Minutes*

Senate Research Committee
Monday, January 28, 2013
2:00 - 4:00
238A Morrill Hall

Present: Linda Bearinger (chair), Melissa Anderson, Jerry Cohen, Susan Everson-Rose, Benjamin Fuller, Greg Haugstad, Goran Hellekant, Brian Johnston, Seung-Ho Joo, Frances Lawrenz, Tucker LeBien, Richard Leppert, LaDora Thompson, Kathleen Thomas, Thomas Vaughan, Kyla Wahlstrom, Lynn Zentner

Absent: Arlene Carney, Brian Herman, Hinh Ly, Federico Ponce de Leon, Karen Williams

Guests: Professor Karen Miksch (co-chair, Senate Committee on Academic Freedom and Tenure)

Other: Mark Bohnhorst (Office of the General Counsel)

[In these minutes: (1) state data practices act requests and scholarly work; (2) update on the Minnesota Partnership for Biotechnology and Medical Genomics; (3) Research Infrastructure Investment Program 2013]

1. State Data Practices Act Requests and Scholarly Work

Professor Bearinger convened the meeting at 2:00, welcomed Professor Hellekant from the Duluth campus, and turned to Professor Miksch, professor in the College of Education and Human Development and an affiliate faculty member in the Law School whose scholarly work is in, among other things, the law and higher education.

Professor Miksch began by saying that "it started in Wisconsin." She reminded Committee members that a Wisconsin Republican Party committee filed a request for the email messages of a University of Wisconsin professor ("all emails related to criticism of Governor's policy toward public unions"). Following that, the Mackinac Center for Public Policy next requested emails of labor studies faculty members in Michigan. Many faculty members were surprised at the Wisconsin case; thinking "no one would want to, let alone be allowed to, look at my emails."

These incidents raised questions of academic freedom and national questions; "you mean my email is not private?" Professor Miksch said that she and her colleagues started looking at whether these kinds of requests have a chilling effect on communication and what impact the requests have on scholarly work and how people think, for example, about IRB protocols.

"Sunshine" laws promote democratic action through open meetings and access to records, make government more accountable, and help avoid corruption, Professor Miksch said, and researchers have found strong support for sunshine laws throughout higher education. That is not a question. The question is about the balance between (1) privacy, scholarship, and research, and (2) open access to public records.

* These minutes reflect discussion and debate at a meeting of a committee of the University of Minnesota Senate; none of the comments, conclusions, or actions reported in these minutes represents the views of, nor are they binding on, the Senate, the Administration, or the Board of Regents.

Although there is widespread support for openness among faculty, administrators, and staff, there are also some concerns, including the cost in time and money to comply, inefficiency, and the potential that openness might make tenure reviews less candid.

Professor Miksch offered three guiding questions.

(1) Does the medium of the record (paper, email, smart phone, data set) matter?

(2) Does the intent behind the request alter the Universities' obligations under MN Data Practices Act?

(3) Is there a scholarly privilege? Should we balance openness with academic freedom?

The quick answer to (1) is "probably not." There are criteria used to judge public access to faculty and staff emails, text messages, and so on, Professor Miksch said. One, is what is being requested data? If not, there is no access. Two, are they requesting "public" data? If the data are private under state law, there is generally no access. Three, are there any exemptions? If an exemption applies, there is no access; if not, the public has access to the data.

In terms of whether or not what is being requested is "data, in the case of Minnesota law, "data" is defined as "Data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media, or conditions of use." The University of Minnesota is defined by the statute as a "state agency." The law has been interpreted to include all data, Professor Miksch said, not just paper; it includes text messages, computer files, email, and so on. It most likely also covers social media.

In terms of whether or not what is being requested is "public," it is if it is work-related, Professor Miksch explained. University policy allows (within reasonable limits) private use of computers by employees. If the email/document/etc. is personal, it is private. If it is a request to have lunch with a friend, for example, it is private, and there would not be public access. Some institutions ONLY allow work-related use of their computers, so everything on them is defined as public. The University of Minnesota, because of its policy, must decide whether something is public or private if asked for copies of email messages (for example).

Professor Miksch said that she and her colleagues made a presentation on this subject at a national meeting and were overwhelmed with questions. "What about if someone else sent me the email?" It is probably a public record, even if the sender is at a private institution. "What about if I send it from home?" That probably makes no difference if it is work-related and one uses a university email account. "What about a private email account?" If a message is work-related, it is likely still a public record. It is not the medium or the account, Professor Miksch reiterated; the question is whether the "data" are work-related. She related that she and her co-authors send drafts of their work back and forth between each other, as do many faculty members, and sometimes they pose sharp questions to one another. The question is how much of those exchanges is exempt from public access?

In terms of whether any exemption applies, there are a number that exist in the law, Professor Miksch said. At the federal level, there is protection of student records (FERPA) and health records (HIPPA). Even FERPA, however, is not as clear as once was believed; there is debate about what a "record" is.

What about a letter of recommendation, Professor Cohen asked? There is a stronger case that the letter is not accessible when the student has waived his or her right to view the letter, Professor Miksch said. One can also argue that it is part of a student's admissions file and as such protected under FERPA. Letters of reference are generally part of a personnel file and thus not publicly accessible—but the University's policy is that the letters for the promotion-and-tenure process are open to the candidate.

There are also state exemptions: matters that are purely private, donor lists, personnel files, and trade secrets. The last one can play into research findings, Professor Miksch observed. Utah law provides a scholarly exemption; it shields records that have been "developed, discovered, disclosed to, or received by or on behalf of faculty, staff, employees, or students of the institution" and covers scholarly correspondence and unpublished manuscripts, research notes, and data.

Professor Vaughan said that the Office for Technology Commercialization (OTC) does not want faculty members to disclose intellectual property before OTC receives it. Professor Miksch said that OTC might be able to say that the intellectual property is either covered under trade secrets or delay the release (state law allows state agencies to delay release for 45 days in some instances and longer in other situations). Professor Vaughan said that when working with industry, one is often asked to delay publication to protect intellectual property. That usually falls under the trade secrets exemption, Professor Miksch said.

The answer to the second question, "Does the intent behind the request alter the Universities' obligations under MN Data Practices Act?" is often "no." But perhaps it should matter, considering the context of higher education, Professor Miksch suggested. Professor Vaughan asked what the response would be if PETA asks how many lab animals the University has and their location. Dean LeBien pointed out that one can obtain the number from federal grant abstracts. Professor Miksch said that the University would not have to identify where they are, for security reasons.

Professor Miksch referred to the "weaponization" of data requests and cited researchers who developed the concept; it "refers to actors who use the state open records act as a tactic to hinder an institution's progress." The goal is to chill or stop research that some consider controversial.

Dr. Lawrenz asked if it is possible to obtain "data" that are interviews with human subjects, with the individuals identified. When the information is not health-related and thus not covered by HIPPA? The question resonates with people who do social science research, Professor Miksch commented, and there is a case from Arizona related to ESL programs in the schools where researchers interviewed people in the schools and promised confidentiality both for the people and the schools; all the information was requested and the court held that the researchers did not have to provide the interview tapes but they did have to give the names of the schools and the superintendents who were interviewed. She said that she had always thought that if she promised someone confidentiality and had an approved IRB protocol, she was on firm ground. In the case of researchers in the area covered by the Ninth Circuit Court of Appeals (which issued the Arizona ruling), that is not true. Minnesota is in the Fifth Circuit, where there is no case law. One wants to be sure one can promise confidentiality—and runs the risk of being held in contempt of court if ordered to release names or information and refusing to do so. But there is a question of how to do many kinds of research if the people involved cannot be promised confidentiality.

In terms of "weaponization," what if the purpose of the request is a fishing expedition, or to harass a researcher, or to hinder a particular research project or program? Professor Miksch explained that Minnesota law does not require that a requestor state a purpose for a request, but when a court is required to balance a benefit conferred upon the requester or the public to access against the harm created by access, the court might consider the purpose of the request to be a factor.

The federal context for "weaponization" includes the Data Access Amendment (DAA) to the Freedom of Information Act, also known as the Shelby Amendment, and the Data Quality Act. Adopted in 1999, The DAA mandated accessibility of federally sponsored research data that grantees maintain. This provision allows the public to access the data from publicly funded research for independent reviews. In 2001, Congress enacted the Data Quality Act (DQA), which permits anyone to challenge data and request an agency evaluation to correct or remove studies used to help craft a policy when disputes exist over the data. The concern that higher-education scholars have expressed is that someone at a private organization can request data from a public organization and critique the work. But the scholar whose work is criticized has no access to the data used by the private organization. This has been a problem for some time and is one the Committee should keep its eye on, Professor Miksch advised.

In terms of the third question, "Is there a scholarly privilege? Does academic freedom outweigh the public right to know?" A number of universities have been using that argument successfully, Professor Miksch said. The University of Wisconsin said it would not turn over everything that was requested because doing so would chill communication; the decision was not contested in court. Some states have a scholarly exemption and some have argued that scholars should have an exemption similar to that afforded to reporters.

Professor Miksch posed a question: How should public institutions/faculty members respond to public record act requests aimed at the activities of individual faculty members? Their recommendations (that is, from those who have studied the matter) are:

-- Have in place a model policy for the institution, one that promote openness, provides clarity (to delete or not to delete?), takes into account the higher-education context, and promotes collaboration between university counsel and faculty member/faculty governance.
-- Seek legislative change: advocate for higher education exemptions, use of a balancing test, or argue that faculty members are not "government official/employee" under the law.
-- Work with University's General Counsel
-- Work with the IRB.

Minnesota courts will balance the public's need to know against other harms, Professor Miksch said, such as a chilling effect on academic inquiry. Working with the IRB helps researchers think through these issues.

She and her colleagues also believe more research is needed. Different questions arise depending on the nature and subject of the research.

Professor Cohen said one can worry about one erases; one can get in trouble for erasing things. If the data are something one should keep, it is probably best to print them out, Professor Miksch said. (Professor Cloyd commented that few universities provide offices large enough to print everything that should perhaps be saved.)

Professor Leppert recalled that in the case of search files, people are told to retain them for 7 years. Does that apply to other materials? What emails are kept on University servers? And for how long? Professor Miksch said that when Tracy Smith (from the Office of the General Counsel) and the Office of Information Technology met with the Academic Freedom and Tenure Committee, they reported that the University's position is that when it receives a request for data including emails, it will provide what is available in the email account. If information is subpoenaed, the University would argue that deleted emails are not accessible but a court might require a more aggressive approach depending on the case. So material is never destroyed, Professor Leppert concluded. Professor Cohen observed that the expected life of a tape is about 40 years. Professor Leppert said that since some emails will necessarily be discarded after a certain point (due to deterioration of tapes or disks and/or the inability to read them due to changes in hardware/software), why then automatically retain all email; shouldn't there be something like a 7-year retention period and then let go of it? Professor Miksch said that she and her colleagues recommend that governance committees look at institutional policies; they are often based on file-cabinet capacity. Now it is possible to keep almost everything.

Physical tapes have a projected life of perhaps 40 years and CDs and DVDs a project life of about 100 years, Professor Cohen said, but who knows how long they'll really last? He expressed skepticism about the proposition that anything will be kept forever—and even if it is, the technology changes and makes earlier storage formats unreadable. Maybe something will last for the length of someone's career, but not likely longer unless there is an active process to save things in response to legal or historical imperatives, but most institutions do not have the resources for such a process.

If someone personally deletes emails that otherwise might be public records, what's the harm since the University de facto retains all email indefinitely, Professor Leppert asked? The question goes back to what are people are required to keep. If one is not required to keep it, and deletes it, the individual is likely not liable, Professor Miksch said. If, however, one's emails are requested and then he or she deletes them, that would be a problem.

The federal government takes the position that one can generate a Word file and it is public even if one never sends it anywhere, Professor Cohen said. If one deletes it, and then someone files a Freedom of Information Act request, one is in trouble.

Professor Miksch reported that the University has taken the position it will not take heroic steps to find copies of items requested because doing so can be very expensive, so it asks employees for copies. Search processes, however, are another matter. What if Professor Leppert had erased the emails, Professor Bearinger asked? That would have been fine, Professor Miksch said, as long as committee members were not required to keep them. But, as she indicated earlier, if he had been asked for the emails and then erased them, there would be a problem.

Professor Bearinger asked if the Committee would like to discuss the issues further or make any recommendations. Professor Miksch said that the Committee on Academic Freedom and Tenure would be willing to participate in discussions and development of recommendations. She also said, in response to a query from Professor Leppert, that there is a coalition that wants to "break" FERPA and make all the records open; these are also issues that scholarly societies and the higher-education associations are interested in.

Professor Vaughan commented that there are statutes of limitations in various parts of the law; would they apply to email? Professor Miksch thought they would—but asked how one really gets rid of email messages. That is a question for the Office of Information Technology, she added. Professor Leppert asked if there are any conversations occurring; just because material can last 100 years does not mean that it should.

Professor Bearinger said she would bring the issues back to the Committee at a future meeting and thanked Professor Miksch for her presentation.

2. Update on the Minnesota Partnership for Biotechnology and Medical Genomics

Professor Bearinger turned now to Associate Vice President LeBien for an update on the Minnesota Partnership for Biotechnology and Medical Genomics, the partnership between the University of Minnesota and the Mayo Clinic.

Dr. LeBien began with a short history. Former Senior Vice President Cerra and the CEO of the Mayo Clinic discussed the strengths of their two organizations and realized that the overall level of collaboration between the two was too low; given their unique research portfolios, they could do better. The concept became a reality in 2003 by combining the health and research strengths of the two organizations along with bipartisan support from the State of Minnesota, on the theory that the two could do more together than each individually and there could be synergies in their areas of expertise. The state contributed $2 million and the University and Mayo each contributed $1 million. The legislative interest was primarily in economic growth, jobs, and patents rather than basic science research, Dr. LeBien recounted. By now, ten years later, the state has contributed about $100 million to the partnership.

Faculty members were invited to submit proposals and they had to be joint from faculty members at the University and Mayo. The partnership expectations were several:

- Joint project that the Mayo Clinic or the University of Minnesota could not perform individually (the proposal would not be accepted if there was a sense that both institutions were not required)
- Research in all areas related to human health and disease (it was an all-University competition and they have received proposals from several AHC colleges, the College of Science and Engineering, and the Duluth campus)
- Novel applications in biotechnology, genomics, proteomics, and bioinformatics to significant issues in human health encouraged
- Advances the understanding of a disease or disease process focusing on prevention, diagnosis, or therapeutics
- Leads to the development of a commercializable product (*preferred*) (this was part of the state's expectation and there has been modest success, although perhaps not to the degree that a biomedical research corridor has been created, although that is still possible because there will be significant opportunities for commercial development; the development period can be long for some of the research outcomes)
- Expected to result in a successful NIH application (e.g., PPG or large R01) from each funded joint research project within 2 years.

The partnership activities include research projects, infrastructure, commercialization, and recruitment of scientific talent, Dr. LeBien said.

Dr. LeBien provided summary data for the partnership for the period 2004-2012 (in millions of dollars).

-- Research Grants – 46, $29.3
-- Infrastructure Grants – 16, $28.7
-- Faculty Development Grants – 3, $11.0
-- Commercialization Grants – 2, $1.67
-- Decade of Discovery, Diabetes – 3, $1.8

-- TOTAL FUNDING – $82.5

He also provided examples of recently-funded projects:

Diagnosis and treatment of ovarian cancer
Novel therapeutics for treating glaucoma
Detection of Alzheimer's using advanced MRI
Functional metabolomics to treat tuberculosis
Studies of myelodysplastic syndrome
Genomics of pancreatic cancer
Nanoparticles to treat cerebral amyloid angiopathy

Dr. LeBien reported that the University and Mayo investigators have attracted more than $100 million in new NIH funds as a direct result of partnership funding and that an additional $20 million in private and corporate support has also been raised. Using standard metrics developed by the NIH and Department of Commerce, one can assume that between 2,400 and 5,700 jobs have been created by this funding. He reviewed the intellectual-property and commercialization outcomes from the partnership, which include a significant number of intellectual-property disclosures, patent applications, and patents. The two patents that have been issued so far are in the areas of prostate cancer and HIV.

One Committee member observed that patents are usually issued to individuals; is that true in these cases? Dr. LeBien said that the Memorandum of Agreement creating the partnership provided that the University and Mayo would share 50/50 any returns on investments or patents. A faculty member's relationship with the University is preserved as it was.

Professor Cohen asked about the number of women and minority researchers who received funding. Dr. LeBien said that the composition of grant recipients looked very much like the faculty of the University in general; they provided funding to newly-appointed faculty members as well as those who are very experienced. That has not really been an issue.

Who decides, Associate Vice President Lawrenz asked? Dr. LeBien said that he and his counterpart at Mayo use a thorough internal peer-review process, and then make recommendations to the Partnership Executive Committee which has the final authority. In the last round of proposals, five were funded out of 35 submitted, so it is very competitive.

Dr. LeBien turned next to a Decade of Discovery, the focus of the partnership on diabetes, and the reasons behind it.

-- Devastating physical, economic, social impacts
-- 7th leading cause of death in the country; #1 contributor to blindness; major contributor to kidney failure and coronary disease
-- More than 269,000 Minnesotans/24 million Americans suffer from the disease
-- 1 in 3 Medicare dollars spent on diabetes treatment
-- $170 billion in U.S.; nearly $3 billion in MN

-- The problem is growing at an alarming rate
-- Recent CDC projections: 1 in 3 American adults could have diabetes by 2050 (up from 1 in 10 today)
-- Need to dramatically change the course of the disease.

They had extensive discussions with health-care organizations, both locally and nationally, about what the goal should be.

Professor Bearinger asked if they had involved the Native American community, given the high rate of diabetes in that population. They have, Dr. LeBien said, and added that if the partnership work can lead to a reduction in cost of care and morbidity in the Native American population, such an accomplishment would be a huge success story

Are the grants distributed across the Academic Health Center, Professor Bearinger inquired? Faculty from the Medical School submit the majority of applications, Dr. LeBien said. However, the proportion of the number of awards per college generally mirrors the number of submissions per college. Is there disciplinary diversity on the review panels, she asked? "Absolutely," Dr. LeBien said; they use reviewers from across the University.

Professor Cohen said he had only raised the question in order to remind the partnership to keep an eye on the numbers. There should be no institutional bias that would disadvantage certain groups in seeking funding. Dr. LeBien agreed wholeheartedly and reported that Dr. Elizabeth Seaquist is leading the diabetes research effort.

Professor Joo asked how the requirement that faculty from both the University and Mayo works. Dr. LeBien said that of the projects that have been funded, it is generally evident that there has already been collaboration between University and Mayo faculty members. That is not a restriction, and there need not be a history of collaboration before a proposal is submitted, and because there is considerable money available he is sometimes asked to be a matchmaker. But in general, the proposals usually demonstrate a collaboration that was already underway. He said that in his opinion, this partnership has been a fabulous success and has provided funding for hundreds of faculty members.

Professor Bearinger thanked Dr. LeBien for his report and commented that, this being the 10th anniversary of the program, it would be advantageous to disseminate the story to local media outlets. It is always a question, when one hears about something like the partnership: How does the University get the word out? Dr. LeBien said they work with a public-relations firm to help educate the public. He noted that they must go to the state each year to make the case for continued support—and there are people who ask questions about the outcomes and products of the partnership. The request has never not been funded, but they make no assumptions on a year to year basis that it will be automatically funded.

3. Research Infrastructure Investment Program 2013

Associate Vice President Lawrenz distributed copies of a handout outlining a Research Infrastructure Investment Program 2013 Request for Proposals. This is a new initiative, she said, and different from the recent I3 (Infrastructure Investment Initiative) program. She noted the key dates, that there will be $3 million available, the eligibility criteria (must be interdisciplinary and intercollegiate, as defined in the program), must include at least one Academic Health Center college/school/center and one non-AHC college/school/center (one of which must be designated the lead; there can be as many participants in the proposal as wished), and provide a 1:1 match with central funds (that can come divided in any way between the collaborating units). The minimum proposal must be $50,000; the maximum will be $1,000,000 (so a total of $100,000/$2,000,000 including the contribution from the schools), the funds must be available at the time of the proposal (although may be contributed over two years), the budget may not exceed two years, and while faculty salaries will not be allowed, compensation and benefits for non-faculty specialized personnel may be. Dr. Lawrenz reviewed the process for making proposals, which will be included in the information distributed. The source of the funds does not matter and proposals could come from individual faculty members. She asked for comments.

Professor Bearinger said that those making proposals from a college might not know what their colleagues are proposing; Dean LeBien said that all of the proposals from the Medical School would flow through his office (because matching dollars will be required), so he will see overlap or redundancy and will help set college priorities. He said he assumed associate deans in the other colleges would play a similar role.

Committee members made a number of suggestions to improve the clarity of the draft document. Professor Bearinger thanked Dr. Lawrenz for bringing the draft to the Committee and adjourned the meeting at 4:00.

-- Gary Engstrand