

# Freedom to Bully

## *How Laws Intended to Free Information Are Used to Harass Researchers*

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*The 1966 Freedom of Information Act (FOIA), a landmark law familiar to many, enables ordinary citizens to file requests with the federal government for public records. “I signed this measure with a deep sense of pride that the United States is an open society in which the people’s right to know is cherished and guarded,” President Johnson wrote at the time, despite having some reservations about transparency (Bridis 2006; Johnson 1966).*

But the federal government was behind the curve. Many states already had laws governing the release of public records dating back decades, with some, such as Florida, eventually enshrining the right to them in their constitutions (Winkler 2010). Ever since, federal and state governments have tried to balance the public interest in transparency and accountability with the privacy essential to allow both government and society to function.

Open records laws are critical tools that enable people to learn more about how public officials make decisions, and to hold them accountable. Individuals



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and organizations of all political stripes use these laws to determine whether officials have followed appropriate guidelines in making decisions, understand the evidence they considered in doing so, expose the influence of special interests, and oversee the use of public funds. At the same time, all open records laws exempt sensitive information from public disclosure, such as some trade secrets and intelligence related to national security.

These laws often apply not only to public agencies but also to private contractors that maintain government records. As institutions partially funded by taxpayer dollars, universities, too, are subject to open records laws. As a result, universities have long wrestled with tension among three values that these laws promote: openness, personal privacy, and the ability of researchers to communicate frankly with one another (Braman and Cleveland 1984).

***We object strongly when public officials misuse exemptions in open records laws to shield decision making from public view.***

Many open records requests to universities regarding the work of academics are entirely appropriate. In 1987, for example, the *Denver Post* investigated allegations that Saudi Arabia had made improper payments to University of Colorado staff and regents designed to grease the wheels for a medical center the university was building there. The university tried to withhold dozens of documents from reporters who asked for them under the state freedom of information act, but the newspaper prevailed in court (*Denver Post Corp. v. University of Colorado* 1987).

That is why science and public interest organizations such as the Union of Concerned Scientists often argue for more transparency. In general, we believe that the more transparent government is, the more officials are likely to serve the public interest and resist efforts to suppress, censor, or otherwise unduly influence scientific research. We object strongly when public officials misuse exemptions in open records laws to shield decision making from public view.

That said, individuals and well-heeled special interests across the political spectrum are increasingly using broad open records requests to attack and harass scientists and other researchers and shut down conversation at public universities. These companies, organizations, and activists

may disagree with researchers' findings or even dislike an entire field of study. They request all materials on a topic in a university's possession, including researchers' draft papers, emails, and even handwritten notes. This strategy can curb the ability of researchers to pursue their work, chill their speech, and discourage them from tackling contentious topics.

At the same time, public funding for public universities has declined markedly. As of 2010, states funded only 19 percent of the operating expenses of major public research universities, down from 28 percent in 2002 (NSF 2012). Some public universities now receive less federal funding in the form of research grants than private universities do. So ironically, in some states, researchers at public universities with grants from private entities cannot protect their private correspondence from public scrutiny, while researchers at private universities who rely on federal funding can. The public or private status of the employer matters—not the funding stream.

The reactions of officials at public universities subject to intrusive open records requests have been inconsistent at best. Although some are pushing back, universities and researchers are often unprepared to respond appropriately, partly because laws and privacy protections vary by state, and also because universities and their employees do not always have the same interests. This report examines the impact of excessive and intrusive open records requests on research, cites examples of such attacks on academics in many different fields, and explores the responses of universities. The report also considers the difference between transparency and harassment, and calls on lawmakers and universities to protect academic inquiry while preserving the public's right to know.

## **The Impact of Harassment on Research**

The widespread use of open records requests to harass academics emerged with the growing use of electronic communications. These technologies have transformed the way researchers pursue knowledge. The ease with which they can share and analyze data has made collaboration with colleagues around the globe far easier and faster. However, common use of online communications also means that conversations that used to occur in person and other less-recordable means are now written down. Snooping on researchers' email has become the twenty-first-century equivalent of tapping their phone lines or bugging a lab's water cooler.

Further, social expectations around transparency are shifting. More and more, hackers are illegally obtaining private information—from emails to intellectual property to credit card files—from major corporations, government agencies, and scientific institutions and disclosing it online.



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During the Deepwater Horizon oil spill, researchers at the Woods Hole Oceanographic Institution (above) volunteered their time and equipment to determine the rate at which oil was flowing from the ruptured well. Yet, BP subpoenaed more than 3,000 confidential emails from these researchers, including personal correspondence, under the guise of verifying the accuracy of their research.

Unfettered access to information is universally recognized as sometimes dangerous.

While many academics highly value healthy scrutiny, few argue that absolutely all documents, conversations, and other government-funded information should be disclosed. In particular, some have long recognized that some level of privacy is necessary for researchers to do their best work. “There are pitfalls in unrestrained openness, including unwarranted violations of privacy, the potential harassment of scientific investigators and the chilling effect that inappropriate public scrutiny could have on the free exchange of ideas and the willingness to take risks to find answers,” said Harold Varmus, then director of the National Institutes of Health, at a 1999 congressional hearing (Varmus 1999). The White House Office of Management and Budget determined after that hearing that information that is disclosable under the federal Freedom of Information Act does not include “preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues” (OMB 1999).

Some companies choose to take to the courts to subpoena documents from researchers at public universities whose

***Snooping on researchers’ email has become the twenty-first-century equivalent of tapping their phone lines or bugging a lab’s water cooler.***

findings bring to light concerns about product safety. In 2012, BP subpoenaed more than 3,000 confidential emails from scientists at the Woods Hole Oceanographic Institution related to the explosion of the *Deepwater Horizon*, which killed 11 people and released millions of gallons of oil into the Gulf of Mexico (Reddy and Camilli 2012). Incredibly, the scientists had volunteered their time during the months-long crisis, using robotic technology they had developed for other purposes to determine the rate at which oil was gushing from the hole that had been created in the ocean floor.





For decades, the lead industry attacked science and scientists to undermine public understanding of the harmful effects of lead on human health, significantly delaying regulation and control of the toxic element.

When BP asked to see their data and methodology, the scientists gave the company 50,000 pages of raw data and information on their research methods. That should have been all BP needed to verify the accuracy of the research. But the company convinced a judge to require the scientists to also turn over their private correspondence. Objecting to that release in the *Boston Globe*, the scientists noted that “our concern is not simply invasion of privacy, but the erosion of the scientific deliberative process.” They continued:

Deliberation is an integral part of the scientific method that has existed for more than 2,000 years; e-mail is the 21st century medium by which these deliberations now often occur. During this process, researchers challenge each other and hone ideas. In reviewing our private documents, BP will probably find e-mail correspondence showing that during the course of our analysis, we hit dead-ends; that we remained skeptical and pushed one another to analyze data from various perspectives; that we discovered weaknesses in our methods (if only to find ways to make them stronger); or that we modified our course, especially when we received new information that provided additional insight and caused us to re-examine hypotheses and methods.

In these candid discussions among researchers, constructive criticism and devil’s advocacy are welcomed. Such interchange does not cast doubt on the strengths of our conclusions; rather, it constitutes the typically unvarnished, yet rigorous, deliberative process by which scientists test and refine their conclusions to reduce uncertainty and increase accuracy (Reddy and Camilli 2012).

Commenting on BP’s intrusive subpoenas, Woods Hole Oceanographic Institution President Susan Avery and

Research Director Laurence Madin released a statement on the need to protect the research process: “Despite earlier Supreme Court recognition of the importance of the deliberative scientific process, there remains inadequate legislation and legal precedent to shield researchers and institutions who are not parties to litigation from having to surrender pre-publication materials, including deliberative emails and notes, manuscript drafts, reviewers’ comments, and other private correspondence. . . . We urge professional scientific and higher education organizations, legal advocates, legislators, citizens, and businesses to examine these issues and support the establishment of adequate protections for researchers and their institutions” (Avery and Madin 2012).

When subpoenas do not work, open records requests often do. Historians Gerald Markowitz and David Rosner expected pushback when they published *Deceit and Denial: The Deadly Politics of Industrial Pollution* in 2003, showing how the lead and chemical industries had systematically undermined and misrepresented research revealing the threats their products posed to human health. What they did not expect was a full-throttle assault on their scientific integrity.

***Some industries are intent on targeting researchers whose results threaten their bottom line.***

Attorneys for a group of chemical firms did not target only the two researchers. They also subpoenaed and deposed the academics who peer-reviewed the book—eliciting a massive protest from the scientific community (Wiener 2005). Industry representatives later used a FOIA request to the National Science Foundation to seek “all records relating to research conducted by David Rosner and/or Gerald Markowitz on the history of lead that has been funded by NSF” (NSF 2009).

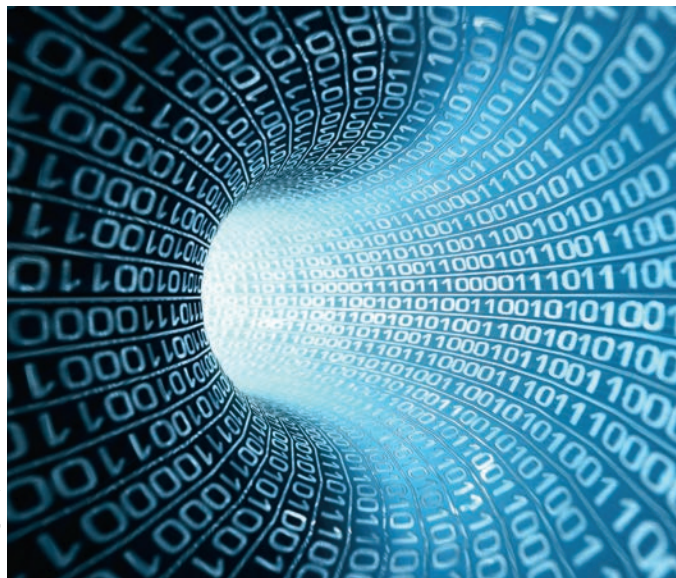
One study found that two-thirds of open records requests come from commercial entities (Society of Professional Journalists 2006). While some regulated industries use requests to gain competitive advantages, others are intent on going after researchers whose results threaten their bottom line.

The harassment of researchers, of course, extends far beyond subpoenas and open records requests. Bloggers publish unsubstantiated allegations of impropriety, which can then circulate widely on social media and sometimes spill over into the mainstream media. Members of Congress convene special hearings to cast doubt on scientists’ work, or

publicly distort the rationale for research grants to score political points among skeptics of federal investments in science. Activists make scientists' emails, phone numbers, and home addresses publicly available, and encourage supporters to weigh in, sometimes leading to death threats (UCS 2012).

Writing in the *New England Journal of Medicine*, five researchers provided case studies that connect the dots between different types of harassment. They describe how one investigation, which found that some blood pressure drugs were associated with a higher risk of heart attacks, became front-page news and the subject of scrutiny from drug companies. One pharmaceutical manufacturer submitted an open records request for all data sets and methods, plus "correspondence, meeting minutes, notes and other documentation" from any researchers and staff. "The common theme in these examples is an attack—through marketing, professional, media, legal, administrative, or political channels—on scientific results that ran counter to financial interests and strong beliefs," the researchers wrote. "Institutions need organized ways of supporting and advising faculty members who come under attack" (Deyo et al. 1997).

Notably, many requesters often are not just looking for data or research methods. Academics already often make that information publicly available once papers are published. What's at stake are the personal documents, correspondence, and discussions that constitute the push and pull of the scientific process—venues that researchers use to challenge the ideas of others.



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Many requesters are seeking far more than published data and research methods, submitting requests for large swaths of emails, class lecture materials, and even handwritten notes—leading to concerns that researchers are more likely to self-censor and stay away from contentious topics.

## ***What's at stake are the personal documents, correspondence, and discussions that constitute the push and pull of the scientific process.***

The Association of Governing Boards and Universities and Colleges recognized the pitfalls of intrusive open records requests in 2004:

Senior campus and system officials also expressed concern about their colleagues' increasing reluctance to electronically record and exchange new or provocative ideas for fear those electronic documents might be obtained through public-records requests. These respondents say that sunshine laws thus have diminished creative thinking and problem solving among senior officials (Hearn, McLendon, and Gilchrist 2004).

Repeated and excessive requests can greatly slow research. As Thomas McGarity and Wendy Wagner show in *Bending Science: How Special Interests Corrupt Public Health Research*:

Harassment is a particularly useful tool for bending science because it can impugn the researchers' integrity while at the same time hampering their ability to continue their potentially damaging research. Even wholly unsupported allegations of scientific dishonesty, for example, may have a lasting impact on a scientist's reputation and the perceived validity of his research that can be rectified only over many years as other researchers replicate the suspect work. The targeted scientists must also divert their time and attention away from their ongoing research, and the resulting delays in or even termination of the challenged research also benefit the harassing party" (McGarity and Wagner 2008).

Of course, "FOIA harassment isn't always so high-profile," Rob Jenkins, an English professor at Georgia Perimeter College, wrote in an online forum hosted by the *Chronicle of Higher Education*. "Ordinary faculty members can suddenly discover that their political opponents on campus are taking advantage of freedom-of-information policies to troll through 'public' records looking for something incriminating. That actually happened to me—no one found anything damning because there wasn't anything to find—and I'm sure it's happened to some of you as well" (Jenkins 2014).



## Examples of Open Records Attacks on Academics

### CLIMATE SCIENTISTS

The most recent prominent harassment cases have focused on climate science. Universities in several states have received open records requests for all materials in a university's possession regarding one or more climate researchers. Nobody has received more scrutiny than Michael Mann, a meteorologist at the University of Virginia from 1999 to 2005 who is now at Pennsylvania State University.

In 2010, Virginia Attorney General Ken Cuccinelli used the state's Fraud Against Taxpayers Act to subpoena Mann's correspondence. As it became clear that state courts considered this an abuse of power, with the Virginia Supreme Court ultimately rejecting the subpoenas (*Kenneth T. Cuccinelli, II, v. University of Virginia* 2012), the American Tradition Institute (ATI, now the Energy and Environment Legal Institute) sought the same documents via the Virginia Freedom of Information Act. Chris Horner, the ATI's director of litigation, is a fellow at the Competitive Enterprise Institute, which has sought the emails of federal government climate scientists (*Competitive Enterprise Institute v. National Aeronautics and Space Administration* 2013; Sturgis 2011).

At first, university president Teresa Sullivan committed to protecting the correspondence (Helderman 2011), but then agreed to give the ATI special access to the documents under a protective order (*American Tradition Institute v. University of Virginia* 2011). After Mann and others objected, a court nullified the protective order.

The university and Mann then argued in circuit court that it has the right to exempt certain information to protect scholarly communication. A judge found in favor of the university and Mann (Jackman 2012). When the ATI appealed to the Supreme Court of Virginia, the American Council on Education, the American Association of State Colleges and Universities, the Association of American Medical Colleges, the Association of American Universities, the Association

**VCU scientist Rodney Dyer dutifully compiled all the information, which took close to 100 hours, after which the university chose which items to disclose.**



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*The University of Virginia has received many high-profile open records requests, most notably with regard to climate research conducted by its faculty.*

of Governing Boards of Universities and Colleges, the Association of Public and Land Grant Universities, and the National Academy of Sciences filed a joint amicus brief objecting to excessive disclosure of academic materials (ACE et al. 2013). The court found that the university could withhold certain academic records when disclosure 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” (*American Tradition Institute v. University of Virginia* 2014).

As the Mann case was playing out, the ATI continued to file extensive open records requests regarding the work of scientists in Alabama, Arizona, Delaware, and Texas (Ogburn 2014). The organization also sought extensive information from five investigators at Virginia Commonwealth University (VCU), including any “logbooks” on their research methods (Schnare 2012).

One of the VCU scientists, population geneticist Rodney Dyer, happened to be on sabbatical. The ATI was seeking records on his use of published climate data and fossil records to reconstruct extinct habitats. The university contacted Dyer to tell him that it had received an open records request, and that he would need to return from sabbatical to take care of it.

At first he found the request strange. “They seemed to assume that there was some kind of giant lab book that the post docs all sign ceremonially when they come in,” he said. “They wanted pictures of the lab book, and all kinds of information about models” (Dyer 2014). He dutifully compiled all the information, which took close to 100 hours, after which the university chose which items to disclose.

Dyer did not see the request as an attempt to truly understand the science. “I generally release raw data before I even publish a paper,” he noted. “They weren’t interested in looking at the data: they were interested in stopping me from doing whatever it is that I’m doing.”

The use of open records laws to harass climate scientists transcends international boundaries. In Australia, one organization submitted more than 750 open records requests to the federal government’s Department of Climate Change, accounting for more than 95 percent of all requests the department received. Staff members would have needed nearly 40 hours to process each request (Morton 2011). These repeated and excessive requests can be compared to “denial-of-service” attacks perpetrated on Internet users: that is, they essentially flood an office with requests, greatly slowing other work. In this context, two prominent Australian scientific societies wrote to the attorney general, who was then reviewing federal open records laws, outlining how to minimize these impacts on scientists (AMOS and STA 2012).

Separately, Australian social scientist Stephan Lewandowsky, whose research showed that climate contrarians were more likely to believe in other conspiracy theories, found himself on the receiving end of several requests that he estimated

took more than 100 hours of staff time. This and numerous other demands for extensive records from climate scientists allowed bloggers to review scientists’ daily email correspondence (Readfearn 2012).

In a widely publicized case in 2009, a hacker stole thousands of emails from a server at the University of East Anglia’s Climate Research Unit in England, manufacturing a controversy labeled Climategate by groups that do not accept human-induced climate change. Ironically, the emails were easier to steal because the university was already collecting them in response to repeated requests under England’s Freedom of Information Act.

The Climate Research Unit had already released some 95 percent of the researchers’ data on temperature changes, and the remainder were subject to confidentiality agreements with foreign governments and research entities (CRU 2009). But the contrarians were still not satisfied. During a five-day period in late July 2009, they submitted 58 Freedom of Information Act requests for details on the confidentiality agreements (Heffernan 2009).

Several investigations were launched into the researchers’ conduct following the release of the emails, with none finding any scientific misconduct. Some of the emails, however,



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*Sometimes, open records requests are redundant and seek information that is already publicly available; still, fulfilling these requests can take hundreds of hours, draining university resources and keeping scientists from their research. This can lead to frustration for researchers who are under excessive scrutiny.*

revealed scientists' frustrations regarding the crippling volume of requests from climate contrarians. One investigation found that scientists were "unhelpful" in responding to open records requests and cited "evidence that e-mails might have been deleted in order to make them unavailable," likely in response to the barrage of requests (Russell 2010).

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Some environmental groups have used open records requests to seek the records of academics who don't accept the scientific consensus on climate change. In 2009, for example, Greenpeace submitted a request to the University of Virginia for a list of grants and all correspondence to and from climatologist Pat Michaels and environmental physicist Fred Singer—both global warming contrarians—regarding a wide variety of subjects. As is common for such requests, the university gave Greenpeace a cost estimate of \$4,000 for complying with the request, and indicated that it could not provide "unfiltered" access to all the email correspondence because some was exempt. After more back and forth, Greenpeace failed to follow up on its request (UVA 2013).

#### **TOBACCO RESEARCHERS**

Many think of the tobacco industry's attacks on science as a relic of the past, but the industry continues to try to undermine public understanding of the health effects of its products. The industry has long understood the utility of open records laws. The National Smokers Alliance—an astroturf organization funded by Philip Morris—dedicated an entire issue of its newsletter in 1995 to recruiting citizens to file open records requests on its behalf (American Nonsmokers' Rights Foundation 1999; American Smokers Alliance 1995). "Can you be a researcher?" asks the alliance in a strangely Dr. Seussian manner. "I don't know: you have to read, write, and occasionally make a phone call or two. The rest is easy; we can show you."

In 1991, Georgia Medical College professor Paul Fischer published research showing that six-year-old children

recognized the "Old Joe Camel" cartoon character and the Disney Channel logo in equal numbers (Fischer et al. 1991). R.J. Reynolds subpoenaed Fischer's research records, including the names and telephone numbers of children involved in the study (Burd 1994). When a court nullified the subpoena, the company sought the same information under the Georgia Open Records Act (Levinson-Waldman and O'Neil 2012). When Fischer resisted, the medical college successfully sued its own professor for the documents and sent them to the company. Disgusted, Fischer resigned his tenured position and set up a family medical practice.

Concurrently, the tobacco company successfully used subpoenas and open records requests to gain access to the research records of scientists who conducted other studies related to Old Joe Camel in California and Massachusetts. "The fact that they made their allegations of fraud so public felt like harassment to me," said Joseph DiFranza, one of the targeted scientists. "For a while, I couldn't sleep. Fighting their charges diverted my time from research" (Burd 1994).

In 2009, a law firm representing Philip Morris—at first anonymously—submitted freedom of information requests to academics in Scotland studying the impact of marketing displays and packaging on adolescents. The requests sought "all primary data," "all questionnaires," "all interviewers' handbooks and/or instructions," "all data files," "all record descriptions," and "all information related to sampling, data collection, handling of non-response and post-stratification weighting and analysis" (Hastings, MacKintosh, and Bauld 2011). Although a private cancer charity funded the projects, the research was subject to open records law because the investigators were employees of the University of Sheffield.

To increase the likelihood that young people they interviewed would speak honestly, the researchers had guaranteed them anonymity—assuring them that only "bona fide" researchers would have access to the information. If Philip Morris succeeded in its requests, it would compromise relationships with those interviewees as well as other scientists, researcher Linda Baird told *The Independent*. "Our colleagues in the community will not be willing necessarily to [share] information" with the targeted scientists, she said (Connor 2011a).

Philip Morris eventually dropped the request after significant negative publicity (Connor 2011b). However, consultations with university attorneys, audits of the requested information, detailed responses, challenges to the responses, appeals, and resubmission of the request had cost the researchers many weeks of work. "The stress of all this is considerable: we are not lawyers and, like most civilians, find the law abstruse and the overt threat of serious punishment





When several researchers found that the cartoon character Joe Camel was effective in marketing cigarettes to children, R.J. Reynolds fought back, first using subpoenas and then open records requests to try to access private information from the researchers, including the names and telephone numbers of young children interviewed in studies. The industry also recruited citizens to file invasive open records requests.

***“For a while, I couldn’t sleep. Fighting their charges diverted my time from research.”***

— Joseph DiFranza,  
adolescent tobacco utilization expert

extremely disconcerting,” they wrote. “The weeks of work we have put into this FOI process have inevitably been done at the expense of our day jobs. It is worth remembering that as academics, a key part of our day job is to disseminate our research through all the normal, properly policed channels. Ironically then, in this case, FOI is actually hindering public access to information” (Connor 2011a).

#### HISTORIANS

The use of open records laws to gain access to professors’ emails first earned significant national attention in 2011, when the Republican Party of Wisconsin sought the emails

of renowned University of Wisconsin history professor William Cronon, who was writing critically about the state’s caustic conversation around collective bargaining rights (Krugman 2011). An industry group in Michigan also sought the correspondence of three labor studies professors at Michigan State University, the University of Michigan, and Wayne State University related to the situation in Wisconsin (Greenhouse 2011). Several academic societies spoke strongly in defense of Cronon, including the American Association of Geographers, the American Historical Association, the American Political Science Association, and the Modern Language Association (AAG 2011; AHA 2011; MLA 2011; Pateman 2011).

“Were open records requests to be regularly invoked by private citizens in attempts to burden, embarrass, or otherwise hassle those professors whose research and scholarship they found objectionable,” wrote Will Creeley of the Foundation for Individual Rights in Education, in connection with the case, “these legal requests might soon amount to a real threat to academic freedom, casting a chill on speech in the academy and encouraging professors and students to avoid dialogue about unpopular or controversial subjects” (Creeley 2011).





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When historians in Wisconsin and Michigan wrote about labor protests in Wisconsin, their universities received open records requests requesting extensive email correspondence.

***“To our faculty, I say:  
Continue to ask difficult  
questions ... and exercise  
your academic freedom.”***

— University of Wisconsin  
President Bidy Martin

Ultimately, the University of Wisconsin released some emails, but not those related to the research process. “To our faculty, I say: Continue to ask difficult questions, explore unpopular lines of thought and exercise your academic freedom, regardless of your point of view,” wrote university president Bidy Martin to the campus community (Martin 2011).

The Cronon situation caused academics around the country to begin to examine how their own institutions would respond. The City University of New York’s Professional Staff Congress expressed concern about the use of open records requests to gain access to faculty correspondence, observing

that “the requirement for disclosure of emails sent on the CUNY system is not entirely clear” (PSC 2011).

#### ENVIRONMENTAL CHEMIST

In the 1990s, Deborah Swackhamer, a professor of environmental health sciences at the University of Minnesota, studied toxaphene, a chemical once considered a promising replacement for DDT but eventually found to be quite toxic. After toxaphene became the most-produced chemical in the United States, its use was severely curtailed in 1982, and it was banned outright in 1990 (EPA 2015).

Toxaphene can be a byproduct of manufacturing processes that involve chlorine, including those often used in the pulp and paper industry. Researchers had found unusual concentrations of toxaphene in the Great Lakes, and wanted to know why (Lerner 1998).

Swackhamer was one of several scientists studying the chemical, but she was unique among them in that her husband, an Environmental Protection Agency (EPA) scientist, had successfully pushed the agency to fund toxaphene research. Their relationship was always disclosed, and conflicts of

interest were fully vetted. But someone who wanted the project shut down sensed a weak link (Swackhamer 2015).

Attorneys from a prominent law firm sought everything Swackhamer had ever touched—raw unpublished data, class notes, purchase records, telephone records, and more—for a 15-year period. It remains, Swackhamer said, the biggest open records request ever made in Minnesota. The attorneys filed similar requests with the EPA, referring to the couple's "familial relationship." Jerry Schwartz, a representative of the American Forest and Paper Products Association, acknowledged the unusual situation: "If nothing else, it's obviously a very burdensome request," he said (Lerner 1998).

The university usually did not need to involve researchers when it received routine open records requests, as most were not terribly invasive. But this one was so broad it had no choice. The university was willing to give up some information, but wanted to protect unpublished data and unfunded research proposals. Swackhamer had to review every scrap of paper before the university sent it out. The boxes of paper filled a conference room.

"At that time, attorneys general were going after the tobacco companies, and the university understood that this

would be a bad precedent if they just complied with the request" she said. "The University of Minnesota did a ton of tobacco research, and it was getting inundated with subpoenas for information related to tobacco. They understood my situation, and said they were willing to go to court" to fight excessive disclosure (Swackhamer 2015).

***Swackhamer had to review every scrap of paper before the university sent it out. The boxes of paper filled a conference room.***

Yet the experience took its toll on Swackhamer. Although her husband was based at the EPA's Chicago office, he was on assignment at the Minnesota Pollution Control Agency. When the open records requests began, the EPA immediately called him back to Chicago. Suddenly forced to live apart during a tumultuous time, the couple had to get a second apartment, furniture, and telephone.

When the *Minneapolis Star Tribune* published an investigation into the matter, the requests stopped immediately at both the university and the EPA. No one was ever able to determine who was behind them. I was a pawn," Swackhamer said. "The main goal was to get the EPA to stop the Great Lakes Research. Our relationship was considered a vulnerability." She continued to work on toxaphene, eventually conducting a study that vindicated the pulp and paper industry (Swackhamer 2015).

#### OCCUPATIONAL HEALTH SCIENTIST

Beginning in 2012, the Highland Mining Company made several open records requests seeking raw data, draft documents, and peer review comments related to the work of Michael Hendryx, a former West Virginia University professor now at Indiana University who had investigated connections between mountaintop removal mining and adverse health effects such as cancer (WVU 2014). It's just ridiculous," Hendryx told the Center for Public Integrity (Su 2012). "They're digging for whatever they can find. They've made me waste a lot of time."

When the university refused to provide all the requested information, the company took it to court. A state circuit court judge found in favor of the university, noting that excessive disclosure could cause some scientists to "temper their approaches to research questions and problem-solving and be



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Researchers had found unusual concentrations of toxaphene, a manufacturing byproduct, in the Great Lakes. One of the scientists studying the chemical was the target of the biggest open records request ever made in Minnesota.



more hesitant to think outside the box, fearing public reception of the extreme or unconventional” (WVU 2014).

#### **AN EPIDEMIOLOGIST, HOG FARMS, AND ENVIRONMENTAL JUSTICE**

In the 1990s, pork producers proposed to build new industrial hog operations in an underdeveloped and predominantly low-income and African-American area of rural North Carolina. Local residents did not have access to expertise that would help them evaluate the potential risks. Research on the environmental, social, and health impacts of industrial hog production, such as groundwater contamination and air pollution because of airborne bacteria from farm wastes, was limited (Wing 2002). And there had been little attention to the disproportionate impact of these farms on low-income communities and people of color.

In response, epidemiologist Steve Wing of the University of North Carolina worked with organizations representing affected communities on a study, which found that industrial hog operations were more common in low-income communities of color and areas where drinking water comes from wells (Wing 2002). Not surprisingly, the hog industry did not like the study. The North Carolina Pork Council publicly criticized its scientific rigor, and the state House Agriculture Committee convened a public hearing with Wing, making his university nervous that it would suffer some kind of retribution (Wing 2002; Myers 1999).

***A university administrator told Wing he could be charged criminally if he refused to turn over documents as directed by the university’s attorney.***

In a concurrent study, Wing found that people who lived near industrial hog farms more frequently reported experiencing headaches, runny noses, sore throats, excessive coughing, diarrhea, and burning eyes compared with two other rural communities. The day he released his findings, the North Carolina Pork Council submitted a broad open records request to the university for all materials associated with the study including, incredibly, the identities of study participants, whose confidentiality Wing had assured. Release of such information would compromise not only the study’s ethics but also community trust, threatening future research. The

council made a similar request under the federal Freedom of Information Act to the National Institute of Environmental Health Sciences, which had funded the research (Wing 2002).

At one point, a university administrator told Wing he could be charged criminally if he refused to turn over documents as directed by the university’s attorney. With the assistance of his own attorney, Wing negotiated an agreement with the university to provide the Pork Council with draft reports, emails, survey responses, and other sensitive materials that were redacted to protect participants’ confidentiality. An assistant professor at another North Carolina university later told him, “I have been conducting research on neighbors of hog operations, but I’m afraid that if I have to deal with legal problems like yours, I’ll never get tenure. So I’ve decided to drop my research for now” (Wing 2002).



Courtesy of Farmsanctuary.com

The North Carolina Pork Council filed an open records request the day a scientist released his study finding that people who lived near industrial hog farms had greater incidences of health problems such as headaches, diarrhea, and burning eyes. The council had also criticized the scientist’s earlier research, which found that hog farms are more common in low-income communities of color.

Political and corporate pressure on research on farming practices extends well beyond North Carolina. For example, the U.S. Department of Agriculture repeatedly prevented one of its microbiologists from speaking about his research on hazards to human health posed by airborne bacteria from farm wastes (UCS 2004). And a survey of agricultural scientists at land grant universities found that researchers who receive industry funding have more difficulty sharing research data and publishing in a timely manner (Goldberger et al. 2005).

#### **RESEARCHERS WHO USE ANIMAL SUBJECTS**

For more than 10 years, animal rights activists relentlessly went after the correspondence of a psychiatry and biobehavioral



Animal rights activists have harassed scientists who study non-human subjects for decades. A recent uptick in the activists' use of open records requests has led to scientific societies and at least one university creating guidelines to protect researchers' privacy and suggestions for responding to such requests.

sciences professor at the University of California–Los Angeles (UCLA), seeking descriptions of grants, medical records, and years of autopsy reports on her primate subjects. The university body that handles all open records requests noted that it had seen an “exponential increase” in open records requests across the institution (Reynolds 2013).

The burden of responding became so onerous that UCLA set up a Task Force on Academic Freedom to develop guidelines to protect faculty records while allowing an appropriate level of accountability (Flaherty 2014). The resulting Statement on the Principles of Scholarly Research and Public Records Requests includes thoughtful and detailed principles to protect scholarly communications (UCLA 2012).

The University of Wisconsin is now in the spotlight for research related to anxiety that uses primate subjects. Although its Institutional Animal Care and Use Committee had approved the research, the Animal Legal Defense Fund (ALDF) portrayed it as torturing animals (Phillips 2014; Sandgren 2013). After a complaint from the ALDF, the U.S. Department of Agriculture found “that the protocol review process was entirely appropriate” (Phillips 2014).

The ALDF then submitted a state open records request for materials related to the review process, and is suing the university for access to handwritten notes used to create

***For more than 10 years, animal rights activists relentlessly went after the correspondence of a UCLA professor, seeking medical records and years of autopsy reports on her primate subjects.***

minutes of official meetings. “A person who produces the minutes for a meeting is entitled to take notes and then use those in the creation of the final document,” Bill Lueders, president of the Wisconsin Freedom of Information Council, which works to ensure public access to information on government and its employees, told WKOW, the ABC affiliate in Madison. “Unless those notes are shared with others and become part of what the institution is using to make decisions, they’re not a public record” (Barbarese 2014).



Open records requests for email and other personal information from researchers who study animal subjects have become so pervasive that the Federation of American Societies for Experimental Biology, the National Association for Biomedical Research, and the Society for Neuroscience developed a guide for researchers in responding to such requests (FASEB 2015).

#### FERAL CAT RESEARCHERS

Ecologist Christopher Lepczyk studies how to control feral cats, which pose a significant threat to wildlife in Hawaii. In 2012, he and two other scientists published a paper in *Conservation Biology* showing that euthanasia is considerably more effective and cost-effective than trap-neuter-release programs, and that reducing abandonment rates is also critical to feral cat control (Lohr, Cox, and Lepczyk 2012).

In response, the Best Friends Animal Society, which opposes euthanasia, submitted an open records request to the University of Hawaii for materials on the grant that had supported the research. The university provided the research proposal, as legally required, but indicated that it would not disclose further information related to the research without justification, citing concerns about unpublished material. The faculty union also supported the scientists.

**“There are people I know who don’t work on [feral cat management] because they get harassed.”**

— Christopher Lepczyk, ecologist

Lepczyk later copublished a paper in *Conservation Biology* showing that residents and other stakeholders wanted to reduce the number of such cats, and preferred euthanasia to a trap-neuter-release approach (Lohr and Lepczyk 2014). This time, simply getting the paper published was a struggle. Several peer reviewers initially gave fairly minor feedback, but when the journal switched editors, one reviewer trashed the paper, and the journal rejected it. “The tone in the review suggested that it had been sent around to a large number of people,” Lepczyk observed, “and the comments were along the lines of ‘You can never do perfect science,’”—so general as to be meaningless (Lepczyk 2014).

After seeking input from six peer reviewers and asking the authors to revise the manuscript three times, journal staff finally accepted it. However, the authors found that when



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Feral cats are killing endangered birds in Hawaii. Those opposed to euthanasia in reducing feral cat populations targeted researchers who found that the practice is not only more effective and cost-effective than trap-neuter-release programs, but also preferred by most residents and stakeholders.



they gave public talks on the article, organizations opposed to killing cats publicly attacked their findings.

“I’ve been targeted for several years by a few vocal people that don’t like euthanasia,” Lepczyk said. “There are people I know who don’t work on this topic because they get harassed. It doesn’t leave a big emotional scar, but it’s on your mind, and takes time and focus away from your work” (Lepczyk 2014).

#### A LEGAL SCHOLAR OF RELIGIOUS FREEDOM

A few months after the Virginia Supreme Court issued its decision in the climate change case, another high-profile open records request surfaced at the University of Virginia. This time, two students went after the email and phone records of Douglas Laycock, a law professor whose work has provoked the ire of GetEqual, which promotes the rights of lesbian, gay, bisexual, and transgender (LGBT) people (Halpern 2014).

A religious liberties scholar, Laycock has argued for equal marriage rights and against sectarian prayers at local public meetings. However, he also supported Hobby Lobby’s opposition to the provision in the Affordable Care Act requiring employers to offer contraceptive coverage to employees. Laycock spearheaded a letter seeking to clarify the scope of controversial legislation in Arizona that would have given individuals and businesses more latitude to discriminate against LGBT people on religious grounds (Lithwick 2014).

The two students claimed they filed their request to start a conversation, but many weren’t buying it. “You don’t start a dialogue with FOIA requests,” wrote conservative UCLA law professor Stephen Bainbridge (2014). The students were not expected to obtain much information, as the university had publicly articulated how it would deal with such requests during the climate records case, and the state supreme court had upheld its legality earlier in the year. The requests drew criticism from people across the political spectrum. The kerfluffle spurred the Cato Institute’s Walter Olson to weigh in:

It might also be time for legislators to clarify state open-records laws to determine under what circumstances they can be used to go after academics, and consider altering them, where appropriate, to provide for financial or other sanctions when they are misused (Olson 2014).

#### POVERTY RESEARCHERS

In 2013, the Civitas Institute sought all the emails, phone records, and calendars of Gene Nichol, director of the Center on Poverty, Work, and Opportunity at the University of North Carolina, during a six-week period. The institute has submitted other requests for Nichol’s work, but this one was the most wide ranging (Sturgis 2013). The institute, which

is dedicated to “liberty and prosperity derived from limited government,” is affiliated with a nationwide political movement to “release residents from government dependency” (Goldenberg 2013).

Responding to the request entailed “going through thousands of e-mails,” Nichol said. “Some were personal, from students, former students having difficulty with their jobs, students applying for law school, my wife. It was long hours culling out personal and private matters. I had to do that with university counsel, too” (Dubose 2014). Academics from 24 North Carolina colleges and universities wrote to Governor Pat McCrory expressing concern about the request (MacLean et al. 2013). The Civitas Institute published dozens of emails related to the planning of a campus event sponsored by Nichol’s center on its website in February 2014 (De Luca 2014). A panel of the university’s board of governors is now threatening to disband the center, charging it with ideological bias in its publications and other work on poverty in North Carolina (Stancill 2014).

***Universities are often not ready to deal with very broad open records requests.***

#### When Universities Are Unprepared

Universities are often not ready to deal with very broad open records requests. For example, when Greenpeace sought email correspondence and other records on the work of climate scientist and global warming skeptic David Legates, University of Delaware officials seemed confused about how best to respond. Delaware’s open records law requires only the release of materials directly paid for by state funds, and state Democrats shut down recent legislative attempts to make universities more transparent (Offredo 2014). In testimony before the U.S. Senate Environment and Public Works Committee, Legates described more than four years of inconsistency and confusion before the university determined that it had no records to supply in response to the Greenpeace request (Legates 2014). The university could have avoided the fiasco if it had proactively and clearly stated how it would deal with such requests.

In a similar case, University of Arizona economics professor Mark Stegeman routinely used his university email address to conduct business as president of the Tucson Unified School Board. When the *Tucson Weekly* sought these records

under the state's open records law, the school board, university, and Stegeman himself played a game of pinball over who was ultimately responsible for releasing the records (Herreras 2012).

Researchers themselves are not always aware of how their university handles open records requests. When a professor at Utah State University received a request from a member of the deaf community for sensitive information related to a 2012 meeting on early detection and intervention related to hearing loss, he took it upon himself to respond, making several errors along the way. The professor indicated that he was not aware that the university had a FOIA officer (Johnson 2012).

### **Separating Legitimate Requests from Harassment**

Some organizations have supported the release of researchers' materials in the interests of accountability. In an amicus brief filed in the University of Virginia climate change case, the Reporters Committee for Freedom of the Press and 17 media organizations were careful not to argue for blanket disclosure of personal correspondence, and recognized the importance of creating safe space for the scientific process (RCFP et al. 2015). At the same time, the organizations expressed concern that overly broad exemptions from the state's open records law would prevent public understanding of the university's funding and operations, and investigations of potential crimes.

"Exemptions to [the Virginia Freedom of Information Act] must be narrowly interpreted to comply with the legislative intent behind the law and to ensure the public and the news media sufficient access to the government to promote an understanding of its operations," the committee wrote. "Public universities are necessarily included in VFOIA, and the media has a strong interest in being able to monitor university spending and operations" (RCFP et al. 2015).

Pennsylvania's open records law includes an overly broad exclusion: it exempts Pennsylvania State University from such requests. Because of that exemption, reporters working on the school's football-related sex abuse scandal faced significant hurdles in gaining access to information on how university officials handled allegations of abuse (Craver 2012). "Along with protecting donors and research," editorialized PennLive.com, "what the extraordinary exemption also means is that in the case of child sex abuse charges at Penn State, there is no access to information that could tell us who knew what and when about the allegations and how people acted or did not act on them" (PennLive.com 2011).

***Overly broad exemptions from the state's open records law would prevent public understanding of the university's funding and operations, and investigations of potential crimes.***

The public should also have access to information on who is funding an academic's work, and any influence the funder has on the content of that work. At the University of Kansas, Students for a Sustainable Future is seeking email correspondence of economics professor Art Hall regarding his relationship with the billionaire Koch brothers. Hall filed a lawsuit to prevent the university from releasing his emails, citing defense of academic freedom, and a judge issued a temporary restraining order in his favor (Dulle 2014; Hall 2014).

However, the American Association of University Professors (AAUP)—which has been highly critical of the blanket use of open records laws—helped raise funds to fulfill the students' request. The AAUP argues that funding relationships are fair game, although intellectually property would not be. "If a precedent is set which allows any public employee engaging in scholarly endeavors at a public institution to hide his/her professional communications with agents who are funding the work, then it can call into question all such research at so-funded institutions and thereby damage the reputation of the institution as a whole," wrote the president of the AAUP's Kansas Conference (Barrett-Gonzalez 2014).

### **Where Do We Go from Here?**

Higher education experts and legal scholars are starting to focus on solutions that will ensure transparency and accountability while protecting researchers from harassment and undue distractions. In April 2014, for example, the George Washington University Law School held a full-day symposium on the tension between academic freedom and state open records laws (GWU 2014).

Writing for the Association of Governing Boards of Universities and Colleges, former AAUP attorney Rachel Levinson-Waldman and FOIA expert Robert O'Neil call on

universities to pay more attention to this challenge. “Clearly, the public-record landscape is rapidly changing, and in ways that framers of FOIA laws—not to mention their champions and their detractors—could hardly have imagined” (Levinson-Waldman and O’Neil 2012). They ask governing boards to clarify their policies and procedures on open records requests, including those related to searches for university presidents, private institutions, and donations to university foundations. They point to the latter because some institutions have been trying to hide the identity of donors—and the strings that come with their donations—from public scrutiny (Levinthal 2014).

University associations and lawyers must also determine and publicly disclose how they will respond to open records requests. And they need to be crystal clear about which materials they consider public and which private, and ensure that their employees understand both their rights and their responsibilities. Noting that smartphones, laptops, and other technologies have “blurred the boundaries between personal and workplace communications,” the National Association of College and University Attorneys held that “public and private colleges and universities must be clear and consistent with policies concerning privacy and the acceptable use of employer-issued technology” (NACUA 2012). When it comes to personal and professional email, this can get complicated. A recent University of Oregon proposal (which was not adopted) suggested that private email sent on private computers could be considered university property if it concerns work-related subjects, and that such correspondence could be subject to Oregon’s open records law (Hammond 2013). However, those who wrote that proposal probably did not intend that every message that academics write on their personal time related to their expertise should be discoverable.

Academics and public institutions should also consider and articulate how they will respond to the use of overly broad open records requests to harass researchers. The Union of Concerned Scientists has created a short guide to help researchers prepare for such requests (Halpern, Huertas, and

O’Brien 2012). Those who feel harassed or are unsure about how to respond can tap resources mentioned in the guide.

Professional societies should recognize that what is in the best interests of a university is not always in the best interests of individual researchers, and offer them legal assistance to protect their privacy.

State legislators also need to examine their open records laws to ensure that they include appropriate exemptions but are not so broad as to compromise accountability. In the *Jour-*



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*Institutions, professional societies, and grant makers should explore developing common disclosure standards so impacts of open records requests on academics are minimized.*

*nal of College and University Law*, after providing a helpful analysis of case law, William Briggs calls on legislators to clarify the scope of these laws and to whom they apply, such as by distinguishing between academics and employees of state agencies (Briggs 2013). The National Academy of Sciences and other research organizations should provide guidance to legislators and universities alike on which kinds of materials should be disclosed and which should be protected.

Ultimately, open records requests should not be the primary option for those who seek to understand the public’s business. If lawmakers, universities, and researchers develop a shared understanding of what they should disclose and a system for proactively doing so, they can avoid costly and time-consuming lawsuits and other battles. And that, in turn, will allow researchers to get back to what they are supposed to be doing: learning more about our world.

***Professional societies should recognize that what is in the best interests of a university is not always in the best interests of individual researchers.***

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