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ABSTRACT

This pamphlet analyzes the clash between higher education institutions' concerns for preserving the confidentiality of peer faculty review and the need for relevant evidence when a disappointed faculty member suspects that a negative tenure decision is infected with illegal bias. Until recently many institutions decided whether to give tenure to a candidate using the judgments of disciplinary colleagues with many institutions insisting on preserving the confidentiality of the documents as critical to encouraging their candor. First the pamphlet summarizes how federal courts approached confidentiality issues prior to 1989 including early and key cases, federal policy, and civil rights law. In a section on the 1989 Supreme Court ruling on confidentiality in "University of Pennsylvania versus the Equal Employment Opportunity Commission," the pamphlet examines the arguments of the parties and the rationale behind the Court's opinion. The implications of the ruling are then spelled out with detailed discussion of using external experts and internal peer reviewers. Also examined are the practices of some institutions who have not used peer review from before the Supreme Court ruling. These approaches include complete openness with full disclosure of all documentation; access to evaluations if a decision is appealed, or maintaining peer evaluation confidentiality except where challenged as discriminatory. Included are 40 notes. (JB)

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Peer Review Confidentiality: Is It Still Possible?

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Peer Review Confidentiality: Is It Still Possible?

Faculty personnel decisions, particularly tenure decisions, are critical to colleges and universities. Because tenure is a promise of lifetime employment (absent financial exigency or flagrantly unprofessional conduct), the quality of an institution's faculty, and the very nature of its academic programs for many decades, may be determined by today's tenure decisions. Moreover, an award of tenure typically obligates the institution to one million dollars or more in salary, fringe benefits and pension contributions over the faculty member's career.

Such decisions also have momentous consequences for individual faculty members. A tenure decision occurs, at the earliest, only after the faculty member has spent at least four years (and often many more) as a graduate student earning the Ph.D., and six years teaching as an assistant professor. By this time faculty members are usually in their 30s and may have a family which has thrown down roots in the community and which has established other important local ties. A negative tenure decision, at minimum, may very likely involve moving to another, perhaps less prestigious, institution. In some cases, a denial of tenure will even cause the end of a career in higher education.

Many colleges and universities rely on the judgments of the tenure candidate's disciplinary colleagues, both from within and outside the institution, to assess the candidate's performance, and to recommend whether tenure should be conferred. At many, but not all institutions,[1] candidates have not been given access to the recommendations of peer evaluators. Even when candidates have claimed that a negative decision violated one of the civil rights laws, some have had difficulty obtaining letters from external evaluators or information on the content of internal peer judgments, because the institution has insisted on preserving the confidentiality of these documents.[2]

Institutions have argued that confidentiality of peer review is critical to encouraging the candor of these evaluations, and they have therefore urged the courts to create an "academic freedom privilege" to shield these documents; some courts have agreed.[3] Recently, however, the U.S. Supreme Court, in *University of Pennsylvania v. EEOC*,[4] rejected the "academic freedom privilege" for cases litigated under Title VII of the Civil Rights Act of 1964.[5]

This pamphlet analyzes the clash between institutions' concerns for preserving the confidentiality of peer review and the need for relevant evidence when a disappointed faculty member suspects that a negative tenure or promotion decision is infected with illegal bias. It summarizes the approaches used by the federal courts prior to the Supreme Court case, and examines the arguments of the parties and the rationale behind the Court's opinion. The pamphlet then evaluates the implications of this opinion for colleges and universities, describes the practices of some institutions where peer review confidentiality was abandoned long before the Court ruling, and suggests several alternatives that institutions grappling with this issue may wish to consider.

The Foundation of the Confidentiality Debate

At most institutions, faculty are evaluated on one or more of the following criteria: scholarship, teaching, and service. Because these criteria are broad, decisions as to whether faculty have performed successfully are based on the subjective judgments of both administrators and other faculty. Although the courts have found the use of subjective criteria appropriate for individuals holding professional and managerial jobs,[6] the use of poorly defined or vague criteria can permit bias to infect an employment decision, whether it is made in academe or elsewhere.

Because the judgments of a candidate's peers on the quality of that individual's teaching, scholarship and/or service are of necessity subjective, many institutions have promised

these evaluators confidentiality in exchange for a promise that the evaluation be candid and forthright. Some academicians fear that, if candidates are permitted to see what their colleagues have written about them, evaluators will temper their criticisms for fear of retaliation if, for example, roles are ever reversed or if the candidate should ever have the opportunity to assess a journal article or grant application prepared by the evaluator. And the concern among evaluators from the candidate's own department is even stronger, for departmental colleagues may have a professional relationship that lasts nearly a lifetime. Furthermore, the spectre of seeing all the details of a negative promotion or tenure decision played out in the student or local community newspaper, with the consequent political pressure on evaluators to reverse their recommendations, is particularly unattractive to faculty and administrators. For these reasons, advocates of confidentiality have argued that forced disclosure of peer evaluation violates the institution's academic freedom to select faculty without outside interference from or influence by the government—in this context, the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces the civil rights laws.

On the other hand, while acknowledging that candid evaluations are critical to informed judgments, faculty who were denied tenure and their lawyers argue that the civil rights laws provide no exemption for colleges and universities, and that it is inappropriate for academe to shield the judgments of evaluators because that shield may also hide unlawful discrimination. If evaluators are accountable neither to the candidate nor to the courts, they assert, then there is no deterrent for evaluators to engage in illegal conduct. Pointing to the relatively low proportion of women and the very low proportion of racial minorities on most tenured faculties, advocates of disclosure believe that the need for information relevant to a discrimination claim far exceeds the institution's interest in protecting the substance of the evaluation, or the identity of the evaluators.

In an attempt to explain why academic institutions have concerns regarding faculty employment decisions that business organizations do not share, proponents of confidentiality have argued that an institution's academic freedom to select its own faculty elevates the importance of protecting peer evaluation from disclosure. Citing the famous *Sweezy v. New Hampshire*[7] case in which the U.S. Supreme Court ruled that the government could not intrude upon academic decisions regarding what material should be taught, advocates of confidentiality assert that institutions have a constitutionally-protected interest in shielding peer review materials from disclosure. They have urged the federal and state courts to create an evidentiary privilege, permitted under Rule 501 of the Federal Rules of Civil Procedure, which would require either the EEOC or the faculty member to make a showing of "particularized need" for the otherwise-confidential information before a court orders its disclosure. If created, such a privilege would require the court to balance the plaintiff's[8] need for the material against the institution's interest in preserving its confidentiality.

Plaintiffs, however, have argued that, without access to peer evaluations, they may not be able to make such a showing. They have noted that if an institution's negative tenure or promotion decision is based upon peer evaluations, then those evaluations are relevant to the lawsuit. Requiring the plaintiff to show particularized need may impose an insurmountable hurdle because, without access to the file, it may be impossible for a plaintiff to convince a court that evidence of discrimination may be found in the evaluations. They have also argued that it is inappropriate to use "academic freedom" to conceal potential discrimination.

These opposing viewpoints have clashed in several federal court cases, with widely varying results. While federal appellate courts in two circuits agreed that peer evaluation should be protected under certain circumstances, appellate courts in two other circuits did not. Similar litigation in various state courts has also resulted in inconsistent rulings.

Background to the Supreme Court Ruling

Title VII of the Civil Rights Act of 1964 provides that the EEOC, while investigating a charge of discrimination, may obtain materials that are relevant to the charge.[9] The EEOC routinely requests not only the plaintiff's complete promotion or tenure file but it also asks the institution to provide similar information for other faculty members who received or were denied tenure or a promotion before, concurrently with, or after the challenged decision. Prior to the Supreme Court decision, some institutions complied in full, others in part, and still others refused to give the EEOC any materials involving confidential peer review.

Federal appellate courts in two circuits have refused to recognize the "academic freedom privilege" asserted by institutions in an attempt to protect peer review materials from disclosure. In *In re: Dinnan*,[10] the U.S. Court of Appeals for the Fifth Circuit scoffed at the notion that the First Amendment shielded a colleague of the plaintiff's from disclosing his vote on her tenure decision; Professor Dinnan went to jail rather than comply with the court-ordered disclosure. The court opinion, foreshadowing the Supreme Court's opinion discussed below, stated:

> We fail to see how if a tenure committee is acting in good faith, our decision today will adversely affect its decision-making process. Indeed, this opinion should work to reinforce responsible decision-making in tenure questions as it sends out a clear signal to would-be wrongdoers that they may not hide behind "academic freedom" to avoid responsibility for their actions . . . Society has no strong interest in encouraging timid faculty members to serve on tenure committees.[11]

Similarly, the Third Circuit refused to permit Franklin and Marshall College to withhold confidential peer evaluations of a professor of French who charged that his tenure denial was based on his national origin.[12] While recognizing the importance of confidentiality in obtaining candid evaluations, the court nevertheless stated that the plaintiff's need for information which might reveal an unlawful basis for the employment decision superceded the institution's interests.

Two other federal appellate courts, however, were more willing to at least entertain the academic freedom argument, although not necessarily to rule along those lines. The Second Circuit, in *Gray v. Board of Higher Education*,[13] agreed to use a balancing test to determine whether a black professor should be told how two of his department colleagues voted on his tenure decision. Although the court was willing to balance the interests of both parties, it ruled in the plaintiff's favor because he had never been given a meaningful statement of reasons for his tenure denial. The Seventh Circuit went somewhat farther, and created a qualified privilege in *EEOC v. University of Notre Dame*,[14] stating that the institution's interest in preserving confidentiality was important, and the identities of individual evaluators should therefore be protected.[15]

Courts faced with similar claims under state law have differed as well. In *Kahn v. Superior Court*[16] a California court denied a plaintiff's attorney the right to question a member of a tenure review committee, citing the privacy provisions of the California Constitution. On the other hand, New Jersey's Supreme Court ruled that Rutgers University must provide to a plaintiff the confidential peer review materials in her tenure file. The court said, "While we are mindful of the need to maintain the confidential nature of the peer review system, we believe that adoption of the qualified academic freedom privilege would interfere significantly with the enforcement of our anti-discrimination laws."[17]

Shortly after the Fifth Circuit's decision in *Dinnan*, the American Association of University Professors (AAUP) drafted a statement that attempted to balance the interests of both plaintiffs and the peers who must evaluate them. Long concerned with protecting faculty interests in personnel decisions, the AAUP found itself in the difficult position of representing the interests of faculty on both sides of a potential lawsuit—the plaintiff, and his or her peer evaluators. The AAUP Statement[18] recommends the following.

1. That any faculty member who is not promoted, tenured, or whose contract is not renewed be told the reasons for the decision, be permitted the opportunity for reconsideration by the decision-making body, and have the opportunity for appeal to a standing committee if the faculty member believes that "an impermissible consideration played a role in the decision."

2. That in appropriate circumstances "the participants in the decision-making process may permissibly be called upon to account for their actions."

3. That before ordering disclosure of peer evaluations, a court first weigh "the facts and circumstances asserted by the complainant," and determine that this showing raises an inference that "some impermissible consideration" played a role in the decision "in order to overcome the presumption in favor of the integrity of the academic process." Such factors might include a) the procedures used to reach the decision, b) the court's assessment of the adequacy of the reasons given the plaintiff for the negative decision, c) statistical evidence of bias, or incidents or statements indicating personal bias by one or more of the participants, d) availability of the information sought from other sources, and e) the importance of the information sought to the plaintiff's case.

The statement is similar in approach to the balancing test used by the Second Circuit in the *Gray* opinion in that it creates a presumption in favor of confidentiality that a plaintiff must overcome through one or more of the above showings. Although not required of plaintiffs alleging discrimination by nonacademic organizations, this approach would clearly make it more difficult for faculty plaintiffs to obtain evidence potentially relevant to their discrimination claim.

The Supreme Court's Ruling: University of Pennsylvania v. EEOC

Although the U.S. Supreme Court had refused to review the Third Circuit's 1985 ruling in *EEOC v. Franklin and Marshall College*, despite the vast differences among the federal circuit courts on the existence and propriety of an academic freedom privilege, the Court finally agreed to speak on this issue in a case brought against the University of Pennsylvania by the EEOC. Rosalie Tung, an associate

professor in the University's Wharton School of Business, was denied tenure, and consequently filed a charge of race, sex, and national origin discrimination against the University. In investigating the charge, the EEOC requested certain materials from the University.

Although the University complied with much of the EEOC's request, it refused to submit confidential letters written by Tung's evaluators, letters from the department chair, and accounts of a faculty committee's deliberations, as well as similar materials for five male faculty colleagues whom, Tung alleged, were treated more favorably at the same time that she was denied tenure. The EEOC then obtained a subpoena from a district court; in spite of the University's objections, the subpoena was affirmed by the U. S. Court of Appeals for the Third Circuit, which relied on its earlier decision in *Franklin and Marshall College*.

Still refusing to disclose the materials, the University appealed the ruling to the U.S. Supreme Court in 1988. The Court subsequently agreed to address the issue of whether a qualified privilege should be created, or whether a balancing approach should be used that would require the EEOC to show particularized need for the confidential information.

As in earlier cases, the University asserted that quality tenure decisions require candid peer evaluations, and candid peer evaluations require confidentiality. The University said that mandated disclosure would "destroy collegiality,"[19] and that either a common-law privilege or a constitutionally-based academic freedom privilege should be created to protect the integrity of the peer evaluation process. It further asserted that the EEOC should be required to make a showing of particularized need for the confidential material before asking a court to order its disclosure. Should confidentiality be compromised, the University warned, decisionmakers would be inclined to discount written evaluations and rely on "oral and undocumented evaluations that do not inspire the same degree of thoughtfulness, fairness and accuracy as those produced under the existing system."[20]

The EEOC argued that privileges or balancing tests may be appropriate for litigation involving private parties but, as a government agency charged with the responsibility of enforcing the civil rights laws, it was entitled to material that was relevant to a charging party's claims. The agency noted that Title VII had been amended in 1972[21] to cover institutions of higher education, and that no language regarding the special nature of academic peer review had been added at that time. The EEOC's position was that the law treats all employers alike; there are no special provisions for academic organizations.

In a unanimous opinion written by Justice Harry A. Blackmun,[22] the Supreme Court rejected the University's arguments in their entirety. The Court refused to create a common law privilege for the following reasons:

1. Congress, in amending the law to cover academic organizations, had not included such a privilege.
2. Title VII confers upon the EEOC a broad right of access to relevant evidence.
3. Title VII includes sanctions for the disclosure of confidential information by EEOC staff.
4. Evidence of discrimination is particularly likely to be "tucked away in peer review files" (p. 584).
5. Requiring the EEOC to show particularized need for the information could frustrate the purpose of Title VII by making the EEOC's investigatory responsibilities much more difficult.

With regard to the University's request that a privilege be created based on its constitutional academic freedom interests, the Court took a similarly strong stand. While acknowledging the great interest of universities in protecting their academic freedom, the Court stated that the University of Pennsylvania's reliance on academic freedom doctrine in this particular regard was "misplaced" (p. 586). The issue before the Court was not government attempts to suppress speech or to dictate its content, but rather a "content-neutral" government action to enforce a federal law. The Court viewed the EEOC's actions as an "extremely attenuated" infringement on academic freedom.

The Court also regarded the potential injury to academic freedom as speculative, noting that not all institutions of higher education keep peer evaluations confidential. And furthermore, it appears that the Court simply did not believe that disclosure of peer evaluations would "destroy collegiality," as the University had claimed. Specifically, Blackmun wrote:

> We are not so ready as petitioner seems to be to assume the worst about those in the academic community. Although it is possible that some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness. Not all academics will hesitate to stand up and be counted when they evaluate their peers (p. 588).

In the face of this apparently decisive victory for the EEOC, it appears that all peer evaluation material that the EEOC deems relevant to a charging party's discrimination complaint must, in the future, be disclosed by a college or university. The Court left open the issue of whether the institution may provide materials from which names and/or institutional affiliations have been redacted. Although an institution can still challenge a request for information on the grounds that it is burdensome, excessive,[23] or not relevant, evaluations of both the charging party and of other faculty that the charging party claims are comparable, have clear relevance and will very likely have to be disclosed.

Implications of EEOC v. University of Pennsylvania

While the outcome of the Supreme Court decision is a setback for institutions that have relied on the confidentiality of peer review, it is unlikely to have much significance for most personnel decisions, nor should it necessarily be viewed as a mandate to make faculty personnel decisions completely open. While a later section of the pamphlet will discuss alternatives for institutions that may wish to provide more information to tenure or promotion candidates than they currently do, this section focuses on the general implications of the

Pennsylvania case for academic employment decision policies and practices.

First, faculty evaluators and administrators should remember that most personnel decisions are not challenged under Title VII, and, even when they are, most plaintiffs do not succeed. A study of the outcome of all faculty discrimination cases litigated under Title VII through 1984 showed that only 20 percent of the plaintiffs were successful.[24] Furthermore, in more than 300 such cases litigated since 1972, although plaintiffs in most of them did obtain access to their own peer review material, many had difficulty obtaining the peer evaluations of comparable faculty because several trial judges have said that tenure or promotion decisions are not comparable across an institution or even between departments.[25]

Nor is it likely that the *Pennsylvania* decision will result in more victories for plaintiffs. In the few cases where plaintiffs have prevailed, it has not been the material in external letters or even in internal peer review reports that has convinced a judge to rule in favor of the faculty member. Rather, it has been sexist or racist comments by departmental colleagues or administrators, communications between a department chair and top university administrators regarding the department's refusal to hire women faculty, or clearly less favorable treatment of women faculty by male administrators that has persuaded judges that discrimination infected a personnel decision.

In a recent case against Boston University, for example, the president's characterization of the English Department as a "matriarchy," as well as the judge's conviction that the plaintiff was well qualified for tenure (as her peers had attested to) contributed to the court's finding of discrimination.[26] In *Rajender v. University of Minnesota*, the department chair's letter refusing, on principle, to hire women faculty because they would lower the status of the chemistry department, was found to be significant evidence of discrimination.[27] An administrator's decision to tell male, but not female, faculty that a master's degree was necessary to obtain tenure at Muhlenberg College convinced

yet another trial judge that discrimination had occurred.[28] In none of these cases were confidential peer evaluation materials at issue. At best, letters from evaluators may help a plaintiff demonstrate that at least some experts believe his or her work is worthwhile, but such a showing alone will generally not be sufficient to convince a judge to overturn a negative promotion or tenure decision, absent some more dramatic proof of discrimination such as those illustrated above.

Nor will obtaining evidence that the plaintiff's work has merit necessarily help to overcome the deference that judges accord to the assessment of a candidate's performance by disciplinary peers, which does not appear to be affected by the Supreme Court decision. Commentators have noted the strong reluctance of judges to substitute their judgment for that of highly-trained professionals;[29] it is unlikely, therefore, that the *Pennsylvania* case will alter such judicial behavior.

Using External Experts. The case does have implications, however, for the manner in which institutions solicit and use the advice of peer evaluators, both those employed by the institution and outside the institution. The invitational letter can no longer contain an absolute promise of confidentiality, although (should the institution wish to continue maintaining peer review confidentiality) it could contain language that promises confidentiality unless compelled by judicial process. (Obviously, in the several states with laws that give employees access to evaluative documents, such promises were not possible even prior to the *Pennsylvania* case.)

Institutions may also want to offer external experts some guidance on structuring their comments. For example, individuals soliciting letters from external experts might request specific examples to buttress the opinions or conclusions drawn: in other words, the expert might be asked to include information to support a claim that the candidate has or has not made a significant contribution to the discipline. As a matter of courtesy, as well as of practicality, the candidate's c.v. and most

relevant publications should be sent to the expert, rather than expecting the expert either to spend hours in the library locating the publications or, worse yet, relying on his or her memory to evaluate the publications.

Furthermore, with regard to using external experts, institutions may wish to develop guidelines for evaluating these letters. What, for example, should the department chair or tenure committee do if a letter appears to contain evidence of apparent, or even subtle, bias? One might argue that such a letter should be returned to the writer and not used or, if read by a decision-making committee, expressly disclaimed and not relied upon in the decision-making process. Clearly, several approaches to this problem are possible. At minimum, an institution should develop procedures before such a problem occurs so that it can behave *consistently* with regard to biased material in an effort to ensure that all candidates are treated equally.

Internal Peer Reviewers. The need for accountability mechanisms extends to internal peer reviewers as well. How information is solicited, how it is used, and the degree to which an individual or group recommendation (department chair, tenure committee) is documented is important for any personnel decision, but it is even more important if that decision may be subject to litigation. It is certainly appropriate for an institution to request, for example, that peer evaluators state why they have drawn certain conclusions, or to request documentation as to which scholarly journals are the important ones in which to publish, why certain topics are more or less desirable subjects of study, and how a department or college defines "creativity" and "promise" in light of its particular discipline.

It is also appropriate to require disciplines or departments to develop clearly-defined performance standards for faculty well in advance of any personnel decisions, and to monitor the performance of faculty against those standards regularly, not just when it is time for a promotion or tenure decision. Litigation is less likely to occur if a candidate has been given honest

feedback on a regular basis using well-understood standards of performance.

The need for defensible peer evaluation practices is not a result of the *Pennsylvania* case: it was recognized a decade ago after courts began scrutinizing academic employment decisions more closely than they had in prior years.[30] Certainly the combination of the Supreme Court's *Yeshiva* decision,[31] which recognized the important role that faculty play in a wide range of "management" decisions such as personnel matters, and its recent *Pennsylvania* decision that refuses to set higher education apart from other enterprises, increases the importance of helping faculty develop and follow peer review practices that are not only unbiased, but which can withstand the scrutiny that either a court or an institutional procedure may require.

Options for Colleges and Universities

Although the Supreme Court opinion clarified an institution's responsibility to disclose information if a discrimination claim is filed, it did not address to what degree institutions should, or may, continue to maintain the confidentiality of peer review materials not requested in a discrimination case. It is very likely that institutional responses to *Pennsylvania* will vary, depending upon their mission and culture, state law, and the desires of the faculty and administration. This section poses several options that colleges and universities may wish to consider adopting in light of the Supreme Court's ruling.

Complete Openness. Several colleges and universities provided full disclosure of the identity of external reviewers and the content of their letters, as well as copies of internal peer evaluation reports, well before *Pennsylvania* was decided. In several states, open public records laws mandate disclosure of this material. In some states, public institutions must comply with open records laws.[32] While some public universities, such as the University of Oregon and Indiana University, have adopted policies that permit faculty to waive their right

to view peer review materials, faculty declining to do so maintain their right of access to the material. These waivers have not been subjected to legal challenge, and it is not certain whether a judge would sustain a waiver of a statutory right of access.

In other states, such as Pennsylvania, the open records law applies to both public and private employers. In a lawsuit challenging Pennsylvania State University's refusal to provide access to peer evaluation materials, a state court determined that such materials were, in fact, "performance evaluations," which the law required to be disclosed, rather than "letters of reference," which it did not.[33]

Many administrators at public institutions with open systems do not believe that openness has eroded the quality of personnel decisions. An attorney for the University of North Carolina-Chapel Hill, for example, where an open system has been in place for over ten years because of a state open records law, believes that the quality of external letters is about the same as it was in the years when confidentiality was the rule. She noted that, if a letter is "mildly positive, then telephone calls are made"[34] to supplement the letter, but that the university does receive negative letters despite its inability to maintain confidentiality. She believes that external experts are more sophisticated about the libel laws, and are better at supporting their opinions with evidence, and in stating carefully that these are opinions, not facts.

The Dean of the Faculties at Florida State University, which also discloses peer evaluation materials because of a state open records law, praised the system as fairer to faculty, and the law school dean denied that openness chilled evaluators' candor.[35] Similarly, a study of tenure decisions at 92 liberal arts colleges found that colleges that give open access to peer evaluation materials did not differ in their rates of tenuring from colleges with closed systems,[36] but that tenure rates were instead related to the institution's history, traditions, and leadership.

Despite the favorable reports from institutions with open access, other institutions may prefer to maintain partial or full confidentiality for external peer evaluations, internal peer deliberations, or both. At least two additional approaches are possible at such institutions: disclosure only if a decision is appealed internally, or disclosure only if required by a federal or state enforcement agency or trial judge.

Access to Evaluations If a Decision Is Appealed. If complete openness is not favored, an institution might treat peer evaluations as confidential unless and until the decision is challenged through an internal appeals or grievance system. At that point, the institution could either disclose the actual letters and reports, or provide summaries of their content, with or without disclosing the identity of the evaluators.

One advantage of this approach is that only faculty challenging a negative decision would have access to this material; otherwise, the evaluations would be presumptively confidential. Another advantage is that faculty candidates may view the system as being fairer precisely because it does permit such challenges, and because both faculty evaluators and administrators would have a greater incentive to develop recommendations that are clearly documented and conscientiously supported than they would in a system that maintained complete confidentiality.

Yet a third advantage of an internal grievance system that permits disclosure of peer evaluations is that, if a finding is made in the candidate's favor, the usual remedy is a remand to the individual or group making the determination to reconsider its decision, omitting the material or behavior viewed as improper. Research on academic grievance systems has concluded that they do, in fact, reduce the potential for litigation.[37] Furthermore, judges hearing academic discrimination cases are less likely to rule in a plaintiff's favor if one or more internal appellate groups have previously rejected a plaintiff's claim, or if the decision has been made a second time with the same result.[38]

Another possible approach is to permit each faculty member to decide before the evaluation process begins whether to assert a right to review peer evaluations or to waive that right. Although Indiana University is covered by a state open records law, the faculty council passed a resolution asking candidates for promotion or tenure to waive their right of access to peer evaluations. External and internal reviewers are notified whether the candidate has signed such a waiver. If a candidate waives access, he or she may still request a summary of the content of the external letters. This summary is prepared by the recipient of the letters and includes all those received. If a candidate appeals a negative decision, and has waived his or her right of access, he or she is given redacted copies of the letters. In informal discussions about this issue, it was reported that some external evaluators choose not to submit letters if access is not waived and, as a consequence, a department chair may often have to solicit letters from two or three times as many external evaluators as the number of letters needed.

Maintaining Peer Evaluation Confidentiality. A third option is that, despite the *Pennsylvania* ruling, it is likely that some institutions will continue to require that peer evaluations, both from external and internal experts, be confidential except in situations where the decision is challenged as discriminatory or where the files must be disclosed because they are deemed relevant to other discrimination cases. The decision clearly permits this response and, as long as institutions comply with EEOC or judicial requests for peer review material, there is no compelling *legal* reason for institutions to change their practices.

The University of Florida, which is exempt by state regulation from the state's open records law that covers the Florida State University system, for example, does not normally disclose either external letters or the substance of internal peer evaluations. It does, however, produce those documents if either a civil rights charge or a lawsuit is filed.

Despite the fact that peer evaluation materials must be disclosed to the EEOC or, very likely, to the plaintiff in the event of litigation, an institution may seek a confidentiality agreement, enforceable in court.[39] Such agreements may limit the plaintiff's right to copy, distribute, or use the material beyond the narrow purposes of the litigation. Although these orders obviously cannot shield the peer evaluation material from the plaintiff, they can at least limit the number of people who are given access to the information.

Other strategies are possible as well. At institutions with faculty unions, the parties may include in the collective bargaining agreement the type of evaluative information which may be used in grievance hearings or arbitration; individual contracts with faculty who are not unionized could contain such clauses as well, except in those states that guarantee access to peer review material.[40] Finally, the Supreme Court decision does not appear to preclude voluntary agreements between administrators and faculty on how such material will be treated, short of an EEOC charge or lawsuit.

Summary

Insisting on confidentiality, in light of the apparent lack of impact at some institutions of a more open system, may not be as critical as previously thought, since the issue seems to be a matter of judgment rather than law. As long as peer evaluators understand that the law may require disclosure in the event of civil rights litigation, as long as state law does not require disclosure, and as long as faculty and administrators behave responsibly and consistently in passing judgment on their colleagues, institutions that wish to continue to protect the confidentiality of peer evaluations should be able to do so.

Notes

*The author is grateful to Monique Clague for her assistance in identifying institutions with open peer evaluation.

1. A discussion of several institutions that do not preserve the confidentiality of peer evaluation begins on page 18.

2. For an analysis of plaintiffs' attempts to gain access to peer evaluation materials prior to *University of Pennsylvania v. EEOC*, see, Delano, "Discovery in University Employment Discrimination Suits: Should Peer Review Materials be Privileged?" 14 *J. Coll. & U. L.* 121 (1987).

3. For a discussion of cases in which courts have agreed to shield peer evaluation materials, see pages 6–7, *infra*.

4. 110 S. Ct. 577 (1990).

5. 42 U.S.C. § 2000e et seq. The ruling applies only to access to these files by the EEOC after a claim has been filed. It does not require colleges to disclose peer evaluations to faculty in the absence of a discrimination claim. The implications of this case for internal disclosure are discussed in a later section.

6. For analyses of judicial evaluation of discrimination claims by plaintiffs holding professional or managerial positions, see Bartholet, "Application of Title VII to Jobs in High Places," 95 *Harv. L. Rev.* 945 (1982) *and* Waintroob, "The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level," 21 *Wm. & Mary L. Rev.* 45 (1979–80).

7. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). The foundation of the "academic freedom privilege" actually is derived from Justice Frankfurter's concurring opinion, in which he discusses (citing a report from the University of South Africa) the "four essential freedoms" of a higher education institution: "to determine for itself in academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Id. at 263 (Frankfurter, J., concurring).

8. For the sake of simplicity, a faculty member who files a discrimination claim, either in court or with a state or federal civil rights agency, will be referred to as the "plaintiff."

9. 42 U.S.C. § 2000e-8(a).

10. 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982).

11. Id. at 431-2.

12. *EEOC v. Franklin and Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986).

13. 692 F.2d 901 (2d Cir. 1982).

14. 715 F.2d 331 (7th Cir. 1983).

15. The university had agreed to provide the EEOC with redacted files; the court ruled that the EEOC must accept the redactions because the identity of the evaluators was privileged. The court also accepted the university's argument that the EEOC should be required to sign a nondisclosure agreement before it obtained the files of nonparty faculty.

16. 188 Cal. App. 3d 752, 233 Cal. Rptr. 662 (6th Dist. 1987).

17. *Dixon v. Rutgers University*, 110 N.J. 432, 453 (1988).

18. "Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments," 67 *Academe* 27 (1981).

19. Brief of Petitioner University of Pennsylvania at 11.

20. *Id.* at 36.

21. Title VII was amended to include institutions of higher education by the Equal Employment Opportunity Act of 1972, 86 Stat. 103.

22. *University of Pennsylvania v. EEOC*, 110 S. Ct. 577 (1990).

23. F.R.C.P. 26(c).

24. G. LaNoue and B. Lee. *Academics in Court: The Consequences of Faculty Discrimination Litigation*. 1987, at 31.

25. *See, e.g., Jackson v. Harvard University*, 111 F.R.D. 472 (D. Mass. 1986); *Scott v. University of Delaware*, 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); *Rosenberg v. University of Cincinnati*, 654 F. Supp. 774 (S.D. Ohio, 1986).

26. *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1989).

27. LaNoue and Lee, *supra* note 24.

28. *Kunda v. Muhlenberg College*, 463 F. Supp. 294 (E.D. Pa. 1978), *aff'd*, 621 F.2d 532 (3d Cir. 1980).

29. Hobbs, "The Courts," in *Higher Education and American Society* (P.G. Altbach and R.O. Berdahl, eds.), (1981); Lee, "Federal Court Involvement in Academic Personnel Decisions: Impact on Peer Review," 56 *J. Higher Educ.* 38 (1985).

30. For an analysis of heightened judicial scrutiny and its implications for academic employment practices, *see* Flygare, "*Keene State v. Sweeney*: Implications of Faculty Peer Review," 7 *J. Coll. & U.L.* 100 (1980–81).

31. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

32. State laws vary widely on the issue of whether faculty have access to peer review materials or, in fact, whether they have a statutory right to review any material in their personnel file. College attorneys generally maintain up-to-date information on personnel file legislation; faculty and administrators should check with the institution's counsel to ascertain whether the law gives faculty a right of access, and to what kind of information.

33. *Pennsylvania State University v. Comm., Dept. of Labor and Industry, Bureau of Labor Standards*, 536 A.2d 852, 113 Pa. Cmwlth. 119, *app. denied*, 546 A.2d 623 (1988). *See also Lafayette College v. Comm., Dept. of Labor and Industry, Bureau of Labor Standards*, 546 A.2d 126 (1988) (right to inspect internally-developed tenure reports and letters from external experts upheld under state open records law).

34. Blum, "Universities Where Tenure Candidates Can Review Their Files Say System Has Not Been Undermined," *Chronicle of Higher Education*, Feb. 14, 1990, A-19, A-21.

35. It would appear that, under the *Pennsylvania* ruling, the substance of telephone calls would also be discoverable if a plaintiff charged that information obtained through a telephone was relied upon to make a personnel decision.

36. Bednash, G. "Tenure Review Outcomes and Their Relationship to Open or Closed Tenure Review Processes." Unpublished Ph.D. dissertation, Ann Arbor: University Microfilms, International, 1989. The Supreme Court opinion in the *Pennsylvania* case cited Bednash's research as an example of institutions where disclosure of peer evaluations apparently did not compromise the quality of tenure decisions.

37. Begin, "Grievance Procedures and Faculty Collegiality: The Rutgers Case," 31 *Indus. & Lab. Relations Rev.* 295 (1978).

38. Lee, *supra* note 29.

39. Rule 26(c) of the Federal Rules of Civil Procedure permits a judge to issue a protective order to restrict the manner in which confidential information can be used by the opposing party.

40. M. Hopson, "Confidentiality and the Tenure Review Process after University of Pennsylvania v. EEOC." Paper presented at the annual conference of the National Center for the Study of Collective Bargaining in Higher Education and the Professions, April 1990.

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