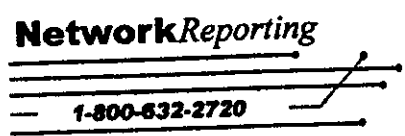


1 that were refused to him based upon institutional policies;
 2 correct?
 3 MR. SERYAK: Let me object to the form and vagueness
 4 of the question.
 5 Q Go ahead.
 6 A **As I read this, I view this as having two requests about**
 7 **two sources of information -- this is reading from the**
 8 **bottom of page 2 -- a request of our conversation with**
 9 **colleagues, and the second about the contents of the**
 10 **personnel file that he's requesting under the Right to Know**
 11 **Act.**
 12 Q And the personal -- personnel file information included the
 13 tenure decision and the reviews and so forth, did it not?
 14 I mean, he wasn't --
 15 A That --
 16 Q He wasn't just asking for his salary and appointment?
 17 A **Correct. He was clearly asking for the written record of**
 18 **documents that were the basis for the tenure decision.**
 19 Q And you were giving Jeff Lehman your input on his request
 20 in the top half of this page 1; correct?
 21 A **That is correct.**
 22 Q And this is June 4th of 2002, so it's actually more than
 23 three months since he was starting to contact individuals
 24 trying to get information about the votes; correct?
 25 A **That seems correct.**

1 talk to them, and there was a question about what could be
 2 revealed to Peter in light of the long-standing norm of
 3 confidentiality. And Jeff eventually wrote an e-mail to
 4 the entire tenured faculty, I surmise, that purported to
 5 offer his view as to what would be appropriate and what
 6 would not be appropriate.
 7 Q And without having that e-mail in front of us, would it be
 8 fair to say that from your critique of it that he was not
 9 instructing the faculty not to share their views of Peter's
 10 scholarship, citizenship, and teaching with him, but,
 11 rather, to refrain from sharing their vote or the votes of
 12 others with him?
 13 A **That is my recollection and it is consistent with what we**
 14 **discussed earlier, that the idea would be people could go**
 15 **share with Peter their view of the case; again, so long as**
 16 **they didn't reveal their own bottom line. But not to**
 17 **reveal who else said what on the faculty floor, in what**
 18 **order, and what was discussed, what was not discussed.**
 19 Q Now, in your letter to Jeff Lehman, there -- at least
 20 responding to what Peter had said in his initial e-mail in
 21 this series -- there seem to have been some confusion about
 22 whether or not faculty members were going to be allowed to
 23 share their own beliefs and assessments of the merits of
 24 this case. Do you see that? About two-thirds of the way
 25 down in the first paragraph?

1 Q Yeah. The Malamud e-mail is the earliest, and that was the
 2 26th of February as you recall?
 3 A Okay.
 4 Q In here, in your e-mail to Jeff Lehman, you indicate at the
 5 bottom of page or paragraph 1, quote, I also think there
 6 are no, quote, copies of institutional policies, closed
 7 quote, governing our confidential norms -- confidentiality
 8 norms other than perhaps the e-mail you sent out to the
 9 entire faculty about this. Do you see that?
 10 A **I see that.**
 11 Q Is that to say that there is no written policy that you're
 12 aware of that requires the tenured faculty to maintain as
 13 confidential the vote that was taken on a tenure vote?
 14 A **That is clearly the long established norm. I am not aware**
 15 **that it is written as part of the tenure standards.**
 16 Q Or anywhere else in writing?
 17 A **I'm not aware of it being anywhere else in writing.**
 18 Q And you refer to an e-mail that Jeff Lehman sent out to the
 19 entire faculty?
 20 A **Correct.**
 21 Q What was that e-mail, do you recall?
 22 A **I don't recall the exact date, but there was a point in**
 23 **time at which enough people had contacted Jeff, and we've**
 24 **already gone over some of these communications, saying that**
 25 **either they want to talk to Peter or Peter has asked to**

1 A **I do not see a reference to confusion, I'm sorry.**
 2 Q Okay. It's starting at about -- let's see -- one, two,
 3 three, four, five, six, seven lines down, the end of that
 4 line.
 5 "But the confidentiality norms you described to the
 6 faculty did not place such an Institutional
 7 restriction. I thought you made it clear that
 8 individuals could share their own beliefs and
 9 assessments of the merits, so long as they did not
 10 reveal to Peter their actual vote."
 11 A **I see that, yes. So, I'm sorry. Maybe I missed the**
 12 **question.**
 13 Q Well, I guess my question is: At least at the time that
 14 you wrote this to Jeff Lehman, you had some awareness, did
 15 you not, that there might be some confusion on the
 16 faculty's part over what the instruction had been regarding
 17 what they could share with Peter and what they could not
 18 share?
 19 MR. SERYAK: Well, I'm going to object to the lack of
 20 foundation as to what the other faculty may have thought.
 21 MR. GREEN: I'm talking about his awareness.
 22 A **That's not my recollection. Peter -- in the line before**
 23 **Peter seems to be describing these institutional**
 24 **restrictions as if it restricted their ability to share**
 25 **their own beliefs and assessments.**



1 **A** And my present recollection is that at that point in time I
 2 would have contacted the internal and the external
 3 reviewers -- reviewers as to whether they would be
 4 comfortable releasing letters in that process to help Peter
 5 get a job. And so I assume that I'm referring back to here
 6 is that I'm now writing to somebody who, in response to
 7 that earlier inquiry, would have said something like, "No,
 8 no, no, no. I care about confidentiality."
 9 **Q** Right. So when you say, I assume, based on your earlier
 10 conversations, you're referring back to conversations
 11 dealing with whether or not external and internal letters
 12 could be used as references in Peter's job search?
 13 **A** That's my present recollection.
 14 **Q** Okay. Now, some of the external reviewers consented to
 15 their letters being disclosed and/or used in a job search;
 16 correct?
 17 **A** That is correct.
 18 **Q** Einer Elhaug did not as I recall?
 19 **A** I believe that's correct.
 20 **Q** Did anyone else refuse? Any other external reviewer
 21 refuse?
 22 **A** I'm sure the answer is "yes." I know that the letters --
 23 the quantity of letters we produced, I think, was only a
 24 subset of the entire set of letters.
 25 **Q** In this letter that -- I'm sorry, this e-mail that you send

1 Lehman's?
 2 **A** Can I take just a moment?
 3 **Q** Sure.
 4 (Witness confers with counsel)
 5 **MR. GREEN:** It involves privilege?
 6 **MR. SERYAK:** Go ahead. Well, right. Go ahead and
 7 answer it.
 8 **Q** You don't have to if it involves privilege.
 9 **MR. SERYAK:** I just don't want it to waive the
 10 privilege; that's all.
 11 **MR. GREEN:** Understand.
 12 **A** There -- I know I had had a conversation with both Jeff
 13 Lehman and Dan Sharporn about this process.
 14 **Q** Okay. And it was subsequent to that conversation that you
 15 decided to inform faculty that there would be a reordered
 16 disclosure?
 17 **A** That is correct.
 18 **Q** All right. Now, we know that in June or so, I think it
 19 was, you first contacted -- it may have been May,
 20 actually -- you first contacted the various reviewers to
 21 see whether they had objections to the letters being used
 22 as references to third parties where Peter was applying?
 23 **A** I don't remember the exact date, but some place in that
 24 time frame, yes.
 25 **Q** Yeah. I think -- I think the e-mails indicate that it was

1 back to whoever the correspondent is -- at the end of your
 2 first paragraph you indicate, "All of this would be
 3 discoverable in litigation, of course, and FOIA, with it's
 4 nation-wide application, might also require some
 5 disclosure, too." Was that your way of telling the
 6 external reviewer in this instance that perhaps while
 7 sincere in its commitment to maintain the confidentiality
 8 of the review, you understood that in litigation that it
 9 would be disclosed?
 10 **A** Well, let me clarify in the sense that I'm now -- I'm not
 11 sure and I don't think I was actually sure at the time that
 12 this really would have been, in fact, discoverable. What I
 13 should have probably said was subject to a discovery
 14 request. But, yes, the gist of what you said is accurate;
 15 that I -- I might basically be saying that -- that we
 16 should really say, we, the Law School will not voluntarily
 17 do anything to compromise confidentiality, but there may be
 18 other legal obligations that impose a duty.
 19 **Q** Okay. And shortly after this was when the decision was
 20 made to re-order the contents of the various reviews in
 21 such a way that Peter would not be able to identify the
 22 authors of the different documents would be fair?
 23 **A** That's correct. I seem to be referring in this e-mail to
 24 my decision to do so, yes.
 25 **Q** Okay. And was it your decision to do so or was it Jeff

1 sometime in May.
 2 **A** Okay.
 3 **Q** And we know that in early July, from the e-mail we looked
 4 at a moment ago, you were sending out a form e-mail asking
 5 people if they minded disclosing the content of their
 6 review to Peter either in redacted or reordered form?
 7 **A** Correct.
 8 **Q** All right. That's the exhibit you have in front of you as
 9 the form e-mail that was sent out?
 10 **A** Correct.
 11 **Q** And at some point then you e-mailed people to tell them
 12 that you were going to reorganize the contents of these in
 13 such a way as to try and obscure the identity of the
 14 reviewers, and I guess just for your edification, I think
 15 the e-mail was July 15th, it appears to be?
 16 **A** Yeah, I -- as to the specifics, you may have to refresh my
 17 recollection, but I do not -- I believe it is the case that
 18 I sent an e-mail to everybody.
 19 **Q** Yeah. Why don't we --
 20 **A** This clearly sends it to the one person.
 21 (Mr. Coley exits)
 22 **MR. GREEN:** Why don't we mark this so that the record
 23 is complete?
 24 (Deposition Exhibit 20 marked)
 25 **Q** And this is the Deposition Exhibit 21.