
CAN PUBLIC UNIVERSITIES PATENT THEIR RESEARCH?: THE TENSION BETWEEN OPEN RECORDS LAWS AND PATENTABILITY

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ABSTRACT

Under state open records laws, which typically preference public access to governmental records, various documents relating to research can be “public records” accessible to the public through an open records request. In many states, such as Iowa, these laws apply just as much to public universities as they do other governmental units. The accessibility of a public university’s documents under state open records laws presents a particular patentability problem. A public university may not be entitled to a patent on inventions developed by university faculty due to a fundamental rule of patent law—that an invention cannot be patented if it was previously described in a printed publication. Under blackletter patent law, the touchstone for determining whether something is a “printed publication” is whether it was “publicly accessible.” And documents available under a state’s open records law would certainly seem to be publicly accessible.

This Article takes seriously the idea that documents associated with research conducted by faculty and staff of public universities in the United States constitute “printed publications” or are “otherwise available to the public” for purposes of patent law’s novelty requirement. Whether this is actually the case turns out to be surprisingly complex and depends in part on the specifics of each state’s open records laws. This Article builds on existing work in this area by rigorously analyzing the Federal Circuit’s law on printed publications, examining the question under post-America Invents Act law, and focusing specifically on Iowa’s open records law, before concluding with a specific recommendation for Iowa.

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I. INTRODUCTION

Picture a typical public university in the heartland of the United States. Green quads, students bustling, and shiny buildings filled with cutting edge scientific research.¹ Perhaps this particular university specializes in health sciences, or in agricultural technologies, or computer engineering. Researchers carefully document their work in laboratory notebooks (or the computer equivalent), place research protocols in binders, and write manuscripts. As faculty and staff researchers discover new advances, they submit 130, or more, invention disclosures to the university's technology transfer office (TTO) each year.² The TTO analyzes the submissions and concludes that some are economically valuable enough that it is worth filing a patent application. In one year alone, the university files 47 U.S. provisional applications and 89 nonprovisional applications.³ That same year, the United States Patent and Trademark Office (USPTO) also grants 42 patents to the university based on previously filed applications.⁴ While many university patents (as with patents generally) individually possess limited economic value, collectively they can represent substantial value. During 2019, the university's technology licenses generated over \$2.5 million.⁵ Each patent license may help move a new technology from the university lab bench to the hands of the public.

But remember, this is a public research university we are envisioning. As a public university, it is part of the state government.⁶ And as a state entity, it is subject to the same open records law as every other governmental

1. We recognize the incongruity of this image with the COVID-19 pandemic of 2020.

2. This could be any university, but in this case, the numbers are from the Iowa State University Technology Transfer Office's annual report. IOWA STATE UNIV. RSCH. FOUND. & OFF. OF INTELL. PROP. & TECH. TRANSFER, ANNUAL REPORT DATA (2019), https://www.techtransfer.iastate.edu/wp-content/uploads/2019/10/FY19_Annual-Report_FULL_FINAL.pdf [<https://perma.cc/26HW-X7GF>].

3. *Id.*

4. *Id.*

5. *Id.*

6. Indeed, a common critique of university patenting activity is that the research has already been paid for by the public, so why should the public pay again through the mechanism of a patent? See, e.g., Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1194 (2000). We do not focus on that question here, instead assuming for the sake of discussion the starting principle that research conducted at state universities should be patentable.

entity. Under that law, which favors public access to governmental records, various documents relating to research can be “public records” accessible to the public through an open records request. These documents might include researchers’ laboratory notebooks, experimental procedures and recorded results, grant applications, draft manuscripts, or even perhaps the invention disclosures submitted to the university TTO. Indeed, universities in some states have been required to provide access to research documents (although thus far we know of no one who has successfully obtained a pre-filing invention disclosure form via an open records request).⁷

The accessibility of these documents under the state’s open records law presents a particular problem for patentability: the potential that the university’s patents may be invalid under the most fundamental rule of patent law—that an invention must be novel.⁸ Lack of novelty prohibits patents when certain acts have taken place before the filing of the application.⁹ Specifically, 35 U.S.C. § 102 states, “A person shall be entitled to a patent unless—(1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.”¹⁰ Under

7. See, e.g., Claudia Polsky, *Open Records, Shuttered Labs: Ending Political Harassment of Public University Researchers*, 66 UCLA L. REV. 208, 213–16 (2018) (describing open records requests for university research, some successful).

8. The issue of novelty can arise both when the decision to grant a patent is made and after the patent is issued, either when it is asserted in infringement litigation or as part of a post-issuance proceeding at the patent office such as *inter partes* review under 35 U.S.C. § 311 (2018). Because we think it is extremely unlikely that an examiner will seek access to academic research documents in the course of examining a patent application, see, e.g., Sean Seymore, *The Presumption of Patentability*, 97 MINN. L. REV. 990, 997–1000 (2013), the issue that we describe in this Article is most likely to arise in the context of post-issuance proceedings. In these situations, a competitor of the university’s licensee is much more likely to conduct an exhaustive search for prior art. See Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1502 (2001) (describing the vast difference between resources expended during patent examination and patent litigation).

9. Patent experts will be familiar with the change from a “true” novelty-plus-statutory-bar framework to a statutory-bar framework for novelty in the 2011 America Invents Act (AIA). See ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS* 324, 439 (7th ed. 2017). This Article is not concerned with pre-AIA “true” novelty. In addition, note that under U.S. law, depending on the circumstances, disclosures made less than one year before the filing may not be considered prior art. 35 U.S.C. § 102 (2018). We address this in Part IV.A.4, *infra*.

10. 35 U.S.C. § 102(a)(1).

blackletter patent law, the touchstone for determining whether something is a “printed publication” is whether it was “publicly accessible.”¹¹ And documents available under a state’s open records law would certainly seem to be publicly accessible.¹²

This argument may strike some as an absurdity. Surely the definition of public records does not encompass these types of things. Surely there are exceptions in state laws that prevent public access to researchers’ notes or invention disclosure forms. Surely information that is commercially valuable to the university can be protected from disclosure. Surely trade secret law would preclude access to these records. Yet the answer to each of these counterarguments is “no”—or at best, a qualified “maybe.”¹³ The practical stakes of this may not seem to be very significant; as we acknowledge, an invalidity challenge based on the theory we develop may or may not actually succeed. But the risk can reduce the value of a public university’s patents, reducing any interest in licenses to commercialize the inventions. It may also steer prospective partners away from public universities and toward research at private universities, which are not subject to the same public access.

This Article takes seriously the idea that documents associated with research conducted by faculty and staff of public universities in the United States constitute printed publications or are “otherwise available to the public” for purposes of patent law’s novelty requirement. Whether this is actually the case turns out to be surprisingly complex and depends, in part, on the specifics of each state’s open records laws.¹⁴ Because a 50-state survey

11. 1 DONALD S. CHISUM, CHISUM ON PATENTS § 3.04[2] (2020).

12. *Id.*

13. One obvious question is, “Why aren’t there lots of cases involving open records requests brought by potential competitors seeking to obtain the secrets of university research?” One reason may simply be that litigation is costly. If companies are willing to pay to access research, they are much more likely to enter into a collaborative agreement with the university than to seek to obtain these materials through an adversarial path. And in some cases, the information may be available simply by asking.

14. One question that some readers might have is, “Why not the Freedom of Information Act?” The reason for this is straightforward: the federal Freedom of Information Act, codified at 5 U.S.C. § 552 (2016), allows people to request records from federal agencies. Some relevant materials could be obtained from federal agencies. *See* Peter M. Midgley, Jr., *The Freedom of Information Act: Another Pond for Prior Art Fishing Expeditions*, 27 AIPLA Q. J. 77, 80 (1999); *E.I. Du Pont De Nemours & Co. v. Cetus Corp.*, No. C-89-2860 MHP, 1990 WL 305551, at *8 n.7 (N.D. Cal. Dec. 3, 1990) (concluding a grant proposal that could be obtained from NSF through a FOIA request was prior art). But we are interested in requests made directly to *state* agencies.

is beyond the scope of this Article, we instead focus on Iowa's open records law and its application to Iowa's public universities.¹⁵ Our analysis and conclusions have application beyond Iowa, however. In particular, we conclude that due to the substantial uncertainty about whether documents associated with research at public universities *are* prior art under § 102,¹⁶ we recommend all states move toward adopting legislation that provides a temporally-limited exemption for these materials. Along those lines, we recommend model statutory language that might be adopted. Specifically, the proposed legislation exempts from disclosure records created as a result of university research unless the research has been publicly disclosed, a patent application has been filed, or it has been five years since the creation of the records, whichever is shorter. We think this proposal balances the reasons for public access with protecting the patentability of public university research.

It may also be helpful to describe what this Article is not. Most importantly, we focus only on the issue of *validity of patents* for public university research in connection with Iowa's open records law. But there are other reasons for caution when it comes to allowing open records laws to reach into preliminary research conducted by faculty, including the potential destruction of scientific norms and the peer review system, and the chilling effects on academic freedom.¹⁷

15. In the Appendix, we provide a list of research or university-related statutory exceptions under several states' open records laws.

16. See 35 U.S.C. § 102(a) (2018).

17. See Tammy L. Lewis & Lisa A. Vincler, *Storming the Ivory Tower: The Competing Interests of the Public's Right to Know and Protecting the Integrity of University Research*, 20 J.C. & U.L. 417, 420 (1994). See generally 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*, DUKE L. & TECH. REV., 2005, at 23 (arguing that the California Public Records Act deters bioscience firms from collaborating with California's public research universities); Polsky, *supra* note 7 (arguing that harassing records requests undermine the peer review process, impair the core intellectual functions of the university, and chill research on critical issues). Tammy Lewis and Lisa Vincler also provide a short discussion of the tension between public right-to-know laws and patentability under 35 U.S.C. § 102(b), particularly in the context of unfunded grant proposals. Lewis & Vincler, *supra*, at 437–38; see also Vladimir Lozan, Comment, *Open for Trouble: Amending Washington's Open Public Meetings Act to Preserve University Patent Rights*, 86 WASH. L. REV. 393, 401–03, 415–18 (2011) (examining the tension between Washington's Open Public Meetings law and § 102(b)).

Nor are we the first to come up with the idea that there is a tension between state and federal governmental disclosure laws and patentability.¹⁸ This Article builds on the existing work of Tammy Lewis and Lisa Vincler, Vladimir Lozan, and others by rigorously analyzing the Federal Circuit's law on printed publications, examining the question under post-America Invents Act (AIA) law, and focusing specifically on Iowa's open records law, before concluding with a specific recommendation for Iowa.

The remainder of this Article proceeds as follows. Part II discusses open records laws, both generally and using the specific example of Iowa. In Part III, we discuss the application of open records laws to public universities, again both generally and in Iowa. Part IV provides background on university patenting and the basic requirements of patentability. In Part V, we analyze the core question: Are documents, such as the ones described above, "prior art" under 35 U.S.C. § 102?¹⁹ We consider every counterargument we can think of, including issues presented by § 102 itself and those based on the specifics of Iowa's open records law. Our conclusion is that the answer is uncertain and can be fact-specific. We conclude in Part VI with a hard look at whether changing Iowa's open records law is appropriate here, ultimately culminating in our proposed statutory language which attempts to balance concerns about patentability with the goals of open access to government embodied in the open records laws.

18. Indeed, a similar argument was successfully made in a patent infringement case at least as early as 1990 in the context of FOIA. *See E.I. Du Pont*, 1990 WL 305551, at *8 n.7. Several authors have discussed the tension under pre-AIA law. *See* Lewis & Vincler, *supra* note 17, at 434–40; Lozan, *supra* note 17, at 401–03, 415–18; Midgley, *supra* note 14, at 100–03; Tamsen Valoir, *Government Funded Inventions: The Bayh-Dole Act and the Hopkins v. Cellpro March-in Rights Controversy*, 8 TEX. INTELL. PROP. L.J. 211, 216 (2000); Russell K. Yoshinaka, *Too Much of a Good Thing? Public Access to Medical Research in Washington After PAWS v. U.W.*, 70 WASH. L. REV. 929, 1006–07 (1995).

19. To help avoid confusion at the outset, we want to make clear this Article is about whether documents that *could have been obtained* through an open records request could constitute § 102(a)(1) prior art rather than whether documents that *were actually obtained* through an open records request constitute § 102(a)(1) prior art. Although, as we discuss in Part IV, there is no requirement that documents actually be obtained in order to constitute printed publications, the argument that documents that were *actually obtained* constitute printed publications is obviously much stronger. Nor is this Article about whether traditional academic talks could be "printed publications." For a discussion of that subject, see generally Sean B. Seymore, *The "Printed Publication" Bar After Klopfenstein: Has the Federal Circuit Changed the Way Professors Should Talk About Science?*, 40 AKRON L. REV. 493 (2007) and Margo A. Bagley, *Academic Discourse and Proprietary Rights: Putting Patents in Their Proper Place*, 47 B.C. L. REV. 217 (2006).

II. OPEN RECORDS LAWS

A. Open Records Laws Generally

Over 100 years ago, Justice Louis Brandeis wrote, “Sunlight is said to be the best of disinfectants.”²⁰ In accordance with this view, state and federal open records laws allow the public to request access to federal, state, and local government records.²¹ These laws are based on the need for government transparency and accountability,²² and the public’s “right to be informed about what their government is up to.”²³ With the “sunshine” provided by open records laws, the public can expose government malfeasance and hold the government accountable for its actions.²⁴

For many people, the most familiar of these laws may be the Freedom of Information Act (FOIA): the federal law that allows the public to request access to federal agency records.²⁵ Congress enacted FOIA in 1966 in order to “foster democracy by ensuring public access to agency records and information” and to “improve public access to agency records and information.”²⁶ FOIA is based on the central principle that “a democracy works best when the people have all the information that the security of the Nation permits.”²⁷ This Act operates with a presumption toward disclosure, so unless the requested information “falls under one of nine exemptions which protect interests such as personal privacy, national security, and law

20. LOUIS D. BRANDEIS, *OTHER PEOPLE’S Money AND HOW THE BANKERS USE IT*, CHAPTER V: WHAT PUBLICITY CAN DO 92 (1914).

21. Zach Greenberg, *The Chilling Effect of Sunlight: Preserving Academic Freedom in the Face of Abusive Open Records Requests*, 29 GEO. MASON U. C.R. L.J. 145, 154 (2019).

22. Polsky, *supra* note 7, at 220.

23. U.S. Dep’t of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 773 (1989) (internal quotation marks and citation omitted).

24. Greenberg, *supra* note 21, at 154.

25. 5 U.S.C. § 552 (2018); *What Is FOIA?*, FOIA.GOV, <https://www.foia.gov/about.html> [<https://perma.cc/K4DD-LA93>].

26. Captain Thomas M. Strassburg, *The Public’s Right to Know and the Individual’s Right of Privacy*, ARMY LAW., Apr. 1976, at 1, 1; *see* Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. § 552); H.R. REP. NO. 104-795, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448.

27. Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 652 (1984) (quoting Statement by the President upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, Weekly Comp. Pres. Doc. 895 (July 4, 1966)).

enforcement,” the federal agency must disclose the requested information to any person who requests it.²⁸

While FOIA only applies to federal information and records, states, too, have open records laws that allow the public to request access to state and local agency records, or public records.²⁹ Similar to their federal counterpart, state open records laws “afford the public broad access to governmental records,” subject “state[] agencies to public scrutiny,” and “ensure the accountability of government officials and agencies.”³⁰ They generally operate with a presumption of disclosure,³¹ but they are not without limits, attempting to balance the public’s right to know with relevant privacy and confidentiality concerns.³² In order to strike this balance, state open records laws include limits on the scope of what may be required and specific exemptions for certain information that agencies need not disclose.³³

Within these general contours, the substance of each state’s open records laws varies greatly,³⁴ particularly regarding the definition of public records, statutory exemptions from disclosure, and how requesters enforce their statutory rights.³⁵

28. *Frequently Asked Questions*, FOIA.GOV, <https://www.foia.gov/faq.html> [<https://perma.cc/P88K-5YK4>]; see also 5 U.S.C. § 552(b) (2018) (providing FOIA’s nine exemptions from disclosure).

29. See 5 U.S.C. § 552; *Freedom of Information Act (Federal) Research Guide*, GEORGETOWN L., <https://guides.ll.georgetown.edu/c.php?g=320807&p=2146492> [<https://perma.cc/WYT8-SYPJ>] (“[The federal FOIA] . . . cannot be used to obtain state records; each state has its own freedom of information statute.”).

30. 37A AM. JUR. 2D *State Freedom of Information Acts* § 2 (2020).

31. David L. Ganz, *Open Public Records Act Litigation*, 128 AM. JUR. *Trials* 495 §§ 7, 20 (2020).

32. *Id.* § 1.

33. *Id.* § 10.

34. See Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 555 (1993) (“The comprehensiveness of these open records statutes varies significantly.”).

35. See 4 CHARLES H. KOCH, JR. & RICHARD MURPHY, *ADMINISTRATIVE LAW AND PRACTICE* §§ 14:61–62 (3d ed. 2020).

B. Iowa's Open Records Act

Iowa's legislature enacted Iowa's Open Records Act, codified at chapter 22 of the Iowa Code, in 1967³⁶ in response to "numerous complaints from an irate public long denied the right of inspection by custodians of public records."³⁷ Consistent with the general principles of open records laws, Iowa's Open Records Act seeks "to open the doors of government to public scrutiny—to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act."³⁸ This law ensures that Iowa's democratic government functions properly because "it deters unwise or illegal government action" and "ensures more careful consideration by government officials of the wisdom and lawfulness of their action."³⁹ Additionally, Iowa taxpayers require access to certain government records in order to properly evaluate public officials and vote accordingly.⁴⁰ The Act has been anything but static, having been amended approximately 120 times since 1967.⁴¹

Under Iowa's Open Records Act, "Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record."⁴² Any person, not just Iowa citizens, may request public records under this

36. Michael A. Giudicessi & Susan P. Elgin, *Iowa: Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide/iowa/> [<https://perma.cc/JZ6L-8A7M>].

37. Note, *Iowa's Freedom of Information Act: Everything You've Always Wanted to Know About Public Records but Were Afraid to Ask*, 57 IOWA L. REV. 1163, 1166 (1972).

38. Iowa C.R. Comm'n v. City of Des Moines, 313 N.W.2d 491, 495 (Iowa 1981).

39. ARTHUR E. BONFIELD, STATE GOVERNMENT IN THE SUNSHINE II: CHAPTERS 21 AND 22 OF THE CODE OF IOWA, REPORT TO JOINT INTERIM STUDY COMMITTEE ON FREEDOM OF INFORMATION, OPEN MEETINGS, AND PUBLIC RECORDS, IOWA GENERAL ASSEMBLY 3–4 (Sept. 6, 2007).

40. ARTHUR E. BONFIELD, KATHRYN L. GRAF & FORREST KILMER, REPORT OF THE GOVERNOR'S COMMITTEE ON THE IOWA PUBLIC RECORDS LAW 1 (1984) ("The importance of a public right of access to information in the possession of government is hard to overstate. Most obvious is the point that an informed electorate is essential to effective representative government. The public can evaluate the performance of its official servants so that its members may vote intelligently in elections only if they have access to all of the information in the possession of the government that is necessary to make that judgment sensibly.").

41. See generally IOWA CODE ch. 22.

42. IOWA CODE § 22.2 (2019).

provision.⁴³ In addition, any “government body”⁴⁴ may be subject to Iowa’s open records law. A government body extends beyond just what one might think of government: entities subject to Iowa’s open records laws include cities,⁴⁵ Iowa’s public universities and the Board of Regents,⁴⁶ city police departments,⁴⁷ state boards,⁴⁸ and school districts.⁴⁹ Private institutions contracting with a public agency may also be subject to Iowa’s open records law⁵⁰ where “the activity at issue . . . advance[s] the statutory objects of the [public] institution.”⁵¹

Anyone wishing to invoke Iowa’s open records law to obtain access to certain public records begins by filing a request with the lawful custodian of the public record.⁵² Although persons are permitted to make open records requests in person, physical presence is not required, and persons may make

43. *See id.* (“Every person shall have the right to examine and copy a public record . . .” (emphasis added)).

44. *Id.* § 22.1(1) (“‘Government body’ means this state, or any county, city, township, school corporation, political subdivision, tax-supported district, nonprofit corporation other than a fair conducting a fair event as provided in chapter 174, whose facilities or indebtedness are supported in whole or in part with property tax revenue and which is licensed to conduct pari-mutuel wagering pursuant to chapter 99D; the governing body of a drainage or levee district as provided in chapter 468, including a board as defined in section 468.3, regardless of how the district is organized; or other entity of this state, or any branch, department, board, bureau, commission, council, committee, official, or officer of any of the foregoing or any employee delegated the responsibility for implementing the requirements of this chapter.”).

45. *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 44 (Iowa 1999); *Diercks v. City of Bettendorf*, No. 18-1068, 2019 WL 2871123, at *5 (Iowa Ct. App. July 3, 2019).

46. *Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 484 (Iowa 2012); *Sysco Iowa, Inc. v. Univ. of Iowa*, 889 N.W.2d 235, 237 (Iowa Ct. App. 2016).

47. *Milligan v. Ottumwa Police Dep’t*, 937 N.W.2d 97, 102 (Iowa 2020).

48. *Doe v. Iowa State Bd. of Physical Therapy & Occupational Therapy Exam’rs*, 320 N.W.2d 557, 559 (Iowa 1982) (“All records of a state board are public records.”); *Reveiz v. Iowa Bd. of Med. Exam’rs*, 735 N.W.2d 203 (Iowa Ct. App. 2007) (holding that the Iowa’s Board of Medical Examiners is subject to Iowa’s open records law).

49. *Rathmann v. Bd. of Dirs. of Davenport Cmty. Sch. Dist.*, 580 N.W.2d 773, 777 (Iowa 1998).

50. IOWA CODE § 22.2 (2019) (“A government body shall not prevent the examination or copying of a public record by contracting with a nongovernment body to perform any of its duties or functions.”).

51. *Gannon v. Bd. of Regents*, 692 N.W.2d 31, 40 (Iowa 2005).

52. IOWA CODE § 22.1(2) (“‘Lawful custodian’ means the government body currently in physical possession of the public record.”); *id.* § 22.3.

the request “in writing, by telephone, or by electronic means.”⁵³ If the lawful custodian decides to grant the request, he or she must make the records available during the agency’s customary office hours⁵⁴ and provide a suitable place for the requester to examine and copy the records.⁵⁵ But the statute also allows the lawful custodian to charge a reasonable fee for his or her supervisory services and any copying expenses.⁵⁶

Iowa’s Open Records Act operates with a presumption of disclosure, so the default rule is that agencies must disclose public records.⁵⁷ This presumption, however, must be balanced with competing public interests including the need for an “effective government, economical government, efficient government, and the protection of certain aspects of personal privacy.”⁵⁸ Accordingly, Iowa’s Open Records Act provides certain restraints on disclosure that public agencies may invoke to deny certain open records requests: (1) statutory exceptions for records which may remain confidential;⁵⁹ (2) injunctions restraining examination;⁶⁰ (3) restraints on examination if disclosure may result in the denial of federal funds;⁶¹ and (4) other statutory provisions outside chapter 22 requiring confidentiality.⁶²

53. *Id.* § 22.3(1). For example, the University of Iowa provides an online form for persons to submit open records requests at any time. *File a Public Records Request*, UNIV. OF IOWA, <https://publicrecordsrequests.iowa.uiowa.edu/> [<https://perma.cc/KF65-BN8P>].

54. IOWA CODE § 22.4.

55. *Id.* § 22.3(1).

56. *Id.* § 22.3(2).

57. *Id.* § 22.8(3) (“In actions brought under this section the district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others.”); *In re Langholz*, 887 N.W.2d 770, 776 (Iowa 2016) (“The Act carries with it a presumption of openness and disclosure.” (internal quotation marks and citation omitted)); *Rathmann v. Bd. of Dirs. of Davenport Cmty. Sch. Dist.*, 580 N.W.2d 773, 777 (Iowa 1998) (“The right of persons to view public records is to be interpreted liberally to provide broad public access to public records.”). Similarly, Iowa’s open meetings law operates “in favor of openness.” IOWA CODE § 21.1.

58. BONFIELD, *supra* note 39, at 2.

59. IOWA CODE § 22.7.

60. *Id.* § 22.8.

61. *Id.* § 22.9.

62. *See, e.g., id.* §§ 96.11(6), 48A.11(4)(b), 422.20, 901.4, 135.41.

Section 22.7 currently provides 73 exceptions for public records that public officials may keep confidential from disclosure.⁶³ Examples of section 22.7 records include personal student information,⁶⁴ hospital records,⁶⁵ criminal identification files,⁶⁶ and medical examiner records.⁶⁷ When a public agency wishes to invoke a section 22.7 exemption in response to a public records request, the agency bears the burden of proving the exemption applies to the requested record.⁶⁸

Even if a section 22.7 exemption does not apply, the public agency may seek an injunction to restrain examination of a public record under section 22.8.⁶⁹ Under this provision, “The district court may grant [the] injunction” where “the examination would clearly not be in the public interest” and “the examination would substantially and irreparably injure any person or persons.”⁷⁰ In balancing these interests, the statute instructs the district court to “take into account the policy of this chapter that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others.”⁷¹

Providing an additional restraint on disclosure, section 22.9 permits Iowa courts to suspend provisions of Iowa’s open records law if the provision would cause the denial of federal funds to a state agency.⁷² Agencies⁷³ may adopt rules in accordance with this section to waive certain provisions of chapter 22 that may prevent the denial of federal funds under certain

63. *Id.* § 22.7.

64. *Id.* § 22.7(1).

65. *Id.* § 22.7(2).

66. *Id.* § 22.7(9).

67. *Id.* § 22.7(41).

68. *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999). When denying open records requests, the University of Iowa notifies the requester regarding which statutory exemption applies to preclude disclosure. *Frequently Asked Questions*, UNIV. OF IOWA, <https://transparency.uiowa.edu/frequently-asked-questions> [<https://perma.cc/T87L-XHAY>].

69. IOWA CODE § 22.8.

70. *Id.* § 22.8(1)(a)–(b).

71. *Id.* § 22.8(3).

72. *Id.* § 22.9(1).

73. *Id.* § 17A.2(1) (“‘Agency’ means each board, commission, department, officer or other administrative office or unit of the state.”).

circumstances.⁷⁴ Although, even if an agency does not adopt a rule in accordance with section 22.9, section 22.9 still applies to suspend provisions of chapter 22 when they would cause the denial of federal funds.⁷⁵

Finally, if another statutory provision outside of chapter 22 requires certain documents to remain confidential, persons may not invoke Iowa's open records law to require disclosure of these documents.⁷⁶ For example, unemployment compensation records,⁷⁷ voter registration data,⁷⁸ income tax return information,⁷⁹ pre-sentence investigation reports,⁸⁰ and hospital infection data summaries⁸¹ must remain confidential under other chapters of the Iowa Code.

If a person believes that a public agency improperly denied an open records request in violation of chapter 22, the requester may seek administrative review with the Iowa Public Information Board (IPIB)⁸² or bring a suit in state district court.⁸³

74. *Id.* § 22.9(2) (“An agency . . . shall adopt as a rule, in each situation where this section is believed applicable, the agency’s determination identifying those particular provisions of this chapter that must be waived in the circumstances to prevent the denial of federal funds, services, or information.”).

75. *Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 490 (Iowa 2012).

76. *In re Langholz*, 887 N.W.2d 770, 776–77 (Iowa 2016) (“In addition to the statutory exemptions contained in section 22.7, there are also separate laws requiring documents to be kept confidential. Therefore, there may be other legal grounds for sealing all or part of a court order.” (internal citation omitted)); *Burton v. Univ. of Iowa Hosps. & Clinics*, 566 N.W.2d 182, 189 (Iowa 1997) (“[C]hapter 22 does not trump or supersede specific statutes . . . on confidentiality of records.”).

77. IOWA CODE § 96.11(6).

78. *Id.* § 48A.11(4)(b).

79. *Id.* § 422.20.

80. *Id.* § 901.4.

81. *Id.* § 135.41; *Burton*, 566 N.W.2d at 189 (holding that the court may not use chapter 22 to require disclosure of infection data summaries because Iowa Code § 135.41 gives Iowa hospitals discretion to deny public disclosure of this information).

82. IOWA CODE §§ 23.5, 23.7.

83. *Id.* § 22.10(1). In addition to the remedies provided in chapter 22, the requester may also seek judicial review under Iowa’s Administrative Procedure Act. *Id.* § 17A.19. “The rights and remedies provided by [chapter 22] are in addition to any rights and remedies provided by section 17A.19.” *Id.* §§ 22.5, 22.10; *see also id.* § 22.5 (“[R]ights under this chapter also may be enforced by an action for judicial review according to the provisions of the Iowa [A]dministrative [P]rocedure Act, chapter 17A, if the records involved are records of an ‘agency’ as defined in that Act.”).

III. PUBLIC UNIVERSITIES AND OPEN RECORDS LAWS

A. Open Records Laws Generally as Applied to Public Universities and Public University Research

As publicly funded institutions, public universities are subject to state open records laws.⁸⁴ Many scholars have viewed open records requests to public universities as effective mechanisms “to expose malfeasance at public educational institutions”⁸⁵ and “to monitor whether public university administration is fiscally sound and financially uncorrupted.”⁸⁶ The American Association of University Professors further states that public access to certain public university records may encourage “universities to fulfill their intended missions by the knowledge that failure to do so is likely to be exposed,” incentivize “university personnel to be more effective because their actions and decisions must survive public scrutiny,” and allow “a wise public [to add] constructive input into university decisions.”⁸⁷ The notorious University of North Carolina (UNC) academic-athletic scandal highlights the need for some public scrutiny of public universities.⁸⁸ In the

84. Polsky, *supra* note 7, at 212; MICHAEL HALPERN, CTR. FOR SCI. & DEMOCRACY AT THE UNION OF CONCERNED SCIENTISTS, FREEDOM TO BULLY: HOW LAWS INTENDED TO FREE INFORMATION ARE USED TO HARASS RESEARCHERS 2 (2015), <https://www.ucsusa.org/sites/default/files/attach/2015/09/freedom-to-bully-ucs-2015-final.pdf> [<https://perma.cc/Y36Y-Q9U8>] (“As institutions partially funded by taxpayer dollars, universities . . . are subject to open records laws.”).

In this Article, we discuss the connection between public university research and state open records laws, rather than the federal FOIA. In the context of university research, the federal FOIA only applies when the research is federally funded. So, while all researchers at public universities should be aware of potential disclosure under state open records laws, only those with federal funding need to be concerned with the federal FOIA.

A quick note about the applicability of the federal FOIA: if university researchers submit grant applications to federal agencies, these grant applications are subject to disclosure under FOIA. Lewis & Vincler, *supra* note 17, at 447. However, any research data produced under a federal grant is generally not subject to federal disclosure because it is not an “agency record” for purposes of FOIA. *Forsham v. Harris*, 445 U.S. 169, 170 (1980).

85. Greenberg, *supra* note 21, at 154.

86. Polsky, *supra* note 7, at 237.

87. Peter O. Steiner et al., *Access to University Records*, 83 ACADEME, no. 1, Jan.–Feb. 1997, at 44, 45.

88. See Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 23, 2014), <https://edition.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html> [<https://perma.cc/CXX6-W27C>].

early 2010s, an investigative report uncovered an 18-year scandal where UNC students, including athletes, obtained easy grades in “fake paper classes.”⁸⁹ In response, concerned citizens invoked North Carolina’s open records law to file record requests with UNC to uncover information about this scandal.⁹⁰ Other examples include journalistic investigations into student-athlete compensation⁹¹ and admissions scandals.⁹²

Open records laws can also be used to target individual researchers for an array of other reasons.⁹³ For example, in 2011, the American Tradition Institute, an opponent of climate change research,⁹⁴ filed an open records request with the University of Virginia (UVA) asking for the disclosure of all the documents of Dr. Michael Mann, a climate scientist formerly employed by UVA.⁹⁵ The Supreme Court of Virginia ultimately held Dr. Mann’s research records were exempt from disclosure under the statutory exemption for “[d]ata, records or information of a proprietary nature produced or collected by or for faculty of public institutions of higher education.”⁹⁶ But Dr. Mann and UVA still expended considerable funds and

89. *Id.*

90. *UNC Trustees Irked by Open-Records Costs*, NEWS & REC. (Mar. 30, 2016), https://www.greensboro.com/news/schools/unc-trustees-irked-by-open-records-costs/article_131fb6f6-de87-5ddc-a3b7-65ffb54f4306.html [<https://perma.cc/23FM-CUK7>].

91. *See, e.g.*, Aaron Marshall, *ESPN Sues Ohio State in Public Records Suit Related to Tattoos for Memorabilia Scandal*, CLEVELAND.COM (Jan. 12, 2019), <https://www.cleveland.com/open/2011/07/espn-sues-ohio-state-in-public.html> [<https://perma.cc/7PSU-6G54>]; *ESPN Asks for Release of OSU Records*, ESPN (July 11, 2011), https://www.espn.com/college-football/story/_/id/6759872/espn-files-public-records-lawsuit-ohio-state-buckeyes [<https://perma.cc/8Q5C-MNX8>].

92. *See, e.g.*, Tamar Lewin, *Privacy and Press Freedom Collide in University Case*, N.Y. TIMES (Oct. 20, 2011), <https://www.nytimes.com/2011/10/21/education/21privacy.html> [<https://perma.cc/U5MC-ZWMT>]; Jodi S. Cohen, Stacy St. Clair & Tara Malone, *Clout Goes to College*, CHI. TRIBUNE (May 29, 2009), <https://www.chicagotribune.com/investigations/chi-070529u-of-i-clout-story.html> [<https://perma.cc/EK9C-7KYD>]. For a range of examples involving the University of Wisconsin, see David Pritchard & Jonathan Anderson, *Forty Years of Public Records Litigation Involving the University of Wisconsin: An Empirical Study*, 44 J.C. & U.L. 48, 59 (2018).

93. Polsky, *supra* note 7, at 212; *see also* Greenberg, *supra* note 21, at 157.

94. Memorandum of Law in Support of Intervenor-Respondent Michael Mann’s Motion for Leave to Intervene at 2, *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, No. CL 11-3236 (Va. Cir. Ct. Sept. 2, 2011), 2011 WL 11545824.

95. *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 756 S.E.2d 435, 437 (Va. 2014).

96. *Id.* at 440–42.

devoted substantial time to litigating this harassing open records request.⁹⁷ The resulting three-year open records litigation ultimately created “a major distraction from [Dr. Mann’s] climate change research.”⁹⁸ In another example, a trade coalition filed an open records request with the University of California, Davis seeking everything a law professor had written about member companies.⁹⁹ The result was over a thousand pages of documents from the professor, who had written an op-ed critical of the industry group’s practices.¹⁰⁰

Public universities receive many requests for faculty records, even for records as personal as e-mails.¹⁰¹ In response, universities typically require that all public records requests go through an authorized public records department or the office of general counsel, and some universities even prohibit university employees from responding to the requests themselves.¹⁰²

97. Polsky, *supra* note 7, at 251–52; *see also* Memorandum in Support of Motion to Quash Process and Deny Petitioners’ Requests for Discovery at 4, *Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va.*, No. CL 11-3236 (Va. Cir. Ct. Jan. 20, 2012), 2012 WL 9938198 (“The Discovery Requests are simply the latest effort to obtain documents to stir controversy, chill scientific debate, and embarrass and harass Dr. Mann and the University.”).

98. Polsky, *supra* note 7, at 251; *see also* Pritchard & Anderson, *supra* note 92, at 66–67 (describing a request for a professor’s e-mails after the professor wrote a blog post critical of changes to state laws).

99. *See* Elizabeth Williamson, *Industries Turn Freedom of Information Requests on Their Critics*, N.Y. TIMES (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/us/politics/freedom-of-information-requests.html>.

100. *Id.*

101. *See, e.g.*, Michael Halpern, *More High Profile FOIA Requests at the University of Virginia*, UNION OF CONCERNED SCIENTISTS (June 10, 2014), <https://blog.ucsusa.org/michael-halpern/more-high-profile-foia-requests-at-the-university-of-virginia-560> [https://perma.cc/3L37-LXH6] (“This time, two UVa [sic] students are requesting the email and phone records of a law school professor whose work has run afoul of the LGBT organization GetEqual.”); William Cronon, *Abusing Open Records to Attack Academic Freedom*, SCHOLAR AS CITIZEN (Mar. 24, 2011), <http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom/> [https://perma.cc/2VFU-LGVM] (detailing the Wisconsin Republican Party’s request to the University of Wisconsin-Madison for a professor’s e-mail records).

102. *See, e.g.*, *Public Information Request*, UNIV. OF MD., <https://www.umd.edu/administration/public-information-request> [https://perma.cc/G6E9-EXVY] (instructing University of Maryland employees that “[i]f you receive a request for documents, do not respond to the request yourself. . . . Regardless of whether the request specifically cites Freedom of Information Act (FOIA, the federal equivalent) or Public Information Act (PIA), you should immediately forward the request to the UM Office of General Counsel.”); *Public Records Request*, MIAMI UNIV., <https://miamioh.edu/about-miami/>

These requests may create problems for university faculty researchers because university administrators are often unprepared to deal with broad research records requests and frequently have different perspectives and interests than faculty.¹⁰³ For example, university administrators may not comprehend the potentially damaging effects of disclosing certain university research documents, or may shift costs from the institution to the individual faculty member.

Whether universities grant access to university documents through open records requests varies greatly depending on each state's open records laws.¹⁰⁴ Each state takes a different approach to addressing the disclosure and protection of university research.¹⁰⁵ A few states categorically exclude all public university records from their definitions of public records,¹⁰⁶ while other states require courts to apply a balancing test to determine whether the public interest in protecting the research records outweighs the public interest in disclosure.¹⁰⁷

leadership/general-counsel/records-request/index.html [https://perma.cc/4G5E-QLHS] (“If a request is made directly to any other University Office, the staff are expected to immediately contact the Office of General Counsel to begin the process.”); *Public Records Requests*, PURDUE UNIV., <https://www.purdue.edu/legalcounsel/public/index.html> [https://perma.cc/ML98-HDKW] (“The Office of Legal Counsel (OLC) is responsible for accepting, reviewing and responding to all requests for public records. Faculty and staff are not authorized to receive, grant or deny any requests and should refer individuals to this webpage for information.”).

103. See HALPERN, *supra* note 84, at 2 (“Although some are pushing back, universities and researchers are often unprepared to respond appropriately, partly because laws and privacy protections vary by state, and also because universities and their employees do not always have the same interests.”).

104. CLIMATE SCI. LEGAL DEF. FUND, RESEARCH PROTECTIONS IN STATE OPEN RECORDS LAWS: AN ANALYSIS AND RANKING 1, 3 (2d ed. 2019), <https://www.csldf.org/wp-content/uploads/2020/04/Research-Protections-in-State-Open-Records-Laws.pdf> [https://perma.cc/62SL-A5CK] [hereinafter CSLDF 2019 REPORT].

105. *Id.* at 3.

106. *Id.*; see, e.g., DEL. CODE ANN. tit. 29, § 10002(i) (2020); ME. STAT. tit. 1, § 402(3)(E) (2020); 65 PA. STAT. AND CONS. STAT. ANN. § 67.708(b)(14) (West 2020).

107. CSLDF 2019 REPORT, *supra* note 104, at 3, 5; see, e.g., CAL. GOV'T CODE § 6254(a) (2020). For a more detailed analysis of the available protections for university research under state open records law, see *infra* Appendix.

B. Iowa's Open Records Law as It Applies to the Regents Institutions

As state institutions, Iowa's Regents universities—the University of Iowa, Iowa State University (ISU), and the University of Northern Iowa¹⁰⁸—are subject to Iowa's open records law.¹⁰⁹ Accordingly, university employees (e.g., faculty researchers) are subject to this law by virtue of their employment.¹¹⁰ Any records created by state employees in the course of their public duties are state records subject to disclosure under Iowa's open records law.¹¹¹ As such, faculty research records (and other university employee records generally) may be public records for purposes of Iowa's open records law because faculty researchers produce these records in the course of their employment.¹¹²

Iowa's public universities follow the Board of Regents's guidance when responding to open records requests in accordance with Iowa's open records

108. IOWA CODE § 262.7 (2019).

109. *Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 484 (Iowa 2012) (“The University of Iowa, a state institution, is clearly covered by the Open Records Act.”); *see, e.g., Gannon v. Bd. of Regents*, 692 N.W.2d 31, 39–40 (Iowa 2005) (holding that a private foundation with close ties to Iowa State University was subject to the state's open records laws because the foundation was performing a government or public function and advancing the statutory goals of the institution); *Sysco Iowa, Inc. v. Univ. of Iowa*, 889 N.W.2d 235, 242 (Iowa Ct. App. 2016) (holding that a contract between the University of Iowa and Sysco was not subject to disclosure under Iowa's open records law because it contained trade secrets); *but see Donahue v. State*, 474 N.W.2d 537, 537 (Iowa 1991) (holding that Iowa's open meetings law does not apply to “an administrative panel, organized among [University of Iowa] faculty members to review promotion decisions” as it is not a “governmental body”).

110. For example, the University of Iowa's Operations Manual provides that “anything containing information which is made, produced, executed, or received in connection with the transactions and official activities of the University or executed in the conduct of University business, including research, teaching, service, and administration” is a record that is the property of the state. UNIV. OF IOWA OPERATIONS MANUAL § 17.2–17.3, <https://opsmanual.uiowa.edu/administrative-financial-and-facilities-policies/records-management> [<https://perma.cc/V4FY-JNTP>].

111. IOWA CODE § 305.13 (“All records made or received by or under the authority of or coming into the custody, control, or possession of public officials of this state in the course of their public duties are the property of the state . . .”).

112. *See id.* § 22.1(3)(a); *see also* UNIV. OF IOWA OPERATIONS MANUAL § 17.2 (“Records are the property of the state . . .”); *id.* § 17.3 (“Records are anything containing information which is made, produced, executed, or received in connection with the transactions and official activities of the University or executed in the conduct of University business, including research, teaching, service, and administration.”).

law.¹¹³ Accordingly, each Regents university has a webpage devoted to transparency and open records requests.¹¹⁴ Each institution has also appointed a transparency officer who may process or consult on open records requests.¹¹⁵

In accordance with this guidance, each university has certain procedures for responding to records requests.¹¹⁶ For example, the University of Iowa processes all records requests through its Office of Transparency.¹¹⁷ This office directs each request to the particular department or employee who possesses the requested records.¹¹⁸ This department or employee then collects and produces the records to the Office of Transparency.¹¹⁹

While the institutional websites do not provide any details concerning how these institutions decide whether to grant or deny open records requests, they grant the majority of open records requests, adhering to Iowa's general preference toward disclosure.¹²⁰ In 2019, the University of Iowa closed 706 records requests.¹²¹ Of those, it granted approximately 80

113. See IOWA CODE § 262.7 (stating the institutions governed by the Board of Regents); *id.* § 262.12 (“The board of regents shall also have and exercise all the powers necessary and convenient for the effective administration of its office and of the institutions under its control . . .”).

114. See *Office of Transparency*, UNIV. OF IOWA, <https://transparency.uiowa.edu> [<https://perma.cc/6FB7-GVCW>]; *Transparency*, IOWA ST. UNIV., <https://www.ur.iastate.edu/transparency> [<https://perma.cc/5ZJS-MT22>]; *Public Records*, UNIV. OF N. IOWA, <https://publicrecords.uni.edu> [<https://perma.cc/6FVL-F54M>].

115. IOWA BD. OF REGENTS, BOARD OF REGENTS ANNOUNCES TRANSPARENCY OFFICERS (2013), <https://www.iowaregents.edu/media/cms/pressreleasetransparencyofficers080913-pdf3426E40C.pdf> [<https://perma.cc/J3YV-HFCK>].

116. See, e.g., *Office of Transparency*, *supra* note 114.

117. *Id.*

118. *What to Do When You Are Assigned a Public Records Request*, UNIV. OF IOWA, <https://transparency.uiowa.edu/public-records-instructions> [<https://perma.cc/E3SG-MU4F>].

119. *Id.*

120. See IOWA CODE § 22.8(3) (2019) (“In actions brought under this section the district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest . . .”).

121. UNIV. OF IOWA, FY 2019 PUBLIC RECORDS STATISTICAL REPORT AND SUMMARY 1 (2019), https://transparency.uiowa.edu/sites/transparency.uiowa.edu/files/wysiwyg_uploads/fy_2019_statistical_summary_and_highlights.pdf [<https://perma.cc/HV2D-9D2Q>].

percent of the requests and denied only 5 percent of the requests.¹²² Approximately 2 percent of the records requests were for research records: there were 11 research records requests in 2018 and 15 research records requests in 2019.¹²³

In 2019, ISU closed 391 records requests—it granted 84 percent of the requests and denied 4 percent of the requests.¹²⁴ Approximately 2 percent of ISU’s open records requests concerned research records.¹²⁵ Based on the available statistics, in 2019, the University of Northern Iowa closed 45 records requests and granted approximately 98 percent of its requests.¹²⁶ While the majority of records requests came from reporters and businesses,¹²⁷ many requests came from persons affiliated with another university, attorneys, and private citizens.¹²⁸

To be fair, to date there have been relatively few requests for research-related records at Iowa public universities. However, this does not mean that

122. *Id.* The remaining requests were either withdrawn or the university reported no records available. More statistical reports are available at *Public Records Available Online*, UNIV. OF IOWA, <https://transparency.uiowa.edu/public-records-available-online> [<https://perma.cc/KMC9-8QDF>]. One limitation of these logs is that they do not provide any information on what was actually provided. “Granted” may simply mean that something was provided by the university in response to the request, which itself may include multiple more specifically worded requests.

123. UNIV. OF IOWA, *supra* note 121, at 3.

124. IOWA STATE UNIV., 2019 PUBLIC RECORDS STATISTICAL REPORT – IOWA STATE UNIVERSITY, [https://www.ur.iastate.edu/sites/default/files/records/reports/2019 4thQ.pdf](https://www.ur.iastate.edu/sites/default/files/records/reports/2019%204thQ.pdf) [<https://perma.cc/Z6JJ-UDAJ>]. More statistical reports are available at *Public Records Statistical Reports*, IOWA ST. UNIV., <https://www.ur.iastate.edu/records/reports.php> [<https://perma.cc/WT6N-NXXP>].

125. *See Public Records Statistical Reports*, *supra* note 124.

126. 2019 Requests, UNIV. OF N. IOWA, <https://publicrecords.uni.edu/2019-request-log> [<https://perma.cc/5V65-U6HF>].

127. *See* UNIV. OF IOWA, *supra* note 121, at 4 (“243 of the 724 requests received in FY 2019 (34%) came from the media: 183 from Iowa reporters (117 from the Cedar Rapids Gazette alone), and 60 from out-of-state reporters. 231 requests (32%) came from businesses/vendors (including bidders, insurance agencies, and companies requesting student directory information), a 12 [percent] decrease from last year’s 262 requests.”); IOWA STATE UNIV., *supra* note 124 (showing that 40 percent of requests were from businesses, and 22 percent of requests were from reporters).

128. *See* UNIV. OF IOWA, *supra* note 121, at 4 (“Other types of requestors included students and researchers from other colleges/universities (42 requests), attorneys (21), and labor unions (24, including a recurring request from SEIU, processed every three weeks). Private citizens, or individuals with unknown affiliation, accounted for 18 [percent] of the requests received (131).”); IOWA STATE UNIV., *supra* note 124.

such requests could not be made—in other states, research records have been more heavily targeted.¹²⁹

The bottom line is documents and other records created by university researchers can be susceptible to request under open records laws. As discussed in Part V, there may be technical challenges associated with identifying them, there may be specific exceptions that exclude particular records from disclosure, and there is a plausible argument that they are not public records. But, on their face, research records at public universities have many similarities with other university records, such as bid awards, football coaches' contracts, and e-mails about a university's investigation of fraternities and sororities or other particular subjects. All are internal documents the institution would likely prefer to avoid subjecting to public access.

IV. PATENTS, UNIVERSITIES, AND § 102

Since at least the passage of the Bayh-Dole Act in 1980, universities have viewed patents as an important tool for translating faculty research into public applications and as a potential source of revenue.¹³⁰ ISU's TTO is illustrative: it works “to facilitate and enhance the inventive and creative works of Iowa State University's employees and students, and to transfer these works for the benefit of society.”¹³¹ Additionally, patents may be the core legal asset of faculty start-ups or be licensed to established companies for further development.¹³²

The Bayh-Dole Act of 1980 permits universities to “elect to retain title to” inventions created under federal grants.¹³³ The passage of this Act

129. For example, the universities of Washington, Virginia, and Wisconsin have all been involved in litigation over these types of records. *See supra* note 15 and accompanying text.

130. *See* Lisa Larrimore Ouellette & Rebecca Weires, *University Patenting: Is Private Law Serving Public Values?*, 2019 MICH. ST. L. REV. 1329, 1338 (2019). *See generally* Peter Lee, *Patents and the University*, 63 DUKE L.J. 1 (2013) (describing the intersection of patents and academic institutions). The relative importance of university patents is further highlighted by various federal legislations that clearly contemplate the patenting of university research. *See, e.g.*, 15 U.S.C. § 3701 (2018); 35 U.S.C. § 202(a) (2018).

131. *About*, IOWA ST. UNIV. OFF. OF INTELL. PROP. & TECH. TRANSFER, <https://www.techtransfer.iastate.edu/about/> [<https://perma.cc/6QWE-PQMY>].

132. *See* Ouellette & Weires, *supra* note 130, at 1343.

133. 35 U.S.C. § 202(a).

spurred the growth of university patenting.¹³⁴ In 2018, over 7,500 patents were issued to U.S. universities and research institutions,¹³⁵ which is a dramatic increase from the 198 patents issued to universities in 1970.¹³⁶ University patents accounted for approximately 2.5 percent of the total U.S. utility patents issued in 2018.¹³⁷

At some universities, patent licenses have proven to be a good source of revenue, providing lucrative incentives for universities to patent academic research.¹³⁸ For example, researchers at New York University (NYU) developed patents related to the drug Remicade, licenses for which generated over \$1 billion in revenue for NYU.¹³⁹ University patents may also lead to an increased amount of research funding. First, universities may reinvest their patent revenues into university research.¹⁴⁰ Or, patent rights

134. Ouellette & Weires, *supra* note 130, at 1335–37.

135. *Patents Hit Record High: 2018 Survey*, AUTM, <https://autm.net/surveys-and-tools/surveys/licensing-survey/2018-licensing-activity-survey> [<https://perma.cc/B9QV-YXJS>]; see also *University Patent Count & Expenditures*, U.S. PAT. & TRADEMARK OFF., <https://developer.uspto.gov/visualization/university-patent-count-expenditures> [<https://perma.cc/HL4A-KMXV>] (detailing the number of patents issued to U.S. universities from 1969 to 2012).

136. Ouellette & Weires, *supra* note 130, at 1336. This dramatic trend is not solely attributable to the passage of the Bayh-Dole Act—university patenting was already on the rise before 1980. See David C. Mowery, Richard R. Nelson, Bhaven N. Sampat & Arvids A. Ziedonis, *The Growth of Patenting and Licensing by U.S. Universities: An Assessment of the Effects of the Bayh-Dole Act of 1980*, 30 RES. POL'Y 99, 100 (2001).

137. See *U.S. Patent Statistics Chart Calendar Years 1963 – 2019*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm [<https://perma.cc/LLZ2-EQRW>] (stating that 307,759 utility patents were granted in 2018). “[S]ince the late 1990s, university patenting has mimicked the overall U.S. patenting trends, with the percentage staying relatively constant at around 2 [percent].” Ouellette & Weires, *supra* note 130, at 1337.

138. See David Orozco, *Assessing the Efficacy of the Bayh-Dole Act Through the Lens of University Technology Transfer Offices (TTOs)*, 21 N.C. J. L. & TECH., Oct. 2019, at 115, 118. That said, it is also the case that the scholarly consensus is that most university technology transfer offices do not directly generate a profit for their institutions. Ouellette & Weires, *supra* note 130, at 1373–75.

139. Richard Pérez-Peña, *Patenting Their Discoveries Does Not Pay off for Most Universities, a Study Says*, N.Y. TIMES (Nov. 20, 2013), <https://www.nytimes.com/2013/11/21/education/patenting-their-discoveries-does-not-pay-off-for-most-universities-a-study-says.html> [<https://perma.cc/7MML-UGZE>]; see also Orozco, *supra* note 138, at 118 (A “more recent ‘blockbuster’ example[] of university technology transfer include[s] Northwestern University’s discovery of pregabalin, marketed by Pfizer as Lyrica that resulted in \$1.4 billion in licensing income . . .”).

140. Ouellette & Weires, *supra* note 130, at 1372–74.

can indirectly increase the amount of federal grants received for university research.¹⁴¹

Granting university patents also serves to spur innovation and encourage the disclosure of new inventions to increase the public's access and knowledge.¹⁴² Patents provide incentives to academic researchers to conduct and disclose their innovative research through the potential financial, reputational, or social welfare benefits of obtaining a patent.¹⁴³ As with all patents, a main justification for university patents is that they allow for the "commercialization of technologies that would otherwise go unused."¹⁴⁴ This justification is especially true for pharmaceutical development, as universities play a significant role in developing approximately one-third of new drugs.¹⁴⁵ Without university patents, many drugs may not be developed.¹⁴⁶

Although not on the scale of California Institute of Technology (Caltech) or Massachusetts Institute of Technology (MIT), Iowa's public universities have obtained numerous patents. In 2018, ISU and the University of Iowa were both recognized among the top 100 universities granted U.S. patents.¹⁴⁷ ISU ranked 69th with 34 granted patents, and the

141. *Id.* at 1375–77.

142. *See id.* at 1338; 1 DONALD S. CHISUM, CHISUM ON PATENTS § 3.01 (2020). There are other mechanisms for incentivizing disclosure of university research beyond patents, of course—publications are the conventional route. But as many scholars have discussed, patents are an important tool for motivating university researchers, particularly those interested in translating their research into products. *See, e.g.,* Alice Lam, *What Motivates Academic Scientists to Engage in Research Commercialization: 'Gold', 'Ribbon' or 'Puzzle'?*, 40 RSCH. POL'Y 1354, 1355–57, 1364–65 (2011).

143. Ouellette & Weires, *supra* note 130, at 1361–62; *see generally* Jason Owen-Smith & Walter W. Powell, *To Patent or Not: Faculty Decisions and Institutional Success at Technology Transfer*, 26 J. TECH. TRANSFER 99 (2001) (detailing a qualitative research study where the authors interviewed faculty researchers about their patenting decisions and motivations). While research publications are important, patents are a form of knowledge codification that can serve an important and distinct purpose. *See* Dan L. Burk, *The Role of Patent Law in Knowledge Codification*, 23 BERKELEY TECH. L.J. 1009, 1017–24 (2008).

144. Ouellette & Weires, *supra* note 130, at 1346.

145. *Id.* at 1350.

146. *Id.*

147. NAT'L ACAD. OF INVENTORS, TOP 100 WORLDWIDE UNIVERSITIES GRANTED U.S. UTILITY PATENTS IN 2018 (2018), <https://academyofinventors.org/wp-content/uploads/2019/06/Top-100-2018.pdf> [<https://perma.cc/SWV5-D7FS>].

University of Iowa ranked 79th with 31 granted patents.¹⁴⁸ Iowa's university patents include influential technologies, many of which have generated considerable revenue for the universities. For example, a graduate student at ISU patented an encoding process for the fax machine that was used in almost every fax machine in the 1980s.¹⁴⁹ ISU licensed this patent to 24 fax machine manufacturers, generating over \$36 million for the university.¹⁵⁰ ISU researchers also patented the lead-free solder, which generated approximately \$60 million in income for ISU.¹⁵¹ Notable University of Iowa patents include the human cytomegalovirus (HCMV) promoter, which generated approximately \$170 million in revenue, an AI-based eye assessment tool to detect diabetes,¹⁵² an ankle prosthesis,¹⁵³ and the first optical mark recognition system for exam scoring.¹⁵⁴

Inventions that result in university patents generally follow the same path at most universities.¹⁵⁵ Many universities have TTOs to assist university

148. Vanessa Miller, *Iowa State, University of Iowa Listed Among Top Patent Producers*, GAZETTE (June 4, 2019), <https://www.thegazette.com/subject/news/education/iowa-state-university-of-iowa-listed-top-100-worldwide-universities-granted-us-utility-patents-20190604> [<https://perma.cc/M3FU-CRDX>].

149. *David C. Nicholas: Inventor of the Encoding Process Essential to Fax Machines*, IOWA ST. UNIV.: ELEC. & COMPUT. ENG'G, <https://www.ece.iastate.edu/profiles/david-c-nicholas/> [<https://perma.cc/K2EL-7DFC>].

150. *Id.*

151. *Lead-Free Solder Royalties Exceed \$58 Million*, IOWA ST. UNIV.: MATERIALS SCI. & ENG'G, <https://www.mse.iastate.edu/news/lead-free-solder-royalties/> [<https://perma.cc/BSH9-YWJ2>]. For other ISU innovations and patents, see *Innovations Through the Years*, IOWA ST. UNIV.: OFF. OF THE VICE PRESIDENT FOR RSCH., <https://www.research.iastate.edu/research-iowa-state/timeline/> [<https://perma.cc/T22G-ATC3>].

152. U.S. Patent No. 9,545,196; Katharine Carlon, *Inside Iowa's Innovation Factory*, CORRIDOR BUS. (Feb. 4, 2019), <https://www.corridorbusiness.com/inside-iowas-innovation-factory/> [<https://perma.cc/B4B6-HZWM>].

153. U.S. Patent No. 7,625,409.

154. U.S. Patent No. 3,050,248 (filed Sept. 21, 1955); see also Sebastian Moncaleano & Michael Russell, *A Historical Analysis of Technological Advances to Educational Testing: A Drive for Efficiency and the Interplay with Validity*, 19 J. OF APPLIED TESTING TECH. 1, 4–5 (2018) (describing the history of the Lindquist optical exam scoring technology).

155. For information about the Iowa State University Research Foundation's general patenting and licensing process, see *Tip Sheets*, IOWA ST. UNIV., <https://www.techtransfer.iastate.edu/for-isu/working-with-isurf/tip-sheets/> [<https://perma.cc/V2PP-39MT>]. For information about the University of Iowa Research Foundation's general process, see *Our Process*, UNIV. OF IOWA RES. FOUND., <https://uirf.research.u-iowa.edu/our-process/> [<https://perma.cc/W9UN-G7PV>].

researchers in this process.¹⁵⁶ Generally, university TTOs direct researchers to disclose their research and inventions to the TTO.¹⁵⁷ Then, the TTO decides whether to seek intellectual property (IP) protection based on the patentability of the disclosed invention and its potential commercial value.¹⁵⁸ Once the TTO decides to seek IP protection, it will assist the researcher in filing a patent application with the USPTO.¹⁵⁹ The TTO will also market the invention and negotiate licenses with companies who wish to commercialize the technology.¹⁶⁰ Through these licenses, companies pay royalties to the university and the inventor.¹⁶¹ Sometimes these patents are licensed to faculty inventors who establish their own start-ups.¹⁶²

Patent applications filed by universities must meet the same basic legal requirements as patent applications filed by everyone else.¹⁶³ To be patentable, an invention must be useful, novel, nonobvious, adequately disclosed, and constitute patent eligible subject matter.¹⁶⁴ Generally, patentability analysis starts with the issue of novelty.¹⁶⁵ The novelty requirement provides that a claimed invention must actually be new in order to be patentable.¹⁶⁶ Novelty is a fundamental and well-established

156. Ouellette & Weires, *supra* note 130, at 1338.

157. *Id.*

158. *Id.* at 1338–39; IOWA STATE UNIV. RSCH. FOUND., TECHNOLOGY INVENTION DISCLOSURE—WHAT TO EXPECT, <https://www.techtransfer.iastate.edu/wp-content/uploads/2019/07/01.-Technology-Invention-Disclosure-09172018.pdf> [<https://perma.cc/2PY8-L6CQ>].

159. *See* IOWA STATE UNIV. RSCH. FOUND., *supra* note 158.

160. Ouellette & Weires, *supra* note 130, at 1339.

161. *Id.*

162. *Id.* at 1340–42.

163. For a discussion of academic exceptionalism and its relationship to patent law, see generally Lee, *supra* note 130. Lee observes that modern courts have rejected the concept of academic exceptionalism in patent cases, with the concept reemerging in the form of statutory carve-outs. *See id.* at 35, 63.

164. 35 U.S.C. §§ 101, 103, 112 (2018); *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1859 (2019) (“[T]he statutory requirements for patentability[] include[e] that the claimed invention is useful, novel, nonobvious, and contains eligible subject matter.”).

165. While utility, patent eligible subject matter, and adequacy of disclosure are all important elements of patentability, the standard for utility is relatively low, patent eligible subject matter only arises as a significant issue in a limited number of areas, and adequacy of disclosure is typically an issue within the control of the applicant.

166. *See* 35 U.S.C. § 102.

requirement of patentability,¹⁶⁷ which has been in place since the first Congress enacted the first patent statute in 1790.¹⁶⁸ The basic rationale for this requirement is that if a claimed invention is not new, then the public would get no benefit from granting the “inventor” a patent.¹⁶⁹ In other words, “the public already has access to [the invention],” so patent protection is not necessary to increase the public’s knowledge or spur innovation.¹⁷⁰ Granting the inventor a patent for an invention that is not new would effectively remove knowledge from the public domain at a high social cost.¹⁷¹

167. See, e.g., Rebecca S. Eisenberg, *Analyze This: A Law and Economics Agenda for the Patent System*, 53 VAND. L. REV. 2081, 2088 (2000) (“Perhaps the most basic limitation on access to the patent system is that one may only patent something that is new.”); Benjamin N. Roin, *Unpatentable Drugs and the Standards of Patentability*, 87 TEX. L. REV. 503, 519 (2009) (“[T]he novelty requirement is said to lie ‘at the heart of the patent system.’”); CHISUM, *supra* note 142 (“The novelty requirement lies at the heart of the patent system.”); *Dewey & Almy Chem. Co. v. Mimex Co.*, 124 F.2d 986, 989 (2d Cir. 1942) (“No doctrine of the patent law is better established than that a prior patent or other publication to be an anticipation must bear within its four corners adequate directions for the practice of the patent invalidated.”); John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439, 502 (2004) (“[T]he novelty requirement is uncontroversial”); *In re Schoenwald*, 964 F.2d 1122, 1123 (Fed. Cir. 1992) (“Paramount among the patentability requirements is that that which is sought to be patented must be new.”).

168. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146–47 (1989) (quoting 1 Stat. 109, 110).

169. CHISUM, *supra* note 142; see also *Bonito Boats*, 489 U.S. at 156 (“Both the novelty and the nonobviousness requirements of federal patent law are grounded in the notion that concepts within the public grasp, or those so obvious that they readily could be, are the tools of creation available to all. They provide the baseline of free competition upon which the patent system’s incentive to creative effort depends.”); Robert P. Merges, *Uncertainty and the Standard of Patentability*, 7 HIGH TECH. L.J. 1, 12–13 (1992) (“A novel invention is one whose combination of features is not found in any single preexisting invention, technical article, or other piece of ‘prior art.’ The logic behind this is fairly straightforward; surely it would be improper to permit someone to claim property rights in something that has been well-known for a long time—say, in the practice of cutting cheese by using a cutting board and knife. This information is already in the public domain when the ‘inventor’ seeks to patent it; society has no need to grant a patent to get this information. It is not novel, either in the everyday sense or the patent law sense.”).

170. Roin, *supra* note 167, at 518.

171. *Bonito Boats*, 489 U.S. at 148 (“Sections 102(a) and (b) operate in tandem to exclude from consideration for patent protection knowledge that is already available to the public. They express a congressional determination that the creation of a monopoly in such information would not only serve no socially useful purpose, but would in fact

While the novelty requirement has existed since the first Congress enacted the Patent Act of 1790,¹⁷² the statutory language for this requirement has changed over the years, expanding on the basic “not before known or used” language of the first patent statute to more specifically state what that means.¹⁷³ Most recently, in 2011, Congress enacted the AIA, which made some significant changes to the novelty requirement while keeping much of its core the same.¹⁷⁴

The current statutory language for the novelty requirement, codified at 35 U.S.C. § 102, states: “A person shall be entitled to a patent unless . . . the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention”¹⁷⁵

In analyzing the novelty of a claimed invention, the first step is to determine whether something is prior art for purposes of § 102,¹⁷⁶ i.e., whether the reference fits into one of the § 102 categories of prior art: patent,

injure the public by removing existing knowledge from public use.”); Eisenberg, *supra* note 167, at 2088 (“Granting patents on technologies that are not new would impose the social costs of monopolies without the countervailing benefits of promoting development and introduction of welfare-enhancing inventions.”); Sean B. Seymore, *Rethinking Novelty in Patent Law*, 60 DUKE L.J. 919, 922 (2011).

172. Patent Act of 1790, 1 Stat. 109, 109–10 (Apr. 10, 1790) (“That upon the petition of any person or persons to the Secretary of State, the Secretary for the department of war, and the Attorney General of the United States, setting forth, that he, she, or they, hath or have invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement *therein not before known or used*, and praying that a patent may be granted therefor, it shall and may be lawful to and for the Secretary of State, the Secretary for the department of war, and the Attorney General, or any two of them, if they shall deem the invention or discovery sufficiently useful and important, to cause letters patent to be made out in the name of the United States” (emphasis added)).

173. See, e.g., Act of July 19, 1952, Pub. L. No. 593, § 102, 66 Stat. 792, 797 (“A person shall be entitled to a patent unless—(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or”).

174. Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 102, 125 Stat. 284, 285–87 (2011) [hereinafter AIA]. The AIA eliminated the “true” novelty language of pre-AIA § 102(a) and adopted a novelty requirement based off of the effective filing date of the application (similar to the pre-AIA § 102(b) statutory bar).

175. 35 U.S.C. § 102(a)(1) (2018).

176. CHISUM, *supra* note 142.

printed publication, in public use, on sale, or otherwise available to the public, and whether it meets the time cut-off: in this case, before the effective filing date of the claimed invention.¹⁷⁷ A claimed invention is not novel—and thus, not patentable—“if each and every element is found within a single prior art reference” before its effective filing date.¹⁷⁸

Critical to understanding the current version of § 102 is recognizing that an inventor’s own actions can render an invention unpatentable. Indeed, the quintessential cases involving novelty-defeating printed publications arise from material authored by the inventor.¹⁷⁹ For example, in *In re Klopfenstein*, the inventors’ own poster presentations at a conference rendered their invention unpatentable.¹⁸⁰ As Sean Seymore has written,

If the infringer can prove that, before the critical date, the professor disclosed the invention to a group of interested persons using a reference that falls under the broad ambit of a ‘printed publication,’ the professor either jeopardizes his or her own right to a patent or compromises the value of an existing patent.¹⁸¹

A core rationale is that once the public has access to something, it should not be removed from the public domain.¹⁸²

In determining whether a prior art reference constitutes a printed publication, the core inquiry is whether the reference is publicly accessible.¹⁸³ A reference is publicly accessible if it has been “made available to the extent that persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can locate it.”¹⁸⁴ Courts have generally

177. 35 U.S.C. § 102(a)(1). This is the conventional approach, although a recent anti-formalist critique seeks to call the categorical approach into question, instead arguing for an underlying trade-secret analysis for determining whether something is or is not prior art. See Camilla A. Hrdy & Sharon K. Sandeen, *The Trade Secrecy Standard for Prior Art* (draft manuscript on file with the Author).

178. *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1294 (Fed. Cir. 2015).

179. See, e.g., *In re Klopfenstein*, 380 F.3d 1345, 1352 (Fed. Cir. 2004).

180. *Id.* at 1347, 1352.

181. Seymore, *supra* note 19, at 494.

182. See *MERGES & DUFFY*, *supra* note 9, at 412 (describing the “‘anti-backsliding’ principle” that “[p]arties cannot obtain patent rights encompassing practices that already exist in the public domain”).

183. *Klopfenstein*, 380 F.3d at 1348.

184. *SRI Int’l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008) (quoting *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir. 2006)); see also *In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986) (“The proponent of the publication bar

interpreted this standard broadly—“even relatively obscure documents qualify as prior art so long as the public has a means of accessing them.”¹⁸⁵ For example, a federal district court broadly stated that a National Science Foundation (NSF) grant proposal available to the public through a FOIA request constituted a printed publication.¹⁸⁶

Additionally, there is no requirement that the public actually viewed the reference at issue so long as the public has the means to access it.¹⁸⁷ For example, in *In re Wyer*, the Court of Customs and Patent Appeals (the Federal Circuit’s predecessor) held that “a microfilm copy of [an] Australian [patent] application preserved in the Australian Patent Office” was a printed publication.¹⁸⁸ Although there was no evidence any member of the public actually viewed the patent application, the court found that the patent application was sufficiently accessible to the interested public because it was “laid open to public inspection at the Australian Patent Office” and the relevant public could view it upon request.¹⁸⁹ Overall, the § 102 printed publication requirement encompasses a broad variety of references and disclosures, so long as they are publicly accessible.¹⁹⁰

must show that prior to the critical date the reference was sufficiently accessible, at least to the public interested in the art, so that such a one by examining the reference could make the claimed invention without further research or experimentation.”).

185. *In re Enhanced Sec. Rsch., LLC*, 739 F.3d 1347, 1354 (Fed. Cir. 2014); *see, e.g., Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350–51 (Fed. Cir. 2008) (holding a “collection of technical specifications” was a publicly accessible and printed publication because it was “visible to any member of the interested public” and there were no restrictions on dissemination).

186. *E.I. Du Pont De Nemours & Co. v. Cetus Corp.*, No. C-89-2860 MHP, 1990 WL 305551, at *8 n.7 (N.D. Cal. Dec. 3, 1990).

187. *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1569 (Fed. Cir. 1988) (“Accessibility goes to the issue of whether interested members of the relevant public could obtain the information if they wanted to. If accessibility is proved, there is no requirement to show that particular members of the public actually received the information.”); *see also* M.P.E.P. § 2128 (“There is no need to prove that someone actually looked at a publication when that publication is accessible to the public through a library or patent office.”).

188. *In re Wyer*, 655 F.2d 221, 223, 227 (C.C.P.A. 1981).

189. *Id.* at 226; *see also* *Siemens-Elema AB v. Puritan-Bennett Corp.*, No. 86-1728-E(CM), 1989 WL 200919, at *3 (S.D. Cal. June 9, 1989), *aff’d*, 925 F.2d 1480 (Fed. Cir. 1991) (holding that a Swedish patent application was publicly accessible because it “was available to the public upon request” regardless of any “difficulty in locating the[] documents”).

190. Joshua D. Sarnoff, *Derivation and Prior Art Problems with the New Patent Act*, 2011 PATENTLY-O PAT. L.J. 12, 27 (2011) (discussing “the broad interpretation that has

Even if a reference does not fit into the broad category of printed publication, it may still constitute prior art for purposes of § 102 if it is otherwise available to the public.¹⁹¹ The otherwise available to the public language was adopted through the AIA's amendments in 2011.¹⁹² While the precise scope of this otherwise available to the public category of prior art is unclear due to the lack of judicial precedent, it is clear that this phrase broadens the potential sources of prior art references for the novelty analysis, including material that does not neatly fit into the other § 102 categories.¹⁹³

Even if an invention is useful, of eligible subject matter, adequately disclosed, and technically novel—in other words, it is literally new—it still must pass a final threshold: the invention must be nonobvious.¹⁹⁴ Nonobviousness is determined based on whether “the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains.”¹⁹⁵ The prior art for purposes of the nonobviousness analysis consists of art that is available under § 102.¹⁹⁶

been given to [the] ‘printed publication’ requirement); Joanna Toke, *Can an Internet Reference Be a “Printed Publication”?*, B.C. INTELL. PROP. & TECH. F., Jan. 21, 2009, at *7 (explaining that the “publication” theory for determining what constitutes a printed publication “is broader than the print theory”).

191. 35 U.S.C. § 102(a)(1) (2018).

192. AIA §3(b)(1), 125 Stat. 284, 286 (2011); CHISUM, *supra* note 142, § 3.3.3.1 (“The AIA’s amended Section 102(a)(1) adds ‘otherwise available to the public’ as a novelty-defeating event.”).

193. *See Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 634 (2019).

194. 35 U.S.C. § 103; *see also* Lewis & Vincler, *supra* note 17, at 439.

195. 35 U.S.C. § 103.

196. *See id.* (“A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and *the prior art* are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains.” (emphasis added)); *see also* *Hazeltine Rsch., Inc. v. Brenner*, 382 U.S. 252, 256 (1965) (“We see no reason to read into [§] 103 a restricted definition of ‘prior art’ which would lower standards of patentability to such an extent that there might exist two patents where the Congress has plainly directed that there should be only one.”); *Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299, 1305 (Fed. Cir. 2006) (“‘Prior art’ in the obviousness context includes the material identified in section 102(a).”).

V. PUBLIC UNIVERSITY RESEARCH DOCUMENTS AS PRIOR ART UNDER § 102

Since documents relating to research conducted by public university faculty can be accessed by members of the public through open records requests, and the legal standard for printed publication asks whether the document is publicly accessible, the logical conclusion is that those documents constitute prior art under § 102(a)(1). The consequence of this conclusion is that such documents can be novelty-defeating or used in connection with a nonobviousness analysis. In both situations, the university's own records can be the basis for rendering any resulting inventions unpatentable.

We are not the first to reach this conclusion: 25 years ago, Tammy Lewis and Lisa Vincler observed, "If a university is subject to public disclosure law, absent a relevant exemption for research documents, the mere creation of the documents as agency records may place their contents in the public domain, whether or not they are ever actually disclosed."¹⁹⁷

Surely this is absurd: that by creating a laboratory notebook, an experimental procedure, or a draft manuscript, a university researcher may invalidate potential patent rights. Yet, while there are a number of caveats and counterarguments that we describe below, we think that on balance it is not clear that the legal analysis is wrong. Indeed, under laws like those of Iowa, undisclosed documents relating to faculty research at public universities may be prior art under § 102(a)(1).

Below, we consider all the possible counterarguments we could think of, ranging from arguments that could be made under § 102 (and might be applicable in all states) to those that are specific to Iowa's open records law, before reaching our ultimate conclusion on the question.

As an additional requirement, to be considered in the obviousness analysis, prior art must be "analogous" to the claimed invention—i.e., it must be "from the same field of endeavor" or "reasonably pertinent to the particular problem with which the inventor is involved." *In re Clay*, 966 F.2d 656, 658–59 (Fed. Cir. 1992).

197. Lewis & Vincler, *supra* note 17, at 438; *cf.* Lozan, *supra* note 17, at 415–16 (concluding that "peer review" meetings could be, but were probably not, "printed publications" or a "public use," but could result in one). Lozan analyzed the question under Washington's Open Meetings Act and the then-applicable § 102, which did not include the language "or otherwise available to the public" added by the 2011 AIA. *See supra* notes 17–18 and accompanying text.

*A. Counterarguments Based on § 102**1. Documents Relating to University Research Are Not “Printed” Publications*

A threshold issue is whether documents created by public university researchers count as “printed” publications. The short answer is “almost certainly” and “it doesn’t really matter.” The term printed publication was first introduced in the Patent Act of 1836, with legislators intending the term printed to mean “a method whereby an original document could be reproduced often and easily.”¹⁹⁸ Basically any type of document—e.g., hand drawings, photographs, handwritten materials, typewritten materials, computer-aided drawings—can be reproduced efficiently via modern equipment and thus constitutes a printed publication.¹⁹⁹ As such, most documents—including university research records—are printed within the meaning of the patent statute, leaving the publication requirement, i.e., whether the document is publicly accessible, as the central inquiry.²⁰⁰

But even if a reference does not fit into the broad category of printed publication, it can still constitute prior art for purposes of § 102 if it fits the “otherwise available to the public”²⁰¹ language adopted through the AIA’s amendments in 2011.²⁰² According to the House of Representatives committee report, this phrase was “added to clarify the broad scope of relevant prior art, as well as to emphasize the fact that it must be publicly accessible.”²⁰³ While the U.S. Supreme Court provided guidance on the

198. Richard W. Hoffman, Comment, *What Constitutes a Printed Publication Under the Patent Act*, 1988 DET. C.L. REV. 961, 967 (1988).

199. *Id.* at 967–68.

200. See *In re Wyer*, 655 F.2d 221, 226 (C.C.P.A. 1981); Hoffman, *supra* note 198, at 968. Today, courts approach the printed publication inquiry “as a unitary concept” addressing the core question of public accessibility. See *Wyer*, 655 F.2d at 226.

201. 35 U.S.C. § 102(a)(1); see also Timothy R. Holbrook, *Patent Prior Art and Possession*, 60 WM. & MARY L. REV. 123, 163–64 (2018).

202. AIA §3(b)(1), 125 Stat. 284, 286 (2011); CHISUM, *supra* note 142, at § 3.3.3.1 (“The AIA’s amended Section 102(a)(1) adds ‘otherwise available to the public’ as a novelty-defeating event.”).

203. H.R. REP. NO. 112-98(I), at 42–43 (2011); see also 157 Cong. Rec. S1360–02, S1371 (daily ed. Mar. 8, 2011) (statement of Sen. Kyl) (“[T]he new definition of prior art will serve only one purpose: ‘to prevent the withdrawal by an inventor of that which was already in the possession of the public’ The new definition is ‘grounded on the principle that once an invention is in the public domain, it is no longer patentable by anyone[]’” (internal citations omitted)); H.R. REP. NO. 112-98(I), at 40 (2011) (“The

scope of this phrase in *Helsinn v. Teva*, it still did not clarify the types of material that would fall under this language.²⁰⁴ The Supreme Court simply stated this “broad catchall phrase” was meant to “capture[] material that does not fit neatly into the statute’s enumerated categories but is nevertheless meant to be covered.”²⁰⁵ For example, this category may cover oral presentations, videos, recordings, and other non-printed material.²⁰⁶ It may also cover new and unanticipated ways of disseminating information.²⁰⁷ In short, even if a document or record is not printed, it is likely to fall within the scope of § 102 as long as it is “publicly accessible.”²⁰⁸

2. Documents Relating to University Research Are Not “Publicly Accessible”

Documents obtainable through a public records request would seem to be publicly accessible. Yet, in some cases, there is a strong argument that

purpose of the ‘America Invents Act,’ as reported by the Committee on the Judiciary, is to ensure that the patent system in the 21st century reflects the constitutional imperative. Congress must promote innovation by granting inventors temporally limited monopolies on their inventions in a manner that ultimately benefits the public through the disclosure of the invention to the public. The legislation is designed to establish a more efficient and stream-lined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.”).

204. See generally *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628 (2019) (analyzing the impact of the AIA’s addition of the phrase “or otherwise available to the public” on the “on sale” bar for § 102 novelty).

205. *Id.* at 634.

206. See Nathan G. Ingham, Note, *Anticipating New References: Predicting the Contours of the New “Otherwise Available to the Public” Category of Prior Art*, 53 B.C. L. REV. 1533, 1566 (2012) (“If, however, a videotape or similar reference, such as a sound recording, DVD, or video recording placed on the Internet, were freed of the ‘printed’ limitation and analyzed under ‘otherwise available,’ there is no reason it could not constitute prior art in appropriate circumstances.”); see also Hung H. Bui, *An Overview of Patent Reform Act of 2011: Navigating the Leahy-Smith America Invents Act Including Effective Dates for Patent Reform*, 93 J. PAT. & TRADEMARK OFF. SOC’Y 441, 470–71 (2011) (“[A] new catch-all phrase ‘otherwise available to the public’ is also added to capture potential new sources of prior art. . . . Perhaps, some forms of experimental uses, oral presentations, lectures and unpublished web pages may now qualify as ‘otherwise available to the public’ prior art.”).

207. Ingham, *supra* note 206, at 1567.

208. See *In re Enhanced Sec. Rsch., LLC*, 739 F.3d 1347, 1354 (Fed. Cir. 2014) (“This court has interpreted § 102 broadly, explaining that even relatively obscure documents qualify as prior art so long as the public has a means of accessing them.”).

even documents that *could* be obtained through an open records request are not publicly accessible.

At the outset, it is important to recognize that while the term “publications” could be understood to require some form of active dissemination,²⁰⁹ patent law only requires that a publication be publicly accessible.²¹⁰ Moreover, as discussed above, the addition of “or otherwise available to the public” at the end of § 102 means that the core inquiry is all about the accessibility of these records.²¹¹

But merely being able to *obtain* a record is not enough for the record to be publicly accessible. Rather, the case law requires that a person of ordinary skill in the relevant art—the “reasonable person” standard for most

209. See CHISUM, *supra* note 142, at § 3.04 (stating that “[t]he concept of a publication requires that a work be circulated to some extent”).

210. See, e.g., *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1348 (Fed. Cir. 2016) (“To qualify as a printed publication, a reference ‘must have been sufficiently accessible to the public interested in the art.’” (quoting *In re Cronyn*, 890 F.2d 1158, 1160 (Fed. Cir. 1989))). There is an entire sub-debate about whether there are two dichotomous lines of printed publication doctrine—the “dissemination” cases and the “publicly accessible” cases—and arguments that the two should not be commingled. See Eric W. Guttag, *Applying the Printed Publication Bar in the Internet Age: Is It as Simple as Googling for Prior Art?*, 16 VA. J. L. & TECH. 66, 77–93 (2011). Despite Eric Guttag’s argument, however, the Federal Circuit has not followed this formalist perception of the printed publication case law. See Eric Guttag, *Jazz Pharmaceuticals: Does the Federal Circuit Really Understand the Dichotomy in the Printed Publication Bar?*, IP WATCHDOG (July 19, 2018), <https://www.ipwatchdog.com/2018/07/19/jazz-pharmaceuticals-federal-circuit-really-understand-dichotomy-printed-publication-bar/id=99462> [https://perma.cc/Q4PA-EPG6].

On the other end of the spectrum, Professors Camilla Hrды and Sharon Sandeen offer a complete anti-formalist view of § 102, arguing that the categorical distinctions ought to be abandoned in favor of a trade secret-based analysis. See Hrды & Sandeen, *supra* note 177. Ultimately, we do not think this debate matters that much for our core argument because: (1) there is enough consistency in the contemporary § 102 case law to conclude that public accessibility is the touchstone of the printed publication inquiry; (2) there is also enough consistency in the public accessibility case law to conclude that the critical question for non-transient displays is the ability of an interested person having ordinary skill in the art (PHOSITA) to find and obtain the document; (3) the addition of “or otherwise available to the public” means we are mostly talking about public accessibility anyways; and (4) our core argument rests on the idea that it is reasonable to think that a public university record could be prior art, not that it will be for absolute certainty 100 percent of the time.

211. Cf. Hrды & Sandeen, *supra* note 177, at 100 (arguing that “publicness” should be central to the interpretation of the new language).

patent law questions—must be able to *find* the document.²¹² One classic path was through cataloging and indexing of physical documents within libraries. For example, in *In re Hall*, the Federal Circuit held that a doctoral thesis catalogued and indexed in a single university’s library was a printed publication because there was “sufficient accessibility to those interested in the art exercising reasonable diligence.”²¹³ The court reasoned that through the library’s cataloging and indexing, the thesis was made accessible to university students, faculty, and the public generally.²¹⁴ In contrast, in *In re Cronyn*, the Federal Circuit held that undergraduate theses were “not ‘printed publications’” because the theses “had not been either cataloged or indexed in a meaningful way.”²¹⁵ Evidence of indexing and cataloging goes to the important inquiry of “whether anyone would have been able to learn of [a reference’s] existence and potential relevance prior to the critical date”—i.e., whether an interested artisan could locate the reference while

212. See, e.g., *In re Lister*, 583 F.3d 1307, 1315 (Fed. Cir. 2009) (describing the requirements to find a reference).

213. *In re Hall*, 781 F.2d 897, 900 (Fed. Cir. 1986). Even though it might seem unfair to the applicant to prohibit the grant of a patent based on a relatively obscure and inaccessible reference like a German dissertation, there are important policy justifications, such as preventing a later-in-time person from getting exclusive rights over something that someone is already using or disclosing. See Douglas Lichtman, Scott Baker & Kate Kraus, *Strategic Disclosure in the Patent System*, 53 VAND. L. REV. 2175, 2182 (2000) (describing the reliance interest of the public). In addition, the prior existence of the invention suggests that a patent is not necessary to induce invention. Cf. Holbrook, *supra* note 201, at 162 (discussing how a capacious approach to the public accessibility requirement comports with possession theory). See generally Michael Abramowicz & John F. Duffy, *The Inducement Standard of Patentability*, 120 YALE L.J. 1590 (2011) (describing the inducement standard in the context of nonobviousness).

214. *Hall*, 781 F.2d at 898.

215. *Cronyn*, 890 F.2d at 1161. Although the theses were filed in the university’s library, they were filed alphabetically by the author’s name with cards that only listed the author’s name and the thesis title. *Id.* Similarly, in *In re Bayer*, the Court of Customs and Patent Appeals (the Federal Circuit’s predecessor), held that a graduate student’s thesis stored in a university’s library was not sufficiently publicly accessible and thus was not a printed publication. *In re Bayer*, 568 F.2d 1357, 1361 (C.C.P.A. 1978). The court reasoned that only the three-member faculty committee who heard the student’s thesis presentation knew how to locate the “uncatalogued and unshelved” thesis. *Id.* at 1359, 1361. Therefore, the thesis was not sufficiently accessible to the interested public because the public could not reasonably locate the thesis without asking one of the members of the faculty committee. *Id.* at 1361.

exercising reasonable diligence.²¹⁶ That said, the Federal Circuit has repeatedly held that cataloging and indexing is not required.²¹⁷

As the places where prior art can exist have expanded, in large part due to the Internet,²¹⁸ the Federal Circuit has responded by limiting the scope of public accessibility to what can meaningfully be found.²¹⁹ Lots of things are somewhere on the Internet, but the real question is whether anyone can actually find them.²²⁰ An analogy to a giant library might be appropriate here: the question is not whether a specific item is somewhere in the library; the question is whether the item can actually be located. Information might be stored on File Transfer Protocol (FTP) servers, or in cloud drives, or on personal webpages, or distributed through e-mail listservs, but that does not necessarily mean that someone interested and ordinarily skilled in the art can reasonably locate it.

A reference is publicly accessible so long as an interested artisan can locate the reference by exercising “reasonable diligence.”²²¹ An available “research aid” or “roadmap” allowing interested artisans to locate the reference may establish public accessibility.²²² For example, in *Bruckelmyer v. Ground Heaters*, the Federal Circuit held that a Canadian patent application was publicly accessible because the application was “available

216. *Lister*, 583 F.3d at 1314; *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1379 (Fed. Cir. 2006).

217. *Jazz Pharm., Inc. v. Amneal Pharm., LLC*, 895 F.3d 1347, 1359 (Fed. Cir. 2018) (“We have consistently held that indexing or searchability is unnecessary for a reference to be a printed publication under § 102(b).”).

218. *See Gutttag*, *supra* note 211, at 70–73.

219. For example, in the recent case *Acceleration Bay, LLC v. Activision Blizzard Inc.*, the Federal Circuit held that an article uploaded to a university department library’s website was not publicly accessible. 908 F.3d 765, 773–74 (Fed. Cir. 2018).

220. Public accessibility can sometimes involve a temporal question as well, particularly when transient displays are involved. In this type of situation, reference to the *Klopfenstein* factors can be helpful. *See In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004). But keep in mind that the *Klopfenstein* factors were developed in the specific context of a poster presentation and do not make much sense when elevated to a “one size fits all” inquiry for public accessibility. In the situation discussed in this Article, we are not talking about transitory displays, so the *Klopfenstein* factors are not all that informative to the question of public accessibility.

221. *Bruckelmyer*, 445 F.3d at 1379; *Lister*, 583 F.3d at 1315 (“[O]ur inquiry is whether it could be located by ‘persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence.’” (quoting *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008))).

222. *Bruckelmyer*, 445 F.3d at 1379.

for public inspection at the Canadian Patent Office.”²²³ The court reasoned that the issued patent, which was classified and indexed, could serve as a research aid providing a roadmap to assist interested artisans in locating the patent application.²²⁴ In contrast, in *Blue Calypso v. Groupon*, the Federal Circuit held that a report made available on a graduate student’s personal webpage was not sufficiently publicly accessible.²²⁵ First, the court reasoned there was no evidence that a skilled artisan would know about the student’s personal webpage or find the webpage through a keyword search on a search engine.²²⁶ Second, although the graduate student published another article, the court reasoned this article did not provide a sufficient roadmap leading a skilled artisan to the report on the graduate student’s personal webpage as the published article did not mention the personal webpage.²²⁷ In defining “roadmap” in the context of public accessibility, the court stated, “An adequate roadmap need not give turn-by-turn directions, but should at least provide enough details from which we can determine that an interested party is reasonably certain to arrive at the destination: the potentially invalidating reference.”²²⁸

The critical question for public accessibility, then, is not the binary question of indexing and cataloging, but rather whether there is a general roadmap for a person of ordinary skill in the art to be able to locate the document. While this roadmap concept is useful, we offer two additional observations.

First, an underlying issue for the roadmap concept is whether it requires that an inventor be able to locate *a specific document*, or whether generally knowing where to look is enough. For example, in the hypothetical library above, a sophisticated cataloging and indexing system might allow someone looking for *Chisum on Patents* to identify its precise location down to its particular location on the bookshelf. Alternately, a floorplan coupled with signs might inform the searcher to look in a particular area for books on patent law, then help the searcher refine the location so that the searcher ultimately comes across the treatise.²²⁹

223. *Id.* at 1375, 1377.

224. *Id.* at 1379.

225. *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1348 (Fed. Cir. 2016).

226. *Id.* at 1349–50.

227. *Id.* at 1350.

228. *Id.*

229. In fact, this is how one of us (Rantanen) found a few of the non-Chisum patent law books on his bookshelf.

We suggest that a map to a specific, known place is not required; rather, what is necessary is the ability to find the information one is looking for.²³⁰ This approach is consistent with the Federal Circuit's jurisprudence: in *In re Lister*, for example, the court considered the ability to search titles by keyword, rather than cataloging by author's last name, to potentially make the record publicly accessible.²³¹ And in any event, if a researcher knew the exact information to be found, the researcher would not need to conduct the search.

Second, the mere theory that an interested member of the public may locate the reference, by itself, is unlikely to be enough to support a finding of public accessibility. Federal Circuit decisions support the conclusion that the theory must be factually plausible. Although nonprecedential, in the recent *Koninklijke Philips v. Zoll Medical* decision, the Federal Circuit held that a Food and Drug Administration (FDA) pre-marketing filing application was not publicly accessible.²³² While a member of the public theoretically "could have found out about the application, requested it from the FDA, and then received it," the court held this theory was just conjecture unsupported by the record.²³³

With these cases as a backdrop, the answer to the question of whether a public university faculty member's research is publicly accessible turns on how easy it would be for an interested person of skill in the art to find it. And the answer to that question could vary substantially from situation to situation, depending on the available roadmaps. For example, a departmental webpage may describe a faculty member's area of research with moderate specificity—sufficient enough for an interested person having ordinary skill in the art (PHOSITA) to pursue an investigation and perhaps click on a link to the researcher's personal webpage. And that personal webpage may provide enough information to request specific documents from the researcher. Similarly, in many fields, faculty at one university know what faculty at other universities are working on. Even though pre-released research may not yet have been disseminated, those other faculty may know

230. See *Blue Calypso*, 815 F.3d at 1350.

231. Cf. *In re Lister*, 583 F.3d 1307, 1314 (Fed. Cir. 2009). The court ultimately concluded the manuscript was not publicly accessible because it was not indexed by keyword until after the critical date. *Id.* at 1317.

232. *Koninklijke Philips N.V. v. Zoll Med. Corp.*, 656 F. App'x 504, 529 (Fed. Cir. 2016) (nonprecedential).

233. *Id.*

enough that they could request the relevant documents.²³⁴ Faculty presentations at conferences that do not themselves disclose the “secret sauce” of an invention may still reveal enough information that an interested person could request documents through an open records request. And specific industries may keep close tabs on faculty research.

Thus, even though actual access to the records is not required, the challenger will need to develop a plausible roadmap. That said, the more economically valuable an area of research is, the more likely people outside the university would be keeping an eye on a faculty member’s research, and thus the more plausible such a theory may be.²³⁵

3. *Can the Document Actually Be Obtained?*

Even if the document could be found, one might argue that it still might not be possible for an interested PHOSITA to actually *obtain* the document. After all, a private company’s document, held internally, is not publicly accessible.²³⁶ And restrictions and norms relating to confidentiality can prevent a conclusion of public accessibility.²³⁷ But in this case, we are talking about internal public university documents, not a private company’s

234. That said, perhaps norms of professional conduct might cause the scrupulous to not do so. *See Cordis Corp. v. Bos. Sci. Corp.*, 561 F.3d 1319, 1333–34 (Fed. Cir. 2009) (“[W]here professional and behavioral norms entitle a party to a reasonable expectation that information will not be copied or further distributed, we are more reluctant to find something a printed publication.” (internal quotation marks omitted)).

235. In response to an earlier draft, two commentators raised the idea that Bayh-Dole may play a role in this question. Specifically, the Bayh-Dole Act, which was passed into law in 1980, is based on the idea that public institutions can patent inventions resulting from research supported by federal funds. *See Government Patent Policy Act of 1980*, Pub. L. No. 96-517, § 200, 94 Stat. 3015, 3019 (1980). Thus, the new version of § 102—and specifically, the addition of “or otherwise available to the public” should be read with the recognition that public universities would not, by automatic operation of the law, be prevented from obtaining patents on their research. For a variety of reasons, however, we do not find this argument to be persuasive. For one thing, as described in this Article, there are still many situations in which a public university could get a patent on research conducted by its faculty members, such as by using the one-year grace period discussed below. In addition, a given state’s decision to allow its open records law to extend into public university research records is a policy decision of the state. Just as with many disclosures by private parties, the state was not required to make that choice.

236. *Cf. ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 865–66 (Fed. Cir. 2010) (affirming that a draft document marked “trade secret” was not publicly accessible).

237. *See, e.g., Medtronic, Inc. v. Barry*, 891 F.3d 1368, 1382 (Fed. Cir. 2018) (involving norms of confidentiality); CHISUM, *supra* note 142, at § 3.04 nn.11–13 (addressing issues of confidentiality).

documents, and the very existence of open records laws provides a potential vehicle for someone to obtain the document. In this way, the name and abstract of a draft paper posted on the website of a prominent cell technology faculty researcher at a private institution would be quite different than that same information posted by a faculty researcher at a *public* university.²³⁸ An interested researcher might have a roadmap to the paper in both cases, but the ability to actually obtain the record (short of voluntary disclosure by the author) would differ between the two. Thus, while the question of actually being able to obtain the record is certainly important to the question of access, here it largely depends on the limits of the open records law. As a result, we address this issue in Part V.B below.

4. *Section 102(b) Provides a One-Year Grace Period*

A fourth patent-law-based counterargument rests on the statutory exception of the inventor's own disclosures under § 102(b)(1)(A).²³⁹ Section 102(b)(1)(A) exempts disclosures "made 1 year or less before the effective filing date of a claimed invention" if "the disclosure was made by the inventor or joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor."²⁴⁰ This would likely encompass publicly accessible research material by public university researchers.²⁴¹

The limitation of § 102(b)(1)(A) as applied to documents created by public university researchers is that it provides only a one-year period before a patent application must be filed. While this may apply in some factual situations, more than one year may, and often will, elapse between the commencement of research and the time when a patent application is filed. In this situation, the earlier documents from the research (e.g., laboratory

238. To be clear, we are not talking about the paper itself being posted on a researcher's website.

239. See 35 U.S.C. § 102(b)(1)(A) (2018); MERGES & DUFFY, *supra* note 9, at 381–87 (describing the operation of § 102(b)). In addition, the university could file a provisional patent application under 35 U.S.C. § 111(b), which requires that a nonprovisional application be filed within a year to gain the benefit of the filing date of the provisional application.

240. 35 U.S.C. § 102(b)(1)(A).

241. See Seymore, *supra* note 19, at 522–23 (discussing the one-year grace period in the context of university research talks under then-applicable § 102(b)). Pre-AIA § 102 contained an absolute one-year "grace period" for the inventor's own disclosures rather than the more complex system of post-AIA § 102(b)(1). See 35 U.S.C. § 102(b) (2010).

notebooks and research plans) may potentially be prior art under § 102(a)(1).²⁴²

There is also an interesting flipped argument based on § 102(b)(1)(B), which creates a “shield” based on the inventor’s own disclosures. That subsection excludes disclosures from being prior art if “the subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.”²⁴³ Thus, assuming that faculty research records could be obtained via an open records request, access to such records could arguably be considered “publicly disclosed”—and thus operate to bar subsequent disclosures of the same subject matter over the next year from counting as prior art under § 102(a)(1). The result would be that university researchers could get the benefit of § 102(b)(1)(B) without taking any extra steps, such as formal publication.²⁴⁴ The difficulty with this argument is that it is somewhat uncertain, particularly given debates over the meaning of publicly disclosed in § 102(b)(1)(B) and uncertainties about what “subject matter disclosed” means.²⁴⁵

B. Counterarguments Under Iowa’s Open Records Law

This Part addresses two threshold issues common to open records requests: whether the types of documents that might be involved in an open records request are public records and difficulties that can arise with actually obtaining documents through a request. It then examines the most likely statutory exceptions that may apply to open records requests for research

242. See Bagley, *supra* note 19, at 246–47 (“[E]ven a one-year grace period often is not long enough to accommodate the needs of many researchers due to the realities of academic research and TTO practices.”). In addition, other countries do not have the one-year period of § 102(b). See *id.* However, in this Article we are not examining whether public university research would be prior art under other countries’ patent systems.

243. 35 U.S.C. § 102(b)(1)(B) (2018).

244. Although, this would start the one-year clock for getting to the USPTO at the time the record was made, which might make for a challenging prosecution and litigation position.

245. See, e.g., MERGES & DUFFY, *supra* note 9, at 386–87, 392–93; Timothy R. Holbrook, *Patent Anticipation and Obviousness as Possession*, 65 EMORY L.J. 987, 1045–47 (2016); Jordan S. Joachim, Note, *Is the AIA the End of Grace? Examining the Effect of the America Invents Act on the Patent Grace Period*, 90 N.Y.U. L. REV. 1293, 1305–08, 1318 (2015).

records under Iowa's open records law, including exceptions for trade secrets, reports to governmental agencies, and preliminary or draft research materials; injunctions from disclosure; and suspension of provisions causing the denial of federal funds or services to a state agency.

In reading this Part, keep in mind two contextual points. First, notwithstanding the specifics of statutory language, there may be a policy preference among judges to protect the patentability of inventions created by faculty researchers at public universities.²⁴⁶ Whether justified on labor theory or utilitarianism grounds, that policy preference may manifest as interpretations of open records laws which favor shielding university research from open records requests—at least where its patentable value can be recognized at the time of the request. The second contextual point is that the applications of open records laws discussed here are not necessarily being done in response to an open records request, but rather in a patentability or validity assessment involving documents that could have been obtained through an open records request. In other words, we are not talking about an actual request for a document or record, but rather examining the reasons why a document may not be provided by the university in the context of assessing whether that document is § 102(a)(1) prior art.

1. Are Documents Created by University Researchers “Public Records” for Purposes of the Open Records Law?

One potential counterargument is that documents such as laboratory notebooks, research plans, or draft manuscripts are not public records and thus will not be subject to disclosure under Iowa's open records law.²⁴⁷ If

246. See Polsky, *supra* note 7, at 264–65 (“At the other extreme of persuasiveness, the tendency of forced disclosure (of unpublished data, manuscripts, presentations, or new ideas contained in scholar e-mails) to make scholars’ original research vulnerable to scooping by third parties—problem (2)—is highly compelling: Few would argue in favor of a public policy that supports theft of intellectual property. . . . Courts interpreting state PRLs with any elasticity have been quick to recognize the harms that accrue from forcing premature disclosure of at least those scholar records that will eventually yield public-facing products, such as publications or patents.”); Pritchard & Anderson, *supra* note 92, at 58 (describing a similar view in the University of Wisconsin system). However, this policy preference is likely more common on the state law level, as the Federal Circuit has consistently refused to extend any special treatment to universities under patent laws. See Lee, *supra* note 130, at 51–64.

247. See IOWA CODE § 22.2 (2019) (“Every person shall have the right to examine and copy a *public record* . . .” (emphasis added)).

these research-related documents are not subject to disclosure, then they are not publicly accessible and do not constitute prior art for purposes of § 102.

Iowa's open records law defines public records as "all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township, school corporation . . . whose facilities or indebtedness are supported in whole or in part with property tax revenue."²⁴⁸ The key language from this definition is the "of or belonging to" term.²⁴⁹ In applying this term, the Iowa Supreme Court stated, "A document *of* the government is a document that was produced by or originated from the government. Documents *belonging to* the government would include those documents that originate from other sources but are held by public officers in their official capacity."²⁵⁰ Additionally, this definition of public records can be read in connection with chapter 305 of the Iowa Code, which governs state records and archives.²⁵¹ This chapter provides that "[a]ll records made or received by or under the authority of or coming into the custody, control, or possession of public officials of this state in the course of their public duties are the property of the state."²⁵² So, records created by state agency employees in connection with their employment are property of the state agency and constitute public records for purposes of chapter 22.²⁵³

As university faculty conduct research in the course of their employment, this research is arguably the property of the state and thus "public" for purposes of Iowa's open records law.²⁵⁴ One counterargument may be that documents relating to university research are not "records." For example, laboratory notebooks, experiment methodologies, and experimental data often do not constitute printed documents or records as they are commonly understood. Given the breadth of public records in Iowa,

248. *Id.* § 22.1(3).

249. *See* *City of Dubuque v. Dubuque Racing Ass'n, Ltd.*, 420 N.W.2d 450, 452 (Iowa 1988).

250. *Id.*; *see also* *IPIB AO 2018-19*, IOWA PUB. INFO. BD. (Nov. 15, 2018), <https://ipib.iowa.gov/advisory-opinions/ipib-ao-2018-19> [<https://perma.cc/83SD-D72U>] (discussing when "documents possessed by public officials" are "public records" under chapter 22).

251. *See* IOWA CODE ch. 305. Thanks to Arthur Bonfield for this point.

252. *Id.* § 305.13.

253. *See id.*

254. The Iowa Supreme Court has explicitly held that Iowa's public universities are subject to Iowa's open records law. *Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 484 (Iowa 2012).

however, this argument seems unlikely to succeed—records include “information[] stored or preserved in any medium,” not just printed documents.²⁵⁵

This reading of Iowa’s law may be a bitter pill for many faculty to swallow, as it may not line up with their normative views on who “owns” their intellectual creations. Certainly, within the realm of traditional scholarly works—articles, books, art, movies, and teaching materials, to name a few—universities take the view that the owner of IP rights (that is, the copyright) in these works is the faculty member.²⁵⁶ But inventions are generally treated differently: universities routinely assert ownership over the IP rights in faculty members’ inventions, requiring disclosure to the TTO and assignment of any legal rights.²⁵⁷ Given this, it would be reasonable for a court to conclude that the state has enough of an interest in these documents and records to conclude they are documents of the state for purposes of the open records law.²⁵⁸

255. IOWA CODE § 22.1(3); *see also* Rathmann v. Bd. of Dirs. of Davenport Cmty. Sch. Dist., 580 N.W.2d 773, 777 (Iowa 1998) (“The right of persons to view public records is to be interpreted liberally to provide broad public access to public records.”).

256. *Statement on Copyright*, AM. ASS’N OF UNIV. PROFESSORS (1999), <https://www.aup.org/report/statement-copyright> [<https://perma.cc/6AT2-DUDE>]; *see, e.g.*, UNIV. OF IOWA OPERATIONS MANUAL § 30.4(b) (“Consistent with academic tradition and the expressed desire to encourage dissemination of the results of scholarship and research, the University agrees that in most cases, individual creators of copyrightable works of scholarship, research, or pedagogy, as well as creators of original works of art and literature, typically will hold personal copyright ownership of those works.”).

257. Samuel Estreicher & Kristina A. Yost, *University IP: The University as Coordinator of the Team Production Process*, 91 IND. L.J. 1081, 1085–90 (2016); Patricia E. Campbell, *University Inventions Reconsidered: Debunking the Myth of University Ownership*, 11 WM. & MARY BUS. L. REV. 77, 81–89 (2019); *see, e.g.*, UNIV. OF IOWA OPERATIONS MANUAL § 30.3(b) (“[T]he University has ownership of rights in qualifying inventions made by its employees . . .”). It is worth noting the type of legal right is different here: traditional scholarly works involve copyrights while inventions involve patents and potentially trade secrets.

258. This brief discussion elides the debate between traditional principles of academic freedom and the university’s property rights in faculty members’ intellectual creations. This is not to belittle the point: it is absolutely a core tension within universities. *Compare* AM. ASS’N OF UNIV. PROFESSORS, DEFENDING THE FREEDOM TO INNOVATE: FACULTY INTELLECTUAL PROPERTY RIGHTS AFTER *STANFORD V. ROCHE* (2014), https://www.aaup.org/file/aaupBulletin_IntellectualPropJune5.pdf [<https://perma.cc/4B7X-C88Z>] (advocating for stronger protection of faculty rights and academic freedom in the ownership of IP rights), *with* *The Association of University Technology Managers’ (AUTM) Response to the American Association of University Professors’ (AAUP) “Recommended Principles and Practices to Guide Academy-Industry*

2. *The Difficulty of Actually Accessing Documents Using Iowa's Open Records Law, Including the Specificity with Which the Document Must Be Identified*

Another counterargument is that it can be difficult to make a successful open records request under Iowa's open records law. Even if research records constitute public records, they are not really publicly accessible if citizens cannot successfully access these documents.

One difficulty that requesters may face is that state agencies may attempt to resist disclosure using various administrative obstacles. For example, certain state agencies have imposed restrictive fees to combat open records requests and resist disclosure.²⁵⁹ State agencies may also improperly reject an open records request because compliance is too "time-consuming and costly."²⁶⁰ While there are mechanisms for forcing agencies to provide documents,²⁶¹ those mechanisms may be expensive and tedious.

Another difficulty with open records requests is that requesters have to make their request in sufficient detail so the state agency can reasonably locate and compile the record. As discussed in Part V.A.2, it may be difficult for requesters to identify what types of research records a specific faculty researcher may have. For example, the requester may not know if the researcher has written a draft manuscript or submitted an invention

Relationships" (July 17, 2012), <https://www.autm.net/AUTMMain/media/Advocacy/Documents/AUTMAAUPResponseSubmitted7-17-12.pdf> [<https://perma.cc/BS7R-KYJ8>] (advocating for university ownership of faculty IP rights). But when it comes to economically valuable inventions, the personhood and academic freedom interests of faculty members traditionally seem to be at their lowest ebb and the property rights of the university at their highest. See Estreicher & Yost, *supra* note 257, at 1085–90; UNIV. OF IOWA OPERATIONS MANUAL § 30.3(b).

259. See Randy Evans, *Records Costs Defy Iowans' Right to Know*, GAZETTE (Jan. 24, 2020), <https://www.thegazette.com/subject/opinion/guest-columnist/records-costs-defy-iowans-right-to-know-20200124> [<https://perma.cc/PG6W-4SN4>]; Erin Jordan, *Cost of Public Records Can Be a Barrier to Transparency*, GAZETTE (Mar. 9, 2019), <https://www.thegazette.com/subject/news/government/iowa-public-records-sunshine-week-cost-maintain-20190309> [<https://perma.cc/QY3T-J2KM>]; *Maybe Open Records for Thee, If You Pay a Fee. Or Maybe Not.*, DES MOINES REG. (Jan. 30, 2020), <https://www.desmoinesregister.com/story/opinion/editorials/2020/01/30/legal-fees-access-government-held-documents-should-eliminated-editorial/4593554002/> [<https://perma.cc/6899-LCGQ>].

260. See *Maybe Open Records for Thee, If You Pay a Fee. Or Maybe Not.*, *supra* note 259.

261. IOWA CODE §§ 23.1; 23.5; 23.7; 23.10 (2019); see also *File a Complaint*, IOWA PUB. INFO. BOARD, <https://www.ipib.iowa.gov/file-complaint> [<https://perma.cc/QG55-68EG>].

disclosure based solely on the information on the university's webpage. So, how can requesters provide sufficient detail if they cannot identify the specific research records at issue?

While both of these issues may pose a challenge to actually *obtaining* a record, they are less relevant in the context of an argument that a research document or record *was* publicly available. The first issue, that a university or other agency may engage in delaying tactics or otherwise make it difficult for requesters to obtain documents in response to a valid open records request, is not really relevant to the question of whether the university was required to provide the document, and thus whether it was publicly accessible. The issue is whether the university had a valid basis to decline a request for the document—including because the document was not a public record, because one of the exceptions applied, or because another statute prohibited disclosure.

Similarly, the evaluation of how much specificity in identifying the document is required would occur in the post hoc context in a challenge to the validity of a patent, rather than in the administrative process of requesting production of a document. And here, the open records law and court decisions likely favor a conclusion that the record could have been located even if the request is reasonably general.²⁶² So if the hypothetical PHOSITA were to request Professor X's research material concerning a certain research topic within a certain date range,²⁶³ it would probably be sufficient to locate the relevant records. For example, in a recent Wisconsin case, an open records request sought disclosure of "all records from [Animal Care and Use Committee] meetings and investigations, including handwritten notes of Committee deliberations, regarding any and all protocols of maternal deprivation and social isolation in primates."²⁶⁴ The court ordered disclosure of the requested research records,²⁶⁵ demonstrating

262. See Monique C.M. Leahy, *Proof Supporting Disclosure Under State Freedom of Information Acts*, 132 AM. JUR. *Proof of Facts* 3D 1 § 8 (2020) ("Generally, the request is required to describe the requested information in general terms and in enough detail to enable agency personnel to locate them with a reasonable amount of effort.").

263. See, e.g., *Instructions for Submitting a Public Records Request*, UNIV. OF IOWA, <https://transparency.uiowa.edu/public-records-requests/instructions-submitting-public-records-request> [<https://perma.cc/RPL7-LF39>] ("Provide specific details about the data being requested, including a date range.").

264. *Animal Legal Def. Fund v. Bd. of Regents of Univ. of Wis.*, No. 14-CV-2874, 2017 WL 4750694, at *1 (Wis. Ct. App. Oct. 19, 2017) (internal quotation marks omitted).

265. *Id.* at *6.

that this type of general open records request can provide sufficient detail to locate the requested records.

The amount of specificity required to obtain a document through an open records request also parallels the Federal Circuit's interpretation of "publicly accessible," such that the two issues are likely to be based on the same operative facts and are likely to rise and fall together. Thus, as discussed above, if a roadmap leading to the relevant documents was available from public sources or known to persons of skill in the art, the research documents may be both publicly accessible and describable "in enough detail to enable agency personnel to locate them with a reasonable amount of effort."²⁶⁶

3. Statutory Exceptions May Apply to University Research

Another counterargument is that research records fall under one or more of the exceptions to disclosure provided in section 22.7. If exempt from disclosure, research records will not be publicly accessible to constitute prior art under § 102. Of the 73 exceptions for records that may be kept confidential from disclosure under section 22.7,²⁶⁷ three would be most likely to apply to university research records.

First, a research record may be exempt from disclosure if it falls under the section 22.7(3) exception for trade secrets.²⁶⁸ The Iowa Code's definition of "trade secret" parallels the standard definition of the concept as being information that is economically valuable because it is a secret and that is the subject of reasonable efforts to maintain its secrecy.²⁶⁹

266. See Leahy, *supra* note 262, § 8.

267. IOWA CODE § 22.7 (2019).

268. *Id.* § 22.7(3).

269. *Id.* § 550.2(4) (defining a trade secret as "information, including but not limited to a formula, pattern, compilation, program, device, method, technique, or process that is both of the following: (a) [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by a person able to obtain economic value from its disclosure or use[; and] (b) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy"). The idea that trade secrets cannot be § 102(a)(1) prior art is also consistent with the core thesis of Hrdy and Sandeen's functional approach to § 102. See Hrdy & Sandeen, *supra* note 177. However, as discussed in this section, there is a fundamental tension between concluding something is a trade secret when there is a legal mechanism for getting access to it.

A core question here is whether a state can rely on the idea that its own work is a trade secret and thus immune from disclosure under its open records law. The very concept of trade secrecy seems to be at odds with a requirement of disclosure. After all, the purpose of open records laws is to reveal information that governments might prefer not to reveal, while trade secret law rests on the idea that secrets can be protected from disclosure.²⁷⁰ The alternative—that the state can maintain secrecy over its records by arguing they are valuable because they are secrets—would allow the exception to swallow the rule. In essence, a general trade secret exception to open records access to information created by the state creates a chicken-and-egg conundrum.

Given this tension, the most plausible reading of section 22.7(3) is that it applies to the trade secrets of persons other than the state that come into the possession of the state—but not information developed entirely by the state itself.²⁷¹ After all, the state has other mechanisms for ensuring that

270. For a deep examination of the concept of government-owned trade secrets, see generally David S. Levine, *The People's Trade Secrets?*, 18 MICH. TELECOMM. & TECH. L. REV. 61 (2011). One might argue state-owned information could be economically valuable to the state, and thus not subject to disclosure. But lots of information is economically valuable to the state if it can prohibit disclosure of that information, such as information about coaches' contracts, settlement agreements, and salary information. As discussed below, we think the better approach is to adopt a narrowly-tailored provision focusing on university research rather than to stretch the meaning of trade secret to encompass state-created information.

271. See, e.g., *Brown v. Iowa Legis. Council*, 490 N.W.2d 551, 552 (Iowa 1992) (applying Iowa's open records law's trade secret exemption to preclude disclosure of computer data purchased by the General Assembly and holding this data was a trade secret belonging to the vendor who prepared it); *Sysco Iowa, Inc. v. Univ. of Iowa*, 889 N.W.2d 235, 242 (Iowa Ct. App. 2016) (applying the trade secret exemption to preclude disclosure of a service contract between a business and the University of Iowa under Iowa's open records law, thereby protecting the business's trade secrets); cf. *Gabrilson v. Flynn*, 554 N.W.2d 267, 272–73 (Iowa 1996) (declining to address the question of whether a school assessment was a trade secret because it was already excluded from disclosure under § 22.7(19)). A more difficult question is whether information developed jointly by a researcher at a public institution and a private entity could fall under this exemption. See, e.g., *Mediacom Iowa, LLC v. Inc. City of Spencer*, 682 N.W.2d 62, 66–68 (Iowa 2004) (rejecting the city's assertion that information was a trade secret on the basis that there were no factual findings supporting the conclusion that it was a trade secret); *Miss. State Univ. v. People for the Ethical Treatment of Animals, Inc.*, 992 So. 2d 595, 609–10 (Miss. 2008) (concluding that under Mississippi statutory law this information was exempt from disclosure under the state open records law); cf. Deepa Varadarajan, *Business Secrecy Expansion and FOIA*, 68 UCLA L. REV. (forthcoming 2021) (discussing the U.S. Supreme Court's recent decision in *Food Marketing Institute*

confidential information is not subject to open records disclosure—including by amending the exceptions themselves. And the state has used those exceptions to exempt information that, for public policy reasons, should be deemed confidential.²⁷² That said, whether a state can own trade secrets is a difficult question. What about a professor’s final exam answer key? Or the exam itself?²⁷³ Or the football team’s playbook?²⁷⁴ These would seem to be information that is “economically valuable because it is a secret and which is the subject of reasonable efforts to maintain its secrecy.”²⁷⁵ Still, the University of Iowa does not appear to have relied much on section 22.7(3) in responding to open records requests,²⁷⁶ and there is no case law applying this exception to university research in Iowa. At best, the extent to which exemption (3) applies to the state itself is unclear. And the idea that trade secrecy can be used to resist the public’s ability to access public records is at odds with a presumption of disclosure and policy of openness.

The other issue with section 22.7(3) and its application to university research is that the information may not be recognized as a trade secret at the time access could have been requested. While invention disclosure forms and draft patent applications may be more easily recognized as and argued to be trade secrets, early experiment results, drafts of manuscripts, project

v. *Argus Leader* and its expansion of Exemption 4 (relating to businesses’ confidential information and trade secrets) in the federal Freedom of Information Act).

272. For example, exemption (7) relates to appraisal information concerning the sale or purchase of property for public purposes prior to the execution of the contract; (8) relates to “[e]conomic development authority information on an industrial prospect with which the authority is currently negotiating”; (33) relates to “[d]ata processing software . . . which is developed by a government body”; and (50) relates to information and records relating to security. IOWA CODE § 22.7 (2019).

273. Lest any students in Iowa try this, take note of exemption (19), which covers “[e]xaminations . . . to the extent that their disclosure could reasonably be believed by the custodian to interfere with the accomplishment of the objectives for which they are administered.” *Id.* § 22.7(19).

274. See *Request History*, UNIV. OF IOWA, <https://publicrecordsrequests.iowa.uiowa.edu/Log> [<https://perma.cc/664A-ACSG>] (indicating that the university cited section 22.7(3) as the basis for nondisclosure of “football playbook and game plans”).

275. See *supra* note 270 and accompanying text.

276. See *id.* (showing that the university has produced numerous contracts that it has entered into and denying record requests only nine times between 2017 and 2020 on the basis of section 22.7(3)). However, the university did cite section 22.7(3) in refusing to disclose “data on admission visits” and “Disclosures of Intellectual Property.” *Id.*; see also Pat Shockley, *The Availability of “Trade Secret” Protection for University Research*, 20 J.C. & U.L. 309, 329–30 (1994) (arguing that university research may be protected as a trade secret depending on the state’s trade secret laws).

budgets, and laboratory notebooks for work done by public university researchers may not. Drawing the line between trade secrecy and public access when public universities are involved is not easy: while these sorts of things might easily fall into the category of trade secrets at a private entity, the state is not a private entity. In addition, the traditional academic culture is one of open communication, and university researchers are often encouraged to share their knowledge to improve the quality of their research.²⁷⁷ So the “reasonable precautions” requirement of trade secret protection may often not be present in the collaborative university research context.²⁷⁸ And given that courts have granted access to research in the past, a court addressing patentability or validity might conclude that the law would have required the university to allow public access absent a very clear basis to rely on exemption (3).

Ultimately, in light of the legal uncertainty over whether section 22.7(3) applies beyond the trade secrets of private parties that are in the possession of the government and whether the relevant materials would even be considered trade secrets in the conventional sense, reliance on this exemption is murky.

Another potential exception from disclosure is section 22.7(6), which excludes “[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose” from disclosure.²⁷⁹ For example, if a university researcher filed an invention disclosure with the university’s TTO, this could perhaps constitute a “report” that may be excluded from disclosure. However, the applicability of this exception to university research is unclear, as there is no case law applying this exception to university research. Additionally, the Iowa Supreme Court has interpreted this exception narrowly.²⁸⁰ To apply this exception, the public

277. See Joshua R. Nightingale, Note, *The Researcher Rat’s Culture and Ease of Access to the Publication Lever: Implications for the Patentability of University Scientific Research*, 113 W. VA. L. REV. 521, 548 (2011); David E. Korn, Note, *Patent and Trade Secret Protection in University-Industry Research Relationships in Biotechnology*, 24 HARV. J. ON LEGIS. 191, 193 (1987).

278. David S. Levine, *What Can the Uniform Trade Secrets Act Learn from the Bayh-Dole Act?*, 33 HAMLINE L. REV. 615, 628 (2010); see also Korn, *supra* note 277, at 221 (“Exchange among researchers in a laboratory, discussion at a scientific meeting, or publication in a technical journal or an issued patent may all lead to loss of trade secret protection.”).

279. IOWA CODE § 22.7(6).

280. *Ne. Council on Substance Abuse, Inc. v. Iowa Dep’t of Pub. Health, Div. of Substance Abuse*, 513 N.W.2d 757, 760 (Iowa 1994); *Iowa Film Prod. Servs. v. Iowa*

entity “must prove two things: the [documents] would give advantage to . . . competitors *and* their release would serve *no* public purpose.”²⁸¹ The “no public purpose” requirement is often a difficult hurdle for public entities, especially where public funds are involved—as with university research—because the public generally has the right to know how public funds are spent.²⁸² That said, it is still necessary for the requester to make out some public purpose. Knowing how public funds are spent does not necessarily require seeing the researcher’s notebooks and research results. Further, this analysis would occur in the post hoc context in a challenge to the validity of a patent rather than during litigation over the public records law, adding to the complexity of this inquiry. In the patent validity context, the court may view the purpose as establishing anticipation or seeking to harm a competitor by invalidating their patent, rather than showing how public funds are spent. That said, it is unclear the extent to which this exception may apply to public university research, if it even applies at all.

Finally, research records may be excluded from disclosure under section 22.7(65). This section provides an exception for:

[t]entative, preliminary, draft, speculative, or research material, prior to its completion for the purpose for which it is intended and in a form prior to the form in which it is submitted for use or used in the actual formulation, recommendation, adoption, or execution of any official policy or action by a public official authorized to make such decisions for the governmental body or the government body.²⁸³

This exception potentially raises the strongest counterargument to public accessibility because it appears to apply the most directly to research records, as the language explicitly includes research material.²⁸⁴ Yet, it would be difficult to argue that exception (65) applies to research conducted by university faculty members. The language of the exception speaks in terms of draft materials prepared in the context of policymaking, not research or patenting. It refers to draft materials (“in a form prior to the form in which

Dep’t of Econ. Dev., 818 N.W.2d 207, 225–26 (Iowa 2012).

281. *Ne. Council on Substance Abuse, Inc.*, 513 N.W.2d at 760.

282. *See id.* at 760–61.

283. IOWA CODE § 22.7(65).

284. The Climate Science Legal Defense Fund (CSLDF) argues this exception is the one most likely to shield faculty members’ research from open records requests but recognized the ambiguities in applying this section to university research. CSLDF 2019 REPORT, *supra* note 104, at 81–82.

it is submitted for use or used”) to be used in making *policy* decisions or taking governmental action (“in the actual formulation, recommendation, adoption, or execution of any official policy or action by a public official authorized to make such decisions for the governmental body or the government”).²⁸⁵ It would stretch the language to apply it to faculty research unconnected to a particular official policy or action.²⁸⁶ The law here, however, is unsettled.²⁸⁷

The legislative history of this amendment may also limit the applicability of this section to university research. Professor Arthur Bonfield, who was instrumental in advocating for the addition of section 22.7(65), stated:

[This exception] should apply only to nonfactual policy, opinion, or idea materials, and such very tentative or very preliminary materials could be withheld only for periods prior to the final formulation of an actual recommendation or proposal, which would be well before any actual authoritative action on any such recommendation or proposal.²⁸⁸

At the end of the day, while it may still be argued that this section applies to university research based on the text of the exception, there is no case law addressing the applicability of this section to university research—so the scope of this exception is unclear at best.

The short of it is that there is substantial uncertainty as to the applicability of the section 22.7 exceptions to university research, and as discussed above, the application of the three most likely exceptions—the trade secret exception, the unfair competitive advantage exception, and the draft policy materials exception—would require expansive readings that would eviscerate the open records laws generally. Furthermore, Iowa’s open records law operates with a presumption toward disclosure, so Iowa courts have construed these exemptions narrowly, resolving ambiguities in favor of disclosure.²⁸⁹ In accordance with this approach, courts are likely to rule in favor of disclosure when applying these ambiguous exceptions to university research records. Adding to the uncertainty, this analysis would occur in the

285. See IOWA CODE § 22.7(65).

286. One response might be that it relates to the decision whether to file a patent application. That may be a viable argument, but it would be difficult to contend this extends beyond, say, an invention disclosure prepared for the TTO to the underlying research records.

287. CSLDF 2019 REPORT, *supra* note 104, at 81–82.

288. BONFIELD, *supra* note 39, at 14.

289. Hall v. Broadlawns Med. Ctr., 811 N.W.2d 478, 485 (Iowa 2012).

post hoc context in a challenge to the validity of a patent rather than during litigation over the public records law, so it is possible a federal court applying patent law may apply these exceptions differently than an Iowa state court applying the open records law.

4. *Section 22.8 May Preclude Disclosure of University Research*

Another potential counterargument is that even if university research records do not qualify for any section 22.7 exceptions, the university or its researchers could have sought an injunction under section 22.8 to prevent disclosure of their research.²⁹⁰ If the university could have obtained an injunction preventing disclosure, then the research records will not be publicly accessible to constitute prior art for purposes of § 102.

To obtain an injunction, section 22.8 requires the movant to prove by clear and convincing evidence that the disclosure of the documents (a) “would clearly not be in the public interest,” and (b) “that the examination would substantially and irreparably injure any person or persons.”²⁹¹

There are relatively few Iowa Supreme Court decisions involving section 22.8, and they largely involve requests for injunctions to protect individuals’ privacy interests.²⁹² The Iowa Supreme Court has a five-factor test to determine whether the disclosure of public records is against public interest, analyzing: “(1) the public purpose of the party requesting the information; (2) whether the purpose could be accomplished without the disclosure of personal information; (3) the scope of the request; (4) whether

290. *Sysco Iowa, Inc. v. Univ. of Iowa*, 889 N.W.2d 235, 238 (Iowa Ct. App. 2016) (“Public records may also be protected from disclosure in other, narrowly-drawn circumstances set forth in chapter 22 . . .”) (citing IOWA CODE § 22.8); *Burton v. Univ. of Iowa Hosps. & Clinics*, 566 N.W.2d 182, 188–89 (Iowa 1997) (discussing section 22.8 as an available remedy for the university hospital to restrain examination); *Gabrilson v. Flynn*, 554 N.W.2d 267, 273–74 (Iowa 1996).

291. IOWA CODE § 22.8(1), (3).

292. *See, e.g., In re Langholz*, 887 N.W.2d 770, 777–79 (Iowa 2016) (involving the sealing of a permanent injunction precluding a softball coach from contacting a minor); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 48 (Iowa 1999) (involving individuals’ sick leave information); *Ne. Council on Substance Abuse, Inc. v. Iowa Dep’t of Pub. Health, Div. of Substance Abuse*, 513 N.W.2d 757, 759 (Iowa 1994) (requesting for injunction brought by nonprofit substance abuse treatment facility); *see also* Spencer Willems, Note, *Tape Don’t Lie*, 67 *DRAKE L. REV.* 797, 817–18 (2019) (describing the Iowa Supreme Court’s approach to section 22.8).

alternative sources for obtaining the information exist; and (5) the gravity of the invasion of personal privacy.”²⁹³

Despite its limited use thus far to protect people’s private information, section 22.8 provides a potential path to a more general balancing exemption to disclosure when the movant is the state itself. Theoretically, it could be used by the university to argue that disclosure of faculty members’ research would not be in the public interest because it would prevent the ability of the university to obtain a patent, inhibiting the ability of the university to transfer the research from the lab bench to the marketplace and depriving the state of a revenue stream. The university itself would be the person irreparably harmed by examination (as would be the faculty researcher). In weighing the injunction, courts would also likely consider the public purpose of the party requesting the information.²⁹⁴

While this path is plausible, the applicability of this section to university research outside the privacy-invading harm is questionable. There is no case law expressly applying this section beyond privacy-invading harms, so it is unclear how effective this provision would be at protecting public university research where privacy is not at stake. Section 22.8 itself specifies that “the district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest” and emphasizes the narrowness of the class of records that can be subject to the injunction.²⁹⁵ In addition, the assessment would be done in the *ex post* context of a patent dispute—and thus the issue would be whether someone *could* have obtained an injunction, something that may be too speculative, particularly given the policy weight favoring disclosure. So, this is another “maybe” argument.

293. *Langholz*, 887 N.W.2d at 777 (internal citations omitted).

294. As a policy matter, we encourage courts to consider making broader use of section 22.8 as a balancing test, even beyond the issue of potentially patentable university research. Doing this might provide more nuanced flexibility to the open records laws without the need to add more statutory exceptions. However, while this might be good from the perspective of the development of Iowa’s open records law, we do not think it provides the kind of certainty necessary to eliminate risks under 35 U.S.C. § 102(a)(1). *See also* Pritchard & Anderson, *supra* note 92, at 68 (describing the application of Wisconsin’s balancing test to academic research).

295. IOWA CODE § 22.8(1), (3).

5. Section 22.9 May Preclude Disclosure of University Research

Finally, section 22.9 permits Iowa courts to suspend provisions of Iowa's open records law if the provision would cause the denial of federal funds or services to a state agency.²⁹⁶ This section provides: "If it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency"²⁹⁷ Agencies²⁹⁸ may adopt rules in accordance with this section to waive certain provisions of chapter 22 that may prevent the denial of federal funds under certain circumstances.²⁹⁹ For example, the Bayh-Dole Act requires universities to take timely action to preserve patent rights—e.g., by filing prior to public disclosure—as a condition to university patent rights.³⁰⁰ Section 22.9 may apply to these Bayh-Dole patents because disclosure under chapter 22 would cause the denial of patent rights (funds) from the federal government.³⁰¹

That said, this section only applies to research that receives federal funding.³⁰² Additionally, most federal funding of research comes from federal grants, which may actually increase the public accessibility of the research material under the federal FOIA.³⁰³ Indeed, a district court has held that because a researcher's federal grant proposals to federal agencies were subject to an open records request under FOIA, the grant proposals constituted printed publications under § 102.³⁰⁴ The real question here is whether the university could have successfully argued that the federal

296. *Id.* § 22.9(1).

297. *Id.* A court or the state agency may make this determination. *See* Press-Citizen Co. v. Univ. of Iowa, 817 N.W.2d 480, 489 (Iowa 2012) ("The first paragraph of section 22.9 . . . is directed at *everyone*. Thus, the first paragraph comes into effect whenever 'it is determined,' without confining itself to determinations by an agency.").

298. IOWA CODE § 17A.2(1) ("Agency" means each board, commission, department, officer or other administrative office or unit of the state.").

299. *Id.* § 22.9(2).

300. *See* 35 U.S.C. § 202(c)(3) (2018).

301. *See* IOWA CODE § 22.9.

302. ASS'N OF AM. UNIVS., UNIVERSITY RESEARCH: THE ROLE OF FEDERAL FUNDING 2 (2011), <https://files.eric.ed.gov/fulltext/ED517263.pdf> [<https://perma.cc/27WA-Y7VK>].

303. *See id.*

304. E.I. Du Pont De Nemours & Co. v. Cetus Corp., No. C-89-2860 MHP, 1990 WL 305551, at *8 n.7 (N.D. Cal. Dec. 3, 1990).

government would deny funds if the research was publicly disclosed.³⁰⁵ Absent a direct federal prohibition on disclosure, such as in the context of national defense research, this seems speculative at best. Ultimately, section 22.9 seems unlikely to provide a basis for a court to conclude in a validity determination that university research otherwise subject to an open records request is not publicly accessible.³⁰⁶

C. Conclusion: Public University Research May Be § 102(a)(1) Prior Art

In order to follow the individual threads of federal patent law and Iowa's open records law, we separated the two in the above sections. The two strands are more entangled than this discussion might suggest. Indeed, the very question of public accessibility depends in large part on whether information is actually available through the open records laws. Unlike conventional public accessibility-type cases, in which the entity with the record is either in the business of facilitating access through cataloging and indexing or voluntarily shared the document at some point, here access to the record is more adversarial, resisted by the very entity that may be required to disclose it.

On balance, our conclusion is that there is a lot of uncertainty as to whether public university research is prior art under § 102. Although, it would seem to fall within the general scope of materials available to the public. Depending on the factual circumstances, it may or may not be possible to demonstrate that a roadmap existed leading to the documents. And while each of the exceptions in chapter 22 described above *could* be a basis for a court to conclude that an interested person would not be allowed access to a university document, none of them provide a clear basis for reaching that conclusion. Other creative arguments exist, but they are even more speculative.³⁰⁷ This is a problem because investors do not like

305. *See id.* at *8.

306. Perhaps one could also argue the “denial of . . . services” language in section 22.9 could encompass the grant of a patent. We do not think this is likely to be a successful argument. The decision of whether to grant a patent is not a “service” that the USPTO provides. Rather, it is based on whether the claimed invention meets the statutory conditions. *See* 35 U.S.C. § 101 (2018).

307. One particularly creative argument we came up with while writing this is the expansion of the experimental use doctrine from the categories of “on sale” and “in public use,” to printed publication. *See Barry v. Medtronic, Inc.*, 914 F.3d 1310, 1328 (Fed. Cir. 2019). But we are not sure that is a viable argument. *See In re Hassler*, 347 F.2d 911, 912–13 (C.C.P.A. 1965) (holding that a newspaper article detailing the experimental progress of an invention was a printed publication even though the

uncertainty, especially in their legal rights.

VI. RECOMMENDATION: PROVIDE A LIMITED EXCEPTION FOR UNIVERSITY RESEARCH

Given all this, our recommendation is that Iowa, and other similarly situated states, act to clarify the law regarding public access to university research. In making this recommendation, however, we are mindful of important countervailing considerations—particularly the goals of transparency discussed in Part II.³⁰⁸ Below, we discuss some of these considerations.

Our proposal assumes a public interest in avoiding the risk of unpatentability or invalidity of public university research through open records laws. Loss of university patent rights could lead to loss of revenue from licenses, loss of funding, and lower faculty retention.³⁰⁹ Should the state not be interested in protecting the patentability of university research, of course, then this proposal is unlikely to find much purchase.

In addition, in proposing the below language, we are also cognizant of the limitations of Iowa's existing open records law and the legislative landscape.³¹⁰ While a complete overhaul of Iowa's open records law may be needed,³¹¹ we recognize that it may not be feasible given the number of different interest groups that hold strong positions on this topic.³¹²

A. Proposed Statutory Language

One option would be to revise section 22.7(65) to extend to university research. While this would seem to be the simplest approach, it is problematic due to the already-convoluted nature of exemption (65), which contains multiple subclauses and refers to a variety of different groups, actions, and types of records.³¹³ Adding additional complexity would not aid

inventor was still experimenting); *Pickering v. Holman*, 459 F.2d 403, 407 (9th Cir. 1972) (“Any publication, regardless of the purposes behind it, violates the policies behind the publication bar. Publication pursuant to experiment is no exception.”).

308. *See supra* Part II.

309. *See supra* Part IV.

310. Willems, *supra* note 292, at 811–12 (highlighting the numerous exemptions to the Act serving various interest groups).

311. *See id.* at 809–10 (criticizing the expansion of the exceptions in section 22.7).

312. *See id.* at 811 (providing examples of various groups).

313. IOWA CODE § 22.7 (65) (2019).

in clarity. Indeed, trying to fit university research into this exemption would itself be a major drafting challenge.

Instead, we recommend that the state of Iowa adopt the following language as an additional exemption in section 22.7. This language reflects the spirit of exemption (65), but addresses the specific circumstance of university research:

Records created at a Regents institution in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, until that study or research is publicly released, published, or a patent application filed, or five years have elapsed from its creation, whichever is shorter.

This proposed legislation is modeled after the definition of “[i]ntellectual property record” under Ohio’s public records law,³¹⁴ but adapted to apply to the state of Iowa. In addition, unlike Ohio’s law, this proposal allows public access to university research once the research has been published or patented or five years have elapsed from its creation. The purpose of this limit is to recognize the public’s many interests in access to university research, while balancing that interest against the state’s and researchers’ interests in potentially patenting inventions that result from this research. After the results of that research have been formally disclosed to the public, such as through publication or patenting, the state’s and researchers’ interests in secrecy are much less. Furthermore, after five years have passed, the proprietary value of that information is likely diminished to the point where the public’s interest in access outweighs the state’s and researchers’ interests in patentability.

B. Countervailing Considerations

The above proposal was drafted with some important countervailing considerations in mind.

1. Is the Game Worth the Candle?

For some public universities, the inability to obtain patents on faculty research may not really be that economically significant. Patenting and licensing technologies is costly, and many university TTOs are cost-centers

314. See OHIO REV. CODE ANN. § 149.43(A)(5) (West 2020).

rather than profit-centers.³¹⁵ While there are stories of blockbuster breakthroughs and highly profitable TTOs, there are many more that struggle to break even.³¹⁶ Yet, despite this landscape, many universities maintain TTOs. Rochelle Dreyfuss describes it like having a football team—it might not win, but every big public university needs one.³¹⁷ Still, the pure financial question is an important one to ask—particularly given the likely opposition to legislative attempts to add an exception to open records laws.³¹⁸

In addition, even though an invention might be patentable, a given university might decide that the patent is not necessary for dissemination and may consider sharing the information through publication (without the burden of a patent) to be more in line with this mission. Each state and institution must decide as a policy matter how it chooses to balance patenting with other forms of dissemination for translating technology from the laboratory to the public.

2. Importance of Transparency to Institutional Accountability

Many justifications used to support public access to government generally apply to universities as well. While scholars have criticized the use of open records laws to target and harass individual researchers based on ideological differences,³¹⁹ open records laws have also been used to expose malfeasance.³²⁰ Adding to the complexity, one person's ideological difference may be another's malfeasance.³²¹

315. See, e.g., Orozco, *supra* note 138, at 120.

316. See, e.g., Brian J. Love, *Do University Patents Pay Off? Evidence from a Survey of University Inventors in Computer Science and Electrical Engineering*, 2 YALE J. L. & TECH. 285, 297 (2014) (describing the literature on the revenue landscape of technology transfer offices).

317. Rochelle Dreyfuss, *Protecting the Public Domain of Science: Has the Time for an Experimental Use Defense Arrived?*, 46 ARIZ. L. REV. 457, 464 (2004); see also Kristen Osenga, *Rembrandts in the Research Lab: Why Universities Should Take a Lesson from Big Business to Increase Innovation*, 59 ME. L. REV. 407, 418 (2007) (elaborating on Professor Dreyfuss's comment).

318. Cf. Pritchard & Anderson, *supra* note 92, at 70–71 (describing opposition to proposed legislation in Wisconsin that sought to implement a commercialization exception).

319. See Polsky, *supra* note 7, at 246–63.

320. See *supra* Part III (describing examples).

321. Consider, for example, the lawsuits brought by PETA, which seek to expose maltreatment of laboratory animals. See, e.g., Linda Blackford, *UK Loses to PETA in*

Consider, for example, the ISU president's alleged use of a university airplane for personal purposes, uncovered by journalists through university records.³²² This would be a classic example of the use of open records requests by the press in order to report on a matter of public importance. But does this reasoning extend to all university records? Certainly, there are some things that are already off limits.³²³

An underlying question is *why* the public should have enhanced access to information at public institutions but not at private institutions. If the university president had been at a private institution, no open records requests would be available.

A classic rationale is that because it is the public's money that is being spent, the public should know how it is being spent.³²⁴ The limitation of this argument, though, is that the public's right to know arguably only extends to information about how the money is being spent—budgetary allocations, for example—and not to the details of what public university employees actually produce with the money. In addition, only a fraction of the money at public universities actually comes from the state—at the University of Iowa, for example, only about 29 percent of the general education fund budget comes from state appropriations³²⁵—and meanwhile, hundreds of millions of dollars come from sources of external funding.³²⁶ Particularly when research

Lawsuit Seeking Records About Animal Experiments, LEXINGTON HERALD LEADER (Mar. 2, 2017), <https://www.kentucky.com/news/local/education/article136021918.html>; Michelle Kretzer, *PETA Sues for Footage of UC-Davis 'Den of Horrors' Monkey Laboratory*, PETA (Jan. 24, 2019), <https://www.peta.org/blog/peta-sues-uc-davis-experiments-on-monkeys/> [<https://perma.cc/42WY-D5QZ>].

322. See Ryan J. Foley, *Iowa State President Damaged School Airplane*, DES MOINES REG. (Sept. 23, 2016), <https://www.desmoinesregister.com/story/news/education/2016/09/23/iowa-state-president-damaged-school-airplane/90962114/> [<https://perma.cc/FJ8F-7D5D>].

323. See, e.g., IOWA CODE § 22.7(19) (2019) (relating to exams).

324. See *Ne. Council on Substance Abuse, Inc. v. Iowa Dep't of Pub. Health, Div. of Substance Abuse*, 513 N.W.2d 757, 760–61 (Iowa 1994).

325. *Financial Management and Budget: General Fund Budget Narrative*, IOWA, <https://fmb.fo.uiowa.edu/general-fund-budget-narrative> [<https://perma.cc/WL2W-8ZUH>].

326. Stephen Pradarelli & Leslie Revaux, *Federal Funding for Research Increases at the University of Iowa*, IOWA: OFF. OF THE VICE PRESIDENT FOR RSCH. (July 13, 2018), <https://research.uiowa.edu/impact/news/federal-funding-research-increases-university-iowa> [<https://perma.cc/SD2Q-NPXT>].

is supported by non-state sources—federal grants, donations, or money from companies—the funding rationale may be weakened.³²⁷

Outside of the “where is my money being spent” rationale, there is a sense that because public universities are, well, public, then the public should be able to act as an auditor—to conduct general oversight over the whole enterprise.³²⁸ And yet, the reality is that the public lens of open records requests is not going to provide the broad-based view of the university that would constitute true oversight. A university has thousands of employees, each of whom send dozens of e-mails each day, write documents, create drafts, develop computer programs, prepare teaching notes, produce art and music, and more. There is just too much information to review, let alone through the cumbersome mechanism of an open records request. Instead, the scholarship on open record requests for faculty records reveals requests primarily targeted at individuals or small groups of researchers rather than the kind of generalized oversight that this rationale envisions.³²⁹ While the idea of general public oversight may make sense for high-profile leaders at the university, the rationale breaks down at the level of the individual staff or faculty members.

Another argument in favor of access is that of public accountability for researcher work, particularly involving issues of scholarly integrity.³³⁰ There is something to be said for this: because research at public universities can be subjected to much more intrusive public scrutiny than research at private institutions, research conducted at public institutions may be more “legitimate” because—like government generally—it must survive the crucible of public inspection. But, as Claudia Polsky observes, there are many other mechanisms better suited for policing ethical transgressions and conflicts of interest among researchers.³³¹ Furthermore, given that public records requests can be used to attack the reputation and character of

327. That said, as discussed below, accountability for the use of state money can be an issue, even when external funding is involved—particularly when conflicts of interest might arise.

328. See *Iowa C.R. Comm’n v. City of Des Moines*, 313 N.W.2d 491, 495 (Iowa 1981) (“The purpose of [the Act] is to open the doors of government to public scrutiny—to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.”).

329. See Polsky, *supra* note 7, at 248–58.

330. See Pritchard & Anderson, *supra* note 92, at 67–68 (describing a request from a researcher who accused a professor of basing publications on unreliable data; the university denied the request under Wisconsin’s balancing test).

331. Polsky, *supra* note 7, at 288–92.

researchers at public universities,³³² any reputational benefit can be an illusion. In short, given reality, accountability is a valid consideration, but not, on balance, so overwhelming that it overrides other costs associated with open records laws and faculty research.

More generally, the mission of public universities typically includes some form of sharing knowledge.³³³ Public access to the knowledge produced by the university can be central to this mission.³³⁴ Providing a mechanism for the public to access this important *public* resource is an important goal. While there are alternative mechanisms for universities to share their information, at some point it may be most valuable for scientists, historians, and other researchers to be able to tap into the records of the university directly.

3. *The Difficulty of Predicting What Information Might Be Relevant to Patentability*

Another consideration is that some existing state statutes allow universities to decline to release records that might affect the ability of the state institution to obtain a patent.³³⁵ The problem here is that, as discussed above, the question of whether someone *could* have accessed the relevant record may be analyzed *ex post*, in the context of a validity or patentability determination—not as a question of whether to *actually* release the record. In other words, the court or agency must determine whether, at the time the request could have been made, the university would have recognized that the release of the record would have affected the patentability. And for some research, the potential for patentability may be uncertain.

A better approach would be to specify the records that are not subject to disclosure without relying on predictions about patentability. This would improve certainty about whether those records would need to be disclosed, and thus constitute prior art under § 102(a).

332. *Id.* at 246.

333. *See, e.g., Mission and Vision*, IOWA ST. UNIV.: OFF. OF THE PRESIDENT, <https://www.president.iastate.edu/projects/mission> [https://perma.cc/VCC5-CN4V] (stating that the mission of Iowa State University is to “[c]reate, share and apply knowledge to make Iowa and the world a better place”).

334. This is not to say that this is the only way the mission can be fulfilled. But it is one way and should be recognized in limiting public access to university research.

335. *See, e.g., IDAHO CODE* § 74-107(20) (2020).

VII. CONCLUSION

While amending Iowa's Open Records Act is a formidable task, the narrowly-crafted statutory language that we propose is a feasible change. It would reduce the risk that Iowa's public universities' patents would be invalidated during infringement litigation or during *inter partes* review, thus ensuring that their value is on the same playing field as patents obtained by private institutions or universities in states where university research is not accessible under state open records laws.

Even if a legislative solution is not possible, however, we would like to close by making clear we do not see the conclusion that public university research fails the novelty requirement of § 102 as a slam-dunk. To the contrary: as we describe in this Article, there are many arguments that the state and university could make, and, depending on the facts of a given situation, those could be very good arguments. In addition, we suggest an expanded use of the balancing analysis contained in section 22.8 may be appropriate when questions of access to university faculty members' research-related documents arise.

All in all, however, we are concerned that the uncertainty and risk arising from public access to nascent patentable inventions at public universities may deter investment in commercializing those inventions, thus reducing a potential revenue source available to the state and perhaps resulting in some inventions never being translated to the public. Should the state want to address this risk, it can do so in the narrow, targeted way that we have provided.

VIII. APPENDIX

Alaska

The public records inspection requirements of ALASKA STAT. §§ 40.25.110–40.25.121 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 publicly 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.³³⁶

Colorado

(2)(a) The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:

....

(III) The 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[.]³³⁷

Delaware

(i) “Public body,” “public record” and “meeting” shall not include activities of the University of Delaware and Delaware State University, except that the Board of Trustees of both universities shall be “public bodies,” university documents relating to the expenditure of public funds shall be “public records,” and each meeting of the full Board of Trustees of either institution shall be a “meeting.”³³⁸

336. ALASKA STAT. § 14.40.453 (2020).

337. COLO. REV. STAT. § 24-72-204(2)(a)(III) (2020).

338. DEL. CODE ANN. tit. 29, § 10002(i) (2020).

Florida

[M]aterials that relate to methods of manufacture or production, potential trade secrets, potentially patentable material, actual trade secrets, business transactions, or proprietary information received, generated, ascertained, or discovered during the course of research conducted within the state universities shall be confidential and exempt from the provisions of s. 119.07(1), except that a division of sponsored research shall make available upon request the title and description of a research project, the name of the researcher, and the amount and source of funding provided for such project.³³⁹

Georgia

(a) Public disclosure shall not be required for records that are:

....

(35) Data, records, or information of a proprietary nature produced or collected by or for faculty or staff of state institutions of higher learning, or other governmental agencies, in the conduct of, or as a result of, study or research on commercial, scientific, technical, or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or private concern, where such data, records, or information has not been publicly released, published, copyrighted, or patented;

(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

339. FLA. STAT. § 1004.22(2) (2020).

and data, discoveries, research projects, methodologies, protocols, and creative works[.]³⁴⁰

Idaho

The following records are exempt from disclosure:

. . . .

(20) Records, data, information and materials collected, developed, generated, ascertained or discovered during the course of academic research at public institutions of higher education if the disclosure of such could reasonably affect the conduct or outcome of the research, or the ability of the public institution of higher education to patent or copyright the research or protect intellectual property.

(21) Records, data, information and materials collected or utilized during the course of academic research at public institutions of higher education provided by any person or entity other than the public institution of higher education or a public agency.

(22) The exemptions from disclosure provided in subsections (20) and (21) of this section shall apply only until the academic research is publicly released, copyrighted or patented, or until the academic research is completed or terminated. At such time, the records, data, information, and materials shall be subject to public disclosure unless: (a) another exemption in this chapter applies; (b) such information was provided to the institution subject to a written agreement of confidentiality; or (c) public disclosure would pose a danger to persons or property.

(23) The exemptions from disclosure provided in subsections (20) and (21) of this section do not include basic information about a particular research project that is otherwise subject to public disclosure, such as the nature of the academic research, the name of the researcher, and the amount and source of the funding provided for the project.³⁴¹

340. GA. CODE ANN. § 50-18-72(a)(35), (36) (2020).

341. IDAHO CODE § 74-107(20)–(23) (2020).

Illinois

(1) When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying. Subject to this requirement, the following shall be exempt from inspection and copying:

. . . .

(i) Valuable formulae, computer geographic systems, designs, drawings and research data obtained or produced by any public body when disclosure could reasonably be expected to produce private gain or public loss

(j) The following information pertaining to educational matters:

. . . .

(iv) course materials or research materials used by faculty members.³⁴²

Indiana

(a) The following public records are excepted from section 3 of this chapter and may not be disclosed by a public agency, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery:

. . . .

(6) Information concerning research, including actual research documents, conducted under the auspices of a state educational institution, including information:

(A) concerning any negotiations made with respect to the research; and

342. 5 ILL. COMP. STAT. 140/7(1) (2020).

(B) received from another party involved in the research.³⁴³

Kansas

(a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

....

(34) Records involved in the obtaining and processing of intellectual property rights that are expected to be, wholly or partially vested in or owned by a state educational institution, as defined in K.S.A. 76-711, and amendments thereto, or an assignee of the institution organized and existing for the benefit of the institution.³⁴⁴

Kentucky

(1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery:

....

(b) Records confidentially disclosed to an agency and compiled and maintained for scientific research. This exemption shall not, however, apply to records the disclosure or publication of which is directed by another statute[.]³⁴⁵

Louisiana

This Chapter shall not apply:

....

343. IND. CODE § 5-14-3-4(a)(6) (2020).

344. KAN. STAT. ANN. § 45-221(a)(34) (2020).

345. KY. REV. STAT. ANN. § 61.878(1)(b) (West 2019).

(16) To the following records of a board or institution of higher learning, in accordance with rules and regulations promulgated by the Board of Supervisors for the University of Louisiana System, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, and the Board of Supervisors of Southern University and Agricultural and Mechanical College, or their successors, in conjunction with the Board of Regents, for programs and institutions under their supervision and management, unless access to the records is specifically required by state or federal statute or is ordered by a court under rules of discovery:

....

(b) Data, records, or information produced or collected by or for faculty or staff of state institutions of higher learning in the conduct of or as a result of, study or research on commercial, scientific or technical subjects of a patentable or licensable nature, whether sponsored by the institution alone or in conjunction with a governmental body or private concern, until such data, records, or information have been publicly released, published, or patented.³⁴⁶

Maine

The term “public records” means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except:

....

(E) Records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative

346. LA. STAT. ANN. § 44:4(16)(b) (2019).

committees of the Maine Maritime Academy, the Maine Community College System and the University of Maine System when the subject matter is confidential or otherwise protected from disclosure by statute, other law, legal precedent or privilege recognized by the courts of this State.³⁴⁷

Maryland

§ 4-346(a) Subject to subsection (b) of this section, a custodian may deny inspection of a public record that contains the specific details of a research project that an institution of the State or of a political subdivision is conducting.

(b) A custodian may not deny inspection of the part of a public record that gives only the name, title, and expenditures of a research project described in subsection (a) of this section and the date when the final project summary of the research project will be available.³⁴⁸

§ 4-347(a) Subject to subsection (b) of this section, a custodian may deny inspection of the part of a public record that contains information disclosing or relating to an invention owned in whole or in part by a State public institution of higher education for 4 years to allow the institution to evaluate whether to patent or market the invention and pursue economic development and licensing opportunities related to the invention.³⁴⁹

Michigan

(1) Except as otherwise provided in this section, the following information in which a public university or college holds an interest, or that is owned, prepared, used, or retained by, or in the possession of, a public university or college, is exempt from disclosure as a public record under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws:

(a) Intellectual property created by a person employed by or under contract to a public university or college for purposes that include research, education, and related activities, until a reasonable opportunity is provided for the information to be

347. ME. STAT. tit. 1, § 402(3)(E) (2020).

348. MD. CODE ANN., GEN. PROV. § 4-346 (West 2020).

349. *Id.* § 4-347.

published in a timely manner in a forum intended to convey the information to the academic community.

(b) Original works of authorship fixed in any tangible medium of expression created by a person employed by or under contract to a public university or college for purposes that include research, education, or related activities, until a reasonable opportunity is provided for the author to secure copyright registration, not to exceed 12 months from the date the work is first fixed in a tangible medium of expression.

(c) Records regarding a process, a machine, an item of manufacture, or a composition of matter, or any new and useful improvement of a process, a machine, an item of manufacture, or a composition of matter, until a reasonable opportunity is provided for the inventor to secure patent protection, not to exceed 5 years from the date the records are first made.³⁵⁰

Mississippi

(3)(a) Except as provided in paragraph (b) of this subsection, documents, records, papers, data, protocols, information or materials in the possession of a community college or state institution of higher learning that are created, collected, developed, generated, ascertained or discovered during the course of academic research, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(b) The exemption under paragraph (a) of this subsection shall not apply to a public record that has been published, copyrighted, trademarked or patented.

(4) Unpublished manuscripts, preliminary analyses, drafts of scientific or academic papers, plans or proposals for future research and prepublication peer reviews in the possession of a community college or state institution of higher learning, or submitted and accepted for publication by publishers shall be exempt from the provisions of the Mississippi Public Records Act of 1983.³⁵¹

350. MICH. COMP. LAWS § 390.1554(1)(a)–(c) (2020).

351. MISS. CODE ANN. § 37-11-51(3)–(4) (2020).

Missouri

Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:

....

(15) Meetings and public records relating to scientific and technological innovations in which the owner has a proprietary interest;

....

(23) Records submitted by an individual, corporation, or other business entity to a public institution of higher education in connection with a proposal to license intellectual property or perform sponsored research and which contains sales projections or other business plan information the disclosure of which may endanger the competitiveness of a business[.]³⁵²

Nebraska

The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records:

....

(3) Trade secrets, academic and scientific research work which is in progress and unpublished, and other proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose[.]³⁵³

New Jersey

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:

352. MO. REV. STAT. § 610.021(15), (23) (2020).

353. NEB. REV. STAT. § 84-712.05(3) (2020).

pedagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available³⁵⁴

North Dakota

(1) Trade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed.

(2) Under this section, unless the context otherwise requires:

. . . .

(c) “Proprietary information” includes:

(1) Information shared between a sponsor of research or a potential sponsor of research and a public entity conducting or negotiating an agreement for the research.

. . . .

(8) A discovery or innovation that is subject to a patent or a copyright, and any formula, pattern, compilation, program, device, combination of devices, method, technique, technical know-how or process that is for use, or is used, in the operation of a business and is supplied to or prepared by a public entity that is the subject of efforts by the supplying or preparing person to maintain its secrecy and provides the preparing person an advantage or an opportunity to obtain an advantage over those who do not know or use it or that may derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper

354. N.J. STAT. ANN. § 47:1A-1.1 (West 2020).

means by, a person that might obtain economic value from its disclosure or use.³⁵⁵

Ohio

(A) As used in this section:

(1) “Public record” does not mean any of the following:

. . . .

(m) Intellectual property records

. . . .

(5) “Intellectual property record” means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.³⁵⁶

Oklahoma

In addition to other records that a public body may keep confidential pursuant to the provisions of the Oklahoma Open Records Act, a public body may keep confidential:

(1) Any information related to research, the disclosure of which could affect the conduct or outcome of the research, the ability to patent or copyright the research, or any other proprietary rights any entity may have in the research or the results of the research including, but not limited to, trade secrets and commercial or financial information obtained from an entity financing or cooperating in the research, research protocols, and research notes, data, results, or other writings about the research[.]³⁵⁷

355. N.D. CENT. CODE ANN. § 44-04-18.4 (West 2020).

356. OHIO REV. CODE ANN. § 149.43(A)(1), (5) (West 2020).

357. OKLA. STAT. ANN tit. 51, § 24A.19(1) (West 2020).

Oregon

The following public records are exempt from disclosure under OR. REV. STAT. §§ 192.311 to 192.478 unless the public interest requires disclosure in the particular instance:

....

(14) Writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented.³⁵⁸

Pennsylvania

(b) Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

....

(14) Unpublished lecture 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.³⁵⁹

Rhode Island

For the purposes of this chapter, the following records shall not be deemed public:

....

(K) Preliminary drafts, notes, impressions, memoranda, working papers, and work products, including those involving research at state institutions of higher education on commercial, scientific, artistic, technical, or scholarly issues, whether in electronic or other format; provided, however, any documents submitted at a public meeting of a public body shall be deemed public.³⁶⁰

358. OR. REV. STAT. ANN. § 192.345(14) (West 2020).

359. 65 PA. STAT. AND CONS. STAT. ANN. § 67.708(b)(14) (West 2020).

360. R.I. GEN. LAWS ANN. § 38-2-2(4)(K) (West 2020).

South Carolina

A public body may but is not required to exempt from disclosure the following information:

....

(14)(A) Data, records, or information of a proprietary nature, produced or collected by or for faculty or staff of state institutions of higher education in the conduct of or as a result of study or research on commercial, scientific, technical, or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or private concern, where the data, records, or information has not been publicly released, published, copyrighted, or patented.

(B) Any data, records, or information developed, collected, or received by or on behalf of faculty, staff, employees, or students of a state institution of higher education or any public or private entity supporting or participating in the activities of a state 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 the information is published, patented, otherwise publicly disseminated, or released to an agency whereupon the request must be made to the agency. This item applies to, but is not limited to, information provided by participants in research, research notes and data, discoveries, research projects, proposals, methodologies, protocols, and creative works.³⁶¹

South Dakota

The following records are not subject to §§ 1-27-1, 1-27-1.1, 1-27-1.3, and § 1-27-1.23:

....

(3) Trade secrets, the specific details of bona fide research, applied research, or scholarly or creative artistic projects being conducted at a school, postsecondary institution or laboratory funded in whole or in part by the state, and other proprietary or

361. S.C. CODE ANN. § 30-4-40(a)(14) (2020).

commercial information which if released would infringe intellectual property rights, give advantage to business competitors, or serve no material public purpose[.]³⁶²

Tennessee

(b) The following records or materials, regardless of physical form or characteristics, received, developed, generated, ascertained or discovered during the course of sponsored research or service conducted by a public higher education institution, or in the course of fulfilling a grant agreement between a public higher education institution and the Tennessee department of economic and community development, shall not be open for public inspection:

(1) Patentable material or potentially patentable material;

....

(7) Any other information that reasonably could affect the conduct or outcome of the sponsored research or service, the ability to patent or copyright the sponsored research or any other proprietary rights any person or entity might have in the research or the results of the research, including, but not limited to, protocols, notes, data, results or other unpublished writing about the research or service.

....

(e) All records or materials, regardless of physical form or characteristics, received, developed, generated, ascertained or discovered during the course of research or service that is not sponsored research or service, as defined in subdivision (a)(3), shall not be open for public inspection if the disclosure of the information reasonably could affect the conduct or outcome of the research or service, the ability of the public higher education institution to patent or copyright the research or any other proprietary rights any person or entity might have in the research or the results of the research, including, but not limited to, proprietary information and trade secrets received from a person or entity cooperating in the research, protocols,

362. S.D. CODIFIED LAWS tit. I § 1-27-1.5(3) (West 2020).

notes, data, results or other unpublished writing about the research or service.³⁶³

Texas

(a) In order to protect the actual or potential value, the following information is confidential and is not subject to disclosure under Chapter 552, Government Code, or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee[.]

....

(b) Information maintained by or for an institution of higher education that would reveal the institution's plans or negotiations for commercialization or a proposed research agreement, contract, or grant, or that consists of unpublished research or data that may be commercialized, is not subject to Chapter 552, Government Code, unless the information has been published, is patented, or is otherwise subject to an executed license, sponsored research agreement, or research contract or grant. In this subsection, "institution of higher education" has the meaning assigned by Section 61.003.³⁶⁴

Utah

The following records are protected if properly classified by a governmental entity:

....

(40)(a) the following records of an institution within the state system of higher education defined in Section 53B-1-102, which have been developed, discovered, disclosed to, or received by or on

363. TENN. CODE ANN. § 49-7-120(b)(1), (7), (e) (West 2020).

364. TEX. EDUC. CODE ANN. § 51.914 (a) (1), (b) (West 2020).

behalf of faculty, staff, employees, or students of the institution:

- (i) unpublished lecture notes;
- (ii) unpublished notes, data, and information:
 - (A) relating to research; and
 - (B) of:
 - (I) the institution within the state system of higher education defined in Section 53B-1-102; or
 - (II) a sponsor of sponsored research;
- (iii) unpublished manuscripts;
- (iv) creative works in process;
- (v) scholarly correspondence; and
- (vi) confidential information contained in research proposals[.]³⁶⁵

Vermont

(c) The following public records are exempt from public inspection and copying:

....

(23) Any data, records, or information produced or acquired by or on behalf of faculty, staff, employees, or students of the University of Vermont or the Vermont State Colleges in the conduct of study, research, or creative efforts on medical, scientific, technical, scholarly, or artistic matters, whether such activities are sponsored alone by the institution or in conjunction with a governmental body or private entity, until such data, records, or information are published, disclosed in an issued patent, or publicly released by the institution or its authorized agents. This subdivision applies to, but is not limited to, research notes and laboratory notebooks, lecture notes, manuscripts, creative works, correspondence, research proposals and agreements,

365. UTAH CODE ANN. § 63G-2-305(40)(a) (West 2020).

methodologies, protocols, and the identities of or any personally identifiable information about participants in research. This subdivision shall not exempt records, other than research protocols, produced or acquired by an institutional animal care and use committee regarding the committee's compliance with State law or federal law regarding or regulating animal care.³⁶⁶

Virginia

A. The following information contained in a public record is excluded from the mandatory disclosure provisions of this chapter but may be disclosed by the custodian in his discretion, except as provided in subsection B or where such disclosure is otherwise prohibited by law. Redaction of information excluded under this section from a public record shall be conducted in accordance with § 2.2-3704.01.

....

(4) Information of a proprietary nature produced or collected by or for faculty or staff of public institutions of higher education, other than the institutions' financial or administrative records, in the conduct of or as a result of study or research on medical, scientific, technical or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or a private concern, where such information has not been publicly released, published, copyrighted or patented.³⁶⁷

Washington

The following financial, commercial, and proprietary information is exempt from disclosure under this chapter:

(1) Valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss[.]³⁶⁸

366. VT. STAT. ANN. tit. 1, § 317(c)(23) (2020).

367. VA. CODE ANN. § 2.2-3705.4(A)(4) (West 2020).

368. WASH. REV. CODE ANN. § 42.56.270(1) (West 2020).

Wyoming

(b) The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:

. . . .

(iii) The specific details of bona fide research projects being conducted by a governmental entity or any other person[.]³⁶⁹

369. WYO. STAT. ANN. § 16-4-203(b)(iii) (West 2020).