



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 20, 2013 Government Records Council Meeting

Luis Rodriguez
Complainant
v.
Kean University
Custodian of Record

Complaint No. 2013-197

At the December 20, 2013 public meeting, the Government Records Council (“Council”) considered the December 10, 2013 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 did not unlawfully deny access under OPRA to the requested report from the University’s ELO setting forth his findings and recommendations regarding sanctions of a University employee. *See* N.J.S.A. 47:1A-6. The Complainant requested a report related to an ethics investigation that is the equivalent of the “personnel records” exempted under N.J.S.A. 47:1A-10, and “[t]he same legislative intent embodied in the general exemption of personnel files from disclosure – one that aims to protect personal information disclosed to government agencies when such agencies are operating under the mantle of employer – demands that protection be afforded to the documents at issue” here. North Jersey Media Group, Inc. v. Bergen County Prosecutor’s Office, 405 N.J. Super. 386, 389 (App. Div. 2009); *see also* Dusenberry v. New Jersey City University, GRC Complaint No. 2009-101.

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 20th Day of December, 2013

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: December 23, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 20, 2013 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2013-197

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: A copy of the report of his findings and recommendations for sanctions that Michael Tripodi sent to the State Ethics Commission (“SEC”) on the matter of [an employee’s] ethics violations. These violations were reported to Mr. Tripodi by the requestor in March 2010. Mr. Tripodi sent the [report] to the State Ethics Commission sometime in late 2012 or January 2013.

Custodian of Record: Laura Barkley-Haelig

Request Received by Custodian: June 17, 2013

Response Made by Custodian: June 27, 2013; July 1, 2013

GRC Complaint Received: July 8, 2013

Background³

Request and Response:

On June 17, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 27, 2013, eight (8) business days later, the Custodian responded in writing requesting an extension of time to respond until July 3, 2013. On July 1, 2013, the Custodian denied the Complainant’s request based on OPRA’s exemption of personnel records and records relating to ongoing investigations. N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-3.

Denial of Access Complaint:

On July 8, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the investigation of the Kean University (“University”) employee was closed prior to his request and, therefore, OPRA’s

¹ No legal representation listed on record.

² No legal representation listed on record.

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.

exemption for ongoing investigations does not apply. The Complainant contends that the report is not a personnel record because it is not related to human resources or employee relations issues, and it was written by someone who is not a member of the University's Human Resources Department.

Statement of Information:

On August 6, 2013, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that he received the Complainant's OPRA request on June 17, 2013 and requested an extension of time to respond on June 27, 2013. The Custodian further certifies that on July 1, 2013, she denied the Complainant's request based on OPRA's exemption of personnel records and records relating to ongoing investigations. N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-3.

The Custodian contends that the records associated with this investigation are part of the employee's personnel file and, as such, are exempt under OPRA pursuant to N.J.S.A. 47:1A-10. The Custodian asserts that a request for personnel records begins with a presumption of non-disclosure and proceeds with a few narrow exceptions. Kovalcik v. Somerset Cnty. Prosecutor's Office, 206 N.J. 581, 594 (2011). The Custodian states that specific exceptions are listed in OPRA, but that no exception exists for documents relating to an employee's alleged ethics violation that may result in disciplinary action against that employee. *Citing* N.J.S.A. 47:1A-10; N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386 (App. Div. 2009) (finding "outside activity" questionnaires to be personnel documents with corresponding duty to safeguard from disclosure to protect personal privacy); Dusenberry v. N.J. City Univ., GRC Complaint No. 2009-101 (finding "outside activity" ethics forms to be personnel records exempt from disclosure under OPRA).

The Custodian additionally contends that the University has an obligation to safeguard a citizen's personal information when disclosure would violate a reasonable expectation of privacy, and that disclosure of documents relating to a pending disciplinary action would violate such an expectation. N.J.S.A. 47:1A-1.

Analysis⁴

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. OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

Pursuant to OPRA:

⁴ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

[T]he 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.

When dealing with personnel records, 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 summary information about an employee’s position (such as a name, title, position, or salary), documents required to be disclosed by law or essential to the performance of official duties, and data that disclose conformity with specific experiential, educational or medical qualifications required for government employment. N.J.S.A. 47:1A-10.

The trial court in N. Jersey Media Grp. submitted a memorandum, after the plaintiff filed a notice of appeal, examining what types of documents are properly labeled “personnel records.” Id. at 389. The court explained that while requests for outside employment may not be personnel records by name, they bear many of the indicia of personnel files because “they pertain to the general subject matter of one’s employment, are proffered in furtherance thereof, and are made pursuant to the employee manual.” Id. The court concluded that, as such, “these documents are of the sort that are so similar to personnel files – if not actually personnel files – that they deserve protection as such.” Id.; *see also* Dusenberry, GRC 2009-101.

The Appellate Division in N. Jersey Media Grp. also agreed that the only personnel information a public entity is authorized to disclose are the specific items listed in N.J.S.A. 47:1A-10, and that such an entity has an obligation to safeguard from public access a citizen’s personal information when disclosure thereof would violate the citizen’s reasonable expectation of privacy. Id. at 390.

Here, the Complainant sought a copy of a report sent by the University’s Ethics Liaison Officer (“ELO”) to the SEC that made findings and recommendations regarding proposed sanctions of a University employee because of alleged ethics violations. The Custodian denied this request based on OPRA’s exemptions for ongoing investigations and personnel records. *See* N.J.S.A. 47:1A-3(a); N.J.S.A. 47:1A-10. The report at issue may not be a personnel record by name, but it bears the indicia of personnel files. *See* N. Jersey Media Grp., 405 N.J. Super. at 390. Further, the requested document does not fall within any of the delineated categories of information that can be disclosed pursuant to N.J.S.A. 47:1A-10. Id.

Specifically, it is reasonable that a University employee, upon learning that he or she was the subject of a possible ethics investigation or sanction, would assume that related documents would be kept confidential. *See* id. at 389. The content of the requested report pertains to employment, and under SEC regulations any preliminary investigation of an alleged ethics violation, the allegations therein, and the corresponding case file are considered confidential. *See* N.J.A.C. 19:61-3.1(a)(3); N.J.A.C. 19:61-3.1(c)(2)-(5); N. Jersey Media Grp., 405 N.J. Super. at 388. Similarly, an employee charged with filing the documents related to a possible ethics sanction, such as the ELO’s findings and recommendations, might not place such documents in

an employee's personnel file, "but would likely turn to an adjacent folder, in the same filing cabinet, and protect that file with the same lock and key that protects the personnel file itself." N. Jersey Media Grp., 405 N.J. Super. at 389. Regardless of whether the report was part of an "ongoing investigation" under N.J.S.A. 47:1A-3, disclosure of the sought personnel record would violate the employee's reasonable expectation of privacy. N.J.S.A. 47:1A-1; N. Jersey Media Grp., 405 N.J. Super. at 390.

Therefore, the Custodian did not unlawfully deny access under OPRA to the requested report from the University's ELO setting forth his findings and recommendations regarding the sanctioning of a University employee. *See* N.J.S.A. 47:1A-6. The Complainant requested a report related to an ethics investigation that is the equivalent of the "personnel records" exempted under N.J.S.A. 47:1A-10, and "[t]he same legislative intent embodied in the general exemption of personnel files from disclosure – one that aims to protect personal information disclosed to government agencies when such agencies are operating under the mantle of employer – demands that protection be afforded to the documents at issue" here. N. Jersey Media Grp., 405 N.J. Super. at 389; *see also* Dusenberry, GRC 2009-101.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian did not unlawfully deny access under OPRA to the requested report from the University's ELO setting forth his findings and recommendations regarding sanctions of a University employee. *See* N.J.S.A. 47:1A-6. The Complainant requested a report related to an ethics investigation that is the equivalent of the "personnel records" exempted under N.J.S.A. 47:1A-10, and "[t]he same legislative intent embodied in the general exemption of personnel files from disclosure – one that aims to protect personal information disclosed to government agencies when such agencies are operating under the mantle of employer – demands that protection be afforded to the documents at issue" here. North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office, 405 N.J. Super. 386, 389 (App. Div. 2009); *see also* Dusenberry v. New Jersey City University, GRC Complaint No. 2009-101.

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Brandon D. Minde, Esq.
Executive Director

December 10, 2013