



October 7, 2014

Chancellor Bernadette Gray-Little
Office of the Chancellor
Strong Hall, Room 230
1450 Jayhawk Blvd.
Lawrence, Kansas 66045

Sent via U.S. Mail and Facsimile (785-864-4120)

Dear Chancellor Gray-Little:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is concerned about the potential threat to academic freedom posed by the University of Kansas's (KU's) response to an August 5, 2014, request by Students for a Sustainable Future under Kansas's Open Records Act for a large amount of the correspondence of Drs. George Bittlingmayer, Koleman Strumpf, and Art Hall. Because of the broad parameters of the request, if KU were to choose to turn over all records requested, faculty speech and academic freedom will likely be chilled to the detriment of KU, its students, and its faculty members.

According to a copy of Students for a Sustainable Future's open records request acquired by FIRE, the group is requesting all correspondence about the hiring of Drs. Bittlingmayer, Strumpf, and Hall; all records of donations associated with them and a long list of grantmaking organizations; all correspondence "containing the subject" of a similar or identical list of organizations, as well as Kansas' Renewable Portfolio Standards and S.B. 433; and various financial disclosure forms from Drs. Bittlingmayer and Hall.

As in most states, Kansas law permits any person—including students—to make an open records request. No reason need be given for the request. Accordingly, Students for a Sustainable Future and its members are well within their rights to file this request and they must not face any adverse action for doing so, even if the request proves time-consuming to

fulfill. However, as an institution of higher education, KU has an obligation to withhold records that are not subject to open records requests when producing them would create a chilling effect on academic discourse. The Supreme Court has held that academic freedom is a “special concern of the First Amendment” and that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted). Open records requests for professors’ emails and other correspondence must be considered in light of both the law and the continuing importance of academic freedom on our nation’s college and university campuses.

In this case, the demands of the law and the protection of academic freedom need not be in tension. Indeed, Kansas law seems to consider the deleterious effects that disclosure may have on certain kinds of academic and research pursuits. Section 45-221(a)(20) of the Kansas Open Records Act states that the following is among information that, “Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose”:

Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, except that this exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.

KAN. STAT. ANN. § 45-221(a)(20) (2013). Many research memoranda and other discussions among colleagues about topics in the request are likely to fall within the exemption noted above, including correspondence discussing the Renewable Portfolio Standards and S.B. 433. While it is likely that only KU will be able to determine exactly which records implicate this exception, the university must be cognizant of the exception’s existence and its importance for preserving academic freedom and freedom of expression on campus.

KU need not break new ground in considering how to respond to broad open records requests. Earlier this year, the Supreme Court of Virginia considered an effort by an outside group to use a Virginia Freedom of Information Act request to acquire the correspondence of climate scientist Dr. Michael Mann, formerly of the University of Virginia (UVA). The court approvingly quoted at length the affidavit of UVA Vice President and Provost John Simon, who stated:

If U.S. scientists at public institutions lose the ability to protect their communications with faculty at other institutions, their ability to collaborate will be gravely harmed. The result will be a loss of scientific and creative opportunities for faculty at institutions in states which have not established protections under state FOIAs for such communications....

For faculty at public institutions such as the University of Virginia, compelled disclosure of their unpublished thoughts, data, and personal

scholarly communications would mean a fundamental disruption of the norms and expectations which have enabled research to flourish at the great public institutions for over a century....

Scientists at private institutions such as Duke, where I previously worked, that are not subject to state freedom of information statutes, will not feel that it is possible to continue collaborations with scientists at public institutions if doing [s]o means that every email or other written communication discussing data, preliminary results, drafts of papers, review of grant proposals, or other related activities is subject to public release under a state FOIA in contravention of scholarly norms and expectations of privacy and confidentiality....

Compelled disclosure [in this case] will also impair recruitment and retention of faculty....

I can state unequivocally that recruitment of faculty to an institution like the University of Virginia will be deeply harmed if such faculty must fear that their unpublished communications with the scientific collaborators and scholarly colleagues are subject to involuntary public disclosure. We will also lose key faculty to recruitments from other institutions – such as Duke, if their continued work at University of Virginia will render their communications involuntarily public.

Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va., 287 Va. 330, 343 (Va. 2014).

When making its determination of which records should be turned over in response to the request by Students for a Sustainable Future, KU would be well advised to keep Vice President Simon's concerns in mind, as they bear directly on the decisions KU must now make.

FIRE hopes that in evaluating both this and future open records requests, KU will properly consider the strong interest that the university and the state's citizens have in maintaining a campus environment protective of unfettered research and discussion.

Sincerely,



Robert L. Shibley
Senior Vice President

cc:

Jeffrey Vitter, Provost
Tim Caboni, Vice Chancellor for Public Affairs
James Pottorff, General Counsel

Dr. George Bittlingmayer, Wagnon Distinguished Professor of Finance and Otto
Distinguished Professor of Austrian Economics
Dr. Koleman Strumpf, Koch Professor in Business Economics
Dr. Art Hall, Director, Center for Applied Economics