

# Balancing Academic Confidentiality and Transparency: The Peer Review Dilemma

Ryan Jessup

Transparency, or the idea of governments and businesses being open and honest, is crucial for society, and the United States' Federal Freedom of Information Act<sup>1,2</sup> (FOIA) as well as Canada's Freedom of Information and Protection of Privacy Act<sup>3</sup> (FIPPA) have been key safeguards allowing citizens to access records from federal agencies that would otherwise be unavailable. The center of the discussion since 1967 has been how the U.S.'s FOIA legislation mandates federal agencies to disclose requested information unless it falls under 1 of 9 exemptions that safeguard interests like personal privacy, national security, and law enforcement. In the academic sphere, a tension currently exists between confidentiality and transparency, particularly concerning confidential peer review reports, which are essential for maintaining the quality of scholarly work and ensuring academic integrity. This article explores the complex issue of balancing the public's right to know and the need for confidentiality in the academic sphere as the pivotal question emerges: Should confidential peer review reports<sup>4</sup> be subject to public disclosure and governed by FOIA/FIPPA?

One reason we empower individuals to seek information from government entities, including public universities, is to augment transparency and accountability within the public sector, for example, government contracts. These contracts, paid to private citizens by the government, are common at federal, state, and local levels. They serve various purposes but are primarily linked to governance and administrative functions like maintaining a public park, performing research, or serving a specific constituent interest such as feeding the homeless. Requests for disclosure records regarding these government contracts are different from private organization requests because they encompass records that are under

the control and custody of public bodies, even though a private citizen has performed the work.

This distinction is particularly relevant in academia, where researchers may be associated with public, nonprofit, or private universities. These scholars undertake multifaceted roles or contracts, encompassing research, teaching, and service, generating records intrinsically tied to the researchers themselves rather than solely belonging to the public university. Omitting such records from FOIA requests becomes essential to safeguard academic freedom and intellectual property.

However, FOIA requests possess legitimate applications, particularly in the realm of academic publishing. They can be instrumental in cases of alleged misconduct, offering access to unprocessed data or electronic correspondence for ethical investigations or investigative journalism. FOIA/FIPPA requests have played a significant role in unveiling deceptive articles, negligent coauthors, or editorial lapses that contravene ethical standards. One example of a FOIA request for a confidential peer review was The Fourth Assessment Report<sup>5</sup> of the Intergovernmental Panel on Climate Change (IPCC), which was targeted by climate change skeptics as they denied the truthfulness of the reports conclusions. The FOIA request was denied—but in 2009, a hacker obtained and unlawfully distributed a large number of records from the University of East Anglia's Climatic Research Unit.<sup>6</sup> Commonly referred to as "Climategate", the records contained private peer review drafts and emails between climate experts. Climate change skeptics then twisted the traditional peer review discussion and suggested scientific fraud and data manipulation. Even though the release of these confidential peer review reports were *not* delivered through a formal disclosure request of any type, it sparked debate and moral dilemmas regarding the privacy and confidentiality of scientific communication.

For a request to be honored, it is *vital* to distinguish publicly funded/nonprofit institutions<sup>7</sup> from private entities/nonprofit companies which are not subject to FOIA when considering any request for a peer review report.<sup>8</sup>

Two persuasive examples include:

1. H 3931 General Bill, By Herbkersman,<sup>9</sup> which attempted to amend the code of laws of South Carolina to require that

Ryan Jessup (<https://orcid.org/0009-0006-6913-202X>) is Owner and Executive Agent, SWB Consultants.

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any nonprofit receiving more than \$100 in public funds must make their expenditure reports publicly available.

2. *Sec. 31.054 Public Access to and Removal of Papers*,<sup>10</sup> in which Texas legislators scrutinized a contract between the state of Texas and two 501(c)(3) nonprofit organizations, including one charged with preserving and maintaining the Alamo, and raised concerns about transparency. They eventually decided that government contracts are open to scrutiny and public access, whereas nonprofit organizations engaged in such contracts operate differently.

Now, what we see in example 2 is that although nonprofit organizations are obligated by the IRS to submit annual Form 990 informational returns, donor information remains confidential. Furthermore, nonprofit organization board meetings are not open to the public, prompting legislators and citizens to question the influence on these organizations.<sup>11</sup>

In the realm of academic peer review, akin to the Alamo contract case, state governments confront a substantial loophole that permits state agencies and nonprofit organizations to potentially exploit taxpayer trust and money. This underscores the importance of striking a balance between confidentiality and transparency to ensure accountability across all sectors in which taxpayer funds are at stake. As governments increasingly contract with private nonprofits<sup>12</sup> and publicly funded or for-profit academic research institutions, the equilibrium between the public's right to know how its money is spent and the contractors' right to safeguard proprietary and confidential information warrants continued examination.<sup>13</sup>

In conclusion, the question of whether confidential peer review reports should be subject to FOIA/FIPPA laws, or other public disclosure requests, is intricate and is also impacted by the state in which the request is generated (in U.S. cases). Although transparency holds undeniable value, it necessitates a delicate balance with the preservation of academic research and individual privacy. Traditional indications lean toward scholars and organizations concurring that peer review reports should remain confidential even in a publicly funded/nonprofit academic research setting; however, maybe things are changing.

Accordingly, if you want to see peer review reports, you should try a careful approach. Instead of only using FOIA and disclosure requests, consider other options such as talking to publishers about their internal policies and consider how your local state laws might impact your request. If we don't find a balance between transparency and confidentiality, it could be risky for academic research institutions, which would have to limit the academic freedom or privacy of faculty members in public universities.

Below are some tips to find out more about the process of acquiring disclosure of confidential peer review reports under FOIA or similar public disclosure requests—please

note that each process can vary depending on the specific circumstances and the laws in place in a given jurisdiction. The following are some general considerations:

1. **FOIA or similar laws.** Confidential peer review reports may be directly subject to FOIA or similar public disclosure requests depending on the relevant jurisdiction's laws. FOIA laws typically apply to federal, state, or local government agencies, but exemptions and requirements can vary.<sup>14</sup>
2. **Exemptions.** FOIA is subject to 9 exemptions that safeguard interests like personal privacy, national security, and law enforcement. Similar laws from state to state often contain other exemptions, exceptions, or loopholes that can be another path to pierce safeguards for specific types of information traditionally kept from public disclosure. This can include confidential peer review reports, deliberative process, personnel records, and business information. These exemptions will vary from federal to state to local agencies as well.<sup>15</sup>
3. **Balancing test.** Agencies may provide confidential peer review reports if they find a need to balance public interest with confidentiality based on case facts and potential harm or benefit.
4. **State and local laws.** State laws and local jurisdictions can differ, so it is crucial to understand your jurisdiction's specific laws, as some have unique public records laws similar to FOIA style requests.<sup>16</sup>
5. **Protecting privacy and confidentiality.** Like the public interest vs. confidentiality balancing test in item 3 above, there is also a balance between privacy and confidentiality in which peer review processes often involve sensitive information, requiring confidentiality protection to ensure candid assessments and evaluations. This test can be another option to acquire disclosure of confidential peer review reports.
6. **Legal counsel.** When deciding whether peer review reports should be disclosed, it is advisable to seek legal counsel familiar with FOIA or relevant public disclosure laws, as legal experts can provide guidance on these complex issues and how the state or local policies impact your request.
7. **Redaction.** Peer review reports can be redacted before release in response to FOIA requests, protecting sensitive information while still allowing some level of disclosure. A federal, state, or local jurisdiction can be encouraged to redact some information if it helps meet any of the balancing tests that have been applied but failed.

*\*DISCLAIMER: Confidential peer review reports' subjectivity to FOIA or public disclosure requests depends on laws,*

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report nature, and public interest. Consulting legal experts and following regulations is crucial for handling such requests.

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