

# OFFICE OF THE GENERAL COUNSEL

## Legal Advisory

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### SUMMARY

A recent federal case creates significant uncertainty for University researchers who wish to protect their unpublished research materials.

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## RECENT FEDERAL CASE CREATES UNCERTAINTY FOR UNIVERSITY RESEARCHERS

A recent federal case, *U.S. v. Moloney*, creates significant uncertainty for University researchers by upholding a subpoena for unpublished interview-related materials, despite promises of confidentiality made to the interviewees.

In this case, two researchers employed by Boston College started an oral history project on the Northern Ireland conflict. As part of their project, they interviewed fighters on both sides to better understand those who engage in violent conflict. The researchers promised their subjects absolute confidentiality to promote candor.

In 2011, the U.S. Justice Department, acting on behalf of the British government under a treaty, subpoenaed Boston College for interview materials from this project that were considered potentially relevant to an unsolved 1972 abduction and murder in Britain. Boston College refused to comply, arguing that ordering production would jeopardize the academic freedom of Boston College and its researchers.

After reviewing the requested materials *in camera*, a federal district judge ordered Boston College and the researchers to produce most of these materials. On appeal, the U.S. Court of Appeals for the First Circuit upheld this production order. The court also rejected the claim that forced production of the materials violated the university academics' First Amendment rights. The court dismissed concerns that university research would be less effective if researchers and participants were subject to subpoenas, stating that "[t]he choice to investigate criminal activity belongs to the government and is not subject to veto by academic researchers."

We note that in this case, the government sought information for a criminal case. By contrast, if a private party had sought these materials for a civil case, a "balancing of interests" test might favor protection, not production. However, the *Moloney* court explicitly stated that production was appropriate even under a balancing test.

Because the *Moloney* case is binding only in the First Circuit, the University remains free to argue in California courts that *Moloney* was wrongly decided and, that in California, academic freedom more broadly protects confidential, unpublished research materials from subpoena. In addition, these facts (e.g., unpublished research relating to a high-profile criminal investigation) are not common. Nevertheless, this case highlights the fact that University researchers should consider taking the following steps to better protect their confidential, unpublished research materials from a potential subpoena and ensure that research subjects have accurate expectations regarding confidentiality:

1. Whenever possible, researchers should obtain "certificates of confidentiality" ("COCs") issued by the federal government (typically the National Institutes of Health) before they start their research. Although not fully tested in court, COCs are designed to offer protection against civil or criminal subpoenas. Federal funding is not a prerequisite for a COC. However, COCs are only available for certain kinds of research (primarily, but not exclusively, health sciences-related projects).
2. Researchers should think carefully before providing absolute promises of secrecy because a court order may interfere with their ability to honor such promises. Rather, researchers may want to tell interviewees that confidentiality will be maintained "to the extent permitted by law."
3. Researchers should consider whether foregoing the use and retention of subjects' names would be feasible in light of their research goals. If names are not used and/or retained, the identity of research participants may be better safeguarded in the event of a subpoena.