FORTY YEARS OF PUBLIC RECORDS LITIGATION INVOLVING THE UNIVERSITY OF WISCONSIN: AN EMPIRICAL STUDY

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Abstract

The research reported in this Article represents a pioneering attempt to study public records lawsuits involving a public university system over an extended period. An analysis of all public records lawsuits involving the University of Wisconsin System over a four-decade period suggests that much of the received wisdom about public records disputes involving higher education is incorrect. Most public records litigation is not about administrative searches or issues that implicate traditional notions of academic freedom. Rather, most lawsuits in Wisconsin sought information about alleged misconduct or suspected ethical lapses by university employees. News organizations initiated the majority of the lawsuits, always prevailing. Advocacy groups were also very successful in litigation. In contrast, students or employees who sued to obtain information for purely personal reasons rarely gained access to the information they sought. The results show the usefulness of public records laws as a means of public accountability. In addition, the Article demonstrates the merits of a research strategy that focuses on data from trial-court cases that are not available via Lexis, Westlaw, or other online services.

Truth-seeking is so fundamental a value in American culture that the law provides a wide variety of mechanisms to promote the quest for knowledge. Many of the freedoms explicitly guaranteed by the First Amendment were designed to protect individuals' rights to search for truths of various kinds.[1] Additional rights associated with truth-seeking such as freedom of association,[2] academic

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1 William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 Ga. L. Rev. 1 (1995); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 Duke L.J. 821 (2008); Brian C. Murchison, *Speech and the Truth-Seeking Value*, 39 Colum. J.L. & Arts 55 (2015).

2 Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1 (1964); Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. Rev. 741 (2008).

freedom,[3] and the right to know[4] have developed in the broad shadow of the First Amendment. Indeed, constitutional law in the United States has been called "the law of penumbras and emanations."[5] Beyond the constitutional realm, Congress and state legislatures have recognized the importance of truth-seeking in education by establishing a diverse network of public colleges and universities[6] as well as by enacting statutes that grant rights of access to information controlled by governmental bodies.[7] Although access-to-information laws are important means by which the press and public can scrutinize the performance of government institutions,[8] higher education's culture of autonomy does not easily accommodate demands for transparency and public accountability.[9] One scholar noted:

> Universities have a special need to preserve academic freedom and independence in academic decision-making. … Thus, a conflict exists

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3 Richard Hofstadter & Walter P. Metzger, The Development of Academic Freedom in the United States (1955); James R. Ferguson, *Scientific Inquiry and the First Amendment*, 64 Cornell L. Rev. 639 (1979); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 Neb. L. Rev. (2011); Robert C. Post, Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State (2012); Stanley Fish, Versions of Academic Freedom: From Professionalism to Revolution (2014).

4 Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 Wash. U. L. Q. 1 (1976); David M. O'Brien, *The First Amendment and the Public's Right to Know*, 7 Hastings Const. L.Q. 579 (1979); Fred H. Cate, D. Annette Fields & James K. McBain, *The Right to Privacy and the Public's Right to Know: The Central Purpose of the Freedom of Information Act*, 46 Admin. L. Rev. 41 (1994); Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 Duke J. Const. L. & Pub. Pol'y 113 (2008).

5 Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 Harv. L. Rev. 1639, 1656 (1993).

6 On the development of the American system of colleges and universities, *see* Christopher J. Lucas, American Higher Education: A History (1994); Arthur M. Cohen & Carrie B. Kisker, The shaping of American Higher Education: Emergence and Growth of the Contemporary System (2nd ed. 2010).

7 Most public colleges and universities are creations of state governments; as such, they are subject to the public records laws of their states. *See* William A. Kaplin & Barbara A. Lee, The Law of Higher Education (5th ed. 2013), § 13.5. The federal Freedom of Information Act, 5 U.S.C. § 552, which applies to the relatively few federally created universities such as the U.S. Military Academy at West Point, does not apply to state colleges and universities. *See* David Pritchard & Craig Sanders, *The Freedom of Information Act and Accountability in University Research*, 66 Journalism Q. 402 (1989); Lauren Kurtz, *The Application of Open Records Laws to Publicly Funded Science*, 31 Natural Resources & Environment (Spring 2017), available at https://www.americanbar.org publications/natural_resources_environment/2016-17/spring/the_application_open_records_laws_publicly_funded_science.html (last visited, Feb. 20, 2018). For convenient access to the public records laws of the 50 states, *see* the FOIAdvocates website, http://www.foiadvocates.com/records.html (last visited Feb. 20, 2018).

8 Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 Am. B. Found. Res. J. 521 (1977); Anthony Lewis, *The Right to Scrutinize Government: Toward a First Amendment Theory of Accountability*, 34 U. Miami L. Rev. 793 (1980).

9 F. King Alexander, *The Changing Face of Accountability: Monitoring and Assessing Institutional Performance in Higher Education*, 71 J. Higher Ed. 411 (2000); David D. Dill, *The Regulation of Public Research Universities: Changes in Academic Competition and Implications for University Autonomy and Accountability*, 14 Higher Ed. Pol'y 21 (2001); Achieving Accountability in Higher Education: Balancing Public, Academic, and Market Demands (Joseph C. Burke ed. 2005); J. Douglas Toma, *Expanding Peripheral Activities, Increasing Accountability Demands and Reconsidering Governance in US Higher Education*, 26 Higher Ed. Res. & Development 57 (2007).

between the laudable goal of open government and the special needs of universities to operate relatively free from public pressure.[10]

The culture of autonomy in higher education is so powerful, in fact, that it is not uncommon for public universities to resist requests from citizens, news organizations, or others for access to information. In such situations, requesters have the option of asking a court to order that the records in question be released.[11]

Little is known, however, about what happens in such lawsuits. The information that scholars, lawyers, and higher-education administrators receive about public records litigation involving universities is fragmented and incomplete, largely because it is based on the small number of cases that are covered by the news media and/or decided by appellate courts. Even the relatively sparse scholarly literature on access-to-information laws and higher education is "largely anecdotal or hortatory," two professors concluded after reviewing existing research.[12] The focus on the unrepresentative disputes that receive media coverage or reach appellate courts has fostered a widespread belief among scholars and higher-education administrators that public records litigation involving colleges and universities tends to be concentrated in two areas of special sensitivity—employment searches for high-level administrators[13] and academic freedom.[14]

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10 Frank A. Vickory, *The Impact of Open-Meetings Legislation on Academic Freedom and the Business of Higher Education*, 24 Am. Bus. L.J. 427, 428 (1986). *See also* James C. Hearn, Michael K. McLendon & Leigh Z. Gilchrist, Governing In The Sunshine: Open Meetings, Open Records, And Effective Governance In Public Higher Education (2004), at 2 ("sunshine laws pose for institutions and society a difficult tension among three desirable objectives: maintaining individual privacy rights, ensuring public accountability (i.e., the public's right to know), and providing institutions the autonomy they need for effective functioning."), citing Harlan Cleveland, The cost and benefits of openness: Sunshine laws and higher education (1985).

11 Daxton R. "Chip" Stewart, *Let the Sunshine In, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws*, 15 Comm. L. & Pol'y 265 (2010).

12 Michael K. McLendon & James C. Hearn, *Mandated Openness in Public Higher Education: A Field Study of State Sunshine Laws and Institutional Governance*, 77 J. Higher Educ. 645, 647 (2006).

13 Judith Block McLaughlin, *From Secrecy to Sunshine: An Overview of Presidential Search Practice*, 22 Res. Higher Ed. 195 (1985); Judith Block McLaughlin & David Riesman, *The Shady Side of Sunshine: The Press and Presidential Searches*, 87 Teachers C. Rec. 471 (1986); Robert Birnbaum, *Presidential Searches and the Discovery of Organizational Goals*, 59 J. Higher Ed. 489 (1988); Charles N. Davis, *Scaling the Ivory Tower: State Public Records Laws and University Presidential Searches*, 21 J.C. & U.L. 353 (1994); Eric M. Eisenberg, Alexandra Murphy & Linda Andrews, *Openness and Decision Making in the Search for a University Provost*, 65 Comm. Monographs 1 (1998); Nick Estes, *State University Presidential Searches: Law and Practice*, 26 J.C. & U.L. 485 (1999-2000); Michael J. Sherman, *How Free Is Free Enough: Public University Presidential Searches, University Autonomy, and State Open Meeting Acts*, 26 J.C. & U.L. 665 (1999-2000); Alexandra Tilsley, *Too Much Sunshine Can Complicate Presidential Searches*, Chronicle of Higher Educ., Aug. 8, 2010; Syni Dunn, *More Public Colleges Opt for Closed Searches*, Chronicle of Higher Educ., June 7, 2013.

14 Nader Mousavi & Matthew J. Kleiman, *When the Public Does Not Have a Right to Know: How the California Public Records Act is Deterring Bioscience Research and Development*, 2005 Duke L. & Tech. Rev. 23; Bruce E. Johansen, Silenced!: Academic Freedom, Scientific Inquiry, and the First Amendment Under Siege in America (2007); Robert R. Kuehn & Peter A. Joy, *"Kneecapping" Academic Freedom*, Academe, Nov.-Dec. 2010, at 8; Michael Halpern, *The Costs of a Climate of Fear*, Academe, Nov.-Dec. 2010, at 16; Jennifer Dearborn, *Ready, Aim, Fire: Employing Open Records Acts as Another Weapon Against Public Law School Clinics*, 39 Rutgers L. Rec. 16 (2011); Rachel Levinson-Waldman, *Academic Freedom and the Public's Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship*,

The research presented in this Article, which is based on an analysis of all public records lawsuits involving the University of Wisconsin System from 1978 through 2017, suggests that much of the received wisdom is incorrect. With respect to administrative searches, we found no public records lawsuits seeking the identities of applicants for university positions after the early 1990s. Meanwhile, only a small number of cases–all involving the UW system's flagship Madison campus–have featured academic freedom arguments for keeping records confidential.

In short, most public records litigation is not about administrative searches or issues that implicate traditional notions of academic freedom. Rather, most lawsuits involving the University of Wisconsin System during the four decades covered by our study sought information about alleged misconduct or suspected ethical lapses by university employees. News organizations initiated most of those lawsuits, although advocacy groups occasionally sought records that the university wished to keep secret. News organizations and advocacy groups that filed public records lawsuits against the university always obtained the records they sought, though sometimes with sensitive peripheral information redacted. In some cases, students or employees who wanted information for purely personal reasons filed lawsuits seeking access to university records. Such litigation tended to be unsuccessful.

Part I of this Article explains the research design of the study. Part II provides background about the University of Wisconsin System and its challenges with freedom of inquiry. Part III traces the history of the Wisconsin Public Records Law, with examples of how media organizations have used it to generate news stories about UW System entities. Part IV provides an overview of the outcomes in public records lawsuits involving the university. Part V tells the story of how the university solved what it considered to be the problem of public records lawsuits about administrative searches. Part VI shows the evolution of the university's academic freedom arguments for withholding information. Part VII documents the university's aggressive use of the Family Educational Rights and Privacy Act (FERPA)[15] as an argument for withholding information. Part VIII discusses the implications of the study's findings.

I. Research Design

A distinctive aspect of the research reported in this Article is its focus on what we believe is a complete set of public records lawsuits filed against any component of the UW System in the 40-year period from 1978 through 2017. We took pains to be comprehensive so that our analysis would avoid the risk of bias that can result from studying only the lawsuits that attract the attention of the news media and/or appellate courts.

Am. Const. Soc., Issue Brief, Sep. 8, 2011, *available at* http://www.acslaw.org/sites/default/files/Levinson_-_ACS_FOIA_First_Amdmt_Issue_Brief.pdf (last visited Feb. 20, 2018); Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, Union of Concerned Scientists report, *available at* http://www.ucsusa.org/center-science-and-democracy/protecting-scientists-harassment/freedom-bully-how-laws#.WX-YS4TyuUk (last visited Feb. 20, 2018).

15 20 U.S.C. § 1232g, 34 C.F.R., Part 99.

The choice of cases in any empirical study of legal phenomena is crucially important. Because cases that reach appellate courts are systematically different from those which are resolved at the trial-court level, research focusing only on appellate cases does not accurately describe the full range of ordinary litigation. As one researcher wrote, "When studies use as data only those cases that result in a published judicial opinion, they are vulnerable to a publication bias that can lead to erroneous conclusions."[16] Cases that draw the attention of the news media are similarly unrepresentative.[17]

A significant challenge to our research was the fact that no one in Wisconsin maintains a list of public records lawsuits. Through a combination of personal knowledge,[18] Internet searches of news coverage, searches of Wisconsin's online database of circuit court cases,[19] and consultations with lawyers who have defended UW System entities when they are sued[20] we identified 34 public records lawsuits that were filed before the end of 2017. We did not find any public records cases filed against a component of the University of Wisconsin before 1978. Most of the 34 cases in our study were resolved at the trial court level. Ten of them (29%) reached appellate courts, with one proceeding all the way to the Wisconsin Supreme Court.[21] Once we had a list of cases, we traveled to courthouses throughout Wisconsin to review thousands of documents in trial court files. The files, which are not available on the Internet, revealed the kinds of information requesters sought, arguments made in favor of and against releasing the information, and the outcomes of the cases. We also examined news coverage about the disputes.

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16 Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 UMKC L. Rev. 171, 171 (2006). *See also* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 Cornell L. Rev. 119, 125 (2002) ("Judicial decisions represent only the very tip of the mass of grievances."); Kay L. Levine, *The Law is Not the Case: Incorporating Empirical Methods into the Culture of Case Analysis*, 17 U. Fla. J.L. & Pub. Pol'y 283, 285 (2006) ("We should be aware that constructing legal arguments in the context of one case, or teaching students how to do so, is distinct from making claims about what the law in a particular area really is, in all of its many forms and messy realities."); David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 Wash. U.L. Rev. 681, 683 (2007) ("For many observers of the American legal system, law is what judges write in appellate opinions. These observers are mistaken. But the gravitational pull of an appellate-centered view of the legal world is strong. Opinions from such tribunals continue to dominate the training of new lawyers and are widely disseminated by the mainstream media."); Kevin M. Clermont, *Litigation Realities Redux*, 84 Notre Dame L. Rev. 1920 (2008).

17 Karen S. Johnson-Cartee, News Narratives and News Framing: Constructing Political Reality (2005); Pamela J. Shoemaker & Stephen D. Reese, Mediating the Message in the 21st Century: A Media Sociology Perspective (2014).

18 As journalists, both authors of this Article were involved in litigation seeking access to documents in the custody of UW System campuses. *See Capital Times v. Bock*, No. 164-312, 9 Med. L. Rptr. 1837 (Dane County Cir. Ct. 1983); *UWM Post v. Union Policy Board*, No. 2009-CV-17771 (Milwaukee County Cir. Ct.).

19 The database is accessible at https://wcca.wicourts.gov (last visited Feb. 20, 2018).

20 The authors acknowledge helpful information provided by Mary E. Burke, former Assistant Attorney General, Wisconsin Department of Justice; Tomas Stafford, UW System General Counsel; and John C. Dowling, former Senior University Legal Counsel, UW-Madison.

21 Two of the cases that reached the Court of Appeals had not been decided as of November 20, 2017. *See Scott v. Board of Regents*, 2015AP1244 (pending); *Hagen v. Board of Regents*, 2017AP2058 (pending).

If a strength of our research is its analysis of a complete set of trial court cases over a period of several decades, a possible limitation is that the study analyzes litigation in only one state. The focus on a single state raises the question of whether knowledge about public records lawsuits involving higher education in Wisconsin may be useful for understanding patterns of similar litigation in other states. Because there is no comprehensive collection of information about how trial courts in other states have resolved public records cases, there is no empirical answer to such a question. That said, a key issue in assessing the generalizability of studies of legal behavior in single jurisdictions is to show that the location where the research was conducted "is not so atypical as to be unique."[22] In other words, the argument for the usefulness of our findings in states other than Wisconsin depends in an important sense on the extent to which Wisconsin's public records statute and Wisconsin's characteristics are similar to those of other states.

Wisconsin's public records statute is a fairly typical state public records law.[23] It is in the middle of the pack in terms of the level of access it enables, procedures for gaining access to records, and penalties for government officials who illegally withhold records.[24] More generally, Wisconsin appears to be a very typical state. A 2006 analysis of U.S. Census data went so far as to declare Wisconsin to be the most representative of the American states. The analysis compared state-by-state averages on twelve variables, including neighborhood characteristics, race and ethnicity, and income and education.[25] An analysis of the Census Bureau's *2015 American Community Survey* came to a similar conclusion: Wisconsin is one of the "most normal" states.[26]

II. The University of Wisconsin

Wisconsin's original Constitution, ratified by popular vote on March 13, 1848, contained the seeds of the modern University of Wisconsin System. The Constitution stated: "Provision shall be made by law for the establishment of a state university, at or near the seat of government, and for connecting with the same, from time to time, such colleges in different parts of the state, as the interests of education may require."[27] After the Constitution was ratified, the state moved

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22 Malcolm M. Feeley, The Process is the Punishment: Handling Cases in a Lower Criminal Court xxxii (1979) *See also* Roger Gomm, Martyn Hammersley & and Peter Foster, *Case Study and Generalization* in Case Study Method: Key Issues, Key Texts 98-115 (2000).

23 Caitlin Ginley, *Grading the nation: How accountable is your state?* Center for Public Integrity, Nov. 10, 2015, https://www.publicintegrity.org/2012/03/19/8423/grading-nation-how-accountable-your-state (last visited Feb. 20, 2018).

24 Bill F. Chamberlin, Crisitina Popescu, Michael F. Weigold & Nissa Laughner, *Searching for Patterns in the Laws Governing Access to Records and Meetings in the Fifty States by Using Multiple Research Tools*, 18 U. Fla. J. L. & Pub. Pol'y 415 (2007); Stewart, *supra* note 11.

25 Mark Preston, *The Most 'Representative' State: Wisconsin*, CNN Politics, July 27, 2006, *available at* http://www.cnn.com/2006/POLITICS/07/27/mg.thu/ (last visited Feb. 20, 2018).

26 Andy Kiersz, *Ranked: All 50 states and DC, from least to most average*, Business Insider, Oct. 12, 2016, available at http://www.businessinsider.com/average-state-ranking-2016-10/#51-district-of-columbia-1 (last visited Feb. 20, 2018).

27 Wis. Const. Art. X, § 6 (1848).

quickly to create the university. On July 26, 1848, Governor Nelson Dewey signed into law a bill incorporating the University of Wisconsin. The first class met in February 1849.[28]

Wisconsin's founding fathers believed that a public education system including a university had two principal functions: "To prepare young people for the duties and obligations of citizenship, and to train them to perform the practical tasks of life."[29] Academic freedom was not contemplated in any serious fashion until 1894, when a prominent faculty member was accused of being a dangerous radical who should be censured, if not fired.[30] In response, the UW Board of Regents adopted a ringing defense of academic freedom. The Regents' statement contained the famous "sifting and winnowing" statement that epitomizes the university's commitment to the search for truth:

> Whatever may be the limitations which trammel inquiry elsewhere, we believe that the great state University of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone the truth can be found.[31]

In 1915 the words of the statement were cast in bronze on a tablet and bolted to the east wall of Bascom Hall on the campus in Madison, where they remain more than a century later.[32]

Over the years the university grew to the point that in 1970 it consisted of the main campus in Madison plus four-year campuses in Milwaukee (added in 1956), Green Bay (1968), and a site called Parkside between the cities of Racine and Kenosha (1968); freshman-sophomore campuses in ten communities around the state; and the statewide University of Wisconsin Extension. In the early 1970s the State Legislature merged the University of Wisconsin with the Wisconsin State University System,[33] which had been composed of nine four-year campuses and four freshman-sophomore campuses. At the end of 2017 the UW System consisted of 13 four-year campuses, 13 two-year campuses, and Extension offices in each

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28 Merle Eugene Curti & Vernon Rosco Carstensen, The University of Wisconsin: A History, vol. 1 (1949).

29 *Id.,* at 46.

30 Theodore Herfurth, *Sifting and Winnowing: A Chapter in the History of Academic Freedom at the University of Wisconsin*, in Academic Freedom on Trial: 100 Years of Sifting and Winnowing at the University of Wisconsin-Madison 59 (W. Lee Hansen ed., 1998). For additional background on the development of academic freedom at the University of Wisconsin, *see* Theron F. Schlabach, *An Aristocrat on Trial: The Case of Richard T. Ely*, 47 Wis. Magazine Hist. 146 (1963-64); Merle Curti & Vernon Carstensen, The University of Wisconsin: A History, 1848-1925 (2 vols.) (1974); Allan G. Bogue & Robert Taylor, The University of Wisconsin: One Hundred and Twenty-Five Years (1975); Proud Traditions and Future Challenges: The University of Wisconsin-Madison Celebrates 150 Years (David Ward & Noel Radomski eds., 1999).

31 University of Wisconsin Board of Regents, Report of Investigation into Charges Against Professor Richard T. Ely, September 18, 1894.

32 Replicas of the "sifting and winnowing" tablet are also displayed at several of the 25 University of Wisconsin campuses outside of Madison.

33 Chapter 335, 1973 Wis. Sess. Laws.

of Wisconsin's 72 counties.[34] It was by far the largest agency in Wisconsin state government, with roughly 175,000 students and 39,000 faculty and staff.[35]

As the university evolved from a single campus in Madison to a sprawling statewide system, its commitment to unfettered "sifting and winnowing" was occasionally called into question. Attempts by university administrators to constrain controversial speech by faculty and students generated considerable opposition and negative publicity, including a successful federal court challenge to a speech code the Board of Regents had adopted.[36] Meanwhile, the university's reluctance to be transparent led to frequent criticism. In the late 1970s, for example, a journalist noted that UW-Madison's "predilection for secrecy" was undermining the State Legislature's trust in the university.[37] The university's lack of transparency in the early 1990s led another journalist to decry "another of a series of disgraceful attempts (by the university) to torpedo Wisconsin's public records law."[38] In 1996 a scholar noted, "The University of Wisconsin System has often reacted zealously to deny access when requests for information about system personnel are made."[39] Legislators also have expressed unhappiness with the university's frequent resistance to disclosure. In 2005, a member of the Wisconsin Assembly made a sweeping request for records about the university's finances because "university officials have never wanted to come clean about pretty much anything—they think they know better than legislators and taxpayers."[40] The university's reputation for transparency was no better in 2009, when editorials in Wisconsin's largest newspaper blasted UW-Milwaukee and the UW-Madison medical school for refusing to release public documents without a court order.[41] In 2016 the university was criticized for deleting video of UW System chancellors describing how state budget cuts had harmed their campuses[42] and for refusing to release

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34 In November 2017 the UW System Board of Regents approved merging the 13 two-year campuses with four-year campuses in their regions. In addition, divisions of the statewide UW Extension were to be placed under the administrative control of UW-Madison or UW System. Implementation of the mergers was to be effective as of July 1, 2018. UW System Board of Regents, *Approval of Restructuring of UW Colleges and UW-Extension*, Res. 7 (Nov. 9, 2017).

35 What is the UW System? *Available at* https://www.wisconsin.edu/about-the-uw-system/ (last visited Feb. 20, 2018).

36 *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991). *See also* Donald A. Downs & Anat Hakim, *The University of Wisconsin, Free Speech, and the First Amendment*, Wisconsin Interest, Fall 2000, 27-34; Donald Alexander Downs, Restoring Free Speech and Liberty on Campus (2005).

37 David Pritchard, *Sifting and Winnowing*, Madison Cap. Times, May 15, 1979, at 3.

38 John Patrick Hunter, *Open record shenanigans are a disgrace*, Madison Cap. Times, Feb. 4, 1992, at 6A.

39 Gary Coll, Mass Communication Law in Wisconsin 83 (1996).

40 State Rep. Steve Nass, quoted in Karen Rivedal, *UW busy digging up data*, Wis. St. J., July 16, 2005, at B1.

41 Editorial, *Compliance "run wild": Officials at the University of Wisconsin-Milwaukee need to understand that the public has a right to see records of public meetings,* Milwaukee J. Sentinel, Nov. 14, 2009; Editorial, *Cough up the records: A newspaper should not have to resort to a lawsuit to force the release of records that are obviously public,* Milwaukee J. Sentinel, Dec. 26, 2009.

42 Nico Savidge, *UW System official deleted video of scrapped budget cut presentations*, Wis. St. J., Apr. 19, 2016.

a final version of the UW System budget for 2016-17.[43] Such incidents led to an editorial in a Madison newspaper titled, "UW System secrecy only breeds suspicion."[44]

III. Wisconsin's Public Records Law

In 1849, a year after statehood, the Wisconsin Legislature adopted a set of statutes for the new state. Although several scholars have implied that the Legislature adopted a general public records law that year,[45] the 1849 statutes did not contain a generalized right of access to government documents. Rather, various laws required some state officials (e.g., the secretary of state[46] and the commissioners of the school and university lands[47]) and many county officials (e.g., county boards of supervisors,[48] probate judges,[49] sheriffs, clerks of circuit court, registers of deeds, county treasurers, and clerks of the board of supervisors[50]) to preserve their records and have them open to public inspection. County officers were required to keep their offices open during business hours and permit public inspection of "all books and papers required to be kept."[51]

In the early days of statehood, public officials sometimes chafed at legally required transparency. Wisconsin courts, however, insisted that both the letter and the spirit of the access-to-information provisions of the statutes be honored. In 1856, for example, after Jefferson County balked at paying for firewood and candles to keep the clerk of circuit court's office heated and lit so that citizens could transact business during the dark days of Wisconsin's long winters, the state Supreme Court made a strong statement in favor of effective access to government: "To require these officers to keep their office open during business hours and yet provide no means of warming or lighting them, would be simply absurd."[52] In 1887, the Court again stressed the importance of meaningful access to public records, this time in a case involving a county register of deeds who wanted to condition access to land records on his evaluation of a citizen's motive for wishing to examine and copy the records. The Court's view was unequivocal. Because the

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43 Pat Schneider, *UW regents relied on private phone, face-to-face conferences for budget briefing*, Madison Cap. Times, June 10, 2016; Karen Herzog, *Finalized budget for UW withheld*, Milwaukee J. Sentinel, June 11, 2016, at 1A.

44 Editorial, *UW System secrecy only breeds suspicion*, Wis. St. J., July 13, 2016.

45 *See, e.g.*, John A. Kidwell, *Open Records Laws and Copyright*, 1989 Wis. L. Rev. 1021, 1027; Michael D. Akers, Gregory J. Naples & Luke J. Chiarelli, *Federal and State Open Records Laws: Their Effects on the Internal Auditors of Colleges and Universities*, 3 Marq. Sports L.J. 161, 172 (1993); Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 Wm. & Mary Bill of Rts. J. 1, 2 n.3 (2003).

46 Wis. Rev. Stat. Ch. 9, § 11 (1849).

47 Wis. Rev. Stat. Ch. 24, § 103 (1849).

48 Wis. Rev. Stat. Ch. 10, § 37 (1849).

49 Wis. Rev. Stat. Ch. 10, § 74 (1849).

50 Wis. Rev. Stat. Ch. 10, § 137 (1849).

51 *Id.*

52 *County of Jefferson v. Besley*, 5 Wis. 134, 136 (Wis. Sup. Ct., 1856).

statute granted rights of access to land records to "any person," the motive of a person seeking access was irrelevant, the Court ruled.[53]

In 1917, the Legislature passed the state's first unified public records law, enacting a two-paragraph statute that not only required state and local government officials to retain records but also gave the public a seemingly unconditional right to inspect, and copy, governmental records "except as expressly provided otherwise."[54] Wisconsin courts interpreted the statute's language quite literally in the years after the law's implementation, with the Wisconsin Supreme Court going so far as to hold that the law required disclosure of individuals' state income tax returns.[55] In 1947, however, the state Supreme Court pulled back from its literal interpretation of the law. The court noted that the 1917 statute had been enacted by the adoption of a "revisor's bill" that was merely intended to compile existing law into a single statute.[56] Although the court acknowledged that the words of the disclosure provision of the 1917 law were clear, it nonetheless decided that the statute did not extend the common law right to examine government records. The result was a significant constriction of the public's right of access to government records in Wisconsin.

By the mid-1960s the membership of the Court had changed; none of the justices who narrowed access rights in 1947 remained. Without explicitly overruling the 1947 decision, the Court established a new common-law rule: Custodians of government documents in Wisconsin would henceforth be required to balance the public interest in disclosure with the harm that might result from disclosure.[57] But the balancing was not to be neutral. Using a variant of the preferred position balancing theory often used in freedom-of-expression cases,[58] the Court stated that the interest in disclosure was to be given a preferred position in the balancing process:

> In reaching a determination so based upon a balancing of the interests involved, the trial judge must ever bear in mind that public policy favors the right of inspection of public records and documents, and, it is only in the exceptional case that inspection should be denied.[59]

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53 *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N.W. 30 (1887). The text of the current public records law grants rights of access to "any requestor" Wis. Stat. § 19.35(1), leading to the reasonable inference that the motive of the party requesting records is not relevant to a decision about whether the records must be released. In a 2016 ruling, however, the Wisconsin Supreme Court considered the "partisan purpose" of a requestor (the Democratic Party of Wisconsin) when it overturned a Court of Appeals decision that would have required release of records in the custody of a Republican elected official. *Democratic Party of Wisconsin v. Department of Justice*, 2016 WI 100, 372 Wis. 2d 460, 888 N.W.2d 584.

54 Wis. Stat. § 18.01 (1917), later renumbered as Wis. Stat. § 19.21 (1979-80).

55 *Juneau v. Wisconsin Tax Commission et al.*, 184 Wis. 485, 199 N.W. 63 (1924).

56 *International Union, United Auto., Aircraft and Agr. Implement Workers v. Gooding*, 251 Wis. 362, 29 N.W.2d 730 (1947).

57 *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 137 N.W.2d 470 (1965).

58 Clay Calvert, Dan V. Kozlowski & Derigan Silver, Mass Media Law 52-53 (20th ed. 2018).

59 *Id.*, at 683, 475.

The presumption-of-openness principle led to a renewed era of generous access to public records, with the Court ruling that the following kinds of documents must be disclosed: a city attorney's report of investigation into alleged police misconduct,[60] accident reports in the custody of police,[61] the names of doctors who performed abortions at a county-operated hospital,[62] and police blotter information, including not only who was arrested but what they were arrested for.[63] When the Legislature adopted a new public records statute to go into effect on January 1, 1983,[64] it enshrined the presumption-of-openness principle in the law's declaration of policy.[65]

Despite the Legislature's declaration of policy in favor of openness, effective rights of access to public records may have narrowed since the enactment of the new law in 1983. A review of activity in the first decade after implementation of the new law found that "records custodians have seemed reluctant to disclose records, courts have increasingly upheld denials of access, and the legislature has appeared more willing to create new exceptions to disclosure."[66] One of the most significant exceptions to disclosure came in 2003, when the Legislature gave certain categories of public employees the right to seek a court order blocking public access to records mentioning them, if disclosure would harm an employee's privacy or reputational interests.[67] All in all, Wisconsin's public records law has become more complex over time.[68]

Media organizations make frequent use of Wisconsin's public records law for the purpose of obtaining newsworthy information about university affairs. Although the university sometimes resists disclosure to the point that news organizations seek a court order requiring the university to disclose records, the university often releases information without requesters having to go to court. Voluntary disclosure has resulted in dozens of news stories about various components of the UW System in recent years, including revelation of the following matters:

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60 *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 137 N.W.2d 470 (1965), *modified & reh'g denied*, 28 Wis.2d 672, 139 N.W.2d 241 (1966).

61 *Beckon v. Emery*, 36 Wis.2d 510, 153 N.W.2d 501(1967).

62 *State ex rel. Dalton v. Mundy*, 80 Wis.2d 190, 257 N.W.2d 877 (1977).

63 *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 279 N.W.2d 179 (1979).

64 Wis. Stat. §§ 19.31-19.39 (2013-14).

65 Wis. Stat. § 19.31 ("The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied"). For legislative history and a critique of the 1983 statute, *see* Linda de la Mora, *The Wisconsin Public Records Law*, 67 Marq. L. Rev. 65 (1983).

66 Sverre David Roang, *Toward a More Open and Accountable Government: A Call for Optimal Disclosure Under the Wisconsin Open Records Law*, 1994 Wis. L. Rev. 719, 720.

67 Wis. Stat. § 19.356(2)(a). *See also* Matthew V. Munro, *Access Denied: How Woznicki v. Erickson Reversed the Statutory Presumption of Openness in the Wisconsin Open Records Law*, 2002 Wis. L. Rev. 1197.

68 For detailed overviews of the law, *see* Melanie R. Swank, The Wisconsin Public Records and Open Meetings Handbook (5th ed. 2012); and Wis. Dep't of Justice, *Wisconsin Public Records Law Compliance Guide* (2015), https://www.doj.state.wi.us/sites/default/files/dls/2015-PRL-Guide.pdf (last visited Feb. 20, 2018).

- Disciplinary actions taken by UW-Milwaukee against a senior professor who sexually harassed a graduate student.[69]
- Violations of National Collegiate Athletic Association rules by UW-Madison athletes who accepted more than $23,000 in unadvertised discounts at a shoe store.[70]
- Disciplinary actions taken against a UW-Oshkosh professor who engaged in improper political activity in his classroom.[71]
- A fox-guarding-the-henhouse situation in which a UW-Madison medical school official who had received more than $25 million in royalties from a company was made responsible for monitoring the potential conflict of interest of a faculty member who received hundreds of thousands of dollars in consulting fees from the same company.[72]
- The reasons for the abrupt retirement of a dean at UW-Sheboygan and the closing of an on-campus program that had served high-school students of color for more than 20 years.[73]
- The discipline UW-Madison meted out to 20 university doctors who provided sick notes to public employees who missed work in early 2011 to protest budget proposals by Wisconsin's newly elected governor.[74]
- The basis for the previously unexplained firing of the men's soccer coach at UW-Milwaukee.[75]
- Details of negotiations between UW System administrators and the Wisconsin Governor as the university sought to minimize the effect of harsh budget cuts.[76]
- The reasons for the suspension of the UW-Stevens Point men's basketball coach.[77]

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69 Margaret Talbot, *A Most Dangerous Method,* Lingua Franca, January/February 1994; *Kiss, banter with student gets professor disciplined*, Milwaukee J., Feb. 25, 1994. The professor in question wrote a book about the controversy: Jane Gallop, Feminist Accused of Sexual Harassment (1997).

70 Andy Hall, *Shoe Box reports released by UW*, Wis. St. J., Jan. 19, 2001, at A1; Don Walker & Jeff Potrykus, *Badgers can't shoo scandal away*, Milwaukee J. Sentinel, Jan. 20, 2001, at 1C.

71 Adam Rodewald, *UW-Oshkosh releases disciplinary record of professor who encouraged students to sign Sen. Randy Hopper recall petition*, Oshkosh Northwestern, May 6, 2011.

72 John Fauber, *Millions paid to UW chairman*, Milwaukee J. Sentinel, Dec. 27, 2011, at 1A.

73 Eric Litke, *University of Wisconsin-Sheboygan Upward Bound program dropped following federal probe*, Sheboygan Press, Jan. 19, 2012, at A1; Eric Litke & Janet Ortegon, *University of Wisconsin-Sheboygan dean was polarizing figure*, Sheboygan Press, Jan. 20, 2012, at A1.

74 Jason Stein & Patrick Marley, *20 doctors disciplined for sick notes; Physicians received fines, warnings, records show*, Milwaukee J. Sentinel, Apr. 6, 2012, at 1A.

75 Don Walker, *Coach had used offensive language; Letter discusses Whalley's dismissal*, Milwaukee J. Sentinel, Apr. 28, 2012, at 10C.

76 Karen Herzog, *Nervous UW System tried to strike deal*, Milwaukee J. Sentinel, Feb. 3, 2015, at 3A.

77 Scott A. Williams, *Point's coach suspended for season*, Milwaukee J. Sentinel, Jan. 6, 2017, at 4B.

- Results of an investigation into allegations that the UW-Madison men's basketball coach used university resources to pay expenses associated with his participation in a lengthy, extramarital affair.[78]
- An examination of the UW-Oshkosh Foundation's curious decision to purchase the home of Chancellor Richard Wells for roughly $120,000 more than its market value.[79]
- An overview of twenty sexual-harassment cases filed against UW-Madison in the previous decade.[80]

IV. Overview of Outcomes

Our research found 34 cases in which a public records lawsuit was filed against a component of the University of Wisconsin. Half of the lawsuits (17) involved UW-Madison. Other campuses had far fewer public records lawsuits to deal with: UW-Milwaukee (4), UW-Stevens Point (3), UW-Superior (2), and one each for UW-Oshkosh, UW-Parkside, UW-Platteville, UW-River Falls, UW-Whitewater, and UW-Fox Valley. Two lawsuits sought records from multiple campuses.

Roughly half of the cases (18, or 53%) originated with requests from news organizations. In six cases in which news organizations sought reports of investigations into alleged misconduct by university employees, the university was willing to release the records but the employees went to court to block release of the documents.[81] Given that the Court of Appeals had previously ruled that the public had a right of access to reports of completed investigations into alleged misconduct,[82] it was no surprise that all of the efforts to block release of similar reports to the media failed.[83] Accordingly, every case involving the news media resulted in release of virtually all of the records sought.

Six lawsuits were filed by advocacy organizations, including groups critical of affirmative action,[84] skeptical of the quality of teacher training in university

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78 Kevin Draper, *Wisconsin Investigated Bo Ryan After Extramarital Affair, Denies It Caused His Resignation*, Deadspin, March 5, 2016, *available at* http://deadspin.com/wisconsin-investigated-bo-ryan-after-extramarital-affai-1762792798 (last visited Feb. 20, 2018).

79 Karen Herzog, *Oshkosh chancellor got sweet deal for home*, Milwaukee J. Sentinel, Apr. 2, 2017, at 1A.

80 Karen Herzog, *UW assault cases cost $591,050 to settle*, Milwaukee J. Sentinel, Apr. 11, 2018, at 1A

81 *Marder v. Board of Regents*, 226 Wis. 2d 563, 596 N.W.2d 502 (Ct. App. 1999); *Doe v. University of Wisconsin-Milwaukee*, No. 2002-CV-6343 (Milwaukee County Cir. Ct., 2002); *Jones v. Board of Regents*, No. 2005-CV-3755 (Dane County Cir. Ct., 2005); *Bell v. Board of Regents*, No. 2007-CV-1453 (Dane County Cir. Ct., 2007); *Buckley v. Board of Regents*, No. 2011-CV-542 (Portage County Cir. Ct., 2012); *Hagen v. Board of Regents*, No. 2017-CV-389 (Winnebago County Cir. Ct., 2017).

82 *Wisconsin State Journal v. University of Wisconsin-Platteville*, 160 Wis.2d 31, 465 N.W.2d 266 (1990).

83 In one case, the employee who was the subject of a journalist's records request appealed the judge's order that the records be released. As of Feb. 20, 2018, the Court of Appeals had not ruled on the appeal. *See Hagen v. Board of Regents*, 2017AP2058 (pending).

84 *Osborn v. Board of Regents*, 254 Wis.2d 266, 647 N.W.2d 158 (Wis. Sup. Ct. 2002). Osborn, a UW-Madison mathematics professor, was president of the Wisconsin Association of Scholars.

education programs,[85] opposed to abortions at the UW medical school,[86] concerned about possible animal abuse in research,[87] and angry that a professor allegedly offered extra credit to students who collected signatures to put an anti-smoking referendum on a municipal ballot.[88] Five of these lawsuits resulted in release of the records the organization sought, either by court order or via a settlement that gave the organization essentially everything it wanted. The plaintiffs who filed the lawsuit involving the anti-smoking referendum did not pursue their records request after the referendum failed.

In all, 24 of the 34 lawsuits (71%) had a public purpose either because they were intended to help produce news stories or because they were related to public policy advocacy. Other than the case that plaintiffs dropped after the side they favored prevailed in the Stevens Point anti-smoking referendum, requesters with a public purpose always succeeded in gaining access to the records they sought. In contrast, university students and employees who filed public records lawsuits seeking information for purely personal reasons (e.g., to find out why complaints had been filed against them,[89] to gain personally identifiable information from surveys in which participants had been promised confidentiality,[90] to learn results of other students' exams[91]) never got the information they wanted.

V. Employment Searches for Administrators

As noted near the beginning of this Article, one of the greatest concerns universities express about the scrutiny that public records and open meetings laws enable is that searches for top administrators could be compromised. Such laws "reframe the search process as a kind of public performance,"[92] with the resulting fear that fewer quality applicants would be willing to apply for high-level positions.[93] An analysis of the search for a new president of the University of Florida in 1983 was scathing about the effect of the state of Florida's legal requirement that all aspects of the search be public:

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85 *National Council on Teacher Quality v. Legal Records Custodians*, No. 2012-CV-63 (Jefferson County Cir. Ct., 2012).

86 *Zignego v. Golden*, No. 2010-CV-5700 (Dane County Cir. Ct., 2010). Zignego was associated with Pro-Life Wisconsin.

87 *Rhodes v. Board of Regents*, No. 2010-CV-1811 (Dane County Cir. Ct., 2010); *Animal Legal Defense Fund v. Board of Regents*, 2017 Wisc. App. LEXIS 823 (Wis. Ct. App., 2017). Rhodes was an employee of People for the Ethical Treatment of Animals.

88 *Hansen v. Bunnel*, No. 2005-CV-98 (Portage County Cir. Ct., 2005). Craig and Susie Hansen, owners of a bar, were associated with a group that opposed the anti-smoking proposal.

89 *Stone v. Board of Regents*, 2007 WI App 223, 305 Wis.2d 679, 741 N.W.2d 774 (Ct. App. 2007); *Scott v. Board of Regents*, No. 2013-CV-11294 (Milwaukee County Cir. Ct., 2015).

90 *Balke v. UW-Madison*, No. 2007-CV-2273 (Dane County Cir. Ct., 2008); *Peterson v. Greenfield*, No. 2009-CV-357 (Kenosha County Cir. Ct., 2009).

91 *Kang v. Board of Regents*, 2007 WI App 1, 298 Wis. 2d 246, 726 N.W.2d 356 (Ct. App. 2006).

92 Eisenberg, Murphy & Andrews, *Openness and Decision Making in the Search for a University Provost*, *supra* note 13 at 18.

93 Hearn, McLendon & Gilchrist, *supra* note 10.

> By forcing the search committee to conduct business in public, open-meeting and open-record laws lead to evasions and game-playing. Unable to talk candidly in public, search committee members avoid controversy altogether or they talk privately, outside of committee sessions, despite the fact that such conversations are "illegal." Hence, the public is not better informed about the real issues and no more confident about the fairness of decisions than had the entire process been conducted in camera.[94]

A few years after that search for a University of Florida president, UW-Madison fired its athletic director and football coach. As the university began taking applications for a new athletic director and football coach, the Milwaukee *Journal* sought access to the names of applicants for the two positions, both of which have a higher profile among Wisconsin residents than do the president of the UW System or the chancellors of individual campuses. The university denied the newspaper's request for the names of applicants; the newspaper filed a mandamus action seeking public release of the names of the applicants.[95] The trial court ordered that the records be released. The university appealed, but to no avail. The Court of Appeals also ruled that the names must be disclosed.[96] The managing editor of the Milwaukee *Journal* praised the Court of Appeals decision, saying that the public had a right to know details about searches for administrative employees:

> Our view of the law all along has been that the citizens of Wisconsin ought to know about the competition for these state jobs, whether it's for football coach at UW-Madison or chancellor of UW-Milwaukee. If we don't know what the field of applicants looks like, how would we ever know if the right choices were made?[97]

The Court of Appeals issued its decision in late June 1991 as a similar case was heating up. In September 1990 several news organizations, including the Milwaukee *Journal*, had gone to court to gain access to the names of applicants for 13 vacant administrative positions throughout the UW System, including campus chancellors at UW-Milwaukee, UW-Oshkosh, and UW-La Crosse.[98] In April 1991, UW System President Kenneth Shaw announced his resignation; in mid-June the news organizations amended their complaint to include a request for the names of

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94 McLaughlin & Riesman, *The Shady Side of Sunshine*, *supra* note 13 at 491.

95 *Milwaukee Journal v. Board of Regents*, 163 Wis.2d 933, 472 N.W.2d 607 (Wis. Ct. App. 1991).

96 *Id.*

97 Steve Schultze, *Ruling rejects UW policy on applicants*, Milwaukee J., June 27, 1991, at 13.

98 *Milwaukee Journal et al. v. Board of Regents*, No. 1990-CV-3524 (Dane County Cir. Ct., 1990). In addition to seeking the names of the applicants for the three vacant chancellor positions, the news organizations requested the names of the applicants for ten additional positions. At UW-Madison, information was sought about applicants for the positions of dean of the School of Law, dean of the School of Business, dean of the School of Education, associate director for women's athletics, associate director for academic and student support, administrative officer in the Department of Athletics, and assistant director of external relations. At UW-Eau Claire, information was sought about applicants for the positions of vice chancellor and of assistant chancellor for information and technology management. At UW System, information was sought about applicants for the position of assistant vice president for university relations.

the applicants to replace him.[99] A few days later, the Court of Appeals ruled that the names of the applicants for the positions of UW-Madison football coach and athletic director had to be disclosed, leaving no doubt that the names of applicants for other administrative positions would have to be made public as well.

In late October 1991, the newspapers and the university agreed to a settlement that made public the names, addresses, and occupations of all applicants and nominees for the administrative positions in which the news organizations had expressed interest, as well as any similar positions in the future.[100] In return, the newspapers agreed not to request other information about job applicants–presumably including reference letters, search committee communications, and the like–for the next three years and two months (until January 1, 1995).[101] Because of the settlement, the names of all applicants for all administrative jobs in the UW System became public record, including the names of more than 140 people who applied or were nominated to replace outgoing UW System President Shaw. The chancellor of the flagship campus in Madison said that the university was "deeply embarrassing" itself by obeying the requirement to release the names of applicants.[102] However, the only way to change the requirement was to change the law, as the Court of Appeals had suggested in June 1991:

> Whether, as the university maintains, the names of applicants for university positions … should be shielded from public view is a question of broad public policy properly directed to the legislature. If the university desires a blanket rule mandating secrecy for the names of job applicants at any level, it should press its case in the legislature, rather than asking the courts to rule contrary to the expressed public policy of the state by creating an exception to the open records law.[103]

The settlement between the group of newspapers and the university over access to the identities of the applicants for the 13 administrative positions noted that any change in "the parties' obligations under Wisconsin's public records laws" would take precedence over the settlement agreement.[104] Accordingly, the university set to work lobbying the Legislature for a change in the law. The university's initial efforts were partly successful. In June 1992 the Legislature modified the law so that the names, occupations, and addresses of all applicants who were not "final candidates" could be kept confidential if the applicants so wished.[105] The names of up to five finalists for each position would have to be released within two days of a request.

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99 *Id.*, Amended Complaint, June 19, 1991.

100 *Id.*, Stipulation and Order, Oct. 28, 1991.

101 *Id.*, Stipulation and Order, at 5.

102 Associated Press, *Shalala: Disclosure law embarrassing*, Wis. St. J., Apr. 15, 1992, at 3B.

103 *Milwaukee Journal v. Board of Regents*, *supra* note 95 at 611 (emphasis in original).

104 *Id.*, Stipulation and Order, at 6.

105 Wis. Stat. § 19.36(7) (2001-02).

For the next two decades, the university continued to lobby the Legislature to allow greater secrecy in administrative searches. In 2015, the efforts bore fruit when the Legislature, despite opposition from major Wisconsin newspapers,[106] exempted the university from the general requirement that state agencies must release the names of finalists for administrative positions. The change allowed the UW System to release only the names of candidates who have been "certified for appointment"[107] for the positions of UW system president, vice presidents and senior vice president, as well as the chancellors and vice chancellors of each campus in the UW system. The names of applicants for all other university positions, including high-profile positions such as UW-Madison football coach, no longer need to be disclosed at all.[108]

The university's efforts in the Legislature to reduce its disclosure obligations mirrored examples elsewhere. In at least three other states–Michigan, Texas, and New Mexico–legislatures have amended the law to exempt disclosure of the names of candidates for public university presidents. University officials in those states lobbied to rewrite the laws after the news media successfully sued for access to such information.[109]

VII. Academic Freedom

The concept of academic freedom was developed to protect faculty members' rights to challenge conventional wisdom and to address controversial or unpopular subjects in their teaching and research.[110] The modern university's conception of academic freedom includes a desire for autonomy from external constituencies. Because people and organizations that request documents related to teaching or research often do so for the purpose of shedding light on what they believe to be unwise or inappropriate activities,[111] universities often perceive such requests as adversarial.

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106 *E.g.*, Editorial, *Don't hide finalists for top UW jobs*, Wis. St. J., June 5, 2015; Ernst-Ulrich Franzen, *One step back, one step forward on open government*, Milwaukee J. Sentinel, June 7, 2015; Editorial, *Remove plan to conceal finalists for UW jobs*, Green Bay Press-Gazette, June 8, 2015; Editorial, *Disclosure change should be reversed*, Kenosha News, July 5, 2015.

107 Wis. Stat. § 19.36(7)(a)1 (2013-14).

108 Wis. Stat. § 19.36(7) (2013-14). *See also* Trisha LeBoeuf, *University of Wisconsin System now has fewer disclosure requirements for applicants to top leadership positions*, SPLC News, July 17, 2015, *available at* http://www.splc.org/article/2015/07/university-of-wisconsin-system-now-has-fewer-disclosure-requirements-for-top-leadership-positions (last visited Feb. 20, 2018).

109 Hearn, McLendon & Gilchrist, *supra* note 10, at 8 ("In all three states, legislatures rewrote the statutes in response to court decisions requiring universities to disclose the names of candidates. Estes notes a distinctive pattern to these reform episodes: a public university's presidential search attracts litigation from the media in pursuit of greater disclosure of candidate identities, the media win their lawsuits, then the university appeals to the legislature, pointing out that it cannot attract good presidential candidates under the rules demanded by the press and the courts.").

110 Hofstadter & Metzger, *supra* note 3; William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 Law & Contemp. Probs. 79 (Summer 1990).

111 *See, e.g.*, examples cited *supra* at notes 69-80. *See also* Jonathan Peters & Charles N. Davis, *When Open Government and Academic Freedom Collide*, 12 First Amend. L. Rev. 295 (2013); William K. Briggs, *Open-Records Requests for Professors' Email Exchanges: A Threat to Constitutional Academic Freedom?* 39 J.C.& U.L. 601 (2013).

Academic freedom was explicitly mentioned in only two public records lawsuits (both involving UW-Madison), but academic freedom in one form or another underlay the university's position in other public records disputes that were resolved without a lawsuit being filed. In addition, the university has used the concept of academic freedom in its efforts to persuade the Legislature (unsuccessfully, as of the end of 2017) to exempt unpublished research material from the public records law.

In 1978, a Madison newspaper made a public records request for reports by UW-Madison faculty members that documented "the nature and scope of any gainful outside activities of an extensive, recurring, or continuing nature."[112] The UW-Madison Faculty Rules and Regulations required faculty members to file the reports, which were, according to the newspaper, "maintained primarily for the purposes of disclosing and preventing conflicts of interest which might arise with respect to outside activities of faculty members."[113] The university denied the request, and the newspaper filed a lawsuit asking a judge to order the university to release the records.[114]

In a speech to the UW-Madison Faculty Senate, the campus chancellor said that if the records were released to the newspaper the result would have "the same chilling impact on academic freedom that demands from the right had on university faculties 25 years ago during the heyday of McCarthyism."[115] In its answer to the lawsuit, the university claimed that disclosure "would violate the faculty members' constitutionally protected right to academic freedom."[116] The university asserted that faculty members' disclosure of gainful outside activities "is for the use of the University administration, including department chairmen (*sic*), alone."[117] The university added that the "unmistakable effect" of disclosure to the media would be a "substantial chilling effect" on activities that served the public interest in a variety of ways.[118]

The judge, however, refused to dismiss the lawsuit, saying that he was "unable to see how public inspection of reports of gainful significant outside activities impinges on any constitutionally secured rights."[119] The university used a variety of procedural mechanisms to delay an ultimate decision, but in April 1983 the

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112 *Capital Times v. Bock*, *supra* note 18, Petition for Writ of Mandamus, at 3.

113 *Id.*, at 4.

114 The attorney general's office normally represents the university in litigation, but Attorney General Bronson La Follette refused to do so, saying that he believed that the law required the reports to be made public. The university hired private counsel to deal with the lawsuit. *La Follette won't defend 11 UW deans*, Madison Cap. Times, Aug. 8, 1978, at 1.

115 David Pritchard, *Shain: C-T suit threatens academic freedom*, Madison Cap. Times, Sept. 12, 1978, at 1.

116 *Capital Times v. Bock*, *supra* note 18, Brief of Respondents in Support of Motion to Quash Alternative Writ of Mandamus, at 7-12.

117 *Id.*, at 10.

118 *Id.*, at 11-12.

119 *Id.*, Decision on Motion to Quash, at 2.

court issued its final ruling, rejecting the university's academic freedom argument and its assertion of a chilling effect. The court noted that less than 3 percent of UW-Madison faculty members had filed reports of outside activities during the years covered by the newspaper's request, a level of compliance with the reporting requirement that the judge characterized as "unrealistically low."[120] Deferring to the statute's command to prevent disclosure only in the exceptional case, the court stated that disclosure was in the public interest:

> The University is dependent upon the trust of the public for its well-being. Nondisclosure raises unfounded suspicions of illegitimate activities. The disclosure of the documents would erase any doubts which might taint the faculty's well-deserved reputation for excellence in, and dedication to, performance. There is a public interest in assuming that the faculty is free from overly burdensome nonscholastic endeavors. The public has a right to know if enough time is being allocated to the faculty's primary educational function.[121]

When the reports were released, they contained no bombshells about faculty conflicts of interest.[122] However, the fact that 97 percent of faculty members had not filed reports led to a new UW System Code of Ethics requiring every faculty member to file an annual report of outside interests that must be made available to the public upon request.[123] Despite the Code of Ethics, conflicts of interest persisted. Beginning in 2009, for example, the Milwaukee *Journal Sentinel* revealed a variety of ethically dubious links between drug companies and UW-Madison medical researchers.[124] The newspaper learned of the relationships in large part because of public records requests.

In 2011, another public records request raised questions of academic freedom. Amid turmoil in Madison over sweeping changes to public employee law proposed by a newly elected Republican governor, a representative of the Wisconsin Republican Party made a public records request for emails sent or received by UW-Madison professor William Cronon, who had written a blog post about the controversial changes in state law.[125] The dispute never went to court, but it attracted national media attention, including pieces on the front page, the editorial page, and the op-ed page of *The New York Times*.[126]

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120 *Id.*, Memorandum Decision, at 11.

121 *Id.*, at 12.

122 Rob Fixmer, *UW makes prof reports public*, Madison Cap. Times, Apr. 29, 1983, at 1.

123 Wis. Admin. Code UWS § 8.025 (Outside activities and interests; reports) (1986). The annotations to the rule specifically state that it incorporates and codifies the result of litigation in *Capital Times v. Bock*.

124 *See*, *e.g.*, John Fauber, *UW doctors speak for drug companies*, Milwaukee J. Sentinel, Jan. 12, 2009; John Fauber & Susanne Rust, *UW course for doctors pushed risky therapy*, Milwaukee J. Sentinel, Jan. 25, 2009; John Fauber, *UW tied to male hormone marketing*, Milwaukee J. Sentinel, Aug. 8, 2009; John Fauber, *Physicians' disclosures to UW, journals inconsistent*, Milwaukee J. Sentinel, Nov. 7, 2009; John Fauber, *UW a force in pain drug growth*, Milwaukee J. Sentinel, Apr. 2, 2011; John Fauber, *Millions paid to UW chairman*, Milwaukee J. Sentinel, Dec. 27, 2011.

125 William Cronon, *Who's Really Behind Recent Republican Legislation in Wisconsin and Elsewhere?*, Scholar as Citizen, Mar. 15, 2011, *available at* http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom/ (last visited Feb. 20, 2018).

126 A.G. Sulzberger and Emma G. Fitzsimmons, *Wisconsin Professor's E-Mails Are Target of G.O.P.*

The university released some of the professor's emails, while refusing to release others for various unremarkable reasons (e.g., confidentiality required for personnel decisions).[127] The university's response argued the confidentiality is a fundamental component of academic freedom:

> Faculty members like Professor Cronon often use e-mail to develop and share their thoughts with one another. The confidentiality of such discussions is vital to scholarship and to the mission of this university. Faculty members must be afforded privacy in these exchanges in order to pursue knowledge and develop lines of argument without fear of reprisal for controversial findings and without the premature disclosure of those ideas. The consequence for our state of making such communications public will be the loss of the most talented and creative faculty who will choose to leave for universities that can guarantee them the privacy and confidentiality that is necessary in academia. For these reasons, we have concluded that the public interest in intellectual communications among scholars as reflected in Professor Cronon's e-mails is outweighed by other public interests favoring protection of such communications.[128]

The requester did not file a lawsuit challenging the university's decision to withhold some records on the grounds of academic freedom, so it is unclear whether a court would have rejected the academic freedom argument, as happened in the earlier case involving faculty members' reports of gainful outside activities.

In recent years UW-Madison has attempted to expand, and in a sense redefine, the concept of academic freedom to incorporate the right to keep unpublished research materials confidential for commercial reasons. This expanded definition of academic freedom was evident in 2009, when the university responded to a request for records documenting experiments on animals in UW-Madison labs. The request was made by People for the Ethical Treatment of Animals (PETA), which sought access to a variety of documents, including photographs and videos of cats and monkeys that had been used in experiments. The university's rejection of the request claimed that academic freedom included the right of a faculty member to control unpublished material for purposes of possible patent applications. An administrator of the UW-Madison Research Animal Resources Center wrote to PETA:

> Regarding the third item in your request, "All photographic and videographic records," please be advised that any such records constitute unpublished proprietary research data. … (U)nder the balancing test inherent in the public records law, we have made the specific determination that the public interest in maintaining academic freedom of researchers to determine how and/or when their research data is published and enabling

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Records Request, N.Y. Times, Mar. 26, 2011, at A1; Editorial, *A Shabby Crusade in Wisconsin*, N.Y. Times, Mar. 26, 2011; Paul Krugman, *American Thought Police*, N.Y. Times, Mar. 28, 2011.

127 Letter from John C. Dowling, Senior University Legal Counsel, to Stephan Thompson, Deputy Executive Director, Republican Party of Wisconsin (Apr. 1, 2011) (copy on file with authors).

128 *Id.*

> patenting of researchers' inventions outweighs the public interest in accessing unpublished data.[129]

The university took the same stance in 2010 when it rejected a request for the raw data that had been used to support the conclusions of two articles co-authored by a faculty member in the UW-Madison Department of Zoology. In denying the request, UW-Madison's senior legal counsel wrote that the public interest in disclosing the raw data was outweighed by other factors, including academic freedom:

> There is a strong interest in the concepts and traditions of academic freedom at institutions of higher education. That is, faculty and staff members must enjoy the academic freedom to decide how and when the fruits of their scholarly labors will be disseminated to the public. Allowing public access to scientific data under these circumstances would have a devastatingly negative effect on the continuing research and the careers of the scientists employed in this state's institutions of public higher education.[130]

The senior legal counsel's statement defined academic freedom not as the right to pursue unpopular or controversial topics, but rather as the right of faculty members to control whether and when "the fruits of their scholarly labors will be disseminated to the public." The requester in the case, a postdoctoral researcher who accused the zoology professor of basing publications on unreliable data,[131] persisted with a plea for assistance to the attorney general. The response from the attorney general's office cast a clear light on the university's expanded definition of academic freedom:

> Raw data generated by academic researchers is widely understood in the scientific community to be the intellectual property of those researchers, to be shared and disclosed as they see fit … If that fundamental academic tradition were to be undermined, incentives for innovative scholars and scientists to devote their lives to original research would disappear. Ground-breaking discoveries in medicine, technology, and other fields would cease.[132]

The letter from the attorney general's office went on to mention "the highly competitive nature of bioscience research" and "the economic importance of original scientific research to UW." In other words, though the university evoked academic freedom in its opposition to disclosing information about the animal

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129 Letter from Richard R. Lane, Associate Director, Research Animal Resources Center, to Chelsea Rhodes, Laboratory Investigations Department, People for the Ethical Treatment of Animals (Feb. 24, 2009) (on file with authors). The rationale for non-disclosure was repeated verbatim in additional letters from Lane to Rhodes over the ensuing several months. *See* Letters from Lane to Rhodes, July 15, 2009, and Sept. 24, 2009 (on file with the authors).

130 Letter from John C. Dowling, Senior University Legal Counsel, to Aaron Taylor, requester (Oct. 8, 2010) (on file with authors).

131 Eugenie Samuel Reich, *Whistle-blower claims his accusations cost him his job*, 474 Nature 140 (2011).

132 Letter from Mary E. Burke, Assistant Attorney General, to Aaron Taylor, requester (Nov. 23, 2010) (on file with authors).

experiments, it did not hide the fact that commercial interests were fundamental to its stance.

Although reasonable people may differ over whether the concept of academic freedom should be construed so broadly as to cover the commercial interests of the university and its researchers, there is no doubt that protecting intellectual property–especially information about potentially patentable inventions–is central to the technology transfer that enables university discoveries to be converted into practical applications in medicine, agricultural, and other fields.[133] Patents allow the university to license companies to manufacture products based on university inventions. The more successful the products in the marketplace, the greater the royalties paid to the university.

The University of Wisconsin has a long history of patenting research. In the early 1920s a professor at the Madison campus demonstrated that irradiation with ultraviolet light increased the amount of vitamin D in food.[134] Rats with rickets that were fed irradiated food were cured. In 1924, the professor patented a process that enabled human food (most memorably milk) to be enriched with vitamin D. Twenty years later rickets had been virtually eliminated in the United States, and the university had a steady stream of royalties that could be used to fund research.[135] More recently, UW-Madison's research foundation sued Apple, Inc., for infringing on a patent a group of computer science researchers obtained for microprocessors that Apple used in some of its iPhone and iPad lines. In 2017, the court ordered Apple to pay the university foundation more than $506 million.[136]

Another concern about the disclosure of research information is possible harassment of people working in areas such as animal research and climate science that are the object of public controversy.[137] Accordingly, when People for the Ethical Treatment of Animals (PETA) and the university agreed on a settlement that gave PETA the photographs that were at the heart of a public records request, the animal-rights organization agreed not to name any university students or employees identified in the materials released by the university.[138] After reviewing the material the university disclosed, PETA filed complaints with federal agencies charging that UW-Madison researchers had violated multiple provisions of the

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133 *See*, *e.g.*, Derek Bok, Universities in the Marketplace: The Commercialization of Higher Education (2003); David Roessner, Jennifer Bond, Sumiye Okubo & Mark Planting, *The Economic Impact of Licensed Commercialized Inventions Originating in University Research*, 42 Res. Pol'y 23 (2013).

134 Harry Steenbock & Archie Black. *Fat-soluble vitamins XVII. The induction of growth-promoting and calcifying properties in a ration by exposure to ultra-violet light*. 61 J. Biological Chemistry 405 (1924).

135 Rima D. Apple, *Patenting University Research: Harry Steenbock and the Wisconsin Alumni Research Foundation*, 80 Isis 374 (1989).

136 *Wisconsin Alumni Research Foundation v. APPLE INC.*, No. 14-cv-062-wmc (W.D. Wis. July 10, 2017). *See also* Karen Herzog, *Judge says Apple owes UW-Madison foundation $506 million in patent infringement case*, Milwaukee J. Sentinel, July 27, 2017. Apple filed notice that it planned to appeal the trial court decision.

137 Stephan Lewandowsky & Dorothy Bishop, *Comment: Don't let transparency damage science*, 529 Nature 459 (2016); Christopher Wlach, *Animal Rights Extremism as Justification for Restricting Access to Government Records*, 67 Syracuse L. Rev. 191 (2017).

138 *Rhodes v. Board of Regents*, *supra* note 87, Settlement Agreement, May 25, 2012.

federal Animal Welfare Act.[139] The university was fined for violations related to the care of research animals, in part because of the information PETA obtained via its public records lawsuit.[140] Less than a year after the fines received media attention, the embattled laboratory closed.[141]

In 2013, the UW System asked the Legislature to exempt research information from disclosure until it was publicly disseminated or patented.[142] Not only did UW-Madison claim to be spending more than $100,000 annually dealing with public records requests from animal rights groups, but it asserted that public disclosure of research contracts, protocols, and investigational brochures would put its medical researchers at a competitive disadvantage.[143] The university's effort failed amid considerable negative press attention.[144] Two years later a similar provision found its way into the governor's budget bill for the 2015-17 biennium.[145] Once again, negative press reaction helped scuttle the proposal.[146]

VII. FERPA

In January 2009, the UW-Milwaukee student newspaper made a written request for a variety of records relating to public meetings of the university's Union Policy Board, a body composed of six students and three university employees. The newspaper asked for copies of meeting agendas, copies of meeting minutes, and audio recordings of public meetings of the Board during the previous five months.[147] The university's records custodian blacked out the names of all students and two employees before she released the agendas and minutes. She also removed the voices of students and the two employees from the audio recording. The rationale for the wholesale redactions? The records custodian claimed that the names and voices of the students were personally identifiable "educational records" within

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139 Dan Simmons, *PETA complaint alleges mistreatment of cats in UW research*, Wis. St. J., Sept. 12, 2012. *See also* Patrick Cole, *Decapitated Cat, Maimed Goat Trigger Scrutiny of Research Labs*, Business Week, Feb. 7, 2013.

140 Lydia Mulvany, *UW-Madison fined $35,000 over care of research animals*, Milwaukee J. Sentinel, Mar. 17, 2014.

141 Pat Schneider, *UW-Madison has ended controversial cat experiments targeted by PETA*, Madison Cap. Times, Jan. 23, 2015.

142 Jason Stein, *UW-Madison seeks limits on open records regarding research*, Milwaukee J. Sentinel, May 24, 2013.

143 Mike Ivey, *Animal rights group cries foul over UW request to block public records access*, Madison Cap. Times, May 26, 2013.

144 *See, e.g.,* Allen Ruff, *Don't exempt UW-Madison from state open records law*, Milwaukee J. Sentinel, July 1, 2013; Dan Simmons, *Public records exemption for UW dies under fierce opposition*, Wis. St. J., Feb. 11, 2014.

145 SB-21 (2015), at 181-182. *See also* Dana Ferguson, *Walker proposal could shield UW research from view*, Minneapolis Star Tribune, Feb. 5, 2015.

146 *See, e.g.,* Ernst-Ulrich Franzen, *Don't cover up UW research*, Milwaukee J. Sentinel, Feb. 9, 2015, at 9A; Bill Lueders, *Don't let UW hide its records*, Milwaukee J. Sentinel, Feb. 23, 2015, at 9A.

147 Letter from Jonathan Anderson, Editor in Chief, *UWM Post*, to Amy Watson, Public Records Custodian, University of Wisconsin-Milwaukee (Jan. 8, 2009) (on file with authors).

the meaning of the Family Educational Rights and Privacy Act (FERPA) of 1974.[148] The names and voices of two of the three employees were redacted because leaving employee voices on the audio recording "would make the identities of the student members easier to trace."[149] An internal appeal of the records custodian's decision elicited a response from a UW-Milwaukee lawyer who acknowledged that meetings of the Union Policy Board were open to the public, and thus to student reporters. Nonetheless, the lawyer asserted that FERPA prevented the university from releasing any information about what student members of the Board did at the meeting, or even whether they attended the meeting. In other words, everything about the meetings of the Board was public until the meetings ended, at which point university officials draped the cloak of confidentiality over any information that might reveal which student members of the Board attended the meeting and what they did while they were there.

This absurd result led to a public records lawsuit against the university[150] as well as a considerable amount of negative publicity.[151] The Wisconsin Department of Justice advised the university to turn over the records with no redactions, so the university did—but the disclosure came more than a year after the student newspaper requested the records. The university paid $11,764 to cover the newspaper's attorney fees and costs.[152]

Despite the bad publicity and the expense associated with the lawsuit by the student newspaper, UW-Milwaukee's aggressive use of FERPA to limit disclosure continued. In 2013 a former member of UW-Milwaukee's student government sued the university to learn how he became the subject of a misconduct investigation. Among the records he sought were emails about him written by the "investigating officer," an employee in the Dean of Students office who was also a graduate student. In addition to emails written by the employee (whose name he knew), the student sought the employee's position description. Because the employee was a student, UW-Milwaukee claimed that everything about the employee's job-related acts was exempt from disclosure because of FERPA.[153] The trial judge agreed with the university's argument.[154]

Many similar examples of what may seem to be over-compliance with FERPA have been documented in the United States.[155] One author asserted that colleges

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148 Family Educational Rights and Privacy Act (FERPA) of 1974, 20 U.S.C. § 1232(g).

149 Letter, Amy Watson, Public Records Custodian, University of Wisconsin-Milwaukee, to Jonathan Anderson, Editor in Chief, *UWM Post* (Mar. 22, 2009), at 2 (on file with the authors).

150 *UWM Post v. Union Policy Board*, *supra* note 18.

151 *See*, *e.g.*, Editorial, *Compliance "run wild*," *supra* note 39.

152 *UWM Post v. Union Policy Board*, *supra* note 18, Stipulation; Bruce Vielmetti, *UWM student paper wins public records, legal fees*, MILWAUKEE J. SENTINEL, Feb. 16, 2010, at 3B.

153 Bruce Vielmetti, *Student activist sues UWM for public records*, MILWAUKEE J. SENTINEL, Dec. 11, 2013.

154 *Scott v. Board of Regents*, *supra* note 89, Decision and Order. As of Feb. 20, 2018, the case was awaiting a decision from the Wisconsin Court of Appeals.

155 *See*, *e.g.*, Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 WIS. L. REV. 1053; Mary

and universities were using FERPA not to protect student well-being, but rather to "prevent further bad press."[156] Former U.S. Sen. James L. Buckley, one of the authors of FERPA, told an interviewer in 2011 that institutions of higher education were making "extreme misinterpretations" of law by using it to justify withholding non-academic information.[157]

Be that as it may, colleges or universities that receive federal funds (e.g., in the form of research grants or student financial aid) have a strong incentive to over-comply with FERPA. Educational institutions that have "a policy or practice" of releasing education records or personally identifiable information contained in education records could lose their eligibility for federal funding.[158] Although the federal government has never withheld federal funding from a college or university for non-compliance with FERPA,[159] the theoretical possibility that it could happen makes lawyers very cautious. The caution was evident in a letter from a UW-Madison lawyer to the lawyer for a student who was requesting documents to determine why other students were admitted to a doctoral program but he was not. The university lawyer wrote: "Please understand that when dealing with FERPA, I believe in being safe, rather than sorry as the university's federal funding could be on the line with any violation."[160]

The executive director of the Student Press Law Center said that UW-Milwaukee had been on the Center's radar because of its extreme interpretations of FERPA: "They're over-complying to an extent that Congress could never have possibly intended."[161] While lamenting what he considered to be the university's overuse of FERPA, he nonetheless understood how the possibility of losing federal funding could make university lawyers exceedingly cautious. "There doesn't seem to be any nefarious motive," he said, "just a bureaucratic mentality run wild."[162]

VIII. Discussion

The research reported in this Article represents a pioneering attempt to survey the landscape of public records lawsuits involving a public university system

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Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 Cardozo L. Rev. 1555 (2012); Ron Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy To Suppress Open Records Requests*, 101 Geo. L. J. 493 (2013).

156 Penrose, *supra* note 155, at 1561.

157 George Schroeder, *It's clear the 'O' stands for opaque*, Eugene (Oregon) Reg.-Guard, Feb. 18, 2011, at C1.

158 20 U.S.C. § 1232g(b)(1).

159 Mathilda McGee-Tubb, *Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Law Must Yield to FERPA*, 53 B.C.L. Rev. 1045 (2012); Frank LoMonte, Executive Director, Student Press Law Center, *Education privacy law used as excuse to conceal records,* Apr. 11, 2017, available at http://www.opengovva.org/blog/education-privacy-law-used-excuse-used-conceal-records (last visited Feb. 20, 2018).

160 Letter from John C. Dowling, Senior University Legal Counsel, UW-Madison, to Lawrence Bensky, Attorney for Seon Kyu Kang (Feb. 11, 2003) (on file with authors).

161 Editorial, *Compliance "run wild," supra* note 41.

162 *Id.*

over an extended period. The results demonstrate the merits of a research strategy that strives to analyze a comprehensive set of trial-court cases. The method of traveling to courthouses to review files that are not available via Lexis, Westlaw, or other online services reaped considerable dividends. The labor-intensive method enabled a much-needed corrective to the scholarly consensus that most public records lawsuits against universities focus on administrative searches or raise issues of academic freedom.[163] In reality, most lawsuits sought information about suspected misconduct or ethical lapses by university employees.

The results also showed how the news media and, to a lesser extent, policy-oriented activist groups have used the public records law with considerable success to obtain information that is newsworthy and/or relevant to public policy. The university's transparency in these cases is sometimes voluntary, sometimes compelled. When the university resisted such requests and the requestor sued to gain access to the information it sought, the university always lost.

The research in trial-court files also found that the university was using a phrase "academic freedom" in a new way, one that goes beyond the traditional conception of "continual and fearless sifting and winnowing by which alone the truth can be found."[164] The modern university argues that it must withhold research information to enhance its chances of monetizing discoveries and innovations via patents and other means.[165] Financial considerations are also the principal rationale for the university's aggressive use of FERPA as a justification for withholding records that mention students. Failure to comply with FERPA could jeopardize eligibility for federal funds.[166] Although no campus has ever been declared ineligible for federal funding because of FERPA violations, the financial stakes are far from trivial.

While the university uses a broad federal statute (FERPA) as the basis for its argument that information about students must not be released, no federal statute authorizes broad confidentiality about research information. After Wisconsin courts showed little sympathy to the university's anti-disclosure positions with respect to research information, the university lobbied the Legislature to pass a state statute that would create a zone of confidentiality for research information. The university had reason to be hopeful; after all, the Legislature had granted it broad confidentiality rights with respect to administrative searches.[167] In addition, information about researchers' unpatented inventions is akin to trade secrets, which are exempt from disclosure in Wisconsin and most other states.[168] As of the

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163 *See* notes 13-14 *supra* and associated text. For another study based on paper documents from trial-court case files that raised questions about an existing scholarly consensus, *see* David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 Comm. Law & Pol'y 303 (2009).

164 University of Wisconsin Board of Regents, *supra* note 31.

165 *See* notes 129-141 *supra* and associated text.

166 UW System campuses received roughly $911 million in federal awards in 2013-14. University of Wisconsin System, *UW System Federal Funding*, May 26, 2015, available at https://www.wisconsin.edu/government-relations/uw_system_federalpriorities/ (last visited Feb. 20, 2018).

167 *See* notes 100-108 *supra* and associated text.

168 Wis. Stat. § 19.36(5).

end of 2017, however, the Legislature had taken no action to limit public access to research information.

Our research demonstrated the dominance of news organizations as requestors of public records from the university. When the university withheld records, news organizations often filed lawsuits asking a court to order the university to release records. News organizations initiated more than half of the lawsuits we identified, never losing a case. Journalists are frequent users of the public records law for a number of reasons. They tend to have experience and expertise in using the public records law to obtain documents.[169] In addition, journalists have access to resources that can help them assess the likelihood of winning a public records lawsuit.[170] Finally, embedded within journalistic culture is an ethic that champions government transparency as a tool of public accountability.[171]

While major Wisconsin news organizations consistently oppose the university's proposals for greater restrictions on access to information, the news media are getting weaker. The precarious economic position of legacy news organizations makes them less likely to go to court to assert access-to-information claims.[172] University administrators may not always welcome public records requests from journalists, but there is no doubt that such requests often lead to newsworthy stories that serve the public interest.[173] As the strength of the institutional press fades, so too does its role as a non-partisan agent of accountability. Because accountability is a cornerstone of democracy, the issue has implications far beyond public universities. As law professor RonNell Andersen Jones noted:

> The loss of newspapers as legal instigators and enforcers, coupled with the existence of barriers that appear to limit the ability of replacement entities in the new media ecology from taking up those roles, should give cause for concern that American democracy will suffer as legislation and litigation in the interest of open government wane.[174]

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169 *See*, *e.g.*, Craig Sanders, *Newspapers' Use of Lawyers in the Editorial Process*, *in* Holding the Media Accountable: Citizens, Ethics, and the Law 138 (David Pritchard ed. 2000).

170 Many news industry associations provide legal assistance with public records and open meetings cases. The Wisconsin Newspaper Association, for example, operates a legal hotline that enables reporters to speak with a lawyer about such matters at no charge. *See generally*, Craig Sanders, *Helping the Press Define Its Rights and Responsibilities*, *in* Holding the Media Accountable: Citizens, Ethics, and the Law 154 (David Pritchard ed. 2000).

171 Society of Professional Journalists, *SPJ Code of Ethics* ("Recognize a special obligation to serve as watchdogs over public affairs and government. Seek to ensure that the public's business is conducted in the open, and that public records are open to all."), *available at* http://www.spj.org/ethicscode.asp (last visited Feb. 20, 2018).

172 Knight Foundation, *News organizations' ability to champion First Amendment rights is slipping, survey of leading editors finds* (April 21, 2016), *available at* http://www.knightfoundation.org/press-room/press-release/news-organizations-ability-champion-first-amendmen/ (last visited Feb. 20, 2018).

173 *See* notes 69-80 *supra* and associated text.

174 RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 Wash. & Lee L. Rev. 557, 627 (2011). *See also* RonNell Andersen Jones & Sonja R. West, *The First Amendment Is Not Enough*, N.Y. Times, Jan. 25, 2017, at A25.

Our research found that partisan, activist organizations began appearing as plaintiffs in public records actions against the university in recent years, regularly winning cases.[175] Like journalists, activists seek to hold the university accountable, but partisan accountability may be fundamentally different from non-partisan accountability in ways that scholars have yet to examine.

Wisconsin courts have unambiguously indicated that if the university would like changes in the state's public records policies, it should seek them from the Legislature. Given that the 2017-18 Wisconsin Legislature was more conservative than at any time since the mid-1950s,[176] the university could hope to find a receptive audience for its proposals.[177] The practical realities and competitive nature of certain kinds of research make it prudent to consider whether there are specific types of research-related records that could be protected by a narrowly drawn exemption without compromising Wisconsin's historically strong public interest in transparency and accountability.

Although Wisconsin is a typical state, and although Wisconsin's public records law is well within the mainstream of state public records laws,[178] access-to-information issues have arisen in other states that have not yet found their way into Wisconsin courtrooms. One such issue is whether university foundations are subject to state public records laws; different states have resolved the issue in different ways.[179] Another issue on which states differ is whether the police forces of private universities are subject to state public records laws. In 2015, the Ohio Supreme Court, in a case involving Otterbein University, ruled that police at such institutions were subject to the state's public records law.[180] The next year, in a case involving the University of Notre Dame, the Indiana Supreme Court ruled that the state's public records law did not apply to police at private universities.[181] Such

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175 *See* notes 83-88 *supra* and associated text.

176 Jason Stein & Patrick Marley, *Wisconsin's Capitol shifts further to right*, Milwaukee J. Sentinel, Nov. 9, 2016.

177 Research about differences among American states has shown that the more conservative a state's political culture, the more its laws tend to restrict freedom of information in terms of public records and other issues. *See* David Pritchard & Neil Nemeth, *Predicting the Content of State Public Records Laws*, 10 Newspaper Res. J. 45 (1989). *See also* Casey Carmody & David Pritchard, *Policy Liberalism, Public Opinion and Strength of Journalist's Privilege in the American States*, 49 First Amend. Stud. 31 (2015).

178 *See* notes 23-26, *supra*, and accompanying text.

179 Alexa Capeloto, *Private Status, Public Ties: University Foundations and Freedom of Information Laws*, 33 Quinnipiac L. Rev. 339 (2014); Jonathan W. Peters & Jackie Spinner, *How university foundations try to avoid public scrutiny – and what reporters can do*, Col. Journalism Rev., July 16, 2015, available at https://www.cjr.org/united_states_project/how_university_foundations_try_to_avoid_public_scrutiny_and_what_reporters_can_do.php (last visited Feb. 20, 2018).

180 *State ex rel. Schiffbauer v. Banaszak*, 2015 Ohio 1854, 142 Ohio St. 3d 535, 33 N.E.3d 52 (2015).

181 *ESPN, Inc. v. University of Notre Dame*, 62 N.E.3d 1192 (Ind. 2016). *See also* Cheva Gourarie & Jonathan Peters, *Why private college police forces are a new front in the fight over public records*, Col. Journalism Rev., Feb. 29, 2016, available at https://www.cjr.org/united_states_project/private_police_records.php (last visited Feb. 20, 2018).

differences are to be expected in a federal system such as the United States where states have considerable latitude to do as they please with respect to many matters, including public records laws.[182]

182 It is apt to recall Justice Brandeis' famous statement about the states' abilities to be laboratories of democracy: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).