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Harmonizing Transparency: the Need for FOIA--Accessibility of Privately Funded Research that Informs Regulatory Action

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Fifteen years ago Congress passed the Data Access Act, requiring public access to all federally funded research data used in agency decision-making. The Data Access Act, implemented by OMB Circular A-110, requires federal agencies to provide underlying research data in federally funded research that is the subject of a Freedom of Information Act (FOIA) request. This is required when the agencies publically and officially cite the research in support of agency actions. The approach is asymmetrical, however. It requires disclosure of federally funded studies but exempts from public access studies that are funded privately.

Recognizing this asymmetry, the Administrative Conference of the U.S. (ACUS), an independent federal agency, recently [recommended](#) that agencies should, where practicable, provide disclosure of all underlying data in research relied upon by agencies, regardless of whether privately or federally funded. This proposal would harmonize transparency of all research that informs regulatory action, while leaving intact existing exemptions that protect proprietary information.

Asymmetry in research transparency broadly impacts regulatory programs, particularly programs at the EPA. EPA relies significantly on federally and privately funded research to inform regulatory decisions. For example, it uses research to grant permits under the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act. It uses research to compile chemical risk assessments and estimate exposure, hazards, and health effects of chemicals. It uses research to register, re-register, and label pesticides and related products under the Federal Insecticide, Fungicide, and Rodenticide Act, and to license chemicals under the Toxic Substances Control Act. As EPA Administrator Gina McCarthy testified in November 2013, before the House Committee on Science, Space, and Technology, at a hearing to discuss strengthening transparency and accountability within EPA, “science is and has always been the backbone of EPA’s decision-making.”

EPA provides public access to data underlying federally funded research but not to data underlying privately funded research because privately funded research is not subject to the Data Access Act. Yet the federal government and the public still have an interest in research generated by means other than federal funds because that research influences regulatory action that impacts more than the regulated party. For example, when a corporate party submits health and safety studies in order to obtain a permit on a pesticide, the study informs EPA’s regulatory decisions regarding that pesticide. These regulatory decisions may affect the health and safety of any individual person who uses or works near the pesticide, any downstream consumer who ingests produce with residues of the pesticide, and any organisms in the surrounding ecosystem that may also be exposed or otherwise affected, including other humans, livestock, or crops. Though the federal government may not have funded the study, its use of it has far-reaching effects on the public. For that reason, EPA’s treatment of the studies should be the same as if the federal government paid to fund them.

Asymmetry in data transparency impacts science quality. Data transparency provides an important check against bias. Privately funded research submitted to EPA, like any research generated with an eye toward regulatory decisions, is vulnerable to ends-oriented biases in design and reporting as well as suppression of adverse results. Regulated parties have sometimes performed research with the intention of influencing regulatory decisions rather than as a disinterested, academic quest for knowledge. Data-sharing and greater transparency may mitigate research bias. With access to data, researchers can validate results and test new hypotheses on previously unavailable data sets by either replicating research or reanalyzing underlying data.

Additionally, public access to underlying data ensures meaningful participation in the notice and comment process even by those who do not have the resources to conduct or replicate a scientific study. Providing access to underlying research data levels the playing field across parties who submit comments on proposed regulatory action. It affords the opportunity to a party to submit informed and technically knowledgeable comments that engage with the same underlying research data relied upon by EPA, even if the party does not possess the resources to conduct its own study. The ability to submit such meaningful comments is hindered when privately funded research data is not available to interested parties.

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