

UW responds to questions about proposal statutory exemption for records of UW research

What immediately follows is from an email sent to the communications officials at the University of Wisconsin System by Bill Lueders, president of the Wisconsin Freedom of Information Council, on Feb. 9, 2015:

I'm hoping you can help me get answers to some questions I have regarding the proposed exemption from the Open Records Law for UW System research. [...]

In defending this exemption, included in Gov. Scott Walker's budget ([SB21](#), on P. 181-182), Marsha Mailick, the UW-Madison's interim vice-chancellor for research and graduate education, said it would allow the UW to operate on "a more level playing field" with university systems in other states. That prompted these very good questions from Ernst-Ulrich Franzen in the Milwaukee Journal Sentinel:

"But can the university offer examples of where research has been hurt by the current rules? Or examples of a loss of funding because they were unable to compete because of the current rules?"

Can you? I am asking for a small number of examples, say three or five, of research projects that the UW was unable to land due to the fact that records of university research are now subject to the state Open Records Law.

Additionally, Mailick [told the Associated Press](#) that more than 20 states include some sort of exemption for university research. Could you kindly please provide me with the basis for this representation? Do you have a list of these states and information on what level of exemption applies?

[end]

On Feb. 12, this query yielded the following reply from William Barker, an official at the UW-Madison. That reply is reproduced here in its entirety:

From: **William Barker** <william.barker@wisc.edu>

Date: Thu, Feb 12, 2015 at 4:55 PM

Subject: Your request related to proposed changes in Wisconsin open records laws

To: "blueders@wisconsinwatch.org" <blueders@wisconsinwatch.org>

Hi Bill, I hope this finds you well and thriving at the WCIJ. I have been asked to respond to your recent inquiry.

As you know, the University of Wisconsin-Madison seeks a change in the state open records laws related to research. Specifically, the proposed statutory language as it appears in this year's budget reads:

19.36 (14) UNIVERSITY OF WISCONSIN SYSTEM AUTHORITY. Any authority may withhold from access under s. 19.35 (1) information in a record that is produced or collected by or for the faculty or staff employed by the University of Wisconsin System Authority in the conduct of, or as a result of, study or research on a commercial, scientific, or technical subject, whether sponsored by the University of Wisconsin System Authority alone or in conjunction with an authority or a private person, ***until that information is publicly disseminated or patented.***

Several valid and important reasons underpin this requested change in statutes. First, we wish to protect our competitive advantage in grant seeking and research, as well as our leadership position in academic technology transfer. The full ramifications of recent changes in U.S. patent law from first to invent to first to file aren't yet well understood in the context of academic technology transfer.

While we cannot point to a specific instance of lost intellectual property or misappropriated research, we seek to optimize our role as an economic engine for the State of Wisconsin. Surely you know the history of Professor Steenbock and the founding of the Wisconsin Alumni Research Foundation and thus the birth of academic technology transfer. Given the hypercompetitive environment in which we compete for scarce research resources, we feel a proactive and conservative

strategy is appropriate. The greater control over timing of release of research-related information conforms well to our mission to discover and disseminate new knowledge, and we are pleased the exemptions we request expire upon publication and/or appropriate protection of intellectual property.

We would be remiss if we did not address the very significant burden associated with compliance of the open records laws as currently written. To give a current example, we received an open records request from USA Today in late October seeking all open and closed session minutes for our Institutional Biosafety Committee. Fulfilling this request consumed much of one of our employee's time for almost three and a half months. As research protocols are discussed in closed session, this person had to work with 33 principal investigators to appropriately review and redact information in the closed session minutes related to 45 research protocols to excise proprietary information, the release of which would have compromised our ability to protect that intellectual property and put our researchers at a competitive disadvantage. Several researchers specifically mentioned their fear of being placed at a "competitive disadvantage" relative to their peers with respect to research plans and funding. Given the extremely low success rate for federal research proposals and thus grant funding, we feel this constitutes a significant risk to our research mission and thus, these researcher's and their colleagues' and students' careers.

Returning briefly to the issue of intellectual property protection, protocols are highly specific playbooks detailing future research directions. Given that patentable inventions are legally defined as being "non-obvious", the risk is clear.

Finally, we should mention the chilling effect of abuses of our current open records laws by persons or groups who disagree with research seen by them to be controversial. Whether it be research involving animals, lethal pathogens, stem cells or climate change, disruption of research activities by the need to respond to inundations of multiple records requests constitutes an unfair assault on academic freedom which we cannot condone or support.

Our existing redaction guidelines of trade secrets or the balancing test are by their very nature subjective and open to legal challenge and this only adds to the burden and expense.

We offer these as “examples of where research has been hurt by the current rules” and feel the limited exemptions we seek offer effective tools to manage the risk and burden of satisfying the public’s access to information related to our research activities. This will indeed level the playing field with respect to the many other states that have adopted similar protections. A list current as of 2013 follows:

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Ohio

Exempts “intellectual property records” Ohio Rev. Code Ann. s. 149.43(A)(1)(m), which refer to” records, other than financial or administrative records, that are produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue...and that have not been publicly released, published or patented.” Ohio Rev. Code Ann. s. 149.43(A) (5).

Michigan

Michigan’s “Confidential Research and Investment Information Act” protects from disclosure certain information obtained in research and related activities of public universities and colleges, specifically: “(a) intellectual property created by a person employed by or under contract to a public university or college for purposes that include research, education, and related activities, until a reasonable opportunity is provided for the information to be published in a timely manner in a forum intended to convey the information to the academic community; (b) [copyrightable material] created by a person employed by or under contract to a public university or college for purposes that include research, education, or related activities, until a reasonable opportunity is provided for the author to secure copyright registration, not to exceed 12 months from the date the work is first fixed in a tangible medium of expression; (c) records regarding [patentable material] until a reasonable opportunity is provided for the inventor to secure patent protection, not to exceed 5 years from the date the records are first made; (d) trade secrets or other proprietary information in which a public university or college holds an interest or that a public university or college owns that is determined by the public university or college to have commercial value, if a general description of the nature of the information and a description of the extent of the interest held by the public

university or college in the information is made available to a person upon request.” Mich. Comp. Laws. s. 390.1554(1)(a)-(d).

Michigan also protects from disclosure “trade secrets, commercial information, or financial information, including that information as it relates to computer hardware and software, that is provided to a public university or college by a private external source and that is in the possession of the public university or college in the performance of a lawful function” if certain conditions are met. Mich. Comp. Laws s. 390.1553

Indiana

Exempts “information concerning research, including actual research documents conducted under the auspices of an institution of higher education...” Ind. Code ss. 5-14-3-4(a)(6)

Nebraska

Exempts “trade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information...” Neb. Rev. Stat. s. 84-712.05

Virginia

Protects “data, records or information of a proprietary nature produced or collected by or for faculty...of public institutions of higher education...in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issue... where such data, records or information have not been publicly released, published, copyrighted or patented.” Va. Code s. 2.2-3705.4(4)

New Jersey

Exempts all “pedagogical scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey...” N.J. Stat. Ann s. 47:1A-1.1

Pennsylvania

Exempts “unpublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related material and scholarly

correspondence of a community college or an institution of the State System of Higher Education or a faculty member, staff employee, guest speaker or student thereof.” 65 Pa. Cons. Stat. Ann. s. 67.708.

Delaware

Exempts all “activities of the University of Delaware and Delaware State University” except those activities and records related to the two universities’ boards of visitors. Del. Code Ann. Tit. 29 s. 10002(i)

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Georgia

Exempts “data, records, or information of a proprietary nature, produced or collected by or for faculty or staff of state institutions of higher learning, or other governmental agencies, in the conduct of, or as a result of, study or research on commercial, scientific, technical or scholarly issues...where such data, records, or information has not been publicly released, published, copyrighted, or patented. Ga. Code. Ann. s. 50-18-72(b)(1).

South Carolina

Exempts “data, records, or information of a proprietary nature, produced or collected by or for faculty or staff of state institutions of higher education in the conduct of or as a result of study or research on commercial, scientific, technical, or scholarly issues...where the data, records, or information has not been publicly released, published, copyrighted, or patented. S.C. Code Ann. s. 30-4-40(14)(A). Also protects “any data, records, or information developed, collected, or received by or on behalf of faculty, staff, employees, or students of a state institution of higher education or any public or private entity supporting or participating in the activities of a state institution of higher education in the conduct of or as a result of the study of research on medical, technical, scholarly, or artistic issues...until the information is published, patented, otherwise publicly disseminated, or released to an agency. This item applies to, but is not limited to, information provided by participants in research, research notes and data, discoveries, research projects, proposals, methodologies, protocols, and creative works.” S.C. Code Ann. s. 30-4-40(14)(B).

North Dakota

Exempts “proprietary information” which includes: (1) information shared between a sponsor or potential sponsor of research and a public entity conducting or negotiating an agreement for the research,” and certain other records the release of which could impact commercialization. N.D. Cent. Code s. 44-04-18.4

South Dakota

Exempts “trade secrets, the specific details of bona fide research, applied research, or scholarly or creative artistic projects being conducted at a school, postsecondary institution or laboratory funded in whole or in part by the state, and other proprietary or commercial information which if released would infringe intellectual property rights, give advantage to business competitors, or serve no material public purpose...” S.D. Codified Laws s. 1-27-1.5.

Louisiana

Exempts “data, records, or information produced or collected by or for faculty or staff of state institutions of higher learning in the conduct of or as a result of, study or research on commercial, scientific or technical subjects of a patentable or licensable nature...until such data, records, or information have been publicly released, published, or patented. La. Rev. Stat. Ann s. 41:4(16)(b). Also protects trade secrets and commercial and financial information obtained from others pertaining to research or the commercialization of technology. La. Rev. Stat. Ann s. 41:4(16)(b).

Utah

Exempts all “unpublished notes, data, and information relating to research of [the institution within the state system of higher education] or a sponsor of sponsored research” and “unpublished manuscripts,” “creative works in process” “scholarly correspondence, and “confidential information contained in research proposals” “which have been developed, discovered, disclosed to, or received by or on behalf of faculty, staff, employees, or students of the institution...” Utah Code Ann. s. 63G-2-305(39)(a).

Arizona

Exempts records “composed of unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews. Ariz. Rev. Stats. s.15-1640A.1(d)

Idaho

Exempts “records, data, information and materials collected, developed, generated, ascertained or discovered during the course of academic research at public institutions of higher education if the disclosure of such could reasonably affect the conduct or outcome of the research, or the ability of the public institution of higher education to patent or copyright the research or protect intellectual property” and “records, data, information and materials collected or utilized during the course of academic research at public institutions of higher education provided by any person or entity other than the public institution of higher education or a public agency.” Idaho Code s. 9-340D. The period of protection terminates when the research is published, copyrighted, patented, completed, or terminated, unless information was provided to the university pursuant to a nondisclosure agreement.

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Colorado

Allows protection of “the specific details of bona fide research projects being conducted by a state institution...” Colo. Rev. Stat. s. 24-72-204(2)(a)(III), and “trade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person.” 24-72-204(3)(a)(IV)

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Wyoming

Authorizes protection of “the specific details of bona fide research projects being conducted by a state institution” Wyo. Sta. Ann. s. 16-4-203.

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Kansas

Exempts “notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals...” unless they are cited, identified, or included on agenda of open meeting.” Kan. Stat. Ann s. 45-221.

Kentucky

Exempts “records confidentially disclosed to an agency and compiled and maintained for scientific research.” Ky. Rev. Stat. Ann. s. 61.878.

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Oklahoma

Protects “any information related to research, the disclosure of which could affect the conduct or outcome of the research, the ability to patent or copyright the research, or any other proprietary rights any entity may have in the research or the results of the research, including but not limited to, trade secrets and commercial or financial information obtained for an entity financing or cooperating in the research, research protocols, and research notes, data, results, or other writings about the research...” Okl. Stat. Ann. s. 24A.19.

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Vermont

Exempts “any data, records or information developed, discovered, collected, or received by or on behalf of faculty, staff, employees or students of the University of Vermont...in the conduct of study, research, or creative efforts on medical, scientific, technical, scholarly, or artistic matters...until such data, records or information are published, disclosed in an issued patent or publicly released by the institution...This subdivision applies to, but is not limited to, research notes and laboratory notebooks, lecture notes, manuscripts, creative works, correspondence, research proposals and agreements, methodologies, protocols, and the identities of or any personally identifiable information about participants in research.

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Maine

Exempts “records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of...the University of Maine System. Me. Rev. Stat. Ann. Tit. 1. S. 402.

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Oregon

Unless the public interest requires disclosure in the particular instance, exempts, “writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted, or patented.” Or. Rev. Stat. s 192.501.

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