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# James v. Ohio State University: Ohio Declares Promotion and Tunure Records of State-Supported Universities and Colleges Public Records Subject to Discloure

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## **JAMES V. OHIO STATE UNIVERSITY<sup>1</sup>: OHIO DECLARES PROMOTION AND TENURE RECORDS OF STATE-SUPPORTED UNIVERSITIES AND COLLEGES PUBLIC RECORDS SUBJECT TO DISCLOSURE**

Indeed, if there is a “smoking gun” to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files.<sup>2</sup>

### I. INTRODUCTION

Throughout our nation’s institutions of higher learning, professors teach, perform research and publish literature in the hopes of becoming a tenured faculty member. Typically, the decision to grant tenure<sup>3</sup> to a faculty member is decided through a peer review system. Many universities have suggested that the First Amendment protects the confidentiality of this process through the academic freedom doctrine. However, in *University of Pennsylvania v. Equal Employment Opportunity Commission*, the Supreme Court held that universities do not enjoy a First Amendment or common law privilege against disclosure of peer review materials.<sup>4</sup>

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1. 637 N.E.2d 911 (Ohio 1994).

2. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990) (Justice Blackmun utilized this reasoning in his landmark decision on access to peer review files).

3. In a recent case, the Second Circuit articulated five factors that make tenure decisions more difficult to review than other employment decisions:

(1) The lifelong commitment by university through tenure accentuates the importance of collegueship among professors.

(2) Tenure decisions are often non-competitive. An award of tenure to one individual does not necessarily preclude the tenure of another, whereas in other areas of employment, a decision to hire one person means a decision not to hire another.

(3) Tenure decisions are unusually decentralized, and there is greater deference given to the department’s position than in most employment decision-making processes.

(4) There are numerous factors that a school considers in tenure deliberations that are peculiar to the university setting.

(5) Tenure decisions are often a source of unusually great disagreement, and because opinions of a candidate are solicited from students, faculty members, and outside persons, tenure files are frequently composed of irreconcilable evaluations.

Elizabeth Kluger, *Sex Discrimination in the Tenure System at American Colleges and Universities: The Judicial Response*, 15 J.L. & EDUC. 319 (1986) (quoting *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92-93 (2d Cir. 1984)).

4. *University of Pennsylvania*, 493 U.S. at 182.

Recently, the Ohio Supreme Court in *State ex. rel. James v. Ohio State University*<sup>5</sup> faced the issue of whether tenure records are subject to disclosure under the Ohio Public Records Act.<sup>6</sup> Clearly, open access to an individual's tenure and promotion records has wide-ranging implications for the tenure process. The possibility of publicly accessible evaluations may force evaluators to be less candid in their comments, thereby depriving a university of the valuable information necessary to make informed tenure decisions. However, the court found unpersuasive Ohio State's<sup>7</sup> arguments that these documents fall under the confidentiality exceptions of the Ohio Public Records Act or that making them accessible would violate the academic freedom necessary to ensure a proper functioning of the tenure process.<sup>8</sup>

This Note will examine the national trend employed by different courts in dealing with the issue of access to peer review materials. Section II of this Note delineates the recent case law in university peer review cases. Next, Section III presents the statement of the case and details the impact of an action in mandamus. Finally, Section IV analyzes the Ohio Supreme Court's ruling in light of the University's arguments of academic freedom and the need for confidentiality.

## II. HISTORICAL BACKGROUND

### A. Academic Freedom

The issue of access to tenure files maintained by a university most often arises in discrimination suits brought by faculty who have been denied tenure.<sup>9</sup> Courts have attempted to define this issue against the backdrop of academic freedom, but the exact nature of this doctrine in relation to First Amendment rights remains undefined.<sup>10</sup> In *Sweezy v. New Hampshire*, the

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5. *James*, 637 N.E.2d at 911.

6. OHIO REV. CODE ANN. § 149.43 (Baldwin 1994 & Supp. 1995). See *infra* note 69 and accompanying text for further discussion of the Ohio Public Records Act.

7. Ohio State University hereinafter referred to as 'University'.

8. *James*, 637 N.E.2d at 913.

9. See Douglas Lederman, *Will Unlocking the Files Disrupt the Process?*, THE CHRON. OF HIGHER EDUC., Apr. 14, 1995, at A18. While most peer review cases involve discrimination suits brought by the EEOC, *James* dealt with an individual's desire to search for the reasoning behind why his application for tenure was not granted. See generally *James v. Ohio State Univ.*, 637 N.E.2d 911 (Ohio 1994). Professor James believed that inappropriate references and personal bias were shown toward his age during his tenure review. *Id.*

10. See Clisby Louise Hall Barrow, Note, *Academic Freedom and the University Title VII Suit after University of Pennsylvania v. EEOC and Brown v. Trustees of Boston University*, 43 VAND. L. REV. 1571, 1581-94 (1990) (this commentator provides background information

United States Supreme Court first recognized the importance of academic freedom as a means to protect the free flow of ideas on a college campus.<sup>11</sup> In support of its position, the Court delineated the essential freedoms it believed necessary for a university to function efficiently.<sup>12</sup> However, in recent decades, the Court has struggled to define the exact nature of academic freedom as a First Amendment right.<sup>13</sup> In *Regents of University of California v. Baake*, the Court described academic freedom as a special concern of the First Amendment.<sup>14</sup> This ideal was reiterated in *Keyishian v. Board of Regents* in which the Supreme Court stressed the importance of allowing a university to become “a marketplace of ideas,”<sup>15</sup> as its success depends upon a wide-open

on the concept of academic freedom and the impact this principle will have as courts decide the issue of public’s access to tenure review files).

11. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (establishing the “academic freedom” doctrine). This case involved a professor who refused to answer questions concerning the content of lectures he gave. *Id.* at 243-44. The court proposed the doctrine of academic freedom in the context of free speech, not to advance the independent institutional rights of the university. *Id.* at 250.

12. *Id.* at 262-63 (stating that the four essential freedoms of a university are “the right to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”). The opinion continues to describe the importance of academic freedom in stating:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straitjacket upon the intellectual leaders would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

*Id.* at 250.

13. Professor Lawrence Tribe proposed that while the Supreme Court has not yet recognized academic freedom as falling under first amendment protection, it has implicitly acknowledged its importance. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 813 (2d ed. 1988).

14. *Regents of University of California v. Bakke*, 438 U.S. 265, 312 (1978) (stating “[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”). Justice Powell’s opinion cited Justice Frankfurter’s ‘four essential freedoms’ as support for the autonomy of a university to select its student body. *Id.* at 318. Despite this reference, the principle of academic freedom has never been applied to justify a university’s institutional rights. *Id.* at 312. Academic freedom was developed in the context of the free speech rights of professors and students to exchange ideas on campus. *Id.*

15. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely teachers concerned. That freedom is therefore a special concern of First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discover truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’ (citations omitted).

debate of beliefs. For academic freedom to be applicable in peer review cases, the court must determine that it applies not only to content-based speech cases, but also to the decision-making procedures of a university.<sup>16</sup> In academic decisions, courts have historically exercised a certain degree of deference to a university's autonomy in deciding their own policies.<sup>17</sup> Academic freedom as a constitutional right offers a potential means to minimize judicial interference in a university's affairs.<sup>18</sup>

### *B. Peer Review Privilege*

One of the primary vehicles for protecting academic freedom in the peer review context is the creation of an evidentiary privilege for peer review materials.<sup>19</sup> Under Federal Rule of Evidence 501, privileges are to be determined on a "case-by-case basis."<sup>20</sup> Rule 501 recognizes five grounds for the creation of an evidentiary privilege: federal common law, the Constitution, federal statutes, Supreme Court rules, and state law.<sup>21</sup>

*Id.* See also *Adler v. Board of Education*, 342 U.S. 485, 511 (1952); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1979) (Douglas, J., dissenting) (acknowledging that all members of society, especially teachers, need constitutional thought).

16. See *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985). "Academic freedom not only protects the free uninhibited exchange of ideas among faculty and students; it also confers on the institution the right of autonomous decision-making in certain narrow areas where decisions are required to be made based on the "expert evaluation of cumulative information." *Id.* (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). This decision has been interpreted to mean courts should show respect to a university's faculty when reviewing decisions based on academic grounds. *Id.* at 227.

17. See Don Mark North, Note, *University of Pennsylvania v. EEOC: The Denial of An Academic Freedom Privilege*, 18 PEPP. L. REV. 213, 219 (1990) (providing a detailed discussion on the impact of the Supreme Court's decision in *University of Pennsylvania v. EEOC* and the attempt to create an academic freedom privilege).

18. See Lynda E. Frost, *Shifting Meanings of Academic Freedom: An Analysis of University of Pennsylvania v. EEOC*, 17 J.C. & U.L. 329 (1991) (providing a detailed analysis of judicial responses to the academic freedom doctrine).

19. *Id.*

20. FED. R. EVID. 501 states:

Except as otherwise required by the Constitution of the United States or provided by an act of Congress or in rules proscribed by the Supreme Court pursuant to statutory authority, the privilege of a witness . . . shall be governed by the principle of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

*Id.* See *Trammel v. United States*, 445 U.S. 40, 47 (1980). See also *In re Dinnan*, 661 F.2d 426, 429 (5th Cir. 1981) (stating privileges are based upon the idea that certain societal values are more important than the search for truth).

21. See David McMillin, Note, *University of Pennsylvania v. EEOC and Dixon v. Rutgers: Two Supreme Courts Speak on the Academic Freedom Privilege*, 42 RUTGERS L. REV. 1089, 1091 (1990) (providing discussion of grounds for evidentiary privileges). See also 8

Congress has attempted to offer some guidance on the issue of a peer review privilege. Originally, universities were excluded from Title VII coverage in the Civil Rights Act of 1964. However, Congress began to recognize that discrimination was occurring in university hiring decisions as well as in other parts of society. Congress considered the impact of these discriminatory practices and the effect it would have on college-age students.<sup>22</sup> In 1972, Congress reacted to these discriminatory practices by bringing universities within the reach of Title VII.<sup>23</sup> When amending Title VII, however, Congress failed to enact special rules or privileges in the academic context.<sup>24</sup> Gradu-

J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (McNaughton 1961 & Supp. 1991). A privilege is recognized when societal interests in disclosure of information is determined to be more important than discovery of the truth. Wigmore suggested four factors to determine if a privilege exists:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

*Id.*

22. See HOUSE EDUC. AND LABOR COMM., EQUAL EMPLOYMENT ACT OF 1972, H.R. Rep. NO. 238, 92nd Cong., 2d Sess. 20 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2155.

[D]iscrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.

*Id.*

23. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 190 (1990). Eight years after Title VII was enacted with an exemption for educational institutions, Congress amended the Act by specifically eliminating that exception. *Id.* This extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. *Id.* The House Report focused specifically on discrimination, including the lack of access for women and minorities in higher ranking (i.e. tenured) academic positions. *Id.* Opponents claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members. *Id.* One cannot seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption. *Id.*

24. McMillin, *supra* note 21, at 1102. When Congress amended Title VII in 1972 to eliminate the exemption of education-related institutions, Congressional opponents of this change argued that enforcement of anti-discrimination laws in the academic context would unduly damage the hiring and promotion decision process in higher education. *Id.* at 1109. However, Congress enacted no special rules for the application of Title VII in an educational context. *Id.* See also Equal Employment Opportunity Act of 1972, Pub. L. No.92-261, Sec.

ally, the academic freedom granted to a university to operate its own affairs has eroded, and the courts have evaluated a university on the same criteria as any other employer.<sup>25</sup>

In *EEOC v. University of Notre Dame du Lac*, the Seventh Circuit developed a qualified privilege for peer review materials provided by confidential evaluators.<sup>26</sup> Under this qualified privilege, an agency must demonstrate a 'particularized need' for relevant information in order to gain access to redacted materials.<sup>27</sup> Such a qualified academic privilege should balance the need for confidentiality in appraising a candidate and the benefits of disclosure to employees seeking evidence of discrimination.<sup>28</sup> The Seventh Circuit believed that the interests fostered by creating a qualified privilege outweighed the interests served by greater disclosure and would, in this case, safeguard the relationships it was designed to protect.<sup>29</sup>

In comparison, the Third Circuit rejected the principle of a qualified privilege.<sup>30</sup> The court spurned the confidentiality and first amendment concerns of the university and held that nothing beyond a showing of "mere relevance" is needed to gain access to confidential peer review files.<sup>31</sup> This holding was extended in *In re Dinnan*, where even the vote of a faculty member was held to be discoverable.<sup>32</sup> Thus, under this view, the academic freedom interests of a university are not implicated when discriminatory

3, 86 Stat. 103 (1972) (codified at 42 U.S.C. Sec. 2000e-1 (1988)).

25. Susan L. Pacholski, Comment, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. CHI. L. REV. 1317, 1325 (1992) (providing an assessment of the impact removal of the Title VII exemption from educational institutions has had on discriminatory suits brought when a professor is denied tenure).

26. 715 F.2d 331 (7th Cir. 1983) (holding that "disclosure of some of the contents of peer review files would assist judicial progress toward ending discrimination, promote the proper functioning of EEOC investigatory powers, and academic excellence, which is fostered when disclosure roots out discriminatory decisions.").

27. *Id.* at 338.

28. *Id.* at 337.

29. *Id.* at 336 ("The process of peer evaluation has evolved as the best and most reliable method of promoting academic excellence and freedom.").

30. *EEOC v. Franklin & Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986). The court held that:

"In the face of the clear mandate from Congress which identified and recognized the threat of unchecked discrimination in education, we have no choice but to trust that the honesty and integrity of the tenured reviewers in evaluation decisions will overcome feelings of discomfort and embarrassment and will outlast the demise of absolute confidentiality".

*Id.* at 115.

31. *Id.*

32. *In re Dinnan*, 661 F.2d 426, 429 (5th cir. 1981).

practices in hiring may have occurred.<sup>33</sup> Courts will not provide a higher degree of protection to academic peer review materials than to any other non-privileged, but confidential communications.<sup>34</sup>

Another approach, used in *Gray v. Board of Higher Education*,<sup>35</sup> has been to apply a balancing test to determine the right of access to peer review materials. The “*Gray*” balancing test employed a “fair opportunity” standard, that is less stringent than the “particularized need” element of the qualified privilege doctrine.<sup>36</sup> This test balances the professor’s need for the information in his or her tenure files against the school’s concern for the confidentiality of its evaluations.<sup>37</sup> When the Supreme Court faced the issue of access to peer review files, it did not apply or explicitly overrule the *Gray* balancing test.<sup>38</sup> Therefore, the *Gray* test may still be argued by universities as a means to analyze this issue.

These various responses to claims for a qualified academic privilege led the Supreme Court to hear the case of *University of Pennsylvania v. EEOC*.<sup>39</sup> A professor at the University claimed that she was refused tenure based upon

33. *Franklin & Marshall*, 775 F.2d at 115. The court balanced the public’s interest in “the vital truth-seeking function of our justice system” against the need to protect the academic freedom of the University. *Id.* The court held that academic freedom interests were not implicated where a decision about terms and conditions of employment was challenged as having been made on other than academic grounds. *Id.*

The court continued to state:

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.

*Id.* at 117.

34. *Keynes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977). *See also* *Branzburg v. Hayes*, 408 U.S. 665 (1972) (refusing to extend a privilege of confidentiality to a news reporter to conceal his source of information, despite the implication that this would inhibit the freedom of the press under the First Amendment).

35. 692 F.2d 901 (2d Cir. 1982).

36. *See* Mary Delano, *Discovery in University Employment Discrimination Suits: Should Peer Review Materials Be Privileged?*, 14 J.C. & U.L. 121, 135 (1987) (providing an analysis of the cases which argue the necessity of an academic peer review privilege).

37. *Gray*, 692 F.2d at 901.

38. *See* *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990).

39. *Id.* In *University of Pennsylvania v. EEOC*, a female professor of Asian descent was denied tenure, despite her belief that she held better qualifications than five male professors who received more favorable treatment. *Id.* at 185. To substantiate her claim, she sought access to the chairman’s letter of evaluation, along with the materials in other professors’ tenure files. *Id.* at 186. Without these materials, she believed she would not have the information upon which to base a comparison between herself and other candidates and proving her pretext would be hopeless. *Id.*



her gender.<sup>40</sup> In order to substantiate her charges of discrimination, the professor sought access to the University's tenure files.<sup>41</sup> The Supreme Court declined to find either a common law or First Amendment privilege to maintain the confidentiality of peer review materials in university tenure decisions.<sup>42</sup>

When considering the possible harm to the tenure process, the Supreme Court held that allowing the documents to be accessible would not cause evaluators to be less candid in their comments.<sup>43</sup> The Court stated that the University's First Amendment right to academic freedom was "remote and attenuated."<sup>44</sup> Justice Blackmun further stated that the Court is inclined toward restraint in using its authority to create or expand privileges where Congress has previously considered the issue.<sup>45</sup> The University's need for academic freedom in maintaining the confidentiality of its peer review files must give way to the victim's right to the evidence which may substantiate a charge of discrimination.<sup>46</sup> The Court found a difference between the right to academic freedom in content-based speech cases versus the need for academic freedom in maintaining the confidentiality of university files.<sup>47</sup> The Court concluded that the University was seeking an expanded doctrine of academic freedom, which would increase the University's power to control its own affairs.<sup>48</sup> The University's arguments failed in this case because the governmental action was neither an attempt to control the content of academic speech nor a direct infringement on the right of the University to select its own faculty.<sup>49</sup> Hence, the Supreme Court reinforced Congress' belief that higher education

40. *Id.*

41. *Id.*

42. *Id.* at 182.

43. *Id.* at 200-01. The Supreme Court stated:

[f]inally, we are not so ready 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. . . .

*Id.*

44. *University of Pennsylvania*, 493 U.S. at 200.

45. *Id.*

46. *Id.*

47. *Id.* at 198-99. The typical university academic freedom case dealt with content of speech engaged in by the university or those affiliated with it or involved direct infringements on the asserted right to determine for itself on academic grounds who may teach. *Id.*

48. *Id.* The University was seeking an expanded right of academic freedom where discovery would not be permissible because it conflicts with the University's right to academic freedom. *Id.*

49. *Id.* at 198-201.

cannot expect special treatment in matters of employment discrimination.<sup>50</sup>

### III. STATEMENT OF THE CASE

#### A. Facts

William Calvin James, an assistant professor at The Ohio State University, applied for tenure in the Department of Geology. After receiving a 13-3 positive vote by the faculty of his department, James' tenure application was turned down at the College level.<sup>51</sup> On February 9, 1994, James requested a copy of the Chairperson's letter of evaluation in his tenure file under the Ohio Public Records Act, O.R.C. 149.43.<sup>52</sup> The University responded by stating "that documents that reveal the name and identity of an information source who has been promised confidentiality are not considered public under the Act."<sup>53</sup> Professor James then expanded his request to include all information in his tenure file, his fourth year review file, the tenure files for the last six years from the Department of Geological Sciences and the promotion and tenure files for the College of Mathematical and Physical Sciences for the last three years.<sup>54</sup>

The University responded by offering James a redacted version of his own file, but refused access to other files as an "unreasonable and inappropriate request for use of public records."<sup>55</sup> The University would permit James to see confidential materials, but only if he wrote to and received permission from the corresponding sources.<sup>56</sup> James reacted by writing a memorandum spelling out the reasons he believed the school's claims of confidentiality were unfounded.<sup>57</sup> The University continued to stand by its position that James could only view a redacted version of his file or attempt to seek permis-

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50. Eileen N. Wagner, *Tenure Committees, Take Heed: University of Pennsylvania v. EEOC Should Change the Way You Proceed*, 64 EDUC. L. REP. 979 (1991).

51. See Brief for Relator at 3, James v. Ohio State Univ., 637 N.E.2d 911 (Ohio 1994) (No. 94-833) [hereinafter referred to as *Brief for Relator*]. See also Lederman, *supra* note 9. In discussing his case, Professor James stated "I felt I had a right to know why a very positive decision at the department level was reversed at the dean's level. I felt the process had been secret too long, and I thought something should be done about it." *Id.*

52. Brief for Relator, *supra* note 51, at 3.

53. Brief for Respondent at 4, James v. Ohio State Univ., 637 N.E.2d 911 (Ohio 1994). (No. 94-833) [hereinafter referred to as *Brief for Respondent*].

54. See Brief for Relator, *supra* note 51, at 4.

55. *Id.* at 4.

56. *Id.*

57. *Id.* at 5.

sion from the letter writers.<sup>58</sup> Also, the Chairperson's letter would be unavailable due to its confidential nature.<sup>59</sup> On March 15, 1994, James examined his file and found numerous redactions from the text as well as many missing documents.<sup>60</sup>

These developments caused Professor James to seek access to all promotion and tenure files at the University for the last three years, along with all documents related to the restructuring program at the school.<sup>61</sup> The Associate Provost forwarded the restructuring materials, but referred the request for access to the tenure files to the school's legal department.<sup>62</sup> The legal office responded by stating that James only had a right to view a redacted version of his own file and not any other file on record at the University.<sup>63</sup>

### B. *Mandamus Action*

Under the Ohio Public Records Act, the proper recourse in seeking access to a public record is a writ of mandamus compelling a state agency to provide access to the records requested.<sup>64</sup> If the state agency wishes to deny

58. See Brief for Relator, *supra* note 51, at 5-6.

59. *Id.* at 6.

60. *Id.*

61. See Brief for Relator, *supra* note 51, at 6-7.

62. *Id.* at 7. Associate Provost Nancy Rudd referred James' request for all tenure files at the University to the legal office.

63. *Id.* at 8-9. The University's counsel believed that it did not have to comply with James requests for the following reasons:

(1) [T]he release of promotion and tenure files to persons other than the relevant candidates themselves could violate those candidates' and their evaluators' constitutional right of privacy.

(2) Ohio's Public Records Statute provides an express exception for documents and information that would reveal "[t]he identity of an information source to whom confidentiality has been reasonably promised."

(3) The Public Records Statute does not contemplate that any individual has the right to a complete duplication of the voluminous files kept by governmental agencies.

(4) The University therefore holds that the requests are improper and the University does not have to comply with them.

*Id.*

64. Ohio Public Records Act specifies that:

If a person allegedly is aggrieved by the failure of a governmental unit to promptly prepare a public record and to make it available to him for inspection in accordance with division (B) of this section, or if a person who has requested a copy of a public record allegedly is aggrieved by the failure of a person responsible for it to make a copy available to him in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgement that

access to the requested records, it must offer evidence as to why access to the record in question should not be granted.<sup>65</sup> Under the Act, an original action to compel a state agency to disclose its records may be commenced in the Ohio Supreme Court, under Section 2 of Article IV of the Ohio Constitution.<sup>66</sup> Mandamus actions are employed when a court decides that the plaintiff has a clear legal right to relief.<sup>67</sup> This typically occurs when there is no adequate remedy at law available and the defendant has a clear legal duty to perform the requested act.<sup>68</sup>

### C. *The Ohio Supreme Court's Opinion*

In a 7-0 decision, the Ohio Supreme Court held that the promotion and tenure records of state-supported institutions of higher learning are "public records" subject to public record disclosure requirements.<sup>69</sup> The court held that the University's arguments for a confidentiality exception did not fall within the language of the statute.<sup>70</sup> The University argued that an evaluator is the equivalent of "an information source or witness to whom confidential-

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orders the governmental unit or the person responsible for the public records to comply with division (B) of this section and award reasonable attorney's fees to the person that instituted the mandamus action.

OHIO REV. CODE ANN. § 149.43 (Baldwin 1994 & Supp. 1995).

65. *Id.*

66. OHIO CONST, art. IV, § 2, (B)(1) (1994). The supreme court shall have original action jurisdiction in the following type of actions: (a) quo warranto, (b) mandamus, (c) habeas corpus, (d) prohibition, (e) procedendo, (f) in any cause on review as may be necessary to its complete determination. *Id.*

67. *State ex rel. Plain Dealer Publishing v. Lesak*, 457 N.E.2d 821, 822-23 (Ohio 1984).

68. *Id.* at 823.

69. *James v. Ohio State University*, 637 N.E.2d 911 (Ohio 1994). Justice Craig Wright wrote the majority opinion, joined by Justices A. William Sweeney, Pfeifer, Francis E. Sweeney, Resnick and Douglas. *Id.* at 913. Justice Moyer concurred in syllabus and judgement only. *Id.* at 911.

70. *See* OHIO REV. CODE ANN. § 149.43 (Baldwin 1994 & Supp. 1995) stating:

Confidential law enforcement investigatory records means any record that pertains to law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) the identity of a suspect who has not been charged with the offense to which the records pertain or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose his identity.

*Id.*

ity has been reasonably promised” under O.R.C. 149.43(A)(2)(a) and (b).<sup>71</sup> However, the court pointed out that the University’s interpretation ignored the “confidential law enforcement investigatory records” limitation to the exception under O.R.C. 149.43(A)(2).<sup>72</sup> Although the University argued that their external evaluators believed that their letters were written in confidentiality, a memo by the provost on this subject contradicted their position.<sup>73</sup> This memo provided notice to evaluators that the confidentiality of their letters could not be assured in light of the Ohio Public Records Act.<sup>74</sup>

Furthermore, the court concluded that the University’s academic freedom argument failed for the same reason the United State Supreme Court rejected this argument, when that Court considered whether tenure files were discoverable by the EEOC in a Title VII investigation.<sup>75</sup> The issue before the court was not whether the “university was permitted to decide on academic grounds who receives tenure, but whether the *records* of those decisions are public records.”<sup>76</sup> It appeared contradictory for the University to argue the need for academic freedom, while it promoted a procedure of maintaining the unavailability of secret files even to the person who is the subject of the evaluation.<sup>77</sup>

Even if the court was convinced that the disclosure of tenure records would be detrimental to the tenure process, it held that the General Assembly in O.R.C. 149.43 had already specified the records that were exempt.<sup>78</sup> To interpret the Public Records Act differently would be a public policy consideration which is not the court’s purpose.<sup>79</sup> Previously, in *State ex. rel. Multimedia v. Whalen*, the Ohio Supreme Court determined that the General

71. *James*, 637 N.E.2d at 911.

72. *Id.*

73. *Id.* Senior Vice President and Provost for Academic Affairs Sisson sent a memo to the persons involved in the tenure procedure entitled REMINDERS AND SUGGESTIONS. In this memo, Provost Sission stated:

*Confidentiality:*

While it is the policy of the Ohio State University to maintain confidentiality regarding access to letters of evaluation from both within and outside the university, the Ohio Public Records Act does not exempt such materials from the law at present. Nonetheless, every effort should be made to limit access to these letters only to persons directly involved in the promotion and tenure review process. External evaluators should be informed of Ohio State’s policy and its standing under the Ohio Public Records Act.

*Id.* at 912.

74. *Id.*

75. *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990).

76. *James*, 637 N.E.2d at 913.

77. *Id.*

78. *Id.*

79. *Id.*

Assembly, in enumerating very narrow and specific exceptions to the public record statute, had already considered the competing public policy considerations.<sup>80</sup> The General Assembly favored the public's right to know how its state agencies make decisions over the potential harm imposed on a state agency by disclosure.<sup>81</sup>

#### IV. ANALYSIS

##### A. Ohio Public Records Statute

Under O.R.C. 149.43, all public agencies must make their records available for disclosure in order to allow the public to monitor their activities.<sup>82</sup> In previous cases on this subject, universities have been defined as "public offices."<sup>83</sup> Also, under O.R.C. 149.011(b), a state-supported institution of higher education is considered a state agency.<sup>84</sup> In addition, a public record is "any record that is kept by a public office."<sup>85</sup> These records include "any documents under the jurisdiction of a public office which serve to document the functions, policies, decisions, procedures, operations, or other activities of the office."<sup>86</sup>

The University agreed that it is a "state agency" under O.R.C. 149.011.<sup>87</sup> However, it contended that its tenure files were not subject to disclosure pur-

80. *State ex rel. Multimedia v. Whalen*, 549 N.E.2d 167 (Ohio 1990). In this case, a television station demanded a tape recording of a police shooting under O.R.C. 149.43(B). The Court held that the General Assembly had already weighed the competing interests in open records cases and created exemptions where it believed were necessary. *Id.* See also *infra* notes 76-87 (discussing the General Assembly's position on exceptions to the Ohio Public Records Act).

81. *James*, 637 N.E.2d at 913-14.

82. *Id.* at 913 (citing public considerations which are beyond the judiciary's authority).

83. See e.g., *State ex rel. Toledo Blade v. University of Toledo Foundation*, 602 N.E.2d 1159 (Ohio 1992); *State ex rel. Halaby v. Board of Directors of University of Cincinnati*, 123 N.E.2d 3 (Ohio 1954).

84. OHIO REV. CODE ANN. § 149.011 (b) (Baldwin 1994). See *infra* note 88 and accompanying text for further discussion.

85. OHIO REV. CODE ANN. § 149.43(A) (Baldwin 1994 & Supp. 1995).

86. See Brief for Relator, *supra* note 51, at 9.

87. *James v. Ohio State University*, 637 N.E. 2d 911 (Ohio 1994). See also O.R.C. 149.011(b) which states that:

"State Agency" includes every department, bureau, board, commission, office or other organized body established by the constitution and laws of this state for the exercise of any function of state government, including any state-supported institution of higher education, the general assembly, or any legislative agency, any court or judicial agency, or any political subdivision or agency thereof.

OHIO REV. CODE ANN. § 149.011(b) (Baldwin 1994).

suant to the exceptions in O.R.C. 149.43(a)(2)(a), (b).<sup>88</sup> The statute exempts "records the release of which is prohibited by state or federal law."<sup>89</sup> In fact, under federal law, the U.S. Supreme Court has declined to find either a common law or First Amendment right to keep peer review materials confidential in tenure decisions.<sup>90</sup> Previous Ohio case law has promulgated the rule that exceptions to disclosure are to be "strictly construed" against the custodian of public records and doubt should be resolved in favor of disclosure.<sup>91</sup> The burden to establish an exception to disclosure rests on the custodian of the public records.<sup>92</sup> Thus far, the only situation in which the Ohio General Assembly has extended confidentiality in an educational setting is to student information contained in public school files.<sup>93</sup>

Under O.R.C. 149.43, any person seeking discovery of public records should be permitted access without stating a reason for their request.<sup>94</sup> Similarly, the Supreme Court in *University of Pennsylvania v. EEOC* held that requiring the EEOC to demonstrate a specific reason for disclosure would hinder the commission's attempt to prove discrimination.<sup>95</sup> Other state courts have followed this approach when determining whether to allow an examination of peer review files. For example, the New Jersey Supreme Court followed the Supreme Court's position when it stated that "a plaintiff need not demonstrate a particularized need for the materials in order to gain access to them."<sup>96</sup> The balancing of conflicting interests in the tenure review process

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88. *Toledo Blade Co. v. University of Toledo*, 602 N.E.2d 1159, 1164 (Ohio 1992). The court in this case held that:

It is the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizens' right to keep private certain information that becomes part of the records of public offices. The General Assembly has done so, as shown by numerous statutory exceptions to R.C. 149.43(b) found in both the statute itself and in other parts of the Revised Code.

*Id.*

89. OHIO REV. CODE ANN. § 149.43 (a)(1) (Baldwin 1994 & Supp. 1995).

90. See Brief for Relator, *supra* note 51, at 12.

91. *State ex rel. Plain Dealer Publishing Co. v. Lasak*, 457 N.E.2d 821, 823 (Ohio 1984).

92. *State ex rel. Natl. Broadcasting Co. v. Cleveland*, 526 N.E.2d 786, 791 (Ohio 1988) (Celebreeze, C.J., concurring).

93. OHIO REV. CODE ANN. § 3319.321(a) ("No person shall release, or permit access to, the names or other personally identifiable information concerning any students attending a public school to any person or group for use in a profit-making plan or activity.").

94. *State ex rel. Fant v. Enright*, 610 N.E.2d 997, 998 (Ohio 1993). See also Gary Elson Brown, *The Right to Inspect Public Records In Ohio*, 37 OHIO ST. L.J. 518 (1976) (providing a detailed description of the legislative history of Ohio's Public Records Statutes).

95. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990).

96. *Dixon v. Rutgers*, 541 A.2d 1046, 1057 (N.J. 1988) (holding that New Jersey does not require an individual to demonstrate a particularized need for materials in order to gain access to them).

lies as a legislative function. The standard of relevance to gain these files should be “virtually any material that might cast light on the allegations against the employer.”<sup>97</sup> The benefit of viewing a significant number of personnel files without limitation provides a plaintiff with the necessary context to determine if discrimination has occurred.<sup>98</sup> Therefore, any attempt to limit access to peer review materials will be struck down, because it hinders the plaintiff’s opportunity to compare his or her case to other candidates.<sup>99</sup>

### B. “Chilling Effect” on Tenure Process

One of the primary arguments offered by universities as to why these records should remain confidential is that candid evaluation of the candidate is needed in order for the tenure process to be effective.<sup>100</sup> Although such discovery may expose an evaluators’ comments, a writer can substantiate his or her evaluation by articulating on academic grounds their judgment of a candidate.<sup>101</sup> However, by exposing an evaluator’s written words, the tenure process could be driven underground to verbal communications between the

97. EEOC v. Shell Oil Co., 466 U.S. 54, 68-69 (1984) (holding that “it is the court’s responsibility to satisfy itself that the charge is valid and that the material requested is relevant to the charge.”). “More generally, the court should assess the contentions made by the employer to ensure that the demand for information is not too indefinite or has been made for an illegitimate purpose.” *Id.*

98. Wagner, *supra* note 50. The meaning of academic freedom has changed based upon the different contexts in which courts have applied this doctrine. *Id.* To ensure that the tenure process is effective, opinions of a candidate should be based in fact and not just on a personal opinion of a candidate. *Id.* at 981.

99. Dixon, 541 A.2d 1052. (“Courts recognize that even in academic settings a plaintiff may show preferential or disparate treatment by comparing his or her credentials with those of other faculty member.”).

100. See Lederman, *supra* note 9, at A18. In the article, an assistant professor at Ohio State discussed an evaluation letter where he described another professor as “on par with some, but not quite as good as others.” *Id.* In wake of the James decision, the professor reassessed this letter by stating “At the very least, I’d probably write a very different kind of letter. A critical letter could do a lot of damage to collegiality in a relatively small field like linguistics. I work with these people.” *Id.* Another administrator comments that “the process depends on lots of people giving their best informed judgement, and writing the truth. If they have to worry not only about whether this information is true, but how it’s going to look in *The Chronicle*, it’s going to make this process less reliable.” *Id.* at A19.

101. EEOC v. Franklin & Marshall College, 775 F.2d 110, 115 (3d Cir. 1985); *In re Dinnan*, 661 F.2d 426, 434 (5th Cir. 1981) (stating that: “in the face of the clear mandate from Congress which identified and recognized the threat of unchecked discrimination in education, we have no choice but to trust that the honesty and integrity of the tenured reviewers in evaluation decisions will overcome feelings of discomfort and embarrassment and will outlast the demise of absolute confidentiality.”). These feelings of embarrassment in evaluating a colleagues work can be overcome by articulating on academic grounds one’s judgement of a candidate. *In re Dinnan*, 661 F.2d at 434.



members of the tenure committee.<sup>102</sup> In other words, a candidate's file may contain positive written comments, but the "grapevine" could work to deny a candidate tenure with no evidence of the basis for this decision.

Some doubt exists as to the importance of the confidential tenure review process because "confidentiality is not the norm in all peer review systems."<sup>103</sup> Justice Blackmun stated in *University of Pennsylvania v. EEOC* that structuring the tenure process to restrict open debate and inquiry seems contradictory to the academic freedom doctrine.<sup>104</sup> A confidential process restricts open debate, because it confines relevant information to a limited group of people. A more open procedure with participants offering evidence to support their opinions would be more harmonious with the academic purpose of a university.<sup>105</sup>

In addition, many universities contend that the right to privacy protects confidential evaluations from disclosure. However, professors at state universities, like other state employees, generally do not possess expectations of confidentiality in most personnel matters.<sup>106</sup> Therefore, state faculty members cannot be considered to have a "right of privacy" when the records are being reviewed by a multitude of faculty.<sup>107</sup>

Furthermore, Ohio does not have a state law right of privacy which would prohibit the release of records to the public.<sup>108</sup> Recently, Ohio has reaffirmed the right to unredacted copies of requested records in *Thomas v. Ohio State University*.<sup>109</sup> In this case, the court has expanded the right of

102. Dennis Kelly, *Tenure Ruling Has Universities Wary*, USA TODAY, Jan. 16, 1990, at 4D. The article offered the predictions of Ernst Benjamin, the general secretary of the American Association of University Professors. *Id.* Mr. Benjamin states that "less in the files . . . more phone calls, more use of grapevine; really illicit means." *Id.* This result may occur because evaluators will become increasingly fearful that their written words may lead to lawsuits when a candidate fails to receive tenure. This will lead to less recorded documentation by tenure review committees. *Id.*

103. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 199-201 (1990) (Justice Blackmun did not believe peer reviewers would shy away from offering candid evaluations in tenure decisions, he stated "not all academics will hesitate to stand up and be counted when they evaluate their peers.").

104. *Id.* at 199.

105. Frost, *supra* note 18, at 329 (discussing the effects of opening the tenure review process).

106. *State ex rel. National Broadcasting Co. v. Cleveland*, 526 N.E.2d 786 (Ohio 1988).

107. *See* Brief for Relator, *supra* note 51, at 11.

108. *See e.g. State ex rel. Toledo Blade Co. v. University of Toledo*, 602 N.E.2d 1159 (Ohio 1992); *State v. Bundy*, 485 N.E.2d 1039 (Ohio 1985); *State ex rel. Dispatch Printing Co. v. Wells*, 481 N.E.2d 632 (Ohio 1985).

109. *State ex rel. Thomas v. Ohio State University*, 643 N.E. 2d 126 (Ohio 1994) (holding that the O.R.C. 149.43 required the University to release the names and work addresses of research scientists employed at the University).

access to school's records, despite the threat of criminal conduct by the individuals seeking access to the files.<sup>110</sup>

### C. Redaction

One issue which remains unaddressed by the federal courts is the right of a university to redact names and information before releasing confidential peer review materials.<sup>111</sup> The Supreme Court, in *University of Pennsylvania*, did not rule out the possibility of redacting certain information from one's file.<sup>112</sup> In *EEOC v. University of Notre Dame*, the Seventh Circuit allowed that university "to redact the name, address, institutional affiliation and any other identifying feature."<sup>113</sup> The only means to obtain this redacted information would be a showing of "particularized need," which requires factual proof of a compelling necessity for specific information.<sup>114</sup> In its evaluation of a peer review privilege, the Supreme Court declined to determine whether it is permissible to redact information from peer-review documents prior to making them public.<sup>115</sup>

In *Dixon v. Rutgers*, a threshold test was proposed to balance the interests involved in disclosure of peer review documents.<sup>116</sup> Other courts have

110. *Thomas*, 643 N.E.2d at 128 (Respondent in this case advocated the adoption of a balancing test similar to the test employed by the Freedom of Information Act which is the federal counterpart to O.R.C. 149.43). 5 U.S.C. § 522(b)(G) allows federal agencies to withhold information contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Thomas*, 643 N.E.2d at 129. Pursuant to this FAIA exemption, the court must balance the privacy interest of the individual against the public interest in disclosure. See also *Department of Air Force v. Rose*, 425 U.S. 352 (1976). However, the FAIA does not apply in this situation, and O.R.C. 149.43 does not contain any similar personal-privacy provisions. *Thomas*, 643 N.E.2d at 129.

111. McMillin, *supra* note 21, at 1089. Redaction procedures may result in causing the harm they are designed to avert, "discouraging candid evaluations by a tenure candidate's peers." *Id.* at 1101. Evaluators may be discouraged to avoid discussion of specific situations that may lead to identify them in event that evaluation is discoverable. *Id.* at 1118.

112. *Id.* at 1116.

113. 715 F.2d 331, 338 (7th Cir. 1983).

114. *Id.*

115. See *Frost*, *supra* note 18, at 345 n.185 for a discussion of the benefits of redacting material from peer review materials.

116. *Dixon v. Rutgers*, 541 A.2d 1046, 1061 (N.J. 1988) (O'Hern, J. concurring). Justice O'Hern proposed a set of threshold factors he would recommend to trial courts in determining whether to grant discovery:

- (1) the extent to which disclosure will impede the university's functions by discouraging academics from providing information to the university;
- (2) the effect disclosure may have on persons who have already given such information, and whether they did so in reliance that their identities would not be disclosed;

employed Federal Rule of Civil Procedure 26 to authorize redaction of certain material.<sup>117</sup> Under this rule, courts may redact identifying language from peer review files, thus allowing evaluators to remain anonymous.<sup>118</sup> However, redacting some information may not provide a complete profile to determine what the tenure decision was based upon.<sup>119</sup> Justice Blackmun addressed this point when he stated “indeed, if there is a ‘smoking gun’ to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files.”<sup>120</sup> If an alleged perpetrator of discrimination could decide what statements to redact, then access to peer review files would be fruitless.<sup>121</sup> For example, a former tenured professor at the Ohio State University commented that “evaluators fear they could be sued if someone sees their file and feels the evaluator’s letter was responsible for the professor not getting tenure, thus damaging his or her career.”<sup>122</sup> Whether evaluators will still provide candid comments amidst this type of environment does not seem likely in light of the consequences of a negative comment.

In this case, James believed that access to all other files in the Univer-

(3) the extent to which university evaluations and promotion and tenure decisions will be chilled by disclosure;

(4) the degree to which the information sought includes factual data as opposed to subjective evaluations;

(5) whether any subsequent circumstances have circumscribed the candidate’s need for the materials.

*Id.* at 1062.

117. FED. R. CIV. P. 26(C). See *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 n.9 (1990) (The Supreme Court not addressing whether university may redact information from peer review files). In an earlier case, the court employed a Rule 26(c) protective order to deny access to peer review material. See *Keynes v. Lenior Rhyne College*, 434 U.S. 904 (1977).

118. FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .”).

119. *EEOC v. Franklin & Marshall College*, 775 F.2d 110, 117 (3d Cir. 1985).

Clearly an alleged penetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary to an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memoranda which the college seeks to protect. Likewise, confidential matters pertaining to other candidates for tenure in a similar time frame may demonstrate the persons with lesser qualifications were granted tenure or that some pattern of discrimination appears. The peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision.

*Id.* at 116.

120. *University of Pennsylvania*, 493 U.S. at 193.

121. *Franklin & Marshall*, 775 F.2d at 117.

122. Alan D. Miller, *Colleges Wince at Ruling*, COLUMBUS DISPATCH, Sept. 2, 1994, at 1E.

sity would allow him to gain information on how other applicants handled the appeals process and to provide a context in which to see what qualifications successful tenure applicants possessed.<sup>123</sup> The University refused this request along with James' request to view the Chairperson's evaluation letter.<sup>124</sup> In comparison, courts have allowed even the vote of a tenure committee member to be discoverable.<sup>125</sup> For example, in *In re Dinnan*, the Fifth Circuit held that no privilege exists which can protect from discovery the vote of a member of a faculty promotions committee.<sup>126</sup> Due to the importance of the information which may be redacted, it appears unlikely that courts will allow any deletion of materials from tenure files.<sup>127</sup> However, since the Supreme Court left this issue unsettled by its decision in *University of Pennsylvania*, state laws may vary on the constitutionality of redacting information from peer review files.<sup>128</sup>

### CONCLUSION

The Ohio Supreme Court in *James* expands the public's right of access

123. Lederman, *supra* note 9, at A1. "Before this law, I would not have known how I was evaluated and how others were evaluated, and I wouldn't have seen the inconsistencies. It gave me the information I needed to know how I had grounds to challenge." *Id.* See also *Franklin & Marshall*, 775 F.2d at 112. The Supreme Court in *University of Pennsylvania v. EEOC* endorsed the decision of *Franklin & Marshall* where comprehensive subpoena included significant number of personnel files. See generally *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990).

124. See *supra* notes 61-62 and accompanying text for further discussion.

125. *Schneider v. Northwestern University*, 151 F.R.D. 319, 323 (N.D. Ill. 1993) (ruling that the University must identify the professor's peer reviewers and provide her with the unredacted version of her file). The standard employed by the court weighed the confidentiality and relevancy interests involved for each evaluator. *Id.*

126. *In re Dinnan*, 661 F.2d 426, 427 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982). The court held that:

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 decisions 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.

*Id.*

127. *Wagner*, *supra* note 50, at 979. This commentator states:

That redaction seems unlikely, especially where subtle comparisons are to be made in an attempt to fit individuals into the various patterns inferring discriminatory intent. Comparisons, from which statistical patterns are found, must piece together evidence of past remarks, past critiques, general attitudes or other pertinent facts about the scholars involved. Without the scholars' identities, such comparisons would be impossible.

*Id.*

128. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 n.9 (1990).

to tenure files to unprecedented levels. Now, schools which obtain peer review materials while evaluating a professor for tenure must keep these files as "public records." Instead of hindering a university's right to academic freedom, the ruling in this case ensures the accountability of administrators in their decision making. The Ohio Supreme Court rejected the University's claims that their constitutionally protected right to academic freedom was being violated for the same reasons articulated by the Supreme Court in *University of Pennsylvania v. EEOC*.<sup>129</sup> The disclosure of documents in one's tenure file does not infringe upon the academic freedom of a university to make tenure decisions based upon academic grounds.

For peer review files to be included in the confidentiality exceptions of the Ohio Public Records Statute, the General Assembly must enact these exemptions. The court and the university cannot offer a cloak of secrecy to the tenure process, when our laws have promoted the public's right to know and hold accountable our public officials.<sup>130</sup> This ruling has made tenure records open not only to the candidate, but to any member of the public who desires to view them. This openness should guard against abuses in a subjective system which decides the fate of an individual's career.<sup>131</sup>

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129. See *infra* notes 39-48 and accompanying text.

130. Editorial & Comment, *Welcome Ruling: University Promotion, Tenure Records Open*, COLUMBUS DISPATCH, Sept. 11, 1994, at 2F.

The Dispatch believes the system can and should work in an atmosphere of openness, though that will make some people uncomfortable. Public money and the caliber of public education are on the line when tenure decisions are made. In the long run, the accountability of public-university officials to the tax-paying citizens of Ohio should be enhanced.

*Id.*

131. Presently, Ohio State and Interuniversity Council, which represents Ohio public colleges, are lobbying state lawmakers to exempt tenure files, patent applications, and four other kinds of university records from the Public Records Statute.