



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

**FINAL DECISION**

**July 29, 2014 Government Records Council Meeting**

Luis Rodriguez  
Complainant

Complaint No. 2013-344

v.

Kean University  
Custodian of Record

At the July 29, 2014 public meeting, the Government Records Council (“Council”) considered the July 22, 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 the Custodian has borne her burden of proving that she lawfully denied access to the requested records relating to the complaints the Complainant filed with the University’s AAO because such documents are not considered to be government records subject to public access under OPRA. *See* N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (McGreevey 2002); Tietze v. New Jersey Pinelands Commission, GRC Complaint No. 2012-276 (September 2013); Tietze v. New Jersey Pinelands Commission, GRC Complaint No. 2011-379 (December 2012); Cargill v. New Jersey Department of Education GRC Complaint No. 2009-256 (March 2011).

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 29<sup>th</sup> Day of July, 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: July 31, 2014**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
July 29, 2014 Council Meeting**

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

**GRC Complaint No. 2013-344**

**v.**

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

**Records Relevant to Complaint:** Copies of any and all documents sent to the Department of Treasury, Equal Employment Opportunity (“EEO”)/Affirmative Action (“AA”) agency for the three (3) complaints filed by the Complainant with the Affirmative Action Office (“AAO”).

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** July 29, 2013  
**Response Made by Custodian:** August 8, 2013  
**GRC Complaint Received:** November 27, 2013

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

**Request and Response:**

On July 29, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On August 8, 2013, eight (8) business days later, the Custodian responded by denying the request for being exempt from access based on OPRA’s exemptions for personnel records under N.J.S.A. 47:1A-10, material that implicates a citizen’s privacy interests under N.J.S.A. 47:1A-1, and records covered by Executive Order No. 26 (McGreevey 2002) (“EO 26”).

**Denial of Access Complaint:**

On November 27, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the Custodian knowingly and willfully violated OPRA because Kean University’s (“the University’s”) EEO/AA officer allegedly did not submit complaints filed by the Complainant to the Civil Service Commission, Division of EEO/AA in accordance with the New Jersey State Model Procedures for Internal

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

<sup>2</sup> Represented by DAG Angela L. Velez.

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Complaints Alleging Discrimination in the Workplace (“Model Procedures”) at N.J.A.C. 4A:7-3.2.

Statement of Information:

On January 7, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the request on July 29, 2013 and responded on August 8, 2013. The Custodian argues primarily that the Complainant’s request is for records of complaints he filed with the AAO at the University and, as such, the documents are not considered government records under OPRA based on EO 26. Relatedly, the Custodian contends that EO 26 refers to “records” generally without, for example, distinguishing between reports or correspondence and documents indicating the existence of such reports or correspondence. The Custodian notes that the Model Procedures state that complaints and investigations are to be handled in a manner that protects the privacy interests of those involved, with potential disciplinary action available for breaches of the required confidentiality. Due to this, the Custodian maintains that a State entity should not be required to reveal information about whether or not records covered by EO 26 were sent to a particular agency, because to do so could violate the Model Procedures’ confidentiality requirements by revealing the existence and status of a complaint against a particular individual.

Additionally, the Custodian argues that the request falls within OPRA’s exemption of personnel records “relating to any grievance filed by or against any individual,” and that to reveal whether the responsive documents exist would implicate the University’s obligation to safeguard from access information that would violate a citizen’s reasonable expectation of privacy. *Citing* N.J.S.A. 47:1A-10; N.J.S.A. 47:1A-1.

**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 also recognizes exemptions to disclosure found in any Executive Order of the Governor, or any regulation promulgated under the authority of any Executive Order of the Governor. *See* N.J.S.A. 47:1A-9(a). In turn, EO 26 provides that:

The following records shall not be considered to be government records subject to public access pursuant to [OPRA] . . . :

Records of complaints and investigations undertaken pursuant to the Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments in accordance with the State Policy Prohibiting

Discrimination, Harassment and Hostile Environments in the Workplace . . .  
whether open, closed, or inactive.<sup>4</sup>

EO 26.

The GRC has held that a combined reading of the State's EEO/AA regulations supports the conclusion that a State employee filing a complaint regarding either discrimination or sexual harassment does so in accordance with the Model Procedures. *See Cargill v. N.J. Dep't of Educ.*, GRC Complaint No. 2009-256 (March 2011); *see also N.J.A.C. 4A:7-3.1; N.J.A.C. 4A:7-3.2* (setting forth model procedures for internal complaints alleging discrimination in the workplace and stating that written record of complaints received shall be confidential). Any records created as part of such a complaint, therefore, are considered confidential under EO 26. *See Cargill*, GRC 2009-256 (finding records from discrimination complaint exempt for disclosure under *N.J.S.A. 47:1A-9(a)* and Executive Order No. 26); *see also Tietze v. N.J. Pinelands Comm'n*, GRC Complaint No. 2012-276 (September 2013) (finding items contained in employees EEO file to be exempt from disclosure under EO 26); *Tietze v. N.J. Pinelands Comm'n*, GRC Complaint No. 2011-379 (December 2012) (finding that any records created as part of Complainant's discrimination complaint, including investigatory report, are to be exempt from disclosure as confidential).

Here, the Complainant requested any and all documents sent to the Department of Treasury, EEO/AA agency relating to the complaints he filed, as a State employee, with the University's AAO. As such, the Complainant sought "records of [his] complaints" undertaken pursuant to the Model Procedures, whether open, closed, or inactive. *See EO 26; N.J.A.C. 4A:7-3.1; N.J.A.C. 4A:7-3.2; Cargill*, GRC 2009-256. Thus, in light of the language of the relevant Executive Order and the Council's prior decisions, the Complainant requested documents that are exempt from access. *See EO 26; Tietze*, GRC 2012-276; *Tietze*, GRC 2011-379; *Cargill*, GRC 2009-256.

Therefore, the Custodian has borne her burden of proving that she lawfully denied access to the requested records relating to the complaints the Complainant filed with the University's AAO because such documents are not considered to be government records subject to public access under OPRA. *See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); EO 26; Tietze*, GRC 2012-276; *Tietze*, GRC 2011-379; *Cargill*, GRC 2009-256.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proving that she lawfully denied access to the requested records relating to the complaints the Complainant filed with the University's AAO because such documents are not considered to be government records subject to public access under OPRA. *See N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (McGreevey 2002); Tietze v. New Jersey*

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<sup>4</sup> *N.J.A.C. 4A:7-3.1*, Policy Prohibiting Discrimination, Harassment or Hostile Work Environments in the Workplace; Complaint Procedure, and Appeals, was renamed Policy Prohibiting Discrimination in the Workplace; Complaint Procedure, and Appeals, by R.2007 d.244, effective August 20, 2007. *See 39 N.J.R. 1340(a); 39 N.J.R. 3499(a)*.

Pinelands Commission, GRC Complaint No. 2012-276 (September 2013); Tietze v. New Jersey Pinelands Commission, GRC Complaint No. 2011-379 (December 2012); Cargill v. New Jersey Department of Education GRC Complaint No. 2009-256 (March 2011).

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

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

July 22, 2014