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Giving Away the Playbook: How North Carolina's Public Records Law Can Be Used to Harass, Intimidate, and Spy

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Giving Away the Playbook: How North Carolina’s Public Records Law Can Be Used to Harass, Intimidate, and Spy*

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INTRODUCTION

In July of 2012, lawyers for a group of news organizations appeared before Judge Howard Manning.¹ The news organizations had filed public records requests for documents related to the NCAA investigation into conduct of the University of North Carolina's football team.² The NCAA Committee on Infractions had found that UNC committed nine violations, including academic fraud, cash and impermissible benefits provided to players, and a sports agent paying money on the side to an associate head coach.³ The news organizations had also requested Head Coach Butch Davis's personal phone records.⁴ The news organizations argued that if the phone records included business-related calls, those records were public records and subject to the request even if made from a private phone.⁵ Jon Sasser, the attorney for Coach Davis, countered that, if the phone records were public records, any document made by a coach would be a public record: "If Roy Williams calls time out during a tight game and draws up a play, that right there is a public record of the state of North Carolina."⁶

This argument may not be as hyperbolic as it sounds. Nothing in North Carolina law indicates that Roy Williams's half-time plays are protected from a public records request.⁷ Furthermore, unlike its counterparts in most other states, North Carolina's Public Records

1. See Neil Offen, *Lawyers Battle Over Release of UNC Records*, HERALD-SUN (Durham, N.C.), July 19, 2012, at A1.

2. *Id.*

3. See Ken Tysiac, *UNC-CH Fires Football Coach to Restore Confidence in University*, NEWS & OBSERVER (Raleigh, N.C.), July 28, 2011, at A1; *UNC banned from 2012 postseason*, ESPN (Mar. 12, 2012, 9:02 PM), http://espn.go.com/college-football/story/_/id/7677271/north-carolina-tar-heels-handed-postseason-ban-2012-ncaa. The athletic investigation also led to an academic probe that revealed major problems in the school's African and Afro-American Studies department. See Robbi Pickeral, *UNC Probe Reveals Academic Fraud*, ESPN (Dec. 20, 2012, 10:49 PM), http://espn.go.com/college-sports/story/_/id/8765672/north-carolina-tar-heels-investigation-reveals-academic-scandal-african-american-studies-department.

4. See Offen, *supra* note 1. For further discussion of whether cell phone records constitute public records, see Frayda Bluestein, *Are Cell Phone Bills Public Records?*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (Oct. 5, 2011, 12:04 PM), <http://canons.sog.unc.edu/?p=5602>.

5. See Offen, *supra* note 1.

6. *Id.* Coach Davis and the media outlets "reached an agreement that will make his university-related calls public." Dan Kane, *Davis' work-related calls to be released*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 23, 2012, at 3B. The records were subsequently released. See Attorney: *Records Prove Innocence*, ESPN (Sept. 21, 2012), http://espn.go.com/college-football/story/_/id/8408604/phone-records-ex-north-carolina-tar-heels-coach-butch-davis-released.

7. See *infra* Part II.E.

Law (“PRL”)⁸ is broad enough that it could potentially reach academic research, client lists from legal clinics, football playbooks, and academic exams.⁹

North Carolina’s PRL equips individuals with a tool to promote government transparency and accountability¹⁰—laudable goals that should be efficiently pursued. However, in an effort to further those goals, North Carolina’s PRL is so expansive that it leaves ample room for abuse and harassment.¹¹ Given that the intended purpose of PRLs is government accountability, the occasional inconvenience to government agencies may be a necessary cost. Universities, however, perform a different role than government, even if they receive government funding: they establish a dedicated environment for creativity, education, and research.¹² In order to create that environment, universities need clear protections for academic freedom.¹³ Government accountability can still be achieved while also

8. In other states, PRLs are given other names, including Open Government Laws, Freedom of Information Laws, and Public Disclosure Laws.

9. See *infra* Part II.B–C (discussing the impact on academic research and on legal clinics).

10. See OPEN GOVERNMENT: COLLABORATION, TRANSPARENCY, AND PARTICIPATION IN PRACTICE, at xix (Daniel Lathrop & Laurel Ruma eds., 2010) (defining open government as the “notion that the people have the right to access documents and proceedings of the government [and] to scrutinize and participate in government”); JAMES C. HEARN, MICHAEL K. MCLENDON, & LEIGH Z. GILCHRIST, GOVERNING IN THE SUNSHINE: OPEN MEETINGS, OPEN RECORDS, AND EFFECTIVE GOVERNANCE IN PUBLIC HIGHER EDUCATION, at i (2004) (stating that PRLs are “oriented to openness as a public value in and of itself, but operationally the laws pursue more specific objectives, including procedural equity in institutional governance and decision-making, outcome equity in institutional actions, financial probity, institutional efficiency, and educational effectiveness”); cf. Harlan Cleveland, *The Costs and Benefits of Openness*, ACADEME, Sept.–Oct. 1987, at 23 (“The mandate to serve the public interest is the basis, implicitly or explicitly, for most state open meeting laws.”). But see Steven J. Mulroy, *Sunlight’s Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309, 310 (2010) (arguing that open government laws, while designed to prevent government officials from engaging in “back-room deals in smoke-filled rooms,” can cause other severe problems due to their overbreadth).

11. See *infra* Part II.

12. For example, part of the mission of the University of North Carolina at Chapel Hill “is to serve as a center for research, scholarship, and creativity and to teach a diverse community of undergraduate, graduate, and professional students to become the next generation of leaders.” UNIV. OF N.C. AT CHAPEL HILL, UNDERGRADUATE BULLETIN / 2012–2013 RECORD 5 (2012), available at <http://www.unc.edu/ugradbulletin/mission.html>.

13. Cf. MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 81 (2009) (“[S]tudents cannot learn how to exercise a mature independence of mind unless their instructors are themselves free to model independent thought in the classroom.”). Finkin and Post continue:

protecting academic activities at public universities.¹⁴ The key to achieving this balance, and to protecting public universities from PRL abuse, is through adoption of carefully tailored exemptions.

Exemptions to a PRL develop as a legislature or court negotiates the necessary balance between a PRL's purpose and its potentially negative side effects. Many states limit the scope of their PRLs with specific statutory exemptions.¹⁵ A few states also allow judicial exemptions where necessary to protect public interests.¹⁶ Such

The common good is made visible only through open debate and discussion in which all are free to participate. Faculty, by virtue not only of their educational training and expertise but also of their institutional knowledge and commitment, have an indispensable role to play in that debate. Freedom of intramural expression protects this role. It insists that institutions whose mission is to serve the public good are best served by the *protection* of robust debate

Id. at 125 (emphasis added).

14. Concerns about scandal cover-ups could be calmed by including exceptions for investigation-related documents. *See infra* notes 278–79 and accompanying text.

15. *See, e.g.*, ALA. CODE § 36-12-40 (LexisNexis 2001 & Supp. 2011) (exempting “records the disclosure of which would otherwise be detrimental to the best interests of the public”); CAL. GOV'T CODE § 6255 (West 2008) (stating that public records can be withheld if “on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record”); COLO. REV. STAT. ANN. § 24-72-204(6)(a) (West 2013) (stating that public records can be withheld if disclosure would do “substantial injury to the public interest”); *Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 537 (Ariz. 1998) (en banc) (“This public right of inspection may also be curtailed in the interest of confidentiality, privacy, or the best interests of the state. If these interests outweigh the public’s right of inspection, the State can properly refuse inspection.” (citations omitted) (internal quotation marks omitted)). *But see* OR. REV. STAT. ANN. § 192.501 (West 2013) (providing a balancing test that weighs *against* providing exemptions by looking at whether the public interest in disclosure overcomes a statutory exemption); *Bd. of Regents of Regency Univ. Sys. v. Reynard*, 686 N.E.2d 1222, 1228 (Ill. Ct. App. 1997) (“There is nothing in either [of Illinois’ PRLs] that suggests a body determined to be public may be exempt from the requirements of the statutes simply because it may be a burden to comply.”). Most balancing test exemptions weigh the damage done to a privacy interest against the public’s interest in disclosure. *See, e.g.*, MONT. CONST. art. II, § 9; HAW. REV. STAT. ANN. § 92F-13(1) (LexisNexis 2012); KAN. STAT. ANN. § 45-221(a)(30) (West 2013); KY. REV. STAT. ANN. § 61.878(1)(a) (West 2013); MASS. ANN. LAWS ch. 214 § 1B (LexisNexis 2011); MICH. COMP. LAWS ANN. § 15.243(1)(a) (West 2004 & Supp. 2012); N.Y. PUB. OFF. LAW § 87(2)(b) (McKinney 2013); *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 684 (Tex. 1976).

16. *See, e.g.*, *Stone v. Consol. Publ’g Co.*, 404 So. 2d 678, 681 (Ala. 1981) (“Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference.”); *Michaelis, Montanari & Johnson v. Superior Court*, 136 P.3d 194, 197 (Cal. 2006) (“[T]his provision contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of

language provides courts with a safety valve to prevent abuses of PRLs. However, the Supreme Court of North Carolina has flatly barred judicially created exemptions.¹⁷ Thus, the only available route for preventing the potential negative uses of North Carolina's PRL is for the General Assembly to craft a statutory exemption. North Carolina currently has no specific statutory exemptions that protect public universities.

This Comment argues that *academic* activities and records produced at public universities need statutory protection from PRLs, not only because of the potential for abuse and harassment, but also because of the unique role universities play in fostering knowledge and educating students—activities that require broad protections for academic freedom.¹⁸ Public universities need specific PRL exemptions for certain academic activities and records, including student records, exams, research, professor communications, and legal clinics.

Analysis proceeds in three parts. Part I presents the background of PRLs and the scope of the North Carolina PRL. Part II examines problems that arise under overly broad PRLs and PRLs that lack protective exemptions. These problems may include: (1) the harassment of professors with respect to their speech and research; (2) the harassment of legal clinics engaged in investigating wrongdoers and representing the public interest; (3) the costs of compliance; and (4) other possible forms of targeted harassment or infringement of legitimate privacy needs, such as students requesting copies of their professors' exams or rival college fans requesting sports playbooks from public university teams. Finally, Part III suggests solutions for North Carolina, looking to exemptions in the

confidentiality."); *Blesch v. Denver Publ'g Co.*, 62 P.3d 1060, 1063 (Colo. App. 2002) ("Whether there has been substantial injury to the public interest is a question of fact.").

17. See *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 484, 412 S.E.2d 7, 18 (1992); see also HUGH STEVENS, C. AMANDA MARTIN, & MICHAEL J. TADYCH, REPORTERS COMM. FOR FREEDOM OF THE PRESS, NORTH CAROLINA – OPEN GOVERNMENT GUIDE, available at <http://www.rcfp.org/north-carolina-open-government-guide/ii-exemptions-and-other-legal-limitations/c-court-derived-exclu> ("North Carolina has no court-derived exclusions or privileges, and the North Carolina appellate courts have held that there can be none. The North Carolina Court of Appeals has held that the only exemptions to the Public Records Law are those that are expressly provided by statute."). But see *S.E.T.A. UNC-CH v. Huffines*, 101 N.C. App. 292, 296, 399 S.E.2d 340, 343 (1991) (holding that, while there are no judicial exemptions, personal information should be redacted from the requested documents as a matter of "public policy").

18. While *academic* areas should be protected, administrative and financial decision-making should still be subject to public disclosure, conforming with principles of *government* accountability and transparency.

other forty-nine states for guidance. Specifically, this Comment advocates for adopting explicit exemptions for student educational records, academic exams, academic research and professor correspondence, and work product from legal clinics.

I. BACKGROUND: PUBLIC RECORDS LAWS AND THE SCOPE OF THE NORTH CAROLINA PUBLIC RECORDS LAW

A. *Background of Public Records Laws and Their Use in North Carolina*

Originally, English common law granted no general right to inspect public records, but instead limited access to those instances that would further the public good, primarily via lawsuits “instituted in the public’s behalf.”¹⁹ The United States Constitution amplified this right by requiring (1) that Congress record and make public its actions²⁰ and (2) that the President “give to the Congress information of the State of the Union.”²¹ However, Congress, “in its very first session . . . passed specific details about when those congressional records could be modified before there was public review of them.”²² Thus, the right to inspect public documents has always been limited.²³

19. 5 JAMES A. RAPP, *EDUCATION LAW* § 13.02[2][a][i] (2012).

20. U.S. CONST. art. I, § 5, cl. 3 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”).

21. *Id.* art. II, § 3; see also Shannon E. Martin & Gerry Lanosga, *The Historical and Legal Underpinnings of Access to Public Documents*, 102 L. LIBR. J. 613, 614 (2010).

22. Martin & Lanosga, *supra* note 21, at 614 (citing Act of Sept. 15, 1789, ch. 14, § 2, 1 Stat. 68).

23. For examples of current limitations on the Freedom of Information Act (“FOIA”), the federal equivalent of a state PRL, see *Frequently Asked Questions*, FOIA.GOV, <http://www.foia.gov/faq.html> (last updated Feb. 2011) (noting FOIA exemptions and exclusions). State exemptions often mirror the FOIA exemptions and exclusions. See *Open Government Guide*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/open-government-guide> (last visited June 22, 2013) (scroll down to “Compare,” check all states, use the dropdown menu to select II.A.1.c “Patterned after the Freedom of Information Act?”, then click “compare”). Perhaps the absence of federal universities, and thus the lack of FOIA exemptions for universities, is one of the reasons for the lack of such exemptions at the state level.

Furthermore, these competing interests directly limit the public’s ability to hold government accountable. For example, many citizens wish to hold the federal government accountable for certain FBI investigation practices, but an overriding national security interest has, in that instance, trumped the public’s right to know. See, e.g., *Edmonds v. U.S. Dep’t of Justice*, 405 F. Supp. 2d 23, 28–29 (D.D.C. 2005) (holding that the FBI “properly invoked” a FOIA exemption where the requested records involved “information on the activity or method used against a targeted individual or organization

Indeed, during early national discussions concerning public records—specifically congressional request of the Executive’s records—Thomas Jefferson advocated that documents should only be released as it served the public interest.²⁴ Jefferson also noted Alexander Hamilton’s concern that Congress “might demand secrets of a very mischievous nature.”²⁵ Congress’s action and the Washington administration’s concerns show how countervailing interests tempered the public’s right to know about its government’s actions.

Despite counterbalancing factors, the scope of information covered by the public interest in inspecting public documents expanded over time. Legislatures and courts have since recognized a general right that citizens have in government action, pushing beyond the original “public interest” inquiry of early public record disclosure.²⁶ But even as that general right was born, courts often restricted access to those records, typically limiting the right to state attorneys or individuals who could show a strong private interest.²⁷ This private interest test required the party seeking disclosure of the public records to demonstrate some interest not possessed by the public generally.²⁸ Thus, where public records formerly were released only upon a showing of a general public interest, courts began to recognize an individual interest to inspect documents, conditioned on the strength of that interest. Eventually, nearly every state disposed of interest tests, establishing a general *right* to inspect public documents via statutory or constitutional provision.²⁹

The progression of North Carolina’s PRL³⁰ towards providing general public access to public records appears to have followed a

that has been determined to be of national security interest” (internal quotation marks omitted)).

24. See Martin & Lanosga, *supra* note 21, at 614–15 (explaining that, in his position as Secretary of State, Thomas Jefferson advised President George Washington that “the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public” (quoting THE JEFFERSONIAN CYCLOPEDIA 179 (John P. Foley ed., 1900))).

25. THE JEFFERSONIAN CYCLOPEDIA 180 (John P. Foley ed., 1900).

26. See RAPP, *supra* note 19, at § 13.02[2][a][i].

27. See Recent Cases, *Mandamus—Parties—Sufficiency of Interest to Enforce Right to Inspect Public Records*, 42 HARV. L. REV. 133, 133–34 (1928).

28. See, e.g., *Nowack v. Fuller*, 219 N.W. 749, 751 (Mich. 1928) (“The plaintiff has not sought to enforce his rights through the office of the Attorney General. He has begun this suit in his own name. In order to maintain it, he must show that he has a special interest, not possessed by the citizens generally.”).

29. See RAPP, *supra* note 19, at § 13.02[2][b].

30. N.C. GEN. STAT. ANN. §§ 132-1 to -10 (West 2013). For a thorough discussion of North Carolina’s PRL and its background, see generally Thomas H. Moore, *You Can’t Always Get What You Want: A Look at North Carolina’s Public Records Law*, 72 N.C. L.

more clerical route than most state statutes. The North Carolina PRL was originally introduced to aid in physically preserving public documents from destruction by natural or man-made causes, both intentional and unintentional.³¹ Indeed, the title of the Act itself stated that its purpose was “to safeguard public records in North Carolina.”³² Though the bulk of the Act refers to preserving public documents, section six also allowed for limited public access, including supervised inspection and provision of copies only “on payment of fees as prescribed by law,”³³ both of which reinforced the law’s archival purpose.

If the primary motivation behind North Carolina’s original PRL was to preserve public documents, this purpose would necessitate broad language—the law would have to cover all such public documents in order to adequately protect them.³⁴ Moreover, as the statute’s purpose evolved in practice, becoming more focused on public access to documents and government accountability, the General Assembly further expanded the already broad language.³⁵ Court decisions only reinforced the broad scope of North Carolina’s PRL.³⁶ While this preservation background colors how North Carolina’s PRL is understood, that background has not limited the scope of the law, nor how courts have applied it.

REV. 1527 (1993) (analyzing and comparing North Carolina’s PRL to those of other jurisdictions).

31. An Act to Safeguard Public Records in North Carolina, ch. 265, 1935 N.C. Sess. Laws 288 (codified as amended at N.C. GEN. STAT. §§ 132-1 to -10) (“Whereas, the failure of the State heretofore to make systematic provision for the preservation and availability of public records has resulted in untold losses from fire, water, rats and other vermin, carelessness, deliberate destruction, sale, gifts, loans, and the use of impermanent paper and ink, and often in the unnecessary expense of copying and repairing records, to the lasting detriment of effective governmental operation and of family, local and state history; and Whereas, the experience of other states and the consensus [sic] of informed opinion indicate that the enactment of state public records laws is the proper approach to the solution of the problem of preserving public records . . .” (emphasis in original)). For further discussion of authenticity concerns and how those concerns motivated PRLs, see Martin & Lanosga, *supra* note 21, at 618–19 (discussing the historical and legal background of PRLs).

32. Ch. 265, 1935 N.C. Sess. Laws 288.

33. *Id.* at 289.

34. See Moore, *supra* note 30, at 1543; see also *id.* at 1544 n.1 (“[T]he primary reason for enactment of the public records statute ‘was a concern for the retention and preservation of public documents—a concern, that is, that centered on archival and historical interests’ [such that] public access constituted a ‘secondary [right] to the statute’s principal goals.’” (quoting David M. Lawrence, *Public Records After Poole*, 41 LOC. GOV’T LAW BULL., Apr. 1992, at 1–2)).

35. See Moore, *supra* note 30, at 1544–45.

36. See *infra* notes 42–55 and accompanying text.

B. Scope of the North Carolina Public Records Law

The North Carolina PRL has a very broad scope, covering all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.³⁷

Even the statutory language quoted above that might limit the law's scope—i.e., records must be “made or received pursuant to law or ordinance”—has not been given any limiting effect.³⁸ A government agency must simply create the documents—whether the agency creates the documents because of legal mandate does not matter.³⁹ Furthermore, the possessor of the record has no effect on the record's “public” or “private” status: personal documents, even if held by a government agency, are not considered public records.⁴⁰ The PRL thus reaches any document created by a government agency, except

37. N.C. GEN. STAT. § 132-1(a) (2011); see also DAVID M. LAWRENCE, *PUBLIC RECORDS LAW FOR NORTH CAROLINA GOVERNMENTS* 11 (2d ed. 2009) [hereinafter LAWRENCE, *PUBLIC RECORDS LAW*] (explaining the broad terms of subsection 132-1(a)).

38. See *News & Observer Publ'g Co. v. Wake Cnty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 13, 284 S.E.2d 542, 549 (1981); LAWRENCE, *PUBLIC RECORDS LAW*, *supra* note 37, at 11.

39. See *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 474, 412 S.E.2d 7, 12–13 (1992); DAVID M. LAWRENCE, *Open Meetings and Public Records, in* COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA (2007) [hereinafter LAWRENCE, *Open Meetings*], available at <http://www.sogpubs.unc.edu/cm/cmg08.pdf> (noting that public records include “any material kept in carrying out an agency's lawful duties”). The one limitation is that a “public agency does not have to create a record that does not already exist pursuant to a public records request.” Kara Millonzi, *Query That! Public Records Requirements Regarding Database Queries*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (Mar. 26, 2012, 2:22 PM), <http://canons.sog.unc.edu/?p=6502>.

40. See LAWRENCE, *Open Meetings*, *supra* note 39, at 5. This would indicate that public records held by private parties, or in private accounts, also constitute public records. See, e.g., *Order of May 12, 2011*, at 4, *News & Observer Publ'g Co. v. Baddour*, No. 10 CV 001941 (N.C. Super. Ct. May 13, 2011) (holding that business-related calls, even if made on personal cellphones, constitute public records in North Carolina).

where the General Assembly has specifically exempted the type of document by statute.⁴¹

Statutory exemptions are the main limitation on the scope of the North Carolina PRL. The Supreme Court of North Carolina has held that anyone can request and receive any public document unless there is a “clear statutory exemption or exception.”⁴² Furthermore, the court has also held that North Carolina courts are not to create new exemptions to North Carolina’s PRL.⁴³ Thus, the requirement of a “clear statutory exemption or exception” becomes particularly important as North Carolina courts look to evaluate whether novel situations fit into existing statutory exemptions.

*News & Observer Publishing Co. v. Poole*⁴⁴ is the leading case interpreting the North Carolina PRL. In *Poole*, a news publisher requested documents related to a University of North Carolina system commission investigation into “certain alleged improprieties relating to the men’s basketball team at North Carolina State University.”⁴⁵ The State Bureau of Investigation (“SBI”) had originally prepared investigative reports and then submitted those reports to the commission.⁴⁶ The defendants, members of the commission, argued that the commission’s draft reports were protected by statutory and public policy concerns and that the SBI reports given to the commission were specifically exempted.⁴⁷

The Supreme Court of North Carolina first dismissed the defendants’ argument that the SBI reports were specifically exempted by section 114-15 of the North Carolina General Statutes and thus not public records.⁴⁸ The court held that, once the SBI turned the reports over to the commission, the reports then entered the public domain

41. See LAWRENCE, *Open Meetings*, *supra* note 39, at 4.

42. See *Poole*, 330 N.C. at 486, 412 S.E.2d at 19 (emphasis added) (“In conclusion, we hold that in the absence of clear statutory exemption or exception, documents falling within the definition of ‘public records’ in the Public Records Law must be made available for public inspection.”). Statutory exemptions to North Carolina’s PRL are discussed *infra* Part I.C.

43. *Poole*, 330 N.C. at 486, 412 S.E.2d at 20.

44. 330 N.C. 465, 412 S.E.2d 7 (1992).

45. *Id.* at 470, 412 S.E.2d at 10. This case is strangely similar to the case surrounding Coach Davis’s cellphone records and the NCAA investigation into impermissible benefits in UNC’s football program. See *supra* notes 1–6 and accompanying text.

46. See *Poole*, 330 N.C. at 472, 412 S.E.2d at 11.

47. See *id.* at 470, 412 S.E.2d at 10. The defendants argued that the commission reports were specifically exempted under section 114-15 of the North Carolina General Statutes, which exempts investigations into lynchings, mob violence, and frauds under various state laws. *Id.*; see also N.C. GEN. STAT. § 114-15 (2011).

48. *Poole*, 330 N.C. at 473, 412 S.E.2d at 12.

and became public records.⁴⁹ The court declined to extend the scope of the exemption, stating that “[t]he legislature knows how to extend the scope of protection of confidential records beyond the confines of the agency which maintains them.”⁵⁰ Thus, North Carolina courts are limited only to interpreting existing statutory exemptions.⁵¹

The court again deferred to the legislature in dismissing the university’s argument that failing to protect these particular records would “chill free and frank decision-making.”⁵² While recognizing the public policy argument, the court still held that the General Assembly had already created several exemptions, none of which included the protection sought by the defendants.⁵³ The court held that “[w]hether [an exemption] should be made is a question for the legislature, not the Court.”⁵⁴ The lack of judicial exemptions leaves legislative exemptions as the only recourse for those seeking refuge from the negative consequences of the North Carolina PRL.⁵⁵

49. *Id.*

50. *Id.* at 474, 412 S.E.2d at 13 (declining to extend section 114-15, even where comparable protection existed under section 126-22, which protects personnel records for state employees). In support, the court cited the legislature’s intent that, “as a general rule, the public would have liberal access to public records.” *Id.* at 475, 412 S.E.2d at 13.

51. *Id.* at 476, 412 S.E.2d at 14 (looking to “the plain meaning of the statutory language” to interpret a statutory exemption); *see also* Carter-Hubbard Publ’g Co. v. WRMC Hosp. Operating Corp., 178 N.C. App. 621, 624, 633 S.E.2d 682, 684 (2006) (“Exceptions and exemptions to the Public Records Act must be construed narrowly.”), *aff’d*, 361 N.C. 233, 641 S.E.2d 301 (2007).

52. *Poole*, 330 N.C. at 481, 412 S.E.2d at 16.

53. *Id.*

54. *Id.* at 484, 412 S.E.2d at 18.

55. The Supreme Court of North Carolina has, however, retained the ability to judicially protect its own documents from the North Carolina PRL. *See Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999) (“[E]ven though court records may generally be public records under N.C.G.S. § 132-1, a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has ‘no power’ to diminish it in any manner This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial.” (citing N.C. CONST. art. IV, § 1; *State v. Britt*, 285 N.C. 256, 271–72, 204 S.E.2d 817, 828 (1974); *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1940))).

Similarly, one case explicitly held that the state constitutional provisions could provide a basis for extending protection. *See News & Observer Publ’g Co. v. Easley*, 182 N.C. App. 14, 20–21, 24, 641 S.E.2d 698, 703, 705 (2007) (holding that, because the legislature did not explicitly include clemency records within the scope of the Public Records Act, those records were protected by article III, subsection 5(6) of the North Carolina Constitution). However, the legislature could amend the Public Records Act to include clemency records within its scope. *See id.*

C. Exemptions to the North Carolina Public Records Law

The North Carolina PRL has various statutory exemptions, but only two exemptions that relate specifically to public universities.⁵⁶ The statutory exemptions are found in two general locations: chapter 132 of the North Carolina General Statutes (which contains the PRL) and individual exemptions scattered throughout other statutes. The chapter 132 exemptions fall into three main categories: (1) records that include personally identifying information;⁵⁷ (2) sensitive public safety and law enforcement investigative materials;⁵⁸ and (3) confidential legal materials.⁵⁹ Exemptions outside of chapter 132

Furthermore, the Supreme Court of North Carolina has created judicial exemptions without explicitly acknowledging as much. In an incredibly sparse opinion, the court held that a news organization could not use the North Carolina PRL to access recordings containing the communications of a police officer who was killed while investigating the illegal use of heavy road-working equipment. *See Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 596–98, 434 S.E.2d 176, 176–78 (1993). The court based its decision on article 48 of chapter 15A of the North Carolina General Statutes, which “provides for discovery in criminal actions.” *Id.* at 597–98, 434 S.E.2d at 177. This inapposite holding directly contradicts *Poole*. There is no specific and clear statutory exemption for the requested records, a point the court blatantly ignored. Instead, the court acknowledged that the recordings appeared to be public records under both *Poole* and section 132-1 of the North Carolina General Statutes, and then went on to hold that the criminal discovery statute would be irrelevant if the media and defendants could use the PRL to gain wider information than allowed by the discovery statute. *See id.* at 597–98, 434 S.E.2d at 177. Finally, the court turned to public policy arguments, stating that “the matters that would have to be released would be the names of confidential informants, the names of undercover agents, and the names of people who had been investigated for the crime but were not charged.” *Id.* at 598, 434 S.E.2d at 177. The court (implicitly) excused itself from *Poole* by stating that where a general statute (in this case the PRL) and a specific statute (the discovery statutes) are in conflict, the specific statute is controlling. *See id.* at 598, 434 S.E.2d at 177–78.

56. *See infra* notes 65–67 and accompanying text.

57. *See* N.C. GEN. STAT. ANN. § 132-1.1(b) (West 2013) (state and local taxpayer information); *id.* § 132-1.1(d) (“[t]he actual address and telephone number of a program participant in the Address Confidentiality Program”); N.C. GEN. STAT. § 132-1.2(2) (2011) (account numbers for electronic payments to public authorities); *id.* § 132-1.2(3) (any “document, file number, password, or any other information maintained by the Secretary of State” pursuant to the state registry for advance health care directives); *id.* § 132-1.2(4) (any document that “[r]eveals the electronically captured image of an individual’s signature, date of birth, drivers license number, or a portion of an individual’s social security number if the agency has those items because they are on a voter registration document”); *id.* § 132-1.10 (social security numbers and other personal identifying information); N.C. GEN. STAT. § 132-1.12 (2011 & Supp. 2012) (identifying information of minors participating in local government parks and recreation programs).

58. N.C. GEN. STAT. § 132-1.5 (2011) (911 database); *id.* § 132-1.6 (emergency response plans); *id.* § 132-1.7 (sensitive public security information).

59. *See* N.C. GEN. STAT. ANN. § 132-1.1(a) (West 2013) (confidential communications sent from legal counsel to any public body); N.C. GEN. STAT. § 132-1.4 (2011 & Supp. 2012) (criminal investigation and intelligence records conducted and compiled by public

include public school student records,⁶⁰ competitive bid process information,⁶¹ voting records,⁶² personnel records,⁶³ and prisoner records.⁶⁴

The two exemptions that relate specifically to higher education apply only to those records containing (1) “personally identifiable information from or about an applicant for admission to” an institute of higher education⁶⁵ and (2) “[r]ecords pertaining to the liability

law enforcement agencies and in furtherance of preventing or solving crimes); N.C. GEN. STAT. § 132-1.9 (2011) (trial preparation materials in most circumstances).

Chapter 132 also protects several other miscellaneous types of confidential information. See N.C. GEN. STAT. ANN. § 132-1.1(c) (West 2013) (public enterprise billing information, not including airport information); *id.* § 132-1.1(e) (Controlled Substances Reporting System information); N.C. GEN. STAT. § 132-1.8 (2011) (photographs and video or audio recordings made pursuant to autopsy); *id.* § 132-1.11 (economic development incentives information); *id.* § 132-1.23 (eugenics program records, insofar as they concern: “(i) persons impacted by the program, (ii) persons or their guardians or authorized agents inquiring about the impact of the program on them, (iii) persons or their guardians or authorized agents inquiring about the potential impact of the program on others”).

60. See *id.* § 115C-402(e) (“The official record of each student is not a public record as the term ‘public record’ is defined by G.S. 132-1. The official record shall not be subject to inspection and examination as authorized by G.S. 132-6.”).

61. See *id.* § 133-33. Government agencies may create confidentiality protections for “(1) [t]he agency’s cost estimate for any public contracts prior to bidding; and (2) [t]he identity of contractors who have obtained proposals for bid purposes for a public contract.” *Id.*; see also N.C. GEN. STAT. ANN. §§ 143-52 to -53 (West 2013) (protections for the bidding process).

62. Certain portions of voting records are protected, including “[f]ull or partial social security numbers, dates of birth, the identity of the public agency at which the voter registered . . . , any electronic mail address . . . , and drivers [sic] license numbers” N.C. GEN. STAT. § 163-82.10 (2011). Additionally, “[v]oted ballots and paper and electronic records of individual voted ballots [are] treated as confidential” and inaccessible to the public. *Id.* § 163-165.1.

63. Personnel records for public employees are covered by various statutes depending on the level of government. State employees are protected under sections 126-22, 126-23, and 126-24; county employees under section 153A-98; municipal employees under section 160A-168; school board employees under sections 115C-319 through 115C-321; and public hospitals employees under section 131E-257.2. Under each statute, the personnel records are partially protected, with some vital information still open to public access, such as name, date of appointment, position, title, and salary. See *id.* §§ 115C-320, 126-23, 131E-257.2(b), 153A-98(b).

64. The Court of Appeals of North Carolina has held that certain prisoner records “shall be made available to law-enforcement agencies, courts, correctional agencies, or other officials requiring criminal identification, crime statistics, and other information respecting crimes and criminals. These records are confidential and only named parties have access to them.” *Goble v. Bounds*, 13 N.C. App. 579, 581, 186 S.E.2d 638, 639, *aff’d*, 281 N.C. 307, 188 S.E.2d 347 (1972). Documents prepared in response to prisoner grievance petitions are also confidential. See N.C. GEN. STAT. § 148-118.5.

65. N.C. GEN. STAT. ANN. § 132-1.1(f) (West 2013). The exemption then carefully circumscribes its protections:

insurance program” of an institution of higher education.⁶⁶ That is the extent of PRL protection afforded to institutions of higher education.⁶⁷

North Carolina also has a trade secrets exemption,⁶⁸ which arguably might safeguard academic research. However, two factors indicate that such an application of the trade secrets exemption is very unlikely. First, North Carolina has a prohibition on judicial exemptions, deterring courts from stretching an existing statutory exemption to fit a distinct set of facts.⁶⁹ Second, precedent already indicates that North Carolina courts would reject such protection. The Court of Appeals of North Carolina denied protection under the North Carolina Trade Secrets Protection Act to a university committee overseeing scientific experimentation using animals.⁷⁰ The

Notwithstanding the preceding sentence, any letter of recommendation or record containing a communication from an elected official to The University of North Carolina, any of its constituent institutions, or to a community college, concerning an applicant for admission who has not enrolled as a student shall be considered a public record subject to disclosure pursuant to G.S. 132-6(a). Nothing in this subsection is intended to limit the disclosure of public records that do not contain personally identifiable information, including aggregated data, guidelines, instructions, summaries, or reports that do not contain personally identifiable information or from which it is feasible to redact any personally identifiable information that the record contains.

Id.

66. N.C. GEN. STAT. § 116-222 (2011).

67. Other exemptions applicable to public education apply only to elementary and secondary education, such as the provisions in chapter 115C governing “Elementary and Secondary Education.” *See, e.g., id.* § 115C-174.13 (exempting individual student’s test scores and including reference to FERPA). Mention of “higher education” or “university” or “universities” in chapter 115C is limited in scope. *See, e.g.,* N.C. GEN. STAT. § 115C-238.54 (2011 & Supp. 2012) (discussing funding for cooperative innovative high schools that partner with higher education institutions); N.C. GEN. STAT. § 115C-310 (2011) (covering student teaching programs, i.e., university students who are teaching at public schools as part of their higher education studies).

68. *See id.* § 66-156 (“In an action under [the Trade Secrets Protection Act], a court shall protect an alleged trade secret by reasonable steps which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action subject to further court order, and ordering any person who gains access to an alleged trade secret during the litigation not to disclose such alleged trade secret without prior court approval.”).

69. *See supra* notes 42–55 and accompanying text.

70. *See S.E.T.A. UNC-CH. v. Huffines*, 101 N.C. App. 292, 296, 399 S.E.2d 340, 343 (1991). Animal researchers are another group often targeted by public records requesters, to the point that the researchers’ trade organization has released documents specifically to educate researchers on how to respond to such requests. *See* NAT’L ASS’N FOR BIOMEDICAL RESEARCH, SOC’Y FOR NEUROSCIENCE, & FED’N OF AM. SOC’YS FOR EXPERIMENTAL RESEARCH, RESPONDING TO FOIA REQUESTS: FACTS AND RESOURCES 1, available at http://www.nabr.org/responding_to_foia_requests.aspx.

court found that the research information in question—statistics about the research and procedures used by the researchers—did not even qualify as a trade secret, let alone meet the other three elements of the trade secrets exemption.⁷¹ The second and third elements of the trade secrets exemption appear even more hostile to academic research.⁷² Those elements require (1) that the trade secret be the property of a *private* person and (2) that the trade secret be disclosed to the public agency in connection with a public contract or project bid.⁷³ Public universities, as their name denotes, are not private entities. Furthermore, beyond the unlikely occurrence of a public university professor “disclosing” his or her trade secrets to the public university, a professor’s disclosure would still not meet the third element’s requirements unless the professor’s employment contract were to constitute a public contract. That said, whether a public university professor’s research qualifies for protection as a trade secret remains otherwise untested in North Carolina.

Beyond specific exemptions, one final phrase within section 132-1(b) of the North Carolina PRL potentially incorporates non-statutory exemptions into the North Carolina PRL. That subsection

In contrast, the Court of Appeals of Indiana struck down a public records request filed against the Indiana University-Purdue University animal research committee in a case with nearly identical facts. *See Robinson v. Ind. Univ.*, 659 N.E.2d 153, 154 (Ind. Ct. App. 1995). The court distinguished Indiana’s and North Carolina’s respective PRLs on the grounds that Indiana’s PRL had an exemption for research in higher education, while North Carolina’s PRL did not. *See id.* at 156–57 (citing IND. CODE § 5-14-3-4(a)(6) (1988 & Supp. 1991) (exempting “[i]nformation concerning research, including actual research documents, conducted under the auspices of a state educational institution” from general disclosure)).

71. *See Huffines*, 101 N.C. App. at 296, 399 S.E.2d at 343 (“We conclude that the information elicited by the questions in these applications are not ‘trade secrets’ subject to protection. What type and how many animals are going to be used in a particular research project is not a trade secret, nor is whether surgery is going to be performed or the type of anesthesia to be used. Pre and postoperative procedures are not trade secrets, nor is how the animals’ pain and discomfort is to be minimized nor the method of euthanasia, if any.”).

The trade secrets statute requires that four conditions are met for protection from disclosure: the information must (1) meet the definition of a “trade secret”; (2) be the “property of a private ‘person’”; (3) be “disclosed . . . to the public agency in connection with the owner’s performance of a public contract or in connection with a bid, application, proposal, industrial development project, or in compliance with [federal or state] laws, regulations, rules, or ordinances”; and (4) be “designated or indicated as ‘confidential’ or as a ‘trade secret’ at the time of its initial disclosure to the public agency.” N.C. GEN. STAT. § 132-1.2(1) (2011). North Carolina courts have not answered whether a public university professor qualifies as a “private person” under the statute, nor whether a professor’s work qualifies as the “performance” defined in the statute. *See id.*

72. *See id.*

73. *Id.*

states that “it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost *unless otherwise specifically provided by law*.”⁷⁴ The last phrase, “unless otherwise specifically provided by law,” is ambiguous—it could apply to the whole sentence, or only to the cost portion of the sentence. In *McCormick v. Hanson Aggregates Southeast, Inc.*,⁷⁵ the Raleigh City Attorney argued that the phrase did indeed apply generally and included common law privileges—in this case attorney-client and attorney work product privileges—as exemptions to the North Carolina PRL.⁷⁶ However, the Court of Appeals of North Carolina specifically rejected such a reading of the statute.⁷⁷

The public’s right to access government records has progressed from English common law, where there was no general right to access public records, to a modern individual right to access public documents, with more sensitive areas protected by statutory exemption.⁷⁸ The North Carolina PRL seems to have followed an even more clerical route, and, as such, is incredibly broad.⁷⁹ The need to preserve all public documents later led to *access* to nearly all public documents.⁸⁰ This access was reinforced by *Poole*, which held that the judiciary could not craft exemptions to the North Carolina PRL, limiting exemption protection to those provided by the General Assembly.⁸¹ As of now, virtually no exemptions protect public universities and their activities from those who would abuse the North Carolina PRL in order to harass professors, legal clinics, and others in the academic realm.⁸²

II. PROBLEMS WITH BROAD PUBLIC RECORDS LAWS: HARASSMENT, ABUSE, AND COSTS

Public Records Laws play a vital role in holding government accountable—the people have a right to know that tax dollars are

74. *Id.* § 132-1(b) (emphasis added).

75. 164 N.C. App. 459, 596 S.E.2d 431 (2004).

76. *See id.* at 470, 596 S.E.2d at 438.

77. *See id.* The Court of Appeals ultimately held that the trial court “erred in granting the City Attorney *even limited* work product protection,” and remanded the case to the trial court for further consideration in light of the ruling. *See id.* at 473, 596 S.E.2d at 440 (emphasis added).

78. *See supra* notes 19–29 and accompanying text.

79. *See supra* notes 30–36 and accompanying text.

80. *See supra* notes 31–36 and accompanying text.

81. *See supra* notes 44–55 and accompanying text.

82. *See infra* Part II.B–C.

wisely spent and that public officials are complying with the law and governing in accordance with the interests of their constituencies.⁸³ But even noble legislative intentions and careful crafting can still produce laws with unintended negative consequences. A law's benefit to the public should outweigh any deleterious effects. When a law's public costs⁸⁴ increase—due to a change in other legal or societal norms or the discovery of unintended negative consequences—a change in the law may be necessary to restore proper balance.

Using specific examples from the North Carolina PRL, this Part first illustrates particular problems that arise as states provide broad PRL access and then protect with statutory exemptions. This is not to say that using such a model—broad access, coupled with specific exemptions—is incorrect, only that there is room for improvement. This Part then highlights various pernicious uses of PRLs against public universities around the country. These examples of harmful PRL application demonstrate the need to rebalance those laws as they pertain to public universities, because, when improperly applied, broad PRLs cause adverse effects, including: (1) restriction of academic freedom by using PRLs to harass research scientists and intimidate public university professors who exercise free speech; (2) impediment of legal clinics that investigate wrongdoing and protect the public interest; (3) high compliance costs; and (4) the potential for future problems, such as students requesting academic exams and fans or coaches of opposing sports teams requesting playbooks.

A. Problems with Providing General Access and then Protecting with Exemptions: Examples from North Carolina

Various problems arise when statutes provide broad PRL access and then protect sensitive areas with exemptions.⁸⁵ The root of these problems is the need to wait-and-see what complications arise with the PRL and what areas need shelter from the sunlight. Because North Carolina does not allow judicial exemptions, the General Assembly must either apply a new exemption to each problem that

83. See *supra* note 10 and accompanying text.

84. In this Comment, the most notable costs of PRLs are intrusions on privacy, disruption of academic activities, and harassment of professors. See *infra* Part II.A–B.

85. That is not to say that providing limited access would not have similar problems (i.e., reverting to the English common law rule or early American common law rule, and then using statutes to “uncover” particular areas). Currently, there are no states that provide a counterfactual to the generally adopted model of broad access and specific exemptions. See Table I.

arises or endure the consequences.⁸⁶ Over time, this wait-and-see approach can erode the effectiveness and integrity of the PRL and lead to further problems: exposure of other areas of weakness to be exploited, development of contradictions between statutes, and potential conflicts with federal law.⁸⁷ A few specific examples highlight these issues.

First, the North Carolina PRL includes a limited exemption for “electronic lists of subscribers.”⁸⁸ This provision initially appears to exempt private e-mail addresses, but the protection is far more limited and leaves open a series of problems: (1) the e-mail subscriber list is still open to in-person inspection; (2) the exemption applies only to local governments, not state agencies; (3) the local government agency is not *required* to hand over a copy of the subscriber list, but the agency could still choose to do so; and (4) the exemption protects only e-mail addresses—“names, street addresses, and phone numbers, are subject to the full rights of access under the public records law, unless another exemption applies.”⁸⁹ In this instance, the exemption essentially points to what information is still available: e-mail addresses included in other records and personal information. State agencies that collect e-mail lists could unwittingly act as initial harvesters of personal information for advertisers and corporations seeking targeted consumer information.

Second, exempted records can sometimes conflict with records explicitly defined as public records. The clearest example of such a

86. See, e.g., Frayda Bluestein, *Public Records Exceptions for Private Information: A Legislative Trend?*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (Aug. 8, 2012, 5:42 PM), <http://canons.sog.unc.edu/?p=6781> (“Recent legislative exemptions reflect a case-by-case approach to managing the treatment of private information under the public records law.”); Moore, *supra* note 30, at 1549–51 (noting the apparent piecemeal approach to constructing new exemptions).

87. Several potential problems arise with judicial exemptions as well. For example, the same confusion that exists with the wait-and-see exemption approach might be exacerbated by having various courts decide which judicial exemptions are appropriate or not. Furthermore, what information merits a judicial exemption might vary between what each judge considers to be in the public interest. General concerns about judicial activism would be at play here. See generally Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009) (discussing the history, concerns, and controversial examples of judicial activism).

88. N.C. GEN. STAT. § 132-1.13 (2011) (“[W]hen a unit of local government maintains an electronic mail list of individual subscribers, this chapter does not require that unit of local government to provide a copy of the list.”).

89. See Frayda Bluestein, *Email Subscriber Lists: A New Exception to the Public Records Law*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (July 6, 2011, 1:07 PM), <http://canons.sog.unc.edu/?p=4957>.

conflict arises between personnel records and settlements.⁹⁰ Personnel records are specifically exempted from the reach of the North Carolina PRL.⁹¹ In contrast, “all settlement documents in any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions” are statutorily defined as public records.⁹² What happens when settlements include information from a personnel file?⁹³

Third, other laws that seem to offer protection for personal information may provide inadequate shelter. For example, the Family Educational Rights and Privacy Act (“FERPA”)⁹⁴ purportedly prevents the disclosure of student records by limiting the circumstances under which anyone but the student or the student’s parent or guardian can access personal education information.⁹⁵ However, FERPA does not actually bar disclosure.⁹⁶ Instead, FERPA simply attaches federal funding to non-disclosure of educational records,⁹⁷ “providing a powerful financial incentive for school systems

90. See LAWRENCE, PUBLIC RECORDS LAW, *supra* note 37, at 240–41.

91. See N.C. GEN. STAT. § 153A-98(a) (“Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a county are subject to inspection and may be disclosed only as provided by this section.”).

92. *Id.* § 132-1.3.

93. The simplest answer might be redaction, which still takes time and money. This question was partially answered in *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76 (2002). In that case, a former state government employee sued, among others, the Secretary of the North Carolina Department of Transportation, alleging that his personnel file was released in retaliation for previously suing the North Carolina Department of Corrections for employment discrimination. See *id.* at 466–67, 574 S.E.2d at 82. The initial suit ended with a negotiated settlement, which provided that files related to the employment discrimination suit would be kept separate from the employee’s personnel file. *Id.* While the court of appeals found that instances might arise where “a department head might need to disclose some information from plaintiff’s personnel file to maintain the integrity of the department,” the court also found that the disclosure here was more than excessive. *Id.* at 471–72, 574 S.E.2d at 85. The question as to what happens when the disclosure is not egregious remains unanswered.

94. 20 U.S.C.A. § 1232g (West 2007 & Supp. 2013). FERPA “is a Federal law that protects the privacy of student education records.” *Family Educational Rights and Privacy Act (FERPA)*, ED.GOV, <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last visited May 9, 2013).

95. See Thomasin Hughes, *Releasing Student Information: What’s Public and What’s Not*, SCH. L. BULL., Winter 2001, at 12, 13.

96. See *Student Bar Ass’n v. Byrd*, 293 N.C. 594, 599, 239 S.E.2d 415, 419 (1977) (“[FERPA] does not forbid such disclosure of information concerning a student and, therefore, does not forbid opening to the public a faculty meeting at which such matters are discussed.”); see also Hughes, *supra* note 95, at 21–22 (discussing the *Byrd* decision).

97. See 20 U.S.C.A. § 1232g(a) (listing “[c]onditions for availability of funds to educational agencies or institutions”). Throughout the statute, the language is conditional. See, e.g., *id.* § 1232g(b)(1) (“No funds shall be made available under any applicable

to comply.”⁹⁸ Thus, because North Carolina courts are not allowed to create judicial exemptions, and because FERPA technically does not create a legislative exemption, a North Carolina public university could theoretically be required to disclose private student records *and simply forgo* federal funding conditioned on FERPA compliance.⁹⁹ However, such a penalty has never been levied against any public university,¹⁰⁰ and penalizing a school requires that the school have a “policy or practice” of disclosure, not simply instances of individual violations.¹⁰¹

The preceding examples illustrate several problems with the wait-and-see approach to exemptions. North Carolina courts have yet to face cases that will test those murky legal waters. In other states, however, cases have already emerged that highlight the problems that North Carolina may encounter in the future. These cases are discussed below.

program to any educational agency or institution which has a policy or practice of permitting the release of education records . . .”).

98. Hughes, *supra* note 95, at 21.

99. See *Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 487 n.6 (Iowa 2012) (describing an instance where the Department of Education advised a school district that FERPA “does not act to preempt conflicting State laws,” but that disclosing FERPA-protected records without student disclosure “will violate FERPA and jeopardize continued receipt of Federal education funds”).

Judge Manning, in his decision requiring Coach Davis to release his cell phone records, seemed to indicate that he believed certain student records would still be protected by FERPA. See *Order of May 12, 2011*, at 3–4, *News & Observer Publ’g Co. v. Baddour*, No. 10 CV 001941 (N.C. Super. Ct. 2011); Andy Thomason, *University Settles in Football Lawsuit*, DAILY TAR HEEL (Chapel Hill, N.C.), Oct. 26, 2012, at 1, *available at* <http://www.dailytarheel.com/article/2012/10/university-settles-in-football-lawsuit> (“‘FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at UNC,’ Manning wrote in the order.”). However, Judge Manning was not presented with the argument that FERPA does not mandate compliance, but rather conditions funding on compliance. See Hughes, *supra* note 95, at 21.

One final problem with scattered exemptions is that they make for very confusing law. See, e.g., Moore, *supra* note 30, at 1549–51 (discussing the confusion wrought by scattered exemptions in the North Carolina PRL).

100. See Mary Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 CARDOZO L. REV. 1555, 1597–98 (2012).

101. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002).

B. Academic Freedom: Stifling of Research and Speech Through Harassment and Intimidation

1. Academic Research

Academic freedom is a critical component for effective teaching and research.¹⁰² A 1915 declaration by the American Association of University Professors articulated the concept, including as component parts “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.”¹⁰³ While academic freedom includes the “freedom to research,” it “does not include the right to refuse to disclose public records related to that research.”¹⁰⁴

States that do not create exemptions for academic freedom risk chilling certain areas of academic research. In some states, PRLs have been used not just to inhibit academic research, but to mount outright attacks on professors and their research or speech. The most notable example is that of Michael Mann, a leading climate change scientist, whose published research on global warming includes the now iconic “hockey stick” graph of temperatures rising precipitously since the turn of the 20th century.¹⁰⁵ Ten years later, Mann was implicated in “Climategate,”¹⁰⁶ a pseudo-scandal revolving around e-mails between various climate change scientists that turned out to be overblown.¹⁰⁷

102. See RAPP, *supra* note 19, at § 11.01[1]. For a broader discussion on whether a right to academic freedom exists, and if so, who possesses that right, see generally Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907 (2006).

103. 1915 Declaration of Principles on Academic Freedom and Academic Tenure, in AM. ASS'N OF UNIV. PROFESSORS POL'Y DOCUMENTS & REPORTS 291, 292 (10th ed. 2006); see also Peter A. Joy, *Government Interference with Law School Clinics and Access to Justice: When Is There a Legal Remedy?*, 61 CASE W. RES. L. REV. 1087, 1093 (2011) (discussing the 1915 Declaration of Principles on Academic Freedom and Academic Tenure).

104. RAPP, *supra* note 19, at § 11.01[4][e][i].

105. See generally MICHAEL E. MANN, *THE HOCKEY STICK AND THE CLIMATE WARS: DISPATCHES FROM THE FRONT LINES* (2012) (discussing the central role of the “hockey stick” graph in the continuing attacks on climate change science).

106. See generally Andrew C. Revkin, *Hacked E-Mail Is New Fodder for Climate Change Dispute*, N.Y. TIMES, Nov. 21, 2009, at A1 (describing the controversy surrounding hacked emails from climate scientists).

107. See *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 124–25 (D.C. Cir. 2012) (“[T]he petitioners’ claims based on the CRU [“Climategate”] documents were exaggerated, contradicted by other evidence, and not a material or reliable basis for questioning the credibility of the body of science at issue; two of the factual inaccuracies alleged in the petitions were in fact mistakes, but both were ‘tangential and minor’ and did not change the key IPCC conclusions; and the new scientific studies raised by some petitions were either already considered by EPA, misinterpreted or misrepresented by petitioners, or put forth without acknowledging other new studies.”), *reh’g en banc denied*,

Despite his eventual vindication, Mann and his employer, the University of Virginia, soon found themselves subject to Freedom of Information Act¹⁰⁸ requests from the American Tradition Institute¹⁰⁹ and the Attorney General of Virginia, Ken Cuccinelli, II.¹¹⁰

Cuccinelli demanded “[a]ny documents prepared during [the] period [of January 1, 1999 through December 31, 2006], or before this time period but which relate thereto”¹¹¹ He claimed that he was investigating Mann for potentially violating the 2002 Virginia Fraud Against Taxpayers Act,¹¹² though critics of both Mann and Cuccinelli alike suspected ulterior motives.¹¹³ A circuit court judge found that

2012 WL 6621785 (D.C. Cir. 2012); see also Karla Adam & Juliet Eilperin, *Academic Experts Clear Scientists in ‘Climate-Gate’*, WASH. POST, Apr. 15, 2010, at A6 (“After interviewing staff members and analyzing 11 peer-reviewed articles published between 1986 and 2008, the panel concluded: ‘We saw no evidence of any deliberate scientific malpractice in any of the work of the Climatic Research Unit and had it been there we believe that it is likely that we would have detected it.’”).

108. 5 U.S.C.A § 552 (West 2007 & Supp. 2013). The Freedom of Information Act is the federal equivalent of a state PRL.

109. See Verified Petition for Mandamus and Injunctive Relief, *Am. Tradition Inst. v. Rector and Visitors of Univ. of Va.* at 1, No. CL-11-3236 (Va. Cir. May 16, 2011), 2011 WL 9133641; *American Tradition Institute v. University of Virginia (Dr. Michael Mann)*, AM. TRADITION INST. (May 16, 2011) <http://www.atinstitute.org/american-tradition-institute-v-university-of-virginia-dr-michael-mann/>; see also Rosalind S. Helderman, *U-Va. Agrees to Complete Response to Global Warming Public Records Request by August*, WASH. POST (May 25, 2011, 5:45 PM), http://www.washingtonpost.com/blogs/virginia-politics/post/u-v-a-agrees-to-complete-response-to-global-warming-public-records-request-by-august/2011/05/25/AGVG5GBH_blog.html (“The University of Virginia and [the American Tradition Institute] have agreed the university will turn over documents in response to a public information request by the group seeking documents related to the work of a former university climate scientist.”).

The American Tradition Institute is a “think tank” established essentially to attack environmentalism. See *About*, AMERICAN TRADITION INSTITUTE, <http://www.atinstitute.org/about/> (last visited May 7, 2013) (“The time for ATI is now, before irreversible damage is done to America’s ability to economically compete – which may be the point for a significant part of the environmentalist movement.”).

110. See *Cuccinelli v. Rector & Visitors of Univ. of Va.*, 722 S.E.2d 626, 628–29 (Va. 2012); Civil Investigative Demand from the Attorney General of Virginia to the Rector and Visitors of the University of Virginia at 1 (Apr. 23, 2010) (CID No. 2-MM), available at http://voices.washingtonpost.com/virginiapolitics/Virginia_Attorney_General_CID.pdf.

111. See Civil Investigative Demand from the Attorney General of Virginia to the Rector and Visitors of the University of Virginia at 4 (Sept. 29, 2010) (CID No. 3-MM), available at <http://voices.washingtonpost.com/virginiapolitics/New%20Mann%20CID.PDF>.

The request covered “all available documents, computer code and data relating to Mann’s research on the five grants” and “all correspondence, including e-mails—from 1999 to the present—between Mann . . . and dozens of climate scientists worldwide, as well as some climate sceptics.” Editorial, *Science Subpoenaed*, 465 NATURE 7295, 135 (May 13, 2010).

112. See *Cuccinelli*, 722 S.E.2d at 628; *Science Subpoenaed*, *supra* note 111.

113. See, e.g., Editorial, *Mr. Cuccinelli’s Witch Hunt*, WASH. POST, May 7, 2010, at A26 (“We knew Virginia Attorney General Ken Cuccinelli II (R) had declared war on reality.

Cuccinelli had failed to state any reason to suspect fraud and initially set aside Cuccinelli's information requests.¹¹⁴ Cuccinelli later reissued the demands.¹¹⁵ Eventually, the Supreme Court of Virginia found in Mann's favor and affirmed, though on different grounds.¹¹⁶

The American Tradition Institute's portion of the suit continued until another circuit court judge ruled from the bench in favor of Mann and the university.¹¹⁷ The judge's ruling was based on a particular exemption in the Virginia PRL:

Data, records or information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education . . . in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues . . . where such data, records or information has not been publicly released, published, copyrighted or patented.¹¹⁸

The judge also reasoned that the exemption was vital to safeguard the academic process.¹¹⁹

The Mann example demonstrates how politically motivated parties can manipulate PRLs to harass research scientists. In Mann's

Now he has declared war on the freedom of academic inquiry as well."); Shawn Lawrence Otto, *Academic Freedom Wins in Cuccinelli Climate Case*, HUFFINGTON POST (Mar. 2, 2012, 1:09 PM), http://www.huffingtonpost.com/shawn-lawrence-otto/ken-cuccinelli-climate-change_b_1316572.html ("But Cuccinelli's investigation was without a reasonable probable cause, and so amounted to a political witch hunt."); John Collins Rudolf, *Ken Cuccinelli v. Climate Skeptics*, N.Y. TIMES (Feb. 23, 2011, 3:04 PM), <http://green.blogs.nytimes.com/2011/02/23/ken-cuccinelli-v-climate-skeptics/> (reporting that "even many of Dr. Mann's chief scientific foes are strongly opposed to Mr. Cuccinelli's fraud investigation"); Editorial, *Witch Hunt, Part Two*, WASH. POST, Oct. 6, 2010, at A18 ("The attorney general's logic is so tenuous as to leave only one plausible explanation: that he is on a fishing expedition designed to intimidate and suppress honest research and the free exchange of ideas upon which science and academia both depend – all because he does not like what science says about climate change.").

114. See *Cuccinelli*, 722 S.E.2d at 629; Rosalind Helderma, *Climate Research Legal Fight Heats Up*, WASH. POST, Oct. 4, 2010, at B1.

115. See Karin Kapsidelis, *Update: Va. Supreme Court Rules Against Cuccinelli in U. Va. Climate Case*, TIMESDISPATCH.COM, http://www.timesdispatch.com/news/update-va-supreme-court-rules-against-cuccinelli-in-u-va/article_21579fbc-ea85-5e7a-b152-b1b9714ef7a6.html (last updated Jan. 29, 2013, 5:31 PM).

116. See *Cuccinelli*, 722 S.E.2d at 633 (dismissing with prejudice Cuccinelli's Civil Investigative Demands). The court found in Mann's favor on different grounds, specifically that the University did not qualify as a "person" under the Virginia Fraud Against Taxpayers Act. *Id.* at 630. Cuccinelli had only subpoenaed the university and its rector and visitors. *Id.* at 628.

117. See Tom Jackman, *U.Va., Scientist Win Round in Global Warming Case*, WASH. POST, Sept. 19, 2012, at B1.

118. See *id.* (alteration in original) (quoting VA. CODE ANN. § 2.2-3705.4(4) (2011)) (internal quotation marks omitted).

119. Jackman, *supra* note 117.

case, a statutory exemption in Virginia's law quieted his detractors, though only after dragging his name through the mud and the courts; in states without such protections, the negative impact could escalate.¹²⁰

For an example of how politically motivated harassment of professors could adversely affect public universities in North Carolina, consider the following: A professor is considering whether to take a research position at either (1) a North Carolina public university or (2) a private university or a public university in a state with protective PRL exemptions. At a North Carolina public university, the professor's research—and any tangentially related communications—would be readily available to anyone who requests those documents. The professor faces no such disclosure requirements at a private university or in a state that has an exemption for academic research. Clearly, accepting a position at a public university in North Carolina imposes an additional cost, regardless of the field of study. Furthermore, professors specializing in more "controversial" areas of scientific research will face a higher likelihood of harassment if they work at unprotected public universities.¹²¹ It takes little imagination to picture the threat of harassment deterring scientists in particular areas from joining North Carolina public university faculties.¹²²

On a related note, scientists are beginning to seek protections for documents and communications used in preparation of scientific reports.¹²³ Correspondence between scientists often admits

120. North Carolina is such a state. See *supra* Part II.A; cf. *supra* notes 70–71 and accompanying text (discussing how the Court of Appeals of North Carolina withheld protection for academic research under the trade secrets exemption, while the Indiana Court of Appeals provided that protection based on a specific academic research exemption in Indiana law).

121. Another example of controversial research is animal testing. See *supra* notes 70–71 and accompanying text. Yet another example is stem cell research. See, e.g., Maggie Fox, *Court Rules Controversial Stem Cell Research Is Legal*, NBC NEWS (Aug. 24, 2012, 2:08 PM), http://vitals.nbcnews.com/_news/2012/08/24/13458821-court-rules-controversial-stem-cell-research-is-legal?lite (discussing recent developments surrounding controversial stem cell testing and research).

122. Cf. Katherine Bagley, *Climate Scientists Face Organized Harassment in U.S.*, BLOOMBERG (Sept. 10, 2012, 12:10 PM), <http://www.bloomberg.com/news/2012-09-10/climate-scientists-face-organized-harassment-in-u-s.html> ("The harassment has an intimidating effect—especially on young scientists," said Stefan Rahmstorf, head of earth system analysis at the Potsdam Institute for Climate Impact Research in Germany. Rahmstorf said that watching colleagues be harassed often deters them from speaking [publicly] about their research, which skews the debate.").

123. See R. Camilli et al., *When Scientific Research and Legal Practice Collide*, 337 SCIENCE 1608, 1608–09 (2012); see also Kate Shaw, *Scientists Ask for Legal Safeguards to*

weaknesses in methodology and contains instances of “devil’s advocacy,” but scientists insist that this is part of the scientific process.¹²⁴ Public disclosure of deliberative correspondence—intended to be a candid and open discussion of research results—could be used to undermine that research at trial.¹²⁵ If such trends continue or escalate, scientists at public universities may overstate the strength of results by not discussing potential weaknesses in their research, thus compromising the integrity of the entire scientific process.¹²⁶

Competitive scientific research can also be stifled by public disclosure.¹²⁷ In their article, Mousavi and Kleiman note that the traditional research centers, specifically including North Carolina’s Research Triangle Park, are “no longer secure” in their “dominant positions.”¹²⁸ The article, which focuses on the effects of the California Public Records Act, notes six requirements for creating successful bioscience companies: “(1) strong academic research institutions conducting basic research in the biosciences, (2) access to public and private early-stage capital, (3) the ability to turn government funded research into successful commercial products, (4) specialized research facilities, (5) a ‘highly skilled workforce,’ and (6)

Keep Their Work Out of Court, ARS TECHNICA (Oct. 2, 2012, 9:15 AM), <http://arstechnica.com/science/2012/10/scientists-ask-for-legal-safeguards-to-keep-their-work-out-of-court/>.

124. See Shaw, *supra* note 123.

125. See Camilli et al., *supra* note 123, at 1608–09 (“Because we [the scientist-authors] are not litigants to the case, having chosen to remain independent and impartial (i.e., not serve as expert witnesses), we have no legal standing in court. Thus, although BP has made generalized assertions of misconduct in the Courts’ public record, our opportunity to challenge these claims is restricted. The law paradoxically requires that, as nonlitigants, we must be found in contempt of court before we are granted legal standing (upon appeal) to defend our work and reputations.”).

126. At the same time, some scholars have argued that the same principles of accountability and transparency applied to government via PRLs should also be applied to scientific research. See generally Dov Greenbaum, *Research Fraud: Methods for Dealing with an Issue that Negatively Impacts Society’s View of Science*, 10 COLUM. SCI. & TECH. L. REV. 61 (2009) (examining various legal and educational methods to counter scientific fraud); Bratislav Stanković, Comment, *Pulp Fiction: Reflections on Scientific Misconduct*, 2004 WIS. L. REV. 975 (analyzing the legal methods and interests that are involved in prosecuting scientific misconduct).

127. See, e.g., 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, ¶ 1, available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1143&context=dltr> (discussing how the California PRL’s lack of a guarantee of proprietary safeguards jeopardizes both public university-private sector research partnerships and California’s position as a national leader in biotechnology research).

128. *Id.*

a 'stable and supportive public policy structure.' ”¹²⁹ Universities contribute to all of those factors.

While Mousavi and Kleinman focus on the potential impact to *businesses* evaluating whether or not to partner with universities, the impact on public universities is clear: “[U]nder current law, counsel for [businesses] should consider advising their clients not to enter such agreements with California’s public universities where the risks of the potential disclosure of its sensitive information outweigh the benefits of the research.”¹³⁰ Public universities would be frozen out of the business-university partnership system if unable to protect proprietary research information.¹³¹ Thus, public universities, a potential asset for Research Triangle Park and the North Carolina economy in general, could become a liability.

2. Academic Speech

Stifling research with PRLs is harmful and underhanded, but stifling speech with PRLs is hypocritical and pernicious. This is particularly true when politicians use PRLs to harass those who criticize the government, thereby undermining the government accountability purpose of PRLs.¹³² Such is the case of William Cronon, the current president of the American Historical Association

129. *Id.* ¶ 3 (citation omitted).

130. *Id.* ¶ 6. California, like North Carolina, does not have a PRL academic research exemption. See *infra* Table I (“Academic Research” column; “California” and “North Carolina” rows).

131. See Mousavi & Kleiman, *supra* note 127, ¶ 3 (“Another important, yet little-known, policy tool is ensuring that bioscience firms can partner with government entities, particularly public research universities, without fearing that sensitive research and development information will be made public.”).

132. See Howard Schweber & Donald A. Downs, *Howard Schweber and Donald A. Downs: Stop poisonous record requests*, WIS. ST. J. (Apr. 1, 2011, 5:00 AM), http://host.madison.com/wsj/news/opinion/column/article_891c738a-5c00-11e0-8177-001cc4c03286.html. The authors highlight the particular irony of using PRLs in this manner:

The request for Cronon's emails has nothing to do with exposing corruption in government. The aim is to find something that can be used to embarrass and silence a public voice that has dared to criticize government officials. This is a reversal of the purpose of open records laws, and a betrayal of constitutional principles that Republicans and Democrats claim to hold dear. The efforts against Cronon also threaten academic freedom in higher education. First Amendment guarantees of freedom of expression are the most important checks on the abuse of power. This is yet another example of the expansion and abuse by our state and national political classes of previously valid legal policies to achieve ends in our increasingly polarized political environment.

Id.

and a former professor at the University of Wisconsin–Madison.¹³³ On March 15, 2011, Cronon wrote a post on his newly created blog, “Scholar as Citizen,” questioning the origins of a “sudden and impressively well-organized wave of legislation being introduced into state legislatures” that sought to “end[] collective bargaining rights for public employees, requir[e] photo IDs at the ballot box, roll[] back environmental protections, [and] privileg[e] property rights over civil rights”¹³⁴ Cronon squarely pointed the finger at the American Legislative Exchange Council, a national organization which in recent years has successfully assisted Republican legislators in states across the country in passing conservative laws.¹³⁵

Two days later, Stephan Thompson of the Republican Party of Wisconsin sent Cronon a request under Wisconsin’s Open Records law.¹³⁶ That request demanded

copies of all emails into and out of Prof. William Cronon’s state email account from January 1, 2011 to present which reference any of the following terms: Republican, Scott Walker, recall, collective bargaining, AFSCME, WEAC, rally, union, Alberta Darling, Randy Hopper, Dan Kapanke, Rob Cowles, Scott Fitzgerald, Sheila Harsdorf, Luther Olsen, Glenn Grothman, Mary Lazich, Jeff Fitzgerald, Marty Beil, or Mary Bell.¹³⁷

133. For further biographical details on Cronon, see *William Cronon Biography*, WILLIAMCRONON.NET, <http://www.williamcronon.net/biography.htm> (last updated July 2013).

134. See William Cronon, *Who’s Really Behind Recent Republican Legislation in Wisconsin and Elsewhere? (Hint: It Didn’t Start Here)*, WILLIAMCRONON.NET (Mar. 15, 2011), <http://scholarcitizen.williamcronon.net/2011/03/15/alec/>.

135. See *id.*; see also *History*, AM. LEGIS. EXCH. COUNCIL, <http://www.alec.org/about-alec/history/> (last visited May 9, 2013) (ALEC is a “nonpartisan membership association for conservative state lawmakers who share[] a common belief in limited government, free markets, federalism, and individual liberty. . . . To date, ALEC’s Task Forces have considered, written and approved hundreds of model bills on a wide range of issues, model legislation that will frame the debate today and far into the future. Each year, close to 1,000 bills, based at least in part on ALEC Model Legislation, are introduced in the states. Of these, an average of 20 percent become law.”).

136. See William Cronon, *Abusing Open Records to Attack Academic Freedom*, WILLIAMCRONON.NET (Mar. 24, 2011), <http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom/>; John Gardner, *William Cronon and Academic Freedom*, THE GUARDIAN (Apr. 1, 2011, 5:28 PM), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/apr/01/wisconsin-republicans>; David Weigel, *Wisconsin GOP Wants E-Mails Sent by Professor Who Wrote Critical Blog Post*, SLATE (Mar. 25, 2011, 11:27 AM), http://www.slate.com/blogs/weigel/2011/03/25/wisconsin_home_of_political_threats_and_false_flag_operations.html.

137. See Cronon, *supra* note 134; see also Anthony Grafton, *Wisconsin: The Cronon Affair*, NEW YORKER (Mar. 28, 2011), <http://www.newyorker.com/online/blogs/newsdesk/2011/03/wisconsin-the-cronon-affair.html>; Don Walker, *GOP Seeks E-Mails of*

When Cronon questioned the motives behind the request, the Executive Director of the Republican Party of Wisconsin ironically accused him of attempting to “intimidate [others] from lawfully seeking information about their government.”¹³⁸ Eventually, Cronon provided the requested documents.¹³⁹ Writing the final post for “Scholar as Citizen,” barely two weeks after he had written the first post touching off the entire ordeal, Cronon quoted a sentence from an 1894 report by the University of Wisconsin Board of Regents: “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.”¹⁴⁰ The “continual and fearless sifting and winnowing” of ideas requires strong protection of freedom of speech, including the right to criticize and question the government. Little could be more harmful to that freedom than a government that turns instruments of government accountability into weapons of intimidation against its own constituents.¹⁴¹

UW-Madison Professor, MILWAUKEE J. SENTINEL (Mar. 25, 2011), <http://www.jsonline.com/blogs/news/118654904.html>.

138. See William Cronon, *Republican Party Response to Cronon Critique of Open Records Request*, WILLIAMCRONON.NET (Mar. 25, 2011), <http://scholarcitizen.williamcronon.net/2011/03/25/republican-party-response/>. The Executive Director went on to say that “it is chilling to see that so many members of the media would take up the cause of a professor who seeks to quash a lawful open records request.” *Id.*

139. See William Cronon, *University of Wisconsin-Madison Strives to Balance Public Records with Academic Freedom*, WILLIAMCRONON.NET (Apr. 1, 2011), <http://scholarcitizen.williamcronon.net/2011/04/01/uw-madison-balancing-test/>.

140. *Id.*; see also THEODORE HERFURTH, *SIFTING AND WINNOWING: A CHAPTER IN THE HISTORY OF ACADEMIC FREEDOM AT THE UNIVERSITY OF WISCONSIN* (1948), reprinted in *ACADEMIC FREEDOM ON TRIAL* 58, 59 (W. Lee Hansen ed., 1998) (describing the history and meaning of the Board’s declaration).

141. For another example of using PRLs to harass professors who make political arguments, see Dawson Bell, *Request for Profs’ E-Mails on Wisconsin Labor Strife Sparks Outage*, USA TODAY (Mar. 31, 2011, 1:34 AM), http://usatoday30.usatoday.com/news/nation/2011-03-31-wisconsin-email-request_N.htm (“A . . . think tank’s demands for professors’ e-mails about Wisconsin’s public employee labor strife is causing an uproar among some who suggest the Freedom of Information Act requests aim to intimidate pro-labor dissenters and stifle academic freedom.”); Cindy Heflin, *Mackinac Center Sparks Uproar with FOIA of Professor Emails Regarding Collective Bargaining*, RACHEL MADDOW, ANNARBOR.COM (Mar. 31, 2011, 8:48 AM), <http://www.annarbor.com/news/mackinac-center-sparks-uproar-with-foia-of-professor-emails-regarding-collective-bargaining-rachel-m/> (reporting the same story).

On the other hand, one journalism professor was heavily criticized for teaching his students how to use PRLs to access certain records—in one assignment, the DePauw University professor distributed a seventeen-page packet detailing the recent arrest of another student at the university. See Chase G. Hall, *Reporting Class Sparks Controversy over Academic Freedom*, THE DEPAUW, <http://www.thedepauw.com/news/reporting-class-sparks-controversy-over-academic-freedom-1.2799710#.UXm92LU4vzy> (last updated

C. *Legal Clinics: Harassment of Watch Dogs and Breaches of Confidentiality*

Similar to the attack on Professor Cronon above, one of the more insidious uses of PRLs is to harass those investigating misdeeds, particularly student legal clinics. Legal clinics serve two important purposes: they “provid[e] students with the hands-on training essential to becoming effective and competent lawyers” and afford “legal representation to an underserved population.”¹⁴² As the economic recession has strained the budgets of organizations that provide legal services for those unable to pay,¹⁴³ the second purpose of legal clinics has become ever more important. However, where most might see legal clinics as serving the public good, those who are investigated or sued may view them as nuisances. This has induced governments and private parties to employ various means, including PRLs, to harass and intimidate legal clinics.¹⁴⁴

In *Sussex Commons Associates, LLC v. Rutgers*,¹⁴⁵ the Rutgers Environmental Law Clinic (“RELC”) represented clients opposed to Sussex Commons’ plan to develop a mall.¹⁴⁶ Sussex Commons filed a

Mar. 21, 2012, 10:03 PM). The student discovered the class assignment when a friend in the class shared the assignment packet with her. *See id.*

142. Jennifer Dearborn, Note, *Ready, Aim, Fire: Employing Open Records Acts as Another Weapon Against Public Law School Clinics*, 39 RUTGERS L. REC. 16, 19 (2011).

143. *See generally* NEETA PAL, BRENNAN CTR. FOR JUSTICE, CUT OFF & CUT OUT: FUNDING SHORTFALLS FORCE MORE LOW-INCOME FAMILIES TO FACE CRITICAL UNMET LEGAL NEEDS ALONE (2011), available at <http://www.brennancenter.org/sites/default/files/legacy/New%20needs%20update%20FINAL%20as%20of%205-19-11.pdf> (discussing Congressional cuts to civil legal aid programs during the recession).

144. *See, e.g.*, Joy, *supra* note 103, at 1087–88 (discussing legislative efforts in Maryland and Louisiana to withhold funds unless legal clinics disclosed client information or received prior approval of projects); Robert R. Kuehn & Peter A. Joy, “Kneecapping” *Academic Freedom*, ACADEME, Nov.–Dec. 2010, at 8, 10, available at <http://www.aaup.org/AAUP/pubsres/academe/2010/ND/feat/kueh.htm> (“The Landmark Legal Foundation, a conservative organization that focuses on the environment and education, has lodged public records requests and complaints against labor-education centers at public universities around the country, seeking to restrict what the centers can do and whom they can serve.”).

145. *Sussex Commons Assocs. v. Rutgers (Sussex Commons II)*, 46 A.3d 536 (N.J. 2012). This is currently the only reported case where PRLs have been used to attack legal clinics. *See* Robert R. Kuehn & Bridget M. McCormack, *Lessons From Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59 app. at 92–95 (2011) (noting *Sussex Commons II* as the only legal clinic case involving public records laws). Moreover, a Westlaw search for (“open records” “public records” “open government”) /p (“legal clinic” “law school clinic”) yielded only the present case.

146. *See Sussex Commons II*, 46 A.3d at 538–39. The RELC represented the Coalition to Protect Our Land, Lakes and Watersheds (“Coalition”), “a non-profit corporation dedicated to preserving and protecting lands and watersheds in northwest New Jersey,”

number of lawsuits related to the mall, including one alleging a conspiracy between the Chelsea Property Group and others, including RELC clients, to tortiously interfere with the mall development.¹⁴⁷ As part of its discovery efforts, the developer sought access to all communications between Chelsea and RELC.¹⁴⁸ The trial court rebuffed those efforts, labeling them “a fishing expedition.”¹⁴⁹ Undeterred, Sussex Commons filed an extensive request against Rutgers University under New Jersey’s PRL, the Open Public Records Act (“OPRA”).¹⁵⁰ The custodian of the university’s records balked, arguing that “OPRA does not require an agency to conduct open-ended searches of its files.”¹⁵¹ Sussex Commons then filed suit.¹⁵²

The trial court initially denied Sussex Commons’s information request, but the Appellate Division overturned this denial.¹⁵³ The Supreme Court of New Jersey, reversing the Appellate Division, emphasized the “‘overriding concern for the academic freedom of [the university]’”¹⁵⁴ and held that the legal clinic documents were not subject to OPRA.¹⁵⁵ The court also looked heavily to the purpose of the New Jersey PRL, finding that the purpose was to promote the public interest through government transparency and

and the Citizens for Responsible Development at Ross’ Corner, “another non-profit corporation that opposed Sussex Commons’ [development] plan.” *Id.*

147. *See id.* at 539. The alleged coconspirators included three officers of the Coalition and a member of the Frankford Township Committee and the Frankford Township Land Use Board. *Id.*

148. *See id.*

149. *Id.*

150. *See id.* Sussex Commons requested eighteen categories of documents, including ones related to RELC’s funding and virtually any document related to the mall development plan. *See id.* at 539–40.

151. *Id.* at 540.

152. *See id.* After filing suit, Sussex Commons added six categories of documents related to funding, and ten other categories related to the RELC generally. *See id.*

153. *See* *Sussex Commons Assocs. v. Rutgers (Sussex Commons I)*, 6 A.3d 983, 985 (N.J. Sup. Ct. App. Div. 2010), *rev’d*, 46 A.3d 536 (N.J. 2012). The intermediate appellate court’s decision sparked concerns of what might happen to legal clinics in other states. *See, e.g.,* Kaitlin Williams, *College Law Clinics Oppose Record Requests*, MICH. DAILY (Jan. 20, 2011), <http://www.michigandaily.com/content/new-jersey-court-ruling-jeopardizes-university-law-clinics-work> (discussing the decision’s potential impact on the University of Michigan Law School’s Innocence Clinic).

154. *Sussex Commons II*, 46 A.3d at 543 (quoting *In re Exec. Comm’n on Ethical Standards*, 561 A.2d 542, 546 (N.J. 1989)). The court also discussed Rutgers’ “unique status” as a private-turned-public university. *See id.* However, the court also emphasized that “[t]he fact that there is State involvement in education should never be a disadvantage” with respect to maintaining academic freedom. *Id.* at 544 (quoting *Exec. Comm’n*, 561 A.2d at 546).

155. *See id.* at 547.

accountability.¹⁵⁶ Given that purpose, the court held that “[c]linical legal programs . . . do not perform any government functions. They conduct no official government business and do not assist in any aspect of State or local government. Instead, they teach law students how to practice law and represent clients.”¹⁵⁷ The court thus acknowledged and evaluated government accountability and found that protecting legal clinics and academic freedom would not harm that purpose.

The New Jersey PRL also contains an exemption that requires compliance with state and federal law, as well as confidentiality protections, such as attorney-client privilege and the work product doctrine.¹⁵⁸ In contrast, North Carolina’s confidentiality exemption protects only “written communications (and copies thereof) to [the public agency].”¹⁵⁹ The *Poole* court declined to address whether common law attorney-client privilege existed for public records, but appeared to disfavor it.¹⁶⁰ The court further recognized that section 132-1.1 extended attorney-client privilege protection only to “written statements to a public agency, by any attorney serving the

156. *See id.* at 546.

157. *Id.*

158. N.J. STAT. ANN. § 47:1A-9 (West 2003); *see also* Gannett N.J. Partners, LP v. Cnty. of Middlesex, 877 A.2d 330, 337–38 (N.J. Sup. Ct. App. Div. 2005).

159. N.C. GEN. STAT. ANN. § 132-1.1(a) (2011) (West 2013) (emphasis added). The section in its entirety reads as follows:

Confidential Communications. – Public records, as defined in G.S. 132-1, shall not include written communications (and copies thereof) to any public board, council, commission or other governmental body of the State or of any county, municipality or other political subdivision or unit of government, made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. Such written communication and copies thereof shall not be open to public inspection, examination or copying unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body.

Id. Thus, the exemption provides only a small carve-out from the North Carolina PRL.

160. *See* News & Observer Publ’g Co. v. Poole, 330 N.C. 465, 482, 412 S.E.2d 7, 17 (“So far this Court has not recognized an attorney-client privilege for public entity clients, and it is unclear whether the traditional privilege should be so extended. Most courts that have applied such a privilege have not considered its origin but have merely assumed it exists.” (internal citation omitted)).

government agency, made within the scope of the attorney-client relationship.”¹⁶¹ Moreover, courts interpreting the *Poole* decision have held that “the statutory protection for privileged information is more narrow than the traditional common law attorney-client privilege,”¹⁶² and that “the Legislature has not created a work product exception to the [Public Record] Act’s disclosure requirements.”¹⁶³ The Court of Appeals of North Carolina has also explicitly rejected the argument that the General Assembly intended “to incorporate[] statutory and common law privileges into the Public Records Act, including work product immunity.”¹⁶⁴ Thus, as shocking as it sounds, communications between a public university legal clinic and its clients could be subject to public disclosure in North Carolina. Hopefully, North Carolina courts would recognize any such request as an opportunity to revisit the uncertainty expressed in *Poole* and provide common law attorney-client privilege protection to legal clinics and their clients. Several factors favor such a reading.

First, as the *Sussex Commons II* court emphasized, legal clinics “do not perform any government functions. They conduct no official government business and do not assist in any aspect of State or local government. Instead, they *teach* law students how to practice law and *represent* clients.”¹⁶⁵ Second, statutory exemptions already exist that tend towards protecting legal clinic documents.¹⁶⁶ Third, the court should contemplate the potential consequences of not protecting legal clinics. For example, the UNC School of Law has multiple clinics, including the Domestic Violence Representation Project and the Immigration Clinic.¹⁶⁷ Consider the consequences if nothing in North Carolina’s PRL prevented the abusive partners of battered women from requesting all documents related to the domestic violence clinic’s representation of those women. Similarly, what if a police

161. *Id.* at 481–82, 412 S.E.2d at 17.

162. *McCormick v. Hanson Aggregates Se., Inc.*, 164 N.C. App. 459, 469, 596 S.E.2d 431, 437 (2004) (citing *Poole*, 330 N.C. at 482, 412 S.E.2d at 17); *see also* MLC Auto., LLC v. Town of S. Pines, No. 1:05CV1078, 2007 WL 128945, at *7–8 (M.D.N.C. Jan. 11, 2007) (citing *Poole* and *McCormick* with approval, but distinguishing those cases when communications involved the town’s agents and employees).

163. *Womack Newspapers, Inc. v. Town of Kitty Hawk*, 181 N.C. App. 1, 14, 639 S.E.2d 96, 105 (2007).

164. *McCormick*, 164 N.C. App. at 470, 596 S.E.2d at 438 (alteration in original) (internal quotation marks omitted).

165. *Sussex Commons II*, 46 A.3d 536, 546 (N.J. 2012) (emphasis added).

166. *See, e.g.*, N.C. GEN. STAT. § 132-1.9 (2011) (exempting trial preparation materials).

167. *See Clinical Program*, UNIV. OF N.C. SCH. OF LAW, <http://www.law.unc.edu/academics/clinic/default.aspx> (last visited July 14, 2013).

chief with an anti-immigration agenda requested all of the immigration clinic's client lists? The potential for abuse is manifest. Fourth, and most importantly, the attorney-client relationship in a legal clinic exists between the attorney and the legal clinic client, not between the attorney and the public body. This distinction alone should carry sufficient weight for courts to reject a challenge to legal clinic attorney-client privilege. However, North Carolina courts have yet to rule on such a matter. There should be no need to wait—legal clinics deserve clear statutory protection.

D. Compliance Costs

The cost of compliance with public records requests can be substantial, to say the least.¹⁶⁸ One university counsel commented that “seven people fully exercising their rights under the California public records act could shut the university down.”¹⁶⁹ In one case, Charlotte city officials stated that a single request from an opponent to a new transit tax cost the city somewhere between \$40,000 and \$61,000,¹⁷⁰ while the person who filed the request never even collected the documents.¹⁷¹ Furthermore, this request was made on a government entity, not a public university. PRL requests sent to public universities that specifically target academic and sports programs, professors, or

168. See, e.g., HEARN ET AL., *supra* note 10, at 19–20 (describing the costs as “monumental”); Michael K. McLendon & James C. Hearn, *State Law, Policy, and Access to Information: The Case of Mandated Openness in Higher Education*, 112 TEACHERS COLL. REC. 2649, 2656–57 (2010) (discussing how the “weaponizing” of PRLs places substantial costs on public institutions).

The costs could become even more stringent—State Senators Goolsby and Apodaca introduced a bill in February 2013 that would attach criminal penalties to any failures to comply with the North Carolina PRL. See S.B. 125, 2013–2014 Gen. Assemb., Reg. Sess. (N.C. 2013) (proposing an amendment to section 132-9 of the North Carolina General Statutes that would read, “[i]t is a Class 3 misdemeanor to deny access to public records for purposes of inspection and examination or to deny copies of public records”). No action has been taken on the bill since its referral to the Senate Judiciary Committee four days after it was filed. See *Senate Bill 125 Information/History (2013-2014 Session)*, N.C. GEN. ASSEMB., <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=s125&submitButton=Go> (last visited Aug. 8, 2013).

169. See HEARN ET AL., *supra* note 10, at 20.

170. See Steve Harrison & Julia Oliver, *What's the True Price of Public Records?*, CHARLOTTE OBSERVER, Apr. 5, 2009, at B1. The estimate was reached by calculating the amount of time employees had to spend checking their emails for the requested documents. *Id.* The total manpower was estimated at around 1300 hours. *Id.*; see also Justin Kmitch, *Naperville Officials Call \$73,000 in FOIA Requests “Harassment, Abuse”*, DAILY HERALD, <http://www.dailyherald.com/article/20120213/news/702139739/> (last updated Feb. 13, 2012, 6:27 PM) (discussing public records requests made in regards to a potential smart power grid in Naperville, Illinois, which cost the town nearly \$75,000 and required nearly 1500 labor hours for compliance).

171. See Harrison & Oliver, *supra* note 170.

legal clinics not only cost taxpayer dollars, but also waste substantial amounts of time.¹⁷² Time previously spent fulfilling certain PRL requests could otherwise be spent teaching, conducting research, coaching, and helping to fulfill the university's duty to serve the people of the state by assuring all can access the justice system.¹⁷³ Furthermore, a more focused PRL might actually shorten compliance delays by narrowing the focus of PRL requests and lowering the total number of requests.

Moreover, North Carolina state representatives have endeavored to pass legislation that would award attorney fees to organizations that successfully sue to receive public records.¹⁷⁴ The goals of the legislation were (1) to encourage parties to resolve PRL disputes outside of court and (2) to ensure that government workers were properly trained in handling PRL requests.¹⁷⁵ Such legislation, if ever passed, would add yet another layer of costs to universities who seek to protect academic or scholastic activities from overreaching individuals.

Compliance costs are so great that at least one news organization has recognized the immensity of the cost—although this recognition came when a similar information request was lodged with the news organization.¹⁷⁶ During the Eve Carson murder trial, Demario Atwater's attorney subpoenaed local media organizations, requesting "a copy of every single television broadcast or news article that either mentioned Eve Carson, Atwater, or his co-defendant in the state case, Laurence Lovette Jr."¹⁷⁷ The news organizations resisted strongly, arguing that "it would take hours, maybe weeks or even a month to identify the stories and copy them," and that "[the

172. While present research has not uncovered exact costs to universities in complying with PRL information requests, the instances of government compliance costs described in this Comment may provide a fair comparison, if not some context. *See supra* notes 169–71 and accompanying text.

173. To clarify, this Comment does not suggest that protecting public universities will eliminate *all* compliance costs, but rather lower compliance costs.

174. *See* Open Government Act, H.B. 1134, 2009–2010 Gen. Assemb., Reg. Sess. (N.C. 2009); *see also* Editorial, *Public Records*, WINSTON-SALEM J. (Apr. 20, 2009, 1:00 AM), http://www.journalnow.com/opinion/editorials/article_2489d0c1-e5bf-5e8f-8432-dfc2ad2b565a.html (describing the bill, including its origins and likely effects). The bill passed the House, only to stall in the Senate Judiciary Committee. *See House Bill 1134 Information/History* (2009-2010 Session), N.C. GEN. ASSEMB., <http://www.ncleg.net/gascripts/BillLookup/BillLookup.pl?Session=2009&BillID=H1134&submitButton=Go> (last visited May 10, 2013).

175. *See* Editorial, *supra* note 174.

176. *See* Beth Velliquette, *Carson Case Judge Sides with the Media*, HERALD-SUN (Durham, N.C.), Mar. 10, 2010, at C1.

177. *Id.*

organizations] didn't have the staff to do the work, especially in light of the drastic personnel cuts many news organizations" had made in recent years.¹⁷⁸ A federal district court judge quashed the subpoena.¹⁷⁹

Public complaints about PRLs tend to focus on delays and lack of compliance within local municipalities.¹⁸⁰ However, those municipalities have limited resources—resources that could theoretically be consumed entirely by complying with PRL requests, if enough were made. Delays might actually be shortened with a more focused law. Protecting particular areas, such as academic university activities, can free up university resources to comply with other records requests that actually pertain to administrative and financial activities and serve a proper purpose.

E. Hypothetical Problems

As previously discussed, North Carolina's PRL is broad enough that a play drawn up by a coach at halftime could constitute a public record.¹⁸¹ Again, this is hyperbole—practical limitations alone would prevent requesting the records with any timeliness.¹⁸² But a few other

178. *Id.* (“ ‘They don't even have enough resources to do what they're trying to do,[]’ said Amanda Martin, who represented 14 news organizations, including The Herald-Sun, The News & Observer, The Daily Tar Heel and WRAL.”).

179. See Kelly Gardner, *Judge Quashes Media Subpoenas in Carson Case*, WRAL.COM (Mar. 10, 2010), <http://www.wral.com/news/local/story/7206742/>.

180. See, e.g., Chelsey Dulaney, N.C., S.C. Flunk Public Records, CHARLOTTE OBSERVER, July 24, 2012, at B1 (reporting on the “failing” grade of North Carolina’s compliance with public records requests); Editorial, *It’s Dark—Our View: This State Earns F for Public-Records Access*, FAYETTEVILLE OBSERVER, July 29, 2012, at 16A (arguing for an “ombudsman” that can oversee the administration of the PRL and “mediate disputes” for regular citizens); Bill Moss, Editorial, *Davis Case Shows Weakness in NC Public Records Law*, HENDERSONVILLE LIGHTNING (July 29, 2012), <http://www.hendersonvilleglightning.com/news/533-lightning-editorial-davis-case-shows-weakness-in-nc-public-records-law.html> (arguing that personnel records should be less protected).

181. See *supra* notes 1–7 and accompanying text.

182. The process for making a public records request is relatively straightforward. Typically, the requesting person need only send a letter to the public agency listing the documents requested (usually by describing the information contained therein) and indicating that the request is for public records. A simple example follows:

Chief Gantos,

Thank you for taking the time to talk to me today and provide me with the front pages of the Incident/Investigation Report regarding an arrest made by an officer with the Elon Campus Police Department

I would like to formally request that Elon Campus Police provide Phoenix14News with a copy of “Incident Report 2010–0017” in its entirety. The document that I am requesting qualifies as a public record under North Carolina law because it reports the following:

hypothetical examples illustrate just how severely laws intended to assure government accountability could be stretched to harass public universities.

First, along the same lines as the halftime play, students or coaches at rival schools might request football playbooks, or any records related to scouting and game preparation. In his decision requiring that Coach Davis turn over his cellphone records, Judge Manning stated that government officials included public university officials and coaches.¹⁸³ Given the incredibly broad scope of North Carolina's definition of "public record," it is difficult to see how materials prepared by a public university football coach (who, according to Judge Manning, is a government official) would not be included in the definition of public records. Furthermore, the UNC

1. "The time; date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency."

2. "The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted."

3. "The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest."

North Carolina's public records law, Chapter 132 of the General Statutes, provides for public inspection and copying of most records made or received by state or local governments and their subdivisions, regardless of the physical form of the record. If you contend that the document I have asked for is not a public record, please advise me of the specific authority for that position.

The Elon Campus Police Department is subject to the Public Records Law because Chapter 132-1.4(b)(3) defines "public law enforcement agencies" as all law enforcement agencies commissioned by the state attorney general. Thus, the law covers police departments at private colleges and universities as well as those at state colleges and universities.

Thank you for your time and attention to this matter. Hopefully we will be able to resolve this matter and find a way to guarantee full access to these public records in the future. I look forward to hearing from you . . .

Nick Ochsner

Phoenix 14News

Ochsner v. Elon Univ., __ N.C. App. __, __, 725 S.E.2d 914, 916 (2012), *aff'd by an equally divided court*, __ N.C. __, 737 S.E.2d 737 (2013). Afterwards, the agency may grant or deny the request and state the grounds (e.g., statutory exemptions) for doing so. Ochsner provides an example of what can happen when an agency denies the request: litigation.

183. See Order of Aug. 22, 2012, at 1-2, News & Observer Publ'g Co. v. Baddour, No. 10 CV 001941 (N.C. Sup. Ct. 2012) (ordering Butch Davis to provide "plaintiffs those portions of his personal cell phone billing statements that reflect phone usage related to his duties and responsibilities as Head Football Coach at UNC-CH"); Dan Kane, *Media Lawyers May See Cell Data*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 9, 2012, at 1A.

football program films its practices—that film would also be a public record under the North Carolina PRL.¹⁸⁴ Making such requests would seem to be an especially apt strategy for students, fans, or coaches at private universities, as they generally would be under no reciprocal threat of disclosure.¹⁸⁵

Second, given the scope of documents covered in the PRL, public records would also include academic exams created by professors. This may seem farfetched, but a majority of states have specifically exempted academic exams from public disclosure.¹⁸⁶ The broad scope of the North Carolina PRL would suggest that nothing prevents a public university in North Carolina from being forced to disclose academic exams.¹⁸⁷ Furthermore, while a federal statute that protects personal information would appear to protect individual *student* tests—as FERPA does with student education records—even those records may be subject to disclosure under North Carolina’s PRL.¹⁸⁸

184. See N.C. GEN. STAT. § 132-1 (2011) (including “films” in the definition of “public record” and stating that any public record “made or received” by a “public officer or official” is “the property of the people”).

185. Private institutions, however, may be subject to PRLs, such as the Freedom of Information Act, if they have certain characteristics. For example, in Arkansas, private institutions are subject to the Arkansas PRL if they “(1) receive public funds, (2) engage in activities that are of public concern, and (3) carry on work that is intertwined with that of government bodies.” See Alexander Justiss, Comment, *State Government—the Arkansas Freedom of Information Act—Houston, We Have A Problem: A Coach and a Comptroller Illustrate the Repercussions of Releasing Electronic Information Through the Arkansas Freedom of Information Act*, 31 U. ARK. LITTLE ROCK L. REV. 159, 163–64 (2008) (footnote omitted) (citing JOHN J. WATKINS & RICHARD J. PELTZ, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 50 (4th ed. 2004)).

In North Carolina, “[t]he nature of the relationship between a corporate entity and the government is the dispositive factor in determining whether the corporate entity is governed by the Public Records Law.” *Chatfield v. Wilmington Hous. Fin. & Dev., Inc.*, 166 N.C. App. 703, 707–08, 603 S.E.2d 837, 840 (2004) (citing *News & Observer Publ’g Co. v. Wake Cnty. Hosp. Sys.*, 55 N.C. App. 1, 11, 284 S.E.2d 542, 548 (1981)). The rationale behind the *Wake County Hospital System* decision indicates that a private university in North Carolina, such as Duke University, would not be subject to North Carolina’s PRL. See *Wake Cnty. Hosp. Sys.*, 55 N.C. App. at 11, 284 S.E.2d at 548–49.

186. Generally, this only includes the pre-testing versions of the exams (i.e., before they are administered to students) and does not include the actual student-completed tests. See *infra* Part III.B.3.

187. See *supra* Part I.B–C.

188. See *supra* notes 94–101 and accompanying text; see also *Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 487 (Iowa 2012) (“FERPA regulations allow for the possibility that an educational institution cannot comply with the Act or this part due to a conflict with State or local law. One could argue that the mere recognition of this possibility in the regulations indicates that FERPA does not supersede state law. On the other hand, other courts have given direct effect to FERPA’s provisions, treating them as positive law with binding force on state authorities.” (footnote omitted) (citations omitted) (internal quotation marks omitted)). The *Press-Citizen* court ultimately avoided deciding the preemption issue because the Iowa PRL contained a provision that gave priority to

These two simple hypotheticals illustrate the type of abuse that could occur under a broad PRL with limited exemptions, beyond the very real damage already discussed. One would imagine that North Carolina courts would have to reject these requests, but on what grounds? Perhaps such a case would force courts to find some creative means to fit these types of abuses into existing exemptions to avoid crafting a judicial exemption. Or perhaps the courts will be forced to leave such work to the legislature. Most, if not all of these problems—with the exception of compliance costs—can be remedied with tailored exemptions.¹⁸⁹

III. EXEMPTIONS: COMPARING NORTH CAROLINA TO THE OTHER FORTY-NINE STATES

This Part lays out the public university-related exemptions in the other forty-nine states and then suggests statutory exemptions that North Carolina could adopt. The primary purpose of a PRL is to keep the government accountable to the people.¹⁹⁰ However, that interest must be weighed against privacy interests, potential for abuse, and other vital rights such as freedom of speech. Universities are different from governments. They can exist independently of governments, as do many private universities, and serve the public interest by creating a marketplace of ideas and by fomenting education and research. To those ends, academic freedom and freedom of speech are absolutely essential.¹⁹¹ Government can act to enhance those ends via funding and legislation that protects and encourages the work conducted at universities. Still, the primary connection between government and public universities is tax-dollar funding.¹⁹² Consequentially, the

FERPA. *See Press-Citizen*, 817 N.W.2d at 487–88; *see also* IOWA CODE ANN. § 22.9 (West 2010).

189. For example, twenty-nine states already exempt academic exams and twenty-five exempt academic research. *See infra* Table I (“Academic Exams” and “Academic Research” columns). Thirty-four states provide some sort of student personal information protection that would go towards satisfying the demands of FERPA. *See infra* Table I. Finally, while the football playbook example is hyperbolic, a specific exemption for coaching notes, plays, and related documents, could allay any concerns about disclosing such records.

190. *See supra* note 10 and accompanying text.

191. *See supra* notes 12–13 (discussing principles of academic freedom), 102–04 (discussing the origins of academic freedom) and accompanying text.

192. *See, e.g.,* Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749, 751 (2010) (“Government regulation of higher education . . . covers a wide range of activities Most [of these regulations] can be divided into four categories: laws applied as a condition of funding that specifically promote and protect the government’s interests and objectives in the research or other activities that it funds; laws and regulations that apply as a condition

primary purpose of a PRL as it relates to state-supported universities is accountability of tax dollar spending.¹⁹³ The balance in evaluating how PRLs should apply to public universities thus becomes one between academic freedom and freedom of speech on the one hand, and tax dollar accountability on the other.

Given the abuses that are already occurring—the attacks on research, free speech, and legal clinics that have little to nothing to do with tax dollar accountability and everything to do with academic freedom and freedom of speech—universities deserve general protection from PRLs with statutory grants of access to specific areas of documents and records that pertain to funding and accountability of administration. In doing so, the legislature could also give the courts some power to allow access to documents that a university might improperly hide behind the rule of general protection. This would assuage concerns about hiding scandals or corruption.¹⁹⁴ However, such a solution might be impossible in practice due to strong public backlash against any perceived weakening of PRLs.¹⁹⁵ Still, the legislature has other options in seeking a solution.

Exemptions to a PRL develop as a legislature or court negotiates the necessary balance between a PRL's purpose and its potential negative side effects. Some states have included broad PRL language allowing judicial exemptions where necessary to protect public interests.¹⁹⁶ This language equips courts with the flexibility to prevent

of funding but that promote a specific federal or public policy agenda separate from the direct purpose of the funding; laws of general application that apply to higher education institutions along with other entities, though the application of the laws to colleges and universities may be unique; and laws that regulate academic institutions based on their not-for-profit status." (footnote omitted)). The article then goes on to discuss each of those categories at greater length. *See id.* at 752–58.

193. *See* Laura A. Jeltama, Comment, *Legislators in the Classroom: Why State Legislatures Cannot Decide Higher Education Curricula*, 54 AM. U. L. REV. 215, 221–22 (2004); 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, 677 (2000).

194. *See supra* notes 2–3 and accompanying text (providing the NCAA investigation into improper benefits in UNC Chapel Hill's football program as a possible example of such a scandal).

195. *See, e.g.,* Dulaney, *supra* note 180 (criticizing the lax enforcement of North Carolina's PRL); Moss, *supra* note 180 (criticizing the personnel records exemption as an "overly high . . . wall"); *see also Our View: The Missing Teeth in Public Records Laws*, LINCOLN TIMES-NEWS, <http://www.lincolntimesnews.com/?p=52778> (last visited May 6, 2013) (suggesting that PRLs need stronger enforcement penalties, including "[c]riminal prosecution to force rapid compliance" and "[a]utomatic loss of job or elective office" among others).

196. *See, e.g.,* ALA. CODE § 36-12-40 (LexisNexis 2001 & Supp. 2011) (exempting "records the disclosure of which would otherwise be detrimental to the best interests of

PRL abuse. However, the Supreme Court of North Carolina has flatly held that judicial exemptions are barred.¹⁹⁷ Thus, the only available route for preventing the potential negative uses of North Carolina's PRL is for the legislature to craft a statutory exemption. The legislature should take action to protect academic areas in particular, while leaving administrative and financial functions subject to public disclosure. This division accommodates academic activities while also conforming to principles of government accountability. The suggestions in this section draw from the fifty-state survey contained in Table I below.¹⁹⁸

the public"); CAL. GOV'T CODE § 6255 (West 2008) (stating that public records can be withheld if "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record"); COLO. REV. STAT. ANN. § 24-72-204(6)(a) (West 2013) (stating that public records can be withheld if disclosure "would do substantial injury to the public interest"); *Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 537 (Ariz. 1998) (en banc) ("This public right of inspection may also be curtailed in the interest of confidentiality, privacy, or the best interests of the state. If these interests outweigh the public's right of inspection, the State can properly refuse inspection." (citation omitted) (internal quotation marks omitted)). *But see* OR. REV. STAT. ANN. § 192.501 (West 2013) (providing a balancing test that weighs *against* providing exemptions by looking at whether the public interest in disclosure overcomes a statutory exemption); *Bd. of Regents of the Regency Univ. Sys. v. Reynard*, 686 N.E.2d 1222, 1228 (Ill. App. Ct. 1997) ("There is nothing in either [of the Illinois PRLs] that suggests a body determined to be public may be exempt from the requirements of the statutes simply because it may be a burden to comply."). Most balancing test exemptions weigh the damage done to a privacy interest against the public's interest in disclosure. *See, e.g.*, MONT. CONST. art. II, § 9; HAW. REV. STAT. ANN. § 92F-13(1) (LexisNexis 2012); KAN. STAT. ANN. § 45-221(a)(30) (West 2013); KY. REV. STAT. ANN. § 61.878(1)(a) (West 2013); MASS. ANN. LAWS ch. 214, § 1B (LexisNexis 2011); MICH. COMP. LAWS ANN. § 15.243(1)(a) (West 2004 & Supp. 2012); N.Y. PUB. OFF. LAW § 87(2)(b) (McKinney 2013); *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 675 (Tex. 1976) ("[T]he task of balancing the public's right of access to government records against potential abuses of the right has been made by the Legislature.").

197. *See* *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 484, 412 S.E.2d 7, 18 (1992); *see also* HUGH STEVENS, C. AMANDA MARTIN, & MICHAEL J. TADYCH, REPORTERS COMM. FOR FREEDOM OF THE PRESS, NORTH CAROLINA – OPEN GOVERNMENT GUIDE, available at <http://www.rcfp.org/north-carolina-open-government-guide/ii-exemptions-and-other-legal-limitations/c-court-derived-exclu> ("North Carolina has no court-derived exclusions or privileges, and the North Carolina appellate courts have held that there can be none. The North Carolina Court of Appeals has held that the only exemptions to the Public Records Law are those that are expressly provided by statute."). *But see* S.E.T.A. UNC-CH v. *Huffines*, 101 N.C. App. 292, 296, 399 S.E.2d 340, 343 (1991) (holding that, while there are no judicial exemptions, personal information should be redacted from the requested documents).

198. *See infra* Table I. Table II focuses more specifically on privacy protections—those states that provide protection either via FERPA protection, personal information protection, a judicial balancing test of privacy interests, or some combination of the three. *See infra* Table II.

Table I is divided into seven categories of exemptions, with an additional column denoting states that have a balancing test for judicial exemptions.¹⁹⁹ While only six states have true balancing tests, forty-three states have at least some protection for public universities beyond a balancing test.²⁰⁰ Of those forty-three states, thirty-three have two or more exemptions.²⁰¹ Three of the states that have no explicit protection for public university documents do allow judicially-created exemptions via public interest balancing tests.²⁰² The seven categories for statutory exemptions are as follows:

- (1) Federal Law and Family Educational Rights and Privacy Act ("FERPA") Protection;
- (2) Personal Information Protection;
- (3) Academic Exam Protection;
- (4) Academic Research Protection;
- (5) Fundraising Protection;²⁰³

199. See *infra* Table I.

200. See *infra* Table I. By some protection, this means that the state has enacted at least one of the seven main exemptions contained in Table I.

201. See *infra* Table I.

202. See ALA. CODE § 36-12-40 (LexisNexis 2001 & Supp. 2011); Scottsdale Unified Sch. Dist. v. KPNX Broad. Co., 955 P.2d 534, 537 (Ariz. 1998) (en banc); City of Las Cruces v. Pub. Emp. Lab. Rel. Bd., 917 P.2d 451, 454 (N.M. 1996); *infra* Table I (Alabama, Arizona, and New Mexico).

203. Thirteen states provide some sort of protection for fundraising information. See *infra* Table I (Georgia, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, and Virginia). Most of these exemptions involve protecting the information of donors and prospective donors who donate to public universities or institutes of higher education. See, e.g., N.J. STAT. ANN. § 47:1A-1.1 (West 2003 & Supp. 2012) ("A government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privileged and confidential: . . . records of pursuit of charitable contributions or records containing the identity of a donor of a gift . . ."); N.D. CENT. CODE § 44-04-18.15 (2007 & Supp. 2011) (exempting "[a]ny donor or prospective donor [personal information] received or retained by a board of higher education or university system officer or employee"); OKLA. STAT. ANN. tit. 51, § 24A.16a (West 2008) ("Institutions or agencies of The Oklahoma State System of Higher Education may keep confidential all information pertaining to donors and prospective donors to or for the benefit of the institutions or agencies."). The protection for personal information is typically limited. See, e.g., NEV. REV. STAT. ANN. § 388.750(2) (LexisNexis 2008 & Supp. 2011) (protecting only the "names of the contributors to the [educational] foundation [and] the amount of their contributions"). New Jersey provides similar protection for identifying information, but only "if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication." N.J. STAT. ANN. § 47:1A-1.1. Ohio takes the opposite approach, protecting donor profile records "except [for] the names and reported addresses

(6) President Search Protection;²⁰⁴ and

(7) Miscellaneous Protections.

of the actual donors and the date, amount, and conditions of the actual donation.” OHIO REV. CODE ANN. § 149.43(A)(6) (LexisNexis 2007 & Supp. 2012). North Dakota provides an example of more comprehensive protection. *See* N.D. CENT. CODE § 44-04-18.15 (protecting the personal information of “[a]ny donor or prospective donor . . . received or retained by” a public university).

As with other exemptions, regardless of the protection provided, the statute should be clear and should consider potential abuse. For example, losing one’s privacy is a clear cost, and identity disclosure may discourage some donors from contributing to a public university.

204. Seven states provide protections for records related to searching for a new university president. *See infra* Table I (Georgia, Michigan, North Dakota, Oregon, South Carolina, Texas, and Wisconsin). Despite the small number, these exemptions are just as varied as any other. For example, Georgia has a very specific exemption, protecting the search process for “persons applying for or under consideration for employment or appointment as executive head of an agency or of a unit of the University System of Georgia,” but then providing for a window of “at least 14 calendar days . . . or five business days prior to the meeting at which final action or vote is to be taken on the position” where “all documents concerning as many as three” of the top candidates will be made available. *See* GA. CODE ANN. § 50-18-72(a)(11) (West 2013). The particularities of the documents, and when or when not to release them, continue in great detail. *See id.* One clause worth noting is that “[p]rior to the release of these documents, an agency may allow such a person to decline being considered further for the position rather than have documents pertaining to such person released.” *Id.* If this occurs, then “the documents of the next most qualified person under consideration” are to be released. *Id.* This clause implicitly recognizes the privacy cost imposed on candidates for such executive positions.

Other statutes are far more broad. Oregon has a very expansive and general exemption, simply protecting “[r]ecords of Oregon Health and Science University regarding candidates for the position of president of the university.” *See* OR. REV. STAT. ANN. § 192.502(22) (West 2013). Broader still is the Wisconsin statute, which protects records of any “‘final candidate’ . . . who is seriously considered for appointment or whose name is certified for appointment and whose name is submitted for final consideration to an authority for appointment to any state position,” without regard to whether the person is being considered for a university position or not. *See* WIS. STAT. ANN. § 19.36(7)(a) (West 2003 & Supp. 2012). As with the protection for donors, this exception appears to recognize the additional privacy cost imposed on those being considered for employment at a public institution. *See id.* § 19.36(7)(b) (“Every applicant for a position with any authority may indicate in writing to the authority that the applicant does not wish the authority to reveal his or her identity.”). In most exemptions, however, the privacy protection often falls off once the university or institution narrows the field to only a few candidates. *See, e.g.,* GA. CODE ANN. § 50-18-72(a)(11). This drop-off in protection makes sense: if a candidate has not withdrawn himself from consideration for a public university leadership position, he or she should become accustomed to the additional public scrutiny that accompanies the position. Furthermore, management positions are typically administrative, not educational. PRLs are meant to focus on government accountability, and public university administrative positions would appear to fall within that scope. *See supra* note 10 and accompanying text. In contrast, professors deserve greater protection because of their need for academic freedom and because they generally lack any significant administrative responsibilities. *See supra* Part II.B; *see also supra* notes 12–14 and accompanying text (discussing, briefly, higher institutions’ need for heightened protection from PRLs).

A. *Balancing Tests: Judicial Exemptions*

Fourteen states allow some form of a judicial exemption in the form of a balancing test.²⁰⁵ However, most of these exemptions are limited to evaluating whether a privacy interest outweighs (or substantially outweighs) the public interest in disclosure.²⁰⁶ The remaining balancing tests typically look at the damage that would be done to the public interest if the records were disclosed (i.e., weighing the public interest in disclosure against the harm such disclosure may have on public interests).²⁰⁷ The flexibility provided by these options—judicial exemptions and the more powerful balancing test exemption—may be seen by some as conferring too much discretion on the judiciary.²⁰⁸ To guard against judicial activism, some states have specifically barred judicial exemptions.²⁰⁹ These tests, as discussed before, would provide judges with some flexibility when faced with public records requests for such things as football playbooks or for requests that appear to be mere harassment of research scientists.

While the Supreme Court of North Carolina does not necessarily need to overturn its decision in *Poole*, the legislature could provide

205. See *infra* Table I (Alabama, Arizona, California, Georgia, Hawaii, Kentucky, Massachusetts, Michigan, Montana, Nevada, New Mexico, New York, Texas, and Wyoming).

206. See *infra* Table I (“Balancing test” column, “Privacy” entries).

207. See *infra* Table I (“Balancing test” column, “Yes” entries). These tests, similar to the privacy interest tests, can require *substantial* injury to the public interest. See, e.g., COLO. REV. STAT. ANN. § 24-72-204(6)(a) (West 2013).

208. Cf. Peter Margulies, *Noncitizens’ Remedies Lost?: Accountability for Overreaching in Immigration Enforcement*, 6 FLA. INT’L U. L. REV. 319, 338 (2011) (discussing the pitfalls of an overbroad judicial interpretation of a “discretionary function” exception to the Federal Tort Claims Act); Jesse N. Panoff, *Rescuing Expedited Discovery from the Commodity Futures Trading Commission & Returning It to Fed. R. Civ. P. 26(d)(1): Using A Doctrine’s Forgotten History to Achieve Legitimacy*, 42 GOLDEN GATE U. L. REV. 393, 410 (2012) (discussing the dangers of courts interpreting procedural exceptions too broadly); Thomas C. Riney & Christopher D. Wolek, *Hippocrates Enters the New Millennium—Texas Medical Privileges in the Year 2000*, 41 S. TEX. L. REV. 315, 318 (2000) (noting that the Texas Supreme Court deleted certain procedural exceptions “because lower courts had construed them too broadly”); Karina Fox, Note, *A Weighty Issue: Will Pharmacists Survive the Fen-Phen Feeding Frenzy? Kohl v. American Home Products Corporation and a Pharmacist’s Duty to Warn of the Dangers of Prescription Drugs*, 2001 BYU L. REV. 1349, 1377–78 (arguing that, in creating its own exception, the court in question created further problems).

209. See, e.g., *Wait v. Fla. Power & Light Co.*, 372 So. 2d 420, 425 (Fla. 1979) (barring judicial exemptions in Florida); *Bd. of Regents of the Regency Univ. Sys. v. Reynard*, 686 N.E.2d 1222, 1228 (Ill. App. Ct. 1997) (“There is nothing in either [of the Illinois PRLs] that suggests a body determined to be public may be exempt from the requirements of the statutes simply because it may be a burden to comply.”); *Hovet v. Hebron Pub. Sch. Dist.*, 419 N.W.2d 189, 191 (N.D. 1988) (barring judicial exemptions in North Dakota).

courts with some power as it pertains to protecting public universities. For example, the legislature could create a balancing test that enables courts to evaluate records requests,²¹⁰ perhaps limiting such discretion only to certain cases, such as those involving public universities. The legislature may worry about courts going too far with this power,²¹¹ but the General Assembly can rein in the courts through statute where necessary. Still, given North Carolina's history of rejecting judicial exemptions, this route seems very unlikely.²¹²

B. Legislative Solutions

Legislative exemptions provide the best route to solve the problems with North Carolina's PRL. Given that North Carolina has only two very limited public university-related exemptions,²¹³ the legislature has work to do to keep pace with the rest of the country. North Carolina has an opportunity to learn from what other states have already done, allowing the General Assembly to synthesize and craft model statutes for other states. Exemptions should be clear, thorough, and unequivocal. Regardless of which exemptions, if any, North Carolina chooses providing no protection would leave public universities susceptible to abuse and harassment. Essentially, *academic* areas should be protected, while administrative and financial decision-making should be subject to public disclosure, conforming with principles of *government* accountability and transparency.²¹⁴

This Part now examines five categories of statutory exemptions. The first category covers student personal information, but can be found in a number of different exemptions. Thirty-six states have some protection for student personal information through (1) federal statute and FERPA-specific exemptions, (2) stand-alone state statutes, or (3) judicial privacy-interest balancing tests.²¹⁵

210. See *supra* note 196 and accompanying text.

211. See generally Green, *supra* note 87 (discussing the history, concerns, and controversial examples of judicial activism).

212. See discussion *supra* notes 43–55 and accompanying text.

213. See N.C. GEN. STAT. § 116-222 (2011); N.C. GEN. STAT. ANN. § 132-1.1(f) (West 2013); see also *supra* notes 65–67 and accompanying text (discussing the two existing university exemptions).

214. For a discussion of the distinction between government, university administration, and university faculty within the context of academic freedom, see generally Frederick Schauer, *The Permutations of Academic Freedom*, 65 ARK. L. REV. 193 (2012).

215. See *infra* Table II.

1. Federal Law or FERPA Protection

The federal law or FERPA exemption typically mandates protection for public documents that are protected by federal law²¹⁶ or records the state must keep confidential “to secure or retain federal assistance.”²¹⁷ While this exemption seems straightforward and perhaps superfluous, not including such an exemption provides an easy loophole through which public universities can lose federal funding.²¹⁸

An example of a typical federal exemption is found in the Colorado statutes. That exemption excepts disclosing public records where “[s]uch inspection would be contrary to any federal statute or regulation issued thereunder having the force and effect of law.”²¹⁹ This does not explicitly provide protection for FERPA documents, but implies such protection, as FERPA is a federal statute that conditions federal funding on maintaining the confidentiality of student educational records.²²⁰ A more ambiguous example is found in Rhode Island, where an exemption protects “[p]ersonnel and other personal individually-identifiable records otherwise deemed confidential by federal or state law or regulation.”²²¹

The Alaska PRL presents a more preferable model, exempting both “records required to be kept confidential by a federal law or regulation or by state law,”²²² as well as “records [that] are required to be kept confidential under 20 U.S.C. 1232g and the regulations adopted under 20 U.S.C. 1232g in order to secure or retain federal assistance.”²²³ Alaska’s statute not only provides protection when required by federal law, but also specifically references FERPA.²²⁴ Given the lack of judicial exemptions in North Carolina, promulgating an exemption such as Alaska’s would be unequivocal in protecting student records. Furthermore, a clear exemption requiring compliance with FERPA would prevent any potential loss of federal funds.²²⁵

216. See, e.g., 5 ILL. COMP. STAT. ANN. 140/7(1)(a) (West 2005 & Supp. 2012) (protecting “[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law”).

217. See ALASKA STAT. ANN. § 40.25.120(a)(5) (West 2013).

218. See *supra* notes 94–101 and accompanying text.

219. COLO. REV. STAT. ANN. § 24-72-204(1)(b) (West 2013).

220. See *supra* notes 96–98.

221. See R.I. GEN. LAWS ANN. § 38-2-2(4)(A)(I)(b) (West 2013).

222. ALASKA STAT. § 40.25.120(a)(4) (2010).

223. *Id.* § 40.25.120(a)(5).

224. *Id.*

225. See *supra* notes 94–101 and accompanying text.

2. Personal Information Protection

Twenty-nine states currently have a federal law compliance exemption (and thirteen of those have both federal law protection *and* personal information protection).²²⁶ While that leaves twenty-one states without any apparent FERPA protection, another five states have separate protection for personal student information, and two more have judicial exemptions that specifically look to privacy interests.²²⁷ Such protection should also satisfy the demands of FERPA. North Carolina has no explicit protection for personal information. The two public university-related exemptions from North Carolina, noted above, only provide personal information protection in an admissions context and protection for higher education institutions' liability insurance plans.²²⁸ Student records are not otherwise protected in North Carolina.

Connecticut has perhaps the most specific personal information protection.²²⁹ Connecticut's personal information exemption refers specifically to students and precludes disclosure of the "[n]ames or addresses of students enrolled in any public . . . college without the consent of each student whose name or address is to be disclosed who is eighteen years of age or older."²³⁰ Specificity is important, but so is coverage. North Carolina should not limit protection to students who happen to be older than eighteen when they start college. Nor should protection be limited only to the names and addresses of those students—at the very least, a PRL exemption should also protect email addresses and phone numbers.

More ambiguous is Delaware's exception, which includes "[a]ny personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy."²³¹ While this includes an implicit FERPA protection, "pupil" appears to typically refer to students under the age of eighteen.²³² North

226. See *infra* Tables I & II.

227. See *infra* Tables I & II.

228. See N.C. GEN. STAT. § 116-222 (2011); N.C. GEN. STAT. ANN. § 132-1.1(f) (West 2013); see also *supra* notes 65–67 and accompanying text (discussing the two existing university exemptions).

229. CONN. GEN. STAT. ANN. § 1-210(b)(11) (West 2013). Connecticut also has an explicit protection for records protected by FERPA. See *id.* § 1-210(b)(17).

230. *Id.* § 1-210(b)(11).

231. See DEL. CODE ANN. tit. 29, § 10002(l)(1) (2003 & Supp. 2012).

232. See, e.g., CAL. EDUC. CODE § 49060 (West 2006) (discussing "pupil records" and explicitly excluding "public community colleges" and "other public or private institutions of higher education"—the section is also codified under Title 2, which covers Elementary

Carolina should again ensure clarity in its exemptions by clearly delineating that the protection applies to students of higher education as well. The positive takeaway from Delaware's statute is that it provides broader protection, covering the entire file instead of limited personal information.

Other broader and more typical examples include the Illinois statute, which exempts "[p]rivate information,"²³³ and West Virginia's, which exempts "[i]nformation of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy."²³⁴ While a general privacy exemption is helpful, given the role of *public* universities, such exemptions should be explicitly worded to protect students.

If the General Assembly chooses to pass a stand-alone privacy statute, the language should be clear, listing the specific personal information that is protected. Connecticut law exhibits this specificity, though its statute is limited to the "[n]ames [and] addresses of students."²³⁵ The General Assembly might consider protecting additional information, such as email addresses, phone numbers, parental contact information, and so on. Finally, the General Assembly could include statutory language specifying that protection should not be limited to those categories, but should also extend to the release of any other information that would constitute an unwarranted or unreasonable invasion of privacy.

3. Academic Exam Protection

Thirty states protect exam questions from PRL disclosure, and often scoring keys as well.²³⁶ The mere need for this exemption shows both the broad reach that PRLs have as well as the potential for abuse. These exemptions are generally straightforward. California's is typical, exempting "[t]est questions, scoring keys, and other examination data used to administer a[n] ... academic

and Secondary Education, not higher education (emphasis added)); OHIO REV. CODE ANN. § 3319.321(H) (West 2009) (discussing the pupil's "principal," and "parent, guardian, or custodian"—terms typically used to discuss minors—in the context of FERPA and disclosure of disciplinary records); WIS. STAT. ANN. § 118.125 (West 2004 & Supp. 2012) (discussing the pupil's "parent, legal guardian or guardian ad litem" as well as the "school board," which are terms typically used to discuss minors).

233. See 5 ILL. COMP. STAT. ANN. 140/7(1)(b) (West 2005 & Supp. 2012).

234. See W. VA. CODE ANN. § 29B-1-4(a)(2) (LexisNexis 2012).

235. CONN. GEN. STAT. ANN. § 1-210(b)(11) (West 2013).

236. See *infra* Table I ("Academic Exams" column).

examination.”²³⁷ Other exemptions provide some qualified language. For example, Indiana’s protects exams only “before the examination is given or if it is to be given again.”²³⁸ An academic exam exemption seems both the most straightforward and the most obvious—there is no clear reason for not exempting academic exams. North Carolina should adopt such an exemption.²³⁹

4. Academic Research Protection

A trade secrets exemption alone will not protect academic research.²⁴⁰ As such, twenty-five states have provided for some further protection for academic research.²⁴¹ This is perhaps the most vital protection to prevent the abuses discussed above. This exemption also has the widest scope in terms of the type of protection provided by each state.

Some states, such as Alaska, provide protection explicitly for their state university systems.²⁴² A North Carolina academic research exemption need not expressly mention the specific state university system, but should clearly apply to all public institutions of higher education.

Alaska’s protection is also noteworthy in that it also requires the provision of certain information, most notably the source of funding for each project.²⁴³ Such conditions keep with the spirit of PRLs by

237. CAL. GOV’T CODE § 6254(g) (West 2008 & Supp. 2013).

238. IND. CODE ANN. § 5-14-3-4(b)(3) (West 2013).

239. Imagining a circumstance where an academic exam would relate to government accountability would require a stretch of the imagination, to say the least. Still, the recent scandal involving the UNC Afro-American Studies Department shows that concerned citizens (or rival fans) might have an interest in ensuring that the student-athletes in those classes are being tested with some degree of rigor. See Dan Kane, *UNC Report Finds Academic Fraud*, NEWS & OBSERVER (Raleigh, N.C.), May 5, 2012, at 1A; Gregg Doyel, *North Carolina Cheated and Prospered, Now It’s Time for Reckoning*, CBS SPORTS (Aug. 14, 2012, 2:00 PM), <http://www.cbssports.com/collegefootball/story/19794788/north-carolina-cheated-and-prospered-and-now-its-time-for-the-reckoning>.

240. See *supra* notes 68–73 and accompanying text.

241. See *infra* Table I (“Academic Research” column).

242. See ALASKA STAT. § 14.40.453 (2010) (“The public records inspection requirements . . . do not apply to writings or records that consist of intellectual property or proprietary information received, generated, learned, or discovered during research conducted by the University of Alaska or its agents or employees until publically released, copyrighted, or patented, or until the research is terminated, except that the university shall make available the title and a description of all research projects, the name of the researcher, and the amount and source of funding provided for each project.”).

243. See *id.*

providing accountability for tax dollars.²⁴⁴ In that spirit, such a condition is both reasonable and even desirable in a potential North Carolina exemption.

New Jersey provides another example that is comprehensive in its protection while also still requiring disclosure of certain information. That exemption generally excludes academic research except for those parts that “give[] the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available”²⁴⁵ The New Jersey statute closely resembles the Alaska statute, but adds a unique piece of information: disclosure of the date of completion.²⁴⁶ Disclosure of an estimated date of completion seems a reasonable addition as it would indicate when the full report might be available to the public. However, universities and professors may be hesitant to self-impose any deadlines on variable research, no matter how reasonable those deadlines may be. Most research projects have some element of uncertainty concerning when they will finish. As such, this Comment recommends against adding such a requirement.

Other exemptions are more ambiguous and may require creative readings to fit a university context. For example, Colorado exempts “[t]he specific details of bona fide research projects being conducted by a state institution, including, without limitation, research projects undertaken by staff or service agencies of the general assembly or the office of the governor in connection with pending or anticipated legislation.”²⁴⁷ A university qualifies as a state institution, but does the phrase “in connection with pending or anticipated legislation” apply to the entire exemption, or only to what follows the word “including”? Again, carefully crafting the exemption is essential to protecting public universities.

A more explicit example is found in Georgia’s statute, which exempts two categories of research data. The first category is reminiscent of a general trade secret exemption and includes “information of a proprietary nature, produced or collected by or for faculty or staff of state institutions of higher learning . . . where such data, records, or information has not been publicly released,

244. Tax dollars might fund academic research either through direct funding (e.g., government grants) or by indirectly by allowing the university to allocate private funds that would otherwise be used for general university administration to research instead.

245. N.J. STAT. ANN. § 47:1A-1.1 (West 2003 & Supp. 2012).

246. *See id.*

247. COLO. REV. STAT. ANN. § 24-72-204(2)(a)(III) (West 2013).

published, copyrighted, or patented.”²⁴⁸ The qualification that the information has not yet “been publicly released, published, copyrighted, or patented” is common throughout other states’ exemptions and makes sense: once one of those specified actions has occurred, the information no longer needs protecting because it is then in the public sphere. However, the question remains as to how much information should be released before that point—would earlier drafts, initial notes, and every other scrap of information ever produced by the professor and research assistants on the topic be included? This is a difficult question, and one that should be carefully answered by the General Assembly. A balance must be reached between disclosure, protection for candid correspondence and questioning, and academic freedom.

The second category protected by Georgia is almost identical, but with important distinctions.²⁴⁹ The second exemption does not require that the records be of a proprietary nature and includes employees and students as “producers” of the information.²⁵⁰ The exemption also seems more targeted at academic research that the producers are not necessarily looking to monetize.²⁵¹ The two Georgia exemptions are likely the most detailed research exemptions, though the first is also qualified in terms of scope (i.e., the language in concerning some form of public release). This Comment advocates for adopting language closer to the second category—professors, employees, and student researchers should all be protected. Furthermore, protection should extend to all academic research, not just commercially viable research.

Idaho also has an exemption that contains broad protective language with specific qualifications. That exemption protects academic research “if the disclosure of such could *reasonably affect the conduct or outcome of the research*, or the ability of the public

248. GA. CODE ANN. § 50-18-72(a)(35) (West 2013).

249. *Id.* § 50-18-72(a)(36) (“Any data, records, or information developed, collected, or received by or on behalf of faculty, staff, employees, or students of an institution of higher education or any public or private entity supporting or participating in the activities of an institution of higher education in the conduct of, or as a result of, study or research on medical, scientific, technical, scholarly, or artistic issues, whether sponsored by the institution alone or in conjunction with a governmental body or private entity, until such information is published, patented, otherwise publicly disseminated, or released to an agency whereupon the request must be made to the agency. This paragraph shall apply to, but shall not be limited to, information provided by participants in research, research notes and data, discoveries, research projects, methodologies, protocols, and creative works . . .”).

250. *See id.*

251. *See id.*

institution of higher education to patent or copyright the research or protect intellectual property.”²⁵² The “outcome” phrase is rather unique, but it is also particularly relevant to some of the problems described above in Part I—given that PRLs are already used to harass climate change scientists and seek their research-related communications, those scientists may change their conduct while carrying out research if they are worried about potential public records requests. However, the language also qualifies disclosure, and leaves discretion to the courts to decide whether or not disclosure could reasonably affect the research. If the General Assembly wants to avoid judicial intervention, it should not include such language in a North Carolina exemption for academic research.

Iowa has more ambiguous research protection, though with an interesting twist. First, the Iowa exemptions generally apply to those situations where preventing disclosure is necessary “to protect the person from annoyance, embarrassment, oppression, or undue burden of expense.”²⁵³ Thus, the exemptions specifically recognize the potential for abuse inherent in PRLs. The research exemption goes on to protect “a trade secret or other confidential research, development, or commercial information.”²⁵⁴ While this initially appears to be only a trade secret exemption, the phrase “other confidential research” might reasonably apply to academic research. However, this wording leaves discretion to courts, which the General Assembly can avoid by being more explicit.

Kansas has another statute that may or may not apply to universities. The statute does not specifically reference the protected entity, but rather references only the types of documents, including “[n]otes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed.”²⁵⁵ The general tone seems to indicate government records, but courts again might be able to stretch “research data” to protect all academic research. Again, as has been stated, North Carolina should adopt an unequivocal exemption that clearly applies to academic research.

Pennsylvania has perhaps the clearest protection for academic research records. That protection includes “[u]npublished lecture

252. IDAHO CODE ANN. § 9-340D(20) (2010 & Supp. 2012) (emphasis added).

253. IOWA CODE ANN. § 553.11 (West 2011).

254. *Id.* § 553.11(6).

255. KAN. STAT. ANN. § 45-221(a)(20) (West 2013).

notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related material and scholarly correspondence of a community college or an institution of the State System of Higher Education or a faculty member, staff employee, guest speaker or student thereof.”²⁵⁶ The exception is clear and applies to the most important documents necessary for protecting academic research. Furthermore, it is one of the few exemptions that refers specifically to correspondence, a vital component of the research process. North Carolina should look to such language for the specificity that will provide academic research with sufficient protection.

An academic research exemption, if correctly constructed, would prevent the use of PRLs to harass academic researchers, as well as the potential loss of partnerships between private businesses and public universities.²⁵⁷ Alaska, Pennsylvania, and Georgia provide model language for an academic research exemption in four aspects. Statutes in those states (1) refer specifically to institutions of higher education;²⁵⁸ (2) grant broad protection for “writings or records that consist of intellectual property or proprietary information received, generated, learned, or discovered during research,”²⁵⁹ as well as “[u]npublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related material and scholarly correspondence;”²⁶⁰ (3) provide protection for professors, university employees, and students alike;²⁶¹ and (4) make reasonable information immediately available, specifically “the title and a description of all research projects, the name of the researcher, and the amount and source of funding provided for each project.”²⁶² By

256. 65 PA. CONS. STAT. ANN. § 67.708(b)(14) (West 2010).

257. *See supra* Part II.B.1.

258. ALASKA STAT. § 14.40.453 (2010).

259. *Id.* This is one aspect where the legislature might use more expansive language—university professors deserve broad protection for their work product, regardless of whether or not it consists of intellectual property or proprietary information.

260. 65 PA. CONS. STAT. ANN. § 67.708(b)(14).

261. GA. CODE ANN. § 50-18-72(a)(36) (West 2013) (“Any data, records, or information developed, collected, or received by or on behalf of faculty, staff, employees, or students of an institution of higher education or any public or private entity supporting or participating in the activities of an institution of higher education in the conduct of, or as a result of, study or research on medical, scientific, technical, scholarly, or artistic issues, whether sponsored by the institution alone or in conjunction with a governmental body or private entity, until such information is published, patented, otherwise publicly disseminated, or released to an agency whereupon the request must be made to the agency. This paragraph shall apply to, but shall not be limited to, information provided by participants in research, research notes and data, discoveries, research projects, methodologies, protocols, and creative works . . .”).

262. ALASKA STAT. § 14.40.453.

implementing similar provisions, North Carolina could lead the way in protecting academic speech, particularly as it pertains to professor communications.²⁶³

5. Miscellaneous Protections

This category contains various miscellaneous protections from eight states. Most of these exemptions involve student record privacy, but are so limited as to not constitute designation as Personal Information Protection. For example, Alaska and Kansas protect records relating to the determination of financial aid.²⁶⁴ Other states protect student disciplinary cases,²⁶⁵ academic transcripts,²⁶⁶ and letters of recommendation for student admission consideration.²⁶⁷

Three of the more unique protections in this category come from Maryland and North Dakota. Maryland provides specific protection for “any part of a public record that relates to the University of Maryland University College’s competitive position with respect to other providers of education services.”²⁶⁸ This provision is surprising given that financial expenditure falls under an area where public disclosure would be more appropriate: government accountability for tax dollars. This exception, which does include some limitations to the protected information,²⁶⁹ shows the competitive disadvantage in which public universities can find themselves. In contrast, under North Carolina’s PRL, there is nothing to stop Duke University, or any other private university that competes with UNC-Chapel Hill, from requesting such information about UNC-Chapel Hill.

North Dakota has two unique exceptions. The first protects as confidential “[a]ny patient record of a patient at a state college or university student health service, university of North Dakota medical center or family practice center, or other university system medical center or clinic.”²⁷⁰ The second exception is more particularly relevant to the subject matter of this Comment—the exception protects “[i]nformation in the files of private clients receiving legal services through the clinical education program of the University of North

263. These changes would solve most of the problems described *supra* Part II.B.

264. ALASKA STAT. § 14.43.910 (2010); KAN. STAT. ANN. § 45-221(a)(17) (West 2013).

265. 5 ILL. COMP. STAT. ANN. 140/7(1)(j)(iii) (West 2005 & Supp. 2012).

266. MICH. COMP. LAWS ANN. § 15.243(1)(q) (West 2004 & Supp. 2012).

267. MISS. CODE ANN. § 37-11-51(2) (West 2010).

268. MD. CODE ANN., STATE GOV'T § 10-618(l) (LexisNexis 2009).

269. *See id.*

270. N.D. CENT. CODE § 44-04-18.16 (2007).

Dakota School of Law . . . unless the information has been requested and is properly obtainable through applicable discovery rules.”²⁷¹

Legal clinics need unequivocal and ample protection.²⁷² Only North Dakota has such an exemption for legal clinic client lists.²⁷³ Furthermore, North Carolina’s current exemption for attorney-client privilege is ambiguous and sparse.²⁷⁴ This leaves another opportunity for North Carolina to take the lead in shielding legal clinics and their clients from abuse.

The exemptions discussed above would prevent the majority of the abuse and harassment directed at public universities.²⁷⁵ The General Assembly might also consider other exemptions. For example, another twelve states have various protections for donors to public universities, while seven states exempt records related to searching for a new university president.²⁷⁶ As of this writing, no state has exempted any aspect of public university athletic programs. Such a statute might raise concerns about scandal coverups,²⁷⁷ but a limited exception for internal investigations would allay these concerns. This exception might be limited in its scope to require the release of investigation-related documents once the investigation is complete. Such an exception would provide some confidentiality and discretion during the investigation itself while also ensuring a level of

271. *Id.*

272. *See supra* Part II.C.

273. *See* N.D. CENT. CODE § 44-04-18.16.

274. *See supra* notes 159–64 and accompanying text.

275. *See supra* Part II.B–C. These are also the areas with the most documented harassment, whereas the hypothetical abuses discussed in Part II.E have not, as of yet, been documented in North Carolina.

276. *See infra* Table I (“Fundraising” and “President Search” columns). These exemptions likely reflect an interest in protecting the privacy of donors and candidates for administrative positions. *See supra* notes 203–04 and accompanying text.

277. Scandals involving university sports programs, given current news coverage, would seem to be the most common problem at public universities. *See, e.g.,* Robbi Pickeral, *UNC Probe Reveals Academic Fraud*, ESPN, http://espn.go.com/college-sports/story/_/id/8765672/north-carolina-tar-heels-investigation-reveals-academic-scandal-african-american-studies-department (last updated Dec. 20, 2012, 10:49 PM) (discussing how investigation into the UNC football athletic scandal also uncovered problems with some UNC academic activities); Dylan Stableford, *Florida A&M President Resigns in Wake of Band Hazing Scandal*, YAHOO! NEWS (July 11, 2012), <http://news.yahoo.com/blogs/lookout/famu-band-hazing-scandal-president-resigns-191854792.html> (discussing the fallout of the FAMU band hazing death scandal); *The Penn State Scandal*, CBS NEWS, http://www.cbsnews.com/2718-400_162-1332/the-penn-state-scandal/ (last visited May 7, 2013) (providing comprehensive updates of the Penn State scandal).

transparency.²⁷⁸ The General Assembly can tailor these exemptions to account for privacy and practical interests.

C. *Problems with Changing the Law*

If and when the North Carolina legislature decides to adopt PRL exemptions for public universities, certain challenges await. First, the public generally opposes any perceived effort to narrow the scope of PRLs.²⁷⁹ Second, media outlets will have little interest in disposing of a ready and powerful newsgathering tool.²⁸⁰ Third, most new legislation requires some sort of political momentum to become legislative reality.²⁸¹ This prerequisite would seem especially true

278. Such protection might also require the actual release of a timely final report so as to prevent any protraction of the investigation process.

279. See *supra* note 195 and accompanying text.

280. See, e.g., *Developments in the Law—The Law of Media*, 120 HARV. L. REV. 990, 1056–58 (2007) (discussing “Newsgathering, FOIA, and State FOI Laws”); *Media Access*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/bloggers/legal/journalists/access> (last visited May 5, 2013) (describing PRLs as a news-gathering tool for news bloggers); *Student Media Guide to News Gathering*, STUDENT PRESS LAW CTR., <http://www.splc.org/knowyourrights/legalresearch.asp?id=21> (last visited May 5, 2013) (describing PRLs as “an important part of the news gathering process”). But see Amanda Fitzsimmons, *National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Reclassification of Information Already in the Public Domain*, 41 S. J.L. & POL’Y FOR INFO. SOC’Y 479, 509 (2008) (“According to reporters, it simply takes too long to get information through FOIA when they are working on deadlines.”).

The Daily Tar Heel, UNC-Chapel Hill’s student newspaper, has also sounded a rallying cry and argued that Carol Folt, the incoming university chancellor, should focus on transparency during her tenure. See Editorial, *Folt Under Pressure*, DAILY TAR HEEL (Chapel Hill, N.C.), Apr. 15, 2013, at 4, available at <http://www.dailytarheel.com/article/2013/04/516b76553cec9> (“Carol Folt’s leadership must be defined by transparency.”); see also Editorial, *The FERPA Fallacy*, DAILY TAR HEEL (Chapel Hill, N.C.), Mar. 18, 2013, at 8, available at <http://www.dailytarheel.com/article/2013/03/51465e82b5297> (“Outgoing Chancellor Holden Thorp has insisted that the University’s resistance to media inquiries has been due to the institution’s dedicated compliance to FERPA But FERPA has been used nationwide as a legal catchall to stymie the inquiries of media organizations – no matter how unrelated to ‘education’ they may be UNC has an obligation to conduct its business with the public looking on; the media’s job is to ensure the University is meeting that obligation.”).

281. Cf. Jeffrey N. Gordon, “Say on Pay”: *Cautionary Notes on the U.K. Experience and the Case for Shareholder Opt-In*, 46 HARV. J. ON LEGIS. 323, 355 (2009) (noting that some legislative momentum responds to a “political moment”); Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability’s Continuing Tort Framework and Sony’s De Facto Demise*, 55 UCLA L. REV. 143, 160–61 (2007) (describing how legislative initiatives to impose “a royalty on recording equipment and blank tapes” failed because “legislative momentum stalled and the proposal died in legislative committees”); Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 313 (2003) (describing the factors leading to a lack of legislative momentum to ban execution of the mentally ill); Peter D. W. Heberling, Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L.

concerning legislation facing opposition from both the public and the media. Regardless, given the countervailing interests—academic freedom, the potential for harassment and abuse, the role of universities in education and research, and so forth—public universities merit greater protection from the negative effects of PRLs. Public universities could even lead this lobbying effort.

CONCLUSION

Common law did not allow a general right to access public documents—government was generally inaccessible to the people. Over time, however, states began to introduce, amplify, and expand this right. Today, Public Records Laws have become tools that allow the public to hold government accountable and to ensure government transparency—vital instruments for safeguarding and promoting the democratic process. However, citizens and organizations can also abuse PRLs, using those laws to harass, intimidate, and spy. As such, counterbalancing interests have always tempered the disclosure of public records. Exemptions to PRLs embody these counterbalancing interests and help to minimize or eliminate abuses.

Many states have multiple PRL exemptions to protect public universities. North Carolina, in contrast, has virtually no statutory protection for public universities. This lack of protection is dangerous, especially given the abuses of PRLs that have already surfaced around the country. These abuses include harassing professors, either for their research or their speech, and seeking documents from public university legal clinics. While such harassment has not yet reached North Carolina, it is only a matter of time.

Principles of academic freedom and the role of universities in education and research weigh in favor of shielding public universities, particularly their academic activities, with exemptions to protect against PRL abuse and harassment. North Carolina can, and should, create specific statutory exemptions for personal student information, academic activities, professor communications and research, and legal clinics. While UNC may not have to worry much about Roy Williams's halftime plays being requested as public records, North Carolina does need to protect its public universities from abuse. Let Roy worry about the basketball team, and let public universities focus on serving the public through education and research.

REV. 914, 914 (1975) (describing the legislative momentum behind "revis[ing] and moderniz[ing] criminal law" as a process taking twenty years).

TABLE I. FIFTY STATES: EXEMPTIONS TO STATE PUBLIC RECORDS LAWS

State ²⁸²	Balancing Test	Federal Law/ FERPA	Personal Information	Academic Exams	Academic Research	Other
AL	Yes ²⁸³					
AK		Yes ²⁸⁴			Yes ²⁸⁵	Determination of financial aid ²⁸⁶
AZ	Yes ²⁸⁷					
AR		Yes ²⁸⁸				
CA	Yes ²⁸⁹			Yes ²⁹⁰		
CO		Yes ²⁹¹		Yes ²⁹²	Yes ²⁹³	
CT		Yes ²⁹⁴	Yes ²⁹⁵	Yes ²⁹⁶		
DE		Yes ²⁹⁷				
FL						

282. The District of Columbia also has protections for personal information and academic examinations. *See* D.C. CODE § 2-534(a)(2) (West 2013) (personal information), (5) (academic examinations). One provision might provide FERPA protection, but it is not clear. *See id.* § 2-534(a)(6) (“Information specifically exempted from disclosure by statute (other than this section), provided that such statute: (A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld . . .”).

283. ALA. CODE § 36-12-40 (LexisNexis 2001 & Supp. 2011) (exempting “records the disclosure of which would . . . be detrimental to the best interests of the public”).

284. ALASKA STAT. ANN. § 40.25.120(a)(4)–(5) (West 2013).

285. ALASKA STAT. § 14.40.453 (2010).

286. *Id.* § 14.43.910.

287. *Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 955 P.2d 534, 537 (Ariz. 1998) (en banc) (“If these interests outweigh the public’s right of inspection, the State can properly refuse inspection. The State has the burden of overcoming ‘the legal presumption favoring disclosure.’” (citations omitted)); *Carlson v. Pima Cnty.*, 687 P.2d 1242, 1245 (Ariz. 1984) (en banc) (“We hold today that the common law limitations to open disclosure are not based on any technical dichotomy which might be argued under the ‘public records’ or ‘other matters’ wording of A.R.S. § 39–121, but rather are based on the conflict between the public’s right to openness in government, and important public policy considerations relating to protection of either the confidentiality of information, privacy of persons or a concern about disclosure detrimental to the best interests of the state.”).

288. ARK. CODE ANN. § 25-19-105(b)(2) (West 2013).

289. *Rosenthal v. Hansen*, 110 Cal. Rptr. 257, 262 (Cal. Dist. Ct. App. 1973) (applying a reasonableness test on “voluminous” or otherwise burdensome requests).

290. CAL. GOV’T CODE § 6254(g) (West 2008 & Supp. 2013).

291. COLO. REV. STAT. ANN. § 24-72-204(1)(b) (West 2013).

292. *Id.* § 24-72-204(2)(a)(II).

293. *Id.* § 24-72-204(2)(a)(III).

294. CONN. GEN. STAT. ANN. § 1.210(b)(17) (West 2013).

295. *Id.* § 1.210(b)(11).

296. *Id.* § 1.210(b)(6).

297. DEL. CODE ANN. tit. 29, § 10002(1)(6) (2003 & Supp. 2012).

State	Balancing Test	Federal Law/ FERPA	Personal Information	Academic Exams	Academic Research	Other
GA	Privacy ²⁹⁸	Yes ²⁹⁹	Yes ³⁰⁰	Yes ³⁰¹	Yes ³⁰²	Fundraising, ³⁰³ President Search ³⁰⁴
HI	Privacy ³⁰⁵	Yes ³⁰⁶				
ID		Yes ³⁰⁷		Yes ³⁰⁸	Yes ³⁰⁹	
IL		Yes ³¹⁰	Yes ³¹¹	Yes ³¹²	Yes ³¹³	Student disciplinary cases ³¹⁴
IN		Yes ³¹⁵		Yes ³¹⁶	Yes ³¹⁷	
IA		Yes ³¹⁸	Yes ³¹⁹		Yes ³²⁰	
KS		Yes ³²¹		Yes ³²²	Yes ³²³	Financial aid applications ³²⁴
KY	Privacy ³²⁵	Yes ³²⁶	Yes ³²⁷	Yes ³²⁸	Yes ³²⁹	

298. *Northside Realty Assocs., Inc. v. Cmty. Relations Comm'n*, 241 S.E.2d 189, 191 (Ga. 1978) (balancing the public interests for and against disclosure). However, the Georgia balancing test has been limited to determining whether disclosure would constitute tortious invasion of privacy, and courts are not allowed to make exceptions not contained in statute. See *Hardaway Co. v. Rives*, 422 S.E.2d 854, 858 (Ga. 1992). "Privacy" in this column will indicate a similar test.

299. GA. CODE ANN. § 50-18-72(a)(1) (West 2013).

300. *Id.* § 50-18-72(a)(20).

301. *Id.* § 50-18-72(a)(38).

302. *Id.* § 50-18-72(a)(35), (36).

303. *Id.* § 50-18-72(a)(29).

304. *Id.* § 50-18-72(a)(11).

305. HAW. REV. STAT. ANN. § 92F-13(1) (LexisNexis 2012).

306. *Id.* § 92F-13(4).

307. IDAHO CODE ANN. § 9-340A(1) (2010).

308. *Id.* § 9-340E(5).

309. *Id.* § 9-340D(20)-(21) (2010 & Supp. 2012).

310. 5 ILL. COMP. STAT. ANN. 140/7(1)(a) (West 2005 & Supp. 2012).

311. *Id.* 140/7(1)(b).

312. *Id.* 140/7(1)(j)(i).

313. *Id.* 140/7(1)(i), (iv).

314. *Id.* 140/7(1)(j)(iii).

315. IND. CODE ANN. § 5-14-3-4(a)(3) (West 2013).

316. *Id.* § 5-14-3-4(b)(3).

317. *Id.* § 5-14-3-4(a)(6).

318. IOWA CODE ANN. § 22.9 (West 2010).

319. IOWA CODE ANN. § 22.7(1) (West 2013).

320. IOWA CODE ANN. § 553.11(6) (West 2011).

321. KAN. STAT. ANN. § 45-221(a)(1) (West 2013).

322. *Id.* § 45-221(a)(9).

323. *Id.* § 45-221(a)(20).

324. *Id.* § 45-221(a)(17).

325. KY. REV. STAT. ANN. § 61.878(1)(a) (West 2013).

326. *Id.* § 61.878(1)(k).

327. *Id.* § 61.878(1)(a).

328. *Id.* § 61.878(1)(g).

329. *Id.* § 61.878(1)(b), (j).

State	Balancing Test	Federal Law/ FERPA	Personal Information	Academic Exams	Academic Research	Other
LA			Yes ³³⁰			
ME					Yes ³³¹	
MD		Yes ³³²	Yes ³³³	Yes ³³⁴	Yes ³³⁵	University's competitive position ³³⁶
MA	Privacy ³³⁷			Yes ³³⁸	Yes ³³⁹	
MI	Privacy ³⁴⁰	Yes ³⁴¹		Yes ³⁴²		Academic Transcripts; ³⁴³ President Search ³⁴⁴
MN						
MS				Yes ³⁴⁵		Letters of recommendation for admission ³⁴⁶
MO				Yes ³⁴⁷	Yes ³⁴⁸	
MT	Privacy ³⁴⁹		Yes ³⁵⁰			
NE		Yes ³⁵¹			Yes ³⁵²	

330. La. Att'y. Gen. Op., No. 76-186 (Feb. 12, 1976), *available at* <http://www.ag.state.la.us/opinions.aspx> (search for 76-186) ("Student records where personally identifiable with the students are not public records and cannot be released without consent.").

331. ME. REV. STAT. ANN. tit. 1, § 402(3)(E) (1989 & Supp. 2012).

332. MD. CODE ANN., STATE GOV'T § 10-615(2)(ii) (LexisNexis 2009).

333. MD. CODE ANN., STATE GOV'T § 10-616(k)(1) (West 2013); MD. CODE ANN., STATE GOV'T § 10-618(m) (LexisNexis 2009).

334. MD. CODE ANN., STATE GOV'T § 10-618(c)(1) (LexisNexis 2009).

335. *Id.* § 10-618(d).

336. *Id.* § 10-618(l).

337. MASS. ANN. LAWS ch. 214, § 1B (LexisNexis 2011).

338. MASS. GEN. LAWS ANN. ch. 4, § 7(26)(l) (West 2013).

339. *Id.* ch. 4, § 7(26)(u).

340. MICH. COMP. LAWS ANN. § 15.243(1)(a) (West 2004 & Supp. 2012).

341. *Id.* § 15.243(2).

342. *Id.* § 15.243(1)(k).

343. *Id.* § 15.243(1)(q).

344. *Id.* § 15.243(1)(x).

345. MISS. CODE ANN. § 37-11-51(1) (West 2010).

346. *Id.* § 37-11-51(2).

347. MO. ANN. STAT. § 610.021(7) (West 2013).

348. *Id.* § 610.021(15). Such records are only protected when "the owner has a proprietary interest." *Id.* The extent to which public university researchers have the requisite proprietary interest in their scientific and technological innovations is unclear and may be governed by individual employment contracts between researchers and universities.

349. MONT. CONST. art. II, § 9.

350. *Id.* art. II, § 10; *see also* Bd. of Trs., Cut Bank Pub. Sch. v. Cut Bank Pioneer Press, 160 P.3d 482, 488 (Mont. 2007) ("To determine whether an individual has a constitutionally protected privacy interest, the Court applies a two-part test: (1) whether the person involved had a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable.").

351. NEB. REV. STAT. ANN. § 84-712.05(1) (LexisNexis 2013).

352. *Id.* § 84-712.05(3).

State	Balancing Test	Federal Law/ FERPA	Personal Information	Academic Exams	Academic Research	Other
NV	Yes ³⁵³					Fundraising ³⁵⁴
NH				Yes ³⁵⁵		
NJ		Yes ³⁵⁶	Yes ³⁵⁷	Yes ³⁵⁸	Yes ³⁵⁹	Fundraising ³⁶⁰
NM	Yes ³⁶¹					
NY	Privacy ³⁶²	Yes ³⁶³		Yes ³⁶⁴		
NC						
ND		Yes ³⁶⁵		Yes ³⁶⁶		University health service patient records; ³⁶⁷ Legal clinic clients; ³⁶⁸ Fundraising; ³⁶⁹ President search ³⁷⁰
OH		Yes ³⁷¹			Yes ³⁷²	Fundraising ³⁷³
OK		Yes ³⁷⁴	Yes ³⁷⁵	Yes ³⁷⁶	Yes ³⁷⁷	Fundraising ³⁷⁸
OR		Yes ³⁷⁹		Yes ³⁸⁰	Yes ³⁸¹	Student personal emails; ³⁸² Fundraising; ³⁸³ President search ³⁸⁴

353. See *Donrey of Nev. v. Bradshaw*, 798 P.2d 144, 147-48 (Nev. 1990).

354. NEV. REV. STAT. ANN. § 388.750(2) (LexisNexis 2008 & Supp. 2011).

355. N.H. REV. STAT. ANN. § 91-A:5(IV) (LexisNexis 2012).

356. N.J. STAT. ANN. § 47:1A-1 (West 2003).

357. *Id.*

358. N.J. STAT. ANN. § 47:1A-1.1 (West 2003 & Supp. 2012).

359. *Id.*

360. *Id.*

361. *City of Las Cruces v. Pub. Emp. Lab. Rel. Bd.*, 917 P.2d 451, 454 (N.M. 1996).

362. N.Y. PUB. OFF. LAW § 87(2)(b) (McKinney 2013).

363. *Id.* § 87(2)(a).

364. *Id.* § 87(2)(h).

365. N.D. CENT. CODE ANN. § 44-04-18(5) (West 2013).

366. N.D. CENT. CODE § 44-04-18.8 (2007).

367. *Id.* § 44-04.18.16.

368. *Id.* § 44-04-29.

369. N.D. CENT. CODE ANN. § 44-04-18.15 (West 2013).

370. N.D. CENT. CODE § 15-10-17(1)(a) (2003 & Supp. 2011).

371. OHIO REV. CODE ANN. § 149.43(A)(1)(v) (LexisNexis 2007 & Supp. 2012).

372. *Id.* § 149.43(A)(1)(m), 149.43(A)(5).

373. *Id.* § 149.43(A)(1)(n), 149.43(A)(6).

374. OKLA. STAT. ANN. tit. 51, § 24A.13 (West 2008).

375. *Id.* tit. 51, § 24A.16(A)(1).

376. *Id.* tit. 51, § 24A.16(A)(2).

377. *Id.* tit. 51, § 24A.19(1).

378. *Id.* tit. 51, § 24A.16a.

379. OR. REV. STAT. ANN. § 192.502(8) (West 2013).

380. *Id.* § 192.501(4).

381. *Id.* § 192.501(14).

382. *Id.* § 192.501(29).

383. *Id.* § 192.501(24), (25).

384. *Id.* § 192.502(22).

State	Balancing Test	Federal Law/ FERPA	Personal Information	Academic Exams	Academic Research	Other
PA		Yes ³⁸⁵	Yes ³⁸⁶	Yes ³⁸⁷	Yes ³⁸⁸	Fundraising ³⁸⁹
RI		Yes ³⁹⁰		Yes ³⁹¹	Yes ³⁹²	Fundraising ³⁹³
SC			Yes ³⁹⁴		Yes ³⁹⁵	Fundraising, ³⁹⁶ President search ³⁹⁷
SD						
TN		Yes ³⁹⁸	Yes ³⁹⁹			
TX	Privacy ⁴⁰⁰	Yes ⁴⁰¹	Yes ⁴⁰²	Yes ⁴⁰³		Fundraising, ⁴⁰⁴ President search ⁴⁰⁵
UT				Yes ⁴⁰⁶	Yes ⁴⁰⁷	Fundraising ⁴⁰⁸
VT		Yes ⁴⁰⁹	Yes ⁴¹⁰	Yes ⁴¹¹	Yes ⁴¹²	

385. 65 PA. CONS. STAT. ANN. §§ 67.102, 67.708(b)(1)(i) (West 2010).

386. *Id.* § 67.708(b)(6)(i).

387. *Id.* § 67.708(b)(15)(ii).

388. *Id.* § 67.708(b)(14).

389. *Id.* § 67.708(b)(13).

390. R.I. GEN. LAWS ANN. § 38-2-2(4)(I)(b), 38-2-2(4)(S) (West 2013).

391. *Id.* § 38-2-2(4)(L).

392. *Id.* § 38-2-2(4)(K).

393. *Id.* § 38-2-2(4)(G).

394. S.C. CODE ANN. § 30-4-40(a)(2) (2007 & Supp. 2012).

395. *Id.* § 30-4-40(a)(14).

396. *Id.* § 30-4-40(a)(11).

397. *Id.* § 30-4-40(a)(13).

398. TENN. CODE ANN. § 10-7-504(a)(4)(B) (West 2013).

399. *Id.* § 10-7-504(a)(4)(A).

400. *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 679 (Tex. 1976) (“The individual does not forfeit all right to control access to intimate facts concerning his personal life merely because the State has a legitimate interest in obtaining that information. Just as the State’s intrusion into the individual’s zones of privacy must be carefully limited, so must the State’s right to reveal private information be closely scrutinized as well.”).

401. *Tex. Att’y. Gen. Op.*, ORD-634 (Dec. 4, 1995), *available at* <https://www.oag.state.tx.us/opinions/openrecords/48morales/ord/1995/htm/ord19950634.htm> (“[A]n educational agency or institution may withhold from public disclosure information that is protected by FERPA . . .”).

402. TEX. GOV’T CODE ANN. § 552.114(a) (West 2012).

403. *Id.* § 552.122(a).

404. *Id.* § 552.1235(a).

405. *Id.* § 552.123.

406. UTAH CODE ANN. § 63G-2-305(5) (West 2013).

407. *Id.* § 63G-2-305(40)(a), (52).

408. *Id.* § 63G-2-305(37).

409. VT. STAT. ANN. tit. 1, § 317(c)(11) (2010 & Supp. 2012).

410. *Id.*

411. *Id.* tit. 1 § 317(c)(8).

412. *Id.* tit. 1 § 317(c)(23).

State	Balancing Test	Federal Law/ FERPA	Personal Information	Academic Exams	Academic Research	Other
VA			Yes ⁴¹³	Yes ⁴¹⁴	Yes ⁴¹⁵	Fundraising ⁴¹⁶
WA				Yes ⁴¹⁷		
WV			Yes ⁴¹⁸	Yes ⁴¹⁹		
WI		Yes ⁴²⁰				President search ⁴²¹
WY	Yes ⁴²²	Yes ⁴²³		Yes ⁴²⁴	Yes ⁴²⁵	
Totals	14 (8) ⁴²⁶	29	17	29	25	

TABLE II. SUMMARY: PRIVACY PROTECTIONS

Type of Privacy Protection	Number of States
FERPA Exemption Only	17
Personal Information Exemption Only	5
Both FERPA and Personal Information Exemptions	12
Privacy Interest Judicial Test without Other Exemptions	1
Total Private Information Exemption	35

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413. VA. CODE ANN. §§ 2.2-3705.1(10), 2.2-3705.4(1) (2011).

414. *Id.* § 2.2-3705.1(4).

415. *Id.* § 2.2-3705.4(4).

416. *Id.* § 2.2-3705.4(7).

417. WASH. REV. CODE ANN. § 42.56.250(1) (West 2006 & Supp. 2013).

418. W. VA. CODE ANN. § 29B-1-4(a)(2) (LexisNexis 2012).

419. *Id.* § 29B-1-4(a)(3).

420. WIS. STAT. ANN. § 19.36(1) (West 2003 & Supp. 2012).

421. *Id.* § 19.36(7).

422. WYO. STAT. ANN. § 16-4-203(b) (West 2013).

423. *Id.* § 16-4-203(a)(ii).

424. *Id.* § 16-4-203(b)(ii).

425. *Id.* § 16-4-203(b)(iii).

426. Fourteen states have some sort of balancing test, while eight of those states have balancing tests limited to evaluating privacy interests: Georgia, Hawaii, Kentucky, Massachusetts, Michigan, Montana, New York, and Texas.