

Freedom of Information Requests and Peer Review Reports

Jaime A Teixeira da Silva and Panagiotis Tsigaris

In this commentary, we briefly assess the legal context of Freedom of Information (FOI) requests, such as the Canadian Freedom of Information and Protection of Privacy Act (FIPPA), within peer review. FOI/FIPPA requests to government institutions need to be carefully vetted, while the privacy of both the applicant and subject should be protected. FOIs related to misconduct are valid, but those that are based merely on inquisitiveness or that seek access to confidential emails and information, are contentious. We believe that access to “research material”, including emails, should be limited to misconduct investigations.

In some countries, it is possible to request information from a government institution such as a public university, via FOI requests, about records at such institutions. FOI requests are associated with issues of accountability and transparency of government operations,¹ but they may also encompass clauses regarding the protection of privacy, both of the applicant and of the subject of the FOI request, such as the FIPPA in each Canadian province, for example, in British Columbia (BC).²

FOI requests cover records that are only under the public body's control and custody, such as the operation and administration of a governing body. Researchers who work at a public university conduct their own research, teach students, and spend time for service. These 3 functions result in records that belong to the researchers and are not the property of the public university, and so should be excluded from FOI requests to protect the researchers' academic freedom and intellectual property. In academic publishing, FOI requests might be associated with misconduct investigations, such

as to gain access to raw data or email communications in an ethics investigation, or to gain insights such as through investigative journalism.³ As one example, FOIA/FIPPA requests were used to find evidence of deceitful articles, careless coauthors, and editors that violated Committee on Publication Ethics (COPE) standards.⁴ In this opinion paper, we briefly discuss whether journals' peer review reports can or should be accessed via FOI requests.

Journals that claim to be peer reviewed, and where open peer review is not used, protect such reports by confidentiality clauses. According to COPE, this confidentiality may apply to peer reviewers, who should not disclose such reports publicly during peer review and are encouraged to request permission from the journal and/or authors when posting after the article has been published.⁵ Many COPE member journals and publishers expect the complete confidentiality of peer reviewer reports by all parties (authors, peer reviewers, editors), including, for example, the Public Library of Science,⁶ Springer Nature,⁷ and Wiley.⁸ The International Committee of Medical Journal Editors (ICMJE) encourages the protection of the confidentiality of all documents related to the peer review process (see clause II. C. 2. a. of the ICMJE Recommendations).⁹

An FOI request for peer reviewer reports from a public university is not the appropriate channel to access such information. Rather, the information should be requested from the publisher, via the journal's editor. If applicants of such FOI requests should contact the authors directly and request reports, it is then up to the authors to decide whether they are willing to share these with the requesting party. However, if authors do so, would they not be violating the publisher's confidentiality agreement?

In addition, FOI exemption of research material protects faculty's academic freedom and scholarly communication in order to pursue new knowledge without the risk of harassment and intimidation.¹⁰⁻¹³ The exchange of information between authors, reviewers, and editors of journals are one such record. For example, the BC FIPPA (2022) Act does not apply to any record that contains research material of a faculty member, as per section 3.(3)(i)(i).² Unfortunately, the FIPPA Act does not define what constitutes “research material”. Materials are typically used to create or to develop research and include any tangible medium such as data, documents, records, email exchanges, software programs, and

Jaime A. Teixeira da Silva (<https://orcid.org/0000-0003-3299-2772>; jaimetex@yahoo.com) is an independent researcher, Kagawa-ken, Japan. Panagiotis Tsigaris (<https://orcid.org/0000-0002-7965-4554>; ptsigaris@tru.ca) is with the Department of Economics, Thompson Rivers University, Kamloops, British Columbia, Canada.

Opinions expressed are those of the authors and do not necessarily reflect the opinions or policies of the Council of Science Editors or the Editorial Board of Science Editor.

<https://doi.org/10.36591/SE-D-4604-07>

CONTINUED

outcomes.¹⁴ Certainly, peer reviewer reports are research material and are thus exempt from FIPPA requests. In fact, the public body should not have control nor custody over any research material, including peer reviewer (i.e., referee) reports and emails.

Even government agencies that conduct research should be protected from intrusive FOI requests for research material and peer review reports. The U.S. Court of Appeals, District of Columbia Circuit court case *Formaldehyde Institute v. Department of Health & Human Services (HHS) No. 88-5383* in 1989 ruled in favor of the HHS withholding the disclosure of a research review letter as part of the FOIA.¹⁵ Because the letter was pre-decisional and a part of the agency's deliberative process, exemption 5 applied.¹⁵

We are of the opinion that requests for information related to peer review reports of journals that do not practice open peer review are incompatible with confidentiality clauses that are in place by such journals and are not under the custody or control of the public body because they are research material and the property of individual reviewers because they typically do not sign over copyright.¹⁶ FOI requests are increasingly being associated with politicized acts of harassment and intrusiveness, so they threaten the stability of academic research institutes, at least in the United States.¹³

Disclaimer

The authors, the first being an independent scientist and the second working at a Canadian public university, declare no conflicts of interest. The second author has been the subject of FIPPA-based requests.

References and Links

1. Special Committee to Review the Freedom of Information and Protection of Privacy Act. FIPPA for the future. [accessed November 17, 2023]. Legislative Assembly of British Columbia, 2022. https://www.leg.bc.ca/content/CommitteeDocuments/42nd-parliament/3rd-session/fippa/report/SC-FIPPA-Report_42-3_2022-06-08.pdf.
2. British Columbia Freedom of Information and Protection of Privacy Act (BC FIPPA) (2022). Freedom of Information and Protection of Privacy Act [RSBC 1996] CHAPTER 165. [accessed November 17, 2023]. King's Printer, 2022. https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96165_00.
3. Oransky I. What we've learned from public records requests. Please help us file more. [accessed November 17, 2023]. Retraction Watch, April 19, 2022. <https://retractionwatch.com/2022/04/19/what-weve-learned-from-public-records-requests-please-help-us-file-more/>.
4. Pickett JT. The Stewart retractions: a quantitative and qualitative analysis. *Econ Journal Watch*. 2020;17:152-190.
5. Committee on Publication Ethics (COPE) (2017). COPE ethical guidelines for peer reviewers. Version 2, 2022. <https://doi.org/10.24318/cope.2019.1.9>.
6. Public Library of Science (PLOS). Confidentiality. In: Ethical publishing practice. [accessed November 17, 2023]. <https://journals.plos.org/digitalhealth/s/ethical-publishing-practice#loc-confidentiality>.
7. Springer Nature. Confidentiality. [accessed November 17, 2023]. <https://www.nature.com/commsbio/editorial-policies/confidentiality>.
8. Wiley. Wiley peer review policy. [accessed November 17, 2023]. <https://authorservices.wiley.com/Reviewers/journal-reviewers/tools-and-resources/review-confidentiality-policy.html>.
9. International Committee of Medical Journal Editors (ICMJE). Recommendations for conduct, reporting, editing, and publication of scholarly work in medical journals. [accessed November 17, 2023]. <https://www.icmje.org/icmje-recommendations.pdf>.
10. O'Neil R. Academic freedom and freedom of information requests. American Association of University Professors, 2011. [accessed November 17, 2023]. <https://www.aaup.org/NR/rdonlyres/FF153796-0DFD-4B44-8C11-6B0D91607F92/0/Academic-FreedomandFOIARequests.pdf>.
11. Peters J, Davis CN. When open government and academic freedom collide. *First Amendment Law Review*. 2013;12:295-324. [accessed November 17, 2023]. <https://scholarship.law.unc.edu/falr/vol12/iss1/6>.
12. Greenberg Z. The chilling effect of sunlight: preserving academic freedom in the face of abusive open records requests. *George Mason University Civil Rights Law Journal*. 2019;29:145-174. [accessed November 17, 2023]. https://sls.gmu.edu/crlj/wp-content/uploads/sites/16/2019/03/GMC203_crop-1.pdf.
13. Polsky C. Open records, shuttered labs: ending political harassment of public university researchers. *UCLA Law Review*. 2019;66:208-293. [accessed November 17, 2023]. <https://www.uclalawreview.org/wp-content/uploads/securepdfs/2018/12/66.1.4-Polsky.pdf>.
14. Bogre M, Wolff N. (2020). Copyright basics: what you think you know may not be true. In: Bogre M, Wolff N, eds. *The Routledge companion to copyright and creativity in the 21st century*. Routledge, 2020:3-14.
15. United States Court of Appeals, District of Columbia Circuit. *Formaldehyde Institute v. Department of Health & Human Services (HHS) No. 88-5383*, 1989. [accessed November 17, 2023]. <https://casetext.com/case/formaldehyde-institute-v-dhhs>.
16. Committee on Publication Ethics (COPE). (2017). Who 'owns' peer reviews? 2017. <https://doi.org/10.24318/rouP81d4>.