



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

July 26, 2016 Government Records Council Meeting

Richard Rizzo
Complainant

Complaint No. 2015-145

v.

William Paterson University
Custodian of Record

At the July 26, 2016 public meeting, the Government Records Council (“Council”) considered the July 19, 2016 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 his burden of proving that he lawfully denied access to the requested records relating to the Office of Employment Equity and Diversity’s investigation of the Complainant’s “retaliation” allegations filed with William Paterson University. Specifically, the responsive records are not considered government records subject to public access under OPRA. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (McGreevey 2002); Cargill v. N.J. Dep’t of Educ., GRC Complaint No. 2009-256 (March 2011); Tietze v. N.J. Pinelands Comm’n, GRC Complaint No. 2011-379 (December 2012); Tietze v. NJ Pinelands Comm., GRC Complaint No. 2012-276 (September 2013); Rodriguez v. Kean Univ., GRC Complaint No. 2013-344 (July 2014).

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 July 26th Day of July, 2016

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, 2016



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 26, 2016 Council Meeting**

**Richard Rizzo¹
Complainant**

GRC Complaint No. 2015-145

v.

**William Paterson University²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of “the records of” the Office of Employment Equity and Diversity’s (“OEED”) investigation, based on the Complainant’s complaint filed on October 20, 2014 for “retaliation.”

Custodian of Record: Ramzi Chabayta
Request Received by Custodian: April 20, 2015
Response Made by Custodian: April 30, 2015
GRC Complaint Received: May 22, 2015

Background³

Request and Response:

On April 13, 2015, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On April 23, 2015, the Custodian e-mailed the Complainant, acknowledging receipt of the subject OPRA request on April 20, 2015, and advising that he would respond within seven (7) business days. On April 30, 2015,⁴ the Custodian responded in writing, denying access to the requested records under Executive Order No. 26 (McGreevey 2002)(“EO 26”).

Denial of Access Complaint:

On May 22, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that he filed an OEED

¹ No legal representation listed on record.

² Represented by Glenn R. Jones, Esq. (Wayne, NJ).

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.

⁴ The GRC notes that the Custodian responded on the eighth (8th) business day after receipt of the subject OPRA request, which by statute resulted in a “deemed” denial. N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i). However, the Complainant did not take issue with the timeliness of the Custodian’s response; therefore, the GRC will not address this issue.

complaint against William Paterson University (“WPU”) for retaliation. The Complainant argued that he requested the investigation records for that complaint after WPU found no violation. The Complainant disputed the Custodian’s denial of access, arguing that the responsive records are vital to his “case.” The Complainant contended that WPU engaged in a “cover-up” of the retaliation against him and denied access to the responsive records in continuance of said cover-up.

Statement of Information:

On June 16, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 20, 2015. The Custodian certified that he searched through OEED matters for fiscal year 2015 and located the responsive file, which contained sixty-five (65) pages of records. The Custodian certified that he responded in writing on April 30, 2015, denying access pursuant to EO 26.

The Custodian asserted that he lawfully denied access to the records at issue here because same were exempt under EO 26. The Custodian certified that the Complainant filed allegations under WPU’s “Procedures for Internal Complaints Alleging Discrimination in the Workplace,” (“Procedures”) which WPU adopted and implemented in accordance with N.J.A.C. 4A:7-3.2. The Custodian affirmed that OEED followed these procedures when investigating the Complainant’s alleged violations of WPU’s “Non-discrimination Policy, Sexual Harassment Policy” and the “New Jersey State Policy Prohibiting Discrimination in the Workplace.” The Custodian asserted that EO 26 explicitly exempted access to “records of complaints and investigations undertaken pursuant to the [“Model Procedures for Internal Complaints Alleging Discrimination, Harassment or Hostile Environments” (“Model Procedures”) in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by Executive Order No. 106 (Whitman 1999)] (“EO 106”) whether open, closed or inactive.”

Additional Submissions:

On August 14, 2015, the Complainant e-mailed the GRC, arguing that he was not an employee at the time of his OEED complaint. The Complainant asserted that he was actually attempting to return to work but that WPU failed to offer him courses to teach. The Complainant thus contended that his complaint was external and no records were exempt under EO 26.

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] . . . [r]ecords of complaints and investigations undertaken pursuant to the [Model Procedures] in accordance with the State Policy Prohibiting Discrimination, Harassment and Hostile Environments in the Workplace adopted by [EO 106], whether open, closed, or inactive.⁵

The GRC has held that records created as part of a State employee's discrimination complaint and during an EEO officer's ensuing investigation fall within the Model Procedures referenced in EO 106. *See* Cargill v. N.J. Dep't of Educ., GRC Complaint No. 2009-256(March 2011)(finding that state employees filing complaints for discrimination do so in accordance with the Model Procedures). *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). Such records, 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); Tietze v. N.J. Pinelands Comm'n, GRC Complaint No. 2011-379 (December 2012); Tietze v. NJ Pinelands Comm., GRC Complaint No. 2012-276 (September 2013); Rodriguez v. Kean Univ., GRC Complaint No. 2013-344 (July 2014).

In the matter currently before the Council, the Complainant requested records of the OEED investigation of his complaint based on "retaliation." The Custodian denied access to same under EO 26, which prompted this complaint. Thereafter, the Custodian certified that the OEED addressed the Complainant's complaint within WPU's Procedures, which it adopted and implemented in accordance with N.J.A.C. 4A:7-3.1 and the Model Procedures. The Complainant subsequently argued that he was not actually an employee at the time of his filing; rather, he was attempting to return to work when he believed that employees at WPU retaliated against by not being assigning him a course to teach.

The evidence of record here clearly indicates that the Complainant sought OEED records created from WPU's investigation of the Complainant's "retaliation" allegations undertaken pursuant to the Model Procedures. *See* EO 26; N.J.A.C. 4A:7-3.1; N.J.A.C. 4A:7-3.2; Cargill, GRC 2009-256. Further, the GRC's precedential case law on disclosure of "EEO records," created in accordance with EO 106 and exempt under EO 26, is on square with the facts here. However, the GRC notes that the Complainant's argument that he was "trying to return to work" as opposed to being an active employee has no bearing on the fact that WPU handled his complaint in accordance with its Procedures in accordance with the Model Procedures. Thus, the GRC is satisfied that a plain recording of EO 26 and the Council's prior decisions support that the Custodian lawfully denied access to the responsive records.

⁵ 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).

Therefore, the Custodian has borne his burden of proving that he lawfully denied access to the requested records relating to the OEED's investigation of the Complainant's "retaliation" allegations filed with WPU. Specifically, the responsive records are not considered government records subject to public access under OPRA. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); EO 26; Cargill, GRC 2009-256; Tietze, GRC 2011-379; Tietze, GRC 2012-276; Rodriguez, GRC 2013-344.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne his burden of proving that he lawfully denied access to the requested records relating to the Office of Employment Equity and Diversity's investigation of the Complainant's "retaliation" allegations filed with William Paterson University. Specifically, the responsive records are not considered government records subject to public access under OPRA. N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-9(a); Executive Order No. 26 (McGreevey 2002); Cargill v. N.J. Dep't of Educ., GRC Complaint No. 2009-256 (March 2011); Tietze v. N.J. Pinelands Comm'n, GRC Complaint No. 2011-379 (December 2012); Tietze v. NJ Pinelands Comm., GRC Complaint No. 2012-276 (September 2013); Rodriguez v. Kean Univ., GRC Complaint No. 2013-344 (July 2014).

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

July 19, 2016