Accidental Disclosures ≠ Permissible Prior Restraints

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If a government agency inadvertently releases unredacted versions of records in response to a public records request, can the agency turn around and claw back those records? Can the agency demand the requester not publish the information, or—even more extreme—have the already-published information taken down?

Anyone with even a minimal understanding of the First Amendment knows that the answer to these questions should be an unequivocal "no." But that hasn't stopped some government agencies from trying.

In a recent example, the University of Wisconsin-Oshkosh has played tug-of-war against a journalist over records the university claims should have never been released. The case dates back to early 2017 when Nemec—then a student reporter for the university's newspaper—requested university documents about UW-Oshkosh business school professor Willis W. Hagen III, who mysteriously and abruptly was relieved of all his classes that semester.

In an initial court battle between Hagen, UW-Oshkosh, and Nemec (as an intervener) over the releasability of the records, the court ordered disclosure, with some redactions. However, when the university records custodian finally released the records to Nemec in August, she inadvertently sent unredacted copies. And here is where it got interesting.

Several months later, Hagen's attorney noticed the mistake, and in response, the university and Hagan filed motions to force Nemec to return or destroy the records and to prohibit him from publishing or sharing any information in the records. One of Hagen's pleadings also requested Nemec turn over any names of individuals with whom Nemec may have already discussed the contents of the records—a request which, if granted, would likely be a violation of Wisconsin's broad shield law.

Nemec's predicament isn't a lone occurrence. Agencies have at times tried to rectify their oversights by trying to claw back records they wish they'd redacted, or demanding that information be withheld or even un-published.

In 2014, for instance, the Board of Regents of the University System of Georgia attempted to have a student remove from his blog several records that the Board of Regents had released to him. After public backlash from journalists and media lawyers, the motion was withdrawn, with a recognition that the demand for a takedown had no basis in law.

In fact, it is a well-known tenet of the First Amendment that the government may not constitutionally punish someone for publishing lawfully obtained information about matters of public concern, absent a state interest of the highest order. The same goes for prior restraints on publications: Courts have consistently held them to be presumptively unconstitutional.

In *Florida Star v. B.J.F.* (1989), the U.S. Supreme Court dealt with the government's inadvertent release of a rape victim's identity. The victim sued the newspaper for publishing the name, in contravention of a Florida law. The Court overturned a verdict in the victim's favor, in large part because the newspaper had published information that the government itself had provided, no matter the error. In such

circumstances "where the government has made certain information publicly available,it is highly anomalous to sanction persons other than the source of its release."

> *The government may classify certain information [in its custody], establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.*

Nonetheless, agencies keep trying—so much so that California lawmakers recently recognized a need for a new legislation that would limit almost any ability for public agencies to take back government records. Proposed Senate Bill 1244 was a response to a 2016 ruling by the Supreme Court of California in *Ardo v. City of Los Angeles*, holding that if a public agency inadvertently releases a document that should have been exempt, it can demand that the recipient give it back or destroy it. However, by the time SB 1244 was signed into law in September, it had been amended to completely remove the curative provision.

To lessen the risk of lower court orders in favor of claw-backs, journalists should consider publishing documents as soon as they're received. Once information is already in public circulation, both the legal and practical arguments against disclosure become even more feeble.