



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

Rebecca S. Murray
Supervisor of Records

April 23, 2021
SPR21/0937

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 Dr. Norbert Tschakert appealing the response of the Salem State University (University) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On February 3, 2021, Ms. Roberta James of the *Massachusetts Teachers Association* requested the following records on behalf of Dr. Norbert Tschakert:

- 1) Any and all communication and documents President . . . initiated or received from . . . (January 1, 2020 to present).
- 2) Any and all communication and documents President . . . initiated or received that reference [an identified individual's] name, her initials . . . , or her prior position as Dean of the Bertolon School of Business . . . (January 1, 2017 to present).
- 3) Any and all communication and documents Provost . . . initiated or received that reference . . . or her initials . . . (January 1, 2018 to present).
- 4) Any and all communication and documents Provost . . . initiated or received that include the term "title IX" (January 1, 2011 to present).
- 5) Any and all communication and documents sent or received from any SSU email account to [an identified individual] . . . (January 1, 2017 to present).
- 6) Any and all communication and documents sent or received from any SSU email account to [an identified individual] . . . (January 1, 2018 to present).
- 7) Any and all communication and documents initiated or received via any Salem State email account from [an identified individual] . . . (January 1, 2011 to present), except for emails which include [an identified individual] as sender or recipient and except for emails which include Dr. Tschakert as sender or recipient.

Previous petition

The requested records were the subject of a fee and time petition. See SPR21/0343 Determination of the Supervisor of Records (February 18, 2021). In my February 18th determination, I found the University had established good cause for a time extension of 15 business days. Further, I found the University had met its burden to explain how the response could not be prudently completed without redaction or segregation. Subsequently, the University provided responses on March 16, 2021 and March 19, 2021. Unsatisfied with the University's responses Dr. Tschakert petitioned this office and this appeal, SPR21/0937, was opened as a result.

Status of the requestor

Dr. Tschakert should be 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). Accordingly, Dr. Tschakert's purpose in making the request has no bearing on the public status of any existing responsive records.

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); 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). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

If there are any fees associated with a response a written, good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records custodian must provide the responsive records.

The University's March 16th and 19th responses

On March 16, 2021, the University provided certain responsive records. On March 19, 2021, the University explained that it withheld certain responsive records under the attorney-

client privilege, as well as Exemptions (c), (o), and (p) of the Public Records Law. G. L. c. 4, § 7(26)(c), (o), (p). The University also provided a fee estimate for the production of records. It appears Dr. Tschakert's appeal is limited to records that were withheld and/or redacted under Exemption (c) and the attorney-client privilege.

Exemption (c)

Exemption (c) permits the withholding of:

personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation.

G. L. c. 4, § 7(26)(c).

Analysis under Exemption (c) is subjective in nature and requires a balancing of the public's right to know against the relevant privacy interests at stake. Torres v. Att'y Gen., 391 Mass. 1, 9 (1984); Att'y Gen. v. Assistant Comm'r of Real Prop. Dep't, 380 Mass. 623, 625 (1980). Therefore, determinations must be made on a case by case basis.

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 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 Exemption (c). See Globe Newspaper Co. v. Exec. Office of Admin. and Finance, Suffolk Sup. No. 11-01184-A (June 14, 2013).

This exemption does not protect all data relating to specifically named individuals. Rather, there are factors to consider when assessing the weight of the privacy interest at stake: (1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal nature; and (3) whether the same information is available from other sources. See People for the Ethical Treatment of Animals (PETA) v. Dep't of Agric. Res., 477 Mass. 280, 292 (2017).

The types of personal information which this exemption is designed to protect includes: marital status, paternity, substance abuse, government assistance, family disputes and reputation. Id. at 292 n.13; see also Doe v. Registrar of Motor Vehicles, 26 Mass. App. Ct. 415, 427 (1988) (holding that a motor vehicle licensee has a privacy interest in disclosure of his social security number).

This exemption requires a balancing test which provides that where the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield. PETA, 477 Mass. at 291. The public has a recognized interest in knowing whether public servants are carrying out their duties in a law-abiding and efficient manner. Id. at 292.

Under Exemption (c), the University states that most of the records have been withheld or redacted, because “. . . they concern ongoing or past investigations or litigation pursuant to Salem State’s equal opportunity, affirmative action and diversity policy (‘EOP’).” The University explains that it redacted the names of complainants, respondents, and witnesses, because “. . . the involvement of these individuals (even the witnesses) in an investigation pursuant to the EOP render the identification of their name a personnel matter pursuant to exemption (c), clause 1.”

The University posits that “[a]ll complainants, respondents and witnesses are assured that they will not be retaliated against for participating in an investigation; disclosing their names opens them up to retaliatory behavior, or at least their own perception of retaliation since their confidential participation has been revealed. Therefore, any investigation pursuant to the university’s EOP is of a highly personal nature, the disclosure of which would constitute an unwarranted invasion of personal privacy pursuant to clause 2 of exemption (c). In all of these matters involving investigations pursuant to the university’s EOP policy, there is no justification presented for the public’s need-to-know the information included in the communications and accompanying documents that outweighs the employees’ interest in keeping this information private.”

Based on the University’s response, I find it may permissibly withhold the names of complainants, respondents, and witnesses, under Exemption (c), where disclosure would result in an unwarranted invasion of personal privacy. However, it is uncertain how certain emails could be withheld in their entirety as constituting personnel matters. Particularly, it is not clear how the contents of the emails constitute one of the core categories of personnel information, such as an employment application, employee work evaluation, disciplinary documentation, or promotion, demotion, or termination information pertaining to a particular employee, which may be properly withheld from disclosure under Exemption (c). See Worcester, 58 Mass. App. Ct. at 5; Wakefield, 431 Mass. at 798.

Further, I find the University has not demonstrated that the emails that were withheld entirely, constitute intimate details of a highly personal nature and that disclosure would result in personal embarrassment to an individual of normal sensibilities. Neither has the University addressed the availability of such information from other sources. See PETA, 477 Mass. at 292. See Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a). Consequently, the University must explain whether segregable portions, that do not fall within an exemption, can be provided.

The University also indicated that it withheld certain resumes under Exemption (c). Please note, the Attorney General's Office (AGO) has concluded, ". . . a resume submitted as part of an employment application falls within a core category of personnel information useful in making employment decisions, and is therefore absolutely exempt from disclosure under . . . Exemption (c)." See AGO letter dated May 7, 2020 regarding SPR19/2399 (Determination of the Supervisor of Records (December 10, 2019).

Common law attorney-client privilege

A records custodian claiming the attorney-client privilege under the Public Records Law has the burden of not only proving the existence of an attorney-client relationship, but also (1) that the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) that the communications were made in confidence; and (3) that the privilege as to these communications has not been waived. See Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 450 n.9 (2017); see also Hanover Ins. Co. v. Rapa & Jepsen Ins. Servs., 449 Mass. 609, 619 (2007) (stating that the party seeking the attorney-client privilege has the burden to show the privilege applies). Records custodians seeking to invoke the common law attorney-client privilege "are required to produce detailed indices to support their claims of privilege." Suffolk, 449 Mass. at 460.

Pursuant to the Public Records Law, in assessing whether a records custodian has properly withheld records based on the claim of attorney-client privilege the Supervisor of Records "shall require, as part of the decision making process, that the agency or municipality provide a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed." G. L. c. 66, § 10A(a).

In its response, the University indicates that certain email records were withheld under the attorney-client privilege. The University explains that these are communications from its in-house or outside Counsel regarding union contract bargaining or a litigation matter. The University further explains that in these communications ". . . the attorney is confidentially advising his clients and sharing information. Additionally, the document was created as a result of a client seeking legal advice from the attorney in his or her capacity as such, the communications were made in confidence; and the privilege as to these communications has not been waived."

Where the University indicates that portions of these email records are confidential discussions between Counsel(s) and the University's employees, and has provided a privilege log in accordance with G. L. c. 66, § 10A(a), I find the University has met its burden to withhold those portions under the attorney-client privilege.

Fee Estimates – agencies

An agency may assess a reasonable fee for the production of a public record except those

records that are freely available for public inspection. G. L. c. 66, § 10(d). The fees must reflect the actual cost of complying with a particular request. Id. A maximum fee of five cents (\$.05) per page may be assessed for a black and white single or double-sided photocopy of a public record. G. L. c. 66, § 10(d)(i).

Agencies may not assess a fee for the first four hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested. G. L. c. 66, § 10(d)(ii). Where appropriate, agencies may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee shall not be more than \$25 per hour. Id. A fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv). See G. L. c. 66, § 10(d)(ii); 950 C.M.R. 32.06(4).

In its response, the University indicates that “[a]most 6000 records were reviewed in response to your request. Many were not provided, redacted or disclosed on the spreadsheets because they were not responsive to the request – despite search term identifiers producing the communications. Nonetheless, each one of those records was reviewed to determine whether they needed to be produced. In total, university personnel spent 160 hours compiling, reviewing, redacting and segregating the records. As the university cannot charge for the first four hours of that time, the final charge is \$3,900.”

Although, the University states that its personnel “. . . spent 160 hours compiling, reviewing, redacting and segregating the records[,]” the University’s estimate does not make clear how many of the 160 hours were allocated to compiling, reviewing, redacting and segregating of the records. The University must clarify this estimate.

SPR20/0954

In his appeal petition, it appears Dr. Tschakert wishes to appeal the August 26, 2020 response to a previous appeal, SPR20/0954. See SPR20/0954 Determination of the Supervisor of Records (June 29, 2020).

Dr. Tschakert is advised that the Public Records Regulations, which govern the procedural aspects of all appeals, require that an appeal to this office be filed within ninety calendar days of the date of the request letter, or within ninety calendar days of the date of a written response from the record custodian. See 950 C.M.R. 32.08(1)(d); 950 C.M.R. 32.08(1)(e). The petition is requesting the appeal of the University’s August 26, 2020 response, which exceeds the ninety day limit.

Dr. Tschakert may make a new request to the University for the same information. The University would then have ten business days in which to respond to your new request. G. L. c. 66, § 10(a)-(b). If the University denies your request or fails to respond within ten business days,

you may appeal to this office within the above timeframe. At that time this office will review the matter.

Conclusion

Accordingly, the University is ordered to provide Dr. Tschakert with a response to the request, provided in a manner consistent with this order, the Public Records Law and its Regulations within ten (10) business days. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of this response to this office at pre@sec.state.ma.us.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive, flowing style.

Rebecca S. Murray
Supervisor of Records

cc: Dr. Norbert Tschakert