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Unreasonable Searches:

The Abuse of Open Records Laws

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Academics are increasingly the subject of requests for e-mails, phone logs, and other private correspondence. The requests typically utilize state open records laws and are limited to faculty at public universities, but requesters need provide little or no justification for the documents they are seeking. Such open records requests span the range of academic disciplines. The Union of Concerned Scientists (UCS) recently issued a brief discussing dozens of requests involving STEM, social science, humanities, and law faculty.¹ Open records requests are also made to scholars on all parts of the political spectrum, as can be seen in the extensive catalog that the Foundation for Individual Rights in Education (FIRE) maintains.²

It is often difficult to know the specifics of such cases. Was the subject behaving in a way that warrants a request? Was the requester's motive sincere? Answering these questions is fundamental to setting the appropriate balance between the public's right to know and a researcher's freedom to investigate.

Thanks to a recent records request I received, I am able to address these issues, at least in part. While mine is but one case, there are enough parallels to the examples above to draw a few general lessons. My experience illustrates how open records requests can be misused, where for little cause or explanation an academic can be forced to turn over copious amounts of personal information. One can be tarred simply for holding a named appointment, even if there is literally no reason to think the donor has any influence on teaching or scholarship. Requests seem, in

¹Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers* (Cambridge, MA: Center for Science and Democracy, Union of Concerned Scientists, 2015), http://www.ucsusa.org/sites/default/files/attach/2015/02/freedom-to-bully-ucs-2015_0.pdf.

²Foundation for Individual Rights in Education, <https://www.thefire.org/>.

part, intended to chill free discourse. These are strong claims, but the facts of my case bear them out. After supporting these claims with evidence and discussion, I will offer some general principles and suggest potential avenues for reform.

In April 2014 two colleagues and I at the University of Kansas School of Business received an open records request from Students for a Sustainable Future, a campus organization that campaigns for social, environmental, and economic issues.³ Kansas, along with most other states, provides opportunities for requests of documents from public employees, including faculty at public universities. In my case the group requested all documents related to my hiring (including phone logs and contracts) as well as a wide range of correspondence (including e-mails) over the last ten years. A copy of the original request is available online.⁴ This is a breathtakingly wide request and even involves records that predate my employment.

To be clear, the request I received is within the scope of the Kansas records law. It was accompanied, however, by a charged public relations campaign. The requesters argue that they are a nonpartisan group interested in transparency, and that the records are needed to investigate the potential influence of external donors on the academic integrity of the university.⁵

³Miranda Davis, "Student Group Awaits Documents from University," *University Daily Kansan*, September 30, 2014, http://www.kansan.com/news/student-group-awaits-documents-from-university/article_5f7faa26-4908-11e4-9d17-87e71d05a3db.html.

⁴Schuyler Kraus and Maslyn Locke, Students for a Sustainable Future, letter to Jane E. Rosenthal, Custodian of Public Records, Office of the Provost, University of Kansas, April 14, 2014, <https://s3.amazonaws.com/s3.documentcloud.org/documents/1384754/first-open-records-request.pdf>.

⁵Schuyler Kraus, "Your Turn: Koch Ties to KU Concern Students," *LJWorld.com*, September

The idea, it seems, is that there are a handful of bought and sold academics who are foot soldiers in a push to politicize higher education. But a few minutes of research would reveal this is hardly the case here. I am a mainstream academic economist who happens to hold a named endowed chair. If one is looking for external meddling on my campus, there are far more glaring examples. Instead, the request is almost surely a partisan attempt to embarrass and intimidate (I will discuss the requester's partisan leanings below). All of this is clear in documents that were freely available prior to the request.

To begin, let's examine the merits of the request. The first item to consider is whether I was hired under unusual circumstances or am behaving in a way that suggests my scholarship and teaching have been compromised. This would be a hard argument to make.

My appointment followed the usual academic process: application, presentation of research in a seminar, on-campus interview, and finally, a faculty committee vote to extend an offer. When I teach, I present a wide range of viewpoints, an approach that is evident in both my syllabi and teaching evaluations. My research involves such (ahem) ideological topics as "Assessing the Importance of Tiebout Sorting" and "Endogenous Policy Decentralization." This is relatively mainstream economic work and along with most of my writings is published in peer-reviewed journals—hardly the kinds of topics that would lead to heated discussion among nonacademics. In fact, my papers rarely involve topics of great interest to the donor of my chair, the Fred and Mary Koch Foundation, whose stated goal is to support "artistic endeavors and education ventures in Kansas that stimulate interest in both the performing and visual arts."⁶ And

21, 2014, <http://www2.ljworld.com/news/2014/sep/21/your-turn-koch-ties-ku-concern-students/>.

⁶Fred and Mary Koch Foundation, "Focus Areas," What We Do, <http://fmkfoundation.org/focus-areas/>. Mary Koch's grandfather, David Hamilton Robinson, was one of the original three

if one considers the broader set of Koch family foundations, my views on the importance of property rights are in diametric opposition to theirs.

All of this is apparent on my webpage, where my research is freely available.⁷ I would have been glad to point the requesters to this or answer any of their questions if they had in fact ever contacted me: my only interaction with them has been the legal request document filed with the university.

So if it was not my actions, perhaps there was something unusual about my position that merits special attention? The requesters have stated they seek the records as part of “a non-partisan campaign designed to ensure a robust, unbiased academic environment rather than target a specific ideology.”⁸ Since the request focuses on the funding and existence of a few faculty positions, this must mean such positions are uncommon or they have some unusual aspect. Neither of these is true.

There are 182 named, endowed positions at the University of Kansas, which comprises about 7 percent of the total faculty.⁹ All of these positions are based on some sort of external funding (much of the funding for my position is from public monies). There are also dozens of centers on campus that have missions to promote research or interest in particular topics and many of them receive external funding (more on one of these below). And this says nothing of

tenured faculty members at the University of Kansas.

⁷Koleman Strumpf, <http://www.people.ku.edu/~cigar/>.

⁸Students for a Sustainable Future, Profile, <https://rockchalkcentral.ku.edu/organization/studentsforsustainablefuture/about>.

⁹KU Endowment, *Excellence Sustained*, annual report (Lawrence, KS: KU Endowment, 2014), 14, http://issuu.com/kuendowment/docs/annual_report_2014_issuu.

faculty and graduate positions supported through federal grants, as is common in STEM fields or privately funded infrastructure such as lecture halls. This sort of private-public partnership is the common state of affairs at any research university, even state universities where public support has continued to decline (state funds provide less than one-fifth of the University of Kansas operating budget).

So, if external funding is relatively common on my campus, it must be the case that my position sticks out as one in which outside influences play an outsized role. But there is a far more obvious candidate: the Confucius Institute of the University of Kansas (CIKU).¹⁰ This CI (and the hundred or so others at American universities) was established through a partnership with the Office of Chinese Language Council International (colloquially referred to as Hanban), a government entity affiliated with the Ministry of Education of the People’s Republic of China and supervised by the Chinese vice premier.¹¹

Hanban spends about \$300 million supporting CIs worldwide, in part to pay for the institute instructors it provides.¹² CIs “function as an arm of the Chinese state and are allowed to ignore academic freedom” according to the American Association of University Professors (AAUP),¹³ and have been associated with several cases of censorship on topics sensitive to the

¹⁰The Confucius Institute of the University of Kansas, <http://confucius.ku.edu/>.

¹¹The Office of Chinese Language Council International, North America Office, Hanban, <http://www.hanban.ca/hanban.php?lang=en>.

¹²“Confucius Says,” *Economist*, September 13, 2014, <http://www.economist.com/news/china/21616988-decade-ago-china-began-opening-centres-abroad-promote-its-culture-some-people-are-pushing>.

¹³Committee A on Academic Freedom and Tenure, *On Partnerships with Foreign Governments:*

Chinese government, and partly as a result of this have been closed at several schools, including the University of Chicago and Penn State. On my campus this influence extends beyond the university: CIKU coordinates a visiting teacher program for Kansas secondary schools in which Hanban preselects instructors from China.¹⁴ One might think that an institute with explicit and direct ties to a foreign government might be a more obvious place to start if one is interested in shining light on external influences on campus.

The University of Kansas also has a long tradition of engagement in policy discussions. While this benefits both the public and university, it has also created some unusual arrangements, such as faculty members holding political positions in the state government while simultaneously maintaining responsibilities at the university (and receiving a separate salary from each).¹⁵ Again, I would think such scenarios make far more obvious cases to look for conflicts of interest and external influence.

Having examined my position and not finding any clear-cut reason for attention, it is

The Case of Confucius Institutes (Washington, DC: American Association of University Professors, 2014), <http://www.aaup.org/report/confucius-institutes>.

¹⁴“Memorandum of Understanding between the Department of Education of the State of Kansas and The Office of Chinese Language Council International of the People’s Republic of China,” Kansas State Department of Education, October 24, 2005, [http://www.ksde.org/Portals/0/CSAS/Content%20Area%20\(M-Z\)/World%20Languages/Visiting_International_Teachers/China%20Memo%20of%20Understanding.pdf](http://www.ksde.org/Portals/0/CSAS/Content%20Area%20(M-Z)/World%20Languages/Visiting_International_Teachers/China%20Memo%20of%20Understanding.pdf).

¹⁵Tim Richardson, “Sebelius Selects Professor as Aide,” *Topeka-Capital Journal*, cjonline.com, December 11, 2004, http://cjonline.com/stories/121104/leg_loomis.shtml.

worth briefly considering the requesters. While the Students for a Sustainable Future have cast themselves as independent, nonpartisan, interested only in promoting transparency on campus, and under-funded, the reality is a bit more complicated. The group is affiliated with UnKoch My Campus, a nationwide movement to target selected faculty at universities; the campaign seeks to remove Charles and David Koch from campuses, and their partners are those with a strong ideological bent including environmental activists (Greenpeace) and unions (American Federation of Teachers).¹⁶ The national organization provides a fifty-page step-by-step guide on how to identify faculty to target, initiate records requests, find external groups that will support them, generate sympathetic media coverage, and more.¹⁷ The requesting group also endorsed political candidates, those deemed to be “Koch-Free,” which happened to include Democrats but no Republicans, and paid volunteers to campaign during the 2014 election.¹⁸ But perhaps most worrisome is evidence of behind-the-scenes coordination with other organizations: Students for a Sustainable Future received a substantial donation from the AAUP a month *before* the record request I received was made public (the memo on the check reads “Gift for Koch Bros” and is accompanied by a note that says “Give ‘em Hell”); it seems that animosity for the Koch family

¹⁶UnKoch My Campus, University of Kansas, <http://www.unkochmycampus.org/university-of-kansas>. A list of their partners is available at <http://www.unkochmycampus.org/partners>.

¹⁷Ibid., “Campus Organizer’s Guide,” <http://www.unkochmycampus.org/s/Toolkit-8415.pdf>.

¹⁸Sara Shepherd, “Student Group Still Awaiting Koch-Related Records from KU, Turns Focus to Electioneering,” *LJWorld.com*, November 1, 2014, <http://www2.ljworld.com/news/2014/nov/01/student-group-turns-political-campaign-while-await/>; Schuyler Kraus, Students for a Sustainable Future Facebook posting, November 2, 2014, <https://www.facebook.com/studentsforasustainablefuture/posts/739206252782403>.

outweighs the main mission of the AAUP to advance academic freedom).¹⁹

In short, there is potential for open records requests to be abused. My case, unfortunately, is hardly unique. Even major media can overuse these requests. For example, in 2013 the *New York Times* published an incendiary piece implying two economists at public universities were receiving grants from Wall Street as a quid pro quo for writing favorable articles.²⁰ While there was much debate about the veracity of the *Times* article,²¹ other academics interviewed in the documentary film *Inside Job*, which focuses on factors precipitating the 2007–2008 financial meltdown, appear to admit such conflicts.²² But since those professors work at private universities, a records request was not possible. It seems likely this played a role in the *Times*'s choice of subjects. The *New York Times* has kept to this playbook in recent long-form articles on obesity and bioengineered food research; both pieces use open records requests to review records of scholars only at public universities.²³

¹⁹Schuyleronnan, Instagram, <http://instagram.com/p/rUW6jInTDf>. The AAUP's mission is defined on the AAUP website: <http://www.aaup.org/about/mission-1>.

²⁰David Kocieniewski, "Academics Who Defend Wall St. Reap Reward," *New York Times*, December 27, 2013, <http://www.nytimes.com/2013/12/28/business/academics-who-defend-wall-st-reap-reward.html>.

²¹James Hamilton, "A Lack of Ethics," Econobrowser, January 1, 2014, http://econbrowser.com/archives/2014/01/a_lack_of_ethic.

²²*Inside Job*, <http://www.imdb.com/title/tt1645089/>.

²³Anahad O'Connor, "Coca-Cola Funds Scientists Who Shift Blame for Obesity Away from Bad Diets," *New York Times*, August 9, 2015, <http://well.blogs.nytimes.com/2015/08/09/coca-cola-funds-scientists-who-shift-blame-for-obesity-away-from-bad-diets/>. Eric Lipton, "Food Industry

It is exactly this kind of wedge that is so worrisome. Yes, public universities are different from private ones, and they have an added mission of transparency to the citizens of their state. Open records requests can and should be part of this transparency. But if academics at public universities alone are subject to these requests, it seems likely that over time some will move to private schools. I doubt such a brain drain is one of the intended goals of open records laws.

It is time to reform the application of these requests to academics. One possibility is to ask a requester to justify his request, and to allow an impartial arbiter to weigh the potential benefit of disclosing information against the costs in time and potential to disrupt free inquiry. Another is to pass the complete financial costs of the request onto the requester, which might help minimize intrusiveness and avoid the initiation of requests with little merit. As it stands now, open records requesters have to pay only nominal fees.

Absent such changes, the potential for continued overuse and even abuse of these open records requests is a danger to free discourse at public universities. As my case illustrates, this is far from an existential threat.²⁴ The current system starts with the premise that the recipient is

Enlisted Academics in G.M.O. Lobbying War, Emails Show,” *New York Times*, September 5, 2015, <http://nyti.ms/1UyJctr>.

²⁴For readers interested in the mechanics of such a request, the university counsel asked me to turn over all documents pertaining to the request. They then reviewed all of my emails to determine what fell under the records request (after the request was initiated, the counsel’s office told the IT department to cache my deleted emails in case it was later determined they should be included as part of the disclosure). My part of the case was resolved half a year after the initial request. Some but not all of the requested documents were sent to the requesters (the university

guilty, with requesters able disingenuously to claim that anyone opposing the full release of all documents must have something to hide. This is a threat to all scholars, a lever that can be potentially used to silence a particular viewpoint. The websites of USC and FIRE, organizations mentioned at the opening of this article, give numerous examples of this tactic being used without regard to discipline or ideology. Let's protect the marketplace of ideas and not have universities operate as fiefdoms of censorship and intimidation.

counsel reviews the request and omits documents if it falls under certain exemptions listed in the open records law). In my case it appears that personnel records involved in the search that led to my hire were disclosed. I say "appears," since I never received a formal listing of which documents were disclosed. Recipients are free to use the documents in any way they want, though there was little publicity associated with my files, since the recipients decided to focus on one of my colleagues.