

The following is a review of Freedom of Information Act requests that have involved questions of academic freedom. It was written by Robert O'Neil, AAUP counsel.

Academic Freedom and Freedom of Information Requests

November 4, 2011

Recent developments involving Freedom of Information Act (FOIA) requests have evoked concern, even alarm, that scholars may face intrusive demands for a broad range of documents. Meanwhile, legal protections that would usually shield such information may not be available in this context, as they would in other settings (for example, in response to subpoenas and discovery demands). To complicate the dilemma, at least in most states, many scholars endorse free academic exchange on the one hand, while on the other hand fully espousing public access and open government. The purpose of this report is to summarize briefly the current tensions while offering guidance that may help reconcile such novel pressures.¹

Summary of Recommendations

We would recommend that Committee A explore various avenues by which to address these concerns and advocate potentially protective measures against intrusive threats to such information. Those measures would include consultation with the AAUP's Committee on Government Relations and the Assembly of State Conferences and with other organizations that share the AAUP's interests in academic freedom.

We would also welcome AAUP involvement in current litigation challenging such threats and intrusions. That involvement would potentially entail amicus briefs or public statements. The Association has, for example, already recently joined with environmental and other groups in a letter to University of Virginia president Theresa Sullivan conveying its position regarding the current internal review of climate-related e-mail messages; that letter recognized the university's duty to respond appropriately to public-records requests or demands but urged special efforts to balance such demands with academic freedom and free inquiry.

Finally, we would urge that the AAUP support legislative efforts to create exemptions or exceptions to state freedom of information laws that would protect scholarly communications and similar sensitive materials. Several states (as we note more fully in our report) have already enacted such exemptions. The AAUP's legal department recently received an offer from a Maryland state delegate to help craft and support such a measure. Given the current controversy, such efforts are likely to expand.

¹ This report relies heavily on Rachel Levinson-Waldman's comprehensive and illuminating issue brief, recently posted by the American Constitution Society for Law and Policy. The brief is available at <http://www.acslaw.org/publications/issue-briefs/academic-freedom-and-the-public's-right-to-know-how-to-counter-the-chillin>.

I. The Current Challenge and Its Implications

This dilemma has recently surfaced in several states. Early in 2011, the American Tradition Institute (ATI), a conservative environmental group, submitted to the University of Virginia a FOIA demand for a wide array of documents related to former University of Virginia professor Michael Mann, who now teaches at Pennsylvania State University. These demands focused on multiple e-mail messages about global warming, specifically regarding the so-called hockey-stick model. The university initially argued that at least some of the documents were exempt from disclosure under Virginia's FOIA law. After ATI sought to compel production, the University of Virginia and ATI reached an agreement to share the materials; under that agreement, ATI's access to documents allegedly exempt will be subject to a protective order that bars further use by ATI. (This proceeding is similar to, but distinct from, a more visible suit by Virginia's attorney general, Ken Cuccinelli, that earlier sought similar information through civil subpoenas.)

In October 2011, the AAUP filed with the Virginia state court a "letter brief" strongly supporting Professor Mann's request to intervene in the open-records litigation. That letter reinforced the position that the AAUP took some months earlier in a letter that urged University of Virginia president Theresa Sullivan to balance as fully and sensitively as possible the potential risks to academic freedom and free inquiry, while appropriately recognizing the university's duty to respond to public-records demands.

Several months earlier, during intense debate over public-employee collective bargaining legislation, University of Wisconsin–Madison professor William Cronon faced FOIA demands for a barrage of sensitive materials, served by the state Republican Party. The university's chancellor, Biddy Martin (who has since become president of Amherst College), initially identified several specific categories of materials that the university would not produce, including "intellectual communications among scholars." She invoked, in respect to one of the nation's toughest public-records laws, the university's celebrated and historic commitment to academic freedom and free inquiry. The UW general counsel elaborated: "The public interest in intellectual communications among scholars . . . is outweighed by other public interests favoring protection of such communication." The state Republican Party has said that it does not intend to appeal the university's ruling.

Around the same time, a libertarian think tank in Michigan (the Mackinac Center) served a batch of FOIA demands on the labor studies departments at the University of Michigan, Michigan State University, and Wayne State University. The premise was that pro-labor materials appeared on the websites of the three labor studies centers, suggesting the faculty members may illegally have used institutional resources for partisan political purposes. Early this past summer, the Mackinac Center offered to pay for two less expensive productions.

By fall of 2011, according to a *Chronicle of Higher Education* report, neither of the conservative organizations appeared to have taken additional steps to compel production of documents, citing diverse explanations, though the Mackinac Center indicated that it was considering litigation. Wisconsin history professor William Cronon, the principal target of the Republican Party demand, later expressed confidence that the forays had been fruitless, in part because he had maintained strict separation between his university e-mail account and any

political communications. Thus the Michigan and Wisconsin requests seem at least to have atrophied if not expired; none of the three targeted institutions has yet revealed whether they plan to withhold any of the documents, under either statutory or common-law exemptions.

Recent responses from the two other institutions indicate that the University of Michigan produced four documents, noting that it had withheld others as exempt under Michigan's open-records law. Wayne State University, meanwhile, submitted thirty-two e-mails but declared that it withheld others that were arguably protected by a state appellate court ruling that exempted the internal communications of labor organizations from the open-records law.

Finally, reminding us that the three very recent incursions are not wholly unprecedented, there is the early 1990s Georgia case of Dr. Paul Fischer, whose research (on children's recognition of "Joe Camel" ads) at the Medical College of Georgia was targeted under the state's open-records act. After Fischer successfully moved to quash several subpoenas seeking analogous information, the medical college volunteered to surrender all the documents targeted by the open-records demands. Fischer soon thereafter left the medical college and went into private practice.

While these four incidents evince a still somewhat muted threat to scientific research, the increasing potential for adverse effects of public and open records requests calls for close analysis. A 2004 study of the effects of congressional scrutiny of National Institutes of Health (NIH) grants found that over half the researchers who responded had altered their research in some respect after their grants had become targets of politically induced attacks or inquiries, including but not limited to FOIA demands. A quarter of these respondents said that they had eliminated "entire topics from their research agendas."

Seventy percent of the investigators agreed that the political environment at the time created a "chilling effect" on the inquiry process. More than half ventured that NIH funding was likely to be reduced as a result. Though further comparable studies have not reported successive data, the range of potential threats has increased in the past seven years.

II. Potential Implications and Effects

While the motives behind such demands are usually obscure or matters of speculation, researchers are rightly concerned about several facets of the recent environmental inquiries. The implications may be briefly noted.

In most states, public or open-records demands are categorical and unequivocal. Unlike subpoenas or other discovery requests, they are not simply the initial stage of a balancing process in which both sides may offer extenuation or support and a court may well split the difference.

Such demands are likely to emerge far more immediately than other types of inquiry, with immediate compliance typically imperative and unequivocal.

The potential scope of public or open-records demands may also be far broader. The array of materials initially demanded in most environmental and politically related inquiries often have an alarming "back up the truck and ask questions later" quality that is less likely to encumber subpoenas and other intrusions.

The potentially (and often immediately) disruptive effect of such demands may serve to halt or suspend productive research for weeks or months while the targeted data are gathered

and produced. In contrast to subpoenas and other requests, judicial intervention to stay or mitigate such intrusive effects on the scientific process is far less readily available.

The potentially adverse impact of such demands may be especially severe for social scientists like those noted earlier in this report. Natural and physical scientists may have greater protection through specific statutory exemptions or by other means. For example, trade secrets and other proprietary information may be shielded or protected in ways that have few, if any, counterparts or analogues in the social sciences.

Suffice it to say that while strikingly few reported cases have come to court as a direct result of FOIA requests, the few that have surfaced are potentially a cause of deep concern for the academic and research community. A survey of potential safeguards and antidotes would thus be timely and appropriate, as the following section of this report illustrates.

III. Potentially Protective Responses to FOIA Threats

Starting with Supreme Court judgments that struck down loyalty oaths, legislative demands, and other burdensome or intrusive restrictions on the speech of public employees, a substantial body of First Amendment law has emerged in the last half century. The AAUP and other kindred organizations have made ample and productive use of those precedents. In a far smaller and more specialized set of cases, courts have explicitly vindicated the expressive interests of college and university professors. While those rulings do not appear to have involved FOIA requests of the type that concern us here, their analogous value is beyond dispute.

Especially welcome are several federal appellate decisions affording substantial protection for scholars and researchers. In such rulings as *Dow Chemical Co. v. Allen*, *In re Cusumanno v. Microsoft Corp.*, and a spate of cases rejecting demands for scientific data gathered by the Centers for Disease Control, for example, several circuits have shielded substantial scientific data from subpoenas and other forms of discovery. In *Dow Chemical*, for example, the Seventh Circuit declared that “the risk of even inadvertent premature disclosure so far outweigh[s] the probative value of and need for the information as to itself constitute an unreasonable burden.” The court embraced an interest advanced by the state of Wisconsin in an amicus brief that “scholarly research is an activity which lies at the heart of higher education, that it lies within the First Amendment’s protection of academic freedom, and therefore judicially authorized intrusion into that sphere of university life should be permitted only for compelling reasons.”

Such congenial precedents as these have typically applied three mitigating criteria. They ask, first, whether a demonstrated need for the contested material has been established by the subpoena seeker; second, whether the potentially adverse impact of compelled discovery upon the process of scientific inquiry (in terms of time, cost, data gathering, and diversion or disruption) outweighs the benefits; and third, whether less burdensome or intrusive alternatives might be pursued with lesser risk. Typically in such cases a court will balance all three factors and weigh carefully the equities.

In a closely related context, a number of courts have struggled with disputes over journalists’ sources or derivative information. After the Supreme Court ruled that the First Amendment afforded no constitutional protection to such sources or the reporters who used them, a number of lower courts nonetheless found ways to circumvent or mitigate that result.

Indeed, over the years it could be said that while reporters lost the constitutional-privilege war, they eventually won most of the battles in the application of privilege principles and guidelines. While this is not the occasion to develop the journalists' privilege analogy, the resulting case law has been helpful and instructive.

When it comes to the precise issue of FOIA requests, however, we encounter largely uncharted legal territory. The handful of potentially pertinent cases turn out to be remarkably unhelpful. In the Fischer case, the medical college simply acceded to extensive and invasive corporate demands without any deference to mitigating factors that should have entered the picture. In the Mackinac Center case involving the Michigan universities, the party that sought disclosure has apparently not renewed or buttressed its claims for production. In the University of Wisconsin (Cronon) case, even in the face of an unusually rigorous public-records law, the administration seems to have persevered in protecting the "sifting and winnowing" process enshrined over a century ago on the Bascom Hall plaque.

Elsewhere the meager record on disputed FOIA issues, in the absence of statutory exemptions or protections, is dismal. In the early 1990s, the Ohio Supreme Court rejected Ohio State University's claim that disclosure to animal-rights activists of the names and addresses of research scientists would have a chilling effect on the scientists' First Amendment right to academic freedom. (This ruling relied indirectly on the US Supreme Court's rejection of an analogous claim in *University of Pennsylvania v. EEOC*.) In the Ohio case, the state's high court ruled quite simply that the legislature had deliberately "weighed and balanced the competing public policy considerations" between the interest in access and protection of academic materials. Two earlier cases, one in Florida and the other in New York, recognized the value of the free exchange of ideas in academic forums, but without a specific FOIA exemption, evinced little sympathy.

In such a discouraging context, and lacking further guidance, we would urge that the AAUP be prepared to file supportive briefs in contested FOIA cases, vigorously invoking now-familiar First Amendment and academic freedom principles and asserting their applicability in such analogous contexts as journalists' and researchers' privilege claims. Surely such claims would not likely fare less well than have analogous claims in the absence of any protective statutory safeguards.

IV. Remaining Avenues of Potential Recourse

Several remaining and possibly productive avenues of recourse remain. Perhaps for the sake of completeness, we should note the need to make sure that the terms of a public-records law actually do apply before moving on to parse fine points of interpretation. Because of the vast differences in state FOIA statutes—no two such laws are identical—a first step in any response is to apply rigorously the statutory definitions. Putting aside any concern or question about the rationale of a FOIA request or demand—that is almost universally deemed irrelevant—a number of seemingly technical issues remain for analysis. The definition of such vital terms as "public record," for example, often invites inquiry (as well as court decisions and government agency rulings or regulations) that may affect or more precisely frame such inquiries. The facial language

of a FOIA statute clearly does not end the inquiry; other resources are available and should be probed.

Far more productive, however, are the handful of safeguards found in state law to protect faculty papers and documents. New Jersey, for example, exempts “scholarly records.” Ohio protects “intellectual property records,” defined as materials produced or collected by faculty and other employees “in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue . . . that have not been publicly released, published, or patented.” Utah may have gone furthest in affording such protection, encompassing higher education materials that have been “developed, discovered, disclosed to, or received by or on behalf of faculty, staff, employees or students of the institution.” Such safeguards encompass, among other documents, unpublished lecture notes, unpublished research-related notes, data and other information, confidential information contained in research proposals, unpublished manuscripts, creative works in progress, and “scholarly correspondence.”

Virginia, the state most recently placed in the crosshairs by Attorney General Cuccinelli’s open-records demands, is actually not far behind. Virginia’s FOIA law specifically (in some detail) protects “data, records or information of a proprietary nature produced or collected by faculty or staff of public institutions of higher education . . . in the conduct of or as a result of study or research on medical, scientific, technical, or scholarly issues . . . where such data, records, or information has not been publicly released, published, copyrighted, or patented.”

Further efforts at legislative exemption and protection will presumably gain favor in the near future. Just two months ago, for example, the AAUP’s legal office received an unsolicited but most welcome offer of interest from a senior member of the Maryland state assembly, conveying his hope that the Association would collaborate and support his efforts to craft a research-protective law. A decade or more ago, on the eve of his retirement from office, New York senator Daniel Patrick Moynihan sponsored the Thomas Jefferson Researcher’s Privilege Act; only the imminent expiration of his term precluded hearings and floor action after initial support within the Senate Judiciary Committee. A host of legal scholars have offered in law review and journal articles their congenial views, though more often in resisting subpoenas than in addressing the far more elusive quarry of FOIA demands.

Accordingly, we would urge Committee A consideration in the state legislative process of broadly protective, Utah-type statutes, as well as of less extensive but still welcome amendments that would more modestly strengthen research-sensitive measures, along with letters or statements and legal briefs responding to specific FOIA requests and litigation. Thus we would continue to strike a balance between our core commitments to protect academic freedom (including scholarly communications) and ensure to the broadest extent possible open government, including access to public records and proceedings.