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Erring on Confidentiality

In the wake of recent hiring issues, the University has instituted a confidentiality requirement for persons serving on search committees. This requirement, which has had an uneven roll-out, is currently manifest in a "Confidentiality Agreement for Search Committee Members" that appears to exist in different forms for different searches.

Important historical context:

- The level of confidentiality now required for all searches (internal as well as external) aspires to that which has historically been accorded upper-level administration searches (such as president and provost).
- The document replicates the fundamental problem of the "CONFIDENTIALITY UNDERSTANDING" select staff and administration were expected to sign last year.
- On May 6, 2021, Senate unanimously passed a resolution to rescind the "CONFIDENTIALITY UNDERSTANDING."
- The President, in a verbal conversation with the Executive Council of the Senate, stated the "CONFIDENTIALITY UNDERSTANDING" would be rescinded. Days later, in a report to Staff Congress, CFO Fister-Tucker stated that she and GC Fitzpatrick had been charged, by the President, with redrafting the understanding.
- The then-President (now the Communications Officer) of Senate informed Staff Congress of Senate actions (and the President's agreement) after the CFO's report.

What necessitates this new level of confidentiality?

The administration has not provided a clear or compelling reason. If there is some deficiency in the training search committees have previously received, or if there is some loophole in PG-61 (the outline of the ethical codes and principles that apply to all employees), that has not been openly stated or rectified.

Are we just following standard practices of confidentiality used in hiring practices at other institutions in the Commonwealth?

No. Several Kentucky schools have processes and enumerated guidelines openly available for review, and steps outlined in those openly available documents cover processes and information that our internal documents designate "confidential."

Why are faculty and staff concerned?

Like the "CONFIDENTIALITY UNDERSTANDING," this new "agreement" is overly broad, vague, and allows for viewpoint discrimination. It too imposes prior constraint on a campus members' ability to discuss business deemed (by the administration) "nonpublic," and it infringes on the whistleblower protections afforded all public employees in the Commonwealth. (Note: this articulation of problems is language is taken directly from the Senate resolution to rescind the "CONFIDENTIALITY UNDERSTANDING.")

This document also *threatens punishment*. Signatories are obliged to acknowledge: "I understand that if I breach any of these confidentiality obligations or fail to act in a professional manner, I may be subject to disciplinary action."

What is the prior constraint?

Item #4 of the "Confidentiality Agreement" states:

> I agree to maintain absolute confidentiality of all discussions of the Search Committee and/or hiring supervisor, both during the search process and after its completion. I understand that any breach of confidentiality could result in considerable damage to the reputations and/or livelihoods of the candidates, the Search Committee members, and the University.

This "absolute" does not allow members to report hiring infractions or problems in the process. Item #7 (#8 in another draft), in fact, requires members to affirm "that only the Search Committee chair or the hiring supervisor is authorized to speak on behalf of the Search Committee."

Why is this so concerning?

There is no mechanism for reporting or complaint outside of the ultimate authority of the designated chain of command. All roads of recourse lead back to item #1: "I understand that the role of this Search Committee is to recommend candidates to the hiring supervisor who has the ultimate authority to select a candidate of choice."

- Given this, why even bother with a search committee?
- This document guards and protects the reputations of supervisors without guaranteeing the whistleblower rights of employees.

Might this problem of prior constraint be an oversight that could be rectified with more thorough review in the drafting process?

Perhaps, but we are now on *multiple* rounds of confidentiality understandings and agreements, and the persons in charge of drafting enforceable documents continue to

produce final products with unforced errors.

- Might the problems we institutionally ascribe to a lack of confidentiality really result from a lack of administrative accountability?

What are other unforced errors or problems with this document?

Two examples are items #8 and #10.

Number 8 (#9 in another draft) lays out consequences of a breach of confidentiality:

> I understand that I may be removed from the Search Committee if I breach any of these confidentiality terms and conditions or fail to act in a professional manner. I also understand that should I be removed from the Search Committee, all terms of this agreement are still applicable and binding.

- What mechanisms are in place to ensure that an employee, seemingly bound in perpetuity to an undefined designation of professionalism (determined via administrative edict), will not be subject to intimidation, harassment, or punishment, all in consequence of perceived infractions of a process that cannot be made public?

Number 10 (which is not included in this form in all versions) is without a proper subject:

> I understand that if an applicant progresses in the interview process to a campus visit with the department/unit/office, the fact that this person applied becomes public knowledge. This neither negates the above confidentiality protocols regarding the applicant nor the applicants who are not moved forward. Does not negate the confidentiality protocols of this agreement.

- What "does not negate"?
- And why are employees expected to understand and affirm that which is not specified?

What chilling effect have we already seen in response to open Faculty Senate discussions of hiring?

A faculty person who raised concerns about hiring practices was repeatedly asked to have a "conversation" with supervisors. When the "conversation" occurred, the member was read a statement that was said to reflect the views of the academic supervisors (present), university counsel (not present), the head of HR (not present), and the provost (also not present).

The statement took umbrage with specific comments in the Faculty Senate Communications report dated December 2, 2021. Four specific claims were identified and contested. One particular claim—which involved the faculty member's criticism of administrative action—was described as defamation.

After being accused of giving an "impression. . ., in public, that the university is not making sound decisions about hiring based on arbitrary information," the member was told:

> The university has revised the confidentiality agreement that search committee members must sign before participating in searches to make these issues clearer, but they also apply to other university employees who are not actually serving on search committees, so we wanted to make sure we were on the same page about our obligations here.

The faculty member was further informed this meeting was "not a disciplinary hearing," but the meeting was nonetheless recorded in a memo, cc'd to the upper administration. This memo, and any such like it, could conceivably be added to the faculty member's personnel file.

The statement—read *in private* to an isolated individual (note: the individual's request to have an AAUP representative present *was denied*)—gives the impression that all employees are currently bound by restraints that the administration has yet to make public. There is no indication when, or if, this information would be rendered legible to all the persons purportedly bound by this administratively defined "agreement." There is also no explanation as to why a signed agreement is necessary for injunctions that purportedly apply to all, regardless of signatory status.

What is the path forward?

An open discussion with clear and consistent articulations of *necessary* rules and regulations for university governance, not cloistered conversations of confidentiality that chill free speech and foster fear. Our obligation here is to guard and protect the ***common good*** of our ***public*** institution.

So, what we need is true shared governance, not confused oversight that suggests punitive surveillance such as this:

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