



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

March 25, 2014 Government Records Council Meeting

Luis Rodriguez
Complainant

v.

Kean University
Custodian of Record

Complaint No. 2013-69

At the March 25, 2014 public meeting, the Government Records Council (“Council”) considered the March 18, 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. The Custodian has borne her burden of proving that she did not unreasonably deny access to the University’s current policy and procedures for disciplinary actions related to ethics violations. N.J.S.A. 47:1A-6. The Custodian provided the Complainant with a link to the Internet address where the responsive record resided and offered to provide a hard-copy of said record if the Complainant could not access the record online.
2. The Complainant’s Request Item No. 2 is an invalid request for information that fails to seek identifiable government records. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to the Complainant’s request. N.J.S.A. 47:1A-6.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 25th Day of March, 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: March 27, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
March 25, 2014 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2013-69

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Email copies of:

1. What are the Kean University's current policy and procedures for disciplinary action for ethics violations? That information no longer appears in the Kean University Employee Handbook as it once did.
2. When was the section on disciplinary action for ethics violation removed from the Kean University Employee Handbook?

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: February 6, 2013
Response Made by Custodian: February 15, 2013
GRC Complaint Received: March 1, 2013

Background³

Request and Response:

On February 6, 2013, the Complainant submitted an OPRA request to the Custodian seeking the above-mentioned records. On February 15, 2013, seven (7) business days later, the Custodian responded, via email, to the Complainant. The Custodian provided that the "[g]overnment records responsive to the Complainants request could be found at the following link <http://www.state.nj.us/ethics/docs/uniformcode.pdf>." The Custodian added that if the Complainant had any problem accessing the document, a hard copy would be made available.

¹ No legal representation listed on record.

² Represented by Deputy Attorney General Jennifer McGruther.

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 1, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts the Custodian was not responsive to his OPRA request because the record produced, via direction to a State of New Jersey website, did not contain the record responsive to his request. The Complainant states that a section titled “Disciplinary Action for Ethics Violations” used to appear in the Kean University (the “University”) Employee Handbook, but no longer does. The Complainant questions why the Handbook changed and states that he wants to find out why.

Statement of Information:

On April 1, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that she received the Complainant’s OPRA request on February 6, 2013 and responded on February 15, 2013. The Custodian further certifies that the University follows the State of New Jersey Uniform Ethics Code, and that she provided the Complainant with a link to the State of New Jersey website page where the State Uniform Ethics Code is published. The Custodian states that the supplemental provision referenced by the Complainant does not currently appear in the University’s Employee Handbook. Additionally, the Custodian states that “[t]he second part of the [Complainant’s] request asks a question which does not correspond to a government record.”

Additional Submissions:

On June 23, 2013, the Complainant provided an additional submission to the GRC. The Complainant argues that the Custodian knowingly and willfully violated OPRA. The Complainant reiterates that certain provisions in the University’s Employee handbook relating to ethics violations existed in or around October and November 2012 but were no longer present in or around January and February 2013. The Complainant contends that the University referenced the provision in question in a report filed with the Middle States Commission on Higher Education (“MSCHE”) in September 2012.

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.

Request Item No. 1:

This complaint offers the Council an opportunity to revisit its policy regarding the sufficiency, under OPRA, of a Custodian referring a requestor to a public website to obtain records. At present, the GRC does not permit a custodian to satisfy an OPRA request by referring

a requestor to a website to obtain records. A reexamination of this policy requires an understanding of how it evolved.

In Windish v. Mount Arlington Public Schools, GRC Complaint No. 2005-216 (August 2006), the complainant sought a breakdown of the actual costs of paper copies. The custodian responded advising the complainant that a breakdown of copying costs was included on the OPRA request form that the complainant used to submit his request. The Council determined that the custodian violated OPRA by informing the complainant of where to find the requested information instead of providing the complainant with a “copy of the Board of Education’s OPRA request form” Id. (citing N.J.S.A. 47:1A-1). The Council’s decision in Windish was based on the custodian’s failure to provide any record at all. *See also* Langford v. City of Perth Amboy, GRC Complaint No. 2005-181 (May 2007) (holding that custodian’s response that “rules in order to obtain a loan” were available for review at the Director of Human Services’ office resulted in violation of N.J.S.A. 47:1A-1).

The Council later applied this reasoning to instances where custodians referred requestors to the Internet. Specifically, in Kaplan v. Winslow Township Board of Education (Camden), Complaint No. 2009-148 (Interim Order dated June 29, 2010), the custodian responded to the complainant’s OPRA request by advising that the responsive records could be found on the Board of Education’s website. The Council, applying its previous holdings in Windish and Langford, without further explanation, determined that informing the complainant that the records could be found on the Internet instead of physically providing the records resulted in a violation of N.J.S.A. 47:1A-1. *See also* Wolosky v. Twp. of Denville (Morris), GRC Complaint No. 2010-191 (Interim Order dated January 31, 2012) (finding custodian’s response directing complainant to township’s website to be impermissible). Thereafter, the Council similarly applied this holding to complaints in which a custodian referred a requestor to a website.

Since the creation of the GRC, however, the use and availability of Internet, as well as technological capability in general, has greatly increased. Many New Jerseyans turn to the Internet to conduct business with government, including electronically filing taxes, renewing motor vehicle registrations, paying penalties for motor vehicle violations, and making OPRA requests. Indeed, the Legislature signified its awareness of this fact by passing a statute requiring “[a]ny State authority, board, or commission, regional authority, or environmental authority, board, or commission [to] develop and maintain either an Internet website or a webpage on the State’s, municipality’s, or county’s Internet website . . . to provide increased public access to . . . operations and activities” N.J.S.A. 40:56A-4.1.

A reversal of the Council’s past holdings that found referring requestors to records readily available on the Internet to be a violation of OPRA will not infringe on the statute’s purpose of “maximiz[ing] public knowledge about public affairs in order to ensure an informed citizenry” Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (citing Asbury Park Press v. Ocean Cnty.Prosecutor’s Office, 374 N.J. Super. 312, 329 (Law. Div. 2004)). Directing a requestor to the specific location of a government record on the Internet will save government, and thus taxpayers, time and money, while also providing an efficient and expedient way for a requestor to easily obtain and examine the responsive record as required under OPRA. N.J.S.A.

47:1A-1. The reversal of the GRC's prior policy is thus beneficial to both citizens and the governmental entities that serve them.

The Legislature incorporated the notion of "reasonableness" into several sections of OPRA. *See, e.g.,* N.J.S.A. 47:1A-1 (directing government entities to safeguard personnel information when disclosure would violate citizen's reasonable expectation of privacy); N.J.S.A. 47:1A-5(c)-(d) (allowing custodians to impose reasonable special service charge); N.J.S.A. 47:1A-5(g) (permitting denial of requests that would substantially disrupt agency operations after custodian attempts to reach reasonable solution with requestor); N.J.S.A. 47:1A-6, 7(f) (stating requestors who prevail in any proceeding are entitled to reasonable attorney's fee). As such, a custodian directing a requestor to responsive records located online shall take reasonable action in light of OPRA's purpose, and under the existing set of circumstances, to disclose the documents. *See* N.J.S.A. 47:1A-1 (declaring public policy favoring disclosure and right of access); Burnett v. County of Bergen, 198 N.J. 408, 423 (2009) ("Section 1 is neither a preface nor a preamble. . . . [I]nstead, it focuses on the law's implementation. Specifically, it imposes an obligation on public agencies . . .").

Thus, a custodian shall direct a requestor, with reasonable clarity, to the specific location on the Internet where the responsive records reside. This shall include, if necessary, directions for accessing the responsive document that would be comprehensible to a reasonable person, including but not limited to providing a link to the exact location of the requested document. However, a custodian's ability to direct a requestor to the specific location of a government record on the Internet is contingent upon on the requestor's ability to electronically access the records. Thus, a custodian is not absolved from providing the record in hardcopy if the requestor is unable to obtain the information from the Internet and makes it known to the custodian within seven (7) business days after receipt of the custodian's response, in which case the custodian will have seven (7) business days from the date of such notice to disclose the record(s) in hardcopy.⁴

Here, the Complainant requested the University's "current policy and procedures . . . for disciplinary action for ethics violations" in electronic form. The Custodian provided a timely response, via email, indicating that the responsive records could be found at <http://www.state.nj.us/ethics/docs/uniformcode.pdf>, and that a hard copy would be provided if the Complainant had any problem accessing the document. The Custodian certified that the University follows the State of New Jersey Uniform Ethics Code, which can be accessed via the above link, and that, as the Complainant stated, the additional provision referenced by the Complainant does not appear in the Employee Handbook.

Therefore, the Custodian has borne her burden of proving that she did not unreasonably deny access to the University's current policy and procedures for disciplinary actions related to ethics violations. N.J.S.A. 47:1A-6. The Custodian provided the Complainant with a link to the Internet address where the responsive record resided and offered to provide a hard-copy of said record if the Complainant could not access the record online.

⁴ If the request was submitted electronically or the records were requested to be disclosed electronically, there will be a presumption that the complainant has access to the Internet.

Request Item No. 2:

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records readily accessible for inspection, copying, or examination.” MAG Entm’t, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) (citing N.J.S.A. 47:1A-1) (quotations omitted). The Court reasoned that:

[m]ost significantly, the request failed to identify with any specificity or particularity the governmental records sought. *MAG provided neither names nor any identifiers other than a broad generic description of a brand or type of case prosecuted by the agency in the past.* Such an open-ended demand required the Division's records custodian to manually search through all of the agency's files, analyze, compile and collate the information contained therein, and identify for MAG the cases relative to its selective enforcement defense in the OAL litigation. Further, once the cases were identified, the records custodian would then be required to evaluate, sort out, and determine the documents to be produced and those otherwise exempted.

Id. at 549 (emphasis added).

The Court further held that “[u]nder OPRA, agencies are required to disclose only ‘identifiable’ government records not otherwise exempt In short, OPRA does not countenance open-ended searches of an agency's files.” Id. (emphasis added). See also Bent v. Stafford Police Dep’t, 381 N.J. Super. 30, 37 (App. Div. 2005), N.J. Builders Ass’n v. N.J. Council on Affordable Hous., 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

Further, in LaMantia v. Jamesburg Public Library (Middlesex), GRC Complaint No. 2008-140 (February 2009), the complainant requested the number of Jamesburg residents that held library cards. The GRC determined that the complainant’s request was not for an identifiable government record, but for information. Id. As such, the request was deemed invalid pursuant to MAG. Id.; see also Ohlson v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-233 (August 2009). Similarly, in Watt v. Borough of North Plainfield (Somerset), GRC Complaint No. 2007-246 (September 2009), the complainant made an OPRA request in the form of several questions regarding when a property was added to the “tax rolls,” how much tax was owed, and why there was any delay in adding the property to the tax roll. The Council determined that the request was an invalid because it failed to identify government records. Id.

Here, the Complainant sought an answer to a question: “When was the section on disciplinary action for ethics violation removed from the Kean University Employee Handbook?” Similar to the requests at issue in LaMantia and Watt, this request seeks information and, unlike Request Item No. 1 above, not identifiable government records. Notwithstanding the Custodian’s appropriate response that no records exist, the Complainant

failed to seek specific, identifiable government records. See LaMantia, GRC 2008-140; Watt, GRC 2007-246.

Therefore, the Complainant's Request Item No. 2 is an invalid request for information that fails to seek identifiable government records. MAG, 375 N.J. Super. 534 at 546; Bent, 381 N.J. Super. 30 at 37; N.J. Builders Ass'n, 390 N.J. Super. 166 at 180; Schuler, GRC 2007-151. Thus, the Custodian did not unlawfully deny access to the Complainant's request. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian has borne her burden of proving that she did not unreasonably deny access to the University's current policy and procedures for disciplinary actions related to ethics violations. N.J.S.A. 47:1A-6. The Custodian provided the Complainant with a link to the Internet address where the responsive record resided and offered to provide a hard-copy of said record if the Complainant could not access the record online.
2. The Complainant's Request Item No. 2 is an invalid request for information that fails to seek identifiable government records. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Thus, the Custodian did not unlawfully deny access to the Complainant's request. N.J.S.A. 47:1A-6.

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Senior Counsel

March 18, 2014