not necessarily substantiate Kean’s denial of access. Further, the Complainant asserted that it would be easy to identify employees for whom Kean hired under an H-1B visa. To substantiate this claim, the Complainant attached documentation that he sent to the State Ethics Commission about an employee for whom he alleged Kean would have had to file an LCA.

Analysis

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 “[n]otwithstanding 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 . . . shall not be considered a government record . . .” 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 include “an individual’s name, title, position . . . and data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension” Id.

Here, the Complainant sought certain resumes, job descriptions and “external advertising” for five (5) positions. The Custodian denied access, arguing in the SOI that disclosure of the records would indicate the employees’ visa status. Further, the Custodian argued that the Complainant’s request for records actually sought information and that the GRC has previously determined that requests for information are invalid under OPRA.

As a threshold issue, the GRC rejects the Custodian’s argument that the Complainant’s OPRA request is invalid. The OPRA request identified records (resumes, “external advertising”) and personnel information (job descriptions), as opposed to general information, which was the case in most of the cases the Custodian cited in the SOI. In fact, the very basis for OPRA is to maximize the public’s knowledge of OPRA. Asbury Park Press v. Ocean Cnty. Prosecutor's

⁴ http://en.wikipedia.org/wiki/H-1B_visa (accessed October 3, 2014).

⁵ http://www.mgplc.com/resources/employer_compliance/h1b_labor_condition_application.php (accessed October 3, 2014).

Office, 374 N.J. Super. 312, 329 (Law Div. 2004). To this end, a requestor submits an OPRA request seeking records with the expectation that same will provide insight regarding an issue of interest.

Resumes

EO 26 provides that:

No public agency shall disclose the résumés, applications for employment or other information concerning job applicants while a recruitment search is ongoing. The résumés of successful candidates shall be disclosed once the successful candidate is hired. The résumés of unsuccessful candidates may be disclosed after the search has been concluded and the position has been filled, but only where the unsuccessful candidate has consented to such disclosure.

Id.

In Fallstick v. Haddon Twp. (Camden), GRC Complaint No. 2008-156 (Interim Order dated August 11, 2009), the custodian denied access to a request seeking a current employee's resume under N.J.S.A. 47:1A-10. However, in the SOI, the custodian noted that after being made aware of EO 26, she disclosed a redacted copy of the resume. Although the Council acknowledged that the custodian eventually disclosed the resume, it determined that she unlawfully denied access to same, reasoning that the resume was “. . . disclosable pursuant to N.J.S.A. 47:1A-10, N.J.S.A. 47:1A-9(b), [EO 26].” (*citing* Mendes v. Tinton Falls Bd. of Educ., GRC Complaint No. 2006-201 (March 2007)).

In this matter, the Custodian, in denying access to the responsive resumes, argued that disclosure would reveal information about certain employees which she believed was exempt. However, the plain language of EO 26 provides that resumes of successful candidates are subject to disclosure under OPRA. Thus, the Custodian should have disclosed same.

Accordingly, because EO 26 provides that the résumés of successful candidates shall be disclosed once the successful candidate has been hired, and because the Complainant sought resumes for the employees filling five (5) identified positions, the Custodian unlawfully denied access to same. N.J.S.A. 47:1A-6. The Custodian must disclose the responsive resumes, with redactions where necessary, to the Complainant. *See* Fallstick, GRC 2008-156.

Job descriptions and external advertising

In Lotito v. NJ Dep't of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014), the Council considered the disclosability of job descriptions. There, the custodian identified a job description as a record responsive to the complainant's request for “education and qualifications” of an employee. The Council determined that “[t]he Custodian unlawfully denied access to the responsive job description . . . because same [was] clearly subject to disclosure. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10.” Id. at 5. In reaching its conclusion, the Council reasoned that:

Included in the excepted information subject to disclosure under OPRA is that “. . . which disclose conformity with specific experiential [and] educational . . . qualifications required for government employment . . .” N.J.S.A. 47:1A-10. The Council has previously ordered disclosure of different types of records sought that disclose such information. Bonanno v. Garfield Bd. of Educ., Bus. Dep’t, GRC Complaint No. 2006-62 (March 2007); Guz v. N.J. Civil Serv. Comm’n, GRC Complaint No. 2010-33 (June 2010).

Id.

Although decided during the pendency of this complaint, the Council’s holding in Lotitio, GRC 2013-65 is instructive here. Job descriptions and external advertisements are generic records providing disclosable information about a public employee’s position. As noted in Lotitio, it is clear that these records are disclosable under N.J.S.A. 47:1A-10. However, the Custodian did not disclose same, contending that disclosure would provide the Complainant with information to which he was not entitled. The GRC is not satisfied that this is case; to the contrary, it is clear that such records are disclosable.

Accordingly, the Custodian unlawfully denied access to the responsive job descriptions and external advertising. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. *See also* Lotitio, GRC 2013-65. The Custodian must disclose same to the Complainant for the five (5) positions identified in his OPRA request. If no records responsive to certain titles exists, the Custodian must certify to this fact.

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. Because Executive Order No. 26 (Gov. McGreevey, 2002) provides that the résumés of successful candidates shall be disclosed once the successful candidate has been hired, and because the Complainant sought resumes for the employees filling five (5) identified positions, the Custodian unlawfully denied access to same. N.J.S.A. 47:1A-6. The Custodian must disclose the responsive resumes, with redactions where necessary, to the Complainant. *See* Fallstick v. Haddon Twp. (Camden), GRC Complaint No. 2008-156 (Interim Order dated August 11, 2009).
2. The Custodian unlawfully denied access to the responsive job descriptions and external advertising. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-10. *See also* Lotitio v. NJ Dep’t of Labor, Human Res., GRC Complaint No. 2013-65 (March 2014). The Custodian must disclose same to the Complainant for the five (5) positions identified

in his OPRA request. If no records responsive to certain titles exists, the Custodian must certify to this fact.

3. **The Custodian shall comply with item Nos. 1 and 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,⁶ to the Executive Director.⁷**
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.

Prepared By: Frank F. Caruso
Communications Specialist/Resource Manager

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

October 21, 2014

⁶ "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."

⁷ Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been *made available* to the Complainant but the Custodian may withhold delivery of the record until the financial obligation is satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.