The Committee met five times and considered the Academic Freedom aspects of the following matters which were referred to us for comment:

**DRAFT DATA MANAGEMENT, USE, AND PROTECTION POLICY**
The Committee recognized the laudable goals of this policy, but upon close examination found it too ambiguous for us to assess with any confidence its potential impact on academic freedom. We requested clarification on several specific aspects of the policy.

**EXECUTIVE SUMMARY AND RECOMMENDATIONS OF THE USA PATRIOT ACT TASK FORCE ON INTERNATIONAL STUDENTS AND SCHOLARS**
The Committee saw nothing in this document of concern about academic freedom.

**ACADEMIC COUNCIL RESOLUTION ON RESTRICTIONS ON RESEARCH FUNDING SOURCES**
The Committee considered this matter at two meetings, and the Chair and several members also attended a joint meeting called by the COR to hear a presentation from the School of Public Health. In general, we support the idea that the Academic Council should articulate a policy that recognizes the academic freedom of faculty members to accept research funding from any source, consistent with their individual judgment and subject to University policy. At the same time, we are reluctant to endorse the present draft in its full strength, providing that “no special encumbrances should be placed” on a faculty member’s decision to solicit or accept funding based on its source. Rather, we recommended that a procedure be developed to permit an individual unit of the University to request, by supermajority vote of the faculty, an exemption from the stated policy in order to protect its academic integrity and mission.

**PROPOSED UPDATE TO THE ELECTRONIC COMMUNICATIONS POLICY**
The Committee found this policy to be well-crafted and generally acceptable.

**BERKELEY’S RESEARCH-DATA SHARING POLICY (DRAFT – 2/4/05)**
The Committee viewed the draft policy as imposing an obligation to share research data in two situations (1) when the data are used in a published paper, book, or some other format designed for final distribution; and (2) when no publication has occurred within a “reasonable” period of time. We do not think the first situation raises academic freedom concerns, with two reservations: (a) a clear definition of a “reasonable time” should be provided; and (b) the definition of “data” should be broadened to include the social sciences and humanities, rather than be limited as closely as it now is to the scientific model of research. We think serious academic freedom issues are raised in the second situation by forcing investigators to share data when no publication is contemplated. Doing so infringes on the autonomy of investigators by creating pressure to publish at all, or to do so at a time and in a form other than that which would result from the investigator’s professional scholarly judgment embedded in traditional disciplinary values. We suggested that the policy needs to be further considered and that wide consultation be undertaken.

We append our full comments on the first, third, and fifth of these matters.
October 18, 2004

Professor Robert Knapp, Chair, Academic Senate
C/o Andrea Green Rush, Executive Director
Academic Senate, Berkeley Division
320 Stephens Hall
Berkeley Campus

Dear Chair Knapp:

Re: Comments on the Draft Data Management, Use, and Protection Policy

I am writing in response to the call for comments regarding the provisional Data Management, Use, and Protection (DMUP) policy. The Academic Freedom Committee welcomes the opportunity to comment on this policy. This letter reflects comments and concerns raised by members of the Academic Freedom committee during their discussion of this policy.

The committee recognizes the laudable goals of this policy. However, members of the committee raised many questions about the specifics of the policy. Several members expressed their concern that the proposed policy lacks sufficient guidance regarding how it would be implemented or what effect it might have on the campus community. Members reported that they found it difficult to identify how DMUP policy might affect their research and teaching, or the work of other faculty and students. They reported that they would have liked to see specifics of what will and won't be permitted. Consequently, the committee concluded that in its present form the policy is too ambiguous for the committee to assess with any confidence its potential impact on academic freedom.

It was also noted that lack of clarity in a policy such as this can pose a fundamental risk to academic freedom, no matter how it is implemented in practice. Ambiguity can cause a chilling effect, where the uncertainty causes researchers or teachers to limit their own activities for fear
of violating campus policy. Such self-enforcement can go far beyond what policymakers intended and thereby raise academic freedom concerns. Some members expressed their opinion that campus participants, including faculty, graduate students, and undergraduate researchers, are entitled to a clear statement explaining what is and isn't prohibited.

To help address the concerns over clarity and fair notice, several members of the committee proposed that specific guidelines, targeted to a few classes of data users, be developed. For instance, one member suggested a 1-page brochure targeted towards graduate student researchers, listing the types of data they might encounter, and specifying exactly what such students are and are not allowed to do with that data. It may be useful to prepare similar brochures for other classes of University participants, such as faculty, instructors, and graduate teaching assistants.

Committee members also requested clarification on whether the DMUP policy was intended to impose any new restrictions on electronic dissemination of research data that go beyond existing restrictions on non-electronic dissemination. Such restrictions require careful examination to identify any potential impact on academic freedom. If the intent of the policy was to avoid any new restrictions that go beyond current policy for non-electronic dissemination, it would be helpful if the policy included a statement of this principle. If any new restrictions were intended, it would be helpful if these were identified explicitly.

In addition, committee members requested clarification on several specific aspects of the policy:

- There was a request to clarify what types of data are excluded from coverage under DMUP policy. It would help to give more specific examples of types of data that are excluded.

- There was a request to clarify the relation of the DMUP policy to that of the UC Copyright Policy. How do the categories of data specified in the Copyright Policy correspond to the classes listed in the DMUP policy? For instance, are scholarly and aesthetic work always excluded from restrictions under DMUP? Does this exclusion apply only to work owned by a faculty member, or does the exclusion remain in full force even to scholarly or aesthetic work produced as part of sponsored research and to other scholarly or aesthetic work owned by the University?

- There was a request to clarify the relation of the DMUP policy to the Sponsored Project Office's policies on the use and release of research results and data. We understand that University policy generally prohibits contracts or grants that limit the freedom to publish or disseminate the results of research (UCOP Contract and Grant Manual, 1-400). Are there any situations under which DMUP policy might introduce new limits on the freedom to publish or disseminate research results (whether or not such research results are produced as part of a sponsored project)? We caution that any new limits on the freedom to publish or disseminate research results or research data could raise fundamental questions of academic freedom.

- There was a request to clarify the relation of the DMUP policy to UC policy on the Patriot Act. We recommend that the wording of the DMUP policy make clear that it is intended to be consistent with all applicable campus requirements on compliance with the Patriot Act. For instance, the drafters of the DMUP policy may wish to consult with the Patriot Act steering
committee to ensure that the DMUP policy is not in conflict with the University's legal obligations under the Patriot Act, if this has not already been done.

- There was a request to clarify the definitions of, and distinctions between, data, campus data, records, and sponsored research data. For instance, is restricted data a subset of campus data, or could there be some form of restricted data that does not qualify as campus data?
- It was suggested that the drafters of the DMUP policy may wish to check the language specifying various classes of data and confirm that the correct class of data was specified in each place. For instance, the policy imposes restrictions on when data may be passed to a third party (p. 13). Are these restrictions intended to apply to transfer of all data, only campus data, only restricted campus data, or something else?

As another example, the policy specifies that campus members should collect only data essential to the performance of assigned tasks (p. 10). Does this refer to all data, or perhaps only to campus data, or to restricted campus data? Scientists sometimes proactively gather as much data as they can and save it for later analysis, even when it is not known in advance whether all of that data will be useful or necessary; is that practice in violation of DMUP policy?

- We would like to request clarification on what class of data the policy on transfer of data to third party vendors (p. 13) was intended to apply to. Is it possible that this clause was only intended to apply to transfer of restricted campus data, and not to all data? We are concerned that the current language could be read as preventing researchers from disseminating the results of their research or data generated during their research to collaborators or to the public. For instance, as currently written, could the DMUP policy be viewed as prohibiting researchers from placing unrestricted research data on their web page for public dissemination? If so, that would raise serious academic freedom concerns. We recommend that the policy on third-party vendors be clarified to apply only to restricted campus data, or to some other appropriate class of data that does not impinge on academic freedom.

In summary, the Academic Freedom committee recommends that the DMUP policy be revised before final approval. We would be happy to offer further comments on the revised version before it is released.

Thank you for the opportunity to comment on the DMUP policy. The Committee is grateful to Professor David Wagner for drafting this memorandum, which was reviewed by the other members of the committee.

Sincerely,

Herma Hill Kay
Chair, Academic Senate Committee on Academic Freedom
MEMORANDUM

TO: CHAIR GEORGE BLUMENTHAL, ACADEMIC COUNCIL

FROM: HERMA HILL KAY, CHAIR, ACADEMIC FREEDOM COMMITTEE

RE: ACADEMIC COUNCIL RESOLUTION ON RESTRICTIONS ON RESEARCH FUNDING SOURCES

DATE: FEBRUARY 7, 2005

At your request, the Committee on Academic Freedom has considered the resolution of the Academic Council on restrictions on research funding sources, first adopted on July 21, 2004, and sent out for general review by systemwide Senate Standing Committees and the Divisions on October 20, 2004. We have reviewed your memorandum dated November 17, 2004, as well as material made available to us by members of the faculty of the School of Public Health at Berkeley.

In general, we support the idea that the Academic Council should articulate a policy that recognizes the academic freedom of faculty members to accept research funding from any source, consistent with their individual judgment and conscience and subject to University policy. We are of the view that the concerns raised as to institutional mission and integrity by the faculty of the School of Public Health could be substantially satisfied by a strong statement that the faculty is opposed to accepting funding from a particular identified source for specified reasons that nonetheless stopped short of coercing dissenting faculty members by refusing to process their grant applications.

At the same time, however, we are reluctant to endorse the Academic Council's resolution in its full strength, which presently holds that "no special encumbrances should be placed on a faculty member's ability to solicit or accept awards based on the source of the funds." We would like to see the Academic Council draft a procedure that would allow an individual unit of the University
to request an exemption from the stated policy in order to protect its academic integrity and mission. While we have not undertaken to draft such a procedure ourselves, we think that at a minimum it should identify the conditions under which such a request for exemption could be made, and that it should require the unit requesting an exemption to do so by a supermajority vote of its faculty. The procedure should specify what body would determine whether such a request should be granted, and provide that the decision-making body specify its reasons for the decision.
Response of Berkeley Academic Freedom Committee

To 2/4/05 Draft of Berkeley's Research-Data Sharing Policy

The Academic Freedom Committee is happy to have the opportunity to comment on the 2/4/05 draft of Berkeley's Research-Data Sharing Policy. The draft stimulated a robust discussion among our members, and we now transmit the results of our deliberations.

First, a disclaimer is in order. We assume that you seek our comments on any academic freedom issues that are or might be raised by the draft policy or its implementation. Based on this assumption, we have refrained from commenting on the wisdom of the policy. We have, however, taken the liberty of offering a few suggestions that might clarify its meaning.

We view the draft policy as imposing an obligation to share research data in two situations: (1) when the data are used in a published paper, book, or some other format designed for final distribution; and (2) when no publication has occurred within a "reasonable" period of time. We believe that the second situation is more problematic for academic freedom than the first, but that even the first situation could be clarified in ways, described below, that would minimize the academic freedom concerns. We will discuss each situation in turn.

A. Situation One. We do not think that a general requirement that researchers make available data they have gathered and used in a publication raises academic freedom concerns, so long as the following two matters are clearly defined.

   (1) Definition of a "reasonable" time. We think the definition of what constitutes a "reasonable time" should indicate when the clock begins to run. The policy contemplates that investigators may have exclusive use of the data they collect "for an initial period of time" before being required to share the data with "bona fide scholars." The suggested "general guide" is that the "first use privilege...should not last beyond the point at which the main findings are accepted for publication." That starting point may not provide the investigator with adequate protection in some fields, where the authors are routinely given a few months to revise their paper, and then several more months may pass before the paper finally appears. We recognize that the draft policy acknowledges that "the understanding of what constitutes a reasonable period may differ between fields and types of research." While this acknowledgement is welcome, we nonetheless think that a "general guide" which starts at publication, rather than acceptance for publication, is preferable to permit the investigator adequate time to determine the content and format of the presentation, surely a component of academic freedom. We also suggest that the policy be revised to make clear that the clock is triggered only by bona fide
publications, rather than by preprints, manuscripts, technical reports, or other informal drafts circulated through the community. This would mean, for example, that if the data are collected in "waves" and published in sequence, each separate publication would trigger its own clock.

Definition of "data." The definition given of "final research data" is taken from the NIH policy, and seems to contemplate the model of scientific research. We think it would be well to seek advice from other segments of the campus research community about whether this definition also adequately describes data produced by investigators in the social sciences and the humanities. For example, assume a humanities investigator who performs a statistical count of poetic motifs in a particular body of poetry. Would the motif-count correspond to the “summary statistics" mentioned in the NIH definition, or to the "data on which summary statistics. . . are based”? If the poetry itself is the "data" that must be shared, then it is already available to anyone who wishes to analyze it, and there would be no threat to academic freedom by the compelled disclosure.

B. Situation Two. We think serious academic freedom issues are raised by forcing investigators to share data when no publication is contemplated. We doubt that the stated rationale contained in Associate Vice-Chancellor Price's transmittal letter applies to this second situation as clearly as it applies to the case of publication. Perhaps the draft policy was not meant to apply in situation two. If not, that point should be clearly stated. But if it is intended to apply to the sharing of data that the investigator has decided not to publish; then we question whether a university - as contrasted with a Project Sponsor - should attempt to force the disclosure of data despite the investigator's contrary decision. We offer the following hypothetical example that illustrates our concerns:

Imagine a hypothetical professor working in the area of global warming, a highly politically charged area of research. She starts gathering data, but after gathering half the data, she realizes that there are fundamental defects in her experimental methodology that would render any conclusions based on this data flawed. Rather than writing a paper based on flawed data, she cancels the data-gathering project and moves on to other pursuits. Two years later, an anti-environmentalist lobbying organization demands that she publish her partial data. She would prefer not to do so; in her professional judgment, any conclusions based on these data would be flawed. She is afraid that the lobbying organization will write a policy paper based on her data, and tout it as "based on data from a UC Berkeley professor," and she doesn't want to have her name associated with anything based on this dataset. Should the university force her to publish her incomplete, flawed data? We think that this compulsion would be uncomfortably close to the academic freedom violation margin.

We think that imposing a disclosure requirement in situation two raises academic freedom issues because it infringes on the autonomy of investigators by creating pressure to publish at all, or to do so at a time and in a form other than that which would result from the investigator's professional scholarly judgment embedded in traditional disciplinary values. While investigators who undertake sponsored research may have contractually surrendered some part of this autonomy, we do not think that
investigators who are not so engaged can fairly be said to have done so. We think the university should foster their academic freedom to conduct research according to the standards of their disciplines rather than seek to impose a duty to disclose that may hinder, rather than advance, the discovery of knowledge.

One consequence of what we have said in our discussion of situation two is that the campus might well ponder whether the draft policy should be limited at present to situation one, pending further consultation about how to proceed with a policy covering situation two. While we think that situations where publication will be foregone entirely are likely to be relatively rare, given the Berkeley ethic favoring research and publication (which is, after all, reinforced by our system of peer-reviewed post-tenure advancements), they pose a relatively high danger of infringing academic freedom.

Please let us know if you have any questions about our comments.