



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

Rebecca S. Murray
Supervisor of Records

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SPR21/1586

Rita P. Colucci, Esq.
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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. 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; appeal

The requested records were the subject of a fee and time petition and subsequent appeal. See SPR21/0343 Determination of the Supervisor of Records (February 18, 2021) and SPR21/0937 Determination of the Supervisor of Records (April 23, 2021). In my April 23rd determination, I found the University had met its burden to withhold records under the attorney-client privilege. Conversely, I found the University had not met its burden to withhold certain responsive records under Exemption (c). Additionally, I directed the University to provide further details regarding its fee estimate. Accordingly, the University was ordered to provide Dr. Tschakert with a response. The University provided responses on May 7, 2021 and June 9, 2021. Unsatisfied with the University's responses Dr. Tschakert petitioned this office and this appeal, SPR21/1586, was opened as a result. Subsequently, while this appeal was pending, the University provided a supplemental response on June 27, 2021.

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 May 7th; June 9 and 27th responses

In its May 7, 2021 response, the University enclosed additional responsive records in redacted form and a pdf file explaining the exemptions claimed to withhold portions of the records. The University claims Exemptions (c) and (e) are applicable to certain records that were withheld and/or redacted.

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.

In its June 27, 2021 response, the University explains that the records are exempt under Exemption (c), because “. . . they are substantive communications between an external investigator and university employees pursuant to allegations of discrimination in the workplace. . . . The content in these documents are specifically exempted by exemption (c).”

Exemption (e)

Exemption (e) permits the withholding of:

notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit

G. L. c. 4, § 7(26)(e).

The exemption may not be applied by custodians of records to withhold materials intended for communication or preservation. Records are protected from mandatory disclosure by Exemption (e) only if they meet the two criteria of the exemption.

The first criterion of Exemption (e) limits its application to work-related records that can be characterized as “personal” to the employee, such as personal reflections on work-related activities and notes created by an employee to assist him/her in preparing reports for other employees or for the files of the governmental entity. Notes that have been shared by the employee may not be considered to be “personal” pursuant to Exemption (e).

The second criterion of Exemption (e) requires that the notes not be kept in a government file. Under the exemption, “files of the governmental unit” excludes working files that are transitory in nature. Such files lack the permanent nature of a government file. Therefore, the retention of materials in such a working file would not bar the application of Exemption (e) and the records custodian may withhold from disclosure any personal notes that were not shared with others and were not part of such a governmental file.

In its June 9, 2021 response, the University claims that an “Email dated August 10, 2020 to [named individuals] with attachment named ‘SM et al and KH Conversations 2020[,]’ . . . is withheld from disclosure pursuant to exemption (n) [sic] of MGL c. 4 section 7(26) which exempts an individual’s personal notes. As the attachment is a copy of [a named individual’s]

personal handwritten notes, they are withheld from disclosure.”

In his appeal petition, Dr. Tschakert’s states that “[a named individual] scanned and then via his Salem State work email account shared the notes in question (which appear to be notes from his open office hours with faculty, and as such are part of his official duties) with outside parties. The attachment is therefore not of a personal nature. . . . Once [the named individual] shared the notes as an email attachment in his official capacity using his Salem State email, he converted those notes into a public document. They are now part of the files of the university.” Dr. Tschakert further states “[b]y scanning, emailing via official Salem State email, and sharing his notes about employees with multiple parties, [the University] can hardly claim that the initially handwritten notes are of such a personal nature to [the named individual] and that they are not part of Salem State’s records that they warrant exemption via MGL c. 4 section 7(26).”

In light of the above, where it appears the notes have been shared with third parties, it is unclear how the University could claim Exemption (e) to withhold this record.

Please note, the University received approval to charge for segregation and redaction, to the extent the responsive records contain the exempt information. See SPR21/0343 Determination of the Supervisor of Records (February 18, 2021). Also, under the Public Records Law, “[a] records access officer . . . shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request, provided that: . . . (iii) *the records access officer receives payment of a reasonable fee as set forth in subsection (d).*” G. L. c. 66, § 10(a)(iii) (emphasis added).

Additionally, Dr. Tschakert states that “[s]ome of the PDFs listing the exemptions were produced with faulty margins, so that much of the relevant information is missing.” Upon review of the file, it appears the total number of pages of the pdf file is 126. However, only 27 pages has information on them. As such, I encourage the parties to continue to facilitate providing missing information, if necessary.

In camera inspection

In order to facilitate a determination as to the applicability of the Exemption (c) claim made by the University to redact and/or withhold responsive records, the University must provide this office with an un-redacted copy of a representative sample of the responsive records for *in camera* inspection. See 950 C.M.R. 32.08(4). After I complete my review of the records, I will return the records to the University’s custody and issue an opinion on the public or exempt nature of the records.

The authority to require the submission of records for an *in camera* inspection emanates from the Code of Massachusetts Regulations. 950 C.M.R. 32.08(4); see also G. L. c. 66, § 1.

This office interprets the *in camera* inspection process to be analogous to that utilized by the judicial system. See Rock v. Mass. Comm'n Against Discrimination, 384 Mass. 198, 206 (1981) (administrative agency entitled deference in the interpretation of its own regulations). Records are not voluntarily submitted, but rather are submitted pursuant to an order by this office that an *in camera* inspection is necessary to make a proper finding.

Records are submitted for the limited purpose of review. This office is not the custodian of records examined *in camera*, therefore, any request made to this office for records being reviewed *in camera* will be denied. See 950 C.M.R. 32.08(4)(c).

This office has a long history of cooperation with governmental agencies with respect to *in camera* inspection. Custodians submit copies of the relevant records to this office upon a promise of confidentiality. This office does not release records reviewed *in camera* to anyone under any circumstances. Upon a determination of the public record status, records reviewed *in camera* are promptly returned to the custodian. To operate in any other fashion would seriously impede our ability to function and would certainly affect our credibility within the legal community. Please be aware, any cover letter submitted to accompany the relevant records may be subject to disclosure.

Order

Accordingly, the University is ordered to provide this office with an un-redacted copy of a representative sample of the responsive records for *in camera* inspection without delay.

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Dr. Norbert Tschakert