

Minutes*

**Senate Consultative Committee
Thursday, February 14, 2002
3:00 – 4:00
Room 238 Morrill Hall**

- Present: Joseph Massey (chair), Susan Brorson, Ryan Brux, Khaled Dajani, Trevor Ewanochko, Dan Feeney, Christine Frazier, Marti Hope Gonzales, Anthony Heryla, Candace Kruttschnitt, Leonard Kuhi, Kari Lindeman, Judith Martin, Matt McBlair, Ryan Osero, Paula Rabinowitz, Charles Speaks
- Absent: Wilbert Ahern, Muriel Bebeau, Judy Berning, Nick Cecconi, Les Drewes, Arthur Erdman, Shawn Lavelle, Jeff Ratliff-Crain
- Guests: Mark Bohnhorst (Office of the General Counsel), Professor Scott McConnell (Chair, Senate Research Committee), Professor Kumar Tamma, Ed Wink (Sponsored Projects Administration)

[In these minutes: requests for exceptions to the research secrecy policy]

Professor Massey convened the meeting at 3:05 and turned to Professor McConnell to lead the discussion.

Professor McConnell first introduced Messrs. Bohnhorst and Wink, from the Office of the General Counsel and Sponsored Projects Administration, respectively, and then explained that the Senate Research Committee was bringing forward two recommendations for exceptions to the Regents' policy on Research Secrecy.

[Professor Massey convened the Committee in a special meeting to exercise its authority to act on behalf of the Senate when the Senate cannot meet in a timely enough fashion to deal with an issue. The Senate Consultative Committee had been asked to act on behalf of the Senate under the provisions of the Regents' policy on Research Secrecy, which reads as follows, in pertinent part (see in particular subd. 4):

Subd. 2. Limits on Public Dissemination of Information. The University of Minnesota shall not accept support from any source for research under a contract or a grant, even though it meets the requirements of subdivision 1, if the contract or grant limits the full and prompt public dissemination of results or specifically permits retroactive classification, except for reasons found compelling by the University community through the review process outlined in section II.

SECTION II. SENATE RESEARCH COMMITTEE.

Subd. 1. Report to the Committee. The director, research contract coordination, or some other designated University official, shall report to the Senate Research Committee every proposed

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

research grant or contract which meets the requirements of section I, subdivision 1, but limits the full and prompt public dissemination of results. If this officer is not certain whether a particular research proposal requires the committee's recommendation, the officer shall submit the proposal to this committee for its determination.

Subd. 2. Committee Report to the Senate. The committee shall recommend to the senate at its next regularly scheduled meeting acceptance or rejection of every proposed contract or grant which limits the full and prompt public dissemination of results in sufficient detail to permit informal discussion of the recommendation made. In addition, the committee shall report on any problems encountered in implementing this policy.

...

Subd. 4. Senate Recommendations. The University Senate shall review the recommendations of the senate research committee and forward its own recommendations to the president. All proposals which are to be submitted for senate evaluation shall be accessible to members of the University community (the faculty and students) in sufficient detail to permit informed evaluation and discussion.]

Professor McConnell reviewed the elements of the Regents' policy and noted that the default position of the University is that it will accept no grant or contract that includes any restrictions on publication of the research results. There are instances when the University can accept such grants or contracts: if the Senate Research Committee and the University Senate recommend to the President that such an exception be granted.

Projects which contain restrictive clauses are reviewed by the Office of the General Counsel and Sponsored Projects Administration, and those two offices negotiate to have the restrictions removed. If they cannot get them removed, they bring them to the Senate Research Committee to ask for an exception. There are at present no active research projects at the University which have any restrictive clauses in the contract or grant language.

Today, Professor McConnell related, the Senate Research Committee is bringing to the Senate Consultative Committee (which will be acting on behalf of the Senate) a recommendation that two exceptions to the Regents' policy be granted. The Research Committee tried to discern if these are really two exceptions or representative of what will be an increased number of such requests.

Mr. Dajani asked if the contract is being voted on. Professor McConnell said the policy issue is the receipt of funds. There is not much difference between the two, Mr. Dajani commented, when much research relies so heavily on external funding, so this involves a question of academic freedom.

Mr. Bohnhorst explained that the issue is restriction on publication of University research results. The issue first arose in 1981, when there was concern about publication of information that, even if not classified, could nonetheless compromise national security. If publication is restricted, International Trafficking in Arms Regulations (ITAR) restrictions come into play, which include the "deemed export" rule: if information is shared with a foreign national, that is the same as exporting the information to the home country of the foreign national. Any publication restriction typically triggers ITAR restrictions.

Mr. Bohnhorst then reviewed briefly the history of restrictions on research publication and federal policy. In 1981 the National Academy of Sciences issued a report which recommended that the only restrictions on publication of university research be imposed through the process of classifying information, but the report also recognized that there are gray areas which could compromise national security. In these areas, the government should be given 60 days to comment, and it could always classify the information in order to prevent it from being published.

The White House followed this recommendation in 1985, as did the Department of Defense in 1987. In the latter case, however, it created an exception for developmental research and identified as "rare and exceptional" situations when there would be a likelihood that publication would disclose characteristics of weapons systems. All other non-classified research would be considered fundamental, and thus freely publishable.

Professor McConnell said he identifies four different kinds of information:

- that which is freely discussable and openly publishable
- that which is proprietary (not involved in the present cases)
- that which is classified (which it is a crime to publish and which may not be released to anyone without a security clearance; the University does no classified research)
- sensitive information (which is negotiated over and which involves the cases at hand)

In the case of "sensitive" research that has already been done, Professor Rabinowitz clarified, the government will look at the results to decide if they can be published, in contrast to classified research, when the government decides in advance that the research will not be published. Professor McConnell agreed, but noted that the government can also declare information classified after the research has been done.

Should the University not decide beforehand if it will accept research, Mr. Dajani asked? Professor McConnell and Mr. Wink agreed that these cases should, and generally are, handled before the work is conducted. In this case, the work proceeded because of a long-standing relationship with the funder and a letter of agreement; it was only when the contract was developed, during the project year, that the restrictive language was encountered. Mr. Wink asserted that the "vast majority" of projects are reviewed and approved before the work is initiated.

Professor McConnell clarified the ITAR restrictions. What they mean, essentially, is that one cannot send certain information or objects to a foreign country nor can foreign national work on projects associated with such information or objects on the assumption that they could be recreated subsequently. That prohibition affects who can be involved in the research and with whom it can be discussed. He said he understood the University has been very careful to accept no research with ITAR restrictions. Mr. Bohnhorst said he has been working in this area of the law for some time and tries to be certain that all University rules are reflected in the contracts it signs.

Mr. Wink then explained the first recommendation. The work has been completed. The University operated under a letter from the company (which had a contract with the Army). The University had been the prime contractor with the Army on the project for a number of years; the company was the subcontractor. The relationship changed in 2000, when the company became the prime contractor and the University became the subcontractor. Nothing about the work changed, however, and

after five years experience, the University believed it knew the terms and conditions of the arrangements and expected to see those same arrangements embodied in the new contract.

Late last fall, however, the University received the contract and discovered it contained clauses that restricted publication because two of the individuals doing the work were at secure facilities and working near classified materials. (The University took the position that one of the individuals was too closely involved in classified work and terminated his employment; he became instead an employee of the company that is the prime contractor.)

In order for the University to be paid, the contract must be approved. The key language in the contract says that publications must be reviewed and approved. (The University can accept language that calls for review, because often proprietary information needs to be redacted from publications, Mr. Bohnhorst told the Committee.)

Did not the letter of understanding include these terms, Mr. Dajani asked? The letter is very broad and general, Mr. Wink explained. The contract--which he showed the Committee--is a number of pages long. Why was not the contract approved first, Mr. Dajani then asked? Because the company offered a letter of understanding in order that the work could be continued, pending preparation of a contract. The University expected that the relationship and terms would be the same as they had been the previous five years, when the University was the prime contractor, Mr. Wink said. It was the same work and the University assumed terms would be the same as well, Mr. Bohnhorst added.

What proportion of contracts are fully resolved before the work begins, Professor McConnell asked? Over 99% of the time the University has a contract in hand, Mr. Wink said. Less than 1% of the time will work begin with a letter of intent. 95% of the time the contracts are resolved before work begins. The 5% represents occasions either when the University has a letter of intent or when the faculty have requested a pre-award authorization to begin work before the contract is signed. It is unfortunate the contract came so late, Mr. Dajani concluded.

Could there be restrictions on publication if the Research Committee and the Senate make a recommendation to the President that restrictions be accepted, Professor Speaks asked? They can. Is approval of this exception the only way the University will be paid, he then asked? This is an ethical point, Ms. Frazier commented.

Professor Rabinowitz urged that the exception not be approved because it contravenes the policy of open research. If the University loses the money, it loses the money. It is not fair to rewrite the contract when they knew the University's policy. The University exists in an environment, with this administration in Washington, of increasing secrecy and limiting access to information. The University is committed to open and free access of information. Professor Massey construed this language as a motion to reject the request for an exception to the Regents' policy; Professor Rabinowitz said that it was. Professor Gonzales seconded the motion.

What leverage does the University have when the work being done is the same as before, even though there is now new language in the contract, Professor Kruttschnitt asked? Mr. Bohnhorst said the University has a similar case pending right now over which it is negotiating, and the University takes the position that it should be paid. But the alternatives are unrealistic, he said: is the University going to sue the government when it receives hundreds of millions of dollars in research funding? In addition, the two

situations are not quite the same, because in the project now under consideration there was the change in prime contractors—so there is not quite the same continuity.

The recommendation from the Senate Research Committee was a unanimous vote that the exception be approved, Professor McConnell noted.

Mr. Dajani asked how the researchers feel about being subject to a clause that may mean their research cannot be published; he also asked how much money is involved.

To the second question Mr. Wink said the amount is \$934,000. To the first, he explained that the staff scientist involved is unaffected because the Army has encouraged the work and never restricted publication.

Mr. Ewanochko said he believed the exception should be approved, with the understanding that it does not set a precedent, is a one-time occurrence, and is not a test case. Professor Feeney responded that he had grave reservations that it WOULD become a precedent and said the Committee would be asking for trouble if it approved the exception. To do so would say that the amount of money owed the institution is more important than anything. The University has been accused of being too linked to corporations; if there is concern about integrity, the Committee should not favor this exception. It sounds like there is no recourse: the University can uphold its integrity, but doing so will cost it \$1 million.

Ms. Lindeman asked why the clause was in the contract if there was no intent to restrict the publications. Because the two individuals were working in a classified area, Mr. Bohnhorst said--that was the only reason. No publications were actually restricted; if the University does not accept the contract, it loses the money it paid for the work.

Professor Martin said she was inclined to agree with Professors Feeney and Rabinowitz, but if there were no restrictions and this is a "done deal," and the University will never sign an agreement like this again, the exception would have no effect on anyone at the University. The only "precedent" is that people doing classified work must leave the University.

The vast majority of the work involved in the contract was outreach and education, Mr. Wink explained. A quarterly bulletin and newsletters are published and educational activities such as workshops and summer institutes are conducted for staff and students, including students from historically black colleges.

Professor Gonzales said that her concern is that there is risk of becoming utilitarian ethicists: A lot of money in the contract was spent on good things, such as outreach and education, so an exception is acceptable. This way of thinking could lead the university down a slippery slope that might well undermine the principles and ethics associated with higher education research. Professor Gonzales noted that in this matter, she's more supportive of Kantian ethics: some principles and values are important enough that practical, utilitarian concerns are irrelevant.

If the University has contracts 95% of the time, Mr. Stingl asked, how large a number is the remaining 5%? There are about 3000 contracts, Mr. Wink reported. In most cases when the contract has not been executed, the University HAS the contract and is negotiating over terms. This is the only time

the University has done work on a letter of understanding, because everyone involved thought they knew what the terms would be.

Professor McConnell said the University is on the horns of a dilemma. On the one hand there is a concern for preserving the open access to research and its results; on the other, the University's commitment to supporting faculty members' rights to pursue their own research, without restriction. While the discussion had well articulated the first issue--that of preserving the integrity of open research--both issues must be considered..

That is exactly the point, Professor Rabinowitz responded. There is the money behind the research, but there are also higher ideals that one cannot put a dollar amount on. She agreed with Mr. Dajani that academic freedom is tied up with the ability to do research, which depends on getting external funds, and that abuts the University's philosophy.

This is complicated, Professor Kuhl commented. He agreed with Professor Rabinowitz but said the University got into this situation in a funny way. It had several years with no problems, and then with a management change, even though all the people involved remained the same, the contract changed. One can say the University was naïve, but with the long experience there was no reason to expect this outcome.

Regardless of how consistent the research was over time, Mr. Heryla said, and even though there were mitigating circumstances, the University could face this situation in the future, too. The University made an error but it should not sell its ethics because of that; there could be another set of circumstances that will require consideration again.

Professor Feeney called the question. The motion to recommend against making an exception to the research secrecy policy was adopted 7-5. [See note below about votes cast.]

Professor McConnell next explained the second case, which is prospective. The Senate Research Committee discussed it and voted unanimously to recommend that an exception be granted. Professor Martin moved to accept the recommendation of the Committee.

The case involves the University as a subcontractor to Mississippi State University, which has a very large contract with the Army, parts of which involve classified information. The part subcontracted to the University, to Professor Tamma, involves no classified work.

This is another case where the Principal Investigator, Sponsored Projects Administration, and the Office of the General Counsel worked diligently to get the restrictions removed, Professor McConnell related. They did the ITAR restrictions removed, but language requiring pre-publication review by the Army remains.

Professor Tamma explained to the Committee that he has been involved in work for the Department of Defense for a long time, and that he also holds very dear the principles of academic freedom and the right to publish and would not want to see them undermined. Since the events of last September 11, the government has gotten more protective. He said he envisions in the future the government will look at ALL contracts. With this contract, however, he will be doing nothing different

from what he has been doing in the past. The letter from the contractor says he is doing nothing classified, but he could only get the contract clause changed by an appeal to Condoleezza Rice.

There is a new clause in the contract, Professor Rabinowitz said, and it would be a pain to try to get Condoleezza Rice to approve a change, but this is just one more government prior restraint using September 11 to justify it. The University can expect to see an increasing number of contracts said to include sensitive information and which will require prior review.

How difficult would it be to get Dr. Rice to change the contract, Mr. Dajani asked? This is a government writing restrictions before the fact into almost all contracts, Professor Rabinowitz said. Everything will need to be reviewed.

Up to last year, the two categories of concern were classified and sensitive, Mr. Bohnhorst said, and nothing had been restricted. In 2000 the National Academy of Sciences held a workshop about "sensitive but unclassified" information because there were concerns about it (before the events of September 11 and before the new administration came into office). Since the new administration, and especially since September 11, the situation has been fluid. Universities are saying that if the government is asking for publication restrictions and application of ITAR, they will reject research closest to the classification line, which is the information the government is most worried about. They have consulted with peer institutions and are talking about export controls (ITAR); they are trying to influence national policy and get a return to the situation recommended in 1982 by the first National Academy of Sciences report. Condoleezza Rice has said that the 1985 policy (the White House endorsement of the National Academy of Sciences report) is still in place. Nothing the Committee does now will set a precedent. Everyone is doing as much as possible to get back to the situation that prevailed in 1985.

Does the language in the Mississippi State contract say "review" or "approve," Professor Kuhi asked? Mr. Bohnhorst said the language--which has frustrated Mississippi State as well as Minnesota--says "clear." This is language Florida and Ohio State, for example, have accepted. In his opinion that means "approve."

Is the "sensitive" category being expanded, Professor Rabinowitz asked? It is, Mr. Bohnhorst said. If a contract contains ITAR restrictions, the University does not accept them and pushes back. He said he could understand, however, if information were truly sensitive, that the government would want publication review.

Mr. Heryla said he did not believe the government always acted in the best interests of the people and did not believe it would act in a limited way with respect to Professor Tamma's work. Things are moving in a bad direction, he said, and he cannot support government review of academic information because a lot of people died on September 11. The government has used similar arguments in the past.

Mr. Dajani said he had had the same thoughts as Mr. Heryla but came to the opposite conclusion: when one takes account of the individual's right to decide on the risk that publications might be accepted or rejected, the request for an exception should be approved.

Mr. Osero agreed; he said that Professor Tamma has the right to decide his research might not be published--but that as a University employee he cannot make that decision.

The question was called; the Committee voted 5-6 against the motion to recommend in favor of granting an exception.

[Note on votes cast: after the meeting it was determined that there had only been 12 voting members of SCC present in the room for the first motion and 11 for the second. There were also two members connected by telephone, but the connection was broken part way through the discussion so those two did not vote. Professor Massey, one of the 12 in the room, did not cast a vote on either, so there could be no more than 11 votes on the first motion and 10 votes on the second, rather than the 12 and 11 votes recorded at the meeting. As a result, the voting members of the Committee who had been present at the meeting were polled by email the next day. The final vote on the first motion (to not grant an exception) was 6-5 in favor; the final vote on the second (to grant an exception) was 3-6 in favor, with one abstention.

In addition, on the first motion, one Committee member wished to change votes, to change from "no" to "yes," which would have meant the motion would have failed 5-6. In addition, the same individual wished to change the abstention on the second motion to "no," which would have meant the motion failed 3-7. The original votes will stand, but Mr. Bohnhorst made the point that since this is a recommendation, not a final decision, Professor Massey should communicate to the President the several votes as well as the sentiment about changing votes.]

Professor Massey adjourned the meeting at 4:00.

-- Gary Engstrand

University of Minnesota