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Cover Page Footnote

This paper won the American Agricultural Law Association's 1992 Legal Writing Competition. The author would like to thank Dr. Michael Olexa at the University of Florida School of Food & Resource Economics for his valuable input and inspiration.

TO DIVULGE OR NOT TO DIVULGE: THE ABILITY OF AN AGRICULTURAL RESEARCHER TO AVOID CERCLA'S AFFIRMATIVE DISCLOSURE REQUIREMENTS*

ANDREW JOHN NORRIS**

I. INTRODUCTION

Farming operations, which routinely use pesticides and other hazardous substances, can potentially transgress some of the major federal environmental laws and regulations enacted over the past twenty years. These federal acts, including the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[1] the Resource Conservation and Recovery Act (RCRA),[2] and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),[3] impose strict monetary penalties that could ruin even the largest farming operation.[4] Yet, farmers are routinely asked to divulge sensitive information regarding their use and disposal of hazardous materials. If brought to the attention of regulatory agencies, this information could subject farmers to liability under one of these statutes. University researchers or farming associations usually generate these requests for information, accompanied by a pledge of confidentiality, to assess the impact of environmental statutes on farming operations, as well as the extent of farmers' compliance with those statutes.

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* This paper won the American Agricultural Law Association's 1992 Legal Writing Competition.

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1. 42 U.S.C. §§ 9601-9657 (1988).
2. 42 U.S.C. §§ 6901-6907 (1988).
3. 7 U.S.C. §§ 136-136y (1988).
4. For example, CERCLA section 9607(a)(4) establishes potential liability for:

   (a) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan; (b) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and (c) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Id.

The following hypothetical demonstrates a typical situation: Researchers at a land-grant institution[5] in Florida have conducted an inquiry into the hazardous waste disposal activities of farmers in the state. This inquiry consisted of field work and a survey of the activities of individual farming operations. Information generated by the inquiry, much of it voluntarily provided by individual farmers under a pledge of confidentiality, could implicate those farmers for involvement in hazardous waste activities that violate CERCLA. Federal or state authorities charged with enforcing CERCLA have named these farming operations in a lawsuit to force the clean-up of hazardous material sites and are requesting disclosure from agricultural researchers of the information generated by the research effort. Are the researchers legally compelled to divulge that information? What legal avenues are available to the researchers to avoid violating the trust of the research respondents? Is disclosure in the best interests of environmental protection? These and other questions are explored in this Article.

II. CERCLA DISCLOSURE REQUIREMENTS

CERCLA requires "*any person* who has or may have information relevant to any of the following" to provide information regarding: "(a) the identification, nature, and quantity of materials which have been or are generated, treated or stored at a facility; (b) the nature or extent of a release or threatened release; or (c) information relating to the ability of a person to pay for a cleanup."[6] The statute further

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5. Agricultural research, together with education and extension services, is a principal mission of America's land-grant institutions. These institutions were established and their missions defined by federal legislation such as the Morrill Acts of 1862 and 1890, the Hatch Act of 1887, and the Smith-Lever Act of 1914. A total of 72 land-grant institutions are today located in each of the 50 states, as well as in the District of Columbia, Puerto Rico, Guam, and the United States Virgin Islands. Pamphlet, *The Land Grant Tradition*, National Ass'n of State Universities and Land-Grant Colleges (on file with the *Journal of Land Use & Environmental Law*).

6. 42 U.S.C. § 9604(e)(2) (1988) (emphasis added). The original version of this section subjected only an individual who "stores, treats, or disposes of, or, where necessary to ascertain facts not available at the facility where such hazardous substances are located, who generates, transports, or otherwise handles or has handled, hazardous substances" to a statutory disclosure requirement. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 104(e)(1), 94 Stat. 2767, 2777 (1980). The current version, which extends that disclosure requirement to "any person who has or may have" relevant information, was incorporated into CERCLA by the Superfund Amendment and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1728 (1986). The amended language was intended to clarify and strengthen the authority of EPA to gain access to facilities and to gather information necessary to achieve the goals of Superfund. H.R. 99-253(I), 99th Cong., 2d Sess., 1986, *reprinted in* 1986 U.S.C.C.A.N. 2852-53. This strengthening of the original provision in CERCLA authorizing EPA access and information-gathering merely

provides the Environmental Protection Agency (EPA) with several important tools for obtaining information related to a suspected hazardous waste site. For example, the EPA under CERCLA section 9622(e)(3)(B) can issue administrative subpoenas requiring the attendance of witnesses and the production of documents.[7] Administrative subpoenas can reach, at a minimum, information regarding the "volume and toxicity of wastes, strength of the evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors."[8]

Another information gathering tool available to the EPA is the information request.[9] The EPA commonly uses information requests to gather initial information about a given site.[10] EPA guidelines on the use of information requests state that initial information requests should seek the following types of information:

- relationship of the Potentially Responsible Party (PRP) to the site;
- business records relating to the site, including, but not limited to, manifests, invoices, and record books;
- any data or reports regarding environmental monitoring or environmental investigations at the site;
- descriptions and quantities of hazardous substances transported to, or stored, treated, or disposed at the site;
- any arrangements made to transport waste material to the site;
- names of any transporters used in connection with the site; and
- where financial viability is or will be at issue, and the Agency is unable to assess financial viability effectively through review of

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served to "confirm the broad access authority that the Congress originally intended when CERCLA was enacted in 1980." S. 99-11, accompanying S-51, Mar. 18, 1985, at 26.

7. Memorandum from Thomas L. Adams, Jr., Assistant Administrator, to Regional Administrators, Regional Counsel, and Directors of Waste Management Divisions (Aug. 25, 1988), *Transmittal of Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas, in* ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE COMPENDIUM III-72, III-81 (BNA 1992). This Memorandum states "[t]he scope of investigation authorized by CERCLA § 104(e)(2) is broad." *Id.* at III-78.

8. *Id.* at III-81 n.15.

9. *See* 42 U.S.C. 9604(e)(2) (1988).

10. Memorandum from Thomas L. Adams, Jr., Assistant Administrator, to Regional Administrators, Regional Counsel, and Directors of Waste Management Divisions (Aug. 25, 1988), *Transmittal of Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas, in* ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE COMPENDIUM III-72, III-79 (BNA 1992).

> publicly available data, information relating to the ability to pay for or perform a cleanup.[11]

Failure to respond to an information request may result in a presidential order requiring compliance, a civil action compelling compliance or enjoining interference with information or document requests, or fines of up to $25,000 per day of noncompliance.[12]

The combination of the plain language of section 9604(e)(2),[13] CERCLA's legislative intent,[14] and judicial approval of the constitutionality of EPA information requests[15] creates a dilemma for academic researchers holding information obtained through a pledge of confidentiality or anonymity. Researchers reluctant to lose the trust of their sources have little choice but to comply with CERCLA disclosure requirements. Researchers might find refuge from CERCLA disclosure requirements within two doctrines discussed in this Article: the law of academic privilege and Rule 26(c) of the Federal Rules of Civil Procedure.

III. ACADEMIC PRIVILEGE

A. Evidentiary Privileges

"The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail."[16] The liberal discovery provisions of the Federal Rules of Civil Procedure,[17] and extensive case law establishing that litigants are entitled to "every

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11. *Id.* The information request generated in United States v. Crown Roll Leaf, Inc., 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,297, 20,298 (D.N.J. Apr. 28, 1989), *aff'd*, 888 F.2d 1382 (3d Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990), illustrates the breadth of the EPA's information gathering authority under § 9604(e). In *Crown Roll Leaf*, the EPA requested written responses to questions and the production of documents regarding hazardous disposal activities at four Superfund hazardous waste sites. 20 Envtl. L. Rep. at 20,298. Crown was required to provide information not only in connection with its generation, handling, and disposal of hazardous materials, but also concerning its transactions with a number of individuals and corporations involved in hazardous waste disposal activities at the sites. *Id.*

12. 42 U.S.C. § 9604 (e)(5) (1988). Bad faith failure to respond to an EPA information request for 790 days resulted in a $100 per day fine against Crown, for a total civil penalty of $142,000, plus costs. *Id.* at 20,302.

13. *See supra* note 6 and accompanying text.

14. *See supra* note 6.

15. Information requests satisfy due process requirements because "the process afforded . . . would appear to pass constitutional muster inasmuch as the private interest, freedom from having to supply the EPA with information and documents, . . . is substantially outweighed by the government interest in controlling promptly and efficiently the release of hazardous waste." United States v. Charles George Trucking Co., 642 F. Supp. 329, 334 n.5 (D. Mass. 1986), *aff'd*, 823 F.2d 685 (1st Cir. 1987).

16. People *ex rel.* Mooney v. Sheriff, 199 N.E. 415, 416 (N.Y. 1936).

17. FED. R. CIV. P. 30(a), 31(a).

man's evidence"[18] support this policy. Privileges against disclosure are exceptions to the general rule. Privileges are neither "lightly created nor expansively construed, for [they are] in derogation of the search for truth."[19]

Professor Wigmore specified four conditions for using a privilege:

> 1) The communications must originate in a *confidence* that they will not be disclosed.
>
> 2) The element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> 3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> 4) The *injury* that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.[20]

B. Limited Acceptance of an Academic Privilege

Traditionally, the common law did not recognize an academic privilege.[21] Federal and Florida statutes do not protect confidential communications between researchers and their subjects, either. Under Federal Rule of Evidence 501, "courts of the United States in the light of reason and experience"[22] determine the existence of privileges. As originally submitted to Congress by the Supreme Court, Article V of the Proposed Rules of Evidence contained thirteen specific privileges,[23] but an academic researcher-subject privilege was not among them. Congress, however, did not enumerate specific privileges in the current version of Rule 501. Instead, the law of privilege is left to the discretion of the courts. Rule 501 is significant in two respects: (a) courts may apply common law as well as statutory and constitutional privileges; and (b) courts may expand existing privileges or develop new privileges on a case by case basis.[24] Lower courts, however, typically do not venture

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18. *See, e.g.*, United States v. Bryan, 339 U.S. 323, 331 (1950).
19. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 710 (1974).
20. JOHN H. WIGMORE, 8 EVIDENCE IN TRIALS AT COMMON LAW 2285 (1961).
21. Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977).
22. FED. R. EVID. 501.
23. Rules of Evidence for the United States Courts & Magistrates, 56 F.R.D. 183 (1972).
24. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 501, 501-3 (1980).

beyond the enumerated privileges of the Proposed Rules of Evidence.[25]

In actions where state law provides the rule of decision on a claim or defense, Rule 501 provides that state recognized privileges, although not controlling, are relevant.[26] In Florida, unless expressly permitted by statute (federal or state), no person in a legal proceeding may: (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness, from disclosing any matter, or from producing any object or writing.[27] This rule prevents judicial expansion of privilege law in Florida.[28]

In *Marshall v. Anderson*,[29] this rule justified denial of an academic privilege in Florida. In *Anderson*, a university professor who was denied tenure sued several colleagues for making allegedly defamatory statements at his tenure hearings.[30] The trial court disallowed discovery of the speakers' identity and the content of their remarks based upon an academic testimonial privilege.[31] On appeal, the Third District Court of Appeal reversed, finding that no statutory or constitutional academic privilege existed.[32] The court reasoned that the absence of statutory or constitutional authority meant that such a privilege could not, as a matter of law, exist in the State of Florida.[33]

Anderson indicates that recognition of a researcher-subject privilege against disclosure would be improbable in Florida. Although CERCLA is a federal statute, "federal courts in federal question cases often look to state law for guidance in the area of privilege, and commentators have argued that in the absence of strong federal policies to the contrary, federal courts should adopt state privilege law."[34] Thus, a federal court in Florida presented with a challenge to a disclosure request based on academic privilege would—in accordance with Florida law—probably not recognize the privilege.

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25. *See, e.g.*, Solargen Elec. Motor Corp. v. American Motors Corp., 506 F. Supp. 546 (N.D.N.Y. 1981); Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979); Baker v. F & F Investment, 470 F.2d 778, 784 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

26. 2 WEINSTEIN & BERGER, *supra* note 24. *See Solargen*, 506 F. Supp. at 551; Wright v. Jeep Corp., 547 F. Supp. 871, 875 (E.D. Mich. 1982).

27. FLA. STAT. § 90.501 (1993).

28. The Sponsor's note, 1979, states "[t]his section abolishes all common-law privileges existing in Florida and makes the creation of privileges dependent upon legislative action or pursuant to the Supreme Court's rule-making power." *Id.* Law Revision Council Note-1976.

29. 459 So. 2d 384 (Fla. 3d DCA 1984).

30. *Id.* at 385.

31. *Id.*

32. *Id.* at 386.

33. *Id.*

34. *Privileged Communications*, 98 HARV. L. REV. 1450, 1470 (1985).

Federal Rule of Evidence 501 does not mandate this result, however. Thus, Rule 501's flexibility gives federal judges discretion to expand the law of privilege to cover confidential communications between researchers and their subjects.[35]

C. *Protecting Confidential Research Through Application of a Limited Testimonial Privilege*

Protecting confidential communications between a researcher and subject under a general academic privilege is a subject of scholarly debate. Opponents of an academic privilege point out that it would "promote secrecy and preclude a free and open debate on the merits and conclusions of the research project."[36] Alternatively, proponents of the privilege point to decisions that shield reporters from having to divulge their confidential sources[37] and analogize this limited reporting privilege to that due researchers.[38] Proponents of an academic privilege find support in Justice White's words from *Branzburg v. Hayes*: "The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, *academic researchers*, and dramatists."[39]

An analysis of case law regarding the extent of confidential source privileges indicates this protection, if it exists at all, will not be absolute. Instead, the protection will rest on a limited privilege that depends upon the facts of a particular case. Justice Powell's pivotal concurring opinion in *Branzburg* suggested this approach, stating:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[40]

This case by case balancing approach corresponds with the fourth part of Professor Wigmore's test for applying a privilege.[41]

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35. *See* Trammel v. United States, 445 U.S. 40, 47 (1980).

36. David A. Kaplan & Brian M. Cogan, *The Case Against Recognition of a General Academic Privilege*, 60 U. DET. J. URB. L. 205, 225 (1983).

37. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972).

38. Howard G. Curtis, *Academic Researchers and the First Amendment: Constitutional Protection for Their Confidential Sources?* 14 SAN DIEGO L. REV. 876, 902 (1977).

39. *Branzburg*, 408 U.S. at 705 (emphasis added).

40. *Id.* at 710.

41. *See supra* text accompanying note 20.

Courts determining the existence of an academic privilege have generally followed this balancing approach. For example, in *Wright v. Jeep Corp.*,[42] Jeep subpoenaed a professor working for the Highway Safety Institute about a research study he had conducted on the safety of utility vehicles.[43] The researcher objected to the subpoena on six grounds, among them: (1) he had an academic privilege to refuse to testify; (2) compliance with the subpoena would be burdensome and forced testimony would have a chilling effect on researchers, scientists and educators; and (3) the documents sought were privileged and confidential.[44] The *Wright* court required the researcher to turn over his data, stating it was unaware of a common law academic privilege.[45] Furthermore, the court rejected the professor's *Branzburg*-type arguments, stating the "limited protection" against disclosure offered reporters and writers under *Branzburg* was limited to situations where the compelled disclosure of a source's identity would chill the future flow of information.[46] Such a concern was not present in this case.[47] The *Wright* court balanced "the minimal chance that compelling [the researcher] to testify or produce his underlying data would cause him to abandon research and writing" with the needs of the justice system to have access to relevant and public material.[48] Ultimately, the court held the facts warranted production of the confidential research.[49]

Another case involving academic privilege in the researcher context is *Dow Chemical Co. v. Allen*.[50] In this herbicide cancellation case, a manufacturer subpoenaed all notes, reports, working papers, and raw data relating to an on-going, incomplete animal toxicity study being conducted by a university research group.[51] The subpoena was issued in accordance with FIFRA.[52] The Seventh Circuit Court

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42. 547 F. Supp. 871 (E.D. Mich. 1982).

43. *Id.* at 873.

44. *Id.*

45. *Id.* at 875.

46. *Wright*, 547 F. Supp. at 876.

47. *Id.*

48. *Id.* The *Wright* court's First Amendment analysis strays from the strict application of Wigmore's criteria because no "relationship" was required to be protected. The court, however, did follow the balancing approach suggested by Justice Powell and Professor Wigmore. *Id.* The decision might be read to suggest that had there existed a channel of communication existed between the researcher and a third party that was deemed to be of some social importance, then perhaps the court would have quashed the subpoena. Such an interpretation is highly speculative, however, and would not serve as secure precedent in any future litigation.

49. *Id.*

50. 672 F.2d 1262 (7th Cir. 1982).

51. *Id.* at 1265-66.

52. *Id.* at 1266.

of Appeals upheld the lower court's ruling that the litigants' need for the requested information was substantially outweighed by the burden on the researchers of producing the information, finding: (1) the materials were of little probative value, (2) the requesting party did not make a convincing showing of need, and (3) the risk of premature disclosure of the research results constituted an oppressive burden itself sufficient to prevent disclosure.[53]

Like *Wright, Dow Chemical* does not involve protection of confidential sources, yet it is still relevant to whether a court could compel a researcher to disclose confidential materials as required by CERCLA. First, *Dow Chemical* followed *Wright*'s approach of balancing the benefit of disclosure with the burden of compelling the production of relevant materials. Second, the subpoena in this case was issued in accordance with FIFRA, an environmental statute that, like CERCLA, is administered by the EPA. This case possibly suggests that information of some relevance to a lawsuit spawned by an action of the EPA (here, cancellation of an herbicide registration) pursuant to the provisions of a federal environmental statute may be held inadmissible where such information is (1) not highly probative, and/or (2) not shown to be necessary to the requesting party, and/or (3) is unduly burdensome to the individual(s) from whom disclosure is sought. This interpretation of *Dow Chemical* is significant to the CERCLA hypothetical because it provides researchers wishing to resist compelled disclosure of confidential materials with persuasive arguments supporting recognition of an academic privilege.

Courts also analyze cases concerning a researcher's disclosure of confidential sources and materials according to Rule 26(c) of the Federal Rules of Civil Procedure. However, a court's analysis is not always clear, nor is a rationale specifically stated. Significant overlap (and confusion) exists between the evidentiary privilege and civil procedure lines of analysis, and the interpretation of a court's holding often involves the application of both analyses.

IV. FEDERAL RULE OF CIVIL PROCEDURE 26

Under Federal Rule of Civil Procedure 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ."[54] Rule 26(c) limits this blanket provision, stating that "for good cause . . . the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or

53. *Id.* at 1272-73.
54. FED. R. CIV. P. 26(b)(1).

undue burden or expense . . . ."[55] One source explains that "[a]lthough the need in specific fact situations to maintain the confidentiality of a researcher's subject or source clearly exists, this result can be accomplished by a court's exercise of its discretionary power to issue a protective order under Rule 26(c) . . . ."[56] A court must base such an exercise of discretionary authority upon a strong showing of "good cause" before denying a party the right of access to the requested information.[57]

A court's power to protect a party from annoyance, embarrassment, oppression, or undue burden or expense is of limited use to researchers protecting suspected violators of CERCLA in attempting to avoid an EPA disclosure request pursuant to section 9604(e)(2). Indeed, CERCLA's underlying purpose seems to impose "burdens or expenses" on individuals who are endangering the public health by engaging in prohibited pollution activities. Any annoyance or embarrassment that such individuals may experience is unlikely to constitute grounds for issuance of a protective order that operates to defeat the statutory scheme.[58]

A. Protecting the Researcher-Subject Relationship

A court might be more inclined to issue a protective order to preserve the sanctity of the researcher-subject relationship rather than to prevent undue annoyance. This was demonstrated in *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*[59] In *Richards*, a Harvard economics professor had researched the environmental decision-making processes of utilities,[60] including a decision by the Pacific Gas & Electric Co. (PG & E) to install spray-cooling equipment manufactured by the plaintiff, Richards of Rockford

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55. FED. R. CIV. P. 26(c). Fla. R. Civ. P. 1.280(c)(7) further stipulates that a trade secret or other *confidential research*, development, or commercial information need not be disclosed, or if it is, only disclosed in a designated way (emphasis added). Unfortunately, there have been no cases reported in Florida where a court has issued a protective order to preserve the sanctity of confidential research.

56. Kaplan & Cogan, *supra* note 36, at 225.

57. 4 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.69 (2d ed. 1993).

58. The EPA has rules derived from CERCLA § 9604(e)(7) that prevent the release to the general public of confidential information gathered by the agency. Under 40 C.F.R. Part 2, subpart B, businesses are allowed to assert a confidentiality claim regarding all or part of the material subject to disclosure because of an EPA request or demand for information. This confidentiality claim does not shield the business or other entity from complying with the EPA's demand or request, however. Rather, under 40 C.F.R. § 2.205(e), the claim, if approved, prevents the EPA from disclosing confidential materials to competitors or other entities who have requested release of that information in accordance with EPA's disclosure policies contained in 40 C.F.R. § 2.101.

59. 71 F.R.D. 388 (N.D. Cal. 1976.)

60. 71 F.R.D. at 389.

(Richards).[61] During the course of the research, the professor interviewed a number of PG & E employees after giving the company a pledge of secrecy.[62]

After the professor completed study, a dispute arose between PG & E and Richards over the quality and performance of the spray-cooling equipment.[63] PG & E withheld final payment, and Richards brought suit.[64] During pre-trial discovery, Richards attempted to obtain the identity of the employees consulted during the study, as well as the content of their statements.[65] The researcher declined to provide the requested material, and Richards moved for an order to compel production.[66] The court denied this motion.[67]

In denying Richards' motion to compel, the *Richards* court noted that the exercise of judicial discretion often balances competing interests.[68] In this case, the court measured the desire of the litigants and of society in the fair and efficient resolution of civil disputes against the unfettered ability of researchers to protect the societal interest by facilitating change through knowledge.[69] Finding such interests not readily comparable, the court turned to the cases recognizing a qualified First Amendment privilege for news reporters' sources. The court found these cases provided "useful guidance" in striking a balance between discovery and non-disclosure.[70] In news reporter cases, courts typically inquire into the nature of the proceeding, whether the deponent is a party, whether the information is available from other sources, and whether the information sought goes to the "heart of the claim."[71] To date, these four factors are the only meaningful standards applied by courts to determine the scope of discovery of confidential materials generated within the context of a relationship of acknowledged social value. Thus, each factor merits discussion.

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61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 389 (N.D. Cal. 1976).
66. *Id.*
67. *Id.* at 391.
68. *Id.* at 389.
69. *Id.* at 389, 390.
70. Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 390 (N.D. Cal. 1976).
71. *Id.*

1. The Nature of the Proceeding: Civil or Criminal

A court may alter the weight given to requests for disclosure of confidential information depending on whether a proceeding is criminal or civil.[72] This conclusion is based on an interpretation of *Branzburg*,[73] that compelled disclosure of confidential news sources is limited to the obligation of reporters to respond to grand jury subpoenas.[74] This obligation is not present in civil litigation.[75] "In the context of a civil trial, the rationales for forcing a newsman to reveal his confidences are much less weighty than those involved in criminal proceedings."[76] Because the analogy between reporter and researcher has consistently been reaffirmed, courts should consider the nature of the proceeding in the researcher-subject context when determining whether researchers should disclose confidential materials or identities.[77]

2. Deponent is a Party or Non-Party

Whether the deponent is a disinterested third party or a main party to the lawsuit was the second factor the *Richards* court considered.[78] The importance of this factor is unclear.[79] All courts refusing to compel disclosure in civil suits have done so when the deponent was not a party to the suit, and either the information was available from other sources or did not go to the heart of the matter.[80] It is uncertain whether a court under similar circumstances would compel disclosure if the deponent was actually a party to the action.[81]

3. Availability of Alternate Sources

As with the status of the deponent in the litigation, the importance courts will attach to the availability of alternate sources is not readily apparent. In decisions where courts have refused to compel disclosure, parties requesting the information had not exhausted alternate sources of information. These courts also found that the requested materials were either irrelevant or did not go to the heart

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72. Curtis, *supra* note 38, at 887.

73. Branzburg v. Hayes, 408 U.S. 665 (1972).

74. *See, e.g.*, Baker v. F & F Investment, 470 F.2d 778, 784 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

75. *Id.*

76. Gilbert v. Allied Chem. Corp., 411 F. Supp. 505, 510 (E.D. Va. 1976).

77. *But see* Wright v. Jeep Corp., 547 F. Supp. 871, 876 (E.D. Mich. 1982).

78. Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 390 (N.D. Cal. 1976).

79. Curtis, *supra* note 38, at 888.

80. *See, e.g.*, Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972).

81. Curtis, *supra* note 38, at 888.

of the claim.[82] In two cases where a party did not exhaust alternate sources, however, the court found the requested material highly probative and compelled its disclosure.[83] As a result, this factor, although of some importance to the determination of whether a court should compel production of confidential materials, is not determinative.

4. *The "Heart of the Claim" Factor*

The "heart of the claim" factor is derived from Rule 26(b) of the Federal Rules of Civil Procedure, which states parties may discover "any matter, not privileged, which is *relevant* to the subject matter involved in the pending action . . . ."[84] The "heart of the claim" analysis is more stringent than a test of relevancy.[85] Unless the information sought is *essential* to the moving party's claim, there is no compelling interest in forcing disclosure that would offset an equally high societal interest in maintaining the integrity of communications generated within the context of a confidential relationship.[86] This factor of the *Richards* test seems to be of overriding importance in assessing compelled disclosure; often it is the only factor analyzed by courts in making this determination.

B. *Case Law After* Richards

1. *The* Procter & Gamble *Cases*

Subsequent decisions examining the propriety of compelling disclosure of confidential materials generated within a researcher-subject context under Rule 26 have not studiously followed the *Richards* guidelines. For example, *Lampshire v. Procter & Gamble Co.*[87] concerned a products liability action against Procter & Gamble (P & G), the manufacturer of a tampon alleged to have caused toxic shock syndrome (TSS). The Center for Disease Control (CDC), a non-party, filed for a protective order preventing P & G's discovery of the

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82. *See supra* text accompanying notes 58-80.

83. Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974) (finding district court did not abuse its discretion in granting appellee's motion to compel discovery of identity of confidential sources in civil libel action); Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969) (granting plaintiff's motion to compel a witness to testify about confidential information sources in a defamation action, finding no reporter privilege existed in Texas and source was necessary for plaintiff's case).

84. FED. R. CIV. P. 26(b) (emphasis added).

85. Curtis, *supra* note 38, at 890.

86. *Id.*; James C. Gooddale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 738 (1975).

87. 94 F.R.D. 58 (N.D. Ga. 1982).

names of participants in a TSS study performed by the CDC.[88] The CDC claimed it had a confidential privilege arising from a common law governmental privilege regarding matters affecting the public interest.[89] The court declined to address this contention by the CDC,[90] holding that because Rule 26(c) authorizes the court to protect persons from undue embarrassment or annoyance, and because such protection was appropriate in this case, it was unnecessary for the court to address the privilege questions.[91]

In another TSS products liability action, *Farnsworth v. Procter & Gamble Co.*,[92] P & G appealed a protective order granted to the CDC.[93] Again, P & G sought the identity of the study participants.[94] The CDC again claimed it held a confidential privilege arising from a common law governmental privilege regarding matters affecting the public interest.[95] The parties did not present relevancy or "heart of the claim" arguments. The CDC disclosed all of the requested materials, including the identities of any women consenting to disclosure.[96] It refused, however, to release the names of non-consenting study participants.[97] On appeal, the Eleventh Circuit held that the protective order granted to the CDC was proper under Rule 26(c).[98] The decision did not address the privilege issue. The court found its Rule 26 analysis was alone sufficient to find that the CDC's interest in keeping its participants' names confidential outweighed the tampon manufacturer's discovery interests.[99]

2. Solarex Corp. v. Arco Solar, Inc.

Solarex Corp. v. Arco Solar, Inc.[100] was another case that balanced privilege interests[101] within the context of a Rule 26 protection analysis. In this patent infringement case, Arco sought to compel the publisher of a scholarly journal to disclose the identity of an

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88. *Id.* at 60.
89. *Id.*
90. *Id.* at 60-61.
91. *Id.* at 61.
92. 758 F.2d 1545 (11th Cir. 1985).
93. *Id.* at 1546.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1548 (11th Cir. 1985).
99. *Id.* at 1547. Note the distinction between the requirement of good cause articulated in Rule 26(c) for limiting discovery and the more stringent balancing test that has emerged in federal case law dealing with the confidential information question. *See id.*
100. 121 F.R.D. 163 (E.D.N.Y. 1988).
101. 8 WIGMORE, *supra* note 20.

independent scholar who helped the journal's editor evaluate manuscripts submitted for publication.[102] The court declined to recognize a general testimonial privilege in this case because of "the weighty authority counseling restraint in recognizing and construing testimonial privileges, particularly where the interests at stake may be protected by less onerous means."[103]

The *Solarex* court refused, however, to compel disclosure of the requested materials after balancing the competing interests.[104] According to the court, the parties' right to discovery, stemming from society's interest in a full and fair adjudication of litigation issues, required balancing with society's interest in protecting the confidentiality of certain disclosures made within the context of a relationship of acknowledged social value.[105] The court denied Arco's motion to compel,[106] finding the confidentiality of the information sought far outweighed any demonstrated need for the information by Arco.[107]

3. Andrews v. Eli Lilly & Co.

A final case regarding production of confidential information generated in a researcher-subject context is *Andrews v. Eli Lilly & Co.*[108] In this case, the defendant sought to compel production of a research study pertaining to the subject matter of the suit, the association between ingestion of diethylstilbestrol, or DES, by pregnant women and the later development of adenocarcinoma of the vagina by their female offspring.[109] Although the material was concededly discoverable under Rule 26(b)(1),[110] the court refused to compel discovery after applying a Rule 26(c) balancing inquiry to the facts of the case.[111]

The *Andrews* court balanced society's interest in production of all relevant evidence with the researcher's (and subjects') interest in maintaining the confidentiality of sources. The court quashed the subpoena for several reasons. First, the court examined whether there was a public interest in maintaining the channels of communications between the researcher and the subject.[112] Researchers

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102. *Solarex*, 121 F.R.D. at 163.
103. *Id.* at 164.
104. *Id.*
105. Solarex Corp. v. Arco Solar, Inc., 121 F.R.D. 163, 169 (E.D.N.Y. 1988).
106. *Id.* at 180.
107. *Id.*
108. 97 F.R.D. 494 (N.D. Ill. 1983).
109. *Id.* at 497.
110. *Id.*
111. *Id.* at 503.
112. *Id.* at 499.

obtained the study's data after a promise of confidentiality.[113] The court was concerned that compelled disclosure could result in a "very substantial reduction in the quality and quantity of epidemiological research and the loss of information that contributes to advancement in the standards of medical care for our population."[114] The court was influenced by three additional facts: the manufacturer's need for the evidence was speculative and uncertain; nothing showed that simply deleting the names from the records would prevent a breach of confidentiality; and the subpoena required premature disclosure of data in an unfinished study.[115]

V. APPLYING THE CASE LAW TO THE HYPOTHETICAL

The foregoing discussion presented the significant case law on the ability of researchers to avoid disclosure of confidential materials and sources. The following section discusses how this precedent impacts analysis of the main issue: whether researchers who hold confidential information regarding pollution activity could avoid CERCLA disclosure requirements. A threshold issue is whether an academic privilege or Rule 26 analysis can be applied to the CERCLA hypothetical.

In the SARA amendments of 1986, Congress addressed the issue of exempting privileged communications from CERCLA's affirmative disclosure requirements. By amending the statute to include not only persons directly involved in the generation, storage, or transportation of hazardous materials, but also "*any person*" who has or may have information regarding hazardous material activities, Congress broadened the disclosure requirement.[116] Possibly, this action means Congress has weighed the social utility of granting enforcing agencies access to any and all information related to a hazardous waste remediation effort, and concluded that this per se outweighs any "incidental" chilling of social values protected by Rule 26(c). This conclusion renders moot any judicial balancing of the equities.

Dow Chemical possibly supports a different conclusion, at least in the context of FIFRA: that a discovery request issued pursuant to FIFRA may be quashed if a party demonstrates compelling reasons against discovery.[117] This conclusion, even if valid, provides little comfort to researchers attempting to convince courts that Congress intended a balancing of the equities regarding disclosure of

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113. Andrews v. Eli Lilly & Co., 97 F.R.D. 494, 499 (N.D. Ill. 1983).
114. *Id.*
115. *Id.* at 494.
116. *See supra* note 6.
117. 672 F.2d 1262 (7th Cir. 1982).

confidential materials under CERCLA. Unlike CERCLA, FIFRA does not mandate the affirmative disclosure of any information or material.[118] FIFRA merely authorizes the use of subpoenas to obtain discoverable materials in anticipation of litigation,[119] an approach commensurate with the discovery provisions of the Federal Rules of Civil Procedure. Thus, the issue of compelled disclosure in a FIFRA action falls within the framework of a Rule 26(c) balancing approach.[120] No similar analysis applies to CERCLA disclosure provisions, which are outside the ambit of the normal discovery process.

It is unclear what might result if, in assessing the need for an information request generated in accordance with CERCLA, a court balanced the social value of preventing or punishing pollution with the social value of preserving the confidentiality of material gathered in the context of a researcher-subject relationship. Though the rationale underlying several related decisions in this area is murky, certain generalities may be stated. First, there is no academic privilege protecting the confidentiality of researcher-subject communications. Several courts have either declined to address this issue or have refused to recognize the privilege, even though they ultimately refused to compel disclosure after applying a Rule 26 balancing test.

A second generality is that compelled disclosure of confidential materials may be avoided on a case by case basis. Courts generally balance society's need for production of all information required to ensure a fair adjudicatory process against the need for preservation of confidentiality in the researcher-subject relationship. There are two justifications for preserving the confidentiality of a researcher-subject relationship: the preservation of the free flow of information between researchers and their subjects, and the preservation of the subject's privacy rights. With this analytical framework in mind, consider again the CERCLA hypothetical.

In the hypothetical, researchers have gathered information from respondents under a pledge of confidentiality that would, if disclosed, implicate the respondents in some unreported pollution activity. The EPA has requested that the researchers disclose their survey sources and materials as mandated by section 9604(e)(2) of CERCLA, and the researchers have refused to comply. The EPA then seeks judicial enforcement of its information request. Will the researchers be able to avoid compelled disclosure?

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118. 7 U.S.C. § 136d(d) (1988).
119. *Id.*
120. FED. R. CIV. P. 26(a), 30(g).

The researchers' arguments would run as follows: The compelled disclosure of sources and materials would "chill" the free flow of information, which is vital to scientific or academic research. Breaching a pledge of confidentiality would cause reluctance among sources to disclose future information, thereby preventing the researchers from contributing to society's advancement through dissemination of knowledge. Furthermore, the disclosure of a survey respondent's name would invade the respondent's privacy.

The EPA would make three interrelated arguments. First, preserving the confidentiality of such communications would hamper EPA's ability to obtain information regarding hazardous material activities. The EPA needs this information to protect human health and the environment. Second, society is not advanced by the withholding of academic information that could harm society. Protection of human and environmental health overrides concerns of confidentiality. Information regarding any pollution activity must be reported for hazardous waste laws to be effective. Acting contrary to reporting requirements is a regression, not an advancement. Third, because the polluters are violating the express statutory pollution control and reporting requirements, they have no privacy interest in the information.

A court applying a balancing analysis to these factors would probably require disclosure of confidential sources and materials. The researchers' strongest argument is that forced disclosure would chill the free flow of information by scaring away potential sources interested in maintaining their privacy and confidentiality. This compelling argument has led several courts in cases discussed above to protect confidential researcher-subject communications from disclosure.[121] Several features of this hypothetical argue against following these earlier precedents, however. First, few cases provided such a compelling argument for disclosure as the instant hypothetical, which directly implicates the survey respondent in unreported hazardous waste activities that have potentially catastrophic effects on the environment. Second, the privacy interest meriting protection in previous cases protected sensitive personal information—not the desire to avoid liability under an environmental statute.[122] Finally, information regarding disclosure of hazardous materials violations is not merely discoverable under the Federal Rules of Civil Procedure, rather, CERCLA affirmatively compels such disclosure. A court would likely give deference to CERCLA's affirmative disclosure

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121. *See supra* part IV.B.

122. South Florida Blood Services, Inc. v. Rasmussen, 467 So. 2d 798, 802 (Fla. 3d DCA 1985).

requirements. Therefore, a court might conclude that, despite some negative consequences, disclosure of confidential sources and materials regarding violations of CERCLA can and should be compelled.

V. CONCLUSION: WHAT'S A RESEARCHER TO DO?

Experience demonstrates that CERCLA is selectively, if not sporadically, enforced. Consequently, the only way to achieve the positive environmental results intended by CERCLA—at least within the agricultural community—is to create a regulatory scheme that consists of both an enforcement and an educational component. Land-grant institutions provide the educational component by using field-level research to evaluate the current disposal practices used by the agricultural community and suggest changes to those practices that will lead to positive environmental results. The validity and success of this educational program depend on open channels of communication between researchers and farmers. Yet the compelled disclosure of confidential sources and materials by researchers could result in significant economic impact to the farmer and would almost certainly chill—if not freeze—those channels of communication.

If strict application of the law would require agricultural researchers to disclose confidential sources and materials, and if disclosure would effectively destroy the educational component of the regulatory scheme, methods must be developed to avoid this consequence. One technique would be for researchers to employ a procedure that ensures the anonymity, not just the confidentiality, of the research subject.[123] Although this procedure might not yield the most complete or comprehensive set of data possible—for example, researchers would be unable to follow-up with those who failed to initially reply—this minor loss is mitigated by avoiding negative consequences to additional research that compelled disclosure would bring. Ensuring a source's anonymity maintains the credibility of the research effort, helps overcome the reluctance of agricultural communities to divulge sensitive information, and, most importantly, encourages farmers to change their practices and conform to the dictates of federal environmental laws.

Another step to avoid the undesirable effects of compelled disclosure would be to improve communication between the educational and enforcement communities. Although the activities of the

123. A discussion of the methodology, benefits, and detriments of various research techniques is beyond the scope of this paper. For further information, see generally Janet H. Malvin and Joel M. Moskowitz, *Anonymous Versus Identifiable Self-Reports of Adolescent Drug Attitudes, Intentions, and Use*, 47 PUB. OPINION Q. 557 (1983); SEYMOUR SUDMAN, APPLIED SAMPLING (1976).

two communities should not be excessively entangled, room exists for heightened understanding between them. The academic community must make it clear by pronouncement and by deed that the two communities are complementary, not antagonistic, to each other, and that the damage to the educational component that would result from compelled disclosure of confidential sources and information would decrease overall social benefit. The enforcement agencies, on the other hand, could enlist the services of the academic community to educate farmers about the dangers of improper hazardous material disposal and to devise improved disposal methods that pose less danger to the environment. Perhaps such an improvement in the level of cooperation between the academic and regulatory communities would prevent the employment of heavy-handed tactics by one community against the other.

An analysis of the language and legislative history of CERCLA as well as the law of academic research reveals that courts would likely compel researchers possessing sensitive information regarding disposal practices in violation of CERCLA to divulge that information to the EPA. Disclosure by the agricultural researchers would almost certainly inhibit the flow of information from the agricultural community, thereby reducing the contribution those researchers could make in bringing about safe disposal practices. In light of the generally ineffective enforcement of CERCLA by regulatory means, this crippling of the educational component would unnecessarily impede the CERCLA's goal of achieving safer disposal practices. Perhaps the modest suggestions made in this Article will foster awareness of the problems that could arise through the use of heavy-handed or insensitive enforcement techniques and spur discussions aimed at avoiding those consequences.