



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

April 30, 2019 Government Records Council Meeting

James J. Capone
Complainant

Complaint No. 2017-60

v.

Kean University
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council (“Council”) considered the April 23, 2019 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 Complainant’s January 26, 2017 OPRA request seeking “Supervisory Conflicts of Interest Certification Forms” are exempt from disclosure as “personnel records.” N.J.S.A. 47:1A-10; Scheeler v. N.J. Dep’t of Educ., GRC Complaint No. 2014-125 (January 2015). See also Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011). Thus, the Custodian lawfully denied access. 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 30th Day of April 2019

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 3, 2019



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

**James J. Capone¹
Complainant**

GRC Complaint No. 2017-60

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: “Copies of ‘Supervisory Conflicts of Interest Certification Forms’ filed with the Kean Ethics Liaison Officer September 2015 to date that this request is fulfilled.”

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: January 26, 2017
Response Made by Custodian: February 6, 2017
GRC Complaint Received: March 22, 2017

Background³

Request and Response:

On January 26, 2017, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On February 6, 2017, the Custodian responded in writing denying access to the request as it sought personnel records exempt under N.J.S.A. 47:1A-10. On February 9, 2017, the Complainant replied to the Custodian, asserting that he believed his request fell under the second exception to the personnel records exemption, citing the Uniform Ethics Code, N.J.S.A. 52:13D-23. On February 20, 2017, the Complainant sent an additional e-mail to the Custodian, reiterating what was asserted on February 7, 2017, and informed the Custodian that he would file a Denial of Access Complaint should he not receive a response.

Denial of Access Complaint:

On March 22, 2017, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that after receiving the

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 Council Staff the submissions necessary and relevant for the adjudication of this complaint.

Custodian's response, he e-mailed a reply on February 9, 2017, asserting that he believed his request fell under an exception to the personnel records exemption. The Complainant quoted OPRA as stating "personnel . . . records shall be accessible when required to be disclosed by another law . . ." The Complainant argued that N.J.S.A. 52:13D-23, the Uniform Ethics Code, granted him access to the records.

The Complainant then stated that he e-mailed the Custodian on February 20, 2017, restating his arguments made in the February 9, 2017 correspondence. The Complainant stated that he did not receive a reply from the Custodian for either correspondence.

Statement of Information:⁴

On January 31, 2018, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on January 26, 2017. The Custodian stated that the request was forwarded to legal counsel for review. The Custodian certified that she responded in writing on February 6, 2017, denying access.

The Custodian asserted that personnel records are not government records subject to disclosure pursuant to OPRA: "OPRA, as it relates to personnel records, begins with a presumption of non-disclosure and proceeds with a few narrow exceptions that would need to be considered." Kovalcik v. Somerset Co. Prosecutor's Office, 206 N.J. 581, 594 (2011). The Custodian noted that there are three (3) exceptions identified: information about the employee's position (name, title, position, salary, etc.); documents required to be disclosed by another law or essential to the performance of official duties; and data that "disclose conformity with specific experiential, education or medical qualifications required for government employment." N.J.S.A. 47:1A-10.

The Custodian contended that the Complainant's reference to N.J.S.A. 52:13D-23 did not require the public disclosure of personnel supervisory conflict forms. The Custodian asserted that the cited law requires agencies to adopt the Uniform Code of Ethics and to promulgate an ethics code specific to each agency. The Custodian contended that the law does not mention or require the disclosure of the records at issue.

The Custodian asserted that the State Ethics Commission's regulations address the supervisory relationship but does not require public disclosure of the personal relationship. The Custodian stated that under N.J.A.C. 19:61-5.7, if a state employee supervises or "exercises authority" over his or her cohabitant or relative, the agency is required to take appropriate screening measures, such as re-assigning the employee's position, create an alternate reporting relationship, or a combination of the two. The Custodian also stated that the regulation requires the agency to create procedures for employees to disclose whether this situation occurs. However, the Custodian asserted that the regulation does not require that an employee's personal relationships be made public.

The Custodian argued that when ethics laws require disclosure of forms, it is expressly stated. See N.J.A.C. 19:61-5.6(d); N.J.S.A. 40A:9-22.6; N.J.S.A. 18A:12-26. The Custodian

⁴ The Complaint was referred to mediation on April 12, 2017. The Complaint was referred back from mediation on January 24, 2018.

referred to Vargas v. N.J. Dep't of Educ., GRC Complaint No. 2012-126 (April 2013) and Scheeler v. N.J. Dep't of Educ., GRC Complaint No. 2014-125 (January 2015). The Complainant asserted that in those cases, the Council held that while financial disclosure statements were required to be disclosed under N.J.S.A. 18A:12-26, the agency was permitted to redact the home addresses of the Board of Education members. The Custodian noted that the Appellate Division upheld the GRC's decision in Scheeler v. N.J. Dep't of Educ., 2017 N.J. Super. Unpub. LEXIS 119 (App. Div. 2017). The Custodian noted that while the holdings of the above cases are not directly applicable, the reasonings contained therein demonstrate that an intent to permit disclosure of personnel records requires express language within the statute or regulation.

The Custodian also argued that OPRA does not include an exception to non-disclosure of personnel records for documents relating to an employee's alleged ethics violation that may result in disciplinary action. The Custodian asserted that OPRA's plain language specifically exempts personnel "records relating to any grievance filed by or against an individual." N.J.S.A. 47:1A-10. See North Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386 (App. Div. 2009). The Custodian argued that in this matter, violations of the restrictions on employment could result in an ethics or disciplinary action, both of which are initially confidential and not subject to disclosure. See N.J.A.C. 19:61-3.1.

The Custodian contended that the personnel records at issue do not come with an exception to OPRA's personnel records exemption. Therefore, the Custodian asserted that there was no unlawfully denial of access and that complaint should be dismissed.

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 further provides that:

Notwithstanding the provisions [OPRA] or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access . . .

[N.J.S.A. 47:1A-10.]

For personnel records, OPRA begins with a presumption against disclosure and "proceeds with a few narrow exceptions that . . . need to be considered." Kovalcik, 206 N.J. at 594. These are:

[A]n individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefore, and the amount and type of any pension received shall be government record;

[P]ersonnel or pension records of any individual shall be accessible *when required to be disclosed by another law*, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and

[D]ata contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.

[N.J.S.A. 47:1A-10 (emphasis added.)]

The Council has addressed whether personnel records not specifically identified in OPRA were subject to disclosure. For instance, in Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011), the complainant sought, among other records, “[a]ny known felony charges.” Id. In the SOI, the custodian argued that he was precluded from acknowledging the existence of felony charges because such information is not included within the excepted personnel information under OPRA. The Council agreed, determining that “. . . even if records of any felony charges were contained within Mr. Spinello’s personnel file, such records are not disclosable under OPRA . . .” Id. at 8. The Council reasoned that “OPRA clearly identifies certain [personnel] information that is subject to disclosure . . . These exceptions do not include any possible felony or criminal charges . . . Thus, OPRA implies that personnel records referencing felony charges are not subject to disclosure . . .” Id.

In the current matter, the Complainant asserted that N.J.S.A. 52:13D-23 required the public disclosure of the “Supervisory Conflicts of Interest Certification Forms” he requested under OPRA. The Custodian argued that the cited law does not speak to the disclosability of the requested records, and that disclosure of personnel records must be expressly permitted within a statute or regulation to qualify under OPRA’s exemption.

Upon review, the evidence in the record favors the Custodian. N.J.S.A. 52:13D-23 details the requirement of each state agency to promulgate a code of ethics in accordance with the standards set forth therein. The statute does not refer to the public disclosure of personnel records related to the ethics code. Additionally, the regulation governing restrictions on employment do not mention conflict of interest certifications or whether they are subject to disclosure. In accordance with Guerrero, GRC 2010-216 and Scheeler, GRC 2014-125, disclosure of the requested personnel records must be expressly permitted via statute or regulation to qualify under OPRA’s exceptions.

Accordingly, the Complainant’s January 26, 2017 OPRA request seeking “Supervisory Conflicts of Interest Certification Forms” are exempt from disclosure as “personnel records.”

N.J.S.A. 47:1A-10; Scheeler, GRC 2014-125. See also Guerrero, 2010-216. Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that the Complainant's January 26, 2017 OPRA request seeking "Supervisory Conflicts of Interest Certification Forms" are exempt from disclosure as "personnel records." N.J.S.A. 47:1A-10; Scheeler v. N.J. Dep't of Educ., GRC Complaint No. 2014-125 (January 2015). See also Guerrero v. Cnty. of Hudson, GRC Complaint No. 2010-216 (December 2011). Thus, the Custodian lawfully denied access. N.J.S.A. 47:1A-6.

Prepared By: Samuel A. Rosado
Staff Attorney

April 23, 2019