



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

May 23, 2017 Government Records Council Meeting

Luis F. Rodriguez
Complainant

v.

Kean University
Custodian of Record

Complaint No. 2015-269

At the May 23, 2017 public meeting, the Government Records Council (“Council”) considered the March 21, 2017 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 Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that there was no unlawful denial of access to the Complainant’s December 15, 2014 OPRA request, because she certified, and the record reflects, that no responsive records exist, and the Complainant’s evidence to refute the Custodian’s certifications is insufficient. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep’t of Educ., GRC Complaint No. 2005-49 (July 2005); Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 38 (App. Div. 2005).

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 23rd Day of May, 2017

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: May 30, 2017



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 23, 2017 Council Meeting**

**Luis Rodriguez¹
Complainant**

GRC Complaint No. 2015-269

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: An electronic copy of the following information on Justin Jacob: Title, Date of Hire and Termination, Position, and Salary.

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: December 15, 2014
Response Made by Custodian: December 22, 2014
GRC Complaint Received: August 24, 2015

Background³

Request and Response:

On December 14, 2014, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On December 22, 2014, six (6) business days following receipt, the Complainant responded in writing, stating that no responsive records exist.

Denial of Access Complaint:

On August 24, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that, despite the Custodian’s claim that no responsive records exist, he had evidence suggesting that “Justin Jacob” worked for, or was affiliated with, Kean University and taught at an associated institution in Bangladesh. The Complainant provided printed screenshots of social media posts and a flyer from the institution, identifying Justin Jacob as a faculty member of Kean University in New Jersey.

Statement of Information:

¹ No legal representation listed on record.

² Represented by Jennifer McGruther, DAG.

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.

On September 10, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on December 15, 2014. The Custodian further certified that she responded to the Complainant’s request in writing on December 22, 2014, stating that no responsive records exist.

The Custodian stated that upon receipt of the request, the Office of Human Resources searched for responsive records using the Human Resources Information Systems database. The Custodian certified that a search yielded no responsive records, suggesting that the named individual was not a Kean University employee.

The Custodian argued that the Complainant’s evidence is insufficient to show that Justin Jacob is or was employed by Kean University. The Custodian cited Bent v. Twp. of Stafford Police Dep’t, 381 N.J. Super. 30, 38 n.3 (App. Div. 2005), where the requestor assumed the existence of records based upon “his own review and interpretation of IRS and other ‘third party’ documents.” The Custodian argued that the Complainant is similarly relying upon his own review and third party documents to deduce that Justin Jacob is or was a member of the Kean University faculty. The Custodian concluded that the Complainant’s dissatisfaction with the absence of responsive records does not constitute an unlawful denial of access and that the matter should be dismissed.

Additional Submissions:

On October 25, 2015, the Complainant responded in writing to the Custodian’s SOI. The Complainant maintained that the Kean Bangladesh Center (“KBC”), the organization asserting Justin Jacob is a faculty member of Kean University, is a close affiliate of Kean University. The Complainant references the response to a separate OPRA request for similar employment information of a different individual. There, the Custodian produced records for the individual, asserting that he was hired by the agency to teach at KBC. The Complainant suggested that since records were produced for this individual, there should also be records available regarding Justin Jacob.

The Complainant requested that the GRC utilize its power to investigate the nature of the relationship between KBC and Kean University, and to reach out to Kean University members to inquire into Justin Jacob’s relationship with the KBC.

On February 3, 2017, the GRC requested additional information from the Custodian. Specifically, the GRC asked whether Justin Jacob has been employed by Kean University in any capacity and asked the Custodian to elaborate on the retention schedules for Kean University employees and independent contractors.

On February 8, 2017, the Custodian responded to the GRC’s request for additional information. The Custodian certified that internal inquiries demonstrated that Justin Jacob has never been employed, contracted, or provided services by or on behalf of Kean University. The Custodian also stated that it adheres to the State of New Jersey Four Year Colleges Retention Schedule regarding personnel records.

On April 10, 2017, the GRC made a second request for additional information from the Custodian. The GRC asked the Custodian to describe the nature of any relationship between Kean University and the KBC. Additionally, the GRC asked whether Kean University's Office of Human Resources has any access to KBC's counterpart.

The Custodian responded to the GRC's request for additional information on April 21, 2017. In response to the second inquiry, the Custodian certified that the Office of Human Resources does not have access to any database of the KBC. Regarding the first inquiry, the Custodian attached a disposition letter and records responsive to a separate OPRA request made by the Complainant, which sought any agreements between Kean University and the International Medical College ("IMC"), located in Bangladesh. The Custodian certified that these agreements detailing the collaboration between the institutions constituted the "Kean Bangladesh Center." The Custodian noted that ¶13 of the April 18, 2011 agreement noted that the institutions are not permitted "to act as an agent or employee of the other . . . nor shall [this Agreement] . . . alter the control of the management, operation, and affairs of either IMC or Kean, it being the intent of this Agreement that IMC and Kean shall maintain separate and independent management[.]" In rebuttal, the Complainant noted that ¶4.5 of the April 18, 2011 agreement stated, "all course material and instruction of the ESL program(s) will be provided by Kean."

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.

The Council has previously found that, in light of a custodian's certification that no records responsive to the request exist, no unlawful denial of access occurred. *See Pusterhofer v. NJ Dep't of Educ.*, GRC Complaint No. 2005-49 (July 2005). Here, the Custodian certified in her SOI that Justin Jacob has never been employed by Kean University, and therefore no responsive records existed. The Complainant responded by providing evidence of an affiliated institution referring to a Justin Jacob as a faculty member of Kean University.

In response to a request for additional information, the Custodian re-certified that Justin Jacob was never employed by Kean University in any capacity. The Complainant's reliance on third party documentation is insufficient to rebut the Custodian's certification. *See Bent*, 381 N.J. Super. at 38.

The Custodian also responded to a second request for additional information, providing records detailing the nature of Kean University's relationship with IMC, which constituted the Kean Bangladesh Center. The Custodian noted that notwithstanding their collaboration towards an English as a Second Language ("ESL") program, Kean University and IMC maintained sole

control over their own management, operations, and affairs. The Complainant's rebuttal highlighting the fact that Kean University was responsible for the ESL program's instruction is insufficient to show that Kean University possesses personnel information for Justin Jacob. Moreover, the Custodian certified that the Office of Human Resources does not have access to any database of the KBC.

Therefore, the Custodian has borne her burden of proof that there was no unlawful denial of access to the Complainant's December 15, 2014 OPRA request, because she certified, and the record reflects, that no responsive records exist, and the Complainant's evidence to refute the Custodian's certifications is insufficient. N.J.S.A. 47:1A-6; Pusterhofer, GRC 2005-49; Bent, 381 N.J. Super. at 38.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian has borne her burden of proof that there was no unlawful denial of access to the Complainant's December 15, 2014 OPRA request, because she certified, and the record reflects, that no responsive records exist, and the Complainant's evidence to refute the Custodian's certifications is insufficient. N.J.S.A. 47:1A-6; Pusterhofer v. NJ Dep't of Educ., GRC Complaint No. 2005-49 (July 2005); Bent v. Twp. of Stafford Police Dep't, 381 N.J. Super. 30, 38 (App. Div. 2005).

Prepared By: Samuel A. Rosado
Staff Attorney

March 21, 2017⁴

⁴ The matter was originally scheduled for adjudication at the Council's March 28, 2017, but was tabled at the request of Counsel.