Union of Concerned Scientists

More High Profile FOIA Requests at the University of Virginia

By Michael Halpern

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The University of Virginia is facing another high-profile open records request, this time from LGBT rights organizers on the political left. Fortunately, UVa has set a highly visible precedent in terms of how it should respond to a Freedom of Information Act request, and has a Virginia Supreme Court decision to back it up.

Since 2010, the industry-funded American Tradition Institute has filed state FOIA requests for the email correspondence of climate scientists in Virginia and several other states. In April, the Virginia Supreme Court found that the university could withhold certain academic records when disclosure would cause "harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression."

This time, two UVa students are requesting the email and phone records of a law school professor whose work has run afoul of the LGBT organization GetEqual. Will Creeley at FIRE, the Volokh Conspiracy, and Dahlia Lithwick at Slate have great summaries of the current request and the politics surrounding it.

In both cases, the requesters claim they want to start a conversation. But as Lithwick puts it, "[W]e should be careful about throwing around disingenuous terms like 'dialogue' and 'transparency' and 'conversation' when we are really attempting to lecture and embarrass and chill." "You don't start a dialogue with FOIA requests," writes conservative UCLA law professor Stephen Bainbridge.

The growing trend of FOIAing academics deserves attention. Over at CATO, Walter Olson writes:

It might also be time for legislators to clarify state open-records laws to determine under what circumstances they can be used to go after academics, and consider altering them, where appropriate, to provide for financial or other sanctions when they are misused.

I'm not sure about the second part of his proposal–after all, how can one reliably and objectively determine misuse? The first part, though, I have embraced before, and bears repeating: state open records laws should appropriately balance academic freedom with the public's right to know.

Yet as I wrote in April, modifying state laws is only one avenue:

University lawyers and their associations should devote time and resources to determining and publicly disclosing how they will respond to open records requests. Those who work for public institutions should be made aware of their rights and responsibilities for using email systems.

Scientific societies should recognize that sometimes, what is in the best interest of the university won't be in the best interest of the individual scientist, and should offer programs that offer legal assistance to protect researchers' privacy. Groups such as the National Academy of Sciences should provide guidance to legislators and universities on what kinds of materials should be disclosed and what kinds should be protected.

Finally, we should all call out attacks on academic freedom when we see them, regardless of whether we support the requester's politics or overall goals.

I fully embrace equal rights for all people. I accept the scientific consensus on climate change. But invasive open records requests do not move the ball forward on these issues. The university should afford the same privacy for the newest target as it did for its climate scientists.