WHEN THE PUBLIC DOES NOT HAVE A RIGHT TO KNOW: HOW THE CALIFORNIA PUBLIC RECORDS ACT IS DETERRING BIOSCIENCE RESEARCH AND DEVELOPMENT

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ABSTRACT

Many bioscience firms collaborate with public research universities to conduct innovative research through sponsored research agreements. Companies sponsoring this research usually require strict confidentiality from their academic partners in order to protect sensitive information that, if revealed, could put them at a competitive disadvantage and threaten their ability to obtain future patents. Yet, ambiguous disclosure requirements in the California Public Records Act preclude California's public research universities from guaranteeing that proprietary information provided in connection with sponsored research agreements will remain confidential. Entering into such agreements with public universities in California is therefore a risky proposition for the sponsors. This iBrief argues that unless this is corrected, many of these public/private partnerships, which often lead to significant advances in science and medicine, may be deterred.

INTRODUCTION

¶1 Competition among the states for a share of the burgeoning bioscience industry is fierce.[3] While the San Francisco Bay Area, Boston,

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[3] The terms "biotechnology" and "bioscience" are related and often used interchangeably, but understanding the distinction between the two is important. The biosciences are a "range of industry sectors relying on insights into the way living organisms function." BIOTECHNOLOGY INDUSTRY ORGANIZATION, LABORATORIES OF INNOVATION: STATE BIOSCIENCE INITIATIVES 2004 5 (2004), *available at* http://www.bio.org/local/battelle2004/main_report.pdf [hereinafter

New Jersey, the Baltimore/Washington, DC region, North Carolina's Research Triangle, and San Diego have traditionally been "the nation's premier bioscience centers," their dominant positions are no longer secure.[4] In 2001, fourteen states had "identified the biosciences as an economic development opportunity."[5] By 2004, forty states had targeted the biosciences for development.[6]

¶2 Nevertheless, California is still the national leader in bioscience research and development. In 2002, California was home to 410 biotechnology firms, representing 30% of the U.S. market.[7] Massachusetts came in second with 210.[8] California is also home to 23% of Americans involved in cutting-edge research and testing.[9] This is far more than its closest competitors, Illinois and Massachusetts, which respectively host only 8.6% and 6.9% of these researchers.[10] However, a hole in California's public records laws may be hampering the state's ability to take full advantage of this intellectual capital.

¶3 In order to succeed, bioscience companies require (1) strong academic research institutions conducting basic research in the biosciences, (2) access to public and private early-stage capital, (3) the ability to turn government funded research into successful commercial products, (4) specialized research facilities, (5) a "highly skilled workforce," and (6) a

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LABORATORIES OF INNOVATION]. These sectors include agriculture livestock and chemicals, drugs and pharmaceuticals, medical devices and equipment, research and testing, and academic health centers, hospitals and research institutes. *Id.* Biotechnology, on the other hand, refers to "the application of molecular and cellular processes to solve problems, conduct research, and create goods and services." *Id.* Hence, "biosciences" refers to a group of industries all engaged in the life sciences, while "biotechnology" is a classification of products produced by certain subsectors of the general bioscience industry.

[4] *See id*. at 23; Clint Riley, *N.J. Must Fend Off Research Rivals*, NORTHJERSEY.COM, June 21, 2005, http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjczN2Y3dnFlZUVFeXk3MDImZmdiZWw3Zjd2cWVlRUV5eTY3MTA3MzMmeXJpcnk3ZjcxN2Y3dnFlZUVFeXky; *Boston, San Francisco Bay Area and Greater Philadelphia Are Top Life Sciences Clusters in the U.S., New Milken Institute Study Shows*, BUSINESS WIRE, June 20, 2005, http://www.businesswire.com.

[5] LABORATORIES OF INNOVATION, *supra* note 3, at vii.

[6] *Id.* at 28-29.

[7] OCCUPATIONAL RESEARCH UNIT, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, UNDER THE MICROSCOPE: BIOTECHNOLOGY JOBS IN CALIFORNIA 17 (2004), *available at* http://www.calmis.cahwnet.gov/file/occmisc/Biotech-Part1.pdf.

[8] *Id.*

[9] LABORATORIES OF INNOVATION, *supra* note 3, at 20.

[10] *Id.*

"stable and supportive public policy structure."[11] States have adopted a wide range of public policy strategies designed to cultivate these six ingredients. Some of the most common examples include tax incentives, grants, public/private partnerships, and direct investment in corporate research parks and public research universities. Another important, yet little-known, policy tool is ensuring that bioscience firms can partner with government entities, particularly public research universities, without fearing that sensitive research and development information will be made public.

¶4 The ability of a public university to protect such information is particularly important in the context of sponsored research agreements ("SRAs"), where private corporations with a need for outside expertise, resources, or technologies fund research projects at large research universities.[12] In a typical SRA, the corporate sponsor reveals confidential and proprietary information to university researchers as necessary to facilitate the sponsored research. For example, a pharmaceutical company might disclose a proprietary drug target or candidate to enable university researchers to generate data useful in the development process. For the sponsor, the risk of entering into these agreements is that public disclosure of such information would undercut substantial investments by the sponsor and place the sponsor at a competitive disadvantage. Early disclosure may also prevent a research corporation from obtaining a patent on the disclosed target, candidate or method.[13] Consequently, SRAs usually contain strict confidentiality clauses restricting the disclosure of sponsor information and research results.

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[11] INT'L BUS. DEV. SECTION, CANADIAN EMBASSY, BIOTECHNOLOGY MARKET STUDY FOR THE MID-ATLANTIC STATES (2002), http://atn-riae.agr.ca/us/3729_e.htm.

[12] It is difficult to determine precisely how much research at California's public universities is funded by outside companies through SRAs, but the available data indicates that it is a substantial amount. For instance, industry-sponsored research funding at UC-Berkeley alone totaled over $26 million in FY 2005. Berkeley Campus Research Funding Reports, http://coeus.spo.berkeley.edu/guest_report.asp (last visited October 12, 2005). For FY 2001, the University of California reported that private businesses, particularly "pharmaceuticals and other research-intensive industries," provided "$235 million, or about 40 percent of private research funds to UC." UNIVERSITY OF CALIFORNIA OFFICE OF RESEARCH, FISCAL YEAR 2001 RESEARCH FUNDING AT UC 1, *available at* http://www.ucop.edu/research/publications/pdf/resfund01.pdf.

[13] An inventor may be denied a patent if the invention was described in a printed publication or otherwise used more than one year prior to filing the patent application. 35 U.S.C. § 102(a) (2000). Once a patent application is filed, it becomes public knowledge and the need for secrecy disappears.

¶5 Of course, secrecy is often contrary to the interests of university researchers, who want to advance science and benefit from these partnerships, as well. To this end, SRAs often permit academic researchers to publish the results of the sponsored research after any patent applications have been filed and the sponsor has had the opportunity to redact its own confidential corporate information.[14] Thus, the market has developed an approach to these partnerships that balances the universities' need to disseminate knowledge and advance science with the sponsors' need to protect sensitive corporate information.

¶6 This iBrief examines the extent to which the California Public Records Act[15] ("CPRA") undercuts this compromise by precluding California's public research universities from agreeing to keep trade secrets and other proprietary information confidential in the context of SRAs. Analysis will show that CPRA is one of the most lopsided public records laws in the country in terms of balancing the public's "right to know" with the need to protect confidential corporate information. The case-by-case evaluation that agencies must engage in when responding to CPRA requests effectively prevents California's public universities from agreeing to confidentiality clauses providing adequate protection of sponsor information and research results. Accordingly, under current law, counsel for the sponsors should consider advising their clients not to enter such agreements with California's public universities where the risks of the potential disclosure of its sensitive information outweigh the benefits of the research. In order to reduce or eliminate this deterrent on potentially fruitful public/private partnerships, California should amend CPRA to provide adequate protection for corporate proprietary information disclosed in connection with SRAs.

I. THE CALIFORNIA PUBLIC RECORDS ACT

¶7 CPRA was enacted in 1968 against a "background of legislative impatience with secrecy in government."[16] Largely modeled on the federal

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[14] For instance, the University of California's contracting guidelines state that while "[f]reedom to publish and disseminate results is a major criterion of the appropriateness of any research project[,] . . . [a] sponsor may seek a short delay . . . in order to comment upon and to review publications for disclosure of its proprietary data or for potentially patentable inventions." UNIVERSITY OF CALIFORNIA OFFICE OF THE PRESIDENT, GUIDELINES ON UNIVERSITY-INDUSTRY RELATIONS (May 1989), *available at* http://www.ucop.edu/raohome/cgmemos/89-20.html.

[15] CAL. GOV'T CODE § 6250 et seq. (Deering 2005).

[16] State Bd. of Equalization v. Superior Court, 13 Cal. Rptr. 2d 342, 346 (Cal. Ct. App. 1992) (citing San Gabriel Tribune v. Superior Court, 192 Cal. Rptr. 415, 420 (Cal. Ct. App. 1983)).

Freedom of Information Act,[17] CPRA was the culmination of the California legislature's long-running effort to "formulate a workable means of minimizing secrecy in government" while securing individual privacy.[18] In fulfilling this purpose, CPRA embodies a broad policy of disclosure while also exempting certain classes of documents from its requirements. This section will discuss CPRA's general provisions and the specific exemptions that may be relevant to protecting proprietary information disclosed in connection with SRAs.

A. General Provisions

¶8 In its introductory provision, CPRA declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."[19] Under CPRA, "[p]ublic records are open to inspection at all times during the office hours of the . . . agency and every person has a right to inspect any public record, except as hereafter provided," and to receive "an exact copy of an identifiable record unless [it is] "impracticable to do so."[20] The agency always bears the burden of justifying nondisclosure, and "any reasonably segregable portion . . . shall be available for inspection . . . after deletion of the portions which are exempt" from disclosure.[21]

¶9 CPRA applies to all state and local agencies, including: (1) any officer, bureau, or department; (2) any "board, commission or agency" created by an agency (including advisory boards); and (3) nonprofit entities that are legislative bodies of a local agency.[22] Public colleges and universities are also subject to CPRA's requirements.[23]

¶10 Once a request is received, an agency has 10 days to determine whether the request seeks disclosable records.[24] This may be extended no more than 14 days in "unusual circumstances."[25] If the agency determines

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[17] 5 U.S.C. § 552 (2000).
[18] *San Gabriel Tribune*, 192 Cal. Rptr. at 420.
[19] CAL. GOV'T CODE § 6250.
[20] *Id.* § 6253(a), (b).
[21] *Id.* § 6253(a).
[22] *Id.* § 6252(a), (b).
[23] *See generally* Cal. State Univ. v. Superior Court, 108 Cal. Rptr. 2d 870 (Cal Ct. App. 2001) (applying CPRA to California State University's private foundation). *See also* Caitlin M. Scully, Note, *Autonomy and Accountability: The University of California and the State Constitution*, 38 HASTINGS L.J. 927, 928 (1987) (describing how, as a public university, the University of California has autonomy over its exclusively internal affairs, but "is not free to deviate from statewide policies and laws governing such matters").
[24] CAL. GOV'T CODE § 6253(c).
[25] *Id.*

the records cannot be disclosed, the requestor must be told the name and position of each person responsible for the denial.[26] If the records are disclosable, the agency must take reasonable steps to assist the requestor in obtaining and copying the records. Requestors may bring an action in state superior court to compel disclosure of records that are improperly withheld.[27]

¶11 CPRA broadly defines "public record", encompassing "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[28] Since the operations of California's public universities, including research, are the "public's business" by virtue of being conducted at "a public facility on land owned by a public university," records relating to sponsored research are likely to be deemed "public records" unless they fall under a specific exemption.[29]

B. Exemptions

¶12 CPRA exempts certain records, in whole or in part, from its disclosure requirements. Qualifying for an exemption does not mean a record is not public, nor does it mean that disclosure is prohibited. Rather, an agency may withhold or disclose exempted records at its discretion.[30] The original owner of the information has no private right of action to compel an agency to withhold a record once the agency decides disclosure is appropriate. Moreover, whether a record is exempt is determined on a case-by-case basis and courts have refused to rule on whether records are exempt in advance of a specific request.[31]

¶13 CPRA's exemption provisions are numerous and specific. In general, CPRA exempts an agency's preliminary drafts and memoranda, records pertaining to litigation, private personal information, law enforcement information, records that are privileged under state or federal law, and records withheld in the public interest.[32] CPRA contains no

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[26] *Id.* § 6253(d).
[27] *Id.* § 6258.
[28] *Id.* § 6252(e).
[29] *See* Cal. State Univ. v. Superior Court, 108 Cal. Rptr. 2d 870, 880 (Cal Ct. App. 2001) (holding that California State University's private foundation's records were "public records" under CPRA).
[30] *See* CAL. GOV'T CODE § 6253(e) (An agency "may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.").
[31] *See* Filarsky v. Superior Court, 49 P.3d 194, 200-01 (Cal. 2002) (holding that CPRA does not permit courts to grant declaratory judgments regarding the status of a specific record prior to an actual request for disclosure).
[32] *See generally* CAL. GOV'T CODE § 6254.

specific exemption for academic or scientific research. Accordingly, since SRAs do not relate to litigation, private personal information, or law enforcement, only the privileged information and public interest exemptions could possibly apply to records pertaining to these agreements.[33]

¶14 Privileged and confidential information is protected from disclosure under CPRA by reference to the California Evidence Code's protection of privileged information.[34] Under the "official information privilege," records are protected if they are (1) acquired in confidence and not previously shared with the public, and (2) disclosure is either (a) protected or privileged under state or federal law, or (b) against the public interest.[35] Presuming that information provided to public research universities by their private research partners was acquired in confidence and not previously revealed to the public, then the ability to keep proprietary information in SRAs confidential turns on whether the information is protected by state or federal law or is against the public interest.

1. Privileged Information: Trade Secrets

¶15 One possible basis for protecting confidential information provided to the University is through the California Evidence Code's privilege for trade secrets. Section 1060 of the Evidence Code provides that "the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice."[36] California law defines a "trade secret" as

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its

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[33] CPRA does, however, specifically exempt financial information given to regulatory bodies, commercial information used for utility system development, market reports, crop reports, and information used to calculate emissions data. *Id.* §§ 6254(d), 6254(e) and 6254.7.

[34] CPRA § 6254 states:

> Except as provided in Section 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are . . . : (k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

Id.

[35] CAL. EVID. CODE § 1040(a), (b) (Deering 2005).

[36] *Id.* § 1060.

> disclosure or use; and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[37]

¶16 The leading case applying Section 1060 to CPRA is *Uribe v. Howie.*[38] *Uribe* concerned a request by a professor of entomology at the University of California at Berkeley for pest control spray reports from a county Agricultural Commissioner containing confidential information about the chemical compounds used by pesticide applicators.[39] The California Court of Appeals held that the data contained in the reports were not trade secrets because the information was available to some individuals outside the pesticide application business, such as doctors, insurance adjusters, and growers, and the applicators had not "invested any great amount of time, money, or expertise above and beyond that common to the industry to develop the pesticide mixes and the dosage levels."[40]

¶17 Although each case is evaluated independently, it is likely that proprietary information provided in conjunction with an SRA (e.g. a drug target or drug development candidate) would be considered a trade secret under Section 1060 and *Uribe*. Unlike the spray reports, such proprietary information is usually not available to others outside the company, and the information represents a significant investment of resources. Nevertheless, the analysis does not end here, for Section 1060's protection of trade secrets is conditional. Even when records contain trade secrets, courts must still evaluate whether disclosing the information is in the public's interest.[41] It is here that the privileged information analysis melds with the second prong of the Section 1040 test, which inquires whether records should be withheld in the pubic interest.

2. *Public Interest in Nondisclosure*

¶18 Two CPRA exemptions provide for the withholding of information when there is a public interest in nondisclosure. First, in addition to a record containing trade secrets, the official information privilege allows an

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[37] CAL. CIV. CODE § 3426.1(d)(1), (2) (West Supp. 2005).
[38] 96 Cal. Rptr. 493 (Cal. Ct. App. 1971).
[39] *Id.* at 495-96.
[40] *Id.* at 502. Subsequent to *Uribe*, California enacted the Uniform Trade Secrets Act. However, the Trade Secrets Act "does not affect the disclosure of a record by a state or local agency under the California Public Records Act" and determinations as to whether disclosures of trade secrets are required "shall be made pursuant to the law in effect before the operative date" of the Trade Secrets Act. CAL. CIV. CODE § 3426.7(c).
[41] *See, e.g.*, State Farm Mutual Auto. Ins. Co. v. Low, 112 Cal. Rptr. 2d 574, 585-86 (Cal. Ct. App. 2001), *aff'd*, State Farm Mutual Auto. Ins. Co. v. Garamendi, 88 P.3d 71 (Cal. 2004) (finding public interest in disclosure even though records might have contained trade secrets); *Uribe*, 96 Cal. Rptr. at 503.

agency to withhold a record if disclosure would be "against the public interest."[42] Second, Section 6255 of CPRA provides a "catchall" exemption permitting an agency to "justify withholding any record by demonstrating . . . that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."[43] Courts apply the same balancing test to both exemptions.[44] Accordingly, they will be addressed interchangeably here.

¶19 Disclosure is against the public interest when "there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice."[45] In construing the public interest, courts are guided by "a policy generally favoring disclosure of public records" and narrow construction of the statutory exceptions.[46]

¶20 In the leading case finding a public interest in nondisclosure, *Times Mirror Co. v. Superior Court*, the California Supreme Court held that a request for five years' worth of information from the governor's appointment calendars was barred by Section 6255 because such massive scrutiny would interfere with the governor's decision-making process.[47] The court's conclusion was influenced by CPRA's protection of "preliminary drafts, notes, or interagency or intra-agency memoranda" that are part of an agency's deliberative process.[48]

¶21 On the other hand, courts often find that the public interest in disclosure outweighs the public interest in nondisclosure when disclosing the information will avoid the development of "secret law" or allow the public to ensure that its resources are used effectively.[49] For instance, in *San Gabriel Tribune v. Superior Court*, the court rejected the city's argument that a waste disposal contractor's private financial statements

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[42] CAL. EVID. CODE § 1040(b)(2) (Deering 2005).
[43] CAL. GOV. CODE § 6255(a) (Deering 2005).
[44] *See, e.g.*, Cal. State Univ. v. Superior Court, 108 Cal. Rptr. 2d 870, 885 (Cal. Ct. App. 2001) (citing CBS, Inc. v. Block, 230 Cal. Rptr. 362, 368-69 (Cal. 1986)).
[45] CAL. EVID. CODE § 1040(b)(2).
[46] *State Farm*, 112 Cal. Rptr. 2d at 587.
[47] 813 P.2d 240, 252-53 (Cal. 1991).
[48] *See id.* at 248-53 (discussing § 6255 in conjunction with § 6254(a)).
[49] *See, e.g.*, State Bd. of Equalization v. Superior Court, 13 Cal. Rptr. 2d 342, 346-47 (Cal. Ct. App. 1992) (public interest in discouraging development of secret law by taxing agency outweighs agency's interest in avoiding burden of extensive redaction of records); New York Times Co. v. Superior Court, 268 Cal. Rptr. 21, 25-26 (Cal. Ct. App. 1990) (disclosing users of excess water resources ensures individuals do not receive special privileges and are not subject to discriminatory treatment).

used to evaluate a city-approved rate increase should be withheld because disclosure would have "a chilling effect on obtaining information in similar future transactions."[50] The court reasoned that this argument "mistat[ed] what the public's interest is as serving the privacy interests of a private contractor, rather than in serving the public's interest in participating in local government."[51] Accordingly, this exemption did not justify withholding the financial records.

¶22 More recently, the California Court of Appeals in *State Farm Mutual Automobile Ins. Co. v. Low* rejected an insurance company's claim that records revealing where it sells insurance policies should be withheld because "a competitor with access to its [records] could use this information to target its customers in a regional marketing strategy."[52] Although conceding that some of the records contained trade secrets, the court concluded that because the insurance industry has historically deprived racial minorities and other disadvantaged groups of access to affordable insurance, public disclosure of the information "will unquestionably serve the public interest by illuminating the debate over these practices and clarifying the scope of the problem."[53]

¶23 Applying similar reasoning to public universities, the California Court of Appeals in *California State University v. Superior Court* ordered the university to release the names of anonymous donors who received license agreements for luxury suites in the university's sports arena in exchange for their contributions.[54] The court reasoned that because the arena utilized public funds on land owned by a public university, the "public should be able to determine whether the purchase price for luxury accommodations in the arena is a fair and reasonable return on its contribution to the project" and whether "any favoritism or advantage has been afforded certain individuals or entities in connection with the license agreements."[55]

¶24 While we are aware of no case evaluating SRAs or other similar agreements, the nondisclosure of proprietary information provided in connection with SRAs is supported by arguments that are distinguishable from those rejected in the cases where such disclosure was required under CPRA. Public universities are not elected governments, so the public probably has less interest in participating in their routine affairs. Unlike the insurance industry, public universities do not have a history of widespread

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[50] 192 Cal. Rptr. 415, 424 (Cal. Ct. App. 1983).
[51] *Id.*
[52] 112 Cal. Rptr. 2d 574, 587 (Cal. Ct. App. 2001), *aff'd*, State Farm Mut. Auto. Ins. Co. v. Garamendi, 88 P.3d 71 (Cal. 2004).
[53] *Id.* at 586.
[54] 108 Cal. Rptr. 2d 870, 873 (Cal. Ct. App. 2001).
[55] *Id.* at 886.

discriminatory practices requiring heightened public scrutiny. Finally, should proprietary information be disclosed, California's public universities could potentially lose millions of dollars in research funding that would go to private universities or to other states more willing to protect the information.

¶25 Nevertheless, the overall tenor of the cases dealing with trade secrets and public interest exemptions indicates that it is still uncertain whether a public university would be able to withhold much of the information relating to an SRA. *California State* recognized a strong public interest in monitoring the activities of publicly funded universities. Moreover, while public research universities in California do not share the insurance industry's history of discrimination, accusations of improper conflicts of interest between faculty and private industry could nonetheless lend credence to arguments favoring public scrutiny of confidential university matters.[56]

¶26 Thus, although it is possible if not probable that proprietary information given to public universities in the context of an SRA will remain private, universities are in no position to guarantee confidentiality to a prospective research partner. Recognizing this, in a published response to the frequently asked question "How can I assure collaborators that the information I gain through my research will be held in confidence?," counsel for the University of California concedes that "[y]ou cannot provide 100% assurances of confidentiality, because you can never be certain that a court will not require you to produce records pursuant to the Public Records Act."[57]

¶27 As a result, confidentiality clauses with public universities in California typically contain an exclusion from the university's obligation to maintain the confidentiality of the sponsor's confidential information where such disclosure is required by CPRA. For example, in a publicly available 2002 agreement between Nanosys, Inc. and University of California (UC), Berkeley:

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[56] *See* Clint Riley, *Secrecy Shrouds Taxpayer-Supported Research; Industry's Closed-Door Culture Raises Ethics Concerns*, NORTHJERSEY.COM, June 20, 2005, http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjczN2Y3dnFlZUVFeXkzJmZnYmVsN2Y3dnFlZUVFeXk2NzEwMzc5JnlyaXJ5N2Y3MTdmN3ZxZWVFRXl5Mg (documenting controversy surrounding confidential research agreements and conflicts of interest at New Jersey's public research universities).

[57] MARIA SHANLE, UNIVERSITY COUNSEL, INFORMATION PRACTICES – FREQUENTLY ASKED QUESTIONS 2 (2002), *available at* http://ucce.ucdavis.edu/files/filelibrary/5220/19937.pdf.

> Neither party may disclose the terms of this Agreement to a third party without express written permission of the other party, except when required under either the California Public Records Act or other applicable law or court order.[58]

¶28 The lack of predictability reflected in this example makes disclosing sensitive information to public research universities a risky proposition for the disclosing party. Even if one of California's public universities wanted to protect confidential records, what information California courts would require to be disclosed is unclear. This uncertainty may hamper the ability of academic and bioscience industry researchers to collaborate on mutually beneficial research projects.

¶29 The impediments of CPRA's ambiguous disclosure requirements are not unknown to California lawmakers. Recently, California's public pension funds were excluded from investing in certain private equity investment funds "due to the risk of disclosure of information [the private funds] consider confidential and proprietary but that they provide to the public institutional investors in the course of doing business."[59] This prompted the California legislature to pass legislation exempting this information from disclosure and to provide "guidance on what is and what is not disclosable under [CPRA]."[60] The remainder of this iBrief will explore how CPRA could be similarly amended to provide certainty to bioscience firms entering into SRAs with public research universities.

II. COMPARISON WITH SIMILAR STATE AND FEDERAL LAWS

¶30 Drafters of public records laws have all wrestled with achieving an appropriate balance between protecting proprietary information and the public's interest in transparency. Nevertheless, CPRA's failure to protect confidential research information is unique among comparable "right-to-know" laws. This saddles California's public universities with a significant disadvantage in the national competition to attract bioscience research dollars. To illustrate how this is so and provide insights into how CPRA could be amended, we will compare CPRA to its federal counterpart, the Freedom of Information Act and the public records law of New Jersey, which is one of California's largest competitors in bioscience research.

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[58] License Agreement for Nanocrystal Technology Between Nanosys, Inc. and The Regents of the University of California through the Ernest Orlando Lawrence Berkeley National Laboratory § 14.2 (Oct. 2002), *available at* http://contracts.onecle.com/nanosys/uc.lic.2002.11.09.shtml.

[59] CAL. ASSEMB. COMM. ON GOV'T ORGANIZATION, ANALYSIS OF S.B. 439 4 (June 21, 2005), *available at* http://www.legislature.ca.gov/cgi-bin/port-postquery?bill_number=sb_439&sess=CUR&house=B&author=simitian.

[60] *Id.* at 5. *See* S.B. 439, 2005-2006 Sess. (Cal. 2005) (as passed by the State Senate on May 31, 2005 and the State Assembly on August 25, 2005).

A. Federal Freedom of Information Act

¶31 CPRA was largely modeled on the federal Freedom of Information Act ("FOIA").[61] FOIA's "legislative history and judicial construction . . . thus serve to illuminate the interpretation of its California counterpart."[62] Nevertheless, there are substantial differences in how FOIA and CPRA each treat confidential and proprietary information. Most importantly, the FOIA exhibits much more concern for private interests in confidentiality in determining whether records may be withheld than does CPRA. To illustrate these differences, this section will look at FOIA's exemption for trade secrets and confidential information and then examine the disclosure policies adopted by federal agencies pursuant to this exemption.

1. FOIA Exemption 4

¶32 FOIA Exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[63] Two types of documents fall under this exemption: "(1) trade secrets, and (2) information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential."[64] The definition of trade secrets mirrors that used by California courts.[65] Information is privileged and confidential if disclosure is likely "(1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[66] Some circuits have adopted a more lenient standard for voluntarily submitted information, finding this information to be confidential so long as it "would customarily not be

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[61] 5 U.S.C. § 552 (2000).
[62] Times Mirror Co. v. Superior Court, 813 P.2d 240, 247 (Cal. 1991) (internal quotations omitted).
[63] 5 U.S.C. § 552(b)(4).
[64] Lawrence Kaplan, Annotation, *What Constitutes "Trade Secrets and Commercial or Financial Information Obtained from Person and Privileged or Confidential," Exempt from Disclosure under Freedom of Information Act*, 139 A.L.R. FED. 225, 244 (rev. 2004).
[65] *See id.* at 276.
[66] *Id.* at 254. *See, e.g.*, Lion Raisins, Inc. v. U.S. Dept. of Agric., 354 F.3d 1072, 1081 (9th Cir. 2004) (permitting the withholding of raisin handler's line check sheets and sampling information under competitive position prong because disclosure would reveal to competitors in bidding competition the type and volume of raisins produced at a particular time); Orion Research, Inc. v. E.P.A., 615 F.2d 551, 554 (1st Cir. 1980) (permitting the withholding of technical information contained in proposals submitted in connection with a government contract under impairment prong because disclosure would "induce potential bidders to submit proposals that do not include novel ideas").

released to the public by the person from whom it was obtained."[67] In those circuits, the two-pronged test is used only when the provider was obligated to provide the information.[68]

¶33 Unlike in California, no balancing of the public interest is required once a federal court analyzing a FOIA request determines that information is either a trade secret or confidential. As the U.S. Supreme Court noted in *FBI v. Abramson*, "Congress thus created a scheme of categorical exclusion; it did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis."[69] This makes revealing sensitive information to the federal government much less risky for the disclosing party than to California state agencies.

2. Agency FOIA Compliance

¶34 FOIA requires federal agencies to adopt their own policies for compliance with its disclosure requirements. A number of agencies that regularly deal with sensitive corporate information have adopted subject-matter specific regulations protecting this information from disclosure. The University of California's CPRA disclosure policy merely restates CPRA's general exemptions without providing further clarification.[70] The SEC, by contrast, states that it will not "[d]isclose trade secrets and commercial or financial information obtained from a person and privileged or confidential."[71] Careful to remove any uncertainty from the process, the SEC regulations go on to specify precisely which corporate documents are protected from disclosure.[72]

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[67] *See* McDonnell Douglas Corp. v. N.A.S.A., 180 F.3d 303, 304 (D.C. Cir. 1999) (quoting Critical Mass Energy Project v. Nuclear Reg. Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992)).

[68] Kaplan, *supra* note 64, at 265; *Critical Mass*, 975 F.2d at 879.

[69] Kaplan, *supra* note 64, at 279 (quoting F.B.I. v. Abramson, 456 U.S. 615, 631 (1982)).

[70] *See generally* UNIVERSITY OF CALIFORNIA BUSINESS AND FINANCE BULLETINS, RMP-8, LEGAL REQUIREMENTS ON PRIVACY OF AND ACCESS TO INFORMATION (July 1, 1992), *available at* http://www.ucop.edu/ucophome/policies/bfb/rmp8.html.

[71] 17 C.F.R. § 200.80(b)(4) (2005).

[72] The regulation applies to:

> (i) Information contained in letters of comment in connection with registration statements, applications for registration or other material filed with the Commission, replies thereto, and related material which is deemed to have been submitted to the Commission in confidence or to be confidential at the instance of the registrant or person who has filed such material unless the contrary clearly appears; and

¶35 The FTC likewise expands upon FOIA's general trade secrets and confidential information exemption. Its FOIA regulations specify that pursuant to Exemption 4 the FTC will not disclose "competitively sensitive information, such as costs or various types of sales statistics and inventories;" nor will it disclose "trade secrets in the nature of formulas, patterns, devices, and processes of manufacture, as well as names of customers in which there is a proprietary or highly competitive interest."[73]

¶36 Just as the federal court jurisprudence interpreting Exemption 4 provides parties with a certain level of predictability in knowing what information might be disclosed, so do the SEC and FTC FOIA regulations. The FOIA regime thus provides corporations who disclose confidential information to the federal government a level of security and stability that California universities cannot currently hope to match under CPRA.

B. New Jersey's Open Public Records Act

¶37 In addition to the federal government, many states have included in their open records laws exemptions for trade secrets and confidential information. Unlike California, at least twenty states have provisions that specifically relate to academic, scientific or technical research.[74] New Jersey, which is one of California's leading competitors in attracting bioscience research, has several particularly strong exemptions covering academic and life sciences research.[75] Comparing the treatment of confidential research information in New Jersey's Open Public Records Act ("OPRA")[76] with CPRA shows just how weak California's protection is.

> (ii) Information contained in any document submitted to or required to be filed with the Commission where the Commission has undertaken formally or informally to receive such submission or filing for its use or the use of specified persons only . . . ; and
>
> (iii) Information contained in reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of or in connection with an examination or inspection of the books and records of any person or any other investigation.

Id.

[73] 16 C.F.R. § 4.10(a)(2) (2005).

[74] *See* Tammy L. Lewis & Lisa A. Vincler, *Storming the Ivory Tower: The Competing Interests of the Public's Right to Know and Protecting the Integrity of University Research*, 20 J.C. & U.L. 417, 455-60 (1994) (surveying the confidentiality clauses in state open records laws).

[75] For example, California and New Jersey each "account for 13% of total employment in the drugs and pharmaceutical" industry. LABORATORIES OF INNOVATION, *supra* note 3, at 13.

[76] N.J. STAT. ANN. § 47:1A-1 et seq. (West 2003).

¶38 OPRA's overall policy of making all government records public and accessible upon request is similar to that of CPRA. Yet, while CPRA's protection of trade secrets and other confidential information is conditional at best, OPRA contains a number of virtually airtight exemptions for confidential research information and trade secrets.

¶39 Similar to CPRA, OPRA contains general exemptions for "trade secrets and proprietary commercial or financial information obtained from any source" and "information which, if disclosed, would give an advantage to competitors or bidders."[77] However, OPRA also has a specific "biotechnology exemption" providing that a "public agency shall not make any biotechnology trade secrets and related confidential information it has access to under this act available to any other public agency, or to the general public, except as allowed pursuant to federal law."[78] Additionally, OPRA includes a comprehensive exemption for academic research, which states:

> A government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privileged and confidential:
>
> [P]edagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available . . . .[79]

¶40 OPRA case law is not very developed because the New Jersey Government Records Council adjudicates most disputes administratively. From the few available administrative decisions concerning these exemptions, it is clear that non-disclosure of trade secrets is the norm. For instance, in the one reported decision utilizing the academic research exemption, the Council held that Rutgers University did not have to disclose copies of responses to a questionnaire conducted as part of a crop damage survey.[80] The mere fact that the research was "conducted under the

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[77] *Id.* § 47:1A-1.1.
[78] *Id.* § 47:1A-1.2(b).
[79] *Id.* § 47:1A-1.1.
[80] Rosenbaum v. Rutgers Univ., G.R.C. Complaint No. 2002-91 (Jan. 23, 2004), *available at* http://www.nj.gov/grc/decisions/2002-91.html.

auspices of a public higher education institution in New Jersey" was sufficient to support non-disclosure.[81]

¶41 Both the language of the exemptions and the administrative decisions interpreting them show that New Jersey is much more protective of confidential research information than California. Whereas California's courts are required to constantly balance the public's interest in disclosure versus nondisclosure, New Jersey courts only weigh the public interest in disclosure when parties try to circumvent OPRA by asserting the common law right to access public records.[82] Unlike in California, this balancing test weighs against disclosure when there is a "legitimate private interest" in confidentiality.[83] Much of the statutory protection of confidential information, particularly the biotechnology exemption, appears to be part of a concerted effort by New Jersey policymakers to make the state a favorable place for biotechnology companies to operate.[84] In contrast, CPRA provides strong disincentives for companies to do business with California's pubic research universities.

CONCLUSION

¶42 Compared to its federal and state counterparts, CPRA is weak when it comes to protecting confidential and proprietary information. There are no hard exemptions for confidential corporate information, biotechnology or academic research, and even information that is nominally protected may be disclosed upon a showing that there is a public interest in disclosure. The resulting uncertainty provides a potentially significant disincentive for bioscience firms to partner with California's public research universities because CPRA trumps the ability of the parties to properly balance by contract the university's need to release information with the sponsor's need to keep certain information secret, at least until a patent application is filed in appropriate cases.

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[81] *Id. See also* Renna v. County of Union, G.R.C. Complaint No. 2003-100 (Mar. 8, 2003), *available at* http://www.nj.gov/grc/decisions/2003-100.html (holding that county properly withheld Xerox's proposal to provide copying services because it contained proprietary information and disclosure would have given and unfair advantage to competitors).

[82] *See, e.g.*, Bergen County Improv. Auth. v. N. Jersey Media Group, Inc., 851 A.2d 731, 742 (N.J. Super. Ct. App. Div. 2004) (finding a public interest in disclosure of audited financial statements of public hospital's management services providers).

[83] Keddie v. Rutgers Univ., 689 A.2d 702, 710 (N.J. 1997). *Cf.* San Gabriel Tribune v. Superior Court, 192 Cal. Rptr. 415, 424 (Cal. Ct. App. 1983) (stating that the public interest does not serve "the privacy interests of a private contractor").

[84] *See* Riley, *supra* note 56.

¶43 Admittedly, no empirical research has been conducted to show how much sponsored research is actually deterred by CPRA-related concerns. Indeed, California's public universities currently participate in many sponsored research projects despite the possibility of disclosure. However, this may be largely because the gaps in CPRA and potential consequences are not widely known and no court has ruled on how CPRA's exemptions apply to SRAs. Just as private equity firms fled from California's public pension funds following one adverse ruling requiring disclosure of confidential corporate information, California's public research universities may be one adverse ruling away from losing substantial sponsored research funding.

¶44 Accordingly, CPRA should be proactively amended to adequately protect the confidential intellectual property of bioscience firms who work with California's public universities. An excellent model is provided in the California Stem Cell Research and Cures Bond Act of 2004,[85] enacted as part of Proposition 71, which dedicated $3 billion over 10 years to stem cell research. The statute protects confidential information provided by researchers to the California Institute for Regenerative Medicine in connection with grant applications by exempting from disclosure under CPRA:

> Records containing or reflecting confidential intellectual property or work product, whether patentable or not, including, but not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information, which is not patented, which is known only to certain individuals who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know it or use it.[86]

¶45 This exemption was included so that stem cell researchers would not be discouraged from seeking funding for these important projects. A similar exemption should be added to CPRA generally. Otherwise, many public/private collaborations in California that could lead to the development of useful pharmaceutical and other biotechnology products may continue to be needlessly deterred.

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[85] CAL. HEALTH & SAFETY CODE §§ 125291.10 - 125291.85 (Deering 2005).
[86] *Id.* § 125290.30(e)(2)(B).