Meeting the Policy Challenges of a Technology Enhanced Future: State Open Records Act Requests, Email, and Text Messages

Neal Hutchens

Karen Miksch

Jeffrey C. Sun*

It started in Wisconsin

- WI Republican Committee requested University of Wisconsin Professor's emails
  - "All emails related to criticism of Governor's policy toward public unions"
- Mackinac Center for Public Policy next requested emails of labor studies faculty in Michigan

Agenda

- Introduction to Current Issues
- Overview of “Sunshine Laws” and application to email/texts
- Small group discussion
- Tension between Academic Freedom and Open Access
- Policy Implications and Discussion

Guiding Questions

- Does the medium of the record (email, smart phone) matter?
- Does the intent behind the request alter a public university's obligations under state open records laws?
- Does academic freedom outweigh the public right to know?

At your table . . .

- Do you have particular concerns/ questions about emails and texts and open records?

All 50 states have "sunshine" laws

- Varies by state how law applies to public institutions of higher education
  - Example: California, Michigan, and Minnesota flagships have constitutional autonomy and exempt from some provisions
  - Special limitations covering certain public universities (e.g., Delaware and Pennsylvania)
  - Vocational institutions may be covered by K-12 provisions

Laws vary, but purpose is similar

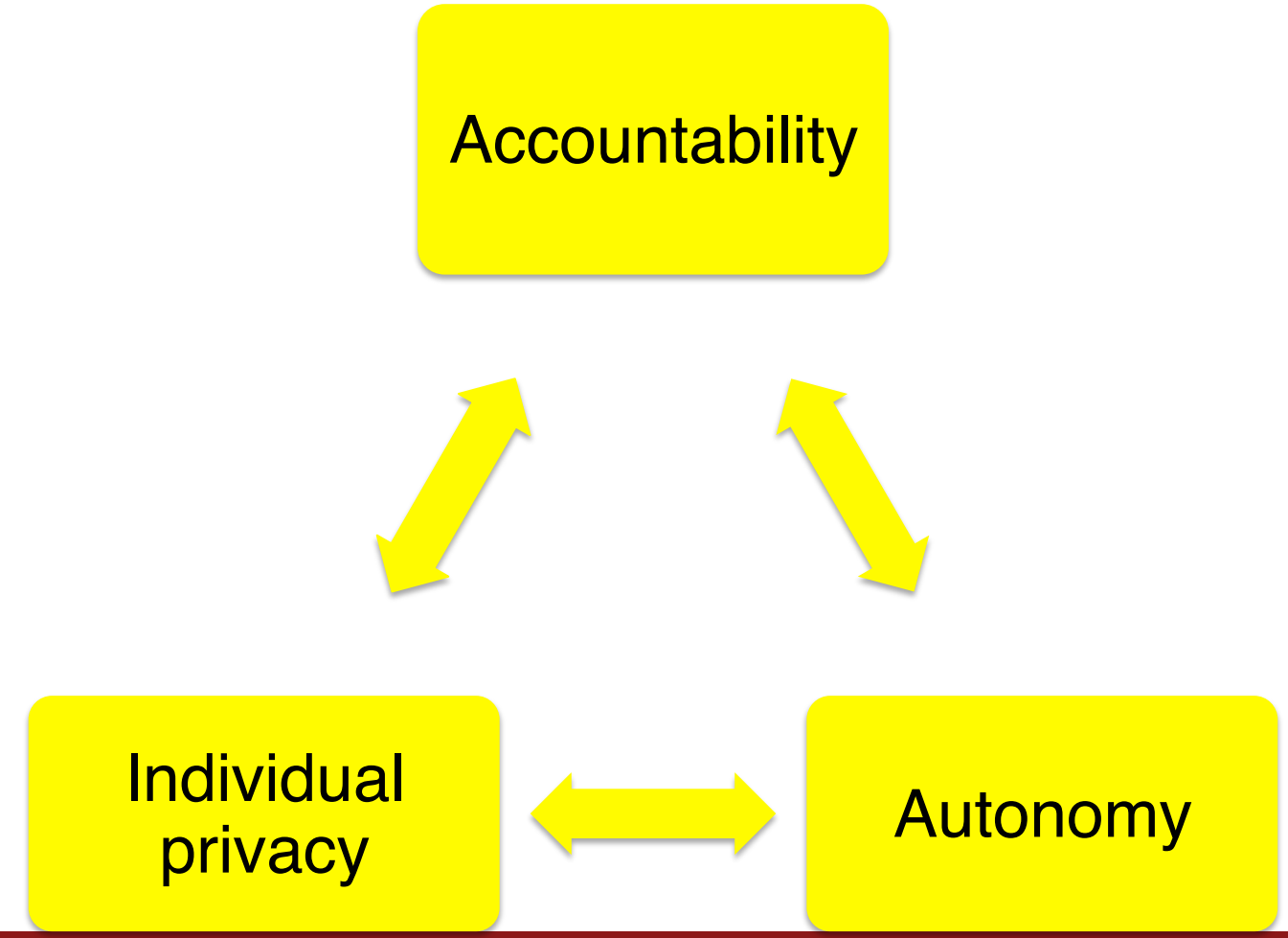
- Promote democratic action via open meetings and access to records
- Make government accountable
- Avoid corruption

McLendon & Hearn (2010) found strong support for sunshine laws throughout higher education

"Trilemmia:"

Tension in Higher Education

(Cleveland, 1985)



Guiding Questions

- 1. Does the medium of the record (email, smart phone) matter?
- Quick answer . . .
- Probably not.

Public Access to Faculty and Staff Emails/Texts

Q1. Is it a "record?"

- If not, no access.

Q2. "public" record?

- If "private" under state law, generally no access.

Q3. Any Exemptions?

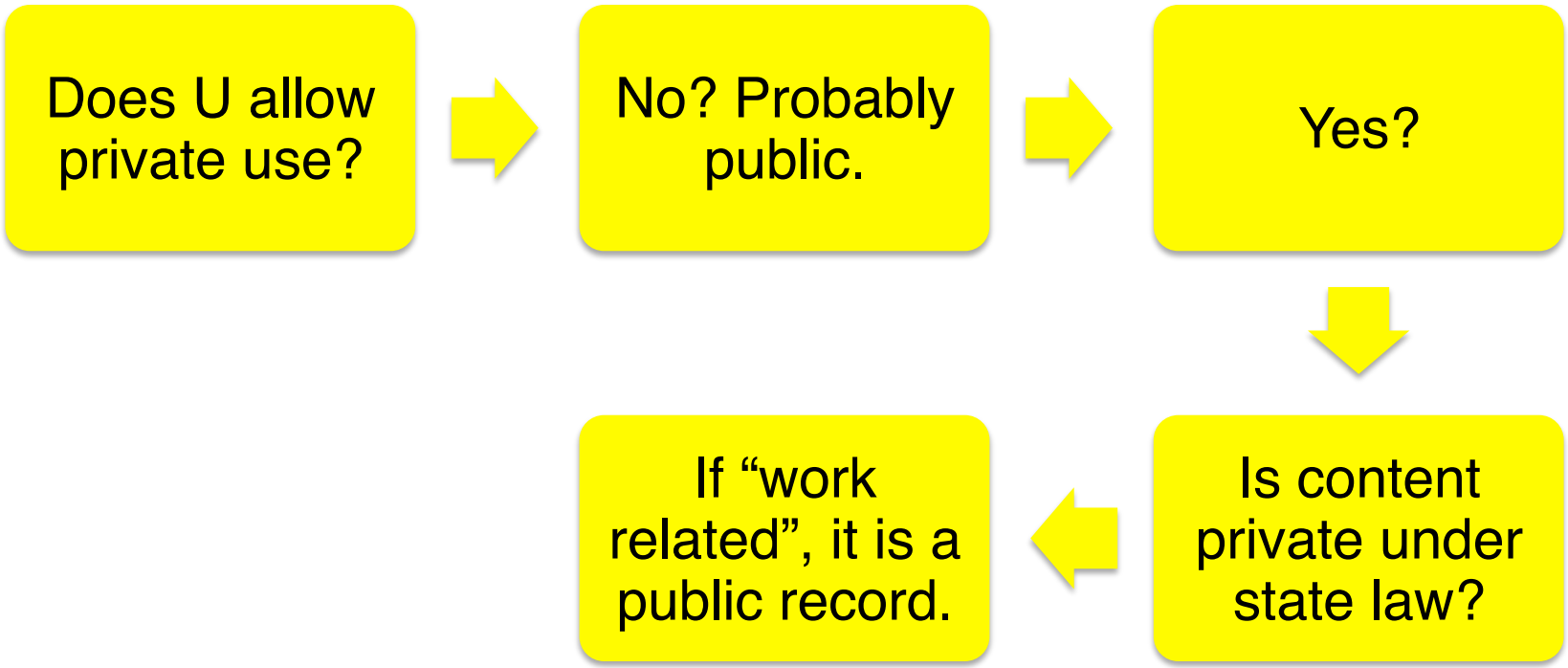
- If exemption applies, no access.
- If no exemption, public has right to access.

Question 1. Is it a Record?

- State law, attorney general opinions, and case law provide guidance on whether emails, text messages, etc. are covered by open records laws.

- See handout to see how a particular state currently deals with email.

Question 2. Is it a “Public Record”



But . . .

- *What about if someone else sent me the email?*
  - Probably still a “public record,” even if sender at a private institution
- *What about if I sent from home?*
  - Probably makes no difference, if work related & using university email account
- *What about a private email account?*
  - If work related/public, probably still a public record

Question 3: Do any exemptions apply?

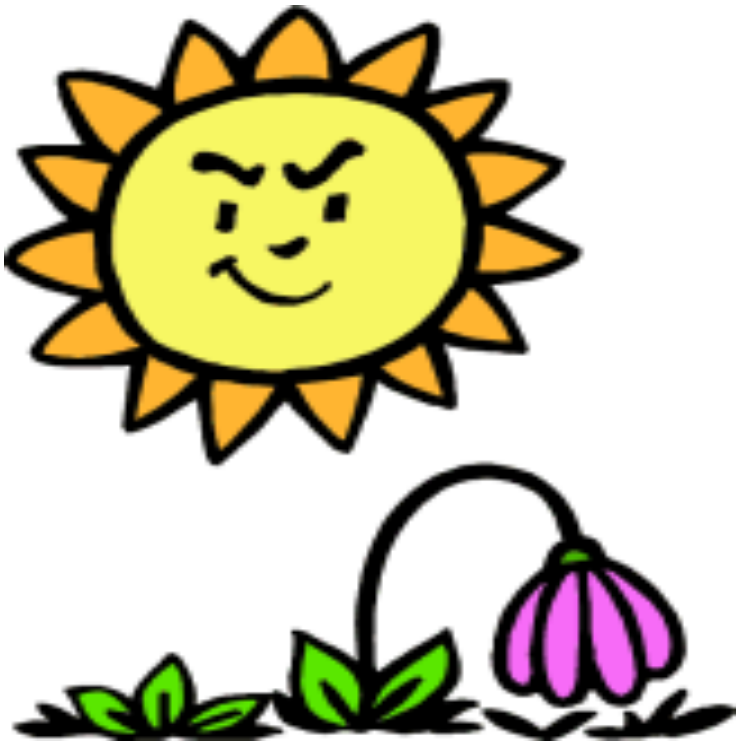
- Federal Law:
  - Student Records private under FERPA
- Common State exemptions include:
  - Purely private
  - Personnel files
  - Intellectual property
- NOTE: few states exempt “scholarly work” in state law. Left to courts to decide.

Guiding Questions

- 2. Does the intent behind the request alter a public university's obligations under state open records laws?

- Quick answer is probably not, but maybe it should considering context of higher education. . .

Weaponization



- McLendon and Hearn (2006) previously articulated the concept of “weaponization” (p. 664).
- The concept refers to actors who use the state open records act as a tactic to hinder an institution’s progress.

"Weaponization": *Does Purpose Matter?*

- What if "purpose" of request is:
  - Fishing expedition?
  - To harass?
  - Hinder a particular research project or program?

- Under most state laws, purpose of request is immaterial
  - Many states not allowed to even ask why
  - Some ask if commercial purpose
  - Some balance **harm/other interest VS public right to know**

“Weaponization”: Federal Context

- Shelby Amendment - Data Access Amendment (DAA) to the Freedom of Information Act
- Data Quality Act (DQA)

Guiding Questions

- 3. Does academic freedom outweigh the public right to know?

Two Streams of Protection for Faculty Speech/Academic Freedom

Professional Standards

- Derived from and articulated in such sources as AAUP Declarations and Statements
  - 1915 Declaration
  - 1940 Statement
- Tenure preeminent expression of professional values to protect individual academic freedom

First Amendment and Academic Freedom

Strong Rhetoric, Few Specifics

- *Adler v. Bd. of Education* (1952)
  - academic freedom 1st mentioned in dissenting opinion
- *Sweezy v. New Hampshire* (1957)
  - Well known concurring opinion
- *Keyishian v. Bd. of Regents* (1967)
  - Academic Freedom a "special concern" of First Amendment

First Amendment and Faculty Speech/Academic Freedom

Supreme Court — has noted but not analyzed potential tension between First Amendment protection for institution versus individual scholar

"Academic Freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . But also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Univ. of Mich. v. Ewing* (1985)

First Amendment and Faculty Speech/Academic Freedom

Some courts and legal scholars reject First Amend. protects individual academic freedom

- See, e.g., *Urofsky v. Gilmore* (4th Cir. 2000):

"Our review of the law . . . leads us to conclude that to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the *First Amendment* rights to which every citizen is entitled, the right inheres in the University, not in individual professors . . . ."

First Amendment and Faculty Speech/Academic Freedom

- **Changing Times** — In a 1989 *Yale Law Journal* article, constitutional law expert J. Peter Byrne, discussing institutional versus individual academic freedom protection, stated:

  "Today, few politicians seek political capital by attacking academics for their political opinions, and those who do only provide their victims with lawsuits that usually fortify their academic positions against more subtle or justifiable assault" (p. 298).

First Amendment and Faculty Speech/Academic Freedom

- **Case Study**: A "Cooling" of Academic Freedom — Records Request from UVA Related to Climate Scientist Michael Mann

- Mann part of a group of climate scientists targeted by climate change skeptics and accused of falsifying research data/results ("Climategate" and Univ. of East Anglia Climate Research Center emails)

First Amendment and Faculty Speech/Academic Freedom

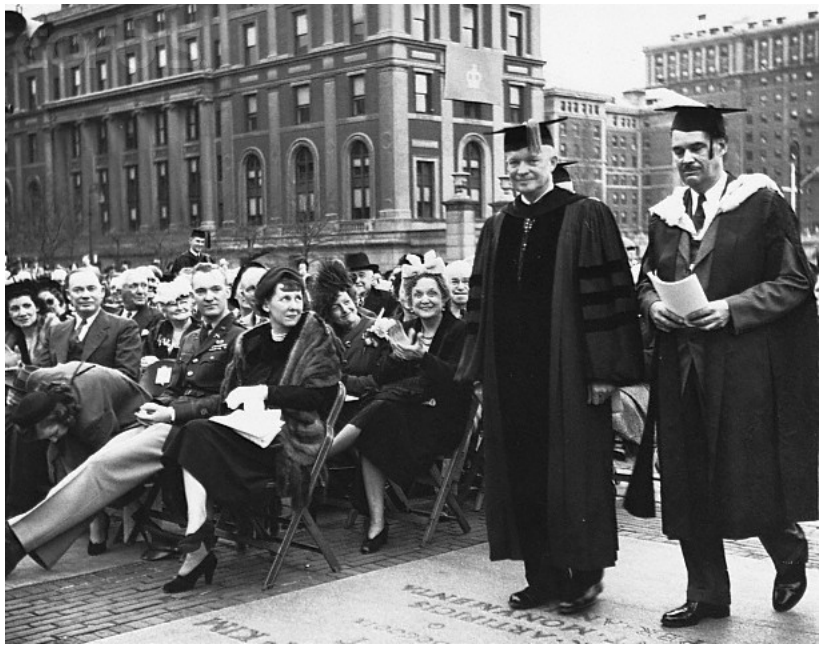
- Before moving to Penn State, Mann was faculty member at UVA
- Va. Atty. General, a climate change skeptic, has sought documents and emails related to Mann's time at UVA
- American Tradition Institute (ATI) has also sought records related to Mann's employment period at UVA

First Amendment and Faculty Speech/Academic Freedom

- UVA's Response to Records Requests inconsistent, with university appearing ready to initially comply with requests in both instances
- With ATI, for example, university had agreed to let the group review even the exempted records
  - Mann has been allowed by court to intervene in the ATI litigation
  - UVA has also sought to narrow the group's access to records in new court filings

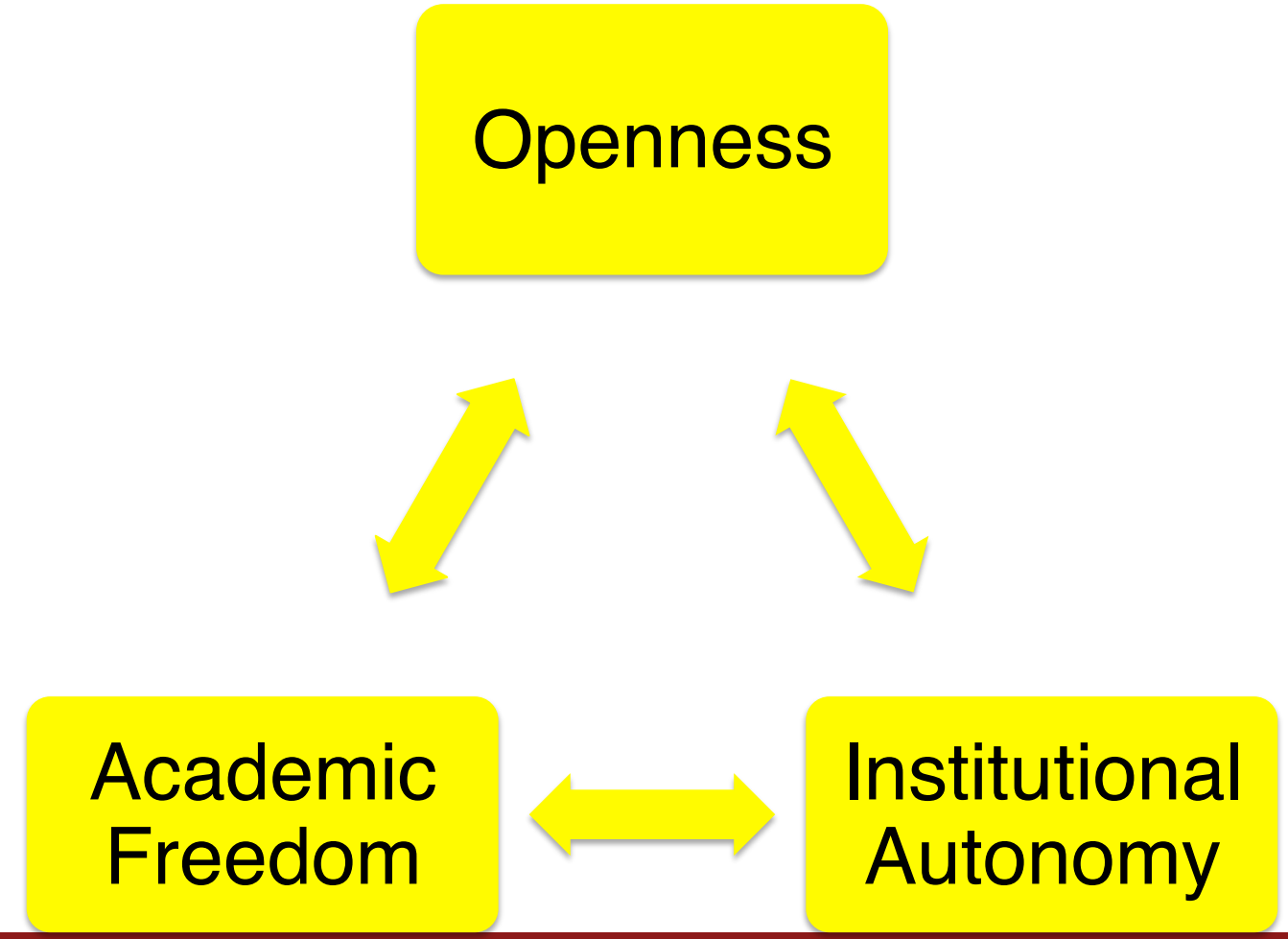
Individual v. Institutional Academic Freedom

"[W]ith all due respect, Sir, we are not employees of Columbia [U] niversity. We are Columbia University" (Sussman, 1981, p. 58).



Policy Implications

How do we balance the 3?



How should public institutions/faculty members respond to public record act requests aimed at the activities of individual faculty members?

- **Model policies for institution**
  - Promote openness
  - Clarity
    - To delete or not to delete?!
  - Higher Education context
  - Collaboration between university counsel and faculty member/faculty governance

Recommendations

- Legislative Change:
  - Advocate Higher Education exemptions
  - Balancing Test
  - Argue faculty not “government official/ employee” under law
- Work with IRB
- AAUP and Reporter Committee
- More scholarship from ASHE members

Utah's Sunshine Law

- Shields records that have been "developed, discovered, disclosed to, or received by or on behalf of faculty, staff, employees, or students of the institution"
  - Scholarly correspondence
  - Unpublished manuscripts, Research notes, and Data

Questions and Future Implications

Selected References

- *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952).
- Byrne, J. P. (1989). Academic freedom: A "Special Concern" of the First Amendment. *Yale Law Journal, 99*, 251-340.
- Cleveland, H. (1985). *The costs and benefits of openness: Sunshine laws and higher education*. Washington, DC: Association of Governing Boards of Universities and Colleges.
- *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).
- Leslie, G., & Caramanica, M. (Eds.) (2011). *Open government guide: Access to public records and meetings in the 50 states and D.C.* (Sixth Edition). Retrieved from The Reporters Committee for Freedom of the Press website: http://www.rcfp.org/ogg/index.php
- Levinson-Waldman, R. (2011). *Academic Freedom and the public's right to know: How to counter the chilling effect of FOIA requests on scholarship.* Retrieved from American Constitution Society website:

References, cont.

- McGarity, T. O., & Wagner, W. E. (2008). *Bending science: How special interests corrupt public health research*. Cambridge, MA: Harvard University Press.
- McLendon, M. K., & Hearn, J. C. (2006). Mandated openness in public higher education: A field study of state sunshine laws and institutional governance. *Journal of Higher Education, 77*(4), 645-683.
- McLendon, M. K., & Hearn, J. C. (2010). State law, policy, and access to information: The case of mandated openness in higher education. *Teachers College Record, 112*(10), 2649-2663.
- O'Connor, J. F., & Baratz, M. J. (2004). Some assembly required: The application of state open meeting laws to email correspondence. *George Mason Law Review, 12*, 719–774.
- *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

References, cont.

- *Univ. of Michigan v. Ewing*, 474 US 214 (1985). New York: Cambridge University Press.
- *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).
- UTAH CODE Ann. § 63G-2-305(40(a)(West 2010)(exception for faculty, staff, employees, or students scholarly work).
- Wagner, W., & Steinzor, R. (Eds.) (2006). *Rescuing science from politics: regulation and the distortion of scientific research*.