



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

Rebecca S. Murray  
Supervisor of Records

August 23, 2021  
**SPR21/1586**

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. 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; appeals***

The requested records were the subject of a fee and time petition and subsequent appeals. See SPR21/0343 Determination of the Supervisor of Records (February 18, 2021); SPR21/0937 Determination of the Supervisor of Records (April 23, 2021); and SPR21/1586 Determination of the Supervisor of Records (July 12, 2021). In my July 12<sup>th</sup> determination, I found the University had not met its burden to withhold an email record under Exemption (e). Additionally, I ordered the University to provide this office with a representative sample of the responsive records withheld under Exemption (c), for *in camera* inspection. The University provided the records and I would like to thank the University for its cooperation.

### ***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.

### ***In camera inspection***

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 (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.

Upon *in camera* review of the responsive records, I find that although portions of the records may fall under Exemption (c), it is unclear how an exemption applies to each redaction within the records at issue. 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).

### ***Request for reconsideration***

With respect to an August 10<sup>th</sup> email, the University claimed Exemption (e) to withhold the record. In my July 12<sup>th</sup> determination, I found the University had not met its burden to withhold the record under Exemption (e), where it appeared the notes had been shared with third parties. In a letter dated July 20, 2021, the University requests that I reconsider my previous determination.

In its July 20<sup>th</sup> letter, the University claims that the email is exempt from disclosure under Exemption (c), and explains that it “. . . includes the handwritten notes of an individual that were shared with an external investigator who was investigating an allegation(s) made pursuant to Salem State’s Equal Opportunity, Affirmative Action and Diversity policy. The notes were considered evidence in that investigation. As such, they should be protected in order to protect the privacy of the parties (complainant and respondent) and other individuals in that investigation.”

Citing PETA, the University indicates that “. . . the notes contain information shared with the sender of the record (and author of the notes) about the complainant in an investigation. Release of the notes, which are critical of the complainant, would result in personal embarrassment to that individual. The criticism itself is of a highly personal nature, in that it opines on the individual’s job performance and the opinions of colleagues. Last, the information is not available from other sources.” The University further explains, “[t]his analysis also holds true for the individuals with whom the author of the notes was speaking. These individuals are identified in the notes and would be readily recognizable to Mr. Tschakert as they are his colleagues. The information they relayed about the complainant, who is currently also a colleague, to the author of the notes would prove embarrassing to them as it is negative in nature and was shared with the individual to whom the complainant reported to (complainant’s boss). The information contained intimate details of a highly personal nature and includes their feelings about the work environment and criticisms of their own work. And again, this information is not available from other sources.”

The University asserts, “. . . these records were produced pursuant to an investigation into a complaint about alleged discrimination in the workplace. Complainants, respondents and

witnesses in these matters deserve to have the information they relay about highly sensitive matters in the context of their employment protected from individuals seeking public records. The public records law was created to encourage transparency in public matters; not to reveal intimate details pertaining to the work lives of public employees.”

Based on the University’s response, it is unclear how the record, in its entirety, constitutes intimate details of a highly personal nature. The University must clarify whether segregable portions can be provided. 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). Where possible, the University must produce any non-exempt, segregable portions of the public record. G. L. c. 66, § 10(a).

***Conclusion***

Accordingly, the University is ordered to provide Dr. Norbert 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](mailto: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