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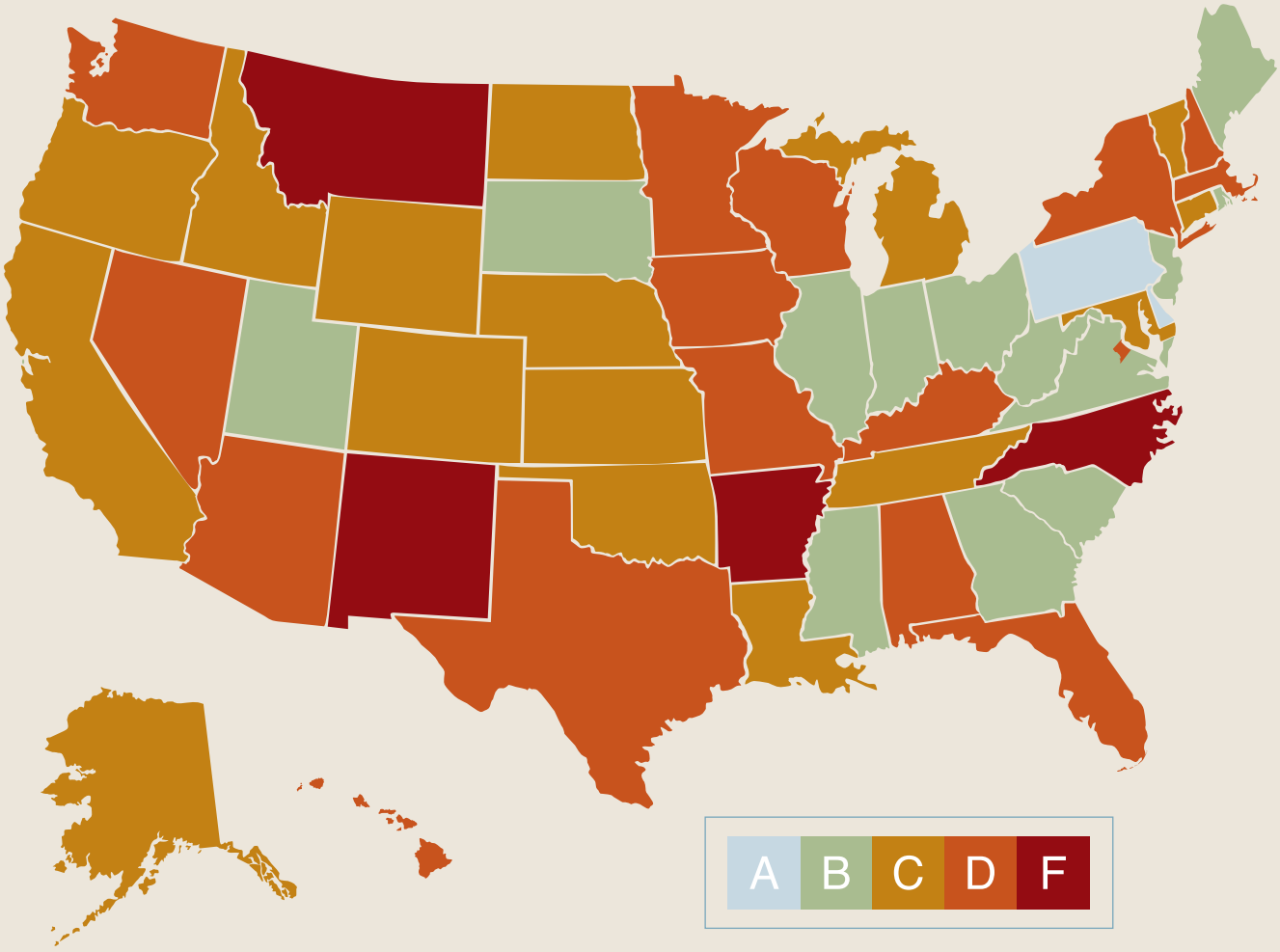
Research Protections in State Open Records Laws: An Analysis and Ranking



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Introduction

Open records laws are powerful tools for government transparency and accountability. Unfortunately, they are too often vulnerable to misuse and abuse by groups who harass researchers in order to stifle scientific research they dislike.

Now in its fifth edition, this report continues to illustrate the ways in which open records laws may be used, at best, to promote valid public policy goals or, at worst, as a weapon against publicly-funded research.

Open records laws seek to promote government transparency by allowing citizens to request copies of administrative records. Any citizen—in fact, in many states, any person—can file a request with a government entity for copies of government documents, and the government must either produce the information or explain why it is exempt from production (for example, for national security purposes). These laws, sometimes called "sunshine laws," have provided important opportunities for investigative journalists, watchdog groups, and taxpayers seeking to understand how their government works.

Open records laws were originally written to provide information on policymakers and bureaucrats, but over the years, open records laws have increasingly been used to request information from publicly funded scientists. Scientists employed by government agencies or public universities, as well as scientists at private institutions with public grants, have received open records requests, sometimes seeking massive troves of documents. In such situations, scientists are often forced to sideline their research to instead spend time on tedious document review. Meanwhile, scientists' institutions are not always equipped to mount a full legal defense even where there are available open records protections, and scientists may have to choose between handing over confidential documents—such as peer review commentary or incomplete drafts of scientific papers—or finding their own lawyer.

The lack of clarity and consistency in open records laws further complicates matters. Treatment of scientific work, including emails concerning research, varies widely among the states, and the protections available under state laws are not always well-defined. (State open records treatment also varies from federal FOIA law, which is not the subject of this report.) Some states have recognized that scientific research materials should be treated differently than agency policymaking documents and have instituted protections, albeit sometimes in idiosyncratic and ambiguous ways. Other states' open records laws do not address the special issues of scientific research and scientific communications, and have few safeguards as a result.

Misuse of Open Records Laws

The importance of protecting confidential scientific research documents and communications cannot be overstated. Indiscriminate release of scientists' files damages science in many ways, including:

- Stifling collaboration and discouraging the frank, creative exchange of ideas, which includes "devil's advocate" arguments and "what if" debates that can easily be misunderstood by outside parties;
- Providing opportunities for hostile actors to take phrases, including scientific jargon, out of context in order to mislead and confuse the public;

- Preventing scientists from fully capitalizing on their research, including obtaining patents, which require that the information in the patent not yet be public;
- Diverting time, energy, and resources away from science, by virtue of the need to comply with the time-intensive demands of legal review and litigation; and
- As a result of all of the above, dissuading scientists from working in politically contentious fields like climate science.

Further complicating matters, open records laws were written well before the advent of email, a communication medium that has not only replaced written letters and faxes, but also taken the place of spoken communications like telephone calls and in-person meetings.[1] The transition to email has been especially beneficial for scientific researchers, who increasingly collaborate across state and country lines.[2] The ubiquitous use of email for both informal and formal communications has also yielded vastly more written records that can be sought under open records laws.

Importantly, there are already standards in place to ensure scientific transparency while also offering the necessary protections. In recent years, there has been a push towards "open data" in science—making publicly available a study's methodologies, conclusions, and underlying data. There is a generally recognized standard of transparency for the results of published scientific studies: the study results, methodologies, and underlying data should be shared, and funding sources should be disclosed, but communications (including peer review commentary), drafts, and other preliminary materials are considered confidential. Satisfaction of this standard permits others to test findings for validity by determining whether the findings can be replicated, and it exposes potential conflicts of interest so that other evaluators can consider whether bias may have influenced the research.[3]

Maintaining openness on materials that ensure replicability of research, while also preserving confidentiality for other materials to ensure the free exchange of ideas is a crucial balance, and is already echoed in a range of states' open records laws. But some states have only implemented partial solutions, and a handful of states have no open records protections for research at all.

Open records laws can serve as a double-edged sword when applied to publicly funded scientists. Open records requests may be used to further important principles of scientific transparency in certain contexts, but they can also be misused by groups who try to harass, intimidate, or discredit scientists whose research they dislike.

Examples of open records misuse are, unfortunately, rife and discussed throughout this report. Scientists across a wide range of disciplines have increasingly found themselves the subject of expansive and intrusive requests that seek years' worth of personal documents and correspondence, as well as other traditionally confidential prepublication materials such as preliminary drafts, handwritten notes, and private critiques from other scientists. Climate scientists, biomedical researchers, environmental health

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1 *E-mail*, NATURE EDUCATION, 2014, https://www.nature.com/scitable/topicpage/e-mail-13953985 [https://perma.cc/F7TN-WQG3]

2 Alexandra Witze, *Research Gets Increasingly International*, NATURE NEWS, Jan. 19, 2016, http://www.nature.com/news/research-gets-increasingly-international-1.19198 [https://perma.cc/QJ6H-U882]; see also SCIENTIFIC COLLABORATION ON THE INTERNET (Gary M. Olson et al. eds., 2008), https://mitpress.mit.edu/books/scientific-collaboration-internet [https://perma.cc/TNE7-NXFW]

3 Stephan Lewandowsky and Dorothy Bishop, *Don't Let Transparency Damage Science*, NATURE, Jan. 25, 2016, http://www.nature.com/news/research-integrity-don-t-let-transparency-damage-science-1.19219 [https://perma.cc/V85B-D5FT]; Michael Halpern and Michael Mann, *Transparency versus Harassment*, SCIENCE, May 1, 2015, http://science.sciencemag.org/content/348/6234/479 [https://perma.cc/DU7M-B9Z6]

researchers, and epidemiologists have all faced invasive open records attacks by groups seeking to discredit theories or even entire fields of study.[4]

Approaches to Protecting Scientific Records

This report evaluates the legal approaches used by each state, including a review of how state institutions—courts, open records review boards, attorneys general's offices, and university records offices, to name a few—have historically treated scientific and academic records under open records laws. Letter grades from A to F have been assigned to each state accordingly.[5]

In general, there are five kinds of approaches used by states to protect some or all research records under open records laws: (1) statutory exclusion, (2) statutory exemption, (3) deliberative process protection, (4) balancing tests (usually formulated as a comparison between the public interest in disclosing the records versus the public interest in protecting the records), and (5) no protections available for research records. Some states use a combination of the first four approaches, such as having statutory exemptions that may apply in certain situations and then a balancing test for the situations where the statutory exemptions are inapplicable.

This report explains each state's approach in more detail. It also illustrates how some groups have tried to use open records laws to pursue outcomes that are clearly contrary to the public interest and how certain open records laws may be particularly prone to misuse. Below is a summary of each of the various approaches with examples of their application.

Statutory Exclusion. A few states—such as Delaware and Pennsylvania—categorically exclude certain forms of scientific and academic research from their open records laws, with statutes that make clear that, even if publicly funded, these records are not considered public records in the first place. Usually this exclusion is done by establishing that, as a general matter, most or all of the records of state public universities are not public records.

For example, Pennsylvania's Right to Know Law excludes Pennsylvania's four "state-related institutions"—Temple University, University of Pittsburgh, Penn State University, and Lincoln University—from the definition of Commonwealth agencies, and therefore their records are not made public under Pennsylvania's Right to Know Law.[6] Instead, Pennsylvania law only requires that these public universities issue annual reports by May 30th that include the salaries of officers, directors, and the 25 highest-paid employees.[7]

Similarly, Delaware's open record law states that the definitions of "public body," "public record," and "meeting" do not include the activities of the University of Delaware and Delaware State University.

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[4] Michael Halpern, Center for Science and Democracy, Union of Concerned Scientists, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, Feb. 2015, http://www.ucsusa.org/sites/default/files/attach/2015/02/freedom-to-bully-ucs-2015_0.pdf [https://perma.cc/NF5M-BA7U]; Taylor Bennett et al., *Use of FOIA by Animal Rights Activists*, LAB ANIMAL, Feb. 2016, http://www.nabr.org/wp-content/uploads/2016/02/Use-of-FOIA-by-AR-Groups.pdf [https://perma.cc/DN8K-Y27C]; Jack Payne, *Activists Misuse Open Records Requests to Harass Researchers*, THE CONVERSATION, Aug. 27, 2015, http://theconversation.com/activists-misuseopen-records-requests-to-harass-researchers-46452 [https://perma.cc/CT3Y-AZJP]

[5] See page 8 of this report.

[6] 65 Pa. Stat. § 67.301 requires that "A Commonwealth agency shall provide public records in accordance with this act." The definition of "Commonwealth agency" in 65 Pa. Stat. § 67.102 includes "State-affiliated entities", a term which itself is explicitly defined to exclude "State-related institutions." State-related institutions, and their disclosure requirements, are outlined in 65 Pa. Stat. §§ 67.1501-1503.

[7] 65 Pa. Stat. § 67.1503.

There are, however, exceptions for meetings of the universities' board of trustees and "university documents relating to expenditures of public funds."[8]

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

A number of states give statutory exemptions to the research produced by their public universities, with varying degrees of protection. For example, New Jersey provides an exemption for "pedagogical, scholarly and/or academic research records and/or the specific details of any research project" of "any public institution of higher education."[9] In *Rosenbaum v. Rutgers Univ.*, GRC Complaint No. 2002-91 (Jan. 23, 2004), an individual attempted to use New Jersey's open records law to request wildlife survey responses from a study done at Rutgers University, a New Jersey public university. New Jersey's Government Records Council found that these survey responses constituted "academic research records of a research project conducted under the auspices of a public higher education institution in New Jersey" as protected by statute.

Another state, Virginia, provides a statutory exemption for the following:

> Information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented.[10]

In *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 287 Va. 330 (Va. 2014), the Virginia Supreme Court interpreted this provision broadly. Specifically, the court concluded that all of a faculty member's emails fell under this protection, as to conclude otherwise "is not consistent with the General Assembly's intent to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges" and would cause "harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression."[11]

Deliberative Process Protection. Some states allow the application of the deliberative process protection to withhold scientific research sought pursuant to state open records requests. The deliberative process protection is based on the principle that a decision-maker's thoughts and processes on how they led to a decision should be protected from undue scrutiny; the protection is designed to improve the quality of

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8 29 Del. C. § 10002(i).

9 N.J.S.A. 47:1A-1.1.

10 Va. Code §§ 2.2–3705.4(4).

11 287 Va. at 442.

government decisions by promoting candid, uninhibited debate. This protection may be available either as a common law privilege or as a general statutory open records exemption.[12]

For example, in *Highland Mining Company v. West Virginia University School of Medicine*, 235 W.Va. 370 (2015), a mining company filed open records requests for documents related to the initiation, preparation, and publication of eight articles by an environmental health professor. In analyzing the university's arguments for withholding the records, the West Virginia Supreme Court held there was no specific protection for academics, but it allowed that professors' records could qualify for an open records exemption under West Virginia's "internal memoranda" exemption. This internal memoranda exemption "encourages free discussion" among agency officials weighing their options and "insulates against the chilling effect likely were officials to be judged not on the basis of their final decisions but for matters they considered before making up their minds."[13]

In another case, *Progressive Animal Welfare Society v. University of Washington*, 125 Wash. 2d 243 (1994), an animal rights group sought records related to a grant proposal that was submitted but ultimately not funded, including internal, confidential peer-review correspondence formally summarized in so-called "pink sheets." The Washington Supreme Court held that Washington's deliberative process privilege applied to protect the peer-review correspondence sought because "the pink sheets foster a quintessentially deliberative process."[14] The court also allowed the application of a Washington statute that specifically protected animal researchers from harassment, allowing that portions of some of the records may be withheld "if the nondisclosure of these portions is necessary to prevent harassment as defined under the anti-harassment statute."[15]

Ultimately, the Washington Supreme Court held that the records "are in large part protected from disclosure [but] the grant proposal at issue here does not come with an exemption that authorizes withholding it in its entirety," and disclosure was required for "appropriate portions" not otherwise exempted.[16] However, the court also noted that when "policies or recommendations are implemented, the records cease to be protected" under Washington's version of the deliberative process privilege, and if a proposal were to be funded "it clearly becomes 'implemented' for the purposes of this exemption, and the pink sheets thereby become disclosable."[17]

Balancing Tests. Some states use balancing tests to determine whether a public record should be produced or withheld in response to an open records request. These balancing tests may be a state's only protection available for scientific research under open records laws, or may be an auxiliary protection if other exemptions are found inapplicable. Courts in different states have taken varying stances as to whether or not scientific research records qualify for exemption under such balancing tests.

For example, California's Public Records Act allows a balancing test for when, absent a relevant statutory exemption, "on the facts of the particular case the public interest served by not disclosing the record

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[12] Russell L. Weaver and James T. R. Jones, *The Deliberative Process Privilege*, 54 MISSOURI LAW REVIEW 279 (1989); Dianna G. Goldenson, *FOIA Exemption Five: Will it Protect Government Scientists From Unfair Intrusion?*, 29 BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW 311 (2002).

[13] 235 W.Va. at 382.

[14] 125 Wash. 2d at 257.

[15] *Id*. at 263.

[16] *Id*. at 272.

[17] *Id*. at 257.

clearly outweighs the public interest served by disclosure of the record."[18] California courts have interpreted this provision to require a case-by-case balancing process when evaluating a claim for withholding documents, such as in *Humane Society v. Superior Court of Yolo County (Regents of the University of California)*, 155 Cal. Rptr. 3d 93 (Cal. App. 2013) (hereinafter "*Humane Society*").

In *Humane Society*, an animal rights group sought to use open records requests to obtain the records related to a University of California study involving egg-laying hens. The California appellate court analyzed the public benefits in protecting the research—mainly, fostering academic freedom in California public universities, encouraging scientists at other institutions to collaborate with University of California scientists, and promoting a state university system where scientists would want to continue to research.[19]

The court acknowledged there was a serious public interest in understanding how public university scientists conducted their research. However, the court noted that the scientific process already provided transparency: the "published report itself states its methodology and contains facts from which its conclusions can be tested . . . published academic studies are exposed to extensive peer review and public scrutiny that assure objectivity."[20] Consequently, "[g]iven the public interest in the quality and quantity of academic research, we conclude that this alternative to ensuring sound methodology serves to diminish the need for disclosure" under open records laws.[21]

The *Humane Society* court concluded that the public interest in protecting scientists' research records outweighed the public interest in producing the records because the "evidence here supports a conclusion that disclosure of prepublication research communications would fundamentally impair the academic research process to the detriment of the public that benefits from the studies produced by that research."[22] Despite favorable decisions such as this, academic records in California and other states using balancing tests remain an easy target of public records requests, because these court decisions are evaluated on a case-by-case factual basis and do not create legal precedent. (Meanwhile, a 2019 attempt to strengthen California's public records laws protection for academic research records was ultimately unsuccessful, thanks in part to very public opposition from animal rights groups.)

Implications

Motive is generally irrelevant for an open records request. This is a helpful posture in many situations, but it also provides an opportunity for bad-faith requests that may be legally valid yet are also clearly harmful. This is particularly true in the sciences. In recent years, scientists have received open records requests by competing scientists or competing companies to see confidential research files.[23]

We have also seen invasive requests, designed to discredit, initiated by industries harmed by certain research. This was the case, for example, in the above-described West Virginia *Highland Mining* case, where a coal mining company sought to discredit an environmental health professor's research by

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18 Cal. Gov't Code § 6255(a).

19 155 Cal. Rptr. 3d at 118-121.

20 *Id*. at 122.

21 *Id*.

22 *Id*. at 121.

23 See Teresa L. Carey and Aylin Woodward, *These Scientists Got to See Their Competitors' Research Through Public Records Requests*, BUZZFEED NEWS, Sept. 2, 2017, https://www.buzzfeed.com/teresalcarey/when-scientists-foia [https://perma.cc/7WT2-NBS3]; Andrew D. Cardon et al., *The Effect of Public Disclosure Laws on Biomedical Research*, 51(3) JOURNAL OF THE AMERICAN ASSOCIATION FOR LABORATORY ANIMAL SCIENCE 306, 306–310 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3358978/ [https://perma.cc/Z3VZ-ARA6]

requesting his personal research files. Groups that dispute the scientific evidence for climate change have also targeted climate scientists in an attempt to find emails or other documents that would allow them to poke holes in the findings, such as in the Virginia *American Tradition Institute* case discussed above.

Some scientists at public institutions have testified that, after they received a large open records request, their colleagues at other institutions were less interested in collaborating.[24] Invasive open records requests may also affect where scientists seek to work and what research they work on.[25]

Complicating these issues is the influx of available records; the increasing use of digital communications for scientific collaboration means more and more records are available for request, including casual scientific debates that could easily be taken out of context.

Even with these challenges, there is reason for optimism. More and more states are instituting legal protections for scientific research. Sometimes this is through the application of existing general protections in a scientific context—as in West Virginia in the 2015 *Highland Mining* case—and sometimes this is through passing new statutory exemptions for research in state legislatures. In the last decade open records exemptions for scientific research were passed in Rhode Island (effective June 27, 2017) and North Dakota (effective August 1, 2017).

Unfortunately, there are also recent examples of failed attempts to reform state open records laws, such as in California in 2019, Hawaii and Arkansas in 2023, Louisiana in 2024, and Connecticut in 2025, as well as states that have instituted new limits to their open records protections, such as with Maine, in 2019.

Despite the setbacks, we hope that the general upward trend continues and that, ultimately, all states recognize the importance of protecting scientific research and institute appropriate revisions to their open records laws. The future of publicly funded science depends on this.

[24] See, *e.g.*, testimony of Dr. Malcolm Hughes submitted in *Energy & Environment Legal Institute v. Arizona Board of Regents*, No. C20134963, discussed on page 32 of this report; see also *Humane Society of the United States v. Superior Court of Yolo County*, 214 Cal. App. 4th 1233 (Cal. Ct. App. 2013), discussed on page 38 of this report.

[25] See, *e.g.*, examples discussed on pages 65 and 136 of this report.