



**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**  
*Commissioner*

**FINAL DECISION**

**October 27, 2015 Government Records Council Meeting**

Luis Rodriguez  
Complainant

v.

Kean University  
Custodian of Record

Complaint No. 2013-71

At the October 27, 2015 public meeting, the Government Records Council (“Council”) considered the October 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:

1. The Custodian complied with the Council’s July 28, 2015 Interim Order because she responded within the prescribed time frame providing those responsive records and portions of records subject to disclosure, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the unredacted portions of the requested e-mails and memos, the Custodian timely complied with the Council’s July 28, 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 27<sup>th</sup> Day of October, 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: October 29, 2015**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director  
October 27, 2015 Council Meeting**

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

**GRC Complaint No. 2013-71**

v.

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

**Records Relevant to Complaint:** E-mails of the following:

1. Any and all correspondence (emails, memoranda, notes, etc.) relating to the memorandum I [Complainant] filed with the Office of Internal Audit (the “Memorandum”) asking for a Conscientious Employment Whistleblower Act [sic] investigation (the “Investigation”). My [Complainant’s] memorandum was given to the Office on or around September 14, 2012.
2. I [Complainant] am asking for records related to the investigation that Office conducted – records of notes of interviews, phone calls, or meetings; memoranda or emails written to or from the two managers [Maria Rizzolo and Lorraine Corrago] in the Office concerning the investigation; etc.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** February 19, 2013  
**Response Made by Custodian:** February 28, 2013  
**GRC Complaint Received:** March 1, 2013

**Background**

July 28, 2015 Council Meeting:

At its July 28, 2015, public meeting, the Council considered the April 21, 2015, *In Camera* 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 December 20, 2013, Interim Order because she provided certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4 and submitted nine (9) copies of the

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

<sup>2</sup> Represented by Deputy Attorney General Jennifer McGruther.

requested records for *in camera* review within the extended time allotted to respond.

2. With few exceptions, the Custodian lawfully denied access to the e-mail and memo discussions because said records are exempt from disclosure as pertaining to personnel matters, performance evaluations, and/or pertaining to ethical violations pursuant to N.J.S.A. 47:1A-10. See North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 390 (App. Div. 2009), Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014), and Cibo, Jr. v. Rowan Univ., GRC Complaint No. 2003-42 (February 2004). Specifically, the e-mail and memo discussions pertain to allegations of retaliatory and discriminatory actions by several employees against the Complainant. The Complainant claimed these actions were as a result of calling attention to misconduct and ethical issues amongst said employees. As such, the e-mails and memos invariably discuss detailed disciplinary actions against the suspected employees and the Complainant himself. Therefore, the e-mail and memo discussions are exempt from disclosure under OPRA.
3. **On the basis of the Council's determination in this matter, as set forth in the above table, the Custodian must disclose all other portions of the requested e-mails and memos to the Complainant (i.e., sender, recipients, date, time, subject, and closing salutations).**
4. **The Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.**<sup>3</sup>
5. 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 July 29, 2015, the Council distributed its Interim Order to all parties.

On August 5, 2015, the Custodian responded to the Council's Interim Order, certifying that she provided the Complainant with electronic copies of the disclosable records in compliance with the Interim Order.

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<sup>3</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If the Complainant incurred a copying or special service charge, 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.

## Analysis

### Compliance

At its July 28, 2015, meeting, the Council ordered the Custodian to disclose those unredacted portions of responsive e-mails and memos to the Complainant and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 29, 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 August 5, 2015.

On August 5, 2015, the fifth (5<sup>th</sup>) business day after receipt of the Council's Order, the Custodian responded to the Council's Order, providing the unredacted records and portions of records responsive to the Complainant's request and certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's July 28, 2015, Interim Order because she responded within the prescribed time frame by providing those responsive records and portions of records subject to disclosure and 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 the unredacted portions of the requested e-mails and memos, the Custodian timely complied with the Council's July 28, 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 July 28, 2015 Interim Order because she responded within the prescribed time frame providing those responsive records and portions of records subject to disclosure, and simultaneously provided certified confirmation of compliance to the Executive Director.
2. Although the Custodian unlawfully denied access to the unredacted portions of the requested e-mails and memos, the Custodian timely complied with the Council's July 28, 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: Samuel A. Rosado  
Staff Attorney

Reviewed By: Joseph D. Glover  
Executive Director

October 20, 2015



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
101 SOUTH BROAD STREET  
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CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

INTERIM ORDER

July 28, 2015 Government Records Council Meeting

Luis Rodriguez  
Complainant

Complaint No. 2013-71

v.

Kean University  
Custodian of Record

At the July 28, 2015 public meeting, the Government Records Council (“Council”) considered the April 21, 2015 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 December 20, 2013, Interim Order because she provided certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4 and submitted nine (9) copies of the requested records for *in camera* review within the extended time allotted to respond.
2. With few exceptions, the Custodian lawfully denied access to the e-mail and memo discussions because said records are exempt from disclosure as pertaining to personnel matters, performance evaluations, and/or pertaining to ethical violations pursuant to N.J.S.A. 47:1A-10. See North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009), Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014), and Cibo, Jr. v. Rowan Univ., GRC Complaint No. 2003-42 (February 2004). Specifically, the e-mail and memo discussions pertain to allegations of retaliatory and discriminatory actions by several employees against the Complainant. The Complainant claimed these actions were as a result of calling attention to misconduct and ethical issues amongst said employees. As such, the e-mails and memos invariably discuss detailed disciplinary actions against the suspected employees and the Complainant himself. Therefore, the e-mail and memo discussions are exempt from disclosure under OPRA.
3. **On the basis of the Council’s determination in this matter, as set forth in the above table, the Custodian must disclose all other portions of the requested e-mails and memos to the Complainant (i.e., sender, recipients, date, time, subject, and closing salutations).**



4. **The Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.<sup>1</sup>**
5. 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 28<sup>th</sup> Day of July, 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 29, 2015**

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<sup>1</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Custodian, 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.



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director  
July 28, 2015 Council Meeting**

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

**GRC Complaint No. 2013-71**

v.

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

**Records Relevant to Complaint:** Emails of the following:

1. Any and all correspondence (emails, memoranda, notes, etc.) relating to the memorandum I [Complainant] filed with the Office of Internal Audit (the “Memorandum”) asking for a Conscientious Employment Whistleblower Act [sic] investigation (the “Investigation”). My [Complainant’s] memorandum was given to the Office on or around September 14, 2012.
2. I [Complainant] am asking for records related to the investigation that Office conducted – records of notes of interviews, phone calls, or meetings; memoranda or emails written to or from the two managers [Maria Rizzolo and Lorraine Corrago] in the Office concerning the investigation; etc.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** February 19, 2013  
**Response Made by Custodian:** February 28, 2013  
**GRC Complaint Received:** March 1, 2013

**Records Submitted for *In Camera* Examination:** Complete investigation file pertaining to a Conscientious Employee Protection Act complaint filed by the Complainant with Kean University.

**Background**

**December 20, 2013 Council Meeting:**

At its December 20, 2013, public meeting, the 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, found that:

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

<sup>2</sup> Represented by Deputy Attorney General Jennifer McGruther.

1. The record lacks both an index or description and the basis for the denial of access for each document contained in the investigation file. The GRC is unable to analyze the confidentiality of each of the documents in the file. In the absence of this information, the GRC cannot accurately determine whether the entirety of the investigation file is exempt from disclosure. Therefore, the GRC must conduct an *in camera* review of the responsive records to determine the validity of the Custodian's position that every page of the investigation file is exempt from disclosure. Paff v. Department of Labor, 379 N.J. Super. 346, 355 (App. Div. 2005).
2. **The Custodian must deliver<sup>3</sup> to the Council in a sealed envelope nine (9) copies of the requested records, from item # 1 above, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>4</sup> that the records provided are the records requested by the Council for the in camera inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. **The Custodian shall comply with item #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, to the Executive Director.<sup>5</sup>**
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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

#### Procedural History:

On December 23, 2013, the Council distributed its Interim Order to all parties. On January 23, 2014, the Custodian responded to the Council's Interim Order, submitting nine (9) copies of Kean University's whistleblower investigation file.

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<sup>3</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>4</sup> "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."

<sup>5</sup> 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.

## Analysis

### Compliance

At its December 20, 2013, meeting, the Council ordered the Custodian to submit nine (9) copies of the whistleblower investigation file for *in camera* review and to submit certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On December 23, 2013, 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 Tuesday, December 31, 2013.

Upon information and belief, the Custodian requested an extension of time to respond to the Council's Interim Order. On January 23, 2014, the twentieth (20<sup>th</sup>) business day after receipt of the Council's Order, the Custodian submitted certified confirmation of compliance to the GRC, via regular mail, and nine (9) copies of the requested records.

Therefore, the Custodian complied with the Council's December 20, 2013, Interim Order because she provided certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4 and submitted nine (9) copies of the requested records for an *in camera* review within the extended time allotted to respond.

### 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. N.J.S.A. 47:1A-6.

N.J.S.A. 47:1A-10 provides that "the personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for public access[.]" The statute goes on to list several exceptions to the personnel record proscription; to wit, "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received[.]" Id.

### Employee Disciplinary Actions/Investigations of Employee Misconduct

The Council has determined that records involving employee discipline or investigations into employee misconduct are properly classified as personnel records exempt from disclosure under N.J.S.A. 47:1A-10. In Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), the Council found that records of complaints or internal reprimands against a municipal police officer were properly classified as personnel records encompassed within the provisions of N.J.S.A. 47:1A-10. For this reason, the Council concluded that "records of complaints filed against [the police officer] and/or reprimands [the officer] received are not subject to public access." Id.

Further, the Council addressed if personnel records, which are not specifically identified in OPRA, are subject to disclosure. Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). The Complainant in Rodriguez, GRC No. 2013-296, sought an employee's reimbursement to Kean University of what was believed to be a 2011 ethics violation. Therein the Complainant argued that disciplinary actions are not part of the personnel record because they do not pertain to employee relations, human resources issues, or the employee's employment. In turn, the Custodian argued that acknowledging that the employee was disciplined would be in contravention to OPRA's presumption that personnel records, with certain exceptions, are exempt from disclosure. The Council reasoned that "[b]ased on the Complainant's description in his OPRA request, the records sought appear to relate to a possible disciplinary action. Thus, if [the employee] was disciplined for an ethics violation, it is reasonable that the documented discipline action would ' . . . bear many of the indicia of personnel files.'" Id., citing North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 390 (App. Div. 2009). The Council therefore held that "disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA." Rodriguez, GRC No. 2013-296.

Moreover, the responsive records in this matter comprise the background material to the final report that was the subject of Rodriguez v. Kean Univ., GRC Complaint No. 2014-52. The Complainant sought the final report stemming from his whistleblower complaint, after being informed of its conclusion. The Council held that because a whistleblower complaint invariably involves discussions of disciplinary actions imposed by or upon the Complainant, disclosure of the final report of the investigation would violate the principle behind OPRA's personnel records exemption. Id., citing Merino, GRC No. 2003-296 and Rodriguez, GRC No. 2013-296.

### Performance Evaluations

Additionally, the Council has long held that performance evaluations are not subject to disclosure pursuant to N.J.S.A. 47:1A-10. In Cibo, Jr. v. Rowan Univ., GRC Complaint No. 2003-42 (February 2004), the Council determined that the custodian lawfully denied access to the underlying reasons for wage increases because ". . . bases for salary increases are integrally intertwined with employee performance evaluations, which are clearly not subject to disclosure under OPRA." Id. See also McCalley v. Rowan Univ., GRC Complaint No. 2003-90 (February 2004), Baker v. NJ Civil Service Comm'n, GRC Complaint No. 2009-253 (Interim Order dated July 27, 2010) and Young v. NJ Dep't of Personnel, GRC Complaint No. 2007-210 (Interim Order dated September 30, 2009).

The GRC conducted an *in camera* examination of the submitted records. The results of the examination are set forth in the following table. The remainder of the file included documents of the type that were not responsive to the Complainant's request, which was for e-mails, notes, and memos, and/or were created after the date of the Complainant's request, February 19, 2013.

Record No. Identified via Custodian's "Rodriguez Compliant Index"	Record Name/Date	Description of Record or Redaction	Custodian's Explanation/ Citation for Non-disclosure or Redactions	Findings of the <i>In Camera</i> Examination <sup>6</sup>
Binder 1 Tab 2	December 13, 2012, e-mail chain, received by Maria Rizzolo ("Ms. Rizzolo") and Lorraine Carango ("Ms. Carango").	E-mail chain forwarded by the Complainant, between himself and Faruque Chowdhury ("Mr. Chowdhury"), regarding the personnel issues within Kean University Library (5 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt, as it contains discussions pertaining to a grievance filing and personnel. <u>N.J.S.A. 47:1A-10</u> .

<sup>6</sup> **Unless expressly identified for redaction, everything in the record shall be disclosed.** For purposes of identifying redactions, unless otherwise noted, a paragraph/new paragraph begins whenever there is an indentation and/or a skipped space(s). The paragraphs are to be counted starting with the first whole paragraph in each record and continuing sequentially through the end of the record. If a record is subdivided with topic headings, renumbering of paragraphs will commence under each new topic heading. Sentences are to be counted in sequential order throughout each paragraph in each record. Each new paragraph will begin with a new sentence number. If only a portion of a sentence is to be redacted, the word in the sentence which the redaction follows or precedes, as the case may be, will be identified and set off in quotation marks. If there is any question as to the location and/or extent of the redaction, the GRC should be contacted for clarification before the record is redacted. The GRC recommends the redactor make a paper copy of the original record, manually "black out" the information on the copy with a dark colored marker, then provide a copy of the blacked-out record to the requester.

Binder 1 Tab 2	December 3, 2012, e-mail chain, received by Ms. Rizzolo from the Complainant, including attached memo.	E-mail chain forwarded by the Complainant, between himself and Mr. Chowdhury, with attached memo requesting permission to refer an employee to HR for formal discipline (4 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The two (2) sentences within the e-mail do not contain discussions of personnel matters. <b>The Custodian must disclose this portion of the record.</b> However, the two (2) main paragraphs of the forwarded message, and the memo attached therein, contain discussions of personnel matters and are thus exempt from disclosure. <u>N.J.A.C. 47:1A-10</u> .
Binder 1 Tab 2	October 19, 2012, e-mail chain, received by Ms. Rizzolo from the Complainant.	E-mail chain forwarded by the Complainant, between himself and Charlie Williams (“Mr. Williams”) (5 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The sentence within the e-mail does not contain discussions of personnel matters. <b>The Custodian must disclose this portion of the record.</b> However, the forwarded e-mail chain contains discussions of personnel matters and is thus exempt from disclosure. <u>N.J.A.C. 47:1A-10</u> .
Binder 1 Tab 2	October 19, 2012, e-mail, received by Ms. Rizzolo from the Complainant.	E-mail chain forwarded by the Complainant, between himself and Dr. Jeffery Toney (“Dr. Toney”) (1 pg.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt, as it contains discussions pertaining to a grievance filing. <u>N.J.S.A. 47:1A-10</u> .

Binder 1 Tab 2	October 19, 2012, e-mail chain, received by Ms. Rizzolo from the Complainant.	E-mail forwarded by the Complainant, between himself and Michael Tripodi (“Mr. Tripodi”) (1 pg.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The two (2) sentences within the e-mail do not contain discussions of personnel matters. <b>The Custodian must disclose this portion of the record.</b> However, the forwarded e-mail contains discussions of personnel matters and is thus exempt from disclosure. <u>N.J.A.C. 47:1A-10</u> .
Binder 1 Tab 2	October 19, 2012, e-mail, between Ms. Rizzolo, Ms. Carango, and others, and the Complainant.	E-mail from the Complainant, seeking a status update on a previous e-mail detailing claims of “harassment, retribution, and defamation.” (2 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The two (2) sentences within the e-mail do not contain discussions of personnel matters. <b>The Custodian must disclose this portion of the record.</b> However, the included message contains discussions of personnel matters and is thus exempt from disclosure. <u>N.J.A.C. 47:1A-10</u> .
Binder 1 Tab 2	October 10, 2012, e-mail, from Marquan Mutazz (“Mr. Mutazz”), and Ms. Rizzolo.	E-mail from Mr. Mutazz attaching a copy of his job description with Kean University (2 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The e-mail and the attachment do not contain discussions of personnel matters. <b>The Custodian must disclose the record.</b>

Binder 1 Tab 3	September 11, 2012, memo from the Complainant to Ms. Carango.	Original whistleblower complaint from the Complainant, detailing various disciplinary actions and grievances filed by and against the Complainant and several employees (6 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt pursuant to <u>N.J.S.A. 47:1A-10</u> , as it contains discussions of personnel matters, discussions pertaining to grievance filings, and discussions pertaining to performance evaluations. <i>See <u>Cibo, Jr. v. Rowan Univ.</u></i> , GRC Complaint No. 2003-42 (February 2004).
Binder 1 Tab 5	September 19, 2012, memo from Ms. Rizzolo to whistleblower investigation file.	Meeting with Kimberly Fraone (“Ms. Fraone”) pertaining to the Complainant’s whistleblower complaint (5 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt from disclosure, as it contains discussions of personnel matters. <u>N.J.S.A. 47:1A-10</u> .
Binder 1 Tab 5	October 1, 2012, memo from Ms. Rizzolo to whistleblower investigation file.	Meeting with Mr. Chowdhury pertaining to the Complainant’s whistleblower complaint (3 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt from disclosure, as it contains discussions of personnel matters. <u>N.J.S.A. 47:1A-10</u> .



Binder 1 Tab 5	October 5, 2012, memo from Ms. Rizzolo to whistleblower investigation file.	Meeting with Mr. Mutazz, pertaining to the Complainant's whistleblower complaint (3 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt from disclosure, as it contains discussions of personnel matters. <u>N.J.S.A. 47:1A-10</u> .
Binder 1 Tab 5	October 9, 2012, memo from Ms. Rizzolo to whistleblower investigation file.	Meeting with the Complainant pertaining to his whistleblower complaint (5 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt from disclosure, as it contains discussions of personnel matters. <u>N.J.S.A. 47:1A-10</u> .
Binder 1 Tab 5	October 9, 2012, memo from Ms. Rizzolo to whistleblower investigation file.	2 <sup>nd</sup> meeting with Mr. Mutazz pertaining to the Complainant's whistleblower complaint (28 pgs. w/ 7 attachments).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The memo and attachments marked "6" and "7" are exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u> , as discussing personnel matters and/or disciplinary actions. However, attachments marked "1," "2," "3," "4," and "8" do not contain discussions of personnel matters. <b>The Custodian must disclose those portions of the record.</b>

Binder 1 Tab 5	October 19, 2012, memo from Ms. Rizzolo to whistleblower investigation file.	Meeting with Dr. Toney pertaining to the Complainant's whistleblower complaint (3 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt from disclosure, as it contains discussions of personnel matters. <u>N.J.S.A. 47:1A-10</u> .
Binder 1 Tab 7	September 18, 2012, e-mail between Ms. Rizzolo and the Complainant.	E-mail response summarizing performance ratings of three (3) employees (1 pg.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt from disclosure pursuant to <u>N.J.S.A. 47:1A-10</u> , as discussing the performance ratings of three (3) employees, which are exempt from disclosure as personnel records. <i>See</i> <u>Cibo, Jr. v. Rowan Univ.</u> , GRC Complaint No. 2003-42 (February 2004).
Binder 2 Tab "B"	October 18, 2012, e-mail between Ms. Rizzolo and the Complainant	Complainant asks Ms. Rizzolo whether an employment court case (excerpted) would apply to his current matter (1pg.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The e-mail does not contain discussions of personnel matters. <b>The Custodian must disclose the record.</b>
Binder 2 Tab "B"	October 18, 2012, e-mail between Ms. Rizzolo and the Complainant.	Complainant forwarded two (2) e-mail chains: between himself and Peter Tober ("Mr. Tober") and Mark Holmes ("Mr. Holmes"), and himself and	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The e-mail attachment does not contain discussions of personnel matters or discussions pertaining to grievance filings. <b>The Custodian must disclose this portion of the record.</b> However, the remainder of the record is exempt pursuant to

		Mr. Tripodi (9 pgs. w/ 1 attachment).		<u>N.J.S.A. 47:1A-10</u> , as it contains discussions of personnel matters and discussions pertaining to grievance filings.
Binder 2 Tab "B"	October 18, 2012, e-mail between Ms. Rizzolo and the Complainant.	Complainant discussed the contents of forwarded e-mail chains (included herein): between himself and Mr. Tripodi (9 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt from disclosure, as it contains discussions of personnel matters and pertains to grievance filings. <u>N.J.S.A. 47:1A-10</u> .
Binder 2 Tab "B"	October 11, 2012, e-mail between Ms. Rizzolo and the Complainant.	Complainant forwarded an e-mail with attached memo pertaining to performance evaluations from 2012 (3 pgs. w/ 1 attachment).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record and attachment are exempt from disclosure, as it contains discussions of personnel matters and pertains to grievance filings. <u>N.J.S.A. 47:1A-10</u> .
Binder 2 Tab "B"	October 10, 2012, e-mail between Ms. Rizzolo and the Complainant.	Complainant forwarded an e-mail with attached memo pertaining to performance issues with a co-worker (4 pgs. w/ 1 attachment).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt from disclosure as it contains discussions of personnel matters and pertains to grievance filings. <u>N.J.S.A. 47:1A-10</u> .
Binder 2 Tab "B"	October 10, 2012, e-mail between Ms. Rizzolo and the Complainant.	Complainant forwarded an e-mail pertaining ethics issues with a co-worker (4 pgs.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-</u>	The record and attachment are exempt from disclosure as they contain discussions of personnel matters and pertain to grievance filings. <u>N.J.S.A. 47:1A-10</u> .

			10.	
Binder 2 Tab "B"	October 10, 2012, e-mail between Ms. Rizzolo and the Complainant.	Complainant forwarded an e-mail with attached scan of documents pertaining to an ethics complaint against a co-worker (6 pgs. w/ 1 attachment).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt from disclosure as it contains discussions of personnel matters and pertains to grievance filings. <u>N.J.S.A. 47:1A-10</u> .
Binder 2 Tab "B"	October 10, 2012, e-mail between Ms. Rizzolo and the Complainant.	Complainant forwarded an e-mail chain with attached scan of documents pertaining to an ethics complaint against a co-worker (7 pgs. w/ 3 attachments).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The three (3) attachments do not contain discussions of personnel matters. However, the attachments and the e-mail pertain to a grievance filing and are thus exempt from disclosure. <u>N.J.S.A. 47:1A-10</u> .
Binder 2 Tab "B"	October 9, 2012, e-mail between Ms. Rizzolo and the Complainant.	Complainant forwarded e-mail with attached document pertaining to employee scheduling issues (6 pgs. w/ 1 attachment).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record and attachment are exempt from disclosure as they contain discussions of personnel matters and pertain to grievance filings. <u>N.J.S.A. 47:1A-10</u> .
Binder 2 Tab "B"	October 9, 2012, e-mail between Ms. Rizzolo and the Complainant.	Complainant forwarded e-mail evidencing misconduct on the part of an employee, as the basis for	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to	The record is exempt from disclosure, as it contains discussions of personnel matters and pertains to a grievance filing. <u>N.J.S.A. 47:1A-10</u> .

		retaliation against the Complainant (2 pgs.).	<u>N.J.S.A. 47:1A-10.</u>	
Binder 2 Tab “B”	October 8, 2012, e-mail between Ms. Rizzolo, Ms Carango, and the Complainant.	Complainant is questioning the ‘investigatory strategy’ deployed by Ms. Rizzolo and Ms. Carango regarding his whistleblower complaint (1 pg.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10.</u>	The record is exempt from disclosure, as it contains discussions of personnel matters and pertains to a grievance filing. <u>N.J.S.A. 47:1A-10.</u>
Binder 2 Tab “B”	October 5, 2012, e-mail between Ms. Rizzolo and the Complainant.	Complainant describing a conversation between himself and Phil Connelly (“Mr. Connelly”) in relation to his whistleblower complaint. (1 pg.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10.</u>	The record is exempt from disclosure, as it contains discussions of personnel matters and pertains to a grievance filing. <u>N.J.S.A. 47:1A-10.</u>
Binder 2 Tab “B”	October 4, 2012, e-mail between Ms. Rizzolo, Mr. Tripodi, and the Complainant.	Complainant expressing concern that confidential information is being discussed with one the employees implicated in his whistleblower complaint (1 pg.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10.</u>	The record is exempt from disclosure, as it contains discussions of personnel matters and pertains to a grievance filing. <u>N.J.S.A. 47:1A-10.</u>
Binder 2 Tab “B”	October 2, 2012, e-mail between Ms. Rizzolo, Mr.	Complainant forwarded an e-mail regarding a	Denied in its entirety as containing discussions of	The record is exempt from disclosure, as it contains discussions of personnel matters and

	Tripodi, and the Complainant.	personnel issue from 2011 as a comparison to how his own incident was being treated as evidence of retaliatory action against him (2 pgs.).	personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	pertains to a grievance filing. <u>N.J.S.A. 47:1A-10</u> .
Binder 2 Tab "B"	October 1, 2012, e-mail between Ms. Rizzolo, Ms. Carango, and the Complainant.	Complainant requesting a status update on his whistleblower complaint (1 pg.).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The record is exempt from disclosure, as it contains discussions of personnel matters and pertains to a grievance filing. <u>N.J.S.A. 47:1A-10</u> . Additionally, the record contains discussions pertaining to performance evaluations. <i>See <u>Cibo, Jr. v. Rowan Univ.</u>, GRC Complaint No. 2003-42 (February 2004).</i>
Binder 2 Tab "C"	September 13, 2012, e-mails between Ms. Rizzolo and the Complainant.	Complainant discussed and attached written warnings and referrals pertaining to an employee he implicated in his whistleblower complaint (9 pgs. w/ 5 attachments).	Denied in its entirety as containing discussions of personnel matters or is a personnel record unto itself pursuant to <u>N.J.S.A. 47:1A-10</u> .	The e-mails and attachments are exempt from disclosure as they contain discussions of personnel matters and pertain to a grievance filing. <u>N.J.S.A. 47:1A-10</u> .

Thus, with few exceptions the Custodian lawfully denied access to the e-mail and memo discussions because said records are exempt from disclosure as pertaining to personnel matters, performance evaluations, and/or pertaining to ethical violations pursuant to N.J.S.A. 47:1A-10. *See also N.J.M.G., 405 N.J. Super. at 390, Merino, GRC No. 2003-110, Rodriguez, GRC No. 2013-296, and Cibo, Jr. GRC No. 2003-42.* Specifically, the e-mail and memo discussions pertain to allegations of retaliatory and discriminatory actions by several employees against the

Complainant. The Complainant claimed these actions were as a result of calling attention to misconduct and ethical issues amongst said employees. As such, the e-mails and memos invariably discuss detailed disciplinary actions against the suspected employees and the Complainant himself. Therefore, the e-mail and memo discussions are exempt from disclosure under OPRA.

However, consistent with N.J.S.A. 47:1A-5(g), if the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to OPRA, the custodian must delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and must promptly permit access to the remainder of the record. Thus, the Custodian must disclose all other portions of the requested e-mails and memos to the Complainant (*i.e.*, sender, recipients, date, time, subject, and closing salutations). To these portions of the requested e-mails and memos, the Custodian has unlawfully denied access.

### **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. The Custodian complied with the Council's December 20, 2013, Interim Order because she provided certified confirmation of compliance to the Executive Director in accordance with N.J. Court Rule 1:4-4 and submitted nine (9) copies of the requested records for *in camera* review within the extended time allotted to respond.
2. With few exceptions, the Custodian lawfully denied access to the e-mail and memo discussions because said records are exempt from disclosure as pertaining to personnel matters, performance evaluations, and/or pertaining to ethical violations pursuant to N.J.S.A. 47:1A-10. *See North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office*, 405 N.J. Super. 386, 390 (App. Div. 2009), Merino v. Borough of Ho-Ho-Kus, GRC Complaint No. 2003-110 (March 2004), Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014), and Cibo, Jr. v. Rowan Univ., GRC Complaint No. 2003-42 (February 2004). Specifically, the e-mail and memo discussions pertain to allegations of retaliatory and discriminatory actions by several employees against the Complainant. The Complainant claimed these actions were as a result of calling attention to misconduct and ethical issues amongst said employees. As such, the e-mails and memos invariably discuss detailed disciplinary actions against the suspected employees and the Complainant himself. Therefore, the e-mail and memo discussions are exempt from disclosure under OPRA.
3. **On the basis of the Council's determination in this matter, as set forth in the above table, the Custodian must disclose all other portions of the requested e-**

**mails and memos to the Complainant (i.e., sender, recipients, date, time, subject, and closing salutations).**

4. **The Custodian shall comply with the Council's Findings of the *In Camera* Examination set forth in the above table within five (5) business days from receipt of this Order and simultaneously provide certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director.<sup>7</sup>**
5. 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: Samuel A. Rosado  
Staff Attorney

Reviewed By: Joseph D. Glover  
Executive Director

April 21, 2015<sup>8</sup>

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<sup>7</sup> Satisfactory compliance requires that the Custodian deliver the records to the Complainant in the requested medium. If a copying or special service charge was incurred by the Custodian, 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.

<sup>8</sup> This complaint was prepared for adjudication for the Council's April 28, 2015, May 26, 2015, and June 30, 2015, meetings, but could not be adjudicated due to lack of quorum.





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

INTERIM ORDER

December 20, 2013 Government Records Council Meeting

Luis Rodriguez  
Complainant  
v.  
Kean University  
Custodian of Record

Complaint No. 2013-71

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:

1. The record lacks both an index or description and the basis for the denial of access for each document contained in the investigation file. The GRC is unable to analyze the confidentiality of each of the documents in the file. In the absence of this information, the GRC cannot accurately determine whether the entirety of the investigation file is exempt from disclosure. Therefore, the GRC must conduct an *in camera* review of the responsive records to determine the validity of the Custodian's position that every page of the investigation file is exempt from disclosure. Paff v. Department of Labor, 379 N.J. Super. 346, 355 (App. Div. 2005).
2. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested records, from item # 1 above, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>2</sup> that the records provided are the records requested by the Council for the in camera inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. **The Custodian shall comply with item #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, to the Executive Director.<sup>3</sup>**

<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>2</sup> "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."

<sup>3</sup> 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

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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order 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 Rodriguez<sup>1</sup>  
Complainant**

**GRC Complaint No. 2013-71**

v.

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

**Records Relevant to Complaint:** Emails of the following:

1. Any and all correspondence (emails, memoranda, notes, etc.) relating to the memorandum I [Complainant] filed with the Office of Internal Audit (the “Memorandum”) asking for a Conscientious Employment Whistleblower Act investigation (the “Investigation”). My [Complainant’s] memorandum was given to the Office on or around September 14, 2012.
2. I [Complainant] am asking for records related to the investigation that Office conducted – records of notes of interviews, phone calls, or meetings; memoranda or emails written to or from the two managers [Maria Rizzolo and Lorraine Corrango] in the Office concerning the investigation; etc.

**Custodian of Record:** Laura Barkley-Haelig  
**Request Received by Custodian:** February 19, 2013  
**Response Made by Custodian:** February 28, 2013  
**GRC Complaint Received:** March 1, 2013

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

**Request and Response:**

On February 19, 2013, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 28, 2013, seven (7) business days later, the Custodian responded in writing denying the Complainant’s

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

<sup>2</sup> Represented by Deputy Attorney General Jennifer McGruther.

<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.

request as pertaining to an ongoing investigation, disclosure of which would be detrimental to the public interest. N.J.S.A. 47:1A-1.1.

#### Denial of Access Complaints:

On March 1, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that the Custodian did not provide factual support for her denial of access. The Complainant also asserts his belief that the Investigation has concluded.

#### Statement of Information:

On April 1, 2013, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that the Complainant’s OPRA request was forwarded to Kean University’s In-House Council, Michael Tripodi, Esq., to determine the status of the Investigation. The Custodian further certifies that at the time of the Complainant’s request, the Investigation was open and ongoing. The Custodian argues that government records pertaining to an ongoing investigation are exempt from disclosure if such disclosure would be inimical to the public interest. N.J.S.A. 47:1A-3a. She further contends that the Complainant’s request is for documents which comprise the Investigation file. She asserts that disclosure of the requested documents would prevent forthright discussions among examiners, and between examinees and interviewees, and would further chill future agency investigations. In addition, the Custodian expresses concern that dissemination of the requested records could harm the reputation of an individual who is the subject of the Investigation regardless of a finding of wrongdoing.

Finally, the Custodian asserts that the documents requested concern a public employee, and therefore are not subject to disclosure pursuant to N.J.S.A. 47:1A-10.

#### Additional Submissions:

The Complainant supplements the record with a letter addressed to the GRC dated April 18, 2013. The Complainant states his concern that the Custodian denied the production of the documents pursuant to N.J.S.A. 47:1A.1 as an ongoing investigation without contacting the offices responsible for the investigation and making a determination of the status of same.

### Analysis<sup>4</sup>

#### 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

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<sup>4</sup> 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.

“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:

A government record shall not include the following information which is deemed to be confidential ... trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure ... information which, if disclosed, would give an advantage to competitors or bidders ...

N.J.S.A. 47:1A-1.1.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC<sup>5</sup> in which the GRC dismissed the complaint by accepting the Custodian’s legal conclusion for the denial of access without further review. The Court stated that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government record ... When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court also stated that:

The statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21, it also provides that the GRC “may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.” N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal ... There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

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<sup>5</sup> Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).

An agency denying access to documents must produce a sworn statement setting forth the basis for the denial. Paff v. N.J. Dep't of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007). Further, the "sworn statement shall have appended to it an index of all documents deemed by the agency to be confidential in whole or in part, with an accurate description of the documents deemed confidential." Id. The index is essential for a substantive review by both the requesting party and the reviewing tribunal. Id.

Here, the Complainant disputed the Custodian's denial of access to the correspondence relating to the Memorandum and the records relating to the Investigation. The Custodian, without identifying any documents or providing an index, denied access to the Complainant's entire OPRA request based upon the exemption for ongoing investigation. N.J.S.A. 47:1A-3a. Subsequent to the initial denial, in her SOI the Custodian added that the documents were also exempt from production as personnel records. N.J.S.A. 47:1A-10.

Although the Custodian asserts that the requested records comprise the investigation file, she fails to index or otherwise identify the documents. The Custodian contends that at the time of the Complainant's request the Investigation was ongoing and, as such, the entirety of the file is exempt from disclosure. Further, she alleges that such disclosure would be inimical to the public interest. N.J.S.A. 47:1A-3a. The Custodian also maintains that disclosure of the records could prevent forthright exchanging in, and chilling of, future investigations. Finally, she argues that the documents requested were exempt from disclosure as personal records.

Here, the record lacks an index or description of the documents as well as the basis for the denial of access. The GRC is unable to analyze the confidentiality of each of the documents in the file. In the absence of this information, the GRC cannot accurately determine whether the entirety of the investigation file is exempt from disclosure. Therefore, the GRC must conduct an *in camera* review of the responsive records to determine the validity of the Custodian's position that every page of the investigation file is exempt from disclosure. Paff, 379 N.J. Super. at 355.

### **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. The record lacks both an index or description and the basis for the denial of access for each document contained in the investigation file. The GRC is unable to analyze the confidentiality of each of the documents in the file. In the absence of this information, the GRC cannot accurately determine whether the entirety of the investigation file is exempt from disclosure. Therefore, the GRC must conduct an *in*

*camera* review of the responsive records to determine the validity of the Custodian's position that every page of the investigation file is exempt from disclosure. Paff v. Department of Labor, 379 N.J. Super. 346, 355 (App. Div. 2005).

2. **The Custodian must deliver<sup>6</sup> to the Council in a sealed envelope nine (9) copies of the requested records, from item # 1 above, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> that the records provided are the records requested by the Council for the in camera inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. **The Custodian shall comply with item #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, to the Executive Director.<sup>8</sup>**
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.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Dawn R. SanFilippo, Esq.  
Senior Counsel

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

December 10, 2013

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<sup>6</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>7</sup> "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."

<sup>8</sup> 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.