

# Access to Faculty Personnel Files

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*The report that follows, approved in 1999 jointly by the Association's Committee A on Academic Freedom and Tenure and its Committee on Women in the Academic Profession (Committee W), is a briefer version of a report initially approved by the two committees in 1992, adopted by the Association's Council in June of that year, and endorsed by the Seventy-eighth Annual Meeting.*

Access by faculty members to their own personnel files and to the files of colleagues has been a significant issue for the academic profession. The long-standing practice on many campuses of confidentiality of such files has been tested by state "sunshine" laws, by court decisions requiring disclosure of personnel files in certain litigation situations, and by concern about racial and gender discrimination in faculty personnel decisions. The issue of confidentiality was perhaps most significantly highlighted in the 1990 decision of the United States Supreme Court in *University of Pennsylvania v. EEOC*, 493 U.S. 182. There, the Court unanimously held that the Equal Employment Opportunity Commission, investigating a charge of employment discrimination in violation of Title VII of the 1964 Civil Rights Act, is entitled to secure, through the issuance of a subpoena, faculty personnel files relevant to the case, including files of faculty members other than the complaining party. (The Court left unresolved the question whether the personnel files to be turned over to the agency might be in redacted form, i.e., edited so as to avoid disclosure of the identity of the evaluator.)

The Court in *University of Pennsylvania* rejected the university's claim that it had a privilege, rooted in the First Amendment and in more general notions of academic freedom, to shield such files against the agency's demands for disclosure. It held that the only limitations upon what had to be disclosed were those that usually obtain when enforcing administrative subpoenas, i.e., the relevance of the requested material and the burden to the defendant. Lower courts appear to agree that the same scope of discovery granted to the EEOC applies to actions brought under Title VII by private litigants.

In view of the ability of faculty members in many personnel disputes to have access to personnel files, through judicial or administrative directives, colleges and universities should give further attention to the question whether they should voluntarily make such files available through their own internal regulations, particularly those setting forth procedures for peer review by faculty committees. Committees A and W of the American Association of University Professors have considered the circumstances and conditions under which faculty members should be afforded access to their own personnel records and to the records of others. The attentions of the two committees were focused upon four questions. Although issues of access to personnel files may be raised in other situations, we believe that the answers to these questions deal with the central issues and provide guidance for other situations that might arise. This report, after recounting the four questions, will set forth "the case for openness" and "the case for confidentiality," and will summarize the conclusions of Committees A and W on each of the questions.

1. When, and in what form, should faculty members have access to materials in their own personnel files?
2. When, and in what form, should faculty members have access to general information about other faculty members, such as is normally contained in a curriculum vitae?
3. When, and in what form, should faculty peer-review committees have access to the files of faculty complainants and of other faculty members whose files are relevant for comparison?
4. When, and in what form, should faculty peer-review committees make available to a faculty complainant the personnel files of other faculty members?

## The Case for Openness

A central argument in support of greater access to faculty personnel files is that knowledge that one's evaluation of the work of a faculty member—whether at one's own institution or at another institution—might be accessible to that person will induce greater care and responsibility on the part of the commentator. The knowledge that one's assessment will be shielded from the scrutiny of the faculty member being discussed could encourage careless and unsubstantiated commentary. In too many instances, confidentiality has been known to foster invidiously discriminatory assessments. The AAUP's tradition of academic freedom and faculty governance relies upon a standard of professionalism that should enable faculty members to be willing to be held accountable for their judgments. To suggest that collegiality requires total secrecy would undermine this concept.

It can also be argued that affording a faculty member access to evaluations of his or her work is further justified by the great professional and personal consequences of decisions about reappointment, promotion, or tenure. Quite apart from cases of suspected discrimination, access could be a means of ensuring not only greater care in evaluation but also simple fairness to the faculty member being assessed, for that person is commonly in the best position to comment upon or to rebut the critical comments of others, whose judgment may be a product of misinformation, misunderstanding, or disciplinary bias.

Proponents of openness assert that the benefits of access to personnel files are particularly great in situations in which a faculty member claims to have been the victim of invidious discrimination in violation of law. The same would be true when a claim is made that norms of the academy have been violated because a faculty member has been punished for exercising academic freedom or because procedures have not afforded thorough or fair consideration of the faculty member's status.

Another important reason for greater openness derives from long-standing AAUP policies relating to the providing of reasons and peer review in certain cases of challenged personnel decisions. The AAUP has long supported the right of a faculty member to receive, upon request, a written statement of reasons for the denial of reappointment or tenure. AAUP policy has also long endorsed intramural review by an independent faculty body of allegations that a decision on faculty status has been tainted by violations of academic freedom or by invidious discrimination or resulted from inadequate consideration.

Thus proponents of openness argue that a faculty member's right to reasons is surely vacuous if there is no effective correlative right to ascertain whether those reasons are substantiated by materials in the faculty member's personnel file, including the assessments of faculty peers. Just as surely, it would seem, the role of peer review is undermined if a faculty committee impaneled to assess a colleague's claims relating to academic freedom, discrimination, or inadequate consideration—or institutional claims of inferior performance in teaching or scholarship—cannot have full access to relevant personnel information. In many such cases, relevant information will include not only assessments of the faculty complainant but also assessments of his or her colleagues, particularly those in the same discipline who are alleged by the complainant to have received preferential treatment.

Another basis for increased access is the decision of the Supreme Court in *University of Pennsylvania v. EEOC*. Faculty complainants have recourse to the courts and to administrative agencies for legal redress on a variety of contractual, statutory, and constitutional theories, and the likelihood is great that they will be able through litigation to secure discovery of relevant personnel materials, their own and in many cases those of faculty colleagues. The institution should therefore be willing to make such materials available voluntarily through intramural procedures. Doing so would help ensure that faculty grievances may be resolved fairly, expeditiously, and inexpensively without the felt necessity of initiating legal proceedings. Coincidentally, doing so would allow for primary emphasis upon resolution of such disputes, best suited to internal collegial assessment, where the AAUP would have them resolved—before faculty peer-review committees rather than before a judicial or administrative decision maker lacking in understanding of the values and criteria intrinsic to the academy.

Those who emphasize the values of confidentiality of faculty files argue that the objectives just articulated may be all but fully achieved by providing a faculty complainant or a faculty appeals committee with personnel information in either summary or redacted form. Summaries, however, will typically fail to capture the detail, nuance, and tone that are often of the greatest importance in conveying the writer's views and that must, in the interests of fairness and accuracy, be communicated to faculty members as well. Moreover, a serious issue may well arise as to the scholarly competence or objectivity of the person assigned the task of reducing personnel assessments to summary form.

Similar flaws, although perhaps of a somewhat lesser order of magnitude, may obtain when material is made accessible only in redacted form. Very often, the probative force of evaluative comments may be either enhanced by the scholarly credentials of the evaluator, or diluted or indeed altogether discredited by that individual's known scholarly (and in some cases even personal) biases. To delete information about the source of evaluative comments may serve to deprive an aggrieved faculty member and peer-review panels of much that might bear upon the weight of the faculty member's claim—that might show in some instances that the claim is particularly weak, but in others that it is quite credible.

### **The Case for Confidentiality**

Perhaps the most weighty argument in support of confidentiality of faculty personnel files is that such confidentiality is the only way to ensure complete candor in the evaluation of candidates for appointment, reappointment, promotion, and tenure. Honest evaluations are at the core of the personnel decision-making process and are indispensable to the quality of an academic institution. Evaluators, whether internal or external, who know that the faculty candidate (or contentious third parties) will have relatively unfettered access to evaluations are likely to be a good deal less candid in their assessments. Revealing the identity of evaluators along with their critical comments may bias the process toward letters of appraisal that are less reliable, and thus less useful.

Proponents of confidentiality see no justification for providing fewer safeguards of confidentiality to the comments of internal reviewers than to the comments of those at other institutions. The adverse impact of open access would be at least as great. Evaluations from within departments may be most seriously affected. Lack of confidentiality may either result in less-than-candid assessments, as already noted, or create the risk, at least as discomfiting, that candidly critical assessments will strain internal collegial relationships and seriously undermine morale and community.

Confidentiality as a safeguard for candid assessments of quality is not unique to personnel files; it characterizes other pertinent processes within the academy. For example, reputable university presses and peer-reviewed journals routinely rely upon confidential processes of evaluation. Even more pertinently, faculty deliberations that culminate in personnel decisions are all but universally conducted in private; and many institutions have secret ballots on such matters as a further means of ensuring uninhibited assessments.

The advocates of open access to personnel files, particularly for the aggrieved faculty member, must conclude that any sacrifice of candor is outweighed by a more urgent and pervasive need to uncover distortions and biases, whether intentional or inadvertent, by colleagues and extramural evaluators. The advocates of confidentiality, however, challenge this assumption of distortion and bias. They view it as incompatible with a paradigm of faculty professionalism that relies instead on faculty integrity, respect, collegiality, and self-discipline. Indeed, they view the AAUP's traditional commitment to academic freedom and faculty self-governance as ultimately founded upon such a paradigm.

This is not to say that confidentiality cannot be abused. Of course it can. It is only to argue that, on the whole, faculty members can and should be trusted to discharge their evaluative responsibilities with integrity and seriousness of purpose, that confidentiality will contribute to a freer, franker, and better process of evaluation, and that in the long run this benefit will outweigh the predictable costs of abuse.

It can be argued that even if this benign paradigm of professionalism is thought naive—or, more pertinently, even if it has unquestionably been shown to fail in particular instances of demonstrable discrimination (or violation of academic freedom)—it does not follow that we must discard all restraints upon disclosure of faculty personnel files. Although openness is a value, it is not an absolute value. Its desirability depends upon its impact on other significant values, such as privacy, collegiality, and the promotion of the general academic enterprise. The question, therefore, is one of balance. A far better balance might be struck through the endorsement of intermediate levels of disclosure. Such a balance would recognize the need to root out distortion and bias but would also honor traditional attributes of faculty professionalism.

Some advocates of confidentiality assert that most of the benefits of openness recounted above can be attained—without undue sacrifice of the benefits that derive from confidentiality—if faculty files were to be made available in redacted form. Others would go further and claim that the benefits of openness could be attained even if faculty files were to be made available not at any time on demand, but only in the case of an adverse personnel decision, and, in those cases in which it would suffice and can be done readily and fairly, through the preparation of summaries. Such forms of intermediate levels of disclosure would enable faculty members independently to review the basis for, and if desired to comment upon, personnel decisions that affect them.

Although proponents of confidentiality would concede that special situations arise in which claims of discrimination cannot be sustained without access to unredacted files, they would argue that these situations are infrequent when measured against the thousands of personnel decisions made on college and university campuses each year, and that these relatively rare occasions can in any event be easily accommodated by creating mechanisms to grant unredacted access in appropriate circumstances.

In keeping with the idea that confidentiality of files should be compromised only sparingly, and only in a manner carefully tailored to the exigencies of the case, one can surely make a stronger claim for access, in summary or redacted form, to the files of an aggrieved faculty member than for access to the files of third persons. Access by a faculty complainant to the files of colleagues presents the problems relating to candor and collegiality noted above, and it also creates new problems by impairing the colleagues' interests in privacy and by possibly engendering intramural divisiveness.

## Conclusions

1. *Committees A and W have concluded that faculty members should, at all times, have access to their own files, including unredacted letters, both internal and external.*

The committees determined that, for the reasons elaborated above in the section titled "The Case for Openness," such access promotes care and accuracy in evaluations, and also provides faculty members a fair opportunity to learn of and respond to critical evaluations. Such access is therefore likely to discourage evaluations that are based upon improper disciplinary, gender, or racial bias, and to facilitate access to proof of such bias. The identity of the writer should be known, because this information will be of pervasive importance in assessing the weight to be given to such evaluations. An individual who is uncertain whether grounds exist for contesting an adverse personnel decision cannot know if there is a basis for appeal unless he or she knows not only the official stated reasons for such a decision but also the substance of the letters of evaluation, internal and external, as well as their authorship.

2. *Committees A and W have concluded that a faculty member should be afforded access upon request to general information about other faculty members such as is normally contained in a curriculum vitae.*

The members of the two committees believe that faculty members should surely know as much about their colleagues as does the general public. Institutions of higher education gather curricula vitae from faculty members at regular intervals, often in the context of yearly salary reviews as well as in reviews for reappointment, tenure, and promotion. There is little reason not to share this information within the university commu-

nity when it is generally available. A wider distribution of this kind of material could benefit those who are unsure of how their work compares with that of others, and it could serve the larger good of keeping faculty members abreast of each other's work.

3. *Committees A and W have concluded that, for purposes of comparison, files of a faculty complainant and of other faculty members should be available in unredacted form to faculty appeals committees to the extent that such committees deem the information relevant and necessary to the fair disposition of the case before them.*

At the heart of AAUP policies regarding such core issues as academic freedom, due process, antidiscrimination, and faculty governance is the role of peer review committees in the appeal of adverse personnel decisions. It is essential that such committees, initially in deciding whether a faculty claim has sufficient merit to warrant a formal hearing, and subsequently in deciding at a hearing the relevance and weight to be given to various materials in faculty personnel files, be permitted to examine all materials that might arguably be relevant.

Those essential powers of faculty appeals committees would be untenably hobbled if an administrative official could unilaterally determine that certain materials are not relevant to a faculty claim, or that relevant materials are too sensitive to be reviewed by the committee in unedited form. Although there is always a risk that unedited sensitive material might be improperly "leaked" to the aggrieved faculty member or to others, Committees A and W believe that AAUP-recommended policies on disclosure should be shaped by an assumption of responsible and professional behavior by peer-review committee members.

Because relevance is the central criterion for access by a peer-review committee, it follows that in appropriate cases the committee should be afforded access to materials contained in the personnel files of faculty members other than the complainant. Such recourse to third-party files, however, is likely to be the exception rather than the rule; it will not likely be relevant in a wide variety of faculty grievances, including cases in which violation of academic freedom or inadequate consideration is alleged.

Committees A and W recognize that the practice on a significant number of campuses relating to disclosure to peer review committees is considerably more restrictive than that advocated here. Nonetheless, the recommendation of the committees is thought particularly warranted, for two reasons.

First, as already noted, a movement toward access for such committees is very much consistent with, if not indeed dictated by, core AAUP-recommended policies on faculty governance and peer review. Second, a faculty member whose appeal is markedly hampered by the committee's inability to secure meaningful access to materials (including relevant third-party materials) will often be able to secure such materials by pressing his or her case in an administrative or judicial forum; all parties would be better served—as would the concept of peer review—if comparable access could be secured through more expeditious and less expensive intramural procedures. (Relatedly, given the fact that personnel files are subject to discovery in formal legal proceedings, it is unlikely that their availability to peer-review committees under limited circumstances, as an effective alternative to or precursor of formal legal proceedings, would materially increase any inclination on the part of peer evaluators to be less than candid or to refrain from commenting altogether.)

4. *Committees A and W have concluded that a faculty appeals committee should make available to the aggrieved faculty member, in unredacted form and without prejudging the merits of the case, all materials the appeals committee deems relevant to the complaint, including personnel files of other faculty members, having due regard for the privacy of those who are not parties to the complaint.*

If a faculty appeals committee determines that certain material, even from third-party files, is relevant to the claims made by an aggrieved faculty member, there would normally be little or no justification for withholding that material from the faculty complainant pursuing intramural procedures. Indeed, it is difficult to contemplate a system

of academic due process and peer review in which a faculty complainant should be required to present his or her case while being denied an opportunity to examine material that the faculty hearing body has determined to be relevant to the case.

The wisdom of providing access in intramural proceedings is reinforced by the likelihood that most such material, because of the determination of relevance by a peer-review panel, would ultimately be discoverable in any event by the faculty complainant in a formal legal proceeding. Because the scrutiny of third-party files will ordinarily be regarded as relevant only in those cases in which discrimination is alleged, such cases are the most likely to generate agency or court directives to disclose such material.

Moreover, because Committees A and W also believe that such discrimination cases tend particularly to call for disclosure of the source of evaluations in order to assess the credibility or bias of the evaluator, they believe that such evaluations—including those relating to relevant faculty members other than the complainant—should be communicated to the complainant unedited and unredacted.

Given the importance of the privacy interests of the faculty members whose files might be turned over to an aggrieved colleague, Committees A and W emphasize that a claim of privacy for such files should be honored, barring a strong reason to the contrary. The only legitimate reason for not doing so is the need to use those files as comparators when judging whether a faculty complainant has been discriminated against or otherwise unfairly treated. The faculty appeals committee should have the authority to make the determination of reasonable need to disclose such information to a faculty complainant, and to take steps to minimize the risks of further disclosure.

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Committees A and W recognize that some colleges and universities, while willing to abide by most of the principles suggested in this report, would prefer to carve out an exception with regard to the disclosure of evaluations in unredacted form, especially if the evaluations were originally solicited under an explicit or implicit assurance of confidentiality. Even apart from the issue of redaction, we appreciate that the recommendations made here go beyond the practices regarding access to personnel files that are common in many colleges and universities. We believe, however, that the AAUP can make a contribution by setting forth the strong affirmative reasons that warrant such openness while urging institutions to move forthrightly in that direction.