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## Issue Brief

# **Academic Freedom and the Public's Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship**

**By Rachel Levinson-Waldman**

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# **Academic Freedom and the Public's Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship**

**Rachel Levinson-Waldman\***

Every state has a mechanism that entitles citizens to request and obtain records produced in the course of official acts.<sup>1</sup> The state statutes enabling this access to public documents – often referred to as state Freedom of Information Act (FOIA) statutes – are intended to make the actions of public employees and representatives transparent, and to foster accountability and debate.<sup>2</sup> The statutes generally do not ask for the requester's reason for wanting the documents; rather, they assume that the government's operations should be open to the public, and proceed upon that presumption in favor of transparency.

Recently, several groups have used state FOIA statutes to demand materials developed by faculty members as well as emails exchanged among scholars. By potentially squelching debate rather than encouraging it, however, these requests threaten to undermine the purpose of freedom of information laws. Indeed, they pose a significant risk of chilling academic freedom by making scholars reluctant to discuss and explore controversial issues or to collaborate with each other, thereby constraining one of the primary services offered by publicly funded colleges and universities. Moreover, not only does judicial treatment of FOIA requests vary significantly from state to state, but the analysis of requests for documents under these state statutory schemes can diverge substantially from the treatment of requests for the same documents as part of litigation or pursuant to other statutory regimes.

In light of the inconsistent treatment of similar requests by different states or under different circumstances, as well as the potentially competing interests in freedom of scholarly exchange on the one hand and full public disclosure on the other, an approach that harmonizes the handling of these document demands and balances these interests would be of significant value to courts, academics, university administrators, and outside parties alike. This paper proposes several methods by which to regularize the responses to document requests, provide guidance to various stakeholders, and ensure that the significant interest in public access – upon which scholars themselves often rely – does not automatically take precedence over the equally significant interest in open academic exchange.

## **I. The Issue in Context: Recent FOIA Requests**

### **A. University of Virginia**

In January 2011, the American Tradition Institute Environmental Law Center (ATI), a libertarian, pro-individual rights environmental think tank, joined forces with a Virginia state

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\* Senior Counsel, American Association of University Professors (AAUP). The views expressed are solely those of the author and not necessarily those of the AAUP.

<sup>1</sup> *State Public Record Laws*, FOIADVOCATES, <http://www.foiadvocates.com/records.html> (last visited Jun. 23, 2011).

<sup>2</sup> Although state statutes go by a variety of names – sunshine acts, public records acts, and open records acts, among others – this paper will refer to them generally as state FOIA statutes.

delegate to serve a records demand on the University of Virginia (UVA). The group requested a wide array of materials related to a former UVA professor, Michael Mann. Professor Mann, now on the faculty at Pennsylvania State University, is best known as the climate scientist who developed the “hockey stick” model of global warming, demonstrating that the Earth’s temperature has increased during the industrialized era. Emails to and from Dr. Mann were at the heart of what became known as “Climategate,” in which climate change skeptics misinterpreted emails released from a hacked server at the University of East Anglia to suggest that global warming was, essentially, a hoax. Although multiple bodies concluded that neither Dr. Mann nor his colleagues engaged in research fraud,<sup>3</sup> the emails nevertheless continued to serve as a flashpoint for climate change deniers, who remained convinced that they revealed a scientific conspiracy.

Citing to “Climategate” and a “cloud of controversy” surrounding the hockey stick model, the ATI and Republican Virginia Representative Bob Marshall served a FOIA request for an exhaustive range of documents, including all correspondence and related materials between Dr. Mann and any of 39 other scientists, all documents referencing any of those people, and all emails to or from Dr. Mann; a wide array of grant-related records; and his computer programs and source codes.<sup>4</sup> UVA initially asserted that at least some of the materials sought were exempt from disclosure under Virginia’s FOIA statute, but after ATI filed a motion urging the court to compel the university to produce the documents,<sup>5</sup> UVA and ATI reached an agreement that UVA would share all of the requested documents with ATI.<sup>6</sup> Under the agreement, ATI’s access to documents that UVA asserts are protected will be subject to a protective order that prohibits ATI from using or revealing the documents further.<sup>7</sup> In addition, ATI can ask the court to issue a

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<sup>3</sup> For a brief listing of the relevant reports, see *Debunking Misinformation About Stolen Climate Emails in the “Climategate” Manufactured Controversy*, UNION OF CONCERNED SCIENTISTS, [http://www.ucsusa.org/global\\_warming/science\\_and\\_impacts/global\\_warming\\_contrarians/debunking-misinformation-stolen-emails-climategate.html](http://www.ucsusa.org/global_warming/science_and_impacts/global_warming_contrarians/debunking-misinformation-stolen-emails-climategate.html) (last visited Jun. 23, 2011). Most recently, the National Science Foundation’s Inspector General concluded that Dr. Mann did not engage in research misconduct. See Douglas Fischer, *Federal Auditors Find No Evidence to Support ‘Climategate’ Accusations*, *The Daily Climate*, (Aug. 22, 2011), available at <http://www.dailyclimate.org/tdc-newsroom/2011/08/feds-clear-climategate-scientist>; see also, Memorandum, Office of Investigation, National Science Foundation, available at <http://www.nsf.gov/oig/search/A09120086.pdf>.

<sup>4</sup> See American Tradition Institute, *Va. Taxpayers Request Records from University of Virginia on Climate Scientist Michael Mann*, AMERICAN TRADITION INSTITUTE, <http://www.atinstitute.org/american-tradition-institute-va-taxpayers-request-records-from-university-of-virginia-on-climate-scientist-michael-mann/> (last visited Jun. 23, 2011) (providing ATI’s own description of its FOIA request and a link to the request itself).

<sup>5</sup> See Verified Petition for Mandamus and Injunctive Relief, *Am. Tradition Inst. v. Univ. of Va.*, No. 11-3236 (Va. Cir. Ct. May 16, 2011), available at [http://www.atinstitute.org/wp-content/uploads/2011/05/ATI\\_v\\_UVA\\_FOIA\\_First\\_Petition\\_final\\_5-15-11.pdf](http://www.atinstitute.org/wp-content/uploads/2011/05/ATI_v_UVA_FOIA_First_Petition_final_5-15-11.pdf).

<sup>6</sup> See Order on the Protection of Documents, *Am. Tradition Inst. v. Univ. of Va.*, No. 11-3236 (Va. Cir. May 24, 2011), available at <http://www.atinstitute.org/wp-content/uploads/2011/05/ATI-v-UVA-5-24-Protective-Order.pdf> (memorializing the agreement between the parties with the Circuit Court of Prince William County). In late August 2011, UVA produced the first batch of documents to ATI. Anita Kumar, *UVA Turns over Documents in Global Warming Case*, WASH. POST, (Aug. 25, 2011), available at [http://www.washingtonpost.com/blogs/virginia-politics/post/u-va-turns-over-documents-in-global-warming-case/2011/08/25/gIQAUtrWeJ\\_blog.html](http://www.washingtonpost.com/blogs/virginia-politics/post/u-va-turns-over-documents-in-global-warming-case/2011/08/25/gIQAUtrWeJ_blog.html).

<sup>7</sup> Letter from UVA president Teresa Sullivan to coalition groups in response to a letter expressing concern regarding academic freedom interests at stake in the ATI case (Apr. 21, 2011), available at <http://www.ucsusa.org/assets/4-21-11-Letter-from-UVA-to-Coalition-Orgs.pdf> (indicating that UVA intends to use “all available exemptions” in responding to the FOIA request). Among other categories of information, the state statute exempts from disclosure “data, records or information of a proprietary nature produced or collected by or for faculty or staff of public

ruling on any exemptions claimed for the documents. This agreement was reached in the midst of a challenge by UVA to an almost identical civil subpoena served on the university last year by Virginia Attorney General Kenneth Cuccinelli, related to the Attorney General's allegations that Dr. Mann had committed fraud on the taxpayers by relying on science with which the Attorney General disagrees.<sup>8</sup> Now that UVA has agreed to produce the documents in response to ATI's FOIA request, it is unclear whether Cuccinelli's litigation will continue or if he will elect to withdraw the subpoena, which was served pursuant to a state statute that requires some showing of fraud to proceed.

## B. University of Wisconsin

Two other recent FOIA requests arose out of the thus far successful efforts in Wisconsin to roll back state law enabling public employees to engage in collective bargaining. First, in mid-March 2011, the Wisconsin Republican Party requested the email records of William Cronon, a professor of history, geography, and environmental studies at the University of Wisconsin-Madison. The request targeted all of Professor Cronon's 2011 emails using the terms "Republican," "Scott Walker" (the Wisconsin governor), "recall," "collective bargaining," "rally," or "union," as well as the names of two public employee unions, the Wisconsin Speaker of the Assembly, the state Senate Majority Leader, or any of eight state politicians who had become the subjects of recall efforts.<sup>9</sup> The request followed closely on the heels of a blog posting by Professor Cronon that outlined the role of the American Legislative Exchange Council, or ALEC, in a variety of conservative state legislative efforts.<sup>10</sup>

Wisconsin has one of the strongest open records laws in the country,<sup>11</sup> as well as a robust tradition of academic freedom. The University of Wisconsin is well-known for a quote that appears on the entrance to one of its main buildings: "Whatever may be the limitations which trammel inquiry elsewhere, we believe that the great state university of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone the truth can be found."<sup>12</sup> With that commitment to academic freedom in mind, Chancellor Biddy Martin indicated that the university would respond to the records request by undertaking a balancing

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institutions of higher education . . . in the conduct of or as a result of research on medical, scientific, technical or scholarly issues . . . where such data, records or information has not been publicly released, published, copyrighted or patented." VA. CODE §2.2-3705.6 (2010).

<sup>8</sup> For a timeline of Attorney General Cuccinelli's document demand and lawsuit against the University of Virginia, see *Timeline: Legal Harassment of Climate Scientist Michael Mann*, UNION OF CONCERNED SCIENTISTS [http://www.ucsusa.org/scientific\\_integrity/abuses\\_of\\_science/va-ag-timeline.html](http://www.ucsusa.org/scientific_integrity/abuses_of_science/va-ag-timeline.html) (last visited Jun. 23, 2011). The American Association of University Professors (AAUP) submitted several *amicus* briefs in that litigation in partnership with the ACLU of Virginia, the Thomas Jefferson Center for the Protection of Free Expression, and the Union of Concerned Scientists.

<sup>9</sup> See William Cronon, *Abusing Open Records to Attack Academic Freedom*, SCHOLAR CITIZEN (Mar. 24, 2011), <http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom/>.

<sup>10</sup> See *Who's Really Behind Recent Republican Legislation in Wisconsin and Elsewhere? (Hint: It Didn't Start Here)*, SCHOLAR CITIZEN (Mar. 15, 2011), <http://scholarcitizen.williamcronon.net/2011/03/15/alec/>.

<sup>11</sup> See WIS. STAT. 19.31 to .39 (2011).

<sup>12</sup> See Photograph of plaque at the entrance to Bascom Hall, available at <http://www.secfac.wisc.edu/SiftAndWinnow.htm>.

test, “taking such things as the rights to privacy and free expression into account.”<sup>13</sup> The chancellor continued: “Scholars and scientists pursue knowledge by way of open intellectual exchange. Without a zone of privacy within which to conduct and protect their work, scholars would not be able to produce new knowledge or make life-enhancing discoveries.” She also highlighted the threat to the integrity of the state’s system of higher education if faculty communications were vulnerable to disclosure, warning that “[h]aving every exchange of ideas subject to public exposure puts academic freedom in peril and threatens the processes by which knowledge is created.”

The university’s formal response to the request identified several specific categories of records that would not be produced, including “intellectual communications among scholars.”<sup>14</sup> Echoing Chancellor Martin’s words, the letter from the general counsel’s office explained: “Faculty members like Professor Cronon often use e-mail to develop and share their thoughts with one another. The confidentiality of such discussions is vital to scholarship and to the mission of this university. Faculty members must be afforded privacy in these exchanges in order to pursue knowledge and develop lines of argument without fear of reprisal for controversial findings and without the premature disclosure of those ideas.” The university concluded that “the public interest in intellectual communications among scholars . . . is outweighed by other public interests favoring protection of such communications.”<sup>15</sup> The state Republican Party has stated that it does not intend to appeal the decision.<sup>16</sup>

### C. University of Michigan, Michigan State University, and Wayne State University

Finally, in March 2011, the Mackinac Center, a libertarian public policy think tank in Michigan, served a set of FOIA requests on the labor studies departments at the University of Michigan, Michigan State University, and Wayne State University. After a public outcry, the Mackinac Center explained that it had filed its request because pro-labor resources appearing on the websites of the labor studies centers (particularly at Wayne State) suggested that faculty

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<sup>13</sup> Letter from University of Wisconsin Chancellor Biddy Martin to the campus community (Apr. 1, 2011), *available at* <http://www.news.wisc.edu/19190>.

<sup>14</sup> See Letter from John C. Dowling, University of Wisconsin-Madison Senior Legal Counsel to Stephan Thompson, Republican Party of Wisconsin (Apr. 1, 2011), *available at* <http://www.news.wisc.edu/19196>.

<sup>15</sup> The counsel’s office also explained that it had reviewed Professor Cronon’s emails for any evidence of use of the university’s resources for political or other improper purposes, and had found none. See *id.*

<sup>16</sup> See Doug Lederman, *Wisconsin Stands Up for Professor*, INSIDE HIGHER ED (Apr. 4, 2011), [http://www.insidehighered.com/news/2011/04/04/wisconsin\\_chancellor\\_cites\\_academic\\_freedom\\_in\\_shielding\\_e-mails\\_from\\_records\\_request](http://www.insidehighered.com/news/2011/04/04/wisconsin_chancellor_cites_academic_freedom_in_shielding_e-mails_from_records_request). In early May, the Wisconsin Republican Party served another FOIA request, this time on the University of Wisconsin-Oshkosh. See Letter from Wisconsin Republican Party Executive Director Mark Jefferson to Chancellor Richard Wells of the University of Wisconsin-Oshkosh requesting documents under the state’s FOIA statute (May 5, 2011), *available at* [http://www.wisgop.org/sites/default/files/5.5.11\\_ORR.pdf](http://www.wisgop.org/sites/default/files/5.5.11_ORR.pdf). The request arose out of an incident in which a criminal justice professor allegedly urged his students during class to sign a petition to recall a state senator. The request asks for emails to or from the professor that refer to Scott Walker, any of several state senators who are the targets of recall petitions (and the treasurer of one of the recall movements), “collective bargaining,” “rally,” “recall,” “petition,” “Republican,” “Wisconsin Progress PAC,” “Democratic Party of Wisconsin,” “Solidarity PAC,” “WEAC” (the Wisconsin Education Association Council), or “AFSCME.” The chancellor of that campus has indicated that the university intends to respond to the request, and has already made the professor’s disciplinary record and a number of underlying emails public – see, e.g., Documents relating to Professor Stephen Richards, <http://www.uwosh.edu/chancellor/communications/documents-relating-to-professor-stephen-richards> – but has not yet responded formally to the request.

members may have illegally used university resources for partisan political purposes. The Center proposed that the Michigan state legislature should scrutinize the use of state tax dollars for public higher education.<sup>17</sup>

While the Mackinac Center indicated that its request came in the wake of both the furor in Wisconsin over collective bargaining legislation and the debate over Michigan legislation expanding the powers of “emergency financial managers,” the Center’s requests were both broader and narrower than its explanation suggested. Specifically, although the Center referred to the Michigan legislation in its explanation of the requests, the requests in fact appeared to focus only on matters in Wisconsin, not Michigan. With respect to those matters, however, the requests swept far beyond simple concern about misuse of state resources, asking for all emails using the words “Scott Walker,” “Wisconsin,” “Madison,” or “Maddow” (as in Rachel Maddow, who had condemned Governor Walker and the state legislation), as well as “any other emails criticizing the collective bargaining situation in Wisconsin.”<sup>18</sup>

As of mid-May, the three universities had notified the Mackinac Center of the cost of fulfilling the requests (less than \$600 for the University of Michigan and Wayne State, and about \$5600 for Michigan State). The Mackinac Center indicated that it would pay for the two less expensive productions and would decide how to proceed with the request to Michigan State.<sup>19</sup> The schools have not yet suggested whether they plan to withhold any of the records under either statutory or common-law exemptions.

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These requests pose difficult issues for university administrators, scholars, FOIA experts, advocates of both academic freedom and open government, and others. How should the critical interests in government transparency be balanced with the equally vital interest in robust academic debates? Should an exemption for scholarly communications be included in state FOIA statutes? Before turning to the possible responses to these questions, a closer examination of what is at stake and how FOIA requests have affected scholarship is warranted.

## II. The Interest at Stake: The Potential Misuse of FOIA Requests to Chill Research

While FOIA statutes serve a critical public function, making every scholarly exchange vulnerable to a FOIA request in the name of public disclosure could – as the Supreme Court has warned about political scrutiny of academics – foster an “atmosphere of suspicion and distrust” and stifle the “marketplace of ideas” that enables public universities to make invaluable contributions to the development of knowledge and to society.<sup>20</sup>

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<sup>17</sup> See Ken Braun, *The Public Purpose of Our 'Professors' Email' FOIA Request*, THE MACKINAC CTR. FOR PUB. POLICY, <http://www.mackinac.org/14863> (last visited Jun. 24, 2011).

<sup>18</sup> See Letter from The Mackinac Center for Public Policy to the Labor Studies Center at the University of Michigan requesting documents under the state’s FOIA statute (Mar. 25, 2011), available at <http://talkingpointsmemo.com/documents/2011/03/mackinac-center-foia.php?page=1>.

<sup>19</sup> See Stephanie Wang, *MSU: FOIA Request Will Cost Thousands to Process*, THE MICHIGAN REVIEW, (May 24, 2011), available at <http://www.michiganreview.com/archives/2996>.

<sup>20</sup> See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“Scholarship cannot flourish in an atmosphere of suspicion and distrust.”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“The classroom is peculiarly the

Indeed, one academic has testified movingly to being the target of FOIA requests designed to halt his research.<sup>21</sup> Dr. Paul Fischer conducted research at the Medical College of Georgia on children's recognition of Camel's "Old Joe" advertising campaign. Fischer was subpoenaed by R.J. Reynolds in litigation involving health warnings on promotional products, although his research was not mentioned in the plaintiff's complaint, he was not listed as a witness for either side in the litigation, and his advertising research was unrelated to the subject of the suit. The subpoena requested a wide range of information, including contact information for the children who participated in the study, all notes and memos related to the study, and data tapes.

After Fischer successfully moved to quash the subpoena, R. J. Reynolds served a nearly identical records request on the college under the state Open Records Act, and a judge ordered the release of all of the requested documents. Although one of the college's lawyers agreed with Fischer that R.J. Reynolds was attempting to harass him and other tobacco researchers to discourage future research, the school ultimately disclosed all of the information requested, including the names of the 3- to 6-year-old children who participated in Fischer's study.<sup>22</sup> Soon after, Fischer left the academy and went into private practice.

Similarly, a study on the effects of congressional scrutiny of National Institutes of Health (NIH) grants in 2004 found that over half of the researchers who responded had altered their research in some way after their grants were targeted politically, and fully a quarter reported that they had eliminated "entire topics from their research agendas." Seventy percent of the participants agreed that the political environment at the time created a "chilling effect," and over half believed the NIH was likely to reduce funding as a result.<sup>23</sup>

Of course, fear of a FOIA request is not the same as fear of reduced governmental funding, and a successful FOIA request will not necessarily result in reduced governmental or institutional support. There are surely a number of scholars who continue to pursue their work in the face of threatened records demands, legislative scrutiny, and more. But it would not be unreasonable, particularly in the current political and funding climate, for scholars and researchers to worry that targeted FOIA requests are an effort to stifle debate rather than to foster it, and to anticipate that already-stressed statehouses may be pressured to reduce funding for research at public colleges and universities on ostensibly academic grounds that legislators are ill-equipped to evaluate. In this regard, it is notable that in the NIH controversy described above,

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marketplace of ideas."). Indeed, as one court has observed, "the goal of both the FOIA and its exemptions is good government, not disclosure for disclosure's sake." *Herald Company, Inc. v. E. Mich. Univ. Bd. of Regents*, 693 N.W. 2d 850, 860 (Mich. Ct. App. 2005).

<sup>21</sup> Paul M. Fischer, *Science and Subpoenas: When do the Courts Become Instruments of Manipulation?*, 59 LAW & CONTEMP. PROBS. 159 (Summer 1996).

<sup>22</sup> An attorney for R.J. Reynolds explained in another tobacco case that "[t]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive. . . . To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making the other son of a bitch spend his." *Id.* at 166 n.37 (quoting Complaint, *Florida v. American Tobacco Co. et al.*, No. CL-1466A0 at 28-29 (Fla. Cir. Ct., Apr. 18, 1995) (memorandum from J. Michael Jordan, legal counsel, R.J. Reynolds)).

<sup>23</sup> See Joanna Kempner, *The Chilling Effect: How Do Researchers React to Controversy?*, 5 PLOS MED. 1571 (2008), available at <http://www.ncbi.nih.gov/pmc/articles/PMC2586361>.

an outside advocacy group took credit for compiling the list of grants that became the target of congressional investigation.<sup>24</sup>

The scholarly communications of social scientists, which were the target of two of the three recent FOIA demands, are both less and more threatened by demands for documents than the scientific research described above. On the one hand, scientific researchers may pursue multiple threads of a theory, or hit multiple dead ends, before hitting an area that is fruitful and publishable. Requiring them to reveal all of those areas of experimentation and failure could simply lead some to stop trying, at least with respect to difficult or controversial areas where funding could be at risk. Moreover, scientists often have a proprietary intellectual property interest in temporarily maintaining the privacy of their research. For this reason, a number of state FOIA statutes contain exemptions for scientific research materials that could constitute trade secrets or be patented, and some even include exemptions for general scholarly work, though very few contain explicit protections for communications among colleagues.<sup>25</sup> On the other hand, it is presumed that scientists will, at an appropriate point, share their data and research methodology so that their findings can be tested and refined through peer review and scrutiny. Often the question with respect to the release of scientific research is not “if” but “when.”

By contrast, some of the types of information sought in the recent FOIA requests will not necessarily be published for review by peers or be clearly protected by existing FOIA exemptions for trade secrets and other scientific material. Nevertheless, freedom of inquiry and debate in the social sciences is equally important to the values of academic freedom that the Supreme Court has lauded for the past half-century, as discussed below. As one court has explained, “[c]ompelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is greatest.”<sup>26</sup> And as the Washington Post observed in response to the American Tradition Institute’s FOIA request to UVA, “Academics must feel comfortable sharing research, disagreeing with colleagues and proposing conclusions — not all of which will be correct — without fear that those who dislike their findings will conduct invasive fishing expeditions in search of a pretext to discredit them. That give-and-take should be unhindered by how popular a

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<sup>24</sup> *Id.* at 1572 (stating that the “Traditional Values Coalition, a self-described conservative Christian lobbying group, claimed authorship of the list”).

<sup>25</sup> Michigan’s Confidential Research and Investment Information Act, for instance, exempts from disclosure intellectual property or “original works of authorship” that are created by a university employee “for purposes that include research, education, and related activities” until the author has a reasonable opportunity to publish it to the university community or to secure copyright registration. MICH. COMP. LAWS ANN. § 390.1554(Sec. 4(1)(a)) (2011); *see also* South Carolina’s Public Records Act, allowing public bodies to exempt “[d]ata, 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,” as well as similar “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 . . . in the conduct of or as a result of study or research on medical, scientific, technical, scholarly, or artistic issues,” including “information provided by participants in research, research notes and data, discoveries, research projects, proposals, methodologies, protocols, and creative works.” S.C. CODE ANN. § 30-4-40(14(A)-(B)) (2010).

<sup>26</sup> *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*, 71 F.R.D. 388 (N.D. Cal. 1976).



professor's ideas are or whose ideological convictions might be hurt.”<sup>27</sup>

It is therefore especially critical to identify mechanisms by which these communications may be protected, either via explicit exemptions or by a balancing approach that takes into account the value of academic collaboration.

### III. Judicial Responses

#### A. Recognition of Academic Freedom

Starting in the McCarthy era, in response to threatened incursions by state legislatures and attorneys general into the operations of universities, the Supreme Court accorded special attention to academic freedom, including it within the free speech protections of the First Amendment. In *Sweezy v. New Hampshire*,<sup>28</sup> a professor at the University of New Hampshire was interrogated by the state's Attorney General about his affiliations with communism. After the professor, Paul Sweezy, refused to answer a number of questions before a judge, he was found in contempt of court and thrown in jail. A plurality of the Supreme Court held that there had been an “invasion of [Sweezy's] liberties in the areas of academic freedom and political expression – areas in which government should be extremely reticent to tread.”<sup>29</sup> The opinion continued:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>30</sup>

A decade later, in *Keyishian v. Board of Regents*,<sup>31</sup> the Court ruled that requiring faculty at SUNY-Buffalo to sign loyalty oaths affirming they were not members of the Communist party was an unconstitutional violation of their rights to academic freedom and freedom of association. Echoing its earlier invocation of academic freedom as critical to the development of democracy and the search for truth, the Court elaborated:

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<sup>27</sup> Editorial, *Harassing Climate-change Researchers*, WASH. POST, May 30, 2011, at A22, available at [http://www.washingtonpost.com/opinions/harassing-climate-change-researchers/2011/05/27/AG1xJMEH\\_story.html](http://www.washingtonpost.com/opinions/harassing-climate-change-researchers/2011/05/27/AG1xJMEH_story.html).

<sup>28</sup> 354 U.S. 234 (1957).

<sup>29</sup> *Id.* at 250.

<sup>30</sup> *Id.* Earlier in the decade, Justice Douglas also invoked academic freedom in a dissent, cautioning: “Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect . . . . [I]t was the pursuit of truth which the First Amendment was designed to protect.” *Adler v. Bd. of Educ.*, 342 U.S. 485, 509-511 (1952) (Douglas, J., dissenting).

<sup>31</sup> 385 U.S. 589 (1967).

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom . . . The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.<sup>32</sup>

U.S. courts of appeals have also articulated forcefully the values at stake in these cases. In *Dow Chemical Company v. Allen*,<sup>33</sup> the Environmental Protection Agency scheduled cancellation hearings for one of Dow Chemical Company’s herbicides on the basis of studies conducted at the University of Wisconsin, and Dow attempted to issue subpoenas to the study’s researchers for all of their notes, reports, working papers, and raw data. The Seventh Circuit refused to enforce the subpoenas, based primarily on an analysis of Dow’s need for the materials (low) and the burden that forced disclosure would impose upon the researchers (high). The researchers’ affidavits described the harm that would come from enforcing the subpoena, including their inability to subsequently publish the studies (which were incomplete and ongoing) and the potential destruction of months or years of research. The Seventh Circuit upheld the district court’s finding that “the risk of even inadvertent premature disclosure so far outweighed the probative value of and need for the information as to itself constitute an unreasonable burden.”<sup>34</sup>

The panel majority also took up the question of whether the dispute implicated interests of academic freedom – a claim raised not by either of the parties but by the State of Wisconsin as *amicus*. As the court observed, the State’s argument in a nutshell was that “scholarly research is an activity which lies at the heart of higher education, that it lies within the First Amendment’s protection of academic freedom, and therefore judicially authorized intrusion into that sphere of university life should be permitted only for compelling reasons.”<sup>35</sup> While noting that the “precise contours of the concept of academic freedom are difficult to define,” the court cited approvingly to *Sweezy* and *Keyishian*, and opined that it was “clear that whatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory

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<sup>32</sup> *Id.* at 603 (internal quotation marks and citations omitted); *see also* *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (“[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (“[A]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (“[I]nhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of [the Bill of Rights and Fourteenth Amendment] vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice . . .”); *Adams v. Trustees of Univ. of N.C.-Wilmington*, No. 10-1413, 2011 WL 1289054, at \*5-6, \*9-10, \*11 (4th Cir. Apr. 6, 2011) (noting that speech related to scholarship and teaching implicates interests under the First Amendment related to academic freedom).

<sup>33</sup> 672 F.2d 1262 (7th Cir. 1982).

<sup>34</sup> *Id.* at 1274

<sup>35</sup> *Id.*

as to the teacher in the classroom.”<sup>36</sup> The court endorsed a balancing inquiry when it came to weighing the merits of an asserted academic freedom privilege, suggesting that “to prevail over academic freedom the interests ... must be strong and the extent of intrusion carefully limited.”<sup>37</sup>

In this case, the subpoena would have required the University of Wisconsin researchers not only to turn over “virtually every scrap of paper and every mechanical or electronic recording made” during the period that the studies had been proceeding, but also to make available any “additional useful data” that emerged during the course of the dispute.<sup>38</sup> As the court added, “It is not unduly speculative to imagine that a large private corporation, through repeatedly securing broad-based subpoenas requiring total disclosure of all notes, reports, working papers, and raw data relating to on-going studies, could make research in a particular field so undesirable as to chill or inhibit whole areas of scientific inquiry.”<sup>39</sup> The court therefore concluded that “there is little to justify an intrusion into university life which would risk substantially chilling the exercise of academic freedom.”<sup>40</sup>

Yet despite these powerful statements by our nation’s highest court and appellate courts recognizing the value of academic freedom and its grounding in the First Amendment, courts charged with reviewing scholarly claims of confidentiality in the face of requests for disclosure pursuant to state FOIA statutes have rendered uneven decisions.

## B. Judicial Treatment of State Freedom of Information Statutes

State FOIA statutes vary widely in their treatment of university-related records, ranging across a spectrum from silence to specific exemptions for presidential search materials or documents protected by federal privacy laws to much broader recognition of protection for at least some categories of scholarly materials. State statutes that do articulate an exemption for scholarly materials provide courts (and records custodians) with specific guidance by which to evaluate records requests. Where the statute is silent or ambiguous, however, courts are generally reluctant to second-guess the legislature by reading in an exemption – though some courts will conduct a balancing inquiry, most commonly if directed to do so by the statute itself.

In *State ex rel. Thomas v. Ohio State University*, the Ohio Supreme Court rejected Ohio State University’s assertion that disclosure to animal rights activists of the names and addresses of animal research scientists would have a chilling effect on the scientists’ First Amendment right to academic freedom.<sup>41</sup> The court relied on its decision half a year earlier in *State ex rel. James v. Ohio State University*,<sup>42</sup> which in turn relied on the U.S. Supreme Court’s 1990

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<sup>36</sup> *Id.* at 1275.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1276.

<sup>39</sup> *Id.* at 1276 n.25.

<sup>40</sup> *Id.* at 1276-77. *Cf.* *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir. 1984) (holding that the drug company Squibb, as the defendant in a products liability lawsuit, would be permitted to subpoena some factual information from a non-party University of Chicago cancer researcher because Squibb would otherwise be at a significant disadvantage in litigation). Squibb would not, however, be able to obtain “any material reflecting development of [the researcher’s] ideas or stating ... conclusions not yet published.” *Id.* at 565.

<sup>41</sup> 643 N.E.2d 126 (Ohio 1994).

<sup>42</sup> 637 N.E.2d 911 (Ohio 1994).

decision in *University of Pennsylvania v. EEOC*.<sup>43</sup> In that case, the Supreme Court concluded that tenure records could be disclosed to the Equal Employment Opportunity Commission without violating the university's asserted First Amendment right to academic freedom. The Court reasoned that the agency's demand for confidential tenure review materials did not prevent the university and its faculty from exercising their best academic judgment regarding faculty hiring and promotion.

The *University of Pennsylvania* holding arguably stood for a far more limited proposition than the Ohio Supreme Court believed, since the university's academic privilege claim was being weighed against the substantial interest in enforcement of federal anti-discrimination laws. Nevertheless, several state courts, including Ohio's, have relied on it for the proposition that there is no privilege in academic materials.<sup>44</sup> The *Thomas* court further declined to read in an unstated exemption to the state's open records statute, quoting *James*:

[I]n enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure.<sup>45</sup>

Acknowledging that the release of contact information for the animal research scientists could pose some risk, the Court concluded that the General Assembly "should consider a personal privacy exemption similar to those in [the federal] FOIA."<sup>46</sup>

Similarly, the Florida Supreme Court refused to confer a privilege upon discussions of a new law school dean by a committee advising the president of the University of Florida.<sup>47</sup> After concluding that the committee performed the type of policy-based and decision-making function that brought it within the purview of Florida's Sunshine Law, the Court added: "[The university] vigorously contend[s] that opening the committee's meetings would threaten dearly held rights of academic freedom. This Court recognizes 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, however, the Court declined to shield these materials.<sup>48</sup>

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<sup>43</sup> 493 U.S. 182 (1990).

<sup>44</sup> See, e.g., *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash. 2d 243, 264-65 (1994); *Students for the Ethical Treatment of Animals v. Huffines*, 399 S.E.2d 340 (N.C. Ct. App. 1991), *aff'd* by 420 S.E.2d 674 (N.C. Ct. App. 1992); *ASPCA v. Bd. of Trustees of State Univ.*, 147 Misc. 2d 847 (N.Y. Sup. Ct. 1990).

<sup>45</sup> *Thomas*, 643 N.E. 2d at 130 (quoting *James*, 637 N.E.2d at 913-914) (citation omitted).

<sup>46</sup> *Id.* at 130.

<sup>47</sup> *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983).

<sup>48</sup> *Id.* at 941. One dissenting justice expressed concern about the application of the Sunshine Law to the search committee, declaring: "The mission of the universities is not to govern or supervise, but rather is to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses, and the like . . . . In order to insure personal rights of privacy and academic freedom, legislation should be construed so that any intrusion is carefully limited." *Id.* at 943-44 (McDonald, J., dissenting).

In a case a decade later, New York’s highest court was similarly reluctant, in the absence of an explicit statutory exemption, to construe the state’s Freedom of Information Law to protect filmstrips used in a college sexuality course. The court ruled that the “breadth of the statutory language,” along with the purpose of the law, “compel[led]” it to hold that the items fell within the scope of the law.<sup>49</sup>

#### IV. Resolving the Dilemma

##### A. Statutory Exemptions

In light of this judicial reluctance to read in unstated statutory exemptions, perhaps the most obvious method to avoid creating the “atmosphere of suspicion and distrust” against which the Supreme Court cautioned in *Keyishian* would be for state legislatures to affirmatively articulate a statutory exemption. Several states already provide broad protection for their faculty members’ papers. New Jersey, for instance, exempts “scholarly records,”<sup>50</sup> and Ohio exempts “intellectual property records,” defined as records produced or collected by faculty and other employees of state universities “in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue . . . that ha[ve] not been publicly released, published, or patented.”<sup>51</sup> Utah is perhaps the most protective of its faculty members’ freedom to communicate without fear of intrusion. The state’s open records statute shields records within the state system of higher education that have been “developed, discovered, disclosed to, or received by or on behalf of faculty, staff, employees, or students of the institution,” including unpublished lecture notes; unpublished research-related notes, data, and other information; confidential information contained in research proposals; unpublished manuscripts; creative works in progress; and “scholarly correspondence.”<sup>52</sup>

Using one or more of the examples above as a model, states could preserve government transparency while fostering scholarly and academic freedom by carving out scholarly materials and non-administrative communications from the coverage of their FOIA statutes. Language similar to Utah’s would be the most robust, but states desiring more latitude could begin with another’s, such as Ohio. Such statutory exemptions would enable faculty to communicate about a variety of controversial and sensitive issues without self-censorship. The carve-outs would also provide certainty and concrete guidance to scholars, the public, and courts about what matters are outside of the realm of disclosable records. This approach could also help synchronize the treatment of identical materials in the litigation and FOIA contexts – since, as described above and in more detail below, courts have generally been more sympathetic to claims of privilege in litigation than in the context of FOIA requests, resulting in compelled disclosure of documents in some circumstances but not in others.

##### B. Balancing Academic Freedom and Disclosure

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<sup>49</sup> *Russo v. Nassau Cnty. Cmty. College*, 623 N.E.2d 15, 19 (N.Y. 1993). As *amici*, the ACLU, the Association of Community College Trustees, and the American Association of University Professors had urged the court to recognize an academic freedom exception for the materials, but the court declined to consider those arguments.

<sup>50</sup> N.J.STAT.ANN. § 47:1A-1.1 (West 2011).

<sup>51</sup> OHIO REV. CODE ANN. 149.43(A)(5) (West 2011).

<sup>52</sup> UTAH CODE ANN. § 63G-2-305(40)(a) (West 2010).

As an alternative to an explicit exemption for faculty materials, courts and records custodians could undertake a balancing test when faced with competing claims for disclosure and protection of academic freedom. Indeed, Justice Breyer recently affirmed that a balancing approach is appropriate where constitutional interests come into conflict, observing that “[i]n circumstances where . . . a law significantly implicates competing constitutionally protected interests in complex ways, the Court balances interests.”<sup>53</sup> Some institutions might use a university committee to conduct this inquiry, with judicial review available where the committee’s determination is challenged.<sup>54</sup> Courts already undertake this balancing test in two contexts: in litigation, where parties serve third-party subpoenas on scholars hoping to obtain relevant information, and in the FOIA context, where they are directed to do so by the state statute or where the courts have imported it into the statute as a common-law gloss on the statutory requirements.<sup>55</sup> Such an approach is therefore already tested and would allow states that are uneasy about a blanket exception to instead direct a case-by-case inquiry.

In the arena of FOIA requests, Wisconsin courts have articulated one of the clearest expressions of this balancing policy. The state’s Open Records Act is premised on a “presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”<sup>56</sup> Nevertheless, Wisconsin courts incorporate a common-law

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<sup>53</sup> *Doe v. Reed*, 130 S. Ct. 2811, 2822 (2010) (Breyer, J. concurring) (citation and internal quotation marks omitted); *see also Eisen v. Regents of Univ. of Cal.*, 269 Cal. App. 2d 696, 706 (Cal. App. Ct. 1969) (“Impairments of First Amendment rights are ‘balanced’ by determining whether there is a reasonable relationship between the impairment and a subject of overriding and compelling state interest. There can be no doubt that disclosure requirements may impair rights of free speech and association . . . .” (citation omitted)).

<sup>54</sup> The American Association of University Professors recommended such a committee and reaffirmed the utility of a balancing approach in its 1996 Report on Access to University Records. As the Report explained, “[w]hile access confers benefits, it also carries costs and potential dangers, many of which apply with special force to an academic community by virtue of its essential, perhaps unique, mission to search for and disseminate truth by wide-ranging exploration of inchoate ideas and hypotheses, some of which may be seen as dangerous by others in the society. Sound policy requires a balancing of the benefits and costs of open access.” American Association of University Professors, *Report on Access to University Records*, ACADEME 44, 45 (Jan.-Feb. 1997). The Report articulated a number of interests that would be served by limitations on access to university documents, including the “need to create and preserve a climate of academic freedom in the planning and conduct of research, free from harassment, public and political pressure, or premature disclosure of research in process”; “the need to create a climate in which the university’s teaching activities are unimpeded and open to innovation and in which controversial issues may be explored without externally imposed limits on what is said, read, or debated”; and “the need to avoid what has been called ‘the chilling effect’ on what is explored and what is taught.” *Id.* With respect to requesters from outside the university community (such as external advocacy groups), the Report suggested that “considerations of privacy, academic freedom, and the desirable insulation of the university from outside pressures, as well as considerations of efficient operation of the educational enterprise, argue in favor of a *strong* or even *compelling* presumption against access to university documents for which a reasonable claim of confidentiality has been made.” *Id.* at 47.

<sup>55</sup> This approach also has some similarities to the inquiry undertaken by courts in states with anti-SLAPP statutes. Strategic Litigation Against Public Participation (SLAPP) suits are generally libel or conspiracy suits brought against journalists, unions, citizen activists, and others to quell commentary on public issues; many states have “anti-SLAPP” statutes designed to allow the targets to dismiss the suits before they reach the merits stage. *See Responding to Strategic Lawsuits Against Public Participation (SLAPPs)*, CITIZEN MEDIA LAW PROJECT, <http://www.citmedialaw.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps> (last visited Jul. 27, 2011).

<sup>56</sup> WIS. STAT. 19.31 (2011).

balancing test into their analysis of Open Records Act requests. In *Osborn v. Board of Regents of University of Wisconsin System*, for instance, a Wisconsin resident and the state Center for Equal Opportunity submitted a request for records of applicants to the University of Wisconsin.<sup>57</sup> While ultimately ruling that the university was obligated to disclose the records because they did not contain personally identifiable information, the Wisconsin Supreme Court reached that conclusion only after utilizing a balancing inquiry. The Court observed that “we have a presumption of open access to public records, which is reflected in both our statutes and our case law.”<sup>58</sup> Nevertheless, “[t]he right to inspect public records . . . is not absolute. In certain circumstances, a custodian should deny a request to inspect public records.”<sup>59</sup> In the absence of a specific statutory exemption, the custodian should “weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection.”<sup>60</sup>

Other states have explicitly written a balancing test into their FOIA statutes. In Michigan, for instance, when the government invokes the “frank communications” exemption to a FOIA request, the statute imposes an obligation “not only [t]o show that disclosure would inhibit frank communications” but also to “articulate why the promotion of frank communications . . . ‘clearly’ outweighs the public’s right to know.”<sup>61</sup> Similarly, Utah’s statute sets out a balancing test for records for which there is no statutory exemption: a court can order that records be kept confidential if “(a) there are compelling interests favoring restriction of access to the record, and (b) the interests favoring restriction of access clearly outweigh the interests favoring access.”<sup>62</sup>

The ability of courts to undertake a similar balancing inquiry – weighing the interests in access against the interests in non-disclosure – in the context of civil and criminal subpoenas and grand jury investigations further bolsters their capacity to make similar judgments in the FOIA context. The obligation to disclose information may, of course, be both stronger and weaker in the litigation context than in the FOIA arena: stronger in criminal prosecutions and grand jury investigations, where there is often a particularly critical need to obtain information, and weaker with respect to civil subpoenas, where federal rules of civil procedure impose a built-in balancing test and some showing of necessity. Nevertheless, the decisions in this area suggest that the researcher’s interest in free exchange of information and the public’s interest in unimpeded flow of information are critical factors to be weighed in the balance. And in light of the fact that two identical records requests for Dr. Mann’s records at UVA have already yielded very different results – a Virginia state court decision largely sympathetic to the university in the Attorney General’s fraud litigation (currently on review by the state Supreme Court), and an agreement to release all of the documents in response to the FOIA request – it would be sensible

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<sup>57</sup> 647 N.W.2d 158 (Wis. 2002).

<sup>58</sup> *Id.* at 165.

<sup>59</sup> *Id.* at 166.

<sup>60</sup> *Id.*

<sup>61</sup> *Herald Co., Inc. v. E. Mich. Univ. Bd. of Regents*, 693 N.W.2d 850, 858 (Mich. Ct. App. 2005), *aff’d* by 719 N.W.2d 19 (Mich. 2006).

<sup>62</sup> UTAH CODE ANN. § 63G-2-405(1) (West 2010); *see also* California’s Public Records Act, CAL. GOV’T CODE § 6255 (West 2011) (“The agency shall justify withholding any record by demonstrating 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.”).

to harmonize the treatment of those different demands to ensure that one approach does not simply become a way of circumventing another.

### C. A Reporter's Privilege?

A related approach would be to analogize to a journalistic privilege in the balancing inquiry. Indeed, the Delaware legislature has set out a reporter's privilege that protects some scholarly work as well. The statute defines "reporter" to include a "scholar, educator, [or] polemicist," and permits all "reporters" to decline to testify in non-adjudicative proceedings about either the source or the content of information they have gathered with the intent of disseminating it to the public.<sup>63</sup>

Some courts have been receptive to this analogy. In *In re Cusumano v. Microsoft Corp.*,<sup>64</sup> the First Circuit endorsed the use of a balancing test where Microsoft, embroiled in an anti-trust prosecution over its dealings with Netscape, subpoenaed two MIT and Harvard professors for materials underlying their pending book on the war between the two companies.<sup>65</sup> The professors, who had conducted multiple interviews with Netscape employees under promises of confidentiality, argued that their work warranted protection under a journalists' privilege. The professors asserted that requiring them to disclose their materials would "endanger the values of academic freedom safeguarded by the First Amendment and jeopardize the future information-gathering activities of academic researchers."<sup>66</sup> The court recognized the significant chilling effect that would occur if researchers and academics were unilaterally subject to subpoenas without exception: "If [scholars'] research materials were freely subject to subpoena, their sources likely would refuse to confide in them. As with reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would

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<sup>63</sup> DEL. CODE ANN. tit. 10, §§ 4320(4), (7), 4321 (2011).

<sup>64</sup> 162 F.3d 708 (1st Cir. 1998).

<sup>65</sup> Boston College recently invoked *Cusumano* in response to a document request from the British government. In spring and summer 2011, the government of the United Kingdom served two subpoenas on the college, which maintains an oral history archive of the "Irish Troubles," the period of sectarian strife in Northern Ireland dating from the 1960s through the 1980s. The subpoenas, which were served pursuant to a criminal assistance treaty between the UK and the United States government, request a range of documents related to interviews of former Irish Republican Army members who had been promised that the materials would remain confidential until their deaths. Boston College asked a federal trial court to quash the subpoena, citing concerns about the free flow of information, particularly confidential information, and urging the court to balance the interests in the criminal investigation against the interests in the protection of academic research: "In *Cusumano*. . . the First Circuit found the interest in protecting academic research materials to be grounded, as is the interest in protecting news reporters' materials, in the First Amendment. Those precedents are the ones on which Boston College relies in asking this Court to weigh the interest in protecting the academic research at issue here from compulsory disclosure." Memorandum of Trustees of Boston College in Reply to Government's Opposition to Motion to Quash Subpoenas and in Opposition to Government's Motion to Compel at 6, *In re Request from the U. K. Pursuant to the Treaty Between the Gov't of the U. S. and the Gov't of the U. K. on Mutual Assistance in Criminal Matters in the Matter of Dolours Price*, No. 1:11-mc-91078-RGS (D. Mass. July 15, 2011) [hereinafter *In re Request from the U.K.*]. The U.S. Attorney's Office has asserted that "[i]n the face of a subpoena to advance a criminal investigation . . . there is no academic privilege which shields the material from disclosure." Government's Opposition to Motion to Quash and Motion for an Order to Compel at 2, *In re Request from the U.K.*, No. 1:11-mc-91078-RGS (D. Mass. July 1, 2011). The oral historians whose materials are targeted have also sought to enter the case as intervenors. The court has not yet ruled on the subpoenas.

<sup>66</sup> *Id.* at 713.



restrict their output . . . . [A]n academician, stripped of sources, would be able to provide fewer, less cogent analyses.”<sup>67</sup> The court therefore concluded that “when a subpoena seeks divulgement of confidential information compiled by a journalist or academic researcher in anticipation of publication, courts must apply a balancing test.”<sup>68</sup>

A federal district court in California anticipated *Cusumano*’s approach by some two decades. In *Richards of Rockford, Inc. v. Pacific Gas & Electric Company*,<sup>69</sup> a Harvard professor who had conducted confidential interviews with Pacific Gas & Electric employees on a variety of subjects was the subject of a third-party subpoena in a lawsuit against PG&E. In considering the professor’s refusal to reveal either the identity of the employees or the substance of their interviews, the court indicated that it would balance the interests in disclosure against the “public interest in maintaining confidential relationships between academic researchers and their sources.”<sup>70</sup> The court reasoned that “society has a profound interest in the research of its scholars, work which has the unique potential to facilitate change through knowledge . . . . Compelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is greatest.”<sup>71</sup> Relying on the elements of the qualified journalist’s privilege, the court concluded that because the lawsuit was civil, because the researcher was not a party to the lawsuit, and because much of the information was available elsewhere, it would be inappropriate to compel the researcher to produce the materials.<sup>72</sup>

Indeed, courts have broadly applied the journalist’s privilege to anyone engaged in the endeavor of newsgathering and dissemination of information. In *Shoen v. Shoen*, the Ninth Circuit held that anyone gathering information for eventual dissemination, including an investigative author, is protected by a qualified privilege. As the court observed, “society’s interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest of sufficient social importance to justify some incidental sacrifice of some sources of facts needed in the administration of justice.”<sup>73</sup> The court also quoted approvingly two commentators’ explanation of the harm that could result from compelled disclosure of information gathered by journalists. In language that could apply equally to scholars, the authors explained that compelled disclosure would harm the ability to gather information by:

damaging confidential sources’ trust in the press’ [or academics’]  
capacity to keep secrets and, in a broader sense, by converting the

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 715. The court issued a similar warning in *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980) (footnote omitted), in which it observed that “courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights. In determining what, if any, limits should accordingly be placed upon the granting of such requests, courts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information.”

<sup>69</sup> 71 F.R.D. 388 (N.D. Cal. 1976).

<sup>70</sup> *Id.* at 389.

<sup>71</sup> *Id.* at 389-390.

<sup>72</sup> *Id.* at 390 (citing *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972)).

<sup>73</sup> *Shoen*, 5 F.3d at 1292 (citation and internal quotation marks omitted).

press [or academy] in the public's mind into an investigative arm of prosecutors and the courts. It is their independent status that often enables reporters [or scholars] to gain access, without a pledge of confidentiality, to meetings or places where a policeman or politician would not be welcome. If perceived as an adjunct of the police or of the courts, journalists [or researchers] might well be shunned by persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they would otherwise be free to attend and to describe . . . .<sup>74</sup>

The Ninth Circuit was so persuaded by this reasoning that it held that the privilege applied even where there had been no offer of confidentiality.

At the same time, consistent with the balancing approach, courts have resisted efforts to assert a blanket privilege for researchers, particularly in the social sciences and particularly where grand juries are concerned. In *United States v. Doe (In re Popkin)*,<sup>75</sup> an assistant professor of government at Harvard and scholar of the Vietnam War was called to testify to a federal grand jury investigating the Pentagon Papers. Relying on grounds that included a First Amendment scholar's privilege, Samuel Popkin declined to provide certain pieces of information. The First Circuit noted that there is an "important public interest in the continued flow of information to scholars about public problems which would stop if scholars could be forced to disclose the sources of such information."<sup>76</sup> In the context of the grand jury investigation, however, the court rejected the assertion that conversations among scholars should be protected and ordered Popkin to disclose the names of persons he interviewed and the content of his conversations with Daniel Ellsberg.<sup>77</sup>

In *In re American Tobacco Company*,<sup>78</sup> the Second Circuit had occasion to consider the scholar's privilege in some detail. Three tobacco companies – American Tobacco, R.J. Reynolds, and Philip Morris – served third-party subpoenas on the Mount Sinai School of Medicine and the American Cancer Society (the Society) in the course of products liability lawsuits. Because the tobacco companies believed that the plaintiffs in the suits would rely on studies directed by researchers at Mt. Sinai and the Society, the companies sought the data underlying the studies. The first set of subpoenas, seeking a broad range of information including the methodology of the studies, questionnaires, and all raw data, was served in the course of state court litigation. A New York state court ultimately quashed the subpoenas,

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<sup>74</sup> *Id.* at 1295 (quoting Duane D. Morse & John W. Zucker, *The Journalist's Privilege*, in TESTIMONIAL PRIVILEGES 474-75 (Scott N. Stone & Ronald S. Liebman eds., 1983)).

<sup>75</sup> 460 F.2d 328 (1st Cir. 1972).

<sup>76</sup> *Id.* at 333.

<sup>77</sup> With respect to the demand for Popkin's opinions about who had access to the documents forming the Pentagon Papers, the court declined to enforce the grand jury's request. The author of the decision, Judge Coffin, opined that "[i]n the long run, the quest for opinions would not be a useful investigative tool. If appellant were forced to answer, scholar-sleuths would in the future think long and hard before admitting to an opinion, and grand juries would be without workable means for forcing them to do so." *United States v. Doe (In re Popkin)*, 460 F.2d 328, 335 (1st Cir. 1972). The court agreed on this issue only on the narrower ground that the questions were badly phrased, however. *See id.* at 337 (Aldrich, J., concurring).

<sup>78</sup> 880 F.2d 1520 (2d Cir. 1989).

concluding that compliance would “hinder the normal functioning” of the medical school and the Society and could have “a chilling effect and discourage future scientific endeavors.” The state court added that the constitutional right of academic freedom, while “not absolute,” could be “balanced against other competing interests” and “figure into the legal calculation of whether forced disclosure would be reasonable.”<sup>79</sup>

Soon after the state court’s decision, the tobacco companies served a somewhat narrower set of subpoenas in connection with several lawsuits in federal court, primarily seeking computer tapes that stored the raw data but excluding some confidential information. Mt. Sinai and the Society again moved to quash; the district court denied the motion, concluding that no expert’s privilege existed and that the burden of redacting the materials was not “unduly burdensome,” though the court did enter a limited protective order.

On appeal, the Second Circuit concluded that the earlier state court decision did not establish a scholar’s privilege, and that it stood, at most, for the proposition that “the scholar’s interest in his data” was “a factor to be taken into account in weighing the burdens of production.”<sup>80</sup> The court reasoned that a scholar’s privilege, if one existed, would have to be analyzed in light of the burdens of compliance and the researchers’ interest in their data – in effect, a balancing inquiry. The panel held that the researchers’ interest here was outweighed by the tobacco companies’ because only data underlying previously published articles were being targeted. The court therefore upheld the district court’s decision and declined to modify the protective order.

Taken together, these cases suggest that a balancing inquiry is appropriate where there is tension between significant constitutional and public interests, and that courts are capable of carrying out this balancing process not only in the litigation context but with respect to FOIA requests as well. As in the litigation arena and as with the qualified journalist’s privilege, First Amendment academic freedom would not necessarily provide absolute immunity from public document requests for faculty materials, but it would be given serious and thoughtful consideration in the balance.

#### D. Academics Could Be Considered Outside the Purview of FOIA Statutes

Finally, scholars may simply not be covered by many state FOIA statutes, which target activity carried out by public officials or on behalf of the public. Michigan’s Freedom of Information Act, for instance, defines a “public record” as “a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function . . . .”<sup>81</sup> Similarly, the statement of legislative intent underlying Wisconsin’s Public Records Law states that citizens are entitled to information regarding “the affairs of government and the official acts of those officers and employees who represent them.”<sup>82</sup>

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<sup>79</sup> *American Tobacco*, 880 F.2d at 1523-24 (quoting *In re R.J. Reynolds Tobacco Co.*, 518 N.Y.S.2d 729, 731-34 (N.Y. Sup. Ct. 1987)).

<sup>80</sup> *Id.* at 1528.

<sup>81</sup> MICH. COMP. LAWS § 15.232(e) (2011).

<sup>82</sup> WIS. STAT. § 19.31.

Seen in this light, it would be consistent to read many state FOIA statutes as not encompassing much work that faculty do. Most government employees are elected, hired, or appointed to carry out a particular governmental agenda; either they participate in forming government policy and thus engage in official acts, or they are working under the direction of those who are and thus carry out duties for the public. Faculty members at public institutions, by contrast, are hired not to pursue a particular governmental agenda, but instead to participate as equal members of the academic community and to engage in creative and innovative scholarship, research, and teaching. While their appointment and the subject of their work may well be of interest to the public, the content of that work is not properly a subject of public oversight.<sup>83</sup>

The American Association of University Professors' 1915 Declaration of Principles on Academic Freedom and Academic Tenure reiterates this dynamic, explaining that in the "relationship between university trustees and members of university faculties," the "latter are the appointees, but not in any proper sense the employees, of the former."<sup>84</sup> The Declaration conceives of this relative freedom for faculty as the essential precondition for the public service that scholars are understood to provide. As the Declaration explains, it is of critical societal interest

that what purport to be the conclusions of men trained for, and dedicated to, the quest for truth, shall in fact be the conclusions of such men, and not echoes of the opinions of the lay public, or of the individuals who endow or manage universities. To the degree that professional scholars ... are, or ... appear to be, subject to any motive other than their own scientific conscience and a desire for the respect of their fellow experts, to that degree the university teaching profession is corrupted; its proper influence upon public opinion is diminished and vitiated; and society at large fails to get from its scholars, in an unadulterated form, the peculiar and necessary service which it is the office of the professional scholar to furnish.<sup>85</sup>

Whether public-sector faculty should be treated differently from the majority of government employees has become particularly relevant in the wake of the Supreme Court's 2006 decision in *Garcetti v. Ceballos*.<sup>86</sup> In *Garcetti*, the Supreme Court ruled that when most public employees speak "pursuant to their official duties," they are not protected by the First Amendment.<sup>87</sup> The majority continued, "Restricting speech that owes its existence to a public

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<sup>83</sup> See *Fromer v. Freedom of Info. Comm'n*, 90 Conn. App. 101, 108 (Conn. Ct. App. 2005) (holding that presentations created by master gardening instructors in a cooperative extension program were not "public records" because, among other things, the course material did "not pertain to the public's business; it relate[d] to gardening and landscape management." It is, however, unclear how the court would have classified a professor who was part of a standard department rather than an extension program and was more integrated into the work of the university.

<sup>84</sup> American Association of University Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, POLICY DOCUMENTS AND STATEMENTS 291-301 (2006), available at: <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1915.htm>.

<sup>85</sup> *Id.* at 294.

<sup>86</sup> 547 U.S. 410 (2006).

<sup>87</sup> *Id.* at 421.

employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over *what the employer itself has commissioned or created*.”<sup>88</sup>

A public university does not, however, “commission or create” its faculty members’ speech, and any attempt to do so would be counter to fundamental precepts of academic freedom as well as to the public interest served by state institutions of higher education. In his dissent in *Garcetti*, Justice Souter articulated this tension, explaining that applying the Court's analysis to public-sector faculty could “imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’”<sup>89</sup> As Justice Souter added, “Some public employees are hired to ‘promote a particular policy’ by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto.”<sup>90</sup> The majority acknowledged in response that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by the Court’s decision,” and therefore declined to decide whether its “official duties” inquiry “would apply in the same manner to a case involving speech related to scholarship or teaching.”<sup>91</sup>

Since faculty members at public colleges and universities research and write as part of their official duties, public (as opposed to peer) oversight of the content of those communications would infringe fundamental academic freedom and First Amendment values. Recognizing that faculty members’ substantive communications are not expressed on the public's behalf (though they certainly have public value), and therefore exempting them in many circumstances from FOIA coverage, would be consistent with the Supreme Court’s recognition from *Sweezy* through *Garcetti* of the special status of scholars.

## V. Conclusion

State FOIA statutes are a critical mechanism to obtain information and to ensure that public employees and elected representatives are utilizing both the public fisc and the public trust appropriately. A more nuanced approach is called for, however, where countervailing First Amendment interests are implicated, as in the case of scholarly communications and academic freedom. In light of the possibly significant chilling effect upon academic inquiry, particularly in controversial areas, state legislatures and courts would be well-advised to consider incorporating one or more of the approaches suggested above, whether an explicit exemption, a balancing inquiry, or a recognition that faculty members may be outside the scope of most FOIA statutes. Such an approach would help ensure that the public interest in unconstrained scholarly inquiry is given appropriate weight relative to the public’s right to know.

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<sup>88</sup> *Id.* at 421-22 (emphasis added).

<sup>89</sup> *Id.* at 438 (Souter, J., dissenting).

<sup>90</sup> *Id.* at 437.

<sup>91</sup> *Id.* at 425; *see also* Kerr v. Hurd, 694 F. Supp. 2d 817, 844 (S.D. Ohio 2010) (“Recognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values.”).