Minutes*

Senate Research Committee
Monday, October 7, 2013
2:00 - 4:00
510 Morrill Hall

Present: Maria Gini (chair), J. Michael Autry, Daniel Habchi, Goran Hellekant, Philip Herold, Brian Johnston, Seung-Ho Joo, Frances Lawrenz, Hinh Ly, Amanda Maxwell, Richard Nho, Scott McIvor, Emily Saunoi-Sandgren, LaDora Thompson

Absent: John Bischof, Arlene Carney, Jayne Fulkerson, Brian Herman, Michael Kyba, Tucker LeBien, Suzanne Paulson, James Orf, Michael Schmitt, Kathleen Thomas, Thomas Vaughan, Kyla Wahlstrom, Joel Waldfogel, Lynn Zentner

Guests: Professor Karen Miksch (co-chair, Senate Committee on Academic Freedom and Tenure); Tracy Smith (Office of the General Counsel); Associate Vice President Pamela Webb (Sponsored Projects Administration)

Other: none

[In these minutes: shield amendment for research and scholarly work]

Shield Amendment for Research and Scholarly Work

Professor Gini convened the meeting at 2:00 and welcomed Professor Miksch and Ms. Smith to discuss a proposal to amend the Minnesota Government Data Practices Act to shield in-progress research from requests that they be made public.

Professor Miksch related that the question of requests for research work that is in progress and possible amendments to state laws shielding such work from requests has been a topic of research that she has been pursuing with two colleagues, Drs. Neal Hutchens and Jeffrey Sun. In particular, they have been studying whether the nature of faculty work may change if researchers are concerned that they will be required via a state open-records request to provide works in progress, correspondence regarding on-going research, and/or information that they have promised subjects will remain confidential pursuant to an IRB protocol.

This is her third visit to the Committee on this topic, Professor Miksch said, and this time she brought draft language it could consider endorsing. Interest in the topic really started when the emails of a faculty member at the University of Wisconsin were requested by legislators. The Committee on Academic Freedom and Tenure (AF&T) raised questions and spoke with Ms. Smith, who outlined Minnesota law and the legal landscape. After that, AF&T decided to develop a resolution to encourage the state legislature to amend the state law.

* 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.

Professor Miksch reviewed briefly the purpose for "sunshine" laws, how they promote democratic action, make government accountable, and help avoid corruption, and noted that they do have disadvantages in that they can slow things down and cause inefficiencies because of external requests for information that are "fishing expeditions." The particular concern in higher education is that requests for information can be used to keep researchers from doing their work.

The first question in Minnesota is whether a piece of information is "data." Professor Miksch cited state law: "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 is a state agency. Under the law, emails and social media postings, for example, are "data."

The second question is whether something is public. If the content is private under state law, it is not accessible. If it is work-related, it is public, Professor Miksch said. Ms. Smith said that if something is personal, it is not government "data" and not covered by the law. But if one is doing work at home, on a home computer, it is still government data if it is work-related. Professor Miksch said that if one has a personal email account but uses it for work-related activity, the work is data under the law. The same is true for anything on a smartphone, for example.

Professor Gini asked if the law applies to a graduate assistant who sends emails to a student. It does, Professor Miksch said (if it is work-related).

Professor Miksch noted that there are exemptions, such as health records (HIPAA) and student records (FERPA) under federal law, and under state law, donor lists, personnel files (except on a need-to-know basis within an organization), and trade secrets.

The purpose for a request does not matter, under the law, Professor Miksch said, nor is anyone required to identify themselves in making a request. The concept of the "weaponization" of data requests has been formulated to describe requests that are fishing expeditions, to harass researchers, or to hinder a particular research program or project. Requests can be used to shut down an activity when requesting tons of data. She said that "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." Ms. Smith noted that under Minnesota law, a balancing test applies only in cases where a party seeks discovery of private data; public data are not subject to a balancing test by a court—public data just must be disclosed.

Professor Nho asked what is public. Name and address? Ms. Smith said the rule is that everything is public unless the law makes it private. In the case of students, everything that is not directory information is private. For employees, their history, salary, etc., are public, but such things as evaluations, reasons for medical leave, etc., are private. The law contains a very specific list of items concerning employees that are public. If a student suppresses the directory information, is it still public, Professor Gini asked? It is not, Ms. Smith said. The law tries to be clear about what is and is not private, she said, but the categories don't always nicely fit all types of data that exist. There are gaps in the law, and the University can seek a temporary classification from the Commissioner of Administration and then seek to have that classification incorporated in the law. But, where possible, they try to use common sense to protect data that should be private through the exemptions that exist. The law was written more for state agencies than for the University.

Ms. Smith told the Committee about the requests that the University receives.

-- If a federal agency that sponsors research at the University receives a request, it passes the request to the researcher, asking the researcher to identify what elements of research might be proprietary, which the agency will protect.

-- The General Counsel will use the "trade secrets" provision of Minnesota law to protect unpublished research because it has value to the institution and the faculty member, for example, someone could lose a grant if all the work to prepare it were made public and someone else filed for a grant on the basis of that work.

-- By far the largest category of requests related to research is about animals being used in research.

-- In recent years, there have been requests from University faculty and others about a drug study in which there was a death.

-- As part of a lawsuit, data related to research on over service of alcohol and "happy hours" has been requested.

-- There have occasionally been more discrete requests targeted at individuals (e.g., someone doing research on clean water).

The General Counsel's office does succeed in protecting unpublished research, and has not faced a successful legal challenge, Ms. Smith said.

Ms. Smith commented on the likely reaction in some quarters to a request to the legislature to amend the data-practices act.

Professor Miksch touched on recommendations she and her colleagues offer about how public institutions and faculty members should respond to data-practices-acts requests aimed at individual faculty members and the model policies institutions could consider. One of their recommendations is to consider advocating higher education "shield laws, which at least three states have adopted (New Jersey, Ohio, and Utah). These laws protect ongoing faculty, staff, and graduate-student work.

In a couple of states, requesters have used state law to ask about human-subjects research subjects. The researchers promise not to release names, but people can try to use the laws to obtain the names of the individuals who participated in the research. The researcher, in response to the request, must either disclose the names or risk being held in contempt of court. Dr. Saunoi-Sandgren asked if someone would be held in contempt because they did not provide the paper or record with the names or did not disclose them. Professor Miksch said a data request must seek something written, on a computer, etc., not the contents of someone's mind.

The Utah law contains the strongest shield provisions, Professor Miksch reported, and protects records that have been "developed, discovered, disclosed to, or received by or on behalf of faculty, staff, employees, or students at the institution." The shield includes scholarly correspondence, unpublished manuscripts, research notes, and data. Professor Miksch commented that she and her colleagues use

email a great deal to debate and criticize one another's ideas and points, and she would not want to see those made public. The biggest cases, however, are in athletics; reporters want coaches' cell phone numbers. Originally she thought that no one would ever want her emails, but when legislators and others start asking for data because of areas of research, she began to worry about the implications of the laws. Faculty members are shocked to learn that their work-related email messages are public. AF&T is concerned that the law can have a chilling effect on the kinds of research that faculty members choose to do and that faculty members need to be able to rely on a human-subjects research protocol that promises confidentiality.

Mr. Johnson reported that he works at the VA Hospital, although is a University employee, and has been told that he should only use the VA email for research. Ms. Smith said it does not matter what email he uses, University-work-related email would still be government data. The University wants employees to put University work on University computers, and not spread it all over different places, because (for one thing) it becomes difficult to find if someone leaves or dies and it is more difficult to protect it.

Professor Miksch said that the VA could require that one can only use VA computers for VA business—in which case everything on them is public (subject to HIPAA, etc.). So anything personal on those computers would automatically be public. The University, however, allows minor personal use of computers, so any requests for data require sorting of public from private before the information is released. In Wisconsin, no personal use was permitted, so everything was public.

When there is a request for copies of emails, what is the process, Professor Gini asked? Who decides? Ms. Smith said the request is directed to the University Records Manager, Susan McKinney, who reports to the General Counsel. She contacts the individual or unit whose emails have been requested and works with the individuals to sift through the messages to determine what is public and what is private, and then releases those that are public. What about non-University email, Professor Gini asked? Professor Miksch said the individual will be asked to provide messages but the University will not go into someone's personal email. Ms. Smith agreed and said the University will ask for the employee's help.

What about grant information, Professor Gini asked? If a proposal was funded? If it was submitted? For any grant matters, they look at trade-secrets protection, Ms. Smith said. If a grant is not funded today, they could protect it. If a grant was not funded in 1975, it would probably be public. There is no bright line. Associate Vice President Webb said that the University can generally protect both proprietary information and information that could be patented, and sometimes those are the same thing. Ideally, researchers should designate in proposals those pages or the specific paragraphs that they wish to keep proprietary to the University, especially if it is going to a sponsor that doesn't use peer review (the peer review processes of major agencies already require their reviewers keep a proposal confidential). Once a federal proposal is awarded, many agencies formally incorporate the proposal itself into the terms of their award documents. Since federal awards are generally public, it is thus more likely that the proposal will become a part of that "public" record. It is also the case that the University or researcher may be somewhat less concerned at that point, because the researcher has received funding to do that work. And even given a request for data, the process still allows the University a chance to review proposals (funded or not) for proprietary information.

The entire proposal or only the technical points, Professor Gini asked? Associate Vice President Lawrenz said that they had a case where they were only allowed to redact the trade secrets, but usually they treat proposals as private. Professor Miksch said it is nice to know that if one has an unfunded proposal, it can be protected after one has gone to all the work to prepare it. Professor Gini said she knows that even with funded research, some people will cut and paste parts of a proposal and submit a similar grant proposal.

Professor Gini said she thought that only funded proposals could be requested; can anyone request all unfunded proposals? Funded versus unfunded is not really the line that is drawn, Ms. Smith said; the question is whether the proposal contains proprietary information and release would harm someone. Some requests can be innocent, Ms. Webb said, such as young researchers who ask for successful proposals in order to learn from their colleagues. They will ask the authors of the proposal if they may release it, and the author can agree or not.

Professor Miksch asked if the Committee wished to consider recommending a shield law, even if there is not currently a problem. One of her main purposes in coming to the Committee, however, was to warn researchers that they have to be careful about promises they make in the course of research with human subjects. Ms. Smith said that the backup position with respect to human-subjects research can be to try to obtain a temporary classification and then seek to have it incorporated in the law. Professor Miksch said this is a frustrating aspect of the law because it could persuade people not to do research (e.g., on vulnerable populations such as undocumented immigrant students) even though it needs to be done. With research for companies, Ms. Webb said, the only promise that can be made is that the University will protect participants in human-subjects research "to the extent allowed by law."

Ms. Smith noted that even private data can be obtained by court order.

How about research with Native Americans, Professor Hellekant asked? He said he believes researchers working with them must go through two processes, that of the IRB and one established by the tribes. Information from the tribes comes from their own nation. Is there anything he can tell his colleagues at Duluth with respect to data acquired from the tribes? Professor Miksch observed that there are three agencies involved: the federal government, the state government, and the tribes. Are research results government data? Ms. Smith pointed out that there is protection for medical data, if that were the subject of research, and the University has never released any human-subjects research information with individual names included.

What if the tribes say they do not want the research made public but the University believes it must release it, Professor Hellekant asked? If the University has it, it is government data, Ms. Smith said, and they would need to point to an exception in order to keep it private. Chances are good that if it is current human-subjects research, it would not be disclosed.

Professor Miksch pointed out that if someone at the University receives data from a colleague at a private institution, those data become public when they come to the University. It is reassuring, however, to learn that the University has never released human-subjects data.

Professor Gini said she would like to see the law changed so it is cleaner; that is better than try to fix bugs later. What would it take to accomplish that goal? What steps need to be taken and on what timeline? Professor Miksch explained that this Committee and AF&T could ask the Faculty Senate to

adopt a statement recommending to the president that the University seek a change in the law. At the same time, the committees could pass a resolution encouraging individual researchers to protect their data (Or they could do both.)

Ms. Smith said that Jason Rohloff, the University's state government affairs official, would have to be directed by the president to work on seeking a change; the idea would need to get on the legislative agenda. There will also be a need to provide the administration with an explanation of the need without a problem facing the University in order that the administration can make the case with the legislature.

Mr. Habchi asked what constitutes "publication." If one gives a presentation or participates in a colloquium, is that publication? Professor Miksch said the laws talk about publication, but what that means can vary with the discipline; the term is not very specific. But there don't seem to be any debates about it, either. Does "publicly available" mean publication? Professor Hellekant noted that in the basic sciences, one can make an oral presentation, provide an abstract, do a poster, etc. It is not clear what publication means.

Dr. Saunoi-Sandgren said that if the Committee wishes to move forward on this proposal, it should be paired with education. Many researchers did their training a long time ago and it would help to get everyone up to speed on conducting research as an employee at a public institution. She also commented that it would be unwise to rely on ethics training because there is a wide range of choices for people to be educated about ethics and they might not be informed about the state law. Associate Vice President Lawrenz reported that there is new online training in the Responsible Conduct of Research, and the requirements of state law could be added.

Professor Gini said that the issue is much broader than IRB-approved research. Engineers typically do not do research requiring IRB approval but they want to protect their papers. She suggested the Committee endorse the idea of moving forward. Professor Hellekant asked for a summary of the discussion and that the Committee take action on a specific motion at the next meeting. Professor Miksch said she would develop a proposal in concert with Professor Gini and Ms. Smith. On Professor Hellekant's motion, the Committee voted unanimously to support developing a proposal to change the law.

Professor Gini adjourned the meeting at 3:20.

-- Gary Engstrand

University of Minnesota