

Minutes\*

**Academic Freedom and Tenure Committee  
Friday, September 13, 2013  
10:00 – 12:00  
238A Morrill Hall**

Present: Carl Flink, Karen Miksch (co-chairs), Phil Buhlmann, Arlene Carney, Jerry Cohen, William Craig, Teresa Kimberley, Jessica Larson, Gary Peter, Scott Petty, Paula Rabinowitz, Nicole Scott, Nathan Shippee

Absent: David Born, Barbara Elliott, Brad Karkkinen

Guests: none

[In these minutes: (1) welcome, introductions, review of committee charge, and issues pending; (2) graduate student international travel for research; (3) Minnesota Government Data Practices Act (MGDPA) requests and scholarly work]

**1. Welcome, Introductions, Review of Committee Charge, and Issues Pending**

Professor Flink convened the meeting at 10:00, welcomed everyone to the first meeting of the year, and announced that he and Professor Miksch had agreed that he would chair the meetings during fall semester and she would chair the meetings during spring semester. Professor Miksch noted that the Committee co-chairs also serve as ex-officio members of the Senate Committee on Faculty Affairs; she will attend those meetings during the fall and Professor Flink will attend them in the spring.

Following introductions, Professor Flink reviewed the Committee's charge (during which he emphasized that this Committee does not deal with individual disputes and that if such disputes come to Committee members, they should be referred to the Office for Conflict Resolution or the Senate Judicial Committee—and told Committee members they were free to refer people with question to him or to Professor Miksch and they will make sure that they are referred to the right venue).

Professor Flink turned to the list of issues pending; Committee members commented on them.

-- College personnel policy and statement on philosophy of TTT/NTTT faculty (including adjuncts): Vice Provost Carney noted that University administrative policy requires colleges to prepare personnel plans identifying personnel who deliver instruction (so it does not include research appointments); last year this Committee and the Senate Committee on Faculty Affairs appointed a joint subcommittee to review the policy; there will be a report later in the semester. The policy sets a limit on the percentage of non-tenured/tenure-track faculty who may deliver instruction (25%) and colleges must file and receive approval for a supplemental plan if the percentage exceeds 25%; one question is whether this one-size-fits-all approach is appropriate.

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\* These minutes reflect discussion and debate at a meeting of a committee of the University of Minnesota Senate; none of the comments, conclusions, or actions reported in these minutes represents the views of, nor are they binding on, the Senate, the Administration, or the Board of Regents.

-- Section 10 procedures: Professor Miksch recalled that section 10 deals with, among other things, unrequested leaves of absence for reasons of disability; the Committee is drafting procedures to make the process more transparent (e.g., when faculty members should register with Disabilities Services).

-- Section 12 procedures: Professor Kimberley reported that section 12 deals with programmatic change, and while the language on tenured faculty is clear, there is need for clarification on procedures for dealing with tenure-track faculty members. Dr. Carney said that tenure-track faculty have the same rights as tenured faculty and are eligible for re-training; one question is the extent to which they want re-training, which some of them may not. Professor Miksch said that some phrases in section 12 are not defined and the Committee would like to develop definitions. Professor Rabinowitz said that one impetus for the tenure battle in the mid-1990s was the possibility of changing the locus of tenure to the unit level; Dr. Carney and other Committee members assured her that that is not the intent of establishing procedures for section 12.

-- Statement on handling promotion-and-tenure materials: Professor Flink said this item arose because there is a wide variation in the procedures departments use to handle promotion-and-tenure files that are often sensitive (e.g., having undergraduate students make copies of the files); the Committee will develop a statement on procedures to be followed.

-- FOIA requests & impact on scholarship is on the agenda today.

-- Annual review of tenured faculty re: goals and expectations (What do CIC schools do? What do the deans think? The 4-year review of associate professors generated much discussion last year; the Committee will review the procedures for reviewing tenured faculty.

-- ITRAAC (going to FCC) will be taken up today.

-- Statement on graduate student academic freedom appeals: Mr. Petty reported that the Council of Graduate Students hosted a focus group and asked graduate students about their concerns in order to help develop policy. Professor Miksch recalled that the Committee had found that graduate students are clearly covered by the Regents' policy *Academic Freedom and Responsibility* but had nowhere to turn if they felt their rights had been violated. Because it is unacceptable to have rights without a remedy for their violation, the Committee wants to act thoughtfully to develop a policy or structure to deal with this gap. Professor Flink observed that the structure of this Committee has evolved, with the addition of P&A staff and graduate students because they do much University work and are affected by issues of academic freedom. The difficulty now is that a graduate student can appeal to a Director of Graduate Studies in a department, Professor Buhlmann noted, but there is no higher-level committee to which a student can appeal.

-- Data requests (with SCFA; headcount, FTEs, trends, TTT/NTTT faculty, etc.): this Committee and the Senate Committee on Faculty Affairs have appointed a joint subcommittee to develop data (e.g., personnel numbers) so that everyone can agree on them and so, Dr. Carney added, the Office of Institutional Research will know what reports it needs to produce every year.

-- Academic freedom protections and academic responsibility implications of social media postings (FB, Twitter, etc.); higher education issues in social media: There has been extended discussion about University policies and social media and the implications for academic freedom. The discussions

continue but the Committee is not moving toward proposing any policy language; this is a large and moving target, Professor Flink commented, and the University has yet to provide an umbrella policy covering the use of social media.

-- Analysis of 7.12 statements: Dr. Carney reported that there is an individual working the analysis and looking at how departments implemented the 2007 changes in the tenure policy and the language the 7.12 statements contain on such matters as interdisciplinarity, diversity, public engagement, mentoring, and so on.

-- Interpretation of "compensation" in order that future discussions of changes in benefits either are or are not covered by various sections of the tenure policy: The issue is whether it should be construed to include fringe benefits or if it is only salary, Professor Flink said, and the question is important when issues of changes to benefits and the need to take "compensation" reductions arise.

-- Public engagement issues (publicly-engaged work in faith-based organizations and credit in P&T and merit decisions for publicly-engaged work): Professor Flink said these issues are on a number of agendas and that Associate Vice President Furco will join the Committee later in the fall with specific questions that require the Committee's advice or recommendation.

-- Technical changes to the tenure policy (and, from AF&T 9/6/12: It was agreed that certain missing references in the tenure regulations (for the SJC Rules of Procedure) could be handled by an Interpretation from this Committee until there are other amendments to the regulations that are needed): A few accumulated errors in the tenure policy can now be corrected without asking the full Board of Regents to approve them. The Committee will forward them to the provost for discussion with the Board office.

-- Template letter to external reviewers for P&T files: Every unit that solicits external review letters does so in its own way, Professor Flink said, and there is wide variation in how they do so. Dr. Carney said that the letters cause so many procedural errors that they are not worth the problems (e.g., they may mis-describe the Minnesota Government Data Practices Act and the availability of external review letters to candidates). The Committee will work with Dr. Carney to develop a template letter with certain language required.

-- Indirect costs/the financial system and potential tension with academic freedom (also a public engagement issue if publicly-engaged research is not approved or less valued because of low F&A rates): Professor Flink explained that some grants bring in funds to cover the University's administrative costs, while others do not, particularly, although in no way exclusively, in the areas of the arts and humanities. The Committee needs to consider whether a lack of Facilities and Administrative (F&A) funding from a granting agency reduces the likelihood such grants will be approved—and thus threaten academic freedom. It may be that the University should have a pool of funds that could be drawn on for grants that carry no F&A funding. Professor Cohen noted that grants lacking F&A rates can't be characterized by discipline and that even within departments, some grants have F&A funds while others do not. There is also a large variation in departments across a college.

Professor Rabinowitz asked that the Committee consider taking up privacy, given the revelations about the National Security Agency snooping and Google, now that the University has switched to Google for email. This is bound to be an issue and the Committee should know what the contract with

Google contains. Professor Flink said he would ask the General Counsel's office to designate someone to speak with the Committee.

## **2. Graduate Student International Travel for Research**

Professor Flink turned to the proposed revisions to the policy "Education Abroad Opportunities: Addressing Health and Safety Risks." He explained to new Committee members the history of the proposed amendments. The Committee is comfortable with the idea that undergraduate students going abroad need broader University oversight but there are trickier issues with graduate students who are doing their own research and who might need to travel to risky places to do it. The Committee believes that if there is a process in place that impedes doing research in risky locations, it has a quieting effect on academic freedom. The Committee has talked with a number of administrators and faculty members over the last two years and decided to divide graduate students into two populations: (1) Those who take courses overseas as part of their curriculum should, along with undergraduate students, fall under the aegis of the International Travel Risk Assessment and Advisory Committee (ITRAAC). ITRAAC is responsible for approving education abroad opportunities when they would take place in areas of risk, and (2) those graduate students who propose to do field research abroad. The Committee proposes a significant change to the policy: a graduate student's adviser and department chair may approve travel to risky locations, and ITRAAC would be asked for an advisory opinion—but would not have authority to approve or disapprove the travel.

When he and Professor Miksch brought the proposed changes to the Faculty Consultative Committee (FCC), FCC members were uneasy with the idea that only two people, inside the graduate student's department, could make the decision. FCC suggested adding one more layer of review, outside the department, and suggested the dean. The goal, Professor Flink said, is to create a space that is more respectful of colleges and departments, who are the experts in the area and should know the risks of traveling in their field.

Professor Cohen took issue with the proposition that the units should know more about the risks of travel to locations of importance to a discipline; in the case of interdisciplinary programs, which dean knows more is a question. He also noted that there is no "department chair" in many interdisciplinary programs. He suggested that the Director of Graduate Studies replace the department chair, because every program has a DGS. In the case of interdisciplinary programs that report to two deans, it would be possible to have a dean quite removed from expertise in a field and two students from the same program, on the same track, could receive different answers to request to travel abroad to risky locations.

Professor Rabinowitz inquired what happens if a student travels to a risky location without University approval. Professor Miksch explained that someone doing that would lose their status as a graduate student, would lose financial aid, would not be considered enrolled, and would not be covered by University protections. Professor Flink recalled that the Committee heard from ITRAAC members that it has only rejected one proposal, so it is not an activist body, but the point made by members of the Political Science faculty is that graduate students are deflected from the process and that timing can be a problem.

The Committee voted unanimously to revise the language to require approval by the graduate student's adviser and the program DGS and to provide that in the case of interdisciplinary programs that

are part of more than one college, the deans of the colleges will decide how to make decisions when requests arise under the policy.

### **3. Minnesota Government Data Practices Act (MGDPA) Requests & Scholarly Work**

Professor Miksch next led a discussion with the Committee about MGDPA requests, scholarly work, and the need for a scholarly privilege; she reported that this topic is also part of her scholarly work as a faculty member in higher education and the law. The question arose especially following the request by Wisconsin legislators for copies of all the emails of certain faculty members. The question before the Committee (and the Research Committee) is "whether we want to propose a resolution to the Faculty Senate encouraging the Minnesota Legislature to include a scholarly privilege in the Minnesota Data Practices Act?"

Professor Miksch said she is supportive of sunshine laws, which the MGDPA is, which across the country provide a wide range of openness. The Minnesota law is about in the middle of the range. She said that sunshine laws "promote democratic action via open meetings and access to records/data, make government accountable, [and] avoid corruption," and that researchers have found "strong support for sunshine laws throughout higher education." These laws can make processes more time-consuming and less efficient but the balance is toward openness. The scholarly question is whether people will be as candid in research and discussions if someone has access to work before it is published.

The first question in Minnesota is whether it is data, Professor Miksch said; she provided the statutory definition: "Data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media or conditions of use." She noted that the University of Minnesota is considered a "state agency" under state law. The definition of data includes email and text messages as well as social media postings if they are work-related. Those who request data under the law need not be Minnesota residents nor do they need to give a reason for the request; agencies may impose a charge for copies if the request is expensive to fulfill.

The second question is whether or not data are public. The University allows private use of email and electronic storage, Professor Miksch pointed out, so if the content is private as defined by the law, it is not public and thus not accessible to those seeking data. However, if the data are work related, they are considered "government data" under the law.

The third question is whether any exemptions apply, Professor Miksch said. Federal law exempts student records and health records; those are private, although which student records are private is becoming hotly contested (e.g., student cell phone numbers on a coach's cell phone were not considered private in a recent case in North Carolina). State exemptions include data that are purely private, donor lists, personnel files (but tenure files are available to the individuals and to those who must make decisions about promotion and tenure), and trade secrets. These exemptions are common in most state laws.

Professor Miksch next asked about "weaponization" of data requests; does purpose matter? What if "purpose" of request is a fishing expedition, or to harass, or to hinder a particular research project or program? Minnesota law does not require that a requestor state a purpose. She said that "when a court is required to **balance** a benefit conferred upon the requestor or the public to access **against** the harm

created by access, the court **might** consider the purpose of the request to be a factor." But one cannot depend on that, she said, and a court might not weigh those factors more heavily than the right to access.

Professor Miksch inquired: "How should public institutions/faculty members respond to public record act requests aimed at the activities of individual faculty members?" This is a field she does research in and said that there are model policies for institutions that promote openness and clarity (e.g., what to keep and what to delete). The University has a policy on what and what not to keep that applies to emails as well as paper. Model policies can also speak to the context of higher education (colleges and universities are different from other state agencies). The policies can also provide for collaboration between university counsel and faculty members and faculty governance. At the University, if someone requests all of Professor X's email, the Office of the General Counsel will work with the individual to delete the private ones. (Some states do not allow removal of private emails, so one can read about office romances and the like if people have written messages about them.)

Professor Rabinowitz observed that even with the help of the Office of the General Counsel, a request for all email messages can be harassment if one has thousands of messages. Professor Miksch agreed and recalled that one University employee had about 8000 text messages that needed review. Mr. Petty said he understood that even if one deletes a message, the University still has a copy somewhere. Professor Miksch pointed out that Ms. Smith from the Office of the General Counsel has said the University will not try to retrieve deleted messages unless ordered to do so by a court.

So what recommendations come out of their work? Professor Miksch said that generally they recommend legislative change, such as an exemption for higher education or use of a balancing test, working with the institution's general counsel, and working with the institution's IRB. Some have argued for a "scholar's privilege," like that enjoyed by reporters, but to date the courts have not accepted that argument. In the case of human-subjects research, that lack of confidentiality can be an enormous problem (e.g., research with undocumented individuals); it is possible to protect research subjects, but one must know what to do—and if a researcher cannot promise confidentiality, sometimes the research cannot be done.

At least three states have a scholarly exemption, Professor Miksch reported: New Jersey, Ohio, and Utah. The Utah provision is the strongest and protects records that have been "developed, discovered, disclosed to, or received by or on behalf of faculty, staff, employees, or students of the institution" and includes such things as scholarly correspondence, unpublished manuscripts, research notes, and research data. Basically this is a shield for in-progress research.

Should a recommendation go forward from this Committee, she said, it should cover all of higher education, so include MnSCU. Does the Committee wish to recommend to the Faculty Senate that it encourage the Minnesota Legislature to include a scholarly privilege in the Minnesota Government Data Practices Act?

Professor Rabinowitz asked if one collaborates with a colleague in Utah but someone in Minnesota asks for research data, could that person obtain the data? Professor Miksch said that she would seek to get the Utah law to cover the case. She also pointed out that if a colleague at a private institution sends her a work-related email, that colleague's email becomes public data in Minnesota. The entire email thread would be data, she added. So faculty members at private institutions, which are not covered

by state data practices legislation, do have to be concerned because their communications with colleagues at public institutions are public data.

Mr. Petty asked where the line is between public and private. Professor Miksch said it is gray; Professor Flink said that in general the law wants to be able to get at data, so it will define "private" narrowly. Professor Miksch agreed and said that new technology changes the way people communicate with each other; the Committee's concern is that openness can inhibit or chill creative work, especially work in its initial stages; society should want to encourage candor in research.

Professor Cohen said that sunshine has value, so if researchers engage in discriminatory practices, sunshine can help demonstrate discrimination. But as one develops a rough research proposal, it is not good for it to become public because it may change a great deal before it is finished. But there is another side to research activities; there can be malfeasance, at which times sunshine is good. Professor Miksch agreed and pointed out that the laws provide exceptions. Professor Cohen said that academic requests for an exception assume good behavior, which is not always the case, but there are also good reasons to protect graduate-student research, for example, or research where one does not have all the results from a sample. Professor Flink said that what Professor Miksch has suggested is proposing a change in the law and then letting case law evolve, which is the way that checks and balances develop.

Mr. Petty asked about the balance between academic work and advocacy. Some in a field could be very ideological and do research to use in public testimony. Professor Flink noted that there are three attorneys on the Committee (Professor Miksch, Mr. Peter, and himself) and once one gets past "let's do lunch," the three of them can argue that something is work-related. Professor Miksch said a law would not grant an exception to the kinds of things that Professor Cohen or Mr. Petty are talking about; it is about manuscripts that are not ready for publication and about promising confidentiality when working with vulnerable human subjects, and so on.

Professor Shippee agreed and said he was working with a community partner to do research with immigrants and undocumented workers and he has talked with his partner about whether he can promise confidentiality. A statutory exception for research would provide clarity.

Professor Miksch reported that the Senate Research Committee is also discussing a scholar's exception and said that the Faculty Consultative Committee is expecting to hear a recommendation from the two committees. She said the idea is to bring a proposal forward when there is no controversy at hand; the Committee would urge the legislature to act. If the two committees and the Faculty Senate concur, then MnSCU should also be brought into the discussion. The Committee agreed that any proposal should refer to a shield for research.

Professor Miksch said, in response to a question, that a change to state law would not override federal law, and if one receives federal research funding, all of the data are public. But there are areas that federal law does not cover (e.g., donors, personnel files) that states can control. She said she believes that people should think about a shield in order that they can engage in robust conversation before they publish, and can critique ideas without having the criticism appear on the front page of the newspaper.

Following additional discussion about the process the Committee should follow in advancing a proposal, it voted unanimously that it wished to pursue a resolution recommending change in Minnesota law to shield unpublished research and teaching materials and voted (with one abstention) to ask

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Professors Flink and Miksch to appoint a subcommittee to work with the language of the Utah law to develop a model the Committee could review and forward to the Senate Research Committee.

Professor Flink adjourned the meeting at 12:00.

-- Gary Engstrand

University of Minnesota