

Date of Hearing: April 2, 2019

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 700 (Friedman) – As Amended March 18, 2019

As Proposed to be Amended

SUBJECT: PUBLIC RECORDS: EXCEPTIONS TO DISCLOSURE: PUBLIC
POSTSECONDARY EDUCATIONAL INSTITUTIONS: RESEARCH INFORMATION

KEY ISSUES:

- 1) SHOULD CERTAIN RECORDS RELATING TO RESEARCHERS AT PUBLIC POSTSECONDARY EDUCATIONAL INSTITUTIONS OR THEIR RESEARCH BE EXEMPT FROM PUBLIC DISCLOSURE PURSUANT TO THE PUBLIC RECORDS ACT?
- 2) SHOULD SPECIFIC RECORDS BE EXPRESSLY EXCLUDED FROM THE CATEGORY OF RESEARCH RECORDS WHICH ARE EXEMPT FROM PUBLIC DISCLOSURE IN ORDER TO ENSURE PUBLIC ACCESS TO RECORDS WHICH ARE MOST LIKELY TO INDICATE RESEARCH MISCONDUCT?

SYNOPSIS

The California Public Records Act (CPRA) requires that the documents and “writings” of a public agency be open and available for public disclosure. The CPRA also provides several express exemptions from mandatory disclosure as well as a “catch-all” exemption for circumstances in which the public interest in withholding records from public disclosure outweighs the public interest in disclosure. Among these is an exemption for records produced in the “deliberative process” of a public agency, which privileges records used or produced in the process of decision-making to allow the unimpeded exchange of ideas and information in the interest of making the most informed decisions for public policy. Though this privilege from disclosure technically applies to researchers at public postsecondary educational institutions as public employees, the process of academic research is unique from typical policy decisions made by most public agencies. Academic research is a continuous process that lacks the finality of a policy “decision,” and a given research project can last years or decades even after some results have been published. Over the past decade, public records requests pursuant to the CPRA and similar public records laws have been used to discourage or discredit lines of research by researchers at public colleges and universities, but public records requests have also revealed severe misconduct in the course of academic research, including undue influence by funders and neglect for the wellbeing of human and non-human research subjects. The legality of withholding academic research documents under existing exemptions for the work product or deliberative process of public agencies has been litigated in this and other states, but has not been conclusively or consistently decided. The manner in which the deliberative process exemption from record disclosure pursuant to the CPRA applies to academic research at public colleges and universities thus warrants additional clarification to specify documents, factual or otherwise, that are central to scientific deliberation. This bill proposes to make certain records possessed by public postsecondary educational institutions relating to researchers or their research exempt from mandatory disclosure pursuant to the CPRA. Specifically, this bill

exempts from mandatory public disclosure records regarding preliminary research that would expose the thought process or preliminary findings of a researcher in a manner that would interfere with their research, records that constitute trade secrets, and information that would compromise the privacy of research subjects.

The bill is supported by science advocacy organizations dedicated to insulating the integrity of the scientific process, and opposed by open government advocates. As in print, this bill does provide a fairly broad set of exemptions and is not sufficiently clear in defining what it seeks to protect, leaving the possibility that it could be used to generally exempt most records possessed by universities and opening the door for other public officials to request broad exemptions from public disclosure. The author has agreed to amend the bill considerably in response to opposition concerns in order to narrow and clarify the breadth of the exemption for research records, specify the intent of the Legislature and the unique circumstances that warrant this exception, and expressly provide that the exemptions in this bill do not apply to records most implicated in misconduct, including communications between researchers and funders, records relating to audits of standards of practice, and disciplinary records relating to researchers. These amendments better suit the intent of the author to define the application of existing deliberative process privileges to better suit the unique circumstances of research and are incorporated into the analysis.

SUMMARY: Specifies types of records relating to researchers at public colleges and universities or their research that are not subject to public disclosure under the California Public Records Act (CPRA). Specifically, **this bill:**

- 1) Provides that the following records regarding preliminary research by researchers at public postsecondary educational institutions are not subject to public disclosure pursuant to the CPRA if they would expose the thought process or preliminary findings of the researcher in a manner that would interfere with their research:
 - a) Research methods that have not been published;
 - b) Preliminary drafts of documents intended for publication;
 - c) Unpublished data;
 - d) Unfunded grant applications; or
 - e) Correspondence from professional peers relating to research.
- 2) Provides that records that constitute trade secrets of researchers at public postsecondary educational institutions, including, without limitation, any information protected by patent, trademark, copyright, license, or any other effort that is reasonable under the circumstance to maintain its secrecy, are not subject to public disclosure pursuant to the CPRA.
- 3) Provides that information that would compromise the privacy of research subjects of research being performed at or in affiliation with a public postsecondary educational institution is not subject to public disclosure pursuant to the CPRA, including but not limited to:
 - a) Information that identifies or permits identification of human research subjects; or

- b) Interview and ethnographic observation notes, interview transcripts, audio or video recordings, and photographs.
- 4) Provides that the following records relating to a researcher or their research at a public postsecondary educational institution shall not be considered to be exempt from disclosure pursuant to 1)-3), above, unless disclosure of the record is exempted or prohibited pursuant to federal or state law:
- a) Information about the identity of any funder, and the amount of any funding of past or ongoing research;
 - b) Communication between a funder and a researcher or any personnel of the public postsecondary educational institution relating to the researcher's current or past research funded by that funder, or relating to the relationship between the funder and the educational institution;
 - c) Records pertaining to institutional audits of compliance with standards of practice; or
 - d) Records pertaining to disciplinary action taken against the researcher relating to their research.
- 5) Provides that limited sharing of information in 1)-3), above, for professionally relevant purposes, including, but not limited to, research collaboration or peer review, shall not constitute a waiver of this exemption.
- 6) Provides that enumeration of categorical exemptions for research records does not affect a researcher's ability to assert, on a case-by-case basis, that additional records in the researcher's possession are exempt from disclosure.
- 7) Defines "data" to mean any information collected in the course of research for the purpose of testing hypotheses and inferring conclusions.
- 8) Defines "public postsecondary educational institution" to mean any of the following:
- a) The California Community Colleges, and each campus, branch, and function thereof;
 - b) The California State University and each campus, branch, and function thereof;
 - c) The University of California and each campus, branch, and function thereof; or
 - d) Each laboratory or medical facility affiliated with an educational institution listed above, inclusive, including, but not limited to, a federal facility operated by the educational institution.
- 9) Defines "researcher" to mean any person who engages in research at, or under contract or in affiliation with, a public postsecondary educational institution.
- 10) Makes legislative findings describing:

- a) The unique circumstances of research at public postsecondary educational institutions that justify the categorical exemptions from disclosure under the CPRA prescribed by this bill; and
- b) The public interest in withholding these records from disclosure to permit open scientific discourse.

EXISTING LAW:

- 1) Provides that the people have the right of access to information concerning the conduct of the people's business and, therefore, the writings of public officials and agencies shall be open to public scrutiny. Specifies that any law or rule that limits the public right of access shall be adopted with findings demonstrating the interest protected by the limitation. (California Constitution, Article I, Section 3.)
- 2) Provides, under the California Public Records Act (CPRA), that public records are open to public inspection upon request, unless the records are otherwise exempt from public disclosure. (Government Code Sections 6253-6254. All further statutory references are to this code, unless otherwise indicated.)
- 3) Makes records of public post-secondary educational institutions in California open to the public and subject to disclosure pursuant to the CPRA. (See *Board of Trustees of California State University v. Superior Court* (2005) 132 Cal.App.4th 889.)
- 4) Allows a public agency, including a public post-secondary educational institution, to withhold any public record by demonstrating that the record in question is exempt under express provisions of the CPRA, or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. (Section 6255.)
- 5) Allows a public agency to withhold any public record if the disclosure of the record in question would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions. (See *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1342.)
- 6) Provides that the privilege in 5) protects factual information that would compromise the deliberative process, including "predecisional" documents that are prepared to assist an agency decision-maker in making a decision. (See *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136.)
- 7) States that the home addresses, home telephone numbers, personal cellular telephone numbers, personal email address, and birth dates of all employees of a public agency shall not be deemed to be public records and shall not be open to public inspection, except as follows:
 - a) To an agent, or a family member of the individual to whom the information pertains.
 - b) To an officer or employee of another public agency when necessary for the performance of its official duties.

- c) To an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and any phone numbers on file with the employer of employees performing law enforcement-related functions, and the birth date of any employee, shall not be disclosed.
 - d) To an agent or employee of a health benefit plan providing health services or administering claims for health services to public agencies and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents. (Section 6254.3 (a) – (b).)
- 8) Prohibits, upon written request of any employee of a public agency, the agency from disclosing the employee's home address, home telephone number, personal cellular telephone number, personal email address, or birth date in response to CPRA request and requires the agency to remove that information from any mailing list maintained by the agency, except if the list is used exclusively by the agency to contact the employee. (*Id.*, at subd. (c).)
- 9) Declares that it is in the interest of the state to ensure that the results of state-funded research are promptly developed and protected and to make the research available in the public domain, where appropriate. (Government Code Section 13988 (b).)
- 10) Requires a grantee that receives funding, in whole or in part, in the form of a research grant from a state agency to provide, without charge, public access to any publication of a peer-reviewed manuscript describing state-agency-funded knowledge, a state-agency-funded invention, or state-agency-funded technology. (Government Code Section 13989.6 (a)(1).)
- 11) Requires, for a peer-reviewed manuscript that is accepted for publication pursuant to the terms and conditions of the research grant, the grantee to ensure that an electronic version of the peer-reviewed manuscript is available to the state agency and on an appropriate publicly accessible repository approved by the state agency, including a number of repositories of public postsecondary educational institutions in California, to be made publicly available not later than 12 months after the official date of publication. (*Id.*, at subd. (b).)
- a) Allows, for publications other than those described above, including scientific meeting abstracts, the grantee to comply with this requirement by providing the manuscript to the state agency not later than 12 months after the official date of publication. (*Id.*, at subd. (c).)
 - b) Makes grantees responsible for ensuring that publishing or copyright agreements concerning submitted articles fully comply with the requirements of 8) and 9), above. (*Id.*, at subd. (d)(1).)
- 12) Clarifies the following:
- a) That nothing in in 10) or 11), above, shall be construed to authorize use of a peer-reviewed manuscript that would constitute an infringement of copyright under the federal copyright law described in Section 101 of Title 17 of the United States Code and following. (*Id.*, at subd. (d)(2).)

- b) That grantees are authorized to use grant money for publication costs, including fees charged by a publisher for color and page charges, or fees for digital distribution. (*Id.*, at subd. (e).)
- c) That nothing in in 10) or 11), above, applies to research grants issued prior to January 1, 2015, for the State Department of Public Health, or to research grants issued prior to January 1, 2019, for any other state agency. (*Id.*, at subd. (g).)

13) Holds in case law by the California Supreme Court that the public has the right to access the content of an employee's personal email which is used to conduct public business. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608.)

14) Prohibits, pursuant to federal law (the Family Educational Rights and Privacy Act or FERPA) and its enacting regulations, in order to protect the privacy of parents and students, educational agencies and institutions that receive federal funding from disclosing the personal identifying information of students within educational records, except to specified parties and entities under specified conditions authorized by law. (20 U.S.C. 1232g, 34 CFR 99.1 *et seq.*)

FISCAL EFFECT: As it is currently in print this bill is keyed as fiscal.

COMMENTS: The California Public Records Act (CPRA) requires that the documents and “writings” of a public agency be open and available for public disclosure. The CPRA also provides several express exemptions from mandatory disclosure as well as a “catch-all” exemption for circumstances in which the public interest in withholding records from public disclosure outweighs the public interest in disclosure. Among these is an exemption for records produced in the “deliberative process” of a public agency, which privileges records used or produced in the process of decision-making to allow the unrestrained exchange of ideas and information in the interest of making the most informed decisions for public policy. Though this privilege from disclosure technically applies to researchers at public postsecondary educational institutions as public employees, the process of academic research is unique from typical policy decisions made by most public agencies. Academic research is a continuous process that lacks the finality of a policy “decision,” and a given research project can last years or decades even after some results have been published. The manner in which the deliberative process exemption from record disclosure pursuant to the CPRA applies to academic research at public colleges and universities thus warrants additional clarification to specify documents, factual or otherwise, that are central to scientific deliberation. As in print, this bill provides a fairly broad set of exemptions from public disclosure for researchers and research-related records at public educational institutions. This bill, as proposed to be amended, proposes to make certain records possessed by public postsecondary educational institutions relating to researchers or their research exempt from mandatory disclosure pursuant to the CPRA, in order to specify the application of deliberative process privilege to the practice of academic research. Specifically, this bill exempts from mandatory disclosure records regarding preliminary research that would expose the thought process or preliminary findings of a researcher in a manner that would interfere with their research, records that constitute trade secrets, and information that would compromise the privacy of research subjects, from mandatory public disclosure. According to the author:

AB 700 modernizes the CPRA to encourage inquiry and knowledge at California public universities. It is important for the public to understand how public institutions function—

including public universities. The public deserves to know where funding comes from and how money is spent. We deserve to know who is influencing the direction of research, and to ensure that special interests don't buy access to universities to establish a veneer of independence.

Fortunately, other researchers and the public already have what is needed to evaluate the quality of academic work. Academics already release detailed methodologies and datasets when they publish papers. Public records laws should be refined to protect the discovery process while ensuring their continued use to ensure integrity and accountability within the university system. To foster innovative research at California's public universities the state should exempt certain research and presentation materials from the CPRA, as well as other information necessary to protect the privacy of research subjects. These sensible reforms can advance the core public interest mission of public universities while maintaining public accountability for their operation, so that Californians can reap the greatest collective benefit from their ongoing investment in our state's public universities. They can also streamline the processing of CPRA requests that serve the public interest by limiting the diversion of limited resources available for enforcing the CPRA.

Statutory and Constitutional Protections for Open Records in California. The California Public Records Act (CPRA) was enacted in 1968 (Chapter 1473, Statutes of 1968) and codified as Sections 6250 through 6276.48. Similar to the federal Freedom of Information Act, the CPRA requires that the documents and "writings" of a public agency be open and available for public inspection, unless they are exempt from disclosure. (Government Code Sections 6250-6270.) The CPRA is premised on the principle that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." It defines a "public record" to mean "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Government Code Section 6252 (e).)

In 2004, the voters of the state approved Proposition 59, which was placed on the ballot by a unanimous vote of both houses of the Legislature. Proposition 59 amended the California Constitution to specifically protect the right of the public to access and obtain government records: "The people have the right of access to information concerning the conduct of the people's business, and therefore . . . the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. 1, sec. 3, subd. (b), par. (1).) In 2014, voters again approved an initiative, Proposition 42, which further increased public access to government records. It was also placed on the ballot after being unanimously approved by the Legislature in SCA 3 (Leno), Chapter 123. Proposition 42 requires local agencies to comply with the PRA and the Brown Act, and with any subsequent statutory enactment amending either act. Proposition 42 also makes the state's compensation of costs for new or higher levels of service in the CPRA discretionary rather than mandatory.

The CPRA weighs the public interest of disclosure of records against the public interest in withholding disclosure. The Legislature, in enacting the CPRA, declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state" (Government Code Section 6250), and courts have held that the CPRA in its intention "to safeguard the accountability of the government to the public...makes public access to governmental records a fundamental right of citizenship." (*Rogers v. Superior Court*, 19 Cal.App.4th at p.476.) Still, the CPRA provides several express exemptions as well as

a “catch-all” exemption for records for which the public interest in withholding disclosure outweighs the public interest in disclosing the record. (Government Code Section 6254, 6255.)

California courts have, on several occasions, upheld the position that the CPRA does not require disclosure of documents that would “expose an agency’s decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions” (see *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1342), and has clarified that this privilege protects “materials reflecting deliberative or policymaking processes...including ‘pre-decisional’ documents...which are prepared to assist an agency decision-maker in making a decision.” (*Wilson*, 51 Cal.App.4th 1136.) In doing so, the courts have “uniformly drawn a distinction between pre-decisional communications, which are privileged, and communications made after the decision and designed to explain it, which are not.” (*Times Mirror Co.*, 53 Cal.3d 1341). The courts have further held that “even if the content of a document is purely factual, it is nonetheless exempt from public scrutiny if it is actually related to the process by which policies are formulated or if it is inextricably intertwined with policymaking processes.” (*Id.*)

The lack of a clear distinction between pre- and post-decisional records in the academic research process justifies special statutory consideration. Although California law makes records of public post-secondary educational institutions in California subject to disclosure pursuant to the CPRA (see *Board of Trustees of California State University v. Superior Court* (2005) 132 Cal.App.4th 889), it is less clear in the context of the academic research process when a “decision” has been made, and therefore, to which documents the privilege of deliberative process may apply based on existing statute and jurisprudence. The process of academic research is continuous and cumulative, and a single research project can span years or even decades. Publication of a manuscript seemingly marks an end to a particular chapter of research, but the timelines for publication are often arbitrary, since a research question is rarely answered in its entirety. The same project may thus continue long beyond publication with expansion on or further consideration of data collected but not included in the initial manuscript. Consequently, publication is an imperfect analogy for the “decision” made by a public official involved in more traditional policymaking, as certain data may be preliminary even after a publication on a given project is produced. Nonetheless, the concerns that gave rise to existing protections for deliberative process at public agencies are relevant to researchers at public educational institutions, since the risk of public disclosure may discourage candid discussion and undermine the open discourse necessary for conceiving experiments, interpreting data, developing theories and hypotheses, and drawing conclusions that advance the public good.

Public records requests have been used to discourage or discredit lines of inquiry by academic researchers, including in California. Worries that public records requests may be weaponized to intimidate and bully researchers into abandoning or avoiding lines of inquiry are not without merit. According to a 2017 analysis in the *University Pennsylvania Law Review* of requests filed under the Freedom of Information Act, the CPRA's federal cognate, “public-oriented inquiries by concerned citizens and their advocates...make up only a small fraction of the 700,000-plus [Freedom of Information Act] requests submitted each year.” (David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, Feb 1, 2017, *University of Pennsylvania Law Review*, Vol. 165, pp.1097-1158.) Rather, the author of the analysis cites several studies that consistently show that the bulk of requests come from businesses seeking to further their own commercial interests by learning about competitors, litigation opponents, or the regulatory environment. (*Ibid.*) Such requests have been increasing dramatically in recent years. The

University of California system, for instance, saw a 418% increase in the number of public records requests received between 2009 and 2017, increasing from 3,266 requests to 16,921. (*Industries Turn Freedom of Information Requests on Their Critics*, Elizabeth Williamson, NY Times, Nov. 5, 2018.) Maria Shanle, managing counsel for education affairs and governance at the University of California, provided that a significant portion of these requests are from activists and industry groups "using public records requests as one part of a strategy to undermine the work of researchers in controversial fields." These include requests for every document a visiting scholar produced related to "chemical substances, including flame retardants," a request by an anti-abortion group for the names of researchers studying abortion safety, and a request for all emails to and from a journalism professor that contained words like "biotech" and "Monsanto." (*Ibid.*)

In a particularly illustrative case, law professor Dennis J. Ventry Jr. of University of California, Davis was targeted by several tax preparation companies following publication of work criticizing contracts providing free tax filing services through the Internal Revenue Service. Only days after Ventry published an op-ed criticizing the IRS for poor oversight of their agreement with tax preparation companies, these companies requested a sweeping array of documents from Ventry, including any emails, text messages, hand-written notes, and other writings relating in any way to those companies. (*Ibid.*) Though these requests failed to yield any particularly damning revelations, Ventry said that the requests discouraged research collaborators from communicating with him. Included in the documents required by the disclosure request were emails between Ventry and a colleague at Stanford University, a private institution not subject to public disclosure laws. His colleague "worries that such requests...stifle the peer review process, a freewheeling exchange of views, often by email, in which academics around the world evaluate one another's work." (*Ibid.*) The additional scrutiny these requests thus impose on the often private communications of researchers at non-public institutions can stifle collaborations with researchers in the public sector, often to the detriment of their work. "We went from emailing multiple times a day over the course of a couple months to not emailing at all...[The request] stifled not just academic freedom but the deliberative and beneficial process of thinking through problems with others," Ventry said. According to Ventry's collaborator, these requests "really [raise] the ante and [make] it very scary just to email stuff." (*Ibid.*)

Although Ventry's case provides a particularly clear picture of the effective use of public records requests to discourage research and publication on specific topics, it is unfortunately not unique. Similar cases have arisen with researchers across the country, including with a group of biological scientists at Washington State University and the University of Florida studying the use of genetically modified organisms (GMOs) who have, since the disclosure of those documents, received death threats (*GM-crop opponents expand probe into ties between scientists and industry*, Keith Kloor, Nature, Aug. 6, 2015), with prominent climate change researchers at the University of Arizona (*Justices let stand order that climate researchers hand over University of Arizona emails*, Howard Fischer Capitol Media Services, tucson.com, Aug. 29, 2018), and with a renowned climate change researcher at the University of Virginia who was ordered to provide nearly every email sent or received during his time as a professor at the university (*Va. Supreme Court rules for U-Va. in global warming FOIA case*, Tom Jackman, Washington Post, April 17, 2014). Though courts ultimately sided with the University of Virginia in the latter case with respect to the 12,000 papers and communications they elected to withhold, the nearly 1,000 documents they were still required to provide resulted in public excoriation by politicians and popular figures, as well as death threats and a faux-anthrax scare aimed at the researcher. (*Ibid.*; *I'm a scientist who has gotten death threats. I fear what may happen under Trump.*, Michael E.

Mann, Washington Post, Dec. 16, 2016.) It should be noted that whether or not the intent of these requests was malicious in nature, they nonetheless can chill the exchange of information between researchers and the freedom to entertain novel ideas and methods.

Instances of research misconduct have been revealed by disclosure of records pursuant to the CPRA. Despite malicious use of public records requests targeting researchers in the aforementioned cases, there have also been several instances in which public access to communications and documents involving researchers at public institutions have illuminated wrongdoing on the part of the researchers or institutions. A particularly striking example is detailed in a recent report by ProPublica Illinois, which discusses a series of negligent and dangerous studies performed by a child psychiatrist at the University of Illinois at Chicago. (*University of Illinois at Chicago Missed Warning Signs of Research Going Awry, Letters Show*, Jodi S. Cohen, ProPublica Illinois, March 20, 2019.) In this case, the researcher committed numerous violations of research protocols and standards of practice by including children as young as eight years old, including many with histories of seizures, dependence on psychotropic substances, or suicidal tendencies, in her psychiatric studies. All of these subjects should have been excluded from the study pursuant to the protocols submitted by the researcher to the National Institute of Mental Health. (*Ibid.*) UIC's Institutional Review Board, the committee tasked with overseeing the propriety of research involving human subjects at the university, overlooked many warning signs of misconduct and improperly fast-tracked approval of the offending study, and internal audits conducted by the university concluding that children were likely harmed in these studies were withheld from disclosure to the public and the National Institute of Mental Health. Though the university eventually reported these offenses to federal officials, the university significantly downplayed their own lapses in oversight, the details of which were only revealed after a FOIA request filed in early 2018 by ProPublica Illinois. (*Ibid.*)

The UIC example is not the only instance of public records requests serving a central role in the revelation of research misconduct. A public records request by a non-profit dedicated to accountability recently revealed that a statistics and data science researcher at Kennesaw State University was unduly influenced by an attorney working closely with the payday lending industry in the production of a report that exonerated payday lending of financial harm to customers. (*How a payday lending industry insider tilted academic research in its favor*, Renae Merle, Washington Post, Feb. 25, 2019.) The industry attorney suggested research to cite, the type of data to include and exclude, and even provided editorial assistance and suggested language, which critically shaped the interpretation of the data by a researcher experienced in data analytics but largely unfamiliar with the ins and outs of payday lending. The report then became an empirical basis for the lobbying efforts of the payday lending industry to encourage rescinding stringent regulations of the industry by the Consumer Financial Protection Bureau, which elected to back away from these regulation on the basis of such studies. (*Ibid.*) These cases and others in which public records can be used to indicate improper influence of research output by funders, egregious violations of research protocols and standards of conduct, and the like, support a legitimate role for public records requests in maintaining accountability and transparency in the ministerial and financial conduct of research. Balancing this role against the potential for deterring or obstructing the necessary functions of research is thus critical to properly legislating the issue.

The author has agreed to amend the bill to significantly narrow the categories of records that are exempt from mandatory disclosure under AB 700. In response to concerns that the exemptions provided by AB 700 as in print are overly broad and would hamper legitimate

inquiry into potential wrongdoing, the author has provided several amendments that narrow the scope of the exemption and qualify categories of records that are expressly excluded from the exemptions provided pursuant to the bill. Several opponents of the bill expressed concern that the exemption as it pertained to “information relating to a researcher or their research...including but not limited to...” lacked clarity and could incidentally exempt records for which disclosure would not impact academic or scientific freedom, including disciplinary and administrative records. Furthermore, opponents feel that the language in print does not adequately identify the categories of records the bill aims to exempt, which could result in more or less indiscriminate use of the exemption for all records at public postsecondary educational institutions.

In response to these concerns, the author has agreed to amendments that categorize the exempt records, remove “including, but not limited to,” and further qualify that the records must be in the possession of the institution. The bill’s exemption, as proposed to be amended, generally applies to “[the] following information that is in the possession of a public postsecondary educational institution, relating to a researcher or their research at or in affiliation with that educational institution.” The proposed amendments then specify several records that are broadly categorized as “[records] regarding preliminary research that would expose the thought process or preliminary findings of the researcher in a manner that would interfere with their research,” “[records] that constitute trade secrets” pursuant to existing definitions in Section 6276.44 of the Government Code and Section 1060, *et seq.*, of the Evidence Code, and “[information] that would compromise the privacy of research subjects.” Specific records are provided under or alongside each broader category, with the first category of preliminary research records limited to the records enumerated, the second category (trade secrets) constrained by existing definitions, and the third category (research subject privacy) providing no limitation to the enumerated records.

This reconstruction of the bill text significantly narrows the scope of the exemption and provides necessary clarity in order to better balance the public interest in disclosure and the public interest in mitigating interference that could hamper the research process. Though the author intends to continue working with stakeholders on the language involving “records regarding preliminary research that would expose the thought process...of the researcher in a manner that would interfere with their research,” this language nonetheless adds clarity and limitation to the bill by indicating a category of research records that would most flagrantly interfere with the research process by chilling speculative or critical communication between peers, discouraging collaboration with private institutions, and impeding the open creative and analytical processes necessary to carry out academic research, a reasonable adaptation of the deliberative process exemption in existing law to fit the unique circumstances of academic researchers and their research.

The author has also agreed to add an additional paragraph to specify certain records that shall *not* be considered to be exempt from disclosure pursuant to the provisions of this bill, unless the record is exempted or prohibited from disclosure pursuant to other state or federal law. These records include information about the identity and financial contributions of a funder to past or ongoing research, communication between a funder and a researcher relating to the researcher’s current or past research funded by that funder, records pertaining to institutional audits of compliance with standards of practice, and records pertaining to disciplinary action taken against the researcher relating to their research. These categories are responsive to the need for avenues permitting public oversight of academic misconduct while avoiding constraint on effective

scientific inquiry and would have allowed misconduct to be detected in all well-publicized cases in which research misconduct was detected through public records requests.

ARGUMENTS IN SUPPORT: Supporters argue that threat of public disclosure stifles the open discourse, preliminary speculation, and creative freedom researchers require to advance knowledge and solve problems affecting Californians, while discouraging collaboration between public and private researchers. The Union of Concerned Scientists, who sponsor this bill, argue:

The University of California system receives more than 12,000 public records requests each year, and many address legitimate issues that deserve public scrutiny, from overpayment for contracts to sexual harassment. Unfortunately, included in that number are a number of requests that effectively stop the work of researchers that are pursuing lines of inquiry disliked by or unfavorable to those requesting the records. Records for unpublished research, correspondence among professional collaborators, and similar materials across the California's public universities and colleges can discourage researchers from tackling "hot" topics with significant societal relevance, while adding little to public understanding of the issues under study. Such requests can also chill communications among co-researchers, deter academics from engaging with the public, and discourage work by graduate students and junior faculty in an entire field of study. It is often on contentious issues that cutting-edge research proves to be most valuable to individual and public policy decisions.

To foster innovative research at California's public universities the state should exempt draft research materials, such as correspondence between professional peers and unpublished data and research methods. These sensible reforms can maintain public accountability and transparency while addressing the abusive practices that threaten public universities' ability to conduct the innovative research that California so badly needs to meet the challenges of a complex future and maintain its economic leadership.

The Climate Scientist Legal Defense Fund expands on the chilling effect of threats of public disclosure on the research process, explaining:

The public interest is harmed when [public records] requests curb the ability of researchers to ask tough questions of each other; chill their communications with collaborators and the public; and isolate them from their peers. Following public release of their emails and other internal documents, researchers have seen scientific jargon taken out of context and had casual emails misrepresented by hostile groups, and even received threats to their personal safety by extremist ideologues.

ARGUMENTS IN OPPOSITION: Opponents of the bill worry that the scope of the CPRA exemptions provided for research records is too broad and would obstruct legitimate inquiry into potential wrongdoing by researchers at academic institutions. Opponents of the bill are also generally concerned that providing additional exemptions from mandatory disclosure will open the door for further exemptions that will erode the intent of the CPRA.

Opposing an earlier version of the bill, The Electronic Frontier Foundation argued that the provisions in AB 700 are unnecessary, as the records the bill attempts to protect are already exempt from disclosure under existing privilege for deliberative process, stating:

Setting aside that the bill would increase secrecy on academic campuses and harm the public's right to know, the proposed exemption is unnecessary because the CPRA currently

prohibits the disclosure of the information that the bill seeks to protect. For example, the CPRA exempts records that document the deliberative process of any state official or agency, which would apply to developing research or academic inquiry or communications reflecting arguments grappling with flaws in research or theories...The new exemption would weaken the CPRA in a dangerous way, by prohibiting the disclosure of "[information] relating to a researcher or their research at a public postsecondary educational institution, including, but not limited to, any of the following..." Consequently, any academic could argue that their work, at any time in the research process, is exempt from disclosure.

As drafted, such broad language could hamper legitimate requests that in no way intrude upon or chill academic freedom. Exempting all correspondence "relating to research" is not defined and could apply to virtually all academic communications.

People for the Ethical Treatment of Animals (PETA), opposing an earlier version of the bill, added:

AB700 would do tremendous harm by undermining transparency and accountability. It would also send a deeply troubling signal to animal experimenters in California's system of higher education that their activities will remain almost entirely shrouded in secrecy, and that the public will never learn about any abuses or violations of animal welfare laws. Animal experimentation facilities around the country are continually fighting for ever greater secrecy.

The amendments that the author has agreed to make seemingly address these concerns by removing or reconfiguring the offending language, narrowing the scope of research records expressly exempted, and specifying types of records that the language of the bill does not exempt, including records relating to audits of compliance with standards of practice, records relating to disciplinary action against a researcher pertaining to their research, and communications between funders and researchers pertaining to the research being funded.

The California News Publishers Association, who oppose the bill, even as it is proposed to be amended, similarly contend that the bill remains overly broad:

AB 700 would take [the] "fundamental precept...that governmental records shall be disclosed to the public, upon request, unless there is a specific reason not to do so" in favor of disclosure with only narrow exceptions and flip it on its head by broadly exempting records "related to research" held by public postsecondary institutions and, as proposed to be amended, then listing narrow categories of records that are subject to disclosure. This approach is antithetical to [the] purpose of the CPRA, and inconsistent with its structure. To the extent a new exemption to the CPRA is needed, it should be narrowly drawn to specifically address only the circumstances that are identified and which existing law fails to protect. Toward this end, AB 700 falls short.

This argument validly points out that a narrow approach to exempting research records from public disclosure is necessary, and the value of free access to public records certainly must be heavily considered when categorically asserting that the value to the public of withholding certain records exceeds the value of that access. The Committee staff has worked with the author's office and stakeholders extensively to narrow the scope of the bill to exempt only the records whose withholding is essential to protect the open deliberative process of academic discourse for effective research. The author has also agreed to include intent language that

explains the unique circumstances surrounding the process of research at public postsecondary educational institutions that justify certain categorical exemptions. The proposed intent language implies that these exemptions are necessary in order to achieve the intent of deliberative process privilege exempting records from more conventional state agencies from public disclosure pursuant to the CPRA.

The California Chapter of the American Civil Liberties Union voices several concerns with the rationale for the bill as it is proposed to be amended:

[We] do not believe the pursuit of truth and education is fostered by darkness rather than sunshine. If it is, the same theory would apply equally to every type of government official that undertakes any inquiry – not only university researchers – and the CPRA would be severely undermined...We have been told that another reason for the bill is to protect university officials from harm to their reputation. Assuming that is a legitimate objective, there are existing methods and laws to address it...Moreover, it is impossible to take the CPRA out of the hands of those who use it for purposes you disapprove of without also extinguishing the rights of those who use the CPRA in the public interest to uncover any number of wrongs. Indeed, the bill seems to rest on the belief that public researchers and university administrators never lie, cheat, steal, commit fraud, falsify data, engage in nepotism or other favoritism, discriminate on the basis of race, sex or other factors, misuse public funds, take bribes, engage in unsafe practices, harm research subjects, or commit any other type of misconduct.

The ACLU argues that if the pursuit of truth and education is fostered by “darkness rather than sunshine,” the same theory would “apply equally to every type of government official that undertakes any inquiry – not only university researchers – and the CPRA would be severely undermined.” However, this theory is already applied to every type of government official protected by the deliberative process privilege provided by the CPRA and upheld on several occasions by the courts. Accordingly, the author has accepted amendments that clarify the types of records that constitute the deliberative process of academic research. Additionally, it is true that protecting researchers from harm to their reputations is a possible ancillary effect of this bill, but the bill is focused primarily on potential uses of public records that would discourage researchers from pursuing lines of inquiry or carrying out a thorough, well-documented analytical process in the first place. The intention, as clarified in the intent language the author has agreed to include, is not to protect researchers from harm to their reputations, but rather, in part, to provide researchers the intellectual freedom to pursue ideas and lines of inquiry without the constraint of fear that their correspondences, methods, or data will be used out of context to maliciously attack their credibility and/or sabotage future career aspirations.

In response to concerns that the potential for researcher misconduct were not adequately considered by the bill in print, the proposed amendments to the bill carve out from the provided exemption information about and communication with the funders of past and ongoing research, records pertaining to institutional audits of standards of practice, and records pertaining to disciplinary action taken against the researcher relating to their research. These amendments ensure public access to records that could implicate researchers or institutions in the types of wrongdoing most frequent, yet nonetheless uncommon, in academic research (i.e. academic fraud, kick-backs, unsafe practices, harm to research subjects, etc.).

REGISTERED SUPPORT / OPPOSITION:

Support

Union of Concerned Scientists (sponsor)
Center for Environmental Health
Climate Science Legal Defense Fund
Numerous individuals

Oppose

American Civil Liberties Union – California
Electronic Frontier Foundation
Moms Across America
People for the Ethical Treatment of Animals
Numerous individuals

Oppose Unless Amended

California News Publishers Association
First Amendment Coalition

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