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July 22, 1975

The Honorable Robert J. Cornell
House Office Building
Washington, D. C. 20515

Dear Congressman Cornell:

Re: Freedom of Information Act

As a result of the Circuit Court of Appeal's decision in the Washington Research Project case some nine months ago, non-commercial research proposals which are submitted to federal agencies for possible funding are open to public inspection under the Freedom of Information Act. The Freedom of Information Act exempts matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (Section 552(b)(4)). While we are generally in favor of disclosure of public records (indeed, some of our research depends on such disclosure) the unlimited application of this law to research involving potentially patentable discoveries and to research proposals during the review process causes extreme difficulties for our faculty and staff. Obviously, full access to information in the hands of government has a very high social utility and value. On the other hand, in limited circumstances, this value must be balanced against possible harm. Two particular instances of situations in which we firmly believe that the public interest is best served by non-disclosure are discussed below.

First, from our standpoint as an educational institution the most important difficulty in the Freedom of Information Act is that public access to research proposals prior to final action on those proposals by the agency involved may have detrimental effects on the evaluation process and the awarding of grants to the most competent individuals and institutions. Researchers who have developed unique ideas upon which continuation of their research funding depends or which may lead to patents or have other value to them would have cause to be reluctant to disclose this information fully in their proposals if such disclosures were to be generally available. Faculty on this campus, and at other institutions as well, feel a perfectly normal selfish interest in their ideas up to the point that the review system has determined to fund them or reject them. Disclosure under the Freedom of Information Act will likely inhibit rather than foster disclosure at this stage. This may lead to greater difficulty in reviewing proposals and force reviewers to depend on information which is not on the record. In addition, it may undercut the peer review system which is presently used in agencies such as the National Institutes of Health and the National Institutes of Mental Health. This peer review system, which has been a major force in shaping the quality research effort in this country, is dependent upon total disclosure, and total disclosure has traditionally been dependent upon total confidentiality in order to prevent an academic researcher's ideas from being exploited by others, whether they be commercial or academic competitors in the United States or abroad.

Moreover, public access to a researcher's proposals constitutes an invasion of that researcher's privacy. Many university researchers spend significant amounts of time (often research progress occurs over a lifetime) developing ideas and methodologies which they hope to test through the acquisition of federal funds. To make these ideas and methodologies accessible so that anyone can use the material to develop his own proposals without having had to expend the time to develop them seems to be a high price to pay for federal funding. Such a situation is likely to have a detrimental effect on researchers' willingness to come forward with creative individual ideas. Interestingly enough, the burden of the Act is placed only on those who are in the academic or non-profit situation, while not being imposed on those in a commercial setting. This seems to be grossly unfair.

Second, we believe that premature public access may have significant adverse impact in the area of potentially patentable discoveries. When information disclosing the nature of a process or product which may be patentable becomes available to the public, "publication" under patent law has occurred. This act of "publication" itself is generally a bar to obtaining a patent in most foreign countries. Thus, unless a U. S. patent application had been filed before such disclosure was made, U. S. inventors and developers would be unable to obtain foreign patents. This could significantly reduce the incentive to develop and make available certain processes and products. In the long run, this may have an adverse effect on the national interest and may contribute to our balance of payments difficulties.

Under United States patent law one normally has a year to secure a patent following publication. Publication of inventive concepts at a preliminary stage of development jeopardizes patent rights in this country. Many of our research proposals are under consideration for periods in excess of one year. Consequently, if the information contained in a research proposal is generally available to the public at the time that it is submitted to a federal agency the time for filing a patent application on any inventive concepts embodied in such proposal will have run prior to the time that further development or consideration may have been possible.

We are concerned because such a loss of patent protection will often remove the incentive to develop and put into marketable form processes and products which are generated through basic research. Thus, the public ultimately loses since they are never able to realize the tangible results from research which may be funded by government agencies. In general, the absence of patent protection most often results in no commercial development of the invention, which, in turn, means that the benefits of the research will not be made available to the public. I have attached a brief description of one case arising on this campus which is clearly illustrative of the incentive supplied by the patent system in promoting the transfer of technology from the University environment to the public benefit. Similar examples are available on this campus and elsewhere.

In conclusion, it seems to us that material involving potentially patentable discoveries and inventions and research proposals which are under review or which have been rejected by federal agencies are two areas in which a limited exemption from the Freedom of Information Act would, in effect, operate to foster the public interest. Members of my staff and I would be glad to assist you as you work on these problems and if you would like further information on this issue we would be happy to supply it. My understanding is that various educational and research groups have made proposals in this area. In general, we would be in favor of amendments to the Act which would meet the concerns expressed above.

Sincerely,

Edwin Young

Edwin Young
Chancellor

cc: President John C. Weaver
Dean Robert Bock
Mr. Robert Gentry
Mr. E. O. Rosten
NASULGC
ACE
AAU

Attachment