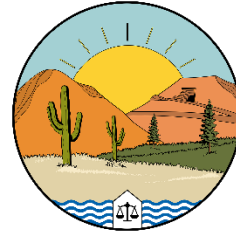




THE UNIVERSITY OF ARIZONA  
COOPERATIVE EXTENSION

## Natural Resource Users Law & Policy Center

A collaboration between the  
James E. Rogers College of Law and  
the College of Agriculture & Life Sciences



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### Memorandum

To: George Ruyle  
Co-Director, Center for Natural Resource Users Law and Policy Center  
University of Arizona

From: Jeff Eisenberg, Consultant

Subject: **Confidentiality of University Research Data Collected from  
Agriculture Operations**

#### Introduction

The public in the United States and Arizona have become increasingly hostile to having farms or ranches operate in the vicinity of where they live and have launched a number of legal challenges to operations in recent years. Maricopa County is an excellent example of the kind of place where these interests collide. The County accounted for 31% of agriculture sales in the State in 2017 and is also the most populous county.

Particular social issues arise around the need to secure the safety of our food supply. The Center for Disease Control estimates that more than 37 million people in the United States acquire a food-borne illness annually from one of 31 pathogens transmitted commonly by food. This large number is significant because it sets the framework within which policy makers consider management of food safety. The number of illnesses traced to e. coli is a fraction of the total with 344,884 reported annual cases.

This concern for food safety and its relationship with beef production is particularly important in Arizona given the significance of vegetable production in the state and the series of lettuce recalls for e. coli contamination over the last several years in the region. In 2020, lettuce generated \$725 million in Arizona which is the highest revenue of any agriculture commodity produced in the state after dairy. The lettuce is largely grown in Yuma County which is also the host county of the largest cattle feedlot in the state, McElhaney Feedyard.

As a result of a record of questionable challenges to the legitimacy of agriculture operations, some farmers and ranchers are suspicious of cooperating with public officials in examining agricultural operations. While American farmers and ranchers are proud of what they do, no one likes for their personal financial information to be put on public display, available to be dissected by journalists and/or activists.

### **The Need for University of Arizona Research**

Notwithstanding these tensions, policy makers, some agriculture producers, and the academic community want to improve the social acceptance of agriculture and strengthen food safety.

The University of Arizona has worked to create best management practices that will enable producers to voluntarily adopt practices to mitigate the risk of pathogen transmission. In particular, it has developed and is implementing a research program focused on identifying the pathways for the transmission of pathogens and then the development of voluntary best management practices to minimize the likelihood that transmission occurs.

For a number of reasons, the ideal outcome for lettuce and beef producers would be for voluntary producer adoption of BMPs to succeed in greatly eliminating the transmission of food pathogens. First and foremost, the supply of food and public health would be safer. Production agriculture would be viewed more positively by the general public if it produces safe food. A more positive overall public opinion environment would help suppress public attacks on agriculture and would generally create a more stable business climate for production agriculture.

Despite the obvious benefits of developing and implementing effective BMPs, beef producers are possibly hesitant to participate in a university research program that could result in the release of proprietary information about an operation to the general public which producers understandably want kept confidential. Beef producers may believe that they have been able to avoid food safety regulation to date, and question whether there will face regulation in the future. If they believe they won't face future food safety regulation, they could ask themselves why they would want to usher in unwanted BMPs that would only serve as a foundation for a future regulatory regime.

No one can predict the future of food safety regulation of beef production in the country. On the one hand, the prospect of significant additional federal legislation to regulate food safety in a new sector of agriculture appears slim for the foreseeable future. On the other hand, the climate for additional regulation could affect the frequency and intensity of new food pathogen outbreaks. As previously noted, food supply is a \$1 trillion industry in this country. Depending on whether there will be frequent and widespread outbreaks of new food pathogens related to beef production, public pressure could drive a new effort to enact federal legislation.

Even without new federal legislation, the private sector has taken its own significant action in this arena. Leafy green growers in both Arizona and California have banded together to bind themselves to Leafy Green Marketing Agreements (LGMA) which prescribe a stringent, science-based food safety protocol to ensure a safe and quality production process. Virtually all growers in both states have signed onto the Agreements. Members are required to have both scheduled and unannounced audits of their production activities. All audits are conducted by USDA-licensed inspectors to assure the public that the industry stands behind the food safety practices that are included in the Agreements.

Both the Arizona and California LGMAs require leafy green fields to be one mile away from Confined Animal Feeding Operations, and 30 feet away from pasture lands used for grazing. Regardless of the standard of proof produced in FDA investigations of *e. Coli* outbreaks that considered the responsibility of cattle operations for the outbreaks, these guidelines represent a judgment by an important economic sector in agriculture production regarding what is necessary to minimize further pathogen outbreaks. While maybe imperfect, these actions represent a social judgment that beef production poses a risk to food safety under certain circumstances.

Into this uncertainty steps the humble beef sector BMP. It holds the promise of helping cattle producers ward off federal regulation of their operations for food safety; of improving food safety in the country; and improving the overall climate of public opinion in support of the industry. These important goals can all be met while at the same time protecting the confidentiality of the operation's proprietary information from the public.

## **University Management of Research Information**

The general rule for records retained by a state institution such as the University of Arizona is that the public is presumed to have the right to see the records, which includes records of research. A.R.S. 39-121. However, Arizona law provides for a number of exceptions to this general rule for the Arizona Board of Regents which governs the Universities of Arizona, Arizona State, and Northern Arizona.

Under A.R.S. 15-1640, the following exemptions apply to the general duty to disclose research data under Title 39:

- 15-1640(A)(1)(b): Information developed by persons employed by a university, independent contractors working with a university or third parties that are collaborating with a university, if the disclosure of this data or material would be contrary to the best interests of this state.
- 15-1640(A)(1)(c): Information provided to a university by a third party pursuant to the terms and conditions of a contract between the university and the third party. These agreements are approved by the Senior Vice President for Research at the University of Arizona.
- 15-1640(A)(1)(d): Information composed of unpublished research data, manuscripts, preliminary analyses, drafts of scientific papers, plans for future research and prepublication peer reviews.

These exemptions do not apply if the subject matter of the records becomes available to the general public, i.e., if the subject matter is published. 15-1640(C).

The Arizona Court of Appeals defined what the "best interests" of the state looks like in the case of university research in Energy & Environment Legal Institute v. Arizona Board of Regents, No. 2CACV-2017-0002 (Ariz. App. Ct., Second App. Div., Sept. 14, 2017) (unpublished). In this decision the Arizona Court of Appeals rejected attempts by a "free market" legal foundation to use public records requests to compel faculty members to release emails related to their climate research. The academic interests argued to the court:

"Courts should consider the best interests of the state to maintain a free and vital university system, which depends on the protection of academic freedom to engage in the free and open

scientific debate necessary to create high quality academic research. Where the requests seek prepublication communications and other unpublished academic research materials, . . . compelled disclosure would have a severe chilling effect on intellectual debate among researchers and scientists.”

The court agreed with this argument and ruled that 15-1640 “created an academic privilege” for university research against the obligation in Title 39 to release all public records. It returned the case to the trial court to properly apply the statutory protections available to the scientists.

This significant decision provides strong support for university researchers collecting data on pathogen transmission or testing methods to prevent transmission to be able to protect their research from public disclosure. It goes a considerable distance in allaying the concerns of producers about releasing to the public, information on the transmission of pathogens that may be connected in some degree to their operations.