CENTER FOR THE DEFENSE OF ACADEMIC FREEDOM

Action Report #1

Responding to Freedom of Information (FOI) Requests at Public Universities

Sachin S. Pandya, Professor of Law, University of Connecticut
Isaac Kamola, Director, AAUP's Center for the Defense of Academic Freedom

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Freedom of Information (FOI) laws are important for a robust democracy and to hold those in power accountable. However, some partisan activists have used FOI laws to harass faculty at public universities and to discourage or discredit faculty research and teaching they don't like (Polsky 2019). This typically involves submitting FOI requests for records of a particular faculty member's research activities, class material and syllabi, and communications, whether emails or other records stored on university servers. Here, we suggest how public universities and their faculty can take precautions to reduce the risk of FOI-facilitated faculty harassment.

Background

FOI law consists of the Freedom of Information Act, which applies to federal agencies, and State FOI laws that cover records kept by State and local governments. Public universities are often subject to *State* FOI law because of the public university's legal status as a State or local government entity. (A private university is not typically subject to a FOI law.) State FOI law imposes upon the public university the legal duty to respond to FOI requests. For that reason, the university, often through the university general counsel's office, *not* any individual faculty member, typically determines what the university will and will not disclose in response to the FOI request.

State FOI laws vary in what public universities must disclose and how much those laws exempt records arising out of faculty teaching and research at public universities. As applied to public universities, State FOI laws typically hinge on (1) whether the items requested count as a public record; (2) to what extent do items that faculty create or

keep *thereby* qualify as items created or kept by the public university; and (3) whether any particular FOI exemption covers the items requested.

Exemptions vary widely depending on the State law and at times the particular institution. Some exemptions may include records whose disclosure would interfere with a faculty member's intellectual property rights, certain personnel records, or certain internal communications (such as with a union representative). State FOI law may also not apply if it directly conflicts with any federal law, such as federal copyright law and the Family Educational Rights and Privacy Act. States also vary in the opinions and practices of their courts and of the State administrative agency in charge of deciding or enforcing FOI disputes.

Guidelines for Reducing FOI Harassment Risk

While faculty and public universities cannot stop anyone from filing an FOI request, they can take precautions to reduce the risk associated with complying with those requests.

Reducing FOI Exposure

A faculty member's best precaution for reducing FOI-harassment risk is to ensure that all *non-work-related* sensitive emails, records, data, documents, or other items of information are not maintained on university-owned computers and servers, email systems, and university-controlled third-party cloud storage solutions (e.g. OneDrive, Dropbox). This may include, for example, emails and documents pertaining to political organizing, union activity, and personal communications.

For arguably *work-related* records, the task is harder. You may think that you can reduce FOI-harassment risk simply by moving work-related items, such as syllabi, emails with students, or lecture notes, onto personal email accounts (e.g. Gmail), personally owned cloud storage or personal computers. But you'd be wrong. Many State FOI laws apply to public records regardless of whether or not they are kept on a work-issued or personal device, email account, or cloud storage. Moreover, most States have record retention laws that regulate when, if ever, public agencies and public employees may delete or destroy public records, including electronic records, and that authorize penalties for violations.

For now, a faculty member's best precaution is to know more and to press their deans and department heads to know more, about their State's FOI law *before* a FOI request comes in, particularly about FOI exemptions that will likely cover some or all of research and teaching records. To date, some States expressly include FOI exemptions specifically for some records arising out of research, teaching, or both. Examples include New Jersey, Rhode Island, Maryland, Virginia, North Dakota, Illinois, Ohio, Pennsylvania, and South Carolina. Such exemptions vary in scope and sometimes on how much discretion they give the university to disclose the exempted records nonetheless (e.g. Georgia). And they do not exempt many other kinds of records, such as emails arising from faculty governance. Other State FOI laws lack such exemptions altogether but do contain other generally applicable exemptions that may apply to some of your research and teaching records. For a fifty-state survey, see Climate Science Legal Defense Fund (2023).

Protocol for Handling FOI Requests

Public colleges and universities should adopt a clear written protocol for how they handle FOI requests. This includes how and when a university's attorneys will contact faculty to (1) inform them that the university has received a FOI request concerning them; and (2) what emails, documents, or other information the university believes it must disclose in response to that FOI request. This also includes a process by which university counsel and the affected faculty work together to understand what falls within the FOI request and what the FOI law might nonetheless exempt from disclosure. Where collective bargaining agreements apply, the faculty's union representative should also participate, particularly in States where a collective bargaining agreement can sometimes supersede what FOI law would otherwise require.

When the FOI request comes in, faculty-university communication is critical. Faculty members and university attorneys likely vary in how much relevant information they have on how the FOI law applies in a particular case. Even if they are not FOI experts, university counsel likely know more about how that FOI law is likely to be enforced. Faculty know more about their own scholarship, teaching, and professional activities. As a result, faculty are more likely to see how any particular requested record might fall within an existing FOI exemption.

At the same time, when a university's attorney responds to a FOI request, their client is the university, not any faculty member targeted or implicated by that request. Thus, university attorneys can depart from what a faculty member wants when it comes to responding to a FOI request. For example, university counsel may decide that it is easier to hand over records rather than litigate in favor of a more limited interpretation of what the FOI law requires. However, in certain instances, faculty may have a significant interest in the records to be disclosed, such as where research or intellectual property rights are implicated. It is important, therefore, for both parties to have a clear idea of what university policy is. Where faculty and university interests diverge, the faculty member should consider contacting a union representative or seeking independent legal advice.

Guidelines on the University's FOI Legal Position

Public universities should adopt clear guidance about what types of records, if requested, they will regularly refuse to provide based on their reading of the FOI law. This is better than ad hoc and inconsistent policy developed in response to a specific FOI request. For example, if the university's general counsel interprets the FOI law not to require disclosing course syllabi or audiovisual records of class meetings, and the university is willing to argue that in court, the university should adopt a FOI request policy that makes that clear to faculty and FOI requesters alike. Similarly, a university can clarify when it will reject a FOIA request as conflicting with a faculty member's copyright over the requested items because federal law provides a copyright owner with the exclusive right to reproduce the copyrighted work in copies and to distribute copies of that work to the public. To be sure, university attorneys may prefer legal ambiguity in order to preserve their discretion in choosing a litigation posture in a future case. However legal ambiguity imposes serious costs for faculty trying to reduce their FOI-facilitated harassment risk. Faculty senates and committees can pass resolutions demanding that universities create such policies along with the FOI protocols discussed above.

In general, university attorneys and faculty should work together to see how much the faculty member's preferred outcome matches up with the university's legal position, and its willingness to litigate that position in court. While both faculty and university attorneys would prefer to avoid litigation, FOI litigation, if unavoidable, can shield the faculty from further FOI harassment, deter future FOI harassment of others, and show that the

university is committed in practice, not just in words, to protecting faculty and preserving academic freedom.

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References

Climate Science Legal Defense Fund. 2023. "Research Protections in State Open Records Laws: An Analysis and Ranking." 4th ed.

Polsky, Claudia. 2019. "Open Records, Shuttered Labs: Ending Political Harassment of Public University Researchers." *UCLA Law Review* 66: 208–93.