



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

December 8, 2020
SPR20/2293

Rita P. Colucci, Esq.
General Counsel
Salem State University
352 Lafayette Street
Salem, MA 01970-5353

Dear Attorney Colucci:

I have received the petition of Norbert Tschakert appealing the response of Salem State University (University) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, on May 20, 2020 and June 18, 2020, Mr. Tschakert requested: "...any and all communication and documents Dean Barnes or Dean Barnes' legal counsel which references [Mr. Tschakert, Mr. Tschakert's name, or Mr. Tschakert's] position as the endowed chair (and which [Mr. Tschakert] is not already a party to)." The University withheld two emails from January 24, 2020 and January 27, 2020 under Exemption (c).

Prior appeal

On September 10, 2020, I ordered the University to provide the responsive January 24th and January 27th emails to this office for an *in camera* inspection. The University did so on September 9th and I thank the University for its cooperation in this matter. Subsequently, the University indicated that it would provide a further response to the request. See SPR20/1481 Determination of the Supervisor of Records (Supervisor) (October 7, 2020). In an October 13, 2020 response, the University claimed that the first clause of Exemption (c) of the Public Records Law; specifically, personnel is applicable to withholding the two emails. The University also reaffirmed its' claim that the second clause of (c) applies to the complaints to the Human Resources Department of the University. As a result of the October 13th response, Mr. Tschakert petitioned the Supervisor again, and this appeal was opened. In his petition, Mr. Tschakert asserts, "[t]he emails accuse other employees at the [University] including myself of severest misconduct. More importantly, these accusations were provided in bad faith and are part of a larger conspiracy..."

Status of the requestor

Mr. Tschakert is advised, the reason for which a requestor seeks access to, or a copy of, a public record does not afford any greater right of access to the requested information than other persons in the general public. The Public Records Law does not distinguish between requestors. Access to a record requested pursuant to the Public Records Law rests on the content of the record and not the circumstances of the requestor. See Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976).

In addition, the discovery process and the Public Records Law are two distinct and independent avenues for gaining access to records. The Massachusetts Supreme Judicial Court has held that while a party's access to records may be limited by the Public Records Law, this may not preclude obtaining the records through discovery. Commonwealth v. Wanis, 426 Mass. 639 (1998); 950 C.M.R. 32.08(1)(a) (the administrative appeal process “shall not apply to records in which an individual, or a representative of the individual, has a unique right of access to the record through statutory, regulatory, judicial or other applicable means.”).

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). “Public records” is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv) (written response must “identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based...”); 950 C.M.R. 32.06(3); see also Dist. Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption).

The University’s October 13, 2020 response

On September 9th, this office was provided with un-redacted copies of the January 24th and January 27th emails for an *in camera* inspection. During this office’s *in camera* inspection of the emails, the University indicated that it would provide a further response regarding the Exemption (c) claim to withhold the emails. The Supervisor closed SPR20/1481 with an order to provide a response within ten business days. See SPR20/1481 Determination of the Supervisor (October 7, 2020). The University provided an October 13th response which claims the first clause of Exemption (c), the personnel clause, to withhold the January 2020 emails, and that the

privacy clause also applies to withhold the emails. As a result, Mr. Tschakert petitioned the Supervisor again, and the current appeal, SPR20/2293 was opened.

Exemption (c)

Exemption (c) applies to:

personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy

G. L. c. 4, § 7 (26)(c).

Exemption (c) contains two distinct and independent clauses, each requiring its own analysis. Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 432-33 (1983). The first clause creates a categorical exemption for personnel information that relates to an identifiable individual and is of a “personal nature.” Id. at 434. Massachusetts courts have found that “core categories of personnel information that are ‘useful in making employment decisions regarding an employee’” may be withheld from disclosure. Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 5 (2003). For example, Exemption (c) contains two distinct and independent clauses, each requiring its own analysis. Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 432-33 (1983).

The first clause creates a categorical exemption for personnel information that relates to an identifiable individual and is of a “personal nature.” Id. at 434. Massachusetts courts have found that “core categories of personnel information that are ‘useful in making employment decisions regarding an employee’” may be withheld from disclosure. Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 5 (2003). For example, “employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee,” may be withheld pursuant to the first clause of Exemption (c). Wakefield Teachers Ass’n v. School Comm., 431 Mass. 792, 798 (2000). The courts have also discussed specific categories of records that may be redacted under the first clause. See Globe Newspaper Co. v. Exec. Office of Admin. and Finance, Suffolk Sup. No. 11-01184-A (June 14, 2013).

In its October 13th response, the University asserted:

“[t]he records at issue are exchanges between employees of [the University] and its human resources department. Because they concern matters of employment specific to their authors, they are considered personnel matters. They contain information that their authors have chosen to share privately with human resources representatives, and which speak directly to their employment at the [U]niversity. Moreover, the information is of a personal nature and would not be appropriately shared with others outside of human resources’ personnel. Last, but certainly not least, there is an expectation that personnel

documents that are personal to one's employment be kept in a private place and shared only with those human resources professionals to whom they were addressed. To deprive public employees of this expectation simply because their employer is a state agency is unfair and contrary to the intent of exemption (c) of G. L. c. 4, § 7(26)."

Based on discussions with you and our inspection of the emails *in camera*, the University asserted that the communications between the employees and the University's human resource personnel for the purpose of providing information concerning employment issues and complaints regarding employment issues with other employees at the University are exempt under the first clause of Exemption (c), and reaffirmed its claim that these emails contain personal information pertaining to the employees' complaints and could be withheld under the second clause of Exemption (c). The University asserted that this information provided by certain University employees as personal to them, and of which the University took into account in making employment decisions regarding employees is exempt as personnel information. See Wakefield, 431 Mass. at 798.

Please be advised that in a 2019 decision from the Attorney General's Office (AGO) regarding a similar matter involving employee allegations and complaints, the AGO indicated it was not persuaded that the custodian was required by the Public Records Law to release the responsive complaints, even in redacted form. See AGO's December 6, 2019 letter regarding SPR19/515 Determination of the Supervisor (December 6, 2019).

Conclusion

Accordingly, I consider this administrative appeal closed. If Mr. Tschakert is not satisfied with the resolution of this administrative appeal, Mr. Tschakert is advised that this office shares jurisdiction with the Superior Court of the Commonwealth. See G. L. c. 66, § 10(b) (pursuing administrative appeal does not limit availability of applicable judicial remedies).

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Norbert Tschakert