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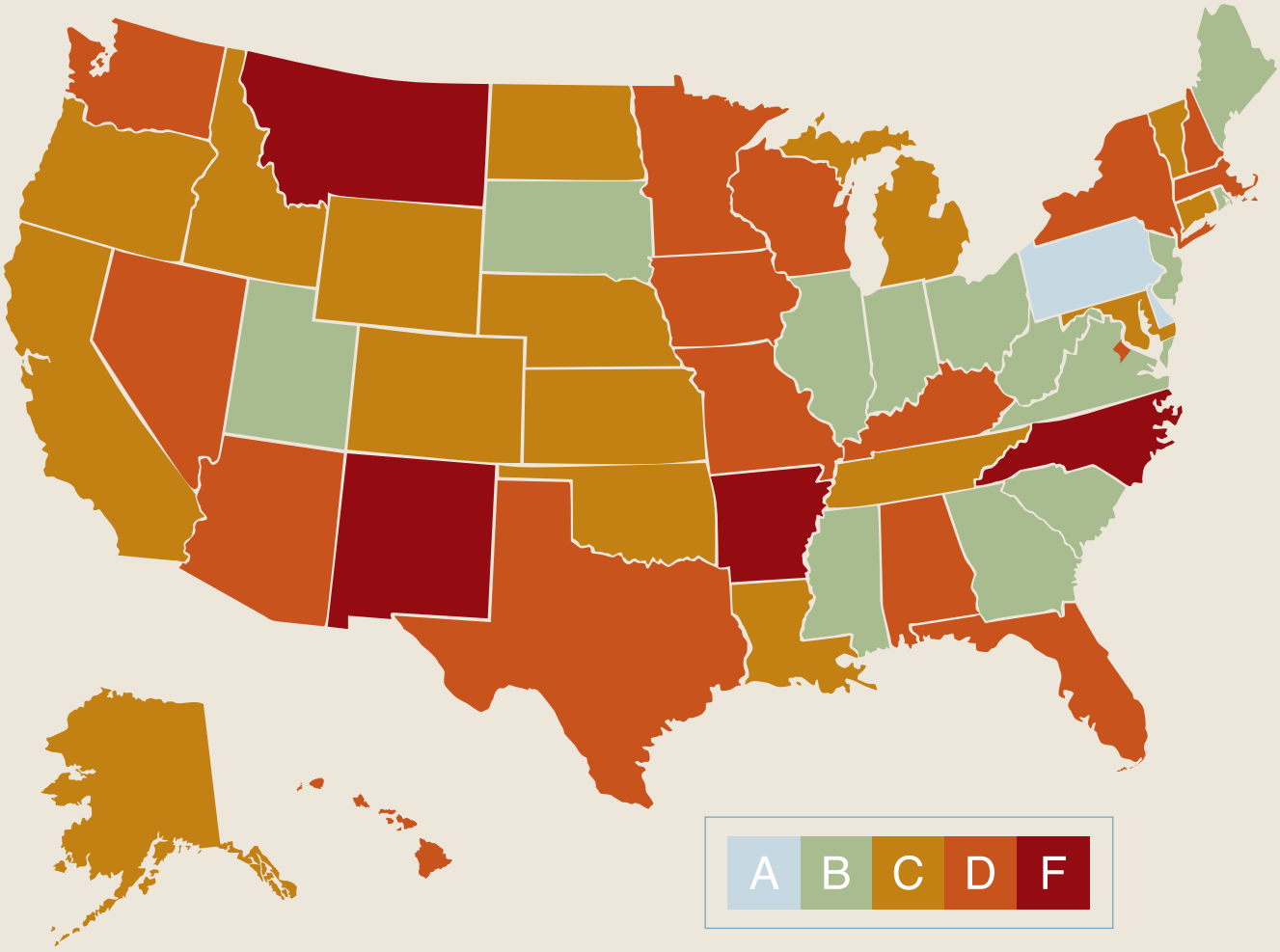
Research Protections in State Open Records Laws: An Analysis and Ranking



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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.

Grading Criteria

The grading of states for the purposes of this report 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 this 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; case law applying deliberate process exemption.

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.

At-a-Glance

State	Grade	Analysis	Relevant Tests & Exemptions
Alabama	D	The Alabama Public Records Law offers no statutory protection from disclosure for research. Absent a specific exemption, Alabama courts will apply a common law rule of reason balancing test to determine if the public interest in disclosure outweighs the public interest in withholding the records. The courts must apply this test strictly, with a presumption in favor of disclosure and with the decision based on the facts of the specific case.	• Balancing test (no relevant case law yet)
Alaska	C	The Alaska Public Records Act does not protect research from disclosure. However, the Alaska Education, Libraries, and Museums Statute contains a Confidentiality of Research Law that protects proprietary information generated by the University of Alaska until it is publicly released. Alaska also has a common law deliberative process exemption.	• Statutory exemption for research until publicly released/ published (no relevant case law yet) • Deliberative process exemption (no relevant case law yet)
Arizona	D	The Arizona Public Records Law contains no protection for research. A different statute section, found in the Arizona Education statute, protects university research from disclosure, but contains a provision that states the protection will not apply if the subject matter of the records becomes available to the general public. The term "subject matter" is not defined and the interpretation of this provision was the subject of litigation in an open records case seeking the emails of two University of Arizona researchers. The university was ultimately forced to disclose these emails but the decisions in this case failed to provide clarity in regard to what is meant by "subject matter." Arizona also has a common law balancing test that can be used to protect records where the disclosure would be contrary to the best interests of the state. In evaluating the disclosure of University of Arizona researchers' emails, the trial court held that the disclosure of university research emails is not contrary to the best interests of the state.	• Statutory exemption for research until publicly released/ published (litigation has failed to • clarify what this encompasses) • Balancing test
Arkansas	F	The Arkansas Freedom of Information Act offers no statutory protection from disclosure for research. However, Arkansas's FOIA does have an exemption for records that, if disclosed, would give advantage to competitors.	• No statutory protection • No relevant common law exemption

California	C	The California Public Records Act offers no statutory protection from disclosure for research. California does have a statutory catchall balancing test that exempts records where the public interest in withholding the records is found to be greater than the public interest in disclosing them. This catchall has been used to deny disclosure of pre-publication communications related to an academic study, and to deny disclosure of university records related to research on animals, where such records could be used to threaten or harm scientists named within. California also has a deliberative process exemption.	• Balancing test (has been used to exclude research records from disclosure) • Deliberative process exemption (subject to balancing test; no relevant case law yet)
Colorado	C	The Colorado Open Records Act (CORA) protects some research from disclosure, categorizing all requests into (1) those that shall be denied versus (2) those that may be denied. Requests for "specific details of bona fide research projects being conducted by a state institution" may be denied if disclosure to the requester would be contrary to the public interest. The application of this exemption has not been reviewed by the courts. CORA also has a statutory deliberative process exemption that will exempt records that are predecisional and deliberative. The statute provides that these records shall be denied if the disclosure of such records is likely to stifle honest and frank discussion within the government. However, Colorado courts tend to interpret this exemption narrowly with a strong presumption in favor of disclosure.	• Statutory exemption for research (subject to balancing test; no relevant case law yet) • Deliberative process exemption (no relevant case law yet)
Connecticut	C	The Connecticut Freedom of Information Act offers no statutory protection from disclosure for research. However, Connecticut courts have applied a statutory exemption for preliminary drafts to exclude a variety of other university records so long as (1) they are both predecisional and deliberative, and (2) the public interest in withholding the records outweighs the public interest in disclosing them. One court found that course presentations prepared by instructors in a university master gardener program were excluded from the definition of public records and therefore not subject to disclosure.	• Deliberative process exemption (potentially relevant case law)
Delaware	A	The Delaware Freedom of Information Act (FOIA) contains strong protection for university research. The statute excludes the activities of the University of Delaware and Delaware State University from the definition of public records, although it does consider university documents relating to the expenditure of public funds to be public records. A recent Delaware case interpreted the meaning of documents relating to the expenditure of public funds narrowly, limiting it to documents whose content relates to the expenditure of public	• State universities excluded

Delaware (continued)		funds. There is no other case law discussing the exclusion of university records from the definition of public records under FOIA.	
District of Columbia	D	The District of Columbia Freedom of Information Act does not protect research from disclosure. The statute contains an inter/intra-agency memorandum exemption, which encompasses a deliberative process exemption, but there are no cases in which these exemptions have been invoked to protect research or other university records. D.C.'s FOIA also contains a broad trade secret exemption that protects from disclosure commercial information provided to the government by an outside party if such disclosure would result in harm to the competitive position of that outside party. This trade secret exemption could be used to protect sponsored research at a university or research records disclosed to a university by an outside entity.	• Deliberative process exemption (no relevant case law yet)
Florida	D	The Florida Public Records Act protects certain records, but the state offers very limited protection from disclosure for research. Florida's Education Code protects sponsored state university research records relating to (1) potentially patentable material, (2) potential or actual trade secrets, and (3) business transactions or proprietary information. Florida recently passed a statute providing limited protections for animal researchers and their records. There is no general statutory protection for preliminary or deliberative materials, although some materials may be withheld if a court decides that, as "drafts or notes"—a category narrowly prescribed—they do not fall under the definition of a public record.	• Statutory protection for sponsored research/research with potential commercial value
Georgia	B	The Georgia Open Records Act protects proprietary research of state universities and other governmental agencies (subsection (a)(35)) as well as other research-related records of a state university, until the records are published or made publicly available (subsection (a)(36)). Subsection (a)(36) applies to research notes and data, research protocols, and methodologies. No Georgia case law addresses the actual application of subsection (a)(36), although a court has held that if research records meet the standards of the two aforementioned research sections, then they must be withheld. It is worth noting that the language in subsection (a)(35) is nearly identical to the language of the Virginia statute that was used to prevent disclosure of the records of climate scientist Michael Mann in American Tradition Institute. v. Rector and Visitors of the University of Virginia, 756 S.E.2d 435 (Va. 2014). However, compared to the Virginia statute, the Georgia	• Strong statutory protection for research

Georgia (continued)		statute is broader: the Virginia statute applies only to records of public institutions of higher education, while the Georgia statute applies to the records of both state institutions of higher learning and to other governmental agencies.	
Hawaii	D	The Hawaii Uniform Information Practices Act offers no statutory protection from disclosure for research and there are no cases that address academic research. A recent Hawaii Supreme Court case also held that there is no blanket deliberative process exemption to the UIPA. This is despite the fact that the Hawaii Office of Information Practices had previously held that such an exemption existed and that non-research university records that are both predecisional and deliberative were exempted from disclosure.	• Limited statutory protection (deliberative process exemption recently rejected by court)
Idaho	C	The Idaho Public Records Act protects all records relating to academic research if the release of the records could reasonably affect the conduct or outcome of the research until such research is publicly released, copyrighted, or patented or until the research is completed or terminated. There is no case law evaluating the application of this statute section.	• Statutory exemption until publicly released/published (no relevant case law yet)
Illinois	B	The Illinois Freedom of Information Act exempts research data that, when disclosed, could reasonably be expected to produce private gain or public loss. Illinois's FOIA also exempts for course materials or research materials used by faculty members, but there is no case law evaluating this exemption. In addition, there is a common law deliberative process exemption, which has been applied to deny disclosure of non-academic university records that are both predecisional and deliberative.	• Strong statutory protection for research • Deliberative process exemption (potentially relevant case law)
Indiana	B	Indiana broadly exempts any information concerning research, which has been used to exempt university research materials from disclosure. In addition, an exemption for inter/intra-agency records that are deliberative or advisory, and communicated for the purpose of decision-making, has been applied to non-academic university records.	• Strong statutory protection for research
Iowa	D	The Iowa Open Records Law protects tentative, preliminary, draft, speculative, or research material from disclosure prior to completion for the purpose that it was intended and in a non-final form. This exemption became effective in 2013; to date, there is no case law evaluating its application.	• Deliberative process exemption (no relevant case law yet)

Kansas	C	The Kansas Open Records Act has a broad exemption for research data in the process of analysis, as well as memoranda and other records in which opinions are expressed. There is no case law evaluating the application of this exemption. However, courts have held that once the final decision/work product is made public, then the exemption for the underlying materials is extinguished; this holding could imply that once the final results of research are made public, all underlying research records must be disclosed.	• Statutory protection for research until publicly released/published (no relevant case law yet) • Deliberative process exemption (potentially relevant case law)
Kentucky	D	The Kentucky Open Records Act contains a narrow research exemption for public records confidentially disclosed to an agency and compiled and maintained for scientific research. The exemption has been strictly applied by Kentucky courts, and protection from disclosure has been extended only where the research was disclosed to the university by a third party upon the condition that it remain confidential. Kentucky Attorney General Opinions have found that research generated by a university will not be exempted from disclosure based on the statutory research exemption.	• Statutory protection only for research disclosed to a university by a private person or entity
Louisiana	C	The Louisiana Public Records Law protects research until it is publicly disclosed, patented, or published. At least one Attorney General Opinion has extended the provision to protect underlying raw data used as the basis for a published study, although the legal reasoning used to reach this conclusion is somewhat vague, which raises questions as to how it would be interpreted in court. A recent case found that even “narrowly” sharing research at a high level still constituted public release, defeating the exemption for undisclosed, unpatented or unreleased research.	• Statutory exemption for research until publicly released/published
Maine	B	The Maine Freedom of Access Act previously excluded records of the University of Maine System (which encompasses all public universities in the state), the Maine Community College System, and the Maine Maritime Academy from disclosure. This exemption was narrowed when the statute was amended in 2019. The statute now exempts records of the University of Maine System, the Maine Community College System, and the Maine Maritime Academy "when the subject matter is confidential or otherwise protected from disclosure by statute, other law, legal precedent or privilege recognized by the courts of this State.”	• State universities excluded from open records law
Maryland	C	The Maryland Public Information Act contains a general provision protecting specific details of a research project that an institution of the state is conducting. There is no case law that evaluates this provision.	• Statutory exemption for research (no relevant case law yet) • Deliberative process

Maryland (continued)		Maryland's PIA also has a statutory deliberative process exemption for predecisional and deliberative records that could potentially be applied to research. There is no Maryland case law evaluating the deliberative process exemption and research records.	exemption (no relevant case law yet)
Massachusetts	D	The Massachusetts Public Records Law provides limited protection for proprietary information of the University of Massachusetts, including proprietary information provided by research sponsors or private concerns. There is also a statutory protection for inter/intra-agency memoranda or letters relating to policy positions being developed by an agency. Exemptions are found in the general definitions of statutory terms section of the Massachusetts General Laws, Mass Gen. Laws ch. 4, § 7, and not within the text of the Public Records Law. There is no Massachusetts case law evaluating these exemptions.	• Statutory protection for sponsored research/research with potential commercial value • Deliberative process exemption (no relevant case law yet)
Michigan	C	The Michigan Freedom of Information Act has a statutory inter/intra-agency communications exemption known as the frank communications exemption, which applies only to the extent that the public interest in protecting frank communication within a public body exceeds the public interest in disclosure of the record. Michigan also has a research specific statute, the Michigan Confidential Research and Information Act, which has a provision that applies to the disclosure of research records created by or disclosed to a university. Under this statute, records generated by the university are protected until they are published.	• Statutory exemption for research until publicly released/published (no relevant case law yet) • Deliberative process exemption (no relevant case law yet)
Minnesota	D	The Minnesota Government Data Practices Act provides very limited protection to research records. Under the statute, proprietary data of the University of Minnesota may only be protected if the disclosure of such data will cause competitive harm to the university. With no statutory or common law definition of "competitive harm," it is unclear whether this provision could be expanded to protect academic research from disclosure. The University of Minnesota takes the position that trade secrets or intellectual property such as research activities are private/nonpublic, and has refused to disclose documents that researchers designated as such.	• Statutory protection only for sponsored research/research with potential commercial value
Mississippi	B	The Mississippi Public Records Act of 1983 contains some provisions protecting research, and the Mississippi Education Code also contains stronger protections for various records relating to academic research. While the Education Code's provision protecting academic records shall not apply to a public record that has been published, copyrighted,	• Strong statutory protection for research that details specific records protected

Mississippi (continued)		trademarked or patented, the language indicates that this applies only to the actual published record and not to the other records generated during the course of the research. There is no Mississippi case law evaluating this exemption. The statute also exempts from disclosure confidential proprietary information generated by a university under contract with a private entity. Mississippi courts have applied this exemption to research information contained in a university's Institutional Animal Care and Use Committee forms.	
Missouri	D	The Missouri Sunshine Law offers very limited statutory protection for research, protecting only those records disclosed to a public institution of higher education by an individual or corporation in connection with sponsored research, the disclosure of which may endanger the competitiveness of a business. Missouri also excludes internal memorandum prepared by a government body that consists of advice, opinions or recommendations but there are no cases that apply this provision. Missouri does protect internal documents that consist of advice, opinions, or recommendations used by any governing body of an institution of higher education in its decision-making processes, although it is unclear how this would apply to open records cases involving scientific research. Missouri also excludes internal memoranda prepared by a government body that consists of advice, opinions, or recommendations but there are no cases that apply this provision.	• Statutory protection only for research disclosed to a university by a private person or entity • Deliberative process exemption (no relevant case law yet)
Montana	F	The Montana Public Records Act addresses open records, but the state offers no statutory or common law protection from disclosure for research. The statute has limited protection for confidential information, but it is unclear whether this could be extended to protect scientific research.	• No statutory protection • No relevant common law exemption
Nebraska	C	The Nebraska Public Records Law protects academic and scientific work that is in progress and unpublished as well proprietary and commercial information, the disclosure of which could give advantage to business competitors and serves no public purpose. The statutory provision lacks detail and there is no case law evaluating the provision to indicate how broadly it may be applied. The statutory provision lacks detail and there is no case law evaluating the provision to indicate how broadly it may be applied.	• Statutory exemption for research until publicly released/published

Nevada	D	The Nevada Public Records Act offers no statutory protection from disclosure for research and very limited trade secret protection. However, a Nevada court held that there is a common law deliberative process exemption that could be used to protect nonfactual deliberative records. A common law balancing test is also used in the event that no statutory exemption exists. There is no Nevada case law applying the balancing test or the deliberative process exemption to any factual situation involving universities or scientific research.	• Deliberative process exemption (no relevant case law yet) • Balancing test, if no statutory exemption exists
New Hampshire	D	The New Hampshire Right-to-Know Law offers no statutory protection from disclosure for research. While there is some protection for internal memoranda and preliminary drafts, as of the writing of this report, that exemption has not been applied by New Hampshire courts to any relevant factual situations.	• Deliberative process exemption (no relevant case law yet)
New Jersey	B	The New Jersey Open Public Records Act (OPRA) contains a comprehensive research protection exemption that has been upheld by the New Jersey Government Records Council (GRC). New Jersey courts have also held that case records of a university legal clinic are not subject to OPRA. Additional statutory exemptions exist for inter/intra-agency communications, proprietary information, and trade secrets. A New Jersey court determined that the inter/intra-agency communications exemption (which, in other states, has also been applied to certain factual situations concerning research records) includes a common-law deliberative process exemption and can be used to withhold records that are predecisional and deliberative.	• All scholarly records excluded • Deliberative process exemption (potentially relevant case law)
New Mexico	F	The New Mexico Inspection of Public Records Act offers no protections from disclosure for research and does not apply a balancing test. New Mexico courts have also held that New Mexico law does not contain a deliberative process exemption. There is an exemption for trade secrets, but no case law applying it.	• No statutory protection • No relevant common law exemption
New York	D	The New York Freedom of Information Law offers no statutory protection from disclosure for research. New York does have an inter/intra-agency materials exemption that protects predecisional deliberative materials, which may offer some protection for research-related correspondence or research analyses. However, this exemption explicitly excludes factual tabulations or data, so underlying data would not be protected under this provision.	• Deliberative process exemption (narrowly applied)

North Carolina	B	Chapter 116 of the North Carolina General Statutes, governing higher education, contains strong protections for university research. University "research data, records or information of a proprietary nature, produced or collected by or for state institutions of higher learning" are not considered public records under the North Carolina Public Records Act, provided that such records have not yet been patented, published, or copyrighted. A recent North Carolina trial court judge interpreted this provision broadly to protect university research from disclosure, and the North Carolina Court of Appeals will soon weigh in on whether the lower court's broad interpretation should be upheld. The North Carolina Public Records Act also offers limited protection for trade secrets (both under the Public Records Act and the trade secret statute), however courts have declined to extend exemptions for trade secrets to university research application materials. North Carolina courts have found that the state does not recognize a deliberate process exemption.	• Strong statutory protection for research that has not yet been patented, published or copyrighted.
North Dakota	C	Effective August 1, 2017, North Dakota enacted a specific protection for university research records, including its data and records, so long as the information has not already been publicly released, published, or patented. There is no true deliberative process exemption, although the disclosure of drafts may be delayed until the final draft is complete.	• Statutory protection for research until publicly released/published (no relevant case law yet)
Ohio	B	The Ohio Public Records Act protects intellectual property records, which includes research records of state universities that have not been publicly released, published, or patented. The Ohio courts have found that records shared with other scientists under strict control are exempt from disclosure, as such sharing does not constitute public release. The courts have also found that raw data that was used for publications is protected from disclosure, where the raw data itself had not been shared and thus was not considered publicly released.	• Statutory exemption for research with case law applying the exemption
Oklahoma	C	The Oklahoma Open Records Act has a statutory protection for research that includes any information related to the research, the disclosure of which could affect the conduct or outcome of research or any other proprietary interests any entity may have in the research or its results, including research notes, data, results, or other writings about the research. The Oklahoma Open Records Act also has a general protection for notes of a public official making a recommendation; this section has not yet been applied to a public university researcher.	• Statutory protection until publicly released/published

Oregon	C	The Oregon Public Records Law protects writings prepared by faculty members of public universities until published or publicly released, unless the public interest in disclosure outweighs the interests in protecting research from "piracy" and avoiding the release of preliminary, incomplete, and inaccurate data. Recent Oregon lower court decisions have found that where there is a comprehensive research paper published based on underlying unreleased data, the faculty research exemption no longer applies, even if the data will be used again for future papers. Several Oregon Attorney General Public Records Opinions have allowed the faculty research exemption to extend to instances where some preliminary research information has been shared or published, but ongoing research on the underlying data is continuing. Oregon also has a deliberative process exemption.	• Statutory protection until publicly released/published (some case law) • Deliberative process exemption
Pennsylvania	A	Pennsylvania has strong protection for academic records: four of its major institutions of higher education—Temple University, Pennsylvania State University, the University of Pittsburgh, and Lincoln University—are considered state-related and exempt from the Pennsylvania Right to Know Law (RTKL) because they are not state agencies under the RTKL. However, 14 Pennsylvania universities are considered state-owned and subject to the RTKL, which offers them exemptions for unpublished articles, research-related materials, and scholarly correspondence. There is no Pennsylvania case law evaluating the RTKL protection as it applies to state universities. Pennsylvania also has a deliberative process exemption that it has applied for records that are 1) internal to the agency—maintained internal to one agency or among governmental agencies; 2) deliberative in nature; and 3) predecisional—created prior to a related decision.	• Major institutions of higher education excluded • Strong statutory exemption that details specific records protected • Deliberative process exemption
Rhode Island	B	The Rhode Island Access to Public Records Act (APRA) offers protection for preliminary drafts, and in June 2017, Rhode Island amended the statute to add specific protection for university research. The new language gives protection to preliminary drafts, notes, impressions, memoranda, working papers, and work products, including those involving research at state institutions of higher education. There is no Rhode Island case law evaluating either the preliminary drafts or research exemption. Nor are there any interpretations by the Office of the Attorney General, which issues findings and files lawsuits regarding APRA complaints.	• Strong statutory exemption for research that details specific records protected • Deliberative process exemption

South Carolina	B	The South Carolina Freedom of Information Act contains detailed protections for both proprietary and nonproprietary research records until published, publicly released, or patented. The exemption for nonproprietary research specifies that it applies to research notes and data, discoveries, research projects, proposals, methodologies, protocols, and creative works. There is no South Carolina case law analyzing this exemption.	• Strong statutory exemption that details specific records protected
South Dakota	B	The South Dakota Public Records Law offers strong statutory protection for research as well as exemptions for correspondence, working papers, and personal correspondence for public officials or employees. There is no South Dakota case law evaluating these statute sections, although in at least once instance, the University of South Dakota has used the research protection statute provision to deny disclosure of records relating to scientific research. The law also contains protections for commercial and proprietary information related to research, and a deliberative process exemption.	• Strong statutory exemption that details specific records protected • Deliberative process exemption
Tennessee	C	The Tennessee Open Records Act contains no protection for research. A separated statute section, found in the Tennessee Education Code, protects sponsored research or research in instances where disclosure would impact the outcome of the research, harm a university's ability to patent or copyright the research, or affect any other proprietary rights. There is no Tennessee case law evaluating this statute, so the application of this language, especially in the case of non-sponsored research, is unknown. While Tennessee courts have applied a common law deliberative process exemption, it has been limited to senior government officials and might not apply to university researchers.	• Statutory protection for sponsored research or research where disclosure may impact the outcome of the research • Deliberative process exemption (narrowly applied)
Texas	D	The Texas Public Information Act has limited protection for trade secrets and commercial information where disclosure would cause harm to the person from whom the information was obtained. The Texas Education Code has some additional protections for information that has the potential to be sold, licensed, or traded for a fee. Texas Attorney General Opinions have applied this provision and withheld records that can be shown to have the potential to be sold, licensed, or traded for a fee, but allowed disclosure of records that do not meet this standard. The statute also provides an inter/intra-agency memorandum exemption, which has been used to withhold university evaluation records that reflected a subjective opinion of the responder, where disclosure could prevent candid responses in future evaluations.	• Potential protection for research that has the potential to be sold, licensed or traded for a fee • Deliberative process exemption (narrowly applied)

Utah	B	The Utah Government Records Access and Management Act (GRAMA) offers very strong statutory protection for research records. GRAMA specifically protects unpublished notes, data, and information relating to research at an institution of higher education, as well as unpublished manuscripts, unpublished lecture notes, and scholarly correspondence. There is no Utah case law evaluating these exemptions, but the wide scope of the exemption and the broad range of records exempted are clearly defined in the statute. GRAMA does allow for court-ordered disclosure of otherwise exempted records where the court determines that the interest of public access outweighs or is equal to the interest of restriction.	• All scholarly records excluded • Deliberative process exemption (drafts protected, no relevant case law yet)
Vermont	C	The Vermont Public Records Act protects research records until they are published or publicly released. This protection extends to research notes and correspondence. There is no Vermont case law evaluating this exemption, and it is unclear whether the protection would remain for prepublication notes and correspondence after the results of research are published.	• Strong statutory exemption that details specific records protected
Virginia	B	The Virginia Freedom of Information Act protects proprietary information collected by or for faculty or staff of public institutions of higher education. The Virginia Supreme Court interpreted the statute to protect the research emails of a University of Virginia climate science professor, holding that all of his emails fell within the definition of the term proprietary for purposes of the statute, and such records were exempted from disclosure.	• Statutory exemption with case law applying the exemption
Washington	D	The Washington Public Records Act offers very limited protection for research data, the disclosure of which may produce private gain and public loss. The statute provides a deliberative process exemption that has been applied to research records, but Washington courts have taken a very strict approach, holding that once a final decision has been made, the predecisional records relating to that final decision are no longer exempt under the privilege.	• Statutory protection only for research with potential commercial value (private gain/public loss) • Deliberative process exemption (narrowly applied)
West Virginia	B	The West Virginia Freedom of Information Act offers no statutory protection from disclosure for research. The statute does provide an internal memorandum exemption, which has been used successfully in West Virginia courts to prevent disclosure of a professor's drafts, data compilations and analyses, proposed edits, emails, and other communications related to the publication of scholarly articles.	• Deliberative process exemption (applied by court to prevent disclosure of research records)

Wisconsin	D	The Wisconsin Public Records Law (PRL) offers no statutory protection from disclosure for research. However, the definition of record under the PRL does not include drafts or notes prepared for the originator's personal use but Wisconsin courts apply a very strict interpretation of this exemption. Information qualifying as a trade secret is exempted from disclosure. The Wisconsin Attorney General has decided in at least one instance that raw research data should be protected. Absent a statutory exemption, Wisconsin courts will use a common law balancing test to determine whether records may be withheld if the public interest in doing so is greater than the public interest in disclosure. There are no cases applying this balancing test to research records.	• Deliberative process exemption (narrowly applied to research)
Wyoming	C	The Wyoming Public Records Act protects research projects being conducted by a state institution, but there is no Wyoming case law analyzing its application. The Wyoming Public Records Act also provides an inter/intra-agency memorandum exemption, which Wyoming courts have found to incorporate a deliberative process exemption. The exemptions have been used to withhold records that are predecisional and deliberative, but there is no case law applying the exemptions to research or other university records.	• Statutory exemption for research project (no case law yet) • Deliberative process exemption (no relevant case law yet)

ALABAMA

D

I. ANALYSIS

The Alabama Open Records Act offers no statutory protection from disclosure for research. Absent a specific exemption, Alabama courts will apply a common law rule of reason balancing test to determine if the public interest in disclosure outweighs the public interest in withholding the records based on the facts of the specific case. The courts must apply this test strictly, with a presumption in favor of disclosure.

II. STATUTE

OPEN RECORDS LAW

Alabama Open Records Act, Ala. Code §§ 36-12-40 to -46Ala. Code §§ 36-12-40 to -46

KEY STATUTORY PROVISIONS (EXCERPTS)

ALA. CODE § 36-12-40

Rights of citizens[1] to inspect and copy public writings; exceptions.

(a) Every resident has a right to inspect and take a copy of any public record of this state, except as otherwise expressly provided by applicable law. Provided however, registration and circulation records and information concerning the use of the public, public school, or college and university libraries of this state shall be exempted from this section. Provided further, any parent of a minor child shall have the right to inspect the registration and circulation records of any school or public library that pertain to his or her child. Notwithstanding the foregoing, records concerning security plans, procedures, assessments, measures, or systems, and any other records relating to, or having an impact upon, the security or safety of persons, structures, facilities, or other infrastructures, including without limitation information concerning critical infrastructure, as

[1] Even though the 2024 amendments changed the Act's scope from citizens to residents, the title does not appear to reflect this change.

defined at 42 U.S.C. §5195c(e), and critical energy infrastructure information, as defined at 18 C.F.R. §388.113(c)(1), the public disclosure of which could reasonably be expected to be detrimental to the public safety or welfare, and records the disclosure of which would otherwise be detrimental to the best interests of the public shall be exempted from this section. Any public officer who receives a request for records that may appear to relate to critical infrastructure or critical energy infrastructure information, shall notify the owner of such infrastructure in writing of the request and provide the owner an opportunity to comment on the request and on the threats to public safety or welfare that could reasonably be expected from public disclosure of the records.

III. CASES

KEY CASES

Cases concerning academic institution records:

Stone v. Consolidated Publishing Company, 404 So. 2d 678 (Ala. 1981)

- Holding: The Alabama Supreme Court held that, absent specific legislative action specifying exemptions to the statute, courts must apply a rule of reason balancing test.
- Facts: The requestor sought access to financial records of Jacksonville State University and its public relations company, JSU Reserve Public Relations Corporation.
- Summary:
    - The court found that the records of both constituted public writings under §36-12-40 (defined as such records as reasonably necessary to record the business and activities required to be done or carried on by a public officer, so that the status and condition of such business and activities can be known by citizens). Absent specific legislative action specifying exemptions to the statute, courts must apply a rule of reason test.
    - Here the court stated, "Recorded *information received by a public officer in confidence,* sensitive personnel records, pending criminal investigations, and records the disclosure of which would be detrimental to the best interests of the public are *some* of the areas which may not be subject to public disclosure."[2]
    - Courts must "balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference."[3]
    - The case was remanded to trial court for determination of fact based on this rule of reason test. It is not known what happened upon remand.

[2] *Stone v. Consolidated Pub. Co.,* 404 So. 2d 678, 681 (Ala. 1981) (emphasis added).

[3] *Id*.

OTHER POTENTIALLY RELEVANT CASES

Chambers v. Birmingham News Co., 552 So. 2d 854 (Ala. 1989): The Alabama Supreme Court found that exceptions and use of the rule of reason test set forth in *Stone* "must be strictly construed and must be applied only in those cases where it is readily apparent that disclosure will result in undue harm or embarrassment to an individual, or where the public interest will clearly be adversely affected, when weighed against the public policy considerations suggesting disclosure. These questions, of course, are factual in nature and are for the trial judge to resolve."[4]

Birmingham News Co. v. Muse, 669 So. 2d 138 (Ala. 1995): In an earlier decision in this case,[5] the Alabama Supreme Court had held that the trial court must use a rule of reason test to evaluate whether letters between the Auburn University President and the National Collegiate Athletic Association (NCAA) about an NCAA investigation should be disclosed. On remand, the trial court applied the rule of reason test and found that the records should be withheld; the trial court's decision was affirmed by the Alabama Supreme Court.

Health Care Auth. for Baptist Health v. Cent. Alabama Radiation Oncology, LLC, 292 So. 3d 623, 633 (Ala. 2019): The Alabama Supreme Court held that a health care authority was subject to Alabama's open records law, because "it chose to partner with the University of Alabama to become a government-authorized health-care authority" and that relationship offered many benefits. Therefore, it must also be subject to the responsibilities, such as being subject to open records requests.

IV. OTHER NOTES

The Open Records Act was amended in 2024. The amendment, Act 2024-278, § 1, eff. Oct. 1, 2024, establishes the procedures for submitting proper records requests and for public officers to respond to such requests. Most notably, the amendment expands the right to inspect and take a copy of any state public record to any resident; the prior text only allowed citizens to do so.

[4] *Chambers v. Birmingham News Co.,* 552 So. 2d 854, 856 (Ala. 1989).

[5] *Birmingham News Co. v. Muse,* 638 So. 2d 853 (Ala. 1994).

ALASKA

C

I. ANALYSIS

The Alaska Public Records Act does not protect research from disclosure. However, the Alaska Education, Libraries, and Museums Statute contains a Confidentiality of Research Law that protects proprietary information generated by the University of Alaska until it is publicly released. Alaska also has a common law deliberative process exemption.

II. STATUTE

OPEN RECORDS LAW

Alaska Public Records Act, Alaska Stat.§§ 40.25.100 to .295

KEY STATUTORY PROVISIONS (EXCERPTS)

ALASKA STAT. § 40.25.120

Public records; exceptions; certified copies

(a) Every person has a right to inspect a public record in the state, including public records in recorders' offices, except

(4) records required to be kept confidential by a federal law or regulation or by state law;

Alaska Statutes Title 14. Education, Libraries and Museums, Alaska Stat. §14.40.453

ALASKA STAT. § 14.40.453

Confidentiality of Research

The public records inspection requirements of Alaska Stat. 40.25.110 — 40.25.121 do not apply to writings or records that consist of *intellectual property or proprietary information received, generated, learned, or discovered during research conducted by the University of Alaska or its agents or employees until publicly released, copyrighted, or patented, or until the research is terminated,* except that the university shall make available the title and a description of all research projects, the name of the researcher, and the amount and source of funding provided for each project.

(Emphasis added.)

III. CASES AND OPINIONS

KEY CASES

There are no open records cases concerning research.

Cases addressing the deliberative process privilege in other contexts:

Gwich'in Steering Committee v. State, Office of the Governor, 10 P.3d 572 (Alaska 2000)

- Holding: The Alaska Supreme Court held that records relating to state lobbying and public relations efforts regarding opening the Arctic National Wildlife Refuge for oil exploration and drilling were exempt from disclosure under a common law deliberative process privilege.
- Facts: The requestors, a nonprofit organization, sought access to records related to lobbying and public relations efforts by the governor's office regarding oil exploration and drilling in the Arctic National Wildlife Refuge. The governor's office withheld disclosure, claiming that the documents were protected under the deliberative process privilege.
- Summary:
    - The deliberative process privilege is a common law exemption incorporated into Alaska statute via the § 40.25.120(a)(4) exemption for records required to be kept confidential by state law. To be exempt under the state deliberative process privilege, the records in question must be predecisional and deliberative.[1]
    - To qualify as predecisional, a communication must have been made before the deliberative process was completed—while the privilege does not protect postdecisional material, predecisional communications do not lose the privilege after a decision has been made.
    - To be considered deliberative, the communication must reflect the give-and-take of the decision-making process and contain opinions, recommendations, or advice about agency policy. If both of these standards are met, focus shifts to a balancing test.
    - The presumption is that the deliberative process privilege favors nondisclosure, with the burden falling on the party seeking disclosure to show that the public's interest in disclosure outweighs the government's interest in shielding the information.

[1] *Gwich'in Steering Comm. v. State, Office of the Gov.*, 10 P.3d 572, 579 (Alaska 2000).

- In this case, the court found that the records in question were predecisional and deliberative, and the public interest in disclosure did not outweigh the government interest in shielding them.

Griswold v. Homer City Council, 428 P.3d 180 (Alaska 2018)

- Holding: The Alaska Supreme Court held that communications between an attorney and the city board were protected from public disclosure under the deliberative process exemption.
- Facts: Appellant Frank Griswold submitted public records requests for all written records of communication between members of the Homer Board of Adjustment (the Board), City of Homer (the City) employees, and attorneys for the City leading up to the Board's decision in a separate case involving him. The City refused to release the records, claiming the deliberative process exemption applied and the lower court found in favor of the City, prompting Griswold to appeal.
- Summary:
    - The deliberative process privilege is a judicially-recognized exemption to the Public Records Act.
    - Public officials may withhold a communication under the deliberative process exemption when the communication is both deliberative and predecisional. Once those requirements are met, the court must balance the public interest in disclosure with the public agency's interest in confidentiality.
    - To qualify as predecisional the communication must have been made before the deliberative process was completed. While post-decisional communications are not protected, predecisional communications do not automatically lose the privilege once the decision has been made for fear that disclosure of past communications could harm future deliberations.
    - To qualify as deliberative the communication must reflect the give and take of the decision-making process and contain opinions, recommendations, or advice about agency policy. Purely factual material will not be considered deliberative unless the facts are inextricably intertwined with the policy making process.
    - If a document is both predecisional and deliberative then the default presumption in favor of disclosure shifts to a presumption in favor of nondisclosure. The party seeking access to the document must overcome that presumption by showing that the right of a citizen to have access to the public records is greater that the right of the agency to be free from unreasonable interference.
    - The Alaska Supreme Court upheld the lower court decision that communications relating to the Board's decision are subject to the deliberative process exemption as they occurred before the decision was issued and contained give-and-take on the wording of the decision. This established a presumption of nondisclosure so the court then applied a balancing test. This application supported nondisclosure, as the disclosure of predecisional communications between members of judicial or quasi-judicial bodies and their supporting staff could "undermine public confidence in the judicial process and affect the quality of governmental decisionmaking."[2]

[2] *Griswold v. Homer City Council*, 428 P.3d 180, 189 (Alaska 2018).

OTHER POTENTIALLY RELEVANT CASES AND OPINIONS

McCloud v. Parnell, 286 P.3d 509 (Alaska 2012): The Alaska Supreme Court held that when state employees use private email accounts to send and receive emails about state business, those messages are public records.

Attorney General Office File No. 661-08-0388 (2008): The Attorney General's office stated that personal emails generated via cell phone used in part for state business and purchased with an allowance from the state are not public records. They are not accounts or writings developed or received by a public agency and are not preserved for their informational value or as evidence of the organization or operation of the public agency. However, the fact that these cell phones are also used for business means a court may be required to review all call records and messages to locate those that concern state business. [3]

[3] Available at https://law.alaska.gov/pdf/opinions/opinions_2008/08-012_661080388.pdf [https://perma.cc/3PVB-CJ8L].

ARIZONA

D

I. ANALYSIS

The Arizona Public Records Law contains no protection for research. A different statute section, found in the Arizona Education statute, protects university research from disclosure, but contains a provision that states the protection will not apply if the subject matter of the records becomes available to the general public. The term "subject matter" is not defined, and the interpretation of this provision was the subject of litigation in an open records case seeking the emails of two University of Arizona researchers. The university was ultimately forced to disclose these emails but the decisions in this case failed to provide clarity in regard to what is meant by "subject matter."

Arizona also has a common law balancing test that can be used to protect records where the disclosure would be contrary to the best interests of the state. In evaluating the disclosure of University of Arizona researchers' emails, the trial court held that the disclosure of university research emails is not contrary to the best interests of the state.

II. STATUTE

OPEN RECORDS LAW

Arizona Public Records Law, Ariz. Rev. Stat. Ann. §§ 39-101 to -161

KEY STATUTORY PROVISIONS (EXCERPTS)

Arizona Revised Statute Title 15, Education, Ariz. Rev. Stat. §15-1640

ARIZ. REV. STAT. § 15-1640

Public records exemptions; confidential information; historical records; donor records

A. *The following records of a university under the jurisdiction of the Arizona board of regents are exempt* from title 39, chapter 1, article 2:

1. *Information or intellectual property that is not available to the public and that is a trade secret as defined in section 44-401 or that is either:*

(a) *Contained in unfunded grant applications or proposals.*

(b) *Developed by persons employed by a university, independent contractors working with a university or third parties that are collaborating with a university, if the disclosure of this data or material would be contrary to the best interests of this state.*

(c) *Provided to a university by a third party pursuant to the terms and conditions of a contract between the university and the third party*. In order to qualify for the exemption prescribed in this subdivision, all of the following criteria must be met:

(i) The contract specifies that the information being provided to the university is confidential and that there is a need to maintain that confidentiality.

(ii) The contract is approved before the contract becomes effective by an official of the university who is authorized to sign these contracts.

(iii) The contract includes the name or names of the third party and a general description of the research or other work that is the subject of the contract in a manner sufficient to provide the public with the information necessary to understand the nature of that research or other work.

(iv) Except for the exemptions from public disclosure prescribed in this section, the contract will become a public document that is subject to title 39, chapter 1, article 2 when the contract is executed.

(d) Composed of *unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews.*

2. Historical records and materials donated to a university by a private person or a private entity, if restricted access is a condition of the donation. The exemption provided by this paragraph shall expire no later than twenty years after the original donation.

3. All records concerning donors or potential donors to a university, other than the names of the donors and the description, date, amount and conditions of these donations.

B. This section does not affect the issues to be decided between a university and a contracting party, including issues related to the university's right to publish the data and the results of the university's research or discoveries and the timing of any related publication.

C. *Any exemption provided by subsection A of this section shall no longer be applicable if the subject matter of the records becomes available to the general public.*

(Emphasis added.)

III. CASES

KEY CASES

Case concerning research records:

Energy & Environment Legal Institute v. Arizona Board of Regents, No. C20134963 (Ariz. Sup. Ct., August 29, 2018)[1]

- Holding: The Arizona Superior Court, a trial court, ruled that A.R.S. § 15-1640 did not apply to exempt emails from two University of Arizona climate scientists, and that disclosure of the emails was not contrary to the best interests of the state.
- Facts: The requestor sought access to 13 years of research emails belonging to two University of Arizona climate scientists. The Arizona Board of Regents produced some emails and withheld others, arguing that the withheld emails were protected under the research exemption § 15-1640 and a common law balancing test.
- Summary: In 2015, the trial court applied Arizona's common law balancing test, which allows the withholding of public records if the public interest in withholding outweighs the public interest in disclosing. The court concluded that the Arizona Board of Regents had not abused its discretion in refusing to produce all of the scientists' emails. Following an appeal and remand over the standard of review, the trial court reapplied Arizona's common law balancing test in 2016. The court concluded that the public interest in withholding the emails was outweighed by the public interest in disclosing the emails. In 2017, following a second remand, the trial court judge ruled that A.R.S. § 15-1640 did not apply to the emails and reiterated that disclosure of the emails was not contrary to the best interests of the state. In 2018, the Board of Regents was ordered to turn over all of the emails.
    - Energy & Environment Legal Institute (E&E Legal), a group that disputes the scientific evidence for climate change, sought a 13-year span of research emails from two University of Arizona climate scientists. E&E Legal often attempts to use open records laws to obtain climate scientists' emails, including—under its previous name, the American Tradition Institute—a case in Virginia, *American Tradition Institute v. Regents of the University of Virginia,* 287 Va. 330 (Va. 2014) (which ruled that the Virginia state open records law protected faculty research emails from disclosure).[2]
    - The Board of Regents released some emails to E&E Legal but withheld over 1,700 others, arguing that they were protected under both the research exemption § 15-1640 and a common law balancing test from *Mathews v. Pyle,* 251 P.2d 893 (Ariz. 1952), which allows for the withholding of records if the public interest in withholding outweighs the public interest in disclosing.
        - In support of its argument that the public interest was better served by withholding the emails, the Board of Regents produced numerous affidavits from

1 Decision available at https://www.csldf.org/wp-content/uploads/2019/09/ASC-Minute-Letter-08-29-2018.pdf.

2 See page 209 of this report.

scientists, university administrators, and grantmakers that explained likely harms from producing thousands of scientists' research emails.[3]

- In a March 2015 ruling,[4] the trial court concluded that the Board of Regents had not "abused its discretion or acted arbitrarily or capriciously" in withholding the emails. E&E Legal appealed this decision, and in December 2015, the Arizona Court of Appeals remanded to the trial court with an instruction to use a de novo review standard instead of an abuse of discretion standard. On remand in 2016, the trial court reversed itself and concluded that, after balancing the interests equally, disclosure was required.[5] Neither the March 2015 nor the June 2016 trial court decisions cited A.R.S. § 15-1640 or explained how it might apply (or not apply) to the academic emails sought by E&E Legal.
- On appeal the second time in September 2017, the appellate court concluded that the trial court "did not consider the application of § 15-1640" and, despite earlier briefings by the parties, noted that the trial court may not have been aware of this protection. The appellate court reversed the June 2016 trial court judgment and remanded for further proceedings to analyze whether § 15-1640 applied to the emails sought.
- In November 2017, the trial court issued a ruling that stated "[d]isclosure of the subject documents is not contrary to the best interests of the State of Arizona" and "[t]o the extent that any of the documents could accurately be described as unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews, the subject matter of the documents has become available to the general public." Consequently "ARS § 15-1640 does not preclude disclosure of the subject records." The trial court stated that, "[w]ith this ruling, the Court hopes to reassure the Court of Appeals and the parties that all arguments made at the trial level were considered and all relevant law applied."
- None of the decisions in this case have provided clarity on how to interpret what is the "subject matter" of a record.
- Following the November 2017 trial court ruling, the Board of Regents petitioned for a new trial but that petition was denied in February 2018; the Board of Regents filed for a stay on the disclosure pending an appeal but the trial court also denied this request. The Board of Regents appealed again for a stay of the disclosure until their underlying appeal was concluded, but the Supreme Court denied this request in August 2018. The Board of Regents ultimately disclosed the requested records of climate scientists Malcolm Hughes and Jonathan Overpeck. The court also entered a judgment awarding E&E Legal $26,828 in attorney fees and $7,103.97 in taxable costs.

[3] For an example of these declarations, the July 28, 2014 declaration of Dr. Malcolm Hughes is available at www.csldf.org/resources/2014-07-28-Hughes-declaration-EELI-v-U-of-A.pdf.

[4] Decision available at https://www.csldf.org/resources/19966054.pdf.

[5] Decision available at https://www.csldf.org/resources/2016-06-14-decision-EELI-v-U-of-A.pdf.

OTHER POTENTIALLY RELEVANT CASES

Arizona Board of Regents v. Phoenix Newspapers, Inc., 806 P.2d 348 (Ariz. 1991): The Arizona Supreme Court held that Arizona State University was right to withhold 239 names from a list of candidates being considered for university president from an open records request. The court determined that revealing these names would "chill the attraction of the best possible candidates for the position" as the prospective candidates—including people nominated by others without their knowledge—"may find it embarrassing and harmful to his or her career" to have the names released. In determining that protection was warranted, the court noted that in other cases, "publicity attendant to the search has proven detrimental to the search process, resulting in lesser qualified, but thicker skinned, persons applying."[6] The interests of the state, the court concluded, "are best served by not discouraging the 'cream' from applying" and thus protection was warranted. However, the court did uphold the trial court's decision to order the release of the names of 17 finalists, as "[c]andidates who actively seek a job … must expect that the public will, and should, know they are being considered. The public's legitimate interest in knowing which candidates are being considered for the job therefore outweighs the countervailing interests of confidentiality, privacy and the best interests of the state."[7]

Abraham v. Arizona Board of Regents, 563 P.3d 632 (Ariz. Ct. App 2025): The requestor[8] made numerous public records requests of the University of Arizona ("University") for records concerning meetings of faculty committees, the hiring of certain academic officials, and an outside scholar's speaking engagement. In response, the University disclosed some materials in full, disclosed some materials with redactions, and withheld some materials, citing privacy, confidentiality, and the best interests of the state. Responding to a special action filed against the Arizona Board of Regents to compel disclosure of the redacted and withheld records, the trial court ruled that the requestor was not entitled to additional records and denied his requests for attorney fees.

On appeal, the requestor argued that the trial court had improperly reviewed the University's withholding and redaction decisions using an abuse of discretion standard instead of a de novo standard.[9] The Arizona Court of Appeals held that courts reviewing such disclosure decisions must apply a two-pronged scope of review: (1) considering "de novo whether the officer or public body has invoked a specific, legally sufficient harm that is grounded in confidentiality, privacy, or the best interests of the state"; and if so, (2) then applying an "abuse-of-discretion review in evaluating the withholding and redaction decisions for specific documents."[10] Applying this standard, the Court of Appeals found that the University's explanation for its withholding and redaction decisions was legally sufficient and that the University had

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6 *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 806 P.2d 348, 352 (Ariz. 1991).

7 *Id.* (internal citations and modifications omitted.)

8 The requestor in this case, Matthew Abraham, was a professor at the University of Arizona. Along with two other professors, Abraham was allegedly excluded from the slate of candidates for the University's Committee on Academic Freedom and Tenure (CAFT) "based on rumors that they're 'problematic' and have 'hidden agendas.'" (CAFT is a faculty governance committee tasked with safeguarding academic freedom and tenure with the jurisdiction to conduct hearings about matters concerning the faculty member employment and grievances by or against faculty members.) In addition to filing the open records lawsuit against the University, Abrahams had also filed multiple grievances alleging violations of his expressive rights. The University denied that professors deemed problematic were excluded from the ballot, "[h]owever, in investigating the allegations that faculty were improperly excluded, the faculty senate itself said the proper process was not followed." Sabrina Conza, *Three 'Problematic Professors' Excluded from Selection for University of Arizona's Academic Freedom Committee*, FIRE (Nov. 10, 2022), https://www.thefire.org/news/three-problematic-professors-excluded-selection-university-arizonas-academic-freedom-committee [https://perma.cc/MB9B-ZYXW].

9 The Court of Appeals also considered and denied plaintiff's request for relief on two other procedural issues: (1) whether the plaintiff was eligible for money damages based on his claim that the University wrongfully destroyed a record although he did not file a "notice of claim"; and (b) whether the trial court had properly granted the University summary judgment on a claim that was time-barred by the statute of limitations.

10 *Abraham v. Board of Regents*, 563 P.3d 632 (Ariz. Ct. App. 2025), at para. 3.

acted within its discretion, thus reaffirming the trial court's decision that the requestor was not entitled to the additional records.

IV. OTHER NOTES

A November 2018 hearing in the above case, *Energy & Environment Legal Institute v. Arizona Board of Regents*, set deadlines for turning over emails. Following this, Michael Mann, a climate scientist who was the subject of a similar case in Virginia, published a blog post[11] in which he proactively disclosed emails that were sent among himself, Overpeck, and Hughes. Mann stated in his post that he believed that once E&E Legal had the emails, they would immediately begin "distributing them online with a series of misleading and disingenuous mischaracterizations, choosing a few phrases here and there to misrepresent me and other scientists and to falsely accuse us of all manner of misdeeds." To try to prevent this from occurring, Mann published the emails with annotations by a group of independent climate science experts that interpreted the exchanges and discussions contained within the messages.

[11] Michael Mann, *Climate Scientist Michael Mann Releases Emails Ahead of University of Arizona Response to E&E Legal*, Nov. 29, 2018, https://www.desmogblog.com/2018/11/29/michael-mann-statement-arizona-emails-released-eeli [https://perma.cc/EL88-VQX4].

ARKANSAS

F

I. ANALYSIS

The Arkansas Freedom of Information Act offers no statutory protection from disclosure for research. Arkansas has very little in the way of other statutory or case law that could be used to protect research. However, Arkansas's FOIA does have an exemption for records that, if disclosed, would give advantage to competitors.

II. STATUTE

OPEN RECORDS LAW

Arkansas Freedom of Information Act, Ark. Code Ann. §§ 25-19-101 to -110

KEY STATUTORY PROVISIONS (EXCERPTS)

ARK. CODE ANN. § 25-19-105

Examination and copying of public records

(b) It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter:

(9)(A) Files that if disclosed would give advantage to competitors or bidders;

III. CASES

KEY CASES

There are no open records cases concerning research.

OTHER POTENTIALLY RELEVANT CASES

Arkansas Department of Finance & Administration v. Pharmacy Associates, Inc., 970 S.W.2d 217 (Ark. 1998): The Arkansas Supreme Court found that the competitive advantage exception to disclosure may apply to protect documents in the state's possession if release of the information would result in competitive harm to the person who supplied it. This is true even if the state owns the documents or does not have proprietary interest in the records in its possession.

Arkansas Gazette v. Southern State College, 620 S.W.2d 258 (Ark. 1981): The Arkansas Supreme Court held that the exemption for educational records extends only to individual academic records; the court declined to extend this "scholastic" exemption for disclosure of academic records to a list of payments made to student athletes. The statute was designed to protect confidential information, the disclosure of which would violate a student's reasonable expectation of privacy; the court determined that a student should not reasonably expect privacy regarding the amount of state funds dispersed to him.

Pulaski County v. Arkansas Democrat-Gazette, 264 S.W.3d 465 (Ark. 2007): The Arkansas Supreme Court found that personal emails on public email systems are considered public records if the emails constitute a record of the performance of the official functions that should be carried out by a public official or employee. In this case, the court found that personal emails relating to a romantic relationship between a county executive and a third-party contractor were subject to disclosure as the romantic relationship between the executive and the contractor was indistinguishably intertwined with the business relationship. The emails in question often contained both business and personal issues.

IV. OTHER NOTES

A bill seeking to exempt "documents, records, papers, data, protocols, information or materials in the possession of a community college or state institution" from disclosure under the Freedom of Information Act was introduced in the Arkansas House in 2015 but died in committee.[1]

In 2023, House Bill 1726 sought to create exemptions from disclosure for deliberative process records and for "Data, records, or information that is: (i) Of a proprietary nature; (ii) Produced or collected by faculty, staff, students, or contractors of an institution of higher education or a public or private entity supporting or participating in the conduct of research on agricultural, medical, commercial, scientific, technical, scholarly, institutional, or artistic matters, whether sponsored by the institution of higher education alone or in conjunction with a contractor, governmental agency, or public or private entity; and (iii) Not publicly released, published, copyrighted, or patented." The bill died in committee.[2]

[1] Ark. HB 1080, 90th Gen. Assembly § 1 (2015), 2015 Bill Text AR H.B. 1080, http://www.arkleg.state.ar.us/assembly/2015/2015R/Bills/HB1080.pdf [https://perma.cc/T569-HH6N]; Legiscan.com, *AR HB1080 | 2015 | 90th General Assembly | Legiscan*, https://legiscan.com/AR/bill/HB1080/2015 [https://perma.cc/YA6C-J59U].

[2] Ark. HB 1726, 94th Gen. Assembly (2023), 2023 Bill Text AR H.B. 1726, https://arkleg.state.ar.us/Bills/Detail?id=HB1726&ddBienniumSession=2023%2F2023R [https://perma.cc/KU7W-LVAU].

CALIFORNIA

C

I. ANALYSIS

The California Public Records Act offers no statutory protection from disclosure for research. However, California has a "catch all" statutory balancing test that exempts records where the public interest in withholding the records is found to be greater than the public interest in disclosing them. This balancing test has been used to deny disclosure of prepublication communications related to an academic study, and disclosure of university records related to research on animals, where such records could be used to threaten or harm the scientists named within. California also has a deliberative process exemption, also subject to the public interest balancing test.

II. STATUTE

OPEN RECORDS LAW

California Public Records Act, Cal. Gov't Code § 7920.00 et seq.
Known as: CPRA

KEY STATUTORY PROVISIONS (EXCERPTS)

CAL. GOV'T CODE § 7927.500

Disclosure of preliminary drafts, notes, or interagency or intraagency memoranda that are not retained by a public agency in the ordinary course of business

Except as provided in Sections 7924.510, 7924.700, and 7929.610, this division does not require disclosure of any *preliminary drafts, notes, or interagency or intraagency memoranda* that are not retained by a public agency in the ordinary course of business, *if the public interest in withholding those records clearly outweighs the public interest in disclosure.*

CAL. GOV'T CODE § 7922.000

Justification for withholding of records

An agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this division or *that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.*

(Emphasis added.)

III. CASES

KEY CASES

Open records cases concerning scientific research and other academic institution records:

Humane Society of the United States v. Superior Court of Yolo County, 214 Cal. App. 4th 1233 (Cal. Ct. App. 2013)

- Holding: Prepublication communications related to an academic research study may be withheld from disclosure using the balancing test of § 6255, as the public interest in withholding the records is greater than the public interest in disclosure.
- Facts: The Humane Society of the United States (HSUS) petitioned for a writ of mandate to order the Regents of the University of California to disclose records related to the funding, preparation, and publication of a study by the University of California Agricultural Issues Center (AIC) on the effects of a proposed voter initiative on the poultry and egg industry in California. The trial court denied the petition, and HSUS petitioned for an extraordinary writ.
- Summary:
    - The appellate court determined that records need not be disclosed; the case first addressed several procedural issues.
    - Given that California does not have a specific research exemption, the application of the balancing test in § 6255 was at issue. For this exemption to apply, the proponent of nondisclosure must demonstrate that, on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served in disclosing the record.
    - The court recognized that the disclosure of prepublication communications could have a chilling effect on academic research. The court concluded that if researchers expect their communications to become public, they would be less forthcoming with data and opinions, finding that "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."[1]

- The court then balanced this interest with the public interest in disclosure, evaluating whether disclosure would contribute significantly to public understanding of government activities.
- HSUS contended that the objectivity of public university researchers is critical, and when the public university releases a report on the effects of a proposed ballot initiative, there is a public interest in reviewing the records to "ensure that the university: (1) reached accurate conclusions based on sound methodology; (2) was not influenced by outside industries or individuals with a private/business interest in the outcome of the ballot initiative; and (3) did not have a monetary motivation to reach a certain conclusion."[2]
- The court agreed that the objectivity of public university researchers is of vital importance, but it gave greater weight to the Regent's assertion that the report itself addressed these concerns and provided the correct level of disclosure necessary to achieve the goal of ensuring an accurate conclusion based on sound methodology, finding that "[a]s the Regents point out, a published report itself states its methodology and contains facts from which conclusions can be tested…published academic studies are exposed to extensive peer review and public scrutiny that assure objectivity. Here, given 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."[3]
- After evaluating further procedural claims relating to improper influence and segregation of information, the court concluded that the public interest in withholding the records outweighed the public interest in disclosure and denied the writ of mandate.

Physicians Committee for Responsible Medicine v. Regents of the University of California, No. A123220 (Cal. Ct. App. February 4, 2009)[4]

- Holding: Public records in the form of program descriptions for research involving animals were subject to disclosure, but information that could potentially be used by animal rights activists for unlawful acts must be redacted prior to disclosure.
- Facts: The plaintiffs, an animal rights group, sought disclosure of program descriptions submitted to the Association for the Assessment and Accreditation of Laboratory Animal Care for eight University of California (UC) campuses.
- Summary:
  - UC declined to disclose the program descriptions, claiming the public interest in withholding the records outweighed the public interest in disclosure due to the threat of harassment of researchers and damage to facilities from unlawful acts carried out by animal rights activists.

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1 *Humane Soc'y of the U.S. v. Super. Ct. of Yolo County*, 214 Cal. App.4th 1233, 1267 (Cal. Ct. App. 2013).

2 *Id.* at 1268.

3 *Id.*

4 Decision available at https://www.csldf.org/resources/Physicians-Committee-for-Responsible-Medicine.pdf.

- At trial, the judge determined that the records in question were public and they should be disclosed, but that certain information must be redacted prior to disclosure because the public interest in withholding this particular information outweighed the public interest in disclosure.[5]
- On appeal, the appellate court upheld the redactions. Attorney's fees were awarded to the petitioner due to UC's initial refusal to disclose and UC's attempt to use substitute documents to avoid disclosure of the requested records.

Government Accountability and Oversight v. Regents of the University of California, 20STCP012226 (Cal. Super. Ct. 2022) [6]

- Holding: A public agency has the burden to demonstrate with reasonably specific detail that records it withholds are exempt or do not constitute public records. Finding that UCLA had failed to meet this burden for the majority of documents it withheld, the court ordered UCLA to disclose them. However, the court found that emails regarding pre-publication academic research were protected by the deliberative process privilege and emails regarding work with an external environmental non-profit as a private citizen were not public records.
- Facts: Government Accountability and Oversight (GAO) served a CPRA request on two UCLA law professors seeking email correspondence during a period of three years with certain named individuals, including a prominent environmental donor. The records sought related to work done at the Emmett Institute on Climate Change and the Environment relating to the research and development of climate litigation theories.
- Procedural history: The court issued a ruling on a small number of documents in January 2020, and finding tentatively that UCLA had not met its burden to withhold the remainder, allowed UCLA to supplement the record with further supporting evidence. After supplementation of the record in the form of further declarations and logs describing the senders and substance of some emails, the court held a hearing on April 7, and entered a final order on April 18.
- Summary:
    - University of California withheld documents based on the deliberative process privilege exemption, Family Educational Rights and Privacy Act (FERPA), and because some documents were asserted to not be public records.
    - The court granted GAO's petition and ordered disclosure for nearly all internal fundraising documents for which the deliberative process privilege was asserted. Under CPRA, this exemption is subject to a public interest balancing test and UCLA had not provided specific explanations of adverse effects if such conversations became public. The court emphasized that the "specific circumstances matter to the court's weighing of the interests involved," reinforcing the importance of justifying withholdings, and the case-specific nature of the inquiry.

[5] The information to be redacted consisted of: (1) names of researchers and employees involved in animal research and care; (2) specific research protocol numbers and names that could be used to identify researchers; (3) locations and floor plans of animal facilities and laboratories where animal research is conducted; (4) security measures employed by Respondent to protect such facilities; (5) names of third-party vendors who supply Respondent animal programs; and (6) any other information the disclosure of which could endanger Respondent employees or facilities or interfere with ongoing scientific research.

[6] Decision available at https://www.csldf.org/wp-content/uploads/2023/04/2022-04-18-Entry-of-Final-Order-Following-Trial.pdf.

- The court agreed that the deliberative process privilege applied to protect pre-publication academic research. The work appeared to be draft chapters or articles that had been shared with the donor for review and input. The court found a "strong public interest in non-disclosure of such emails," because such disclosure could harm the ability to engage in collaboration and receive frank and candid comments, and could allow others to "steal the thunder" of work before publication.[7] The court also determined that the professor did not waive the privilege by sharing the pre-publication research with a third party, because that third party was a source of information for the publication and thus an interested party.
- For the majority of documents that UCLA asserted were personal emails and thus not public records, the court ordered disclosure. For example, UCLA claimed a batch of documents were not public records because they were personal emails of Professor Ann Carlson, including social emails of congratulation, discussions of recent political appointments, and the professor's opinion of a nonprofit. The court found that the evidence submitted was "inadequate for the court to determine to determine that the emails did not include any discussion related to public UCLA business. Carlson's email discussions of environmental and climate issues using her governmental email address presumably relate in some general sense to her public duties as a law professor."[8] And the emails included a major donor, furthering the assumption that the discussions involved public business.
- The court agreed, however, that certain documents relating to the professor's work as a private citizen with an external environmental nonprofit did not involve government business and therefore were not public records. The documents consisted of meeting agendas and reminders, and privileged materials relating to litigation undertaken by the nonprofit. The court relied on the professor's declaration that the work was done in a private capacity and that it did not involve governmental business of UCLA, even though it was on her university email, and the court's review of the subject lines of the emails, to determine that they were not public records.
- The court denied GAO's request for a declaration that UCLA was in violation of the CPRA, reasoning that the existence of an ongoing legal dispute, in which GAO had won and lost some claims, "suggests that a judicial declaration stating that Respondent violated the CPRA is not a necessary or appropriate remedy. A writ directing Respondent to produce further records is a sufficient remedy in this case."[9]
- The court awarded GAO with $225,000 in court costs and attorneys' fees because the organization prevailed in obtaining an order directing the University to produce a substantial amount of public records. But the court significantly reduced GAO's request for $1.5 million by cutting the billing rate in half, and halving the number of hours spent,

[7] Minute Order at page 48, *Government Accountability & Oversight, P.C. v. University of California*, No. 20stcp01226 (Cal. Super. Ct., Jan. 20, 2022).

[8] Minute Order at page 26, *Government Accountability & Oversight, P.C. v. University of California*, No. 20stcp01226 (Cal. Super. Ct., Apr. 7, 2022).

[9] *Id.* at page 30.

reasoning that GAO had "engaged in litigation activities that were unnecessary or inefficient."[10] "Petitioner's mixed success also justifies a reduction in fees."[11]

People for the Ethical Treatment of Animals, Inc. v. Regents of the University of California CV-2019-172 (Cal. Super. Ct. Jan. 11, 2022)[12]

- Holding: The California Superior Court declined to order disclosure of videos of animal research, finding that the public interest in nondisclosure—protecting academic freedom and researchers safety—was greater than the public interest in disclosure, because the raw video footage without context would contribute little to the public understanding of the research or the expenditure of government funds.
- Facts: In January 2019, PETA filed a California Public Records Act (CPRA) suit against the University of California seeking access to video footage of experiments conducted on monkeys at the University of California, Davis (UC Davis). PETA claimed the videos depicted monkeys being exposed to "psychological torture" and that, as taxpayer funded research, the videos should be made available under the CPRA.
- Summary:
    - UC Davis turned over some of the requested records but withheld others under the "catch all exemption," claiming that the public interest in withholding the records outweighed the public interest in disclosure. The University maintained that because the video records were part of research that was ongoing and not yet published, release would negatively impact the researchers' ability to publish or patent the work. Furthermore, the release of incomplete research might confuse the public with premature exposure to data that has not been scrutinized or peer-reviewed, contrary to the public interest in the dissemination of good science. PETA argued that much of the research in question was already published, and that it was in the public interest to see how taxpayer funds were being used.
    - The court found that UC Davis met its burden of proof in showing that the public interest in nondisclosure outweighs the public interest served by disclosure of the videos. The court found that disclosure would undermine academic freedom, and could result in physical harm to researchers and inhibit future research. Further, the court found that PETA's demand imposed too high of a burden on the University to segregate videos used for already published research studies and to redact private identifying information of researchers depicted in those videos. The court noted that while there is value in the public seeing records pertaining to the conduct of the people's business as a general matter, the disclosure of these videos would only minimally contribute to the public's understanding of government. The raw video footage, taken out of context, could not be well understood by the public and might actually cause misunderstanding of the purpose or methodology of the research undertaken at the research center.
    - PETA did not appeal the ruling, rendering it final.[13]

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[10] Notice of Entry of Order on Petitioner's Motion for Attorneys' Fees at 6, *Government Accountability & Oversight, P.C. v. University of California*, No. 20stcp01226 (Cal. Super. Ct., July 22, 2022).

[11] *Id.*

[12] Decision available at https://www.csldf.org/wp-content/uploads/2023/04/2022-01-11-PETAvsUCruling.pdf.

[13] Andy Fell, *UC Davis Wins Lawsuit Protecting Academic Freedom and Scientific Process* (April 11, 2022), https://www.ucdavis.edu/news/uc-davis-wins-lawsuit-protecting-academic-freedom-and-scientific-process [https://perma.cc/J62T-DK2U].

California Rifle and Pistol Association v. Regents of the University of California CV171068 (Cal. Super. Ct. December 9, 2011)[14]

- Holding: Researchers could withhold certain records relating to lead poisoning in condors but must disclose others based upon the application of a balancing test.
- Facts: The California Rifle and Pistol Association Foundation sought records from multiple University of California, Santa Cruz researchers who were part of a study on lead poisoning in condors caused by the use of lead ammunition by hunters.
- Summary:
    - The request sought writings related to analyses of samples for lead contamination, emails among members of the researcher group using the words "condor," "lead," "blood," and others, all writings discussing analyses of objects for lead contamination, and all writings relating to the analyses that were referenced by the National Park Service news releases.
    - The court stated that it believed the request was made to show that findings linking lead shot to condor mortality were unfounded, and that the evidence would be used to argue that the use of lead shot in condor habits should not be banned.
    - The court identified that in cases where research may impact legislation there is a need to balance the ability of scientists to engage in candid peer review with the need for scientists to be subject to some level of scrutiny by other scientists. The court also noted that the disclosure of research records that may relate to potential legislation could lead to a politically motivated witch hunt and discourage scientists from engaging in such research. The court noted this is counter-productive policy-wise because solid research is essential for good policy decisions.
    - The court applied a balancing test to the research records at issue. It stated that there was a public interest in disclosing the research records because doing so would allow independent analyses of the study data. This is critical when a policy decision is involved as disclosure can reveal any potential bias on the part of researchers or an intent to falsify results.
    - On the other hand, there was public interest in withholding the records as disclosure could allow anomalous results to be highlighted, and potentially confuse the issue and open up researchers to false accusations of bias. Disclosure of such records could chill discussion among scientists and result in less thoroughly analyzed conclusions. The court also noted the significant burden that disclosure would place upon scientists.
    - In balancing the interests, the court concluded that the public had the right to the disclosure of published studies and the raw data contained in those studies, but not data that was excluded from studies or private communications among researchers about studies.
    - Formal presentations made at conferences or before the legislature must also be disclosed, as well as any data that researchers relied on in making their presentations, which they failed to identify as preliminary. However, the public is not entitled to that information if, in a presentation, the researcher relied on and cited unpublished studies and identified them as preliminary.

[14] Decision available at https://www.csldf.org/wp-content/uploads/2019/09/California-Rifle-and-Pistol-v-Regents-of-UC.pdf.

- Unpublished and undisclosed studies also do not need to be made public; it is an unwarranted intrusion on academic freedom to require the disclosure of studies that have been performed but not yet published, especially given that such unpublished studies are not used as the basis for public policy decisions.
- The court was largely unsympathetic to the demands on researchers' time that would be required to comply with the request. The court found it would be fair for the researchers in question to spend one to two hours a week *for as long as necessary* to complete the task. In the case of one researcher, it was estimated this would take 80 weeks.
- Despite the fact that the court noted the goal of the CPRA request in this case was to attack the findings of the researchers in question, they failed to award costs to UC, even though the university prevailed on the main issue at hand stating that "the petition was not frivolous and dealt with important public and legal issues."[15]

Stop Animal Exploitation Now v. University of California Regents, No. BC402237 (Cal. Super. Ct., L.A. County July 16, 2010)[16]

- Holding: The California Superior Court found that the public interest in withholding records related to research on animals, such as records containing the names and other identifying information of researchers, was greater than the interest in disclosure, as release of the records sought created a risk of intimidation and physical harm to those researchers.
- Facts: The plaintiffs, an animal rights group and an individual member of the group, sought disclosure of research protocols, animal care logs, and details about nonhuman primates housed and used by the University of California Los Angeles (UCLA). Citing safety threats posed by disclosure of the records, UCLA declined to disclose them and the plaintiffs sought an order compelling disclosure.
- Summary:
  - In this case, the burden was on UCLA to demonstrate that the records in question were exempt under the express provisions of the California Public Records Act or to show that, on the facts of the particular case, the public interest served by not disclosing the records clearly outweighed the public interest in disclosure.
  - UCLA demonstrated the existence of serious threats to the safety of researchers and their families from animal rights activists. The actual and potential acts of violence and vandalism had an impact on scientific research at UCLA and deterred some researchers from using animals in their research.
  - The court found that disclosure of the requested records would result in "a significant and specific risk of unlawful intimidation and physical harm to the researchers involved in the research and to their families"[17] and that redacting names and identifying information could not mitigate this risk.
  - The plaintiffs argued that disclosure of the records would advance the public interest in enforcing the law regarding the care and use of animals in research. The court stated these interests are protected by other required university disclosures, and as a result, the public interest in disclosure of these records was minimal.

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15 *California Rifle and Pistol Association v. Regents of the University of California* CV171068 (Cal. Sup. Ct. December 9, 2011) at 11.

16 Decision available at https://www.csldf.org/resources/SAEN_-_Order.pdf.

17 *Id.* at 3.

- Therefore, the court held that the public interest in withholding the records was greater than the public interest in disclosure; the plaintiffs' request for declaratory and injunctive relief requiring disclosure of the records was denied.

***Iloh v. Regents of the University of California,* 87 Cal.App.5th 513, 303 Cal. Rptr. 3d 709 (Cal. Ct. App. 2023)(Iloh I)**

- Holding: The California Court of Appeals found that (i) a researcher's post-publication communications were considered "public records" under the CPRA; (ii) the CPRA's catchall exemption from disclosure did not apply with respect to post-publication communications; and (c) the CPRA's exemption from disclosure for personnel files did not apply.
- Facts: Constance Iloh, an assistant professor at the University of California, Irvine (UCI) published four articles on her topic of study in academic journals. The journals later either retracted or corrected all of these articles, at least in part due to inaccurate references or plagiarism concerns. The Center for Scientific Integrity (CSI), a non-profit organization with the mission "to promote transparency and integrity in science and scientific publishing"[18] sent UCI a request under the CPRA "seeking certain postpublication communications between Iloh, the university, and the journals regarding the retracted articles. The university determined the requested documents were subject to disclosure; Iloh disagreed, filed a petition for writ of mandate, and sought a preliminary injunction to prevent disclosure."[19] The trial court denied the Iloh's motion for a preliminary injunction.
- Summary:
    - Given that the Constitution of California requires the people's right of access to information to be broadly construed, the CPRA's exemptions to disclosure must be narrowly construed.
    - Because the CPRA does not include a statutory procedure for an interested party to prevent a public agency from disclosing public records, any such party "must show disclosure is 'otherwise prohibited by law,' that is, that the government agency *lacks* discretion to disclose."[20]
    - The articles at issue did not concern personal matters unrelated to the professor's job but rather discussed topics, and were published in journals, directly relevant to her field of study at UCI. The requested communications likely concerned whether Iloh "committed plagiarism or otherwise violated university policies on academic integrity—an issue tied to the use of public funds."[21] As such, the records requested qualified as "public records" under the CPRA.
    - Because only Iloh's post-publication correspondence was requested, legitimate concerns that the disclosure of prepublication communications could have a chilling effect on the academic process were not applicable.

[18] *Iloh v. Regents of the University of California*, 87 Cal.App.5th 513, 303 Cal. Rptr. 3d 709 (2023), at 715.

[19] *Id*., at 519.

[20] *Id*., at 718 (citing *Amgen v. Health Care Services,* 47 Cal. App. 5th 716, 732 (2020)).

[21] *Id*., at 719.

- Therefore, the court held that Iloh "did not meet her burden of establishing 'a clear overbalance' on the side of nondisclosure."[22]
- Iloh's argument that certain portions of the requested records are exempt under CPRA section 7927.700 ("exempting personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy") failed because (i) it was not clear that any personnel files were requested (the request asked for "correspondence"); and (ii) even if copies of responsive communications were placed in the professor's personnel file, public interest in disclosure outweighed the privacy concerns. The exemption in section 7927.700 was "developed to protect intimate details of personal and family life, not business judgments and relationships."[23]

OTHER POTENTIALLY RELEVANT CASES

California State University, Fresno Association, Inc. v. Superior Court, 90 Cal. App. 4th 810 (Cal. Ct. App. 2001): The California Court of Appeals found records that revealed the identity of donors who entered into license agreements for the purchase of suites in a multipurpose arena being built on a state university campus were public records, and the university must disclose such records in its possession as the public interest in disclosure outweighed public interest in nondisclosure. The court concluded that the public has the right to know the donor-purchasers' identities, because they may have received favorable consideration in contract negotiations.

City of San Jose v. Superior Court, 389 P.3d 848 (Cal. 2017): The California Supreme Court found that when a city employee uses a personal email account to communicate about the conduct of public business, those emails meet the definition of public record and are disclosable.

Doe v. Regents of the University of California, 102 Cal. App. 5th 766 (Cal. Ct. App. 2024). Professors at the University of California, Los Angeles (UCLA) sought a writ of mandate to compel the university to withhold the disclosure of a report, requested under the CPRA, finding that they had engaged in misconduct. The trial court denied the writ of mandate, finding that although disclosure of the report would compromise the professors' substantial privacy interests, such potential harm to the privacy interests did not outweigh the public interest in disclosure. "Among other points, the court observed the professors worked at a public university occupying positions of trust, responsibility and authority; the allegations of misconduct were 'unquestionably serious and substantial'; the public 'has a strong, legitimate and weighty interest in knowing whether and how the university enforces its rules,' especially where professors 'have sometimes used staff to assist in their misconduct'; and the report 'will inform about important governmental activities—the manner in which this public university addressed whistleblower complaints and claims of student victimization by professors.'"[24] On similar grounds, the trial court later denied the professors' subsequent request for a preliminary injunction to block disclosure of notices of intent to dismiss and settlement agreements between the professors and UCLA. On appeal, the Court of Appeals affirmed the

[22] *Id.*, at 720 (citing *Humane Soc'y of the U.S. v. Super. Ct. of Yolo County*, 214 Cal. App. 4th 1233, 1255 (Cal. Ct. App. 2013)).

[23] *Id.*, at 528 (citing *Bakersfield City School Dist. v. Super. Ct.* (2004) 118 Cal. App. 4th 1041,1045).

[24] *Doe v. Regents of University of California*, 102 Cal. App. 5th 766, 770-771 (Cal. Ct. App. 2024).

lower court's decision, agreeing that as the professors "had no likelihood of prevailing on the merits at trial", injunctive relief to block disclosure was not warranted.[25]

Iloh v. Regents of the University of California, 94 Cal.App.5th 947 (Cal. Ct. App. 2023) (*Iloh II*). In its second opinion in the *Iloh v. Regents of the University of California* case (see summary of *Iloh I* above), the California Court of Appeals considered whether to grant requester CSI's special motion to strike its inclusion as a real party in interest in Iloh's petition for a writ of mandate, declaratory relief, and injunctive relief. Iloh's petition was intended to stop UCI from disclosing to CSI communications related to four of Iloh's articles that were later corrected or retracted by journals. CSI filed a special motion under California's anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc., § 425,16 (section 425.16)).

Evaluation of a special motion to strike under the anti-SLAPP statute requires a two-pronged analysis: (1) whether the complaint against the defendant arises from a protected activity (the exercise of free speech or petition rights in connection with a public issue); and (2) whether the plaintiff established a probability of prevailing on the merits of her claim.

The trial court denied CSI's anti-SLAPP motion, finding under the first prong of an anti-SLAPP analysis that "CSI's protected activity of newsgathering may have led to or been incidental to the conduct being challenged (i.e., the disclosure of the records), but it was not the *basis* of Iloh's claims."[26]

The California Court of Appeals disagreed, finding that "[i]n issuing the CPRA request, CSI was engaging in newsgathering so it could report on matters of public interest, such as how a public university funded largely by taxpayer dollars resolves quality or integrity problems in its professors' publications. CSI was therefore engaged in protected activity when it issued the CPRA request."[27] The Court of Appeals further noted that "By targeting and seeking to impede CSI's newsgathering activity, Iloh's petition threatens to chill CSI's speech-related processes like newsgathering; if successful, this could inhibit CSI's exercise of free speech. This is the type of lawsuit the anti-SLAPP statute is designed to address, and it should be stricken if Iloh cannot demonstrate a probability of prevailing on her petition."[28]

The Court of Appeals reversed the trial court's finding on the first prong of the anti-SLAPP analysis and remanded the case back to the trial court with directions that the trial court consider, under the second prong of the anti-SLAPP analysis, whether Iloh had established a probability of prevailing on her claims.

[25] *Id.* at 775.

[26] *Iloh v. Regents of the University of California,* 94 Cal.App.5th 947 (2023) at 954.

[27] *Id.* at 951-52.

[28] *Id.* at 952.

IV. OTHER NOTES

2019 Proposed Legislation

California Assembly Member Laura Friedman introduced AB 700 on February 29, 2019,[29] a bill that proposed changes to the California Public Records Act. While the initial bill did not contain specific language regarding the protection of academic records at public universities, the draft that emerged from committee on March 18, 2019 included detailed exemptions for academic records, including research methods that have not been published, unpublished data, and "correspondence, including, but not limited to, electronic correspondence, from professional peers relating to research, whether or not provided through a formal peer review process or whether relevant publication has occurred."[30]

Unfortunately the draft was met with widespread criticism in the press[31] and vocal opposition from several high profile organizations including People for the Ethical Treatment of Animals (PETA), who actively encouraged their supporters to act to defeat the bill,[32] the American Civil Liberties Union (ACLU), and the American Society of News Editors and the Associated Press Media Editors (the nation's two oldest and most prominent organizations for news editors).[33] A group of environmental and consumer groups also joined together to write an open letter to Assembly Member Freidman urging her to stop the bill.[34] Despite further amendments intended to appease critics, Assembly Member Friedman decided to halt AB 700 in May for the 2019 legislative session.[35]

Pending and Settled Lawsuits as of 2022

In February 2022, the Physician's Committee for Responsible Medicine sued UC Davis for refusing to release documents relating to animal experiments performed in conjunction with Neuralink, a company owned by Elon Musk. UC Davis withheld many documents, claiming the public interest weighed against disclosure. The Physician's Committee obtained at least some of the requested records.[36]

In February of 2022, the Physicians Committee filed a second public records lawsuit in Yolo County Superior Court to compel the university to release videos and photographs of the monkeys, and filed a

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[29] A.B. 700, Reg. Sess., (CA, 2019), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB700 [https://perma.cc/TZY5-SYVL].

[30] *Id.*

[31] *See, e.g.*, *Editorial: Don't weaken open records laws at California's public universities*, San Diego Union-Trib., Apr. 8, 2019, https://www.sandiegouniontribune.com/opinion/editorials/story/2019-04-05/california-public-records-act-universities-exemptions [https://perma.cc/EB6X-JGED].

[32] *Tweet to Defeat California's Proposed 'Lab-Gag' Bill,* PETA, Archived Jul. 18, 2019, https://support.peta.org/page/10360/tweet/1?locale=en-US [https://perma.cc/UHE6-MZ7V].

[33] Available at https://usrtk.org/wp-content/uploads/2019/05/ASNE-APME-letter-on-AB700.pdf [https://perma.cc/Z5A2-ZP65].

[34] Available at https://usrtk.org/wp-content/uploads/2019/04/Second-coalition-letter-in-opposition-to-AB-700.pdf [https://perma.cc/R38G-VWSR].

[35] Jessie Gomez, *California lawmaker halts controversial transparency bill amidst public outcry,* Muckrock, May 7, 2019, https://www.muckrock.com/news/archives/2019/may/07/ab-700-update/ [https://perma.cc/A4EK-A8PT].

[36] *Physicians Committee's Lawsuit Against Elon Musk Company Neuralink Reveals Existence of Hundreds of Photos of Monkeys Used in Painful Experiments,* Business Wire, Sep. 26, 2022, https://www.businesswire.com/news/home/20220926005606/en/Physicians-Committees-Lawsuit-Against-Elon-Musk-Company-Neuralink-Reveals-Existence-of-Hundreds-of-Photos-of-Monkeys-Used-in-Painful-Experiments [https://perma.cc/32GT-88HQ].

federal complaint with the for violations of the federal Animal Welfare Act.[37] Regarding the withheld documents, UC Davis argued that the images were proprietary and would be misunderstood by the public. Physician's Committee argued that these photos are public records created with the use of public funds. It is unclear whether this case has progressed at all since 2022.

Another CPRA case involved the Competitive Enterprise Institute (CEI) and the University of California Los Angeles (UCLA).[38] CEI filed suit in November 2018 after UCLA failed to respond to a public records request seeking the correspondence of two faculty members over a two-month period in 2016. CEI alleged the faculty members were involved in efforts to urge state attorney generals to bring legal actions against "traditional energy industry participants or political opponents of the 'climate policy' agenda."[39] The case was settled in December 2019, but the terms are unknown.

University of California Public Records Guidance

In 2012, the University of California Los Angeles published the "Statement on the Principles of Scholarly Research and Public Records Requests"[40] which was drafted by the Academic Senate-Administration Task Force on Academic Freedom. The statement warns of the danger of politically or similarly motivated public records requests for faculty communications and sets forth the following four principles, which it believes are consistent with the letter and intent of the public records law:

> *Protect the system of peer review at all levels.* Public records requests are neither a substitute for nor an effective check on peer review by the scholarly community, but instead damage the process by threatening scholars into silence when they should be speaking truthfully and frankly about their concerns. The published record is the gold standard on which scholarship rests and it is readily available to the public. Public records requests of private, draft, or pre-publication materials only serve to confound the peer review process, rather than leading to an improvement or check on this process.
>
> *Protect the right of faculty to choose topics and research areas based on intrinsic criteria.* Research that is politically or socially controversial should be subject to the same protections as any other kind of research. If the scholarly process is to function correctly, it must be protected from political, social, religious, or other non-academic criteria of evaluation.
>
> *Provide the same protections to UCLA faculty that colleagues in private universities or corporations enjoy.* Scholarship is inherently collaborative and extends beyond the bounds of a single lab or office or university. Hence, faculty at UCLA should be afforded the same kinds of protection offered elsewhere, including at private universities. Maximum protection of UCLA faculty also is necessary to ensure that our colleagues at other institutions do not experience

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[37] *Physicians Committee's Lawsuit Against Elon Musk Company Neuralink Reveals Existence of Hundreds of Photos of Monkeys Used in Painful Experiments* (Sept. 28, 2022), available at https://www.pcrm.org/news/news-releases/physicians-committees-lawsuit-against-elon-musk-company-neuralink-reveals [https://perma.cc/7HRM-H6QK].

[38] Petition for writ available at http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2018/20181108_docket-18-ST-CP-02832_petition-for-writ-of-mandate.pdf [https://perma.cc/DND3-QB5P].

[39] Complaint at page 4.

[40] Available at https://www.apo.ucla.edu/policies-forms/academic-freedom [https://perma.cc/8LN7-WPZL].

"second-order" chilling effects, *i.e.,* a fear of collaborating with UC faculty due to concern about potential public disclosure of private materials.

Reiterate the value of the longstanding traditions of ethical and professional codes of conduct. Disciplines possess necessary and effective standards that govern the ethics of research. It is this time-tested oversight that ensures accountability. Public records requests should not be allowed to undermine these traditions.

(Emphasis original.)

COLORADO

C

I. ANALYSIS

The Colorado Open Records Act (CORA) protects some research from disclosure, categorizing all requests into (1) those that shall be denied versus (2) those that may be denied. Requests for "specific details of bona fide research projects being conducted by a state institution" may be denied if disclosure to the requester would be contrary to the public interest. The application of this exemption has not been reviewed by the courts.

CORA also has a statutory deliberative process exemption that will exempt records that are predecisional and deliberative. The statute provides that these records shall be denied if the disclosure of such records is likely to stifle honest and frank discussion within the government. However, Colorado courts tend to interpret this exemption narrowly with a strong presumption in favor of disclosure.

II. STATUTE

OPEN RECORDS LAW

Colorado Open Records Act, Colo. Rev. Stat. 24-72-200.1 to -206
Known as: CORA

KEY STATUTORY PROVISIONS (EXCERPTS)

COLO. REV. STAT. § 24-72-204

Allowance or denial of inspection - grounds - procedure - appeal - definitions

(2)(a) The custodian *may deny* the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:

> (III) *The specific details of bona fide research projects being conducted by a state institution, including, without limitation, research projects undertaken by staff or service agencies of the general assembly or the office of the governor in connection with pending or anticipated legislation;*

(3)(a) The custodian *shall deny* the right of inspection of the following records, unless otherwise provided by law . . .:

> (IV) *Trade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data*, including a social security number unless disclosure of the number is required, permitted, or authorized by state or federal law, furnished by or obtained from any person;
>
> (XIII) *Records protected under the common law governmental or "deliberative process" privilege, if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government*, unless the privilege has been waived. The general assembly hereby finds and declares that in some circumstances, public disclosure of such records may cause substantial injury to the public interest. If any public record is withheld pursuant to this subparagraph (XIII), the custodian shall provide the applicant with a sworn statement specifically describing each document withheld, explaining why each such document is privileged, and why disclosure would cause substantial injury to the public interest. If the applicant so requests, the custodian shall apply to the district court for an order permitting him or her to restrict disclosure. The application shall be subject to the procedures and burden of proof provided for in subsection (6) of this section. All persons entitled to claim the privilege with respect to the records in issue shall be given notice of the proceedings and shall have the right to appear and be heard. In determining whether disclosure of the records would cause substantial injury to the public interest, the court shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein.

(6)(a) *If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection or if the official custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited pursuant to this part 2, the official custodian may apply to the district court of the district in which such record is located for an order permitting him or her to restrict such disclosure or for the court to determine if disclosure is prohibited.* Hearing on such application shall be held at the earliest practical time. In the case of a record that is otherwise available to public inspection pursuant to this part 2, after a hearing, the court may, upon a finding that disclosure would cause substantial injury to the public interest, issue an order authorizing the official custodian to restrict disclosure. In the case of a record that may be prohibited from disclosure pursuant to this part 2, after a hearing, the court may, upon a finding that disclosure of the record is prohibited, issue an order directing the official custodian not to disclose the record to the public. In an action brought pursuant to this paragraph (a), the burden of proof shall be upon the custodian. The person seeking permission to examine the record shall have notice of said hearing served upon him or her in the manner provided for service of process by the Colorado rules of civil procedure and shall have the right to appear and be heard. The attorney fees provision of subsection (5) of this section shall not apply in cases brought pursuant to this paragraph (a) by an official custodian who is unable to determine if disclosure of a public record is prohibited under this part 2 if the official custodian proves and the court finds that the custodian, in good faith, after exercising reasonable diligence, and after making reasonable inquiry, was unable to determine if disclosure of the public record was prohibited without a ruling by the court.

(Emphasis added.)

III. CASES

KEY CASES

Open records case concerning academic institution records:

Denver Publishing Co. v. University of Colorado, 812 P.2d 682 (Colo. App. 1990)

- Holding: The Colorado Court of Appeals held that a settlement agreement between the university and its former chancellor could not be withheld from disclosure under the CORA catchall balancing test exemption.
- Facts: A newspaper brought an open records suit seeking the disclosure of documents contained in a personnel file belonging to Glendon Drake, the former chancellor of the University of Colorado Denver. Documents sought under the open records law included the settlement agreement relating to a termination dispute between Drake and the university, as well as contracts between the university and its current chancellors. The university disclosed the contracts with the current chancellors but denied disclosure of other records requested based on a CORA exemption for personnel files, §24-72-204(3)(a)(II).
- Summary:
    - The court concluded that the personnel file exemption did not apply because, given the intent of CORA, it was unreasonable for a university to assume records relating to the terms of employment between a public institution and those that it hires are exempt from disclosure merely by placing them in a personnel file.[1]
    - The university asserted that the requested records should not be disclosed under the catchall balancing test because disclosure would do substantial injury to the public interest. The court held that the catchall exemption did not apply, as the public's right to know how public funds are spent outweighed any potential damage to the university's ability to resolve internal matters of dispute by releasing information contrary to parties' expectations.[2]

OTHER POTENTIALLY RELEVANT CASES

Land Owners United, LLC v. Waters, 293 P.3d 86 (Colo. App. 2011): The Colorado Court of Appeals found that when considering whether the deliberative process exemption applies, courts must look both to the statute, Colo. Rev. Stat. § 24-72-204(3)(a)(XIII) and to *City of Colorado Springs v. White*, 967 P.2d. 1042 (Colo. 1998), which recognized the common law deliberative process exemption and was decided prior to the adoption of the statute section, and determine whether:

1. Disclosure of the material would expose an agency's decision-making process in such a way as to discourage discussion within the agency and thereby undermine its ability to perform its function. Thus the privilege applies only to material that is predecisional and deliberative; and
2. Whether, based on the circumstances of the particular case, the public interest in honest and frank discussion within government is outweighed by the beneficial effects of public scrutiny upon the quality of government decision-making and public confidence therein.

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1 *Denver Pub. Co. v. Univ of Colo.*, 812 P.2d 682, 684 (Colo. App. 1990).

2 *Id.*, at 685.

Denver Publishing Co. v. Board of County Commissioners of County of Arapahoe, 121 P.3d 190 (Colo. 2005): The Supreme Court of Colorado held that the definition of public records under CORA includes only email messages that address the performance of public functions or the receipt or expenditure of public funds; sexually explicit and romantic emails were not public records within scope of mandatory disclosure of CORA.

IV. OTHER NOTES

In 2024, the Animal Activists Legal Defense Project at the University of Denver Sturm College of Law filed a lawsuit against Colorado State University (CSU), alleging that CSU failed to comply with CORA when it refused to disclose video and photos related to a previously-published study that was funded by the meat industry. CSU had initially told the Animal Activists Legal Defense Project it could not produce any responsive records, and then that any responsive records fell within an exception to CORA protecting disclosure of records relating to ongoing research. CSU later acknowledged that if records could be found the exemption would not apply as the study at issue had been previously published.[3]

It is unclear what the current status of this lawsuit is.

[3] Allie Seibel, *CSU Sued Over CORA Obstruction in Animal Mistreatment Investigation,* THE ROCKY MOUNTAIN COLLEGIAN, (April 11, 2024) https://collegian.com/articles/news/2024/04/category-news-csu-sued-over-cora-obstruction-in-animal-mistreatment-investigation/ [https://perma.cc/TR9L-C3FZ]. The Plaintiff's complaint can be found here: https://thebrooksinstitute.org/sites/default/files/2024-04/AP Colorado FOIA Case - To Accompany 2024-04-22 Weekly Digest No. 239.pdf [https://perma.cc/9UJ3-T28S].

CONNECTICUT

C

I. ANALYSIS

The Connecticut Freedom of Information Act offers no statutory protection from disclosure for research. However, Connecticut courts have applied a statutory exemption for "preliminary drafts or notes" to exclude a variety of university records so long as (1) they are both predecisional and deliberative, and (2) the public interest in withholding the records outweighs the public interest in disclosing them. One court found that course presentations prepared by instructors in a university master gardener program were excluded from the definition of public records and therefore not subject to disclosure. Connecticut courts have not specifically been asked to apply this exemption to research documents thus far.

II. STATUTE

OPEN RECORDS LAW

Connecticut Freedom of Information Act, Conn. Gen. Stat. §§ 1-200 to -259

KEY STATUTORY PROVISIONS (EXCERPTS)

CONN. GEN. STAT. § 1-210

Access to public records. Exempt records.

(b) Nothing in the Freedom of Information Act shall be construed to require disclosure of:

(1) *Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure;*

(5)(A) *Trade secrets,* which for purposes of the Freedom of Information Act, are defined as information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts or detailed production budgets *that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable*

under the circumstances to maintain secrecy; and

(B) Commercial or financial information given in confidence, not required by statute;

(Emphasis added.)

III. CASES

KEY CASES

Open records cases concerning other academic institution records:

Coalition to Save Horsebarn Hill v. Freedom of Information Commission, 806 A.2d 1130 (Conn. App. Ct. 2002)

- Holding: The Connecticut Appellate Court found that drafts of proposed agreements between the University of Connecticut and a private pharmaceutical company for the construction of a joint development project on the campus (which ultimately did not go ahead) were exempt under the preliminary draft exemption in Sec. 1-210(b)(1).
- Facts: The requestors sought access to documents relating to a joint project between the university and Pfizer for construction of a Center for Excellence in Vaccine Research at the University of Connecticut; the project was later canceled.
- Summary:
    - The court found the records in question fell within the preliminary draft exemption, finding the fact that they may have been drafted by Pfizer irrelevant, as all public records that consist of preliminary draft documents are eligible to be withheld despite their provenance.
    - The court rejected the requestors' claim that the documents were not predecisional because they were generated after the parties had agreed to the terms of the contract, finding that even if the terms had been agreed the records still contemplated a future contract.
    - The court also rejected the requestors argument that even if the documents did fall under the preliminary draft exception, the public interest in disclosure outweighed the public interest in nondisclosure, finding that the public interest in nondisclosure was greater given that there could be a negative impact on the university's ability to negotiate real estate transactions in the future should these documents become public record.

Fromer v. Freedom of Information Commission, 875 A.2d 590 (Conn. App. Ct. 2005)

- Holding: The Connecticut Appellate Court held that instructor presentations for the University of Connecticut Extension Master Gardener Program were not public records subject to a Connecticut Freedom of Information Act request.
- Facts: The requestor, a student in the Master Gardener Program, sought disclosure of PowerPoint presentations prepared by various instructors in the program.

- Summary:
    - The court found that the instructors were not considered public agencies within the meaning of the Act. The court adopted a functional equivalent test to determine whether they were public agencies by examining (1) whether they perform a government function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.
    - The court agreed with the trial court's finding that (1) the instructors do not perform a government function; (2) government funding was received only as consideration for the services provided as employees of the university,[1] and they were not paid to develop PowerPoint presentations; (3) the government does not control their day-to-day activities as instructors, and the instructors were not required to use electronic presentations of handouts; and (4) they were not created by the government but are employees of the university.[2]
    - The court stated that the key to determining whether an entity is a government agency or merely a contractor with the government is whether the government is really involved in the core of the program, and here the instructors "have no power to govern, to regulate or to make decisions affecting government, they simply provide instruction to students pursuant to their contractual obligation."[3]
    - Furthermore, since the presentations were not prepared, owned, used, received, or retained by the university, they could not be considered public records subject to a Freedom of Information Act request.[4]

Wilson v. Freedom of Information Commission, 435 A.2d 353 (Conn. 1980)

- Holding: The Connecticut Supreme Court found that records from a committee that reviewed operations of university departments could be withheld from disclosure under the preliminary draft exemption.
- Facts: The requestor sought access to records relating to the Program Review Committee (PRC) at the University of Connecticut; the PRC reviewed the operations of academic departments of the university and made recommendations on improving the efficiency of these departments.
- Summary:
    - The court held that the exemption does not only apply to documents that are not in their final form. Rather the term "preliminary drafts and notes" relates to advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated.[5]
    - It is not enough to determine that the records in question were preliminary; the statute requires the public agency to determine if the public interest in withholding the documents outweighs the interest in disclosure.

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1 The court made no distinction between adjunct, tenure-track, and tenured instructors.

2 *Fromer v. Freedom of Information Commission,* 875 A.2d 590, 593–4 (Conn. Ct. App. 2005).

3 *Id.* at 594.

4 *Id*. at 595 (based on finding in *Commission on Human Rights & Opportunities v. Truelove & Mclean, Inc*., 680 A.2d 1261 (Conn. 1996)).

5 *Wilson v. Freedom of Information Commission*, 875 A.2d 353, 359 (Conn. 1980).

- Here, the court found that the documents were predecisional and deliberative because they represented uninhibited communication and exchange of opinions, ideas, and points of view. The court found the public interest in withholding them outweighed the public interest in disclosure, as disclosure would violate promised confidentiality and could embarrass and cause unnecessary panic among faculty and staff who were evaluated as part of the program review.

OTHER POTENTIALLY RELEVANT CASES

University of Connecticut v. Freedom of Information Commission, 36 A.3d 663 (Conn. 2012): The Connecticut Supreme Court found that a public university database identifying persons who had paid to attend, donated to, inquired about, or participated in certain educational, cultural, or athletic activities of institutions within the university was a trade secret and thus exempt from disclosure under the Freedom of Information Act. The court concluded that even if the university did not engage in a trade, the legislature's intention was to afford trade secret protection to state entities as long as the information met the statutory criteria for a trade secret.

IV. OTHER NOTES

In 2025, the Connecticut legislature considered a number of reforms to the state's open records laws, including SB 1226, which would provide a broad statutory exemption for higher education research records.[6] The bill did not pass prior to the end of the legislative session.

[6] Conn. SB 1226, Gen. Assembly 2025 Session, https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?which_year=2025&selBillType=Bill&bill_num=1226 [https://perma.cc/59P6-JMH4].

DELAWARE

A

I. ANALYSIS

The Delaware Freedom of Information Act (FOIA) contains very strong protections for university research. The statute excludes the activities of the University of Delaware and Delaware State University from the definition of public records, although it does consider university documents relating to the expenditure of public funds to be public records. A recent Delaware case interpreted the meaning of documents relating to the expenditure of public funds narrowly, limiting it to documents whose content relates to the expenditure of public funds. There is no other case law discussing the exclusion of university records from the definition of public records under FOIA.

II. STATUTE

OPEN RECORDS LAW

Delaware Freedom of Information Act, Del. Code Ann. tit. 29, §§ 10001 to 10007
Known as: FOIA

KEY STATUTORY PROVISIONS (EXCERPTS)

DEL. CODE ANN. TIT. 29, § 10002

Definitions.

(l) *"Public body," "public record" and "meeting" shall not include activities of the University of Delaware and Delaware State University*, except that the Board of Trustees of both universities shall be "public bodies," *university documents relating to the expenditure of public funds shall be "public records,"* and each meeting of the full Board of Trustees of either institution shall be a "meeting." Additionally, any university request for proposal, request for quotation, or other such document soliciting competitive bids for any contract, agreement, capital improvement, capital acquisition or other expenditure proposed to involve any amount or percentage of public funds by or on behalf of the university shall indicate on the request for proposal or other such document that it relates to the expenditure of public funds.

(o) "Public record" is information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public

business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced. For purposes of this chapter, the following records shall not be deemed public: ....

(2) Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature; ....

(6) Any records specifically exempted from public disclosure by statute or common law;

(Emphasis added.)

III. CASES

KEY CASES

Open records cases concerning academic institution records:

Jud. Watch, Inc. v. Univ. of Delaware, 267 A.3d 996, 1006 (Del. 2021)

- Holding: The court held that a university document is a public record subject to disclosure under the state FOIA only when the *content* of that document relates to the expenditure of public funds.
- Facts: A government watchdog group and a non-profit media organization challenged the University of Delaware's denial of their state FOIA requests for access to Joe Biden's donated senatorial papers based on the university documents exemption.
- Summary:
    - In 2012, then-Vice President Joe Biden donated his Senatorial papers to the University of Delaware, subject to a gift agreement that placed certain restrictions on the University's ability to make the papers publicly available.
    - In April 2020, Judicial Watch, Inc. and The Daily Caller News Foundation submitted record requests under Delaware's FOIA to access the papers and any records discussing the documents.
    - The University denied the requests, stating that the papers did not meet the definition of a public record under Delaware's FOIA, because the contents of the documents did not contain information about public funds. The Deputy Attorney General issued opinions concluding that the University had not violated FOIA, and the plaintiffs appealed.
    - The appellants argued that If the University used any public funds in relation to a document, including by funding staff to manage the documents, that document relates to the expenditure of public funds.
    - The Supreme Court disagreed, reasoning that the plain language and specific examples given in the statute precluded such a broad reading. The Court also noted that such an interpretation would eviscerate the legislature's clear intention to exempt most university records from the state FOIA, as under appellant's reading, nearly all public university documents would relate to the expenditure of public funds.

In the later, related case of ***Jud. Watch v. Univ. of Del.***, No. N20A-07-001 FWW, 2024 Del. Super. LEXIS 560 at *1 (Del. Super Aug. 5, 2024), the court considered whether to vacate the Supreme Court's prior judgment because of newly discovered evidence that that two of President Biden's longtime former staffers had been paid by the University to conduct a pre-donation review of the Senatorial papers in order to recommend which papers should be donated. The petitioners argued that this evidence contradicted the sworn affidavit, stating that University had not "paid any consideration, State funded or otherwise, to Mr. Biden for the Senate Papers", upon which the court relied in denying them relief. The court disagreed, finding that (i) at best, the newly-discovered evidence was "merely arguably impeaching" of the affidavit in question, and that (ii) in any case, granting the motion would at most entitle petitioners to documents related to the expenditure of state funds in connection with the payments made to the staffers. Thus, the court held that the newly-discovered evidence was not so material and relevant that it would probably change the result of the court's prior decision that the University had met its burden of justifying its denial of petitioners' FOIA requests.

IV. OTHER NOTES

In 2009, David Legates, a University of Delaware climatology professor, the Delaware State Climatologist from 2005–2011, and self-described climate change "skeptic," received a FOIA request from Greenpeace. The organization demanded disclosure of all email correspondence and financial and conflict-of-interest disclosures possessed or generated by the Office of the Delaware State Climatologist over a period of nine years that contained the phrase "global climate change" and any of 22 additional keywords.

Following a meeting with the university's general counsel, Legates alleged he was instructed to turn over all documents in his possession relating to "global climate change" even though the Delaware FOIA specifically excludes University of Delaware records from the definition of public records, with only records relating to the expenditure of public funds being subject to the act. Legates also alleged that a fellow climate scientist in 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 Delaware 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 activities around the time of the FOIA request. Legates also claimed that when he confronted the general counsel about the fact that his work did not relate to the expenditure of public funds, he was told that he must comply with the demands of a senior university official. While the law did not require the university to produce the documents, it also did not prohibit the university from doing so.[1] The process dragged on for almost four years, and ultimately no records were turned over.[2]

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[1] Jan H. Blits, *Climate-Change Shenanigans at the U. of Delaware*, MINDING THE CAMPUS, May 19, 2014, http://www.mindingthecampus.org/2014/05/climate-change_shenanigans_at_/ [https://perma.cc/5RDG-K5JH].

[2] For more information, see David R. Legates' statement, Farming, Fishing, Forestry and Hunting in an Era of Changing Climate: Hearing Before the Subcomm. on Green Jobs and the New Econ. of the Senate Comm. on Envt'l and Pub. Works (Statement of David R. Legates, Ph.D., C.C.M., University of Delaware), 113th Cong. (June 3, 2014), 2014 WL 2466069, https://www.epw.senate.gov/public/_cache/files/a/a/aa8f25be-f093-47b1-bb26-1eb4c4a23de2/01AFD79733D77F24A71FE_F9DAFCCB056.6314witnesstestimonylegates.pdf [https://perma.cc/J8XP-DJCG].

In 2021, there was a Senate bill (SB 155) introduced that aimed at revising the Delaware FOIA law to allow public bodies to deny requests deemed to be unreasonable, disruptive, or abusive, and to charge admin fees for reviewing records in these cases. It was removed from the agenda before a vote.[3]

[3] Sarah Gamard, *Delaware lawmaker drops plans for FOIA 'abuse' bill. Here's Why.*, DE. Online, Jun. 14, 2021, https://www.delawareonline.com/story/news/politics/2021/06/14/delaware-foia-bill-lawmaker-pulled-kyle-evans-gay/7691681002/ [https://perma.cc/JWQ2-THV7].

DISTRICT OF COLUMBIA

D

I. ANALYSIS

The District of Columbia Freedom of Information Act does not protect research from disclosure. The statute contains an inter/intra-agency memorandum exemption, which encompasses a deliberative process exemption, but there are no cases in which these exemptions have been invoked to protect research or other university records. D.C.'s FOIA also contains a broad trade secret exemption that protects commercial information provided to the government by an outside party from disclosure if such disclosure would result in harm to the competitive position of that outside party. This trade secret exemption could be used to protect sponsored research at a university or research records disclosed to a university by an outside entity.

II. STATUTE

OPEN RECORDS LAW

District of Columbia Freedom of Information Act, D.C. Code § 2-531 to -540
Known as: FOIA

KEY STATUTORY PROVISIONS (EXCERPTS)

D.C. CODE § 2-534

Exemptions from Disclosure

(a) The following matters may be exempt from disclosure under the provisions of this subchapter:

> (1) Trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained;
>
> (4) Inter-agency or intra-agency memorandums or letters, including memorandums or letters generated or received by the staff or members of the Council, which would not be available by law to a party other than a public body in litigation with the public body.

III. CASES

KEY CASES

There are no open records cases relating to research or university records.

OTHER POTENTIALLY RELEVANT CASES

Washington Post Co. v. Minority Business Opportunity Commission, 560 A.2d 517 (D.C. 1989): The D.C. Court of Appeals found that in order to invoke the exemption for trade secrets and confidential commercial or financial information, the government must show that the party from whom the information was obtained faces actual competition from the disclosure and that it will cause substantial competitive injury.

Fraternal Order of Police v. District of Columbia, 79 A.3d 347 (D.C. 2013): The D.C. Court of Appeals held that the general common law deliberative process privilege, which is encompassed in the inter/intra-agency memorandum exemption to FOIA, protects information that is both predecisional and deliberative. Predecisional records are prepared to assist an agency decision maker in arriving at his decision, and deliberative records reflect the give-and-take of the consultative process. The key question when deciding if a record is deliberative is whether the disclosure of the information would discourage candid discussion within the agency. Factual materials are not protected under the privilege or the FOIA exemption.

FLORIDA

D

I. ANALYSIS

The Florida Public Records Act protects certain records, but the state offers very limited protection from disclosure for research. Florida's Education Code protects sponsored state university research records relating to (1) potentially patentable material, (2) potential or actual trade secrets, and (3) business transactions or proprietary information. Florida recently passed a statute providing limited protections for animal researchers and their records. There is no general statutory protection for preliminary or deliberative materials, although some materials may be withheld if a court decides that, as "drafts or notes"—a category narrowly prescribed—they do not fall under the definition of a public record.

II. STATUTE

OPEN RECORDS LAW

Florida Public Records Act, Fla. Stat. § 119.01 to .15

KEY STATUTORY PROVISIONS (EXCERPTS)

FLA. STAT. § 119.011

Definitions

As used in this chapter, the term:

(12) "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Florida Education Code, Fla. Stat. § 1004.22

FLA. STAT. § 1004.22

Divisions of sponsored research at state universities

(1) Each university is authorized to create, in accordance with guidelines of the Board of Governors, divisions of sponsored research which will serve the function of administration and promotion of the programs of research, including sponsored training programs, of the university at which they are located

(2) The university shall set such policies to regulate the activities of the divisions of sponsored research as it may consider necessary to administer the research programs in a manner which assures efficiency and effectiveness, producing the maximum benefit for the educational programs and maximum service to the state. *To this end, materials that relate to methods of manufacture or production, potential trade secrets, potentially patentable material, actual trade secrets, business transactions, or proprietary information received, generated, ascertained, or discovered during the course of research conducted within the state universities shall be confidential and exempt from the provisions of s. 119.07(1),* except that a division of sponsored research shall make available upon request the title and description of a research project, the name of the researcher, and the amount and source of funding provided for such project. Donors to Florida public universities are protected.

(Emphasis added.)

Florida Agriculture, Horticulture and Animal Code, Fla. Stat. § 585.611

FLA. STAT. § 585.611

Animal research identifying information

(1) Personal identifying information of a person employed by, under contract with, or volunteering for a public research facility, including a state university, that conducts animal research or is engaged in activities related to animal research, is exempt from § 119.07(1) and § 24(a), Article I of the State Constitution, when such information is contained in the following records:

(a) Animal records, including animal care and treatment records.

(b) *Research protocols and approvals.*

(c) Purchasing, funding, and billing records related to animal research or activities.

(d) Animal care and use committee records.

(e) Facility and laboratory records related to animal research or activities.

(2) This exemption applies to personal identifying information as described in subsection (1) held by a public research facility, including a state university, before, on, or after the effective date of this exemption.

(Emphasis added.)

III. CASES

KEY CASES

There are no open records cases addressing research exemptions.

Other open records case concerning research:

Marino v. University of Florida, 107 So. 3d 1231 (Fla. Dist. Ct. App. 2013)

- Holding: The Florida District Court of Appeals found that a university could not deny disclosure of the location of primates used for research based on an exemption for security plans.
- Facts: Animal rights activists sought records containing details of the location of primates used for research. The university denied disclosure of the animals' location based on exemptions for security plans (the university's security plan contained an Animal Research Security component). The animal rights activists were clear that they planned to use this information to release the animals.
- Summary:
    - Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and the damage to an individual or institution resulting from such disclosure.[1]
    - Despite the fact that the purpose of the request was to find the animals' location and disrupt the research activities, the court allowed the records to be disclosed, finding that the location of public facilities are public records. Attempting to shield the location of public facilities when their location may subject them to threats was not in keeping with the required narrow reading of the statute.
    - The court stated that the university would need to seek a specific exemption in order to prevent disclosure of these types of records, and they must go to the legislature for such an exemption.

Sierra Club v. University of Florida, No. 01 2012 CA 000254 (Alachua Cty. Cir. Ct. 2011)

- Summary: The Sierra Club filed a complaint against the University of Florida for its refusal to provide records related to the Institute of Food and Agricultural Sciences reports on fertilizer use and recommendations, including the names of internal and external reviewers, correspondence between various individuals, and the "science upon which" various conclusions in the report were based. According to the complaint, the reports set forth a state model ordinance in which a 3-foot fertilizer exclusion zone was superior to a 10-foot exclusion zone for keeping fertilizer from running into water bodies, and these recommendations were relied upon by Florida agencies.[2]
- Settlement Agreement: On August 1, 2012, the parties agreed to a settlement, in which the University agreed to make available pre- and post-publication reviews, as well as the identities of

[1] *Marino v. University of Florida,* 107 So. 3d 1231 (Fla. Dist. Ct. App. 2013) (citing *News–Press Publishing Co., Inc. v. Gadd,* 388 So. 2d 276, 278 (Fla. Dist. Ct. App. 1980)).

[2] Complaint available at https://www.csldf.org/wp-content/uploads/2023/04/sierra-club-v-UF-complaint.pdf.

the reviewers, and correspondence between the requested individuals. The University also agreed to pay Sierra Club a net amount of $5,000 for attorneys' fees and costs.[3]

OTHER POTENTIALLY RELEVANT CASES

Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633 (Fla. 1980): The Supreme Court of Florida held that the statutory definition of public record is construed to mean "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type. *To be contrasted with 'public records' are materials prepared as drafts or notes, which constitute mere precursors of governmental 'records' and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation.* Inter/intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records in as much as they supply the final evidence of knowledge obtained in connection with the transaction of official business."[4] (Emphasis added.)

Wood v. Marston, 442 So. 2d 934 (Fla. 1983): The Florida Supreme Court refused to exempt disclosure of discussions by a committee advising the president of the University of Florida about a new law school dean. The university argued that opening the committee's meetings would threaten academic freedom rights. While the court recognized "the necessity for the free exchange of ideas in academic forums, without fear of governmental reprisal, to foster deep thought and intellectual growth," in the absence of a specific exemption, the court declined to shield the materials.

State v. City of Clearwater, 863 So. 2d 149 (Fla. 2003): The Supreme Court of Florida found that personal emails are not made or received pursuant to law or ordinance or in connection with the transaction of official business and therefore do not fall within the definition of public records by virtue of their placement on a government-owned computer system.

Butler v. City of Hallandale Beach, 68 So. 3d 278 (Fl. Dist. Ct. App. 2011): The Florida District Court of Appeals held that an email sent by a mayor from her personal email account, using her personal computer, with an attachment containing three articles she had written for a local newspaper, were not public records. The court found the email was not intended to perpetuate, communicate, or formalize the city's business and was not prepared in connection with the official business of the city.

IV. OTHER NOTES

In 2015, *The New York Times* used the Florida Public Records Act to force disclosure of emails belonging to Kevin Folta, chair of the University of Florida Horticultural Department and a leading biotech researcher. For many years, Folta was a proponent of genetically modified foods (GMOs), and the *Times* sought information about his relationship with the agrochemical company Monsanto, a producer of GMO

[3] Settlement agreement available at https://www.csldf.org/wp-content/uploads/2023/04/Sierra-club-v-UF-settlement-agreement.pdf.

[4] *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.,* 379 So. 2d 633, 640 (Fla. 1980).

seeds. Folta was particularly outspoken about GMOs and scientific communication and took a strong stance that public fear of GMOs was not based on scientific research but rather on hype and fear mongering. Folta began working with Monsanto in 2013 and was never paid directly by the company, but he accepted funds to travel to conferences and defend the use of GMOs. He stated that he was willing to join the campaign to publicly defend genetically modified technologies because he believes they are safe, and that his job was to share his expertise.

In September 2015, *The New York Times* published an article about how the food industry enlisted scientists to help advocate for GMOs.[5] Folta's relationship with Monsanto was highlighted in the article, which also had links to 174 pages of Folta's emails that were obtained via the public records request. Among the information brought to light by the article was a $25,000 donation from Monsanto to a University of Florida foundation. It was meant to support Folta's travel and related expenses, and a digital projector used for a year's worth of monthly academic and public GMO education workshops by Folta (this donation was in addition to other publicly disclosed donations from Monsanto to the University of Florida). There was no indication that the donation was intended to "buy off" Folta. The university foundation had strict guidelines surrounding the use of this type of donation, but the negative publicity that resulted from the article prompted the university to repurpose the money and use it to fund a campus food bank for students.

Folta maintained that he was not on the payroll of Monsanto and that he only accepted travel funds to speak at Monsanto events because their position aligned with his scientific findings. Folta eventually filed a defamation suit against the *Times* article, claiming that his relationship with Monsanto had impacted his scientific judgment. The suit was dismissed in January 2019, with the court finding that there was no issue of material fact in the article.[6]

V. OTHER NOTES

The University of Florida General Counsel's office previously indicated in its online public records law guide that, for the most part, drafts are not considered public records. As of August 2019, that guide has been removed from the website.

[5] Eric Lipton, *Food Industry Enlisted Academics in G.M.O. Lobbying War, Emails Show*, NEW YORK TIMES, Sept. 5, 2015 https://www.nytimes.com/2015/09/06/us/food-industry-enlisted-academics-in-gmo-lobbying-war-emails-show.html [https://perma.cc/E5EH-QRKS].

[6] Colleen Flaherty, *Court Sides With 'The New York Times' in Professor's Defamation Case*, INSIDE HIGHER ED, Mar. 1, 2019 https://www.insidehighered.com/quicktakes/2019/03/01/court-sides-new-york-times-professors-defamation-case [https://perma.cc/G5TX-TZ6P].

GEORGIA

B

I. ANALYSIS

The Georgia Open Records Act exempts the proprietary research of state universities and other governmental agencies. It also exempts state university research-related records, such as notes and data, research protocols, and methodologies, until the records are published or made publicly available. A Georgia court has held that research records must be withheld if they meet the standards of these two exemptions.

It is worth noting that the language of Georgia's research exemption is nearly identical to the language of the Virginia statute that was used to prevent disclosure of a climate scientist's emails in the Virginia case *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 756 S.E.2d 435 (Va. 2014).[1] However, compared to the Virginia statute, the Georgia statute is broader. The Virginia statute applies only to records of public institutions of higher education, while the Georgia statute applies to the records of both state institutions of higher learning and other governmental agencies.

II. STATUTE

OPEN RECORDS LAW

Georgia Open Records Act, Ga. Code Ann. §§ 50-18-70 to -77

KEY STATUTORY PROVISIONS (EXCERPTS)

GA. CODE ANN. § 50-18-72

When Public Disclosure Not Required

(a) Public disclosure shall not be required for records that are:

[1] See page 209 of this report.

(34) Any trade secrets obtained from a person or business entity that are required by law, regulation, bid, or request for proposal to be submitted to an agency. An entity submitting records containing trade secrets that wishes to keep such records confidential under this paragraph shall submit and attach to the records an affidavit affirmatively declaring that specific information in the records constitute trade secrets pursuant to Article 27 of Chapter 1 of Title 10. If such entity attaches such an affidavit, before producing such records in response to a request under this article, the agency shall notify the entity of its intention to produce such records as set forth in this paragraph. If the agency makes a determination that the specifically identified information does not in fact constitute a trade secret, it shall notify the entity submitting the affidavit of its intent to disclose the information within ten days unless prohibited from doing so by an appropriate court order. In the event the entity wishes to prevent disclosure of the requested records, the entity may file an action in superior court to obtain an order that the requested records are trade secrets exempt from disclosure. The entity filing such action shall serve the requestor with a copy of its court filing. If the agency makes a determination that the specifically identified information does constitute a trade secret, the agency shall withhold the records, and the requester may file an action in superior court to obtain an order that the requested records are not trade secrets and are subject to disclosure;

(35) *Data, records, or information of a proprietary nature produced or collected by or for faculty or staff of state institutions of higher learning, or other governmental agencies, in the conduct of, or as a result of, study or research on commercial, scientific, technical, or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or private concern, where such data, records, or information has not been publicly released, published, copyrighted, or patented;*

(36) *Any data, records, or information developed, collected, or received by or on behalf of faculty, staff, employees, or students of an institution of higher education or any public or private entity supporting or participating in the activities of an institution of higher education in the conduct of, or as a result of, study or research on medical, scientific, technical, scholarly, or artistic issues, whether sponsored by the institution alone or in conjunction with a governmental body or private entity, until such information is published, patented, otherwise publicly disseminated, or released to an agency whereupon the request must be made to the agency. This paragraph shall apply to, but shall not be limited to, information provided by participants in research, research notes and data, discoveries, research projects, methodologies, protocols, and creative works;*

(Emphasis added.)

III. CASES

KEY CASES

Open records case concerning research exemption:

Campaign for Accountability v. Consumer Credit Research Foundation, 303 Ga. 828 (Ga. 2018)

- Holding: The Georgia Supreme Court held that state agencies are not prohibited from disclosing records where the records in question are subject to an Open Records Act (ORA) exemption that states "disclosure shall not be required."
- Facts: A consultant to a state university brought action against the Board of Regents of the University of Georgia System to enjoin the release of academic research correspondence under the Open Records Act; the lower court granted summary judgment for the Board and the consultant appealed. The Court of Appeals overturned the lower court ruling, holding that the records may not be disclosed. This decision was appealed to the Georgia Supreme Court.
- Summary:
    - The Consumer Credit Research Foundation (CCRF) had a contract with Kennesaw State University (KSU)[2] for a professor to conduct research on payday loans. In 2015, the Campaign for Accountability made an open records request for copies of correspondence between the professor and CCRF relating to the research. KSU informed CCRF that it planned to release the correspondence pursuant to the open records request.
    - CCRF objected to the release of the correspondence and filed an action against the Board to prevent the release of the research correspondence. The parties filed cross-motions for summary judgment with CCRF, claiming the correspondence was exempt from disclosure under the research exemptions in § 50-18-72(a)(35) and (36). The Board claimed CCRF failed to prove that the correspondence fell within the research exemptions, and even if it did, the exemptions permitted but did not require KSU to withhold the records from disclosure.
    - The trial court granted summary judgment for the Board, finding that the research exemptions authorized a state agency to withhold the records but did not mandate nondisclosure; therefore KSU had the discretion to release the research correspondence. The trial court did not determine whether the correspondence in question fell within the exemption. The Court of Appeals overturned the lower court's ruling,[3] holding that the ORA mandates the nondisclosure of certain information[4] and that KSU did not have the discretion to release the records if they fell under an exemption. The summary judgment was vacated and the case remanded to the trial court to determine whether the records fell within one or both of the research exemptions.
    - The case was then appealed to the Georgia Supreme Court. The court examined the language of the ORA, with the inquiry hinging on the meaning of the term "disclosure

[2] KSU is part of the University System of Georgia.

[3] *Consumer Credit Research Foundation v. Board of Regents of the University System of Georgia,* 800 S.E.2d 24 (Ga. Ct. App. 2017).

[4] *Bowers v. Shelton*, 453 S.E.2d 741, 743 (Ga. 1995).

shall not be required."[5] The court concluded that "not required" does not mean "prohibited" and therefore a state agency may release such records if they decide they do not wish to utilize the exemption.

- The Supreme Court also disagreed with CCRF's argument that allowing government agencies to release research records would ensure that no private entity would ever again contract with a public university for research. The court stated that "nothing in the ORA or in our decision today prevents agencies from promising by contract not to disclose information that the ORA does not require them to disclose, assuming that the contract is within the agency's authority to enter and is otherwise valid…The ORA cannot remedy that oversight for CCRF."[6]
- The decision of the Court of Appeals was reversed and the Court of Appeals subsequently upheld the trial court's summary judgment order.[7]

Milliron v. Antonakakis, 905 S.e.2d 657 (Ga. 2024)

- Holding: The Georgia Supreme Court held that (1) records prepared or maintained by a private contractor in the performance of a service or function for or on behalf of an agency were "public records" under the Open Records Act, even if the private contractor separately worked as an employee of an agency; and (2) even when an open records officer had been designated by an agency, a request for public records related to a private contractor's services to a public agency could be served upon the private contractor who was the custodian of the records sought. Thus, legal actions seeking to enforce compliance with the Open Records Act can also be brought against such non-agency custodians of public records, including individuals.
- Facts: Plaintiff sent an Open Records Request to the Georgia Institute of Technology (Georgia Tech) and to the respondent, who was a professor employed by Georgia Tech and who additionally provided services to Georgia Tech as a private contractor. The request to both parties sought records relating to the respondent's service to Georgia Tech in his role as private contractor. Georgia Tech responded and produced documents, but the respondent did not. The plaintiff filed suit against the respondent in his individual capacity, seeking to force him to independently produce documents in his custody.

  The trial court granted the respondent's motion to dismiss, concluding that the Open Records Act § 50-18-70 et seq. only obligates agencies to produce records, not individual employees of those agencies. Because Georgia Tech had designated "an open records officer" as "the custodian of agency records" upon whom open records requests must be made, the plaintiff's request directly to the respondent instead of the open records officer was improper. The Court of Appeal affirmed.
- Summary:
  - The Supreme Court found that under the plain language of the statute, records prepared or maintained by a private contractor "in the performance of a service or function for or on behalf of an agency" are "public records" under the Act, and this is so even if the private contractor separately works as an employee of an agency. The Supreme Court rejected the trial court's apparent finding that the respondent was only an employee and

[5] The research exemptions are subsections of § 50-18-72(a), The introductory language to these exemptions that is at issue here reads: "Public disclosure shall not be required for records that are:"

[6] *Id*. at 838.

[7] *Consumer Credit Research Foundation v. Board of Regents of the University System of Georgia*, 347 Ga.App. 188 (Ga. Ct. App. 2018).

not a private contractor of Georgia Tech, therefore rebutting the trial court's conclusion that the records sought from the respondent were not subject to the Open Records Act.

- The Supreme Court next considered whether an open records request and an action to enforce compliance with the Open Records Act could be made on a custodian of public records outside the agency, such as a private contractor. The Supreme Court first noted that nothing in the plain language of the Open Records Act dictates that only agencies can receive requests for public records and/or are obligated to produce public records. Considering the Supreme Court's view that a "private person or entity" working on the agency's behalf can prepare, maintain, or receive public records, the Court thus found that under these circumstances such private person or entity could become the custodian of the records upon whom a request for product and an action for enforcement could be made.
- The Supreme Court thus reversed the lower courts' judgments. It remanded the case back to the trial court to determine what records are in the respondent's possession which may be public records subject to the Open Records Act.

IV. OTHER NOTES

In 1991—prior to the adoption of the research exemptions § 50-18-72(a)(35) and (36) to the Georgia Open Records Act—Paul Fischer, a Medical College of Georgia professor, received an open records request from the tobacco company R.J. Reynolds. The company sought his research records for a study he published that found more than half of the children surveyed between the ages of 3 and 8 recognized the character Joe Camel and associated this character with cigarettes. Fischer resisted disclosure, but the medical college successfully sued him for the documents and sent them to R.J. Reynolds, as there was no protection for such records in the Georgia Open Records Act at that time. The incident led Fischer to resign from the faculty of the medical college and leave academia to pursue private practice.[8]

[8] 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].

HAWAII

D

I. ANALYSIS

The Hawaii Uniform Information Practices Act (UIPA) offers no statutory protection from disclosure for research and there are no cases that address academic research. A recent Hawaii Supreme Court case also held that there is no blanket deliberative process exemption to the UIPA. This is despite the fact that the Hawaii Office of Information Practices had previously held that such an exemption existed and that non-research university records that are both predecisional and deliberative were exempted from disclosure. A bill introduced in 2022 and revived in 2023 has proposed to overrule the Supreme Court decision, and create a statutory deliberative process exemption in Hawaii.

II. STATUTE

OPEN RECORDS LAW

Hawaii Uniform Information Practices Act, Haw. Rev. Stat. § 92F-1 to -43

KEY STATUTORY PROVISIONS (EXCERPTS)

HAW. REV. STAT. § 92F-13

Government records; exceptions to general rule. This part shall not require disclosure of:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

STATUTORY NOTES

The Hawaii Office of Information Practices (OIP), the state agency responsible for administering the Hawaii Uniform Information Practices Act (UIPA), has long taken the position that the "frustration of a legitimate government function" exemption found in § 92F-13(3) of UIPA applies to "*Proprietary information, such as research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it.*"[1]

Opinions issued by OIP also determined that this language incorporates a deliberative process exemption. OIP updated its "Guide to Hawaii's Uniform Information Practices Act" in October 2018 to reflect that the frustration of a legitimate government function exemption included a deliberative process exemption.[2]

However, less than two months after the guide's publication, the Hawaii Supreme Court held that this exemption *does not* include a blanket deliberative process exemption (see Cases and Opinions section below). OIP was unhappy with this decision and posted an analysis of the case on its website[3] which states that, while it disagrees with the court's ruling, absent legislative acts to change or clarify the intent of the statute, OIP will follow the court's ruling and advise agencies that they can no longer use a general deliberative process exemption to withhold records from disclosure under the UIPA. On May 21, 2019 OIP posted its first opinion relating to deliberative materials since the Peer News decision (see Key Cases and Opinions section below.) In August 2019, OIP updated the "Guide to Hawaii's Uniform Information Practices Act" to remove the deliberative process exemption language from the section on the frustration of legitimate government function exemption.[4]

III. CASES AND OPINIONS

KEY CASES AND OPINIONS

Peer News LLC v. City and County of Honolulu, 143 Hawaii 472 (Haw. 2018)

- Holding: The deliberative process exemption is inconsistent with the plain language and legislative intent of UIPA and therefore a city department of budget and fiscal services cannot use this exemption to not make records public.

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1 See, *e.g.*, Senate Standing Committee Report No. 2580, dated March 31, 1988 Excerpted in Haw. Office of Information Practices Op. Ltr. No. 90-6 (Jan. 31, 1990), 1990 WL 482354.

2 This guide listed examples of records that might be included under this exemption including "(7) Inter-agency or intra-agency memoranda or correspondence used in the agency's decision- making that falls under the "deliberative process privilege." This privilege allows an agency to withhold recommendations, draft documents, proposals, suggestions, and other opinion materials that comprise part of the process by which the agency formulates its decisions and policies. It protects the quality of agency decisions by encouraging the uninhibited exchange of ideas, recommendations, and opinions within an agency." See Haw. Office of Information Practices "Guide to Hawaii's Information Practices, October 2018 at 21, available at https://oip.hawaii.gov/wp-content/uploads/2018/10/October-2018-UIPA-Manual.pdf) [https://perma.cc/RAN9-HREW].

3 *OIP'S ANALYSIS OF THE HAWAII SUPREME COURT'S MAJORITY AND DISSENTING OPINIONS REJECTING THE DELIBERATIVE PROCESS PRIVILEGE AS AN EXCEPTION TO DISCLOSURE UNDER THE UIPA*, HI. OIP, Rev. May 20, 2019, [https://perma.cc/6E2P-HLF2].

4 *Guide to Hawaii's Uniform Information Practices Act,* HI. OIP, Aug. 2019, [https://perma.cc/ZKR6-NHKR].

- Facts: The appellant, a news outlet, requested budget documents from the City of Honolulu Department of Budget and Financial Services. The City claimed that the records, which consisted of preliminary budget memoranda, were exempt under the deliberative process exemption to the UIPA. Neither party sought an opinion from OIP and the appellant instead instigated a lawsuit. The lower court granted summary judgement after finding that that the documents were exempt from disclosure under the deliberative process exemption and appellant appealed to the Hawaii Supreme Court.
- Summary:
    - The City asserted that the records in question were predecisional and deliberative and therefore exempt from disclosure under the UIPA § 92F-13(3) deliberative process exemption. It argued that were the candid discussions contained in the budget memoranda disclosed, it would hinder the free exchange of ideas between policymakers and harm the quality of agency decision-making.
    - OIP previously opined[5] that a deliberative process exemption is incorporated into the § 92F-13(3) exemption from disclosure for "Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function"[6] These OIP opinions formed the only precedent on this issue as no case evaluating a deliberative process exemption had ever come before the court.
    - In a UIPA enforcement action where OIP opinions form the only prior interpretation of the relevant provisions of the UIPA, the standard of review that OIP's opinions are considered as precedent in so long as they are not "palpably erroneous."[7] Since this case also involved interpretation of statutory intent, the court stated that "judicial deference to an agency's interpretation of [even] ambiguous statutory language is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history."[8]
    - The court first examined the language of § 92F-13(3) and stated that, to fall within the parameters of the exemption, "a record must be of such a nature that disclosure would impair the government's ability to fulfil its proper duties."[9] The court found that OIP's interpretation of this provision, under which it allowed a record to be withheld any time it is both predecisional and deliberative, was incorrect and that to withhold a record without a determination that the disclosure of the record would *actually* frustrate a legitimate government function is inconsistent with the plain language of § 92F-13(3). The court noted that UIPA expressly states that the formation of public policy, including discussions and deliberations, should be conducted as openly as possible. The court concluded that to withhold all deliberative, predecisional records would mean that almost all policy discussions and deliberations would be shielded under this exemption, which is clearly contrary to the statutory intent.

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5 The court noted that OIP had opined for nearly thirty years that UIPA incorporates a deliberative process exemption. See *Peer News LLC v. City and County of Honolulu,* 143 Hawaii 472, 479 (Haw. 2018).

6 HAW. REV. STAT. § 92F-13(3).

7 *Peer News*, 143 Hawaii at 479.

8 *Id.* at 485 (citing *Kanahele v. Maui Cty. Council*, 307 P.3d 1174, 1190 (2013).

9 *Id.* at 479.

- The court also examined the legislative history of UIPA and determined that the Hawaii legislature purposely did not include a deliberative process exemption into UIPA. Therefore it was incorrect to infer that the frustration of legitimate government function exemption included a deliberative process exemption.[10]
- Based on the both the plain reading of the statute and the statute's legislative history, the court held that OIP's interpretation of the frustration of government function exemption was indeed "palpably erroneous." As a result, the court was not bound to follow the OIP opinions that applied a deliberative process exemption.
- The court then turned to providing guidance on the proper application of § 92F-13(3). The court held that in order to exempt a record, a government agency must be able to "define the government function that would be frustrated by a record's disclosure with a degree of specificity sufficient for a reviewing court to evaluate the legitimacy of the contemplated function. To hold otherwise would result in the provision having no meaningful limitations."[11] The government agency needs to establish "a connection between the disclosure of the specific records and the likely frustration of a legitimate government function, including by clearly describing the particular frustration and providing concrete information indicating that the identified outcome is the likely result of disclosure."[12] (Emphasis original.)
- The Hawaii Supreme Court therefore held that the circuit court erred in allowing the records in this case to be withheld.

Haw. Office of Information Practices (OIP) Op. Ltr. No. F-19-05

Holding: In the first OIP opinion issued on the subject of deliberate material since the *Peer News* decision, OIP stated that the Hawaii Department of Taxation (TAX) could not withhold documents used to create revenue estimates presented in legislative testimony as deliberative material.

- Facts: The requestor sought assumptions, bases, computations, source data and documents, and analyses that were relied on in connection with testimony to the Hawaii State Legislature on pending bills. TAX denied the request, claiming a deliberate process exemption under the frustration of legitimate government function exemption to the UIPA.
- Summary:
  - TAX originally claimed that the records in question were confidential, predecisional, deliberative work products created to aid in the preparation of legislation.
  - Since the initial denial of disclosure came prior to the *Peer News* decision, following the decision OIP gave TAX time to supplement its position in light of the ruling. TAX came

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[10] The original Hawaii House bill that became the UIPA contained an exemption for interagency deliberative material communicated for the purpose of decision-making where the disclosure would inhibit the flow of communication or impair an agency's decision-making process. However, neither the Senate version of the bill or the final legislation contained such an exemption, only the more general frustration of legitimate government exemption. The Senate Standing Committee report that went along with the Senate bill attempted to clarify what type of records this exemption protected. It listed nine functions (all of which were contained in the House bill) that could meet the definition of frustration of a legitimate government function for purposes of § 92F-13(3) but did not include mention of a deliberative process exemption. It was the only exemption contained in the House version of the bill that was not incorporated into the Senate bill/final statute or referenced in the Senate Standing Committee report. Therefore, the court concluded that the deliberate omission of all mention of this exemption in any of these documents indicated that the legislature expressly intended to not incorporate a deliberative process exemption into the UIPA.

[11] *Peer News*, 143 Hawaii at 479.

[12] *Id.* at 487.

back and stated that disclosure would frustrate its legitimate government function of being able to produce objective and independent revenue estimates.

- TAX argued that the *Peer News* decision still allowed certain deliberative records to be withheld, as long as the agency could define the government function that would be frustrated with a degree of specificity and demonstrate the connection between the disclosure of the specific record and the likely frustration of a legitimate government function.
- OIP stated that while the *Peer News* decision could potentially allow for certain predecisional deliberative records to be withheld, to do so the agency must clearly describe what government function will be frustrated and provide specificity about the impeded process. It also stated that for the records to be withheld, they must impede a specific legitimate government function such as enforcement of laws or procurement of property; broader categories of functions such as "decision-making" are too general to meet the specificity requirement. Furthermore, under *Peer News*, even if the agency can establish the legitimacy of the contemplated government function, the frustration exemption requires "an individual determination that disclosure of the particular record or portion thereof would frustrate a legitimate government function."[13] This means the agency must demonstrate a direct connection between the specific record and the likelihood of the government function being frustrated by clearly describing the frustration and indicating that this outcome is the likely result of this specific record being disclosed.
- Based on *Peer News*, OIP concluded that the fact that a record is related to decision-making does not rise to the standards necessary to withhold records under the frustration of government function exemption. The government function TAX claims will be frustrated—"its ability to produce objective and independent revenue estimates"[14]—is decision-making by another name and thus not exempt under this provision unless the agency can argue that another government function would be frustrated by disclosure. TAX did not establish that a different government function is frustrated by the disclosure of the records, so they must be disclosed.

Haw. Office of Information Practices (OIP) Op. Ltr. No. 91-15, 1991 WL 474712 (Sept. 10, 1991)

- Holding: OIP found that the frustration of legitimate function exemption extends beyond the points set out in the legislative history. It includes a common law deliberative process exemption that excludes inter/intra-agency memoranda that are both predecisional and deliberative.[15]
- Facts: The requestor sought access to all materials related to the University of Hawaii at Manoa William S. Richardson School of Law's self-study program that were prepared in order for the program to be accredited by the American Bar Association.
- Summary: OIP found that general factual materials associated with the accreditation process were not protected and must be disclosed. However, portions of the materials that contained opinions,

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13 Haw. Office of Information Practices (OIP) Op. Ltr. No. F-19-05 at 11 (citing *Peer News*).

14 *Id.* at 12.

15 Note that the decision in *Peer News* likely overturns this decision.

recommendations, or evaluations of self-study authors were protected based on the deliberative process exemption, as such records were both predecisional and deliberative.

OTHER POTENTIALLY RELEVANT CASES AND OPINIONS

Haw. OIP Op. Ltr. No. 95-10, 1995 WL 377546 (May 4, 1995): OIP found that the William S. Richardson School of Law should not disclose the identities of persons who had applied for admission without their written consent, as disclosure constituted an invasion of personal privacy.

Haw. OIP Op. Ltr. No. 06-03, 2006 WL 1386627 (May 9, 2006): OIP found that the University of Hawaii at Manoa must disclose the number of student athletes who tested positive for performance-enhancing drugs, but it need not disclose the breakdown of sanctions in order to protect the personal privacy of those students.

IV. OTHER NOTES

In 2022, a bill supported by the University of Hawaii, OIP, and other state agencies was proposed in the Hawaii state legislature to enshrine the deliberative process privilege exemption in the UIPA. The director of OIP, which had long interpreted the UIPA to contain a deliberative process privilege prior to the Supreme Court's decision, submitted testimony that the bill "would provide a reasonable balance to be able to return to what OIP has been doing for 30 years beforehand." A representative for University of Hawaii testified that "the University supports this bill because it strikes an appropriate and needed balance between the public's interest in disclosure, and the public's need for government entities to be able to deliberate towards well-informed, stress-tested, and thoughtful decisions." This bill died in committee in 2022, was revived in 2023 but failed to pass during the legislative session.[16]

In 2012, Christopher Lepczyk, a wildlife biologist in the University of Hawaii at Manoa Department of Natural Resources and Environmental Management, published a study that used computer modelling to evaluate the control of feral cat populations with euthanasia due to the risk the cats posed to native wildlife. The Best Friends Animal Society, an animal welfare organization, then made an open records request to the University of Hawaii asking for materials related to the grant that supported the research. The university disclosed the research proposal but refused to disclose the remainder of the materials requested. It is not known what the exact legal grounds were for the denial, although the university apparently cited concerns about disclosing unpublished material. A follow-up study was later published, and Lepczyk continued to be targeted when presenting his findings, but additional open records requests were not used to harass him.[17]

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[16] Kevin Dayton, *Some Hawaii Agencies Are Pushing A Bill That Would Limit Public Access To Government Records*, HONOLULU CIVIL BEAT, Feb. 22, 2022, https://www.civilbeat.org/2022/02/some-hawaii-agencies-are-pushing-a-bill-that-would-limit-public-access-to-government-records/ [https://perma.cc/9NQN-QF3F]; Kevin Dayton, *Hawaii Senators Move To Keep Public Records Secret*, HONOLULU CIVIL BEAT, Feb.7, 2023, https://www.civilbeat.org/2023/02/hawaii-senators-move-to-keep-public-records-secret/ [https://perma.cc/Q4BY-THK7].

[17] Michael Halpern, Union of Concerned Scientists, Center for Science and Democracy, *Freedom to Bully: How Laws Intended to Free Information are Used to Harass Researchers*, Feb. 2015, http://www.ucsusa.org/sites/default/files/attach/2015/09/freedom-to-bully-ucs-2015-final.pdf [https://perma.cc/2EB2-HWEL].

IDAHO

C

I. ANALYSIS

The Idaho Public Records Act protects all records relating to academic research if the release of the records could reasonably affect the conduct or outcome of the research until it is publicly released, copyrighted, or patented or until the research is completed or terminated. There is no case law evaluating the application of this statute section.

II. STATUTE

OPEN RECORDS LAW

Idaho Public Records Act, Idaho Code Ann. §§ 74-101 to -126

KEY STATUTORY PROVISIONS (EXCERPTS)

IDAHO CODE ANN. § 74-107

Records Exempt from Disclosure – Trade Secrets, Production Records, Appraisals, Bids, Proprietary Information.

The following records are exempt from disclosure:

> (20) *Records, data, information and materials collected, developed, generated, ascertained or discovered during the course of academic research at public institutions of higher education if the disclosure of such could reasonably affect the conduct or outcome of the research, or the ability of the public institution of higher education to patent or copyright the research or protect intellectual property.*
>
> (21) *Records, data, information and materials collected or utilized during the course of academic research at public institutions of higher education provided by any person or entity other than the public institution of higher education or a public agency.*
>
> (22) *The exemptions from disclosure provided in subsections (20) and (21) of this section shall apply*

only until the academic research is publicly released, copyrighted or patented, or until the academic research is completed or terminated. At such time, the records, data, information, and materials shall be subject to public disclosure unless: (a) another exemption in this chapter applies; (b) such information was provided to the institution subject to a written agreement of confidentiality; or (c) public disclosure would pose a danger to persons or property.

(23) The exemptions from disclosure provided in subsections (20) and (21) of this section do not include basic information about a particular research project that is otherwise subject to public disclosure, such as the nature of the academic research, the name of the researcher, and the amount and source of the funding provided for the project.

(Emphasis added.)

III. CASES

KEY CASES

There are no open records cases concerning research or the research exemption, which was enacted in 2015.

OTHER POTENTIALLY RELEVANT CASES

Cowles Publishing Co. v. Kootenai County Board of County Commissioners, 159 P.3d 896 (Idaho 2007): The Idaho Supreme Court found that emails are considered public records if they (1) contain information relating to the conduct or administration of the public's business, and (2) were prepared, owned, used, or retained by a government agency. The court found that emails of a personal nature that were sent via county email system between the manager of a juvenile education and training court and her supervisor were considered public records, because they were sent by county employees on a county email system and related to the public's business. There were allegations of an improper relationship between the two that had implications for an investigation into misconduct.

ILLINOIS

B

I. ANALYSIS

The Illinois Freedom of Information Act exempts research data that could reasonably be expected to produce private gain or public loss when disclosed.

The Illinois FOIA also has an exemption for course materials or research materials used by faculty members, but there is no case law evaluating this exemption. In addition, there is a common law deliberative process exemption, which has been applied to deny disclosure of non-academic university records that are both predecisional and deliberative.

II. STATUTE

OPEN RECORDS LAW

Illinois Freedom of Information Act, 5 ILCS §§ 140/1 to 140/11.6
Known as: FOIA

KEY STATUTORY PROVISIONS (EXCERPTS)

5 ILCS § 140/7

Exemptions

(1)(f) *Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated*, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body. The exemption provided in this paragraph (f) extends to all those records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents.

(1)(i) Valuable formulae, computer geographic systems, designs, drawings and *research data obtained or produced by any public body when disclosure could reasonably be expected to produce private gain or public loss*. The exemption for "computer geographic systems" provided in this paragraph (i) does not

extend to requests made by news media as defined in Section 2 of this Act when the requested information is not otherwise exempt and the only purpose of the request is to access and disseminate information regarding the health, safety, welfare, or legal rights of the general public.

(1)(j) The following information pertaining to educational matters:

(i) test questions, scoring keys and other examination data used to administer an academic examination;

(ii) information received by a primary or secondary school, college, or university under its procedures for the evaluation of faculty members by their academic peers;

(iii) information concerning a school or university's adjudication of student disciplinary cases, but only to the extent that disclosure would unavoidably reveal the identity of the student; and

(iv) *course materials or research materials used by faculty members.*

(Emphasis added.)

STATUTORY NOTE

5 ILCS § 140/7(1)(g) provides an exemption for trade secrets.

III. CASES AND OPINIONS

KEY CASES AND OPINIONS

Ill. Att'y Gen. Pub. Access Op. 19-0 (February 1, 2019)

- Holding: The University of Illinois improperly denied disclosure of portions of research records in response to FOIA requests.
- Facts: In February 2019, ProPublica Illinois submitted a FOIA request to the University of Illinois seeking records related to research conducted by Mani Pavuluri, a child psychiatrist at the University of Illinois, Chicago. The University produced some of the records but denied disclosure of others under exemptions to the Illinois FOIA, including the preliminary drafts exemption found in 5 ILCS 140/7(1)(f) and the 5 ILCS 140/791(j)(iv) exemption for course materials and faculty research.
- Summary:
    - ProPublica requested the records as part of an investigation on research misconduct. Pavuluri had allegedly put children at risk in clinical trials by giving the drug lithium to children under the age of 13, violating research rules, failing to alert the parents of the study's risks, and falsifying data to cover up the misconduct.

- ProPublica made several requests for records. While the university turned over most of them, it also withheld several letters and redacted another. ProPublica then submitted a Request for Review to the Illinois Public Access Bureau (PAB).
- The university denied production of the letters under the 5 ILCS 140/7(1)(a) exemption for records specifically prohibited from disclosure under federal or State law. The university claimed that four letters concerning research misconduct sent by the Institutional Review Board (IRB) to the United States Department of Health and Human Services were prohibited from disclosure under the Illinois Medical Studies Act (MSA) and thus fell under the 5 ILCS 140/7(1)(a) exemption. The MSA protects records that are part of the peer review process from disclosure in order to encourage candid communication.
- ProPublica claimed this exemption did not apply because the MSA does not apply to information originating from IRB files. The PAB disagreed, finding that IRB files are covered by the MSA. However, it found that the letters should not be withheld in their entirety as only certain portions of the letters fell under these provisions. The rest consisted of IRB findings and corrective actions that resulted from the IRB process. Disclosure of such information is not prohibited by the MSA, and the records could therefore be disclosed with the portions protected by the MSA redacted.
- The university also claimed a 5 ILCS 140/7(1)(f) deliberative process exemption and redacted certain portions of a fifth letter that responded to issues raised by the National Institute of Mental Health. The PAB found that these portions of the letter were not protected under the MSA as they detailed corrective actions taken and thus were not considered interagency communications privileged under the MSA.
- Finally, the university claimed the letters in question should be withheld or redacted under the 7(1)(j)(ii) exemption for information used by a university in its evaluation of faculty members by their peers because the records contained peer review commentary. It also stated that the letters may be exempt under the 7(1)(j)(iv) exemption for research materials used by faculty members. The PAB found that neither of these exemptions applied. There was no indication that the IRB review materials were used for faculty evaluation, and the results of the IRB review process did not contain research materials used by faculty members.
- The University was therefore ordered to disclose the required portions of the letters to ProPublica.

State Journal-Register v. University of Illinois Springfield, 994 N.E.2d 705 (Ill. App. Ct. 2013)

- Holding: The Appellate Court of Illinois found that certain records relating to the resignation of three University of Illinois Springfield athletic coaches were exempt under the deliberative process exemption in FOIA.
- Facts: The requestor filed a FOIA request seeking all records, documents, and written and electronic correspondence concerning allegations of sexual misconduct by three women's softball coaches during a team trip to Florida.

- Summary:
    - The court stated that the purpose of the deliberative process exemption was to protect the communications process and encourage frank and open discussion among employees before a final decision is made. Otherwise, the expectation that remarks may be made public will temper employees' candor to the detriment of the decision-making process.
    - The court also stated that purely factual material must be disclosed once a final decision has been made unless the factual material is inextricably intertwined with predecisional and deliberative discussions.
    - Communications after an agency has issued a decision are not exempt from disclosure.
    - When applying these standards to the records in question, the court exempted email chains that contained staff opinions and general communications regarding the process of the investigation or the scheduling of meetings during the investigative process as predecisional and deliberative. The court stated that these related to the collection of information necessary to reach a decision, the exact type of frank and open discussion intended to be protected by the exemption.
    - The court declined to extend the exemption to information contained in witness statements, as they were factual accounts (not intertwined with deliberative material) and also declined to extend the protection to an email that reflected the final decision, as it was not part of the predecisional, deliberative process.

OTHER POTENTIALLY RELEVANT CASES AND OPINIONS

Ill. Att'y Gen. Pub. Access Op. 16-006 (Aug. 9, 2016): Communications pertaining to the transaction of public business that are sent or received on public employees' personal email accounts are public records under the definition of that term in Section 2(c) of FOIA.

IV. OTHER NOTES

In 2024, a reporter for *Sportico* filed a public records lawsuit, demanding that the University of Illinois (U of I) provide communications sent to and from U of I Chancellor Robert J. Jones over BoardVantage, a third-party software system, relating to the Big Ten Conference (the NCAA Division I collegiate athletic conference). U of I asserted that communications conveyed over BoardVantage are categorically immune from public disclosure, arguing that "The administration of the Big Ten—a private organization—and its regulation of athletics for students of its member institutions is not 'public business' under Illinois law."[1] The lawsuit is currently pending.

[1] Daniel Libit, *Big Ten Backs Message Portal Secrecy in Illinois FOIA Case*, SPORTICO (May 7, 2025), https://www.sportico.com/leagues/college-sports/2025/big-ten-boardvantage-illinois-foia-lawsuit-1234851379/ [https://perma.cc/7UT5-3G2A].

INDIANA

B

I. ANALYSIS

Indiana broadly exempts any information concerning research from disclosure. Indiana courts have applied this statute to exempt university research materials from disclosure.

The Indiana Code also has an exemption for inter/intra-agency records that are deliberative or advisory, and are communicated for the purpose of decision-making. Indiana courts have applied this exemption to non-academic university records.

II. STATUTE

OPEN RECORDS LAW

Indiana Access to Public Records Act, Ind. Code Ann. §§ 5-14-3-1 to -10

KEY STATUTORY PROVISIONS (EXCERPTS)

IND. CODE ANN. § 5-14-3-4

(a) The following public records are excepted from section 3 of this chapter and may not be disclosed by a public agency, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery:

> (6) *Information concerning research, including actual research documents, conducted under the auspices of a state educational institution*, including information:
>
> > (A) concerning any negotiations made with respect to the research; and
> >
> > (B) received from another party involved in the research.

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(6) *Records that are intra-agency or interagency advisory or deliberative material*, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

(7) Diaries, journals, or other *personal notes* serving as the functional equivalent of a diary or journal.

(Emphasis added.)

STATUTORY NOTE

There is also an exemption for trade secrets (Ind. Code §5-14-3-4(a)(4)).

III. CASES

KEY CASES

Open records case concerning research exemption:

Robinson v. Indiana University, 659 N.E.2d 153 (Ind. Ct. App. 1995)

- Holding: The Indiana Court of Appeals found that Animal Care and Use Applications submitted to Indiana University's Animal Care and Use Committee fell under the research exemption found in Ind. Code Ann. § 5-14-3-4(a)(6).
- Facts: The requestor sought access to multiple records relating to Indiana University's Animal Care and Use Committee and its School of Medicine Subcommittee. At issue in this appeal was whether completed Animal Care and Use applications submitted to the Committee and the Subcommittee—and any references to particular research in the meeting minutes of those committees—were exempt from disclosure under the Indiana Public Records Act.
- Summary: The only issue in this case was whether the requested records concerned research for the purpose of the research exemption Ind. Code Ann. § 5-14-3-4(a)(6).
    - The court stated that while the statute should be liberally construed to implement the policy of providing the public with full and complete information regarding the affairs of government, the legislature has also enacted a "myriad of broad exceptions"[1] that should be strictly construed without ignoring the legislative intent behind such exemptions.

[1] *Robinson v. Indiana Univ.,* 659 N.E.2d 153, 156 (Ind. Ct. App. 1995).

- The court looked at a similar case in North Carolina where the Animal Care and Use Committee forms were not protected from disclosure.[2] The court found that case was not relevant here because North Carolina does not contain a statutory exemption for research.
- In contrast, the Indiana statute contains a specific research exemption which indicates the Indiana legislature's intent to extend non-disclosure to these types of records.
- The court held that all of the information contained in the research applications was "information concerning research conducted by [or] under the auspices of Indiana University"[3] and therefore not subject to disclosure under the Public Records Act.

OTHER POTENTIALLY RELEVANT CASES

Journal Gazette v. Board of Trustees of Purdue University, 698 N.E.2d 826 (Ind. Ct. App. 1998): The Indiana Court of Appeals found that notes made in a compliance log regarding National Collegiate Athletic Association (NCAA) rules and regulations were exempted under the diaries, journals, and personal notes exemption in Ind. Code Ann. § 5-14-3-4(b)(7). In addition, documents relating to the investigation of alleged NCAA violations were deliberative, consisting of opinions created for the purpose of decision making and therefore exempt under the inter/intra-agency exemption under Ind. Code Ann. § 5-14-3(b)(6).

Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University, 787 N.E.2d 893 (Ind. Ct. App. 2003): The Indiana Court of Appeals held that records relating to an investigation into complaints made by students against a basketball coach were predecisional, but also contained both factual information and deliberative/speculative material and therefore could not be excluded as a whole under the inter/intra-agency exemption. Any records containing factual information must be disclosed as long as they are not inextricably linked to non-disclosable materials, but any speculative material remains protected from disclosure.

Family & Social Servs. Admin. v. Saint, 158 N.E.3d 972 (Ind. 2025): The Indiana Supreme Court considered whether a White Paper provided by a private entity for use in settlement negotiations with a public agency could be exempted from disclosure under the deliberative-material exception in Ind. Code Ann. § 5-14-3-4(b)(6). The Indiana Supreme Court determined that the White Paper could not be withheld as the exemption only applied to material that "originates from, and is communicated between, employees of the same agency",[4] and not to material provided by a private entity that was merely "used" within the agency for its deliberative process.

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[2] *S.E.T.A. UNC-CH Inc. v. Huffines*, 440 N.E.2d 726 (N.C. Ct. App.1991) (interpreting North Carolina's Public Records Laws in N.C. Gen. Stat. § 132-1 to -9). See page 157 of this report.

[3] *Robinson*, 659 N.E.2d at 157.

[4] *Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University,* 787 N.E.2d 893, 980 (Ind. Ct. App. 2003).

IV. OTHER NOTES

In 2024, Indiana's governor signed House Bill 1338 into law, which limited how broadly Indiana's Public Access Counselor, an office that provides advice and assistance concerning Indiana's public access laws (specifically, the Access to Public Records Act and the Open Door Law), can interpret these laws.[5] Indiana now confines the counselor's interpretations and advisory opinions to the plain text of the law, shifting away from the longer-standing approach of construing the law in favor of government transparency.[6]

[5] Rachel Fradette, *Holcomb signs law limiting state's public access official*, WFYI Indianapolis, Mar. 18, 2024, https://www.wfyi.org/news/articles/holcomb-signs-law-targeting-idiana-public-access-counselor [https://perma.cc/QH6R-MGX4].

[6] Rachel Fradette, *Indiana's public records expert steps down as new law shapes office's future*, Indiana Pub. Radio, Feb. 20, 2025, https://indianapublicradio.org/news/2025/02/indianas-public-records-expert-steps-down-as-new-law-shapes-offices-future/ [https://perma.cc/NS98-PVAJ].

IOWA

D

I. ANALYSIS

The Iowa Open Records Law protects tentative, preliminary, draft, speculative, or research material from disclosure prior to completion for the purpose that it was intended and in a non-final form. This exemption became effective in 2013; to date, there is no case law evaluating its application.

II. STATUTE

OPEN RECORDS LAW

Iowa Open Records Law, Iowa Code 22.1 to 22.15

KEY STATUTORY PROVISIONS (EXCERPTS)

IOWA CODE § 22.7

Confidential records.

The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information:

> (65) *Tentative, preliminary, draft, speculative, or research material, prior to its completion for the purpose for which it is intended and in a form prior to the form in which it is submitted for use or used in the actual formulation, recommendation, adoption, or execution of any official policy or action by a public official authorized to make such decisions for the governmental body or government body.* This subsection shall not apply to public records that are actually submitted for use or are used in the formulation, recommendation, adoption, or execution of any official policy or action of a governmental body or government body by a public official authorized to adopt or execute official policy for the governmental body or government body.

(Emphasis added.)

STATUTORY NOTE

There is a trade secret exemption (Iowa Code § 22.7(4)) and an exemption for "Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose" in Iowa Code § 22.7(6).

III. CASES

There is no case law to date that analyzes Iowa Code § 22.7(65).

KANSAS

C

I. ANALYSIS

The Kansas Open Records Act has a broad exemption for research data in the process of analysis, as well as memoranda and other records in which opinions are expressed. There is no case law evaluating the application of this exemption. However, courts have held that the exemption for the underlying materials is extinguished once the final decision/work product is made public; this holding could imply that once the final results of research are made public, all underlying research records must be disclosed.

II. STATUTE

OPEN RECORDS LAW

Kansas Open Records Act, Kan. Stat. Ann. §§ 45-215 to -254
Known as: KORA

KEY STATUTORY PROVISIONS

KAN. STAT. ANN. § 45-221

Certain records not required to be open; separation of open and closed information required; statistics and records over 70 years old open.

(a) Except to the extent disclosure is otherwise required by law, a public agency *shall not be required to disclose:*

> (14) Correspondence between a public agency and a private individual, other than correspondence which is intended to give notice of an action, policy or determination relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public by a public agency and is not specifically in response to communications from such a private individual.
>
> (20) *Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or*

policies or actions are proposed, except that this exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.

(34) Records involved in the obtaining and processing of intellectual property rights that are expected to be, wholly or partially vested in or owned by a state educational institution, as defined in K.S.A. 76-711, and amendments thereto, or an assignee of the institution organized and existing for the benefit of the institution.

(Emphasis added.)

III. CASES

KEY CASES

There is no court analysis of the application of the research exemption; see other notes below for details of case that was settled.

OTHER POTENTIALLY RELEVANT CASES AND OPINIONS

Burroughs v. Thomas, 937 P.2d 12 (Kan. Ct. App. 1997): The Kansas Court of Appeals found that while a preliminary drafts exemption exists, the exemption for the underlying materials is extinguished once the final work papers become public.

Kan. Att'y. Gen. Op. No. 2013-5: The Attorney General's office stated that minutes from a meeting of the county commissioners were preliminary drafts and covered by the exception in Kansas Stat. Ann § 45-221(a)(20) unless either of the following occurs: "(1) when the draft meeting minutes are publicly cited or identified in an open meeting, or (2) when an agenda of an open meeting is created and it cites or identifies the draft meeting minutes."[1] The opinion continues, "[i]f neither of those events occurs, *e.g.*, if the draft minutes are never discussed or voted on in an open meeting and never identified in an agenda of an open meeting, then such draft minutes may be discretionarily closed to the public."[2]

IV. OTHER NOTES

In April 2014, Students for a Sustainable Future, a student group at the University of Kansas, made a KORA request for documents that included contracts and correspondence related to professor Arthur Hall and other faculty that detailed their hiring by the university. The group also sought records detailing funding from the Koch Brothers and other entries that supported the university's Center for Applied

[1] Kan. Att'y Gen. Op. No. 2013-5 at 2.

[2] *Id.*

Economics. 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 a Petition for Declaratory and Injunctive Relief against the university and contemporaneously sought a Temporary Restraining Order against the university.

The Douglas County District Court executed the Temporary Restraining Order on December 4, 2014,[3] enjoining the university from disclosing, producing, or providing access to the disputed documents while litigation was pending. Among the arguments against disclosure in the original petition[4] are that the records should not be released based on the § 45-221(a)(20) research exemption and the § 45-221(a)(14) exemption for correspondence between a public agency and a private individual.

The case was settled in August 2015 with the agreement that some of the documents would be released.[5] However, neither the settlement agreement nor any of the articles discussing the settlement address the grounds on which the university decided to release some records and withhold others, so this case is of limited help when it comes to determining how this exemption may be applied in the case of KORA requests for the correspondence of university professors.[6]

[3] TRO available at https://www.csldf.org/resources/hall_lawsuit_et_al.pdf.

[4] *Id.*

[5] Settlement agreement available at https://www.csldf.org/resources/Art-Hall-Kansas-15-0821_settlement_agreement.pdf.

[6] For more information on this case see Allison Crist, *Sustainability Group Joins KU in Lawsuit*, THE UNIVERSITY DAILY KANSAN, Feb. 18, 2015, http://www.kansan.com/news/sustainability-group-joins-ku-in-lawsuit/article_5e4bd120-b7e4-11e4-bb6a-7f06181fb370.html [https://perma.cc/3L5R-M2AH]; Letter from Robert L. Shibley, Foundation for Individual Rights in Education (FIRE), Oct.7, 2014, https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2014/12/FIRE-Letter-to-University-of-Kansas-October-7-2014.pdf [https://perma.cc/F8X5-S5X5].

KENTUCKY

D

I. ANALYSIS

The Kentucky Open Records Act contains a narrow research exemption for public records confidentially disclosed to an agency and compiled and maintained for scientific research. Kentucky courts have strictly applied the exemption, and protection from disclosure has been extended only where the research was disclosed to the university by a third party upon the condition that it remains confidential.

Kentucky Attorney General Opinions have found that research generated by a university will not be exempted from disclosure based on the statutory research exemption.

II. STATUTE

OPEN RECORDS LAW

Kentucky Open Records Act (KORA), Ky. Rev. Stat. Ann. §§ 61.870 to .884

KEY STATUTORY PROVISIONS (EXCERPTS)

KY. REV. STAT. ANN. § 61.878

Certain public records exempted from inspection except on order of court -- Restriction of state employees to inspect personnel files prohibited.

(1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery:

> (b) *Records confidentially disclosed to an agency and compiled and maintained for scientific research.* This exemption shall not, however, apply to records the disclosure or publication of which is directed by another statute;

(c)1. Upon and after July 15, 1992, *records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records;*

(c)2. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained:

a. In conjunction with an application for or the administration of a loan or grant;

b. In conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154;

c. In conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person; or

d. For the grant or review of a license to do business.

(i) *Preliminary drafts, notes, correspondence with private individuals*, other than correspondence which is intended to give notice of final action of a public agency;

(j) *Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended*

(Emphasis added.)

III. CASES AND OPINIONS

KEY CASES AND OPINIONS

Cases and opinions concerning research exemption and other academic institution records:

In re People for the Ethical Treatment of Animals/University of Kentucky, Ky. Op. Att'y Gen. 15-ORD-108, 2015 WL 3919071 (June 16, 2015)[1]

[1] Decision upheld by administrative appeal *University of Kentucky v. People for the Ethical Treatment of Animals, Inc.*, 15-CI-2595 (Fayette Cir. Ct., Feb. 28, 2017), available at https://www.csldf.org/resources/University-of-Kentucky-v-PETA-Ky-Fayette-Cir-Ct-2017.pdf.

- Holding: The Kentucky Attorney General's office found that University of Kentucky Institutional Animal Care and Use Committee (IACUC) approved protocols are not protected from disclosure under the Kentucky Open Records Act.
- Facts: People for the Ethical Treatment of Animals (PETA) requested copies of all active University of Kentucky IACUC-approved protocols for the use of animals in teaching exercises.
- Summary:
    - The Attorney General's office found that the protocols were not protected under KRS 61.878(1)(b) because the records in question were generated by, not disclosed to, the university as specified in the language of the exemption.
    - The office also declined to extend the confidential records exemption in KRS 61.878(1)(c)1. and 2., again because the exemption applies only to records that were disclosed to, not generated by, the university. The exemption is designed to protect confidential information disclosed to the university by a private entity, the disclosure of which would place the private entity at a competitive disadvantage.
    - Additionally, the preliminary documents exemption of KRS 61.878(1)(j) was not applicable, as the protocols in question were approved and vetted by the IACUC, which constituted final action, and therefore they could not be considered preliminary.
    - The office also found that the trade secret exemption and a personal information protection did not apply to the protocols, with the exception of the contact information of the faculty and staff. This is because the contact information does not advance the citizens' right to know what the government is doing.

In re CNN/University of Kentucky, Ky. Op. Att'y Gen. 14-ORD-158, 2014 WL 4100146 (Aug. 6, 2014)

- Holding: The Kentucky Attorney General's office found that reports submitted to the University of Kentucky by a surgical society were exempt under the research exemption in KRS 61.878(b), as they were submitted with the express understanding that the university would not disclose the information to other parties.
- Facts: Cable News Network (CNN) requested records relating to the University of Kentucky pediatric heart surgery program. The university disclosed certain records but refused to disclose reports submitted to the university by the Society of Thoracic Surgeons Congenital Heart Surgery Database/Duke Clinical Research Institute. It also refused to provide raw numbers of the total volume of surgeries, number of deaths, and number of survivors on which the rates were based.
- Summary:
    - The reports submitted by the Society of Thoracic Surgeons were found to have been properly withheld based on the exemption in KRS 61.878(b).
    - The reports in question contained scientific research and were disclosed to the university with the explicit understanding that the university would not disclose the information to others.
    - Therefore, the statute sections are factually applicable to the reports in question, and they were properly withheld.[2]

[2] The raw data was exempted based on HIPAA and privacy exemption grounds.

In re Mark Donham/University of Kentucky, Ky. Op. Att'y Gen. 10-ORD-151, 2010 WL 5474607 (Dec. 22, 2010)

- Holding: The Kentucky Attorney General's office found that visualization scenarios developed by a university and used in a focus group cannot be withheld based on the 61.878(1)(b) exemption for scientific research disclosed to an agency, nor can they be withheld under other potentially relevant statutory exemptions. However, a list of participants in the focus group may be withheld under the exemption for personal privacy in 61.878(1)(a).
- Facts: The requestor sought disclosure of list of participants in a community focus group held to inform a vision for possible uses of the Paducah Gaseous Diffusion plant as well as the visualizations used in the scenarios presented at the visioning session. The University of Kentucky denied the disclosure of the visualizations under KRS 61.878(1)(b), (i), and (j) and denied the disclosure of the list of participants under the invasion of personal privacy exemption found in KRS 61.878(1)(a).
- Summary:
    - The Attorney General's office held that the list of names was properly withheld under the personal privacy exemption because the participants had a privacy interest in the nondisclosure of their names, but the visualizations were not protected under any of the other statute sections asserted.
    - The visualizations did not constitute records disclosed to an agency and compiled and maintained for scientific research under 61.878(1)(b), as they were generated by the university and not confidentially disclosed to it.
    - The records were also not drafts, notes, or correspondence with private individuals within the meaning of 61.878(1)(i) or preliminary recommendations or memoranda in which opinions were expressed or policies formulated or recommended for purposes of 61.878(1)(j).

OTHER POTENTIALLY RELEVANT CASES

2024 Att'y Gen. No. 118, 24-ORD-118 (May 10, 2024): The Kentucky Attorney General's office found that the University of Kentucky (the "University") did not violate the Open Records Act when it denied a request to inspect text messages on privately-owned devices because the request did not seek records prepared, owned, used, in the possession of, or retained by the University. In making this determination, the Attorney General considered whether the content of a record is what determines whether it is a "public record" under the Open Records Act and found that rather, that the statutory definition under KRS 61.870(2) requires that public records be something "prepared, owned, used, in the possession of or retained by a public agency." In other words, "Records that are the property of a 'public agency' are, in effect, the public's property."[3] Here, although the University qualified as a "public agency", as mere employees of the public agency "the two individuals are not 'state or local officers.' Thus, the records on their private devices can only become public records if a public agency, such as the University, obtains a

[3] 2024 Att'y Gen. No. 118, 24-ORD-118, 3 (May 10, 2024).

property interest in them."[4] In this case, the University did not own, possess or retain text messages that were stored on the employee's privately-owned devices. Moreover, communications prepared by employees were not automatically public records, but only become such when the public employee uses them for an official purpose on behalf of a public agency. The Attorney General reasoned that if these text messages had been "used" by the University, "then presumably the University would have already obtained them from the employee for that purpose and would therefore possess its own copies of them."[5]

2025 Ky. Op. Att'y Gen. No. 47, 25-ORD-047, (Feb. 18, 2025): The Kentucky Attorney General's office found that the University of Kentucky had violated the Open Records Act when it entirely withheld preliminary records under the exemptions set out in KRS 61.878(1)(i) and (j) from a former employee who had requested them. Under KRS 61.878(3) "[n]o exemption in this section shall be construed to deny, abridge, or impede the right of a public agency employee, including university employees[,] to inspect and to copy any record including preliminary and other supporting documentation that relates to him or her." The Attorney General therefore found that the emails, which mentioned the employee by name, "related" to her, and so the University erred in entirely withholding them instead of merely redacting the portions that did not "relate to" the employee.

2023 Ky. Op. Att'y Gen. No. 24, 23-ORD-024 (Feb. 2 2023): In examining the Murray State University's decision to withhold emails from a KORA request on the basis of, *inter alia*, the "preliminary exemptions" set forth in KRS 61.878(1)(i) and (j), the Kentucky Attorney General's Office found that the University properly relied on these exemptions for emails that contained preliminary drafts of a proposed response to the media inquiry and for emails that "can be generally described as short, 'for your information' types of emails, which are not substantive communications in themselves, but merely direct the recipient to other attached emails. They are the equivalent of a digital post-it note, such as a note affixed to a paper file instructing the recipient to read the file, and they are the types of notes that would be thrown in a wastebasket if they existed in physical form."[6] However, the Attorney General found that the University erred in withholding an email that contained substantive statements describing the author's past decision and the factual basis for that decision under KRS 61.878(1)(i) and (j) because this email was not a preliminary statement subject to future change, but instead a statement describing past events and the justification for taking past action.

University of Kentucky v. Kernel Press, Inc., 620 S.W.3d 43 (Ky., 2021): The Kentucky Supreme Court held that University of Kentucky violated the Open Records Act when it withheld records relating to the investigation of a professor by claiming they were exempt under the Family Educational Rights and Privacy Act (FERPA), finding that the University's "initial, single-paragraph assertion of a blanket exemption to disclosure of the entire Harwood Investigative File was wholly insufficient." The Supreme Court also found that the preliminary records exemption did not apply, because the professor's resignation amounted to final action. The Court remanded the case to the trial court for further

4 *Id.* at 5.

5 *Id.* at 6.

6 Att'y Gen. No. 24, 23-ORD-024, *6 (Feb. 2 2023).

proceedings to determine which parts of the requested records must be disclosed. It is unclear what decision was made on remand.

University of Louisville v. Sharp, 416 S.W.3d 313 (Ky. Ct. App. 2013): The Kentucky Court of Appeals held that emails relating to a proposed merger of a university hospital and other medical entities were preliminary materials for the purposes of 61.878(1)(i) and (j). The emails related to the scheduling of a meeting to discuss the merger, and the meeting itself, did not decide the final status of the merger and thus did not constitute a "final agency action" for the purposes of the exemption.

Justice and Public Safety Cabinet v. Malmer, Franklin Circuit Court No. 06-CI-1373 (Nov. 19, 2007): The Franklin Circuit Court upheld an Open Records Decision of the Office of the Attorney General that found that personal, non-work emails sent between state employees on state computers during working hours are subject to disclosure under the Open Records Act. The decision distinguishes these facts from another non-reported case, *Gannet v. Governor Ernie Fletcher*, Franklin Circuit Court No. 05-CI-1015 (May 17, 2006), where emails in question were determined not to be subject to the Open Records Act as they were sent by a private citizen volunteer with a state email address as opposed to a state employee.

IV. OTHER NOTES

2024 Proposed Legislation

In 2024, House Bill 509 was introduced in the Kentucky House of Representatives with significant majority support. The Bill requires public agencies to create official email accounts for public employees to conduct business on; simultaneously, the bill prevents public disclosure of information from officials' private phones or email accounts. Critics claim that the bill creates a large loophole for public officials to skirt KORA by using their personal phones or email accounts—which would no longer be subject to disclosure--to conduct public business.[7] There has been no further movement on this bill since floor amendments were filed in April 2024.[8]

Kentucky Attorney General Opinions

In recent years, the Kentucky Attorney General has handed down dozens of opinions that consider whether university records (including, but not limited to, staff emails, contracts with third parties, personnel files, etc.) can be withheld under the "preliminary exemptions" set forth in Ky. Rev. Stat. Ann. § 61.878(1)(i) and (j). While not setting forth new legal standards, these opinions are detailed factual analyses of whether specific records truly constitute "preliminary drafts, notes, correspondence with private individuals . . . " or "preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." A few examples have been included under "Other Potentially Relevant Cases" above.

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[7] Joe Sonka, *Bill that 'destroys' transparency of Ky. public records drops one provision as it advances*, KY. Pub. Radio, Mar. 27, 2024 https://www.lpm.org/news/2024-03-27/bill-that-destroys-transparency-of-ky-public-records-drops-one-provision-as-it-advances [https://perma.cc/TJX4-XEET].

[8] AN ACT relating to access to the records and meetings of public agencies, H.B. 509, Leg. of KY, (2024) https://apps.legislature.ky.gov/record/24rs/hb509.html [https://perma.cc/MRL2-HGVQ].

LOUISIANA

C

I. ANALYSIS

The Louisiana Public Records Law protects research until it is publicly disclosed, patented, or published. At least one Attorney General Opinion has extended the provision to protect underlying raw data used as the basis for a published study, although the legal reasoning used to reach this conclusion is somewhat vague, which raises questions as to how it would be interpreted in court. A recent case found that even "narrowly" sharing research at a high level still constituted public release, thereby defeating the exemption for undisclosed, unpatented or unreleased research.

II. STATUTE

OPEN RECORDS LAW

Louisiana Public Records Act, La. Rev. Stat. § 44:1 *et seq.*

KEY STATUTORY PROVISIONS (EXCERPTS)

LA. REV. STAT. 44:4

Applicability

This Chapter shall not apply:

(16) *To the following records of a board or institution of higher learning,* in accordance with rules and regulations promulgated by the Board of Supervisors for the University of Louisiana System, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, and the Board of Supervisors of Southern University and Agricultural and Mechanical College, or their successors, in conjunction with the Board of Regents, *for programs and institutions under their supervision and management, unless access to the records is specifically required by state or federal statute or is ordered by a court under rules of discovery:*

(a) Trade secrets and commercial or financial information obtained from a person, firm, or corporation, pertaining to research or to the commercialization of technology, including any

such information designated as confidential by such person, firm, or corporation, but not including any such information relating to the identity of principals, officers, or individuals

and entities directly or indirectly owning or controlling an entity other than a publicly held entity, or the identity of principals, officers, or individuals and entities directly owning or controlling five percent or more of a publicly held entity.

(b) *Data, records, or information produced or collected by or for faculty or staff of state institutions of higher learning in the conduct of or as a result of, study or research on commercial, scientific or technical subjects of a patentable or licensable nature, whether sponsored by the institution alone or in conjunction with a governmental body or private concern, until such data, records, or information have been publicly released, published, or patented.*

(c) Those portions of research proposals, supporting documentation and information, submitted by an institution of higher learning to the Board of Regents' Louisiana Education Quality Support Fund Program, which have been certified by the institution as containing data, information, ideas, or plans of a potentially patentable or licensable nature, including any discussions or written comments concerning such information by reviewers of the proposals, but not including reviewer ratings, until such data, records, or information have been publicly released, published, or patented.

(d) Those portions of private document collections donated to state institutions of higher learning for historical research or preservation purposes, which are designated by the donor to have restricted access for a specific period of time.

(e) Test questions, scoring keys, and other examination data pertaining to the administration of an academic examination.

(f) *Teaching materials used by faculty that are not provided to students, including unpublished lecture notes, outlines, slides, syllabi, or recordings.*

(Emphasis added.)

III. CASES AND OPINIONS

KEY CASES AND OPINIONS

People for the Ethical Treatment of Animals v. Bd. Of Supervisors of La. State Univ., 387 So. 3d 527 (La., 2024)

- Holding: The Louisiana Supreme Court upheld the ruling of the lower courts, ordering the production of records relating to a Louisiana State University (LSU) research project involving wild songbirds. Specifically, the Supreme Court found that (1) records not generated solely in accordance with

federal law were not exempt from the Public Records Act (the Act); (2) all photographs and videographic records of birds held and/or used by a university professor were not exempt under § 44:4(16)(b) of the Act because the university did not establish that the videos were patentable or licensable or had not been previously published; (3) LSU failed to show that the records requests were so burdensome that they interfered with the operation of its constitutional and legal duties; and (4) the professor's communications conducted through a private attorney that nonetheless related to her work at LSU constituted "public records" subject to the Act.

- Facts: People for the Ethical Treatment of Animals (PETA) made a number of public records requests to LSU seeking records related to the use and treatment of songbirds in the labs of an LSU professor. LSU failed to produce any records in response, alleging that the animal care records sought by PETA were records of the Institutional Animal Care and Use Committee, a body created by federal law, and therefore were not subject to the Louisiana Public Records Act (the Act). LSU further asserted that certain of the requested records were exempt from production under § 44:4(16) of the Act.

  The district court initially ruled in favor of PETA, granting PETA access to all the records it requested. The Court of Appeals reversed in part and affirmed in part. Specifically, the Court of Appeals found that LSU did not have certain videographic records responsive to part of PETA's request and therefore was not compelled to produce records it did not have. The Court of Appeals also found that LSU was not compelled to produce certain of the requested photographs and videographic records that "may lead to patentable or licensable data, records, or information" until such time as those records were publicly released, published or patented. However, because the professor had used portions of such videos for a published article or in presentations, those videos were deemed to have been already publicly released and were therefore not exempt from production. In all other respects, the court of appeals upheld the district court's order to produce the requested records.

- Summary: The Supreme Court examined the lower courts' order that LSU produce four categories of records requested by PETA: (1) animal use/veterinary care records; (2) video recordings emanating from the professor's experiments; (3) communications relating to the professor's plans to trap or experiment on birds and to amend the City of Baton Rouge's wild bird ordinance; and (4) records relating to the professor's hiring of private counsel in order to have a wild bird ordinance amended.

  With respect to (1) the animal use/veterinary care records, the Supreme Court upheld the lower courts' determination that such records were not generated *solely* in accordance with federal law but were also created and maintained pursuant to state law. Therefore, these records were not simply federal records that were exempt from requests made under the Act.

  With respect to (2) the video recordings emanating from the professor's experiments, the Supreme Court upheld the Court of Appeal's order, finding that that data, records or information derived from research is only excepted from the Act temporarily, until such research is "publicly released, published, or patented". Although the professor had only "narrowly" shared her research at a high level, this still constituted public release, which barred LSU from withholding this research under § 44:4(16)(b) of the Act.

  With respect to (3) the professor's communications, the Supreme Court considered evidence that a narrowed records request had produced a "manageable" number of results and therefore upheld the lower courts' ruling that requests were not unduly burdensome. The Supreme Court reiterated that a

public records request may only be denied "where the request is so burdensome that it interferes with the custodian's constitutional and legal duties."[1]

- With respect to (4) the records relating to the hiring of private counsel, the Supreme Court found that, in determining whether records were subject to the Act, the dispositive issue was not whether the records were in physical possession of a public body nor whether the records are located on private devices or in private accounts. Rather the dispositive inquiry was whether the "communications (including the hiring of private counsel) were used 'in the conduct, transaction, or performance of any business, transaction, work, duty, or function' of a public body, under the authority of state or local law."[2] Here, the Supreme Court found that, although the professor's efforts and communications to amend the wild bird ordinance were conducted through her private attorney allegedly on the professor's own behalf, such communications did relate to the work, duty or function of LSU and were therefore public records subject to production under the Act.

Krielow v. Louisiana State University Board of Supervisors, 290 So.3d 1194 (La. App. 1 Cir., 2019)

- Holding: The Louisiana appellate court affirmed the trial court's finding that Louisiana State University (LSU) had improperly withheld records under the public records act exemption for trade secrets held by an institute of higher education, and upheld an attorneys' fees award.
- Facts: Krielow requested documents related to the transfer of certain rice technology developed by the LSU Rice Research Facility and its employees to third parties. The requested documents allegedly contained information that was subject to a Licensing Agreement between LSU and BASF Corporation. LSU disclosed some records but withheld others as exempt trade secrets under La. Rev. Stat. 44:4(16)(a). Krielow filed a petition for a writ of mandamus and attorney's fees. The trial court appointed a special master, who performed an *in camera* review and found that some documents had been improperly withheld. The trial court adopted this finding, and awarded attorneys' fees. LSU appealed the trial court's decision.
- Summary: The court of appeal found that by allowing the BASF corporation to make redactions and withhold documents without further review, LSU had failed to perform its duty as custodian of the records, forcing Krielow to incur additional time and expense to recover the public records to which he was legal entitled. The court found that the trial court did not abuse its discretion in awarding attorneys' fees, but declined to award additional fees for the appeal.

La. Op. Att'y Gen., No. 92-94, 1992 WL 610895 (June 3, 1992)

- Holding: Research information obtained by Florida Parishes Social Science Research Center at Southeastern Louisiana University may be exempt under 44:4(16)(a) and (b), including raw data that forms the basis of published reports.
- Facts: Southeastern Louisiana University requested an opinion to determine whether 44:4(16)(a) and (b) applied to data compiled by its Florida Parishes Social Science Research Center, which contracts

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[1] *People for the Ethical Treatment of Animals v. Bd. Of Supervisors of La. State Univ.,* 387 So. 3d 527, 542 (La., 2024) (citing *Krielow v. Louisiana State University Board of Supervisors*, 290 So.3d 1194 (La. App. 1 Cir., 2019)).

[2] *Id.* at 544.

with private and commercial companies to conduct research or collect other commercial data such as demographic information and political polling.

- Summary: Research collected by the research center that is commercial in nature is exempt from the Public Records Act under 44:4(16)(a). While the exemption in 44:4(16)(b) applies only until the data is publicly released, published, or patented, other exceptions to the Louisiana Public Records Law may mean certain raw data that forms the basis of published reports may also be exempted under this provision (*i.e.*, if a participant in research has a reasonable expectation of privacy).

OTHER POTENTIALLY RELEVANT CASES AND OPINIONS

Dorson v. State, 657 So. 2d 755 (La. Ct. App. 1995): The Louisiana Court of Appeals found that the Institutional Animal Care and Use Committee of Louisiana State University Medical Center is not subject to the state Public Records Law, as it is fully funded and regulated by the federal government, even though state university faculty members make up the Committee.

Matter of Philip Morris, Inc., 706 So. 2d 665 (La. Ct. App. 1998): In a suit brought by a tobacco company seeking disclosure of raw research data from studies performed at Louisiana State University Medical Center, which was decided based on a public health data statute, the Louisiana Court of Appeals briefly addressed the open records exemption 44:4(16)(b). It noted that had the case been brought as an open records request, and an argument could have been made that even though the final study was published, the raw data was not, and thus the raw data remained protected under 44:4(16)(b).

La. Op. Att'y Gen., No. 10-272, 2011 WL 21796890 (Apr. 13, 2011): The Attorney General's office found that emails of a purely personal nature received or transmitted by a public employee, and that have no relation to any function of a public office, were not public records as described by the Public Records Act.

IV. OTHER NOTES

2024 Proposed Legislation

In April 2024, a Louisiana State Senator introduced Senate Bill 482, which would create an exception to the public records law for any records reflecting advisory opinions, recommendation or preliminary deliberations.[3] The bill has not advanced since 2024.

[3] S.B. 482, Reg. Sess. (LA, 2024). https://legis.la.gov/legis/BillInfo.aspx?i=247180 [https://perma.cc/DP52-R54R].

MAINE

B

I. ANALYSIS

The Maine Freedom of Access Act excludes from disclosure records of the University of Maine System (which encompasses all public universities in the state), the Maine Community College System, and the Maine Maritime Academy. While the exclusion was originally very broad, it was narrowed in 2019 to only include "subject matter" that is "confidential or otherwise protected from disclosure by statute, other law, legal precedent or privilege recognized by the courts of this State." There is no case law analyzing the exclusion, and there is no case law recognizing or analyzing a common law deliberative process privilege exemption.

II. STATUTE

OPEN RECORDS LAW

Maine Freedom of Access Act, 1 Me. Rev. Stat. Ann. §§ 400 to 414
Known as: FOAA

KEY STATUTORY PROVISIONS (EXCERPTS)

1 ME. REV. STAT. ANN. § 402(3)

Definitions

(3) The term "public records" means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, *except*:

> E. *Records, working papers, interoffice and intraoffice memoranda 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 when the subject matter is confidential or otherwise protected from disclosure by statute, other law, legal precedent or privilege recognized by the courts of this State. The provisions of this paragraph do not apply to the boards of trustees and the committees and subcommittees of those boards, which are referred to in subsection 2, paragraph B.

(Emphasis added.)

III. CASES

There are no relevant open records cases.

MARYLAND

C

I. ANALYSIS

The Maryland Public Information Act (PIA) contains a general provision that protects specific details of a research project that a state institution is conducting. There is no case law that evaluates this provision.

Maryland's PIA also has a statutory deliberative process exemption for predecisional and deliberative records that could potentially be applied to research. There is no Maryland case law evaluating the deliberative process exemption and research records.

II. STATUTE

OPEN RECORDS LAW

Maryland Public Information Act, Md. Code Ann., Gen. Prov. §§ 4-101 to -601
Known as: PIA

KEY STATUTORY PROVISIONS (EXCERPTS)

MD. GEN. PROV. CODE, TIT. 4, SUBTIT. 3, PT IV

§ 4-343. In general.

Unless otherwise provided by law, if a custodian believes that inspection of a part of a public record by the applicant would be contrary to the public interest, the custodian may deny inspection by the applicant of that part of the record, as provided in this part.

§ 4-344. Interagency or intra-agency letters or memoranda.

A custodian *may deny inspection of any part of an interagency or intra–agency letter or memorandum* that would not be available by law to a private party in litigation with the unit.

§ 4-346. State or local research project.

(a) *Subject to subsection (b) of this section, a custodian may deny inspection of a public record that contains the specific details of a research project that an institution of the State or of a political subdivision is conducting.*

(b) Denial for particular information prohibited. -- A custodian may not deny inspection of the part of a public record that gives only the name, title, and expenditures of a research project described in subsection (a) of this section and the date when the final project summary of the research project will be available.

(Emphasis added.)

§ 4-347. Inventions owned by State public institution of higher education.

(a) Subject to subsection (b) of this section, a custodian may deny inspection of the part of a public record that contains information disclosing or relating to an invention owned in whole or in part by a State public institution of higher education for 4 years to allow the institution to evaluate whether to patent or market the invention and pursue economic development and licensing opportunities related to the invention.

(b) A custodian may not deny inspection of a part of a public record described in subsection (a) of this section if:

(1) the information disclosing or relating to an invention has been published or disseminated by the inventors in the course of their academic activities or disclosed in a published patent;

(2) the invention referred to in that part of the record has been licensed by the institution for at least 4 years; or

(3) 4 years have elapsed from the date of the written disclosure of the invention to the institution.

§ 4-348. Confidential information owned by specific State entities.

A custodian may deny inspection of the part of a public record that contains information disclosing or relating to a trade secret, confidential commercial information, or confidential financial information owned in whole or in part by:

(1) the Maryland Technology Development Corporation; or

(2) a public institution of higher education, if the information is part of the institution's activities under § 15-107 of the Education Article.

MD. GEN. PROV. CODE ANN., TIT. 4, SUBTIT. 3, PT III

§ 4-328. Denial of inspection by custodian.

Unless otherwise provided by law, a custodian shall deny inspection of a part of a public record, as provided in this part.

§ 4-335. Trade secrets; confidential information.

A custodian shall deny inspection of the part of a public record that contains any of the following information provided by or obtained from any person or governmental unit:

(1) a trade secret;

(2) confidential commercial information;

(3) confidential financial information; or

(4) confidential geological or geophysical information.

III. CASES AND OPINIONS

KEY CASES AND OPINIONS

No open records cases address the exemptions for research or intellectual property owned by a university.

The Office of the Maryland Attorney General has issued a Maryland Public Information Act Manual[1] that discusses this exemption and two instances where it has been applied:[2]

> The specific details of an ongoing research project conducted by an institution of the State or a political subdivision (*e.g.*, medical research project) need not be disclosed by the custodian. GP § 4-346. Only the name, title, expenditures, and the time when the final project summary will be available must be disclosed. *See* 58 Opinions of the Attorney General 53, 59 (1973) for an application of this exception to a consultant's report. *See also* Letter from Assistant Attorney General Catherine M. Shultz to Leon Johnson, Chairman, Governor's Commission on Migratory and Seasonal Labor (Aug. 8, 1985) (census information revealing individual migrants' names may be protected under this provision).

The Public Information Act Manual also discusses the standard for applying the discretionary exemptions of Part IV of PIA, stating:

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[1] Office of the Maryland Attorney General, Maryland Public Information Act Manual (14th ed., Oct. 2015), available at http://www.marylandattorneygeneral.gov/Pages/OpenGov/piaManual.aspx [https://perma.cc/3CEJ-KUSX].

[2] *Id*. at 3-32.

Whether disclosure would be "contrary to the public interest" under these exceptions is in the custodian's "sound discretion," to be exercised "only after careful consideration is given to the public interest involved." 58 Opinions of the Attorney General 563, 566 (1973). In making this determination, the custodian must carefully balance the possible consequences of disclosure against the public interest in favor of disclosure. 64 Opinions of the Attorney General 236, 242 (1979). If the custodian denies access under one of the discretionary exemptions, the custodian must provide "a brief explanation of why the denial is necessary." GP § 4-203(c)(1)(i)1.[3]

OTHER POTENTIALLY RELEVANT CASES AND OPINIONS

Stromberg Metal Works v. University of Maryland, 854 A.2d 1220 (Md. 2004): The Maryland Court of Appeals held that a final cost forecast for a university construction project cannot be redacted based on an exemption for inter/intra-agency letter or memorandum[4] that would not be available by law to a private party in litigation with the unit. To fall under the exemption, the record must be predecisional and deliberative. The university asserted that the cost forecast reflected subjective assessment of the final cost, but the court disagreed, finding that the number alone did not reflect views or opinions and was therefore not deliberative.[5]

81 Md. Op. Att'y Gen. 140 (1996): The Office of the Attorney General found that PIA applies to an electronically stored email message or a hard copy of the message in the custody and control of a public officer or employee, if the message is related to the conduct of public business.

[3] *Id.* at 3-28.

[4] This provision encompasses the common law deliberative process exemption.

[5] The court noted that facts may be exempted if, for example, they are facts obtained upon promises or understandings of confidentiality, investigative facts underlying and intertwined with opinions and advice, and facts the disclosure of which would impinge on the deliberative process. *Stromberg Metal Works, Inc. v. Univ. of Md.*, 854 A.2d 1220, 1229 (Md. 2003).

MASSACHUSETTS

D

I. ANALYSIS

The Massachusetts Public Records Law provides limited protection for proprietary information of the University of Massachusetts, including proprietary information provided by research sponsors or private concerns. There is also a statutory protection for inter/intra-agency memoranda or letters relating to policy positions being developed by an agency.

Exemptions are found in the general definitions of statutory terms section of the Massachusetts General Laws, Mass Gen. Laws ch. 4, § 7, and not within the text of the Public Records Law. There is no Massachusetts case law evaluating these exemptions.

II. STATUTE

OPEN RECORDS LAW

Massachusetts Public Records Law, Mass. Gen. Laws ch. 66, § 10 *et seq.*

KEY STATUTORY PROVISIONS (EXCERPTS)

MASS. GEN. LAWS CH. 4, § 7

Definitions of Statutory Terms; Statutory Construction

Twenty-sixth, "Public records" shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions in that they are:

(d) *inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency;* but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;

(u) *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.*

(Emphasis added.)

III. CASES

KEY CASES

People for the Ethical Treatment of Animals Inc. v. University of Massachusetts Amherst, No. 2284CV02096 (Suff. Cty. Sup. Ct. 2022): PETA requested videos and other records of experiments performed on Marmoset monkeys at University of Massachusetts Amherst.[1] The University denied the request, citing the proprietary information exemption to the public records law. PETA sued on September 19, 2022, requesting that the court order the University to release the records. In April 2025, the University of Massachusetts Amherst settled with PETA, releasing the requested records, the names of those currently serving on the university's institutional animal care and use committee, and paying $50,000 in PETA's legal fees.[2] In July 2025, the lab at issue in the lawsuit announced that it was shutting down, citing "the anti-science climate and funding cuts of the current administration" as the reasons for its closure.[3]

People for the Ethical Treatment of Animals Inc. v. University of Massachusetts Amherst, No. 1984CV00926 (Suff. Cty. Sup. Ct. 2019): In 2017, PETA requested videos and other records from a project studying laboratory monkey behavior. The University provided some records, but withheld others, citing trade secrets and proprietary information; the university wrote that the videos were "prepublication research data," and therefore intellectual property "squarely within the language of the exemption," and

[1] Will Katcher, *PETA Sues UMass over Monkey Lab Records, Continuing Years-long Fight over Experiments School Says Are Humane*, MASSLIVE, Sept. 12 2022, https://www.masslive.com/umass/2022/09/peta-sues-umass-over-monkey-lab-records-continuing-years-long-fight-over-experiments-school-says-are-humane.html [https://perma.cc/Y39Z-7AKF].

[2] Sara Oliver, *Win! PETA Scores Vital Records on Monkey Experiments in UMass Lawsuit*, PETA, Apr. 22, 2025 https://www.peta.org/news/records-on-monkey-experiments-umass-lawsuit/ [https://perma.cc/ZB5M-XLXX].

[3] Bella Ishanyan and Kavya Sarathy, *Lacreuse "Monkey" Lab Closes Down*. MASSACHUSETTS DAILY COLLEGIAN, Aug. 16, 2025, https://dailycollegian.com/2025/08/lacreuse-monkey-lab-closes-down/ [https://perma.cc/7SZ5-9TUM].

also cited privacy interests.[4] PETA filed suit in 2019, and the University agreed to release the videos in 2020.[5]

OTHER POTENTIALLY RELEVANT CASES

Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 787 N.E.2d 602 (Mass. App. Ct. 2003): The Massachusetts Appeals Court held that to the extent that only a portion of a public record may fall within an exemption to disclosure under the Public Records Law, the nonexempt segregable portion of the record is subject to public access.

[4] Greta Jochem, *PETA Sues UMass over Monkey Videos*, THE DAILY HAMPSHIRE GAZETTE, Mar. 25, 2010, https://www.gazettenet.com/PETA-Sues-UMass-Over-Public-Records-of-Animal-Testing-24389847 [https://perma.cc/A83A-6TM5].

[5] Jacquelyn Voghel, *UMass Settles Lawsuit with PETA over Research Monkeys*, THE DAILY HAMPSHIRE GAZETTE, June 25, 2020, https://www.gazettenet.com/UMassPETA-hg-062520-34922179 [https://perma.cc/YV8K-5JJG].

MICHIGAN

C

I. ANALYSIS

The Michigan Freedom of Information Act has a statutory inter/intra-agency communications exemption known as the frank communications exemption, which applies only to the extent that the public interest in protecting frank communication within a public body exceeds the public interest in disclosure of the record.

Michigan also has a research specific statute, the Michigan Confidential Research and Information Act, which has a provision that applies to the disclosure of research records created by or disclosed to a university. Under this statute, records generated by the university are protected until they are published.

II. STATUTE

OPEN RECORDS LAW

Michigan Freedom of Information Act, Mich. Comp. Laws § 15.231 to 246
Known as: FOIA

KEY STATUTORY PROVISIONS (EXCERPTS)

MICH. COMP. LAWS § 15.243

Exemptions from disclosure; public body as school district or public school academy; withholding of information required by law or in possession of executive office.

Sec. 13.

(1) A public body *may exempt from disclosure* as a public record under this act any of the following:

> (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover *other than purely factual materials and are preliminary to a final agency determination of policy or action.* This exemption does not apply unless the public

body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

(Emphasis added.)

Michigan Confidential Research and Investment Information Act, Mich. Comp. Laws § 390.1554

MICH. COMP. LAWS §390.1554

Information in which interest held, or owned, prepared, used, retained by, or in possession of public university or college; exemption from disclosure; applicability of subsection (1) to information regarding sold or marketed product or process; applicability of MCL 390.1553(3).

Sec. 4.

(1) Except as otherwise provided in this section, *the following information in which a public university or college holds an interest, or that is owned, prepared, used, or retained by, or in the possession of, a public university or college, is exempt from disclosure as a public record under the freedom of information act,* Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws:

(a) *Intellectual property created by a person employed by or under contract to a public university or college for purposes that include research, education, and related activities, until a reasonable opportunity is provided for the information to be published in a timely manner in a forum intended to convey the information to the academic community.*

(b) *Original works of authorship fixed in any tangible medium of expression created by a person employed by or under contract to a public university or college 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 from the date the work is first fixed in a tangible medium of expression.*

(c) Records regarding a process, a machine, an item of manufacture, or a composition of matter, or any new and useful improvement of a process, a machine, an item of manufacture, or a composition of matter, until a reasonable opportunity is provided for the inventor to secure patent protection, not to exceed 5 years from the date the records are first made.

(d) Trade secrets or other proprietary information in which a public university or college holds an interest or that a public university or college owns that is determined by the public university or college to have potential commercial value, if a general description of the nature of the information and a description of the extent of the interest held by the public university or college in the information is made available to a person upon request.

§ 390.1553 of this act contains detailed protections for research disclosed to a university by private external sources.

(Emphasis added.)

III. CASES

KEY CASES

There are no open records cases that address the research protections found in the Confidential Research and Investment Information Act.

Open records cases that address the frank communications exemption:

Herald Co., Inc. v. Ann Arbor Public Schools, 568 N.W.2d 411 (Mich. Ct. App. 1997)

- Holding: The Michigan Court of Appeals found that even when records in question fall under the frank communications exemption, the records must be disclosed if the public interest in disclosing the records is greater than the public interest in encouraging frank communication within the public body.
- Facts: The requestor sought disclosure of records relating to a public school teacher who pleaded guilty to carrying a concealed weapon.
- Summary:
    - The majority of records requests were decided on different grounds, but the decision regarding one document, a memorandum discussing the teacher's professional performance, was decided partly on grounds of the inter/intra-agency exemption.
    - In order to prevent disclosure, the public body seeking to withhold the records must establish that the documents cover materials other than purely factual materials, and that they are preliminary to a final determination or action.
    - Because this exemption is a conditional exemption ("A public body *may* exempt from disclosure"), if the documents cover more than factual materials and are preliminary to a final action, the public body must also establish that the public interest in encouraging frank communications within the public body/between public bodies clearly outweighs the public interest in disclosure.
    - Assuming that the memorandum in question is not factual and is preliminary to a final action, the court concluded that the public interest in disclosing a memorandum that contains public observations of a teacher who was convicted of carrying a concealed weapon was greater than the public interest in encouraging frank discussion. The memorandum was not protected under the frank communications exemption.

Herald Co., Inc. v. Eastern Michigan University Board of Regents, 719 N.W.2d 19 (Mich. 2006)

- Holding: A letter containing opinions regarding alleged misconduct by a university president was withheld under the frank communications exemption, in which public interest in withholding and protecting frank communications outweighed the public interest in disclosure.
- Facts: The requestor sought disclosure of a letter from the university vice president to the university Board of Regents regarding construction of the university president's house and containing a candid appraisal of the president's role in alleged over expenditures in construction of the house.

- Summary:
    - The court applied the test from *Herald Co., Inc. v. Ann Arbor Public Schools* and established that the letter contained material that was other than purely factual and was preliminary to a final determination.
    - Having established this, the court then had to evaluate whether the public interest in encouraging frank communications within the public body outweighed the public interest in disclosure and found that it did.
    - The court stated that frank communications were essential to the Board of Regent's ability to discharge its vital constitutional oversight function on behalf of the public. To disclose the letter would deter sources of candid opinions from being honest, especially in cases like this where a high-level administrator is asked to give an opinion of the highest ranking official in the administration whose favor he needs for job security.

Mackinac Cntr. For Pub. Policy v. Mich. State Univ., No. 364244 (Mich. Ct. App. 2023)

- Holding: The Michigan Court of Appeals affirmed the lower court's decision that: (a) certain communications between Michigan State University (MSU) officials were exempted by the frank communications exemption in MCL 15.243(1)(m) because in this case, the public interest in frank communication clearly outweighed the public interest in disclosure; and (b) certain emails containing student information were *not* exempted by the Family Educational Rights and Privacy Act of 1974 (FERPA) exemption in MCL 15.243(2) because this information did not fall into the category of "education records" pursuant to FERPA.
- Facts: The requestor sought disclosure of any emails to or from the president of MSU that mentioned an administrator, Stephen Hsu, who was the subject of student-led petitions of favor of and against his removal. These emails contained MSU students' names, email addresses, and phone numbers. MSU redacted or withheld some of the requested records, asserting that they were exempt either under the "frank communications" exemptions under MCL 15.243(1)(m) or the FERPA exemption under MCL 15.243(2).

  The lower court ruled that some records were exempt under the frank communications exemption but that the FERPA exception did not apply.
- Summary:
    - In considering whether the frank communications exemption applied, the Court of Appeals first noted that there was no dispute as to whether the information at issue involved frank communications. Therefore, the Court applied a balancing test weighing the public interest in disclosure versus the public interest in encouraging frank communication. Given the statute's intent to favor disclosure, a "public record is not exempt under the frank communication exemption *unless* the public body demonstrates that the public interest in encouraging frank communication between officials and employees of public bodies *clearly outweighs* the public interest in disclosure. . . . Rather than speak in platitudes and generalities, the parties and the courts must consider how the unique circumstances of the 'particular instance' affect the public interest in

disclosure versus the public interest in encouraging frank communication."[1] Here, the Court of Appeals found that given the high-profile and sensitive nature of the situation, the need for officials to communicate with each other candidly and in confidence clearly outweighed the public's interest in disclosure.

- The Court of Appeals also considered whether a FERPA exemption applied, an inquiry which revolved around whether the student information redacted from the requested emails was the type of "education record" that the FERPA barred from disclosure. The Court determined that the FERPA exemption did not apply because such information was not an "educational record," and that the redacted student information was "mere directory information, which in any case was excluded from the general FERPA disclosure prohibitions."[2]

OTHER POTENTIALLY RELEVANT CASES

Howell Education Association v. Howell Board of Education, 789 N.W.2d 495 (Mich. Ct. App. 2010): The Michigan Court of Appeals found that personal emails between public school teachers regarding their roles as teacher union leaders were not public records for the purpose of FOIA. The fact that the records were sent via a public body's email system, for which there was an acceptable use policy that may have been violated by the sending of personal emails, did not mean they were considered public records. The emails were personal and not related to official functions and therefore not subject to disclosure.

IV. OTHER NOTES

2011 – University of Michigan, Wayne State University, and Michigan State University

In 2011, the Mackinac Center for Public Policy, 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 difficult 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; Wayne State turned over 32 emails but withheld others based on an FOIA exemption. Michigan State quoted a $5,600 fee to produce the documents, which Mackinac refused to pay. Mackinac at one point

[1] *Mackinac Cntr. For Pub. Policy v. Mich. State Univ.*, No. 364244, 8 and 9 (Mich. Ct. App. 2023)(citing *Herald Co., Inc. v. Eastern Michigan University Board of Regents*, 719 N.W.2d 19, 473-75 (Mich. 2006))

[2] Id., at 16.

indicated that it intended to pursue litigation to compel disclosure, but there is no evidence to suggest they did so.[3]

2017 – University of Michigan

Mackinac filed a lawsuit against the University of Michigan in March 2017 seeking disclosure of all emails containing the word "Trump" sent between July 1 and November 16, 2016 by university President Mark Schissel. The request was the 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.[4]

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. The 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.[5] The letter also stated that these four emails had some email addresses redacted (claiming the addresses fell under security exemptions found in §§13(1)(y) and 13(20) of FOIA), and that a small number of additional internal messages had been withheld under the §13(1)(m) frank communications exemption. 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.[6] 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 percent of FOIA requests without charging fees. The university also agreed to reimburse Mackinac $7,914 in legal fees.[7]

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[3] For discussion of this matter see Robert O'Neil, Am. Ass'n of Univ. Professors, *Academic Freedom and Freedom of Information Requests* (Nov. 4, 2011), https://www.aaup.org/NR/rdonlyres/FF153796-0DFD-4B44-8C11-6B0D91607F92/0/AcademicFreedomandFOIARequests.pdf [https://perma.cc/7ZUH-7WV7].

[4] See Dylan LaCroix, *University Sued for Delayed Compliance with FOIA Request*, THE MICHIGAN DAILY, March 6, 2017, https://www.michigandaily.com/section/administration/mackinac-center-files-lawsuit-against-university-over-fioa-request [https://perma.cc/5W7A-VBHM].

[5] Letter available at https://www.csldf.org/resources/U-of-M-letter-to-Mackinac.pdf.

[6] Nisa Khan, et al., *University Releases Schlissel's Emails During 2016 Presidential Election in FOIA Settlement*, THE MICHIGAN DAILY, October 4, 2017, https://www.michigandaily.com/section/administration/university-settles-foia-lawsuit-releases-schlissels-emails-during-2016 [https://perma.cc/W8BF-WJSJ].

[7] Joint statement available at https://www.csldf.org/resources/JointStatementUofMweb.pdf.

2024 – University of Michigan Law School

In April 2022, Rachel Rothschild, an assistant professor at the University of Michigan Law School, wrote a detailed memorandum in which offered new legal strategies to fight climate change; her ideas provided the basis for the nation's first "climate superfund" laws, passed in New York and Vermont in 2024, which hold oil and gas companies financially liable for damage caused by extreme flooding and wildfires that were made worse by use of their products. In 2024, shortly after the passage of the Vermont law, Government Accountability and Oversight, a conservative group, filed a lawsuit against the Regents of the University of Michigan for the law school's refusal to disclose a professor's private emails related to "climate superfunds" under the state's Freedom of Information Act. Government Accountability and Oversight also sought to have Ms. Rothschild undergo a deposition. According to *The New York Times* reporting of this case: "The university, which has filed a motion to dismiss the lawsuit, maintains Ms. Rothschild's communications are not subject to public records requests because they were written on her private email account. Still, the university told Ms. Rothschild that she must comply with the request for a deposition. Experts said the actions against Ms. Rothschild seemed designed to discourage her or others from similar work."[8]

This case is currently pending.

University of Michigan Guidance

The University of Michigan has a dedicated page on its Research and Sponsored Projects website providing information on records requests and the applicability of the Confidential Research and Investment Information Act.[9]

[8] Coral Davenport, *She Inspired Laws to Hold the Fossil Fuel Industry Accountable. Now She's a Target.* NEW YORK TIMES (March 27, 2025)

[9] https://orsp.umich.edu/policies-procedures/foia-criia-confidential-research-and-investment-information-act-and-u-m [https://perma.cc/44UA-XLJ2].

MINNESOTA

D

I. ANALYSIS

The Minnesota Government Data Practices Act provides very limited protection to research records. Under the statute, proprietary data of the University of Minnesota may only be protected if the disclosure of such data will cause competitive harm to the university. With no statutory or common law definition of "competitive harm," it is unclear whether this provision could be expanded to protect academic research from disclosure. The University of Minnesota takes the position that "trade secrets, including some research activities" are private/nonpublic,[1] and has refused to disclose documents that researchers designated as such.

II. STATUTE

OPEN RECORDS LAW

Minnesota Government Data Practices Act, Minn. Stat. § 13.01 to 13.90
Known as: MGDPA

KEY STATUTORY PROVISIONS (EXCERPTS)

13.3215 UNIVERSITY OF MINNESOTA DATA

Subdivision 1. Definitions.

(a) For purposes of this section, the terms in this subdivision have the meanings given them.

(b) "Business data" is data described in section 13.591, subdivision 1, and includes the funded amount of the University of Minnesota's commitment to the investment to date, if any; the market value of the investment by the University of Minnesota; and the age of the investment in years.

(c) "Financial, business, or proprietary data" means *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,* the legal entity in which the University of

[1] University of Minnesota, Examples of Public, Private and Confidential Information, https://policy.umn.edu/operations/publicaccess-appc [https://perma.cc/TU37-HY3A].

Minnesota has invested or has considered an investment, the managing entity of an investment, or a portfolio company in which the legal entity holds an interest.

13.37 GENERAL NONPUBLIC DATA

(1)(b) "Trade secret information" means government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(Emphasis added.)

III. CASES

KEY CASES

There are no open records cases addressing the § 13.3215 University of Minnesota data exception.

OTHER POTENTIALLY RELEVANT CASES

Krampf v. University of Minnesota, 2020 WL 3410191 (June 22, 2020): In this unpublished case, the Minnesota Court of Appeals affirmed the district court's summary judgment dismissing petitioner's claims against respondent University of Minnesota (the University) under the Minnesota Government Data Practices Act (MGDPA). Petitioner submitted an MGDPA request to the University for data in the University's possession concerning Regenerative Medicine Minnesota, a partnership between the University of Minnesota and the Mayo Clinic for regenerative medicine. The University notified relevant researchers of the request, and instructed them to "to notify the University if there was any information in his/her proposal that he/she believed would fall under the 'trade secret' provision of the MGDPA." Based on the researchers' representations, the University produced some documents, but redacted some private educational and trade secret data. Petitioner filed suit, but because he only requested damages for willful noncompliance, rather than an order forcing compliance with the Act, the courts declined to review the University's trade secret designations.

In *Krampf v. University of Minnesota,* 2022 Minn. Dist. LEXIS 9497 (July 18, 2022), the same petitioner sued the University for its alleged violation of MGDPA in its response to a later records request, although the University had released over 2400 pages within 10 business days of the petitioner's request. Here, the Court granted the University's motion for summary judgment on the grounds that there was no genuine issue of material fact concerning the University's compliance with MGDPA and the petitioner had not suffered any damages. The petitioner appealed, and in *Krampf v. University of Minnesota,* No. A22-1316 (Minn. Ct. App., 2023), the Court of Appeals affirmed the lower court's summary judgment, finding again

that that was no genuine issue of material fact as to whether the University violated MGDPA. The Court of Appeals held that the petitioner's argument that the University failed to enlist the help of information technology personnel in responding to his request did not evidence a failure by the University to provide a complete response to the records request. Moreover, there was no evidence that the University was in possession of relevant emails and data that it failed to provide.

Prairie Island Indian Community. v. Minnesota Department of Public Safety, 658 N.W.2d 876 (Minn. Ct. App. 2003): The Minnesota Court of Appeals held that, when a document contains both public and nonpublic information, it is appropriate to release the data with the nonpublic information redacted. The entire document may only be withheld if the public and nonpublic information is so inextricably intertwined that segregating the material will impose a significant financial burden and leave the remaining parts of the document with little informational value. As applied to the trade secret exemption found in § 13.37(b), the court will not exempt a document if there would be no economic harm from releasing the document, if the proprietary information could be redacted, or if the information could be obtained by competitors by proper means.

IV. OTHER NOTES

In 1996, a law firm (on behalf of an anonymous client) filed an expansive open records request for all records created by and relating to Deborah Swackhamer, a professor of Environmental Studies at the University of Minnesota. Swackhamer had been 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.[2]

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 too was the 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.[3]

[2] Maura Lerner, *Researcher Investigating Toxin Becomes Subject of Investigation*, MINN. STAR TRIB., May 17, 1998, available at https://www.csldf.org/resources/harrassing-scientists.pdf.

[3] *See* Michael Halpern, Center for Science and Democracy at the 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/2015/09/freedom-to-bully-ucs-2015-final.pdf [https://perma.cc/2EB2-HWEL].

MISSISSIPPI

B

I. ANALYSIS

The Mississippi Public Records Act of 1983 contains some provisions protecting research, and the Mississippi Education Code also contains stronger protections for various records relating to academic research. While the Education Code's provision protecting academic records shall not apply to a public record that has been published, copyrighted, trademarked, or patented, the language indicates that this applies only to the actual published record and not to the other records generated during the course of the research. There is no Mississippi case law evaluating this exemption.

The statute also exempts from disclosure confidential proprietary information generated by a university under contract with a private entity. Mississippi courts have applied this exemption to research information contained in a university's Institutional Animal Care and Use Committee forms.

II. STATUTE

OPEN RECORDS LAW

Mississippi Public Records Act of 1983, Miss. Code Ann. §§ 25-61-1 to -61-19

KEY STATUTORY PROVISIONS (EXCERPTS)

MISS. CODE ANN. § 25-61-9 TRADE SECRETS AND CONFIDENTIAL COMMERCIAL FINANCIAL INFORMATION

(3) *Trade secrets 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 like entity *shall not be subject to inspection, examination, copying or reproduction under this chapter*.[1]

(Emphasis added.)

[1] An almost identical provision to § 25-61-9 is also found in Commercial and Proprietary Information, Miss. Code Ann. § 79-23-1.

Mississippi Education Code, Miss. Code Ann. § 37-11-51

MISS. CODE ANN. § 37-11-51 DOCUMENTS EXEMPT FROM PUBLIC RECORDS ACT

(3)(a) Except as provided in paragraph (b) of this subsection, *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 the course of academic research, shall be exempt from the provisions of the Mississippi Public Records Act of 1983*.

(b) The exemption under paragraph (a) of this subsection *shall not apply to a public record that has been published, copyrighted, trademarked or patented.*

(4) 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, or submitted and accepted for publication by publishers shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(Emphasis added.)

III. CASES

KEY CASES

Open records case concerning research:

Mississippi State University v. People for the Ethical Treatment of Animals, Inc., 992 So. 2d 595 (Miss. 2008)

- Holding: The Mississippi Supreme Court found that the Institutional Animal Care and Use Committee (IACUC) records for research carried out under contract with a pet food company were exempt from disclosure, under the exemption for confidential commercial proprietary information under contract with a firm/business.
- Facts: People for the Ethical Treatment of Animals (PETA) sought disclosure of IACUC records for research projects, tests, and experiments that received funding and/or sponsorship from the pet food manufacturer Iams.
- Summary: The court found that the data and information contained within the records constituted trade secrets and/or confidential commercial and financial information of a proprietary nature developed by Mississippi State University under contract with Iams. The data and information therefore fell within the statutory exemption of § 25-61-9/§ 79-23-1.

MISSOURI

D

I. ANALYSIS

The Missouri Sunshine Law offers limited statutory protection for research. While it does protect public records relating to scientific innovations in which the researcher or university has a proprietary (ownership) interest, as well as confidential business records submitted to a university in connection with a proposal to perform sponsored research when the disclosure would endanger the competitiveness of a business, it does not offer specific protections for academics. There are also no cases that apply these provisions.

Missouri does protect internal documents that consist of advice, opinions, or recommendations used by any governing body of an institution of higher education in its decision-making processes, although it is unclear how this would apply to open records cases involving scientific research. Missouri also excludes internal memoranda prepared by a government body that consists of advice, opinions, or recommendations but there are no cases that apply this provision.

II. STATUTE

OPEN RECORDS LAW

Missouri Sunshine Law, Mo. Rev. Stat. §§ 610.010 to .035

KEY STATUTORY PROVISIONS (EXCERPTS)

MO. REV. STAT. § 610.010

Definitions

(6) "Public record", any record, whether written or electronically stored, retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared for the public governmental body by a consultant or other professional service paid for in whole or in part by public funds, including records created or maintained by private contractors under an agreement with a public governmental body or on behalf of a public governmental body[.] . . . *The term "public record" shall*

not include any internal memorandum or letter received or prepared by or on behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body, unless such records are retained by the public governmental body or presented at a public meeting. Any document or study prepared for a public governmental body by a consultant or other professional service as described in this subdivision shall be retained by the public governmental body in the same manner as any other public record[.]

(Emphasis added.)

MO. REV. STAT. § 610.021

Closed meetings and closed records authorized when, exceptions

Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:

(14) Records which are protected from disclosure by law

(15) *Meetings and public records relating to scientific and technological innovations in which the owner has a proprietary interest*

(24) *Records submitted by an individual, corporation, or other business entity to a public institution of higher education in connection with a proposal to license intellectual property or perform sponsored research and which contains sales projections or other business plan information the disclosure of which may endanger the competitiveness of a business.*

(Emphasis added.)

III. CASES

KEY CASES

There are no open records cases addressing the deliberative process exemption or the § 610.021(15) and (24) exemptions.

POTENTIALLY RELEVANT CASES

National Council of Teachers Quality, Inc. v. Curators of University of Missouri, 446 S.W.3d 723 (Mo. Ct. App. 2014): The Missouri Court of Appeals addressed the § 610.021(14) exemption for "Records which are protected from disclosure by law." The appellant, an education nonprofit, sought disclosure of course syllabi that students receive from their professors. The university claimed the syllabi were protected from

disclosure under § 610.021(14) as they were subject to the Federal Copyright Act (which gives copyright owners the exclusive rights to do and authorize reproduction of their copyrighted works). The court agreed that the Federal Copyright Act exempted the requested university course syllabi from disclosure under the Sunshine Law.

IV. OTHER NOTES

In 2020, a state court found that the University of Missouri violated the Sunshine Act and ordered it to pay $175,000 in damages and attorneys' fees to a non-profit group.[1] The non-profit had requested records relating to animal research, and the University was found to have greatly overestimated the cost of producing the records in violation of the law.

Another 2016 lawsuit against the University of Missouri similarly alleged cost overestimations and stalled production of records requested under the Sunshine Law.[2] 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 actually asserted any exemptions in failing to respond to the Sunshine Law requests. The plaintiff—Kevin Elmer, a former state representative who was backing one of Hawley's primary opponents—filed and was granted a motion to dismiss this lawsuit without prejudice in September 2016 (after Hawley won the primary), and Hawley was elected Attorney General of Missouri in November 2016.

[1] *University of Missouri to Pay $175,000 in Open Records Case*, AP NEWS, May 13, 2020, https://apnews.com/article/7c6ebe9b55fe6e65658c933be440ef20 [https://perma.cc/HT29-WYVX].

[2] Taylor Blatchford and Elizabeth Loutfi, *Court Documents Show Elmer Sought to Track Hawley's Movements and Activities*, COLUMBIA MISSOURIAN, May 27, 2016, http://www.columbiamissourian.com/news/higher_education/court-documents-show-elmer-sought-to-track-hawley-s-movements/article_edbba85c-2459-11e6-9478-472165634e39.htm [https://perma.cc/MM8M-AWK9]; Initial filing available at https://assets.documentcloud.org/documents/2845070/Elmer-v-Barrett-Petition-Cleaned.pdf [https://perma.cc/P3VV-KRF3].

MONTANA

F

I. ANALYSIS

The Montana Public Records Act offers no statutory or common law protection from disclosure for research. Nor has any common law deliberative process exemption been recognized.

The statute has limited protection for confidential information, but it is unclear whether this could be extended to protect scientific research.

II. STATUTE

OPEN RECORDS LAW

Montana Public Records Act, Mont. Code Ann. §§ 2-6-1001 to -1020

KEY STATUTORY PROVISIONS (EXCERPTS)

MONT. CODE. ANN. § 2-6-1002

§ 2-6-1002. Definitions.

As used in this chapter, the following definitions apply:

(1) "Confidential information" means information that is accorded confidential status or is prohibited from disclosure as provided by applicable law. The term includes information that is:

(a) *constitutionally protected from disclosure because an individual privacy interest clearly exceeds the merits of public disclosure*;

(b) related to judicial deliberations in adversarial proceedings;

(c) necessary to maintain the security and integrity of secure facilities or information systems owned by or serving the state; and

(d) designated as confidential by statute or through judicial decisions, findings, or orders.

(11) "Public information" means information prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law.

(Emphasis added.)

III. CASES

KEY CASES

There has been no relevant open records case law since the adoption of this version of the statute became effective in 2015.

IV. OTHER NOTES

Since assuming office in 2021, Montana Governor Greg Gianforte resisted various public records requests seeking sensitive information, and filed briefs asserting that the records are protected, among other things, by the deliberative process privilege. An attorney quoted in a recent article described this exemption as a "total fabrication," and that the deliberative process exemption does not exist in Montana.[1]

[1] Amanda Eggert, *Gianforte Wields 'Executive Privilege' Argument against Sensitive Records Requests*, MONTANA FREE PRESS, Aug. 18, 2022, https://montanafreepress.org/2022/08/18/montana-governor-claims-executive-privilege-records-request-lawsuits/ [https://perma.cc/82B8-UPVA].

NEBRASKA

C

I. ANALYSIS

The Nebraska Public Records Law protects academic and scientific work that is in progress and unpublished as well as proprietary and commercial information, the disclosure of which could give advantage to business competitors and serves no public purpose.

The statutory provision lacks detail and there is no case law evaluating the provision to indicate how broadly it may be applied.

II. STATUTE

OPEN RECORDS LAW

Nebraska Public Records Law, Neb. Rev. Stat. §§ 84-712 to -712.09

KEY STATUTORY PROVISIONS (EXCERPTS)

NEB. REV. STAT. § 84-712.05

Records which may be withheld from the public; enumerated.

The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records:

> (3) *Trade secrets, academic and scientific research work which is in progress and unpublished*, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose;

(Emphasis added.)

III. CASES AND ADVISORY OPINIONS

KEY CASES

No open records cases address the academic and scientific research portion of the exemption in § 84-712.05(3).

IV. OTHER NOTES

The Nebraska Attorney General Office's "Outline of Nebraska Public Records Statutes"[1] gives some guidance on trade secrets and scientific research. In analyzing § 84-712.05(3), it states the following:

> iii. In Op. Att'y Gen. No. 92068 (May 7, 1992), the Attorney General discussed withholding records involving "proprietary or commercial information which would give advantage to business competitors and serve no public purpose if released." The Attorney General concluded that (a) Section 84-712.05(3) does not impose any requirement of "substantial" competitive injury or advantage to make the exception from disclosure available; (b) a bare assertion by the provider of commercial information that such information is confidential is insufficient to justify nondisclosure; and (c) nondisclosure must be based upon a showing that a specified competitor may gain a demonstrated advantage by disclosure rather than a mere assertion that some unknown business competitor may gain some unspecified advantage. The Attorney General reaffirmed those requirements to assert the proprietary and commercial information exception to disclosure in Op. Att'y Gen. No. 97033 (June 8, 1997) and Op. Att'y Gen. No. 16-003 (February 16, 2016).
>
> iv. The Attorney General has indicated informally that a study of Mexican American sentencing trends conducted for a state agency by a college professor, which was in uncompleted form, constituted academic or scientific research work which could be withheld from the public.

[1] Neb. Att'y Gen., Outline of Nebraska Public Records Statutes (Rev. Jan. 2017), https://ago.nebraska.gov/public-records (quoting (E)(c)(5)) [https://perma.cc/EJ69-MNCV].

NEVADA

D

I. ANALYSIS

The Nevada Public Records Act offers no statutory protection from disclosure for research and very limited trade secret protection. However, the Nevada Supreme Court has held that there is a common law deliberative process privilege, although it has not yet been applied in the research context. In the event that no exemption or privilege exists, a common law balancing test allows the withholding of records if the state agency can prove that its interest in non-disclosure clearly outweighs the public's interest in access. There is no Nevada case law applying the balancing test or the deliberative process exemption to any factual situation involving universities or scientific research.

II. STATUTE

OPEN RECORDS LAW

Nevada Public Records Act, Nev. Rev. Stat. §§ 239.001 to .030

KEY STATUTORY PROVISIONS (EXCERPTS)

NEV. REV. STAT. § 239.010

Public books and public records open to inspection; confidential information in public books and records; copyrighted books and records; copies to be provided in medium requested.

1. Except as otherwise provided in this section and [statute references omitted][1] and unless otherwise declared by law to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person.

[1] This section contains references to over 100 other statute sections.

NEV. REV. STAT. § 333.333 [referenced in Nev. Rev. Stat. § 239.010]

Proprietary information regarding trade secret: Confidentiality; disclosure.

1. Except as otherwise provided in subsection 2 and NRS 239.0115, *proprietary information regarding a trade secret does not constitute public information and is confidential.*

2. A person shall not disclose proprietary information regarding a trade secret unless the disclosure is made for the purpose of a civil, administrative or criminal investigation or proceeding, and the person receiving the information represents in writing that protections exist under applicable law to preserve the integrity, confidentiality and security of the information.

(Emphasis added.)

III. CASES

KEY CASES

There are no open records cases concerning research.

POTENTIALLY RELEVANT CASES

Due Diligence Group, LLC v. Las Vegas Metropolitan Police Department, Case No.: A-22-853953-W (Clark Cty. D. Ct. Aug. 26, 2022):[2] A Nevada district court held that emails sent from a government account that are of a "wholly personal nature would not constitute public records open to inspection."

Clark County School District v. Las Vegas Review-Journal, 429 P.3d 313 (Nev. 2018): The Nevada Supreme Court found that the common law deliberative process doctrine did not prevent the disclosure of a school district's internal reports and investigations regarding an elected official's harassing behavior. The Court explained that the primary purpose of the doctrine is to protect the decision-making process of government agencies, and this reasoning does not apply where the government's own potentially discriminatory decision-making is in question. The Court found that deliberative process should only apply in the context of communications designed to directly contribute to the formulation of an important public policy and not, as in the instant case, a particular personnel matter. The Court implicitly concluded that where documents are protected by the deliberative process privilege, the public interest balancing test does not apply.

The Court did require the redaction of various school official's identifying information. In doing so, it adopted a balancing test wherein once the agency demonstrates nontrivial personal privacy interests that

[2] Order available at https://www.documentcloud.org/documents/22271653-a-22-853953-w-notice-of-entry-of-order-neoj-civ [https://perma.cc/SU6E-5LZM].

would be protected by withholding or redactions, the requester must show that the public interest sought to be advanced is a significant one and the information sought is likely to advance that interest.

***DR Partners v. Board of County Commissioners of Clark County*, 6 P.3d 465 (Nev. 2000):** The Nevada Supreme Court found that a common law deliberative process exemption does exist in Nevada but did not apply to billing statements for county officials using publicly owned cell phones; the billing statements were purely factual and did not reveal the contents of any deliberative process of the county.

***Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623 (Nev. 2001)**: The Nevada Supreme Court set forth a framework for applying the public records balancing test:

> First, we begin with the presumption that all government-generated records are open to disclosure. The state entity therefore bears the burden of overcoming this presumption by proving, by a preponderance of the evidence, that the requested records are confidential. Next, in the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved, and the state entity bears the burden to prove that its interest in non-disclosure clearly outweighs the public's interest in access. Finally, our case law stresses that the state entity cannot meet this burden with a non-particularized showing or by expressing hypothetical concerns.[3]

IV. OTHER NOTES

In 2025, the Nevada Assembly passed Bill 128, which sets up a Public Records Task Force to evaluate public records management in the state. It is mandated to make recommendations on, among other topics, "situations in which access to public records should be granted or denied."[4] Its report is due to the legislature by October 31, 2026.

[3] *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, 628 (Nev. 2001) (citations omitted).

[4] A.B. 128, 83rd Leg., Reg. Sess., (NV, 2025), https://www.leg.state.nv.us/Session/83rd2025/Bills/AB/AB128_R2.pdf [https://perma.cc/Z97A-4NXC].

NEW HAMPSHIRE

D

I. ANALYSIS

The New Hampshire Right-to-Know Law offers no statutory protection from disclosure for research. While there is some protection for internal memoranda and preliminary drafts, as of the writing of this report, that exemption has not been applied by New Hampshire courts to any relevant factual situations.

II. STATUTE

OPEN RECORDS LAW

New Hampshire Right-to-Know Law, N.H. Rev. Stat. Ann. §§ 91-A:1 – 9

KEY STATUTORY PROVISIONS (EXCERPTS)

N.H. REV. STAT. ANN. § 91-A:5

Exemptions.

The following governmental records are exempted from the provisions of this chapter:

> IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.
>
> VIII. *Any notes or other materials made for personal use that do not have an official purpose*, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.

> IX. *Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated*, or available to a quorum or a majority of the members of a public body.
>
> (Emphasis added.)

STATUTORY NOTE

There is also a provision found at 91-A:10 that allows the limited release of data sets and statistical tables for the purpose of research; such a request must follow specific guidelines and meet certain criteria, including an agreement not to use or further share the data without the written consent of the agency.

III. CASES

KEY CASES

There are no open records cases addressing research or university records.

POTENTIALLY RELEVANT CASES

ATV Watch v. New Hampshire Department of Transportation, 20 A.3d 919 (N.H. 2011): The New Hampshire Supreme Court found that drafts circulated between state agencies for review/comment are still considered preliminary for the purposes of § 91-A:5(VIII).

Union Leader Corp. v. City of Nashua, 686 A.2d 310 (N.H. 1996): When applying the catchall exemption of § 91-A:5(IV) (which exempts, among other things, confidential, commercial, or financial information and other files whose disclosure would constitute an invasion of privacy), the court will apply a test which balances the benefits of public disclosure against the benefits of nondisclosure.

NEW JERSEY

B

I. ANALYSIS

The New Jersey Open Public Records Act (OPRA) contains a comprehensive research protection exemption that has been upheld by the New Jersey Government Records Council (GRC) on more than one occasion. New Jersey courts have also held that case records of a university legal clinic are not subject to OPRA. Additional statutory exemptions exist for inter/intra-agency communications, proprietary information, and trade secrets. A New Jersey court determined that the inter/intra-agency communications exemption (which, in other states, has also been applied to certain factual situations concerning research records) includes a common law deliberative process exemption and can be used to withhold records that are predecisional and deliberative.

II. STATUTE

OPEN RECORDS LAW

New Jersey Open Public Records Act, N.J. Stat. Ann. §§ 47:1A-1 to 13
Known as: OPRA

KEY STATUTORY PROVISIONS (EXCERPTS)

N.J. STAT. ANN. § 47:1A-1.1

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. *The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material*.

A government record shall not include the following information which is deemed to be confidential for the purposes of P.L.1963, c. 73 (C.47:1A-1 et seq.) as amended and supplemented:

- *trade secrets and proprietary commercial or financial information obtained from any source.* For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure;

A government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privileged and confidential:

- *pedagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey*, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available;

(Emphasis added.)

III. CASES AND OPINIONS

KEY CASES AND OPINIONS

Open records cases concerning research exemption and other academic institution records:

Stevens v. Rutgers University, GRC Complaint No. 2016-249 (June 26, 2018)

- Holding: The research records of a state university professor are exempt from disclosure under OPRA.
- Facts: Complainant sought access to records held by Paul Lioy, an environmental scientist at the Rutgers University Environmental and Occupational Health Sciences Institute (EOHSI). The records concerned World Trade Center dust samples collected by Lioy in the wake of the September 11, 2001 attacks. The records sought included raw data and the interpretation of the results of the analysis. The university denied the disclosure based on the exemption for pedagogical, scholarly, and/or academic research records. The complainant appealed the denial to the New Jersey Government Records Council (GRC), claiming Rutgers unlawfully denied his request.
- Summary:
    - New Jersey law exempts from disclosure under OPRA the pedagogical, scholarly, and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution. Therefore, to determine whether the records in question can be withheld, the GRC must find that they meet the requirements of the exemption.

- Lioy was a professor at both EOHSI and the University of Medicine and Dentistry of New Jersey (UMDNJ), which falls under the umbrella of Rutgers University. He conducted research on the World Trade Center dust samples and published his findings in a book. GRC found that his work met the definition of research for purposes of the exemption.
- Both Rutgers and UMDNJ are authorized by New Jersey statute to operate as public higher education institutes and therefore meet the public higher education requirement of the exemption.
- Based on this analysis, the GRC concluded the records were correctly withheld from disclosure.

Haber v. Rutgers University, GRC Complaint No. 2017-122 (Feb. 26, 2019)

- Holding: Rutgers University Institutional Animal Care and Use Committee (IACUC) protocols and records are exempt from disclosure under the exemption for pedagogical, scholarly and/or academic research records.
- Facts: Complainant sought disclosure of IACUC protocols and records, including photos and videos, relating to the use of dogs and other live animals in the training of emergency medicine residents. Rutgers denied disclosure claiming the university is exempt under the pedagogical, scholarly, and/or academic research records exemption. The complainant filed a denial of access complaint with the GRC but provided no argument as to why the records should be disclosed.
- Summary:
  - The GRC found that the records in question were research records for the purpose of the exemption. It stated that the intent of IACUC is to ensure all research programs meet the required standards; and the records in question were maintained by IACUC in an online account accessible only to Rutgers faculty or staff. The GRC concluded that there is a strong indication that the protocols and the related photographs and videos were intended to be shared only within the research community.
  - The GRC then considered whether IACUC was a "public higher education institution" for purposes of the exemption and found that Rutgers was defined by statute as such and that therefore, by extension, so was its IACUC.
  - As a result, the GRC concluded the records were correctly withheld under the exemption.

Rosenbaum v. Rutgers University, GRC Complaint No. 2002-91 (Jan. 8, 2004)

- Holding: Wildlife survey responses sought by the complainant were academic research records exempt from disclosure under N.J. Stat. Ann. § 47:1A-1.1.
- Facts: The requestor sought the written responses to an opinion survey questionnaire, studying crop damage by white tailed deer, conducted by the Wildlife Damage Control Center at Rutgers University.
- Summary:
  - The New Jersey Government Records Council (GRC) found that the 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.

- Moreover, the GRC found that sharing the survey results with the New Jersey Legislature, for the purpose of considering a bill, did not waive any confidentiality privilege because "[u]nlike a common law or regulatory privilege, a statutory exemption cannot be waived."

Sussex Commons Associates, LLC v. Rutgers, 46 A.3d 536 (N.J. 2012)

- Holding: The New Jersey Supreme Court ruled that records from the Rutgers Environmental Law Clinic (RELC) were not subject to OPRA.
- Facts: RELC students and employees had been helping land conservation groups that opposed a plan to build an outlet mall. The real estate developer submitted OPRA requests asking for RELC's files related to its land conservation clients—including all communications between the clinic and its land conservation clients, all communications between the clinic and various state and local agencies, and documents reflecting funding.
- Summary: Rutgers provided the funding information but litigated over the other requests.
- The court held that, under OPRA, Rutgers must disclose funding records.[1]
    - However, the court also ruled that the purposes of OPRA would not be served by releasing the legal clinic's records. Clinical legal programs "do not perform any government functions. They conduct no official government business and do not assist in any aspect of State or local government . . . . Unlike a request for documents about the funding of a clinic or its professors' salaries, which are discoverable under OPRA, case-related records would not shed light on the operation of government or expose misconduct or wasteful government spending."[2]
    - In contrast, the New Jersey Supreme Court concluded that there were likely to be serious harms in releasing law clinic records: reducing demand for law clinic services (and thus reducing opportunities for law students to learn about the practice of law), impinging on law clinics' ability to communicate freely with their clients, undermining academic freedom of law school clinics, diverting clinics' attention away from training students and serving clients, and creating an "absurd result" where public and private legal clinics were treated differently.[3]

OTHER POTENTIALLY RELEVANT CASES

Bozzi v. City of Atlantic City, 84 A.3d 277 (N.J. Super. Ct. App. Div. 2014): The New Jersey Superior Court, Appellate Division, ruled that the language excluding inter/intra-agency advisory, consultative, or deliberative material from the definition of government record in the statute encompasses the common law deliberative process privilege.

Ciesla v. New Jersey Department of Health and Senior Services, 57 A.3d 40 (N.J. Super. Ct. App. Div. 2012): The New Jersey Superior Court, Appellate Division, ruled that for records to be excluded under the deliberative process privilege, they must be both predecisional and deliberative; purely factual material that does not reflect deliberative process is not protected from disclosure.

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1 *Sussex Commons Assocs., LLC v. Rutgers*, 46 A.3d 536, 544 (N.J. 2012).

2 *Id.* at 546.

3 *Id.* at 547.

Education Law Center v. New Jersey Department of Education, 966 A.2d 1054 (N.J. 2009): The New Jersey Supreme Court ruled that a record that contains or involves factual components is entitled to deliberative-process protection if it was used in the decision-making process, and its disclosure would reveal deliberations that occurred during that process.

Rosetti v. Ramapo-Indian Hills Reg'l High Sch. Bd. Of Educ. 1, 330 a.3d 786 (N.J. Super. Ct. App. Div. 2025): The New Jersey Superior Court, Appellate Division, ruled that email logs on private servers that concern government business and were sent to or from the personal accounts of government officials are government records and disclosable under OPRA.

IV. OTHER NOTES

In 2024, the New Jersey Legislature amended OPRA, including a new provision in § 47:1A-5.1 that allows public agencies to seek a protective order against individuals or entities who seek records "with the intent to substantially interrupt the performance of government function." Although yet untested in court, this provision potentially allows courts to protect public agencies from harassment via public records request.

On June 7, 2024, Nicole Neily filed a lawsuit against Rutgers University for its alleged failure to properly respond to her records request for records relating to an employee's pro-Palestine political activism on campus. According to Neily's complaint, the University identified 30,000 pages of responsive documents and requested that Neily limit her keywords or date range request in order to produce a more manageable number of records to review. Neily refused, and filed suit.[4] The result of this lawsuit is unclear.

[4] Complaint available at https://www.holtzmanvogel.com/uploads/Rutgers-Filed-Complaint.pdf [https://perma.cc/3EV8-7GPX].

NEW MEXICO

F

I. ANALYSIS

The New Mexico Inspection of Public Records Act offers no protections from disclosure for research and does not apply a balancing test. New Mexico courts have also held that New Mexico law does not contain a deliberative process exemption. There is an exemption for trade secrets, but no case law applying it.

II. STATUTE

OPEN RECORDS LAW

New Mexico Inspection of Public Records Act, N.M. Stat. Ann. §§ 14-2-1 to 12
Known as: IPRA

KEY STATUTORY PROVISIONS (EXCERPTS)

N.M. STAT. ANN. § 14-2-1

§ 14-2-1 Right to inspect public records; exceptions.

Every person has a right to inspect public records of this state except:

> F. trade secrets, attorney-client privileged information and long-range or strategic business plans of public hospitals discussed in a properly closed meeting;
>
> N. as otherwise provided by law.

III. CASES

KEY CASES

Republican Party of New Mexico v. New Mexico Taxation and Revenue Department, 283 P.3d 853 (N.M. 2012)

- Holding: The New Mexico Supreme Court held that a "rule of reason" balancing test does not apply to open records requests in New Mexico, and the executive privilege exemption is narrow and contains only an executive communications privilege—not a deliberative process privilege.
- Facts: The petitioner sought disclosure of records from the Motor Vehicles Division (MVD) relating to issuance of drivers' licenses to foreign nationals, including documents relating to an audit of the license program instituted by the governor. Records disclosed had information redacted based on attorney–client privilege, executive privilege, and federal and local driver privacy statutes. The case was appealed to the Supreme Court of New Mexico following a Court of Appeals ruling that documents were properly redacted based on a deliberate process exemption and attorney–client privilege.
- Summary:
    - The court found that the lower court had erroneously applied a rule of reason balancing test in its decision. While early decisions had applied a rule of reason test, the legislature subsequently enumerated specific exemptions to IPRA, including the § 14-2-1(8) exemption "as otherwise provided by law." Therefore, courts should restrict their analysis to "whether disclosure under IPRA may be withheld because of a specific exemption contained in IPRA, or statutory or regulatory exemptions, or privileges adopted by this Court or grounded in the constitution."[1]
    - The court noted that the term "executive privilege" generally encompasses several different types of privilege, including a deliberative process privilege and an executive communications privilege. However, the court also stated that no deliberative process exemption exists under New Mexico law, and only a very narrow form of executive communications privilege exists (limited to communications regarding the governor's decision-making sent to or from individuals in very close organizational and functional proximity to the governor).
    - In this instance, the court found that executive privilege did not apply, as the records in question were emails among MVD staff and not communications with the governor or his immediate advisors. There was no indication that the records contained policy recommendations to the governor, rather they were records relating to employees implementing policies and otherwise performing the routine functions of the agencies for which they work.[2] Therefore, the court held that the records must be disclosed.

[1] *Republican Party of N.M. v. N.M. Taxation and Revenue Dep't*, 283 P.3d 853, 860 (N.M. 2012). The court also ruled that all cases applying the rule of reason test to all of the exceptions enumerated by the Legislature were overruled to the extent that they conflict with this opinion.

[2] *Id*. at 868 (noting that the MVD, the respondents in this action, did not have grounds to assert this privilege even if it did apply to the records, as only the governor would be able to assert it).

Edenburn v. New Mexico Department of Health, 299 P.3d 424 (N.M. 2012)

- Holding: There is no deliberative process exemption in New Mexico.
- Facts: The requestor brought action to enforce disclosure of emails and a draft letter related to a block grant administered by the Department of Health (DOH).
- Summary:
    - DOH denied access to the emails and the draft letter based on executive privilege (which it asserted included a deliberative process exemption).
    - The court followed the decision in *Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept*. 283 P.3d 853 (2012) and found that the emails could not be protected by a deliberative process privilege, as no such exemption exists in New Mexico, and the email string did not fall under the executive communication privilege.

IV. OTHER NOTES

A bill aiming to protect university research from disclosure under IRPA was introduced in January 2017 but failed to pass during the 2017 legislative session.[3]

In 2025, House Bill 139 was introduced in the New Mexico Legislature, which proposes significant changes to the IPRA. In addition to clarifying certain procedures and timelines, the bill would authorize public bodies to deny requests for any reason specified in IPRA or applicable law, as well as on the basis of a "reasonable justification, based on a public policy ground". This would effectively reinstitute the rule of reason that previously existed in New Mexico case law but was overturned by *Republican Party of New Mexico v. New Mexico Taxation and Revenue Department* (see above). The bill also defines new exemptions for disclosure, including library records and certain records concerning public employees. In addition, HB 139 institutes new provisions concerning "vexatious requesters" in order to help public bodies to address situations in which a requester abuses the IPRA process.[4]

[3] H.B. 267, 53rd Leg., 1st Sess. (N.M. 2017), available at https://legiscan.com/NM/text/HB267/2017 [https://perma.cc/K2LU-RED3]; Legiscan.com, NM HB267 | 2017 | Regular Session, https://legiscan.com/NM/bill/HB267/2017 [https://perma.cc/2ZJJ-X5VX] (showing status as *adjourned sine die*; the legislation ultimately failed to pass during the session).

[4] H.B. 139, 57th Leg First Sess. (N.M. 2025), https://www.nmlegis.gov/Sessions/25 Regular/bills/house/HB0139.html [https://perma.cc/ZZ7G-TCFB].

NEW YORK

D

I. ANALYSIS

The New York Freedom of Information Law offers no statutory protection from disclosure for research. New York does have an inter/intra-agency materials exemption that protects predecisional deliberative materials, and this framework has been applied in the higher education context to exempt records from disclosure. However, this exemption explicitly excludes factual tabulations or data, so underlying data would not be protected under this provision.

II. STATUTE

OPEN RECORDS LAW

New York Freedom of Information Law, N.Y. Pub. Off. Law §§ 84 to 90
Known as: FOIL

KEY STATUTORY PROVISIONS (EXCERPTS)

N.Y. PUB. OFF. LAW § 87

Access to agency records.

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

> (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;
>
> (g) *are inter-agency or intra-agency materials which are not:*
>
> > i. *statistical or factual tabulations or data*;
> >
> > ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government;

(Emphasis added.)

STATUTORY NOTE

New York is unusual in that, in addition to its public universities, it also has statutory, or contract, colleges that are operated on behalf of the state by Cornell University, a private institution: 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 State School of Industrial and Labor Relations. Some aspects of these four colleges' administrations are overseen by Cornell, but they are also subject to oversight by the State University of New York (SUNY) Board of Trustees and are funded with state money that must be kept separate from Cornell's private funds. This combination has led to some debate as to whether records of these statutory colleges are considered agency records for the purpose of FOIL. The nature of the documents in the request is the key factor in determining whether or not they need be disclosed.

- In *Stoll ex rel. Maas v N.Y. State College of Veterinary Medicine at Cornell University,* 723 N.E.2d 65 (N.Y. 1999), records relating to complaints of sexual harassment brought against any professor, administrator, or student of any statutory college at Cornell University were held to not be subject to FOIL because Cornell was given discretion over the maintenance of discipline at the four statutory colleges and thus maintained the records in question.
- In contrast, in *Alderson v. N.Y. State College of Agriculture, 825 N.E.2d 585* (N.Y. 2005), the court found that records relating to Cornell's management of the New York State College of Agriculture and Life Sciences and the New York State Agricultural Experiment Station were in part subject to FOIL and in part not. Financial and funding records of the college and the experiment station were subject to FOIL because while Cornell managed the finances of the College of Agriculture, the underlying funds were public. The court ruled that to the extent that Cornell is accountable for public funds, it is performing a public function. However, additional documents relating to research and other activities conducted at the college and the experiment station were found to be not subject to FOIL; the enabling legislation for both institutions provided that Cornell shall administer all activities including research work with neither SUNY trustees nor any other agency of the state able to participate in any decisions related to prospective or ongoing research activity. Therefore, documents relating to these research activities involve the private function of Cornell University and are not subject to FOIL.

III. CASES

KEY CASES

Open records cases concerning research and other academic institution records:

Humane Society of the United States v. Brennan, 861 N.Y.S.2d 234 (App. Div. 2008)

- Holding: The New York Supreme Court, Appellate Division (Third Department), found that factual and objective information found in agency records concerning the presence of avian influenza at a foie gras farm was subject to disclosure, but portions of memoranda that contained recommendations and opinions need not be disclosed and should be redacted.
- Facts: The requestor sought disclosure of records related to the production of foie gras; the respondent released more than 1,300 pages of documents but withheld 43 documents under the inter/intra-agency materials exemption; the state trial court ordered the release of some of these records and allowed others to be withheld. At issue in this appeal were four specific documents.
- Summary:
    - Under FOIL, an agency may deny disclosure of inter/intra-agency records that are not statistical or factual; factual data is objective rather than deliberative.
    - The four documents in question were a set of handwritten notes and three veterinarian memoranda regarding an investigation into the presence of avian influenza at one farm.
        - The court held that the handwritten notes detailing the layout and structure of the farm were factual data and not exempt from disclosure.
        - A memorandum containing details of the farm layout and the manner in which the ducks are moved about the farm was held to be factual and objective and not exempt from disclosure.
        - A memorandum describing procedures used to collect samples at the farm needed to test for avian influenza and describing the location of the ducks was held to be factual and objective and not exempt.
        - A memorandum containing some information that was determined to be recommendations and opinions was held to be exempt from disclosure and was redacted; however, the remaining paragraphs that contained objective factual information about the locations where samples tested positive for avian influenza, the procedure for the disposal of manure, and a description of how the ducks were moved were not exempt.

Russo v. Nassau County Community College, 623 N.E.2d 15 (N.Y. 1993)

- Holding: The New York Court of Appeals, New York's highest court, held that films used in a community college course do not fall under the interagency materials exemption to FOIL and must be disclosed.

- Facts: The requestor sought access to film and filmstrips used in a public community college course on human sexuality.
- Summary:
    - Public community college is considered a state agency for the purposes of FOIL, and materials used to teach at a public college fall under the FOIL definition of records.
    - Given that the materials in question were records of an agency, the respondent asserted that they were exempt from disclosure based on the inter/intra-agency materials exemption to FOIL.
    - The court found that the term interagency materials is not defined under FOIL; case law has determined it to mean "deliberative material," *i.e.*, communications exchanged for discussion purposes not constituting final policy decisions."[1]
    - While the classroom environment may be deliberative, the court held that since the course materials themselves had been used in the course for many years, there was no valid reason to determine that they do not constitute "final agency policy or determinations."[2] Therefore, the court concluded that the records do not fall within an exemption and must be disclosed.

Rothenberg v. City University of N.Y., 594 N.Y.S.2d 219 (App. Div. 1993)

- Holding: The New York Supreme Court, Appellate Division (First Department), held that records of committees that evaluated candidates for tenure at a university were exempt from disclosure under FOIL as inter/intra-agency materials.
- Facts: The petitioner sought access to documents related to his failure to achieve tenure at Queens College, part of the City University of New York (CUNY) system.
- Summary:
    - The court held that the records were exempt under the inter/intra-agency materials exemption to FOIL.
        - The records in question were "inter-agency or intra-agency materials" which are not "statistical or factual tabulations or data" or "final agency policy or determinations."[3]
        - The records here contained recommendations of various committees that were entirely advisory in nature and prepared only to aid the decision maker in reaching a determination on a candidate. The records therefore fell within the scope of the purpose of the exemption, which is "to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers."[4]

Roman v. Davis, 2023 NY Slip Op 32006(U) (Sup. Ct. New York Country, 2023):

- Holding: The Supreme Court, New York Country, a trial court, found that the City University of New York (CUNY) had properly redacted deliberative material pursuant to FOIL § 87(g)(2) and private

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1 *Russo v. Nassau County Cmty. Coll.*, 623 N.E.2d 15, 19 (N.Y. 1993) (citing *Matter of Xerox Corp. v. Town of Webster*, 480 N.E.2d 74 (N.Y. 1985).

2 *Id*.

3 *Rothenberg v. City Univ. of N.Y.*, 594 N.Y.S.2d 219, 220 (App. Div. 1993).

4 *Id.* (quoting *Matter of Town of Oyster Bay v. Williams*, 520 N.Y.S.2d 599 (App. Div. 1987)).

material pursuant to FOIL § 87(b)(providing an exemption where disclosure of records would constitute an unwarranted invasion of personal privacy).

- Facts: Hunter College, a member college within the larger CUNY system, received a grant to set up an interdisciplinary study group to focus on Puerto Rico's collective future; applications for this inaugural study group were evaluated by members of Hunter College staff and members of an external review committee. The petitioner sent a request to Hunter College for three categories of documents: (1) the names, job titles and/or professional affiliations of the members of the Program's external review committee; (2) records of meetings and deliberations for the selection of the Program's inaugural study group; and (3) any summaries listing semi-finalists, finalists and/or ranking of candidates for the Program. After a search, Hunter College found no documents in the first category, one document in the second category; and two documents in the third category. Of these three documents, Hunter College withheld two and provided a redacted copy of one.

  After the petitioner appealed Hunter College's decision to CUNY, Hunter College provided copies of all three documents, redacting ideas shared at a meeting regarding the focus of the inaugural study group, opinions regarding what types of applicants would be best to analyze the subject of decolonization, and the names of the fellowship candidates from the external review committee's numerical evaluation of the candidates. The petitioner filed suit compelling Hunter College to produce the full names, job titles and/or personal affiliations of members of the external review committee and full disclosure of all three redacted documents.

- Summary:
  - The court determined that the records the petitioner sought were "pre-decisional materials prepared to assist Hunter College in choosing the inaugural study group for the Program. They reflect ideas regarding the focus and composition of the inaugural study group, and opinions and evaluations of the Program candidates."[5] As such, CUNY had properly redacted these deliberative materials pursuant to FOIL § 87(g)(2). The court also noted that this privilege extended to materials prepared for a government agency at its request, by an outside consultant so it was therefore immaterial that the members of the external review committee were not public officers.
  - The court further determined that, as "A reasonable person would find it offensive and objectionable to disclose subjective evaluations of their candidacy for a job or fellowship", CUNY had also properly redacted the names of the candidates in the two documents responsive to petitioner's third request category.[6]
  - Finally, the court determined that CUNY had properly responded to the petitioner's request seeking the names, titles, and professional affiliations of the external review committee because Hunter College had properly certified that no such list could be located and FOIL does not create an obligation for an agency to furnish records it does not possess.

Southey v. City Univ. Of New York, Index No. 160213/2024, 2025 WL 2410527, (Sup. Ct. New York Country, 2025):

- Holding: The Supreme Court, New York Country, a trial court, held that the City University of New York (CUNY) must release its investment holdings reports, as such documents did not fall under the

[5] *Roman v. Davis,* 2023 NY Slip Op 32006(U), *6 (Sup. Ct. New York Country, 2023).

[6] *Id*. at *7.

trade secrets exemption in FOIL § 87(2)(d). The court also held CUNY had properly certified that it conducted a comprehensive search for records responsive to a second FOIL request, and that no such records were found.

- Facts: Petitioner, a CUNY law student engaged in on campus social justice advocacy, filed FOIL requests seeking documents including, inter alia, investment holdings reports and all contracts between CUNY and a list of enumerated companies. With respect to the FOIL request for investment holdings reports, CUNY withheld the documents claiming they fell under the trade secrets exemption in FOIL § 87(2)(d), arguing "that disclosure of the records would negatively impact CUNY's ability to effectively manage, invest, and receive returns on CUNY's investments, which in turn could affect CUNY's ability to fund various student-based initiatives vital to its mission." CUNY also claimed that after a comprehensive search was conducted, it found no responsive records to the request for contracts between CUNY and the listed companies, noting that state "agencies, such as CUNY are not parties to umbrella contracts that the New York State Office of General Services ('OGS') enters with distributors."

  The Petitioner appealed the FOIL request denial.

- Summary:
  - The court noted that exemption from disclosure under FOIL § 87(2)(d) has two independent prongs. "The first prong allows an agency to deny access to records that constitute trade secrets. The second prong allows an agency to deny access to records submitted to it by a commercial enterprise or derived from information obtained from a commercial enterprise and which, if disclosed, would cause substantial injury to the competitive position of the subject enterprise."
  - In determining whether information constitutes a trade secret under the first prong, several factors should be considered such as "(l) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." Here, the court found that the mere fact that discussions about CUNY's portfolio were held in closed door sessions did not transform the information into a trade secret. The court also found that CUNY had not addressed many of the factors to be considered when determining whether information constitutes a trade secret. With regard to the second prong, the court found that CUNY had failed to show the likelihood of substantial competitive injury should the requested investment records be released. Therefore, the court held that requested investment records did not fall under the FOIL § 87(2)(d) exemption for trade secrets and should be released.
  - Regarding the request for contracts between CUNY and the list of enumerated companies, the court found CUNY was not a "contracting" party to the OGS umbrella contracts at issue, and therefore had properly certified that it had found no records responsive to the Petitioner's FOIL request.

OTHER POTENTIALLY RELEVANT CASES

American Society for Prevention of Cruelty to Animals v. Board of Trustees of State University of New York, 184 A.D.2d 508 (N.Y. App. Div. 1992): The New York Court of Appeals held that the Laboratory Animal Users Committee (LAUC) of the State University of New York at Stony Brook is not an "agency" for the purposes of FOIL[7] and that its records are not subject to disclosure.

Citizens for Alternatives to Animal Labs, Inc. v Board of Trustees of the State University of New York, 92 N.Y.2d 357 (N.Y. 1998): The New York Court of Appeals found that records kept pursuant to federal law by a State University of New York (SUNY) research facility are subject to disclosure under FOIL. The research facility, SUNY Health Science Center at Brooklyn, is a part of SUNY (an agency under FOIL) and is performing SUNY's statutory research mission. The purpose for which the records are generated or held cannot provide a rationale for denying disclosure under FOIL.

General Motors Corporation v. Town of Massena, 693 N.Y.S.2d 870 (Sup. Ct., St. Lawrence County 1999): The Supreme Court, St. Lawrence County, a trial court, found that a consultant's report containing comparable sales information prepared for a town in connection with its revaluation of taxable properties need not be disclosed under FOIL. While the report used underlying factual data as the basis, the report itself was not factual in nature because "choosing any particular comparable property involves a thought process and professional judgment which cannot be classified as mere data gathering."[8]

NYP Holdings, Inc. v. Metropolitan Transp. Auth., 2025 NY Slip Op 30641(U) (Sup. Ct. New York County 2025): The Supreme Court, New York County, a trial court, found that schematics for subway stations that had not yet been built were exempted from disclosure under the inter-agency exception because they were hypothetical plans in draft form, and not the final product or factual data.

IV. OTHER NOTES

In 2024, Animal Partisan, a legal non-profit organization focused on animal rights advocacy, filed a lawsuit against SUNY Downstate Health Sciences University, a New York medical school, over its denial to produce public records involving animal research. Animal Partisan had requested under FOIL "records associated with a USDA inspection into the medical school's animal research program. The inspection revealed several violations of federal animal welfare law associated with one particular research study."[9] SUNY Downstate Health Sciences University released the records after the lawsuit was filed, and the case was dismissed.

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[7] Based on prior ruling that the LAUC was not a public body for the purposes of New York Open Meetings Law as its constituency, powers, and functions derive solely from federal law and regulations. *Matter of the Am. Soc'y for Prevention of Cruelty to Animals v. Bd. of Trustees of State Univ. of N.Y.*, 591 N.E.2d 1169 (N.Y. 1992).

[8] 693 N.Y.S.2d 870, 872 (Sup. Ct., St. Lawrence County 1999).

[9] Animal Partisan, *Lawsuit Filed Against New York Medical School for Refusing to Release Animal Research Records,* (Feb. 23, 2024), https://www.animalpartisan.org/news/lawsuit-filed-against-new-york-medical-school-for-refusing-to-provide-animal-research-records [https://perma.cc/G74S-A44R].

NORTH CAROLINA

B

I. ANALYSIS

Chapter 116 of the North Carolina General Statutes, governing higher education, contains strong protections for university research. University "research data, records or information of a proprietary nature, produced or collected by or for state institutions of higher learning" are not considered public records under the North Carolina Public Records Act, provided that such records have not yet been patented, published, or copyrighted. A recent North Carolina trial court judge interpreted this provision broadly to protect university research from disclosure, and the North Carolina Court of Appeals will soon weigh in on whether the lower court's broad interpretation should be upheld.

The North Carolina Public Records Act also offers limited protection for trade secrets (both under the Public Records Act and the trade secret statute), however courts have declined to extend exemptions for trade secrets to university research application materials. North Carolina courts have found that the state does not recognize a deliberate process exemption.

II. STATUTE

OPEN RECORDS LAW

North Carolina Public Records Act, N.C. Gen. Stat. §§ 132-1 to 11

North Carolina General Statute Chapter 116 (Higher Education), N.C. Gen. Stat. §§ 116-1 to 38.

KEY STATUTORY PROVISIONS (EXCERPTS)

N.C. GEN. STAT. § 132-1

"Public Records" defined.

(a) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina

government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

N.C. GEN. STAT. § 132-1.2

Confidential information.

Nothing in this Chapter shall be construed to require or authorize a public agency or its subdivision to disclose any information that:

(1) Meets all of the following conditions:

a. Constitutes a "trade secret" as defined in G.S. 66-152(3).

b. Is the property of a private "person" as defined in G.S. 66-152(2).

c. Is disclosed or furnished to the public agency in connection with the owner's performance of a public contract or in connection with a bid, application, proposal, industrial development project, or in compliance with laws, regulations, rules, or ordinances of the United States, the State, or political subdivisions of the State.

d. Is designated or indicated as "confidential" or as a "trade secret" at the time of its initial disclosure to the public agency.

N.C. GEN. STAT. § 116-43.17

Confidentiality of research data, records, and information of a proprietary nature.

Research data, records, or information of a proprietary nature, produced or collected by or for state institutions of higher learning in the conduct of commercial, scientific, or technical research where the data, records, or information has not been patented, published, or copyrighted are not public records as defined by G.S. 132-1.

III. CASES

KEY CASES

Open records case involving research:

U.S. Right to Know v. Univ. of N.C. at Chapel Hill, 22CVS000463-670 (N.C. Sup. Ct., Orange County, Oct. 31., 2024): [1]

- Holding: The Superior Court, Orange County applied a broad construction to the research exemption under N.C. Gen. Stat. § 116-43.17. The court granted summary judgment in part to plaintiff U.S. Right to Know and in part to University of Carolina at Chapel Hill (UNC), ordering UNC to produce some additional documents, but confirming that others were exempt under N.C. Gen. Stat. § 116-43.17.
- Facts: In the course of investigating the origins of COVID-19, U.S. Right to Know, a nonprofit, made public records requests to the UNC regarding the university's scientific research concerning coronaviruses. Citing the exemption for university research in N.C. Gen. Stat. § 116-43.17, UNC disclosed a very small part of the thousands of pages that it had indicated were responsive to these public records request. U.S. Right to Know filed suit.
- Summary: The Superior Court interpreted the research exemption widely, reading "N.C. Gen. Stat. § 116-43.17 such that 'of a proprietary nature' only modifies 'information,' and does not modify either 'data' or 'records.'" Thus, research data and records were exempt regardless of whether they were proprietary in nature. The Superior Court further held that the phrase "of a proprietary nature" should be interpreted broadly to include information in which the owner has a protectable interest.

Note: the North Carolina Court of Appeals is currently considering the appeal of this case.

S.E.T.A. UNC-CH, Inc. v. Huffines, 399 S.E.2d 340 (N.C. Ct. App. 1991)

- Holding: The North Carolina Court of Appeals found that research applications containing details of experiments to be performed on animals must be disclosed.
- Facts: A student animal rights organization sought access to records relating to the care and use of animals in scientific experiments at the University of North Carolina–Chapel Hill. The university refused to disclose research application forms for four experiments that were submitted to the Institutional Animal Care and Use Committee (IACUC).
- Summary:
    - The court rejected the university's argument that the information in the applications is confidential and proprietary information that must be protected in order to insure the safety of the researcher and prevent a "chilling effect" on research, finding that the information contained in the applications was too general to have a chilling effect, and the names,

[1] Decision available at https://usrtk.org/wp-content/uploads/2024/10/USRTK-v-UNC-Summary-Judgment-Order-22CVS000463-670.filed_.pdf [https://perma.cc/V755-G443]; see also *NC Appeals Court to Hear Case Involving UNC's Possible Role in COVID's Origin,* THE CAROLINA JOURNAL (May 28, 2025) https://www.carolinajournal.com/nc-appeals-court-to-hear-case-involving-uncs-possible-role-in-covids-origin/ [https://perma.cc/P834-QYLZ].

contact information, and department names of researchers and staff members could be redacted prior to disclosure.

- The court also rejected the university's argument that the information contained in the applications constituted trade secrets under North Carolina's Trade Secrets Protection Act (N.C. Gen. Stat. § 66-152), finding that the information in these applications did not constitute trade secrets. The applications detailed the type of animals to be used, pre-and post-operative procedures, pain management, and euthanasia method; the court held that none of these pieces of information constitutes a trade secret and therefore must be disclosed.
- The description of the experiment described in the applications also does not rise to the standard of trade secret and must be disclosed.
- The court rejected the university's final claim—that the information was protected under a First Amendment academic exception—as the court concluded that a United States Supreme Court case[2] had rejected this argument, and the North Carolina court was bound by that decision.
- Note: this case predates the 2014 passage of N.C. Gen. Stat. § 116-43.17, exempting university research from the definition of public records and N.C. Gen Stat. § 132-1

OTHER POTENTIALLY RELEVANT CASES

News and Observer Publishing Co. v. Poole, 412 S.E.2d 7 (N.C. 1992): The North Carolina Supreme Court held that draft reports prepared by a committee investigating improprieties of a university basketball team must be disclosed, as the North Carolina statute did not contain a deliberative process exception, and whether one should be made was a question for the legislature not the court.

IV. OTHER NOTES

In 2002, the North Carolina Pork Council filed a voluminous open records request for the records of University of North Carolina 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 the university ultimately settled, providing draft reports, emails, survey responses, and other sensitive materials with confidential information redacted. However, the impact of the request had a chilling effect on research into the impact of hog farming, with one researcher telling Wing that he dropped his own research out of fear of facing similar open records requests which may harm his chances of getting tenure.[3]

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

[2] *University of Penn. v. Equal Opportunity Comm'n*, 493 U.S. 182 (1990).

[3] 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* 12, Feb. 2015, http://www.ucsusa.org/sites/default/files/attach/2015/02/freedom-to-bully-ucs-2015_0.pdf [https://perma.cc/GK3J-GVDN].

of North Carolina.[4] Civitas sought emails and communications sent over a six-week period, and the request resulted in Nichol having to spend many hours conducting document review. The emails that were disclosed were published by Civitas and used in an article that claimed the Poverty Center had used public funds to host political activities.[5] In February 2014, the UNC Board of Governors voted to close the Poverty Center along with two other academic institutes, although they denied any political motivation for doing so.[6]

[4] *Id.* at 15.

[5] Francis De Luca, Civitas Institute, *What UNC's Poverty Center Was Hiding*, Feb. 25, 2014, https://www.nccivitas.org/2014/uncs-poverty-center-hiding/ [https://perma.cc/MT9RKQPB7].

[6] Zoë Carpenter, *How a Right-Wing Political Machine is Dismantling Higher Education in North Carolina*, THE NATION, June 8, 2015, https://www.thenation.com/article/how-right-wing-political-machine-dismantling-higher-education-north-carolina/ [https://perma.cc/775L-YR56].

NORTH DAKOTA

C

I. ANALYSIS

Effective August 1, 2017, North Dakota enacted a specific protection for university research records, including data and records, so long as the information has not already been publicly released, published, or patented.

There is no true deliberative process exemption, although the disclosure of drafts may be delayed until the final draft is complete.

II. STATUTE

OPEN RECORDS LAW

North Dakota Open Records Law, N.D. Cent. Code § 44-04-01 *et seq.*

KEY STATUTORY PROVISIONS (EXCERPTS)

N.D. CENT. CODE § 44-04-18.4

Confidentiality of trade secret, proprietary, commercial, financial, and research information.

1. *Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed*.

2. Under this section, unless the context otherwise requires:

a. "Commercial information" means information pertaining to buying or selling of goods and services that has not been previously publicly disclosed and that if the information were to be disclosed would impair the public entity's future ability to obtain necessary information or would cause substantial competitive injury to the person from which the information was obtained.

b. "Financial information" means information pertaining to monetary resources of a person that has not been previously publicly disclosed and that if the information were to be disclosed

would impair the public entity's future ability to obtain necessary information or would cause substantial competitive injury to the person from which the information was obtained.

c. *"Proprietary information" includes*:

(1) *Information shared between a sponsor of research or a potential sponsor of research and a public entity conducting or negotiating an agreement for the research.*

(2) *Information received from a private business that has entered or is negotiating an agreement with a public entity to conduct research or manufacture or create a product for potential commercialization*.

(3) A discovery or innovation generated by the research information, technical information, financial information, or marketing information acquired under activities described under paragraph 1 or 2.

(4) A document specifically and directly related to the licensing or commercialization resulting from activities described under paragraph 1, 2, or 6.

(5) Technical, financial, or marketing records that are received by a public entity, which are owned or controlled by the submitting person, are intended to be and are treated by the submitting person as private, and the disclosure of which would cause harm to the submitting person's business.

(6) A discovery or innovation produced by the public entity that an employee or the entity intends to commercialize.

(7) A computer software program and components of a computer software program that are subject to a copyright or a patent and any formula, pattern, compilation, program, device, method, technique, or process supplied to a public entity that is the subject of efforts by the supplying person to maintain its secrecy and that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons that might obtain economic value from its disclosure or use.

(8) A discovery or innovation that is subject to a patent or a copyright, and any formula, pattern, compilation, program, device, combination of devices, method, technique, technical know-how or process that is for use, or is used, in the operation of a business and is supplied to or prepared by a public entity that is the subject of efforts by the supplying or preparing person to maintain its secrecy and provides the preparing person an advantage or an opportunity to obtain an advantage over those who do not know or use it or that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, a person that might obtain economic value from its disclosure or use.

d. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, technical know-how, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally

known to, and not being readily ascertainable by proper means by, other persons that can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain the secrecy of the information.

8. *Unless made confidential under subsection 1, university research records are exempt. "University research records" means data and records, other than a financial or administrative record, produced or collected by or for faculty or staff of an institution under the control of the state board of higher education in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone, or in conjunction with a governmental or private entity, provided the information has not been publicly released, published, or patented.*

44-04-18. Access to public records - Electronically stored information.

9. It is not an unreasonable delay or a denial of access under this section to withhold from the public a record that is prepared at the express direction of, and for presentation to, a governing body until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first. It also is not an unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first.

10. *For public entities headed by a single individual, it is not an unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, or work is discontinued on the draft but no final version has been prepared,* whichever occurs first. A working paper or preliminary draft shall be deemed completed if it can reasonably be concluded, upon a good-faith review, that all substantive work on it has been completed.

(Emphasis added.)

III. CASES AND OPINIONS

KEY CASES

There are no relevant open records cases on the recently-passed university research exemption.

POTENTIALLY RELEVANT CASES AND OPINIONS

2007 N.D. Op. Att'y Gen. No. O-01 (N.D.A.G.) (March 10, 2017): The Attorney General's office found that the University of North Dakota did not have to release preliminary drafts of a new logo prepared for it by the design firm SME, Inc. While SME was not a public entity, the logos in question were prepared under contract with the university and therefore subject to the Open Records Law. SME asserted that while their work product may be subject to the Open Records Law, the draft logos were exempt under the § 44-04-18.4 (1) trade secret exemption, as they had not been publicly disclosed and were of a privileged nature. Records are considered to be of a privileged nature when disclosure of the records is likely to "cause substantial harm to the competitive position of the entity supplying the information."[1] The Attorney General's office agreed with SME's position, finding that the preliminary designs not chosen by the university still have economic value because they can be used by SME in future projects; it would damage SME's competitive position to allow its competitors to have access to and be able to utilize those images. In addition, it could further harm SME's competitive position if its competitors could utilize the designs without incurring the same costs and time spent creating the designs.

2009 N.D. Op. Att'y Gen. No. O-01 (N.D.A.G.), 2009 WL 270377 (Feb. 2, 2009): The Attorney General's office found that North Dakota State University was a public entity headed by a single individual for the purposes of § 44-04-18(10), and a preliminary draft of a lease could be withheld from disclosure until all substantive work on it was completed.

IV. OTHER NOTES

The 2023 edition of the Open Records Manual, prepared by the North Dakota Office of Attorney General and most recently updated on April 1, 2024 confirms that "'University research records,' as defined by N.D.C.C. § 44-04-18.4(8) are exempt provided the information has not been previously publicly released, published, or patented."[2]

[1] 2007 N.D. Op. Att'y Gen. No. O-01 (N.D.A.G.) (March 10, 2017) at page 4, available at https://www.csldf.org/wp-content/uploads/2019/09/UND-Open-Records-and-Meetings-Opinion.pdf.

[2] North Dakota Office of Attorney General, *Open Records Manual* (2023) at page 39, available at https://attorneygeneral.nd.gov/wp-content/uploads/2025/08/2025-08-OR-Guide.pdf [https://perma.cc/RM5Q-2BTN].

OHIO

B

I. ANALYSIS

The Ohio Public Records Act protects intellectual property records, which includes research records of state universities that have not been publicly released, published, or patented. The Ohio courts have found that records shared with other scientists under strict control are exempt from disclosure, as such sharing does not constitute public release. The courts have also found that raw data that was used for publications is protected from disclosure, where the raw data itself had not been shared and thus was not considered publicly released.

II. STATUTE

OPEN RECORDS LAW

Ohio Public Records Act, Ohio Rev. Code Ann. § 149.43 *et seq.*

KEY STATUTORY PROVISIONS (EXCERPTS)

OHIO REV. CODE ANN. § 149.43

Availability of public records for inspection and copying.

(A) As used in this section:

> (1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:
>
> > (m) Intellectual property records;
> >
> > (v) Records the release of which is prohibited by state or federal law;

(5) *"Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.*

(Emphasis added.)

III. CASES

KEY CASES

Open records cases concerning research exemption and other academic institution records:

State ex rel. Physicians Committee for Responsible Medicine v. Ohio State University Board of Trustees, 843 N.E.2d 174 (Ohio 2005)

- Holding: The sharing of research records with other scientists for purpose of education and furthering research in that area is not considered "publicly released, published or patented" for the purposes of § 149.43(A)(5).
- Facts: Physicians Committee for Responsible Medicine (PCRM), a health advocacy group, filed a writ of mandamus[1] to compel Ohio State University (OSU) College of Medicine to disclose photographs and other video and audio records related to the use of animals in research into spinal cord injuries.
- Summary: The parties agreed that the records in question were intellectual property records with the only issue being whether the records had been publicly released, published, or patented.
    - The records in question were lent to other scientists and research trainees; OSU stated that they were only lent to collaborators who were also working on spinal cord injuries, and that the recipients of the records were required to sign nondisclosure agreements barring them from copying the records or showing them to others.
    - OSU also showed a small number of the records to scientists at medical conferences, but the conferences were closed to the public, and the records were never shared in classes for OSU students.
    - The records were kept in secure cabinets in a locked office with access restricted.
    - Some OSU researchers had described some of their research techniques in a published article, but the specific records PCRM sought here were never published.
    - The court held that the records in question had not been publicly released, published, or patented, as the information was not available to the public and did not appear to have been released to them at any point in the past. Limited sharing with other scientists for the

[1] A writ of mandamus is the name for an order of a court that directs a government official to fulfill his or her duty or correct an abuse of that official's discretion, and it is the name for the cause of action to compel disclosure of public records in Ohio.

purpose of learning did not mean that the records had been publicly released, and the records remained the intellectual property of OSU, with no indication that OSU "intends to give up its right to the scientific and financial benefits that might redound to OSU from its research in the treatment of spinal cord injuries."[2]

Walker v. Ohio State University Board of Trustees, 2010 WL 376801 (Ohio Ct. App. Feb. 4, 2010)

- Holding: The Ohio Court of Appeals found that raw research data that is never published or publicly released is exempt from disclosure under the Ohio Public Records Act, and a plaintiff cannot bring a civil forfeiture action[3] as an aggrieved party due to the destruction of the records when the records in question are exempt from disclosure.
- Facts: The plaintiff-appellant appealed from a judgment dismissing her civil forfeiture claim for wrongful destruction of public records.
- Summary: In 2002, an Ohio State professor distributed questionnaires to members of the public as part of a study into watershed development programs in the Muskingum Watershed Conservancy District. The questionnaires were distributed randomly to residents and the participants were advised that the data would be entered into an electronic file and the paper questionnaires destroyed. 1,190 responses were received, and the raw data was entered into the professor's home and office computers with the paper records kept in a locked file cabinet. This data was presented in tabulated cumulative tallies in a written report and at a public meeting, and it was also used for three scholarly articles. Only one other person had access to the raw data and, following the professor's retirement in 2005, the paper questionnaires were destroyed. Following the destruction of the records, the plaintiff-appellant made a public records request for copies of all written responses to the survey. After being informed by the university that the records had been destroyed, she then filed a civil forfeiture action against the university seeking $4,760,000—$1,000 for each of the four pages of the 1,190 responses received. At trial, the court held that the records were not public records because they fell within the intellectual property records exemption, and the plaintiff-appellant was therefore not aggravated by the destruction and could not commence a civil forfeiture action against the university.
    - The first issue considered on appeal was whether the records were intellectual property records exempt from disclosure under § 149.43(A)(1)(m).
    - Both parties agreed that the records met most of the definition of intellectual property records, at issue was whether they were considered publicly released or published.
    - The court found that the university presented evidence that the raw data was kept under tight control in a locked file cabinet with only two people having access to it.
    - The underlying data in question was never published, released, or made available to other members of the public or to other researchers or scientists.
    - The university also contended that the data had proprietary value, and if it were publicly disclosed, the university could suffer substantial harm, including loss of grants and potential liability for breaching the confidentiality of participants.
    - The court agreed with the university and found it had met its burden of proving that the records had not been publicly released or published. The records were therefore intellectual

[2] *State ex rel. Physicians Comm. For Responsible Med. V. Bd. Of Trustees of Ohio State Univ.*, 843 N.E.2d 174, 181 (Ohio 2006).

[3] Ohio Rev. Code Ann. § 149.351 provides for a civil forfeiture action for the destruction of records.

property as per the definition in § 149.43(A)(5) and exempt from disclosure under § 149.43(A)(1)(m).

- The court also held that the trial court correctly found that the plaintiff could not commence a civil forfeiture action, as she was not aggravated by the destruction of the records since she never had a legal right to disclosure.

OTHER POTENTIALLY RELEVANT CASES

State ex rel. Thomas v. Ohio State University, 643 N.E.2d 126 (Ohio 1994): The Ohio Supreme Court held that the names and work addresses of animal research scientists cannot be withheld under the Ohio Public Records Act. The act contains no personal privacy exemption that would protect such information, and an academic freedom argument has been previously rejected by the court. While there is a concern that criminal conduct may result from the release of the names or work addresses, courts have previously held that the way to address this is via criminal sanctions or for the General Assembly to propose a personal privacy exemption that covers names and addresses, rather than to judicially extend the constitutional right to privacy and academic freedom to prevent the disclosure of such records.

State ex rel. James v. Ohio State University, 637 N.E.2d 911 (Ohio 1994): The Ohio Supreme Court held that promotion and tenure records (specifically peer evaluations) of a state university are public records and are not subject to any exemptions. While the court recognized that some evaluators may be less candid if their evaluations could be made available to the public, this fear does not constitute a violation of a university's constitutionally protected right to academic freedom sufficient to deny disclosure based on the Public Record Act exemption for "records the release of which is prohibited by state or federal law" (Ohio Rev. Code Ann. § 149.43(v)).

State ex rel. Bowman v. Jackson City School District, 2011 WL 1770890 (Ohio Ct. App May 5, 2011): The Ohio Court of Appeals held that personal emails sent over a public office's computer system may become public records if the private emails are used to make decisions in the public office. In this case, the court found that inappropriate personal messages sent by a teacher during times she should have been teaching were public records despite being private in nature, where such emails were used as evidence in the decision to dismiss her from her position for misconduct. The emails in question documented activity of the office under the definition of public record in §149.011(G) (documents are public record if they serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office).

State ex rel. Wilson-Simmons v. Lake County Sheriff's Department, 693 N.E.2d 789 (Ohio 1998): The Ohio Supreme Court denied Ms. Wilson-Simmons a writ of mandamus seeking disclosure of racist emails by her public employee coworkers, sent via a public office's email system, finding that while reprehensible, the emails were not a part of conducting the business of the public office and therefore did not constitute public records for the purposes of § 149.011(G) and § 149.43.

Doe v. Ohio State Univ., 261 N.E.3d 1 (Ohio Ct. App Dec. 17, 2024): Plaintiff, a ticket reseller, had made a request to the Ohio State University for records containing information about Ohio State football season ticketholders. The Ohio Court of Appeals ruled that spreadsheets containing the ticketholders' mailing addresses, email addresses, and phone numbers did not qualify as "records" under Ohio Revised Code 149.011(G) that were subject to disclosure under the Public Records Act because they did not shed light

on or document the organization, functions, policies, decisions, procedures, operations, or activities of the University.

IV. OTHER NOTES

In 2025, House Bill 314 was introduced to address frivolous public records requests. The bill permits limiting or denying records requests "[i]f a requester submits multiple related or unrelated requests for copying or inspection of public records to the same public office or person responsible for a public record and, based on the volume or the repeated nature of the requests, the public office or person has reason to believe that the requests are intended to harass the public office or person or to disrupt the essential functions of the public office or person." H.B. 314 is currently in committee.

OKLAHOMA

C

I. ANALYSIS

The Oklahoma Open Records Act has a statutory protection for research that includes any information related to the research, the disclosure of which could affect the conduct or outcome of the research, or any other proprietary interests any entity may have in the research or its results, including research notes, data, results, or other writings about the research. An Oklahoma Appellate Court applied the research records exemption to water sampling results processed at a public university lab that had been paid for by the defendant's counsel, finding that the defendant had a clear proprietary (ownership) interest in the results.

The Oklahoma Open Records Act also has a general protection for notes of a public official making a recommendation; this section has not yet been applied to a public university researcher.

II. STATUTE

OPEN RECORDS LAW

Oklahoma Open Records Act, Okla. Stat. tit. 51, §§ 24A.1 to 30

KEY STATUTORY PROVISIONS (EXCERPTS)

OKLA. STAT. TIT. 51, § 24A.9

Confidential Personal Notes and Personally Created Materials of Public Official Making Recommendation

Prior to taking action, including making a recommendation or issuing a report, *a public official may keep confidential his or her personal notes and personally created materials* other than departmental budget requests of a public body prepared as an aid to memory or research leading to the adoption of a public policy or the implementation of a public project.

OKLA. STAT. TIT. 51, § 24A.19

Confidential Nature of Research Information

In addition to other records that a public body may keep confidential pursuant to the provisions of the Oklahoma Open Records Act, a public body may keep confidential:

1. *Any information related to research, the disclosure of which could affect the conduct or outcome of the research, the ability to patent or copyright the research, or any other proprietary rights any entity may have in the research* or the results of the research including, but not limited to, trade secrets and commercial or financial information obtained from an entity financing or cooperating in the research, *research protocols, and research notes, data, results, or other writings about the research*; and

2. The specific terms and conditions of any license or other commercialization agreement relating to state owned or controlled technology or the development, transfer, or commercialization of the technology. Any other information relating to state owned or controlled technology or the development, transfer, or commercialization of the technology which, if disclosed, will adversely affect or give other persons or entities an advantage over public bodies in negotiating terms and conditions for the development, transfer, or commercialization of the technology. However, institutions within The Oklahoma State System of Higher Education shall:

a. report to the Oklahoma State Regents for Higher Education as requested, on forms provided by the Regents, research activities funded by external entities or the institutions, the results of which have generated new intellectual property, and

b. report to the Oklahoma State Regents for Higher Education annually on forms provided:

(1) expenditures for research and development supported by the institution,

(2) any financial relationships between the institution and private business entities,

(3) any acquisition of an equity interest by the institution in a private business,

(4) the receipt of royalty or other income related to the sale of products, processes, or ideas by the institution or a private business entity with which the institution has established a financial arrangement,

(5) the gains or losses upon the sale or other disposition of equity interests in private business entities, and

(6) any other information regarding technology transfer required by the Oklahoma State Regents for Higher Education.

The reports required in subparagraphs a and b of this paragraph shall not be deemed confidential and shall be subject to full disclosure pursuant to the Oklahoma Open Records Act.

(Emphasis added.)

III. CASES AND OPINIONS

KEY CASES

Meritor, Inc. v. State ex rel. Board of Regents of University of Oklahoma, 451 P.3d 914 (Okla. Civ. App. Div. 1, 2019):

- Holding: The appellate court found that lab results performed at the University of Oklahoma were exempt from disclosure because they would normally be privileged in litigation as the work of a non-disclosed expert, and 2) because the records fell within OORA's research results exemption.
- Facts: A manufacturing facility sought to bar the University of Oklahoma from releasing certain documents in response to a request filed under the Oklahoma Open Records Act (OORA). The facility was a defendant in Mississippi lawsuits regarding groundwater contamination. In preparing its defense, the facility's attorney had retained an undisclosed, non-testifying expert, who in turn subcontracted with a University of Oklahoma (OU) lab to have certain water samples analyzed. An attorney representing plaintiffs in a Mississippi lawsuit filed an OORA request with OU to obtain the results. OU indicated it would release the records absent a court order barring their release, and the facility brought suit to bar their release.
- Summary: The appellate court found that the records were exempt from disclosure for two reasons.
    - First, it followed the reasoning in several U.S. Supreme Court cases to determine that documents that are "normally or routinely privileged" in litigation should also fall within the evidentiary privilege exemption of OORA. Any other finding would allow individuals to use OORA to circumvent normal discovery rules. The court focused much of its opinion on this first issue.
    - Second, the court found that the records also fell within OORA's research results exemption, because the "records sought are undisputably research results in which [the defendant's] counsel has a proprietary interest."[1] Because the facility's lawyer hired an expert who in turn paid for the research, the court found that the facility had a proprietary interest in the records. The court also adopted a broad definition of proprietary interest, following the Virginia Supreme Court in *American Tradition Institute v. Rector and Visitors of University of Virginia*, 287 Va. 330, 756 S.E.2d 435 (2014). This case defined a proprietary interest as "a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls."[2]

[1] *Meritor, Inc. v. State ex rel. Board of Regents of University of Oklahoma*, 451 P.3d 914, 923 (2019).

[2] *Id.* at 923 n.17 (citation omitted).

OTHER POTENTIALLY RELEVANT CASES AND OPINIONS

Nichols v. Jackson, 38 P.3d 228 (Okla. Crim. App. 2001): In an action by a criminal defendant to seal his criminal record, the Oklahoma Court of Criminal Appeals held that the First Amendment right of access by press to nonconfidential court records precluded sealing of the records. The court also noted that the Oklahoma Open Records Act does not allow a court to balance the public interest in disclosure versus an individual's interest in withholding records. "The Legislature has determined by statute that the public's interest is greater, except where specific statutory exemption is given. However, such statutory provisions are always subject to interpretation to ensure compliance with constitutionally guaranteed rights."[3]

Oklahoma Public Employees Association v. State ex rel. Oklahoma Office of Personnel Management, 267 P.3d 838 (Okla. 2011): The Oklahoma Supreme Court ruled that release of state employees' birth dates and employee identification numbers under the Open Records Act would constitute a clearly unwarranted invasion of personal privacy that outweighed the public interest in the records. In so ruling, the court followed a 2009 opinion of the Oklahoma Attorney General, which stated that release of state employees' birth dates required a balancing test to determine if such a release amounted to an unwarranted invasion of personal privacy. The Oklahoma Supreme Court also ruled that the *Nichols* case was inapposite to this decision, and concluded that the Oklahoma legislature's silence on the issue meant that "the Legislature agrees with the Attorney General that it may be necessary to balance the public's right to know against the employee's right to privacy when it is alleged that the information requested would constitute a clearly unwarranted invasion of personal privacy."[4]

Okla Att'y. Gen. Op. No. 09-12, 2009 WL 1371725 (May 13, 2009): Emails made or received in connection with the transaction of public business, the expenditure of public funds, or the administration of public property are subject to the Oklahoma Open Records Act whether or not they are created, received, transmitted, or maintained by government officials on publicly or privately owned equipment or communication devices.

[3] *Nichols v. Jackson*, 38 P.3d 228, 231 (Okla. Crim. App. 2001) (citation omitted).

[4] *Okla. Pub. Emps. Ass'n v. State ex rel. Okla. Office of Pers. Mgmt.*, 267 P.3d 838, 844 (Okla. 2011).

OREGON

C

I. ANALYSIS

The Oregon Public Records Law protects writings prepared by faculty members of public universities in connection with research until published or publicly released, unless the public interest in disclosure outweighs the interests in protecting research from "piracy" and avoiding the release of preliminary, incomplete, and inaccurate data. Recent Oregon lower court decisions have found that where there is a comprehensive research paper published based on underlying unreleased data, the faculty research exemption no longer applies, even if the data will be used again for future papers. Several Oregon Attorney General Public Records Opinions have allowed the faculty research exemption to extend to instances where some *preliminary* research information has been shared or published, but ongoing research on the underlying data is continuing. Oregon also has a deliberative process exemption.

II. STATUTE

OPEN RECORDS LAW

Oregon Public Records Law, Or. Rev. Stat §§ 192.311 to 478

KEY STATUTORY PROVISIONS (EXCERPTS)

OR. REV. STAT. § 192.345[1]

Public records conditionally exempt from disclosure.

The following public records are exempt from disclosure under ORS 192.410 to 192.505 *unless the public interest requires disclosure in the particular instance*:

> (2) Trade secrets. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or

[1] Note that this statute was renumbered in 2018; prior section numbers for those cited here were 192.501 and 192.502 and references to section numbers in cases below may involve old numbering.

compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

(14) *Writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented*.

(30) The name, home address, professional address or location of a person that is engaged in, or that provides goods or services for, medical research at Oregon Health and Science University that is conducted using animals other than rodents. This subsection does not apply to Oregon Health and Science University press releases, websites or other publications circulated to the general public.

(Emphasis added.)

OR. REV. STAT. § 192.355

Other public records exempt from disclosure.

The following public records are exempt from disclosure under ORS 192.410 to 192.505:

(1) Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

(21) Sensitive business records or financial or commercial information of the Oregon Health and Science University that is not customarily provided to business competitors.

III. CASES AND OPINIONS

KEY CASES AND OPINIONS

Open records cases concerning research:

PETA v. Oregon Health Sciences University, No. 19-cv-13964 (Or. Cir. Ct. April 20, 2020)[2]

- Holding: The Multnomah County Circuit Court held that where research videos had been used and thoroughly described in published research, the underlying videos were subject to disclosure. But for

[2] Decision available at https://s3.amazonaws.com/arc-wordpress-client-uploads/wweek/wp-content/uploads/2020/04/21122131/IN-THE-CIRCUIT-COURT-OF-THE-STATE-OF-OREGON.pdf [https://perma.cc/J9GP-KENG].

another set of videos, where there was no published research yet and only limited data were used in a student's dissertation, the faculty research exemption still applied.

- Facts: An animal rights group filed an Oregon Public Records Law request for videos of macaque monkeys created as part of studies by a faculty member of the Oregon Health Sciences University (OHSU).
- Summary:
    - The University refused to disclose the videos, relying on the faculty research exemption. This was affirmed by the Multnomah County District Attorney's Office, and the animal rights group appealed.
    - The court stated that the primary purpose of the faculty research exemption is to protect against the "piracy" of research ideas and data collected by public university faculty members. A secondary purpose is avoiding the release of preliminary, incomplete, and inaccurate data.
    - The court found that all of the videos were public records, and that the public had an interest in the lab's compliance with regulatory requirements in using monkeys in experiments, and in understanding how public grant funding is being spent. The court separated the videos into two categories for further analysis—the Thompson Videos, on which a paper had been published, and the Grant Videos, not yet used in a published paper.
    - The court found that the faculty research exemption no longer applied to the Thompson Videos, even though they had not been published themselves, because they had been used and described in a published research article. The court rejected OHSU's argument that the videos should remain protected because future papers would incorporate and rely on this same data set, reasoning that future uses of the data does not render the publication of a comprehensive analysis of the videos preliminary or incomplete.
    - As to the Grant Videos, the court found that they were still protected by the faculty research exemption, because the research team was still working to analyze the data, and there had been "no publication or public presentation of any findings or analysis" from the videos. Some limited data had been used in a student's dissertation. In this instance, the court found that the exemption's purpose of protecting research from "piracy" outweighed the public interest in ensuring regulatory compliance and the wise use of public resources. But that balance would likely require disclosure once the research was published or if the lab ceased analyzing all or part of the videos.
    - The court ordered minor redactions of the disclosed videos based on portions of the Public Records Law that conditionally protect the identity of animal researchers, ORS 192.345(30), and another personal privacy exemption, ORS 192.355(2)(a).

PETA v. Oregon Health Sciences University, No. 20-cv-15874 (Or. Cir. Ct. July 6, 2022)[3]

- Holding: The Multnomah County Circuit Court held that OHSU had unduly delayed in disclosing vole videos and microscopic photographs of vole brain tissue, and for the same reason engaged in discovery violations, and awarded penalties and attorneys' fees to the plaintiff.

[3] Decision available at https://www.peta.org/wp-content/uploads/2022/07/PETA-vs-OHSU-Ruling-7_6_2022.pdf [https://perma.cc/8SYR-8Q3S].

- Facts: An animal rights group sought access to videos and photographs of voles it learned of through a publication by a faculty member of OHSU.
- Summary:
    - After receiving the request, the University first denied that it had any responsive materials. After the primary researcher admitted to having photographs of the vole experiments during a deposition, counsel for OHSU turned over the responsive photographs. After the animal rights group's forensic analyst discovered relevant videos on a hard drive that was turned over as a part of discovery, OHSU's counsel acknowledged that those videos were also responsive to the original request.
    - The court ruled that the photographs and videos at issue were all public records, and that no exemption applied. There is no indication in the court's order whether the University asserted the faculty research exemption. The photographs and videos were used and analyzed in published research, as the paper is what alerted the animal rights group to the pictures and videos. The court found that OHSU's belated disclosures constituted undue delay, and awarded a total of $400 in penalties and attorneys' fees to the plaintiff for the two claims regarding the photographs and videos.
    - The court ruled against the plaintiff's claims that OHSU had discriminated against them by responding to its public records requests in a discriminatory fashion due to the group's political and social views. The court did find, however, that OHSU police had violated an Oregon law, ORS 181A.250, by maintaining information about PETA's political and social views that were not related to an ongoing criminal investigation, and ordered them to delete such material. The court did not award attorneys' fees or other penalties for this claim.

In Defense of Animals v. Oregon Health Sciences University, 112 P.3d 336 (Or. Ct. App. 2005)

- Holding: The Oregon Court of Appeals held that research records of the OHSU could be withheld under the § 192.502(30) exemption for business records of OHSU and that it was in the public interest to withhold the names of researchers under a conditional exemption that protects such information.
- Facts: An animal rights group sought access to various records of the Oregon Regional Primate Research Center (ORPRC), a unit of the Oregon Health and Science University.
- Summary:
    - Various procedural issues were addressed by the court, mainly relating to fees assessed for provision of the records.
    - Of relevance here was an assignment of error on appeal, where the plaintiff contended that OHSU failed to meet the burden of proving the records in question were subject to the exemptions asserted. Because of other procedural issues, there was not a direct holding at trial on this issue, but the trial court did find that OHSU had complied with the law and thus it explicitly concluded that the records sought by the plaintiff were subject to the claimed exemptions.[4]

[4] *In Defense of Animals v. Or. Health Scis. Univ.*, 112 P.3d 336, 345-46 (Or. Ct. App. 1995).

- OHSU claimed that the names of the drug companies for which it conducted research and the names of the experimental drugs involved were exempt under the § 192.502(21).[5] The court agreed, finding that while ORPRC has a primary purpose of improving human health, their research activities constituted business activities. The names of the companies they contract with and the drugs tested constituted business records for the purpose of the exemption, as they were sensitive records that would ordinarily not be provided to the companies' competitors.
- OHSU also claimed that the names of the ORPRC staff were exempt from disclosure under § 192.501(30).[6] As the exemptions of § 192.501 are conditional exemptions, the court applied a balancing test to determine whether the public's interest in disclosure outweighed the public's interest in withholding the records.
- The plaintiff alleged that its purpose in obtaining the records was to ensure primate research facilities are complying with the federal Animal Welfare Act and to educate the public about the inadequacy of current animal welfare laws, and these purposes indicated that the public's interest in disclosure outweighed the public's interest in withholding the records.
- OHSU's interest was a general concern about harassment and threats to safety at ORPRC from animal rights activists.
- The court held that, while there was no direct evidence linking the plaintiff to harassment of ORPRC staff, the public interest did not require disclosure of the ORPRC staff names.
- The case was remanded for consideration on other issues. The decision on remand is unknown.

Oregon Attorney General's Public Records Orders concerning research exemption:

Speede, Or. Att'y Gen. Pub. Recs. Order, June 19, 1995[7]

- Holding: The Oregon Attorney General's office held that the publication of initial findings of research did not constitute public release where there was intention to perform additional research using the same data. Note that the reasoning of this opinion may conflict with the 2020 Multnomah County Court decision described above, which is a higher authority.
- Facts: Animal welfare activists sought access to videotapes that served as data for an article on the behavior of caged monkeys.
- Summary:
  - The AG's office determined that publication of initial research findings based on analysis of videotapes of a caged monkey was not considered public release under the faculty research exemption when the intention was to perform further analysis of the same data and continue publishing based on this analysis.
  - The AG's office supported its position by stating that "premature disclosure of the writings of faculty to third parties would have a chilling effect on faculty publications,"[8] and it would result in faculty members refraining from publishing any of their findings until they were absolutely certain they had gleaned data that had any possible scientific value from their

[5] This section has been renumbered since the decision in this case, and the reference here is updated to the current statute numbering.

[6] This section has been renumbered since the decision in this case, and the reference here is updated to the current statute numbering.

[7] Decision available at https://www.doj.state.or.us/wp-content/uploads/2017/04/speede_61995.pdf [https://perma.cc/JCD9-X8K8].

[8] *Speede*, Or. Att'y Gen. Pub. Recs. Order at 3, June 19, 1995.

materials. This delay in publication could result in the inability of public institution faculty to gain the recognition that enables them to receive research grants and would prevent public institutions from maintaining a reputation of being on the forefront of innovative research.

- The AG's office also stated that allowing disclosure would also confer benefit on private institutions (who would not have to worry about publishing preliminary records as they are exempt from public records requirements) and cause researchers to prefer to work for private institutions; this drain of researchers/instructors from the public sector would deprive students of public institutions from the benefit of education at institutions at the forefront of scientific research.
- The respondents asserted that even if the statutory exemption did apply, because the exemption is conditional, the public interest in disclosing outweighs the public interest in withholding. The respondent's claims included the argument that when research is funded by public money, the public has the right to know how it is spent. They also presented the argument that disclosure was necessary due to heightened public concern over the humane treatment of animals in research.
- The AG's office disagreed, concluding that just because the nature of research is controversial should not mean it loses its exemption and that, while there was a public interest in the humane treatment of animals in research, the fact that the research in question was performed according to federal government guidelines and standards safeguarded the public's interest.

Bridges, Or. Att'y Gen. Pub. Recs. Order, Sept. 25, 2003[9]

- Holding: The Oregon Attorney General's office found that preliminary drafts of research regarding bridge safety were not subject to disclosure as they were not yet publicly released.
- Facts: The requestor petitioned for disclosure of correspondence—together with copies of all working notes and preliminary drafts of the bridge analysis report—between Oregon State University (OSU) and Oregon Department of Transportation (ODOT) employees regarding a bridge analysis ODOT commissioned OSU to perform.
- Summary:
  - The Attorney General's office denied the petition, finding that the records in question fell under the faculty research exemption.
  - The records in question were drafts, which had yet to be publicly released; the research was expected to continue for several more months before the final report would be prepared.
  - The requestor asserted that because the exemption is conditional, even if the exemption applies, the public interest in disclosing the records outweighs the interest in withholding because there was a public interest in knowing whether the ODOT overstated the bridge problem in order to pass a revenue package to finance bridge work.
  - The AG's office disagreed, concluding that the preliminary findings and conclusions would be subject to change as the research continued, and disclosing such preliminary results would lead to an increased risk of it being misinterpreted.

[9] Decision available at https://www.doj.state.or.us/wp-content/uploads/2017/04/Bridges_092503.pdf [https://perma.cc/2KKZ-WAMY].

Milstein, Or. Att'y Gen. Pub. Recs. Order, Oct. 15, 2007[10]

- Holding: The Oregon Attorney General's office found that sharing information at a scientific conference about a new method of testing municipal drinking water for traces of drugs did not constitute "publicly released," because the presentation focused on the method, did not detail results, and the underlying research was still in progress.
- Facts: The requestor sought access to copies of Oregon State University data and results derived from a new method developed to detect traces of drugs in municipal drinking water.
- Summary:
    - The researchers involved in the project presented a report to the American Chemical Society explaining the development of their method. Some results were discussed anonymously, and the presentation did not identify any municipalities.
    - A professional publication on the research and the new method was in preparation and would be submitted to academic journals upon completion.
    - The AG's office found that the limited sharing of information about the new method did not reveal any of the specific data sought by this public records request, and the findings to date were still preliminary with the intention to perform further research based on the requested data.
    - Therefore, in keeping with prior decisions by the AG's office, the AG's office concluded that limited disclosure of some preliminary data does not constitute being publicly released, copyrighted, or patented for the purposes of § 192.501(14), and the records need not be disclosed.
    - Since the exemption is conditional, the AG's office also evaluated whether the public interest in disclosure was greater than the public interest in withholding the records, finding that this was not the case. There was a strong public interest in withholding these records due to the fact that they were evaluating and developing a new methodology for measuring traces of drugs in drinking water, and the data itself may not present accurate information. While there is a public interest in knowing how much drug residue is in drinking water, the public has no interest in the release of inaccurate or unreliable data on this subject.

McCleery, Or. Att'y Gen. Pub. Recs. Order, July 7, 1989[11]

- Holding: Records relating to research on mother–daughter relationships were exempt under the research exemption despite some preliminary results being shared as research was still in progress.
- Facts: The requestor sought access to records prepared by an Oregon State University (OSU) professor relating to an interview with a mother and daughter who participated in a study on relationships between adult daughters and their mothers to whom they provided care.
- Summary:
    - The AG's office determined that the records in question were writings prepared by a faculty member of a public educational institution.

[10] Decision available at https://www.doj.state.or.us/wp-content/uploads/2017/04/milstein_10152007.pdf [https://perma.cc/YSB7-GPRJ].

[11] Decision available at https://www.doj.state.or.us/wp-content/uploads/2017/04/mccleery_7789.pdf [https://perma.cc/Y3SC-FX4C].

- The records in question were prepared as part of a research project, and some preliminary results of the project had been released, but OSU indicated that the continuing publications based on the data were planned and the research was scheduled to continue for two more years.
- In light of this, the AG determined that the records had not yet been publicly released, copyrighted, or patented so as to terminate the exemption and therefore need not be disclosed.

PENNSYLVANIA

A

I. ANALYSIS

Pennsylvania has strong protection for academic records: four of its major institutions of higher education—Temple University, Pennsylvania State University, the University of Pittsburgh, and Lincoln University—are considered state-related and exempt from the Pennsylvania Right to Know Law (RTKL) because they are not state agencies under the RTKL. However, 14 Pennsylvania universities are considered state-owned and subject to the RTKL, which offers them exemptions for unpublished articles, research-related materials, and scholarly correspondence. There is no Pennsylvania case law evaluating the RTKL protection as it applies to state universities.

Pennsylvania also has a deliberative process exemption that it has applied in the higher education context for records that are 1) internal to the agency—maintained internal to one agency or among governmental agencies; 2) deliberative in nature; and 3) predecisional—created prior to a related decision.

II. STATUTE

OPEN RECORDS LAW

Pennsylvania Right-to-Know Law, 65 Pa. Stat. §§ 67.101 – 3104
Known as: RTKL

KEY STATUTORY PROVISIONS (EXCERPTS)

65 PA. STAT. § 67.708

Exceptions for public records

(b) Exceptions. — Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

(10)(i) A record that reflects:

(A) *The internal, predecisional deliberations of an agency, its members, employees or*

officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

(11) A record that constitutes or reveals a trade secret or confidential proprietary information.

(12) Notes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.

(14) *Unpublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related material and scholarly correspondence of a community college or an institution of the State System of Higher Education or a faculty member, staff employee, guest speaker or student thereof.*

(Emphasis added.)

STATUTORY NOTE

Pennsylvania has a unique situation in that there are four "state-related institutions" (defined in 65 Pa. Stat. § 67.1501 as Temple University, Pennsylvania State University, The University of Pittsburgh, and Lincoln University) that are not considered state agencies for the purpose of the RTKL.[1] *See Mooney v. Temple University Board of Trustees*, 285 A.2d 909 (Pa. Commw. Ct. 1972); *Roy v. Pa. State Univ.*, 568 A.2d 751 (Pa. Commw. Ct. 1990).

There are also 14 Pennsylvania state-owned universities that are considered state agencies for the purposes of the RTKL. *See* 24 Pa. Stat. § 20-2002-A; *Dynamic Student Services v. State System of Higher Education,* 697 A.2d 239 (Pa. 1997). These institutions are:

(1) Bloomsburg State College;
(2) California State College;
(3) Cheyney State College;
(4) Clarion State College;
(5) East Stroudsburg State College;
(6) Edinboro State College;
(7) Indiana University of Pennsylvania;
(8) Kutztown State College;
(9) Lock Haven State College;
(10) Mansfield State College;
(11) Millersville State College;
(12) Shippensburg State College;
(13) Slippery Rock State College; and

[1] 65 Pa. Stat. § 67.301 of the RTKL 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."

(14) West Chester State College.

III. CASES

KEY CASES

There are no open records cases concerning the research exemption, 65 Pa. Stat. § 67.708.

OTHER POTENTIALLY RELEVANT CASES

Bagwell v. Pennsylvania Department of Education, 76 A.3d 81 (Pa. Commw. Ct. 2013): The Pennsylvania Commonwealth Court found that the secretary of education is considered to be acting on behalf of the Department of Education when serving on the Pennsylvania State University (PSU) Board of Trustees. Therefore, correspondence records received by the secretary in that role are considered records of the agency and are subject to RTKL—even though the university itself is not an agency and not subject to disclosure under the RTKL.

Pennsylvania State University v. State Employees' Retirement Board, 935 A.2d 530 (Pa. 2007): The Pennsylvania Supreme Court found that while records of PSU are exempt from the RTKL, records relating to PSU employees who participated in the State Employees' Retirement System (SERS) are subject to the RTKL as SERS is a state agency. The records relate to PSU employees who have voluntarily chosen to participate in SERS, and they are therefore considered state employees for this purpose under the relevant definition in 71 Pa. Stat. § 5902.

California University of Pennsylvania v. Schackner, 168 A.3d 413 (Pa. Commw. Ct. 2017): The Commonwealth Court applied the predecisional deliberative exemption factors to determine whether records of a state-owned university relating to its investigation into the structural failure of an on-campus parking garage were exempt from disclosure. To be exempt, the records must be 1) internal; 2) deliberative in nature; and 3) predecisional—created prior to a related decision. The Court determined the university did not provide enough information for the test to be met and the records were not exempted in this case.

Township of Worcester v. Office of Open Records, 129 A.3d 44 (Pa. Commw. Ct. 2016): The Pennsylvania Commonwealth Court found that factual information is not exempt under the deliberative process exemption, as it is not deliberative in nature.

Pennsylvania Office of the Attorney General v. Bumstead, 134 A.3d 1204 (Pa. Commw. Ct. 2016): The Pennsylvania Commonwealth Court found that pornographic emails sent and received via the Office of the Attorney General computers are not public records under the RTKL. To be considered public records, emails must document a transaction or activity of the agency and be created, received, or retained in connection with the activity of the agency. The emails in question did not relate to any transaction or activity of the agency, and while the emails may have violated the agency's policies, the agency is not required to disclose them under the RTKL just because an agency email address is involved.

Barkeyville Borough v. Stearns, 35 A.3d 91 (Pa. Commw. Ct. 2012): The Pennsylvania Commonwealth Court held that emails between council members discussing borough business were public records subject to the RTKL despite being sent from personal accounts. The messages were considered records as they were sent in transaction of business of the borough, and they were public records for the purpose of the RTKL, as the messages were between council members and discussed borough business, making them "of" the borough and subject to disclosure under the RTKL.

Penncrest Sch. Dist. v. Rodgers, 337 A.3d. 604 (Pa. Commw. Ct. 2024): The Pennsylvania Commonwealth Court held that emails sent or received by individual school board members on their personal email accounts are "records" subject to disclosure under the RTKL if the emails document a transaction or activity of the school district conducted in the board member's official capacity. The location of an email on a personal computer or email account is not determinative of whether it is a public record; the key factor is whether the email documents official agency business. This is true even though an individual school board member cannot bind the school district alone; a board member acts in an official capacity when discussing school district business and furthering its interests, and emails relating to such activities are public records under the RTKL. Thus, Pennsylvania Commonwealth Court found that the lower court did not err or abuse its discretion in directing the School District to have its Board members and Superintendent search their personal email accounts emails responsive to the records request.

Pa. PUC v. Nase, 302 A.3d 264 (Pa. Commw. Ct. 2023): In considering whether records were exempt from disclosure under the notes and working papers exemption of RTKL § 67.708(b)(12), the Pennsylvania Commonwealth Court found that, although sharing a document within an agency does not necessarily prevent the exemption from applying, such document must be retained solely for the convenience of an individual official in order for the exemption to apply. In considering whether withheld records were exempt from disclosure under the "predecisional deliberations" exemption of RTKL § 67.708(b)(10)(i)(A), the Pennsylvania Commonwealth Court held that records that merely reveal the existence of a deliberative process without effectively disclosing the confidential communications themselves are not exempt.

Trethewe v. Downington Area Sch. Dist., 331 A3d 956 (Pa. Commw. Ct. 2025): The Pennsylvania Commonwealth Court considered whether the Downington Area School District's DEI training materials constituted trade secret or confidential proprietary information exempt from disclosure under RTKL § 67.708(b)(11). It found that the materials were not trade secrets because they did not derive their value from being generally unknown to and unascertainable to other persons; to the contrary, the training materials derived their value from being shared with School District employees and others participating in the training program. Further, the DEI training materials were the actual product, unlike a trade secret which is essential to the product, but not the product itself. The Pennsylvania Commonwealth Court also found that the affidavits provided by the School District contained insufficient factual details to determine whether the training materials constituted confidential proprietary information because the affidavits did "not explain how this information has value to the School District's competitors; the identity of competitors in the DEI training market; and the likelihood of substantial injury if the information was released."[2]

[2] *Trethewe v. Downington Area Sch. Dist*., 331 A3d 956, 969 (Pa. Commw. Ct. 2025).

RHODE ISLAND

B

I. ANALYSIS

The Rhode Island Access to Public Records Act (ARPA) offers protection for preliminary drafts, and in June 2017, Rhode Island amended the statute to add specific protection for university research. The new language gives protection to preliminary drafts, notes, impressions, memoranda, working papers, and work products, including those involving research at state institutions of higher education. There is no Rhode Island case law evaluating either the preliminary drafts or research exemption. Nor are there any interpretations by the Office of the Attorney General, which issues findings and files lawsuits regarding APRA complaints.

II. STATUTE

OPEN RECORDS STATUTE

Access to Public Records Act, R.I. Gen. Laws §§ 38-2-1 to -15

KEY STATUTORY PROVISIONS (EXCERPTS)

R.I. GEN. LAWS § 38-2-2

Definitions.

As used in this chapter:

(4) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, computer stored data (including electronic mail messages, except specifically for any electronic mail messages of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities), or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. For the purposes of this chapter, the following records shall not be deemed public:

(B) *Trade secrets and commercial or financial information* obtained from a person, firm, or corporation which is of a privileged or confidential nature.

(K) *Preliminary drafts, notes, impressions, memoranda, working papers, and work products, including those involving research at state institutions of higher education on commercial, scientific, artistic, technical or scholarly issues, whether in electronic or other format*; provided, however, any documents submitted at a public meeting of a public body shall be deemed public.

(Emphasis added.)

III. CASES

KEY CASES

There is no directly relevant open records case law.

OTHER POTENTIALLY RELEVANT CASES

Providence Journal Co. v. Convention Center Authority, 774 A.2d 40 (R.I. 2001): The Rhode Island Supreme Court found that, for the purpose of § 38-2-2(B), confidential means any financial or commercial information whose disclosure would be likely either "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[1]

IV. OTHER NOTES

The bill that introduced the more specific protection for university research found in § 38-2-2 (4)(K) was signed into law on June 27, 2017. The state representative who introduced the bill to the Rhode Island House, Rep. Carol Hagan McEntee, decided to sponsor the bill after moderating a climate change seminar at the University of Rhode Island and hearing how climate science professors have been harassed via open records requests. In addition to protecting climate scientists and other researchers from harassment, Rep. McEntee also stated that research records need to be protected in order to maintain the competitiveness of public universities. Without such protections in place, companies may choose to work on research with private universities instead of public universities, and that would be detrimental to the state institutions.[2]

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[1] *Providence Journal Co. v. Convention Ctr. Auth.*, 774 A.2d 40, 47 (R.I. 2001) (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

[2] For more information on the background to the passage of this bill *see* Kendra Gravelle, *Legislation to Protect Scientists Signed by Raimondo*, THE NARRAGANSETT TIMES, July 2, 2017, http://www.ricentral.com/narragansett_times/legislation-to-protect-scientists-signed-by-raimondo/article_76ed8dd4-5db1-11e7-8576-735f106dec15.html [https://perma.cc/S5LS-LNSX].

SOUTH CAROLINA

B

I. ANALYSIS

The South Carolina Freedom of Information Act contains detailed protections for both proprietary and nonproprietary research records until published, publicly released, or patented. The exemption for nonproprietary research specifies that it applies to research notes and data, discoveries, research projects, proposals, methodologies, protocols, and creative works. There is no South Carolina case law analyzing this exemption.

II. STATUTE

OPEN RECORDS LAW

South Carolina Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 to 165
Known as: FOIA

KEY STATUTORY PROVISIONS (EXCERPTS)

S.C. CODE. ANN. § 30-4-40

Matters exempt from disclosure.

(a) A public body may but is not required to exempt from disclosure the following information:

> (1) Trade secrets, which are defined as unpatented, secret, commercially valuable plan, appliances, formulas, or processes, which are used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities obtained from a person and which are generally recognized as confidential and work products, in whole or in part collected or produced for sale or resale, and paid subscriber information. Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies, marine terminal service and non-tariff agreements, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation.

(14)(A) *Data, records, or information of a proprietary nature, produced or collected by or for faculty or staff of state institutions of higher education in the conduct of or as a result of study or research on commercial, scientific, technical or scholarly issues*, whether sponsored by the institution alone or in conjunction with a governmental body or private concern, *where the data, records, or information has not been publicly released, published, copyrighted, or patented.*

(14)(B) *Any data, records or information developed, collected or received by or on behalf of faculty, staff, employees, or students of a state institution of higher education or any public or private entity supporting or participating in the activities of a state institution of higher education in the conduct of or as a result of study or research on medical, scientific, technical, scholarly, or artistic issues, whether sponsored by the institution alone or in conjunction with a governmental body or private entity until the information is published, patented or otherwise publicly disseminated, or released to an agency whereupon the request must be made to the agency. This item applies to, but is not limited to, information provided by participants in research, research notes and data, discoveries, research projects, proposals, methodologies, protocols and creative works*.

(Emphasis added.)

III. CASES

There is no relevant open records case law.

SOUTH DAKOTA

B

I. ANALYSIS

The South Dakota Public Records Law offers strong statutory protection for research as well as exemptions for correspondence, working papers, and personal correspondence for public officials or employees. There is no South Dakota case law evaluating these statute sections, although in at least once instance, the University of South Dakota has used the research protection statute provision to deny disclosure of records relating to scientific research. The law also contains protections for commercial and proprietary information related to research, and a deliberative process exemption.

II. STATUTE

OPEN RECORDS LAW

South Dakota Public Records Law, S.D. Codified Laws §§ 1-27-1 to -48

KEY STATUTORY PROVISIONS (EXCERPTS)

S.D. CODIFIED LAWS § 1-27-1.5

Certain records not open to inspection and copying.

The following records are not subject to §§ 1-27-1, 1-27-1.1, and 1-27-1.3:

> (3) Trade secrets, *the specific details of bona fide research, applied research, or scholarly or creative artistic projects being conducted at a school, postsecondary institution or laboratory funded in whole or in part by the state*, and other proprietary or commercial information which if released would infringe intellectual property rights, give advantage to business competitors, or serve no material public purpose;
>
> (12) Correspondence, memoranda, calendars or logs of appointments, working papers, and records of telephone calls of public officials or employees;

(19) Personal correspondence, memoranda, notes, calendars or appointment logs, or other personal records or documents of any public official or employee;

(24) Internal agency record or information received by agencies that are not required to be filed with such agencies, if the records do not constitute final statistical or factual tabulations, final instructions to staff that affect the public, or final agency policy or determinations, or any completed state or federal audit and if the information is not otherwise public under other state law, including chapter 15-15A and § 1-26-21;

S.D. CODIFIED LAWS § 1-27-1.6

Certain financial, commercial, and proprietary information exempt from disclosure.

The following financial, commercial, and proprietary information is specifically exempt from disclosure pursuant to §§ 1-27-1 to 1-27-1.15, inclusive:

(7) Financial, commercial, and proprietary information supplied in conjunction with applications or proposals for funded scientific research, for participation in joint scientific research projects, for projects to commercialize scientific research results, or for use in conjunction with commercial or government testing;

S.D. CODIFIED LAWS § 1-27-1.7

Certain drafts, notes and memoranda exempt from disclosure

Drafts, notes, recommendations and memoranda in which opinions are expressed or policies formulated or recommended are exempt from disclosure pursuant to §§1-27-1 to 1-27-1.15, inclusive

(Emphasis added.)

III. CASES

There is no relevant open records case law.

IV. OTHER NOTES

Beginning in 2008, People for the Ethical Treatment of Animals (PETA) began targeting University of South Dakota (USD) neuroscientist Robert Morecraft, requesting records relating to brain injury research conducted on nonhuman primates. The first open records request came in 2008 when PETA requested 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.[1]

[1] *People for the Ethical Treatment of Animals v. S.D. Bd. of Regents*, Off. of Hearing Examiners PRR 08-04 (Apr. 15, 2009), available at https://www.csldf.org/resources/PETA-v-USD-Office-of-Hearing-Examiners-Decision.pdf.

In July 2009, PETA filed another request, and the university again declined to disclose the records. At this point, the South Dakota public records statute had changed and now provided protection for research under § 1-271.5(3); USD based its denial on these sections as well as stating that the cost of locating and assembling the remaining records would be $2,000. PETA amended its request to 11 records (reduced from 19), and 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.[2] While PETA stated at the time that they were deciding how to proceed, it does not appear that further action was taken.[3]

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[2] See Summons and Complaint, *People for the Ethical Treatment of Animals v. S.D. Bd. of Regents*, No. 10-31 (Feb. 2, 2010), available at https://www.csldf.org/resources/PETA-v-USD-PETA_Complaint_Against_USD.pdf.

[3] For more information on this matter see Bob Grant, *New Front in Animal Rights War*, THE SCIENTIST, Apr. 21, 2010, http://www.the-scientist.com/?articles.view/articleNo/28948/title/New-front-in-animal-rights-war/ [https://perma.cc/67E6-ZHM7].

TENNESSEE

C

I. ANALYSIS

The Tennessee Open Records Act contains no protection for research. A separate statute section, found in the Tennessee Education Code, provides some protections for sponsored research, defined as any 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 university research where disclosure would impact the outcome of the research, harm a university's ability to patent or copyright the research, or affect any other proprietary rights. There is no Tennessee case law evaluating this statute, so the application of this language, especially in the case of non-sponsored research, is unknown. While Tennessee courts have applied a common law deliberative process exemption, it has been limited to senior government officials and might not apply to university researchers.

II. STATUTE

OPEN RECORDS LAW

Tennessee Open Records Act, Tenn. Code Ann. §§ 10-7-501 to 517

KEY STATUTORY PROVISIONS (EXCERPTS)

Tennessee Education Code, Tenn. Code. Ann. §49-7-120

TENN. CODE ANN. § 49-7-120

RESEARCH DATA; CONFIDENTIAL AND PRIVILEGED INFORMATION

(a) As used in this section, unless the context otherwise requires:

(1) "Patentable materials" means inventions, processes, discoveries or other subject matter that the public higher education institution or the sponsor reasonably believes to be patentable under 35 U.S.C.;

(2) “Proprietary information” means:

(A) 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 and that is disclosed by the person or entity to the public higher education institution; or

(B) Any information received, developed, generated, ascertained or discovered by the public higher education institution under terms of a contract for the development thereof that recognizes the proprietary interest of the person or entity in the information;

(3) “Sponsored research or service” means any research, analysis, or service conducted pursuant to grants or contracts between the public higher education institution and a person or entity. “Sponsored research or service” does not include research, analysis or service conducted under an agreement with other agencies of the state, unless the research, analysis or service is a subcontract to a sponsored research or service contract with a person or entity; and

(4) “Trade secrets” means any information, knowledge, items or processes used directly or indirectly in the business of a person or entity that give the person or entity an advantage or an opportunity to obtain an advantage over competitors who do not know or use them.

(b) The following records or materials, regardless of physical form or characteristics, received, developed, generated, *ascertained or discovered during the course of sponsored research or service conducted by a public higher education institution*, or in the course of fulfilling a grant agreement between a public higher education institution and the Tennessee department of economic and community development, shall not be open for public inspection:

(1) Patentable material or potentially patentable material;
(2) Proprietary information;
(3) Trade secrets or potential trade secrets, including, but not limited to, manufacturing and production methods, processes, materials and associated costs;
(4) Business transactions, commercial or financial information about or belonging to research subjects or sponsors;
(5) Summaries or descriptions of sponsored research or service, unless released by the sponsor;
(6) Personally identifiable information; and
(7) *Any other information that reasonably could affect the conduct or outcome of the sponsored research or service, the ability to patent or copyright the sponsored research or any other proprietary rights any person or entity might have in the research or the results of the research, including, but not limited to, protocols, notes, data, results or other unpublished writing about the research or service.*

(c) Nothing in this section shall prohibit voluntary disclosure of the records or materials by the sponsor or by the public higher education institution with the consent of the sponsor.

(d) The public higher education institution shall make available, upon request by a citizen of this state, the titles of sponsored research or service projects, names of the researchers and the amounts and sources of funding for the projects.

(e) *All records or materials, regardless of physical form or characteristics, received, developed, generated, ascertained or discovered during the course of research or service that is not sponsored research or service, as defined in subdivision (a)(3), shall not be open for public inspection if the disclosure of the information reasonably could affect the conduct or outcome of the research or service, the ability of the public higher education institution to patent or copyright the research or any other proprietary rights any person or entity might have in the research or the results of the research, including, but not limited to, proprietary information 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.*

(f) Upon agreement of a subject and the clinical study physician assigned to the human subject and upon the withdrawal, termination or conclusion of the research project, the assigned clinical study physician shall, upon notification and request of the human subject, disclose all pertinent medical information in that human subject's research records. Disclosure shall take place as soon as reasonably practical, not to exceed three (3) business days.

(Emphasis added.)

III. CASES AND OPINIONS

KEY CASES

There are no open records cases addressing the confidentiality of research information exemption.

POTENTIALLY RELEVANT CASES

Swift v. Campbell, 159 S.W.3d 565 (Tenn. Ct. App. 2004): The Tennessee Court of Appeals recognized the existence of a common law deliberative process exemption but found that the application of the exemption depends on the government officials involved. The court declined to extend the privilege to the records of an assistant district attorney, but stated that it had no doubt the privilege would apply to records of the governor.

Davidson v. Bredesen, 2013 WL 5872286 (Tenn. Ct. App. 2013): The Tennessee Court of Appeals found that the deliberative process privilege did protect notes of senior state legal officials relating to protests at the state capitol, as they were records of high government officials and contained either no facts, only deliberations, or mixed facts and opinion that are intertwined to the point that production must be denied.

Marquardt. v. Univ. of Tenn. at Knoxville, No. E2024-00891-COA-R3-CV, 2025 LX 165026 (Tenn. Ct. App. 2025): The Court of Appeals considered whether emails sent between a professor at the University of

Tennessee at Knoxville (UTK) and Elan Young, a part-time employee of UTK and freelance journalist, were "public records" subject to disclosure. The requested emails related to an old journal article discussing the effects of coal mining on the environment that the professor had sent to Young, using their UTK email addresses. Young, while acting in her capacity as a freelance journalist, had later published an article on a related topic for the Huffington Post (which had paid for her work).

The professor, whose area of expertise was not related to the environmental impact of coal or the science of climate change, had picked up the old journal amid a pile of materials left after a colleague cleaned out her office and had kept it out of personal interest to his family history. The professor had shared an article contained in one of these journals with Young because he knew she was interested in environmental issues. Based on these facts, the Court of Appeals affirmed the lower court's ruling that the professor's sharing of the article with Young was not made or received in connection with official business of the university and therefore did not constitute a "public record" subject to disclosure.

Brennan v. Giles County Board of Education, 2005 WL 1996625 (Tenn. Ct. App. 2005): The Tennessee Court of Appeals found that digital records maintained by a public school internet service provider on school-owned computers or private computers connected to the school internet are only public records if they are sent or received in connection with the transaction of official business of the public agency. This determination is a question of fact to be determined by a trial court via *in camera* review.

IV. OTHER NOTES

In 2018, Tennessee Technological University published a study on glider trucks that was conducted by an engineering professor and funded by Fitzgerald, a leading manufacturer of glider trucks—new truck bodies fitted with older engines that were not manufactured to current emissions standards. The study became controversial because it claimed glider trucks did not emit more pollution than new trucks. The study was apparently shared with the U.S. Environmental Protection Agency (EPA), which was, at the time, considering rolling back glider truck restrictions (this decision has since been put on hold). However, investigative reporting by *The New York Times* discovered that the study was seriously flawed and that Fitzgerald had donated money to name a building on campus.[1] University faculty became outraged by the revelations and demanded an investigation into the research as well as the relationship between the university president and Fitzgerald. Lawyers for Fitzgerald threatened faculty senate members with open records requests related to their communications on the topic. The study was eventually disavowed by the university and an inquiry opened into whether proper research protocol had been followed.

The Southern Environmental Law Center (SELC) also filed an open records request on the university for records associated with the study. At first the university denied production, claiming the records fell under the exemption for sponsored research, but some records were eventually released. The released records did not reveal much information; the SELC claimed the release was "tailored" by Fitzgerald and mainly focused on email communications between Tennessee Tech employees and receipts for project expenditures.[2]

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[1] Eric Lipton, *How $225,000 Can Help Secure a Pollution Loophole at Trump's E.P.A.*, NEW YORK TIMES, Feb. 15, 2018, https://www.nytimes.com/2018/02/15/us/politics/epa-pollution-loophole-glider-trucks.html?module=inline [https://perma.cc/3JWT-PLUZ].

[2] Ben Wheeler, *SELC Releases Public Records Regarding Fitzgerald*, HERALD CITIZEN, June 18, 2018, http://heraldcitizen.staging.communityq.com/stories/selc-releases-public-records-regarding-fitzgerald,28536 [https://perma.cc/S87M-QY4U].

TEXAS

D

I. ANALYSIS

The Texas Public Information Act has limited protection for trade secrets and commercial information where disclosure would cause harm to the person from whom the information was obtained. The statute also provides an inter/intra-agency memorandum exemption, which has been read to incorporate the deliberative process privilege into the Public Information Act. The Texas Education Code has some additional protections for scientific information that has the potential to be sold, licensed, or traded for a fee.

In Texas, a government body that wishes to withhold information when responding to a request for public records must first ask for a decision from the Attorney General as to whether the information falls within an exception if there has not been a previous determination finding that it does. Texas Attorney General Opinions contain interpretations of the above provisions and serve as an important resource. There is little relevant case law.

II. STATUTE

STATUTE NAME

Texas Public Information Act, Tex. Gov't Code Ann. §§ 552.001 to .353
Known as: PIA

STATUTORY PROVISIONS (EXCERPTS)

TEX. GOV'T CODE ANN. § 552.110

§ 552.110. Exception: Confidentiality of Trade Secrets; Confidentiality of Certain Commercial or Financial Information

(a) In this section, "trade secret" means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or

however stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

(1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

(2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

(b) Except as provided by Section 552.0222, information is excepted from the requirements of Section 552.021 if it is demonstrated based on specific factual evidence that the information is a trade secret.

(c) Except as provided by Section 552.0222, commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

TEX. GOV'T CODE ANN. § 552.111

§ 552.111. Exception: Agency Memoranda

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from the requirements of Section 552.021.

Texas Education Code, Tex. Educ. Code Ann. §51.914

TEX. EDUC. CODE ANN. § 51.914

Protection of Certain Information

(a) In order to protect the actual or potential value, the following information is confidential and is not subject to disclosure under Chapter 552, Government Code, or otherwise:

(1) *all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee*;

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties; or

(3) the plans, specifications, blueprints, and designs, including related proprietary information, of a scientific research and development facility that is jointly financed by the federal government

and a local government or state agency, including an institution of higher education, if the facility is designed and built for the purposes of promoting scientific research and development and increasing the economic development and diversification of this state.

(b) 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, or that consists of unpublished research or data that may be commercialized, is not subject to Chapter 552, Government Code, unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant. In this subsection, "institution of higher education" has the meaning assigned by Section 61.003.

(Emphasis added.)

III. CASES AND OPINIONS

KEY CASES AND OPINIONS

Office of the Attorney General Open Records Decision regarding research:

Tex. Att'y Gen. Op. ORD No. 651, 1997 WL 33493019 (Tex. A.G. Mar. 18, 1997)

- Holding: Records relating to research that has the potential to be sold, traded, or licensed for a fee can be withheld from disclosure.
- Facts: The opinion considers two requests: 1) for field notes, raw data, and other background information collected and used by university employees to prepare studies on salamanders, as part of a contract between the university and the Texas Parks and Wildlife Department, and 2) for correspondence, notes summaries, opinions, evaluations, and other documents relating to the research performed by an assistant professor in the Department of Botany under a contract with E.I. Du Pont de Nemours and Company, where the corporate sponsor would receive a report of the research results.
- Summary:
    - The Attorney General's (AG's) office first considered whether the records in question were public records (based on a prior version of the statute) and found that they met the definition of public records.
    - Based on this determination that the records in question were public records, the AG's office then considered the university's contention that if the records were indeed public, they were still excluded from disclosure based on the research exemption found in § 51.914.
    - The university stated the salamander research identified the DNA sequences of a new type of salamander, and this had the potential for being sold, traded, or licensed for a fee. The university also asserted that the DuPont-sponsored research had potential to be sold, traded, or licensed for a fee, although they did not indicate why and the faculty member conducting the research stated in a letter that he expected no inventions to arise from his research.

- The AG's office found nothing to indicate how the legislature intended a court or their office to determine whether or not scientific information has the potential to be sold, traded, or licensed for a fee. Therefore, it was decided that the university may make that determination and, as a result, allowed the university to withhold records relating to the salamander DNA sequencing and the DuPont-sponsored research. However, the AG's office allowed disclosure of other records relating to the salamander research that did not relate to the DNA sequencing, which the university failed to assert had potential to be sold, traded, or licensed for a fee.

Tex. Att'y Gen. Op. ORD 557, 1990 WL 508254 (Tex. A.G. May 21, 1990)

- Holding: The Texas Attorney General found that minutes of Texas Tech University's Animal Care and Use Committee meetings and records of committee proceedings were not on their face protected from disclosure by article 51.914 of the Education Code, but allowed for submission of evidence to the contrary within 30 days. These meeting records were protected by the inter- and intra-agency memoranda exception only to the extent they contained opinion, advice, or recommendation.

Tex. Att'y Gen. Op. ORD 497, 1988 WL406274 (Tex. A.G. June 27, 1988)

- Holding: Records that reveal vital information about research that has the potential to be sold, traded, or licensed for a fee may be withheld from disclosure.
- Facts: The requestor sought records relating to superconductor research at the University of Houston, including patent applications, patent strategies, patent searches, patent prosecution, foreign filings, licensing, contracting, equity deals, federal government financing, and other supporting documentation related to invention and patent aspects.
- Summary:
    - The AG's office held that patent applications and related documents fall under the § 51.914 exemption, as they reveal vital information about the superconductivity research that clearly has the potential for being sold, traded, or licensed for a fee.
    - However, basic information about licensing, contracting, equity deals, and federal government financing does not necessarily reveal details about the research itself and does not enable a person to appropriate the university's research; therefore, those records cannot be withheld.

OTHER POTENTIALLY RELEVANT CASES AND OPINIONS

Tex. Att'y Gen. Op. ORD 464, 1987 WL 269396 (Tex. A.G. June 3, 1987): In an effort to clarify the distinction between fact and opinion, the AG's office examined the interagency opinion exemption in more detail and found that a more viable approach focuses on whether the advice, opinion, or recommendation actually plays a role in the decisional process.

- The AG's office applied the test to a compilation of responses to anonymous evaluations of university administrators, finding that questions answered with a letter answer (rated with a grade of A, B, C, etc.) could not be withheld, as they did not reflect or play a role in the decisional process, so their release would not harm the deliberative process even if they may reflect the subjective opinion of the responder.

- The AG's office did, however, find that narrative evaluations could be withheld; while the narratives were technically anonymous, the nature of the information contained therein could reveal the identity of the evaluator and therefore impair the university's ability to obtain the same degree of openness in responses to future evaluations.

Adkisson v. Paxton, 459 S.W.3d 761 (Tex. App. 2015): The Texas Court of Appeals found that emails sent and received by a county commissioner via his personal email account that related to official county business were considered information held in connection with the transaction of official business; this information is held, and owned, by the county and thus satisfies the definition of "public information" under the Public Information Act.

UTAH

B

I. ANALYSIS

The Utah Government Records Access and Management Act (GRAMA) offers strong statutory protection for research records. GRAMA specifically protects unpublished notes, data, and information relating to research at an institution of higher education, as well as unpublished manuscripts, unpublished lecture notes, and scholarly correspondence. There is no Utah case law evaluating these exemptions, but the wide scope of the exemption and the broad range of records exempted are clearly defined in the statute. GRAMA does allow for court-ordered disclosure of otherwise exempted records where the court determines that the interest of public access is equal to or outweighs the interest of restriction.

II. STATUTE

OPEN RECORDS LAW

Utah Government Records Access and Management Act, Utah Code Ann. §§ 63G-2-101 to 901
Known as: GRAMA

KEY STATUTORY PROVISIONS (EXCERPTS)

UTAH CODE ANN. § 63G-2-301

Public records

(3) The following records are normally public, but to the extent that a record is expressly exempt from disclosure, access may be restricted under Subsection 63G-2-201(3)(b), Section 63G-2-302, 63G-2-304, or 63G-2-305:

(i) empirical data contained in drafts if:

(i) the empirical data is not reasonably available to the requester elsewhere in similar form; and

(ii) the governmental entity is given a reasonable opportunity to correct any errors or make nonsubstantive changes before release;

(j) drafts that are circulated to anyone other than:

(i) a political subdivision;

(ii) a federal agency if the governmental entity and the federal agency are jointly responsible for implementation of a program or project that has been legislatively approved;

(iii) a government-managed corporation; or

(iv) a contractor or private provider;

(k) drafts that have never been finalized but were relied upon by the government entity in carrying out action or policy;

UTAH CODE ANN. § 63G-2-305

Protected records

The following records are protected if properly classified by a governmental entity:

(1) trade secrets as defined in Section 13-24-2 if the person submitting the trade secret has provided the governmental entity with the information specified in Section 63G-2-309;

(2) commercial information or nonindividual financial information obtained from a person if:

(a) disclosure of the information could reasonably be expected to result in unfair competitive injury to the person submitting the information or would impair the ability of the governmental entity to obtain necessary information in the future;

(b) the person submitting the information has a greater interest in prohibiting access than the public in obtaining access; and

(c) the person submitting the information has provided the governmental entity with the information specified in Section 63G-2-309;

(22) drafts, unless otherwise classified as public;

(36) materials to which access must be limited for purposes of securing or maintaining the governmental entity's proprietary protection of intellectual property rights including patents, copyrights, and trade secrets;

(40) (a) *the following records of an institution within the state system of higher education* defined in Section 53B-1-102, *which have been developed, discovered, disclosed to, or received by or on behalf of faculty, staff, employees, or students of the institution*:

(i) *unpublished lecture notes;*

(ii) *unpublished notes, data, and information*:

(A) *relating to research; and*

(B) *of:*

(I) *the institution within the state system of higher education defined in Section 53B-1-102; or*

(II) *a sponsor of sponsored research;*

(iii) *unpublished manuscripts;*

(iv) *creative works in process;*

(v) *scholarly correspondence; and*

(vi) *confidential information contained in research proposals;*

(b) Subsection (40)(a) may not be construed to prohibit disclosure of public information required pursuant to Subsection 53B-16-302(2)(a) or (b); and

(c) Subsection (40)(a) may not be construed to affect the ownership of a record;

(Emphasis added.)

UTAH CODE ANN. § 63G-2-404

Judicial Review

(7) (a) Except as provided in Section 63G-2-406, *the court may*, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, *order the disclosure of information properly classified as private, controlled, or protected if the interest favoring access is greater than or equal to the interest favoring restriction of access*.

(b) The court shall consider and, where appropriate, limit the requester's use and further disclosure of the record in order to protect privacy interests in the case of private or controlled records, business confidentiality interests in the case of records protected under Subsections 63G-2-305(1) and (2), and privacy interests or the public interest in the case of other protected records.

III. CASES

There are no relevant key cases and opinions.

OTHER POTENTIALLY RELEVANT CASES AND OPINIONS

Big Game Forever v. Peterson, 551 P.3d 411 (Utah Ct. App. 2024): The Court of Appeals affirmed the lower court's decision that records requested from the Utah Department of Natural Resources, which disclosed the names of its contractor's subcontractors, should be released. Through multimillion-dollar contracts, Utah had supported Big Game Forever, a non-profit organization, in its efforts to remove protections for the Canadian Gray Wolf from the federal Endangered Species Act. A journalist requested Big Game's expenditure reports under one of these contracts. The Department of Natural Resources released these reports, but redacted the subcontractors' names on the grounds they were protected records under § 63G-2-305's exemption for trade secrets and commercial information.

The lower court determined that the names of Big Game's subcontractors were neither trade secrets nor commercial information but also applied the balancing test in § 63G-2-404(7)9a) and held that "even if the subcontractor list is properly classified as protected, the interest favoring access is greater than or equal to the interest favoring restriction of access."[1] The Court of Appeals found that in its appeal, Big Game only addressed the question of whether the redacted information constituted trade secrets or commercial information and did not meaningfully engage with the lower court's balancing of interest; in thus ignoring this separate reason for disclosure Big Game did not carry its burden of persuasion on appeal.

[1] *Big Game Forever v. Peterson,* 551 P.3d 411, P10 (Utah Ct. App. 2024).

VERMONT

C

I. ANALYSIS

The Vermont Public Records Act (PRA) protects research records until they are published or publicly released. This protection extends to research notes and correspondence. There is no Vermont case law interpreting this exemption, and it is unclear whether the protection would remain for prepublication notes and correspondence after the results of research are published.

II. STATUTE

OPEN RECORDS LAW

Vermont Public Records Act, Vt. Stat. Ann. tit. 1, §§ 315 to 320
Known as: PRA

KEY STATUTORY PROVISIONS (EXCERPTS)

VT. STAT. ANN. TIT 1, § 317

Definitions; public agency; public records and documents

(c) The following public records are exempt from public inspection and copying:

> (9) Trade secrets, meaning confidential business records or information, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which a commercial concern makes efforts that are reasonable under the circumstances to keep secret, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it, except that the disclosures required by 18 V.S.A. § 4632 are not exempt under this subdivision.
>
> (17) Records of interdepartmental and intradepartmental communications in any county, city, town, village, town school district, incorporated school district, union school district, consolidated water district, fire district, or any other political subdivision of the State to the extent that they cover other than primarily factual materials and are preliminary to any determination of policy or

action or precede the presentation of the budget at a meeting held in accordance with section 312 of this title.

(23) *Any data, records, or information produced or acquired by or on behalf of faculty, staff, employees, or students of the University of Vermont or the Vermont State Colleges in the conduct of study, research, or creative efforts on medical, scientific, technical, scholarly, or artistic matters, whether such activities are sponsored alone by the institution or in conjunction with a governmental body or private entity, until such data, records, or information are published, disclosed in an issued patent, or publicly released by the institution or its authorized agents*. This subdivision applies to, but is not limited to, *research notes and laboratory notebooks, lecture notes, manuscripts, creative works, correspondence, research proposals and agreements, methodologies, protocols, and the identities of or any personally identifiable information about participants in research*. This subdivision shall not exempt records, other than research protocols, produced or acquired by an institutional animal care and use committee regarding the committee's compliance with State law or federal law regarding or regulating animal care.

(Emphasis added.)

III. CASES

KEY CASES

U.S. Right to Know v. University of Vermont, 255 A.3d 719 (Vt. 2021)

- Holding: Emails involving a professor's work on outside academic journals and external advisory committees, and not university-related matters, are not public records under the PRA.
- Facts: The University of Vermont argued before the superior court that the emails in question were not considered public records, and the superior court granted summary judgment in favor of the University. The plaintiff, a nonprofit group, appealed this decision.
- Summary:
    - The emails at issue were between a retired medical professor and third party entities, concerning the professor's work, both before and after retirement, on outside academic journals and external advisory committees, conducted in her personal capacity.
    - The Vermont Supreme Court concluded that these emails were not public records as they did not involve university-related matters. It upheld the lower court's determination that the emails were not "produced or acquired in the course of public agency business."
    - Even though the university derived benefits from the external work and spent money on those benefits, the emails themselves concerned private workings of unaffiliated entities.
    - As an aside, the court noted that this holding is "consonant with" the exemption for research records, and such records would be exempt if there had been a sufficient nexus with the University.

Animal Legal Defense Fund v. Institutional Animal Care and Use Committee of the University of Vermont, 159 Vt. 133 (Vt. 1992)

- Holding: Records of the Institutional Animal Care and Use Committee (IACUC) at the University of Vermont were public records under the PRA and must be disclosed.
- Facts: The University of Vermont claimed, among other arguments, that the IACUC was not a "committee of" the university and therefore its records were not public records. The superior court determined that the PRA did in fact apply, and the university appealed.
- Summary:
    - The Animal Legal Defense Fund and another animal rights group sought meeting minutes of the IACUC under the PRA (as well as access to the meetings under Vermont's Open Meetings Law).
    - The University of Vermont claimed that the IACUC was established pursuant to federal law as a condition for federal funding and, therefore, could not be a "committee of" the university. The court disagreed, noting that the IACUC was appointed and supervised by university leadership, and the university may reject research criteria accepted by the committee and may replace members of the committee. As the IACUC was properly a committee of the university, its records were subject to the PRA.

OTHER POTENTIALLY RELEVANT CASES

Toensing v. Attorney General of Vermont, No. 2017-90 (October 20, 2017) 2017 WL 4700508

The Vermont Supreme Court found that private email and text message accounts of public officials are subject to the PRA so long as the records in question otherwise meet the definition of public records. The court held that the PRA does not define public record based on the location of the record in question, rather the determinative factor as to what constitutes a public record is whether the document at issue is produced or acquired in the course of agency business.

VIRGINIA

B

I. ANALYSIS

The Virginia Freedom of Information Act protects proprietary information collected by or for faculty or staff of public institutions of higher education. The Virginia Supreme Court interpreted the statute to protect the research emails of a University of Virginia climate science professor, holding that all of his emails fell within the definition of the term proprietary for purposes of the statute, and such records were excluded from disclosure.

II. STATUTE

OPEN RECORDS LAW

Virginia Freedom of Information Act, Va. Code Ann. §2.2-3700 *et seq.*
Known as: FOIA

KEY STATUTORY PROVISIONS (EXCERPTS)

VA. CODE. ANN.§ 2.2-3701

Definitions.
As used in this chapter, unless the context requires a different meaning:

"Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; governing boards of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.

"Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or

in the possession of a public body or its officers, employees or agents in the transaction of public business.

VA. CODE. ANN. § 2.2-3705.4

Exclusions to application of chapter; educational records and certain records of educational institutions.

The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

4. *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 information has not been publicly released, published, copyrighted or patented.*

(Emphasis added.)

III. CASES

KEY CASES

Open records cases concerning research exemption and other academic institution records:

American Tradition Institute v. Rector and Visitors of University of Virginia, 287 Va. 330 (Va. 2014)

- Holding: The Virginia Supreme Court held that a professor's emails were exempt from disclosure under the research exemption to FOIA.
- Facts: American Tradition Institute (ATI) sought disclosure of virtually all emails that Michael Mann, a climate science professor, produced and/or received while working at the University of Virginia (UVA) or otherwise using its facilities and resources.
- Summary:
    - Following the initial request, UVA negotiated a fee and production schedule with ATI. In May 2011, when UVA failed to deliver the first set of documents by the required date, ATI filed a Petition for Mandamus and Injunctive Relief in the trial court, and the trial court entered an Order on Production of Documents that directed UVA to release 1,793 emails within 90 days of the order.
    - In September 2011, Mann filed a motion to intervene, arguing that the university could not sufficiently protect his interests, and the trial court granted the motion in November 2011.
    - The trial court conducted an *in camera* review, using exemplars selected by the parties, to determine whether the documents should be classified as exempt. The parties primarily

disputed whether the documents were considered "proprietary" for the purposes of the exemption in §2.2-3705.4(4).

- UVA argued in favor of a definition of "proprietary" found in *Green v. Lewis*, 272 S.E.2d 181 (Va. 1980): "A proprietary right is a right customarily associated with ownership, title and possession. It is an interest or right of one who exercises dominion over a thing or property, of one who manages and controls."[1] Under this rationale, all of Mann's emails were "proprietary."
- ATI contended that proprietary was the same as competitive advantage and limited to disclosures that would cause financial harm.
- The trial court adopted UVA's definition and upheld UVA's exclusion of the emails from production.
- ATI appealed, and on appeal, the Virginia Supreme Court found that there was no definition of "proprietary" in the Virginia FOIA, and therefore they must use statutory construction to interpret the provision.
- The Virginia Supreme Court agreed with the broader definition UVA advanced at trial, and stated that ATI's narrow definition of "proprietary" as constituting financial competitive advantage was not consistent with the Virginia General Assembly's intent to protect public universities from being placed at a competitive disadvantage compared to private universities: "In the context of the higher education research exclusion, competitive disadvantage implicates not only financial injury, but also 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."[2]
- The Virginia Supreme Court also held that UVA produced enough evidence to meet the research exemption's seven requirements and that the trial court did not err in allowing UVA to demand payment for the cost of exclusion review of the documents sought.

Virginia Freedom of Information Advisory Council Op. AO-04-10 (Nov. 19, 2010)[3]

- Holding: The Virginia Freedom of Information Advisory Council found that records prepared by public employees for a public body other than which they are employed need not be disclosed by their public employer, as the records are not in the transaction of that body's public business.
- Facts: A journalist sought disclosure of records, including emails and other communications, related to a climate change report authored by two George Mason University (GMU) professors that was commissioned by the United States Congress; the journalist sought Freedom of Information Advisory Council opinion regarding the responses received from GMU.
- Summary:
  - The university responded to the request stating that it did not have any of the records requested and provided other documents that indicated that the professors did not use any university facilities, equipment, or resources when performing the work at issue; one

[1] *Green v. Lewis*, 272 S.E.2d 181 (Va. 1980).

[2] *Am. Trad. Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330, 342 (Va. 2014).

[3] Opinion available at http://foiacouncil.dls.virginia.gov/ops/10/AO_04_10.htm [https://perma.cc/AYC9-34XN].

professor also mentioned that his correspondence on the matter was not handled through the university's email system.

- The primary question asked of the Advisory Council was whether the records requested are related to the transaction of public business and subject to release under FOIA, given that the professors were public university employees, the report was commissioned by a public body, and the issue discussed in the report was of high public interest.
- The Advisory Council found that the university is a public body subject to FOIA, and a university professor is a public employee. Therefore, records prepared or owned by, or in the possession of a university professor are public records if they are in the transaction of public business.
- The term "transaction of public business" is not defined in FOIA. Past opinions have found that emails between members of a public body that are not related to public business are not subject to FOIA—the fact that the messages go through the public email system does not, by itself, make them public records; rather, it is the subject of the messages that determines their status as public records.
- Here, the professors attested they did not use the university email system, but that alone would not be enough to determine whether they are public records; even if the professors used private email, the records may still be public records because they were prepared and possessed by the public employees and may have been in the transaction of public business.
- The deciding factor is whether the records were prepared in the transaction of public business. Here, the report was prepared for and commissioned by Congress and not by the university, and the work was not part of the professors' jobs at the university. Therefore, the records are not in the transaction of the university's or the professors' public business.
- The fact that the work was performed as a transaction of the public business of Congress is irrelevant—under Virginia FOIA, a public body is only responsible for providing records it uses in transaction of its own public business. Therefore, these records are not public records of the university and need not be disclosed pursuant to the request.

Transparent GMU v. George Mason Univ., 298 Va. 222, 835 S.E.2d 544 (2019)

- Holding: The Supreme Court of Virginia held as a matter of first impression that the George Mason University Foundation, a privately held nonprofit corporation, which was established to raise funds and manage donations given for the benefit of George Mason University, was not a public body subject to FOIA.
- Facts: The requester, Transparent GMU, submitted a FOIA request to the University and the Foundation seeking information about private gifts to the University. The University denied that it had possession of the records, and the Foundation asserted that it was not a public body subject to the FOIA.
- Summary: The Court reasoned that the Foundation was not "an entity of" the University because it operates under its own internal rules, has a purpose distinct from that of the University, and was created as a distinct corporate entity. Further the manner of dealing between the Foundation and GMU was persuasive: The Foundation and GMU regularly enter into contracts, and GMU does not supervise the decision-making of the Foundation. Nor does the Foundation receive public funds.

IV. OTHER NOTES

In the unreported case *Horner v. Rectors and Visitors of George Mason University*, Case No. 15-4712 (Richmond City Cir. Ct.) (April 22, 2016),[4] the Richmond City trial court ruled that George Mason University (GMU) needed to produce the emails of a GMU climate communications professor sought under FOIA, as these emails were considered public records under FOIA. The trial court's decision made no mention of or reference to FOIA's protections for public university records, § 2.2-3705.4(4), or the Virginia Supreme Court decision protecting a public university professor's records in *American Tradition Institute v. Rector and Visitors of University of Virginia*. Notably, the lead plaintiff in the *Horner* case, Christopher Horner, was also one of the American Tradition Institute's attorneys in the *American Tradition Institute* case.

In September 2025, PETA filed a FOIA lawsuit in Norfolk Circuit Court against Virginia Polytechnic Institute and State University, alleging that the university was unlawfully withholding public records relating to research on pigs.[5]

[4] Order available at https://www.csldf.org/resources/2016-04-22-Order.pdf.

[5] Ava Garrison, *PETA sues Virginia Tech over experiments on minipigs*, Collegiate Times, SEP 14, 2025, https://www.collegiatetimes.com/news/peta-sues-virginia-tch-over-experiments-on-minipigs/article_34baa044-77c7-408b-9cf1-9945b5b35d1f.html [https://perma.cc/GMJ5-RT36].

WASHINGTON

D

I. ANALYSIS

The Washington Public Records Act offers very limited protection for research data, the disclosure of which may produce private gain and public loss.

The statute provides a deliberative process exemption that has been applied to research records, but Washington courts have taken a very strict approach, holding that once a final decision has been made, the predecisional records relating to that final decision are no longer exempt under the privilege.

II. STATUTE

OPEN RECORDS LAW

Washington Public Records Act, Wash. Rev. Code Ann. §§ 42.56.001 – 904
Known as: PRA

KEY STATUTORY PROVISIONS (EXCERPTS)

WASH. REV. CODE ANN. § 42.56.270

Financial, commercial, and proprietary information.

The following financial, commercial, and proprietary information is exempt from disclosure under this chapter:

> (1) Valuable formulae, designs, drawings, computer source code or object 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;

WASH. REV. CODE ANN. § 42.56.280

Preliminary drafts, notes, recommendations, intra-agency memorandums.

Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publicly cited by an agency in connection with any agency action.

(Emphasis added.)

III. CASES

KEY CASES

Open records case concerning research:

Progressive Animal Welfare Society v. University of Washington, 884 P.2d 592 (Wash. 1994)

- Holding: The Supreme Court of Washington held that the "pink sheets" in a research proposal, which contained peer review comments of the proposed research, are exempt under the deliberative process privilege, so long as the proposal remains unfunded. However, once a proposal is funded and implemented, the deliberate process privilege no longer applies to these records.
- Facts: Animal rights group brought action against the University of Washington, seeking disclosure of an unfunded grant proposal for research that would be performed on rhesus monkeys. The grant proposal in question was prepared for submission to the National Institutes of Health (NIH) and included a project review form (which are generally designed to be disclosable), details of the research to be performed, and pink sheets that contained a summary of confidential peer review of the proposed research. If funded by NIH, the grant proposal typically becomes public information—although information that would affect patent or other valuable rights as well as the pink sheets are excluded from this release. The NIH, as well as the scientific community as a whole, does not disclose information about unfunded grant proposals.
- Summary:
    - The court upheld the trial court's finding that much of the grant proposal, including the hypotheses and the raw data, were protected from disclosure under Wash. Rev. Code § 42.56.270, which "protects recently acquired intellectual property from being converted to private gain."[1]
        - The university contended that the grant proposal was exempt under the deliberative process exemption of Wash. Rev. Code Ann. § 42.56.280. In order to rely on this exemption, "an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations and opinions; and finally, that the materials covered

[1] The relevant statute sections have been renumbered since this case was decided; this summary references the current statute sections and these references are therefore different than those in the decision.

by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based."[2]

- Once the policies or recommendations are implemented, Washington case law holds that the records cease to be protected under this exemption.[3]
- The court found that the grant proposal itself does not reveal or expose a deliberative process and thus cannot be exempted as a whole under this exemption. However, the pink sheets contained in the proposal do detail a deliberative process and are exempt from disclosure, but only while they pertain to an unfunded grant proposal. Once a proposal becomes funded, it becomes "implemented" for purposes of the exemption and therefore is disclosable.
- The court denied the university's claim that the grant proposals should be protected in their entirety under Wash. Rev. Stat. § 42.56.550,[4] as that section only concerns injunctive relief and does not create a substantive exemption; it merely allows the court to enjoin the release of public records if they fall within exemptions found elsewhere in statute. The court ruled that allowing this provision to serve as a catchall exemption would render the exemptions of the statute superfluous.[5]
- 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."[6]
- The case was remanded for determination of other procedural and factual issues.

OTHER POTENTIALLY RELEVANT CASES

Servais v. Port of Bellingham, 904 P.2d 1124 (Wash. 1995): As part of a public records action to compel disclosure of a cash flow analysis prepared for the Port of Bellingham for development negotiations, the Washington Supreme Court concluded that this analysis was protected under the research data exemption, as disclosure would benefit private developers and harm the Port's negotiation abilities, creating a loss to the public. The court also defined research data 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."[7]

West v. Port of Olympia, 192 P.3d 926 (Wash. Ct. App. 2008): The Washington Court of Appeals held that once an agency implements a policy or recommendation, the records created prior to the

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2 *Id.* at 600 (citing *Columbia Pub'g Co. v. Vancouver*, 671 P.2d 280 (Wash. 1983)).

3 *Id.* (citing *Brouillet v. Cowles Publ'g Co.*, 791 P.2d 526 (Wash. 1990)).

4 This exemption states "the examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice."

5 *Id.* at 602.

6 *Progressive Animal Welfare Society v. University of Washington*, 884 P.2d 592, 263 (Wash. 1994).

7 *Servais v. Port of Bellingham*, 904 P.2d 1124, 1130 (Wash. 1995).

implementation that relate to the policy or recommendation no longer fall under the deliberative process exemption and can be disclosed; here, records relating to a lease negotiation were disclosable once the lease was executed.

West v. Vermillion, 384 P.3d 634 (Wash. Ct. App. 2016): The Washington Court of Appeals held that emails in a city council member's personal email account were capable of being public records and must be disclosed if they met the definition of a public record—*i.e.*, records were prepared, owned, used, or retained by an agency employee within the scope of employment.

IV. OTHER NOTES

The Municipal Research and Services Center, a nonprofit organization that helps local governments across Washington State better serve their communities by providing legal and policy guidance, keeps a compendium (with summaries) of all Washington Public Records Act Court Decisions on its website.[8]

[8] Public Records Act Court Decisions, Municipal Research and Services Center (MRSC), Last Modified JUL. 29, 2025, https://mrsc.org/explore-topics/decisions-agos/topics/public-records-act-court-decisions [https://perma.cc/QB8M-WY2R].

WEST VIRGINIA

B

I. ANALYSIS

The West Virginia Freedom of Information Act offers no statutory protection from disclosure for research. The statute does provide an internal memorandum exemption, which has been used successfully in West Virginia courts to prevent disclosure of a professor's drafts, data compilations and analyses, proposed edits, emails, and other communications related to the publication of scholarly articles.

II. STATUTE

OPEN RECORDS LAW

West Virginia Freedom of Information Act, W. Va. Code Ann. §§ 29B-1-1 to -7
Known as: FOIA

KEY STATUTORY PROVISIONS (EXCERPTS)

W. VA. CODE ANN. § 29B-1-4

Exemptions

(a) There is a presumption of public accessibility to all public records, subject only to the following categories of information which are specifically exempt from disclosure under the provisions of this article:

> (1) Trade secrets, as used in this section, which may include, but are not limited to, any formula, plan pattern, process, tool, mechanism, compound, procedure, production data or compilation of information which is not patented which is known only to certain individuals within a commercial concern who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and which gives its users an opportunity to obtain business advantage over competitors;
>
> (8) *Internal memoranda or letters received or prepared by any public body;*

(Emphasis added.)

III. CASES

KEY CASES

Open records case concerning academic research:

Highland Mining Company v. West Virginia University School of Medicine, 774 S.E.2d 36 (W. Va. 2015)

- Holding: The West Virginia Supreme Court held that records relating to the preparation of academic publications can be withheld under the internal memorandum exemption in § 29B-1-4(a)(8) of FOIA.
- Facts: Highland Mining Company sought disclosure of documents related to articles written by a university medical school professor linking surface coal mining to health problems in adjacent populations, including drafts, data compilations and analyses, proposed edits, emails, and other communications.
- Summary:
    - Highland Mining sought all documents related to the preparation and publication of eight articles coauthored by Michael Hendryx, a professor and Director of the West Virginia Rural Health Research Center at the West Virginia University (WVU) School of Medicine's Department of Community Medicine. The articles suggested a link between surface coal mining and birth defects, cancer, and poor quality of life in surrounding areas.
    - WVU produced around 2,364 documents but withheld 772 and redacted 119; the circuit court granted summary judgment in favor of WVU, and Highland Mining appealed, asking the court to overturn the summary judgment and require WVU to provide the documents requested.
    - The court stated that the FOIA exemption for internal memoranda found in § 29B-1-4(a)(8) incorporates a deliberative process privilege and that to be excluded, records must reflect a public body's deliberate decision-making process where the disclosure of such records could inhibit frank discussion of legal or policy matters. To be excluded under the internal memorandum exemption, the records must be both predecisional and deliberative. Predecisional records are prepared in order to allow a decision maker to reach their decision, and deliberative materials reflect the give-and-take of the decision-making process that allows an agency to evaluate possible alternative outcomes.
    - The court rejected Highland Mining's argument that this exemption did not apply because the professor in question was not engaged in policy making on behalf of WVU when preparing the articles, and publishing articles did not involve a deliberative process. Following earlier case law, the court ruled that a deliberative process exemption is intended to apply to public bodies engaged in activities other than agency policy making.
    - The court found that any document which reveals the analysis underlying Hendryx's articles is predecisional as documents related to the initiation, preparation, and publication of the articles are, by their nature, predecisional.

- The court also found that "any document, regardless of its nature, that exposes the give-and-take of the scientific research consultative process, by revealing the manner in which the researchers evaluate possible alternative outcomes, is deliberative." [1]
- The court concluded that because the records in question related to the planning, preparation, and editing necessary to produce a final published article, they were exempt from disclosure, and WVU had successfully met the burden required for summary judgement in the circuit court.
- The court also found that the circuit court had erred in withholding 740 documents on the basis of academic freedom, which the circuit court had incorporated into the FOIA personal privacy exemption. Here, the Supreme Court found that West Virginia FOIA did not provide an academic freedom exemption and that peer review comments were not protected by a personal privacy exemption, although could be excluded under the deliberative process exemption.
- The case was remanded to circuit court for consideration of a reasonableness of the FOIA request and request for attorney fees and costs.

[1] *Highland Mining Co. v. W. Va. Univ. Sch. of Med.*, 774 S.E.2d 36, 52 (W. Va. 2015).

WISCONSIN

D

I. ANALYSIS

The Wisconsin Public Records Law (PRL) offers no specific statutory protection from disclosure for research. While the definition of record under the PRL does not include drafts or notes prepared for the originator's personal use, Wisconsin courts are very strict with the application of this exemption. Information qualifying as a trade secret is exempted from disclosure. The Wisconsin Attorney General has decided in one instance that raw research data should be protected.

Absent a statutory exemption, Wisconsin courts use a common law balancing test and may withhold the records if there is a specific showing that disclosure will adversely affect the public interest.

II. STATUTE

OPEN RECORDS LAW

Wisconsin Public Records Law, Wis. Stat. Ann. §§ 19.31 – 39

KEY STATUTORY PROVISIONS (EXCERPTS)

WIS. STAT. ANN. § 19.32

Definitions.

As used in § 19.32 to 19.39:

(2) "Record" means any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed, or printed pages, maps, charts, photographs, films, recordings, tapes, optical discs, and any other medium on which electronically generated or stored data is recorded or preserved. "Record" does not include drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials that are purely the personal property of the custodian and

have no relation to his or her office; materials to which access is limited by copyright, patent, or bequest; and published materials in the possession of an authority other than a public library that are available for sale, or that are available for inspection at a public library.

(Emphasis added.)

WIS. STAT. ANN. § 19.36

(5) Trade secrets. An authority may withhold access to any record or portion of a record containing information qualifying as a trade secret as defined in s. 134.90(1)(c).

III. CASES

KEY CASES

Open records case concerning research records:

Animal Legal Defense Fund v. Board of Regents of the University Wisconsin and Richard Lane, No. 14-CV-2874 (Wis. Ct. Apps. Dist. IV, Oct. 19, 2017)[1]

- Holding: Handwritten notes prepared to assist a notetaker in preparation of meeting minutes are *not* excluded from the definition of records under Wis. Stat. Ann. § 19.32 as "materials prepared for the originator's personal use" and therefore must be disclosed.
- Facts: The petitioner sought disclosure of records of the University of Wisconsin Institutional Animal Care and Use Committee (IACUC) regarding research on nonhuman primates. Respondents disclosed some records and withheld others; the petitioner made a second request for additional documents, including handwritten notes taken at IACUC meetings; the request was denied because the University stated they were notes intended for personal use only and therefore not subject to disclosure under the public records law. The lower court agreed with this determination and denied disclosure of the records. Petitioner subsequently appealed this decision.
- Summary: The court disagreed with the lower court and found that the records in question were subject to disclosure.
    - At issue were ten documents prepared during a March 2014 IACUC meeting, six prepared by Holly McEntee and four by Christine Finney.
    - The court agreed with the trial court that the documents were notes for the purpose of the exemption: the first eight records were handwritten, and the final two were typed with handwritten notes scrawled over them. The notes were often barely legible or totally illegible.
    - The question then became whether the notes could be considered "prepared for the originator's personal use" as required for the exemption.

[1] Decision available at https://www.csldf.org/wp-content/uploads/2019/09/Animal-Legal-Defense-Fund-v-Board-of-Regents-of-the-University-of-WI-et-al-Decision-Order-8-22-17.pdf.

- The court first addressed McEntee's notes. Notes are considered for "personal use only" if they are created solely for the purpose of refreshing the authors recollection of the meeting at a later time. If the notes are then distributed to others for the purpose of communicating information, then they cannot be considered created for personal use. McEntee took notes during the meeting and then gave them to Finney to create the minutes of the meeting. This meets the definition of distributing notes for the purpose communicating information, as the information contained in the notes was used by Finney in drafting the official meeting minutes. Therefore, the court concluded that the personal exemption did not apply to the six records created by McEntee.
- The court then turned to consideration of Finney's notes. Notes taken by an agency employee may be considered "for personal use only" if they are made voluntarily for the taker's own convenience. They are not considered for personal use if it "seems obvious that whatever notes are used to establish a formal position or action of an authority, such uses goes beyond an personal uses of the originator."[2] McEntee's job was to create the minutes of the meeting and she took notes as part of her job. The court could see no evidence that the notes created by Finney were taken voluntarily, at her own initiative or at her own convenience. Rather Finney was obligated to take these notes as part of her employment and then use the notes to create the official minutes. As a result, the court concluded that the four records created by Finney were not notes taken for personal use and were therefore subject to disclosure.
- Based on the evidence provided, the court remanded the case to the trial court with direction that summary judgment be granted in favor of appellant and the ten records in question be disclosed.

OTHER POTENTIALLY RELEVANT CASES

Voces de la Frontera, Inc. v. Clarke, 891 N.W.2d 803 (Wis. 2017): The Wisconsin Supreme Court held that there are three ways a record can be exempt in Wisconsin: specific statutory exemption, common law exemption, and the public interest balancing test weighing in favor of nondisclosure.

Powder River Basin Resource Council v. Wyoming Oil & Gas Conservation Commission, 320 P.3d 222, 233 (Wis. 2014): The Wisconsin Supreme Court held that the meaning of trade secret under the Wisconsin Public Records Act would be "the definition of trade secrets articulated by federal courts under the FOIA. A trade secret in the public records context is 'a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.'"

Linzmeyer v. Forcey, 646 N.W.2d 811 (Wis. 2002): The Wisconsin Supreme Court found that absent a statutory or common law exemption, courts will apply a balancing test on a case-by-case basis to determine whether permitting inspection of the records would result in harm to a public interest that outweighs the public interest in opening the records to inspection.

[2] *Animal Legal Defense Fund v. Board of Regents of the University Wisconsin and Richard Lane*, No. 14-CV-2874 at 12 (citing *Voice of Wisconsin Rapids*, 364 Wis. 2d 429.

Osborn v. Board of Regents of University of Wisconsin System, 647 N.W.2d 158 (Wis. 2002): The Wisconsin Supreme Court found that the university must disclose student application records where the records in question did not contain personally identifiable information about students. The public interest in allowing the public to gage the effectiveness of university admissions policies/practices outweighs the public interest in nondisclosure, as the records did not contain identifying information there was no compelling public interest in denying disclosure (especially as there is a presumption of openness that favors disclosure with access to be denied only in exceptional cases).

Schill v. Wisconsin Rapids School District, 786 N.W.2d 177 (Wis. 2010): The Wisconsin Supreme Court found that personal emails sent from government email systems will not be considered public records if they have no connection to a government function.

Midwest Env't Advocs. Inc., v. Prehn, 2025 Wisc. App. LEXIS 678 (Wis. Ct. Apps. Dist. I, Jul. 29, 2025): Among other issues, the Court of Appeals considered whether text messages sent by a board member of the Wisconsin Natural Resources Agency about remaining on the board past the expiration of his term constituted "records" under the Public Records Act. The Court found that these communications concerned the board member's decision to exercise a power inherent to his office—remaining as a holdover after his term expired—and therefore had a connection to government function. As such, they could not be considered purely personal and constituted "records" under the Public Records Act.

State ex rel. Bernegger v. Woodall-Vogg, 2025 Wisc. App. LEXIS 252 (Wis. Ct. Apps. Dist. I, Mar. 18, 2025): The Court of Appeals found that a hard drive itself is not a record under the Public Records Act, though it may contain records. This, the state agency has no legal duty to disclose hard drives.

IV. OTHER NOTES

2019 – Law review article re University of Wisconsin and public records lawsuits

A 2019 article published in the Rutgers Law School *Journal of College and University Law* examined the history of the Wisconsin Public Records Law and lawsuits against the University of Wisconsin.[3] In addition to the Cronin matter mentioned above, the article discussed two other examples of non-litigated public records disputes involving the University of Wisconsin and academic research.

> In 2009, People for the Ethical Treatment of Animals (PETA) sought disclosure of records relating to animal experiments in a lab at the University of Wisconsin-Madison. The records requested included photographs and videos of the animals used in experiments; the university denied disclosure on the basis that academic freedom included "the right of faculty members to control unpublished material for the purposes of possible patent applications."[4] In a letter to PETA, the university stated that they had applied a balancing test to the records in question and concluded the public interest in maintaining the academic freedom of researchers and allowing them to

[3] David Pritchard and Jonathan Anderson, *Forty Years of Public Records Litigation Involving the University of Wisconsin: An Empirical Study*, 44 J.C. & U.L. 48 (2018-2019) https://jcul.law.rutgers.edu/wp-content/uploads/2018/11/Forty-Years-Public-Records.pdf [https://perma.cc/WYK3-FQUF].

[4] *Id.* at 67.

control how and when to release the results of their research outweighed the public interest in releasing the data. Eventually, the university turned over photographs of the animals, which PETA then used to bring a complaint with federal agencies that ultimately led to the lab in question being shut down.

The article also detailed a 2010 request for raw data used to support an article published by a faculty member from the University of Wisconsin Department of Zoology.[5] The university again claimed that the public interest in maintaining academic freedom outweighed the public interest in disclosure as, were the data to be disclosed, it would have a negative impact on continuing research and the careers of the scientists involved. The requester, a zoology postdoctoral researcher who claimed the article was based on unreliable data, appealed the decision to the Wisconsin Attorney General's office, which sided with the university. It found that raw data is generally understood to be the intellectual property of the researchers and that to disclose such data when the researchers do not see fit to do so would take away the incentive for scientists to conduct original research and stifle potentially groundbreaking discoveries in medicine, technology, and other fields. The Attorney General's office also referenced the highly competitive nature of bioscience research and the economic impact of original research to the university indicating that, while the university may have invoked academic freedom in its denial of disclosure, the economic interest at stake was also a key factor in the decision to allow the records to remain confidential.

2015 – Wisconsin State Legislature

In 2015, the Wisconsin State Legislature's budget committee added open records reforms, including the introduction of a deliberative process exemption, in a budget bill that was sent to the full Wisconsin Assembly and Senate for voting.[6] However, the Wisconsin Senate voted 32-0 to remove the open records reforms from the bill.[7]

2011 – University of Wisconsin

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 wrote a blog post that discussed legislative actions to strip unions of collective bargaining rights; the open records 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,[8] 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

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5 *Id*. at 68.

6 See Molly Beck and Mark Sommerhauser, *Republicans Vote to Dramatically Scale Back Oversight of Lawmakers, Other Public Officials*, WISCONSIN STATE JOURNAL, July 3, 2015, http://host.madison.com/wsj/news/local/govt-and-politics/republicans-vote-to-dramatically-scale-back-oversight-of-lawmakers-other/article_8901f2df-1ec2-5e74-b6ea-4a1f006aacf5.html [https://perma.cc/MDU6-J54S].

7 See Molly Beck, *Gov. Scott Walker's Office Helped Draft Severe Limits to Open Records Bill,* WISCONSIN STATE JOURNAL, July 8, 2015 http://www.chicagotribune.com/news/local/breaking/ct-gov-scott-walkers-office-helped-draft-severe-limits-to-open-records-law-20150708-story.html [https://perma.cc/27SQ-RJV8].

8 Letter from John C. Dowling, Senior University Legal Counsel, University of Wisconsin-Madison, to Stephan Thompson, Director of the Republican Party of Wisconsin (Apr. 1, 2011), http://news.wisc.edu/letter-from-uw-madison-legal-counsel-regarding-cronon-emails/ [https://perma.cc/RT4W-33F5].

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.

WYOMING

C

I. ANALYSIS

The Wyoming Public Records Act protects research projects being conducted by a state institution, but there is no Wyoming case law analyzing its application.

The Wyoming Public Records Act also provides an inter/intra-agency memorandum exemption, which Wyoming courts have found to incorporate a deliberative process exemption. The exemptions have been used to withhold records that are predecisional and deliberative, but there is no case law applying the exemptions to research or other university records.

II. STATUTE

OPEN RECORDS LAW

Wyoming Public Records Act, Wyo. Stat. Ann. §§ 16-4-201 to -205

KEY STATUTORY PROVISIONS (EXCERPTS)

WYO. STAT. ANN. § 16-4-203

§ 16-4-203. Right of inspection; grounds for denial; access of news media; order permitting or restricting disclosure; exceptions.

(b) The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:

> (iii) *The specific details of bona fide research projects being conducted by a state institution*, *agency or any other person;*
>
> (v) *Interagency or intraagency memoranda or letters which would not be available by law to a private party in litigation with the agency;*

(d) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law:

> (v) Trade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person;

(h) Notwithstanding any other provision of this section, the following applies to the Wyoming natural diversity database located at the University of Wyoming and any report prepared by the custodian from that database:

> (i) The custodian may charge a reasonable fee for searching the database and preparing a report from that database information. The interpretation of the database in a report shall not contain recommendations for restrictions on any public or private land use;
>
> (ii) The custodian shall allow the inspection of all records in the database at a level of spatial precision equal to the township, but at no more precise level;
>
> (iii) Research reports prepared by the custodian funded completely from nonstate sources are subject to paragraph (b)(iii) of this section;
>
> (iv) Any record contained in the database pertaining to private land shall not be released by the University of Wyoming without the prior written consent of the landowner. Nothing in this paragraph prohibits the release of any information which would otherwise be available from any other information source available to the public if the original source is cited.

(Emphasis added.)

III. CASES

KEY CASES

There are no open records cases addressing the research exemption.

Open record case concerning the inter/intra-agency memorandum exemption:

Aland v. Mead, 327 P.3d 752 (Wyo. 2014)

- Holding: The Wyoming Supreme Court held that a common law deliberative process privilege is incorporated into the Wyoming Public Records Act via the inter/intra-agency memoranda exemption found in § 16-4-203(b)(v). Records relating to the status of grizzly bears under the federal Endangered Species Act were properly withheld under this privilege.
- Facts: The requestor sought access to documents concerning the status of grizzly bears under the federal Endangered Species Act, and the state withheld documents based on the deliberative process exemption.
- Summary:

- For the privilege to apply, the record must satisfy a three-pronged test: 1) it is an inter/intra-agency communication; 2) the communication is predecisional and deliberative; and 3) disclosure is not in the public interest.
- In this case, the records in question related to the preparation of a letter from the governor to the United States Secretary of the Interior concerning the continued listing of the grizzly bear on the endangered species list. The court examined multiple records to determine if they fell within the deliberative process exemption, and concluded the following:
    - Notes and emails that contained opinions or recommendations were excluded from disclosure, as they reflected the give-and-take of the policy process and not the final opinion of the state. To disclose would be contrary to public interest, as this would stifle communication and candor in the decision-making process.
    - Drafts that differ from the final version of letters and other documents should also be exempt from disclosure, as the disclosure of such drafts could prematurely disclose the state's policy or strategy or confuse the public on the state's position, and therefore disclosure is contrary to the public interest.
    - The privilege did not extend to drafts of meeting and letters that did not substantively differ from the final version because, while predecisional, they were not deliberative and the fact that there were minor differences between the draft and the final would not prematurely disclose the state's policy or confuse the public as to the state's position.
    - Deliberative process protection does not extend to notes of a policy advisor that contained his personal thoughts and opinions, as these notes were then incorporated into the final letter—once the letter was sent, the deliberative nature of the document no longer exists. Disclosure was not contrary to the public interest, as the suggestions were used in the letter, and there was no risk of confusing the public on the governor's position on the issue or prematurely disclosing the thoughts, opinions, or deliberations that were ultimately rejected by the governor's office.
    - Three records were also withheld based on the attorney–client privilege, and the court found that the privilege was correctly applied to two out of the three records in question.

OTHER POTENTIALLY RELEVANT CASES

Powder River Basin Resource Council v. Wyoming Oil and Gas Conservation Commission, 320 P.3d 222 (Wyo. 2014): For purposes of the Wyoming Public Records Act, a trade secret is 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.

Sheaffer v. State ex rel. University of Wyoming, 139 P.3d 468 (Wyo. 2006): A tape recording of a university committee meeting was found to be a public record.

Glossary[1]

1) Parties to Cases

Petitioner: The party that presents a petition (sometimes also referred to as a complaint) to a court or other official body, including when seeking relief on appeal.

Respondent: The party responding to a petition. Sometimes also used to refer to the party against whom an appeal is taken. In some appellate courts, the parties are designated as petitioner and respondent, but in most appellate courts in the United States, the parties are designated as appellant and appellee.

Appellant: The party who appeals a lower court's decision, usually seeking a reversal of that decision.

Appellee: The party against whom an appeal of a case is taken and whose role is to respond to that appeal, usually seeking affirmance of the lower court's decision.

2) General Legal Terms

Appeal: A case or proceeding undertaken to have the decision of a court or judicial panel reconsidered by a higher authority; the submission of a lower court's or agency's decision to a higher court for review and possible reversal.

> EXAMPLE DEFINITION: A request made after a trial by a party that has lost on one or more issues that a higher court review the decision to determine if it was correct. To make such a request is "to appeal" or "to take an appeal." One who appeals is called the "appellant;" the other party is the "appellee."[2]

Balancing Test: A doctrine whereby an adjudicator—like a judge—measures competing interests and decides which interest should prevail. In open records cases, this typically involves determining whether the public interest in protecting the records in question is greater than the public interest in disclosing the records.

Case Law: The law to be found in the collection of reported rulings in a particular jurisdiction. These cases can be cited as precedent in future cases.; more simply, the laws made by judges via their written decisions

> EXAMPLE DEFINITION: The law as established in previous court decisions. A synonym for legal precedent. Akin to common law, which springs from tradition and judicial decisions.[3]

Common Law: The body of law derived from judicial decisions rather than from statutes or constitutions.

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1 Unless otherwise noted, definitions are derived from BLACK'S LAW DICTIONARY (10th ed. 2014).

2 United States Courts Glossary of Legal Terms, http://www.uscourts.gov/glossary

3 *Id.*

EXAMPLE DEFINITION: The legal system that originated in England and is now in use in the United States, which relies on the articulation of legal principles in a historical succession of judicial decisions. Common law principles can be changed by legislation.[4]

Damages: Money that a defendant pays a plaintiff in a civil case if the plaintiff has won. Damages may be compensatory (for loss or injury) or punitive (to punish and deter future misconduct).[5]

Decision: A judicial or agency determination after consideration of the facts and the law; syn. Order, Judgment.

EXAMPLE DEFINITIONS:

Judgment. The official decision of a court finally resolving the dispute between the parties to the lawsuit.[6]

Opinion: A judge's written explanation of the decision of the court. Because a case may be heard by three or more judges in the court of appeals, the opinion in appellate decisions can take several forms. If all the judges completely agree on the result, one judge will write the opinion for all. If all the judges do not agree, the formal decision will be based upon the view of the majority, and one member of the majority will write the opinion. The judges who did not agree with the majority may write separately in dissenting or concurring opinions to present their views. A dissenting opinion disagrees with the majority opinion because of the reasoning and/or the principles of law the majority used to decide the case. A concurring opinion agrees with the decision of the majority opinion, but offers further comment or clarification or even an entirely different reason for reaching the same result. Only the majority opinion can serve as binding precedent in future cases.[7]

Order: An order is an instruction or direction issued by the court. Unlike an opinion, which analyzes the law, an **order** tells parties or lower courts what they are to do.[8]

Deliberative Process Privilege: A privilege 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. This privilege is designed to improve the quality of government decisions by promoting candid, uninhibited debate, and also to prevent public confusion that could result from releasing documents that do not represent the government's final word on a given matter. Accordingly, the deliberative process privilege permits the government to withhold documents relating to the decision-making behind government decisions. State open records laws typically require that for records to be withheld from disclosure under the deliberate process privilege (or a statutory provision derived from such privilege) that they must be both 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).[9]

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4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 SCOTUSblog, Glossary of Legal Terms, http://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms/

9 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).

De Novo: Latin, meaning "anew."

> **Hearing de novo:** A review anew of a lower court's decision of a matter, which gives no deference to the lower court's findings; a new hearing of a matter, conducted as if the original hearing had not taken place.
>
> **Trial de novo:** A new trial on an entire case; a new trial on questions of fact and issues of law, conducted as if the original trial had not taken place.

Enjoin: To legally prohibit or restrain an action by injunction.

Exemption: In the context of open records laws, a caveat—created via statutory provision or via common law—that permits certain categories of records to be withheld from disclosure.

In Camera: Latin, meaning in a judge's chambers. A trial judge's private consideration of evidence, where the evidence is not made available to the jury or the public unless pursuant to the judge's subsequent order.

Injunction: a judicial order that restrains a person from beginning or continuing an action threatening or invading the legal right of another, or that compels a person to carry out a certain act, *e.g.*, to make restitution to an injured party.

Institutional Animal Care and Use Committee (IACUC): Every institution that uses animals for federally funded laboratory research must have an Institutional Animal Care and Use Committee (IACUC). The IACUC is a committee established to review research protocols and to conduct evaluations of an institution's care and use of animals, including evaluating the results of legally mandated facility inspections.

Mandamus (also termed writ of mandate): A writ issued by a court to compel performance of a particular act by a government officer or body, usually to correct a prior action or failure to act. In the open records context, mandamus is typically used to compel disclosure of records which a government body has refused to disclose.

Pleadings: Written statements filed with the court that describe a party's legal or factual assertions about the case.[10]

Remand: A determination by an appellate court to send a case back to the lower court from which it came for some further action.

Statute: A law passed by a legislative body; specifically legislation enacted by any lawmaking body such as a legislature, administrative board or municipal court.

Strict construction (also termed strict interpretation): An interpretation of a law according to the narrowest, most literal meaning of the words without regards for context and other permissible meanings.

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[10] United States Courts Glossary of Legal Terms, http://www.uscourts.gov/glossary

Summary Judgment: A judicial decision granted without a full trial on the merits of a case or on a discrete issue (*e.g.*, a claim or defense) about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law. The court considers the contents of the court documents and evidence submitted by the parties, to determine whether there is a genuine issue of material fact rather than one of law, and, where there is no issue of material fact, to rule on the issue of law. This procedural device allows the speedy disposition of a controversy. (See FRCP Rule 56.)

Writ: A written court order directing a person to take, or refrain from taking, a certain act.[11]

[11] *Id.*

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