IN THE ARIZONA SUPREME COURT
STATE OF ARIZONA

ARIZONA BOARD OF REGENTS, an educational, non-profit corporation, and **TERI MOORE**, in her official capacity as Custodian of Public Records for the University of Arizona, Appellants, vs. **ENERGY & ENVIRONMENT LEGAL INSTITUTE**, Appellee.	Arizona Supreme Court No. CV-18-0194-SA Court of Appeals Div. 2 No. 2CACV-2017-0002 Pima County Superior Court Cause No. C2013-4963

Brief for *Amici Curiae*
Climate Science Legal Defense Fund, American Meteorological Society, Dr. Malcolm Hughes, Dr. Jonathan Overpeck, and Pfizer Inc. In Support of Appellants

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INTEREST OF THE *AMICI CURIAE*

The Climate Science Legal Defense Fund ("CSLDF"), a 501(c)(3) non-profit organization, was founded in 2011 for the purpose of providing legal assistance in defense of the scientific endeavor in general, and climate science and climate scientists in particular. In furtherance of its mission, CSLDF provides legal knowledge and support to scientists who would otherwise lack the means to defend themselves. Much of its work has involved defending scientists against invasive and burdensome public record requests like those in this case.

American Meteorological Society ("AMS") was founded in 1919 and is dedicated to advancing atmospheric and related sciences for the benefit of society. It accomplishes this goal by, among other things, publishing several peer-reviewed scientific journals. AMS has more than 13,000 members, including scientists, researchers, and other climate professionals. It is committed to strengthening scientific work across the public, private, and academic sectors, and believes that collaboration and information sharing are critical to ensuring that society benefits from the best, most current scientific knowledge and understanding available.

Pfizer Inc. ("Pfizer") is a research-based, global biopharmaceutical company that engages in scientific research to discover, develop, and manufacture healthcare products, including medicines and vaccines. During the course of researching and testing new biomedical products, Pfizer often partners with universities, which

have invaluable access to data and expertise. In just the past decade, Pfizer has collaborated over a dozen times with Arizona public universities. Pfizer's partnerships with public universities depend on the free flow of information among researchers, protected by traditional expectations of confidentiality.

Dr. Malcolm Hughes is a climate scientist at the University of Arizona; Dr. Jonathan Overpeck is a climate scientist who was at the University of Arizona until last year (he is now at the University of Michigan). Their records are the subject of the public records demands at issue in this case, and they anticipate being the target of more such demands in the future should this Court rule in favor of the plaintiff in this case, the Energy & Environment Legal Institute ("E&E Legal").

Amici have an interest in ensuring (1) that a stay is issued so that the important issues presented by the Arizona Board of Regents ("ABOR")'s appeal in this case may receive an authoritative appellate decision in this case rather than be left unresolved and uncertain to the detriment of scientific pursuits at the State's universities; and (2) that Arizona's public records law be interpreted consistently with the public's interest in encouraging scientific research and advancing scientific knowledge and in protecting scientists from invasive public records requests like the one in this case.

INTRODUCTION

Amici respectfully submit that the denial of a stay by the lower courts is a striking—indeed, inexplicable and untenable—departure from well-settled principles that govern stay practice on appeals in the courts of this State. Unless the judgment of the superior court is stayed, ABOR will be compelled to turn over certain records whose confidential nature has been the central issue in this case from the beginning. This result would irreparably harm ABOR, whose appeal raises substantial and important issues regarding the scope of the public records act that deserve prompt and authoritative resolution. This Court should grant ABOR's requested stay.

In considering ABOR's requested stay, amici respectfully submit that this Court should consider the following points, which will be discussed in more detail below:

1. As ABOR's brief convincingly demonstrates, because denial of the stay will compel production of the contested records, it will suffer irreparable injury that only a stay can avoid. Consequently, the balance-of-harms consideration strongly favors grant of the requested stay. Barring extraordinary circumstances not present here, courts across the country have routinely granted stays in such cases, as ABOR's brief shows. ABOR Petition for Special Action at 12-13, 14-15. The courts below have offered no explanation whatever for their departure from

this consistent practice. Moreover, as amici show below, a stay is warranted because ABOR's appeal presents an important issue deserving of prompt and authoritative appellate resolution, and ABOR's legal position has substantial merit.

2. E&E Legal's overbroad and intrusive public records demands here are part of a larger and deeply concerning trend of ideologically, financially, and politically motivated individuals and organizations using public records laws to attempt to silence or undermine scientists whose work they do not like. *Infra* at 10-12 and Appendix A.

There are numerous cases in which E&E Legal, and other organizations and individuals, have used open records requests to seek documents—including years' worth of email communications among scientists, as well as prepublication analyses and drafts. Such materials have traditionally been treated as confidential, and for good reason. Confidentiality of scientists' email communications and prepublication drafts is necessary to ensure the uninhibited and creative collaboration among scientists that is instrumental to the successful scientific endeavor. As a wealth of uncontroverted evidence presented by ABOR to the trial court showed, granting politically motivated opponents easy access to such traditionally confidential materials will unduly burden public university scientists and those who cooperate or consult with them in conducting their research, or even discourage them from accepting employment at public universities, contracting

with those universities, or entering into controversial yet important fields of research in the first place. [ROA 36, EP 302-67; 423-45; 456-99; 507-28.]

While E&E Legal claims that the important interests above must give way in the name of transparency, the reality is that the burdensome and invasive disclosure of scientists' communications and preliminary analyses and drafts do not further transparency in any meaningful way. Rather, it constitutes a weapon being unjustifiably deployed against scientists whose research supports a point of view at odds with the political and economic interests of the plaintiffs. *Infra* at 10-12 and Appendix A.

3. These important practical considerations provide the background against which the substantial statutory and common law issues presented by this litigation would be heard on appeal. These issues were backhanded by the trial court, whose short, conclusory order on the latest remand offered no analysis explaining why the court believed the statute required disclosure. By peremptorily denying a stay, the Court of Appeals too is avoiding its responsibility to address the circumstances in which the radical rupture of traditional confidentiality of scientists' work papers and communications would be required.

Amici respectfully submit that the questions presented by ABOR's appeal are too important to be decided by default, and without guidance for the future. The Court should grant the requested stay in order (1) to ensure that the order

requiring the production of massive quantities of the confidential emails and work papers of two University of Arizona scientists to hostile opponents is not legally erroneous, and (2) to allow ABOR its day in an appellate court on the important and substantial issues presented in its appeal.

I. THIS CASE PRESENTS STATUTORY INTERPRETATION QUESTIONS OF FIRST IMPRESSION

As ABOR's brief demonstrates, a movant who establishes irreparable injury from the denial of a stay need not show a high probability of success on appeal; it suffices that the appeal present a non-frivolous issue. *See* Pet. for Special Action and Motion for Stay of Release of Records Pending Conclusion of Appeal at 11-14. That criterion is easily met here. ABOR's appeal raises important questions of first impression involving the appropriate interpretation of A.R.S. § 15-1640, which recognizes certain exemptions from public records requests for identified types of university records. Denial of a stay will deprive the parties and other state agencies, as well as those such as amicus Pfizer who do business with or are considering doing business with Arizona's public universities, of the benefit of a precedential statutory interpretation. In the meanwhile, the compelled production of documents resulting from an unstayed judgment in this case would leave a dark cloud over the viability of the 2012 amendment that purported to give what would now appear to be, under the trial court's ruling, an almost entirely illusory protection to scientists' traditionally confidential work product.

In particular, § 15-1640(A)(1)(d) exempts from disclosure, among other items, "unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews" of an Arizona public university. However, § 15-1640(C) states that the exemptions provided by the statute "shall no longer be applicable if the subject matter of the records becomes available to the general public." The term "subject matter" is not defined in the statute, and the parties disagree strenuously about its meaning.

In previous briefing before the Court of Appeals, E&E Legal conceded that "the phrase 'subject matter of the records' is sufficiently ambiguous that the civil bar will benefit from this Court reflecting on §1640(C), as it applies to A.R.S. 39-121, and as it applies in this matter." Appellee's Answering Brief at 13 (June 2, 2017). Neither the Court of Appeals nor the trial court has yet provided such a reflection. At a minimum, the meaning of the cryptic phrase "subject matter" in subsubsection (C) needs interpretation, and the stay ABOR seeks is crucial to keep the core of this litigation alive pending appeal.

E&E Legal has argued for an extraordinarily broad interpretation of "subject matter" in subsection (C), under which the subject matter of the records includes any concepts discussed in them that are also contained in any published work – including ideas as broad as climate change research. Namely, E&E Legal contends that since these records concern climate change research, a subject matter that is

publicly discussed, the exemptions provided by A.R.S. § 15-1640 no longer apply. This proposed interpretation of subsection (C) is so expansive that it effectively eviscerates the entire exemption that § 15-1640(A)(1)(d) was intended to create—or, more accurately, to safeguard consistently with existing understanding and practice. ABOR proposes a narrower meaning.

Amicus Pfizer particularly stresses—and the other amici joining this brief agree—that E&E's interpretation of the statute, adopted by the trial court, renders it entirely ineffectual to achieve its purpose of attracting scientific projects and jobs to the State's universities. *See* Pet. for Special Action and Motion for Stay of Release of Records Pending Conclusion of Appeal at 17-19. Concurrently with a substantial research partnership with the University of Arizona, Sanofi worked with interested legislators to secure enactment of § 15-1640(A)(1)(d).[1] Without the

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1 A video recording of the consideration of and unanimous passage of this statutory amendment, HB2272, by the Senate Committee on Commerce and Energy on March 14, 2012 can be accessed at http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=10606&meta_id =196906 (last visited July 22, 2018). In the hearing, Representative Vic Williams described the amendment as a "jobs bill" to "ensure that when a private sector company, like Sanofi, does clinical research in Arizona they'll have protection of their intellectual property while they develop their drugs and research here in the state."

Statements concerning a bill by sponsors and committees about "what they intended to accomplish with a specific provision of that bill . . . can be useful to clarify any ambiguity in the meaning of the enacted legislation." *Hernandez-Gomez v. Leonardo*, 185 Ariz. 509, 513, 917 P.2d 238, 242 (1996).

protection provided by the 2012 adoption of subsection (A)(1)(d), Sanofi was unwilling to jeopardize the protections its scientists' confidential communications traditionally enjoyed.

Subsection C, with its "subject matter" language, had been enacted as part of the original 2001 legislation. There is no indication that the legislature, in electing to add explicit protections under subsection A for documents reflecting "unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews," considered the relationship between that newly explicit protection and the preexisting limitation on the exemptions from disclosure contained in subsection A.[2] But to give it the broad reading espoused by E&E and apparently adopted by the trial judge would

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[2] To the contrary, it appears that the original conception of the 2001 statute was to protect underlying materials regardless of the release of a final product. The 2001 statute protected, *inter alia*, university research contract proposals and materials provided in relation to the contract; it explicitly noted that an executed contract became subject to the public records law, while seemingly maintaining the protection for the underlying materials. *See* A.R.S. § 15-1640 (2001).

In Senate testimony on the 2001 law, Paul Ward (then-General Counsel of Arizona State University) testified that "this bill does not protect any contract, it simply protects the proposal. Once the party has entered into an agreement or a contract with a state agency, the agency must report the full details: the subject of research, who is engaging, and the complete budget, but *not the proprietary information which led up to the development*." Minutes of Committee on Education, Arizona State Senate, 45th Legislature, First Regular Session, at pp. 23-25 (March 1, 2001) [APP 350] (Emphasis added.)

effectively nullify the 2012 amendments and destroy the protections on which Sanofi relied on regarding its partnership with the University of Arizona, for at least two reasons:

First, scientists' confidentiality concerns, with respect to the kind of material specified in the 2012 amendment to § 15-1640 and at issue in this litigation, definitely continue after the publication of any scientific studies to which those materials may relate. There is a well-established standard as to what information must be released in association with the publication of scientific research: the materials and methods used in the study and any other information necessary to enable other scientists to replicate the study and test its results and conclusions. The compelled disclosure of other materials generated during the process, such as peer-review correspondence or internal drafts, is as objectionable after publication as before, any statutory regime that intends to protect the kinds of materials identified in subsection (A)(1)(d) from disclosure will be completely ineffective if it ceases to apply following publication.

Second, public records requests relating to controversial scientific work are almost always made *after* publication, as in this case. Any regime that strips scientists' otherwise confidential materials of confidential status upon publication is therefore essentially worthless. Notwithstanding the purpose of the 2012 amendments to clear the path for companies like Sanofi and Pfizer to do business

with Arizona's universities, but the risk for such companies is likely to be too great so long as the judgment in this case stands uncorrected.

II. GROWING MISUSE OF PUBLIC-RECORD LAWS TO TARGET SCIENTISTS IMPAIRS SCIENTIFIC RESEARCH AND RESULTING ADVANCES IN SCIENTIFIC KNOWLEDGE

There is another reason for a stay. This case reflects a national trend of misuse of open record laws in a way that threatens significant damage to the interests of research institutions in Arizona specifically and to the scientific endeavor in the United States generally.

A. Abuse of Public Records Laws Is a National Phenomenon Involving Persons and Groups of All Political and Ideological Stripes and Targeting Many Areas of Scientific Endeavor.

In the past decade or so, there has been an alarming increase in the use of public record laws by special interest or ideological groups, of the left as well as the right, to target scientists whose findings—or entire fields of study—the groups believe threaten their financial interests or ideological beliefs.[3] Scientists across a

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[3] *See* Climate Science Legal Defense Fund, *Research Protections in State Open Records Laws* (Dec. 2017) [hereinafter "CSLDF Rept."], *available at* https://www.csldf.org/wp-content/uploads/2017/12/CSLDF-Research-Protections-in-State-Open-Records-Laws.pdf; Michael Halpern, Union of Concerned Scientists, Center for Science and Democracy, *Freedom to Bully: How Laws Intended To Free Information Are Used To Harass Researchers* 2 (Feb. 2015) [hereinafter "CSD Rept."], *available at* http://www.ucsusa.org/sites/default/files/attach/2015/09/ freedom-to-bully-ucs-2015-final.pdf ("[I]ndividuals and well-heeled special interests across the political spectrum are increasingly using broad open records requests to attack and harass scientists and other researchers and shut down

wide range of disciplines have increasingly found themselves the subject of overbroad and intrusive requests that seek years' worth of personal documents and correspondence, and other traditionally confidential prepublication materials, such as preliminary drafts, handwritten notes, and private critiques from other scientists.[4] Requests even sometimes go so far as to seek the names of human subjects, even where those subjects have been promised confidentiality.[5]

Appendix A describes a small sample of document-production demands made upon scientists working in a wide variety of fields and illustrates the breadth

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conversation at public universities."); *see also* Rachel Levinson-Waldman, American Constitution Society, *Academic Freedom and the Public's Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship*, (Sept. 2011), *available at* https://www.acslaw.org/issue_brief/briefs-2007-2011/academic-freedom-and-the-publics-right-to-know-how-to-counter-the-chilling-effect-of-foia-requests-on-scholarship/.

[4] *See* CSLDF Rept., *supra* n. 3, at 1-2; CSD Rept., *supra* n.3, at 2, 5; *see also* Levinson-Waldman, *supra* n.3, at 1-8; Michael Halpern & Michael Mann, Editorial, *Transparency Versus Harassment*, SCIENCE, Vol. 348, Issue 6234, at 479 (May 1, 2015), *available at* http://www.sciencemag.org/content/348/6234/479.full.

[5] Steve Wing, *Social Responsibility and Research Ethics in Community-Driven Studies of Industrialized Hog Production*, ENVIRONMENTAL HEALTH PERSPECTIVES 110(5): 437–444 (discussing a request made by an industry group for a university to provide "all documentation . . . that contain, represent, record, document, discuss, or otherwise reflect or memorialize the results of the Study" including the identities of participants whose confidentiality the academic conducting the study had assured).

of the problem—from animal rights activists targeting scientists in the biology and medicine fields to coal mining companies targeting scientists studying mining health effects to anti-GMO activists targeting scientists studying plant biology.

B. This Misuse Impairs Scientific Research and Resulting Advances in Scientific Knowledge.

As the examples in Appendix A demonstrate, abuse of open records laws is not the exclusive domain of liberals or conservatives; these tactics are used by "activists across the political spectrum." Whether this sort of harassment should be countenanced is not about any particular political or special-interest groups; instead, it is a fundamental question about whether the public records laws should be construed to provide opportunities for persons and groups such as these to advance an agenda to stifle science.

If successful, overly broad and intrusive public records demands for the emails and traditionally confidential prepublication materials of scientists enable economically or ideologically motivated groups to impair science in several ways: (1) they stifle collaboration, especially between public university scientists and outside researchers (including research undertaken with and for pharmaceutical and other industry groups); (2) they divert time, energy, and resources away from science by virtue of the need to comply with the often-exorbitant, time-intensive demands of review and litigation; (3) they discourage scientists from working in controversial fields; and (4) they seriously disadvantage public universities and

government agencies in recruiting efforts because of the burdens created by the risk of promiscuous disclosures to which scientists would not be subject if at private universities or in the many states whose public records laws do not permit such intrusions.

These unfortunate consequences are convincingly demonstrated by an extensive set of declarations from distinguished scientists and university administrators from within and outside Arizona submitted to the trial court by ABOR. [ROA 36, EP 302-67; 423-45; 456-99; 507-28.] While these policy considerations are important to consideration of the ultimate merits of the dispute, amici do not believe it is necessary at this stage to burden the Court with details supporting these conclusions. A compelling case for a stay exists based on the balance of harms and the substantiality and importance of the issues to be determined on appeal. There is simply no justification in the circumstances of this case for forcing ABOR to surrender the documents in dispute *before* it has had a decision on its appeal.

CONCLUSION

For all the foregoing reasons, *amici curiae* respectfully request that this Court grant ABOR's Special Action request for a stay pending resolution of its appeal.

Respectfully submitted this 24th day of July, 2018:

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APPENDIX A

The following are examples of demands for documents from scientists engaged in a wide range of scientific research opposed for political, economic, or ideological reasons by those making the demands:

- *Climate Science*. Recently, numerous climate scientists have found themselves the targets of invasive public records requests and other overbroad inquiries. For example, Dr. Michael Mann, a former climate scientist at the University of Virginia, was for years the target of repeated, duplicative, and burdensome demands for his personal emails with other scientists—including by Representative Joe Barton, then the chair of the House Energy and Commerce Committee[1]; Ken Cuccinelli, then Attorney General of Virginia[2]; and E&E Legal (through its predecessor, the American Tradition Institute).[3] Barton's inquiry was heavily criticized by other members of Congress, including fellow

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1 Michael E. Mann, *The Serengeti Strategy: How Special Interests Try To Intimidate Scientists, And How Best To Fight Back,* BULLETIN OF THE ATOMIC SCIENTISTS, Vol. 71, Issue 1, at 33, 39 (2015), *available at* http://www.meteo.psu.edu/holocene/public_html/Mann/articles/articles/MannBullAtomSci15.pdf.

2 Steve Wing, *Social Responsibility and Research Ethics in Community-Driven Studies of Industrialized Hog Production*, ENVIRONMENTAL HEALTH PERSPECTIVES 110(5): 437–444; Climate Science Legal Defense Fund, *Research Protections in State Open Records Laws* (Dec. 2017), at 169, *available at* https://www.csldf.org/wp-content/uploads/2017/12/CSLDF-Research-Protections-in-State-Open-Records-Laws.pdf; Michael Halpern, Union of Concerned Scientists, Center for Science and Democracy, *Freedom to Bully: How Laws Intended To Free Information Are Used To Harass Researchers* 2 (Feb. 2015), at 6 *available at* http://www.ucsusa.org/sites/default/files/attach/2015/09/freedom-to-bully-ucs-2015-final.pdf.

3 *Id.*

Republican Sherwood Boehlert, chair of the House Science Committee;[4] Cuccinelli's and E&E Legal's efforts were ultimately rebuffed by the courts.[5] In siding with Dr. Mann and the University against E&E Legal, the Virginia Supreme Court cited the State's interest in "protect[ing] public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges," explaining that this interest "implicates . . . harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression."[6] In addition, the Court noted that, as in this case, "many noted scholars and academic administrators submitted affidavits attesting to the harmful impact disclosure would have" on the scientific endeavor generally.[7]

- *Biology and Medicine*. Scientists in various fields related to biology who use animal subjects in their research have similarly been on the receiving end of harassment from animal-rights supporters. For instance, activists pursued 10 years of correspondence of a UCLA professor who used primate subjects.[8] UCLA ultimately found the burden of responding to these and other public-record requests so great that it felt compelled to establish a task force "to develop guidelines to protect faculty records while allowing an appropriate level of accountability."[9] In a declaration submitted to the trial court in this case, Professor Carole Goldberg, who co-chaired that task force, summarized

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4 Juliet Eilperin, *GOP Chairmen Face Off on Global Warming*, WASHINGTON POST, July 18, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/17/AR2005071701056.html.

5 *See Cuccinelli v. Rector & Visitors of Univ. of Va.*, 283 Va. 420 (2012); *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330 (2014).

6 *Am. Tradition Inst.*, 287 Va. at 342.

7 *Id.* at 343.

8 CSD Rept., *supra* n.3, at 12-13.

9 *Id.* at 13.

the key principles underlying its conclusions, noting that the task force concluded that public-records requests are specifically damaging when "used for political purposes or to intimidate faculty working on controversial issues."[10] The University of Wisconsin and the University of South Dakota have similarly encountered this issue in the context of research using primates.[11] In general, the use of public-records requests to seek email and other personal information from researchers who use animal subjects has become so prevalent that the National Association for Biomedical Research, the Federation of American Societies for Experimental Biology, and the Society for Neuroscience have developed a guide to help researchers understand their rights and responsibilities, including advice on how to apply existing exemptions to maximally protect documents from disclosure.[12]

- *Law and Religion*. Abusive public records requests of this sort are not confined to the sciences: in 2014, LGBT student activists targeted University of Virginia law and religion professor Douglas Laycock, who advocated for the defense of laws requiring accommodation of certain religious views, such as religious opposition to same-sex marriage. The LGBT student activists sought all

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10 Decl. of Carole Goldberg ¶¶ 3-8 (July 29, 2014).

11 Noah Phillips, *University of Wisconsin Monkey Research Sparks Opposition*, WISCONSIN CTR. FOR INVESTIGATIVE JOURNALISM, Sep 26, 2014, *available at* http://host.madison.com/ct/news/local/education/university/university-of-wisconsin-monkey-research-sparks-opposition/article_101d3294-4581-11e4-8eda-eb7b71ab5a0a.htm; *see also People for the Ethical Treatment of Animals v. S.D. Bd. of Regents, Off. of Hearing Examiners* PRR 08-04 (Apr. 15, 2009), *available at* https://www.csldf.org/resources/PETA-v-USD-Office-of-Hearing-Examiners-Decision.pdf

12 National Association for Biomedical Research et al., *Responding to FOIA Requests: Facts and Resources*, *available at* http://www.faseb.org/FOIArequest (discussing applicable federal and state open records laws and exemptions, as well as advice to "[a]lways be in full compliance with relevant laws and regulations, but do not provide extraneous information that is not required by law; extraneous information may be taken out of context and used by animal rights activists to target you.").

communications between Professor Laycock and various organizations that support religious accommodation laws or oppose same-sex marriage, including two and a half years of cell phone records. The students claimed their FOIA requests were designed to "start a conversation"; one commentator responded that "[y]ou don't start a dialogue with FOIA requests."[13]

- *Health Sciences*. Beginning in 2012, the Highland Mining Company made a series of public-record requests to the University of West Virginia seeking, among other things, draft documents and peer review comments related to the work of Michael Hendryx, who had studied the relationship between a certain kind of mining and adverse health effects.[14] The University refused to provide much of the requested information, and the company took it to court. Ruling in favor of the University, the West Virginia Supreme Court explained that requiring the "involuntary public disclosure of Professor Hendryx's research documents would expose the decision-making process in such a way as to hinder candid discussion of WVU's faculty and undermine WVU's ability to perform its operation."[15]

- *Environmental Health Science.* In the 1990s, an anonymous party through a prominent law firm targeted Deborah Swackhamer, a scientist researching the unusual concentration of toxaphene in the Great Lakes.[16] The request was for unpublished data, class notes, purchase records, telephone records, and many other items spanning a 13-15 year period and only remotely connected to her research, the eventual collection of which "filled a conference room."[17] Ms.

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13 Jonathan Adler, "*You Don't Start a Conversation with FOIA Requests*," WASHINGTON POST (May 27, 2014), *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/27/you-dont-start-a-dialogue-with-foia-requests/?utm_term=.529d702a4200.

14 *Highland Mining Co. v. W. Va. Univ. School of Med.,* 235 W.Va. 370, 376 (2015).

15 *Id.* at 388

16 Maura Lerner, *Researcher Investigating Toxin Becomes Subject of Investigation*, MINNEAPOLIS STAR TRIBUNE (May 17, 1998).

17 CSD Rept., *supra* n.3, at 11.

Swackhamer described the experience as "intimidating and disruptive," taking valuable time away from her research.[18]

- *Horticultural Sciences*. In 2015, an activist group named "US Right to Know," an offshoot of the failed California initiative to require labeling for foods containing genetically modified organisms (GMOs), sent public records requests to fourteen scientists at four different universities (University of California - Davis, the University of Nebraska, the University of Illinois, and the University of Florida) seeking years' worth of emails.[19] One of those scientists—Dr. Kevin Folta, a plant molecular biologist at the University of Florida—spent months reviewing his communications and producing thousands of pages of emails in response to US Right to Know's requests.[20] Those emails were then cherry-picked and distorted to imply that Dr. Folta's research was secretly being funded by agricultural companies; since then, he has received numerous threats of violence against him and his family.[21]

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18 Michael Halpern, Union of Concerned Scientists, *Twenty Years of Open Records Attacks*, (Feb. 13, 2015), http://blog.ucsusa.org/michael-halpern/twenty-years-of-open-records-attacks-629.

19 Alan Levinovitz, *Anti-GMO Activist Seeks to Expose Scientists' Emails with Big Ag*, WIRED MAGAZINE (Feb. 23, 2015), *at* https://www.wired.com/2015/02/anti-gmo-activist-seeks-expose-emails-food-scientists/.

20 Michael Hiltzik, *GMO Controversy: When Do Demands For Scientists' Records Turn Into Harassment?*, L.A. TIMES (Sept. 30, 2015), *available at* http://www.latimes.com/business/hiltzik/la-fi-mh-a-new-gmo-controversy-20150925-column.html; Jack Payne, *Activists Misuse Open Records Requests To Harass Researchers*, THE CONVERSATION, Aug. 27, 2015, *available at* http://theconversation.com/activists-misuse-open-records-requests-to-harass-researchers-46452; David Kroll, *What the New York Times Missed on Kevin Folta and Monsanto's Cultivation of Academic Scientists*, FORBES, Sept. 10, 2015, *available at* https://www.forbes.com/sites/davidkroll/2015/09/10/what-the-new-york-times-missed-on-kevin-folta-and-monsantos-cultivation-of-academic-scientists/#5d2a44b3619a.

21 Hiltzik, *supra* n.20; Payne, *supra* n.20; Tanya Perez, *Watchdog Group Sues UCD Over Public-Records Requests*, THE DAVID ENTERPRISE,

- *Agricultural research.* Scientists researching the effects of confinement on the productivity of egg-laying hens were targeted by the Humane Society, which attempted to use California open records laws to obtain the researchers' records underlying a study on the impacts of a proposed voter initiative on the poultry and egg industry in California. The California appellate court recognized that the disclosure of prepublication communications could have a chilling effect on academic research. The court concluded that if researchers expected their communications to be public they would be less forthcoming with data and opinions, finding that "the evidence here supports a conclusion that disclosure of prepublication research communications would fundamentally impair the academic research process to the detriment of the public that benefits from the studies produced by that research."[22]

- *Epidemiology*. Scientists researching the environmental, social, and health impacts of industrial hog production have been the targets of harassing FOIA requests. Interest groups like the North Carolina Pork Council have requested materials associated with pig farming studies, including the identities of study participants who had been assured anonymity.[23] Steve Wing, for example, a researcher at the University of North Carolina, has had to engage in negotiations just to keep the names of confidential study participants redacted.[24] Researchers into the pork industry have cited these kinds of requests as chilling to their research due to fear of similar requests being made of them.[25]

Aug. 21, 2016, *available at* http://www.davisenterprise.com/local-news/ucd/anti-gmo-group-sues-ucd-over-public-records-requests/.

22 *Humane Soc'y of the U.S. v. Super. Ct. of Yolo Cty.*, 214 Cal. App.4th 1233, 1267 (Cal. Ct. App. 2013).

23 Wing, *supra* n.3.

24 *Id.*

25 CSD Rept., *supra* n.3.