The Chilling Effect of Sunlight: Preserving Academic Freedom in the Face of Abusive Open Records Requests

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"Freedom in research is fundamental to the advancement of truth."[1] Writing a paper can be a difficult and messy process. It involves many stops and starts, fits of inspiration and hopelessness, and a final cathartic release when all the work comes together into a polished product. This process is an inherently private one, shared maybe with a few close colleagues and confidants. But imagine if this private process were open to public scrutiny, if your innermost thoughts and failed ideas were aired to everyone. Perhaps you will face public ridicule, scorn, or even calls for your resignation. Would you continue to write? Would you continue to pick up your pen?[2]

This is a problem affecting professors across the political spectrum. For example, University of Virginia law school professor Douglas Laycock was targeted by an LGBT group for his religious liberty scholarship,[3] and the Virginia Attorney General demanded the private records of former University of Virginia professor and climate scientist Michael Mann.[4] The Civitas Institute, self-described as "North Carolina's conservative voice," demanded the records of Gene R.

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1 American Association of University Professors (AAUP), *1940 Statement of Principles on Academic Freedom and Tenure With 1970 Interpretive Comments*, AAUP Reps. & Publ'ns, https://www.aaup.org/file/1940%20Statement.pdf [hereinafter AAUP Statement].

2 Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 448 (1980) "[p]rivacy . . . contributes to learning, creativity, and autonomy by insulating the individual against ridicule and censure at early stages of groping and experimentation. . . . In the absence of privacy we would dare less, because all our early failures would be on record. We would only do what we thought we could do well. Public failures make us unlikely to try again."

3 Dahlia Lithwick, *Chilling Effect*, Slate (May 28, 2014, 5:54 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/douglas_laycock_gets_smeared_lgbtq_groups_attack_on_the_university_of_virginia.html.

4 Rosalind S. Helderman, *State attorney general demands ex-professor's files from University of Virginia*, Wash. Post (May 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/

Nichol, a University of North Carolina at Chapel Hill law professor and former director of its Center on Poverty, Work, and Opportunity.[5] Additionally, Art Hall, a University of Kansas economics professor, was singled out for his previous work for Koch Industries by Students for a Sustainable Future—a group seeking to eliminate corporate influence in academia.[6] Both conservatives and liberals have targeted professors on the left and the right for their research, scholarship, and for speaking out.[7] The targeted professors' colleagues have taken note.[8] As a result, their speech is chilled, their academic rigor is stifled, and fruitful avenues of research go unexplored.

Open records laws—the "sunshine" statutes that shed light on the machinery of government—have been used to target professors at state colleges and universities.[9] These laws serve the laudable purpose of promoting transparency and accountability in government—a function essential to a free society.[10] Their salutary effect must not be stifled. This creates a profound dilemma. On one side of the scale rests professorial academic freedom—the principle that professors must be free to research, teach, and debate ideas without censorship or outside interference.[11] On the other side of the scale rests the open records laws, which enforce the axiom that sunlight is the best of disinfectants.[12] Which principle should win?

The answer is neither. Both sides of the scale can stay balanced by employing a clear academic freedom exemption for state open records laws. By shielding professors' private academic records from

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2010/05/03/AR2010050304139.html; Dahlia Lithwick, *Suing Science*, SLATE (May 4, 2010, 5:21 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/05/suing_science.html.

[5] Charles Huckabee, *Chapel Hill Professors Question Group's Public-Records Request*, THE CHRONICLE OF HIGHER EDUC. (Nov. 27, 2013), https://www.chronicle.com/blogs/ticker/chapel-hill-professors-question-groups-public-records-request/69735.

[6] Art Hall, *Your Turn: KU lecturer shares academic freedom view*, LAWRENCE J.-WORLD (Dec. 9, 2014, 12:00 AM), http://www2.ljworld.com/news/2014/dec/09/your-turn-ku-lecturer-shares-academic-freedom-view/; John Hanna, *Judge blocks University of Kansas records release*, WASH. TIMES (Dec. 4, 2014), https://www.washingtontimes.com/news/2014/dec/4/ku-centers-leader-sues-to-block-records-release/.

[7] *See infra* Section III.

[8] *See infra* Section III, B.

[9] *See infra* Section II, A.

[10] *See infra* Section II, A.

[11] *See infra* Section I.

[12] "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes, Co., 1914).

disclosure, this narrow carve-out creates clarity and certainty for all parties, deters fishing expeditions into professors' unfinished business, and reduces the need for litigation to figure out how the two principles in the dilemma interact.[13]

Section I of this article crafts a working definition of academic freedom and discusses its importance to academia. Section II considers the equally profound importance of open records laws. This section dives into the effects these laws have on public colleges, including how open records laws can be used to expose malfeasance in higher education. Section III discusses how these principles collide, replete with examples of professors targeted via open records requests because of their research and expression. Finally, Section IV introduces a solution to the dilemma in the form of a model exemption to state open records laws. The article concludes by highlighting the benefits of such an exemption: reduced litigation, increased certainty and clarity for all parties involved, and the codification of a careful balance between government transparency and academic freedom.

I. PROFESSORIAL ACADEMIC FREEDOM IS ESSENTIAL TO STUDENTS, PROFESSORS, AND COLLEGES

This article focuses on professorial academic freedom. Before diving into the importance of this principle, a definition must be established. This will be done by exploring legal and theoretical frameworks of the term, and then discussing how professorial academic freedom benefits professors, students, and educational institutions.

A. *Defining Professorial Academic Freedom*

There has been much sound and fury regarding the academic freedom of educational institutions[14] and of students,[15] but this article

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[13] *See infra* Section IV.

[14] *See, e.g.,* Erica Goldberg & Kelly Sarabyn, *Measuring a "Degree of Deference": Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 217 (2011); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1497 (2007).

[15] *See, e.g.,* Henry Reichman, *On Student Academic Freedom*, INSIDE HIGHER ED (Dec. 4, 2015), https://www.insidehighered.com/views/2015/12/04/what-does-student-academic-freedom-entail-essay.

focuses on the academic freedom of professors. Professorial academic freedom has both a legal and an academic definition. Rather than expounding upon the righteousness of a broad conception of faculty rights, this article uses a concise blend of the most widely-accepted definitions of professorial academic freedom.

Starting with the legal framework, academic freedom is considered tied to the First Amendment, although commentators have lamented the muddiness of this connection.[16] One conception of constitutional academic freedom is the "insulation of scholarship and liberal education from extramural political interference,"[17] while another more narrowly encompasses "the freedom of individual professors to teach, research, and publish opinions on issues of public concern."[18] Other approaches differentiate constitutional academic freedom, asserting this is an ill-defined right against the state, from a professional creed described as "a canon of self-imposed professional ethics . . . of self-governance and autonomy set forth by the AAUP [American Association of University Professors]."[19] Virtually all definitions draw from the canonical 1940 AAUP *Statement of Principles on Academic Freedom and Tenure*.[20]

For the purposes of this article, professorial academic freedom is the general recognition that professors must be free to research, teach, and debate ideas free from censorship or institutional or outside interference.[21] This definition blends the philosophical conceptions of the term with an emphasis on individual rights. It reflects that a professor's role at a university is centered on researching, teaching, and

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16 J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 253 (1989) ("There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles."). *See generally* Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677,678 (2014) (arguing that the Supreme Court has never defined academic freedom as an individual right under the First Amendment).

17 Byrne, *supra* note 16, at 255. The author's non-legal definition of academic freedom similarly protects "the liberties claimed by professors through professional channels against administrative or political interference with research, teaching, and governance."

18 Stacy E. Smith, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 303-04 (2002).

19 Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CALIF. L. REV. 1061, 1065-66 (2003).

20 AAUP Statement, *supra* note 1, at 1.

21 *First Amendment Glossary*, FIRE (last visited Nov. 13, 2018), https://www.thefire.org/first-amendment-library/glossary/.

debating ideas pertinent to his or her academic field. Furthermore, these professorial functions are widely recognized by courts and may have constitutional dimensions.[22] Courts have consistently reiterated the importance of professorial academic freedom to a free society.[23]

B. *Judicial Interpretations of Professorial Academic Freedom*

Judicial decisions expounding upon the importance of professorial academic freedom are rooted in government attempts to control the professoriate at public universities. There are three cases, in particular, spanning several decades that best illustrate the legal conception of professorial academic freedom. These cases involve the types of activity generally understood to form the core of a professor's job.

1. *Sweezy v. New Hampshire*

In *Sweezy v. New Hampshire,* the United States Supreme Court vacated the conviction of professor Paul Sweezy, who, during the height of the Red Scare, refused to answer the New Hampshire Attorney General's subpoenas regarding his knowledge of the state's Progressive Party membership and a lecture he gave at a state university.[24] A plurality of the Court found that there had been an "invasion of [Sweezy's] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."[25] In one of the strongest pronouncements supporting academic freedom, the Court added:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[26]

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22 *See infra* Section I, B.
23 *See infra* Section I, B.
24 354 U.S. 234, 235, 241-44 (1957).
25 *Id.* at 250.
26 *Id.*

By discussing the need to protect a professor's freedom to teach, the Court put lecturing squarely within the activities protected by professorial academic freedom.[27]

2. *Keyishian v. Board of Regents*

Sweezy was followed a decade later by *Keyishian v. Board of Regents*, where several State University of New York at Buffalo professors were fired for refusing to sign an oath stating they were not communists.[28] Building on *Sweezy*, the Supreme Court struck down the oath requirement and reiterated that academic freedom is a paramount value to a free society:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the *First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[29]

This language also touches upon a professor's freedom to teach without government interference, especially political interference designed to enforce conformity.[30]

3. *Dow Chemical Company v. Allen*

Finally, in *Dow Chemical Company v. Allen*, Dow sought to subpoena University of Wisconsin faculty records for a hearing before the Environmental Protection Agency regarding one of its herbicides.[31] The United States Court of Appeals for the Seventh Circuit agreed with the University of Wisconsin's academic freedom argument in its *amicus curiae* brief and refused to enforce the subpoenas, holding that "whatever constitutional protection is afforded by the *First Amendment* extends as readily to the scholar in the laboratory as to the

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[27] This point was made more explicitly by Justice Frankfurter in his concurrence, where he stated: "[Academic] inquiries . . . must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling." *Id.* at 262 (Frankfurter, J., concurring).

[28] 385 U.S. 589, 592 (1967).

[29] *Id.* at 603.

[30] *Id.*

[31] 672 F.2d 1262, 1265-66 (7th Cir. 1982).

teacher in the classroom."[32] Citing approvingly to *Sweezy* and *Keyishian*, the Seventh Circuit reiterated that if academic freedom means anything, it includes the right to teach and research without government intrusion.[33]

C. *Academic Freedom is Vital to the Proper Functioning of a University*

In addition to these decisions accentuating the importance of academic freedom to a free society, there are several key normative reasons for protecting academic freedom. Although our focus is on professors, the value of academic freedom is also tied to the education of students and to the purpose of a university. In this way, protecting the right of professors to lecture, research, and debate has a positive effect on students, on the advancement of knowledge, and on the university itself.

As the prior cases demonstrate, the most prominent attempts to stifle academic freedom involve forcing professors to conform to an orthodoxy, usually a political one. Academic freedom protects the very opposite result: the ability of scholars to delve into diverse, innovative, and controversial fields of research without government interference. Recent attempts to restrict the subject matter of research and pedagogy underlie the principle that professors must be free to explore even the most politically inconvenient topics.[34] Considering that the vast majority of universities are dedicated to the pursuit of the truth and discovery of knowledge,[35] academic freedom is the means by which professors achieve that purpose.

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[32] *Id.* at 1275.

[33] *Id*. at 1275-76.

[34] *See* Joe Cohn, *Wisconsin Lawmakers Once Again Threaten Academic Freedom*, FIRE (Dec. 21, 2016), https://www.thefire.org/wisconsin-lawmakers-once-again-threaten-academic-freedom/; Brynne Madway, *Court forbids enforcement of Arizona law restricting ethnic studies classes in grade schools*, FIRE (Jan. 22, 2018), https://www.thefire.org/court-forbids-enforcement-of-arizona-law-restricting-ethnic-studies-classes-in-grade-schools/; Alex Morey, *AAUP: Free Speech, Due Process, and Academic Freedom Collateral Damage in Feds' Title IX Enforcement*, FIRE (Mar. 25, 2016), https://www.thefire.org/aaup-free-speech-due-process-and-academic-freedom-collateral-damage-in-feds-title-ix-enforcement/; Alex Morey & Adam Steinbaugh, *Wisconsin Legislator's Threat to Slash UW Budget Over Reading Assignment 'Cuts to the Core of Academic Freedom'*, FIRE (July 8, 2016), https://www.thefire.org/wisconsin-legislators-threat-to-slash-uw-budget-over-reading-assignment-cuts-to-the-core-of-academic-freedom/.

[35] *See, e.g.,* Cornell University Mission Statement, CORNELL UNIV., https://www.cornell.edu/about/mission.cfm (last visited Oct. 31, 2017) ("Cornell's mission is to discover, preserve

Turning to students, academic freedom benefits the student body by allowing them to explore the full range of available scholarship. Many students attend college without a clear picture of what they want to study or without a narrow focus on a particular academic topic.[36] Academic freedom allows professors to satisfy the intellectual curiosity of their students, many of whom seek to push the boundaries of conventional academic discourse.[37] In the wake of recent legislative attempts to restrict the range of acceptable topics of study,[38] the preservation of this freedom is vital to ensuring that there are no restricted sections of the library.[39]

Finally, the advancement of knowledge and pursuit of truth lies within the very soul of a university. Over a hundred years ago, the AAUP produced a canonical formulation regarding how academic

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and disseminate knowledge, to educate the next generation of global citizens, and to promote a culture of broad inquiry throughout and beyond the Cornell community."); Regis University Mission Statement, REGIS UNIV., http://www.regis.edu/About-Regis-University/History-and-Mission/The-Regis-University-Mission.aspx (last visited Oct. 31, 2017) ("We nurture the life of the mind and the pursuit of truth within an environment conducive to effective teaching, learning and personal development.").

36 *See* Xianglei Chen & Matthew Soldner, *STEM Attrition: College Students' Paths Into and Out of STEM Fields*, NAT'L CTR. FOR EDUC. STATS. (2013) https://nces.ed.gov/pubs2014/2014001rev.pdf (a majority of college students switch their major at least once).

37 Kenneth J. Barnes, *Report of the Committee on Freedom of Expression at Yale*, YALE UNIV. (1965), http://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale (The Woodward Report, named after historian Comer Vann Woodward, who chaired the Yale University committee that created the report, represents one the strongest affirmations of academic freedom: "The primary function of a university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function a free interchange of ideas is necessary not only within its walls but with the world beyond as well. It follows that the university must do everything possible to ensure within it the fullest degree of intellectual freedom. The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable.").

38 Madway, *supra* note 34; Cohn, *supra* note 34; Morey, *supra* note 34; Morey & Steinbaugh, *supra* note 34.

39 Perhaps the most famous example of how restricted libraries hurt students can be found in J. K. Rowling's *Harry Potter and the Sorcerer's Stone* (1998), where the main character's magical quest to learn about the "dark arts" was almost thwarted by restricted access to literature on the subject. Another prominent example can be seen in HBO's *Game of Thrones*, where a studious character's thirst for knowledge was nearly stifled after being denied access to the "restricted section of the library." Alice Vincent, *Did you catch Jim Broadbent's Harry Potter in-joke in the Game of Thrones season 7 premiere?*, THE TELEGRAPH (July 18, 2017, 2:36 PM), http://www.telegraph.co.uk/tv/2017/07/17/did-catch-jim-broadbents-harry-potter-in-joke-game-thrones-season/.

freedom advances the purpose of a university.[40] Academic freedom, the organization wrote, allows professors the freedom to "perform honestly and according to their own consciences the distinctive and important function which the nature of the profession lays upon them."[41] When used as a shield to resist politically driven attempts to control their work, academic freedom allows professors to focus on purely academic pursuits. Ideas and theories can be researched, taught, and debated solely based on merit. Without bureaucrats and legislators tipping the scales in favor of one academic theory over another,[42] ideas can be tested through vigorous debate and intellectual discussion by scholars. Protecting academic freedom ensures that the pursuit of truth remains the principal concern of the academy.[43]

II. OPEN RECORDS LAWS SERVE THE EQUALLY PROFOUND PURPOSES OF PROMOTING TRANSPARENCY AND ACCOUNTABILITY IN GOVERNMENT

While open records laws do not have the same constitutional magnitude as academic freedom, the notion that a government must be transparent in order to be held accountable by the people is rooted in the founding of our nation.[44] This article does not seek to promote one ideal over the other, but instead recognizes that academic free-

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[40] AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE 295 (1915), https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf.

[41] *Id*. at 294.

[42] *See* Madway, *supra* note 34. *See also* Cohn, *supra* note 34; Morey *supra* note 34; Morey & Steinbaugh *supra* note 34.

[43] In the interest of full disclosure, FIRE is an organization dedicated to defending academic freedom. Although FIRE believes academic freedom is an essential value, it is FIRE's position that academic freedom is not absolute and may be balanced against competing interests, such as government transparency. FIRE Mission, FIRE www.thefire.org/about-us/mission (last visited Nov. 1, 2017). *See infra* Section IV (discussing the balance between academic freedom and open records laws).

[44] *See* Letter from James Madison to W.T. Berry (Aug. 4, 1822) *reproduced in* The Founders' Constitution, Epilogue: Securing the Republic (The University of Chicago Press 1987), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html ("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. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."); Patrick Henry, Speech On the Expediency of Adopting the Federal Constitution, Delivered in the Convention of Virginia (June 9, 1788), *available at* The Constitution Society, Popular Pages, http://www.constitution.org/rc/rat_va_07.htm (Last visited Nov. 1, 2017) (Founding Father Patrick Henry, in a debate before Virginia's constitutional ratification committee, stated: "The

dom and open records laws serve equally important functions. While academic freedom is bolstered by constitutional jurisprudence and normative arguments about the proper functioning of a university, the value of open records laws is best explained by policy rationales and examples of their beneficial effects.

A. *"In a Free and Open Society, Sunlight is Said to be the Best of Disinfectants"*[45]

Justice Louis Brandeis' pithy statement—that in a free and open society, sunlight is the best of disinfectants—drives to the heart of open records statutes.[46] These laws allow parties to request government documents and, if the government refuses to turn them over, to sue to force disclosure.[47] Codified by every state and the federal government, open records laws are the legal embodiment of Justice Brandeis' theory that "sunshine" will dry up corruption and wrongdoing.[48] The overarching goal of open records laws is to enhance transparency in governmental affairs.[49] The federal equivalent of the state sunshine laws is embodied in the Freedom of Information Act (FOIA).

Practically, open records laws enable the public to formally request information from public entities.[50] All such statutes have a presumption of disclosure, meaning that all government records are

liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.").

45 Brandeis, *supra* note 12, at 92.

46 *Id*.

47 *See, e.g.*, *Federal Open Government Guide,* REPORTERS COMM. FOR FREEDOM OF THE PRESS, *Federal Open Government Guide*, (10th ed. 2009) at 4-5, *available at* https://www.rcfp.org/open-government-guide.

48 *See, e.g.,* 5 ILL. COMP. STAT. ANN. 140/1 (LexisNexis 2017) ("Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government. . . . Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest. . . . [I]t is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government."); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). ("The basic purpose of FOIA [the federal open records law] is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.").

49 *See Robbins Tire & Rubber Co.*, 437 U.S. at 242.

50 *See, e.g.*, 5 U.S.C. § 552(a)(3) (2012). *See also Federal Open Government Guide supra* note 48, at 4.

open for public inspection unless an exemption applies.[51] In response to a formal request, the public entity can either: (1) fully comply with the request; (2) partially comply with the request by withholding or redacting certain documents; (3) refuse the request by providing a justification for doing so; or (4) ignore the request.[52] Disputes over whether the requested records were improperly withheld or redacted can be resolved via litigation addressing whether a specific exemption warrants disclosure.[53]

B. *Open Records Laws Are Used to Unearth Noteworthy Information and to Expose Scandals at Public Colleges and Universities*

The effect of open records laws can be seen in the many instances in which they are used to expose malfeasance at public educational institutions. In support of subjecting state university documents to public scrutiny, the AAUP cites "[t]he increased ability to expose corrupt, biased, or otherwise improper behavior by institutions," "[t]he beneficial pressure exerted on universities to fulfill their intended missions by the knowledge that failure to do so is likely to be exposed," and "[t]he incentive to university personnel to be more effective because their actions and decisions must survive public scrutiny," among other reasons.[54] In an example that made national news, *The Chicago Tribune* uncovered that the University of Illinois accepted hundreds of subpar student applications for admission solely because of interference by state lawmakers and university trustees.[55] The fallout from this scandal, called the "Clout List," was significant—the university president, and almost every trustee, resigned following the

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[51] *See, e.g.*, 5 USC § 552(a)(3)(A) (2012). *See, e.g.,* N.Y. Pub. Off. Law §§ 84 to 90 ("Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, [with certain enumerated exceptions].") All public records laws follow the similar format of stating that all public records shall be made available for inspection, with enumerated exemptions.

[52] *See, e.g.*, N.Y. Pub. Off. Law § 89(3) (McKinney 2018).

[53] *See, e.g.*, N.Y. Pub. Off. Law § 89(4) (McKinney 2018).

[54] Peter O. Steiner et al., *Report on Access to University Records*, 83 ACADEME 44, 45 (1997).

[55] *See* Jodi S. Cohen, Stacy St. Clair & Tara Malone, *Clout goes to college*, Chi. Trib. (May 29, 2009), http://www.chicagotribune.com/news/watchdog/chi-070529u-of-i-clout-story.html; Tamar Lewin, *Privacy and Press Freedom Collide in University Case*, N.Y. Times (Oct. 20, 2011), http://www.nytimes.com/2011/10/21/education/21privacy.html.

public outcry.[56] The *Tribune*'s diligent investigation, fueled by the vigorous use of the Illinois open records law, reached as far as former Illinois Governor Rod Blagojevich.[57]

Open records laws are often used to dig deeper into ongoing scandals, especially when it comes to college athletics. In one high-profile example, ESPN invoked Ohio's open records statute to request The Ohio State University's records regarding allegations that administrators arranged for student-athletes to receive tattoos in exchange for signed memorabilia.[58] CNN also used sunshine laws to uncover the pervasive indifference to subpar student-athlete reading and writing skills at many top university athletic programs.[59] One instance occurred after the news broke of a fraudulent academic program involving two decades of fake classes for athletes, fraternity members, and other students at the University of North Carolina.[60] In the aftermath, administrators at UNC faced many requests under open records laws for data underlying the scandal.[61] These examples

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[56] *See* Tara Malone, *2 U. of I. trustees still ignore Quinn's call for resignations,* CHI. TRIB. (Aug 23, 2009), http://www.chicagotribune.com/news/chi-quinn-trustee-22-aug23-story.html.

[57] *See* Jodi S. Cohen, Tara Malone & Robert Becker, *U. of I. jobs-for-entry scheme*, CHI. TRIB. (June 26, 2009), http://www.chicagotribune.com/news/chi-ui-trustees-26-jun26-story.html. Jason Meisner and Patrick M. O'Connell, *Blagojevich faces 8 years more in prison after judge sticks to 14-year term*, CHI. TRIB. (Aug 8, 2016), http://www.chicagotribune.com/news/ct-rod-blagojevich-appeal-20160809-story.html (reporting on how former Illinois governor Rod Blagojevich is infamous for being impeached and convicted for, among other crimes, trying to trade or sell a United States Senate seat vacated when then-Illinois Senator Barack Obama became President).

[58] *See ESPN asks for release of OSU records*, ESPN (Jul. 12, 2011), http://www.espn.com/college-football/story/_/id/6759872/espn-files-public-records-lawsuit-ohio-state-buckeyes; Andrew Schnitkey, *ESPN v Ohio State: The Lawsuit and What It Means*, WAITING FOR NEXT YEAR (July 12, 2011), http://waitingfornextyear.com/2011/07/espn-v-ohio-state-the-lawsuit-and-what-it-means/; Aaron Marshall, *ESPN sues Ohio State in public records suit related to tattoos for memorabilia* scandal, CLEVELAND.COM (July 11, 2011), http://www.cleveland.com/open/index.ssf/2011/07/espn_sues_ohio_state_in_public.html.

[59] *See* Sara Ganim, *CNN analysis: Some college athletes play like adults, read like 5th-graders*, CNN (Jan. 8, 2014, 1:05 PM), http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/index.html.

[60] *Id*.

[61] *See UNC trustees irked by open-records costs*, GREENSBORO NEWS & RECORD (Mar. 30, 2016), http://www.greensboro.com/news/schools/unc-trustees-irked-by-open-records-costs/article_131fb6f6-de87-5ddc-a3b7-65ffb54f4306.html. Professors at public educational institutions are not free from such scandals. Open records requests can aid in the discovery of academic dishonesty, research fraud, and even embezzlement. *See The 10 Greatest Cases of Fraud in University Research*, ONLINEUNIVERSITIES.COM (Feb. 27, 2012), http://www.onlineuniversities.com/blog/2012/02/the-10-greatest-cases-of-fraud-in-university-research/ (research fraud); Matt Miller, *Ex-PSU professor Craig Grimes sentenced to federal prison for research grant fraud*, PENNLIVE

illustrate the power of open records laws to shed light on the innermost machinery of higher education.[62]

III. ABUSIVE OPEN RECORDS REQUESTS HAVE STIFLED ACADEMIC FREEDOM

Any law, even those most carefully drafted and passed with the finest intentions, can be abused. In the case of open records laws, the abuse occurs when they are used to target professors at public universities to discourage research and speech. This section will explore how these laws have been used to chill academic freedom.

A. *Examples of Abuse*

In one of the most brazen attempts to stifle research using open records laws, students at the University of Virginia School of Law filed a request for "among other things, university-funded travel expenses and cellphone records for the past two-and-a-half years" regarding UVA law professor Douglas Laycock.[63] This extremely broad request was triggered by the professor's scholarship on religious liberty, which, in the students' words, formed the "basis for discrimination bills like the one that went into effect in Mississippi and nearly in Arizona" and "efforts to resist the requirement in the Affordable Care Act that employers cover the cost of contraception."[64] Working with the LGBT rights group GetEQUAL, the students targeted Laycock, a prominent expert on religious liberty jurisprudence, solely on

(Nov. 30, 2012), http://www.pennlive.com/midstate/index.ssf/2012/11/ex-psu_prof_craig_grimes_sente.html (embezzlement).

[62] It should be noted that academia has transparency mechanisms through the journal publication process that are designed to ensure research integrity. *See* Stephan Lewandowsky & Dorothy Bishop, *Research integrity: Don't let transparency damage science*, NATURE (Jan. 15, 2016), https://www.nature.com/news/research-integrity-don-t-let-transparency-damage-science-1.19219#/b7 (describing processes used by academics to ensure research integrity); Claudia Polsky, *Open Records, Shuttered Labs: Ending Political Harassment of Public University Researchers*, 66 UCLA L. REV. (forthcoming Jan. 2019) (manuscript at 68-71) (available at https://ssrn.com/abstract=3140154 (discussing ways to police university research ethics without resorting to open records request).

[63] *LGBT activists take UVA professor to task for his stance on cases*, THE DAILY PROGRESS (May 23, 2014), http://www.dailyprogress.com/news/local/lgbt-activists-take-uva-professor-to-task-for-his-stance/article_f15797b4-e2cf-11e3-ae02-001a4bcf6878.html.

[64] *UVA Scholar Responds To Student Attacks*, NBC29 (May 30, 2014), http://www.nbc29.com/story/25539656/uva-scholar-responds-to-student-attacks.

the basis of the content of his research and its effect on legislation.[65] While the students claimed that their request was designed to start "a dialogue with UVA students who are negatively impacted by [his] work," forcing a professor to expose travel expenses and phone records seems unnecessarily invasive.[66]

In another example, the Republican Party of Wisconsin filed a request for the records of University of Wisconsin-Madison Professor William Cronon.[67] Within thirty-six hours of the publication of Professor Cronon's highly shared *New York Times* piece criticizing the Wisconsin Republican Party, the university received an open records request from a member of the party for all of Cronon's work emails that "reference any of the following terms: Republican, Scott Walker, recall, collective bargaining . . . rally, union," and the names of various Wisconsin Republican legislators and others connected to public sector unions.[68] The timing of the request, the nature of the requestor, and the scope of emails requested made apparent the naked attempt to intimidate a professor into silence and made the national news.[69]

Broad requests for professorial records create a chilling effect despite the best intentions of the requester. When an Arizona congressman requested detailed records of University of Delaware (UD) researchers who publicly questioned the human contribution to climate change,[70] UD granted only a narrow portion of the request, cit-

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65 *See* Will Creeley, *FOIA Request for UVA Law Prof's Records Threatens Academic Freedom*, FIRE (May 28, 2014), https://www.thefire.org/foia-request-for-uva-law-prof-records-threatens-academic-freedom/.

66 Jonathan H. Adler, *"You don't start a dialogue with FOIA requests"*, WASH. POST: THE VOLOKH CONSPIRACY (May 27, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/27/you-dont-start-a-dialogue-with-foia-requests/?utm_term=.6720ab394229. *Cf*. Blake Neff, *Sexual Consent Contracts Are Now A Real Thing You Can Buy,* THE DAILY CALLER (July 8, 2015, 8:52 AM), http://dailycaller.com/2015/07/08/sexual-consent-contracts-are-now-a-real-thing-you-can-buy/#ixzz3udpy8nCO (explaining that, as a general matter, presenting someone with legal paperwork of any kind will tend to limit the opportunities to socialize).

67 *See* Don Walker, *GOP seeks e-mails of UW-Madison professor*, J. SENTINEL (Mar. 25, 2011) http://archive.jsonline.com/blogs/news/118654904.html.

68 *Id.*

69 *See generally* William Cronon, *NYT Editorial and Other Coverage of Cronon Open Records Case*, SCHOLAR AS CITIZEN (Mar. 26, 2011), http://scholarcitizen.williamcronon.net/2011/03/26/coverage-cronon-open-records/ (collecting sources about the incident including articles in the New York Times, The Atlantic, the Chronicle of Higher Education, Forbes, among many others). The ironic part about this request is that it was in response to the professor's article about the deplorable tactics of the state Republican party. The professor was not thrilled.

70 Andy Thomason, *Congressman Wants to Know Who Pays for Climate Skeptics' Research*, CHRON. OF HIGHER EDUC. (Feb. 25, 2015), http://www.chronicle.com/blogs/ticker/con

ing the researchers' academic freedom.[71] The congressman claimed that his intent was to determine whether there were conflicts of interest in climate change research,[72] yet he requested "all communication . . . [regarding] travel expenses and other compensation than his Delaware salary" and "copies of and written communication about [climatology professor David] Legates's Congressional testimony,"[73] which the congressman later admitted was an "overreach."[74] By refusing to hand out private communications, UD upheld the right of its professors to honestly and openly discuss research theories without external interference.[75] The targeting of professors will continue so long as their private academic records are subject to disclosure under open records laws.

Despite widespread negative media coverage on the use of open records requests to steer professors away from certain controversial issues,[76] there is at least one organization that vows to continue the practice. According to the AAUP, the Energy & Environmental Legal Institute (E&E)'s crusade against climate scientists has "span[ned] a total of 13 years, from 1999 to 2012, requiring hundreds of hours by professors and other university personnel to cull through more than 100,000 pages of email and attachments to identify the emails that were responsive to the requests and to distinguish those that could be properly disclosed and withheld."[77] The group alleges

gressman-wants-to-know-who-pays-for-climate-skeptics-research/94637?cid=pm&utm_source=pm&utm_medium=en.

71 *See generally* Valerie Richardson, *University of Delaware spurns House Democrats' probe into climate professor*, WASH. TIMES (Mar. 18, 2015), http://www.washingtontimes.com/news/2015/mar/18/raul-grijalvas-probe-david-legates-climate-scienti/.

72 Joby Warrick, *House Dems: Did Big Oil seek to sway scientists in climate debate?*, WASH. POST (Feb. 24, 2015), https://www.washingtonpost.com/news/energy-environment/wp/2015/02/24/house-dems-did-big-oil-seek-to-sway-scientists-in-climate-debate/?utm_term=.2fef16d1e86a.

73 Susan Kruth, *U. of Delaware Resists Potentially Chilling Records Request from Congressman*, FIRE (Mar. 25, 2015), https://www.thefire.org/u-of-delaware-resists-potentially-chilling-records-request-from-congressman/; Colleen Flaherty, *Academic Freedom or Secrecy?,* INSIDE HIGHER ED (Mar. 24, 2015), https://www.insidehighered.com/news/2015/03/24/does-academic-freedom-mean-researchers-need-not-reveal-their-funding-sources.

74 Kruth, *supra* note 73.

75 *See* Polsky, *supra* note 62, at 32-49 (describing numerous incidents of university researchers targeted by politically-motivated open records requests).

76 *See* Cronon, *supra* note 69 (listing negative coverage).

77 Brief for Am. Ass'n of Univ. Professors as Amici Curiae Supporting Appellants, 5, Energy & Env't Legal Inst. v. Ariz. Bd. of Regents, 2017 Ariz. App. Unpub. LEXIS 1342 (Ariz. Ct. App.Sept. 14, 2017) at *28. [hereinafter AAUP *Amicus* Brief] (the AAUP further expounds on E&E's efforts to abuse open records laws in this manner stating: "Additionally, E&E's nationwide anti-climate science campaign, including overly broad and intrusive public records

that E&E has stated a desire to "Expand Pursuit of Researchers' Emails" and to "keep peppering universities around the country with similar requests under state open records laws."[78] Although they focus on climate scientists, such continued hostility towards a professor's right to delve into this topic demonstrates that the strategy of abusing open records laws is not going away anytime soon.[79]

B. *The Chilling Effect of Forced Disclosure of Private Academic Records is Based on Empirical Evidence*

The chilling effect of open records law abuse is not merely anecdotal. In a study of grant recipients whose research attracted significant public scrutiny, a majority of the respondents admitted that they self-censored their grant application in response to public controversy, while almost a quarter of them "reframed studies, removed research topics from their agendas, and, in a few cases, changed their jobs."[80] This is in addition to countless affidavits, news articles, and testimony from scholars describing how compelled disclosure of their private academic records has hampered their research and, in some cases,

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requests, has created harassing and intimidating conditions that interfere with the scientists' ability to engage in academic research. E&E's overly broad and intrusive records requests to faculty in universities around the country constitute a campaign of harassment and intimidation against climate scientists that has severe chilling effects on academic freedom of public university faculty and discourages collaboration between public university researchers and their colleagues in US private universities and in universities internationally.").

[78] *Id.* at *28; *Group to Request Rehearing in U.Va. Case, Expand Pursuit of Researchers' Emails,* 11 Report on Research Compliance 5 (Theresa Defino ed. 2014).

[79] Elizabeth Williamson, *Industries Turn Freedom of Information Requests on Their Critics*, N. Y. TIMES (Nov. 5, 2018), https://www.nytimes.com/2018/11/05/us/politics/freedom-of-information-requests.html. (In another example of an industry group using broad open records request to attack its critics, a University of California, Davis School of Law professor who criticized low-income tax filing programs of financial services companies was subject to a request from the companies' trade coalition "seeking everything . . . [the professor] had written or said about the companies this year, including emails, text messages, voice mail messages and hand-jotted notes." The university "estimated that it spent 80 to 100 hours complying with the request," which "generated 1,189 pages of documents.").

[80] Joanna Kempner, The Chilling Effect: How Do Researchers React to Controversy?, 5 PLOS MED. 1571, 1575-76 (2008), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2586361/pdf/pmed.0050222.pdf. (The report dives into the disturbing details of this chilling effect: "Over half "cleansed" grant applications of controversial language, but many also reframed studies, removed research topics from their agendas, and, in a few cases, changed their jobs. Overall, they viewed these actions as important and even necessary strategies to use when applying for federal grants to do potentially controversial research.").

their livelihood.[81] Courts rely on this evidence when weighing an academic freedom interest.[82]

C. *Courts' Divergent Balancing of Academic Freedom and Transparency Has Created Uncertainty About The Protection of Professors' Private Records*

When a professor is targeted by an open records request, the requester lists the college as the keeper of the professor's records.[83] This alone can create considerable uncertainty for professors, as the privacy of their records rests entirely with their employer. However, even if a university defends its professors' privacy, the varied ways in which courts have interpreted open records laws lend no assurances to faculty.

In a lawsuit filed by the previously mentioned Energy & Environment Legal Institute (then known as the American Tradition Institute), the Virginia Supreme Court construed the state's open records exemptions broadly in ruling for the targeted professor.[84] The decision hinged on whether an exemption for "information of a proprietary nature" covered emails regarding the unpublished research of University of Virginia climate scientist Michael Mann.[85] The request-

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[81] *See* Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, CTR. FOR SCI. & DEMOCRACY, Feb. 2015, at 1, 2-4, *available at* https://www.ucsusa.org/sites/default/files/attach/2015/09/freedom-to-bully-ucs-2015-final.pdf (listing numerous examples of the adverse effect of open records laws on university researchers); Rachel Levinson-Waldman, *Academic Freedom and the Public's Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship*, AM. CONST. SOC'Y ISSUE BRIEF, Sept. 2011, at 1, 5-8, https://www.acslaw.org/sites/default/files/Levinson_-_ACS_FOIA_First_Amdmt_Issue_Brief.pdf (discussing numerous examples of scholars describing the chilling effect of forced disclosure).

[82] *See, e.g.*, *Dow Chemical Co.*, 672 F.2d at 1273 (discussing professors' affidavits describing the chilling effect of forced disclosure of private and unpublished academic records); *see also infra* Section III.C and accompanying discussion.

[83] An open records request is usually made to the custodian of the government employee's records. *See State Sample FOI Request Letters*, Nat'l Freedom of Info. Coal., *State Sample FOI Request Letters* (last visited Dec. 19, 2018), https://www.nfoic.org/organizations/state-sample-foia-request-letters (listing samples of state open record request).

[84] Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va., 756 S.E.2d 435, 439-42 (Va. 2014) (The exemption at issue was for: "Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher learning. . .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.").

[85] *Am. Tradition Inst.*, 756 S.E.2d at 437, 440-42.

ing party argued that this term only includes information that would put the university at a competitive financial disadvantage.[86] Rejecting this narrow construction of the exemption, the court stated:

> In the context of the higher education research exclusion, competitive disadvantage implicates not only financial injury, but also harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression. This broader notion of competitive disadvantage is the overarching principle guiding application of the exemption.[87]

The court then described how forced disclosure of private academic communities would impede research and pedagogy at public institutions.[88] Because this would disadvantage professors at public institutions compared to those at private ones, the disclosure of these records would create a competitive disadvantage for public schools, making the professor's emails exempt from disclosure under Virginia law.[89]

Another application of a balancing test can be found in the *Dow Chemical Company* decision, where the U.S. Court of Appeals for the Seventh Circuit weighed the chilling effect of disclosure of University of Wisconsin researchers' records against the probative value of the records to the chemical company's claims.[90] In this instance, the court gave tremendous weight to the academic freedom interest, holding that disclosure "could jeopardize both the [professors'] studies and their careers."[91] Although the court admitted that "[t]he precise contours of the concept of academic freedom are difficult to define," it cited a wealth of Supreme Court First Amendment jurisprudence recognizing its significance.[92]

In a case where the pendulum swung the other way, the Arizona Superior Court in Pima County held that academic freedom did not

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[86] *Id.* at 441.

[87] *Id*. at 442.

[88] *See id.* at 441-42.

[89] *Id*. at 442.

[90] 672 F.2d 1262, 1268-77. The transparency interest in this case involved the enforcement of an administrative subpoena rather than a state open records law.

[91] *Id*. at 1276.

[92] *Id.* at 1274-75 (citing *Sweezy* and *Keyishian* among other cases).

justify withholding faculty emails.[93] At issue was case law that allowed public universities to refuse disclosure of faculty records if "the countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection . . . or if [the] release of the information would have an important and harmful effect upon the official duties of the official or agency."[94] The court considered the "chilling effect concerns" raised by the university, but found "this potential harm . . . speculative at best" in ruling for disclosure.[95] In making this decision, the court considered that many of the emails in question concerned published data sent over a decade ago and did not contain ongoing research or prepublication material.[96]

In another decision, where the academic freedom interest succumbed to a balancing test, the Florida Supreme Court held that a faculty search committee for a new dean did not have an academic freedom right to exclude members of the press or public from their meeting.[97] The court was deeply fractured in weighing the academic freedom interest at play, with the majority recognizing the "necessity for the free exchange of ideas in academic forums, without fear of governmental reprisal, to foster deep thought and intellectual growth," yet still subordinating this interest to "Florida's commitment to open government at all levels."[98] The dissent attacked this balancing test as insufficiently protective of academic freedom and for

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93 Energy & Envtl. Legal Inst. v. Ariz. Bd. of Regents, No. C20134963 (Pima Co., Ariz. Super. Ct. June 14, 2016), *order modified by same court*, Nov. 30, 2017, *affirmed*, Feb. 26, 2018, *appeal dismissed* Oct. 3, 2018.

94 Energy & Envtl. Legal Inst. v. Ariz. Bd. of Regents, 2015 Ariz. Super. LEXIS 1636, *3 (Ariz. Super. Ct. 2015) (citing Church of Scientology v. City of Phoenix Police Dep't, 122 Ariz. 338, 339 (Ct. App. 1979). Unlike the open-ended balancing tests of other cases, this case featured structured balancing where case law provided a standard for the judges to apply. While this type of balancing offers more predictability than cases where judges are unconstrained by or precedential or statutory guidance, it does not absolve the uncertainty created by courts weighing opposing interests. For more on structured versus unstructured judicial balancing. *See generally* Stefan Sottiaux & Gerhard van der Schyff, *Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights*, 31 HASTINGS INT'L & COMP. L. REV. 115 (2008).

95 *Energy & Envtl. Legal Inst.*, No. C20134963 at 4.

96 *Id.* at 2-3.

97 Wood v. Marston, 442 So. 2d 934, 941 (Fla. 1983).

98 *Id.*

allowing an inappropriate level of government intrusion into the academic community's leadership selection process.[99]

The disagreement among judges over how to balance these interests, even those on the same court hearing the same case, underlies the inconsistency of judicial balancing tests.[100] Although the AAUP has pushed for balancing tests as the best way to preserve the benefits of open access without harming academic freedom,[101] these cases illustrate the severe lack of predictability plaguing this approach, among other flaws.[102] While the facts of each case undoubtedly influence how the interests are weighed,[103] balancing tests ultimately come down to a subjective value judgment prone to the proclivities and biases of individual judges.[104] This has led several notable judges and commentators to denounce judicial balancing tests in favor of bright-

[99] *Id.* at 944 (McDonald, J., dissenting). This case raises important questions regarding how much academic freedom a dean search committee merits. This difficult determination may have contributed to the divergent opinions of the judges in this case. Although it did not concern professorial academic freedom, these differing opinions underscore the difficulty of weighing academic freedom against open government interests.

[100] *See id.*

[101] AAUP *Amicus* Brief, *supra* note 77, at 3, 15 (recommending that courts use a balancing test to adjudicate issues regarding the use of open records laws to interfere with faculty research).

[102] *See generally* Patrick M. McFadden, *The Balancing Test*, 29 B.C.L. REV. 585, 636-50 (1988) (describing the flaws of balancing tests).

[103] For example, the Florida and Ohio Supreme Courts considered the nature of the records requested in discounting the academic freedom interest at issue. *See Wood*, 442 So.2d at 938-41; State ex rel. Thomas v. Ohio State Univ., 643 N.E.2d 126, 130 (Ohio 1994).

[104] Konigsberg v. State Bar of Calif., 366 U.S. 36, 74-75 (1961) (Black, J., dissenting) (Justice Hugo Black fiercely objected to the use of balancing tests, especially in First Amendment cases. Dissenting to a decision on the grounds that "important constitutional rights have once again been 'balanced' away," he asserted: "This, of course, is an ever-present danger of the 'balancing test' for the application of such a test is necessarily tied to the emphasis particular judges give to competing societal values. Judges, like everyone else, vary tremendously in their choice of values. This is perfectly natural and, indeed, unavoidable. But it is neither natural nor unavoidable in this country for the fundamental rights of the people to be dependent upon the different emphasis different judges put upon different values at different times."). *See* McFadden, *supra* note 102, at 643 ("This first concern takes its cue from the observation that balancing test results are peculiarly subject to the world view of the judge who employs it. When the judge weighs the elements to be balanced, the weights will be assigned in accordance with the judge's view of what is important. Whether one interest or set of interests "outweighs" another quite straightforwardly depends on which of them the judge values more highly.").

line rules created by the collective wisdom of the legislature.[105] A better solution is a clear and explicit exemption.[106]

IV. THE BEST WAY TO BALANCE THE INTERESTS OF ACADEMIC FREEDOM AND TRANSPARENCY IS AN ACADEMIC FREEDOM EXEMPTION TO STATE OPEN RECORDS LAWS

The proposal that follows is built upon a foundation created by many thoughtful and noteworthy scholars. Writing for the American Constitutional Society (ACS), then-Senior Counsel for the AAUP Rachel Levinson-Waldman proposed an array of judicial and legislative fixes, including statutory exemptions removing scholarly material from open records laws, requiring courts and recordkeepers to engage in a balancing test, extending the journalistic reporter's privilege to professors, and categorically excluding academics from open records laws.[107] Levinson-Waldman's solutions are discussed at length by William K. Briggs, who argues in the Journal of College and University Law that the best way forward is for courts to interpret public records as only those records related to a government function, thus excluding

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[105] Oregon v. Mitchell, 400 U.S. 112, 206-07 (1970) (Harlan, J., concurring and dissenting) (internal citations omitted) (weighing in on the wisdom of allowing judges to balance competing interests: "Where the balance is to be struck depends ultimately on the values and the perspective of the decisionmaker. It is a matter as to which men of good will can and do reasonably differ. I fully agree that judgments of the sort involved here are beyond the institutional competence and constitutional authority of the judiciary. They are preeminently matters for legislative discretion, with judicial review, if it exists at all, narrowly limited. But the same reasons which in my view would require the judiciary to sustain a reasonable state resolution of the issue also require Congress to abstain from entering the picture."); *Konigsberg*, 366 U.S. at 74-75; *Energy & Envtl. Legal Inst.*, No. C20134963 ([The plaintiff's arguments] go beyond championing academic freedom and, in effect, promote the creation of an academic privilege exception to ARS §39 – 121. This is a proposition more properly made to the legislature rather than the courts.); McFadden, *supra* note 102, at 641-42 (arguing that legislatures are generally better able to balance equally competing interests than judges).

[106] An example of this approach can be seen in a decision by the Ohio Supreme Court. The court refused an invitation to balance the interests, instead relying on a straightforward application of the "very narrow, specific exceptions to the public records statute" because "the [Ohio] General Assembly has already weighed and balanced the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm." *State ex rel. Thomas*, 643 N.E. at 130.

[107] Levinson-Waldman, *supra* note 81, at 12-20 (discussing possible solutions to the conflict between open records laws and academic freedom).

scholarly email exchanges from forced disclosure.[108] Michael Halpern of the Union of Concerned Scientists also weighs in, suggesting in a report that university associations should work with professional societies and their attorneys to prepare how they will respond to open records requests involving researchers.[109] Others consider some form of academic freedom exceptions to open records schemes.[110]

Additionally, the Climate Science Legal Defense Fund (CSLDF) has compiled a list documenting how each state protects scientific research from forced disclosure.[111] The report takes case law and exemptions affecting research into account, and assigns each state a grade based on how thoroughly research is protected.[112] Another commentator compiled a table of cases discussing a "scholar's privilege" and other academic freedom interests which, with the CSLDF report, provides an invaluable resource to universities and those seeking their records.[113]

A. *A Model Resolution on Academic Freedom and Government Transparency*

The Foundation for Individual Rights in Education (FIRE)'s model exemption, outlined below, incorporates the research and expertise of these commentators by offering state legislatures a practical and effective way to protect academic freedom and to preserve the salutary effect of open records laws.[114] FIRE harnessed the detailed discussions of theoretical proposals to create a pragmatic solution that

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[108] William K. Briggs, *Open-Records Requests for Professors' Email Exchanges: A Threat to Constitutional Academic Freedom*, 39 J.C. & U.L. 601, 624-31 (2013).

[109] Halpern, *supra* note 81.

[110] *See* Ryan C. Fairchild, *Giving Away the Playbook: How North Carolina's Public Records Law Can Be Used to Harass, Intimidate, and Spy*, 91 N.C. L. REV. 2117, 2160 (2013) (favoring legislative solutions over judicial balancing tests for North Carolina); Jonathan Peters & Charles N. Davis, *When Open Government and Academic Freedom Collide*, 12 FIRST AMEND. L. REV. 295, 323-24 (2014) (arguing that open records exemptions for scholarly communications would be conceptually consistent with similar exemptions to such laws)

[111] *See Research Protections in State Open Records Laws: An Analysis and Ranking,* CLIMATE SCIENCE LEGAL DEFENSE FUND, at 9-22 (2017), *available at* https://www.csldf.org/resources/50-state-report/.

[112] *Id.* at 8.

[113] Eric Robinson, *No Confidence: Confidentiality, Ethics and the Law of Academic Privilege,* 21 COMM. L. & POL'Y 323, 338 (2016).

[114] *FIRE Model Resolution on Academic Freedom and Government Transparency*, FIRE (July 12, 2017), www.thefire.org/fire-model-resolution-on-academic-freedom-and-government-transparency. FIRE created this model resolution and exemption to aid state lawmakers seeking

lawmakers in every state can easily implement.[115] FIRE's model resolution on academic freedom and government transparency is as follows:

MODEL RESOLUTION ON ACADEMIC FREEDOM AND GOVERNMENT TRANSPARENCY

PREAMBLE. In recent years, open records laws have been misused nationwide to facilitate politically motivated attempts to target professors and to discourage scholarly inquiry. If left unchecked, these abuses will chill academic inquiry, debate, and research.[116]

WHEREAS, our open records law reflects {name of state}'s commitment to transparency, responsive government, and an informed citizenry;

WHEREAS, protecting the academic freedom of {name of state}'s public university faculty is vital to both the general welfare and individual rights;

WHEREAS, subjecting faculty materials to broad open records requests might endanger proprietary research or present a competitive disadvantage;

WHEREAS, the Supreme Court of the United States declared in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) that "[t]o 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";

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to revise their open records laws to protect the academic freedom of their state university professors.

115 University of California, Berkeley, School of Law professor Claudia Polsky also proposes a model legislative exemption for scholar-related records in her paper on this issue. Her model exemption provides near-total protection to state university professors from open records requests, whereas FIRE's model legislation does not exempt administrative conditions of grant applications, which are vital to uncovering undue bias and conflicts of interest. *FIRE Model Resolution on Academic Freedom and Government Transparency*, *supra* note 114. *See* Polsky, *supra* note 62, at 272-80.

116 *FIRE Model Resolution on Academic Freedom and Government Transparency*, *supra* note 114.

Now therefore be it resolved that: the {legislative body} of the state of {name of state} seeks to both guarantee transparency and protect academic freedom, to the benefit of {name of state}'s citizens, by drawing a distinction, for the purpose of open records requests made of state institutions of higher education, between faculty records related to scholarship and records concerning the administration of grants or other donations.[117]

MODEL ACADEMIC FREEDOM EXEMPTIONS FOR OPEN RECORDS LAWS

Section [x]: Exemptions for faculty of state institutions of higher education.[118]

The following records maintained by faculty of state institutions of higher education are exempt from the provisions of this statute:

A. Documents, correspondence, notes, or other materials made for personal use that do not serve an official purpose.[119]

B. Faculty records, documents, correspondence, and other written materials for purposes concerning scholarship, research, teaching, classroom activities, and related functions, not including departmental administrative records.[120]

C. Data, records, information, research notes, proposals, and creative works, produced or collected pursuant to study or research on commercial, scientific, technical, scholarly, or artistic issues, whether sponsored by the institution alone or in conjunction with a governmental body or private entity, where the data, records, or information has not been publicly released, published, copyrighted, or patented.[121]

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117 *Id.*

118 *Id.* This section is intended as a set of exemptions to add to or augment an existing state open records law, and should be modified accordingly with appropriate cross-references, definitional tailoring, or other edits necessary for consistency and coherence within the larger statute. It is modeled in part on New Hampshire Statutes Chapter 91-A, "Access to Governmental Records and Meetings." N.H. REV. STAT. ANN. § 91-A:5 (LexisNexis 2018).

119 *FIRE Model Resolution on Academic Freedom and Government Transparency*, *supra* note 114.

120 *Id.*

121 *Id.*

D. Records, documents, correspondence, and other written materials concerning applications for grants or other funding that concern scholarship, research, teaching, classroom activities, and related functions; except:

(1) the names and reported addresses of the grantors or donors; and
(2) the date, amount, and administrative conditions of any grant or donation received; and
(3) the date and total disbursement of the grant or donation received.[122]

B. *Explaining the Model Resolution*

The proposed exemption balances the need to protect academic freedom with the need to preserve the sunlight-inducing power of open records laws. This resolution leaves no doubt about the central purposes of the exemption—protecting academic freedom by curtailing the chilling abuse of open records laws. This resolution, passed with the exemption, is a failsafe because courts generally only examine the purpose of a statute when its language is ambiguous.[123] The specificity of the proposed exemption should make clear to the courts what is covered, obviating the need for an examination of legislative intent.

The emphasis of the exemption is on private academic records. This includes data, notes, and proposals, as well as correspondences such as emails. The first clause, (A), protects professors' privacy by exempting records "made for personal use."[124] Working for a governmental institution does not require the public to know every detail about public university professors, especially when it comes to personally identifiable information, such as home addresses and social security numbers.

The next clause, (B), covers the crux of what academic freedom protects—"written materials for purposes concerning scholarship,

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122 *Id.*

123 *See generally Legislative History and Intent as Aides to Statutory Construction In Federal Court*, LEGIS. INTENT SERV., INC., http://www.legintent.com/pa/fed_guide.pdf (discussing how federal courts use legislative intent to interpret statutes).

124 *FIRE Model Resolution on Academic Freedom and Government Transparency*, *supra* note 114.

research, teaching, classroom activities, and related functions."[125] These functions form the crux of a professor's job responsibilities, and they have traditionally triggered judicial scrutiny when targeted by forced disclosure laws.[126] Although many professors perform administrative functions, these functions are ancillary to their scholarship, teaching, and lecturing, and would be unprotected under this exemption.

Clause (C) delineates records related to the research process, protecting data and other records that have not been publicly released, copyrighted, or patented.[127] The research process is protected by a combination of academic freedom and privacy interests, which is why this clause covers records regardless of their topic or sponsored institution so long as they remain private. Even if the findings of research are published, the underlying data would remain shielded so long as the records remain unpublished.

The next clause, (D), discussing grants, necessitates a more nuanced approach due to the potential for grant information to expose corruption and conflicts of interests.[128] The clause protects the private data and proposals of grant applications because this is where academic freedom is most strongly implicated, while its subsections represent the countervailing interest of revealing how taxpayer money is spent at public universities. This compromise is reflected by allowing the disclosure of "reported addresses of the grantors or donors," "the date, amount, and administrative conditions of any grant or donation received," and "the date and total disbursement of the grant or donation received."[129] By allowing the public to seek information on the grantors and grant conditions, allegations of embezzled, wasted, or misappropriated funds and improper biases or conflicts of interests can be substantiated.[130] These exemptions are

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125 *Id.*

126 *See Sweezy*, 354 U.S. at 250; *Keyishian*, 385 U.S. at 603; *Dow Chemical Co.*, 672 F.2d at 1274-75 (discussing cases where courts have recognized an academic freedom interest).

127 *FIRE Model Resolution on Academic Freedom and Government Transparency*, *supra* note 114.

128 *Id.*

129 *Id.*

130 For a recent example of how open records laws for grant conditions can reveal the influence of donors on university affairs, see *Open records request reveals donor influence at George Mason University*, FIRE (May 1, 2018), https://www.thefire.org/open-records-request-reveals-donor-influence-at-george-mason-university/ (showing that documents produced via open records requests uncovered agreements giving the Charles Koch Foundation input into

narrow enough to avoid swallowing the rule, and they are designed to aid those filing and processing open records requests concerning grants.

Overall, the proposed resolution is a compromise between two competing values. Ideally, the resolution should appeal to state lawmakers seeking to address the concerns of both open government advocates and academic freedom proponents.

C. *Adopting The Proposed Resolution Will Benefit Professors, Colleges, Judges, and Those Making Open Records Requests*

The key advantage of the proposed exemption over judicial balancing tests is its clarity. It is designed to avoid situations where universities and open records requesters must spend hundreds of thousands of dollars on lawyers urging judges to interpret the law in their favor.[131] Such litigation is expensive and time-consuming, and in no way guarantees a favorable outcome for either side, which especially harms those without the resources to pursue their interests in court.[132] The current patchwork of scattered exemptions and court opinions forces all parties to spend precious resources trying to resolve the uncertainty in their favor.

By adopting this academic freedom exemption, states can ensure that professors will be able to teach and research controversial topics without the threat of intrusive and burdensome open records requests. The proposed exemption will aid requesting parties by giving them a clearer picture of which records the university is likely to grant them, and it will help judges adjudicate open records disputes by allowing them to easily apply the exemption. It will also ease the burden on university administrators tasked with honoring valid requests for information.

Although open government advocates may balk at any narrowing of the scope of open records laws, the proposed reforms do not seek,

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faculty employment at George Mason University). *See also* Dan Berrett, *Not Just Florida State*, INSIDE HIRING ED (June 28, 2011), https://www.insidehighered.com/news/2011/06/28/not-just-florida-state.

131 *See generally* Keith W. Rizzardi, *Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 STETSON L. REV. 425 (2015) (describing the enormous costs of litigating open records disputes).

132 *See generally id.*

and will not result in, the undue shielding of government decisionmakers from public scrutiny. Subjecting state university professors to open records laws does virtually nothing to further the goal of a transparent government, as there is scant newsworthy information to be gleaned from the private academic records of these professors. Exempting individuals without the authority to create or enforce government policy will have an invariability minimal effect on the state accountability interest these laws seek to further. Rather, the full power of open records laws will be preserved once the research and communications of state university professors are exempt from their reach.

However, when these laws are used to target professors in ways that have the potential to reveal newsworthy information, such use must be allowed. This is why the proposal leaves information involving the administrative conditions of grant proposals subject to disclosure, as such requests have successfully revealed substantial outside donor influence on faculty hires, among other concealed biases.[133] This solution preserves the ability of these laws to reach into the institutional decision-making processes of state universities without burdening the academic pursuits of professors.

Finally, the exemption provides an additional benefit to public universities and their faculty by placing them on a more level playing field with their private-sector counterparts.[134] Currently, there are two classes of academics—those in private universities who must subject only their conclusions to public scrutiny, and those in public universities who must disclose their entire writing process upon request.[135] Considering the minuscule public interest of open records requests for private academic data, this disadvantage serves no meaningful purpose. The public interest is best served by allowing the substantive academic rigor at public institutions to match that of the private sector, which can be achieved by relieving researchers at state universities from the burden of abusive open records requests.

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[133] *See supra* note 126.

[134] Courts and commentators have discussed how this disadvantage extends to hiring faculty, developing research programs, and sustaining athletic programs. *See, e.g., Am. Tradition Inst.*, 756 S.E.2d at 441-43; Fairchild, *supra* note 110, at 2132-54 (2013) (discussing how open records abuse disadvantage North Carolina's public educational institutions); AAUP *Amicus* Brief, *supra* note 77, at 6, 28.

[135] The extent to which state university professors must disclose their private academic records when subject to open records requests is a function of state law. *See generally supra* note 111.

CONCLUSION

One need not be a judge or a professor to understand why academic freedom and transparent government are subjects worthy of public attention. Serving these interests is the responsibility of every state legislature. State legislatures have an opportunity to do a great service to state professors, universities, open records requesters, and the taxpaying public by adopting an academic freedom exemption to their open records laws. This article aims to be the starting point for discussion, the roadmap for navigating the issue, and the catalyst for enacting the solution.