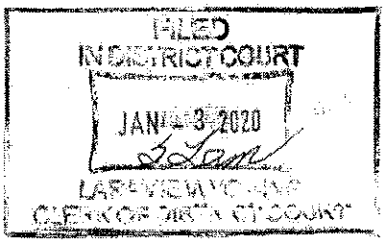
IN THE DISTRICT COURT
FOR THE SECOND JUDICIAL DISTRICT
STATE OF WYOMING, COUNTY OF ALBANY
Civil Action No. 34888

LEE PUBLICATIONS, INC, APG MEDIA OF THE ROCKIES, LLC, and WYOFILE,	)
Petitioners,	)
-vs.-	)
UNIVERSITY OF WYOMING, and UNIVERSITY OF WYOMING BOARD OF TRUSTEES, as Custodians of the Records,	)
Respondents.	)
and	)
DR. LAURIE NICHOLS,	)
Third-Party Intervenor.	)



ORDER ON PETITION FOR ACCESS TO RECORDS AND ORDER TO SHOW CAUSE HEARING

THIS MATTER came before the Court upon a *Petition for Access to Records*, filed by Petitioners on June 21, 2019. In response thereto and pursuant to the Wyoming Public Records Act, this Court entered an *Order to Show Cause* on July 8, 2019, and the matter was set for hearing after briefing by the parties was completed. A hearing was conducted on October 8, 2019. Petitioners were present by and through counsel, Bruce Moats. Respondents were present by and through counsel, Robert Jarosh. Dr. Laurie Nichols later was permitted to intervene in these proceedings and is represented by Megan O. Goetz. The parties have conducted extensive briefing on the issues presented to this Court.

Being fully advised in matter, this Court FINDS, CONCLUDES, and ORDERS as follows:

BACKGROUND FACTS AND PROCEDURAL HISTORY

1. In March of 2019, the University of Wyoming Board of Trustees (Board) declined to renew the employment contract of University President Dr. Laurie Nichols and did not disclose its reasons for that decision.

2. Thereafter, Petitioners sought disclosure of certain documents pertaining to the Board's decision, pursuant to the Wyoming Public Records Act (WPRA), Wyoming Statutes §§ 16-4-201 *et seq.* Petitioners therefore submitted several "records requests" to the University of Wyoming (University), which were processed by the University's Office of the General Counsel. *See Respondents' Brief in Response to Order to Show Cause* (Respondents' Brief), at 3.

3. The first request, received by the University on March 28, 2019, and assigned Request No. 19-019, sought "all public records of communications that include [Trustees] Dave True, Jeffrey Marsh, Kermit Brown and John McKinley that include any of the following keywords: Nichols, Laurie, president, sweep, scrape, renewal, evaluation, Steve Portch, Portch." *Id.* at 3.

4. In response to Request No. 19-019, General Counsel conducted a search through University records which produced 7,890 emails. *See id.* at 5. General Counsel estimated that it would take eighteen (18) hours of professional staff time to review the documents and redact privileged portions of the documents prior to disclosure. General Counsel submitted a letter to Petitioners explaining the process for producing electronically stored documents and provided an invoice for $720.00 to cover the costs associated with the production, pursuant to University policy.[1] *See id.* at 5–6.

5. General Counsel then reviewed 2,235 emails, dated January 1, 2019 and after. *See id.* at 6. Of the documents reviewed, General Counsel deemed 157 pages

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[1] As noted on page 6 of Respondents' *Brief in Response to Order to Show Cause*,

> The University has published its Policies and Procedures on Public Records Requests, in which it charges the amounts set forth in the Rules and Regulations of the Department of Administration and Information, Director's Office, Ch. 2, § 4(c), including $40.00/hour for time spent by "professional staff" to respond to a request. *See* http://www.uwyo.edu/generalcounsel/wyoming-public-records-act/. These fees are authorized by WYO. STAT. ANN. § 16-4-202(d).

Id. at n.1.

responsive and neither privileged nor protected. Those documents were produced to Petitioners, along with an email identifying documents redacted or withheld and an explanation therefor. *See id.*

6. Petitioners objected to the University's reasons for withholding two categories of documents from Request No. 19-019: (1) two communications dated January 3 and 11, 2019, between members of the Board relating to the proposed terms of a renewal contract for then-President Nichols and withheld under the deliberative process privilege and (2) twenty-one communications between Board members and General Counsel, dated January 3, 2019 to March 28, 2019, and withheld pursuant to the attorney-client privilege. *See id.* at 6–7.

7. After the initial search, General Counsel estimated it would require an additional eighteen (18) hours of professional staff time to review the remaining requested documents from its search and sent Petitioners a second invoice, which Petitioners did not pay (and have not paid to date). The subsequent review, therefore, did not occur. Petitioners challenge this fee as unreasonable. *See id.* at 7.

8. On April 10, 2019, Petitioners submitted Request No. 19-027, seeking: "all public records of reviews or investigations into President Laurie Nichols' performance or behavior conducted by the University of Wyoming's Board of Trustees or at their direction . . . that was conducted earlier this year by an independent investigator, group or firm and that contacted current and former employees" and included a request for "any contract or agreement with the outside firm that was brought in to perform the investigation or review." *Id.* at 4.

9. The University denied Request No. 19-027 as seeking documents exempt *per se* from the WPRA by the "personnel files" exception under Wyoming Statute § 16-4-203(d)(iii), by the "records of investigations" exception under Wyoming Statute § 16-4-203(d)(xi), and also as protected by the attorney-client privilege. *See id.* at 7

10. Subsequently, Petitioners requested a "privilege log" detailing the documents withheld and listing the reasons for doing so. Respondents refused to provide a privilege log, stating that neither the WPRA nor decisions of the Wyoming Supreme Court require them to do so. *See id.*

11. On June 21, 2019, Petitioners filed a *Petition for Access to Records* (*Petition*), pursuant to Wyoming Statute § 16-4-203(f),[2] seeking access to documents in

[2] Wyoming Statute § 16-4-203(f) provides:

Respondents' custody under the WPRA.

12. The *Petition*, in relevant part, alleges the following:

a. They Wyoming Board of Trustees announced in late March of 2019 that University of Wyoming (University) President Dr. Laurie Nichols' employment contract would not be renewed, and that Dr. Nichols would serve instead as a professor at the University during the following school term. *See Petition* at ¶ 13.

b. On April 2, 2019, Petitioner Lee Publications, Inc. requested information from the University pertaining to communications mentioning Board members and including various keywords: "Nichols, Laurie, president, sweep, scrape, renewal, evaluation, Steve Portch, Portch." *Id.* at ¶ 18.

c. The University estimated that responding to the request would require 18 hours of professional staff time at a rate of $40.00 per hour, and credited Petitioner for $180.00, for a total charge of $720.00. *Id.* at ¶ 19.

d. On June 6, 2019, the University provided some documents in response to Petitioner's request and denied others. The University alleged that releasing more of the documents requested on April 2, 2019, would require an additional $720.00 to cover an addition eighteen (18) hours of professional staff time. *Id.* at ¶ 20.

e. On April 10, 2019, Petitioner requested documents related to any investigation into the performance or conduct on Dr. Nichols. Respondents claimed that any such documents would be exempt from public disclosure pursuant to the "personnel files" exception to public disclosure under the Wyoming Public Records Act (WPRA) under Wyoming Statute § 16-4-203(d)(iii). *Id.* at ¶ 15.

f. Petitioner also sought records pertaining to the terms and conditions of employing/retaining an individual and/or entity to conduct an investigation into the conduct or performance of Dr. Nichols. Respondents also denied this request pursuant to Wyoming Statute § 16-4-203(d)(iii). *Id.* at ¶ 16.

(f) Any person denied the right to inspect any record covered by this act may apply to the district court of the district wherein the record is found for an order directing the custodian of the record to show cause why he should not permit the inspection of the record.

Id.

g. Respondents refused to provide a privilege log of the records being withheld pursuant to the WPRA requests, and, without such a log, Petitioners are unable to determine whether the requested documents were properly withheld under either the personnel files exemption or attorney-client privilege. *Id.* at ¶ 17.

13. On July 8, 2019, pursuant to Wyoming Statute § 16-4-203(f), this Court entered an *Order to Show Cause*, originally scheduling a show cause hearing in this matter for August 5, 2019.

14. On July 11, 2019, Respondents filed their *Answer*, claiming that the documents withheld from Petitioners' requests are either privileged or statutorily exempted from the WPRA; denying that a "privilege log" is required when materials are privileged under Wyoming law and the WPRA; and asserting that the costs required for the University to comply with Petitioners' search requests are reasonable. *See Answer* (July 11, 2019).

15. On July 11, 2019, so as to allow the parties sufficient time to brief the issues, this Court vacated the hearing scheduled for August 5, 2019, pursuant to its own motion and entered a *Briefing Schedule* on July 16, 2019, requiring the parties to file briefs with the Court on this matter, and Respondents to provide the disputed documents to the Court, in conjunction with their brief, for *in camera* review.

16. On August 15, 2019, Respondents filed their *Brief in Response to Order to Show Cause* and produced the disputed documents to the Court for *in camera* review.

17. The arguments presented in *Respondents' Brief* can be summarized as follows:

a. Any documents not already produced that may be responsive to the records requests are *per se* exempt from disclosure under the WPRA as either personnel files under Wyoming Statute § 16-4-203(d)(iii), or records of investigations under § 16-4-203(d)(xi);

b. Any documents not already produced that may be responsive to the requests are subject to the deliberative process privilege under Wyoming Statute § 16-4-203(b)(v), and/or the attorney-client privilege, and are therefore outside the definition of "public records" in Wyoming Statute § 16-4-201(a)(v) because they are subject to privilege;

c. Respondents are not required under Wyoming law to provide a "privilege log," and have complied with the WPRA by providing a written statement of the grounds for denial, including citation to statutory authority; and

d. The University's estimate of fees to review and redact responsive electronic documents is reasonable.

18. Petitioners filed their *Petitioners' Response to Respondents' Brief in Response to Order to Show Cause* (*Petitioners' Brief*) on September 5, 2019, arguing that:

a. The personnel files exception under Wyoming Statute § 16-4-203(d)(iii) does not apply, and the records of investigation exemption under Wyoming Statute § 16-4-203(d)(xi) applies only to the extent that the requested documents constitute a clearly unwarranted invasion of personal privacy, which is a narrow exemption, and most of the requested documents cannot constitute a clearly unwarranted invasion of personal privacy;

b. Wyoming law requires a privilege log, or something similar, for any documents withheld from disclosure under the WPRA in order to allow a meaningful opportunity for Petitioners to challenging the basis for withholding the documents;

c. The deliberative process privilege does not apply to the Board of Trustees, the attorney-client privilege does not apply to all of the disputed documents, and public policy strongly favors disclosure;

d. The fees the University charges for reviewing and redacting electronic documents are unreasonable, and the adoption of the fee schedule was an ultra vires act by the state.

19. Respondents filed their *Respondents' Reply Brief in Response to Order to Show Cause* (*Reply Brief*) on September 19, 2019, alleging that:

a. The personnel files exception under Wyoming Statute § 16-4-203(d)(iii) does apply, and only the records of investigation exemption under Wyoming Statute § 16-4-203(d)(xi) requires a showing of a "clearly unwarranted invasion of personal privacy," whereas the personnel files exception does not;

b. The release of any requested records could constitute the unwarranted invasion of personal privacy of Dr. Nichols and/or any third parties, in which the public has no legitimate concerns;

c. Petitioners are not entitled to a privilege log; and

d. The fees charged by the University to review and redact records are reasonable.

20. This Court has examined all documents submitted by Respondents for *in camera* review.

21. A show cause hearing was held on October 8, 2019.

22. Thereafter, on October 15, 2019, Dr. Nichols filed a *Motion to Intervene* in these proceedings.

23. On November 20, 2019, this Court entered its *Order on Motion to Intervene*, allowing Dr. Nichols to intervene as of right in this matter under Wyoming Rule of Civil Procedure 24(a). However, Dr. Nichols was not permitted to review the contested documents but, rather, was given the opportunity to brief her arguments for or against disclosure under the WPRA, to which the other parties would then be allowed to respond.

24. On December 10, 2019, Dr. Nichols filed her *Verified Brief in Response to Order to Show Cause* (*Nichols' Brief*), supplementing Respondents' arguments against disclosure and adding that she has a protectable personal privacy interest under statutory and common law; that Respondents may have violated internal procedures by failing to also may apply to prevent disclosure of the contested documents.

25. Petitioners responded on December 23, 2019, objecting to Dr. Nichols' characterization of the nature of their initial records request as "mere curiosity" and noting that a party requesting records is not required to show that it need the records. *See Petitioners' Response to Brief of Intervenor* at 2–3 (December 23, 2019). Petitioners reiterate that a privilege log would alleviate much of the mystery involving the requested documents and that Dr. Nichols' ignorance regarding the nature and content of the records is not relevant. *Id.* at 4–8. Petitioners also argue that the requested records cannot constitute personnel files if Respondents have refused to disclose them to Dr. Nichols, who, they contend, would have a right to view her own personnel file, and that, if the requested documents do, in fact, show that Dr. Nichols violated internal rules and regulations while serving as University President and the Board did not properly follow

internal procedures for investigating a complaint (specifically, notifying Dr. Nichols of the investigation), then public interest is increased by the nature of Dr. Nichols' dismissal. *Id.* at 5–7.

26. Also on December 23, 2019, Respondents filed their *Respondents' Response to Petitioners' Response to Brief of Intervenor*, arguing that the plain language of the WPRA requires Respondents to disclose to Dr. Nichols only certain documents within her personnel file and that Dr. Nichols' assertion that the University violated any rules is without any factual or legal support and is irrelevant to the issues pending before this Court.

27. On December 27, 2019, Dr. Nichols filed her *Third-Party Intervenor Nichols' Reply to (1) Petitioners' Response to Brief of Intervenor (2) Respondents' Response to Petitioners' Response to Brief of Intervenor (3) Petitioners' Motion to Strike Respondents' Response to Petitioners' Response to Brief of Intervenor, or int the Alternative Allow a Reply*, addressing both Petitioners' and Respondents' *Responses*, generally reiterating her previous arguments and taking no position on Petitioners' motion to strike.

28. Petitioners moved to strike *Respondents' Response to Petitioners' Response to Brief of Intervenor* or, in the alternative, to be permitted to reply. On December 27, 2019, the Court entered an *Order Permitting Petitioners to File Petitioners' Reply to Respondents' Response to Petitioners' Response to Brief of Intervenor* and declined to strike *Respondents' Response to Petitioners' Response to Brief of Intervenor*. Petitioners thereafter filed their *Reply* on December 30, 2019, taking issue with Respondents' position that Respondents properly denied Dr. Nichols access to her personnel file and that any allegations of potential wrongdoing by Respondents are irrelevant in this case. Dr. Nichols also addressed these issues in her *Reply*, filed on December 27, 2019. Having considered all the pleadings filed by the parties, the Court finds that these arguments are well outside the scope of the *Petition for Access to Public Records* and the matters properly before this Court. As a result, the Court declines to address the additional and irrelevant arguments further. The only matter properly before this Court is whether Petitioners are entitled to the documents requested under the Wyoming Public Records Act.

29. These matters are now before the Court for resolution of the pending issues. Further facts will be discussed as necessary.

LEGAL ANALYSIS

I. The Wyoming Public Records Act

30. Petitioners herein seek access to certain documents in the possession of the University pursuant to the Wyoming Public Records Act (WPRA), Wyoming Statute § 16-4-201 *et seq.* "The WPRA provides that records of the state, its agencies, and local government entities shall be open for inspection by any person at reasonable times." *Aland v. Mead*, 2014 WY 83, ¶ 10, 327 P.3d 752, 758 (Wyo. 2014) (internal quotation omitted).

31. In that vein, certain statutory provisions are helpful in providing context to this request:

> (v) "Public records" when not otherwise specified includes any information in a physical form created, accepted, or obtained by the state or any agency, institution or political subdivision of the state in furtherance of its official function and transaction of public business which is not privileged or confidential by law. Without limiting the foregoing, the term "public records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by the state or any agency, institution or political subdivision of the state in furtherance of the transaction of public business of the state or agency, institution or political subdivision of the state, whether at a meeting or outside a meeting. Electronic communications solely between students attending a school in Wyoming and electronic communications solely between students attending a school in Wyoming and a sender or recipient using a nonschool user address are not a public record of that school. As used in this paragraph, a "school in Wyoming" means the University of Wyoming, any community college and any public school within a school district in the state;
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> (vi) Public records shall be classified as follows:
>
> > (A) "Official public records" includes all original vouchers, receipts and other documents necessary to isolate and prove the validity of every transaction relating to the receipt, use and disposition of all public property and public income from all sources whatsoever; all agreements and contracts to which the state or any agency or subdivision thereof is a party; all fidelity, surety and performance bonds; all claims filed against the state or any agency or subdivision thereof; all records or documents required by law to be filed with or kept by any agency or the

state of Wyoming; and all other documents or records determined by the records committee to be official public records;

(B) "Office files and memoranda" includes all records, correspondence, exhibits, books, booklets, drawings, maps, blank forms, or documents not defined and classified in subparagraph (A) of this subsection as official public records; all duplicate copies of official public records filed with any agency of the state or subdivision thereof; all documents and reports made for the internal administration of the office to which they pertain but not required by law to be filed or kept with the office; and all other documents or records, determined by the records committee to be office files and memoranda.

Wyo. Stat. Ann. § 16-4-201 (2018).[3]

32. The nuts and bolts provisions of the WPRA are set out in Wyoming Statutes §§ 16-4-202 and 16-4-203(a). Wyoming Statute § 16-4-202 (2018) provides, in relevant part:

(a) **All public records shall be open for inspection by any person at reasonable times**, during business hours of the state entity or political subdivision, except as provided in this act or as otherwise provided by law, but the official custodian of any public records may make rules and regulations with reference to the inspection of the records as is reasonably necessary for the protection of the records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or his office.

. . .

(c) If the public records requested are in the custody and control of the person to whom application is made but are in active use or in storage, and therefore not available at the time an applicant asks to examine them, the custodian or authorized person having personal custody and control of the public records shall notify the applicant of this situation within seven (7) business days from the date of acknowledged receipt of the request, unless good cause exists preventing a response within such time period. In the event the applicant is not satisfied that good cause exists, the applicant may petition the district court for a determination as to whether the custodian has demonstrated good cause

[3] Of note, there have been statutory changes to Wyoming Statute § 16-4-201, which took effect on July 1, 2019. However, as the *Petition for Access to Records* was filed on June 21, 2019, the 2018 version of the statute is appropriately referenced in this analysis.

existed. **If a public record is readily available, it shall be released immediately to the applicant so long as the release does not impair or impede the agency's ability to discharge its other duties.**

(d) If a public record exists primarily or solely in an electronic format, the custodian of the record shall so inform the requester. Electronic record inspection and copying shall be subject to the following:

(i) The reasonable costs of producing a copy of the public record shall be borne by the party making the request. The costs may include the cost of producing a copy of the public record and the cost of constructing the record, including the cost of programming and computer services;

(ii) An agency shall provide an electronic record in alternative formats unless doing so is impractical or impossible;

(iii) An agency shall not be required to compile data, extract data or create a new document to comply with an electronic record request if doing so would impair the agency's ability to discharge its duties;

(iv) An agency shall not be required to allow inspection or copying of a record in its electronic format if doing so would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained;

Wyo. Stat. Ann. § 16-4-202 (2018) (emphasis added).[4]

33. Wyoming Statute § 16-4-203(a) (2018) provides:

(a) The custodian of any public records shall allow any person the right of inspection of the records or any portion thereof except on one (1) or more of the following grounds or as provided in subsection (b) or (d) of this section:

(i) The inspection would be contrary to any state statute;

[4] Again, there have been statutory changes to Wyoming Statute § 16-4-202 that took effect on July 1, 2019. However, as the *Petition for Access to Records* was filed on June 21, 2019, the 2018 version of the statute is appropriately referenced in this analysis.

(ii) The inspection would be contrary to any federal statute or regulation issued thereunder having the force and effect of law; or

(iii) The inspection is prohibited by rules promulgated by the supreme court or by the order of any court of record.

Wyo. Stat. Ann. § 16-4-203 (2018).[5]

34. Thus, the WPRA generally allows any person to inspect at reasonable times the records of the state, its agencies, and local government entities. *See Powder River Basin Res. Council v. Wyoming Oil & Gas Conservation Comm'n*, 2014 WY 37, ¶ 32, 320 P.3d 222, 231 (Wyo. 2014) (citing Wyo. Stat. Ann. § 16-4-202(a)). The Act describes three categories of records: public records that must be disclosed, under Wyoming Statute § 16-4-203(a); public records that may be withheld if disclosure would be contrary to the public interest, under Wyoming Statute § 16-4-203(b); and public records that shall not be disclosed, under Wyoming Statute § 16-4-203(d).

35. From a policy perspective and as a matter of statutory interpretation, the Wyoming Supreme Court has found that the provisions of the WPRA must be construed liberally and its exceptions narrowly applied:

> With specific respect to the WPRA, we have augmented [the] standard of review. The WPRA and the Federal Freedom of Information Act (FOIA) have a common objective, which is **that disclosure, not secrecy, should prevail.** Implementation of that goal is provided by affording **a liberal interpretation to the WPRA and construing its exceptions narrowly**. *Sublette County Rural Health Care v. Miley,* 942 P.2d 1101, 1103 (Wyo. 1997); *Sheridan Newspapers, Inc. v. City of Sheridan,* 660 P.2d 785, 794 (Wyo. 1983); *Laramie River Conservation Council v. Dinger,* 567 P.2d 731, 733 (Wyo. 1977). Indeed, we used this language in the *Sheridan Newspapers* case to further explicate the applicable standard of review:
>
> > Given the policy of the state as announced through the Public Records Act, the custodian, in any exercise of his right to withdraw, must confine his withdrawal discretion to those areas and circumstances prescribed by this Act. Having taken this restriction into account, **the custodian must then employ his discretion on a selective basis rather than through the withdrawal of entire categories of public**

[5] Again, there have been statutory changes to Wyoming Statute § 16-4-203 that took effect on July 1, 2019. However, as the *Petition for Access to Records* was filed on June 21, 2019, the 2018 version of the statute is appropriately referenced in this analysis.

> **records** — as was done by the chief of police in this case. Since **the public policy which pertains to the Public Records Act speaks to the philosophy of disclosure**, it is therefore contrary to that philosophy for the police chief to withdraw entire categories of public records—or any public records—without first addressing the issue which asks whether or not the withdrawal of *individual* [emphasis in original] records, documents, or portions thereof violates provisions of the Act. In other words, the language of the statute imposes a legislative presumption, which says that, where public records are involved, **the denial of inspection is contrary to the public policy, the public interest and the competing interests of those involved. This, then, places the burden of proof upon the custodian to show that the exercise of his discretion does not run afoul of statutory limitations in any particular instance where custodial withdrawal is effected.**

660 P.2d at 795–96 (footnote omitted).

In *Laramie River Conservation Council,* 567 P.2d at 734, we opined that:

> There is a well-known expression applied to those in public office, "If you can't stand the heat, you'd better stay out of the kitchen." Confrontation has a salutary effect and causes those in positions of public responsibility to practice thoughtfulness and wisdom in their utterances and carefully weigh their decisions. Paraphrased from *Environmental Protection Agency v. Mink,* supra, **such disclosure acts are broadly conceived to permit access to information long shielded unnecessarily from public view and create judicially enforceable rights to secure information from possibly unwilling hands.** The disclosure acts promote within the agencies affected a sensitiveness to the needs of the public and make democratic government function in a modern society. **With some necessary exceptions, recognized by Wyoming's records and meetings acts, state agencies must act in a fishbowl.**

Moreover, we have also held that the freedom-of-the-press and due process provisions of the Federal and Wyoming constitutions guarantee a person's right to access public records, and **absent a compelling State interest, the State may not exclude an entire class of records from public inspection.** *Houghton v. Franscell,* 870 P.2d 1050, 1053 (Wyo. 1994).

Allsop v. Cheyenne Newspapers, Inc., 2002 WY 22, ¶¶ 10–12, 39 P.3d 1092, 1095–96 (Wyo. 2002) (footnotes omitted) (emphasis added). *See also* David L. Ganz, J.D., *Open Public Records Act Litigation*, 128 Am. Jur. *Trials* 495 (October 2019 update, originally published in 2013).

36. The Court must, therefore, interpret the provisions of the WPRA "in light of the legislative presumption of openness and in keeping with the constitutional right of access to public records." *Alsop*, ¶ 13, 39 P.3d at 1096.

II. Statutory Exceptions and Common Law/Statutory Exemptions from Disclosure of Public Records

37. Understanding the prevailing policy of disclosure attributed to the WPRA, there are, however, categories of public records that are statutorily exempt from disclosure. Wyoming Statute § 16-4-203 addresses those, in relevant part, as follows:

> (b) **The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:**
>
> > (i) Records of investigations conducted by, or of intelligence information or security procedures of, any sheriff, county attorney, city attorney, the attorney general, the state auditor, police department or any investigatory files compiled for any other law enforcement or prosecution purposes;
> >
> > (ii) Test questions, scoring keys and other examination data pertaining to administration of a licensing examination and examination for employment or academic examination. Written promotional examinations and the scores or results thereof shall be available for inspection, but not copying or reproduction, by the person in interest after the examination has been conducted and graded;
> >
> > (iii) The specific details of bona fide research projects being conducted by a state institution, agency or any other person;
> >
> > (iv) Except as otherwise provided by Wyoming statutes or for the owner of the property, the contents of real estate appraisals made for the state or a political subdivision thereof, relative to the acquisition of property or any interest in property for public use, until such time as title of the property or property interest has passed to the state or

political subdivision. The contents of the appraisal shall be available to the owner of the property or property interest at any time;

(v) Interagency or intraagency memoranda or letters which would not be available by law to a private party in litigation with the agency;

(vi) To the extent that the inspection would jeopardize the security of any structure owned, leased or operated by the state or any of its political subdivisions, facilitate the planning of a terrorist attack or endanger the life or physical safety of an individual, including:

(A) Vulnerability assessments, specific tactics, emergency procedures or security procedures contained in plans or procedures designed to prevent or respond to terrorist attacks or other security threats;

(B) Building plans, blueprints, schematic drawings, diagrams, operational manuals or other records that reveal the building's or structure's internal layout, specific location, life and safety and support systems, structural elements, surveillance techniques, alarms, security systems or technologies, operational and transportation plans or protocols, personnel deployments for airports and other mass transit facilities, bridges, tunnels, emergency response facilities or structures, buildings where hazardous materials are stored, arenas, stadiums and waste and water systems;

(C) Records of any other building or structure owned, leased or operated by the state or any of its political subdivisions that reveal the building's or structure's life and safety systems, surveillance techniques, alarm or security systems or technologies, operational and evacuation plans or protocols or personnel deployments; and

(D) Records prepared to prevent or respond to terrorist attacks or other security threats identifying or describing the name, location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities of individual medical facilities, storage facilities or laboratories established, maintained, or regulated by the state or any of its political subdivisions.

(vii) An application for the position of president of an institution of higher education, letters of recommendation or references concerning the applicant and records or information relating to the process of searching for and selecting the president of an institution of higher education, if the records or information could be used to identify a candidate for the position. As used in this paragraph "institution of higher education" means the University of Wyoming and any community college in this state;

(viii) Sensitive wildlife location data in the custody of the game and fish department which could be used to determine the specific location of an individual animal or a group of animals.

(c) If the right of inspection of any record falling within any of the classifications listed in this section is allowed to any officer or employee of any newspaper, radio station, television station or other person or agency in the business of public dissemination of news or current events, it may be allowed to all news media.

(d) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law:

(i) Medical, psychological and sociological data on individual persons, exclusive of coroners' verdicts and written dockets as provided in W.S. 7-4-105(a);

(ii) Adoption records or welfare records on individual persons;

(iii) Personnel files except those files shall be available to the duly elected and appointed officials who supervise the work of the person in interest. Applications, performance ratings and scholastic achievement data shall be available only to the person in interest and to the duly elected and appointed officials who supervise his work. Employment contracts, working agreements or other documents setting forth the terms and conditions of employment of public officials and employees are not considered part of a personnel file and shall be available for public inspection;

(iv) Letters of reference;

(v) Trade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person;

(vi) Library, archives and museum material contributed by private persons, to the extent of any limitations placed thereon as conditions of the contributions;

(vii) Hospital records relating to medical administration, medical staff, personnel, medical care and other medical information, whether on individual persons or groups, or whether of a general or specific classification;

(viii) School district records containing information relating to the biography, family, physiology, religion, academic achievement and physical or mental ability of any student except to the person in interest or to the officials duly elected and appointed to supervise him;

(ix) Library patron transaction and registration records except as required for administration of the library or except as requested by a custodial parent or guardian to inspect the records of his minor child;

(x) Information obtained through a 911 emergency telephone system or through a verification system for motor vehicle insurance or bond as provided under W.S. 31-4-103(e) except to law enforcement personnel or public agencies for the purpose of conducting official business, to the person in interest, or pursuant to a court order;

(xi) Records or information compiled solely for purposes of investigating violations of, and enforcing, internal personnel rules or personnel policies the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(xii) Information regarding the design, elements and components, and location of state information technology security systems and physical security systems;

(xiii) Records or information relating to individual diagnoses of contagious, infectious, communicable, toxic and genetic diseases maintained or collected by the Wyoming state veterinary laboratory as provided in W.S. 21-17-308(e);

(xiv) Information concerning an agricultural operation, farming or conservation practice, or the land itself, if the information was provided by an agricultural producer or owner of agricultural land in order to participate in a program of the state or any agency, institution or political subdivision of the state. The custodian shall also deny the right of inspection to geospatial information maintained about the agricultural land or operations. Provided, however, that if otherwise permitted by law, the inspection of the information described in this paragraph shall be allowed in accordance with the following:

(A) The custodian may allow the right of inspection when responding to a disease or pest threat to agricultural operations, if the custodian determines that a threat to agricultural operations exists and the disclosure of information is necessary to assist in responding to the disease or pest threat as authorized by law;

(B) The custodian shall allow the right of inspection of payment information under a program of the state or of any agency, institution or political subdivision of the state, including the names and addresses of recipients of payments;

(C) The custodian shall allow the right of inspection if the information has been transformed into a statistical or aggregate form without naming:

(I) Any individual owner, operator or producer; or

(II) A specific data gathering site.

(D) The custodian shall allow the right of inspection if the disclosure of information is pursuant to the consent of the agricultural producer or owner of the agricultural land;

(E) As used in this paragraph:

(I) "Agricultural operation" means the production and marketing of agricultural products or livestock;

(II) "Agricultural producer" means any producer of livestock, crops or dairy products from an agricultural operation.

(xv) Within any record held by an agency, any income tax return or any individual information derived by the agency from an income tax return, however information derived from these documents may be released if sufficiently aggregated or redacted so that the persons or entities involved cannot be identified individually;

(xvi) Except as required in a contested case hearing, any individual records involved in any workers' compensation claim, however information derived from these documents may be released if sufficiently aggregated or redacted so that the persons or entities involved cannot be identified individually;

(xvii) Any records of the consensus revenue estimating group as defined in W.S. 9-2-1002, that discloses information considered by, or deliberations or tentative decisions of, the group;

(xviii) Information obtained through a peace officer recording provided that:

(A) The custodian shall allow the right of inspection to law enforcement personnel or public agencies for the purpose of conducting official business or pursuant to a court order;

(B) The custodian may allow the right of inspection:

(I) To the person in interest;

(II) If the information involves an incident of deadly force or serious bodily injury as defined in W.S. 6-1-104(a)(x);

(III) In response to a complaint against a law enforcement personnel and the custodian of the information determines inspection is not contrary to the public interest;

(IV) In the interest of public safety.

> (xix) Any records of the investment funds committee, created by W.S. 9-4-720, that disclose information considered by the committee, committee deliberations or tentative decisions of the committee.

Wyo. Stat. Ann. § 16-4-203 (2018) (emphasis added).

38. Accordingly, the custodian of the records, here Respondents, must show that an applicable exemption applies in order to prevent disclosure under the WPRA:

> If the custodian bears his burden of showing that an exemption applies to the record sought, that is the end of the judicial inquiry. *See Allsop*, ¶ 33, 39 P.3d at 1102 (Golden, J., dissenting); *Sheridan Newspapers,* 660 P.2d at 788–89, 799. If the custodian fails to prove that the record is exempt from inspection by the public, the court must order the custodian to allow inspection.

Powder River Basin Res. Council v. Wyoming Oil & Gas Conservation Comm'n, 2014 WY 37, ¶¶ 24–25, 320 P.3d 222, 230 (Wyo. 2014).

39. Respondents, who bear the burden of proving that the records requests were properly denied, assert that any requested documents pertaining to investigations, by either the Board or an outside firm, into Dr. Nichols' performance or behavior(s) fall within the category of records that "shall not be disclosed" under two exceptions in Wyoming Statute § 16-4-203(d). More specifically, Respondents assert that the documents sought by Petitioners were withheld pursuant to two exceptions in the WPRA (the personnel files exemption and the records of investigations exemption, Wyoming Statutes §§ 16-4-203(d)(iii) & (d)(xi)) as well as two common law/statutory privileges (the "deliberative process privilege" and the "attorney-client privilege").

40. Dr. Nichols joins in Respondents' arguments against disclosure, adding that she likely has a personal privacy interest in the subject matter of any such records the disclosure of which would constitute an unwarranted invasion of that personal privacy.[6]

41. On the other hand, Petitioners allege that the exemptions and privileges do not require withholding of all the documents; that a privilege log is required describing the documents withheld and the justifications for doing so; and assert that the fees charged for the production of the documents generally is unreasonable.

[6] As Dr. Nichols notes in her *Verified Brief in Response to Order to Show Cause*, this Court has not permitted her to preview the documents submitted to the Court for *in camera* review in this matter. *See Order on Motion to Intervene* (November 20, 2019).

42. The Court will address each argument, and its response, in turn.

A. Personnel Files: Wyoming Statute § 16-4-203(d)(iii) (2018)

43. First, Respondents argue that the "personnel files" exception requires the University as custodian to deny Petitioners' request for information regarding any investigation into Dr. Nichols' performance or conduct, or any records reflecting an agreement with a third party to investigate the same.

44. Wyoming Statute § 16-4-203(d)(iii) (2018) states:

> (d) The custodian **shall** deny the right of inspection of the following records, unless otherwise provided by law:
>
> . . .
>
> (iii) **Personnel files** except those files shall be available to the duly elected and appointed officials who supervise the work of the person in interest. Applications, performance ratings and scholastic achievement data shall be available only to the person in interest and to the duly elected and appointed officials who supervise his work. Employment contracts, working agreements or other documents setting forth the terms and conditions of employment of public officials and employees are not considered part of a personnel file and shall be available for public inspection[.]

Id. (emphasis added).

45. As Respondents note in their brief, the term "personnel files" is not defined in the WPRA, nor has the Wyoming Supreme Court espoused a definition.

46. Respondents cite to other state and federal court cases which "universally define the term to include performance evaluations and disciplinary records." *Respondents' Brief* at 8. As such, Respondents claim that Petitioners' requests for documents pertaining to Dr. Nichols' performance or conduct are *per se* exempt from disclosure under Wyoming Statute § 16-4-203(d)(iii) as personnel files. *Id.*

47. Petitioners assert that the two claimed exceptions, Wyoming Statute § 16-4-203(d)(iii) (personnel files) and Wyoming Statute § 16-4-203(d)(xi) (records of investigations) conflict and that the rules of statutory interpretation require the Court to find that "a specific statute will control over a general one dealing with the same subject

when they are in apparent conflict." *Petitioners' Brief* at 4 (citing *Cheyenne Newspapers, Inc., v. Bd. Of Trs. Sch. Dist. No. One*, 2016 WY 113, ¶ 23, 384 P.3d 679, 685 (Wyo. 2016).

48. Therefore, Petitioners argue, the "records of investigations" exception, Wyoming Statute § 16-4-203(d)(xi), being the more specific statute, should apply here[7] and would allow disclosure of the requested documents unless they "constitute a clearly unwarranted invasion of personal privacy." *Id.*; Wyo. Stat. Ann. § 16-4-203(d)(xi). Petitioners assert, as discussed in detail below, that few of the requested documents, if any, would constitute an unwarranted invasion of privacy and so must be disclosed. *See Petitioners' Brief* at 6–7.

49. Petitioners further argue that the personnel files exception does not create a blanket exemption for any documents that are placed into an employee's personnel file, but rather the exception was intended only to exempt documents the disclosure of which would constitute an unwarranted invasion of privacy. *See id.*

50. In support of this argument, Petitioners cite to *Houghton v. Franscell*, 870 P.2d 1050 (Wyo. 1994). In *Houghton*, the Wyoming Supreme Court found that documents reflecting physicians' employment contracts were not exempt from disclosure under Wyoming Statute § 16-4-203 (d)(vii), the "hospital records exemption."[8] The court "reviewed the hospital records exemption in conjunction with the other exemptions found under Wyo. Stat. § 16-4-203(d)" and found that the "common thread running through" the ten classifications for exempt documents in the statute is "**personal information instinct with a privacy interest.**" *Houghton*, 870 P.2d at 1055 (emphasis added).

51. The court in *Houghton*, finding only hospital records that constituted an unwarranted invasion of personal privacy were exempt from disclosure under the WPRA, applied Georgia's definition, for purposes of the Georgia Open Records Act, of an "unwarranted invasion of privacy:"

> unwarranted publicity, unwarranted appropriation or exploitation of one's personality, or the **publicizing of one's private affairs with which the public had no legitimate concern.**

[7] Because this Court would order disclosure of the same documents under the application of either the personnel files or the records of investigations exemption, as discussed below, the Court will examine both exemptions and declines to find that only the records of investigations exception, under Wyoming Statute § 16-4-203(d)(xi), applies. That decision is left for another day.

[8] Wyoming statute § 16-4-203(d)(vii) exempts, unless otherwise provided by law, "[h]ospital records relating to medical administration, medical staff, personnel, medical care and other medical information, whether on individual persons or groups, or whether of a general or specific classification." *Id.*

Id. (citing *Richmond County Hosp. Auth. V. S.E. Newspapers Corp.*, 252 Ga. 19, 311 S.E.2d 806, 807 (Ga. 1984) (emphasis added).

52. Petitioners assert that the "publicizing of one's private affairs with which the public had no legitimate concern" definition is *apropos*, and that the public has a legitimate concern with the "conduct of the chief executive officer of the state's lone university." *Petitioners' Brief* at 8. Thus, because the public has a legitimate interest in the internal governance of the University and with the conduct of the University President and Board, the requested documents do not constitute an unwarranted invasion of personal privacy and must be disclosed. *Id.*

53. The Wyoming Supreme Court in *Houghton* specifically stated: "**We adopt** Georgia's definition of invasion of privacy **for purposes of exempting records from disclosure under the public records act.**" *Houghton*, 870 P.2d at 1056 (emphasis added). Nothing in the *Houghton* analysis or the court's adoption of the Georgia definition of unwarranted invasion of privacy restricts the application of its finding only to the hospital records exception in Wyoming Statute 16-4-203(d)(vii).

54. Rather, the *Houghton* court's analysis of the WPRA exceptions under § 16-4-203(d), as a whole, turn on the Wyoming State Legislature's intention to exempt from disclosure **only** records which implicate a personal privacy interest because the right of access to public records is constitutional, and "absent a compelling state interest, that right cannot be denied." *Houghton*, 870 P.2d at 1055.

55. Similar to the personnel files exception under Wyoming Statute § 16-4-203(d)(iii) at issue here, the hospital records exception at issue in *Houghton* did **not** include language referring to an unwarranted invasion of privacy. But, taking the WPRA as a whole, the Wyoming Supreme Court found that:

> A review of the language prefacing the hospital records exemption demonstrates the legislature did not intend to create an exemption which would deny the public its constitutional right of access. That language provides "[t]he custodian shall deny the right of inspection unless otherwise provided by law." Wyo. Stat. § 16–4–203(d).
>
> **We find it highly unlikely the legislature intended to create a blanket exemption for all records developed or retained by the hospital in the ordinary course of its business. An exemption insulating from public review all the records of a public entity probably would not pass**

constitutional muster, and as noted above, the legislature did not intend to deny the public a right of access otherwise provided by law.

Houghton, 870 P.2d at 1056–57 (emphasis added). The *Houghton* court thus read into the language of the hospital records exception a limitation that only those records implicating an individual's personal privacy are outside the public's right of access; otherwise the exception would apply too broadly to pass "constitutional muster." *Id.*

56. This Court concurs with that analysis vis-à-vis Wyoming Statute § 16-4-203(d)(iii). In practicality, if the personnel files exception were to be interpreted without limiting its application only to documents implicating a personal privacy interest, the state government and its agencies would have the unfettered ability to withhold almost any document from inspection simply by placing it in within an employee's personnel file.[9] *See Oregonian Pub. Co. v. Portland Sch. Dist. No. 1J*, 329 Or. 393, 403, 987 P.2d 480, 485 (1999) ("[The Oregon personnel files exception] does not, however, authorize the district to exempt a public record from disclosure by placing it in a district personnel file and claiming an exemption based on the report's title or location, rather than its content.").

57. Similarly, the Illinois Fourth District Appellate Court, in *Gekas v. Williamson*, 912 N.E.2d 347, 359–60 (Ill. 2009), analyzed to what extent disciplinary investigations, such as may pertain to the records at issue here, are part of a "personnel file" and, thus, *per se* exempt from disclosure:

> Defendant argues that because an investigative report by the Division is intended to be used in determining the employee's eligibility for discharge or other disciplinary action, it is a "personnel record" and, as such, it is properly part of the personnel file, which, under section 7(1)(b)(ii) of the Act, is exempt *per se* from disclosure. See *Copley Press, Inc. v. Board of Education*, 359 Ill. App.3d 321, 324, 296 Ill. Dec. 1, 834 N.E.2d 558, 561 (2005) ("we must determine what documents are properly part of a personnel file").
>
> A personnel file can contain various supporting materials that, in themselves, are not personal or private. For example, if a police officer committed misconduct in the course of his or her duties and that misconduct resulted in a judgment against the police officer in a court of law, the employer could, quite sensibly, put a copy of that judgment in the personnel file as documentation

[9] Wyoming Statute § 16-4-203(d)(iii) does limit the withholding of some documents: "Employment contracts, working agreements or other documents setting forth the terms and conditions of employment of public officials and employees are not considered part of a personnel file and shall be available for public inspection." *Id.*

> supporting the decision to discipline the officer. Surely, filing this quintessentially public document in a personnel file would not make it any the less a public document. The written statement of a witness or an investigative report could go into the personnel file for the same purpose — as supporting documentation for disciplinary action — in which case they would seem analogous to the judgment order. We do not see how Gillette could have a privacy interest in someone's statement of what he did in the public sphere. We do not see how he could have a privacy interest in dispatch tapes, either. **The legislature could not have intended the accessibility of public documents, or their private or public nature, to depend on a clerical formality, that is, the public body's choice to store these documents in a personnel file.**
>
> Answering the question of whether a document is "properly part of a personnel file does not necessarily answer the question of whether the document is exempt from disclosure under section 7(1)(b)(ii), for, as we have observed, that section speaks of "personnel files and personal information." 5 ILCS 140/7(1)(b)(ii) (West 2006). **We should "evaluate[ ] documents based on their [personal] content rather than [on] where they are filed."** Section 8 expressly contemplates that a public record exempt from disclosure under section 7 (5 ILCS 140/7 (West 2006)) could contain material that is not exempt. 5 ILCS 140/8 (West 2006). **In such a case, "the public body shall delete the information which is exempt" (5 ILCS 140/8 (West 2006)), such as "personal information" (5 ILCS 140/7(1)(b)(ii) (West 2006)), "and make the remaining information available for inspection and copying"** (5 ILCS 140/8 (West 2006)). Investigative materials prepared or compiled by the Division are "remaining information" insomuch as they bear on alleged wrongdoing by Gillette in the performance of his duties.

Id. (some internal citations omitted) (emphasis added).

58. Respondents claim that any records related to disciplinary actions or investigations must, *per se*, become part of an employee's personnel file and, as such, must be exempt from disclosure under the WPRA. *See Respondents' Brief* at 8–9. Respondents also argue that no language in Wyoming Statute § 16-4-203(d) refers to balancing an individual's personal privacy against the public's interest in disclosure.

59. However, the *Houghton* court, after reviewing the purpose and nature of all the § 16-4-203(d) exceptions, applied to those exceptions a definition of "unwarranted invasion of privacy" which clearly includes consideration of the public's interests in the information as balanced against an individual's privacy. *See*, supra, ¶¶ 48–53.

60. Dr. Nichols appears generally to agree with this analysis as it applies to the personnel files exemption in the WPRA.[10] Addressing the WPRA personnel files exemption in her *Verified Brief in Response to Order to Show Cause*, Dr. Nichols cites to United States Supreme Court case law holding that personnel records exemptions within the comparable provisions of the federal Freedom of Information Act (FOIA) apply to documents "the disclosure of which 'would constitute a clearly unwarranted invasion of personal privacy' and might harm the individual" and that this limitation "provides proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information." *Nichols' Brief*, ¶ 40 (citing *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599–600 (1982)).

61. Dr. Nichols strongly asserts that she has a personal privacy interest in the information contained in the records that "outweighs any legitimate interest that The Media would have in gaining the information."[11] *Id.*, ¶¶ 44–47 (citing *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1233 (10th Cir. 2007) ("we must balance the public interest in disclosure against the privacy interest Congress intended the [FOIA] exemption to protect.")). In evaluating that balance, Dr. Nichols cites *Forest Guardians v. U.S. Fed. Emergency Mgmt. Agency*, 410 F.3d 1214, 1218 (10th Cir. 2005):

> If there is an important public interest in the disclosure of information and the invasion of privacy is not substantial, the privacy interest in protecting the disclosure must yield to the superior public interest. . . . If, however, the public interest in the information is virtually nonexistent or negligible, then even a very slight private interest would suffice to outweigh the relevant public interest.

Id.

62. Dr. Nichols argues that her lack of knowledge concerning the content and nature of the withheld records impacts the balance between her privacy interest and the public's right to inspect the records:

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[10] It is not clear to the Court whether Dr. Nichols differentiates between the "personnel files" exemption and the "records of investigations" exemption under Wyoming Statutes §§ 16-4-203(d)(iii) & (d)(xi) respectively. However, Dr. Nichols does assert, without analysis or legal authority, that any records of investigations should be considered personnel records and, therefore, be exempt from disclosure if they would constitute an unwarranted invasion of privacy. *Nichol's Brief*, ¶¶ 40–41.

[11] The Court notes that Petitioners, as news agencies, are members of the public and represent an important facet of the public's ability to disseminate information.

> **IF** (stated with emphasis), Dr. Nichols was aware of an investigation into alleged misconduct or performance issues, then perhaps the weight of the public learning of this behavior might outweigh Nichols' privacy right and interest. However, Nichols doesn't even know what the records say or why they were gathered. Thus, any release would subject her to a potential trial and lynching. (Again, Nichols must assume the worst when knowing nothing.)

Nichols' Brief, ¶ 50 (parenthetical and bold emphasis in original).

63. While the Court is certainly sympathetic to the position in which Dr. Nichols finds herself with regard to the records requested, her knowledge and understanding, or lack thereof, concerning the content of the records has no bearing on Petitioners' requests made to Respondents pursuant to the WPRA. Dr. Nichols cites to several common law privacy concepts that exist in tort law. The matter at issue is, however, a petition for access to public records. As Petitioners note in their *Response*, Dr. Nichols does not cite any authority for the proposition that these tort concepts require non-disclosure in this case or in any way relevant to these proceedings. *Petitioners' Response to Brief of Intervenor* at 7, n.1 (December 23, 2019). This Court agrees.

64. Other states faced with similar issues have found that the public's interest in monitoring the disciplinary operations of public institutions outweigh the personal privacy concerns involved, especially after sensitive personal information has been redacted. *See, e.g., Oregonian Pub. Co. v. Portland Sch. Dist. No. 1J*, 329 Or. 393, 987 P.2d 480 (1999); *Denver Pub. Co. v. Univ. of Colorado*, 812 P.2d 682 (Colo. App. 1990); *Hagen v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2018 WI App 43, ¶ 9, 383 Wis. 2d 567, 573, 916 N.W.2d 198, 201 (finding the strong public interest in allowing inspection outweighed harm in allowing requester, a reporter, to inspect public university's records related to a closed investigation of a complaint against professor, as required to allow disclosure under Public Records Law; public had a strong interest in monitoring the disciplinary operations of a public institution, and the identities of the complainant and witnesses were redacted in the records at issue); *Wisconsin State Journal v. Univ. of Wisconsin-Platteville*, 160 Wis. 2d 31, 41–42, 465 N.W.2d 266, 270 (Ct. App. 1990) (finding the public interest in disclosing records of university's investigation into charge that professor had violated administrative regulations prohibiting nepotism outweighed possibility of harm to reputation of professor, making records subject to disclosure under public records law; by accepting appointment as dean of department at university, professor voluntarily took position of public prominence and relinquished his right to keep confidential activities directly related to his employment, and investigation regarding his activities had been completed); *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 551–52 (Tex. App. 1983), *writ refused* (Nov. 23, 1983) ("a liberal construction of the Open Records Act seems to compel disclosure of information, even

when disclosure might cause inconvenience or embarrassment for some persons.").

65. Other courts also have held that documents, which are of the type Respondents and Dr. Nichols assert are *per se* exempt, may be subject to disclosure even where the parties agreed explicitly that the information was to be kept confidential and such disclosure may chill the agency's ability to resolve future disputes, and where the records involve private personal matters but the public has an interest in disclosure:

> The university argues that disclosure, contrary to the expectation of parties, of the terms of the settlement of a controversy may chill its future ability to resolve internal matters of dispute, thus effectuating a substantial injury to the public interest. While such an effect is possible, the public's right to know how public funds are expended is paramount considering the public policy of the Open Records Act. Section 24–72–201, C.R.S. (1988 Repl. Vol. 10B).

Denver Pub. Co. v. Univ. of Colorado, 812 P.2d 682, 685 (Colo. App. 1990); *see also*, *Caldecott v. Superior Court*, 243 Cal. App. 4th 212, 223, 196 Cal. Rptr. 3d 223, 232 (2015) (finding a former school district employee's Public Records Act (PRA) request for disclosure of documents related to employee's personnel complaint against the district's superintendent was not within the "unwarranted invasion of personal privacy" exemption from the PRA, even though employee's complaint included a claim of a hostile work environment, since there was a strong public interest in judging how the superintendent and school board responded to employee's claims); *Martin v. Riverside Sch. Dist. No. 416*, 180 Wash. App. 28, 35, 329 P.3d 911, 914 (2014) (finding that a school district's disclosure of records pertaining to its investigation of allegations of former teacher's sexual misconduct and to its ultimate substantiation of allegations and termination of teacher would not violate teacher's right to privacy, as required for personal information exemption or investigative records exemption to prohibit disclosure of the records in response to newspaper reporter's request under Public Records Act (PRA); although disclosure of the records would be highly offensive to a reasonable person, such that first prong of PRA's invasion-of-privacy test was satisfied, public had legitimate interest in disclosure of the records, such that second prong of test was not satisfied.)

66. Quite simply, public employees, especially those who, by nature of their position, are subject to increased scrutiny and notoriety, such as Dr. Nichols and the Board, have a decreased interest in privacy. *See Denver Pub. Co.*, 812 P.2d at 685 ("Moreover, it has been recognized that public employees have a narrower expectation of privacy than other citizens."); *Wisconsin State Journal v. Univ. of Wisconsin-Platteville*, 160 Wis. 2d 31, 41, 465 N.W.2d 266, 270 (Ct. App. 1990) ("**By accepting appointment as Dean of a department of a state university, Al Yasiri voluntarily took a position of public prominence. He has, for the most part, relinquished his right to keep**

confidential activities directly related to his employment. . . . He has little reasonable expectation of privacy regarding his professional conduct.") (emphasis added); *Martin v. Riverside Sch. Dist. No. 416*, 180 Wash. App. 28, 35, 329 P.3d 911, 914 (2014) ("The identity of a public school teacher and the substantiated allegations regarding the teacher's misconduct that occurred on school grounds is of legitimate interest to the public. . . . Disclosure of Mr. Martin's identity and the requested records would not violate Mr. Martin's right to privacy.").

67. Because of the public's great interest in understanding why governmental and public employees behave in their professional capacities and how they conduct the business of the state, access to such public records generally is permitted even at the risk of injury to official reputation or the private interests of those individuals in keeping information confidential. *See BRV, Inc. v. Sup.Ct. (Dunsmuir Joint Union High School Dist.)*, 143 C.A.4th 742, 759 (Cal. 2006); *American Federation of State, County & Municipal Employees (AFSCME), Local 1650 v. Regents of Univ. of Calif.*, 80 C.A.3d 913, 916-919, 146 CR 42, 43-45 (Cal. 1978)

68. Given the strong, overarching policy favoring disclosure, and the implied limitation necessitated by the application of the rule, this Court finds that the personnel files exception in Wyoming Statute § 16-4-203(d)(iii) exempts from disclosure ***only*** those records within a personnel file the disclosure of which would constitute an unwarranted invasion of personal privacy. *See Houghton*, 870 P.2d at 1055.

69. Further, exempting an entire category of records, such as any documents relating to an alleged investigation into Dr. Nichols's conduct or behavior, from disclosure is plainly contrary to the policy underlying the WPRA:

> **[T]he custodian must then employ his discretion on a selective basis rather than through the withdrawal of entire categories of public records** — as was done by the chief of police in this case. Since the public policy which pertains to the Public Records Act speaks to the philosophy of disclosure, **it is therefore contrary to that philosophy for the police chief to withdraw entire categories of public records — or any public records — without first addressing the issue which asks whether or not the withdrawal of *individual* [italics in original] records, documents, or portions thereof violates provisions of the Act.** In other words, the language of the statute imposes a legislative presumption which says that, where public records are involved, the denial of inspection is contrary to the public policy, the public interest and the competing interests of those involved.

Sheridan Newspapers, Inc. v. City of Sheridan, 660 P.2d 785, 795–96 (Wyo. 1983) (bold added). Thus, Respondents, and now the Court, must address each record *individually* to evaluate whether an exception applies such as to trigger redaction or non-disclosure under the WPRA.

70. The Court is not persuaded that the personnel files exemption in Wyoming Statute § 16-4-203(d)(iii) applies to the documents in dispute. The documents are not in the nature of "[a]pplications, performance ratings and scholastic achievement data" contemplated by the exemption, but rather are more akin to "[e]mployment contracts, working agreements or other documents setting forth the terms and conditions of employment of public officials and employees" which "are not considered part of a personnel file and shall be available for public inspection." Wyo. Stat. Ann. § 16-4-203(d)(iii).

71. While the documents the Court reviewed do not fall squarely within the types of records outlined in the personnel files exemption as quoted above, and fit more naturally within the records of investigations exemption (discussed below), the Court also finds the personnel files exemption must be narrowly construed and cannot apply to an entire category of records, as Respondents argue. Therefore, even given a finding that the records fall within the "personnel files" exemption, the Court interprets the exemption to require ***only*** those documents which would, if disclosed, constitute an ***unwarranted invasion of an individual's privacy interest*** be withheld.

72. Portions of the documents submitted for *in camera* review may contain information which could constitute an unwarranted invasion of personal privacy if disclosed (as discussed in detail below). In such situations, redaction is the proper remedy:[12]

> We take this opportunity to hold that a district court may use redaction as one of the remedies to vindicate the public's interests in access to public records. That redaction is an appropriate tool to be used in circumstances such as these is well established in case law, as well as in statutes.

Allsop v. Cheyenne Newspapers, Inc., 2002 WY 22, ¶ 30, 39 P.3d 1092, 1101 (Wyo. 2002); *see also, Denver Pub. Co. v. Univ. of Colorado*, 812 P.2d 682, 685 (Colo. App. 1990).

73. Most of the documents requested by Petitioners under the WPRA would ***not*** constitute an unwarranted invasion of personal privacy (for anyone involved in the

[12] Accordingly, this Court will redact portions of the released documents as necessary to protect appropriate individuals from an unwarranted invasion of personal privacy.

communications) were they to be released, and, as such, the Court will order full disclosure of those documents. To the extent that some records do contain personal information the disclosure of which would result in an unwarranted invasion of personal privacy for certain individuals involved or named therein, the Court will order disclosure of those documents as redacted by the Court when necessary to protect the personal privacy interests of some parties involved to the degree possible. *See Booth Newspapers, Inc. v. Univ. of Michigan Bd. of Regents*, 444 Mich. 211, 233, 507 N.W.2d 422, 432 (1993) (holding that personal privacy exception does not extend to public information that could conceivably lead to invasion of privacy, but rather only to information that presents clearly unwarranted invasion of matters of personal nature.)

B. Records of Investigations: Wyoming Statute § 16-4-203(d)(xi) (2018)

74. Respondents also argue that Wyoming Statute § 16-4-203(d)(xi) (2018) requires them to withhold certain requested documents as records of investigations which would constitute an unwarranted invasion of personal privacy. The statute reads as follows:

> (d) The custodian **shall** deny the right of inspection of the following records, unless otherwise provided by law:
>
> . . .
>
> (xi) Records or information compiled solely for purposes of investigating violations of, and enforcing, internal personnel rules or personnel policies the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

Wyo. Stat. Ann. § 16-4-203 (2018) (emphasis added).

75. The Wyoming Supreme Court has opined on the application of this exemption:

> The exemption allows the record custodian to deny public inspection if the record or information was compiled *solely* for purposes of investigating violations or enforcing internal personnel rules or policies, the disclosure of which would clearly constitute an unwarranted invasion of privacy. In this context, the word "solely" is equivalent to "exclusively." See Webster's New College Dictionary 1075 (3rd ed. 2005).

Sheaffer v. State ex rel. Univ. of Wyoming, 2006 WY 99, ¶ 14, 139 P.3d 468, 473 (Wyo. 2006) (italics in original).

76. Respondents allege that the request for information involving an investigation into Dr. Nichols' job performance may involve investigations into violations of internal personnel policies and, thus, cannot be disclosed to the extent it invades Dr. Nichols's or any other employee's personal privacy. *See Respondents' Brief* at 9-10.

77. Respondents, analogizing the very similar provisions in the federal Freedom of Information Act (FOIA) Exemption 6, cite to federal caselaw that interpreting FOIA's invasion of privacy language and setting out at two-step inquiry to determine whether information whether information is private for purposes of FOIA Exemption 6: first, whether the information requested is similar to what may be within a medical or personnel file; and, second, whether the balance between the individual's privacy interest against the public's interest in disclosure. *See id.* at 10.

78. Petitioners do not take issue with a conclusion that the requested documents may well be "records or information compiled solely for purposes of investigating violations of, and enforcing, internal personnel rules or personnel policies." *See* Wyo. Stat. Ann. § 16-4-203(d)(xi) (2018). Instead, Petitioners argue that, as noted above, public employees have a diminished expectation of privacy while the public has a has a strong interest in knowing "what the government is up to." *Petitioners' Brief* at 10 (quoting *Wyoming Dept. of Transp. v. Int'l Union of Operating Engineers*, 908 P.2d 970, 974 (Wyo. 1995). As such, they argue that disclosure of these records does not result in a clearly unwarranted invasion of personal privacy.

79. Given that the parties do not debate the potential applicability of the exception for "records or information compiled solely for purposes of investigating violations of, and enforcing, internal personnel rules or personnel policies." *see* Wyo. Stat. Ann. § 16-4-203(d)(xi) (2018), this Court will accept, for purposes of this decision alone that the sought-out records potentially fall within the purview of that statutory provision. The issue, rather, is whether the latter requirement of Wyoming Statute § 16-4-203(d)(xi) applies, rendering disclosure of these records a clearly unwarranted invasion of personal privacy. *See id.*

80. As discussed above, the Wyoming Supreme Court has defined an unwarranted invasion of personal privacy to be "the publicizing of one's private affairs with which the public had no legitimate concern." *Houghton*, 870 P.2d at 1055.[13]

[13] Some courts apply a balancing test to determine whether disclosure of information rises to the level of an unwarranted invasion of personal privacy:

81. Other courts define the phrase similarly:

> The test to determine if the disclosure of the information would be an unwarranted invasion of personal privacy is whether the revelation would be **highly embarrassing or is of an intimate nature, which, if publicized, would be highly objectionable to a reasonable person**. *See Hubert v. Harte–Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550–51 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

Thomas v. El Paso Cty. Cmty. Coll. Dist., 68 S.W.3d 722, 726 (Tex. App. 2001) (emphasis added).

82. The Court, therefore, finds that Wyoming Statute § 16-4-203(xi) is clear on its face and that only those records created for purposes of investigating violations of or enforcing internal personnel rules or policies, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy (i.e. the publicizing of one's private affairs with which the public has no legitimate concern), are exempt from disclosure. As with all WPRA exemptions, the records of investigations exemption must be narrowly construed. *See Allsop v. Cheyenne Newspapers, Inc.*, 2002 WY 22, ¶¶ 10–12, 39 P.3d 1092, 1095–96 (Wyo. 2002).

83. As Respondents correctly note, individuals have a privacy interest in their own names and addresses. *See Respondents' Brief*, at 10-11 (citing, inter alia, *United states Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 765 (1989); *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1233 (10th Cir. 2007)); *see also, Glassmeyer v. City of Columbia*, 414 S.C. 213, 220–21, 777 S.E.2d 835, 839–40 (Ct. App. 2015) ("Simply put, disclosure of employees' home addresses and telephone

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> To determine whether a particular intrusion into an individual's privacy is justified, "[a court] must engage in the delicate task of weighing competing interests." *Fraternal Order of Police*, 812 F.2d at 110 (citing *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 578 (3d Cir. 1980)). Factors that the court should consider include: "(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access". *Id. (citing Westinghouse,* 638 F.2d at 578); see also *Doe v. Poritz,* 142 N.J. 1, 87–88, 662 A.2d 367 (1995).

Does v. City of Trenton Dep't of Pub. Works, 565 F. Supp. 2d 560, 567 (D.N.J. 2008).

numbers to plaintiff would reveal little or nothing about a governmental agency's conduct.").

84. However, as discussed previously, public employees and public figures, including Dr. Nichols and the Board, have a diminished privacy interest by nature of their positions and the public has a legitimate concern and great interest in the actions of the University Board and the University President.[14] As the Wyoming Supreme Court said in *Laramie River Conservation Council v. Dinger*, 567 P.2d 731, 734 (Wyo. 1977), "[t]here is a well-known expression applied to those in public office, 'If you can't stand the heat, you'd better stay out of the kitchen.'" *Id.*

85. As such, the Court will order disclosure of those records that do not reveal private information of third-parties and will redact such private information as names and addresses of the individuals involved in the records disclosed, other than those of Dr. Nichols and the Board. Information regarding Dr. Nichols or members of the Board will be redacted only to the degree that it "would be highly objectionable to a reasonable person" or concerns "private affairs with which the public has no legitimate concern." *Thomas*, 68 S.W.3d at 726; *Houghton*, 870 P.2d at 1055. The vast majority of the records submitted to the Court for *in camera* review do ***not*** fall into either category and do not constitute an unwarranted invasion of personal privacy; as such they will be ordered disclosed "as is."

II. Common Law/Statutory Privileges as Prohibiting Disclosure

86. Respondents next allege that some documents which may be responsive to Petitioners' WPRA request fall within the "deliberative process" privilege and/or "attorney-client" privilege and, as such, are not subject to disclosure. Dr. Nichols argues additionally that the "official information" or "executive" privilege may also apply.

87. Under Wyoming Statute § 16-4-203(a)(v) public records "include[] any information in a physical form created, accepted, or obtained by a governmental entity in furtherance of its official function and transaction of public business **which is not privileged or confidential by law**." *Id.* Documents falling within either privilege claimed by Respondents are *per se* exempt from disclosure because they fall outside the statutory definition of "public records."

[14] The Court is not persuaded by Dr. Nichols' assertion that Petitioners' "curiosity" does not give rise to public interest. *See Nichols' Brief*, ¶ 52. Petitioners comprise several news organizations who are in the business of disseminating information for public consumption, and, given the frequent appearance of this litigation in local and state-wide news media, the Court is quite convinced that this is a matter of general public interest, to say the least.

88. The Court will address each privilege asserted in turn.

A. Deliberative Process Privilege

89. The Wyoming Supreme Court adopted the deliberative process privilege in the context of public records requests under Wyoming Statute § 16-4-203(b)(v) (2018), which allows the custodian to deny the right of inspection to certain records:

> (b) The custodian **may** deny the right of inspection of the following records, unless otherwise provided by law, **on the ground that disclosure to the applicant would be contrary to the public interest**:
>
> . . .
>
> (v) **Interagency or intraagency memoranda or letters which would not be available by law to a private party in litigation with the agency**[.]

Wyo. Stat. Ann. § 16-4-203 (2018) (emphasis added). *See also Aland v. Mead*, 2014 WY 83, ¶ 38, 327 P.3d 752, 765 (Wyo. 2014) ("We hold that the deliberative process privilege is incorporated into section 203(b)(v) of the WPRA.").

90. The privilege, which also applies to Freedom of Information Act (FOIA) requests, covers intragovernmental communications which are pre-decisional and deliberative, and serves several purposes:

> The deliberative process privilege exempts from disclosure communications between executive officials that are both pre-decisional and deliberative. *Freudenthal,* 2010 WY 80, ¶ 33, 233 P.3d at 942. The policy objective proffered for the privilege is protection of the governmental decision-making process:
>
> > Among the reasons given for recognizing the privilege in the context of FOIA's Exemption 5 are that the privilege **protects the flow of ideas within government agencies, allows candid discussion and free exploration of ideas and improves governmental decision-making by taking official deliberations out of a fishbowl**. *Id.; Sun–Sentinel Co. v. U.S. Dep't of Homeland Sec.,* 431 F.Supp.2d 1258, 1277 (S.D. Fla. 2006). The United States Supreme Court reiterated the rationale for the privilege within the context of FOIA's Exemption 5 most

recently in *Dep't of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8–9, 121 S.Ct. 1060, 1066, 149 L.Ed.2d 87 (2001):

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance "the quality of agency decisions" by protecting open and frank discussion among those who make them within the Government.

Id. at ¶ 16, 233 P.3d at 937–38.

Another court has framed the policy underlying the deliberative process privilege as follows:

> The privilege has a number of purposes: it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action. See *Jordan* [*v. United States Dep't of Justice*], 591 F.2d 753, 772–74, 192 U.S.App.D.C. [144], 163–165 [(1978)].

Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

Aland, ¶¶ 20–21, 327 P.3d at 760–61 (emphasis added).

91. Respondents argue that the deliberative process privilege applies to two communications, which meet the prongs of the *Aland* test below, because: (1) they are between members of the Board; (2) they concern recommendations, proposals and suggestions for the terms of a potential renewed employment contract; and (3) disclosure of mere proposals would not be in the public interest and would inaccurately reflect the views of the University. *See Respondents' Brief* at 16.

92. Dr. Nichols' arguments are substantially the same. Additionally, she argues that the release of any "investigatory materials" which were never shared with her and

which she has not had the opportunity to review, would not be in the public interest. *Nichols' Brief*, ¶ 76.

93. Petitioners argue that the privilege is "very narrowly circumscribed" and does not apply to members of a legislative body such as the Board, but only to executive officials. *See Petitioners' Brief* at 16–17 (quoting *Aland*, ¶ 38). Petitioners further note that the privilege applies only to advice "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." *Id.* (quoting *Aland*, ¶ 42). They argue that, because the public has a legitimate interest in the Board's decision not to renew Dr. Nichols' contract and because a loose application of the privilege would lead to a wide loophole in the WPRA, the records should be disclosed. *Id.* at 17–18.

94. The Wyoming Supreme Court laid out, in *Aland*, the test for whether documents requested under the WPRA fall within the deliberative process privilege:

> We hold that the deliberative process privilege is incorporated into section 203(b)(v) of the WPRA. In recognizing the deliberative process privilege in the context of the WPRA, **we note that it is a very narrowly-circumscribed privilege that can be invoked only with due care. The burden remains upon the custodian of the records to overcome the WPRA's presumption in favor of disclosure as to *each* document withheld (or redacted**, see Allsop, 2002 WY 22, ¶ 30, 39 P.3d at 1101). The custodian must be prepared to provide a written statement of grounds for denial upon request of the applicant, with sufficient information to allow the applicant to evaluate the basis for denial. Wyo. Stat. Ann. § 16–4–203(e) (LexisNexis 2013); see *PRBRC*, 2014 WY 37, ¶¶ 21–24, 320 P.3d at 229–30; *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, 629 (Nev. 2011) (holding that "a claim that records are confidential can only be tested in a fair and adversarial manner, and in order to truly proceed in such a fashion, a log typically must be provided to the requesting party.").
>
> In making the decision to assert the deliberative process privilege in response to a public records request, the custodian must insure that the decision to withhold the records does indeed satisfy all prongs of the test: **1) it is an interagency or intraagency communication, 2) the communication is pre-decisional and deliberative, and 3) disclosure is not in the public interest**.

Aland, ¶¶ 38–39, 327 P.3d at 765–66 (emphasis added).

95. The Court will examine each *Aland* prong in turn.

i. Interagency or Intraagency Communications

96. To meet the requirements of the test laid out by the Wyoming Supreme Court, Respondents must first show that the communications were "between employees or officials within an agency or between agencies of the State." *Aland*, ¶ 40, 327 P.3d at 766.

97. While the Court notes that the University does not qualify as an "agency" of the state for purposes of the Wyoming Administrative Procedures Act (WAPA), *see* Wyo. Stat. Ann. § 16-3-101(b)(i), there can be no argument that the WPRA applies to the University of Wyoming. *See Sheaffer v. State ex rel. Univ. of Wyoming*, 2006 WY 99, ¶ 16, 139 P.3d 468, 474 (Wyo. 2006).[15] "Agency" in this context is meant to apply to entities that are subject to the WPRA.[16]

98. The Court, therefore, finds that the communications between members of the Board, as officials of a state institution, are "intra-agency communications" for purposes of the deliberative process privilege under the WPRA.

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[15] Under the 2019 amendments to the WPRA, the University and its Board are a "governmental entity" under the WPRA. *See* Wyo. Stat. Ann. § 16-4-201(a)(xiii) ("'Governmental entity' means the state of Wyoming, an agency, political subdivision or state institution of Wyoming."

[16] This is particularly true given the definition of "public records":

> (v) "Public records" when not otherwise specified includes any information in a physical form created, accepted, or obtained by the state or any agency, institution or political subdivision of the state in furtherance of its official function and transaction of public business which is not privileged or confidential by law. Without limiting the foregoing, the term "public records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by the state or any agency, institution or political subdivision of the state in furtherance of the transaction of public business of the state or agency, institution or political subdivision of the state, whether at a meeting or outside a meeting. Electronic communications solely between students attending a school in Wyoming and electronic communications solely between students attending a school in Wyoming and a sender or recipient using a nonschool user address are not a public record of that school. **As used in this paragraph, a "school in Wyoming" means the University of Wyoming, any community college and any public school within a school district in the state[.]**

Wyo. Stat. Ann. § 16-4-201 (2018) (emphasis added).

ii. Pre-Decisional and Deliberative Communications

99. Second, Respondents must show that the communications were pre-decisional and deliberative in nature:

> [F]or a document to be "pre-decisional," the document must be one that is generated prior to the government's adoption of a policy. "The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents . . . which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." *Coastal States Gas Corp.*, 617 F.2d at 866.
>
> The *Coastal States Gas Corp.* court went on to say:
>
> > To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, **courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency. . . . We also ask whether the document is recommendatory in nature or is a draft of what will become a final document, and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another.** Finally, even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.
>
> 617 F.2d at 866.
>
> To demonstrate that a document is "deliberative" in nature, **the government must show that the document reflects the give and take of the government's decision-making process. Such documents will contain "advisory opinions, deliberations or the exercise of discretion on some policy."** *Freudenthal,* 2010 WY 80, ¶ 35, 233 P.3d at 943. **Mere factual information will not generally be considered sufficient to satisfy the deliberative nature requirement.**
>
> In *Freudenthal,* we cited with favor the Tenth Circuit's conclusion that **"[i]nformation is not protected simply because disclosure would reveal some minor or obvious detail of an agency's decision making process."** 2010 WY 80, ¶ 36, 233 P.3d at 943 (citing *Trentadue v. Integrity Comm.*, 501

> F.3d 1215, 1228 (10th Cir. 2007)). We further explained that **a document is privileged only "if its disclosure would 'lay bare the discussion and methods of reasoning of public officials' and withholding it is necessary to 'protect free discussion of prospective operations and policy.'"** *Freudenthal,* 2010 WY 80, ¶ 34, 233 P.3d at 943 (citing *Kaiser Aluminum & Chemical Corp. v. United States,* 157 F.Supp. 939, 947, 141 Ct. Cl. 38, 49 (1958)).

Aland v. Mead, 2014 WY 83, ¶¶ 41–44, 327 P.3d 752, 766 (Wyo. 2014) (emphasis added).

100. This Court has reviewed the documents that Respondents claim fall within the deliberative process privilege.

101. While the communications do include pre-decisional information and some "recommendations, draft documents, proposals, suggestions, and other subjective documents," the documents are in no way of the type which "would lay bare the discussion and methods of reasoning of public officials and withholding it is necessary to protect free discussion of prospective operations and policy." *Id.* The documents include suggestions for amendments to the proposed renewal contract under negotiation, and disclosure would simply "reveal some minor or obvious detail of [the Board's] decision making process." *Id.* No deliberation is reflected; no methods of reasoning, and, in fact, no discussion at all is included in the communications. They simply include proposed text to attach to a draft of Dr. Nichols' renewed employment contract during negotiations, with some changes noted within the contract itself. Nothing within the communications is "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." *Id.*

102. For these reasons, the Court finds that the second prong of the *Aland* test has not been met.

iii. Disclosure Not in the Public Interest

103. Third, and finally, the Respondents must show that disclosure of the documents would be contrary to the public interest:

> In some instances, this public interest prong of the test is satisfied by weighing the public interest in allowing the free exchange of opinions within the executive branch against the public interest in being informed of the actions of public officials carrying out the business of the public. However, that may not be the result in every case, and the records custodian as well as the trial courts

must carefully weigh the competing public interests, even after concluding the documents fall under the deliberative process privilege.

Aland, ¶ 47, 327 P.3d at 767.

104. Having already determined that the documents at issue are not of the type that would chill the free exchange of ideas between members of the Board, the Court finds that the public's interest in "being informed of the actions of public officials carrying out the business of the public" outweighs the Board's interest against disclosure. *Id.* The public has a compelling interest in knowing the employment details of the President of the only university in the State of Wyoming and how public funds are being used, and, while the contract was never finalized, the communications in dispute contain little or no private deliberative information regarding the discussion or decision-making process on the part of the Board. The fact that Dr. Nichols herself has not been able to review the documents in Respondents' custody does not impact this determination.

105. The Court, therefore, finds that disclosure of the contested communications would not be contrary to the public interest, and Respondents have failed to meet the third prong of the *Aland* test.

106. For the foregoing reasons, the Court finds and concludes that the disputed communications do **not** fall within the deliberative process privilege and will order release of those documents, redacted by the Court as necessary.

B. Attorney-Client Privilege

107. Respondents also assert that twenty-one (21) communications between the Board, Board members, and the University's General Counsel, dated January 3, 2019 to March 28, 2019 contain legal advice and were, therefore, appropriately withheld properly pursuant to the attorney-client privilege.

108. Petitioners argue that the privilege does not apply. First, in order for the privilege, which must be narrowly construed, to apply the attorney must be acting in "his or her capacity as a legal advisor" and not in situations where an attorney is acting as a participant in the transaction, rather than as a legal advisor. *Petitioners' Brief* at 15 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). Further, communications with an attorney who is acting as a negotiator or agent in a commercial venture are not privileged, and the fact that an attorney was involved in the communication does not automatically trigger the privilege. *Id.* at 18–19.

109. Wyoming Statute § 1-12-101(a)(i) codifies the attorney-client privilege and states an attorney shall not disclose information "concerning a communication made to him by his client in that relation, or his advice to his client[.]" *Id.*

110. Respondents, as the party seeking to assert the privilege, bear the burden of proving that it applies:

> The burden of establishing the applicability of the [attorney-client] privilege rests on the party seeking to assert it. The party must bear the burden as to specific questions or documents, not by making a blanket claim. **The privilege must be strictly constructed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.**

In re Grand Jury Proceedings, 616 F.3d 1172, 1182-83 (10th Cir. 2010) (internal citations and quotations omitted) (emphasis added).

111. To be privileged, the communication generally must be between the attorney and the client and related to legal services:

> The attorney-client privilege protects **confidential communications by a client to an attorney** made in order to obtain legal assistance from the attorney in his capacity as a legal advisor. **The mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege; rather, the communication between a lawyer and client must relate to legal advice or strategy sought by the client.**

Id. (emphasis added) (internal citations and quotations omitted).

112. Respondents offer no argument in either their *Brief* or *Reply* as to specifically how and why the attorney-client privilege applies to the communications at issue. However, the Court finds Respondents, in an abundance of caution, properly invoked the privilege as a potential exemption from disclosure. *See Aland*, ¶74, 327 P.3d at 772.

113. Petitioners cite to case law from other states for the proposition that the attorney-client privilege does not apply when an "attorney acts merely as a negotiator for the client or is providing [non-legal] advice" or "functions as an agent or negotiator in a commercial venture." *Petitioners' Brief* at 18 (citing *Costco Wholesale Corp. v. Superior*

Court, 47 Cal. 4th 725, 735, 219 P.3d 736, 743 (2009); *Nelson v. City of Billings*, 2018 MT 36, ¶ 34, 390 Mont. 290, 305, 412 P.3d 1058, 1070; *305-7 W. 128th St. Corp. v. Gold*, 178 A.D.2d 251, 251, 577 N.Y.S.2d 278, 279 (1991)).

114. The Court agrees with Petitioners. The privilege covers only communications relating to legal advice, and "[t]he mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege." *In re Grand Jury Proceedings*, 616 F.3d at 1183.

115. Many of the communications that Respondents withheld from disclosure under the attorney-client privilege are communications between members of the Board and the University's General Counsel and labelled within the documents as subject to the attorney-client privilege. However, the fact that General Counsel is a party to, or even the author or recipient of, a communication does not automatically make the communication privileged when it does not seek or offer legal advice. As such, the Court will order many of the documents to be disclosed, as the communications simply within do not "relate to legal advice or strategy sought by the client" and, thus, do not fall within the privilege. *Id.*

116. However, it is apparent from some of the communications that they were made for the purpose of seeking or rendering legal advice to and from the Office of General Counsel. The Court concludes that those documents Bates Stamped HA000364-HA000369; HA000399-HA000408; and HA000453-HA000454 qualify as attorney-client privileged communications and are exempt from disclosure. Accordingly, those communications will be withheld in their entirety in keeping with the principles of the attorney-client privilege.

C. Official Information/Executive Privilege

117. Dr. Nichols argues that, in addition, the "official information" or "executive" privilege also may act to prevent the disclosure of some of the records: "Broadly stated, this privilege sanctions the nondisclosure by governmental agencies or instrumentalities of information, files, reports, or memoranda maintained by those agencies or instrumentalities, when disclosure would be harmful to the public interest." *Martinelli v. Dist. Court In & For City & Cty. of Denver*, 199 Colo. 163, 169, 612 P.2d 1083, 1088 (1980), *holding modified by In re Dist. Court, City & Cty. of Denver, 09CV7235.*, 256 P.3d 687 (Colo. 2011) (internal quotation omitted).

118. Neither Petitioners nor Respondents addressed this argument in their responses.

119. It is not clear to the Court which aspect or interpretation of the privilege Dr. Nichols argues would apply in this instance. The "official information" and/or "executive" privilege has been interpreted and applied differently depending on the statutory background in the relevant jurisdiction and the nature of the proceedings. *Compare Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045, ¶¶ 9-12, 299 P.3d 424, 428 (2013); *Marylander v. Superior Court*, 81 Cal. App. 4th 1119, 1125–26, 97 Cal. Rptr. 2d 439, 443–44 (2000).

120. The executive privilege generally applies only to communications made to or closely associated with the office of chief executive or governor. *See Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045,¶ 9, 299 P.3d 424, 428 (2013) ("It applies only to communications 'connected to the chief executive's decisionmaking, as opposed to other executive branch decisionmaking,' and only to those 'to or from individuals in very close organizational and functional proximity to the Governor.'") (internal citations omitted). In that context, that privilege certainly does not apply here.

121. While the privilege has not been directly applied to the WPRA in Wyoming, other jurisdictions generally recognize it as an exemption to public records requests:

> The executive communications privilege plays a critical part in preserving the integrity of the executive branch. Courts have widely recognized that the chief executive must have access to candid advice in order to explore policy alternatives and reach appropriate decisions. *Nixon,* 418 U.S. at 708, 94 S.Ct. 3090; *Republican Party v. N.M. Taxation & Revenue Dep't,* 2012–NMSC–026, 283 P.3d 853; *State ex rel. Dann v. Taft,* 109 Ohio St.3d 364, 2006–Ohio–1825, 848 N.E.2d 472; *Guy v. Judicial Nominating Comm'n,* 659 A.2d 777 (Del. Super. Ct. 1995); *Hamilton v. Verdow,* 287 Md. 544, 414 A.2d 914 (1980); *Nero v. Hyland,* 76 N.J. 213, 386 A.2d 846 (1978). These same courts have recognized that the communications privilege ensures the chief executive access to such candid advice, promoting the effective discharge of the chief executive's constitutional duties. *Nixon,* 418 U.S. at 705–08, 94 S.Ct. 3090; *Republican Party,* 283 P.3d at 866–68; *Dann,* 848 N.E.2d at 484; *Guy,* 659 A.2d at 783–84; *Hamilton,* 414 A.2d at 922; *Nero,* 386 A.2d at 853. Refusal to recognize the gubernatorial communications privilege would subvert the integrity of the governor's decision making process, damaging the functionality of the executive branch and transgressing the boundaries set by our separation of powers doctrine. *See Nixon,* 418 U.S. at 708, 94 S.Ct. 3090 (calling the privilege "fundamental to the operation of Government and inextricably rooted in the separation of powers"); *accord Loving v. United States,* 517 U.S. 748, 757, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996) ("Even when a branch does not arrogate power to itself, moreover, the separation-of-

powers doctrine requires that a branch not impair another in the performance of its constitutional duties."); *Guy,* 659 A.2d at 783 (the privilege guards the "vital public interest . . . involved in the effective discharge of a governor's constitutional duties").

Our decision to recognize the executive communications privilege as an exemption to the PRA comports with the decisions of our sister states. Every court that has examined the executive communications privilege in light of open government laws has recognized both the privilege and its applicability to open government laws. *Republican Party,* 283 P.3d at 853; *Dann,* 848 N.E.2d at 485; *Guy,* 659 A.2d at 777. The state open government laws at issue in *Republican Party, Dann,* and *Guy* shared the PRA's purpose and language. Just as each of those courts did, we determine that constitutional concerns must trump the mandate of our open government law, and we reject the idea that this will debilitate our democracy.

> Neither the Supreme Court of the United States nor state supreme courts have been persuaded by arguments similar to those asserted by relator here that the recognition of an executive privilege threatens the viability of our democratic institutions. Rather, to the extent that an executive privilege facilitates candor and open, vigorous debate in the formulation of public policy, it lubricates the decisional process.

Dann, 848 N.E.2d at 482.

Freedom Found. v. Gregoire, 178 Wash. 2d 686, 696–99, 310 P.3d 1252, 1258–59 (2013).

122. The Court first notes that the executive privilege generally may be asserted ***only*** by the head of the executive branch or persons closely associated therewith. *See Edenburn v. New Mexico Dep't of Health*, 2013-NMCA-045,¶ 9, 299 P.3d 424, 428 (2013) ("the privilege . . . [is] reserved to the constitutionally-designated head of the executive branch—the Governor."). And, "[a]lthough the privilege must extend beyond the chief executive, the demands of the privilege become more attenuated the further away operationally the advisors are from the chief executive." 81 Am. Jur. 2d *Witnesses* § 487 (citing *Freedom Found. v. Gregoire*, 178 Wash. 2d 686, 310 P.3d 1252 (2013)). Here, Dr. Nichols herself is personally asserting the privilege. Given the operational distance between the governor and the former president of the University, the Court must find that the privilege, even if it could be asserted by Dr. Nichols personally, would be attenuated to the degree of virtual nonexistence.

123. The Court, therefore, finds that the privilege is inapplicable in this instance, and, in any case, that it has not been properly invoked.

124. On the other hand, the "official information" privilege, when raised in discovery disputes, requires the trial court to

> make an independent determination of the extent to which the privilege applies to the materials sought to be discovered. This determination is the result of the ad hoc balancing of: (a) the discoverant's interests in disclosure of the materials; and (b) the government's interests in their confidentiality.
>
> The trial court must balance the competing interests through an in camera examination of the materials for which the official information privilege is claimed. Such a review enables the trial court: (a) to allow or disallow discovery as to individual items of material for which the privilege is claimed; or (b) to excise or edit from individual items those matters which it determines to come within the scope of the privilege; or (c) to take other protective measures pursuant to C.R.C.P. 26(c).

Martinelli, 612 P.2d at 1088–89 (internal citations omitted).

125. Other courts have found that the official information privilege may be invoked in public records requests where there are statutory provisions or procedural rules supporting and recognizing the privilege.[17] *See e.g., Herald Ass'n, Inc. v. Dean*, 174 Vt. 350, 356, 816 A.2d 469, 475 (2002); *Wilson v. Brown*, 404 N.J. Super. 557, 574, 962 A.2d 1122, 1133 (App. Div. 2009). Such is not the case in Wyoming.

126. This Court is not persuaded that the official information privilege is applicable in this case. No Wyoming rules, statutes, or cases directly recognize such a privilege or its application to the WPRA. Even if the official information or executive privilege were to apply, it is analogous to the deliberative process privilege and requires the Court to similarly balance the government's interest in confidentiality against the public's right to disclosure, which this Court has done. *See Kwitny v. McGuire*, 102

[17] Dr. Nichols argues "evaluative summaries" are subject to the official information privilege and must, under the privilege, be balanced against the public's interest to determine whether they should be disclosed. *See Nichols' Brief*, ¶ 60 (citing *Martinelli*, 612 P.2d at 1090). The Court, having reviewed the disputed documents, finds that there are no "evaluative summaries" contained within the records, and, even if there were evaluative summaries, the same balancing test applied in the Court's deliberative process privilege analysis would weigh in favor of disclosure of the records, redacted as necessary. *See Ostoin v. Waterford Twp. Police Dep't.*, 189 Mich. App. 334, 471 N.W.2d 666 (1991) (government documents containing agency's deliberative or evaluative processes are protected from disclosure by qualified privilege).

Misc. 2d 124, 125–26, 422 N.Y.S.2d 867, 868 (Sup. Ct. 1979), *aff'd*, 77 A.D.2d 839, 432 N.Y.S.2d 149 (1980), *aff'd*, 53 N.Y.2d 968, 424 N.E.2d 546 (1981). Having already found that the public's constitutional right of access to public records in this case outweighs Respondents' interest in non-disclosure, discussed in the deliberative process privilege analysis above, the Court finds that the balance of interests would result nonetheless in disclosure of the requested records, redacted by the Court as necessary.

III. Production of a Privilege Log by Respondents

127. As stated previously, Petitioners seek the production of a privilege log to the extent that any of the documents produced for *in camera* review are not disclosed and remain confidential.

128. A privilege log is the general term used by attorneys for a document listing what items of discovery are being withheld pursuant to a privilege and is required to be produced by parties in litigation when a privilege is asserted, pursuant to Wyoming Rule of Civil Procedure 26(b)(5)(A). *See Dishman v. First Interstate Bank*, 2015 WY 154, ¶ 22, 362 P.3d 360, 368 (Wyo. 2015).

129. Petitioners argue that Respondents must provide a privilege log identifying each record withheld; describing the nature of each record; and detailing the reasons and authority for withholding each record. *See Petition* at 3. Petitioners cite to *Aland* for the proposition that a privilege log, sufficient to allow Petitioners to challenge the reasons for denial of the record in an adversarial manner, is required when records are withheld under the WPRA:

> The custodian must be prepared to provide a written statement of grounds for denial upon request of the applicant, with sufficient information to allow the applicant to evaluate the basis for denial. Wyo. Stat. Ann. § 16–4–203(e) (LexisNexis 2013); *see PRBRC*, 2014 WY 37, ¶¶ 21–24, 320 P.3d at 229–30; *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, 629 (Nev. 2011) (holding that "a claim that records are confidential can only be tested in a fair and adversarial manner, and in order to truly proceed in such a fashion, a log typically must be provided to the requesting party.").

Aland v. Mead, 2014 WY 83, ¶ 38, 327 P.3d 752, 765 (Wyo. 2014).

130. Respondents argue that a privilege log is required only in litigation and is not required for exempt documents under the WPRA: "Because the public records request was for documents which are, ***by definition***, specifically prohibited from disclosure, no log describing the documents is required." *Respondents' Brief* at 12 (emphasis in

original). Respondents assert that no case law or statute in Wyoming requires a privilege log to be produced pursuant to a WPRA request.

131. The WPRA requires that "[i]f the custodian denies access to any public record, the applicant may request a written statement of the grounds for the denial. The statement shall cite the law or regulation under which access is denied and shall be furnished to the applicant." Wyo. Stat. Ann. § 16-4-203(e) (2018).

132. The Wyoming Supreme Court has provided guidance on the nature of this "written statement" in *Aland*, where the court cited to Wyoming Statute § 16-4-203(e) in holding that the custodian must provide a written statement "with sufficient information to allow the application to evaluate the basis for denial." *Aland*, ¶ 38, 327 P.3d at 765.

133. The *Aland* court cited to *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, 629 (Nev. 2011), to further expound on what must be included in the written statement: "a claim that records are confidential can only be tested in a fair and adversarial manner, and in order to truly proceed in such a fashion, a log typically must be provided to the requesting party."

134. In *Reno Newspapers*, in interpreting the Nevada Public Records Act (NPRA), the Supreme Court of Nevada held:

> We therefore conclude that after the commencement of an NPRA lawsuit, **the requesting party generally is entitled to a log unless, for example, the state entity withholding the records demonstrates that the requesting party has sufficient information to meaningfully contest the claim of confidentiality without a log. We decline to spell out an exhaustive list of what such a log must contain or the precise form that this log must take because, depending on the circumstances of each case, what constitutes an adequate log will vary**. *See Keys v. U.S. Dept. of Justice,* 830 F.2d 337, 349 (D.C.Cir. 1987) (stressing that "it is the function, not the form, of the index that is important"). For purposes of this opinion, it is sufficient to simply explain that **in most cases, in order to preserve a fair adversarial environment, this log should contain, at a minimum, a general factual description of each record withheld and a specific explanation for nondisclosure.**

Reno Newspapers, Inc. v. Gibbons, 266 P.3d 623, 629 (Nev. 2011) (emphasis added).

135. Respondents argue, rightly, that there are situations in which a detailed privilege log is not required, as the court in *Reno Newspapers* noted. However, this

particular case is not one where "the requesting party has sufficient information to meaningfully contest the claim of confidentiality without a log." *Id.* Petitioners have alleged as much, and this Court agrees.

136. The Court, therefore, finds that the "written statement" contemplated by Wyoming Statute § 16-4-203(e) requires, in this case, more than a bare assertion that the requested records are privileged; rather Respondents shall provide Petitioners with "sufficient information to meaningfully contest the claim of confidentiality." *Id.*

137. While the precise definition of the term "privilege log" is in dispute, the heart of the WPRA and the logical purpose of Wyoming Statute § 16-4-203(e) is to provide open access to public records, and, when certain records are not subject to disclosure, to give the requesting party a meaningful chance to evaluate the basis for the denial and to test the denial in a fair and adversarial manner.

138. This Court, as did the court in *Reno*, declines to define the precise form and content of a privilege log in the context of the WPRA, but notes that "in order to preserve a fair adversarial environment, this log should contain, at a minimum, a general factual description of each record withheld and a specific explanation for nondisclosure." *Reno Newspapers*, 266 P.3d at 629.

139. Respondents, therefore, are ordered to provide a privilege log as described above **for any responsive documents that remain withheld in this case and any other documents which may be responsive to the requests already made by Petitioners under the WPRA in this matter.**[18] Obviously, the privilege log need not pertain to or reflect the documents that originally were withheld by Respondents but which have been produced to this Court for *in camera* review ***and*** which this Court will disclose to Petitioners as a result of this *Order*. Any documents submitted to the Court for review and not disclosed pursuant to this *Order* must be included in the privilege log. Said privilege log shall be produced and provided to Petitioners within ten (10) calendar days of the date of this *Order*.

IV. Reasonableness of Production Fees under the WPRA

140. In response to Petitioners records requests, the University's Office of General Counsel conducted a search through University records which produced 7,890

[18] Dr. Nichols argues that Respondents have no obligation to create public records which do not already exist but makes little cogent legal argument as it applies to the facts of this case. To the extent that documents responsive to Petitioners' request do not, in fact, exist, Respondents clearly are under no obligation to create such responsive documents. *See Nichols' Brief*, ¶¶ 77–78 (citing *Williams v. Matheny*, 2017 WY 85, ¶ 21, 398 P.3d 521, 528 (Wyo. 2017)).

emails. *See Respondents' Brief* at 5. General Counsel estimated that it would take eighteen (18) hours of professional staff time to review the documents and redact privileged portions of the documents prior to disclosure. General Counsel submitted a letter to Petitioners explaining the process for producing electronically stored documents, and provided an invoice for $720.00 to cover the costs associated with the production, pursuant to University policy. *See id.* at 5–6.

141. General Counsel then reviewed 2,235 emails, dated January 1, 2019 and after. *See id.* at 6. Of the documents reviewed, General Counsel deemed 157 pages responsive and neither privileged nor protected, and produced those pages to Petitioners, along with an email identifying documents redacted or withheld and explanations for their nondisclosure. *See id.*

142. After this initial search, General Counsel estimated it would require an additional eighteen (18) hours of professional staff time to review the remaining documents from its search and sent Petitioners a second invoice, which Petitioners did not pay. The subsequent review therefore has not occurred. *See id.* at 7. Petitioners argue that the fees charged by the University are unreasonable.

143. Under Wyoming Statute § 16-4-202(d)(i), the "reasonable costs of producing a copy of the public record" stored in electronic format must be born by the requesting party and those costs "may include the cost of producing a copy of the public record and the cost of constructing the record, including the cost of programming and computer services." *Id.* Petitioners assert that no part of this statute, nor its interpretation in *Cheyenne Newspapers v. Laramie County School Dist. No. 1*, 2016 WY 113, allow for costs of attorney review and redaction but only for costs of production. Petitioners further allege that the adoption of the fee schedule was an *ultra vires* act on the part of the University.

A. Jurisdiction to Consider the Reasonable of the Production Fees

144. Respondents assert that the fees are reasonable and properly adopted, and argued that the Court may lack jurisdiction to rule on this matter because Petitioners did not raise the issue as a declaratory judgment action, but rather included the argument within a WPRA show-cause case.

145. Thus, before addressing the reasonableness and appropriateness of the fees assessed herein, the Court notes that Respondents have questioned whether this Court has jurisdiction to decide the issue, given the procedural posture of this case. Petitioners disagree and point out that they specifically pled the unreasonableness of fees in their *Petition for Access to Records* (June 21, 2019).

146. Petitioners brought this action, including specific allegations that the fees charged by the University are unreasonable, under Wyoming Statute § 16-4-203(f) (2018):

> (f) Any person denied the right to inspect any record covered by this act may apply to the district court of the district wherein the record is found for an order directing the custodian of the record to show cause why he should not permit the inspection of the record.

Wyo. Stat. Ann. § 16-4-203 (2018).

147. Of note, this provision was modified, effective July 1, 2019, to include:

> (f) Any person aggrieved by the failure of a governmental entity to release records on the specified date mutually agreed upon pursuant to W.S. 16-4-202(c)(iv) or by the failure of a governmental entity to comply with an order of the ombudsman pursuant to W.S. 16-4-202(c)(v) may:
>
> > (i) Apply to the district court of the district wherein the record is found for an order to direct the custodian of the record to show cause why he should not permit the inspection of the record and to compel production of the record if applicable. **An order issued by the district court under this paragraph may waive any fees charged by the state governmental entity[.]**

Wyo. Stat. Ann. § 16-4-203(f) (2019) (emphasis added).

148. While not expressly provided in the 2018 statute, the 2019 version of Section 16-4-203(f)(i) specifically grants this Court jurisdiction to waive any fees charged by the University for the records requests at issue. The Court concludes that it was the inherent intent of the Wyoming Legislature, both historically and currently, to permit the courts to review the actions, as a whole, taken under the WPRA, including the assessment of fees thereunder. Accordingly, the Court, therefore, has jurisdiction to hear the argument concerning the reasonableness of the fees pursuant to Wyoming Statute § 16-4-203(f)(i) and brought in the *Petition* and jurisdiction to rule in this matter whether the fees charged are reasonable.

B. Consideration of the Reasonableness of Fees Assessed Herein by the University

149. Wyoming Statute § 16-4-202(d)(i) pertains to the costs associated with the production of records stored in electronic format, as here:

> (d) If a public record exists primarily or solely in an electronic format, the custodian of the record shall so inform the requester. Electronic record inspection and copying shall be subject to the following:
>
> > **(i) The reasonable costs of producing a copy of the public record shall be borne by the party making the request. The costs may include the cost of producing a copy of the public record and the cost of constructing the record, including the cost of programming and computer services;**
> >
> > (ii) An agency shall provide an electronic record in alternative formats unless doing so is impractical or impossible;
> >
> > (iii) An agency shall not be required to compile data, extract data or create a new document to comply with an electronic record request if doing so would impair the agency's ability to discharge its duties;
> >
> > (iv) An agency shall not be required to allow inspection or copying of a record in its electronic format if doing so would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained;

Wyo. Stat. Ann. § 16-4-202 (2018) (emphasis added).

150. Wyoming Statute § 16-4-204(e) provides: "The department of administration and information shall adopt uniform rules for the use of state agencies establishing procedures, fees, costs and charges for inspection, copies and production of public records under W.S. 16-4-202(d)(i), 16-4-203(h)(i) and 16-4-204." Wyo. Stat. Ann. § 16-4-204 (2018). As stated above, the University is a state institution for purposes of the WPRA, and § 16-4-204(e) applies to records requests for electronically stored records made to the University pursuant to the WPRA.

151. The Rules of the Wyoming Department of Administration and Information, Director's Office, ch. 2, § 4 reflects the adoption of the uniform rules authorized by Wyoming Statute § 16-4-204(e), and says, in pertinent part:

Section 4. Electronic Public Records.

(a) Production and Construction Costs. Under W.S. 16-4-202(d)(i), a custodian shall charge an applicant the reasonable costs of producing and constructing a copy of an electronic public record for inspection and copying. **This cost may include, but is not limited to, the time spent retrieving, compiling, sorting, *reviewing, redacting*, formatting, converting, or copying the electronic public record, as well as activities required to create or construct a new electronic public record from existing data sources and all associated programming and computer services.**

(b) Minimum Requirement to Charge Costs. Production and construction costs will be charged only if they exceed $180.00. If the costs exceed $180.00, the initial $180.00 will be a credit and not charged to the applicant. If electronic production and/or construction costs for a request total $180.00, the applicant will not be charged any costs for production and/or construction of said electronic records. If, for example, the production and/or construction costs for a request total $200.00, the applicant will be charged $20.00. The initial $180.00 is a credit upon the total amount charged for the production and/or construction of electronic records.

Applicants may not use multiple record requests to evade this $180.00 threshold. The custodian has discretion to consolidate public records requests that he or she reasonably believes have been drafted and submitted to evade this $180.00 threshold.

(c) Production and Construction Costs. Production and construction costs for electronic public records shall be as follows:

(i) $15.50/hour for clerical staff time.

(ii) $30.00/hour for information technology staff time.

(iii) $40.00/hour for professional staff time.

(iv) Actual cost of programming and computer services.

(d) Payment. The custodian must provide the applicant with an estimate of the reasonable costs of production and construction of the electronic public records. The applicant must pre-pay the estimated costs before the custodian

> produces or constructs the electronic public records or provides any copies for inspection. Payment shall be made to the custodian. If the custodian reaches the limit of the payment by the applicant, the custodian will produce the records that are ready and available at that point and will provide an additional estimate pursuant to this subsection prior to continuing with the request.

Id. (emphasis added). Section 4 specifically allows the agency to charge $40.00/hour for professional staff[19] time, which Respondents assert is what the Office of General Counsel properly did in reviewing and redacting the records at issue.

152. The University has adopted the procedures and fees above. *See* http://www.uwyo.edu/generalcounsel/wyoming-public-records-act/.

153. The Court also finds that the fees, as authorized by Wyoming Statute § 16-4-204(e) and adopted from the Department Director's Office Rules are reasonable as applied in this matter. The University, pursuant to its adoption of the regulations promulgated by the Department, may charge $40.00/hour for professional staff time spent reviewing and redacting records stored in electronic format that may be responsive to requests made under the WPRA.

CONCLUSION

THEREFORE, IT IS HEREBY ORDERED that the Petitioner's *Petition for Access to Records*, filed by Petitioners on June 21, 2019, shall be and hereby is **GRANTED in part and DENIED in part.**

IT IS FURTHER ORDERED that the Court will permit disclosure to Petitioners of the majority of the records requested by Petitioners and produced by Respondents to this Court for *in camera* review, as redacted by the Court when necessary, and for the reasons set out herein. The Court will attach to this *Order* a copy of all such documents **under seal** for each party. The attached documents are **not**, however, subject to a protective order.

IT IS FURTHER ORDERED that Respondents shall provide to Petitioners a privilege log in compliance this *Order* as it pertains to documents submitted to this Court for review but deemed by the Court to be privileged or otherwise properly withheld (specifically documents Bates Stamped HA000364-HA000369; HA000399-HA000408; and HA000453-HA000454). All records submitted to this Court for *in camera* review

[19] Professional staff are "employees who are not clerical/support or information technology staff as defined herein. Professional staff employees perform administrative, managerial, or professional duties." Rules of the Dep't of Admin. and Info., ch. 2, § 3(a).

will, thus, be either released (whether in redacted form or not) or included in Respondents' privilege log. Said privilege log (for documents Bates Stamped HA000364-HA000369; HA000399-HA000408; and HA000453-HA000454) shall be produced to Petitioners within **ten (10) calendar days** of the date of this *Order*.

IT IS ALSO ORDERED that Respondents shall provide to Petitioners a privilege log in compliance this *Order* as it may pertain to any documents requested by the Petitioners and **not** submitted to this Court for *in camera* review. Pursuant to the general timelines of Wyoming Statute § 16-4-202(c)(iii), said privilege log shall be produced to Petitioners within **thirty (30) calendar days** of the date Petitioners, should they choose to do so, tender to Respondents the reasonable costs of reviewing and producing a privilege log, as calculated by Respondents pursuant to this *Order* and Wyoming Statute § 16-4-202(d)(i).

IT IS FURTHER ORDERED that the fees charged by Respondents and the University for redaction, review, and production of documents responsive to requests made by Petitioners under the WPRA are reasonable and properly adopted within the authority of the University as prescribed by Wyoming Statute § 16-4-204(e).

SO ORDERED this 3rd day of January 2020.

TORI R.A. KRICKEN
DISTRICT JUDGE

Copies to:
Bruce T. Moats
Robert Jarosh
Megan Goetz

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