



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

Rebecca S. Murray
Supervisor of Records

May 14, 2021
SPR21/1110

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. Michael Mulnix 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 April 7, 2021, Dr. Mulnix requested several categories of records including, “a copy of any-and-all documents in my personnel file...any-and-all surrounding documents and correspondence that mention me or my initials (MM, MJM), or which refer to me by any means... [a]ll communication, emails, memos, and documents that reference me in the period from January 1, 2018-April 5, 2021. Slide decks, images, charts and/or other similar documents pertaining to retrenchment that specifically mention me, my initials, or other ways of identifying me, or my personnel file.”

The University provided responses on April 14, 2021, and April 21, 2021. Unsatisfied with the University’s responses, Dr. Mulnix petitioned this office and SPR21/1110 was opened as a result.

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 April 14th and April 21st responses

In its April 21st response, the University states “[a]s I stated in my response to you on April 14, 2021, some aspects of your request require modification; I would suggest qualifying your request by identifying offices, individuals or specific meetings as sources from which to pull the records.” In a supplemental response sent to this office on May 6, 2021, the University indicates it “continues to be willing to work with Dr. Mulnix to explore modifications to the request so that the records can be produced.”

The University indicates five responsive records in “regard to...‘[s]lide decks, images, charts and/or other similar documents pertaining to retrenchment that specifically mention me, my initials, or other ways of identifying me, or my personnel file’ contain “the names of current employees are not produced pursuant to exemption (c) of G. L. c. 4, § 7 (26)...”

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 “[t]he documents concern personnel actions, the nature of which is private to each individual named. As such, the documents are exempted by both the first and second clauses of exemption (c) as the subject matter pertains to personnel information and release would constitute an unwarranted invasion of personal privacy.” In regard to three of the documents being withheld, the University indicates “[w]hile these records are exempted as described above, I believe you already have copies of the records as they were inadvertently released to another employee.”

Based on the Department’s responses, I find it has not met its burden of specificity to withhold the records in their entirety pursuant to Exemption (c). It is unclear which records are being withheld from disclosure under Exemption (c). To deny access to a record under the Public Records Law, a records access officer must identify the record, categories of records, or portions of the record it intends to withhold. G. L. c. 66, § 10(b)(iv); see also 950 C.M.R. 32.06(3)(c)(4). Additionally, it is unclear how disclosure of the records would result in personal embarrassment to an individual of normal sensibilities; and whether any of the information is available from other sources. PETA, 477 Mass. at 292. Further, the University’s response does not address the balancing test outlined in PETA. Id. at 291. Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a). The University must clarify these matters.

Conclusion

Accordingly, the University is ordered to provide Dr. Mulnix 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 style with a large, looped "M" and a long, sweeping tail on the "y".

Rebecca S. Murray
Supervisor of Records

cc: Dr. Michael Mulnix