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WHEN OPEN GOVERNMENT AND ACADEMIC FREEDOM COLLIDE

BY JONATHAN PETERS* AND CHARLES N. DAVIS*

ABSTRACT

Uneasy is the balance between open government and academic freedom. Scholars have argued that using public records laws to obtain their emails is a form of harassment and intimidation. Nonprofits and political parties have argued that the public has a right to know that

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scholars are following university rules and properly using public resources. Against that backdrop, we have explored whether public records laws apply to faculty members and whether an exemption in those laws for academic freedom would be conceptually sound and consistent with other exemptions for communications and work product.

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I. INTRODUCTION

In March 2011, the Republican Party of Wisconsin sent a request under the state’s freedom of information statute to the University of Wisconsin-Madison, asking for the emails of history professor William Cronon.¹ The request was limited to 2011 and targeted his emails that contained terms related to the state’s collective bargaining debate, including “Republican,” “Scott Walker,” “recall,” “collective bargaining,” “rally,” and “union.”²

The state party sent the request after Cronon published a blog post commenting on the role of the American Legislative Exchange

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

2. *Id.*

Council (“ALEC”) in conservative legislative efforts.³ In that post, “Cronon argued from indirect evidence that ALEC had played a major role behind the scenes in Governor Walker’s attack on public employee unions in Wisconsin. He also argued that this sort of political work, though legitimate, should be done in the open.”⁴

Mark Jefferson, executive director of the Republican Party of Wisconsin, refused to tell *The New York Times* why the records request was filed, saying it was inappropriate for Cronon to question his motives.⁵ “Like anyone else filing a public records request,” Jefferson said, “I don’t have to give a reason.”⁶ On one level, the request appeared to be an attempt by the state Republican party to determine if Cronon used his public email account improperly, “for partisan political purposes.”⁷ (He denied doing so and asked the party to withdraw its request.⁸) On another level, the request appeared to be an attempt to intimidate Cronon and an infringement of his academic freedom.⁹

Cronon himself wrote in a blog post that the request amounted to an “attack” on academic freedom.¹⁰ The American Historical Association

3. Rachel Levinson-Waldman, *Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship*, AM. CONSTITUTION SOC’Y, 3 (Sept. 2011), available at http://www.acslaw.org/sites/default/files/Levinson_-_ACS_FOIA_First_Amdmt_Issue_Brief_1.pdf; see also William Cronon, *Who’s Really Behind Recent Republican Legislation in Wisconsin and Elsewhere? (Hint: It Didn’t Start Here)*, SCHOLAR AS CITIZEN (Mar. 15, 2011), <http://scholarcitizen.williamcronon.net/2011/03/15/alec/>.

4. Anthony Grafton, *Wisconsin: The Cronon Affair*, NEW YORKER NEWS DESK (Mar. 28, 2011), <http://www.newyorker.com/online/blogs/newsdesk/2011/03/wisconsin-the-cronon-affair.html>. A few days later, Cronon published this op-ed in the *The New York Times*, criticizing Governor Scott Walker. See William Cronon, Op-Ed., *Wisconsin’s Radical Break*, N.Y. TIMES, Mar. 22, 2011, at A27, available at http://www.nytimes.com/2011/03/22/opinion/22cronon.html?_r=0.

5. A.G. Sulzberger, *Wisconsin Professor’s E-Mails Are Target of G.O.P. Records Request*, N.Y. TIMES (Mar. 26, 2011), <http://www.nytimes.com/2011/03/26/us/politics/26professor.html>.

6. *Id.*

7. Phil Brinkman, *Why Request for Bill Cronon’s Email Isn’t News*, WIS. ST. J. (March 30, 2011, 5:30 AM), http://host.madison.com/news/opinion/column/phil-brinkman-why-request-for-bill-cronon-s-email-isn/article_ddcb5d49-f3c6-548e-933a-5ffb41b90d3d.html.

8. *Id.*

9. *Id.*

10. Cronon, *supra* note 1.

said in a statement that fulfilling the request would “discourage other historians (and scholars in other disciplines) employed by public institutions from speaking out as citizen-scholars.”¹¹ The organization called on “public-spirited individuals and organizations to join us in denouncing this assault on academic freedom.”¹² The American Association of University Professors wrote in a letter that disclosing Cronon’s emails would “produce a chilling effect not only on... Cronon’s academic freedom but also on the academic freedom of his faculty colleagues and of faculty members throughout the University of Wisconsin system.”¹³ Finally, *The New York Times* wrote in an editorial that the “latest technique used by conservatives to silence liberal academics is to demand copies of e-mails and other documents” and that those “demands not only abuse academic freedom, but make the instigators look like petty and medieval inquisitors.”¹⁴

On April 1, 2011, John Dowling, senior legal counsel for the University of Wisconsin-Madison, responded to the request filed by the Republican Party of Wisconsin.¹⁵ Dowling wrote in a letter that the university was releasing some emails but withholding others related to current and prospective students, to personnel matters, and to professional organizations.¹⁶ Statutory exemptions applied to the students and personnel matters, and for the professional organizations, Dowling wrote, the university applied a common-law balancing test before concluding that “the public interest in such communications is

11. Robert B. Townsend, *AHA Deplores Effort to Intimidate William Cronon*, AHA TODAY (Mar. 27, 2011), <http://blog.historians.org/2011/03/aha-council-deplores-recent-intimidation-efforts-aimed-at-cronon/>.

12. *Id.*

13. Gregory F. Scoltz, *Letter from Gregory F. Scoltz, Associate Director and Secretary, Department of Academic Freedom, Tenure, and Governance, American Association of University Professors, to Doctor Carolyn A. (Biddy) Martin, Chancellor, UNIV. OF WIS.*, (Mar. 28, 2011), available at <http://www.aaup.org/NR/rdonlyres/CCED586E-3430-4865-B578-01D8584127B4/0/BiddyMartin.pdf>.

14. Editorial, *A Shabby Crusade in Wisconsin*, N.Y. TIMES, Mar. 25, 2011, at A26, available at http://www.nytimes.com/2011/03/28/opinion/28mon3.html?_r=0.

15. Grafton, *supra* note 4.

16. John C. Dowling, *Letter from John C. Dowling, Senior University Legal Counsel, University of Wisconsin-Madison, to Stephan Thompson, REPUBLICAN PARTY OF WIS.* (Apr. 1, 2011), available at <http://www.news.wisc.edu/19196>.

outweighed by other public interests favoring protection of such communications.”¹⁷

Similarly, the university withheld all “intellectual communications among scholars.”¹⁸ Dowling reasoned that scholars needed to exchange and develop their ideas “without fear of reprisal for controversial findings and without the premature disclosure of those ideas.”¹⁹ For that reason, after applying the same common-law balancing test, Dowling concluded that “the public interest in intellectual communications among scholars... is outweighed by other public interests favoring protection of such communications.”²⁰

Accompanying the Dowling letter was a statement from Biddy Martin, then chancellor of the University of Wisconsin-Madison.²¹ She called Cronon “one of the university’s most celebrated and respected scholars, teachers, mentors and citizens,” and she explained the contours and importance of academic freedom:

[It] is the freedom to pursue knowledge and develop lines of argument without fear of reprisal for controversial findings and without the premature disclosure of those ideas.... 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.... When faculty members use email or any other medium to develop and share their thoughts with one another, they must be able to assume a right to the privacy of those exchanges, barring violations of state law or university policy. Having every exchange of ideas subject to public exposure puts

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Biddy Martin, Chancellor, *Chancellor’s Message on Academic Freedom and Open Records*, UNIV. OF WISCONSIN-MADISON NEWS (Apr. 1, 2011), available at <http://www.news.wisc.edu/19190>.

academic freedom in peril and threatens the processes by which knowledge is created.²²

On April 4, 2011, the university's faculty senate passed a resolution calling on the university to protect its "atmosphere of free inquiry and expression and to defend faculty and staff from harassment in the form of open records requests."²³ The resolution argued that "open records laws are abused when they become partisan tools, which come from both sides of the political aisle—posing a threat to academic freedom."²⁴

Howard Schweber, a political scientist at the University of Wisconsin-Madison, had this to say about the resolution:

The university can't change the law, but [it] can take a leading position on behalf of public employees everywhere and make a statement that we think this is wrong.... What was begun as a classic notion of sunshine being the best disinfectant has turned into a law that's used as a weapon to target not government officials and offices but individual public employees.²⁵

For its part, the state Republican Party did not appeal the university's decision to withhold certain emails,²⁶ and it appears the party did not produce a report about the contents of the emails released.²⁷

Notably, the Cronon case is just one raising these issues, an exemplar at the intersection of freedom of information and academic freedom. Two other such cases made headlines recently. First, in January 2011, the American Tradition Institute ("ATI") sued the University of Virginia²⁸ under the state's Freedom of Information Act,²⁹ claiming the

22. *Id.*

23. Stacy Forster, *Faculty Senate Approves Resolution Protecting Academic Freedom*, UNIV. OF WISCONSIN-MADISON NEWS (Apr. 5, 2011), <http://www.news.wisc.edu/19210>.

24. *Id.*

25. *Id.* (Quoting Schweber).

26. Levinson-Waldman, *supra* note 3, at 4.

27. We are unaware of any such reports as of this writing.

28. In a separate but related case, in April 2010, Virginia Attorney General Kenneth Cuccinelli issued two Civil Investigative Demands (CIDs) to the University of Virginia, pursuant to the state Fraud Against Taxpayers Act (FATA). The CIDs

Act required the university to release records related to the research of climate scientist Michael Mann, a professor there from 1999–2005.³⁰ The records included emails he had exchanged with other scientists.³¹ Mann said ATI targeted him because ATI disagreed with his scientific conclusions.³² But David Schnare, director of the Environmental Law Institute at ATI, had a different take: “The public has a right to see that these professors are following their own university’s rules.... This is about the balance between the public’s right to know... and the university’s need to protect academic freedom.”³³

After months of negotiations and court involvement, the University of Virginia released nearly 1,800 emails to ATI, withholding 12,000 more.³⁴ The university claimed that some were not public records and that others were exempted from disclosure.³⁵ ATI challenged those

sought information related to Mann’s research as part of an investigation into the grants Mann received while employed by the University of Virginia. Ultimately, the Virginia Supreme Court set aside the CIDs, holding that “the University of Virginia, as an agency of the Commonwealth, does not constitute a ‘person’ under the Fraud Against Taxpayers Act and therefore cannot be the proper subject of a CID.” *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 722 S.E.2d 626, 633 (Va. 2012).

29. *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, No. CL11003236-00, 2011 WL 9150896 (Va. Cir. Ct. June 15, 2011).

30. Memorandum of Law in Support of Intervenor-Respondent Michael Mann’s Motion for Leave to Intervene at 11, *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, No. CL11003236-00, 2011 WL 9150896 (Va. Cir. Ct. June 15, 2011), available at <http://www.atinstitute.org/wp-content/uploads/2011/09/9-2-11-memo-of-law-interve-pt-1.pdf>.

31. Levinson-Waldman, *supra* note 3, at 2.

32. See Rosalind Helderman, *Judge Quashes Cuccinelli Subpoena of U-Va. Records*, WASH. POST (Aug. 30, 2010, 12:46 PM), http://voices.washingtonpost.com/virginiapolitics/2010/08/judge_quashes_cuccinelli_subpo.html.

33. Tom Jackman, *Prince William Hosts Important Global Warming Case*, STATE OF NOVA (Nov. 2, 2011, 10:19 AM), http://www.washingtonpost.com/blogs/the-state-of-nova/post/prince-william-hosts-important-global-warming-case/2011/11/01/gIQA6TcfM_blog.html.

34. Tom Jackman, *Prince William Climate Change Case Takes Center Stage*, STATE OF NOVA (Mar. 21, 2012, 1:45 AM), http://www.washingtonpost.com/blogs/the-state-of-nova/post/pwm-climate-change-case-takes-center-stage/2012/03/19/gIQA1vLGQS_blog.html.

35. *Id.*

exemption claims,³⁶ and Mann, no longer at the University of Virginia, hired a lawyer to intervene in the case to protect his interests.³⁷

In his motion to intervene,³⁸ Mann argued that his “First Amendment constitutional right to academic freedom is at severe risk,”³⁹ citing *Sweezy v. New Hampshire*,⁴⁰ which said: “To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”⁴¹ ATI responded by driving a wedge between Mann and the University of Virginia, reasoning that any right of academic freedom belonged to the university, not to Mann.⁴² However, neither Mann’s nor ATI’s motion really addressed the merits of academic freedom or its relationship with freedom of information.⁴³

For three years, the case has worked its way through the Virginia courts. In September 2012, a judge in Prince William County Circuit Court ruled⁴⁴ that Mann’s correspondence qualified as public records

36. *Id.*

37. *Press Release, ATI Welcomes Michael Mann to the Case*, AM. TRADITION INST. (Nov. 2, 2011), available at <http://webcache.googleusercontent.com/search?q=cache:JYOSrxO5soMJ:www.atinstitute.org/press-release-ati-welcomes-michael-mann-to-the-case/+&ccd=1&hl=en&ct=clnk&gl=us>.

38. Memorandum of Law in Support of Intervenor-Respondent Michael Mann’s Motion for Leave to Intervene, *supra* note 30.

39. *Id.* at 5.

40. 354 U.S. 234 (1957).

41. Memorandum of Law in Support of Intervenor-Respondent Michael Mann’s Motion for Leave to Intervene, *supra* note 30, at 5 (quoting *Sweezy*, 354 U.S. at 250).

42. Transcript of Hearing at 88:22–89:21, *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, No. CL11003236-00, 2011 WL 9150896 (Va. Cir. Ct. June 15, 2012), available at <http://www.atinstitute.org/wp-content/uploads/2012/05/2012-04-16-Hearing-Transcript-full.pdf>.

43. ATI’s motion was strategic and designed to show that any First Amendment argument from Mann was not properly before the court. The motion was not designed, then, to address the merits of any First Amendment argument from Mann, even though ATI acknowledges that the University of Virginia, rather than Mann, might “own” a First Amendment right of academic freedom in the case.

44. Tom Jackman, *U.Va. Wins Key Ruling in Prince William Global Warming-FOIA Case Involving Michael Mann*, STATE OF NOVA (Sept. 18, 2012, 12:52 AM), http://www.washingtonpost.com/blogs/the-state-of-nova/post/uva-wins-key-ruling-in-prince-william-global-warming-foia-case-involving-michael-mann/2012/09/18/6c422d98-0133-11e2-b257-e1c2b3548a4a_blog.html.

under the state Freedom of Information Act, but he also ruled that the correspondence was covered by the Act's exemption for:

[d]ata, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education... in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues... where such data, records or information has not been publicly released, published, copyrighted or patented.⁴⁵ Most recently, in September 2013, the Virginia Supreme Court agreed to review the case to determine the scope of that exemption.⁴⁶ The high court has not set a hearing date, but it is likely to be in early 2014.⁴⁷

In a third case, in March 2011, the Mackinac Center, a libertarian think tank in Michigan, sent records requests to the labor studies departments at the University of Michigan, Michigan State University, and Wayne State University.⁴⁸ The center said it filed those requests because pro-labor resources on the departments' websites suggested that faculty members might have used university resources for partisan political purposes, in violation of the law.⁴⁹ Notably, the requests focused on the collective-bargaining debate in Wisconsin, not Michigan, and they demanded all emails containing the words "Scott Walker," "Wisconsin," "Madison," or "Maddow," as well as "any other e-mails dealing with the collective-bargaining situation in Wisconsin."⁵⁰ By pursuing the FOIA

45. VA. CODE ANN. § 2.2-3705.4(4) (2011).

46. Bryan McKenzie, *Climate Data Case in State Supreme Court May Affect FOIA*, DAILY PROGRESS (Sept. 27, 2013), http://www.dailyprogress.com/news/climate-data-case-in-state-supreme-court-may-affect-foia/article_32b45566-27f1-11e3-a525-0019bb30f31a.html.

47. *Id.*

48. Michele Narov, *Michigan Mackinac Center for Public Policy Requests Labor Studies E-mails*, MICH. DAILY (Mar. 30, 2011), <http://www.michigandaily.com/news/foias-raise-concerns-u-msu-wsu?page=0,0>.

49. Ken Braun, *The Public Purpose of Our 'Professors' Email' FOIA Request*, THE MACKINAC CTR. FOR PUB. POLICY (Apr. 4, 2011), <http://www.mackinac.org/14863>.

50. Peter Schmidt, *Michigan Think Tank Asks 3 Universities for Labor Professors' E-Mails*, CHRON. OF HIGHER EDUC. (Mar. 29, 2011), <http://chronicle>

request, Ken Braun, managing editor of the Mackinac Center's online news site, said:

We were not engaging in an activity different from other FOIA requests. We routinely ask for a variety of public documents, including financial reports, salary data and union contracts.... This has always been done with a desire to increase the public's understanding of why government adopts certain policies or spends money in certain ways.⁵¹

The conflict between academic freedom and access to governmental information has grown so pronounced that it inspired legislative relief in one U.S. state.⁵² In February 2012, a Maryland state representative introduced a bill to shield professors at public universities from records requests.⁵³ Sandy Rosenberg, a Democrat, introduced the bill after learning about the Wisconsin case.⁵⁴

The bill's purpose was to protect academic freedom and professors from "requests that appear very political in nature," and it would have "broadened the categories of information that universities could deny in response to requests under the state's Public Information Act."⁵⁵ However, Rosenberg withdrew the bill in March 2012, saying it was unnecessary and that current law protected academics from requests designed to harass them.⁵⁶ The Maryland-Delaware-District of Columbia Press Association opposed the bill and hailed as "good news" Rosenberg's decision to withdraw it.⁵⁷

.com/article/Michigan-Think-Tank-Asks-3/126922/.

51. Braun, *supra* note 49.

52. Childs Walker, *Bill Would Limit Public Information Requests of Professors*, BALT. SUN (Feb. 4, 2012), http://articles.baltimoresun.com/2012-02-04/news/bs-md-universities-public-information-20120202_1_public-information-requests-public-information-act-academic-freedom.

53. *Id.*

54. Michael Dresser, *Bill to Shield Professors from Public Records Requests Is Withdrawn*, BALT. SUN (Mar. 8, 2012), http://articles.baltimoresun.com/2012-03-08/news/bs-md-university-information-20120308_1_professors-original-bill-academics.

55. *Id.*

56. *Id.*

57. *Id.*

As illustrated by these timely examples, the underlying issues are varied and difficult. And they have pitted against one another a variety of groups and constituencies whose interests are normally compatible: university administrators, faculty members, journalists, advocates of academic freedom, and advocates of open government. The overarching question that has galvanized them: How should an interest in open government be balanced with an interest in academic freedom? That is the question at the heart of this article, and to answer it requires us first to answer a few sub-questions.

First, does the motive matter? Some have argued that using public records laws to obtain a professor's emails is tantamount to harassment and intimidation, and that the requests are mere fishing expeditions, whose purpose is to dig up dirt on good and decent people.⁵⁸ We argue that the motive does not matter, because the government cannot be in the position to decide which request is a good one and which request is a bad one.⁵⁹ Courts have long held that the purpose of a request is not germane to the inquiry; if information satisfies the state's definition of a public record and meets no legal exemption from disclosure, then the information is disclosable.

Second, are academics at public universities considered "covered persons" under public records laws? It is conceivable that some would argue that such laws are supposed to apply to public officials, not to professors who merely draw a public paycheck. We reject that idea—that only public officials are "covered persons" under public records laws.⁶⁰ We argue that such laws provide access to the records of any government employee who merits scrutiny, regardless of the employee's responsibilities or place on the organizational chart. We also argue that such a policy is wise because it serves as a prophylactic: It prevents

58. See, e.g., Anthony Grafton, *Academic Freedom After the Cronon Controversy*, N.Y. REV. OF BOOKS (Apr. 4, 2011, 10:15 AM), http://www.nybooks.com/blogs/nyrblog/2011/apr/04/academic-freedom-cronon-affair/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+nybooks+%28The+New+York+Review+of+Books%29 (arguing that the Republican Party of Wisconsin's request for William Cronon's emails was a "challenge to academic freedom").

59. See *infra* Part II.

60. See *infra* Part III.

executive-level employees from housing (and thus immunizing from disclosure) any records with exempt employees.

Third, should an exemption for academic freedom or scholarly communications be included in state FOIA statutes? Some have argued that using public records laws to obtain a professor's emails would create a chilling effect, one that would interfere with the free flow of ideas among scholars, discouraging them from speaking candidly with their colleagues and from speaking out in blogs, op-eds, books, and so on.⁶¹ We do not argue normatively that granting Freedom of Information exemptions for academic freedom and scholarly communications is desirable from a policy standpoint. Rather, we simply conclude that granting FOI exemptions for academic freedom and scholarly communications would be conceptually sound and consistent with other exemptions available under existing FOI laws.

II. DOES THE MOTIVE FOR THE REQUEST MATTER?

Attempting to protect faculty from information requests targeting research or other scholarly activity in a categorical fashion offends a central precept of freedom of information law: that the purpose or intent of a request generally is not germane to the analysis.⁶² Freedom of information laws broadly hold that if the information sought satisfies the law's definition of a public record and meets no legal exemption from disclosure, the records are disclosable.⁶³

61. See, e.g., Levinson-Waldman, *supra* note 3.

62. See *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (holding that a government agency generally may not consider the purpose of a records request when deciding whether to disclose records); see, e.g., KENT R. MIDDLETON & WILLIAM E. LEE, *THE LAW OF PUBLIC COMMUNICATION* 584-85 (8th ed. 2012) ("A requester does not have to justify a request or explain why disclosure might be in the public interest. If release of records depended on an official's definition of the 'public interest,' agency personnel could withhold documents because they disapproved how the information might be used.").

63. See DON R. PEMBER & CLAY CALVERT, *MASS MEDIA LAW* 327 (17th ed. 2011) ("One can write an open-records law in two basic ways. The first way is to declare that the following kinds of records are to be accessible for public inspection and then list the kinds of records that are open. The second way is to proclaim that all government records are open for public inspection except the following kinds of records and then list the exceptions. Congress approved the second kind of law as

For example, in a case that typifies how the vast majority of state courts have addressed the issue of motive, the Connecticut Supreme Court held that whether records are disclosable under FOIA “does not depend in any way on the status or motive of the applicant for disclosure, because the act vindicates the public’s right to know, rather than the rights of any individual.”⁶⁴ And many state laws hold plainly that custodians of records may not inquire about the purpose of a request.⁶⁵ Others allow inquiry only into whether a requester represents a commercial interest, thus triggering higher reproduction fees,⁶⁶ but neither the federal act nor any state laws allow broad-based inquiry into the intent behind a request.⁶⁷

The reason for these principles is straightforward and illustrates a paradox where academic freedom is concerned: If record custodians could inquire about a requester’s motives, it would create the potential for retaliation and intimidation, particularly for requesters of politically sensitive information.⁶⁸ Imagine an investigative reporter and a good-government group responding truthfully to questions about the reasons they requested a record (e.g., to investigate whether a government agent has abused his power). The potential for political gamesmanship is simply too great to ignore.

The requester’s motive, then, must not play a meaningful role in determining access to information, according to the prevailing principles

the FOIA.”). W. WAT HOPKINS, *COMMUNICATION AND THE LAW* 390 (2009 ed.) (“The nuts and bolts of state right-to-know laws share similarities. They generally declare that all records and meetings are open to the public unless exemptions apply.”).

64. *Chief of Police v. FOIC*, 746 A.2d 1264, 1270 (Conn. 2000); *see also Groton Police Dept. v. FOIC*, 931 A.2d 989 (Conn. App. 2007) (holding that disclosure does not depend on status or motive of person requesting record).

65. For example, Idaho prohibits public agencies from asking a person why he or she wants access to a public record, except “[t]o verify the identity of the requester,” *IDAHO CODE ANN.* § 9-338(5)(a) (2012), or “[t]o ensure that the requested record or information will not be used for purposes of a mailing or telephone list prohibited by section 9-348, Idaho Code, or as otherwise provided by law.” *Id.* at § 9-338(5)(b).

66. *See KY. REV. STAT.* § 61.874(4)(b) (West 2012).

67. *See Reporters Comm. for Freedom of the Press*; MIDDLETON & LEE, *supra* note 62.

68. MIDDLETON & LEE, *supra* note 62.

of access law.⁶⁹ This may exacerbate the problems associated with requests that implicate academic freedom because such requests tend to be problematic singularly because of the motive underlying the requests. But not all requests made of faculty raise the issue of academic freedom (only those with the motive to intimidate raise that issue), and to adopt a rule that creates a motive inquiry would be untenable as a practical matter and inconsistent with one of the purposes of FOI laws: to “vindicate[] the public’s right to know.”⁷⁰

III. ARE FACULTY MEMBERS COVERED PERSONS UNDER FREEDOM OF INFORMATION LAWS?

Central to determining whether a record meets the various legal definitions of a public record is the question of whether the subject of a request is a covered person or agency under the law.⁷¹ Taxpayer-funded public universities routinely are held to be covered,⁷² and they routinely respond to requests for information under state freedom of information statutes.⁷³ In most instances, those statutes include faculty members within the definition of “covered person.”⁷⁴

69. See *supra* note 64 and accompanying text.

70. *Chief of Police v. FOIC*, 746 A.2d 1264, 1270 (Conn. 2000).

71. See DAVID CUILIER & CHARLES N. DAVIS, *THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS* 42–43 (2011) (It is important to “[k]now who is covered by the law. The federal Freedom of Information Act states that it covers every ‘agency,’ ‘department,’ ‘regulatory commission,’ ‘government controlled corporation’ and ‘other establishment’ in the executive branch of the federal government At the state and local level, the state public records law typically will apply to executive agencies (the state transportation department, the health department, state police, etc.) and local governments, such as cities, counties, school districts and even mosquito control districts.”).

72. See, e.g., *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 884 P.2d 592 (Wash. 1994); *State Univ. v. Sup. Ct.*, 108 Cal. Rptr. 2d 870 (Cal. Dist. Ct. App. 2001); *Red & Black Publ’g Co. v. Bd. of Regents*, 427 S.E.2d 257 (Ga. 1993); *Kestenbaum v. Mich. State Univ.*, 327 N.W.2d 783 (Mich. 1982); *Ind. Newspapers v. Ind. Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2003); *Lieber v. Bd. of Trustees of S. Ill.*, 680 N.E.2d 374 (Ill. 1997).

73. See, e.g., *OSU Public Records Policy*, OHIO STATE UNIVERSITY, available at <http://legal.osu.edu/publicrecords.php> (“The Ohio State University is a public institution subject to Ohio’s Public Records Statute and therefore it is Ohio law that applies to requests for our public records. While Ohio law does not state when

Colorado's public records statute is typical: it defines "public records" as those "made, maintained, or kept by the state, any agency, institution, [or] a nonprofit corporation...."⁷⁵ The broad scope of this definition includes all agencies of the executive branch and all legislative bodies.⁷⁶ Like many freedom of information laws, Colorado's explicitly includes colleges and universities by stating that the Act applies to every state institution of higher education and the respective governing boards.⁷⁷ In addition, the University of Colorado and its regents are specifically included as a state "institution" to which the Act applies.⁷⁸

records are to be provided, the statute requires that we provide copies of existing records that are requested with reasonable specificity, within a reasonable period of time."); *Public Records Requests*, UNIVERSITY OF FLORIDA, available at <http://www.ufl.edu/media-relations/public-records-requests/> ("As a state agency, the University of Florida is required to provide public records in accordance with Chapter 119 of the Florida Statutes."); *Office of Public Records*, UNIVERSITY OF OREGON, available at <http://publicrecords.uoregon.edu/> ("The University of Oregon's Office of Public Records, which was established in July 2010, responds to requests from members of the public for university records."); *Welcome*, UNIVERSITY OF IOWA, available at <https://publicrecords.uiowa.edu/> ("In its statement of core values, The University of Iowa 'recognizes its accountability to the people of Iowa and the need to exercise responsible stewardship over the intellectual and material resources entrusted to it.' That obligation is also codified in state law. As a public university, the UI and its employees are subject the Iowa Public Records Law, Chapter 22 of the Iowa Code, which establishes that most documents or records held by governmental agencies are public and subject to disclosure.").

74. See, e.g., *What Is the Definition of a Public Record?*, THE UNIVERSITY OF IOWA, available at <https://publicrecords.uiowa.edu/what-definition-public-record>. The Iowa Code defines public records as "all records, documents, tape, or other information stored or preserved in any medium" that belong to a governmental body, as well as "investment policies, instructions, trading orders, or contracts, whether in the custody of the public body responsible for the public funds or a fiduciary or other third party." IOWA CODE ANN. § 22.1(3)(a)-(b) (West 2013). "Practically speaking, this definition covers . . . e-mails, text messages and voice messages left on UI telephones or on telephones used by employees to conduct university business. *Id.*

75. COLO. REV. STAT. § 24-72-202(6)(a)(1) (2012).

76. See, e.g., *Colorado Open Records Act - "CORA,"* OFFICE OF LEGISLATIVE LEGAL SERVICES, COLORADO FREEDOM OF INFORMATION COALITION, available at http://coloradofaic.org/files/2013/09/CORA_OLLS.pdf ("The definition of 'public records' found in CORA is quite expansive and applies to virtually all levels and types of governments in Colorado, except for the federal government.").

77. COLO. REV. STAT. § 24-72-202(1.5) (2012).

78. *Id.*

Similarly, the Missouri Sunshine Law applies to “public governmental bodies” and “quasi-public governmental bodies.”⁷⁹ The definition of “public governmental bodies” includes the traditional branches of state government, as well as The Curators of the University of Missouri and other governing bodies of any institution of higher learning that is supported in whole or in part by state funds.⁸⁰

Meanwhile, Minnesota’s statute defines a “State agency” as “the state, the University of Minnesota, and any office, officer, department, division, bureau, board, commission, authority, district or agency of the state.”⁸¹ A few years ago, the University of Minnesota attempted to shield the names of finalists for the position of university president, arguing that the university’s unusual position in the Minnesota Constitution put decisions by the Board of Regents beyond the Data Practices Act.⁸² The Minnesota Supreme Court rejected that argument.⁸³

Even in statutes that are silent on higher education institutions, statutory design clearly enumerates the broadest possible coverage, and faculty of public universities fall squarely within the scope of those laws. West Virginia, for example, declares that its freedom of information statute applies to all “public bodies,” and it defines that term in the broadest possible way:

[E]very state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other body which is created by state or local authority or which is primarily funded by the state or local authority.⁸⁴

The inclusive nature of state access laws, whether universities and faculty are covered explicitly or implicitly, is good policy. First,

79. MO. REV. STAT. § 610.010(2) (2012).

80. *Id.* at § 610.010(4)(a).

81. MINN. STAT. § 13.02, subd. 17 (2011).

82. *Star Tribune Co. v. Minn. Bd. of Regents*, 683 N.W.2d 274, 283 (Minn. 2004).

83. *Id.*

84. W. VA. CODE § 29B-1-2(3) (2011).

inclusiveness in general prevents covered employees from housing records with exempt employees and thus immunizing them from disclosure. Second, one theory underlying freedom of information is that government employees ought to be scrutinized so members of the public can hold them accountable for their actions.⁸⁵ The accountability theory applies most forcefully in the context of elected officials.⁸⁶ However, the theory is not limited to that context. The public can benefit from the scrutiny of government employees who are not elected—employees whose work is supported wholly or partly by state funds, regardless of the employees' place on the organizational chart.⁸⁷

85. HOPKINS, *supra* note 63, at 375 (“From the earliest days of the United States, elected officials, journalists, scholars, attorneys, judges and other citizens have recognized that speech about government is more credible when it is based on information. That information must come, in large part, from the government’s own meetings and records. James Madison observed, for example: ‘Nothing could be more irrational than to give people power, and to withhold from them information with which power is abused. A people who mean to be their own governors must arm themselves with power which knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both.’”).

86. *See id.*

87. For example, some have used state public records laws to obtain faculty evaluation information, which can be used to investigate the effectiveness of a university’s faculty and to expose any abuses in promotion processes. The public records law, or a court’s interpretation of it, expressly allows such disclosure in Colorado, New York, North Dakota, and Ohio. *See* COLO. REV. STAT. § 24-72-202(4.5) (2011); *Denver Post v. Univ. of Col.*, 739 P.2d 874 (Colo. App. 1987); *Blecher v. Bd. of Educ.*, N.Y.L.J., Oct. 25, 1979 (Sup. Ct. Kings Co. 1979); *Anonymous v. Bd. of Educ. for Mexico Central*, 616 N.Y.S.2d 867 (Sup. Ct. Oswego Co. 1994); *Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189 (N.D. 1988); *State ex rel. James v. Ohio State Univ.*, 637 N.E.2d 911 (Ohio 1994); *Dove v. Allen Co. Educ. Serv. Ctr.*, 691 N.E.2d 1127 (Ohio Ct. App. 1997). It is not, however, a universally protected right of access. Statutes or courts in Connecticut, Kansas, Louisiana, Massachusetts, Missouri, and Rhode Island allow government officials to keep some evaluation information private. *See, e.g.*, CONN. GEN. STAT. § 10-151(c) (2013); KAN. STAT. ANN. § 45-221(a)(4) (2013); *La. Atty Gen. Op.* 85-724 (1985); *Trahan v. Larivee*, 365 So.2d 294 (La. App. 3rd Cir. 1978), *cert. denied*, 366 So.2d 564 (La. 1979).

IV. SHOULD ACADEMIC FREEDOM EXEMPTIONS BE INCLUDED IN FREEDOM OF INFORMATION STATUTES?

For legal and policy reasons, we have concluded that a requester's motive does not matter and that generally academics at public universities are considered "covered persons" under public records laws. Here, we do not argue normatively that granting FOI exemptions for academic freedom and scholarly communications is desirable from a policy standpoint. Rather, we simply conclude that granting FOI exemptions for academic freedom and scholarly communications would be conceptually sound and consistent with other exemptions available under existing FOI laws.

The FOIA requests in Virginia, Wisconsin, and Michigan generated much discussion about faculty members that focused on their communications, work product, and chilling effects. Paul Krugman wrote in *The New York Times* that "there's a clear chilling effect when scholars know that they may face witch hunts whenever they say things the G.O.P. doesn't like."⁸⁸ He went on to summarize the problem this way: "What's at stake here... is whether we're going to have an open national discourse in which scholars feel free to go wherever the evidence takes them, and to contribute to public understanding."⁸⁹ Similarly, a *Washington Post* editorial argued:

[F]reedom-of-information requests can... be used... to intimidate political adversaries and chill free speech. That risk is especially high with... requests involving professors at public universities. By dint of their employment, these scholars are subject to open-government laws. By virtue of their educational roles, such requests can pose a particular threat to academic freedom.⁹⁰

88. Paul Krugman, Op-Ed, *American Thought Police*, N.Y. TIMES, Mar. 27, 2011, at A27, available at <http://www.nytimes.com/2011/03/28/opinion/28krugman.html>.

89. *Id.*

90. Opinion, *Using Open-Records Laws to Harass Scholars*, WASH. POST (Apr. 3, 2011), http://www.washingtonpost.com/opinions/using-open-records-laws-toharasscho%20lars/2011/04/01/AFLInHXC_story.html.

In general, the worry is that FOI requests will chill speech among academics and discourage them from participating in public debates about important issues. They will not feel free, for example, to contact a colleague by email to discuss preliminary data analysis or to blog about their work. The loss accrues to both the scholar personally and to the marketplace of ideas, which is deprived of a learned voice. For these reasons, some have concluded that it is “especially critical to identify mechanisms” to protect academic communications and work product, “either via explicit exemptions or by a balancing approach that takes into account the value of academic collaboration.”⁹¹

But there are other worries: that an exemption protecting academic freedom would lack the legislative precision needed to ensure that the exemption does not become a catch-all for any academic communication whatsoever. FOI exemptions can cover records never intended to be closed by lawmakers,⁹² and judicial expansion of an academic exemption is a real threat.⁹³ Then there is the risk of university administrators claiming the exemption for themselves to protect records never intended to be closed. This section of the paper explores those ideas. The starting point is a general discussion of the contours of academic freedom.

A. Academic Freedom

Academic freedom as a concept is difficult to define. As one commentator noted, “Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does

91. Levinson-Waldman, *supra* note 3, at 8.

92. See CUILIER & DAVIS, *supra* note 71, at 44 (“Agencies make exemption claims unsupported by the law all the time. They bend and twist exemptions to suit their needs, and they bet the house you’ll take the denial, sigh and walk away.”).

93. See PEMBER & CALVERT, *supra* note 63, at 322 (“The usefulness of any freedom of information act depends in no small part on the way the government chooses to interpret and apply it.”); CUILIER & DAVIS, *supra* note 71, at 43 (“The federal FOIA has just nine exemptions, but over the years court rulings on them have generated a nine-inch-thick digest called ‘Litigation under the Federal Freedom of Information Act’ Check out the U.S. Department of Justice’s ‘Freedom of Information Act Guide,’ which encompasses 1,135 pages to explain all the ways to use exemptions for keeping federal records secret.”).

barnacles.”⁹⁴ And yet the Supreme Court, along with the lower courts, has hailed the importance of academic freedom. In *Regents of University of California v. Bakke*,⁹⁵ the Court observed, “Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”⁹⁶ Likewise, in *Sweezy v. New Hampshire*, the Court discussed the foundational importance of academic freedom both at institutions of higher learning and in society:

The essentiality of freedom in the community of American universities is almost self-evident.... 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.⁹⁷

Other cases have reiterated those points, making it clear that the Supreme Court values academic freedom. The majority in *Keyishian v. Board of Regents*⁹⁸ ruled that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”⁹⁹ And the majority in *Rust v. Sullivan*¹⁰⁰ noted that “the university is a traditional sphere of free expression so fundamental to the functioning of our society.”¹⁰¹

To the extent academic freedom has been defined for constitutional purposes, it has come to represent the “four essential freedoms” of a university: “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may

94. J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251, 253 (1989).

95. 438 U.S. 265 (1978).

96. *Id.* at 312.

97. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

98. 385 U.S. 589 (1967).

99. *Id.* at 603.

100. 500 U.S. 173 (1991).

101. *Id.* at 200.

be admitted to study.”¹⁰² Similarly, one commentator concluded that the “First Amendment protects the central intellectual efforts of the modern university. These efforts include teaching, scholarship, and experimentation, all of which contribute unique cultural and intellectual values to a free society.”¹⁰³

The problem is that the “Court has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning.”¹⁰⁴ For example, what does it mean “to impose any strait jacket upon the intellectual leaders in our colleges and universities”?¹⁰⁵ Or to “remain free to inquire, to study and to evaluate, to gain new maturity and understanding”?¹⁰⁶ Does “scholarship” include communication among scholars about their work? Indeed, the generalities have made it difficult to determine “which officials can do what to which professors.”¹⁰⁷ Even the Supreme Court has noted that the “precise contours of the concept of academic freedom are difficult to define.”¹⁰⁸ In general, then, it appears “courts are poorly equipped to enforce traditional academic freedom as a legal norm.”¹⁰⁹ And, specifically, courts have been unwilling to use academic freedom as an unstated exemption to state FOI statutes. Courts in Ohio, Florida and New York all have declined to do so.¹¹⁰

In *State ex rel. Thomas v. Ohio State University*,¹¹¹ the Supreme Court of Ohio did not accept Ohio State University’s argument that disclosing the names and addresses of animal researchers to animal rights activists would have a chilling effect on the researchers’ academic freedom.¹¹² In *Wood v. Marston*,¹¹³ the Supreme Court of Florida did not accept the University of Florida’s argument that disclosing the

102. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

103. Byrne, *supra* note 94, at 258.

104. *Id.* at 257.

105. *See Sweezy*, 354 U.S. at 250.

106. *Id.*

107. Byrne, *supra* note 94, at 257.

108. *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982).

109. Byrne, *supra* note 94, at 288.

110. *See infra* notes 112–17 and accompanying text.

111. 643 N.E.2d 126 (Ohio 1994) (*per curiam*).

112. *Id.*

at 129–30.

113. 442 So. 2d 934 (Fla. 1983).

discussions of a committee advising the president about a new law dean would “threaten dearly held rights of academic freedom.”¹¹⁴ And in *Russo v. Nassau County Community College*,¹¹⁵ the New York Court of Appeals did not accept Nassau County Community College’s argument that disclosing the filmstrips used in a college sexuality course would infringe academic freedom.¹¹⁶

B. Statutory Exemptions

When the University of Virginia released nearly 1,800 e-mails to ATI, it withheld 12,000 more emails, claiming that some were not records and that others were exempted from disclosure.¹¹⁷ It cited the exemption for “educational records and certain records of educational institutions,” specifically section 2.2-3705.4(4), which states that the “following records are excluded” from the state FOI law “but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law”:¹¹⁸

Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions’ financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such data, records or information has not been publicly released, published, copyrighted or patented.¹¹⁹

Virginia is one of eighteen states whose FOI statutes include exemptions specifically for industrial trade secrets and academic work

114. *Id.* at 941.

115. 623 N.E.2d 15 (N.Y. 1993).

116. *Id.* at 19.

117. Jackman, *Prince William Hosts Important Global Warming Case*, *supra* note 33.

118. VA. CODE ANN. § 2.2-3705.4(4) (2010).

119. *Id.*

product.¹²⁰ The strongest are Michigan's and Utah's. In Michigan, the Confidential Research and Investment Information Act ("CRIA")¹²¹ amended the state's FOI statute to protect (1) information provided to a university by outside research sponsors, and (2) the work product of faculty and staff. For part (1), it protects:

[T]rade secrets, commercial information, or financial information... that is provided to a public university or college by a private external source and that is in the possession of the public university or college in the performance of a lawful function is exempt from disclosure as a public record under the [sunshine statute].¹²²

The information must be used in academic pursuits, such as research or teaching,¹²³ and in general it must meet the definition of a trade secret.¹²⁴ For part (2), the CRIA allows faculty and students the chance to disseminate their work "in a timely manner in a forum intended to convey the information to the academic community," before requiring disclosure under the FOI statute.¹²⁵

Meanwhile, Utah's FOI 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."¹²⁶ That includes unpublished lecture notes, research notes, data, and other information; confidential information contained in research proposals; unpublished manuscripts; creative

120. The others are Colorado, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, South Carolina, Utah, and Vermont. See Christopher S. Reed, *Stuck in the Sunshine: The Implications of Public Records Statutes on State University Research and Technology Transfer*, at 8, FRANKLIN PIERCE LAW CENTER, December 1, 2004.

121. Confidential Research and Investment Information Act, MICH. COMP. LAWS §§ 390.1553, 390.1554 (2004).

122. *Id.* at § 390.1553(1).

123. *Id.* at § 390.1553(1)(a).

124. *Id.* at §§ 390.1553(1)(b)–(c).

125. *Id.* at § 390.1554(1)(a).

126. UTAH CODE ANN. § 63G-2-305(40)(a) (West 2008).

works in progress; and “scholarly correspondence.”¹²⁷ There is no requirement that the information meet the definition of a trade secret.

Seventeen states have FOI statutes whose general exemptions could be used by universities to protect academic work product from disclosure.¹²⁸ In other words, “the statutes typically include language protecting trade secrets, commercial information, or proprietary data, but fall short of expressly protecting academic research work product.”¹²⁹ “Trade secrets” is the most common term, and most of the states have adopted a version of the Uniform Trade Secrets Act (still, the definition of trade secrets varies as a matter of state law).¹³⁰

Perhaps unsurprisingly, a nearly universal requirement for maintenance of a trade secret is secrecy.¹³¹ One commentator has pointed out that the secrecy requirement might be a problem in the academic environment, where “it is unlikely that the subject matter of most research programs can remain confidential.”¹³² He concluded that as students come and go, and as academics communicate with one another, “information regarding various aspects of ongoing research... seeps out and becomes public knowledge, thereby terminating any trade secret protection that may exist.”¹³³ For those reasons, the commentator questioned whether the presence of a mere trade secret exemption in a FOI statute would be sufficient “to fully protect the efficacy of university research.”¹³⁴

An issue paper published in 2011 by the American Constitution Society (“ACS”) proposes using an exemption like Utah’s as a model to “enable faculty to communicate about a variety of controversial and

127. *Id.*

128. Those states are California, Connecticut, Idaho, Iowa, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, Rhode Island, South Dakota, Texas, Washington, West Virginia, Wisconsin, and Wyoming. *See* Reed, *supra* note 120, at 13.

129. *Id.*

130. *Id.*

131. *Id.* According to the Uniform Trade Secrets Act § 1(4)(ii), a trade secret must be “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Uniform Trade Secrets Act § 1(4)(ii) (1985).

132. Reed, *supra* note 120, at 13.

133. *Id.*

134. *Id.*

sensitive issues without self-censorship.”¹³⁵ The exemption would balance freedom of information and academic freedom, recognizing that “the goal of both the FOIA and its exemptions is good government, not disclosure for disclosure’s sake.”¹³⁶

Moreover, the explicitness of the exemptions would “provide certainty and concrete guidance to scholars, the public, and courts about what matters are outside of the realm of disclosable records.”¹³⁷ And Utah’s statute would have the added benefit of protecting communications among scholars that might not trigger the trade secret protection.¹³⁸ It is unclear whether Michigan’s statute (or any of the others) would provide similar protection.¹³⁹

C. Balancing

The ACS issue paper also suggested that in the absence of an explicit exemption for academic freedom, courts and records custodians could use a balancing test to decide when to disclose materials and when not to disclose them.¹⁴⁰ Wisconsin uses such a test, illustrated by the University of Wisconsin–Madison’s response to the request for Cronon’s emails:

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

135. Levinson-Waldman, *supra* note 3, at 12.

136. *Herald Co. v. E. Mich. Univ. Bd. of Regents*, 693 N.W.2d 850, 860 (Mich. Ct. App. 2005), *aff’d*, 719 N.W.2d 19 (Mich. 2006); *see also* *Richards of Rockford Inc. v. Pac. Gas & Elec. Co.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976) (“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.”).

137. Levinson-Waldman, *supra* note 3, at 12.

138. UTAH CODE ANN. § 63G-2-305(40)(a) (West 2008).

139. Confidential Research and Investment Information Act, MICH. COMP. LAWS §§ 390.1553, 390.1554 (2004).

140. Levinson-Waldman, *supra* note 3, at 13.

fear of reprisal for controversial findings and without the premature disclosure of those ideas. The consequence for our state of making such communications public will be the loss of the most talented and creative faculty who will choose to leave for universities that can guarantee them the privacy and confidentiality that is necessary in academia. For these reasons, we have concluded that the public interest in intellectual communications among scholars as reflected in Professor Cronon's e-mails is outweighed by other public interests favoring protection of such communications.¹⁴¹

That exemption is not found in the state FOI statute; rather, Wisconsin courts have incorporated a common-law balancing test into their analysis of records requests. Consider the case *Osborn v. Board of Regents of University of Wisconsin System*,¹⁴² in which the Supreme Court of Wisconsin ruled that the University of Wisconsin had to disclose records of its applicants to a state resident and the state Center for Equal Opportunity.¹⁴³

On the one hand, the court noted that "we have a presumption of open access to public records, which is reflected in both our statutes and our case law."¹⁴⁴ On the other hand, the court noted that "[t]he right to inspect public records... is not absolute,"¹⁴⁵ and the custodian should decide whether the potential public harm resulting from disclosure outweighs the public interest in inspecting the documents.¹⁴⁶

In general, balancing tests are quite common when public interests are in conflict, and Justice Breyer recently said as much, writing, "In circumstances where . . . a law significantly implicates

141. John C. Dowling, *Letter from UW-Madison Legal Counsel Regarding Cronon Emails*, UNIV. OF WISCONSIN MADISON NEWS, Apr. 1, 2011, available at www.news.wisc.edu/19196.

142. 647 N.W.2d 158 (Wis. 2002).

143. *Id.* at 177.

144. *Id.* at 165.

145. *Id.* at 166.

146. *Id.* (quoting *Newspapers Inc. v. Breier*, 279 N.W.2d 179, 184 (Wis. 1979)).

competing constitutionally protected interests in complex ways, the Court balances interests.”¹⁴⁷ How to balance those interests is an open question. The ACS paper proposed that “institutions might use a university committee to conduct this inquiry, with judicial review available where the committee’s determination is challenged.”¹⁴⁸ That is consistent with the balancing approach proposed in a 1996 Report on University Records, published by the American Association of University Professors. The report concluded that “[s]ound policy requires a balancing of the benefits and costs of open access.”¹⁴⁹ As the ACS paper showed, courts already conduct that sort of balancing 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.”¹⁵⁰

Indeed, in the FOIA context, Michigan and Utah are the exemplars. In Michigan, when the government invokes the “frank communications” exemption, 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.”¹⁵¹ And in Utah, a court can order, in the absence of an applicable exemption, 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 are greater than or equal to the interests favoring access.”¹⁵²

147. *Doe v. Reed*, 130 S. Ct. 2811, 2822 (2010) (Breyer, J., concurring) (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)) (internal quotation marks omitted).

148. Levinson-Waldman, *supra* note 3, at 13.

149. Peter O. Steiner et al., *Report on Access to University Records*, 83 *ACADEME* 44, 45 (Jan.-Feb. 1997).

150. Levinson-Waldman, *supra* note 3, at 14.

151. *Herald Co. v. E. Mich. Univ. Bd. of Regents*, 693 N.W.2d 850, 858 (Mich. Ct. App. 2005), *aff’d*, 719 N.W.2d 19 (Mich. 2006).

152. UTAH CODE ANN. § 63G-2-405(1) (West 2012).

V. CONCLUSION

Scholars have argued that using public records laws to obtain their emails is a form of harassment and intimidation. They have argued that they are not “covered persons” under public records laws.¹⁵³ And they have argued that using public records laws to obtain their emails would create a chilling effect.¹⁵⁴ At the same time, nonprofits and political parties have argued that the public has a right to know that the scholars are following their own university’s rules, that the scholars are properly using public resources, and that the scholars are basing their scientific conclusions on valid and reliable data.¹⁵⁵

Against that backdrop, first, we concluded that the requester’s motive does not matter.¹⁵⁶ Courts have long held that the purpose of a request is not germane to the inquiry, and the government cannot be in the position to decide which request is good and which request is bad. Second, we concluded that generally academics at public universities are “covered persons” under public records laws, which provide access to the records of government employees who merit scrutiny, regardless of their responsibilities or place on the organizational chart.¹⁵⁷ This regime also serves as a prophylactic, preventing high-level employees from housing (and thus immunizing from disclosure) any records with low-level exempt employees. Third, we concluded that an FOI exemption for academic freedom or scholarly communications would be conceptually sound and generally consistent with other exemptions for communications and work product.¹⁵⁸ Such an exemption would recognize that scholars to some degree must be free to assemble information, to sift the relevant from the irrelevant, and to develop theories.

The regimes in Michigan and Utah, in the balancing context, would be good models. Courts in those states are required by statute to

153. See, e.g., *supra* notes 82–83 and accompanying text.

154. See *supra* note 13 and accompanying text; see also Krugman, *supra* note 88.

155. See, e.g., Jackman, *Prince William Hosts Important Global Warming Case*, *supra* note 33.

156. See *supra* Part II.

157. See *supra* Part III.

158. See *supra* Part IV(C).

balance interests in FOI cases. That would enable courts, on a case-by-case basis, to address any conflicts. Application of the exemption necessarily would involve the consideration of two competing policies: (1) the value of a zone of privacy in the scholarly enterprise to protect creativity and the free flow of ideas, and (2) the value of effective citizen oversight of public bodies and employees.¹⁵⁹

With respect to the first policy, one can appreciate that when scholars are exploring a particular theory or data set, the scholars should be encouraged to put all ideas and perspectives on the table, even if some of those ideas might later be discounted as unworkable, impractical, or improvident. If the scholars were required to make all such ideas and perspectives public, then the scholars might be hesitant to speak up as they brainstorm or to make suggestions, all out of fear of public scrutiny or ridicule. This would result in a chilling effect on the free flow of ideas, potentially leading to something less than full and open discourse concerning a particular issue or phenomenon.¹⁶⁰

With respect to the second policy, it goes without saying that citizens ought to be able to oversee the activities of public bodies and employees. The inclusive nature of access laws is good policy. In general, it prevents covered employees from housing records with exempt employees, and specifically, the public ought to be able to evaluate whether a faculty member is properly using state resources. Still, it is possible that an exemption protecting academic freedom, if not drafted narrowly, would lack the legislative precision needed to ensure that the exemption did not become a catch-all for any and all academic communication whatsoever (e.g., emails among administrators about plans to cut a college's budget).¹⁶¹

We are not arguing normatively that granting FOI exemptions for academic freedom and scholarly communications is desirable from a policy standpoint. Rather, we are simply concluding that granting FOI exemptions for academic freedom and scholarly communications would be conceptually sound and consistent with other exemptions available under existing FOI laws. In addition, it is important to note that this article does not address every dimension of the tension between

159. *Id.*

160. *See supra* Part IV.

161. *See supra* notes 93–94 and accompanying text.

academic freedom and open government. For example, one such dimension is whether academic freedom is an individual right, an institutional right, or both—a concept very much in dispute in the literature. That question deserves more attention, and we hope future research will explore that question in greater detail. For now, suffice it to say: motives do not matter, scholars are “covered persons,” and an FOI exemption for academic freedom and scholarly communications would be conceptually sound.