



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

FINAL DECISION

May 18, 2021 Government Records Council Meeting

David Scott Carew
Complainant

Complaint No. 2020-41

v.

Kean University
Custodian of Record

At the May 18, 2021 public meeting, the Government Records Council (“Council”) considered the May 11, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian has not borne her burden of proving a lawful denial of access to any records potentially responsive to the subject OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian did not provide a sufficient legal certification proving that acknowledging the existence of responsive records would run contrary to N.J.S.A. 47:1A-10. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office, 447 N.J. Super. 182 (App. Div. 2016). Thus, the Custodian’s use of the “Glomar” response with respect to the subject OPRA request is not proper here
2. The requested disciplinary letters, to the extent they exist, are exempt from disclosure under OPRA. N.J.S.A. 47:1A-10; North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). For this reason, the Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6.

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

Final Decision Rendered by the
Government Records Council
On The 18th Day of May 2021

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 20, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
May 18, 2021 Council Meeting**

**David Scott Carew¹
Complainant**

GRC Complaint No. 2020-41

v.

**Kean University²
Custodial Agency**

Records Relevant to Complaint: Copies of “[a]ny official written reprimand signed by Jennifer Peters where [she] suggests misconduct even when there was no finding of the suggested misconduct and where [she] did not take her actions with belief that intentional misconduct had been proven.”³

Custodian of Record: Laura Barkley-Haelig
Request Received by Custodian: January 6, 2020
Response Made by Custodian: January 15, 2020
GRC Complaint Received: February 18, 2020

Background⁴

Request and Response:

On December 30, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On January 15, 2020, the Custodian responded in writing obtaining an extension of time to January 29, 2020 to search for and review any responsive records. On January 29, 2020, the Custodian responded in writing obtaining an extension of time to February 12, 2020 to review records for responsiveness and redactions, if applicable. On February 12, 2020, the Custodian responded in writing stating that “should any government record exist,” same would be exempt under N.J.S.A. 47:1A-10.

On February 13, 2020, the Complainant e-mailed the Custodian expressing concern about her February 12, 2020 denial of access. The Complainant asked the Custodian whether she believed it acceptable to deny an OPRA request without granting access, denying access, or stating that no responsive record existed. On February 14, 2020, the Complainant e-mailed the Custodian

¹ No legal representation listed on record.

² Represented by Kraig M. Dowd, Esq., of Weber, Dowd Law, LLC (Woodland Park, NJ).

³ The Complainant sought additional records that are not at issue in this complaint.

⁴ 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.

stating that he received guidance from the GRC “confirm[ing]” that her response was not appropriate. The Complainant contended that the Custodian was required to identify a responsive record or state if no records existed. The Complainant thus requested that the Custodian advise if responsive records existed by the end of the day, or he will file a complaint with the GRC.

Denial of Access Complaint:

On February 18, 2020, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant stated that the subject OPRA request arose out of disciplinary action taken against him. The Complainant asserted that the reprimand letter given to him included a statement from Human Resources (“HR”) Director Peters that was contradicted by “in-house Labor Counsel” about his level of “misconduct.” The Complainant asserted that he thus believed the reprimand were retaliatory in nature.

The Complainant argued that the Custodian’s denial was improper under OPRA because it was based on the “hypothetical” existence of records. The Complainant contended that the Custodian failed to identify whether any responsive records existed. The Complainant noted that he subsequently received guidance from the GRC and voiced his concerns to the Custodian, but to no avail. The Complainant asserted that his hope for this complaint is that the Custodian will state whether any responsive records exist.

Statement of Information:

On March 10, 2020, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on January 6, 2020. The Custodian certified that her search included sending the subject OPRA request to the “Office of Record” for review and identification of potentially responsive records. The Custodian affirmed that she sought multiple extensions to allow for a “comprehensive search [and] review” of any records located by the Office of Record. The Custodian certified that she responded in writing on February 12, 2020 denying the subject OPRA request under OPRA’s personnel exemption.

The Custodian asserted that the Complainant’s issue here is the fact that she neither confirmed nor denied the existence of responsive records, which is typically known as a “Glomar response.” *N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor’s Office*, 447 N.J. Super. 182 (App. Div. 2016) (citing *Phillippe v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976)). The Custodian asserted that here, the Complainant was already in possession of those records responsive to the OPRA request that pertain to him: records relating to other employees would be exempt from disclosure under N.J.S.A. 47:1A-10. See also *Merino v. Borough of Ho-Ho-Kus*, GRC Complaint No. 2003-110 (March 2004).

The Custodian noted that although the Complainant did not seek personnel records of other employees by name, she declined to acknowledge the existence of records to not violate the personnel exemption related to any other employee. The Custodian averred that because HR Director Peters had been in her position for just over a year, there is a “limited universe of cases in which she may have issued an official written reprimand.” The Custodian contended that she thus appropriately employed the “Glomar” response because identifying records would have

provided the Complainant with information on whether other employees received written reprimands.

Additional Submissions:

On March 10, 2020, the Complainant e-mailed the GRC disputing the SOI. Therein, the Complainant questioned the Custodian's reliance on a "Glomar" response in this situation. The Complainant contended that the response may have only been appropriate had he sought written reprimands for other specific employees. The Complainant argued that the Custodian could have cured the issue by properly completing the SOI and identifying a specific list of "all records responsive" without risking the disclosure of exempt information. The Complainant contended that allowing a public agency to employ the "Glomar" response to hide inconsistent disciplinary practices would be "problematic to public employees throughout the State."

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.

Glomar Response

The New Jersey Appellate Division has previously ruled on the issue of whether an agency can "neither confirm nor deny" the existence of records in response to an OPRA request. N. Jersey Media Grp., Inc., 447 N.J. Super. 182. In that case, the plaintiff sought records under OPRA concerning an individual who was not charged with a crime. The court established a two-part test to determine when an agency may employ a "Glomar"⁵ response to an OPRA request:

[T]he agency [must] (1) rel[y] upon the exemption authorized by OPRA that would itself preclude the agency from acknowledging the existence of such documents and (2) present[] a sufficient basis for the court to determine that the claimed exemption applies.

[N. Jersey Media Grp., Inc., 447 N.J. Super. at 188.]

In N. Jersey Media Grp., Inc., the defendant's initial response to the OPRA request argued that a confirmation of whether or not the subject of the request has been arrested, charged, or involved in an investigation could cause "irreparable harm" to the subject and open the defendant and its employees to civil liability. Id. at 205. It was not until after the plaintiff challenged the

⁵ The moniker stems from Phillippi v. CIA, 546 F.2d 1009, 1011 (D.C. Cir. 1979), where the CIA responded to a Freedom of Information Act request regarding the *Hughes Glomar Explorer*, an oceanic ship allegedly owned by the federal government but officially listed as a private vessel.

defendant in court that they listed specific OPRA exemptions: the criminal investigatory records exemption and the ongoing investigation exemption. Id. The court rejected those exemptions because they only applied where government records actually existed. Id. at 207.

However, the N. Jersey Media Grp., Inc. court noted that N.J.S.A. 47:1A-9(b) protected a preexisting grant of confidentiality for records if established by, among other authorities, judicial case law. Id. at 202. The court then highlighted pre-OPRA precedent, demonstrating the need for confidentiality pertaining to whether an individual has been arrested or charged. Id. at 203. According to the court, the grant of confidentiality benefited law enforcement in conducting investigations as well as protects the privacy interests of individuals. Id. at 203-204. Therefore, the court held that the defendant satisfied its two-part test and found that its “Glomar” response was valid. Id. at 206.

Here, the Custodian initially denied access to the subject OPRA request under N.J.S.A. 47:1A-10. The Complainant subsequently filed this complaint arguing that the Custodian failed to properly identify whether any responsive records existed. In the SOI, the Custodian invoked the “Glomar” response by neither confirming nor denying the existence of responsive records based on N.J.S.A. 47:1A-10. The Custodian asserted that although the Complainant did not identify any other employees, she believed that the “Glomar” response was appropriate to not disclose whether other employees received reprimands. In response to the SOI, the Complainant questioned the Custodian’s reliance on the “Glomar” response and its application here.

In reviewing the Custodian’s denial, the GRC finds her reliance on a “Glomar” response in error. As set forth in N. Jersey Media Grp., Inc., the Custodian had to meet the two-prong test established in that case to properly invoke the exemption. As to the first prong, the Custodian cited N.J.S.A. 47:1A-10, which has typically been applied in denials of requests for employee disciplinary records. As to the second prong, the Custodian argued that identifying the existence of potentially responsive records would risk disclosure of personnel information that would otherwise be exempt from access under OPRA.

As noted in N. Jersey Media Grp., Inc., “[w]hen evaluating a ‘Glomar’ response, federal courts must ‘accord ‘substantial weight’ to the agency's affidavits.’” Id. at 209 (citing Wilner v. NSA, 592 F.3d 60, 68 (2d Cir. 2009) (quoting Minier v. CIA, 88 F.3d 79, 803-04 (9th Cir. 1996)). However, the Custodian’s certification does not meet to the “Glomar” test as set forth by the court. No personnel information for a specific individual was identified, and thus this complaint is distinguishable from N. Jersey Media Grp., Inc. and other GRC complaints where this exemption was appropriately asserted. See e.g. Harmon v. Morris Cnty. Prosecutor’s Office, GRC Complaint No. 2017-38 (February 2019). Thus, the Custodian would not be inherently disclosing exempt personnel information simply by confirming the existence of disciplinary letters.

Further, the length of time that HR Director Peters has served in her position is of no moment; a requestor would need inherent knowledge of the individuals reprimanded to pair responsive records with those individuals. Even with that knowledge, the language contained in the letters to which the Complainant sought access may not encompass the full universe of responsive discipline records unless the language was boiler plate. This has not been asserted by

the Custodian. The GRC thus finds that the Custodian did not provide a sufficient explanation to prove that the “Glomar” response was appropriately invoked here.

Accordingly, the Custodian has not borne her burden of proving a lawful denial of access to any records potentially responsive to the subject OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian did not provide a sufficient legal certification proving that acknowledging the existence of responsive records would run contrary to N.J.S.A. 47:1A-10. N. Jersey Media Grp., Inc., 447 N.J. Super. 182. Thus, the Custodian’s use of the “Glomar” response with respect to the subject OPRA request is not proper here.

Personnel Exemption

OPRA 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.]

OPRA begins with a presumption against disclosure and “proceeds with a few narrow exceptions that . . . need to be considered.” Kovalcik v. Somerset Cnty. Prosecutor’s Office, 206 N.J. 581, 594 (2011). 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.

[Id.]

Further, the personnel record exemption may apply to records that “. . . bear many of the indicia of personnel files.” North Jersey Media Grp. v. Bergen Cnty. Prosecutor’s Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). In Rodriguez, 2013-296, the Council held that “disciplinary actions are not specifically

identified as personnel information subject to disclosure under OPRA.” *Id.* at 5. The Council has also similarly 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. See Merino, GRC 2003-110, Wares v. Twp. of West Milford (Passaic), GRC Complaint No. 2014-274 (May 2015).

In the matter before the Council, the Custodian responded to the subject OPRA request stating that “should any government record exist,” it would be exempt under N.J.S.A. 47:1-10. This complaint ensued, wherein the Complainant disputed the Custodian’s response as a hypothetical denial of access that did not identify whether any records actually existed. The Complainant argued that, per the GRC, the Custodian had an obligation to tell him whether records existed or provide a definitive statement as to their non-existence. In the SOI, the Custodian identified that the records at issue would comprise “discipline record(s),” but relied on the “Glomar” response addressed previously in this analysis.

A custodian has an obligation under OPRA to definitively state that no records exist where applicable. See *e.g.* Paff v. Town of Guttenberg (Hudson), GRC Complaint No. 2014-112 (January 2015) (citing Shanker v. Borough of Cliffside Heights (Bergen), GRC Complaint No. 2007-245 (March 2009)). However, Council decisions addressing a custodian’s insufficient response are predicated on a custodian’s SOI certification that no records existed after failing to state such at the time of their denial. Nonetheless, prior Council decisions also support a custodian’s denial of a request, absent a statement as to the existence of responsive records, where the subject request sought records exempt on their face. See *e.g.* Green v. Essex Cnty. Prosecutor’s Office, GRC Complaint No. 2018-218 (April 2020).

The crux of the issue before the Council is, by the Complainant’s own admission, an attempt to see whether Kean addressed other employee disciplinary matters in a manner like his.⁶ However, the Custodian has not asserted here that no records exist; rather, that they would be exempt from disclosure under N.J.S.A. 47:1A-10. This fact thus differentiates the current complaint from Paff, GRC 2014-112. Instead, the request is like that in Green, GRC 2018-218 because it clearly seeks access to personnel records that are exempt from access under OPRA. Rodriguez, 2013-296. Thus, and in keeping with the Council’s decisions allowing for a denial of access where a request on its face seeks exempt records, the GRC is satisfied that the Custodian lawfully denied access to the subject OPRA request.

Accordingly, the requested disciplinary letters, to the extent they exist, are exempt from disclosure under OPRA. N.J.S.A. 47:1A-10; N. Jersey Media Grp., 405 N.J. Super. 386; Rodriguez, GRC 2013-296. For this reason, the Custodian lawfully denied access to the Complainant’s OPRA request. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

⁶ The GRC notes that the request in and of itself could be considered invalid because it would have required research in order to locate potentially responsive records. MAG Entm’t, LLC v. Div. of ABC, 375 N.J. Super. 534, 546 (App. Div. 2005); Valdes v. Union City Bd. of Educ. (Hudson), GRC Complaint No. 2011-147, *et seq.* (July 2012)

1. The Custodian has not borne her burden of proving a lawful denial of access to any records potentially responsive to the subject OPRA request. N.J.S.A. 47:1A-6. Specifically, the Custodian did not provide a sufficient legal certification proving that acknowledging the existence of responsive records would run contrary to N.J.S.A. 47:1A-10. N. Jersey Media Grp., Inc. v. Bergen Cnty. Prosecutor's Office, 447 N.J. Super. 182 (App. Div. 2016). Thus, the Custodian's use of the "Glomar" response with respect to the subject OPRA request is not proper here

2. The requested disciplinary letters, to the extent they exist, are exempt from disclosure under OPRA. N.J.S.A. 47:1A-10; North Jersey Media Grp. v. Bergen Cnty. Prosecutor's Office, 405 N.J. Super. 386, 390 (App. Div. 2009); Rodriguez v. Kean Univ., GRC Complaint No. 2013-296 (June 2014). For this reason, the Custodian lawfully denied access to the Complainant's OPRA request. N.J.S.A. 47:1A-6.

Prepared By: Frank F. Caruso
Executive Director

May 11, 2021