

August 1, 2003

ROBERT M. BERDAHL  
CHANCELLOR

Enclosed is the report of the USA PATRIOT Act Steering Committee, which is comprised of an Executive Summary and more detailed summaries of the reports and recommendations, endorsed by the Steering Committee, of the Working Group on Records and the Working Group on Research Compliance. The full reports of both Working Groups are also enclosed.

The Steering Committee agreed to meet again in early fall to discuss a proposal from Co-Chair Catherine Koshland to establish a new working group to consider issues of campus climate related to the USA PATRIOT Act. We also agreed to plan for a one-year assessment of the impact of the USA PATRIOT Act on the campus. The Steering Committee is open to meeting again on other issues, as they arise.

We would like to express our sincere appreciation to Registrar Susie Castillo-Robson and Associate Vice Chancellor-Research Robert Price, and the members of the working groups for their outstanding contributions.

On behalf of the members of the USA PATRIOT Act Steering Committee and the working groups, we thank you for the opportunity to contribute to this very important effort. We look forward to hearing your comments on the report and discussing strategies for implementation.

Paul R. Gray  
Executive Vice Chancellor and Provost

Catherine Koshland  
Chair, Academic Senate

cc: USA PATRIOT Act Steering Committee

Enclosures:

Charge to the USA PATRIOT Act Steering Committee  
Executive Summary  
Records Working Group – Summary of Findings and Recommendations  
Research Compliance Group - Summary of Findings and Recommendations  
Reports of the Records Working Group and the Research Compliance Working Group  
Statement from Graduate Student Representatives

## **Report of the USA PATRIOT Act Steering Committee**

### **Executive Summary**

The USA PATRIOT Act Steering Committee was appointed in January 2003 and charged to oversee the review and analysis of the campus's response to the USA PATRIOT Act (the Act) and related legislation. The committee was created in response to concerns first raised by the Divisional Council, expressed in its December 2001 Statement in Support of Civil Liberties and Academic Freedom: "Striking the perfect balance between civil liberties and academic freedom and the desire to improve internal security is an enduring, complex and difficult challenge."

Since that statement was issued the Federal government has taken additional steps to enhance the security of the United States, steps that have promoted an increasingly restrictive federal regulatory environment, which has led to great uncertainty about how future anti-terrorism laws and regulations might affect the University. What we are certain about is that many members of the campus community are concerned that blanket compliance with the USA PATRIOT Act could compromise the University's commitment to maintain the privacy of faculty, students and staff, and diminish open communication and the ability to freely disseminate the results of teaching and academic research, all values that are prized at Berkeley. It therefore seems imperative that we should take steps immediately to prepare the campus, in terms of its policies, procedures and protocols, to meet its legal obligations as defined in the USA PATRIOT Act while ensuring protection for the rights of individuals and the University's mission.

As instructed in its charge, the Steering Committee appointed two Working Groups, one to focus on records disclosure and the other to examine research compliance in light of the Act and related legislation.

The Records Working Group, chaired by Registrar Susanna Castillo-Robson, was charged to 1) review existing policies, procedures and standards governing the disclosure of records, and make recommendations for any necessary changes; 2) review protocols for responding to subpoenas and search warrants, 3) review protocols for disclosure of records under the Health and Safety" statutory exemption, and 4) recommend mechanisms for effectively informing the campus community of campus policies and procedures governing the disclosure of records.

The Research Compliance Working Group, chaired by Associate Vice Chancellor – Research Robert Price, was asked to 1) review campus policies, procedures and standards governing research compliance in light of the Act and related legislation, with a focus on policies and protocols governing access to certain biological agents used in research, restrictions on participation in research of foreign nationals, and limits on the dissemination of research results, 2) recommend changes to campus policy and procedures in light of changes in the regulatory environment created by the Act, related legislation, and federal government policy, and 3) recommend mechanisms for effectively informing the campus community of campus policies and procedures, and of any new requirements that are being adopted, in light of the Act and related legislation and government policies.

The results of the deliberations of the Steering Committee are contained in this Executive Summary and the more detailed summaries of the reports and recommendations, endorsed

by the Steering Committee, of the Working Group on Records and the Working Group on Research Compliance. We have also attached the full Working Group reports. In addition, we have included a statement from the Steering Committee's graduate student representatives, whose concerns and recommendations, which are reflective of those voiced in the Working Group reports, we also endorse.

The research results of the two Working Groups show that to date, the Berkeley campus administration is unaware of the receipt of any subpoenas or court orders for student and business records pursuant to the USA PATRIOT Act. Neither have we been affected by the Federal regulations governing research activities that would most likely apply to us: access to certain biological agents used in research and limits on the dissemination of research results. Current regulations on how certain biological and chemical agents are handled in laboratories have no impact on Berkeley's research enterprise since the campus presently has no laboratories that are using any of the select agents in sufficient quantity to warrant registration with the U.S. Department of Health and Human Services. And, although there has been much discussion in Washington about increasing restrictions on the publication of research designated by the governmental classification "sensitive but unclassified," no regulations have emerged so far.

While there is some comfort in knowing that Berkeley has had no negative impact from USA PATRIOT Act legislation, the Steering Committee believes it would be in the best interests of the campus if its recommendations are reviewed and implemented as soon as possible in order to prepare the campus to meet its legal obligations as defined in the USA PATRIOT Act while ensuring protection for the rights of individuals and the University's mission.

Below are the major recommendations that we endorse for immediate action by the campus. Details are available in the summaries and in the full Working Group reports. The campus should:

- Assume a pro-active role in encouraging the UC system to resist through legal challenge aspects of the USA PATRIOT Act that unnecessarily or excessively compromise the individual rights of faculty, students and staff.
- Continue to observe the guidelines issued in Chancellor Berdahl's *Anti-Terrorism and Student Records* Deans and Directors memo of December 3, 2001.
- Develop campuswide protocols for handling subpoenas and court orders for business record requests, search warrants, and health and safety emergency situations.
- Reinstitute the campus's Records Management Department, considering the Chancellor's Communications and Resource Center as the unit most qualified to assume this role. Chief among the new Department's duties, appoint the Department's Director to serve as the Information Practices Act Coordinator for the campus.
- Improve communication to faculty, students and staff: 1) Develop a Records Management Website to centralize the communication of policies, procedures, and protocols related to the Act's requirements for the disclosure of information and for research compliance; 2) Create a proactive training and general awareness program about the Act targeted to all segments of the campus community; and 3) Provide contact information to assist anyone who believes he or she has been unfairly treated in accordance with the Act.

- Continue traditional campus prohibition on controls that prohibit free dissemination of research. The kinds of controls that must be implemented to restrict the publication of research results that have been or could in future be classified by the Federal government as potentially threatening to homeland security are incompatible with what the University so highly values—the free flow and unimpeded distribution of scholarly communication and research results. The Steering Committee recommends against the performance of on-campus research that could be classified in this manner. Those faculty members who wish to conduct this kind of research should be encouraged to do so at off-campus sites that maintain classified facilities, such as the Lawrence Livermore National Laboratory. We recommend the creation of an ad hoc task force to explore the advisability and feasibility of establishing an off-campus facility where restricted research could be conducted.
- Encourage UCOP to 1) complete its revision of the Records Management Program to ensure that record custodians maintain records appropriately and 2) collect, review, revise and present one specific Web site for “Guidelines for Access to Records.”

The Steering Committee will meet in early fall to discuss the formation of a third working group to evaluate the impact of not only the PATRIOT Act but also the impact of other legislation on the ability of international scholars (students, faculty, researchers) to become part of the campus community. We will also ask the group to assess over the next year the impact of these national security measures on the campus’s intellectual and social life and our ability to freely exchange ideas and information.

August 1, 2003

## **Records Working Group Summary of Findings and Recommendations**

The USA PATRIOT Act Steering Committee endorsed all of the recommendations of the Records Working Group.

### **A. Disclosure of Records (General)**

In its evaluation of campus policies, procedures, and protocols, the Records Working Group found that, in general, the USA PATRIOT Act does not change the types of processes that law enforcement may use to obtain records maintained by the University. In general, it simply enhances their ability to obtain court orders or subpoenas for University records. Even with the enactment of the USA PATRIOT Act and its amendments, in most instances the government must still obtain a court order or subpoena in order to gain access to records.

### **B. Student Records**

- **Subpoenas and Court Orders**

#### Findings:

The Family Educational Rights and Privacy Act (FERPA) of 1974 allows University officials to release student records absent a student's written authorization in specific circumstances noted in its implementing regulations. (34 CFR Part 99). One such circumstance is when a subpoena is issued. The USA PATRIOT Act revised FERPA to allow a court, based on specific and articulable facts, to issue a court order requiring an educational institution to disclose to the United States Attorney General, or his designee, student records relevant to a terrorism investigation. It also does not require the University to notify the student or keep a record of the disclosure, as otherwise required under FERPA. This protocol is the same as other *ex parte* subpoenas the University has received in other types of circumstances, normally criminal investigations.

The USA PATRIOT Act also permits the U.S. Attorney General, or his designee, to obtain a court order for the disclosure of "business records" (discussed below). Because the definition of "business records" is extremely broad, University student records could theoretically be requested pursuant to a business records court order, as well as a FERPA court order.

To the Records Working Group's knowledge, the Berkeley campus to date has not received any student record subpoenas pursuant to the USA PATRIOT Act's provisions (under either the FERPA or "business record" provisions).

#### Recommendations:

The campus should continue its current practice related to student records as reflected in Chancellor Berdahl's December 3, 2001 memo to Deans and Directors regarding *Anti-Terrorism and Student Records*. Responses to subpoenas or court orders for student records pursuant to a USA PATRIOT Act should be coordinated with the Office of Legal

Affairs and the Office of the General Counsel. As is true with other *ex parte* student record subpoenas, departments should not notify a student that a subpoena for the student's records has been issued, if explicitly noted in the subpoena.

- **Health and Safety Disclosures**

Finding:

To the Records Working Group's knowledge, no releases under the Health and Safety FERPA exemption related to terrorism investigations have occurred on the Berkeley campus. The campus nonetheless should establish a written protocol for assessing a health and safety situation for student record disclosure purposes.

Recommendations:

- 1) Campus units and departments should contact the UCPD, who will work with the Office of the Registrar to assess emergency health and safety situations.
- 2) The campus should adopt a narrow definition of what constitutes a Health and Safety emergency. Departments should use it in making their assessments of potential emergency situations.
- 3) Though it remains appropriate to disclose confidential student information to law enforcement in connection with emergencies, the campus should be informed that the Health and Safety exception is significantly limited as defined below:
  - a. The exception applies to a specific situation that presents imminent danger to a student or others of the University community or to a situation that requires the immediate need for information from student records in order to avert or diffuse serious threats to the safety or health of a student or other individuals.
  - b. Disclosure must be narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency.
  - c. The Health and Safety exception is temporally limited to the period of the emergency.
- 4) The campus should approve the Records Working Group's draft campuswide Health and Safety protocol.

### **C. Business Records**

The state Public Records Act (PRA) and Information Practices Act (IPA) generally govern access to and privacy of records that are maintained by the University. The PRA is a state statute that provides that every person has a right to inspect any public record, with specified exceptions. In general, any documents that the University possesses, whether hard copy or electronic, are public records subject to disclosure. Certain documents, such as confidential personnel records, medical records, and most police records are statutorily exempt from release under the PRA. The IPA governs the disclosure of information from business records maintained by state agencies, including the University, and generally prohibits the disclosure of personal information from those records without the individual's consent, unless another specific statutory exemption permits disclosure. University policy regarding the disclosure of and access to information from University records is contained in University Business and Finance Bulletin RPM-8 (<http://www.ucop.edu/ucophome/policies/bfb/rmp8toc.html>).

- **Subpoenas and Court Orders**

Finding:

As is the case with student records, the USA PATRIOT Act allows the U.S. Attorney General, or his designee, to obtain a court order for the disclosure of any type of business record. The definition of "business records" subject to such a court order is extremely broad, and could include any record maintained by the University, including student records, police records, medical records, and library records. The definition even includes other "tangible things" in addition to records.

The USA PATRIOT Act authorizes a directive accompanying this special "business records" court order (unlike a subpoena or regular court order), stipulating that the record custodian not disclose the existence of the court order to anyone other than to those "necessary to produce the tangible things" requested in the court order. Therefore, pursuant to a court order under this provision (Foreign Intelligence Surveillance Act of 1978, Sections 501-503 (50 U.S.C. 1861 et seq.)), a records custodian should only disclose the existence of the court order to those necessary to carry out the records search that would be required by this type of information request. This permitted disclosure would include contacting campus counsel or the Office of General Counsel, in order to determine whether the court order is lawfully issued and what the lawful scope of the order is. This type of court order will state on its face that its existence must not be disclosed. It may not contain the phrase "USA PATRIOT Act," and therefore may need to be recognized by its statutory citation: (Foreign Intelligence Surveillance Act of 1978, Sections 501-503 (50 U.S.C. 1861 et seq.))

As with a subpoena or court order for student records, the University is legally obligated to comply with a lawfully issued subpoena or court order for business records. The Records Working Group discovered that, with respect to non-personnel requests, there is currently no written procedure on how to respond to business record requests. The lack of a clear protocol distributed to campus units could result in untimely responses, increases the risk of inappropriate disclosure, and increases vulnerability to legal action.

### Recommendations:

- 1) It is in the University's best interest to quickly complete the revision of the Records Management Program. The campus should adopt interim schedules to ensure that record custodians maintain records appropriately. The Office of the President (OP) should collect, review, revise and present one specific site for "Guidelines for Access to Records" for access by all UC entities.
- 2) A campus administrative Records Management Department should be re-instituted. An excellent administrative candidate to take on this role would be the Chancellor's Communications and Resource Center (CCRC). Chief among the new Department's duties should be the appointment of the Department's Director to serve as the Information Practices Act Coordinator for the campus.
- 3) The campus should develop a Records Management website as a mechanism for communicating policies, procedures, and protocols for the disclosure of information.

### • **Personnel Records**

#### Finding:

Requests related to academic personnel files have adequate campus protocols in place in light of the USA PATRIOT Act requirements; this is not the case for UC systemwide Academic Personnel policies. As for non-academic staff personnel records, campus access and disclosure policies and procedures conform to the requirements of the USA PATRIOT Act.

#### Recommendations:

The Office of the President (OP) should collect, review, revise and present one specific site for "Guidelines for Access to Records" for access by all UC entities. This would include reviewing RMP-8, RMP-7 and RMP-10 (subpoenas) for any overlap and to ensure proper references to current system wide policies. OP should also review RMP-9 - UC Guidelines for Access to University Personnel Records by Governmental Agencies Correspondence, in order to address any additional requirements due to the USA Patriot Act.

### • **Background Checks**

#### Finding:

Under the USA PATRIOT Act, employees who are already working in a particular position may be required to pass a newly initiated security check in order to continue working. Though only tangentially related to the Records Working Group's charge, members noted that the requirements under the USA PATRIOT Act appear to be in conflict with existing campus policy regarding background checks. It is the Working Group's assumption, however, that this issue will be fully investigated by the Working Group on Research, in particular the need to review internal policies on background and security checks in light of the potential use of disclosed records under the Act for this purpose.



Recommendation:

The campus should review its internal policies on background and security checks in light of the potential use of disclosed records under the Act.

- **Police Records**

Finding:

UC Police records are kept in accordance with applicable federal and state laws. California Government Code section 6254(f) governs access by the general public to information contained in law enforcement records. The California Information Practices Act governs the privacy of personal information contained in such records, while other statutes also specifically address the maintenance and release of police records. The UCPD will continue to be guided by these established laws and regulations and, thus, UCPD procedures will not change under the USA PATRIOT Act. However, note that UCPD records may be the subject of a "business records" court order as described above.

Recommendation:

See above recommendation under Subpoenas and Court Orders.

- **Library Records**

Finding:

The goal of the Library is straightforward: protect the privacy of its patrons whenever possible. Berkeley's libraries, in concert with other UC libraries, have made headway towards this goal. The Records Working Group commends the Library for taking a leadership role in educating its staff and patrons on their privacy rights, and in addressing issues such as circulation records. The Records Working Group is confident that the campus libraries will continue to improve and examine their procedures.

Recommendations:

**Campus departments should adopt three best practices related to records management and retention exemplified by the campus libraries in light of the USA PATRIOT Act's records requirements.**

**1) The University should collect the information that it requires to complete its job. With this in mind, record custodians should continually assess whether information that is being retained is necessary. If statistics are deemed necessary, where feasible they should be collected absent any personally identifiable information.**

**2) A clear subpoena protocol should be established for campus departments to use in training staff on what to do when a subpoena of records is received. The campus should adopt as its standard, the protocol adopted by the libraries.**

3) Other campus departments should adopt the same due diligence in ensuring that staff and patrons of their services are well informed as to the implication of the USA PATRIOT Act on records requests.

#### **D. Electronic Communications Records**

##### Finding:

Procedures established under the Electronic Communications Policy (ECP) are explicit as to what should be done whenever a non-consensual request for electronic data is made. (The ECP applies whether the electronic communications record is stored on a server or on an individual desktop.) These procedures need to be modified to conform to the requirements of the USA PATRIOT Act.

The new Act's provisions should generally be treated in the same manner as past requests by law enforcement for search warrant or subpoena purposes. Should a department or unit receive a search warrant or subpoena pursuant to the USA PATRIOT Act for electronic communications, it will follow the established protocol outlined in Assistant Chancellor-Legal Affairs in his November 12, 2001 memorandum. Note that these new provisions may not permit the University to guarantee the same level of privacy of electronic records as it has in the past, even where this established protocol is followed.

##### Recommendations:

The campus should adopt the Records Working Group's proposed modifications to the Electronic Communications policy related to notification and reporting requirements to ensure compliance with the USA PATRIOT Act. The Records Working Group also recommended informing the campus community on the cost of retrieving data should a USA PATRIOT Act subpoena be issued for electronic records to ensure that the ECP is congruent with the provisions of the USA PATRIOT Act.

In addition to the Working Group's findings, the Steering Committee felt that retention schedules for e-mail and telephone communication needed to be reviewed and updated in light of the USA PATRIOT Act provisions. The Committee recommended that IST work toward establishing a campus-standard for these two areas.

#### **E. Disclosures to the Department of Homeland Security (SEVIS)**

##### Finding:

The Student and Exchange Visitor Information System (SEVIS), which was established after the September 11, 2001 terrorist activities, is a Department of Homeland Security automated student tracking system from which all F and J visa documents will be produced. SEVIS implements the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) passed in 1996. This law requires the Immigration Service (since March 1, 2003 a part of the Bureau of Homeland Security) to collect current information, on an ongoing basis, from schools and exchange programs relating to nonimmigrant F and J students and J visiting scholars during their stay in the United States.

The USA PATRIOT Act provisions are no different for F and J visitors than for any other person in the U.S. Access to information on F and J visitors, other than that which is permitted under SEVIS and consent given by students via the issuance of visa documents, requires the government to obtain a court order or subpoena. This is consistent with procedures that law enforcement must follow for information requests regarding U.S. citizens and permanent residents. This Act did mandate that the SEVIS system be "fully implemented and expanded prior to January 1, 2003." The Records Working Group commends the SISS for taking a leadership role in the SEVIS process.

Recommendation:

No recommendations submitted.

**F. Records Management Issues**

Finding:

Unlike other UC campuses, the Berkeley campus currently does not have a stand-alone department with campus-wide responsibility to deal directly with campus-wide records management matters. While a position existed in the 1980s that served in this capacity, its responsibilities have been delegated through ad hoc arrangements with various offices. It is the opinion of the Records Working Group that, though well intentioned, this has had a diluting effect on the authority for issuing campus-wide policy statements, best practices and protocols for responding to federal, state, and University records requirements. The absence of such an administrative unit at a high level results in the absence of a uniform records philosophy for the campus and the lack of an infrastructure for communicating records matters succinctly and accurately to staff.

The campus must improve how it communicates with staff about what to do upon receipt of a records request, and how to do it in light of the USA PATRIOT Act. For example, though the Working Group found that existing policies were adequate in light of the new law, we were very troubled by the lack of campus-wide policies and protocols for complying with subpoenas, court orders, and search warrants. Solid and well-established campus-wide policies would help ensure the University responds to law enforcement requests consistent with all applicable legal requirements while protecting all privacy rights afforded under state and federal privacy acts.

A second example is the lack of a campus-wide understanding of the obligations for records retention and adequate stewardship of records. The Records Management Program (RMP) was established by UCOP in part to promote sound records management practices; to assure the protection of records vital to the University; and to establish and monitor a program of records disposition to assure that University records are not maintained longer than necessary, but are maintained as long as needed to meet administrative and legal requirements. The RMP series also includes disposition schedules for records classified by functions, including administrative, fiscal, medical, payroll/personnel/benefits, physical plant, student and applicant records, library, and administrative electronic data.

The current RMP contains documents that no longer exist and does not include documents that were created after the last revision of the RMP, The retention schedules are over ten years old. The Office of the President is revising the RMP and retention schedules, but until that is done, the old schedules apply.

A third example of this lack of campus-wide responsibility is the role of the IPA Coordinator, which has been housed in different divisions over the last decade. The RMP-7 requires a "Coordinator of Information Practices" on each campus. Currently, many campus units notify University Counsel upon receipt of a PRA or IPA request because who the Coordinator actually is at times is not fully understood by campus personnel. University Counsel (and other offices) must then step in and determine which office should respond to PRA or IPA requests.

Recommendations:

Reinstitute the Records Management Department, considering the Chancellor's Communications and Resource Center, under the direction of Associate Chancellor John Cummins, as the unit most qualified to assume this responsibility. Chief among the new Department's duties, appoint the Department's Director to serve as the Information Practices Act Coordinator for the campus.

Develop a Records Management Website.

Campus departments need a written procedure on how to respond to business record requests; the lack of a clear protocol could result in untimely responses, increases the risk of inappropriate disclosure, and increases vulnerability to legal action. This has been highlighted with the introduction of USA PATRIOT Act and the University's obligations that flow from it.

The campus needs to have campus-wide protocols for handling subpoenas, search warrants, and health and safety emergency situations.

The Office of the President should be encouraged to complete the revision of the RMP as quickly as possible. The campus should adopt interim schedules to ensure that record custodians maintain records appropriately.

August 1, 2003

## **Research Compliance Working Group Summary of Findings and Recommendations**

### **A. Findings**

The USA PATRIOT Act and related legislation have altered the landscape for research at U.S. universities. Driven by a concern that research-generated information, and materials used in research experiments, could be used by terrorists to attack the American population, the Federal government has extended its regulation of research activities at Universities and private laboratories. The effects of this new regulatory regime will be felt especially by the biological sciences, and some branches of chemistry, computer science, and physics.

At present, the likely direct impact of the emerging regulatory environment will be in two areas: 1) new regulations with respect to how certain biological and chemical agents are handled in laboratories, and new restrictions on who may have access to laboratories that contain such agents; and, 2) restrictions written into Federally-funded contracts and grants that place limits on the publication of research results, and that impose citizenship requirements on participation in research programs. University research may also be indirectly impacted by the difficulties foreign graduate students, post-doctoral scholars, and research collaborators confront in gaining timely entry into the United States as a result of a slowdown in the Visa issuing process.

- **Access to Laboratories Containing “Select Agents”**

The Public Health Security and Bio-Terrorism Preparedness and Response Act, the Agricultural Bioterrorism Protection Act, and the USA Patriot Act impose regulations on laboratories that possess “select agents” (currently more than 80 pathogens, toxins, and poisons). The basic purpose of this new regulatory regime is to limit access to select agents. In some instances, possession of any amount of the select agent triggers regulation, while in other instances (more numerous) the Centers for Disease Control (CDC) has set quantity thresholds. Laboratories which possess select agents in amounts that fall below these thresholds are exempt from the new regulations. However, for those laboratories whose select agents exceed the thresholds registration with extensive security regulations is required. Principal Investigators who fail to comply with the elaborate regulations are subject to both fines and criminal prosecution.

At the moment, the impact of the select agent regulations on Berkeley’s research enterprise is nil, since we currently have no campus laboratories that are using any of the select agents in sufficient quantity to warrant HHS registration.

- **Restrictions in Federal Contracts and Grants**

Concerns have been expressed within the academic community that Federal agency awards for research on subjects viewed as relevant to terrorism will contain clauses that would 1) limit the dissemination of research results, 2) restrict the hiring of, or collaboration with, foreign nationals such restrictions would emerge from the internal policy and implementation decisions of the various Federal Government agencies that sponsor university-based research, and include in the terms of their grants and contracts clauses

that allow for pre-publication review and for the withholding from publication of material the agencies consider to be "sensitive but unclassified."

Another major troubling element is that by accepting sponsored research that contains publication restrictions a university could trigger export control regulations. These require an export license for the dissemination of technology that may have a military or dual military/civilian use. Without such a license the technology can not be transferred (i.e., published, discussed, presented) to any person who is not a U.S. citizen. Export control laws possess an exclusion for "fundamental research" under which university research, except in very special areas, has been exempt from export control regulations. Unfortunately, these laws define "fundamental research" as research "where the resulting information is ordinarily published and shared broadly with the scientific community." Hence, should publication restrictions be imposed because the research is considered "sensitive" that research might no longer qualify for the exclusion. If that were the case, not only would dissemination by publication be restricted but so would any communication of the research to non-citizens (in classes, seminars, conferences, etc.).

As of this moment, a new regime of publication regulation based on the "sensitive but unclassified" designation has not emerged, but university and academic associations widely believe that increased publication restrictions are in the offing.

To date Berkeley has not been confronted with homeland security-related federal contracts or grants requiring pre-publication reviews, restrictions on publication, or prohibitions on the hiring of persons of particular nationalities.

## **B. Recommendations**

- Establish a Joint Academic Senate-Administration "Research Exceptions" Committee

The environment of research regulation by the Federal Government in matters relating to post-9/11 homeland security is in flux. The emergent environment could well be dramatically influenced by events whose scope, timing, and consequences cannot be accurately predicted. Hence, it makes little sense to adopt a research policy now that could well be rendered obsolete by the rapidly changing reality that that policy needs to engage. What is required is a policy that allows for adaptation in the face of change.

In our view, current policies have sufficient flexibility to do just that. The default position of these policies is that, all things being equal, the campus will not conduct research or accept grants and contracts that limit the dissemination of research results or restrict access to our facilities to whole categories of individuals. However, exceptions can be made in light of the needs of public safety, national security, and the University's public service mission.

We recommend the establishment of a small Administration-Academic Senate standing committee that will analyze any research that requires an exception to the openness principle and make a recommendation to the Chancellor as to whether such an exception should be granted. The current Conflict of Interest Committee (aka the Committee on Positive Disclosure) is a model for this new committee. Henceforth, any contract or grant that contains clauses restricting the dissemination of information or limiting the types of individuals who are permitted to work on the research, would be passed on from SPO to the "Research Exceptions Committee" for determination. Likewise, the Office of Environment, Health, and Safety (EH&S) would forward to the committee any requests to conduct research on regulated select agents. In either instance the Committee's decision would be

advisory to the Chancellor, who has the authority to make the final decision, or, in the case of laboratory access, make a recommendation to the President of the University of California.

Decision: The Steering Committee decided that it was unnecessary to form a new committee solely to consider requests for exceptions to policy. However, this decision ought to be reconsidered if the number of requests should ever rise to a level for which a committee might be useful. Until then, requests should continue to go directly to the Chancellor for final approval.

- **Maintain Prohibition on Classified Research Conducted**

The kinds of controls that must be implemented for research under the “national security classification” are incompatible with the values of the University. Therefore, we recommend that classified research not be performed on-campus. Those faculty members who wish to conduct classified research should be encouraged to do so at off-campus sites that maintain classified facilities, such as the Lawrence Livermore National Laboratory.

Decision: Endorsed by the Steering Committee

- **Establish Task Force to Explore Various Options for Restricted Research Facilities**

Create an ad hoc task force to explore the advisability and feasibility of establishing a facility where restricted research (and perhaps classified research) could be conducted. Some major research universities maintain a policy of non-restricted research on their core campuses while maintaining separate but close-by facilities where such research can be conducted.

Decision: Endorsed by the Steering Committee

- **Develop a Communications Strategy**

It is imperative that faculty members understand the new regulatory environment for research and are aware of the severe penalties for non-compliance, including criminal penalties. This is especially true for the biological sciences where work with regulated select agents is a possibility.

In respect to internal communications, our minimum recommendations are the following:

- Deans (particularly the Deans of Biological Science, Physical Science, Engineering, Public Health, and Chemistry) should be tasked with presenting their Chairs with an overview of both the Federal post-9/11 research regulations and our campus policy framework. Chairs, in turn, should be tasked to do likewise with respect to their faculties. The Director of EH& S, the Office of Research Administration and Compliance, as well as the Office of the Vice Chancellor for Research should assist the Deans and Chairs in this task.
- A session on the post-9/11 research environment should be added to the annual Deans and Chairs retreat.

- Relevant campus unit websites (especially EH & S, SPO. and VCRO) should be updated with the new regulations with respect to select agents, and with the internal policy framework, once one is developed.

As regards an external communications strategy-- It is important that Media Relations is made aware of developments in the research area in the aftermath of 9/11 and of the campus's policy framework with respect to it. The actual development of an external communications strategy, and the decisions about if and when to launch it, should be left to the Director of Media Relations, working with the Chancellor and other actors with responsibility in the research compliance area, such as the Vice Chancellor for Research.

Decision: Endorsed by the Steering Committee

- **Government Lobbying**

Berkeley should avail ourselves of any opportunity to contribute to the current lobbying efforts of the Association of American Universities (AAU), the National Association of State Universities and Land-Grant Colleges (NASULGC), and the Council On Governmental Relations (COGR) to shape the emerging governmental regulatory environment so as to preserve the openness that is so essential to university life and scientific progress.

Decision: Endorsed by the Steering Committee

August 1, 2003