

# Washington Law Review

---

Volume 70  
Number 3 *Symposium on Immigration Policy*

---

7-1-1995

## Too Much of a Good Thing? Public Access to Medical Research after *PAWS v. U.W.*

Russell K. Yoshinaka

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Animal Law Commons](#)

---

### Recommended Citation

Russell K. Yoshinaka, Notes and Comments, *Too Much of a Good Thing? Public Access to Medical Research after PAWS v. U.W.*, 70 Wash. L. Rev. 929 (1995).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol70/iss3/14>

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

## TOO MUCH OF A GOOD THING? PUBLIC ACCESS TO MEDICAL RESEARCH IN WASHINGTON AFTER PAWS V. U.W.

Russell K. Yoshinaka

*Abstract:* In *Progressive Animal Welfare Society v. University of Washington*, the Washington State Supreme Court held that Washington's Public Disclosure Act mandated public access to unfunded medical research grant proposals submitted by researchers to public institutions within the state. This holding conflicts with federal policy and the current national standard of maintaining full confidentiality of research grant proposals until after research actually is funded. This Note examines the harmful impact that this decision will have on medical research conducted in Washington and the implications for Washington's biotechnology industry. It recommends that both the Washington legislature and Congress act to ensure that unfunded medical research proposals are exempt in their entirety from state and federal public disclosure laws.

Progressive Animal Welfare Society (PAWS) is an animal rights activist organization opposed to the use of animals in all medical research. On January 9, 1991, PAWS requested from the University of Washington (U.W.) a copy of an unfunded research grant proposal<sup>1</sup> submitted jointly by researchers from the University of Washington and the Johns Hopkins University. After U.W. officials denied the request, PAWS filed suit to compel disclosure of the proposal pursuant to Washington's Public Disclosure Act.<sup>2</sup> Almost four years after PAWS's initial request, the Washington Supreme Court affirmed the trial court's holding that the entire unfunded medical research grant proposal was not exempt from disclosure.<sup>3</sup> The court ordered U.W. to give PAWS access

---

1. A medical research grant proposal contains, among other things, a detailed description of the research plan including its specific aims, background and significance, and experimental designs and methods. See, e.g., Application for Public Health Service Grant, Form PHS 398, U.S. Department of Health and Human Services, 19-22 [hereinafter PHS Grant Application].

2. Wash. Rev. Code § 42.17.340 (1994).

3. The Washington Supreme Court granted direct review of the appeal. *Progressive Animal Welfare Society v. University of Washington*, 125 Wash. 2d 243, 884 P.2d 592 (1994). As this book went to press, this case was on remand at the trial court level for a ruling on PAWS's motion for statutory penalties pursuant to Wash. Rev. Code § 42.17.340(4). See *infra* note 31 and accompanying text. PAWS contends that U.W. failed to disclose all of the documents ordered by the court to be released and acted in bad faith in denying the original disclosure request. PAWS's Memorandum re: Attorney Fees and Statutory Penalties, *Progressive Animal Welfare Society v. University of Washington* (No. 91-2-07148-9). According to U.W., however, Dr. Gene Sackett acted as a subcontractor in the collaborative research with Dr. Linda Cork and as such was given only the portions needed for his own contribution as a subcontractor. Thus, according to U.W. it never possessed the entire proposal and PAWS was given all of the documents within the possession of U.W. University of Washington's Memorandum Regarding Statutory Penalties and Disclosure of

to the proposal with the exception of certain material redacted by the trial court. Because the redacted material might allow an educated reader to deduce "valuable formulae, designs, drawings, and research data," it was exempt from disclosure.<sup>4</sup>

State and federal public disclosure laws attempt to maintain a delicate balance between the public's right to know and the need for the fair and efficient administration of government. Of the many governmental functions within the scope of the public disclosure laws, perhaps none deserves greater care in applying these laws than the government's sponsorship of medical research. Washington's liberal interpretation of its public disclosure law deviates from the current national standard of maintaining the confidentiality of research proposals until after the research is funded by a governmental agency.<sup>5</sup> This results in a counterproductive policy toward medical research conducted in Washington, places Washington research institutions at a competitive disadvantage, and may threaten the development of valuable and potentially life-saving inventions.

This Note begins with background discussion of Washington's Public Disclosure Act,<sup>6</sup> the federal Freedom of Information Act,<sup>7</sup> and the current national standards on disclosure of unfunded research proposals. Part II discusses the funding process for medical research.<sup>8</sup> Part III sets forth the facts and holding of *PAWS v. U.W.*<sup>9</sup> Part IV then analyzes this holding,

---

Documents at 8, *PAWS v. U.W.* (No. 91-2-07148-9). The issue on remand and its disposition has no bearing on the issues discussed in this Note.

4. Wash. Rev. Code § 42.17.310(1)(h) (1994).

5. Only two reported federal cases have dealt with disclosure requests involving medical research proposals. *Washington Research Project, Inc. v. Department of Health, Education and Welfare*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), involved disclosure of a *funded* proposal. *Kurzon v. Department of Health & Human Services*, 649 F.2d 65 (1st Cir. 1981), involved a disclosure request for only the names and addresses of researchers whose proposals had been denied funding.

6. Initiative 276, 1973 Wash. Laws ch. 1 (codified at Wash. Rev. Code §§ 42.17.010-955 (1994)).

7. 5 U.S.C. § 552 (1994).

8. For a more detailed discussion on the funding process and the Freedom of Information Act as they relate to medical research proposals, see Tammy L. Lewis & Lisa A. Vincler, *Storming the Ivory Tower: The Competing Interests of the Public's Right to Know and Protecting the Integrity of University Research*, 20 J.C. & U.L. 417 (1994). Vincler was the attorney of record for U.W. in *PAWS v. U.W.*

9. U.W. set forth numerous arguments to support its contention that unfunded medical research proposals should be exempt from disclosure in their entirety, all of which were rejected by the majority. U.W. argued for exemption based on several provisions within Washington's Public Records Act, as well as federal preemption pursuant to patent law, copyright law, the Freedom of Information Act, and the Bayh-Doyle Act. *Progressive Animal Welfare Society v. University of*

while part V examines the practical ramifications associated with it. Finally, part VI proposes state and federal legislative solutions to mitigate the impact of this holding.

## I. WASHINGTON STATE AND FEDERAL DISCLOSURE LAWS

Initiative 276, otherwise known as the Public Disclosure Act,<sup>10</sup> was passed by Washington State voters in 1972 by a substantial margin.<sup>11</sup> The initiative contained four measures, each designed to provide open public access to governmental activities.<sup>12</sup> The initiative reflects the belief that the sound governance of a free society demands that the public have full access to information concerning the workings of the government.<sup>13</sup> To promote complete disclosure of information related to the governmental activities covered in the Public Disclosure Act, the statute further states that its provisions are to be liberally construed.<sup>14</sup>

### A. *The Public Records Act*

In *PAWS*, the Washington Supreme Court interpreted several provisions within the Public Records Act,<sup>15</sup> which is the section of the Public Disclosure Act that specifically relates to the disclosure of public records.<sup>16</sup> The stated purpose of The Public Records Act (the Act) is to ensure the sovereignty of the people and the accountability of the governmental agencies that serve them.<sup>17</sup> To further this policy, the

---

Washington, 125 Wash. 2d 243, 884 P.2d 592 (1994). This Note examines only the argument involving Wash. Rev. Code § 42.17.330 of Washington's Public Records Act.

10. Initiative 276, 1973 Wash. Laws ch. 1 (codified at Wash. Rev. Code §§ 42.17.010–955 (1994)).

11. The initiative passed 959,143 to 332,693, an approval rate of 72%. Matthew Edwards, *Are Privacy and Public Disclosure Compatible?: The Privacy Exemption to Washington's Freedom of Information Act*, 62 Wash. L. Rev. 257, 257 n.2 (1987) (citing Washington State Secretary of State, 1972 Abstract of Votes 2).

12. The measures concerned campaign financing; lobbyist reporting; reporting of elected officials' financial affairs; and public records. Wash. Rev. Code §§ 42.17.010–955 (1994). The Public Disclosure Act has since been expanded to include Reports by Public Treasurers [Wash. Rev. Code § 42.17.245 (1994)] and Political Advertising [Wash. Rev. Code §§ 42.17.505–.540 (1994)].

13. Wash. Rev. Code § 42.17.010(11) (1994).

14. *Id.*

15. Wash. Rev. Code §§ 42.17.250–.348 (1994).

16. "Public record" is defined as "any writing, containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Wash. Rev. Code § 42.17.020(27).

17. Wash. Rev. Code § 42.17.251 (1994).

statute specifically states that the Act should be construed liberally and its exceptions narrowly.<sup>18</sup> Courts are instructed to take into account the Act's policy that free and open examination of public records is in the public interest, even though such examination may inconvenience or embarrass public officials or other subjects of the records.<sup>19</sup> The Act requires that state agencies make available for public inspection and copying all public records unless a record falls within one of the Act's enumerated exemptions or is protected by a statute that prohibits disclosure of the record at issue.<sup>20</sup>

In responding to a disclosure request, an agency has five days to either provide the record, notify the requesting party that it needs additional time to respond to the request, or to deny the request.<sup>21</sup> The agency shall not distinguish between persons making a disclosure request, nor generally require the requesting party to disclose the purpose of the request.<sup>22</sup> Under the Act, an agency may attempt to deny a disclosure request either through an exemption or under Wash. Rev. Code § 42.17.330.

### 1. *The Act's Enumerated Exemptions*

The Act contains a provision that creates automatic exemptions for thirty-three categories of documents.<sup>23</sup> An agency denying a request pursuant to an exemption must provide the requesting party with a written statement identifying the applicable exemption.<sup>24</sup> If the requested record contains both exempt and non-exempt material, the exempt material may be redacted but the remaining material must be disclosed.<sup>25</sup>

If the agency denies a disclosure request by claiming that the document falls within an automatic exemption, the requesting party has three options. First, the party may accept the agency's decision. Second, the party may request that the Attorney General review the matter and

---

18. *Id.*

19. Wash. Rev. Code § 42.17.340(3) (1994).

20. Wash. Rev. Code § 42.17.260 (1994).

21. Wash. Rev. Code § 42.17.320 (1994).

22. Wash. Rev. Code § 42.17.270 (1994).

23. Wash. Rev. Code § 42.17.310(1)(a)-(gg) (1994).

24. Wash. Rev. Code §§ 42.17.310(4), 320 (1994).

25. Wash. Rev. Code § 42.17.310(2) (1994). The Act also contains 10 other automatic exemptions, Wash. Rev. Code §§ 42.17.312-.31902 (1994), which are not subject to the redaction requirement. *Progressive Animal Welfare Society v. University of Washington*, 125 Wash. 2d 243, 261 n.8, 884 P.2d 592, 602 n.8 (1994).

provide a written opinion on whether the record is exempt.<sup>26</sup> Finally, the requesting party may file a motion in superior court to compel the agency to show cause for refusing the disclosure request.<sup>27</sup> At the hearing, judicial review is *de novo*<sup>28</sup> and the agency bears the burden of proving that the record falls within one of the Act's exemptions or is protected by another statute prohibiting disclosure of the record.<sup>29</sup> Should the plaintiff prevail in this action against the agency, the document must be disclosed subject to court redaction,<sup>30</sup> and the prevailing party is awarded reasonable attorney's fees incurred in connection with bringing such an action.<sup>31</sup>

## 2. Section .330

In addition to denying a disclosure request pursuant to one of the Act's enumerated exemptions, an agency also may attempt to enjoin disclosure of a specific record pursuant to Wash. Rev. Code § 42.17.330 ("section .330") by filing a motion and affidavit in superior court.<sup>32</sup> The agency may file such a motion prior to, or in response to, a requesting party's motion for a show cause hearing under Wash. Rev. Code § 42.17.340.<sup>33</sup> Section .330 instructs courts to grant the agency's motion

---

26. Wash. Rev. Code § 42.17.325 (1994). Neither the Act itself nor legislative or case history shed any light on the impact of such an opinion.

27. Wash. Rev. Code § 42.17.340(1) (1994).

28. Wash. Rev. Code § 42.17.340(3) (1994). Ordinarily, "de novo" review means that the reviewing court interprets the statutory law and applicable facts independently of the trial court's interpretation. In the case of a motion under Wash. Rev. Code § 42.17.340, however, *de novo* review means that the court will interpret the coverage of the exemption independent of the agency's interpretation. *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 129-31, 580 P.2d 246, 250 (1978).

29. Wash. Rev. Code § 42.17.340(1).

30. *See supra* note 25 and accompanying text.

31. Wash. Rev. Code § 42.17.340(4) (1994). The statute also gives the court discretionary authority to award an additional \$5 to \$100 for each day that the party was denied access to the record.

32. Wash. Rev. Code § 42.17.330 (1994), "Court protection of public records," provides:

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.

33. *See supra* note 27 and accompanying text.

to enjoin disclosure of the record only if the agency meets the burden of proving that disclosure clearly would not be in the public interest and would substantially and irreparably damage any person or vital governmental function.<sup>34</sup> Exactly when a record may qualify for protection under section .330 was a critical issue addressed by the court in *PAWS*.

### B. *The Federal Freedom of Information Act*

The Freedom of Information Act (FOIA), enacted in 1966, was the congressional response to agency abuse of the public disclosure provisions of the Administrative Procedure Act.<sup>35</sup> FOIA applies only to federal agencies; state and local agencies are not included within its scope.<sup>36</sup> In most respects, FOIA and Washington's Public Records Act are similar. FOIA gives the public access to agency records, puts the burden of proof for nondisclosure on the agency, and contains nine specific exemptions from disclosure.<sup>37</sup> Likewise, it mandates full disclosure of public records unless they qualify for one of its enumerated exemptions<sup>38</sup> and non-exempt portions of a requested record must be disclosed as long as they can be reasonably segregated from the exempt material.<sup>39</sup> FOIA does not, however, contain a counterpart to Wash. Rev. Code § 42.17.330.<sup>40</sup> Therefore, federal courts may not, in ruling on motions to compel disclosure, exercise discretion and balance the equities of releasing or withholding information sought to be disclosed.<sup>41</sup>

The Washington Supreme Court has noted that the state act closely parallels FOIA and that judicial interpretations of the latter are therefore particularly helpful in construing the state act.<sup>42</sup> The court also has indicated that in "many areas" the state act is stricter than its federal

---

34. See *supra* note 32.

35. Edwards, *supra* note 11, at 259 (citing *EPA v. Mink*, 410 U.S. 73, 79 (1973); S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965)).

36. Ciccone v. Waterfront Comm'n of N.Y. Harbor, 438 F. Supp. 55, 58 (S.D.N.Y. 1977); James T. O'Reilly, *Federal Information Disclosure* § 4.02 (2d ed. 1990).

37. 5 U.S.C. § 552 (1994).

38. *Id.*

39. 5 U.S.C. § 552(d) (1994).

40. *Id.*; see also 37A Am Jur 2d, § 74, § 509; O'Reilly, *supra* note 36, § 9.06.

41. *Robles v. EPA*, 484 F.2d 843, 848 (1973); *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (1987).

42. *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 128, 580 P.2d 246, 249 (1978).

counterpart, but the only specific example identified by the court is the mandatory award of attorney's fees.<sup>43</sup>

### C. *National Standards on Disclosure of Research Proposals*

The prevailing practice of federal agencies and academic research institutions throughout the country is to maintain the confidentiality of medical research proposals until they are funded.<sup>44</sup> The U.S. Department of Health and Human Services provides expressly in both its Public Health Service Grants Policy Statement<sup>45</sup> and Public Health Service Grant Application Form<sup>46</sup> that application information generally is available to the public only after the research actually is funded.

As previously noted, FOIA applies to federal agencies, including the federal funding agencies that receive the grant applications.<sup>47</sup> These agencies rely on two disclosure exemptions within FOIA to deny disclosure requests of unfunded proposals.<sup>48</sup> The first claimed exemption applies to trade secrets and commercial or financial information that is "privileged or confidential."<sup>49</sup> The second claimed exemption applies to personnel, medical or "similar files," the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy."<sup>50</sup>

---

43. The award of fees is discretionary under FOIA. *Animal Welfare Society v. University of Washington*, 114 Wash. 2d 677, 687–88, 790 P.2d 604, 608–09 (1990).

44. Brief Amicus Curiae of American Council on Education and Association of American Medical Colleges at 4, *Progressive Animal Welfare Society v. University of Washington*, (No. 59714-6) [hereinafter ACE Brief]. See also Lewis & Vincler, *supra* note 8, at 420.

45. Amicus Curiae Brief of the Johns Hopkins University and Washington Association for Biomedical Research at iv, 8, *PAWS v. U.W.* (No. 59714-6) (citing Public Health Service, Grants Policy Statement, D.H.H.S. Pub. No. (OASH) 90-50,000 (1991)).

The Public Health Service is a division of the Department of Health and Human Services. It consists of four major components: (1) The Office of the Surgeon General; (2) the National Institutes of Health; (3) the Bureau of Medical Services, and (4) the Bureau of State Services, and the Agency for Health Care Policy and Research. 42 U.S.C. § 203 (1994).

46. PHS Grant Application, *supra* note 1, at 4.

47. See O'Reilly, *supra* note 36, § 4.02.

48. See Declaration of Joanne Belk, Acting Freedom of Information Officer of the National Institutes of Health (contained in the appendix of Appellant's Reply Brief to the Brief of Amicus Curiae American Civil Liberties Union of Washington, *PAWS v. U.W.* (No. 59714-6)).

49. 5 U.S.C. § 552(b)(4) (1994) (codified at 45 C.F.R. § 5.65 (1994)).

50. 5 U.S.C. § 552(b)(6) (1994) (codified at 45 C.F.R. § 5.67 (1994)).



## II. THE FUNDING PROCESS FOR MEDICAL RESEARCH

There are two primary sources of medical research funding. The researcher may obtain grants from federal agencies or seek investment from private companies that hope to commercialize the results of promising university research.<sup>51</sup> The following sections describe these processes.

### A. Federal Funding

Many federally funded research projects are collaborative efforts between researchers at different academic institutions. These researchers combine their individual skills and research to develop proposals that may receive federal funding. Due to limited resources, the combining of skills and research often proves invaluable in receiving otherwise unattainable funds.

Whether conducting research on their own or in conjunction with another researcher, university researchers who seek federal funding must first submit their research proposals to the sponsoring university where the proposals undergo an internal review.<sup>52</sup> Review at the university focuses primarily on the proposal's conformity with university policy and any financial, administrative, and legal questions that the research may present.<sup>53</sup>

If the proposed research involves the use of vertebrate animals, the research also is subject to federal regulation at the university level. In 1966, Congress passed the Animal Welfare Act (AWA),<sup>54</sup> which is aimed at ensuring the humane care and treatment of animals used in medical research.<sup>55</sup> The AWA mandates that each research institution utilizing animals provide an oversight committee responsible for the welfare and treatment of the animals.<sup>56</sup> The Public Health Service (PHS) also requires

---

51. See Lewis & Vincler, *supra* note 8, at 421-34.

52. *Id.* at 421-26.

53. See *id.* at 422 n.15 (describing internal review process at the University of Washington).

54. 7 U.S.C. §§ 2131-2157 (1988).

55. 7 U.S.C. §§ 2131, 2143.

56. 7 U.S.C. § 2143(b) (1988). The committee must be comprised of at least three members, including one member who is not affiliated with the research facility other than as a committee member and who is specifically included to represent community interests in the proper care and treatment of animals. The AWA also mandates semi-annual inspections of the research facility by the committee, an annual report submitted by the institution to the committee containing assurances of compliance with the standards set forth in the AWA, identification of any procedures likely to cause pain to animals, and training of scientists at each of the research facilities on the humane

the formation of an animal-care committee as well as institutional compliance with other requirements aimed at ensuring proper treatment of animals.<sup>57</sup>

Upon approval at the university level, the university submits the proposal to one of several federal agencies charged with distributing federal funds for biomedical research.<sup>58</sup> In *PAWS*, for example, the proposal was submitted to the National Institutes of Health (NIH).<sup>59</sup> At the NIH, the submitted proposal is assigned to an appropriate institute where it undergoes an intensive peer review by university and industry scientists with expertise in the area of the proposed research.<sup>60</sup> The review system at the NIH consists of two levels. The first level evaluates the scientific merit of the proposal and the second level incorporates funding priorities and policy considerations.<sup>61</sup> If the proposal is approved at the first level of review, it is forwarded to the second level where it undergoes another evaluation and is assigned funding priority based on the combination of its scientific merit and its relevance to agency priorities.<sup>62</sup> This dual system of review allows the institute to isolate and focus on the scientific merit of a proposal before policy related considerations are incorporated into the funding decision.<sup>63</sup>

---

treatment of animals and methods of minimizing their pain, and provides for both civil and criminal sanctions for violations. 7 U.S.C. §§ 2143(b), 2149(b), (d).

57. The PHS *Policy on Humane Care and Use of Laboratory Animals by Awardee Institutions* requires that the institutions “establish and maintain appropriate policies and procedures to ensure the humane care and use of live vertebrate animals involved in research activities supported by the PHS.” PHS Grant Application, *supra* note 1, at 6. The research institution must file an Animal Welfare Assurance statement with the Office for Protection from Research Risks. As part of its duties under the PHS assurance procedure, the animal care committee must review and approve the section of the PHS grant application addressing the use of vertebrate animals. *Id.* The points to be addressed under this section include: 1) a description of the proposed use of the animals; 2) justification of the use of animals and the particular species and number of animals used; 3) information on their veterinary care; 4) procedures for minimizing their discomfort including the use of pain-relieving drugs; and 5) any use of euthanasia. *Id.* at 22.

58. Lewis & Vincler, *supra* note 8, at 422.

59. *Progressive Animal Welfare Society v. University of Washington*, 125 Wash. 2d 243, 248, 884 P.2d 592, 595 (1994). The National Institutes of Health is an agency within the Public Health Service, *supra* note 45, and is one of the primary federal research funding agencies.

60. Lewis & Vincler, *supra* note 8, at 422–23.

61. *Id.* at n.19 (citing U.S. Department of Health and Human Services, Public Health Service, National Institutes of Health, *Orientation Handbook for Members of Scientific Review Groups 4* (1989)).

62. *Id.*

63. *Cf.* Lewis & Vincler, *supra* note 8, at 422–23.

Due to limited resources, competition for funding is fierce, and only a small percentage of grant applications receive funding on initial review.<sup>64</sup> A researcher usually receives and incorporates feedback from the reviewing scientists, often resulting in multiple revisions and resubmissions of the original proposal.<sup>65</sup> The effectiveness of the peer review process rests on the confidentiality, objectivity, and impartiality of the reviewing scientists.<sup>66</sup> Absent these safeguards, funding decisions could be based on improper outside influences, such as fear of harassment. This in turn could threaten the ultimate goal of maximizing the public benefit through operating a system that bases funding decisions on the potential and importance of the research.<sup>67</sup> Moreover, any breach of confidentiality could result in intellectual piracy and plagiarism,<sup>68</sup> as well as defeat the patentability of a resulting invention.<sup>69</sup>

### *B Private Funding Through University and Industry Collaboration*

The second major form of research funding involves collaboration between universities and private companies that intend to commercialize any medical or pharmaceutical innovations resulting from the research.<sup>70</sup> There are two basic models of university/industry exchange.<sup>71</sup> The first model involves collaboration in federally funded research.<sup>72</sup> The second involves direct collaboration between industry and universities without government sponsorship.<sup>73</sup>

Both Congress and the Washington Legislature have enacted statutes that assist in the transfer of technology from public institutions to private

---

64. *Id.* at 424.

65. *Id.* Even after resubmission, the percentage of approved proposals that actually receive funding is low. At the NIH in the late 1980s, approximately 27.5% of the grant proposals approved and submitted by research institutions actually were awarded funds. *Id.* at 422 (citing National Institutes of Health, *A Plan for Managing the Costs of Biomedical Research* 4 (Draft, Jan. 15, 1991)). One medical association submitted the even lower figure of 20%. Brief Amicus Curiae of the American Psychological Association in Which the Washington State Psychological Association Joins at 2, *Progressive Animal Welfare Society v. University of Washington* (No. 59714-6) [hereinafter APA Brief].

66. See Lewis & Vincler, *supra* note 8, at 423-26.

67. *Id.* at 424-26.

68. *Id.* at 424-25; see also *infra* part V.B.

69. *Id.* at 434-40; see also *infra* part V.A.

70. *Id.* at 430-34.

71. *Id.* at 430.

72. *Id.*

73. *Id.*

industry. At the federal level, the Bayh-Doyle Act<sup>74</sup> gives sponsoring universities intellectual property rights in inventions stemming from federally funded research. These intellectual property rights are then transferable to private companies. The goal of the Bayh-Doyle Act is to create a single, uniform national policy that defines patent rights for the sponsoring university and the federal government.<sup>75</sup> This uniform policy is intended to benefit U.S. companies that desire to use government-funded research, and to encourage the commercial development of any resulting inventions.<sup>76</sup> The Bayh-Doyle Act grants patent rights in federally funded research to the sponsoring university, but the statute's "March-in rights" provision allows the federal government to receive title to and oversee the development of the invention if the university declines to do so.<sup>77</sup> The Bayh-Doyle Act also contains a "Confidentiality" section that provides that federal agencies may deny public access to information related to an invention in which the federal government owns or may own a right, title, or interest for a reasonable time in order to file a patent application.<sup>78</sup>

At the state level, several acts of Washington's legislature have furthered the interests of the biotechnology industry. For example, Washington's Uniform Trade Secrets Act<sup>79</sup> provides broad means for courts to protect trade secrets. Additionally, in 1983 the Washington legislature created the Washington Technology Center, an enterprise that facilitates collaborative efforts and technology transfer between private industry and the state's universities.<sup>80</sup> A third example is the exemption the legislature included within the Public Records Act for valuable formulae, designs, drawings, and research data.<sup>81</sup>

---

74. 35 U.S.C. §§ 200–212 (1988).

75. H.R. Rep. No. 1307, 96th Cong., 2d Sess. 2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6460, 6461.

76. *Id.* at 6461–62.

77. 35 U.S.C. § 203.

78. 35 U.S.C. § 205.

79. Wash. Rev. Code § 19.108 (1994).

80. Wash. Rev. Code § 28B.20.285 (1994); Washington Technology Center, Biennium Report (1991–1993). The Biennium Report lists 97 industry participants and co-sponsors. While two of the Center's primary programs are aimed at assisting small and start-up companies located within the state, some of the larger industry participants include Apple Computers, AT&T, several divisions of the Boeing Co., Dow Chemical Corp., IBM Corp., Johnson & Johnson, and 3M Corp.

81. Wash. Rev. Code § 42.17.310(1)(h). The trial court in *PAWS v. U.W.* redacted certain material from the proposal pursuant to this exemption. This exemption, however, may provide insufficient protection for some valuable material in the proposal. *See infra* part V.

### III. PAWS V. U.W.

#### A. Procedural Aspects and Facts

Following internal review and approval by the U.W., a proposal by Dr. Gene Sackett<sup>82</sup> and Dr. Linda Cork<sup>83</sup> was submitted to the NIH.<sup>84</sup> PAWS submitted its disclosure request to the U.W.,<sup>85</sup> presumably because federal agencies routinely deny disclosure requests for unfunded medical research proposals under FOIA.<sup>86</sup> The request was denied by U.W.'s Public Records Officer and a subsequent request was denied by U.W. President William Gerberding.<sup>87</sup> PAWS then filed suit pursuant to Wash. Rev. Code § 42.17.340 of Washington's Public Records Act to compel disclosure of the proposal.<sup>88</sup>

Both parties moved for summary judgment. U.W. argued that as a matter of law the proposal was exempt in its entirety.<sup>89</sup> PAWS

---

82. Dr. Sackett is a University of Washington professor of psychology and Associate Director for Behavioral Research at the Child Development and Mental Retardation Center, and research staff member of the Regional Primate Research Center located at the U.W.

83. Dr. Cork is a Johns Hopkins University researcher and was the preliminary investigator in the research.

The proposal was based on previous research conducted by Dr. Cork. As of the time of the case, Dr. Cork had not published any results of the research and had revealed the research only for the purpose of supporting the funding application. Amicus Curiae Brief of The Johns Hopkins University and Washington Association for Biomedical Research at 10, *Progressive Animal Welfare Society v. University of Washington* (No. 59714-6).

The grant proposal was entitled "Effects of Socialization on Forebrain Development." The research involved studying the behavioral development of socially deprived rhesus monkeys in the hope of better understanding and treating self-injurious behavior displayed by certain mentally ill people. Dr. Sackett and Dr. Cork hypothesized that such disorders were caused by abnormal neurobiology and sought to isolate the particular chemical processes responsible for bringing about such abnormalities. To accomplish this goal, the researchers proposed to isolate some monkeys for one year, then to contrast their behavior with a control group of monkeys raised in a social environment. The monkeys would then be euthanized in order to study the neurochemistry of their brains. Brief of Appellant at 7-8, *PAWS v. U.W.* (No. 59714-6).

After PAWS initiated its lawsuit, NIH ultimately denied federal funding. *Lewis & Vincler, supra* note 8, at 420 n.9.

84. *Progressive Animal Welfare Society v. University of Washington*, 125 Wash. 2d 243, 248, 884 P.2d 592, 595 (1994).

85. *Id.* at 247, 884 P.2d at 595.

86. *See supra* notes 48-50 and accompanying text.

87. *PAWS*, 125 Wash. 2d at 250, 884 P.2d at 596.

88. *Id.*

89. *Id.* U.W. argued that the unfunded proposal in its entirety qualified for protection under several exemptions: Wash. Rev. Code § 42.17.310(1)(b), (h), (i). *Id.* at 254-56, 884 P.2d at 598-600. For reasons beyond the scope of this Note, the court rejected all of these arguments.

maintained that it was entitled to disclosure of the unfunded proposal with the exception of certain material that might reveal confidential or sensitive formulae, designs, drawing, research data, or trade secrets.<sup>90</sup> After an in camera review, the court excised such material as well as certain budgetary information all of which, in the court's view, "an educated reader could use to reveal research hypotheses or data, valuable formulae and the like."<sup>91</sup> The trial court then granted PAWS's motion for summary judgment and ordered disclosure of the remaining material.<sup>92</sup>

### B. *The Holding*

The majority rejected U.W.'s argument that the court could and should enjoin disclosure of the proposal in its entirety pursuant to section .330.<sup>93</sup> The majority limited itself to two options in interpreting section .330: either the statute was a "general exemption," or it was an injunctive remedy that could be invoked only if the specific record first qualified for one of the enumerated exemptions within the Act.<sup>94</sup> The majority chose the latter interpretation and held that, because the proposal in its entirety did not fall within one of the Act's exemptions, the court was precluded from even considering the proposal for enjoinder under section .330.

---

U.W. also argued that unfunded medical research proposals were exempt in their entirety on the basis of federal preemption. U.W. asserted that states were preempted from mandating disclosure due to conflicts with four areas of federal occupation: (1) FOIA; (2) federal patent law; (3) federal copyright law; and (4) The Bayh-Doyle Act. The majority rejected these arguments for several reasons. First, the majority noted that FOIA did not expressly preempt similar state acts, nor did it pervasively or comprehensively occupy the field of public disclosure so as to preempt state action in the area. Second, the majority asserted that the redaction of the material by the trial court adequately protected U.W.'s patent rights and copyrights. Finally, the court asserted that because FOIA and the Bayh-Doyle Act applied only to federal and not state agencies, neither of these acts preempted state regulation of public disclosure. *PAWS*, 125 Wash. 2d at 265-67, 884 P.2d at 604-06.

90. *Id.* at 250, 884 P.2d at 596. Specifically, PAWS requested, inter alia, disclosure of sections of the proposal addressing "Specific Aims," "Background and Significance," "Progress Report/Preliminary Studies," "Experimental Design and Methods," "Literature Cited," "Consultant/Collaborators," and "Consortium/Contractual Arrangements." ACE Brief, *supra* note 44, at 2.

91. *PAWS*, 125 Wash. 2d at 250, 884 P.2d at 596.

92. *Id.* The trial court also granted attorney's fees to PAWS pursuant to Wash. Rev. Code § 42.17.340(4), but declined to award the discretionary penalties authorized by the same section. *Id.*

93. *Id.* at 257-61, 884 P.2d at 600-02.

94. *Id.*

IV. ANALYSIS OF *PAWS V. U.W.*A. *The PAWS Holding Conflicts with a Sound Washington Precedent*

The majority's interpretation of section .330 in *PAWS* contradicted the Washington Supreme Court's unanimous interpretation of the same statute in *Dawson v. Daly*.<sup>95</sup> *Dawson* involved a disclosure request by Daly, a former law enforcement officer who appeared frequently as a defense expert witness in child sex-abuse prosecutions in Snohomish County, Washington. Daly requested numerous documents, including files that Snohomish County prosecutors had developed for use in cross-examination. The court in *Dawson* discussed whether the requested documents fell within several of the Act's enumerated exemptions. The court also interpreted section .330 as providing a separate means by which an agency may attempt to withhold disclosure of a specific document. In so doing, the court stated the following:

We hold that RCW 42.17.330 does create an independent basis upon which a court may find that disclosure is not required if the court, upon a request for an injunction under RCW 42.17.330, finds (1) that disclosure is not in the public interest and (2) that disclosure would cause substantial and irreparable damage to a person or a vital governmental function.<sup>96</sup>

The *Dawson* interpretation of section .330 recognized the statute not as an exemption, but as a separate and discretionary basis upon which a court may find that disclosure of a specific record is not required.<sup>97</sup> As noted by the dissent in *PAWS*, "[a]n exemption is absolute; section .330

---

95. *Dawson v. Daly*, 120 Wash. 2d 782, 845 P.2d 995 (1993). The decision in *Dawson* was 9 to 0. Interestingly, two of these nine justices participated in the majority opinion of *PAWS*, and another two participated in the concurrence. Only three out of the nine justices who participated in the *Dawson* decision remained consistent and participated in the *PAWS* dissent.

96. *Id.* at 794, 845 P.2d at 1002. The court then differentiated between the two distinct avenues by which an agency may attempt to withhold disclosure of a record. The court first described the avenue that involved an agency invoking an enumerated exemption, then differentiated this from the avenue involving section .330. While the former allowed an agency to withhold a record on its own initiative, the court explained, the latter required court intervention and a determination of whether the requirements contained in section .330 were met. The court concluded its discussion of section .330 by holding that if, on remand, the trial court found that the requirements of section .330 were met, an injunction barring access should be entered. *Id.*

97. At least one other state court has interpreted a provision of its public disclosure act in a manner consistent with *Dawson*. In *Civil Service Comm'n v. Pinder*, 812 P.2d 645 (Colo. 1991), the Colorado Supreme Court held that Section 24-72-204(6) of Colorado's Open Records Act provided a discretionary basis for a court to deny public access to otherwise accessible records if the court finds that disclosure would cause "substantial injury to the public interest." *Id.* at 648.

is a grant of individualized discretionary authority.”<sup>98</sup> Furthermore, while the enumerated exemptions apply to general categories of documents, section .330 relates to specific documents on a case-by-case basis that an agency seeks to withhold from disclosure.

Had the legislature intended to impose upon the agencies the burden of first establishing that the record qualified for an exemption before the court may even consider issuing a section .330 injunction, it simply could have done so by inserting language in section .330 to that effect, rather than inserting the carefully crafted requirements contained in the statute.<sup>99</sup> According to the majority in *PAWS*, the requested document must qualify for an exemption whether the agency chooses to deny a disclosure request by invoking an automatic exemption or by filing a section .330 motion. However, under the majority’s interpretation, only if the agency chooses to file a section .330 motion will the agency also bear the burden of proving that disclosure of the document will clearly not be in the public interest and will substantially and irreparably damage any person or vital governmental function. This differing treatment, based solely on which method the agency chooses to utilize in denying a disclosure request, is difficult to justify.

The majority in *PAWS* downplayed the significance of *Dawson* and discussed its concern with adopting the *Dawson* interpretation of section .330. The majority began by characterizing the *Dawson* court’s interpretation of section .330 as dicta rather than a holding.<sup>100</sup> The majority then set forth its concern that if the court adopted the *Dawson* interpretation of section .330 and enjoined disclosure of the unfunded proposal pursuant to that provision, the court would be repeating its error in *In re Rosier*.<sup>101</sup> In *Rosier*, the court interpreted Wash. Rev. Code § 42.17.260 in a manner that allowed the court to create a general disclosure exemption for personal privacy.<sup>102</sup> The Washington

---

98. *PAWS*, 125 Wash. 2d at 275, 884 P.2d at 610 (Brachtenbach, J., dissenting).

99. See *supra* note 32.

100 *PAWS*, 125 Wash. 2d at 261 n.7, 884 P.2d at 602 n.7. Not only does the court’s use of the actual words “We hold” indicate that the decision regarding the proper interpretation of section .330 was a holding, a subsequent Washington Court of Appeals opinion also interpreted it as such. In *Brown v. Seattle Public Schools*, 71 Wash. App. 613, 860 P.2d 1059 (1993), the court referred to *Dawson* extensively and at one point states, “In addition, in *Dawson*, the Supreme Court held that RCW 42.17.330 creates ‘an independent basis upon which a court may find that disclosure is not required.’” 71 Wash. App. at 618, 860 P.2d at 1062 (quoting *Dawson*, 120 Wash. 2d at 793–94, 845 P.2d at 1002).

101. *In re Rosier*, 105 Wash. 2d 606, 717 P.2d 1353 (1986).

102. *Id.* at 609, 717 P.2d at 1356. Wash. Rev. Code § 42.17.260 is a procedural section that instructs the agencies of their general disclosure obligations and the means by which they may deny



Legislature specifically overturned the *Rosier* holding by amending that statute and proclaimed that the intent of the amendment was to make clear that “[a]gencies having public records should rely upon statutory exemptions or prohibitions for refusal to provide public records.”<sup>103</sup>

The majority’s concern in *PAWS* was predicated on a mischaracterization of the *Dawson* holding and a misunderstanding as to what the legislature’s response to *Rosier* meant to prohibit. The *Dawson* court interpreted section .330 as a general exemption only in the sense that a court may exempt specific records that do not otherwise qualify for protection under one of the Act’s enumerated exemptions based on the unique characteristics of the specific record and the facts involved in the case. In contrast, the legislature overturned *Rosier* because the court created a general disclosure exemption, similar to the automatic exemptions found in Wash. Rev. Code § 42.17.310(1),<sup>104</sup> based on a certain type of interest — privacy. The statute at issue in *Rosier*, Wash. Rev. Code § 42.17.260, and the legislature’s proclamation as to the intent of its amendment refer only to the avenue of non-disclosure involving automatic exemptions for certain types of interests or for certain categories of documents, not section .330, which requires court intervention and discretion in enjoining disclosure of specific records. The *Dawson* interpretation of section .330, therefore, would allow a court to rule that a particular record may be withheld by an agency without creating a general exemption for that type of document, thus avoiding the error of *Rosier*.

The majority’s fear of legislative reprisal also overlooked the fact that the legislature declined to amend section .330 following the court’s holding in *Dawson* in both the 1993 and 1994 sessions. Given the legislature’s willingness to respond to the court’s interpretation of the Public Records Act, as seen by the response to *Rosier*, its inaction suggests approval.

### B. *The Majority’s Interpretation of Section .330 Renders It Superfluous*

One canon of statutory construction dictates that courts should interpret a statute in a manner that gives meaning to all portions of the statute, not in a manner that renders any portion meaningless,

---

a disclosure request without seeking court intervention, i.e., by invoking one of the automatic exemptions.

103. 1987 Wash. Laws, ch. 403, § 1, pp. 1546–47.

104. See *supra* note 23 and accompanying text.

superfluous, or questionable.<sup>105</sup> The second troubling aspect of the *PAWS* majority's interpretation of section .330 is that it rendered the provision superfluous. Section .330 became essentially meaningless once the majority held that the provision may be invoked only if the document first qualifies for protection under one of the enumerated exemptions of the Act. If a document falls within a class of documents that is automatically exempt, there remains little reason for an agency to seek court protection pursuant to section .330.<sup>106</sup>

Ironically, the majority in *PAWS* argued that the *Dawson* interpretation of section .330 rendered the Act's enumerated exemptions superfluous.<sup>107</sup> This assertion was misguided for several reasons. First, the enumerated exemptions address an avenue of non-disclosure that is entirely different from the avenue addressed by section .330. While the former allows for automatic withholding of the requested record, the latter requires court intervention.

Second, the majority overlooked the heavy burden that the agency must meet in order to prevail in a section .330 action. The agency must effectively prove three elements: (1) a clear lack of public interest in disclosure; (2) substantial and irreparable harm to a governmental function; and (3) the vital nature of the governmental function.<sup>108</sup> Presumably, agencies will try to avoid this burden and do so when invoking an automatic exemption. According to the *Dawson* holding, an otherwise non-exempt record would face scrutiny under this burden, thus addressing the concern of the majority in *PAWS* that courts could haphazardly enjoin disclosure of an otherwise non-exempt document.<sup>109</sup>

Finally, the majority failed to consider the extensive time and litigation costs that agencies would expend were they always to resort to court intervention pursuant to section .330 rather than opt for protection of the document under an automatic exemption. Though the statutory scheme of the Act would allow for this general approach to denying

---

105. *Lutheran Day Care v. Snohomish County*, 119 Wash. 2d 91, 829 P.2d 746 (1992).

106. One unlikely explanation is that an agency might seek court protection pursuant to section .330, even if it believes that an exemption truly applies, in order to hedge against the possibility of being assessed attorney's fees should the requesting party attempt to compel disclosure pursuant to Wash. Rev. Code § 42.17.340 and prevail.

107. *Progressive Animal Welfare Society v. University of Washington*, 125 Wash. 2d 243, 260, 884 P.2d 592, 601-02 (1994).

108. See *supra* note 32.

109. The *PAWS* majority's exact words were "simply declare records covered by personal privacy or vital governmental interests without ever having to invoke or construe the exemptions of RCW 42.17.310." *PAWS*, 125 Wash. 2d at 260, 884 P.2d at 602.

requests for automatically exempt records, such an approach would undermine the intent of the exemptions and is logistically unimaginable.

## V. PRACTICAL IMPLICATIONS OF THE *PAWS* HOLDING

Though the majority did rule that a trial court may redact certain parts of the proposal pursuant to the "valuable formulæ" exemption,<sup>110</sup> redaction by a trial judge may provide insufficient protection for the researcher and the proposal. The primary concerns of medical researchers, the sponsoring universities, the federal government, and private industry are the loss of patent rights and the intellectual piracy that may result from unwitting and premature disclosure of sensitive information. The potential for intellectual piracy and the loss of patent rights in turn creates several serious threats to the future of research conducted in Washington and jeopardizes the development of important medical and pharmaceutical innovations.

### A. *Disclosure of Preliminary Proposals May Result in the Loss of Patent Rights*

The Patent Act requires patentable inventions to be useful, novel, and non-obvious.<sup>111</sup> To be non-obvious, an invention cannot be considered prior art to a person with ordinary skill in the relevant art<sup>112</sup> at the time the invention was made.<sup>113</sup> Under the novelty requirement, no patents will issue if the invention is described in a printed publication and the inventor fails to file a patent application within one year.<sup>114</sup> Most foreign countries provide for a shorter grace period.<sup>115</sup> Germany, for example, provides for only a six-month grace period and protects only a disclosure by the inventor, or his or her legal predecessor, at an officially recognized exhibition.<sup>116</sup> Thus, almost any publication of an invention in the United States would render the invention unpatentable by the researcher in Germany.<sup>117</sup>

---

110. Wash. Rev. Code § 42.17.310(1)(b).

111. 35 U.S.C. §§ 101-103 (1988).

112. In this context, the word "art" effectively means technical field.

113. 35 U.S.C. § 103.

114. 35 U.S.C. § 102.

115. Charles R.B. Macedo, *First-to-File: Is the American Adoption of the International Standard in Patent Law Worth the Price?*, 18 AIPLA Q.J. 193, 204 (1990).

116. *Id.*

117. *Id.*

In the early, unfunded stages of a research proposal, it is nearly impossible for the researchers to identify all the information that may be important to a future patent application and which information must be protected to ensure that the confidentiality of the research is not compromised. A superior court trial judge is even less able to make these vital determinations. Not only is the field of medical research complex and highly specialized, most superior court trial judges have little to no experience in trying patent cases because such cases ordinarily are handled by the federal courts and appeals are handled by a special branch of the federal courts. The trial judge will be faced with foreign issues and information and will need to apply the complex patent standard that requires the judge to redact any information that would render the invention obvious to a person with skill in the field of biomedical research, not only the information that would allow an “educated reader” to deduce sensitive information. Ultimately, despite the best efforts of judges to excise any potentially patentable and sensitive material, judges may unwittingly disclose too much.

*B. Disclosure of Preliminary Research Proposals May Facilitate Intellectual Piracy*

A second underlying concern of premature disclosure is the impending threat of intellectual piracy that may result from disclosure of trade secrets and other sensitive information. Access to the specific formulae, data, or research hypothesis of a proposal is not always necessary for other scientists with experience in the pertinent area to deduce the procedures necessary to carry out the research. Often, crucial information can be deduced from seemingly innocuous information, such as a description of the research aims or bibliographies of published related research.<sup>118</sup> Intellectual piracy is devastating to researchers who may spend years preparing a single grant proposal, only to see their efforts stolen by aggressive competitors who may then reap the rewards of the resulting invention.

*C. Industry Funding of University-Sponsored Research in Washington May Decline*

Private biotechnology companies that invest in research development collaborations with Washington’s public institutions do so only if they are reasonably certain that patent rights are protected, licensing

---

118. ACE Brief, *supra* note 44, at 8–9.

agreements are exclusive, and new technology cannot be utilized by competitors. Without such assurance, companies cannot afford to invest the necessary money for commercial development, thus further jeopardizing already costly and risky ventures.<sup>119</sup> A retreat of industry funding may prevent development of many valuable and possibly life-saving medical and pharmaceutical inventions.<sup>120</sup>

A related concern is the possible withdrawal of private biotechnology companies from Washington. Washington is home to a substantial and rapidly growing biotechnology community,<sup>121</sup> due in great part to the desire of such companies to maintain close proximity to the valuable technology and skilled researchers housed at Washington's research institutions.<sup>122</sup> Without secure patent and trade-secret rights, these private

---

119. On average, it takes 12 years to bring a prescription drug to market in the United States. The odds of getting a new compound to the market are 1 in 10,000. The dollar investment for one prescription medicine averages \$231 million. Of the drugs that reach the marketplace, only 3 out of 10 even recoup the average cost of research and development. P. Roy Vagelos, *Are Prescription Drug Prices High?*, 252 *Science* 1080-82 (May 24, 1991).

120. One example, cited by U.W. in its trial brief, involved the stalled commercial development of research conducted by two U.W. researchers. Their research led to the development of an antibody with multiple potential benefits, including the treatment of victims of hemorrhagic shock (trauma due to blood loss). Despite a showing of life-saving potential, the patent rights were compromised by premature publication of information regarding the antibody. As stated by one of the researchers:

The end result is even though the antibody has great potential to prevent lifethreatening organ failure in trauma victims, and is licensed to a major pharmaceutical company, no drug company has been willing to invest the time and money to market the product because the patent and trade secret protection for the antibody was compromised.

Declarations of Dr. Charles L. Rice (Vice Chairman of the Department of Surgery at the University of Washington School of Medicine, Surgeon-in-Chief at Harborview Medical Center, Research Affiliate of the Regional Primate Research Center at the University of Washington) and Dr. John Harlan (Professor and Head of the Division of Hematology at the University of Washington School of Medicine) (Contained in Brief of Appellant at 29, *Progressive Animal Welfare Society v. University of Washington* (No. 59714-6)).

121. The Seattle area is one of the six main biotechnology centers in the United States. *Washington State Biotechnology Targeted Sector Advisory Committee Report to the Legislature* at 3-4. (Jan. 1992) [hereinafter *Biotech. Report*]. Washington's biotechnology industry currently generates more than \$500 million annually and employs nearly 5,000 people in more than 60 companies and nonprofit organizations. *Washington Industry Profile: Biotechnology* at 2 (pamphlet published by Washington CEO Magazine, on file with *Washington Law Review*).

The U.W. derives substantial licensing revenue from private companies. In fiscal year 1994, the U.W. received \$7.45 million from licensing its intellectual property, bringing its cumulative profit since 1984 to \$26.83 million. Seth Adkins, *Scientists Turn Technological Ideas Into Revenue Sources*, *The Daily* (University of Washington student newspaper), Feb. 27, 1995, at 2.

122. The institutions include the University of Washington, Washington State University, Eastern Washington University, and the Fred Hutchinson Cancer Research Center. *Biotech. Report*, *supra* note 121, at 4.

companies may not only withhold investment but may leave the state altogether.

*D. Collaboration Between U.W. and Researchers Outside of Washington May Decline*

By deviating from the nationwide policy of withholding disclosure of unfunded research proposals, Washington severely impedes the incentives for researchers at institutions outside of Washington to collaborate with Washington-affiliated researchers. Because their sensitive, preliminary research is threatened only in Washington, potential collaborators now have reason to look toward institutions located elsewhere. This jeopardizes future receipt of the vast funds granted to U.W. researchers involved in inter-university collaborative research. Additionally, Washington's liberal disclosure law may compromise the reputation of U.W. as a top research institution that actively promotes and protects the rights of its researchers.

*E. U.W.'s Ability to Attract and Retain Quality Researchers May Be Hampered*

Washington's research institutions now may find it more difficult to attract and retain strong faculty. While technically it is the sponsoring university that suffers from the loss of patent rights, the researchers also suffer from premature disclosure of sensitive information. In an environment where the competition for funding and standing in the medical research community is fierce, intellectual piracy has devastating effects on the livelihood of researchers. The results of years of intense efforts may be lost. Intellectual piracy deprives the researcher of credit for the invention and may prevent the publication of the research information because many journals will not publish information that previously has been published elsewhere.<sup>123</sup> These consequences can prove devastating to the researchers whose tenure, promotions, and standing in the academic community depend largely on any inventions and publication in scholarly journals.<sup>124</sup> In order to avoid these threats, researchers may prefer to work at institutions that are able to maintain the confidentiality of preliminary, unfunded research concepts.

---

123. *Id.*

124. APA Brief, *supra* note 65, at 12.

*F. The Effectiveness of the Peer Review Process May Be Adversely Affected*

Due to the nature of the peer review process, which depends on open and candid exchange, full disclosure of research information to the funding agency is crucial. Researchers who fear premature dissemination of their research likely will become reluctant to fully disclose their ideas and preliminary results. The content of disclosure also may be affected by fear of reprisal from groups having access to unfunded proposals who oppose and harass researchers engaged in certain types of research.<sup>125</sup> Any reluctance to disclose less than all material to peers will compromise the effectiveness of the review.

Groups in possession of unfunded proposals may also affect the objectivity and impartiality of the peer reviewers by subjecting them to political pressures and possibly even harassment, thereby threatening the effectiveness of a process that relies on a delicate balance of objective, merit-based review and policy-oriented considerations.

## VI. SUGGESTED COURSES OF ACTION TO MINIMIZE THE IMPACT OF PAWS

To minimize the adverse effects of the *PAWS* holding in Washington and nationwide, several corrective measures could be undertaken at the judicial and legislative levels. First, the Washington Legislature should amend Wash. Rev. Code § 42.17.310 to include an express exemption for unfunded medical research proposals. Such an amendment will prove

---

125. In *PAWS*, the court discussed a letter written from Dr. Sackett to a U.W. official. In the letter, Dr. Sackett described the harassment he had been subjected to as an animal researcher as well as the fear of attack harbored by animal researchers. *Progressive Animal Welfare Society v. University of Washington*, 125 Wash. 2d 243, 268 n.13, 884 P.2d 592, 606 n.13 (1994).

Lewis & Vincler, *supra* note 8, at 453 nn.200–01, lists many such examples including: *Standoff Broken in Animal Rights Protest in Md.*, Wash. Post, Aug. 1991, at C3 (discussing animal rights protesters picketing researcher's home over four month period); *Animal Activists Target Home of Researcher*, U.S. Medicine, Sept. 1991; *Protesters Stalk Researcher Over Cat Experiments*, Wash. Post, June 23, 1991, at C1; Constance Holden, *Animal Rightists Trash MSU Lab*, Science, Mar. 13, 1992, at 1349 (discussing fire set by the Animal Liberation Front (ALF) to a Michigan State University laboratory that caused approximately \$75,000 worth of damage); Eric Sorenson, *Activists Vandalize WSU Labs, Release Research Animals*, Spokesman-Review (Spokane), Aug. 14, 1991, at A1 (discussing ALF raid on Washington State University lab that resulted in damage to lab equipment and the release of minks and coyotes); Dave Birkland, *Animal Rights Group Claims It Started Big Edmonds Fire*, Seattle Times/Seattle Post Intelligencer, June 16, 1991 at A1 (discussing ALF's claim of responsibility for animal food co-op warehouse arson and their expressed desire to cause "maximum economic damage"); Jeff Wright, *Radicals Say They Set Fire*, Eugene Register Guard, June 11, 1991 (discussing fire set by ALF to an Oregon State University research barn and destruction of research records and vandalism of research equipment).

the swiftest and most effective means of formally addressing this problem in Washington state. The public does have an interest in monitoring the expenditure of public funds for research. However, in light of the safeguards already established to represent public interests in research, and given the risks associated with premature disclosure of research information, the national policy of allowing public access to proposals only after funding strikes the correct balance between the public's right to know and the researchers' need for confidentiality in the proposal process.

Regardless of any response by the Washington Legislature, Congress should expressly preempt state law mandating disclosure of unfunded medical research proposals. Because the federal government has rights in any federally funded research pursuant to the "March-in rights" provision of the Bayh-Doyle Act,<sup>126</sup> it has a significant interest in protecting the patentability of the inventions. Washington's current position conflicts with the intent of the Bayh-Doyle Act to support and improve U.S. technological innovation and industry investment. A practice of protecting unfunded proposals at the federal level by invoking the pertinent FOIA exemptions<sup>127</sup> will prove futile if the sensitive information is released at the state level. Not only would congressional action settle this problem in Washington, it also would prevent other states from deviating from the current national standard, thus preventing the spread of a counterproductive policy.

In the meantime, courts in states with public records acts similar to Washington's should decline to follow Washington's example. Because *PAWS* is a case of national first impression, and U.W. is a leading recipient of federal research grants, other state courts may look to Washington's current policy on disclosure of unfunded research proposals as persuasive authority in deciding similar cases. Any state interested in avoiding the risks associated with forced disclosure of unfunded medical research proposals should refuse to follow Washington's example and instead continue to follow the national standard of respecting the confidentiality of unfunded medical research proposals.

## VI. CONCLUSION

Washington's Public Records Act serves a valuable and necessary function. It helps ensure that the government remains of the people and

---

126. See *supra* note 77 and accompanying text.

127. See *supra* notes 48-50 and accompanying text.



for the people. It was designed to serve Washington's citizens and to safeguard and further their interests. However, the *PAWS* holding placed too little weight on a nationwide policy of maintaining the confidentiality of unfunded medical research proposals. The result is the adoption of a policy that is detrimental to the interests of the citizens of Washington and to progress in biomedical research.

The most difficult aspect of drafting public disclosure laws is knowing where to draw the line between the public's right to oversee the government and the need for an effective government that is free from undue interference. Hopefully, the Washington legislature and Congress will realize that this line has been crossed and will act quickly to properly reset it.