Professional Opinion

Being Served

How to respond to subpoenas directed at academic works or scientific research

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University Business, February 2014

Universities, research institutions, academics and scientists have increasingly been under the bright light scrutiny of the legal system. While not unprecedented for courts and litigators to pull questions of science and research into the courtroom, public debates and high stakes litigation have recently forced some academics and scientists to center stage.

From climate change and medical research, the history of the Troubles of Northern Ireland, to flow rates of the BP Deepwater Horizon oil spill, both private parties and government bodies have been seeking access to confidential research notes, internal debates, and other personal writings (e.g., emails) through the judicial process. When university administrations and research institutions are confronted with a subpoena, there are a number of steps and decisions those organizations must first make.

This article seeks to create a response framework, including necessary considerations and the (sometimes unknown) options, to help guide an institution through that process. It does not attempt to address subpoenas unrelated to academic endeavors (e.g., employment action, general litigation involving an institution, or student records), nor does it cover specific legal requirements and/or steps that must be taken in order to comply with any court-ordered discovery.

Subpoenas are an integral part of our judicial system, allowing parties to reach the underlying truth at issue and discerning questions of fact. Therefore, there is no doubt that most institutions will not only respond to subpoenas over time, but will themselves one day need and demand them from others as part of a litigation and fact investigation.

Despite the critical importance of subpoenas in the truth seeking process of litigation, being served a subpoena can be the beginning of a trying and difficult time for an institution, its staff, and its academics. With a careful and deliberate process in place, however, unnecessary stress and concern can be mitigated, and the institution may come out the other side of the crisis unscathed. Therefore, when confronted with a new subpoena, an

scientific debate it wishes to assert. To do so, it must then directly tackle three principle questions and issues: (1) its response; (2) its legal options; and (3) how, if at all, the information sought should be shared with the media and/or other institutional colleagues.

Response

In order to protect the academic and research processes, the organization, as a whole, must first decide whether the subpoena is directed at areas that are, or should be, protected from disclosure –the answer to which is not always easy or straightforward.

To make this determination, the institution should first survey its academics (those directly involved in the subpoena, as well as others) to get a sense of what materials are sought, why, and the possible effects and intrusions the institution may face in producing such documentation. While scientific and academic institutions strive – or should strive – for open access to all underlying data, its funding sources, any conflicts, reliance materials, and scholarly assumptions, when faced with a subpoena an institution must first decide whether it wishes to make a clear line rule that certain materials should be protected from disclosure if appropriate (e.g., lab notes, internal emails, and draft papers).

This decision cannot be made lightly, as it will likely lead to increased legal costs just to support the institution's position; it could also put the institution in an unwanted and unfavorable media spotlight. Such media attention is likely inevitable when an institution's internal documents are subject to legal and media scrutiny. And, despite any such pressure or attention, the institution should be prepared to stay firm on its decision to produce certain (but not all) materials sought. Indeed, in the event it enters into a push back ballet with other parties to the case, a perceived wavering on its original stance could do more damage to the institution and academia as a whole, than had the institution simply acquiesced, in toto, to the original subpoena.

Legal options

After consulting legal counsel regarding specific requirements for data preservation and other legal compliance concerns, the institution should next consider those options available to it under the First Amendment of the United States Constitution, specifically, its options per the emerging doctrine of Scholastic Privilege. Institutions are sometimes, often justifiably, concerned that lawyers will subordinate the institution's priorities and goals with a lawyer set playbook and dedicated response. While time-honored and likely the most protective of legal liabilities and concerns, such a course of action may not always achieve the academic goals and best interests of the institution as a whole. Therefore, it is important to have a reflective review of the goals, concerns, and priorities of the institution before sitting down with legal counsel.

It is only with the institution's objectives and priorities in hand, that its administration can adequately and thoroughly balance the pros and cons of

recognition in courts is Scholastic Privilege. In order to protect the important goal of academic research, some courts have started to recognize that academics and scientists can have a limited Scholastic Privilege of their draft works. In essence, such courts have ruled that an institution's Scholastic Privilege protects academics "engaged in pre-publication research…commensurate to [those protections] which the law provides for journalists." These courts recognize that protecting the internal academic discussions on draft scientific publications "help[s] to ensure that the articles disseminated to the medical and scientific communities are of the highest quality."

As Jeffrey Drazen, the editor in chief of *New England Journal of Medicine*, argued in the Bextra subpoena litigation, "scientific theories do not emerge completely formed" and exposing draft papers and the scientific peer-review process to complete disclosure could have "serious adverse consequences" for the scientific process and innovation. And as one legal commentator noted, "[a] researcher's notes and personal opinions, often completely unrepresentative of their research methods, are easy targets for those seeking to discredit their findings outside the normal process of scientific inquiry." Although an emerging area of law, an institution's use of the Scholastic Privilege could be an important tool when responding to subpoenas. However, as the privilege is not – nor should it be – absolute, and is therefore subject to an important legal balancing test (not to mention being an unsettled area of law), institutions must be prepared for uncertain results when advancing the privilege.

Forward facing

An institution must coordinate with its academics (professors and scientists), legal counsel, and public relations team to determine how, if at all, to publicly address a subpoena. Going public with a potentially overreaching subpoena is fraught with perils, but it can also be an important part of the institution's vision of its academic duty. Most legal counsel would prefer, if not demand, that the institution lie quiet during the duration of any proceedings. That is because misstatements of fact, or statements made before all facts are gathered, can be used later in court to the detriment of a party's position. But lying quiet is not always the best option for an institution, and its academics, for reasons of scholastic integrity and academic leadership. In the Bextra subpoena litigation, the NEJM used mostly surrogates, such as *Science* Editor-in-Chief Donald Kennedy, to publicly challenge the appropriateness of subpoenas for peer-review notes. When Woods Hole Oceanographic Institution's papers on the Deepwater Horizon oil spill were challenged and subject to an intensive subpoena seeking emails, draft papers, and peer review comments, WHOI chose to proactively plead their case and concerns in the media before resolution of the subpoena and the deposition of the primary scientist. For instance, WHOI scientists published an editorial in the *Boston Globe* and gave a number of media interviews, including a NPR interview for *On The Media*. The Bextra and Deepwater Horizon subpoenas are also great examples of the double-edged nature of pursuing a subpoena, despite being a valid and valued tool to discern truth, , the seeking

If an active, forward facing, response to a subpoena is the direction taken by an institution, it must be balanced by legal counsel's concerns and compliance with legal requirements, and include a message focusing both on intellectual sovereignty, but also on the openness of the scientific and academic process, as a whole. In other words, when fighting a subpoena, an institution's goal should be the furtherance of academic openness, debate, and scientific reliability, which may be better protected with the non-disclosures of unfinished draft reports and the incomplete thoughts oft found in emails.

Conclusions

Being served with a subpoena related to a larger political controversy or mass disaster can place an enormous burden on an institution, its administration, and the scientists targeted by it. However, being aware of an institution's ideals, coupled with a frank review of the sought science and process, can help provide the guideposts the institution needs to follow for a successful response within legal constraints. The goal of any response is not, of course, to protect faulty or biased science, but rather to help guide a university or research institution to properly respond when pulled into one of these crisis situations, while still protecting the scientific process and its scientists. In an era of increased scrutiny of scientific findings, and media reporting that may not always understand or adequately explain risks and uncertainties, more subpoenas are likely to follow. However, with a strong plan and well executed strategy in place, such an inquiry can be weathered successfully while also bolstering the scientific process and debate.

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