



# A Guide to Open Records Laws and Protections for Research Materials



Brought to you by  
The Climate Science  
Legal Defense Fund

[www.csldf.org](http://www.csldf.org)

 [@ClimSciDefense](https://twitter.com/ClimSciDefense)

## INTRODUCTION

### A Guide to Open Records Laws and Protections for Research Materials

Open records laws are valuable tools for government transparency, enabling the public to request documents related to state and federally funded activities. However, these laws are increasingly misused to attack scientists who work on politically contentious topics in attempts to distort or undermine their research. The misuse of open records laws damages the scientific endeavor by diverting researchers' time, threatening their privacy, and chilling candid scientific discussions. And by harming the scientific endeavor and interfering with scientific progress, the abuse of open records laws also harms human and environmental health.

Until the necessary protections for scientific research are included in open records laws, it is crucial that scientists understand the laws in their state. This guide distills the open records laws in each of the fifty states and the District of Columbia into an easy-to-use reference that describes how each state's open records law can potentially be used to protect research materials. It highlights categories of research records that may be vulnerable to an invasive open records request and lists areas where there are ambiguities. It also describes examples of how that state has treated specific records in the past. Included are practical tips for labeling records to help scientists categorize materials that may be protected from disclosure and maximize the chances that their records will remain safe.

#### **Weaponizing Open Records Laws**

The original purpose of open records laws was to provide the public information about policymakers and other state and federal business. Under an open records law, a person can file a request for copies of government records. The government must either produce them or show that the records fall under an exemption to the law (for example, to protect national security interests). Over the years, these laws have been used to positive effect by investigative journalists, watchdog groups, and taxpayers seeking more information about how their government works.

In most states, the laws also allow people to request public university records. Yet few states have considered that scientific research materials should be treated differently than agency policymaking materials. Without important safeguards in place, the laws can be—and regularly are—used to target scientists and disrupt their work.

Anti-science politicians and partisan groups use open records laws to demand emails and other documents from publicly funded scientists. Their goal is to discredit findings and fields of study they dislike by taking information out of context and using it to cast doubt on the science underlying climate change, pollution, biomedicine, and other controversial topics.

With the rise of email as a primary means of communication among scientists, the number of records that can potentially be made available via an open records request is exponentially larger than it was previously. Hostile requesters can seek a huge volume of records, usually emails, sometimes for a period of 10 years or more. A massive open records request on a prolific researcher can end up yielding tens of thousands of emails—a significant burden for the scientist, who must sideline his or her research to comb through years of records in response to the request.

Furthermore, university counsel, who are typically involved in coordinating the disclosure of the records, are not always equipped to mount a full legal defense even when there are available open records protections. As a result, scientists may be forced to choose between turning over documents that could potentially be protected or prepare their own costly, time-consuming legal defense in

## INTRODUCTION

### A Guide to Open Records Laws and Protections for Research Materials

response to the request. Either way, these cases can drag on for years, taking further time away from a scientist's research.

By using open records laws to obtain scientists' informal emails and other preliminary notes—containing devil's advocate debates, what-if arguments, and even technical terms that are easy to misrepresent—hostile groups seek to impugn scientific research by twisting ordinary statements to embarrass scientists and mislead the public about their findings.

#### Transparency in Science

Groups attempting to use open records laws to obtain reams of scientists' records often couch their actions as “pro-transparency.” But using open records laws to obtain internal emails, early drafts, peer-review correspondence, and other traditionally confidential materials does nothing to bolster any legitimate scientific critique.

Science advances are, in large part, made through the publication of individual pieces of peer-reviewed research, including the sharing of underlying data, methodologies, and results as part of the publication process. Other researchers are invited to evaluate, review, and attempt to replicate others' research, and the subsequent determinations are part of an ongoing effort to refine the state of scientific understanding. This is true scientific transparency—and it can be, should be, and is done without the need for open records requests.

Of course, there are appropriate open records requests regarding scientific research, most notably requests for funding information. Such requests can uncover important conflict-of-interest information that can help evaluate the reliability of a piece of scientific research.

#### Conclusion

Scientists are at a disadvantage when it comes to open records laws because the treatment of scientific research under the laws varies widely from state to state; there is no one set of rules for scientists about how to respond to an open records request. State open records laws can also be confusing, with the relevant provisions hard to locate. Even if the law contains protections for scientific research, the language of the protection is often ambiguous or vague.

Some states provide insight into how to apply the relevant protections, through court decisions, Attorney General's Office opinions, open records review boards, and university general counsel advisory guides. However, many states provide few interpretations of the relevant exemptions, leaving us with open questions as to what records may or may not be subject to disclosure.

We hope that this guide, in addition to helping researchers, will also inform policymakers of the shortcomings in state laws, including areas where the laws lack definitions or are otherwise vague or confusing. Our short-term goal is to help scientists understand how open records laws may affect their research. Long-term, we would like lawmakers to realize the implications of not protecting scientific research, and write better laws.

## REPORT CARD

### A Guide to Open Records Laws and Protections for Research Materials

STATE	GRADE	STATE	GRADE
Alabama	D	Montana	F
Alaska	C	Nebraska	C
Arizona	D	Nevada	D
Arkansas	F	New Hampshire	D
California	C	New Jersey	B
Colorado	C	New Mexico	F
Connecticut	C	New York	D
Delaware	A	North Carolina	F
District of Columbia	D	North Dakota	C
Florida	D	Ohio	B
Georgia	B	Oklahoma	C
Hawaii	C	Oregon	C
Idaho	C	Pennsylvania	A
Illinois	B	Rhode Island	B
Indiana	B	South Carolina	B
Iowa	D	South Dakota	B
Kansas	C	Tennessee	C
Kentucky	D	Texas	D
Louisiana	C	Utah	B
Maine	A	Vermont	C
Maryland	C	Virginia	B
Massachusetts	D	Washington	D
Michigan	C	West Virginia	B
Minnesota	D	Wisconsin	D
Mississippi	B	Wyoming	C
Missouri	D		

## GRADING CRITERIA

### A Guide to Open Records Laws and Protections for Research Materials

The grading of states in this guide follows the criteria developed for the publication of our 2017 report, "[Research Protections in State Open Records Laws](#)." This grading system is a subjective rather than an objective exercise. While there are some common themes, the statutory regime in each state varies considerably and the protections offered for research records under these regimes do not fall into easily defined categories. In addition to the varying statutory regimes, courts in different states often take vastly different approaches to similar or even virtually identical factual situations.

In preparing our 2017 report, we attempted to analyze these factors and give grades based on how these various factors intersect. In many instances, the difference between a state receiving a grade of B and a grade of C or D is slight, with ambiguity and lack of court decisions or interpretations of a provision providing the key differential. In the instances where there is little clarification or interpretation as to what the legislature intended to cover with the exemption, we have interpreted the exemptions most narrowly (as is the presumption under open records laws in general) and have therefore awarded the lower of two or even three potential grades.

The following provides a general overview of how we awarded grades based on statutory provisions, court decisions, and other open records opinions (e.g., attorney general opinions, state open records board decisions):

A – State universities excluded (constituting entirety or majority of major state research institutions).

B – Strong statutory exemption that details specific records protected; statutory exemption with case law applying the exemption; deliberate process exemption with case law application protecting research records.

C – Statutory exemption until publicly released/published with no relevant case law; deliberate process exemption with potentially relevant case law; balancing test that has been used to exclude research records from disclosure.

D – Protection only for sponsored research/research with potential commercial value; research disclosed to a university by a private person or entity; deliberate process exemption narrowly applied or with no relevant case law; balancing test with no relevant application.

F – No statutory protection; no relevant common law exemption.

**Alabama earned a D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Alabama's—do not protect scientific research materials from indiscriminate disclosure. As a result, Alabama open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Alabama Public Records Law](#) ensures that "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute."

Alabama uses a general balancing test to determine which materials are protected, meaning the public interest in protecting the record must outweigh the public interest in disclosing it. There is no known instance of Alabama's balancing test being applied to research records.

Here is a brief overview of how the Alabama Public Records Law treats research records.

## What research records may be subject to disclosure under the Alabama law?

### > Research records generally

» There is no specific protection for research records. Records subject to disclosure may include:

- Emails and other written communications
- Drafts
- Notes
- Grant proposals
- Peer review correspondence
- Data
- Other research records

» In contrast to some other states, no exemption exists to protect records that are deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete).

» However, research records could potentially be withheld under Alabama's balancing test if the facts of the situation warranted exemption—see below.

## What research records may be protected from disclosure under Alabama law?

- Records for which it is determined that, on balance, the public interest in protecting the records is greater than the public interest in disclosing.
  - There is no specific exemption in Alabama to protect research records. However, in instances where no exemption applies, a balancing test is applied to evaluate whether the public interest in withholding the record outweighs the public interest in disclosing it.
  - Alabama will apply this standard very strictly with the presumption strongly in favor of disclosure and based only on the specific facts of the case. There is no known instance of this balancing test being applied to research records.

## Tips for Protecting Your Research Materials in Alabama

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Alabama law generally does not recognize the following protections, but these steps may help in other contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Alaska earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Alaska's—do not protect scientific research materials from indiscriminate disclosure. As a result, Alaska open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Alaska Public Records Act](#) provides that "Every person has a right to inspect a public record in the state."

Alaska has statutory protections for certain research records until the research is publicly released or published but no relevant example applying this exemption. It is unknown whether publication extinguishes protection for the underlying records.

Here is a brief overview of how Alaska law treats research records.

### What research records may be subject to disclosure under Alaska law?

- Final products and actions, including published reports and papers, and research made public by a state university or other state agency
- Titles and descriptions of research projects, the name of the researcher(s), and the source(s) and amount of funding for the project

### What research records may be protected from disclosure under Alaska law?

- Intellectual property or proprietary information received, generated or discovered during research conducted by the University of Alaska is protected until the research is publicly released, copyrighted, patented or terminated. These non-final records may include:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data

- » Other research records
- » Records of a state agency, including a public university, that are deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). The goal is to promote candid debate and free discussion in the decision-making process.
  - » To apply this exemption, the records must be predecisional and deliberative. The records must also be considered under a balancing test, which evaluates whether the public interest in withholding the record outweighs the public interest in disclosing it (with the presumption in favor of disclosure).
  - » Note: For certain university records, this protection for predecisional and deliberative records is somewhat duplicative of the above protection for non-final University of Alaska records. It is anticipated that this general protection would only be used in areas where the specific research protection is not available, such as at a state agency.

### Tips for Protecting Your Research Materials in Alaska

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- » Some records within Alaska may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government. Researchers can take these steps to help ensure that materials that may fall under an exemption are classified as such:
  - » Mark all prepublication communications as “draft.”
  - » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - » Label all peer-review correspondence as “peer-review.”

## ALASKA

### A Guide to Open Records Laws and Protections for Research Materials

» Label all commercially valuable information as “trade secret.”

Arizona earned a **D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Arizona's—do not protect scientific research materials from indiscriminate disclosure. As a result, Arizona open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Arizona Public Records Law](#) provides that "Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours."

Arizona has a statutory protection for certain research records. Arizona also uses a general balancing test to determine which materials may be protected, and to be protected, the public interest in protecting the record must outweigh the public interest in disclosing it. Similar balancing tests have been used to protect research records in other states, but Arizona's balancing test has been used in at least one instance to allow disclosure of research records. The application of the general balancing test and the interpretation of the statutory research protection are both currently under litigation.

Here is a brief overview of how the Arizona law treats research records.

### What research records may be subject to disclosure under Arizona law?

- It is unclear what may be disclosed. Arizona has an exemption for preliminary university research records, but in an ongoing case, a court has failed to apply this exemption to research emails belonging to university professors.
- The following research records may be subject to disclosure:
  - Data
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Other research records

## What research records may be protected from disclosure under Arizona law?

- There is an exemption for university records that includes unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research, and prepublication peer reviews.
- Absent a specific exemption, Arizona has balancing test where records may be protected if the public interest in withholding the records is greater than the public interest in disclosing them. This balancing test has been applied to public university researchers' emails; a court determined in the first instance that the emails merited protect but later reversed itself, revoking protection. This case is still under litigation.

## Tips for Protecting Your Research Materials in Arizona

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Arizona may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as such:
  - Label all prepublication communications as "draft."
  - Label all preliminary, non-final versions of papers, reports, etc. as "draft."
  - Label all peer-review correspondence as "peer-review."
  - Label all commercially valuable information as "trade secret."

**Arkansas earned an F grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Arkansas's—do not protect scientific research materials from indiscriminate disclosure. As a result, Arkansas open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Arkansas Freedom of Information Act](#) declares "All public records shall be open to inspection and copying by any citizen of the State of Arkansas."

Arkansas has virtually no statutory protections that could potentially be applied to research records.

Here is a brief overview of how the Arkansas Freedom of Information Act treats research records.

### What research records may be subject to disclosure under Arkansas law?

- Research records generally, including:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research records

### What research records may be protected from disclosure under Arkansas law?

- While there are no protections that on their face could apply to research records, Arkansas law does contain an exemption for records in the possession of a state agency, which, if disclosed, may give an advantage to a competitor of the person who provided them. So, if disclosing records in the state's possession might cause competitive harm to the person who supplied them, the records could potentially be excluded from disclosure.

## Tips for Protecting Your Research Materials in Arkansas

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Label all commercially valuable information as “trade secret” and/or “confidential.”
- Arkansas law generally does not recognize the following protections, but these steps may help in other contexts, including when open records requests are received by a colleague working for another state agency, another state public university, or for the federal government:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”

California earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including California's—do not protect scientific research materials from indiscriminate disclosure. As a result, California open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [California Public Records Act](#) (CPRA) "finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

California uses a balancing test to determine which materials are protected. For a record to be protected, the public interest in protecting the record must outweigh the public interest in disclosing it. California's balancing test has been used to protect research records from disclosure.

Here is a brief overview of how CRPA treats research records.

### What research records may be subject to disclosure under CPRA?

- Research records generally, unless they qualify for protection under California's balancing test.
  - California's balancing test is fact specific and applied on a case-by-case basis. Do not assume that because the balancing test has been previously used to protect research records that it will always be applied as such. Unless they are found to be protected under the balancing test, the following research records may be subject to disclosure:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals
    - Peer review correspondence
    - Data
    - Other research records
  - Note: A common argument made in favor of the disclosure of research records and communications is that there is a public interest in disclosure to show that the study in question is based on sound methodology and was not influenced by outside interests.

- Emails in a personal account that are about the conduct of public business—despite their location in a private email account—meet the definition of public record, and are disclosable.

### What research records may be protected from disclosure under CPRA?

- Any record where a state agency, including a state university, can demonstrate that the public interest in not disclosing the record outweighs the public interest in disclosing it.
  - Example: This provision has been used to protect prepublication research communications on the basis that disclosing such records could have a chilling effect on academic research. The argument made is that if researchers think their communications could become public, they will be less forthcoming with opinions and debate; this impairs the research process to the detriment of the public who benefit from the results of the research.
  - Example: This exemption has been used to protect records relating to research using animals because the records contained identifying information that could be used by an animal rights group to target researchers with threats and intimidation and potentially sabotage the research itself.
  - The records may be disclosed with portions redacted in instances where the records are generally of the type that should be publicly disclosed but contain certain information for which the public interest in withholding outweighs the interest in disclosure of the records.
- Preliminary drafts, notes, or inter- or intra-agency communications belonging to a state agency, including a state university, where the public interest in withholding the records outweighs the public interest in disclosing them. This exemption incorporates a deliberative process exemption and exempts records that are deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). The goal is to promote candid debate and free discussion in the decision-making process.
  - Note: this protection is somewhat duplicative of the broader balancing test above. It is anticipated that this general protection would only be used in instances where this narrower preliminary exemption is most suited to the facts at issue.

### Tips for Protecting Your Research Materials in California

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to

disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.

- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within California may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as such:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Colorado earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Colorado's—do not protect scientific research materials from indiscriminate disclosure. As a result, Colorado open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Colorado Open Records Act](#) (CORA) states "It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times."

Colorado has statutory protections for certain research records until the research is publicly released or published, as long as the public interest in withholding the record outweighs the public interest in disclosing it. There is no relevant example applying this exemption. It is unknown whether publication extinguishes protection for the underlying records.

Here is a brief overview of how CORA treats research records.

### What research records may be subject to disclosure under CORA?

- The specific details of bona fide research projects being conducted by the state where disclosure is determined not to be contrary to the public interest. Note that "bona fide" is not defined under CORA. The exact definition of "being conducted" is also not clear but this may imply that completed, published research would be subject to disclosure. Records that may potentially be disclosable, if not contrary to public interest, include:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research materials that are not considered records of "bona fide" research projects being conducted by the state
- Any state agency records, including state university records, where the public's right to know the contents of the record outweighs any injury to public interest that would result from disclosure
  - Example: Records relating to a termination agreement and financial settlement between a public university and its former chancellor could not be withheld. The public's right to know

how public funds are spent outweighs any potential damage to the university's ability to resolve personnel matters that may arise as the result of disclosing such information.

### What research records may be protected from disclosure under CORA?

- The specific details of bona fide research projects being conducted by a state institution. These records may be withheld if the disclosure would be contrary to the public interest. It is again important to note that the term “bona fide” research is not defined and there is no relevant example applying this exemption. The exact definition of “being conducted” is also not clear but may imply that completed research would not be protected under this exemption. This protection may apply to:

  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research materials that are considered records of “bona fide” research projects being conducted by the state
- Deliberative materials, if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion

  - To be withheld under this provision, records must be deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete), and the public interest in withholding the records must be greater than the public interest in disclosing them. The goal is to promote candid debate and free discussion in the decision-making process.
- Any state agency records, including state university records, where the disclosure of the contents of the record would do substantial injury to the public interest
- Emails on public servers that do not address the performance of public functions. Note that emails of a personal nature do not meet the definition of a public record for the purposes of disclosure under CORA

## Tips for Protecting Your Research Materials in Colorado

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Colorado may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as such:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Connecticut earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Connecticut's—do not protect scientific research materials from indiscriminate disclosure. As a result, Connecticut open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Connecticut Freedom of Information Act](#) provides that "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records."

Connecticut uses a general deliberative process exemption to protect records that are both deliberative and predecisional (see below for definitions) and where the public interest in withholding the record outweighs the public interest in disclosing it. This test has been used to withhold university records from disclosure in Connecticut.

Here is a brief overview of how the Connecticut Freedom of Information Act treats research records.

### **What research records may be subject to disclosure under Connecticut law?**

- Research records are not specifically protected, and the other provisions have yet to be tested as to their application to university research records. This means the following research records may potentially be disclosed:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research records

### **What research records may be protected from disclosure under Connecticut law?**

- Preliminary drafts or notes of a public agency, including a public university, where such records are both predecisional (generated prior to making recommendations) and deliberative (representing uninhibited communications and exchange of ideas) and the public interest in withholding such records is greater than the public interest in disclosing them. The goal is to promote candid debate and free discussion in the decision-making process.

## CONNECTICUT

### A Guide to Open Records Laws and Protections for Research Materials

- » Example: Drafts of a university's real estate contracts generated after the terms of the contract are agreed were found to constitute predecisional records because they contemplate a future action (the signing of the contract). The court concluded there is a public interest in withholding such drafts because if they are disclosed it could harm the ability of the university to negotiate real estate contracts in the future.
- » Example: Records from a committee reviewing the operations of university departments may be withheld from disclosure under the preliminary draft exemption. The court found that such records are both predecisional and deliberative, and the public interest in withholding these records outweighs the public interest in disclosure because making such records public would violate confidentiality and could cause panic among faculty and staff who were reviewed as part of the process.
- » Instructor presentations for a program at a state university have been found to not be public records. It is not known whether the same logic would apply to course materials prepared by tenured professors at a state university.
- » Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business)
  - » Trade secret protection extends to records of a university, despite the fact that a university does not technically engage in a trade, so long as the records in question meet the statutory criteria for a trade secret.

### Tips for Protecting Your Research Materials in Connecticut

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails, and consider using in-person meetings or the telephone for sensitive communications.
- » Some records within Connecticut may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.

- To ensure that materials that may fall under an exemption are classified as such:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

**Delaware earned an A grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Delaware Freedom of Information Act](#) (FOIA) was enacted because "It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic."

Virtually all research records of the University of Delaware and Delaware State University are excluded from the definition of public records and are therefore not subject to disclosure.

Here is a brief overview of how the Delaware FOIA treats research records.

### **What research records may be subject to disclosure under FOIA?**

- Records of the Board of Trustees of the University of Delaware and Delaware State University, which are considered public bodies for the purpose of FOIA, and are therefore subject to disclosure
- University documents relating to the expenditure of public funds

### **What research records may be protected from disclosure under FOIA?**

- Records of the University of Delaware and Delaware State University. These records are not considered "public bodies," "public records," or "meetings" for the purpose of FOIA and therefore do not need to be disclosed. This should include the following research records:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research records

- Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business)

### Tips for Protecting Your Research Materials in Delaware

- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- The following precautions are generally unnecessary under Delaware law, but may help in other contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

### In the News

In 2009, David Legates, a climatology professor at the University of Delaware and a former Delaware State Climatologist (as well as a self-described climate change “skeptic”) received a Delaware FOIA request from Greenpeace. The organization requested all email correspondence and financial and conflict-of-interest disclosures that were in the possession of, or generated by, the Office of the Delaware State Climatologist over a period of nine years regarding “global climate change” and containing any of 22 additional keywords.

Following a meeting with the university’s general counsel, Legates alleged he was instructed to turn over all of the documents he had in his possession relating to “global climate change,” even though the Delaware FOIA specifically excludes records of the University of Delaware from the definition of public records; only records relating to the expenditure of public funds are subject to the act. Legates also alleged that a fellow climate scientist within his department, whose research focused on the existence of human-caused climate change, received a similar request from a conservative group. According to Legates, the general counsel declined to disclose the records, claiming they did not relate to the expenditure of public funds and were therefore not subject to FOIA.

Legates did not receive state funding for his work as the State Climatologist and his university research was not state-funded, although a small portion of his teaching salary was put on the list of state-funded activity around the time of the FOIA request. Legates also claimed that when he

## DELAWARE

### A Guide to Open Records Laws and Protections for Research Materials

confronted the general counsel about the fact that his work did not relate to the expenditure of public funds, he said he was told that he must comply with the demands of a senior university official, and while the law did not require the university to produce the documents, it also did not prohibit the university from doing so. The process dragged on for almost four years, and ultimately no records were turned over.

The District of Columbia earned a **D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including the District of Columbia's—do not protect scientific research materials from indiscriminate disclosure. As a result, District of Columbia open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [District of Columbia Freedom of Information Act](#) (FOIA) provides that "The public policy of the District of Columbia is that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees."

The District of Columbia uses a deliberative process exemption to protect records that are both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). There is no known instance of the District of Columbia's deliberative process exemption being applied to research records (although similar exemptions have been used to protect research in other states).

Here is a brief overview of how the District of Columbia FOIA treats research records.

### What research records may be subject to disclosure under FOIA?

- Communications within or between DC agencies, including public universities, that are purely factual
- The following research records may be subject to disclosure unless they fall under the exemption for communications within or between agencies:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research records

## What research records may be protected from disclosure under FOIA?

- Communications made within or between DC agencies, including public universities, may be exempt from disclosure.
  - This exemption protects records containing material that both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). The goal is to promote candid debate and free discussion in the decision-making process. The key question in determining whether a record should be protected under this rationale is whether disclosure would discourage candid discussion within an agency.
  - This exemption could potentially protect research records containing opinions and recommendations that are created prior to publication of the final work.
- Trade secrets
  - The trade secret exemption can be invoked only if the party from whom the information was obtained (the party that shared it with the DC agency) faces actual competition and will suffer a substantial competitive injury as a result of disclosure.

## Tips for Protecting Your Research Materials in the District of Columbia

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within the District of Columbia may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as such:
  - Mark all prepublication communications as “draft.”

- » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
- » Label all peer-review correspondence as “peer-review.”
- » Label all commercially valuable information as “trade secret.”

Florida earned a **D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Florida's—do not protect scientific research materials from indiscriminate disclosure. As a result, Florida open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Florida Public Records Act](#) declares "It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person."

Florida has a statutory protection for research but it extends only to records relating to sponsored research.

Here is a brief overview of how the Florida Public Records Act treats research records.

### What research records may be subject to disclosure under Florida law?

- Research records, unless they fall into specific categories (see below), including:
  - Emails and other written communications
  - Drafts that are circulated to other people
  - Notes that are not just for personal use
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research records
- Personal emails on public email systems do not fall within the definition of public record solely because they are located on a public-owned computer system.

### What research records may be protected from disclosure under Florida law?

- Sponsored research at state universities
  - Sponsored research is not defined under the Florida open records law, but has been defined by at least one Florida public university as research executed by university employees using any university space, facilities, materials, equipment, or property, and which is financed by contract payments, grants, or gifts from any source.

- » Materials related to methods of manufacture or production; potential or actual trade secrets; and potential or actual patents or proprietary information received, generated, ascertained, or discovered during the course of research conducted within state universities are exempt from disclosure.
- » Animal research identifying information
  - » Personal identifying information of a person employed by a public research facility is exempt from disclosure when it is found in research protocols, animal research committee records, and other records related to animal research.
- » Personal drafts and notes
  - » Drafts and notes that are for personal use are considered precursors of public records. Examples of the type of documents not considered public records—and therefore not subject to disclosure—include rough drafts, notes used in preparing other documentary material, and tapes or notes taken by a secretary as dictation. Research notes and drafts that are for personal use only may fall under this exemption.

### Tips for Protecting Your Research Materials in Florida

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- » Some records within Florida may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- » To ensure that materials that may fall under an exemption are classified as exempt:
  - » Mark all prepublication communications as “draft.”
  - » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - » Label all peer-review correspondence as “peer-review.”

- » Label all commercially valuable information as “trade secret.”
- » Label all documents related to sponsored research as “sponsored research.”

Georgia earned a **B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

[The Georgia Open Records Act](#) declares "The strong public policy of this state is in favor of open government; that open government is essential to a free, open, and democratic society; and that public access to public records should be encouraged to foster confidence in government and so that the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions."

Georgia has a strong statutory exemption for research that protects a wide range of specific research material.

Here is a brief overview of how the Georgia Open Records Act treats research records.

### What research records may be subject to disclosure under Georgia law?

- Research records that have been published
  - The exact application of this is unknown since the relevant provision of Georgia law is relatively new and has yet to be analyzed by a court.

### What research records may be protected from disclosure under Georgia law?

- Proprietary research data, records, and information until published, patented, or publicly disseminated
  - While proprietary research is not defined in this statute section, Virginia's research exemption is worded very similarly to Georgia's; the Virginia Supreme Court defined proprietary as "an interest or right of one who exercises dominion over a thing or property, of one who manage and controls" and concluded that all of a professor's research records were his proprietary information.
  - Records protected under this provision may include:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals

- Peer review correspondence
  - Data
- Non-proprietary research data, records, or information until published, patented, or publicly disseminated.
- For non-proprietary research records, the statute has some ambiguities about whether underlying research records that are not published remain protected once the final work itself is published. The overall construction of the statute suggests the underlying records would remain protected after publication of the final work, but this is not certain. This provision protects:
- Information provided by participants in research
  - Research notes and data, discoveries
  - Research projects
  - Methodologies
  - Protocols
  - Creative works
- Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business).

### Tips for Protecting Your Research Materials in Georgia

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Georgia may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague

working for another state agency, another state public university, or for the federal government.

- To ensure that materials that may fall under an exemption are classified as exempt:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Hawaii earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Hawaii's—do not protect scientific research materials from indiscriminate disclosure. As a result, Hawaii open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Hawaii Uniform Information Practices Act](#) states that "In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest."

Hawaii uses a general deliberative process exemption to protect records that are both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). This test has been used in Hawaii to withhold university records from disclosure.

Here is a brief overview of how the Hawaii Uniform Information Practices Act treats research records.

### What research records may be subject to disclosure under Hawaii law?

- There is no specific protection for research records, unless they are considered proprietary, predecisional and deliberative, or trade secrets. Records subject to disclosure may include:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Non-proprietary data (see below)
- Factual materials
  - The exemption for predecisional, deliberative records—explained further below—does not extend to factual records.

### What research records may be protected from disclosure under Hawaii law?

- The Hawaii statute has a very general provision protecting “Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.” The state legislature and the courts have determined that this provision extends protection to:
  - Proprietary information including research methods, records, and data owned by an agency or entrusted to it.
    - Note: The statute does not define “proprietary” for these purposes, or explain the potential application of this to university research records.
  - Communications of a state university or other state agency that are deliberative (reflects the give-and-take of the decision-making process and contains opinions, recommendations or advice) and predecisional (made before the deliberative process was complete). The goal is to promote candid debate and free discussion in the decision-making process. This exemption could potentially protect research records containing opinions and recommendations that are created prior to publication of the final work.
  - Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business)

### Tips for Protecting Your Research Materials in Hawaii

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Hawaii may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - Mark all prepublication communications as “draft.”

- » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
- » Label all peer-review correspondence as “peer-review.”
- » Label all commercially valuable information as “trade secret.”

### In the News

In 2012, Christopher Lepczyk, a University of Hawaii researcher, published a study that used computer modelling to evaluate whether feral cat populations in Hawaii could be controlled with euthanasia.

After the research was published, the Best Friends Animal Society made an open records request to the University of Hawaii asking for materials related to the grant that supported Lepczyk’s research. The university disclosed the research proposal but refused to release the remainder of the materials requested.

It is not known what the exact legal grounds were for the denial, although the university may have cited concerns about disclosing unpublished material. A follow-up study was later published and Lepczyk continued to be harassed when he gave public presentations about his work, but no additional open records requests were made for his research materials.

Idaho earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Idaho's—do not protect scientific research materials from indiscriminate disclosure. As a result, Idaho open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Idaho Public Records Act](#) states that "Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute."

Idaho has statutory protections for certain research records until the research is publicly released or published, but there no relevant example applying this exemption. It is unknown whether publication extinguishes protection for the underlying records.

Here is a brief overview of how the Idaho Public Records Act treats research records.

### What research records may be subject to disclosure under Idaho law?

- Basic information about a research project, such as the nature of the academic research, the name of the researcher, and the amount and source of funding for the project
- Academic research records once the research is published, patented, or copyrighted, or after it is completed or terminated. Once this occurs, the following records may be subject to disclosure:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data

### What research records may be protected from disclosure under Idaho law?

- Academic research records, where disclosure could reasonably affect the conduct or outcome of the research, or academic research records provided by any person other than the public institution of higher education or a public agency (for example, by an outside collaborator).
  - The protection only applies before the research is published, patented, or copyrighted, or before it is completed or terminated. Once this occurs, the statute specifies that the

records may be disclosed unless there is a written confidentiality agreement, or disclosure would pose a danger to persons or property.

» Until the publication of the research, this exemption may protect:

- Emails and other written communications
- Drafts
- Notes
- Grant proposals
- Peer review correspondence
- Data

### Tips for Protecting Your Research Materials in Idaho

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
  - » In Idaho, personal emails on a government system have been found to be public records when the personal relationship is the subject of a government investigation into misconduct.
- Some records within Idaho may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - » Consider whether a confidentiality agreement between research collaborators may be appropriate.
  - » Mark all prepublication communications as “draft.”

- » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
- » Label all peer-review correspondence as “peer-review.”
- » Label all records that are subject to a confidentiality agreement as “subject to confidentiality agreement.”

Illinois earned a **B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Illinois Freedom of Information Act](#) (FOIA) states "Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest."

Illinois has a strong statutory exemption for research that protects a wide range of specific research material.

Here is a brief overview of how FOIA treats research records.

### What research records may be subject to disclosure under FOIA?

- Preliminary drafts, notes, recommendations, and other records of a public body where the record is publicly cited by the head of the public body
- Factual materials, unless they are inextricably intertwined with preliminary materials where opinions are expressed or policies or actions are formulated (see below). This may not apply to research data because a different statute section most likely protects it.
- Communications sent after a public body has issued a decision

### What research records may be protected from disclosure under FOIA?

- Research data, when disclosure could reasonably be expected to produce private gain or public loss
- Educational records, including evaluations of faculty members by their academic peers and course materials or research materials used by faculty members. It is not clear exactly what research records are protected by this exemption, but it may include:
  - Emails and other written communications
  - Drafts

## ILLINOIS

### A Guide to Open Records Laws and Protections for Research Materials

- » Notes
- » Grant proposals
- » Peer review correspondence
- » Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed or policies or actions are formulated.
  - » This provision is very similar to deliberative process exemptions that have been used in other states to protect research records that are both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). The goal is to promote candid debate and free discussion in the decision-making process.
  - » Example: An Illinois court protected internal university communications concerning an investigation into alleged abuse by college coaches on the grounds that releasing such records could temper candor to the detriment of the decision-making process.
- » Trade secrets
  - » Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business)

### Tips for Protecting Your Research Materials in Illinois

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- » Some records within Illinois may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.

- To ensure that materials that may fall under an exemption are classified as exempt:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Indiana earned a **B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Indiana Access to Public Records Act](#) states that "A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees."

Indiana has a strong statutory exemption for research that protects a wide range of specific research material.

Here is a brief overview of how the Indiana Access to Public Records Act treats research records.

### What research records may be subject to disclosure under Indiana law?

- Public agency records that consist of factual materials, unless they are trade secrets
  - Records that contain both factual and opinion material cannot be excluded from disclosure completely; factual portions must be disclosed unless they are inextricably linked to non-disclosable materials.
  - This may not apply to factual research of a state education institution, which is most likely protected under another statute section (see below).

### What research records may be protected from disclosure under Indiana law?

- Information concerning research, including research documents conducted under the auspices of a state educational institution. This may include:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data

- Advisory or deliberative, internal communications of a public agency
  - Applies to materials that include expressions of opinion or are of a speculative nature and are communicated for the purpose of decision making. The goal is to promote candid debate and free discussion in the decision-making process.
  - Materials developed by a private contractor under a contract with a public university are included.
- Diaries, journals, or personal notes that serve as a functional equivalent of a diary or journal
- Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business)

### Tips for Protecting Your Research Materials in Indiana

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Indiana may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as such:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Iowa earned a **D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Iowa's—do not protect scientific research materials from indiscriminate disclosure. As a result, Iowa open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Iowa Open Records Law](#) states that "Everyone shall have the right to examine and copy a public record."

Iowa has a deliberative process exemption to protect records that are both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). The statute states its applicability to research materials, but there is no known instance of Iowa's deliberative process exemption being applied to research records.

Here is a brief overview of how Iowa law treats research records.

### What research records may be subject to disclosure under Iowa law?

- Records that are submitted for use or are used in the formulation, recommendation, adoption, or execution of any official policy or action of a governmental body
- Academic research records are not specifically protected, but they could fall under the exemption for tentative and preliminary records if they are prepublication records (see below). Unless they fall under that exemption, the following records may be subject to disclosure:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research records

### What research records may be protected from disclosure under Iowa law?

- Tentative, preliminary, draft, speculative, or research material in a non-final form for use in the formulation, recommendation, adoption, or execution of official policy or action by a public official. The goal is to promote candid debate and free discussion in the decision-making process.
  - There has been no clarification about what constitutes “research materials” or “execution of official policy or action by a public official” for the purposes of this exemption, and it is not known whether the execution of official policy or action (such as publication of a research paper) extinguishes this exemption and allows the underlying records to be disclosed.
- Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business)

### Tips for Protecting Your Research Materials in Iowa

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Iowa may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

**Kansas earned a C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Kansas's—do not protect scientific research materials from indiscriminate disclosure. As a result, Kansas open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Kansas Open Records Act](#) (KORA) states "It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy."

Kansas has a statutory protection for research data in the process of analysis, but it is unknown whether this protection has been used. There are some examples in Kansas where once final work papers become public, the exemption for the underlying records is extinguished.

Here is a brief overview of how KORA treats research records.

### What research records may be subject to disclosure under KORA?

- Once a study or other final research product is published or made public, the underlying records become subject to disclosure, including the following:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research records

### What research records may be protected from disclosure under KORA?

- Materials related to in-progress research are protected.
  - This includes:
    - Emails and other written communications

- Drafts
- Notes
- Unfunded grant proposals
- Peer review correspondence
- Data in the process of analysis
- Other research records in which opinions are expressed, or policies or actions are proposed but not yet implemented.

» As stated above, Kansas courts have found that once final work papers become public, this protection is extinguished and the records become public. In the case of academic research, this may mean that once the final study is published, the underlying research records are no longer protected and are subject to disclosure.

- Records involved in the obtaining and processing of intellectual property rights that are expected to be wholly or partially vested or owned by a state educational institution
- Correspondence between a public university or other agency and a private individual

### Tips for Protecting Your Research Materials in Kansas

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Kansas may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.

- Kansas law generally does not recognize the following protections once the research is published, but these steps may help in other contexts, including open records requests received by correspondents in other states:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

### **In the News**

In April 2014, a student group at the University of Kansas, Students for a Sustainable Future, made a KORA request for documents that included contracts and correspondence related to Dr. Arthur Hall and other professors. The requested documents detailed the hiring of these professors by the University of Kansas and financial support received by the university’s Center for Applied Economics from the Koch Brothers and related entities.

Hall and the university disagreed as to whether the documents should be produced under KORA: The university agreed to produce the emails and Hall opposed their release. Hall filed suit seeking to prevent the university from disclosing the records and was granted a Temporary Restraining Order prohibiting the university from disclosing the records during the litigation. The case was settled in August 2015 with an agreement that some of the documents would be released and some withheld. However, there is no publicly available information that indicates what KORA exemptions were used to determine which records to withhold or disclose.

**Kentucky earned a D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Kentucky's—do not protect scientific research materials from indiscriminate disclosure. As a result, Kentucky open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Kentucky Open Records Act](#) declares that it is the basic policy of Kentucky law "that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others."

Kentucky has a statutory protection for research but it extends only to research records disclosed to (as opposed to generated by) a university.

Here is a brief overview of how the Kentucky Open Records Act treats research records.

### What research records may be subject to disclosure under Kentucky law?

➤ Scientific research records generated by a university

➤➤ Records disclosed to a university will be protected, but this exemption does not extend to records produced by a university. The exemption is designed to only protect confidential information shared by an outside individual or entity that would be placed at a competitive disadvantage should the records be disclosed.

➤➤ This means that the following research records generated by a university may be subject to disclosure:

- Emails and other written communications
- Drafts
- Notes
- Grant proposals
- Peer review correspondence
- Data
- Other research records

### What research records may be protected from disclosure under Kentucky law?

- Records confidentially disclosed to an agency and maintained for scientific research.
  - Applies to records submitted to a university for research with the express understanding that they will not be shared.
    - Example: Records disclosed to a public university medical center by a private surgical research institute were not subject to disclosure. The court found this was because they were shared with the university with the express understanding that the university would not disclose the information to others.
- Preliminary drafts, notes, and correspondence with private individuals, other than correspondence which is intended to give notice of final action.
  - Example: Emails regarding the scheduling of meetings to discuss final action by a public agency are considered preliminary, and therefore are still protected, because they do not communicate the actual final agency action.
- Preliminary recommendations and preliminary memoranda of a public agency in which opinions are expressed or policies formulated or recommended. It is unclear whether this exemption could potentially apply to preliminary research records of a public university.

### Tips for Protecting Your Research Materials in Kentucky

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
  - Personal, non-work emails sent between state employees on a state computer system during work hours may be disclosed.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- It is unclear whether Kentucky law recognizes the following protections, but these steps may help in other contexts, including open records requests received by correspondents in other states:

- » Label all prepublication communications as “draft.”
- » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
- » Label all peer-review correspondence as “peer-review.”

Louisiana earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Louisiana's—do not protect scientific research materials from indiscriminate disclosure. As a result, Louisiana open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Louisiana Public Records Law](#) allows for open access to public records.

Louisiana has statutory protections for certain research records until the research is publicly released or published but no relevant example applying this exemption. It is unknown whether publication extinguishes protection for the underlying records.

Here is a brief overview of how the Louisiana Public Records Law treats research records.

### What research records may be subject to disclosure under Louisiana law?

- Research records that have been published.
  - There are some examples (see below) that indicate the intention of this provision is that only records that are already published must be disclosed, and that underlying research records that are not published may remain protected, but the exact application of this is not clear.

### What research records may be protected from disclosure under Louisiana law?

- Data, records, or information produced or collected by or for faculty or staff of state public universities, for study or research on commercial, scientific, or technical subjects until publicly released, published, or patented.
  - It is unclear whether the intent of the statutory exemption is to continue to protect records that are not themselves published once the final study is published, but the examples below suggest that underlying records would remain protected even after research publication.
  - Example: The Louisiana Attorney General's Office suggested that raw data forming the basis of a published report could potentially be protected even after publication of the report if the data itself is not published.
  - Example: The statute itself states that research proposals submitted to the Board of Regents' Louisiana Education Quality Support Fund Program, certified by the institution as containing data, information, ideas, or plans of a potentially patentable or licensable nature, are exempted until such records are publicly released, published, or patented.

- Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business), and commercial or financial information shared with a university by a person, firm or corporation pertaining to research or the commercialization of technology

#### Tips for Protecting Your Research Materials in Louisiana

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Louisiana may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Maine earned an **A grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Maine Freedom of Access Act](#) (FOAA) states that "The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly."

Virtually all research records of the Maine Maritime Academy, the Maine Community College System, and the University of Maine System are excluded from the definition of public records and are therefore not subject to disclosure.

Here is a brief overview of how FOAA treats research records.

### What records are subject to disclosure under FOAA?

- Records of the Board of Trustees (and its committees) of the Maine Maritime Academy, the Maine Community College system, and the University of Maine system. Maine law generally excludes the records of the state institutions of higher education, but this exclusion does not apply to a university's Board of Trustees.

### What records are protected from disclosure under FOAA?

- Records, working papers, interoffice and intra-office communications used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Community College system, and the University of Maine system are excluded from the definition of public records and, as a result, are not subject to disclosure. This includes:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research records

## Tips for Protecting Your Research Materials in Maine

- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- The following precautions are generally unnecessary under Maine law, but may help in other contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Maryland earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Maryland's—do not protect scientific research materials from indiscriminate disclosure. As a result, Maryland open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Maryland Public Information Act](#) (PIA) states "All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees."

Maryland has a general protection for specific details of a research project that an institution of the state is conducting but no relevant example applying this exemption. It is unknown whether publication extinguishes protection for the underlying records.

Here is a brief overview of how the Maryland PIA treats research records.

### What research records may be subject to disclosure under PIA?

- Factual communications or final decisions of state agencies. This may not include all research materials, as some may be protected by a different statute section.
  - Only predecisional, deliberative records are exempt from disclosure (see below). Records that don't reflect views or opinions are disclosable.
- Certain details of research projects, such as name and title (see below).

### What research records may be protected from disclosure under PIA?

- Records containing specific details of a research project being conducted by a researcher at an institution of the state. It is not clear exactly what type of research projects are included in the scope of this exemption.
  - This exemption is conditional—the records may be withheld if the public interest in doing so is greater than the public interest in disclosure. The application of this to research records in Maryland is unknown.
  - This exemption may potentially protect:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals

## MARYLAND

### A Guide to Open Records Laws and Protections for Research Materials

- Peer review correspondence
  - Data
- » When this exemption applies, only the name, title, expenditures, and the time when the final project summary will be available must be disclosed.
- » State agency records that consist of inter or intra-agency letters or communications
- » To fall under the exemption, a record must be deliberative (reflects the give-and-take of the decision-making process and contains opinions, recommendations or advice about agency policy) and predecisional (made before the deliberative process was complete). The goal is to promote candid debate and free discussion in the decision-making process.
- » Inventions owned by a state institution of higher education may be withheld unless the information disclosed or relating to an invention has already been published or patented, the invention record has been licensed by the institution for at least four years, or four years have elapsed from the date of the written disclosure of the invention to the institution.
- » Trade secrets and confidential commercial information

### Tips for Protecting Your Research Materials in Maryland

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- » Some records within Maryland may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- » To ensure that materials that may fall under an exemption are classified as exempt:

## MARYLAND

### A Guide to Open Records Laws and Protections for Research Materials

- » Label all prepublication communications as “draft.”
- » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
- » Label all peer-review correspondence as “peer-review.”
- » Label all commercially valuable information as “trade secret.”

**Massachusetts earned a D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Massachusetts's—do not protect scientific research materials from indiscriminate disclosure. As a result, Massachusetts open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Massachusetts Public Records Law](#) provides that public records must be available to be inspected or examined by any person. The law provides no specific protections for research records, aside from a protection for proprietary information of the University of Massachusetts. ("Proprietary information" is not defined in the Massachusetts open records statute.)

There is also a more general protection for inter- or intra-agency communications relating to policy positions being developed by a commonwealth agency, which could potentially be applied to protect certain research records.

Here is a brief overview of how the Massachusetts Public Records Law treats research records.

#### What research records may be subject to disclosure under Massachusetts law?

- Research records of a commonwealth agency (including non-proprietary records of the University of Massachusetts) including:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research records
- Reasonably completed factual studies or reports of a commonwealth agency, including a public university, on which policy positions are based. The statute does not define "reasonably completed."

#### What research records may be protected from disclosure under Massachusetts law?

- Trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the university by research sponsors or private concerns.
  - It is not clear what is determined to be “proprietary information” for the purposes of this exemption.
- Inter- or intra-agency communications relating to policy positions being developed by a commonwealth agency. The goal is to promote candid debate and free discussion in the decision-making process.
  - It is unclear whether this could potentially apply to protect pre-publication university research records. Similar exemptions have been used in other states to protect research records.
- Trade secrets
  - To invoke the protection, one must show that the party from whom the information was obtained (the party that shared it with the government agency / public university) faces actual competition from the disclosure and will suffer a substantial competitive injury.

#### Tips for Protecting Your Research Materials in Massachusetts

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Massachusetts may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.

- To ensure that materials that may fall under an exemption are classified as exempt:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Michigan earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Michigan's—do not protect scientific research materials from indiscriminate disclosure. As a result, Michigan open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Michigan Freedom of Information Act](#) (FOIA) states that "It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees."

Michigan has statutory protections for certain research records until the research is publicly released or published, but no relevant example applying this exemption. It is unknown whether publication extinguishes protection for the underlying records.

Here is a brief overview of how the Michigan FOIA treats research records.

### What research records may be subject to disclosure under Michigan law?

- Factual materials
  - Purely factual records are not protected from disclosure; this may not apply to pre-publication academic research data, which is most likely protected by a different statute section (see below).
- Final decisions of a public body
  - Final agency policy or determinations, possibly including published research (unless protected by a different provision—see below), are not protected from disclosure.

### What research records may be protected from disclosure under Michigan law?

- Intellectual property (defined as all original data, findings, or other products of the mind or intellect commonly associated with claims, interests and rights that are protected under trade secret, patent, trademark, copyright, or unfair competition law) created by a person employed by or under contract to a public university for purposes that include research, education, and related activities until published in a timely manner in a forum intended to convey information to the academic community. There have been no cases addressing exactly what types of records are protected by this provision, but it may include the following records if made prior to the publication of the study:
  - Emails and other written communications
  - Drafts

- » Notes
  - » Grant proposals
  - » Peer review correspondence
  - » Data
  - » Other research records
- Original works of authorship fixed in any medium, created by a person employed by or under contract to a public university for purposes that include research, education, or related activities, until a reasonable opportunity is provided for the author to secure copyright registration (not to exceed 12 months).
  - Records regarding a process, machine, item of manufacture, composition of matter, or any new and useful improvement of a process, machine, item of manufacture, or a composition of matter, until a reasonable opportunity is provided for the inventor to secure patent protection (not to exceed five years from the date the records are first made).
  - Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business) or other proprietary information (not defined by the statute for this purpose) in which a public university holds an interest, or that a public university owns, that is determined by the public university to have potential commercial value.
  - Communications and notes within a public body or between public bodies of an advisory nature
    - » Records must not be purely factual (such as data), and must be preliminary to a final determination or action. The goal is to promote candid debate and free discussion in the decision-making process.
    - » To be exempt, the public interest in encouraging frank communications between officials and employees of public bodies must outweigh the public interest in disclosure.

### Tips for Protecting Your Research Materials in Michigan

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the

communication must be disclosed under the open records law.

- Some records within Michigan may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

## In the News

### 2011

In 2011, the Mackinac Center for Public Policy (Mackinac), a conservative think tank based in Midland, Michigan, submitted FOIA requests to the Center for Labor and Community Studies at the University of Michigan, the Douglas A. Fraser Center for Workplace Issues at Wayne State University, and Michigan State University’s School of Human Resources & Labor Relations, seeking disclosure of all emails relating to a labor union battle in Wisconsin, as well as emails relating to Governor Scott Walker (R-WI) and MSNBC’s Rachel Maddow.

The request was apparently triggered by pro-labor union materials on the Wayne State website (the materials were removed subsequent to the FOIA request) that, according to Mackinac, suggested that faculty members at the three institutions may have used institutional resources for partisan political purposes. It is hard to find information on the resolution of this issue, but one source indicates that the University of Michigan turned over four emails but withheld others based on exemptions to FOIA, and Wayne State turned over 32 emails but withheld others based on a FOIA exemption. Michigan State quoted a \$5,600 fee to produce the documents, which Mackinac refused to pay. Mackinac at one point indicated that it intended to pursue litigation to compel disclosure, but there is no evidence to suggest they did so.

### 2017

In March 2017, Mackinac filed a lawsuit against the University of Michigan seeking disclosure of all emails sent by university President Mark Schissel containing the word “Trump” between July 1 and November 16, 2016. The request came about as a result of a speech Schissel gave at a campus vigil in which he encouraged advocacy by those who were unhappy with the 2016 election results

The request was submitted on November 16 and, under FOIA, a response was due within five business days. The university's initial response was to seek a 10-business day extension, claiming high volume of FOIA requests. On the last day of the extension, the university responded with a letter outlining a \$126 cost to produce the records and requiring a good-faith deposit of half of that amount in order to complete the request. This letter also stated it would take an additional four weeks to complete the request once the deposit was cashed. On February 9, 2017, the university sent a letter to Mackinac stating that four emails had been located in response to the request and that they would be sent as soon as the final payment was made. The letter also stated that these four emails had some email addresses redacted (based on an exemption for security), and that a small number of additional internal messages had been withheld under the exemption for "frank communications." The final payment was made on February 23, but the records were not produced. On March 2, Mackinac filed the lawsuit. A few days later, the center received the four emails but decided to continue the suit, claiming an unreasonable delay as it took the university 106 days to produce the records.

On October 4, 2017, the university settled the suit with Mackinac and released seven additional emails. The university denied any wrongdoing but admitted there was an unusual delay due to a high volume of FOIA requests and staff absences due to illness. As a result, the university agreed to revise its FOIA practices by hiring additional staff members and aiming to complete 75% of FOIA requests without charging fees. The university also agreed to reimburse Mackinac \$7,914 in legal fees.

Minnesota earned a **D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Minnesota's—do not protect scientific research materials from indiscriminate disclosure. As a result, Minnesota open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Minnesota Government Data Practices Act](#) (MGDPA) "establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public."

Minnesota has statutory protection for research but it extends only to proprietary data of the University of Minnesota. Proprietary data is defined as data, as determined by the responsible authority for the University of Minnesota, that is of a financial, business, or proprietary nature, the release of which could cause competitive harm to the University of Minnesota.

Here is a brief overview of how MGDPA treats research records.

### What research records may be subject to disclosure under MGDPA?

- Research records including:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data, unless it is determined to be data where disclosing it could cause competitive harm to the University of Minnesota
  - Other research records
- Records that contain both protected and non-protected data must be disclosed with the non-protected information redacted. The record can only be withheld completely if the non-protected and protected information are inextricably intertwined and segregating the material will impose significant financial burden and leave the remaining parts of the document with little informational value.

- Records containing trade secrets if there would be no economic harm caused by releasing the document, if the proprietary information can be redacted, or if the information could be obtained by competitors by proper means

#### What research records may be protected from disclosure under MGPTA?

- Some University of Minnesota data:
  - Financial, business, or proprietary data—defined as data that is of a financial, business, or proprietary nature, the release of which could cause competitive harm to the University of Minnesota
    - There is no analysis of what types of records constitute data for the purposes of the exemption. It is also not clear what is considered “competitive harm” for the purpose of this exemption, and whether that definition could include the potential damage to the university from disclosing research data.
- Trade secrets where there would be economic harm from disclosure

#### Tips for Protecting Your Research Materials in Minnesota

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Minnesota may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- Label all commercially valuable information as “trade secret.”
- While Minnesota law generally does not recognize the following protections, these steps

may help in other contexts, including open records requests received by correspondents in other states:

- » Label all prepublication communications as “draft.”
- » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
- » Label all peer-review correspondence as “peer-review.” Label all preliminary, non-final versions of papers, reports etc. as “draft.”

### In the News

In 1996, a law firm filed an expansive open records request on behalf of an anonymous client for all records created by and relating to Deborah Swackhamer, a professor of environmental studies at the University of Minnesota. Swackhamer was studying the presence of the chemical toxaphene, a common by-product of the pulp and paper industry, in the Great Lakes. The open records request demanded raw and unpublished data, correspondence, notes, telephone records, and grant-related documents for a period of over 15 years.

The university was concerned about having to disclose unpublished data and unfunded grant proposals, and about the precedent of simply turning over all records. The university refused to provide some of the information requested, especially Swackhamer’s unpublished data, because it considered that information a trade secret.

As a result, Swackhamer had to review every single document to determine whether it should be disclosed. Her husband worked at the U.S. Environmental Protection Agency and was involved in funding the toxaphene study (their relationship was fully disclosed), and he was also a target of broad open records requests. Eventually, the *Minneapolis Star Tribune* published an investigation into the matter and the requests stopped, which led Swackhamer and the university to conclude that whoever was behind the request was attempting to stop the research and cut off the funding for it.

Mississippi earned a **B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

[Mississippi's Public Record Act](#) declares "It is the policy of the Legislature that public records must be available for inspection by any person unless otherwise provided by this act."

Mississippi has a strong statutory exemption for research that protects a wide range of specific research material.

Here is a brief overview of how the Mississippi Public Record Act treats research records.

### What research records may be subject to disclosure under Mississippi law?

- Records of a community college or state institution of higher learning that have been published, patented, copyrighted, or trademarked.

### What research records may be protected from disclosure under Mississippi law?

- Documents, records, papers, data, protocols, information, or materials in the possession of a community college or state institution of higher learning that are created, collected, developed, generated, ascertained, or discovered during academic research until the record in question is published, copyrighted, or patented. This likely includes the following records:
  - Emails and other written communications
  - Notes
  - Grant proposals
  - Data
- Unpublished manuscripts, preliminary analyses, drafts of scientific or academic papers, plans, or proposals for future research and prepublication peer reviews in the possession of a community college or state institution of higher learning.
- Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business) and confidential commercial and financial information of a proprietary nature developed by a college, university, or public hospital under contract with a firm, business, partnership, association, corporation, individual, or other similar entity.

- » This exemption has been applied to university research records developed under contract with a corporation.

#### Tips for Protecting Your Research Materials in Mississippi

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- » Some records within Mississippi may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- » To ensure that materials that may fall under an exemption are classified as such:
  - » Mark all prepublication communications as “draft.”
  - » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - » Label all peer-review correspondence as “peer-review.”
  - » Label all commercially valuable information as “trade secret.”

Missouri earned a **D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Missouri's—do not protect scientific research materials from indiscriminate disclosure. As a result, Missouri open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Missouri Sunshine Law](#) states "It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law."

Missouri has a statutory protection for research but it extends only to research records shared with a university in connection with sponsored research, where disclosure would endanger the competitiveness of the party that provided the information. There is also a general protection for internal communications containing advice, opinions, and recommendations, but there are no known examples of this being applied to protect research in Missouri.

Here is a brief overview of how the Missouri Sunshine Law treats research records.

### What research records may be subject to disclosure under Missouri law?

- There is no specific protection under the Sunshine Law for research records although they may fall under one of the specific exemptions (see below), particularly if the records consist of advice, opinions, and recommendations. If the research records fail to fall under an exemption, the following types of records may be subject to disclosure:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research materials

### What research records may be protected from disclosure under Missouri law?

- Records submitted by an individual, corporation, or other business entity to a public institution of higher education connected to a proposal to license intellectual property or perform sponsored

research, and which contain sales projections or other business plan information, if their disclosure may endanger the competitiveness of a business.

- » “Sponsored research” is not defined in the statute section but typically means research, analysis, or service conducted pursuant to grants or contracts between the public higher education institution and an outside party.
- » Internal communications received or prepared by, or on behalf of, a public governmental body—including a public university—consisting of advice, opinions, and recommendations connected to the deliberative decision-making process.
  - » This is similar to a deliberative process exemption, which protects records that are deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). The goal is to promote candid debate and free discussion in the decision-making process.
  - » Similar exemptions have been applied to protect research records in other states, but there has yet to be an example of this application in Missouri.
- » Records relating to scientific and technological innovations in which the owner has a proprietary interest. The term “proprietary interest” is not defined in this statute section.

### **Tips for Protecting Your Research Materials in Missouri**

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- » Some records within Missouri may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.

- To ensure that materials that may fall under an exemption are classified as exempt:
  - Label all documents related to sponsored research as “sponsored research.”
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review”

### **In the News**

A 2016 lawsuit addressed the University of Missouri’s alleged failure to turn over documents requested under the Sunshine Law. The documents involved former University of Missouri associate law professor Josh Hawley and his alleged use of the university’s computer system for work on his campaign for state Attorney General.

It does not appear the university asserted any exemptions in failing to respond to the Sunshine Law requests. Rather, it was alleged that the university charged high fees and stalled on production, and this prompted the filing of the lawsuit. There are no documents available that discuss a resolution to this matter, and Hawley was elected Attorney General of Missouri in November 2016.

Montana earned an **F grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Montana's—do not protect scientific research materials from indiscriminate disclosure. As a result, Montana open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Montana Public Records Act](#) states that "Every person has a right to examine and obtain a copy of any public information of this state."

Montana has no statutory protection for research records. There is a very limited general protection for records where an individual privacy interest outweighs the public interest in disclosure, but there is no known example of this being used for research.

Here is a brief overview of how the Montana Public Records Act treats research records.

### What records may be subject to disclosure under Montana law?

➤ Research records generally

➤➤ There is no specific protection under Montana law for research records. It is unlikely that any other exemption, including the individual privacy interest exemption (see below), would apply to protect research. This means the following research records are likely subject to disclosure:

- Emails and other written communications
- Drafts
- Notes
- Grant proposals
- Peer review correspondence
- Data
- Other research materials

### What research records may be protected from disclosure under Montana law?

➤ Records that are constitutionally protected from disclosure because an individual privacy interest clearly exceeds the merits of public disclosure.

- » Montana offers no explanation of what type of records could potentially be withheld under this exemption. There is no known example of this being used for research, and it is unclear if this limited protection could be applied in a research context.

#### Tips for Protecting Your Research Materials in Montana

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications. While Montana law generally does not recognize the following protections, these steps may help in other contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government:
  - » Label all prepublication communications as “draft.”
  - » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - » Label all peer-review correspondence as “peer-review.”

Nebraska earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Nebraska’s—do not protect scientific research materials from indiscriminate disclosure. As a result, Nebraska open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Nebraska Public Records Law](#) provides that "All citizens of this state and all other persons interested in the examination of the public records" shall have the authority to examine such records.

Nebraska has statutory protections for certain research records that are in progress and unpublished, although there is no relevant example applying these protections. It is unknown whether publication extinguishes protection for the underlying records.

Here is a brief overview of how the Nebraska Public Records Law treats research records.

### What research records may be subject to disclosure under Nebraska law?

- Research records relating to completed work, such as a published study. This may include the underlying records as well, including:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research materials
- Proprietary records where there is only a mere assertion that some unknown business competitor may gain some unspecified advantage. "Proprietary" is not defined in the statute section.

### What research records may be protected from disclosure under Nebraska law?

- Academic and scientific research work which is in progress and unpublished
  - This provision may potentially protect the following categories of underlying research records:

- Emails and other written communications
- Drafts
- Notes
- Grant proposals
- Peer review correspondence
- Data
- Other research materials

» Note: the Nebraska Attorney General has informally indicated that records related to a study conducted by a state university professor for a state agency, which were in an incomplete form, constituted academic or scientific research work that could be protected from public disclosure.

» Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business)

» Other proprietary or commercial information which, if released, would give advantage to business competitors and serve no public purpose

» The advantage to business competitors caused by disclosing the records need not be substantial but there must be a showing beyond a “bare assertion,” i.e., the non-disclosure must be based on a finding that a specified competitor may gain a demonstrated advantage by disclosure of the records.

### Tips for Protecting Your Research Materials in Nebraska

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails. Consider using in-person meetings or the telephone

for sensitive communications.

- Some records within Nebraska may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government
- To ensure that materials that may fall under an exemption are classified as exempt:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all records containing trade secrets as “trade secret.”
  - Label all documents related to sponsored research as “sponsored research.”

Nevada earned a **D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Nevada's—do not protect scientific research materials from indiscriminate disclosure. As a result, Nevada open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

[Nevada Public Records Act](#) states "The purpose of this chapter is to foster democratic principles by providing members of the public with access to inspect and copy public books and records to the extent permitted by law."

Nevada uses a deliberative process exemption to protect records that are both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). Nevada also uses a general balancing test to determine which materials are protected, meaning the public interest in protecting the record must outweigh the public interest in disclosing it. There is no known instance of Nevada's deliberative process exemption or Nevada's balancing test being applied to research records (although similar exemptions have been used to protect research in other states).

Here is a brief overview of how the Nevada Public Records Act treats research records.

## What research records may be subject to disclosure under Nevada law?

### ➤ Research records generally

➤➤ There is no specific protection under Nevada law for research records so, unless they qualify for protection under one of Nevada's general protections (see below), the following records may be subject to disclosure:

- Emails and other written communications
- Drafts
- Notes
- Grant proposals
- Peer review correspondence
- Data
- Other research materials

## What research records may be protected from disclosure under Nevada law?

- Nevada courts have held that a general balancing test—weighing the public interest in disclosing the record against the public interest in protecting the record—exists, although its exact application is unclear. Nevada’s default presumption is that the record should be disclosed.
- Deliberative records
  - Nevada courts have found that a deliberative process exemption exists for non-factual deliberative records (i.e., records containing a deliberative, back-and-forth process, such as correspondence evaluating different opinions and strategies). The goal is to promote candid debate and free discussion in the decision-making process. However, this has not yet been used in a research context in Nevada, so the application is unclear.
- Trade secrets
  - In Nevada, proprietary information (“proprietary information” is not defined by the statute for this purpose) regarding a trade secret (i.e., information used by a business that is secret to the general public and is critical to the livelihood and success of a business) is protected from disclosure.

## Tips for Protecting Your Research Materials in Nevada

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - Label all records containing trade secrets as “trade secret.”
- Nevada law generally does not recognize the following protections but these steps may help in other contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government:

- » Label all prepublication communications as “draft.”
- » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
- » Label all peer-review correspondence as “peer-review.”

**New Hampshire earned a D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including New Hampshire's—do not protect scientific research materials from indiscriminate disclosure. As a result, New Hampshire open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [New Hampshire Right-to-Know Law](#) declares "Openness in the conduct of public business is essential to a democratic society."

New Hampshire uses a general deliberative process exemption to protect records that are both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). There is no known instance of New Hampshire's deliberative process exemption being applied to research records (although similar exemptions have been used to protect research in other states).

Here is a brief overview of how the New Hampshire Right-to-Know Law treats research records.

### **What research records may be subject to disclosure under New Hampshire law?**

- There is no specific protection under New Hampshire law for research records. Unless one of the specific protections—see below—applies, research records may be subject to disclosure. This may include:
  - Emails and other written communications
  - Drafts that are circulated to other people
  - Notes that are not just for personal use
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research materials

### **What research records may be protected from disclosure under New Hampshire law?**

- Notes or materials made for personal use that do not have an official purpose. Personal research notes and drafts may fall under this exemption.

- Preliminary drafts, notes, and communications or other documents not in their final form and not disclosed, circulated, or otherwise made available to a quorum or most of the members of a public body. The goal is to promote candid debate and free discussion in the decision-making process.
  - This may include:
    - Emails and other written communications
    - Peer review correspondence
    - Non-final data
  - Example: Drafts circulated between state agencies for review and comment are considered preliminary and are exempt from disclosure.
- Confidential, commercial or financial information, and other files where their disclosure would constitute an invasion of privacy
  - This catch-all exemption is applied using a balancing test—i.e., the records can be withheld if the public interest in non-disclosure is greater than the public interest in releasing the records.

### Tips for Protecting Your Research Materials in New Hampshire

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within New Hampshire may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:

- » Mark all prepublication communications as “draft.”
- » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
- » Label all peer-review correspondence as “peer-review.”
- » Label all commercially valuable information as “trade secret.”

**New Jersey earned a B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [New Jersey Open Public Records Act](#) (OPRA) declares "Government records shall be readily accessible for inspection, copying, or examination by the citizens of this State."

New Jersey has a strong statutory exemption for research that protects a wide range of specific research material.

Here is a brief overview of how OPRA treats research records.

### **What research records may be subject to disclosure under OPRA?**

- Names, titles, and expenditures related to a research project, and the sources and amounts of funding for research conducted by a public university
- Communications within and between public agencies that consist of factual materials and that do not reveal deliberations. This may not apply to factual research materials, such as research data, as they are likely protected by a different statute section.

### **What research records may be protected from disclosure under OPRA?**

- Pedagogical, scholarly, and/or academic research records and/or the specific details of any research projects conducted under the auspices of a public higher education institution in New Jersey
  - This provision may protect the following categories of research records:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals
    - Peer review correspondence
    - Data
    - Other research materials

- » Includes, but is not limited to, research, development information, testing procedures, or any information regarding test participants
  - Example: Responses to a state university research questionnaire were protected as academic research records.
- » Inter- and intra-agency advisory, consultative, or deliberative materials
  - » Records must be both predecisional (made before final action) and deliberative (reflecting the decision-making process), exchanged within or between public agencies.
    - This is normally used to protect non-factual materials, such as opinions, but a record may be protected if it contains factual components that were used in the decision-making process, and its disclosure would reveal deliberations that occurred during that process. The goal is to promote candid debate and free discussion in the decision-making process.
- » Research records that do not relate to a government function
  - » Such records are not considered public records at all and so cannot be disclosed under the public records law.
    - Example: Case files of a law school clinic were not considered public records under OPRA. A court found that the law school clinic case files did not relate to the performance of a government function, in contrast to records regarding the funding of a clinic or the salaries of its professors. These files would be considered related to the performance of a government function, in this case, the expenditure of state funds.
- » Trade secrets (generally defined as information used by a business that is secret to the public and is critical to the livelihood and success of a business), and proprietary, commercial or financial information obtained by a public body under a licensing agreement which prohibits its disclosure

### Tips for Protecting Your Research Materials in New Jersey

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the

communication must be disclosed under the open records law.

- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- While research-related communications within New Jersey should be protected, emails sent to colleagues working for another state agency, another state public university, or for the federal government may not qualify for this exemption and may be subject to different rules regarding disclosure..
- The following precautions are generally unnecessary under New Jersey law, but these steps may help in other contexts, including open records requests received by correspondents in other states:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

**New Mexico earned an F grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including New Mexico’s—do not protect scientific research materials from indiscriminate disclosure. As a result, New Mexico open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [New Mexico Inspection of Public Records Act](#) (IPRA) declares “Government records shall be readily accessible for inspection, copying, or examination by the citizens of this State.”

New Mexico has no statutory protection that could potentially be applied to research records.

Here is a brief overview of how IPRA treats research records.

### **What research records may be subject to disclosure under IPRA?**

- There is no specific protection for research records, so the following categories of records are likely subject to disclosure:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research materials
- New Mexico courts have rejected the use of a “balancing test” approach which would weigh the public interest in disclosure versus non-disclosure. (Balancing tests have been used in some other states to protect research records.) The court stated that only the exemptions specifically listed in New Mexico’s statute may be applied.

### **What research records may be protected from disclosure under IPRA?**

- Trade secrets (information used by a business that is secret to the public and is critical to the livelihood and success of a business) are exempt from disclosure.

## Tips for Protecting Your Research Materials in New Mexico

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Label all commercially valuable information as “trade secret.”
- New Mexico law generally does not recognize the following protections, but these steps may help in other contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”

**New York earned a D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including New York’s—do not protect scientific research materials from indiscriminate disclosure. As a result, New York open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [New York Freedom of Information Law](#) (FOIL) declares “The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.”

New York has statutory protections for certain New York universities. New York also uses a deliberative process exemption to protect records that are both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). It does not appear that New York’s deliberative process exemption been applied to protect research records (although similar exemptions have been used to protect research in other states).

Here is a brief overview of how FOIL applies to research records.

### What research records may be subject to disclosure under FOIL?

- Factual materials
  - Statistical or factual tabulations of data are not protected from disclosure.
- Final decisions
  - Final agency policy or final determinations—including published reports and papers—are not protected from disclosure.
- Funding records of statutory colleges
  - FOIL applies to public universities but it may not apply to records of the four statutory colleges operated on behalf of the state by Cornell University. These are the New York State College of Veterinary Medicine, the New York State College of Agriculture and Life Sciences, the New York State College of Human Ecology, and the New York School of Industrial and Labor Relations. Records of these statutory colleges that relate to the expenditure of state funds are typically subject to FOIL.
- There is no specific protection under FOIL for research records. However, they may be protected by one of the other FOIL exemptions, particularly if they are considered deliberative, preliminary

materials (see below). Yet the application of these exemptions to research records is unclear, so the following records may be subject to disclosure:

- » Emails and other written communications
- » Drafts
- » Notes
- » Grant proposals
- » Peer review correspondence
- » Other research materials

### What research records may be protected from disclosure under FOIL?

- » Research records of statutory colleges
  - » Records of the statutory colleges that relate to research—or other daily operations related to research, as well as the operation of these colleges—are typically not subject to FOIL.
- » Subjective, deliberative, preliminary and internal communications
  - » FOIL protects certain types of internal deliberative records—namely, communications that are not statistical or factual data and that are not final agency policy or determinations. The goal is to promote candid debate and free discussion in the decision-making process. This may potentially be extended to protect pre-publication research records which are deliberative including:
    - Emails and other written communications
    - Drafts
    - Notes
    - Peer review correspondence
  - » Example: Records that contain a combination of factual and deliberative material may be separated. The factual materials (such as datasets, maps, and objective observations) may be disclosed, with the subjective, deliberative materials removed.
  - » Example: Materials that are used in the same manner for many years, such as college course materials, may be considered “final” and therefore not subject to any protection for deliberative records.

» Example: Records that use underlying factual data as their basis but present such data in a manner that involves professional judgment are not considered purely factual and may be withheld from disclosure. For example, a list of comparable sales prices for a property prepared by an appraiser may be withheld from disclosure, despite the fact that the report consists of factual data. This is because the selection of properties to include in the list involved a thought process and professional judgment as opposed to mere data gathering.

#### » Trade secrets

» Records considered trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business) are also exempt from disclosure under FOIL.

## Tips for Protecting Your Research Materials in New York

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are located in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- » Some records within New York may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- » To ensure that materials that may fall under an exemption are classified as exempt:
  - » Mark all prepublication communications as “draft.”
  - » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - » Label all peer-review correspondence as “peer-review.”
  - » Label all commercially valuable information as “trade secret.”

North Carolina earned an **F grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including North Carolina’s—do not protect scientific research materials from indiscriminate disclosure. As a result, North Carolina open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [North Carolina Public Records Act](#) states “The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law.”

North Carolina has no statutory protection that could potentially be applied to research records.

Here is a brief overview of how the North Carolina Public Records Act treats research records.

#### What research records may be subject to disclosure under North Carolina law?

➤ Research records must be disclosed unless they constitute trade secrets.

➤➤ These records may include:

- Emails and other written communications
- Drafts
- Notes
- Grant proposals
- Peer review correspondence
- Data
- Other research material

➤➤ Example: Research applications for experiments to be performed do not constitute trade secrets and are therefore not exempt from disclosure.

#### What research records may be protected from disclosure under North Carolina law?

➤ Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business) that are shared with a government agency, including a public university, and designated as “confidential” or “trade secret” at the time of disclosure.

## Tips for Protecting Your Research Materials in North Carolina

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Label all commercially valuable information as “trade secret” and/or “confidential.”
- North Carolina law generally does not recognize the following protections, but these steps may help in other contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”

## In the News

In 2002, the North Carolina Pork Council filed a voluminous open records request for the records of University of North Carolina (UNC) epidemiologist Steve Wing relating to research linking industrial hog farms to health problems among people who lived near these farms. The request sought emails, draft reports, and the identities of study subjects who had been promised confidentiality.

Wing and UNC ultimately settled, providing draft reports, emails, survey responses, and other sensitive materials with the confidential information redacted. However, the impact of the request had a chilling effect on research examining the impact of hog farming on public health. One researcher told Wing that he dropped his own research project because he feared facing similar open records requests, which could have harmed his chances of obtaining tenure.

## NORTH CAROLINA

### A Guide to Open Records Laws and Protections for Research Materials

In 2013, North Carolina conservative think tank Civitas filed an open records request for the emails and phone records of Gene Nichol, director of the Center on Poverty, Work, and Opportunity at the University of North Carolina. Civitas sought emails and communications sent over a six-week period; the request resulted in Nichol having to spend many hours reviewing documents.

The emails that were eventually disclosed were published by Civitas and included in an article that claimed the Poverty Center had used public funds to host political activities. In February 2014, the UNC Board of Governors voted to close the Poverty Center (along with two other academic institutes), although the board denied there were political motivations for doing so.

**North Dakota earned a C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including North Dakota’s—do not protect scientific research materials from indiscriminate disclosure. As a result, North Dakota open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [North Dakota Open Records Law](#) provides that “Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.”

North Dakota has statutory protections for certain research records until the research is publicly released or published, but there is no relevant example applying this exemption. It is unknown whether publication extinguishes protection for the underlying records.

Here is a brief overview of how the North Dakota Open Records Law treats research records.

### **What research records may be subject to disclosure under North Dakota law?**

- Research records that have been published or publicly released. It is unclear as to how exactly the exemption is applied and whether the underlying records—including records such as emails, drafts, and notes—remain protected after the research is published.

### **What research records may be protected from disclosure under North Dakota law?**

- University research records are exempt from disclosure until they have been publicly released, published, or patented. These records may include:
  - Emails and other written communications
  - Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Data
  - Other research records
- Trade secrets (information used by a business that is secret to the public and is critical to the livelihood and success of a business), and proprietary, commercial, and financial information are

protected from disclosure if they are of a privileged nature and have not been previously disclosed.

- » Example: “Proprietary information” has been considered to include information shared with a university for use in negotiating an agreement to conduct sponsored research, and information given to a university by a private business to conduct research or create a product for potential commercialization.
- Public entities headed by a single individual, may withhold a working paper or preliminary draft until a final draft is completed.
  - » Example: North Dakota State University was found to be an agency headed by a single individual; a draft lease prepared by the university was protected until all substantive work on the lease was completed.

### Tips for Protecting Your Research Materials in North Dakota

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within North Dakota may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - » Mark all prepublication communications as “draft.”
  - » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - » Label all peer-review correspondence as “peer-review.”

» Label all commercially valuable information as “trade secret.”

Ohio earned a **B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws.](#)"

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Ohio Public Records Act](#) provides for all public records to be made available for inspection to any person.

Ohio has a strong statutory exemption for research that protects a wide range of specific research material and this exemption has been applied to protect research records in Ohio.

Here is a brief overview of how the Ohio Public Records Act treats research records.

### What research records may be subject to disclosure under Ohio law?

- Research records where the record has already been published or publicly released
- Promotion and tenure records of a state university
- Names and work addresses of research scientists

### What research records may be protected from disclosure under Ohio law?

- Intellectual property records, including state university research records, that have not been publicly released, published, or patented.
  - This may include:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals
    - Peer review correspondence
    - Data
    - Other research materials

- » Example: Sharing research with scientists at other institutions for scientific purposes does not constitute public release.
- » Example: Underlying raw data for published works is not considered publicly released if the data was never published or made available to people aside from the original project researchers.

### Tips for Protecting Your Research Materials in Ohio

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Ohio may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- The following precautions are generally unnecessary under Ohio law, but these steps may help in other contexts, including open records requests received by correspondents in other states:
  - » Mark all prepublication communications as “draft.”
  - » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - » Label all peer-review correspondence as “peer-review.”
  - » Label all commercially valuable information as “trade secret.”

Oklahoma earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Oklahoma's—do not protect scientific research materials from indiscriminate disclosure. As a result, Oklahoma open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Oklahoma Open Records Act](#) states that "As the Oklahoma Constitution recognizes and guarantees, all political power is inherent in the people. Thus, it is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government."

Oklahoma has a statutory protection for research records, but only where disclosure could affect the conduct or outcome of the research. There is no known explanation or example illustrating the standard necessary for research records to be protected under this exemption.

Here is a brief overview of how the Oklahoma Open Records Act treats research records.

### What research records may be subject to disclosure under Oklahoma law?

- Records where the disclosure would not impact the conduct or outcome of the research
  - This standard is not explained in the statute and has not been evaluated by the courts, so its application is unclear.
  - Depending on the application of this standard, the following records may be subject to disclosure:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals
    - Peer review correspondence
    - Data
    - Other research material

## What research records may be protected from disclosure under Oklahoma law?

- Records may be protected if their disclosure could affect the conduct or outcome of the research, the ability to patent or copyright the research, or any other proprietary rights an entity may have in the research.
  - This standard is not explained in the statute and has not been evaluated by the courts, so its application is unclear.
  - Depending on the application of this standard, the following records may be protected from disclosure:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals
    - Peer review correspondence
    - Data
    - Other research material
- Prior to taking any action, such as making a recommendation or issuing a report, a public official may keep his or her personal notes and materials confidential. A public official is defined as any employee of a public body, including a public university.
  - There is no example illustrating what type of personal notes and materials may be protected under this exemption, but it could potentially apply to research materials created prior to publication that have not been shared with other people.

## Tips for Protecting Your Research Materials in Oklahoma

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the

communication must be disclosed under the open records law.

- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Oklahoma may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Oregon earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Oregon's—do not protect scientific research materials from indiscriminate disclosure. As a result, Oregon open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Oregon Public Record Law](#) states "Every person has a right to inspect any public record of a public body in this state."

Oregon has a statutory protection for certain research records until the research is publicly released or published. The Attorney General's Office has interpreted this standard to allow protection to extend to instances where some research has been shared or published but ongoing research on the underlying data is continuing.

Here is a brief overview of how the Oregon Public Record Law treats research records.

### What research records may be subject to disclosure under Oregon law?

- Records relating to published research
  - The Oregon Attorney General's Office has interpreted instances involving the initial disclosure of ongoing research not to constitute "publication"—see below for examples.
- Factual materials of a government agency, including a state university, that do not reveal deliberations. This may not apply to pre-publication research data, as that is likely protected by a different exemption.

### What research records may be protected from disclosure under Oregon law?

- Writings prepared by or under the direction of faculty of public educational institutions, that are connected to research, until that research is publicly released, copyrighted, or patented
  - This exemption may protect the following research records prior to final publication or full public release:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals
    - Peer review correspondence

- Data
  - Other research materials
- » Example: Underlying data and research records remain protected where an initial study has been published but additional, unpublished research is ongoing and using the same data.
  - » Example: Correspondence relating to preliminary research findings that have yet to be publicly released remains protected.
  - » Example: Presenting or sharing information about ongoing research at a scientific conference does not constitute public release.
  - » Example: Sharing preliminary results does not constitute publication or public release if the research is still in progress.
- » The name, home address, professional address or location of a person who is engaged in, or providing goods or services for, medical research at Oregon Health and Science University involving animals other than rodents
  - » Communications within or between public bodies, including public universities, that are advisory, contain non-factual materials, and are preliminary to any final policy decision or action. The goal is to promote candid debate and free discussion in the decision-making process.
    - » In order to receive this protection, the public body must show that the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

### Tips for Protecting Your Research Materials in Oregon

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.

- Some records within Oregon may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

**Pennsylvania earned an A grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Pennsylvania Right to Know Law](#) (RTKL) states "Unless otherwise provided by law, a public record, legislative record or financial record shall be accessible for inspection and duplication in accordance with this act."

Pennsylvania excludes most of its major research universities from its open records law and offers a strong statutory exemption for the remaining institutions.

Here is a brief overview of how the RTKL treats research records.

### What research records may be subject to disclosure under RTKL?

- Records related to published research of universities of the State System of Higher Education—see below for a list of these institutions—may potentially be disclosed.
  - It is unclear exactly how the underlying records remain protected once the research in question is published.
- Records of four specific universities—listed below—only if those records relate to other state agencies. (These four major research universities are generally excluded from the RTKL.)
  - Example: Records related to employees of those particular universities who are participating in a state-run pension plan are subject to the RTKL

### What research records may be protected from disclosure under the RTKL?

- Research records of four state-related universities
  - Due to the way they are funded, four universities in Pennsylvania—Temple University, Pennsylvania State University, The University of Pittsburgh, and Lincoln University—are excluded from the RTKL. No research records of these institutions are disclosable.
- Unpublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related materials, and scholarly correspondence of a community college or an institution of the State System of Higher Education (Bloomsburg State College, California State College, Cheyney State College, Clarion State College, East Stroudsburg State College, Edinboro State College, Indiana University of Pennsylvania, Kutztown State College, Lock Haven State College, Mansfield State College, Millersville State College, Shippensburg State College, Slippery Rock State College, and West Chester State College).

- » It is not clear to what extent scholarly correspondence and other underlying research materials are protected once the work they relate to is published.
- Records that reflect the internal, predecisional records of an agency. These must be internal records or those between state agencies, as well as deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations or advice) and created prior to the related decision. The goal is to promote candid debate and free discussion in the decision-making process.
- Personal notes and records that do not have an official purpose
- Trade secrets (information used by a business that is secret to the public and is critical to the livelihood and success of a business)

### Tips for Protecting Your Research Materials in Pennsylvania

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- The following precautions are generally unnecessary under Pennsylvania law, but may help in other contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government:
  - » Mark all prepublication communications as “draft.”
  - » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - » Label all peer-review correspondence as “peer-review.”
  - » Label all commercially valuable information as “trade secret.”

Rhode Island earned a **B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Rhode Island Access to Public Records Act](#) declares "The public's right to access to public records and the individual's right to dignity and privacy are both recognized to be principles of the utmost importance in a free society."

Rhode Island has a strong statutory exemption for research that protects a wide range of specific research material.

Here is a brief overview of how the Rhode Island Access to Public Records Act treats research records.

#### What research records may be subject to disclosure under Rhode Island law?

- Rhode Island protects preliminary drafts and other research materials. The statute does not define "preliminary" but legislative history suggests that the statute drafters intended to broadly protect non-published research records.

#### What research records may be protected from disclosure under Rhode Island law?

- Preliminary drafts, notes, impressions, memoranda, working papers, and work products of a public agency including those involving research at state institutions of higher education.

- There is no known example applying this exemption so its exact application is unknown. However, legislative history indicates the protection may include the following research records:

- Emails and other written communications
- Drafts
- Notes
- Grant proposals
- Peer review correspondence
- Data
- Other research materials

- Trade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature

#### Tips for Protecting Your Research Materials in Rhode Island

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- The following precautions are generally unnecessary under Rhode Island law, but may help in other contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

**South Carolina earned a B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [South Carolina Freedom of Information Act](#) (FOIA) declares that "The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy."

South Carolina has a strong statutory exemption for research that protects a wide range of specific research material.

Here is a brief overview of how FOIA treats research records.

#### What research records may be subject to disclosure under FOIA?

- Research records that have been published
  - The exact application of this is unknown

#### What research records may be protected from disclosure under FOIA?

- Proprietary research data, records and information until published, patented, or publicly disseminated
  - While proprietary research is not defined in this statute section, Virginia's research exemption is worded very similarly to South Carolina's; the Virginia Supreme Court defined proprietary as "an interest or right of one who exercises dominion over a thing or property, of one who manage and controls" and concluded that all of a professor's research records were his proprietary information.
  - Records protected under this provision may include:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals

## SOUTH CAROLINA

### A Guide to Open Records Laws and Protections for Research Materials

- Peer review correspondence
  - Data
- Non-proprietary research data, records or information until published, patented, or publicly disseminated.
- For non-proprietary research records, the statute has some ambiguities about whether underlying research records that are not published remain protected once the final work itself is published. The overall construction of the statute suggests the underlying records would remain protected after publication of the final work, but this is not certain. This provision protects:
- Information provided by participants in research
  - Research notes and data, discoveries
  - Research projects
  - Methodologies
  - Protocols
  - Creative works
- Trade secrets (information used by a business that is secret to the public and is critical to the livelihood and success of a business)

### Tips for Protecting Your Research Materials in South Carolina

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within South Carolina may be subject to an exemption, but those

protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.

- The following precautions are generally unnecessary under South Carolina law, but these steps may help in other contexts, including open records requests received by correspondents in other states:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

**South Dakota earned a B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [South Dakota Public Records Law](#) declares "Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in § 1-27-1.1, are hereby fully empowered and authorized to examine such public record."

South Dakota has a strong statutory exemption for research that protects a wide range of specific research material.

Here is a brief overview of how the South Dakota Public Records Law treats research records.

### What research records may be subject to disclosure under South Dakota law?

- Records of research that is not considered bona fide research or applied research.
  - Note that the terms "bona fide research" and "applied research" are not defined under the statute, so it is not known exactly what type of research materials are considered subject to disclosure.
- Factual materials
  - Final statistical or factual tabulations of data are not protected from disclosure.
- Final decisions of a state agency
  - Final agency policy or final determinations—including published reports and papers—are not protected from disclosure.

### What research records may be protected from disclosure under South Dakota law?

- Trade secrets, specific details of bona fide research, applied research, or scholarly or creative artistic projects being conducted at a school, postsecondary institution, or laboratory, if funded in part or entirely by the state, as well as other proprietary (not defined in this statute section) or commercial information, which, if released, would infringe on intellectual property rights, give an advantage to business competitors, or serve no material public purpose
  - The terms "bona fide research" and "applied research" are not specifically defined, so the exact scope of this exemption is unknown. It may protect the following records:
    - Emails and other written communications

## SOUTH DAKOTA

### A Guide to Open Records Laws and Protections for Research Materials

- Drafts
  - Notes
  - Grant proposals
  - Peer review correspondence
  - Preliminary data
  - Other research materials that are considered records of “bona fide” research projects being conducted by the state
- Correspondence, memoranda, calendars or logs of appointments, working papers, and records of telephone calls of public officials or employees
  - Personal correspondence, memoranda, notes, calendars or appointment logs, or other personal records or documents of any public official or employee
  - Internal agency records that don’t constitute final statistical or factual tabulations, final instructions to staff that affect the public or final agency policy or determinations.
  - Financial, commercial, and proprietary information supplied in conjunction with applications or proposals for funded scientific research, participation in joint scientific research projects, projects to commercialize scientific research results, or for use in conjunction with commercial or government testing.
  - Drafts, notes, recommendations, and communications in which opinions are expressed or policies are formulated or recommended.
    - This is similar to a deliberative process exemption—used to protect research records in other states—which protects materials that are deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). The goal is to promote candid debate and free discussion in the decision-making process.

### Tips for Protecting Your Research Materials in South Dakota

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the

communication must be disclosed under the open records law.

- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within South Dakota may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- The following precautions are generally unnecessary under South Dakota law, but these steps may help in other contexts, including open records requests received by correspondents in other states:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

## **In the News**

Beginning in 2008, People for the Ethical Treatment of Animals (PETA) began targeting University of South Dakota (USD) neuroscientist Robert Morecraft to gain access to records related to brain injury research conducted on nonhuman primates. PETA filed the first open records request in 2008 to gain access to Morecraft’s experimental protocol, along with videos and photos of his research. USD declined to disclose the records and the State of South Dakota Office of Hearing Examiners denied PETA’s request for a hearing to dispute the denial.

In July 2009, PETA filed another request, and the university again declined to disclose the records. By this time, the South Dakota public records statute had changed and now provided protection for research. USD based its denial on these sections and stated that the cost of locating and assembling the remaining records would be \$2,000.

PETA then amended its request to 11 records instead of 19, but USD responded with specific denials for each one, either because the documents did not exist or because they were protected by the research exemption. In February 2010, PETA filed suit to compel disclosure but ultimately withdrew the suit because of problems with the way the school was served with notice of litigation. PETA stated

## SOUTH DAKOTA

### A Guide to Open Records Laws and Protections for Research Materials

at the time that they were deciding how to proceed, but it does not appear that further action was taken.

Tennessee **earned a C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Tennessee's—do not protect scientific research materials from indiscriminate disclosure. As a result, Tennessee open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Tennessee Open Records Act](#) provides that all state, county, and municipal records shall be open for personal inspection by any citizen of the state.

Tennessee has statutory protections for sponsored research records, defined as "research, analysis, or service conducted pursuant to grants or contracts between the public higher education institution and a person or entity." It also protects non-sponsored research records if disclosure could affect the conduct or outcome of the research. There is no known explanation or example illustrating the standard for non-sponsored research to be protected under this exemption.

Tennessee courts have also recognized a limited "deliberative process exemption" that protects certain predecisional and deliberative records. Similar exemptions have been used to protect research records in other states. However, in Tennessee the exemption applies only to "high government officials," such as senior state legal officials, which would likely rule out its application to records belonging to most university researchers.

Here is a brief overview of how the Tennessee Open Records Act treats research records.

### What research records may be subject to disclosure under Tennessee law?

- Records for non-sponsored research where disclosure won't affect the outcome of the research or the ability of the institution to patent or copyright the research. There is no case law to clarify exactly what type of records may or may not be disclosed based on this standard.
- The titles of sponsored research or service projects, names of the researchers involved, and the amounts and sources of funding for the project

### What research records may be protected from disclosure under Tennessee law?

- Records generated during sponsored research at public higher education institutions, including:
  - Patentable materials, which is defined as "inventions, processes, discoveries, or other subject matter that the public higher education institution or the sponsor reasonably believes to be patentable."
  - Proprietary information is defined as "any information used directly or indirectly in the business of any person or entity that gives the person or entity an advantage or an opportunity to obtain an advantage over competitors who do not know or use the

information that is disclosed by the person or entity to the public higher education institution.”

- » Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business)
  - » Business transactions, and commercial or financial information about or belonging to research subjects or sponsors
  - » Summaries or descriptions of sponsored research or service, unless this information is released by the sponsor
  - » Personally-identifiable information
  - » Any other information that could affect the conduct or outcome of the research, the ability to patent or copyright the sponsored research, or any other proprietary rights any person or entity may have in the research or the results of the research. This includes, but is not limited to, protocols, notes, data, results, or other unpublished writing about the research or service.
- » Non-sponsored research records where disclosure could affect the conduct or outcome of the research or service, or the ability of a public higher education institution to patent or copyright the research, including:
- » Proprietary information (defined above) and trade secrets received from a person or entity cooperating in the research
  - » Protocols, notes, data, results, or other unpublished writing about the research or service
- » Predecisional and deliberative records of “high government officials.” To be considered, the records must be both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). The goal is to promote candid debate and free discussion in the decision-making process.
- » As mentioned above, the term “high government officials” has been used to apply to officials such as senior state legal officials, which would likely rule out its application to records belonging to most university researchers.

## Tips for Protecting Your Research Materials in Tennessee

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Tennessee may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - Label all commercially valuable information as “trade secret” or “proprietary”
  - Label all documents related to sponsored research as “sponsored research.”
- While Tennessee law generally does not recognize the following protections, these steps may help in other contexts, including open records requests received by correspondents in other states:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”

Texas earned a **D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Texas's—do not protect scientific research materials from indiscriminate disclosure. As a result, Texas open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Texas Public Information Act](#) (PIA) states "Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees."

Texas has a statutory protection for research but this extends only to research records that have the potential to be sold, licensed, or traded for a fee. There are also limited protections that apply in specific circumstances, such records regarding federal-state projects to build research facilities.

Here is a brief overview of how PIA treats research records.

### What research records may be subject to disclosure under PIA?

- Research records that have no potential to be sold, traded, or licensed for a fee.
  - Records that relate to research that is not sponsored and that a university does not assert can be sold, traded, or licensed for a fee
  - Basic information about the research, such as licensing information and funding details, that doesn't reveal specifics about the research itself and doesn't enable a person to appropriate the research
  - Unless they contain information with the potential to be sold, traded, or licensed for a fee, the following records may be subject to disclosure:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals
    - Peer review correspondence
    - Data
    - Other research materials

## What research records may be protected from disclosure under PIA?

- Information relating to a product, device, or process, the application or use of such product, device, or process and any technological and scientific information developed in whole or in part at a state institution of higher education that has the potential for being sold, traded, or licensed for a fee.
- Any information relating to a product, device, or process, that application or use of such product, device, or process and any technological and scientific information that is the proprietary (the term “proprietary” is not defined in the Texas open records statute) information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education for the purpose of a research contract or grant that contains a provision prohibiting the disclosure of the proprietary information.
- Plans, specifications, blueprints, and designs of a scientific research and development facility jointly financed by the federal government and the state institution of higher education, if the facility is designed and built for the purposes of promoting scientific research and increasing the economic development and diversification of the state.
- Information maintained by or for an institution of higher education that would reveal the institution’s plans or negotiations for commercialization or a proposed research agreement, contract or grant that consists of unpublished research or data that may be commercialized unless the information has been published, is patented or is otherwise subject to an executed license, sponsored research agreement or research contract or grant.
- Commercial or financial information where it can be demonstrated that disclosure would cause substantial competitive harm to the person from whom the information was obtained.
- Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business).
- Interagency or intra-agency memoranda or letters that would not be available by law for a party in litigation with the agency.
  - This is a deliberative process exemption designed to protect records that are deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). The goal is to promote candid debate and free discussion in the decision-making process. In an attempt to clarify what constitutes opinion under this exemption, the Texas Attorney General’s Office has stated that records should be withheld or disclosed based on whether the advice, opinion or recommendation played an actual role in the decisional process.
  - Example: The Attorney General’s Office concluded that anonymous evaluations of university administrators that gave only a letter grade are subject to disclosure, as these

grades are not considered to reflect the deliberative process and there would be no harm from their release even if the grades themselves reflect subjective opinion.

- » Example: The Attorney General’s Office concluded that anonymous narrative evaluations of a university administrator may be withheld. While anonymous, the information contained therein could reveal the identity of the evaluator and impair the university’s ability to obtain the same degree of openness in future evaluations.

### Tips for Protecting your Materials in Texas

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Texas may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - » Label all documents related to sponsored research as “sponsored research.”
  - » Label all prepublication communications as “draft.”
  - » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - » Label all peer-review correspondence as “peer-review.”
  - » Label all records containing trade secrets as “trade secret.”

Utah earned a **B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Utah Government Records Access and Management Act](#) (GRAMA) recognizes the public's right of access to information concerning the conduct of the public's business.

Utah has a strong statutory exemption for research that protects a wide range of specific research material.

Here is a brief overview of how GRAMA treats research records.

### What research records may be subject to disclosure under GRAMA?

- Records relating to published research may be disclosable, although some records may remain protected even after publication—see below.

### What research records may be protected from disclosure under GRAMA?

- Records of an institution within the state system of higher education that have been developed, discovered, disclosed to or received by or on behalf of faculty, staff, employees, or students of the institution.
- Unpublished notes, data, and information relating to research of the institution or the sponsor of sponsored research (defined by GRAMMA as all research and development activities that are sponsored by federal and nonfederal agencies and organizations). This includes:
  - Unpublished lecture notes
  - Unpublished manuscripts
  - Creative works in progress
  - Scholarly correspondence, including emails
    - The language of the statute indicates that underlying emails and other correspondence are protected even after the research is published.
  - Confidential information contained in research proposals
    - "Confidential information" is not defined in the statute, so the exact scope of this is unclear.

- Drafts prepared by a government entity, including a state university. This pertains to drafts that are circulated internally, drafts that contain data that is not available elsewhere, and drafts that were never finalized even though they were relied on by a government entity to carry out an action or policy.
- Records of an institution within the state system of higher education relating to tenure evaluations, appointments, applications for admissions, retention decisions, and promotions.
- Commercial information or non-individual financial information obtained from a person if disclosure of the information would result in unfair competitive injury to the person submitting the information or would impair the ability of the government entity to obtain necessary information in the future; the person submitting the information has greater interest in promoting access than the public does in obtaining access and the person submitting the information has provided the government entity with the information specified.
- Trade secrets (information used by a business that is secret to the public and is critical to the livelihood and success of a business).

### Tips for Protecting Your Research Materials in Utah

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Utah may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- While the following precautions are generally unnecessary under Utah law, these steps may help in other contexts, including open records requests received by correspondents in other states:
  - Mark all prepublication communications as “draft.”

- » Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
- » Label all peer-review correspondence as “peer-review.”
- » Label all commercially valuable information as “trade secret.”

Vermont earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Vermont's—do not protect scientific research materials from indiscriminate disclosure. As a result, Vermont open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Vermont Public Records Act](#) (PRA) states that "The legislature finds and declares that public commissions, boards and councils and other public agencies in this State exist to aid in the conduct of the people's business and are accountable to them."

Vermont has statutory protections for certain research records until the research is publicly released or published but no relevant example applying this exemption. It is unknown whether publication extinguishes protection for the underlying records.

Here is a brief overview of how PRA treats research records.

### What research records may be subject to disclosure under PRA?

- Research records post publication, but it is not clear how underlying materials such as correspondence and drafts are treated once the research is published.
- Inter- and intra-departmental factual material of a state subdivision, including a state university.

### What research records may be protected from disclosure under PRA?

- Research data, records, or information of the University of Vermont or the Vermont State Colleges until published, patented, or publicly released. It is not known whether publication of the final research extinguishes protection for the underlying records.
  - Includes research notes and laboratory notebooks, lecture notes, manuscripts, creative works, correspondence (including emails), research proposals and agreements, methodologies, protocols and the identities of and personally identifiable information about participants in research.
- Trade secrets (information used by a business that is secret to the general public and is critical to the livelihood and success of a business).
- Inter- and intra-departmental communications of a state subdivision, including a state university, that are not factual and are preliminary to a determination of policy. This incorporates a deliberative process exemption which aims to protect records that are deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete).

## Tips for Protecting Your Research Materials in Vermont

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Vermont may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Virginia earned a **B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Virginia Freedom of Information Act](#) (FOIA) declares that "Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked."

Virginia has a strong statutory exemption for research that protects a wide range of specific research material and relevant examples applying this exemption.

Here is a brief overview of how FOIA treats research records.

### What research records may be subject to disclosure under FOIA?

- Research records that are not considered "proprietary information" (see below).
- Research records that have already been publicly released, published, copyrighted, or patented. Note that even if final research is published, the underlying records (such as emails and drafts) remain protected.

### What research records may be protected from disclosure under FOIA?

- "Proprietary information" relating to research, produced, or collected by public university faculty or staff which has not already been publicly released, published, copyrighted, or patented.
  - Proprietary information has been defined in Virginia as "an interest or right of one who exercises dominion over a thing or property, of one who manage and controls." Virginia courts have concluded that all of a professor's research records were his proprietary information because he managed and controlled them. This includes:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals
    - Peer review correspondence

- Data
- Other research materials

➤ Records unrelated to public agency's public business

- Example: Records prepared by state university professors for a report commissioned by the United States Congress, unrelated to university duties, have been exempted from disclosure.

### Tips for Protecting Your Research Materials in Virginia

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether it must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Virginia may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- The following precautions are generally unnecessary under Virginia law, but these steps may help in other contexts, including open records requests received by correspondents in other states:
  - Mark all prepublication communications as "draft."
  - Label all preliminary, non-final versions of papers, reports, etc. as "draft."
  - Label all peer-review correspondence as "peer-review."
  - Label all commercially valuable information as "trade secret."

Washington earned a **D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Washington's—do not protect scientific research materials from indiscriminate disclosure. As a result, Washington open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Washington Public Records Act](#) (PRA) declares that records should be public because "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created."

Washington has a statutory protection that extends only to research data where disclosure may produce public harm and private gain. Additionally, Washington uses a general deliberative process exemption to protect records that are both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). While this exemption has been applied to research records, Washington courts have determined that once a final decision is issued—which includes research publication—all underlying records become disclosable.

Here is a brief overview of how PRA treats research records.

### What research records may be subject to disclosure under PRA?

- Factual materials
  - Statistical or factual tabulations of data are not specifically protected from disclosure. However, note that some research data may be protected from disclosure under a different statute section, such as when release would cause private gain and public loss—see below.
- Predecisional records, once the final decision has been implemented
  - This "final decision" may be the publication of a paper, a public presentation, the funding of a grant proposal, or other culmination of the underlying work.
  - Example: Once a grant proposal is accepted for funding, the underlying peer review comments related to the proposal are subject to disclosure.

### What research records may be protected from disclosure under PRA?

- Valuable formulae, designs, drawings, computer source code, and research data obtained by any agency within five years of the request for disclosure, when disclosure would produce private gain and public loss.

- » Example: A cash flow analysis prepared for the Port of Bellingham was protected under this research data exemption on the grounds that disclosure would benefit private developers and harm the Port's negotiation abilities, creating a loss to the public. Research data was defined as "a body of facts and information collected for a specific purpose and derived from close, careful study, or from scholarly or scientific investigation or inquiry."
- » Preliminary drafts, notes, recommendations, and intra-agency memoranda in which opinions are expressed or policies formulated or recommended, unless the record is publicly cited by the agency in connection with any agency action. This exemption protects records that are both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). The goal is to promote candid debate and free discussion in the decision-making process.
  - » Once a final action is taken—including publication of a research paper or funding of a grant proposal—all of the underlying records relating to that action become public.
    - Example: Records containing opinions or recommendations regarding unfunded grant proposals are considered protected. But once the opinions or recommendations are implemented, meaning the grant is funded, the underlying records cease to be protected.

### Tips for Protecting Your Research Materials in Washington

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- » Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- » Some records within Washington may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- » To ensure that materials that may fall under an exemption are classified as exempt:
  - » Label all records that could potentially produce private gain and public loss as

“proprietary.”

- While draft materials become public upon publication of the research, records relating to unpublished research remain protected. Therefore, these steps may help so long as the research remains unpublished and also in other contexts including open records requests received by correspondents in other states:
  - Label all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”

**West Virginia earned a B grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws do not protect scientific research materials from indiscriminate disclosure. As a result, some state open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [West Virginia Freedom of Information Act](#) (FOIA) declares that "Pursuant to the fundamental philosophy of the American Constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees."

West Virginia uses a general deliberative process exemption to protect records that are both deliberative (reflecting the give-and-take of the decision-making process and containing opinions, recommendations, or advice) and predecisional (made before the deliberative process was complete). This exemption has been used to protect a wide range research records from disclosure in West Virginia.

Here is a brief overview of how FOIA treats research records.

### **What research records may be subject to disclosure under FOIA?**

- Factual materials such as data

### **What research records may be protected from disclosure under FOIA?**

- Internal memoranda or letters received or prepared by any public body, including a public university, that are predecisional and deliberative. The goal is to promote candid debate and free discussion in the decision-making process.
  - Records relating to the preparation of academic publications may be withheld under this internal memorandum exemption. These may include:
    - Emails and other written communications
    - Drafts
    - Notes
    - Grant proposals
    - Peer review correspondence

- Other research records
- Trade secrets (information used by a business that is secret to the public and is critical to the livelihood and success of a business)

#### Tips for Protecting Your Research Materials in West Virginia

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Some records within West Virginia may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government. To ensure that materials that may fall under an exemption are classified as such:
- Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

Wisconsin earned a **D grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Wisconsin's—do not protect scientific research materials from indiscriminate disclosure. As a result, Wisconsin's open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Wisconsin Public Records Law](#) (PRL) states that "In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them."

Wisconsin uses a general balancing test to determine which materials are protected, and to be protected, the public interest in protecting the record must outweigh the public interest in disclosing it. There is no known instance of Wisconsin's balancing test being applied to research records (although similar balancing tests have been used to protect research records in other states). Additionally, notes prepared solely for personal use may be excluded from the definition of public record and are therefore not subject to disclosure.

Here is a brief overview of how the PRL treats research records.

### What research records may be subject to disclosure under Wisconsin law?

- Research records that are not created for personal use
- Records where it is determined that the public interest in disclosure outweighs the public interest in withholding the record
- Final decisions and drafts of public agency records, including records of a public university, that don't substantially differ from the final version
  - Example: Notes of a policy advisor containing personal thoughts and opinions that were then incorporated into the final version were disclosable. Because these opinions were ultimately expressed in a final decision, the court's rationale was that the underlying thought process did not need to be protected.

### What research records may be protected from disclosure under Wisconsin law?

- Personal drafts, notes, preliminary computations, and like materials
  - Research-related records that are prepared for personal use have been exempted from disclosure; records that are meant to be shared with anyone other than the author are not protected. This has been strictly interpreted.

- Absent a specific exemption, a balancing test can be used to determine whether the record in question should be protected, meaning the public interest in protecting the record is greater than the public interest in disclosing the record.

### Tips for Protecting Your Research Materials in Wisconsin

- Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.
- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Wisconsin may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- Label all preliminary, non-final versions of papers, reports, etc. that are created for personal use as “draft.”
- While Wisconsin law generally does not recognize the following protections, these steps may help in other contexts (including open records requests to correspondents in other states):
  - Label all prepublication communications as “draft.”
  - Label all peer-review correspondence as “peer-review.”

### In the News

In 2011, the Republican Party of Wisconsin made an open records request for three months of emails belonging to William Cronon, a professor of history at the University of Wisconsin. Cronon kept a blog that had discussed legislative actions to strip unions of collective bargaining rights, and the requests sought disclosure of all email messages containing various politicized words, as well as messages containing the name of the governor and various members of the legislature.

The university released some of the emails but declined to disclose others. In a letter from the university legal counsel to the Republican Party of Wisconsin, the university detailed the reasons for

denial of specific records, basing many of the arguments on the balancing test and using an academic freedom argument to find that the public interest in withholding the records was greater than the public interest in disclosure. We are not aware of any litigation or other dispute from the Republican Party following this letter.

In 2015, the Wisconsin State Legislature's budget committee added open records reforms, including the introduction of a deliberative process exemption, in the budget bill that was sent to the full Wisconsin Assembly and Senate for voting. However, the Wisconsin Senate voted 32-0 to remove the open records reforms from the bill.

Wyoming earned a **C grade** for its approach to protecting scientific research materials in our 2017 report, "[Research Protections in State Open Records Laws](#)."

State open records laws are critical to government transparency, but many of the laws—including Wyoming's—do not protect scientific research materials from indiscriminate disclosure. As a result, Wyoming open records laws are prone to misuse by groups who seek to harass scientists, stifle research they dislike, and undermine the scientific endeavor.

The [Wyoming Public Records Act](#) provides that "All public records shall be open for inspection by any person at reasonable times."

Wyoming has statutory protections for details of research projects being conducted by a state institution, but there is no known relevant example applying this exemption. It is unknown whether completion of the research extinguishes protection for the underlying records.

Here is a brief overview of how the Wyoming Public Records Act treats research records.

### What research records may be subject to disclosure under Wyoming law?

- Research materials that are not considered records of "bona fide" research projects being conducted by the state (see below)
- Factual materials
  - Statistical or factual tabulations of data are not protected from disclosure; this may not apply to pre-publication research data, which may be protected by a different statute section.
- Final decisions
  - Final decisions of a state agency, including a public university, and drafts that don't substantially differ from the final version are not protected from disclosure. This may not apply to research drafts, which may be protected by a different statute section (see below).
    - Example: Preliminary notes that contain opinions that were expressed in the final version are not exempt because they do not substantially differ from the final version.

### What research records may be protected from disclosure under Wyoming law?

- The specific details of bona fide research projects being conducted by a state institution. The term "bona fide" is not defined so the exact scope of the exemption is unclear. It is also unclear if underlying records remain protected once the research is concluded. The exemption could potentially be extended to protect:
  - Emails and other written communications

- » Drafts
  - » Notes
  - » Grant proposals
  - » Peer review correspondence
  - » Other research materials that are considered records of “bona fide” research projects being conducted by the state
- » Certain inter- or intra-agency communications, including communications within a university and with other universities within the state system. This could potentially be applied to protect pre-publication research records, such as drafts and peer review communications.
- » For a record to receive this protection, three aspects must be satisfied:
    - The record must be an intra- or inter-agency communication.
    - The record must be predecisional (occurring during the time before a decision was made) and deliberative (created as part of the act of carefully considering issues and options before making a decision or taking some action). The goal is to promote candid debate and free discussion in the decision-making process.
    - Disclosure must **not** be in the public interest.
  - » Example: Notes and emails that contain recommendations may be withheld if they reflect the give-and-take of the process.
- » Trade secrets
- » A trade secret is defined as a secret, commercially valuable plan, formula, process, or device that is used for making, preparing, compounding, or processing trade commodities and that can be said to be the end product of either innovation or substantial effort, with a direct relationship between the trade secret and the productive process.

### Tips for Protecting Your Research Materials in Wyoming

- » Keep all personal and professional emails in separate accounts. Be aware that even if professional communications are in a personal email account they may be subject to

disclosure. Typically it is the contents of the communication (i.e., content related to public job versus personal content) and not its location that determines whether the communication must be disclosed under the open records law.

- Be mindful of what is put in emails. Consider using in-person meetings or the telephone for sensitive communications.
- Some records within Wyoming may be subject to an exemption, but those protections may not apply in all contexts, such as an open records request received by a colleague working for another state agency, another state public university, or for the federal government.
- To ensure that materials that may fall under an exemption are classified as exempt:
  - Mark all prepublication communications as “draft.”
  - Label all preliminary, non-final versions of papers, reports, etc. as “draft.”
  - Label all peer-review correspondence as “peer-review.”
  - Label all commercially valuable information as “trade secret.”

## ACKNOWLEDGMENTS

### A Guide to Open Records Laws and Protections for Research Materials

The Climate Science Legal Defense Fund recognizes with gratitude the Common Sense Fund for their leadership support of "A Guide to Open Records Laws and Protections for Research Materials."

We want to thank the following institutional supporters, individual donors, and volunteers for their generous support: the David and Lucile Packard Foundation, the Energy Foundation, the Overbrook Foundation, and the Claneil Foundation.

We would also like to acknowledge our staff who wrote, reviewed, and edited this guide: Susan Rosenthal, Vanessa Nadal, Rebecca Fowler, Lauren Kurtz, Augusta Wilson, and Meredith Weber.

Special thanks to Meredith Boginski, Clare Crawford, and Duane Dobbels for their editing and design help. Finally, we would like to thank the Foundation for Individual Rights in Education (FIRE) and Laura Beltz for sharing their open records laws expertise.

The conclusions and opinions expressed herein do not necessarily reflect those of the organizations that funded the work or the individuals who reviewed it. CSLDF bears sole responsibility for the report's contents.



The Climate Science Legal Defense Fund (CSLDF) works to protect the scientific endeavor by helping defend climate scientists against politically and ideologically motivated attacks. CSLDF is a non-profit organization under section 501(c)(3) of the Internal Revenue Code.

#### **Climate Science Legal Defense Fund**

475 Riverside Drive, Suite 244  
New York, NY 10115

**[www.csldf.org](http://www.csldf.org)**

© April 2018 Climate Science Legal Defense Fund