Stuck in the Sunshine:

The Implications of Public Records Statutes on State University Research and Technology Transfer

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Imagine a typical research laboratory on the campus of a major state university. Like most academic research laboratories, this facility is filled with complex scientific equipment, chemicals, and other resources used to conduct advanced scientific research. While ongoing experiments bubble away in the background, professors consult with graduate students, as they hurriedly transcribe data and research results into their notebooks, hoping to eventually discover the next major scientific or technological breakthrough. But unlike other academic research laboratories, namely those owned by private universities, this laboratory has no doors; it has no walls either. Instead, this lab's walls are made of glass, as is the ceiling, which allows anyone to drop by and take a peek at the research projects and their various outcomes.

Although it sounds far-fetched, this type of exposure is exactly what many state universities face by virtue of their states' public records statutes, a common component of so-called "sunshine laws,"[1] which compel disclosure of documents possessed by state agencies[2] subject only to specific statutorily defined exemptions. For universities engaged in academic research, these laws are cause for concern. Under a broad sunshine law without the necessary exemptions, a university could be compelled to disclose information used by a particular academic research program, like confidential or otherwise proprietary data provided by an industrial research sponsor. Moreover, sunshine laws could require a university to release research reports or other products of a particular research program prior to publication or before a patent application is filed.

[1] The titles of such laws vary from state to state. In addition to "sunshine laws" they are often known as "freedom of information," "public record," "open record," or "open government" laws. For simplicity and clarity, this paper will address these laws generically as "sunshine laws" or "sunshine statutes."

[2] Most sunshine laws also require government agencies to open official meetings and proceedings to the public. This paper, however, is limited to the document disclosure aspects of these laws.

Such disclosure has adverse and potentially fatal consequences for the intellectual property protection available to a particular discovery.

There is presently little written about this area of law as it relates to university technology transfer. Although this paper does not provide a detailed analysis of the law in each state, it does endeavor to explain the nature of sunshine laws, the potential impact of such laws upon academic research and technology transfer, and how technology transfer community should respond to ensure that research opportunities and the prospects for commercialization of technology remain strong. Part I of the paper offers a general explanation of sunshine laws and describes the problems they create for academic researchers and university technology transfer professionals. Part II features a review of various sunshine laws, emphasizing those which provide unusually strong and unusually weak protection to academic institutions. Finally, Part III attempts to provide some practical guidance for those in academia and university technology transfer offices on how to handle various sunshine law issues that may arise.

I. Introduction to Sunshine Laws

A. What Are Sunshine Laws?

Perhaps one of the most fundamental principles of a representative democracy is the public's right to obtain certain information about the inner workings of government.[3] Because the government is effectively owned and operated by the people, and because the free flow of information promotes responsible decision making, public access to government records is a hallmark of a free and democratic society.[4] In order to further the goals of an open government, and to establish some level of transparency with respect

[3] *See* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 Emory L.J. 649, 652 (1984).
[4] *See id.* at 653.

to government operations, in 1966 Congress passed the Freedom of Information Act ("FOIA" or the "Act"),[5] which essentially requires federal government agencies to make its internal documents and records available, upon request, to any member of the public.[6] Despite its numerous various limitations and exemptions,[7] the FOIA effectively serves as a conduit through which information flows from the government to the public, through requests made by both individuals and by the press, which later informs the public.[8]

While the FOIA applies only to agencies of the federal government, the same underlying principles have been recognized by state legislatures. Starting with Wisconsin in 1849,[9] today all fifty states have some sort of sunshine law which provides public access to government documents and records.[10] Because these sunshine statutes differ significantly from state-to-state, making generalizations as to the substance of the laws is particularly difficult, but the structure of a sunshine statute is relatively standard across states. Such statutes typically begin with a blanket edict that requires each state agency to promulgate rules and procedures to make its internal records and documents available to the public and to appropriately handle such requests in a timely manner.[11] Following the general open-records provisions, the statutes then proceed to enumerate a list of specific exemptions – categories of documents that are not subject to disclosure.[12] Typical exemptions often include personal information about state citizens[13] or

[5] 5 U.S.C. § 552 (2000).
[6] *Id.* at § 552(a).
[7] *See id.* at § 552(b) (enumerating nine specific exemptions).
[8] Michael D. Akers, Gregory J. Naples & Luke J. Chiarelli, *Federal and State Open Records Laws: Their Effects on the Internal Auditors of Colleges and Universities*, 3 Marq. Sports L.J. 161, 164 (1993).
[9] John A. Kidwell, *Open Records Laws and Copyright*, 1989 Wis. L. Rev. 1021, 1027 (1989).
[10] The Freedom of Information Center, *State FOI Laws*, http://foi.missouri.edu/citelist.html (accessed Nov. 17, 2004).
[11] *See e.g.* Ohio Rev. Code Ann. § 149.43(B) (Anderson 2004).
[12] *See e.g.* Kan. Stat. Ann. § 45-221(a) (2003).
[13] *See e.g.* W. Va. Code § 29B-1-4(2) (2004).

employees,[14] internal legislative work products,[15] library records,[16] trade secrets submitted to states in compliance with various regulatory requirements,[17] information that, if disclosed, could cause bodily injury or death,[18] and records and documents created in preparation for litigation.[19]

When a request for documents under a sunshine request is made, the state agency must determine whether the requested materials fall within one of the enumerated exemptions. If they do not, most statutes require that the agency provide responsive information with a specified period of time, or simply allow the requester to review the documents, in the case of an in-person request.[20] For requests made by mail, in order to defray the costs of duplication and fulfillment, agencies are generally permitted to charge a reasonable fee for the request.[21] If disclosure of the requested materials is statutorily prohibited, the request will ordinarily be denied in writing along with the reason(s) for such denial.[22] Although a detailed discussion of the judicial review process for sunshine statute denials is beyond the scope of this paper, it is important to note that a requester who believes his or her request was wrongfully denied by a state agency may usually appeal that decision.[23]

B. Problems for State Universities

Sunshine laws should be of particular interest to technology transfer personnel at state-owned universities. As agencies of the state government, universities are normally

[14] *See e.g.* 5 Ill. Comp. Stat. 140/7 (b)(ii) (2004).
[15] *See e.g.* 1 Me. Rev. Stat. Ann. § 402(3)(C) (2004).
[16] *See e.g.* Colo. Rev. Stat. 24-72-204(3)(a)(VII) (2004).
[17] *See e.g.* Idaho Code § 9-340D(1) (2004).
[18] *See e.g.* N.Y. Pub. Off. Law § 87(2)(f) (Consol. 2004).
[19] *See e.g.* Ohio Rev. Code. Ann. §149.43(A)(5).
[20] *See e.g. id. at* § 149.43(B).
[21] *See e.g.* Fla. Stat. § 119.07(4)(a)(1) (2004).
[22] *See e.g.* Mo. Rev. Stat § 610.023(4) (2004).
[23] *See e.g.* Or. Rev. Stat. Ann. § 192.440(5) (2003).

subject to the sunshine laws of their respective states.[24] While compliance with sunshine laws as a functional matter is probably no more onerous for an academic institution than any other state agency, application of document disclosure laws presents unique challenges in the area of academic research and the transfer of technologies that are derived from such research. Specifically, there are two ways in which sunshine statutes might adversely affect the university. First, industrial research sponsors often require investigators at the university to use confidential or proprietary data, and because that data becomes incorporated into university-owned documents and records as part of the research program,[25] such data might conceivably be made publicly available through a request under the sunshine law. This potential for public release of otherwise confidential information might lead some companies to not fund public university research programs, thereby decreasing the quality and diversity of a university's research portfolio.

The second potential problem arises after a research program is underway, as it generates inventive discoveries that might be worthy of patent protection. Because the invention disclosures submitted by investigators to the technology transfer office are

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[24] Most statutes provide a broad description of what constitutes a state agency. For example, North Carolina's sunshine law provides that a public agency is:

> … every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

N.C. Gen. Stat. § 132-1(a) (2004).

[25] Just like *supra*, n. 24, most sunshine statutes also incorporate a relatively broad definition of what constitutes a public record. Delaware's definition, for instance, defines a public record as:

> … information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.

Del. Code Ann. tit. 29, § 10002(g) (2004).

university-owned records or documents,[26] such materials may be subject to disclosure under a properly made sunshine law request. If such disclosure takes place prior to the filing of a patent application, it would most likely start the clock running on the commonly known "one year bar" as described in § 102(b) of the Patent Act.[27] Thus, conformity with a state's sunshine law could force a university to make a quick and perhaps ill-founded decision as to the patentability of a particular invention disclosure or risk losing the ability to claim patent rights in the disclosed subject matter.

Because of the potential for serious implications on the academic research and technology transfer activities of state-owned educational institutions, sponsored research program staffers and technology transfer personnel should be familiar with the relevant laws of their state and the internal sunshine law compliance procedures set forth by the university administration. As discussed in part III, *infra*, such awareness and understanding will help public universities craft internal guidelines and processes that aim to maximize the institution's research opportunities and intellectual property rights, while simultaneously ensuring compliance with state sunshine law mandates.

II. A Survey of the Statutory Landscape

Because of the tremendous diversity that exists among the several states' sunshine statutes, a survey of relevant state laws is useful. After a review of all fifty state sunshine

[26] *See supra*, n. 25.

[27] 35 U.S.C. § 102 (2000) states, in pertinent part, that:

> A person shall be entitled to a patent unless…(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, *more than one year prior to the date of the application for patent* in the United States… (emphasis added).

statutes, it became clear that the exemptions applicable to universities can be divided into four distinct categories:[28]

- "Research Encouraging" statutes include specific exemptions to the document disclosure requirements which are specifically intended to protect academic research programs and their work products.
- "Research Friendly" statutes provide exemptions for more generalized categories of documents such as those which contain trade secrets or confidential business information. These exemptions, though not specifically directed at academic research, could be plausibly used to protect industrial data and research work product.
- "Research Supporting" statutes include language that might plausibly protect research work products, but are less protective than Research Friendly statutes and may require some additional support or favorable judicial interpretation of the statutory language to support the university's position.
- "Research Unfriendly" statutes offer no language that can be reasonably construed to protect academic research work products.

A. Research Encouraging Statutes

Eighteen states[29] have sunshine statutes that include specific exemptions intended to shield industrial trade secrets and academic research work products from disclosure. Arguably the strongest and most comprehensive Research Encouraging statute hails from

[28] Although the taxonomy used here is unique to this paper, the notion of categorizing sunshine laws based on levels of protection or openness is relatively commonplace. *See e.g.* Akers, *supra*, n. 8 (describing various categorization schemes for sunshine laws); *see also* Marion Brechner Citizen Access Project, University of Florida College of Journalism and Communications, http://www.citizenaccess.org (accessed Nov. 19, 2004) (developing a "weather forecast" model for categorizing sunshine laws).

[29] Colorado, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, South Carolina, Utah, Vermont, and Virginia.

Michigan, the only state to have apparently passed a specific, named legislative act to shield academic research from disclosure under the sunshine law. Passed in 1994, the Confidential Research Information Act ("CRIA")[30] amended the state's sunshine law to add provisions that protect both information provided to a university by outside research sponsors as well as creations of the university staff and faculty.[31]

The first part of the Michigan CRIA extends protection to:

> … trade secrets, commercial information, or financial information … that is provided to a public university or college by a private external source and that is in the possession of the public university or college in the performance of a lawful function is exempt from disclosure as a public record under the [sunshine statute].[32]

In order to qualify for the exemption, the information must be used in various academic pursuits, including research or teaching,[33] and generally, must meet the definition of a trade secret.[34] The university must, however, maintain a "general description of the information to be received" from the external sponsor that must be disclosed in lieu of the confidential information itself, should a request be made under the sunshine statute.[35]

The Michigan CRIA also protects research work products in an effort to preserve the intellectual property rights available to the university. Specifically, the CRIA endeavors to allow faculty and students an opportunity to disseminate their work "… in a timely manner in a forum intended to convey the information to the academic community"[36] before requiring disclosure under the sunshine statute. Similarly, the

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[30] 1994 Mich. Acts 248
[31] Mich. Comp. Laws §§ 390.1553-4 (2004).
[32] *Id.* at § 390.1553(1).
[33] *Id.* at § 390.1553(1)(a).
[34] *Id.* at §§ 390.1553(1)(b), (c).
[35] *Id.* at § 390.1553(1)(d).
[36] *Id.* at § 390.1554(1)(a).

statute provides that copyrightable works need not be disclosed pursuant to a sunshine request "until a reasonable opportunity is afforded for the author to secure copyright registration, not to exceed 12 months from the date the work is first fixed in a tangible medium of expression."[37] Records disclosing patentable subject matter are also shielded from the disclosure requirements "until a reasonable opportunity is provided for the inventor to secure patent protection,[38] not to exceed five years from the date the records are first made."[39] University trade secrets are always exempt from disclosure, provided they are maintained in confidence and have "potential commercial value."[40]

The provisions in the Michigan CRIA demonstrate the state's recognition of the value of academic research and industrial research partnerships as well as the importance of maximizing the university's available intellectual property protection. But while the Michigan sunshine statute contains the most complete research oriented exemption of all the states, a number of others also contain language designed specifically to encourage academic research and transfer of technological innovation out of the university and into industry.

Georgia's exemption language, though less comprehensive than Michigan's, is nevertheless specifically targeted at protecting university research from discovery under the sunshine statute. It specifically exempts "information of a proprietary nature, produced or collected by or for faculty or staff of state institutions of higher learning…" as well as trade secrets provided to such institutions in furtherance of academic

[37] *Id.* at § 390.1554(1)(b).
[38] It is interesting to note the use of the phrase "inventor" in this context, since in most cases of academic research, the inventor is not the party securing patent protection. Rather, the university typically files the patent application pursuant to its obligations under the Bayh-Dole Act. *See generally* 35 U.S.C. §§ 200-12.
[39] Mich. Comp. Laws § 390.1554(1)(c).
[40] *Id.* at § 390.1554(1)(d).

activities.[41] The exemption notes it applies, but is not limited to, "information provided by participants in research, research notes and data, discoveries, research projects, methodologies, protocols, and collective works."[42] Colorado's exemption contains similar language, preventing disclosure of "trade secrets … furnished by or obtained from any person"[43] and the "specific details of bona fide research projects being conducted by a state institution."[44] Maryland's statute also protects trade secrets[45] and specifically mentions "research projects"[46] and records relating to "inventions owned by [s]tate public institutions of higher education,"[47] with language that appears to target confidential invention disclosures.

The Illinois, Indiana, Kentucky, Nebraska, New Jersey, and Virginia statutes also contain language protecting both trade secrets and university research work products, specifically.[48] Interestingly, the New Jersey statute specifically enumerates documents or records "relat[ing] to the development or testing of any pharmaceutical or pharmaceutical delivery system"[49] as protected from the sunshine law. Another section of the statute expressly protects "biotechnology trade secrets."[50] These targeted provisions are not surprising when one considers the high concentration of pharmaceutical companies located in the state,[51] and may be particularly helpful for New Jersey-based public

[41] Ga. Code Ann. § 50-18-72(b)(1) (2004).
[42] *Id.* at § 50-18-72(b)(2).
[43] Colo. Rev. Stat. § 24-72-204(3)(a)(IV).
[44] *Id.* at § 24-72-204(2)(a)(III).
[45] Md. St. Govt. Code Ann. § 10-617(d) (2004).
[46] *Id.* at § 10-618(d).
[47] *Id.* at § 10-618(h).
[48] 5 Ill. Comp. Stat. §§ 140/7(1)(g), (v); Ind. Code. §§ 5-14-3-4(a)(4), (6) (2004); Kan. Stat. Ann. §§ 61.878(1)(b), (c); Neb. Rev. Stat. § 84-712.05(3) (2004); N.J. Stat. Ann. § 47:1A-1.1 (2004); Va. Code Ann. § 2.2-3705.4(3) (2004).
[49] N.J. Stat. Ann. § 47:1A-1.1.
[50] *Id.* at § 47:1A-1.2.
[51] *See generally* Patricia A. Piermatti & Mie Ling Lo, *New Jersey Pharmaceutical, Cosmetic, and Health Companies Directory*, http://www.scc.rutgers.edu/njpharm/ (accessed Nov. 20, 2004).

institutions working on various biotechnology and pharmaceutical programs with industry sponsors.

Several other states in the Research Encouraging category feature exemptions that may not mention university research specifically, but recognize the importance of protecting the end results. Utah's statute, for example, specifically exempts trade secrets,[52] and also "materials to which access must be limited for purposes of securing or maintaining the governmental entity's proprietary protection of intellectual property rights including patents, copyrights, and trade secrets."[53] The Kansas statute includes similar language, guarding "records involved in the obtaining and processing of intellectual property rights that are expected to be, wholly or partially vested in or owned by a state educational institution"[54] from public disclosure. Oklahoma's statute prohibits the release of information "related to research, the disclosure of which could affect the conduct or outcome of the research, the ability to patent or copyright the research, or any other proprietary rights any entity may have in the research or the results of the research."[55] Delaware's statute does not mention university research activities, but specifically excludes the state universities from the definition of a "public body" thereby limiting public access to research related documents.[56]

B. Research Friendly Statutes

[52] Utah Code Ann. §§ 63-2-204(1), (2) (2004).
[53] *Id.* at § 63-2-204(36).
[54] Kan. Stat. Ann. § 45-221(a)(34).
[55] Okla. Stat. tit. 51, § 24A.19(1) (2004).
[56] Del. Code Ann. tit. 29, § 10002(d) (the statute specifically *includes* activities of the Board of Trustees and documents related to the "expenditure of public funds" presumably in recognition of the fundamental democratic principles that gave rise to the concept of public access to government documents and records.)

Seventeen states[57] have sunshine statutes that provide generalized exemptions that might be used by universities to protect academic research work products from disclosure. These statutes typically include language protecting trade secrets, commercial information, or proprietary data, but fall short of expressly protecting academic research work product, or a university's intellectual property rights. Most frequently, these exemptions mention "trade secrets"[58] but provide little guidance as to what, exactly, is protected, leaving wide latitude for interpretation.

Trade secrets are typically the subject matter of state law, and therefore the precise definition varies among states.[59] Despite the differences, however, a nearly universal requirement for maintenance of a trade secret is that it actually remains a secret.[60] But because of the inherently open and progressive environment of most academic institutions, it is unlikely that the subject matter of most research programs can remain confidential. As students come and go and as professors and investigators talk to colleagues, information regarding various aspects of ongoing research undoubtedly seeps out and becomes public knowledge, thereby terminating any trade secret protection that may exist. As a result, it is questionable whether the mere presence of a trade secret exemption in the sunshine statute is sufficient to fully protect the efficacy of university research and technology transfer.

Some Research Friendly states have crafted exemptions that are slightly more specific and that may be beneficial to academic institutions. Montana, for example,

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[57] California, Connecticut, Idaho, Iowa, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, Rhode Island, South Dakota, Texas, Washington, West Virginia, Wisconsin, and Wyoming.
[58] *See e.g.* Del. Code Ann. tit. 29, § 10002(g)(2) (exempting from disclosure "trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature").
[59] Many states have adopted some version of the Uniform Trade Secrets Act, as amended.
[60] As defined in the Uniform Trade Secrets Act § 1(4)(ii), a trade secret must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

specifically mentions "trade secrets"[61] but continues to prescribe a balancing test, effectively prohibiting the release of documents if the "individual privacy interest"[62] would "clearly exceed[] the merits of public disclosure."[63] Although academic research likely would not rise to the level of an individual privacy interest, a university facing a disclosure request under this type of statute might apply the notion of balancing competing state interests to argue against the disclosure.

Washington's law features a similar provision, protecting, in addition to trade secrets,[64] "valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss."[65] Although not aimed at academic research specifically, this provision would likely protect university research work product prior to publication, particularly if the requester were seeking to leverage the disclosed technologies or developments for private commercial gain.

The statutes in this category have been termed Research Friendly simply because they include terms that are favorable to the maintenance of trade secrets. As discussed throughout this paper, however, the protection of proprietary information from industrial research sponsors is but one factor associated with a legal climate that encourages academic research programs. Because most of the statutes in this category do not provide any sort of protection for research work products, they only address one half of the problem faced by public universities. It is unclear how universities operating in this kind

[61] Mont. Code Ann. § 2-6-102(3) (2004).
[62] *Id.*
[63] *Id.*
[64] Wash. Rev. Code § 42.17.310(1)(fff) (2004).
[65] *Id.* at § 42.17.310(1)(h).

of legal environment would defend themselves against request for public disclosure of research results, data, or invention disclosures.

C. Research Supporting Statutes

Nine states[66] have sunshine statutes that include language that might plausibly protect research work products, but the effectiveness of such language is arguable. Arkansas, for example, features specific language in its sunshine statute exemptions preventing the disclosure of records which "if disclosed would give advantage to competitors … "[67] From the statutory context, however, it appears that this exemption is actually designed to protect against the release of bid documents submitted as part of a competitive bidding process for state contract. A university might argue, however, that disclosure of confidential information provided by an industrial research sponsor under a sunshine request could provide competitors of the industrial sponsor with an unfair advantage. Moreover, since the university effectively "competes" in the technology licensing market, allowing invention disclosures to be publicly disclosed might also arguably create an unfair advantage in other players in the technology licensing market by having access to the intimate details of university developments before the university has an opportunity to secure patent protection.

Hawaii has a similarly broad exemption, declaring that documents "that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function."[68] The applicability of this statute to a university research or technology transfer context would almost certainly hinge on the definition of "legitimate government function." The mere presence of state-owned and state-funded

[66] Alabama, Arizona, Arkansas, Hawaii, Louisiana, Maine, Minnesota, Oregon, and Pennsylvania.
[67] Ark. Code Ann. § 25-19-105 (b)(9)(A) (2003).
[68] Haw. Rev. Stat. § 92F-13 (2003).

universities demonstrates that higher education is a legitimate government function, and since research programs and the innovations that flow from them are necessarily intertwined with contemporary higher education, it is a logical extension to suggest that research programs are likewise a "legitimate government function." Continuing the extension, a university might reasonably argue that the protection of confidential industry data and information, and the preservation of a university's intellectual property options vis-à-vis invention disclosures, both critical components of academic research, would be considered a "legitimate government function."

Other states in the Research Supporting category, like Maine and Pennsylvania, have ambiguous sunshine exemption language relating to the "internal use only" nature of certain documents and records. Pennsylvania's statute, for example, excludes from disclosure "any report, communication or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties."[69] But while academic research could reasonably be considered an official duty of a state university, it is less clear whether the specific concerns at issue here, namely the protection of proprietary industrial data, and the preservation of future intellectual property rights are likewise considered official duties. The Bayh-Dole Act,[70] however, requires universities to use licensing revenues to either pay the inventor(s) or support further teaching and research.[71] Thus, preserving future intellectual property rights by virtue of preventing public disclosure of research work products prior to filing a patent application, albeit indirectly, supports an official government duty by promoting effective research programs at state owned universities.

[69] 65 Pa. Consol. Stat. Ann. § 66.1 (2004).
[70] 35 U.S.C. §§ 200-12.
[71] 37 C.F.R. § 401.14(k)(2) (2004) (regulations promulgated under authority granted in 35 U.S.C. § 206).

Though somewhat creative (or rather weak, depending on one's perspective), the statutory interpretations discussed here are not unlike the arguments an academic institution would be advised to make were it attempting to avoid disclosure of sensitive research related material under a sunshine law request if forced to operate in a Research Supporting statutory climate.

D. Research Unfriendly Statutes

Only six states[72] have sunshine statutes which have no language that can be reasonably construed to protect academic research work products. Massachusetts offers limited protection to certain classes of documents by regulation,[73] but provides nothing generally applicable to universities. Tennessee's sunshine statute exempts "capital plans, marketing information, proprietary information and trade secrets"[74] but only those which are "submitted to the Tennessee venture capital network at Middle Tennessee State University"[75] which provides only narrow protection for a limited range of documents and records.

Some state statutes, while indicating at least some respect for the unique environment in which state universities operate, fall short of providing the exemptions that rise to the level of Research Supporting, Friendly, or Encouraging statutes. Alaska's sunshine statute, for example, does not contain a blanket trade secret exemption, nor does it include any language specific to academic research, but it does contain a tangentially related exemption for "records … required to be kept confidential under 20 U.S.C.

[72] Alaska, Florida, Massachusetts, Nevada, New Hampshire, and Tennessee.
[73] *See e.g.* 980 Code Mass. Regs. 4.01 (protection of trade secrets submitted to the Energy Facilities Siting Council).
[74] Tenn. Code. Ann. § 10-7-504(a)(10)(A) (2004).
[75] *Id.*

1232g[76] and the regulations adopted under 20 U.S.C. 1232g[77] in order to secure or retain federal assistance."[78] Although the cited sections of the United States Code deal with the confidentiality of student records, and have nothing to do with academic research or technology transfer documents, the mere presence of this language in the sunshine statute demonstrates the legislature's cognizance of state-level obligations to maintain access to certain federal funds.

The presence of such legislative awareness suggests that as lawmakers become more familiar with the particular needs of the public university setting, states that are currently classified as Research Unfriendly might begin to pass the requisite statutory exemptions or promulgate applicable regulatory exemptions in support of university research and technology transfer activities. Until that time, however, public institutions of higher learning in Research Unfriendly states must attempt to operate as best they can within the pertinent statutory constraints.

III. Implications for University Technology Transfer

This paper is designed to provide only a broad overview of the applicable laws throughout the United States. Many of the statutes discussed herein are lengthy and detailed, and while a discussion of each law's nuances reaches beyond the scope of the present discussion, it is imperative that those working in the field of academic research or technology transfer, either on the university side or the industrial side, become familiar with the specific laws of the relevant jurisdictions. Appendix 1 provides a list of each state's sunshine statute as well as the pertinent exceptions, if any, that apply to the academic research and technology transfer community.

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[76] "Family educational and privacy rights"
[77] *Id.*
[78] Alaska Stat. § 40.25.120(a)(5) (2004).

What follows in this section is a series of "best practices" – thoughts and guidelines for how public universities can seek to maximize research and technology transfer opportunities while simultaneously ensuring compliance with the relevant state statutes. First and foremost, university personnel involved in securing or administering industrially sponsored research programs and licensing technologies out of the university should be familiar with the basic provisions and relevant definitions of the state's sunshine statute; this includes the nature of information required to be disclosed under the statute as well as the exemptions relevant to the university setting. Staff familiarity with the statutory language is essential to ensure that when entering into research agreements with industrial sponsors, the university does not make untenable promises regarding the confidentiality of data or results of to track the relevant statutory language in the applicable portion of the research agreement. In cases where exemptions apply, universities must take care to ensure that the industrial sponsor is familiar with the specific terms of the sunshine statute and the situation(s) under which disclosure may be required. Failure to inform third parties of the university's possible disclosure obligations or to draft language that takes into account such obligations could result in contract liability for the university, should a sunshine request involve industrially sponsored research.

Beyond mere recognition of the issues and understanding of the applicable statutes, public universities should develop internal procedures for complying with requests made under a sunshine statute to ensure that there are no inadvertent disclosures of otherwise exempt information. Administrators charged with managing sunshine requests, together with academic research and technology transfer personnel should craft

a sunshine compliance process that allows for a comprehensive review of each request involving research-related materials by research and technology transfer professionals to prevent disclosure of materials that might qualify for a statutory exemption.

In addition to the specific university-oriented language discussed in part II, *supra*, many sunshine statute provide generalized exemptions for particular information that might apply to certain research programs based on the subject matter of the specific program. Indiana's law exempts records which, if disclosed, "would have a reasonable likelihood of threatening public safety by exposing a vulnerability to a terrorist attack."[79] A research program that involves some sort of terrorism prevention or preparation might seek a disclosure exemption under this portion of the statute.

Similarly, Washington's sunshine statute provides an example for "[s]ensitive wildlife data obtained by the department of fish and wildlife,"[80] which might apply to university research programs relating to certain environmental issues. In Iowa, records "concerning the nature and location of any archaeological resource or site if … disclosure of the information will result in unreasonable risk of damage to or loss of the resource or site …,"[81] which might also provide some support to universities seeking to prevent disclosure of certain research documents.

Although these three statutes are merely illustrative, they serve to provide universities with an example of the types of exemptions that exist in many sunshine statutes that go beyond specific university-protecting language or basic trade secret exemptions. In states where the regulatory or statutory climate is less than encouraging to public academic research and technology transfer, university personnel may need to

[79] Ind. Code § 5-14-3-4(a)(19).
[80] Wash. Rev. Code § 42.17.310.
[81] Iowa Code § 22.7(20).

turn to creative arguments under statutory language such as those presented in the preceding paragraph.

Even with a comprehensive sunshine compliance management program in place, and well-trained staff who recognize and understand the issues related to public disclosure of research-related materials, universities remain constrained by the statutory language of their state. Ultimately, the power rests with the state legislatures. States that desire state universities to become centers for scientific and technological innovation will pass the requisite statutes to shield certain documents from public scrutiny, much as the state statutes described in the Research Encouraging section of this paper[82] currently provide. As industrial research sponsors and public university faculty and staff become aware of the potential problems they face under some states' sunshine statutes, it is logical and reasonable to believe that the level of academic research and residual out-licensing may be somewhat suppressed because sponsors fear their confidential and proprietary data may be released, or inventions derived from the research are made publicly available thereby limiting the potential for efficacious intellectual property protection.

This paper has presented an overview of the problems public universities face with respect to state sunshine statutes. It was designed to provide the academic research and technology transfer community with a look into an area of law that tends go be ignored until a particular problem arises. By understanding the nature of state sunshine laws and the position of public universities within the statutory framework, university faculty, staff, and the industrial sponsors that promote university research can make more informed decisions about how to best structure a specific research program. Similarly,

[82] *See supra*, § II. A.

with an understanding of the research problems, university administrators can fortify internal compliance procedures to prevent unintentional disclosure of materials that would qualify under a statutory exemption. Finally, universities in states without exemptions to benefit researchers or technology transfer offices can lobby their respective legislatures to pass appropriate legislation to protect the confidentiality of research data and invention disclosures. Altogether, increased awareness of sunshine statutes and appropriate responses from universities and industry will help ensure that the modern public university remains a driving force in the development and deployment of new technologies well into the future.

APPENDIX A: SUNSHINE STATUTES AND EXEMPTIONS

State	Category (see § II, *supra*)	Sunshine Statute (document disclosure portion; initial section)	Exemption Most Relevant to Academic Research
Alabama	Supporting	Ala. Code § 36-12-40	Ala. Code § 36-12-40
Alaska	Unfriendly	Alaska Stat. § 40.25.110	None
Arizona	Supporting	Ariz. Rev. Stat. § 39-101	Ariz. Rev. Stat. § 39-103
Arkansas	Unfriendly	Ark. Code. Ann. § 25-19-105	None
California	Friendly	Cal. Govt. Code Ann. § 6250	Cal. Civil Code. Ann. § 3426.7
Colorado	Encouraging	Colo. Rev. Stat. § 24-72-201	Colo. Rev. Stat. § 24-72-702
Connecticut	Friendly	Conn. Gen. Stat. § 1-18a	Conn. Gen. Stat. § 1-210
Delaware	Encouraging	Del. Code. Ann. tit. 29, § 10001	Del. Code. Ann. tit. 29, § 10002(g)(2)
Florida	Unfriendly	Fla. Stat. § 119.01	None
Georgia	Encouraging	Ga. Code Ann. § 58-18-70	Ga. Code Ann. § 50-18-72(b)(1)
Hawaii	Supporting	Haw. Rev. Stat. § 91-1	Haw. Rev. Stat. § 92F-13
Idaho	Friendly	Idaho Code § 9-337	Idaho Code § 9-340D
Illinois	Encouraging	5 Ill. Comp. Stat. § 116	5 Ill. Comp. Stat. §§140/7(g), (v)
Indiana	Encouraging	Ind. Code § 5-14-3-1	Ind. Code §§ 5-14-3-4(a)(4), (6)
Iowa	Friendly	Iowa Code § 22.1	Iowa Code § 22.7(3)
Kansas	Encouraging	Kan. Stat. Ann. § 45-215	Kan. Stat. Ann. § 45-221(a)(34)
Kentucky	Encouraging	Ky. Rev. Stat. Ann. § 61.872	Ky. Rev. Stat. Ann. §§ 61.878(1)(b), (c)
Louisiana	Supporting	La. Stat. Ann. § 44:1	La. Stat. Ann. § 44:4.1
Maine	Supporting	1 Me. Rev. Stat. Ann. § 402	1 Me. Rev. Stat. Ann. § 402(2)(E)
Maryland	Encouraging	Md. St. Gov. Code Ann. § 10-611	Md. St. Gov. Code Ann. §§ 10-617(d), (h)
Massachusetts	Unfriendly	Mass. Gen. Laws ch. 66, § 10	None
Michigan	Encouraging	Mich. Comp. Laws. § 15.231	Mich. Comp. Laws. § 390.1551
Minnesota	Supporting	Minn. Stat. § 13.01	Minn. Stat. § 13.37
Mississippi	Friendly	Miss. Code Ann. § 25-61-1	Miss. Code Ann. §§ 25-61-9(1), (3)
Missouri	Friendly	Mo. Rev. Stat. § 610	Mo. Rev. Stat. § 610.021
Montana	Friendly	Mont. Code Ann. § 2-6-101	Mont. Code. Ann. § 2-6-102
Nebraska	Encouraging	Neb. Rev. Stat. § 84-712	Neb. Rev. Stat. § 84-712.05
Nevada	Unfriendly	Nev. Rev. Stat. § 239	None
New Hampshire	Unfriendly	N.H. Rev. Stat. Ann. § 91-A	None
New Jersey	Encouraging	N.J. Stat. Ann. § 47:1A-1	N.J. Stat. Ann § 47:1A-1.1
New Mexico	Friendly	N.M. Stat. Ann. § 14-2-1	N.M. Stat. Ann. § 14-2-19A
New York	Friendly	N.Y. Pub. Off. Law § 84	N.Y. Pub. Off. Law § 87
North Carolina	Friendly	N.C. Gen. Stat. § 132-1	N.C. Gen. Stat. § 132-1.2
North Dakota	Encouraging	N.D. Cent. Code § 44-04-18	N.D. Cent. Code 44-04-18-18.4
Ohio	Encouraging	Ohio Rev. Code Ann. § 149.43	Ohio Rev. Code. Ann. § 149.43
Oklahoma	Encouraging	Okla. Stat. tit. 51, § 24A.1	Okla. Stat. tit. 51, § 24A.19
Oregon	Supporting	Or. Rev. Stat. Ann. § 192.410	Or. Rev. Stat. Ann. § 192.502
Pennsylvania	Supporting	65 Pa. Consol. Stat. Ann. § 66.1	65 Pa. Consol. Stat. Ann. § 66.1
Rhode Island	Friendly	R.I. Gen. Laws § 38-2-1	R.I. Gen. Laws § 38-2-2
South Carolina	Encouraging	S.C. Code Ann. § 30-4-10	S.C. Code Ann. § 30-4-40
South Dakota	Friendly	S.D. Codified Laws § 1-27-1	S.D. Codified Laws § 1-27-3
Tennessee	Unfriendly	Tenn. Code Ann. § 10-7-503	None
Texas	Friendly	Tex. Govt. Code Ann. § 552	Tex. Govt. Code Ann. § 552.110
Utah	Encouraging	Utah Code Ann. § 63-2-101	Utah Code Ann. § 63-2-304
Vermont	Encouraging	Vt. Stat. Ann. tit. 1, § 315	Vt. Stat. Ann. tit. 1, § 317
Virginia	Encouraging	Va. Code Ann. § 2.1-340	Va. Code. Ann § 2.2-3705.4
Washington	Friendly	Wash. Rev. Code § 42.17.010	Wash. Rev. Code § 42.17.310
West Virginia	Friendly	W. Va. Code § 29B-1-1	W. Va. Code § 29B-1-4
Wisconsin	Friendly	Wis. Stat. § 19.31	Wis. Stat. § 19.36
Wyoming	Friendly	Wyo. Stat. Ann. § 16-4-201	Wyo. Stat. Ann. § 16-4-203