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The Application of Open Records Laws to Publicly Funded Science

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The federal Freedom of Information Act (FOIA) and the state law equivalents promote government transparency by allowing citizens to request copies of administrative records. Any citizen can file a request with a government entity for copies of government documents, and the government must either produce the information or explain why it is exempt from production (for example, for national security purposes).

While these laws were originally written with an eye toward policy makers and bureaucrats, in recent years, these open records laws have been used increasingly to request information from publicly funded scientists. Scientists employed by federal agencies, state agencies, or state universities, as well as scientists at private institutions who have received federal grants, have all received open records requests for information about their work.

Treatment of open record requests for scientific work varies widely among the states, and between the states and the federal government. Some jurisdictions also make distinctions based on

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how the research was funded, e.g., a grant recipient may be treated differently than an employee, even if the work is identical.

Concurrently, there also has been a push toward “open data” in science, i.e., making available a study’s methodologies, results, and conclusions. This transparency is usually a requirement for publishing a study in a peer-reviewed journal so that anyone may try to replicate the research and compare results.

This differentiation—seeking openness regarding methodologies, results, conclusions, and research data while also maintaining confidentiality for other materials such as peer-review correspondence—is already echoed in many jurisdictions’ open records laws, from federal to state. However, in other jurisdictions, open records laws focus entirely on bureaucratic transparency and have done little to contemplate the special issues of scientific transparency. Given these inconsistencies, open records laws can serve as a double-edged sword when applied to publicly funded scientists. Open records requests may be used to further important principles of scientific transparency, but they also can be misused by bad actors who attempt to harass, intimidate, or try to discredit scientists whose research they dislike.

This article first describes the federal treatment of open record requests and then details the four kinds of approaches used by different states: statutory exclusion, statutory exemption, common law privileges, and balancing tests. In the discussion following, the article explains how some groups have tried to use open records laws to pursue outcomes that are clearly contrary to the public interest, and how certain open records laws may be particularly prone to misuse.

Federal Treatment

Federal agency scientific records are considered agency records, subject to federal FOIA requests the same as any other agency records. *Burka v. Dep’t of Health & Human Servs.*, 87 F.3d 508, 515 (D.D.C. 1996). Consequently, federal scientific research is entitled to the nine standard statutory FOIA exemptions—exemptions that allow for protection of trade secrets, internal personnel records, and other matters. Most relevant is the FOIA exemption for “inter-agency or intra-agency memorandum or letters,” which would be privileged in civil litigation. 5 U.S.C. § 552(b)(5).

This exemption for agency memoranda or letters allows the application of common law privileges against discovery. For a federal scientist, the most relevant common law privilege is the “deliberative process” privilege, which originally was designed to

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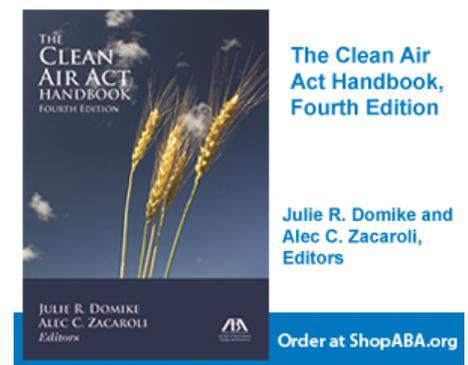
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protect recommendations and advice that are part of the deliberative process involved in governmental decision making. The theory behind protecting such deliberative, pre-decisional documents is that the government will receive more candid advice, with a freer exchange between policy makers, resulting in better decisions for society as a whole. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1974) (discussing the rationale for the privilege and its application to FOIA). This protection for the deliberative process is also designed to keep the public's attention on what the agency actually did, not on ideas that were discarded, and to "protect against public confusion that might result from disclosure of reasons and rationale that were not, in fact, ultimately the grounds for an agency's action." *Judicial Watch, Inc. v. Dep't of Army*, 435 F. Supp. 2d 81, 87–88 (D.D.C. 2006).

Just as the public benefits when public policy makers have freedom in debating the best course of action, there is also a public benefit in allowing public scientists to engage in candid exchange of thought, with freedom to advance and discard ideas, either within the peer review context or more generally. Thus, while the deliberative process privilege was originally intended to protect the pre-decisional records of federal policy makers, it has also been applied to the records of federal agency scientists.

This application of the deliberative process privilege can be seen in *Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184 (D.D.C. 2009). In that case, a manufacturing company under investigation by the U.S. Environmental Protection Agency (EPA) for potential groundwater contamination submitted FOIA requests to the EPA for two in-progress scientific models created by EPA to study the contamination. Although the District of Columbia district court found that EPA had waived privilege for one of the models by producing it earlier, the court agreed with EPA that the second draft model and related documents were properly exempted from FOIA under the deliberative process privilege because "evolving iterations of the Model's inputs and calibration reflect the opinions of the staff currently developing the Model, which may not represent EPA's ultimate opinions relating to these matters." 593 F. Supp. 2d at 189. Similarly, in *Sierra Club v. Dep't of Interior*, 384 F. Supp. 2d 1 (D.D.C. 2004), the District of Columbia district court held that agency scientists' peer review correspondence regarding an ecological survey qualified for deliberative process protection. The court agreed with the government that the scientists' peer review e-mails should be treated the same as pre-decisional debates by policy makers, holding that "[t]hese kinds of email exchanges constitute the workings of the deliberative

process: [Department of the Interior] employees commenting, critiquing, editing, arguing, and finally resolving how they think the information for the [wildlife] Report should be drafted, analyzed, and presented.” 384 F. Supp. 2d at 29.

In comparison to science conducted within federal agencies, scientific research produced under federal grants is treated under a different mechanism. However, the result can be similar to the application of the deliberative process privilege.

FOIA requests regarding projects funded by federal grants are governed by the 1999 Shelby Amendments. Reflected in the Office of Management and Budget’s Circular A-110, “research data relating to published research findings produced under a [federally funded] award will be made available to the public through the procedures established under the Freedom of Information Act.” 2 C.F.R. § 215.36(d)(1). Research data is defined as “recorded factual material commonly accepted in the scientific community as necessary to validate research findings, *but not* any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues.” *Id.* (emphasis added). This language has been codified by various federal agencies at 10 C.F.R. § 600.136(d)(1) (Department of Energy); 43 C.F.R. § 2.70(1) (Department of the Interior); and 7 C.F.R. § 550.42(d) (1) (Department of Agriculture), among others. It has also been applied in federal litigation. *See Am. Chemistry Council v. Dep’t of Health & Human Servs.*, 922 F. Supp. 2d 56, 59 (D.D.C. 2013) (holding that research data from a federally funded study at University of California (U.C.), Berkeley must be produced under FOIA, while communications, preliminary analyses, and drafts were exempt from production).

State Treatment

In contrast to the relatively consistent treatment under the federal FOIA, state open records laws vary widely in how they treat publicly funded scientific research. In general, however, there are four basic types of treatment: (1) statutory exclusion, (2) statutory exemption, (3) common law privileges, and (4) balancing tests. Each is discussed in turn.

Statutory Exclusion

Some states categorically exclude certain forms of scientific and academic research from their open records laws, with statutes that make clear that, even if publicly funded, these records are not considered “public records” in the first place. Usually this exclusion is done by establishing that all or many of the records of state public universities are not public records.

For example, Pennsylvania's Right-to-Know Law states that Pennsylvania's four "state-related institutions"—Temple University, University of Pittsburgh, Penn State University, and Lincoln University—are not considered Commonwealth agencies and, therefore, their records are not made public under Pennsylvania's Right-to-Know Law. 65 Pa. Stat. §§ 67.1501–1503. Instead, Pennsylvania law only requires that public universities issue annual reports by May 30 that include the salaries of officers, directors, and the 25 highest-paid employees. 65 Pa. Stat. § 67.1503.

Similarly, Delaware's open record law states that the definitions of "public body," "public record," and "meeting" do not include the activities of the University of Delaware and Delaware State University. There are, however, exceptions for meetings of the universities' Board of Trustees and "university documents relating to expenditures of public funds." 29 Del. C. § 10002(i).

Yet, while some states have created specific statutory exclusions for public university scientists, there does not appear to be any state that categorically excludes the records of state agency scientists.

Statutory Exemption

Like states that provide statutory exclusions, states with statutory exemptions stipulate that certain academic and scientific records should not be produced under open records laws. However, under a statutory exemption scheme, these records are still considered "public records," but the owner of the record has the burden of proving that the records in question qualify for exemption.

Several states give statutory exemptions to the research produced by their public universities. For example, New Jersey provides an exemption for "pedagogical, scholarly and/or academic research records and/or the specific details of any research project" of "any public institution of higher education." N.J.S.A. 47:1A-1.1. In *Rosenbaum v. Rutgers University*, GRC Complaint No. 2002-91 (Jan. 23, 2004), an individual attempted to use New Jersey's open records law to request wildlife survey responses from a study done at Rutgers University, a New Jersey public university. New Jersey's Government Records Council found that these survey responses constituted "academic research records of a research project conducted under the auspices of a public higher education institution in New Jersey" as protected by statute. The decision is available at www.nj.gov/grc/decisions/2002-91.html.

Another state, Virginia, provides a statutory exemption for:

Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented.

Va. Code §§ 2.2–3705.4(4).

In *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 287 Va. 330 (Va. 2014), the Virginia Supreme Court interpreted this provision broadly, holding that it applied to all research records and correspondence. Specifically, the court stated that it “is not consistent with the General Assembly’s intent to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges” and would cause “harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression.” 287 Va. at 442.

Despite the statutory exemptions for public university scientists available in some states, there does not appear to be any state that has a statutory exemption for the records of state agency scientists.

Common Law Privileges

Just as the federal system allows for the application of common law privileges regarding federal FOIA requests, some states have allowed the application of common law privileges to withhold scientific research sought pursuant to state open records requests.

For example, in *Highland Mining Company v. West Virginia University School of Medicine*, 235 W. Va. 370 (2015), a mining company filed open records requests for documents related to the initiation, preparation, and publication of eight articles by an environmental health professor. In analyzing the university’s arguments for withholding the records, the Supreme Court of Appeals of West Virginia held there was no specific protection for academics, but it allowed that professors’ records could qualify for an open records exemption under West Virginia’s “internal memoranda” exemption. This “internal memoranda exemption”—

like the “federal deliberative process” privilege—“encourages free discussion” among agency officials weighing their options and “insulates against the chilling effect likely were officials to be judged not on the basis of their final decisions but for matters they considered before making up their minds.” 235 W. Va. at 382.

In another case, *Progressive Animal Welfare Society v. University of Washington*, 125 Wash. 2d 243 (1994), an animal rights group sought records related to a grant proposal that was submitted but ultimately not funded, including internal, confidential peer-review correspondence formally summarized in so-called “pink sheets.” The Washington Supreme Court held that Washington’s deliberative process privilege applied to protect the peer-review correspondence sought because “the pink sheets foster a quintessentially deliberative process.” 125 Wash. 2d at 257. The court also allowed the application of a Washington statute that specifically protected animal researchers from harassment, allowing that portions of some of the records may be withheld “if the nondisclosure of these portions is necessary to prevent harassment as defined under the anti-harassment statute.” *Id.* at 263.

Ultimately, the Washington Supreme Court held that the records “are in large part protected from disclosure [but] the grant proposal at issue here does not come with an exemption that authorizes withholding it in its entirety” and disclosure was required for “appropriate portions” not otherwise exempted. *Id.* at 272. However, the court also noted that when “policies or recommendations are implemented, the records cease to be protected” under the deliberative process privilege, and if a proposal were to be funded “it clearly becomes ‘implemented’ for the purposes of this exemption, and the pink sheets thereby become disclosable.” *Id.* at 257.

Balancing Tests

Finally, some states use balancing tests to determine whether a public record should be produced or withheld in response to an open records request. Courts have varied as to whether or not scientific research records qualify for exemption under such balancing tests.

For example, California’s Public Records Act allows a balancing test for when, absent a relevant statutory exemption, “on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” Cal. Gov’t Code § 6255(a). California courts have interpreted this provision to require a case-by-case

balancing process when evaluating a claim for withholding documents, such as in *Humane Society v. Superior Court of Yolo County (Regents of the University of California)*, 155 Cal. Rptr. 3d 93 (Cal. App. 2013) [hereinafter *Humane Society*].

In *Humane Society*, an animal rights group sought to use open records requests to obtain the records related to a U.C. Davis study on egg-laying hens in intensive confinement. The California appellate court analyzed the public benefits in protecting the research, mainly, fostering academic freedom in California public universities, encouraging scientists at other institutions to collaborate with U.C. scientists, and promoting a state university system where scientists would want to continue to research. 155 Cal. Rptr. 3d at 118–121.

The court acknowledged there was a serious public interest in understanding how public university scientists conducted their research. However, the court noted that the scientific process already provided transparency: the “published report itself states its methodology and contains facts from which its conclusions can be tested . . . published academic studies are exposed to extensive peer review and public scrutiny that assure objectivity.” *Id.* at 122. Consequently, “[g]iven the public interest in the quality and quantity of academic research, we conclude that this alternative to ensuring sound methodology serves to diminish the need for disclosure” under open records laws. *Id.*

The *Humane Society* court concluded that the public interest in protecting scientists’ research records outweighed the public interest in producing the records because the “evidence here supports a conclusion that disclosure of prepublication research communications would fundamentally impair the academic research process to the detriment of the public that benefits from the studies produced by that research.” *Id.* at 121.

Like California, Arizona also applies a balancing test for open records requests. However, at least one Arizona court has come out the other way as to whether the public harm of releasing scientific research records outweighs the public benefit.

In *Energy & Environment Legal Institute v. Arizona Board of Regents*, No. C20134963 (Ariz. Sup. Ct. Sept. 19. 2016), the Energy & Environment Legal Institute (E&E Legal) sought a 13-year span of two climate scientists’ e-mails from the University of Arizona concerning a variety of their research work and professional correspondence. In conducting the balancing test, the Arizona trial court judge acknowledged that the university had made “compelling” arguments that releasing scientists’ e-mails would chill academic free speech and impinge on the scientific

process. However, the court concluded that these harms were generally “speculative” and found that the benefits of public disclosure outweighed the harms. *Id.*, slip op. at 4. The trial court ultimately determined that the university effectively sought “creation of an academic privilege exception” to Arizona’s open records laws, which, the court stated, “is a proposition more properly made to the legislature rather than the courts.” *Id.* (It is worth noting that Arizona does provide an exemption for “unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer review.” A.R.S. § 15-1640(A)(1)(d). However, this exemption becomes unavailable once the “subject matter of the records becomes available to the general public.” A.R.S. § 15-1640(C). Thus, once publication of “the subject matter” occurs, the statute no longer provides an exemption. As most of the materials requested in the *E&E Legal* case involved research where the subject matter was published, this exemption was found to apply only to a small subset of the e-mails at stake. See *Energy & Env’t Legal Inst. v. Ariz. Bd. of Regents*, No. C20134963 (Ariz. Sup. Ct. Mar. 24, 2015), slip. op. at 3.)

Implications

Motive is generally irrelevant for an open records request. This is a helpful posture in many situations, but it also provides an opportunity for bad-faith requests that may be legally valid but are also clearly harmful. This is particularly true in the sciences. For example, in recent years, scientists have received open requests by competing scientists or competing companies to see confidential research files, particularly in the biomedical fields. See Andrew D. Cardon et al., *The Effect of Public Disclosure Laws on Biomedical Research*, 51(3) J. Am. Assoc. Lab Animal Sci. 306, 306–310 (2012).

We also have seen invasive requests, designed to discredit, initiated by industries harmed by certain studies. This was the case, for example, in the above-described West Virginia *Highlands Mining* case, where a coal mining company sought to discredit the research of an environmental health professor by requesting his personal research files. Groups critical of the idea of climate change have also gone after climate scientists in an attempt to find e-mails or other documents that would allow them to poke holes in the research, as seen, for example, in the Virginia *American Tradition Institute* or Arizona *E&E Legal* cases discussed above.

Complicating these issues is the influx of available records. In our increasingly digital world, e-mail has replaced not only other

forms of written correspondence, like letters, but also phone calls and in-person meetings. Consequently, there is now a written record for all sorts of communications that previously would not have been transcribed. This has been especially true in science, where teams of researchers often collaborate across institutions and state lines, and between countries. The increasing use of digital communications for scientific collaboration means more and more records are available for request, including casual scientific debates that could easily be taken out of context.

Some scientists at public institutions have testified that after they received a large open records request, their colleagues at private institutes were less interested in collaborating. There is also a real fear that open records requests may affect where scientists seek to work and what research they work on.

Open records laws remain powerful forces for good, and many important issues have come to light through these transparency laws.

And yet, scientific research is already premised on a rare level of transparency. In order to obtain credit for a research finding, a scientist must publish his or her results in a peer-reviewed journal, which includes making available the methodologies, results, and conclusions. There is also a growing trend (often a requirement) to make the full datasets available as well, so that anyone may try to replicate the research and compare results.

Notably, this distinction—requiring transparency for methodologies, results, conclusions, and research data while maintaining confidentiality for pre-publication drafts, communications, and peer-review materials—is already echoed in many jurisdictions' open records laws, from federal to state. But, in other jurisdictions, the open records laws focus entirely on bureaucratic transparency and have done little to contemplate the special issues of scientific transparency and protect scientific research from unwanted negative repercussions.

For those states, it may well be time—as the Arizona trial court suggested in the *University of Arizona* open records litigation—for the legislatures to address the issue of disclosure in a scientific context.