EXHIBITS FOR EDWARD MAIBACH'S MOTION FOR LEAVE TO INTERVENE

EXHIBIT A

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

Christopher Horner, et al.	)	
	)	
Petitioners,	)	
	)	
v.	)	No. CL-2015-4712
	)	
Rector and Visitors of George Mason University	)	
	)	
	)	
Respondent.	)	

AFFIDAVIT OF EDWARD MAIBACH IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE

STATE OF VIRGINIA
COUNTY OF FAIRFAX, SS:

Personally appearing before the undersigned and with authority and in for said county and state, EDWARD MAIBACH, being first duly sworn by the undersigned, deposes and says:

1. My name is Edward Maibach. I am Communication Professor at George Mason University ("GMU"), and my research is on how to communicate the risks of climate change, and how to educate the public of the importance of reducing greenhouse gas emissions. I teach on these topics, as well as general communications classes. My courses have included *Public Speaking*, *Building Social Science Theory*, and *Social Marketing*.
2. I am also Director of the Center for Climate Change Communication at GMU. At the Center for Climate Change Communication, we conduct nonpartisan research on public understanding of and engagement in climate change and partner with outside organizations for public engagement initiatives.

3. I have been at GMU since 2007. During my time at GMU, I have routinely used the University's computer system to correspond electronically with professional colleagues around the world to exchange thoughts and ideas, scientific and scholarly research, and innumerable other academic materials that I intended and reasonably believed were my private, proprietary, and confidential communications.

4. I have also, on occasion, used my GMU email account for communications of a personal nature. Any personal use of my GMU email has been secondary to my professional use, and use of my GMU email account for incidental personal communications has been solely for convenience.

5. In the summer of 2015, I and other academics involved in various aspects of climate change research began discussing a May 29, 2015 *Washington Post* op-ed by Senator Sheldon Whitehouse. The op-ed suggested potential legal tools in the fight against climate change, primarily the federal RICO anti-racketeering statute. While none of us were legal or policy experts, as individuals concerned about climate change, we all believed this was an idea worthy of further consideration and we decided to exercise our First Amendment rights to petition our government. On September 1, 2015, we wrote a citizen's letter to President Obama and two officials in Obama Administration to call attention to Sen. Whitehouse's proposal (the "September 1 Letter").

6. The September 1 Letter was mailed via first class mail.

7. Because Petitioners' VFOIA request over the September 1 Letter sought all documents containing the term "RICO," this has also meant that a presentation of my work in Puerto Rico, involving a paper in which I was a co-author, has become subject to this litigation.

In addition to personal email correspondence regarding the September 1 Letter, I have professional emails that mention Puerto Rico.

8. I have been advised by GMU that roughly 1,000 to 1,500 pages of my emails, involving both personal and professional correspondence, are to be produced to the Competitive Enterprise Institute ("CEI") and Christopher Horner under the Virginia Freedom of Information Act ("VFOIA"), pursuant to an April 22, 2016 order by this Court and subsequent May 13, 2016 ruling.

9. I have been following GMU's VFOIA litigation in this matter against CEI and Mr. Horner, and I understand that GMU has argued before this Court that my emails were not subject to VFOIA. Following the Court's April 22 order, I understand that GMU planned to pursue an appeal, and I believed that preserved my rights up and until the case was before the Virginia Supreme Court. Nonetheless, GMU counsel informed me on May 20, 2016, that they will be releasing all of the emails that Petitioners have requested.

10. I do not believe my interests, or the interests of the other academics in my emails, are currently being adequately protected in this case. GMU's decision to produce my emails instead of continuing with the appeal will destroy the confidential and private nature of these communications, chill the free exchange of ideas between me and other academics, and cause me and my colleagues annoyance, harassment, oppression, and undue burden and expense.

11. The disclosure of thousands of pages of my personal and professional emails violates my protections under VFOIA, my reasonable expectation of privacy, my academic freedom, and my rights under the First Amendment of the United States Constitution.

12. Upon learning that GMU planned to release thousands of pages of my emails, I sought to intervene in this litigation.

13. Throughout their averments in the Petition for Mandamus, statements in the press, and statements on CEI's webpage, CEI and Mr. Horner have made clear that they are intent on attacking my professional reputation and character and the professional reputations and characters of other academics with whom I corresponded and associated, as well as the reputation of GMU.

14. CEI and Mr. Horner have repeatedly attacked me in relation to this VFOIA matter and have made clear that they seek my emails as a mechanism to harass and impugn me and my work. Indeed, a CEI blog post published just last week compared me and my colleagues to "quacks and snake oil salesmen" and suggested we are somehow guilty of fraud. (See Exhibit C to the Motion to Intervene, a copy of a CEI blog post dated May 17, 2016.)

15. To allow my emails to be released to CEI and Mr. Horner virtually guarantees that I will continue to be a target and there will be additional fodder for them and others to attack my professional reputation and the reputations of my colleagues. Moreover, it allows access to my professional work and proprietary information – any ideas I may have expressed, opinions I may have shared, research or other work I conducted, will be divulged publicly and available for others' potential personal, proprietary, economic, or political gain.

16. Disclosure of academics' personal and professional email correspondence has been demonstrated to have a "chilling effect" on researchers' willingness to freely exchange ideas and other materials of scholarship by electronic correspondence.

17. Major scientific and academic societies have criticized the growing use of open records laws to attempt to harass, intimidate, and discredit researchers. The American Association for the Advancement of Science has spoken out against "excessively intrusive demands for personal or irrelevant information" – largely via open records requests – and it has decried "demands for unnecessary personal information." *See* "AAAS Statement on Scientific Transparency, Disclosure, and Responsibility" (March 2015,http://www.aaas.org/sites/default/files/AAAS%20Statement%20on%20Scientific%20Transparency%2C%20Disclosure%2C%20and%20Responsibility.pdf). A copy of this statement is attached as Exhibit 1.

18. In the same vein, a report published by American Association of University Professors concluded that open records requests for faculty emails "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." *See* Rachel Levinson-Waldman, "Academic Freedom and the Public's Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship" (September 2012, http://www.acslaw.org/sites/default/files/Levinson__ACS_FOIA_First_Amdmt_Issue_Brief.pdf) An excerpt from this report is attached as Exhibit 2.

19. Similarly, the University of California – Los Angeles, has published a statement on the importance protecting faculty communications from open records requests.

> *[F]aculty scholarly communications must be protected from [open records] and FOIA requests to guard the principle of academic freedom, the integrity of the research process and peer review, and the broader teaching and research mission of the university. Moreover, these requests have increasingly been used for political purposes or to intimidate faculty working on controversial issues. These onerous, politically motivated, or frivolous requests may inhibit the very*

communications that nourish excellence in research and teaching, threatening the long-established principles of scholarly research.

See UCLA Statement on the Principles of Scholarly Research and Public Records Requests (Sept. 2012, https://www.apo.ucla.edu/policies-forms/academic-freedom) A copy of this statement is attached as Exhibit 3.

20. I do not believe that GMU is capable of fully protecting my personal and privacy interests in this matter. GMU counsel cannot represent me personally, and counsel have acted in what they consider the best interests of the University. Up until very recently, I reasonably believed these interests corresponded with my own interests. However, GMU's recent decision to release thousands of pages of my emails has made clear that our interests have diverged.

Further, affiant sayeth naught.

Ed Maibach

Edward Maibach

EXHIBIT 1

AAAS

ADVANCING SCIENCE, SERVING SOCIETY

AAAS Statement on Scientific Transparency, Disclosure, and Responsibility

Public trust in the integrity of science and scientists remains essential to the effective use of scientific research in improving human welfare. In response to recent challenges to the integrity of science, the American Association for the Advancement of Science (AAAS) has reaffirmed its commitment to robust, independent peer review as well as the sharing of research results through publications and public discourse, in accordance with well-crafted transparency policies and procedures.

Two recent events have raised questions about scientific transparency and the responsibility of scientists to fully disclose potential conflicts of interests: Questions were raised about the financial interests of a researcher at the Harvard-Smithsonian Center for Astrophysics, whose congressional testimony has discounted the human fingerprint on global climate change—a reality that has repeatedly been confirmed by a consensus of climate scientists. Also, a Member of Congress made unnecessarily broad requests of seven universities for all communications regarding the climate-change testimonies of other scientists.

AAAS and its journals will continue to take seriously any questions regarding conflicts of interest, while calling on all scientists and engineers to uphold the highest standards of transparency and responsibility. Toward that end, the *Science* family of journals has set forth clear and rigorous conflict-of-interest requirements for all authors, as have the leading scientific journals more widely. AAAS also routinely requires full disclosure by scientists involved in a wide array of programmatic activities (e.g., speakers at the association's Annual Meeting, and award or fellowship reviewers) and participates, often with a leading role, in national and international discussions on the nature of scientific responsibility and integrity.

While AAAS has long upheld the importance of transparency and accountability in all scientific affairs, we have also cautioned that excessively intrusive demands for personal or irrelevant information that go beyond appropriate levels of oversight can negatively affect the research enterprise. Respectful scholarly debate remains essential to the progress of science, particularly related to issues at the intersection of science and society, but politicized or ideology-based intrusions to scientific discovery can create a hostile environment for researchers, inhibiting the free exchange of scientific findings. Such efforts can slow the pace of scientific discovery, and if they escalate beyond civil discourse, may sometimes even put researchers at risk: AAAS has previously decried instances of researchers—including some working on climate change as well as human health research involving laboratory animals—who have been subjected to demands for unnecessary personal information, efforts to discredit their professional integrity based on ideological grounds, and even death threats.

A proper balance between scientific freedom and accountability is therefore essential for advancing science in service of society, which is the AAAS mission. AAAS remains dedicated to promoting the responsible conduct and use of science, and it asks individual scientists and engineers to remain vigilant in ensuring the transparency of the scientific enterprise.

Rush D. Holt
CEO, AAAS, and Executive Publisher of the *Science* family of journals

Executive Office

American Association for the Advancement of Science
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EXHIBIT 2

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

By Rachel Levinson-Waldman

September 2011

American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005

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.[1] 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.[2] 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.

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

[2] 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,[3] 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.[4] 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,[5] UVA and ATI reached an agreement that UVA would share all of the requested documents with ATI.[6] 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.[7] In addition, ATI can ask the court to issue a

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[3] 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 (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://wwwp.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.

[4] *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).

[5] *See* Verified Petition for Mandamus and Injunctive Relief, Am. Tradition Inst. v. Univ. of Va., No. 1l-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.

[6] *See* Order on the Protection of Documents, Am. Tradition Inst. v. Univ. of Va., No. 1l-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.

[7] 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.[8] 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.[9] 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.[10]

Wisconsin has one of the strongest open records laws in the country,[11] 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."[12] 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).

[8] 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 (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.

[9] *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/.

[10] *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/.

[11] *See* WIS. STAT. 19.31 to .39 (2011).

[12] *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."[13] 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."[14] 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."[15] The state Republican Party has stated that it does not intend to appeal the decision.[16]

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

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

[14] *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.

[15] 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.*

[16] *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. 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. 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. [17]

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."[18]

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.[19] 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.[20]

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[17] *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).

[18] *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.

[19] *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.

[20] *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.[21] 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.[22] 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.[23]

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).

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

[22] 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)).

[23] *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.[24]

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.[25] 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."[26] 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

[24] *Id.* at 1572 (stating that the "Traditional Values Coalition, a self-described conservative Christian lobbying group, claimed authorship of the list").

[25] 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).

[26] 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."[27]

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*,[28] 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."[29] 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.[30]

A decade later, in *Keyishian v. Board of Regents*,[31] 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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[27] 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.

[28] 354 U.S. 234 (1957).

[29] *Id.* at 250.

[30] *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).

[31] 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.[32]

U.S. courts of appeals have also articulated forcefully the values at stake in these cases. In *Dow Chemical Company v. Allen*,[33] 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."[34]

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."[35] 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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[32] *Id.* at 603 (internal quotation marks and citations omitted); s*ee 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).

[33] 672 F.2d 1262 (7th Cir. 1982).

[34] *Id*. at 1274

[35] *Id.*

as to the teacher in the classroom."[36] 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."[37]

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.[38] 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."[39] 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."[40]

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.[41] The court relied on its decision half a year earlier in *State ex rel. James v. Ohio State University*,[42] which in turn relied on the U.S. Supreme Court's 1990

[36] *Id.* at 1275.
[37] *Id.*
[38] *Id.* at 1276.
[39] *Id.* at 1276 n.25.
[40] *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.
[41] 643 N.E.2d 126 (Ohio 1994).
[42] 637 N.E.2d 911 (Ohio 1994).

decision in *University of Pennsylvania v. EEOC*.[43] 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.[44] 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.[45]

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."[46]

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.[47] 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.[48]

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[43] 493 U.S. 182 (1990).

[44] *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).

[45] *Thomas*, 643 N.E. 2d at 130 (quoting *James*, 637 N.E.2d at 913-914) (citation omitted).

[46] *Id.* at 130.

[47] Wood v. Marston, 442 So. 2d 934 (Fla. 1983).

[48] *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).

EXHIBIT 3

ACADEMIC FREEDOM

From the joint Senate-Administration Task Force on Academic Freedom

Statement on the Principles of Scholarly Research and Public Records Requests

September 2012

Preamble

Robust, frequent, and frank intellectual exchange is essential to research and teaching at the university level. It is therefore a matter of great concern that faculty at public universities throughout the country are increasingly the objects of requests through state (California Public Records Act, or PRA) and federal (Freedom of Information Act, or FOIA) public records acts for emails, notes, drafts, and other documents. Public access laws are an important component of the democratic process in our society, and scholars themselves frequently benefit from this legal framework. However, faculty scholarly communications must be protected from PRA and FOIA requests to guard the principle of academic freedom, the integrity of the research process and peer review, and the broader teaching and research mission of the university. Moreover, these requests have increasingly been used for political purposes or to intimidate faculty working on controversial issues. These onerous, politically motivated, or frivolous requests may inhibit the very communications that nourish excellence in research and teaching, threatening the long-established principles of scholarly research.

The principles of scholarly research

Faculty at UCLA carry out a triple mission of teaching, service, and research. The three parts of this mission are not identical: our service to the institution is by definition something that concerns the shared governance, operation, and decision-making here at UCLA and UC wide. By contrast, our research and teaching are often conducted in collaboration with others in our discipline at institutions around the world, and serve the general advancement of knowledge.

Sound, high-quality scholarship is a collective process of trial and error, peer review, and questioning that happens in classrooms, laboratories, offices, conferences, workshops, at work and at home, day and night, in the university and in the field. Through this collective process, scholarship is scrutinized, questioned, improved, and ultimately accepted or rejected by the community. There are a number of principles that underlie this process and are accepted across the disciplines, including the following:

Frank exchange among scholars is *essential to advancing knowledge.* Scholars frequently test ideas in extreme form, explore possibilities through hypotheticals, or play "devil's advocate," making claims they may not themselves believe in edgy, casual language not intended for public circulation or publication. These communications are frequent and diverse in nature because scholarship is a competitive and fast-paced process, requiring intensive communication among a diverse array of participants.

Peer review is built into the academic enterprise at every level. Review and contestation is a nearly constant feature of the exploration of scholarly problems, and that review comes from peers at every stage, from the initial identification of a problem to the publication of scholarly work on the problem. Publications are the final tangible result of scholarly exploration. A published work articulates in detail the methods, materials, and modes of research that led to the findings reported or the narrative constructed. Publications are written with the expectation that they will contribute new knowledge to a field and spur deeper examination of the problems addressed within them. In essence, peer review never ends.

Faculty often choose research topics that are highly relevant to society and therefore may generate strong reactions. These topics may be controversial and highly politicized *(e.g.,* global warming), deal with illegal or criminal behavior, or focus directly on contentious social questions *(e.g.,* ethnicity, sexual orientation). Faculty must be free to work on these important topics without fear of retribution, threats, or interference.

Faculty members regularly collaborate with colleagues at other institutions. Faculty within the UC system require, and deserve to have, the same freedom of communication with people at other universities and corporations, public and private. Faculty at private universities who

perform equivalent research need not fear interference through state public records act requests pertaining to their scholarly contributions; neither should faculty at public universities such as UCLA.

Teaching and research are conducted and governed by the generally accepted professional and ethical commitments specific to each academic discipline. University policies generally incorporate, rather than supersede, those requirements and expectations. Thus, university faculty members already are held to very high professional and ethical standards in the conduct of their scholarly work.

The potential harms of public records requests for scholarly records

Frank, honest exchange depends on the maximum protection of the informal and everyday work, personal email, drafts, and records related to research and teaching. It is essential that regular and frequent communications among faculty within UCLA and with colleagues in other institutions remain within faculty control. Public records requests can lead to unnecessary and unwarranted increased time commitments necessary to monitor all that is written or said in case of potential public disclosure. A lack of protection from such requests can directly impinge on academic freedom (the "chilling effect") by causing faculty to avoid investigating controversial issues.

Principles endorsed to protect scholarly communications

Clarity concerning what is considered a public record by the university is essential to the success of faculty research and teaching endeavors. The university must do its utmost to protect those records not subject to public records oversight and to prevent the chilling effect of public records requests on frank scholarly exchange. These principles are consistent with the letter and intent of the open records laws:

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 "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.

Conclusion

The academic enterprise is intrinsically different from other enterprises conducted for the benefit of the public. Its product, *knowledge,* is intangible, yet it informs all of society in countless tangible ways, including technology, medical care, ecology, and art. Academia can only make these tremendous contributions to the quality of our lives if it operates according to the standards that *have* ensured its freedom from bias and its unwavering devotion to truth, whatever that truth may be. The threat to faculty of forced disclosure of scholarly communication through PRA/FOIA requests can damage intellectual freedom and interfere with robust scholarly communication. The proper forum for evaluating and vetting academic research is through the time-honored and rigorous process of peer review. The world's academic community, including its faculties and administrative

leaders, must protect itself from these requests if it is to continue to function and contribute *to* society in the highly valuable manner that is has for centuries.

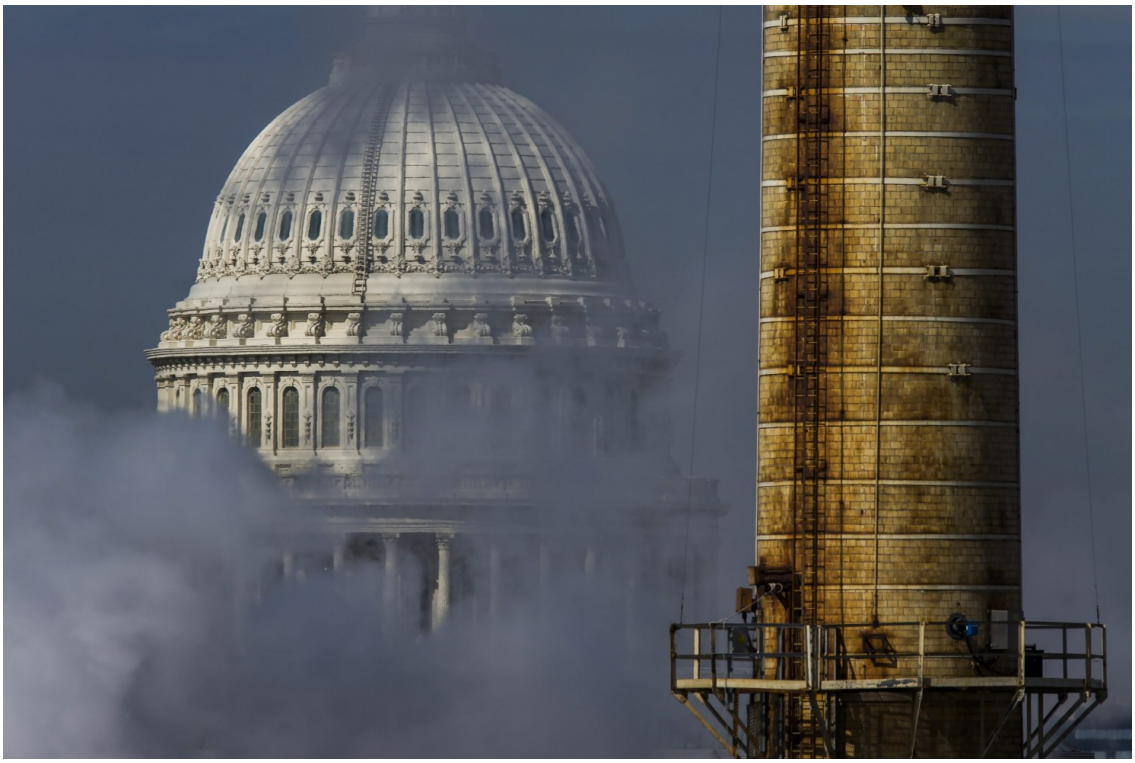
Faculty Guide to Public Records Requests [https://ucla.box.com/apo-public-records-request]

EXHIBIT B

washingtonpost.com
https://www.washingtonpost.com/opinions/the-fossil-fuel-industrys-campaign-to-mislead-the-american-people/2015/05/29/04a2c448-0574-11e5-8bda-c7b4e9a8f7ac_story.html

The fossil-fuel industry's campaign to mislead the American people

By Sheldon Whitehouse May 29, 2015



The dome of the U.S. Capitol is seen behind the emissions, and a smokestack, from the coal-burning Capitol Power Plant, in Washington, D.C., March 10, 2014. (Jim Lo Scalzo/EPA)

Sheldon Whitehouse, a Democrat, represents Rhode Island in the Senate.

Fossil fuel companies and their allies are funding a massive and sophisticated campaign to mislead the American people about the environmental harm caused by carbon pollution.

Their activities are often compared to those of Big Tobacco denying the health dangers of smoking. Big Tobacco's denial scheme was ultimately found by a federal judge to have amounted to a racketeering enterprise.

The Big Tobacco playbook looked something like this: (1) pay scientists to produce studies defending your product; (2) develop an intricate web of PR experts and front groups to spread doubt about the real science; (3) relentlessly attack your opponents.

Thankfully, the government had a playbook, too: the Racketeer Influenced and Corrupt Organizations Act, or RICO. In 1999, the Justice Department filed a civil RICO lawsuit against the major tobacco companies and their associated industry groups, alleging that the companies "engaged in and executed — and continue to engage in and execute — a massive 50-year scheme to defraud the public, including consumers of cigarettes, in violation of RICO."

Tobacco spent millions of dollars and years of litigation fighting the government. But finally, through the discovery process, government lawyers were able to peel back the layers of deceit and denial and see what the tobacco companies really knew all along about cigarettes.

In 2006, Judge Gladys Kessler of the U.S. District Court for the District of Columbia decided that the tobacco companies' fraudulent campaign amounted to a racketeering enterprise. According to the court: "Defendants coordinated significant aspects of their public relations, scientific, legal, and marketing activity in furtherance of a shared objective — to . . . maximize industry profits by preserving and expanding the market for cigarettes through a scheme to deceive the public."

The parallels between what the tobacco industry did and what the fossil fuel industry is doing now are striking.

In the case of fossil fuels, just as with tobacco, the industry joined together in a common enterprise and coordinated strategy. In 1998, the Clinton administration was building support for international climate action under the Kyoto Protocol. The fossil fuel industry, its trade associations and the conservative policy institutes that often do the industry's dirty work met at the Washington office of the American Petroleum Institute. A memo from that meeting that was leaked to the New York Times documented their plans for a multimillion-dollar public relations campaign to undermine climate science and to raise "questions among those (e.g. Congress) who chart the future U.S. course on global climate change."

The shape of the fossil fuel industry's denial operation has been documented by, among others, Drexel University professor Robert Brulle. In a 2013 paper published in the journal Climatic Change, Brulle described a complex network of organizations and funding that appears designed to obscure the fossil fuel industry's fingerprints. To quote directly from Brulle's report, it was "a deliberate and organized effort to misdirect the public discussion and distort the public's understanding of climate." That sounds a lot like Kessler's findings in the tobacco racketeering case.

The coordinated tactics of the climate denial network, Brulle's report states, "span a wide range of activities, including political lobbying, contributions to political candidates, and a large number of communication and media efforts that aim at undermining climate science." Compare that again to the findings in the tobacco case.

The tobacco industry was proved to have conducted research that showed the direct opposite of what the industry stated publicly — namely, that tobacco use had serious health effects. Civil discovery would reveal whether and to what extent the fossil fuel industry has crossed this same line. We do know that it has funded research that — to its benefit — directly contradicts the vast majority of peer-reviewed climate science. One scientist who consistently published papers

downplaying the role of carbon emissions in climate change, Willie Soon, reportedly received more than half of his funding from oil and electric utility interests: more than $1.2 million.

To be clear: I don't know whether the fossil fuel industry and its allies engaged in the same kind of racketeering activity as the tobacco industry. We don't have enough information to make that conclusion. Perhaps it's all smoke and no fire. But there's an awful lot of smoke.

EXHIBIT C

Published on *Competitive Enterprise Institute* (https://cei.org)

RICO 20 Ringleader's Implausible Denial of Intent to Silence Skeptics [1]

Submitted by Marlo Lewis on Tue, 2016-05-17 10:30

After a recent victory in a FOIA lawsuit, *Horner and CEI v. GMU [2],* a Richmond court allowed the Competitive Enterprise Institute to release records on Friday that showed George Mason University's Ed Maibach and Jagadish Shukla, both taxpayer-funded instructors, organized a campaign calling for prosecution of those who disagree with their views on climate policy.

In one of the many documents [2] released, Shukla denies he and his collaborators were attempting to silence dissent on climate change.

Some quick background. Early last September, Shukla, Maibach, and 18 other climate advocates sent a letter [3] to President Obama, Attorney General Lynch, and Office of Science and Technology Policy Director Holdren, urging the administration to launch a "RICO (Racketeer Influenced and Corrupted Organizations Act) investigation of corporations and other organizations that have knowingly deceived the American people about the risks of climate change, as a means to forestall America's response to climate change."

In one of the just-released documents (#000033 [4], dated October 2, 2015), Shukla insists that he and his comrades never asked for a RICO investigation [5] of "contrarian scientists or bloggers" for "expressing their views about climate change." Well, of course they didn't—openly. Only a fool would do that.

However, the RICO investigation they propose would unavoidably extend to people whose only 'crime' is questioning climate orthodoxy.

In the October 2 document, Shukla argues that a RICO investigation would target only "corporations and organizations," not "individuals":

> Our letter never once makes reference to individuals, be they scientists or bloggers, instead suggested an "investigation of corporations and other organizations" such as oil and coal lobby groups. We are not calling for contrarian scientists or bloggers to be investigated for expressing their beliefs about climate change. Freedom of speech and freedom of scientific exploration are critical rights that should always be respected. We wish to apologize to any scientist or blogger who mistakenly concluded that we were calling for an investigation into their activities.

But the RICO20 letter need not mention scientists and bloggers for the proposed investigation to target them. Few contrarians operate as lone wolves. Most work as employees of organizations. In many cases, those are conservative and free-market organizations. Such groups typically pride themselves on not seeking or accepting coerced contributions from taxpayers. So they pursue financial support from private sources, which may include fossil-energy companies. Donors communicate with their recipients. If donors are in the crosshairs of RICO, recipients are bound to become targets as well.

For example, as part of a parallel campaign by 17 state attorneys general [6] to investigate fossil-energy companies for the alleged crime of delaying climate action, U.S. Virgin Islands Attorney General Claude E. Walker on April 7 subpoenaed [7] the Competitive Enterprise Institute, demanding ten years' worth of communications, emails, statements, drafts, and other documents regarding CEI's work on climate change and energy policy, including private donor information.

Walker's full, non-redacted subpoena [8] reveals that the AGs intend to cast a wide net. Walker is demanding that ExxonMobil provide all climate-related documents and communications between the company and more than 100 universities, think tanks, and academics, over a 40-year period. Each named person or entity—and any other contrarian who may have temporarily escaped the AGs' attention—now faces the risk of having to fund a legal defense for having defied the "consensus." How could that prospect not have a chilling effect on speech and association?* The investigation called for by the RICO20 would do so as well.

Shukla's October 2 document continues:

> There is much published credible evidence suggesting that some fossil fuel companies and other organizations broke the law by lying to the public about climate risk. We ask our government to investigate this evidence. Organizations that knowingly mislead the public about a clear and present danger—thereby robbing many innocent people of their lives and livelihoods—should be held accountable for their actions. Our government's investigation into the deadly lies of the tobacco industry provides a clear precedent for this sort of investigation.
>
> In conclusion, we stand by our request that corporations and other organizations that have knowingly deceived the American people about the risk of climate change be investigated to determine if they knowingly deceived the public about climate science. And we wish to be clear that we are not suggesting that scientists or bloggers should be investigated for expressing their beliefs.

That is incoherent. How exactly did ExxonMobil and other fossil energy companies "deceive" the public about climate change risk, according to the RICO 20? In their September 2015 letter to Obama, Lynch, and Holdren, Shukla et al. invoke the 'merchants of doubt' literature as the smoking gun that justifies a federal investigation. According to that literature, fossil energy companies have misled the public chiefly by funding 'climate denial front groups.' In other words, conservative and free-market organizations. Organizations staffed by the contrarian researchers and bloggers Shukla claims the RICO 20 have no interest in investigating.

The RICO 20 campaign is incoherent on a deeper level. Shukla believes the feds should prosecute organizations that "knowingly mislead the public about a clear and present danger—thereby robbing innocent people of their lives and livelihoods." For more than two decades, climate action groups have knowingly misled the public about the perils of putting an energy-starved planet [9] on an energy diet [10].

Globally, poverty remains the leading cause of preventable disease and premature death [11]. A key factor hindering poverty eradication, as well as a major source of indoor air pollution [12], which kills an estimated 3.5 million people per year, is ***energy poverty***. Even today, more than one billion people have no access to electricity and billions more have too little energy to support development [13].

So-called "climate stabilization" targets cannot be met without raising energy prices in industrial countries and restricting access to fossil fuels even—indeed, especially—in developing countries [14], which are experiencing rapid emissions growth as they industrialize. Thus, the climate policies championed by the RICO 20 could rob millions of innocent people of their lives and livelihoods.

As anyone knows who has watched television pharmaceutical ads, all medications have side effects, ranging from dry mouth to suicidal thoughts or actions to increased risk of cancer, heart attack, stroke, and death. Only quacks and snake oil salesmen advertise risk-free remedies. Yet climate physicians like the RICO 20 talk as if governments can wage regulatory warfare on humanity's most affordable and reliable energy sources, and no one could possibly get hurt. That's fraud. Like their professed devotion to freedom of speech.

* Meeting this threat head on, CEI on Monday [15], May 16, petitioned the District of Columbia Superior Court to fine AG Walker for violating the organization's First Amendment rights under the District of Columbia's Anti-SLAPP [16] law, and for attorneys' fees and other sanctions.

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Links
[1] https://cei.org/blog/rico-20-ringleaders-implausible-denial-intent-silence-skeptics
[2] https://cei.org/litigation/horner-and-cei-v-gmu
[3] http://web.archive.org/web/20150920110942/http:/www.iges.org/letter/LetterPresidentAG.pdf
[4] https://cei.org/sites/default/files/GMU%20Bates%20Stamps%201%20-%2059_0.pdf#page=33
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