

# Information Disclosure Requirements and Issues for Universities in the United States: Letting Sunshine into the Ivory Tower

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Law and policy in the United States regarding information disclosure by institutions of higher education (referred to generally herein as “universities” for ease of reference) must address a host of complex issues and balance important but competing values when deciding which information to release and which to withhold from the public. Indeed, it has been said that universities, especially public universities, must resolve a “trilemma,” or three-fold dilemma, when faced with questions of disclosure, attempting to balance effectively at least three sets of competing interests: public accountability, or the public’s right to know; the university’s need for institutional autonomy to preserve academic freedom and function effectively; and the right of faculty, staff and students to privacy.<sup>3</sup>

Universities were historically permitted considerable autonomy from regulation in the United States in the interests of fostering academic freedom and the “marketplace of ideas” that enables them to make invaluable contributions to the development of knowledge and to society.<sup>4</sup>

However, preserving the university’s academic autonomy has come into inevitable tension with the public’s desire to be informed about what these important institutions are doing and how they are spending and allocating public funds that help support the operations of public and, to some extent, private universities. Modern universities are diverse, complex institutions, with research laboratories, hospitals, police departments, and large support staffs in addition to faculty, students, classrooms and dormitories. Apart from specifically student- and education-related concerns, they must also deal with other issues like intellectual property rights in university research funded by government grants; crime prevention, including drug and alcohol abuse on campus; claims of discrimination in admissions and faculty tenure decisions; concerns over rising tuition amidst a climate of shrinking Federal and State funding for higher education; and disclosure concerns relating to donors and donations.

Increasingly, United States regulation and case law developed by our courts have placed public universities within the same disclosure environment that applies to any other public institution.<sup>5</sup> While excluded from Federal and State “freedom of information” laws, private universities that receive public funding through government research grants and financial aid for

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<sup>3</sup> Michael K. McLendon, Leigh Gilchrist and James C. Hearn, “State Open-Meetings and Open-Records Laws in Higher Education: An Annotated Bibliography,” January 2003 (hereafter referred to as “McLendon”); available online at: [www.usc.edu/dept/chepa/pdf/governance\\_bib.pdf](http://www.usc.edu/dept/chepa/pdf/governance_bib.pdf).

<sup>4</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>5</sup> Marsha Woodbury, “Freedom of Information Laws Affect the Autonomy of American Universities,” *Murdoch U. Electronic J. of Law*, Vol 1, No. 4 (December 1994), available online at: <http://www.murdoch.edu.au/elaw/issues/v1n4/woodbury14.html>.

students have been subjected to a more limited but nonetheless important array of information and data disclosure requirements as well.

Transparency in the U.S. university world is a complicated topic,<sup>6</sup> given the complex web of Federal and State law that governs this area. Public and private universities in the U.S. are created under State law, not Federal law, with the exception of Federally-funded institutions for military personnel and government employees, such as the United States military academies, Naval Postgraduate School, and military staff colleges. Yet, most private as well as public universities rely on Federal funding of some sort and thus become subject to a variety of Federal laws that require different types of information disclosure.

Moreover, in the last decades, American universities may have lost some of the trust invested in them due to a number of scandals about the misuse of funds, discrimination in admissions and faculty tenure decisions, and widespread cheating, plagiarism and other unethical practices inside academia. The 1993 Wingspread Report of a prestigious panel of scholars urged “Higher Expectations for Higher Education” and called upon universities to reform themselves or face more intrusive regulation.<sup>7</sup> Recently, some citizens and State legislators have called for specific laws to further improve transparency in higher education, including private universities.

This paper will outline the legal framework governing information disclosure for universities in the United States. We first address the limited applicability of the Freedom of Information Act (FOIA), a broad Federal statute that applies to certain information provided by universities to the Federal government, such as research grant applications and government contracts. Next we review State open records laws, many of which follow the model of the Federal FOIA with respect to basic principles and systems of transparency and are the primary legal mechanism to promote and ensure transparency in American universities. We then turn to consider other Federal laws that may expand or limit the disclosure obligations imposed by State open records laws. In addition, we discuss various methods of information disclosure. Finally, we examine several recent proposals for further legislation aimed at increasing university transparency in areas such as financial performance.

## **I. Applicability of Federal and State Freedom of Information Laws to Universities and University Records**

### **A. The Federal Freedom of Information Act (FOIA)**

Apart from the few Federal military-related educational institutions, which do appear to be subject to the U.S. Freedom of Information Act (FOIA),<sup>8</sup> the vast majority of public and

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<sup>6</sup> We have located very few articles that address this issue comprehensively. One survey of literature on the subject concluded that the most popular subject on which articles exist is disclosure relating to the search for and selection of university presidents. Numerous other topics of importance such as disclosure relating to research on campus, student affairs and disciplinary matters, financial decisions, fund raising, donor conflicts, athletics and other matters were only sporadically addressed in the literature. See, McLendon, *supra* note 3.

<sup>7</sup> Woodbury (1994), *supra* note 5.

<sup>8</sup> See, e.g., website of the U.S. Naval Academy, with contact information for its FOIA officer, <http://www.usna.edu/AdminSupport/foia.htm>.

private universities are organized as non-profit corporations under State laws. Accordingly, those universities are, at the institutional level, not subject to FOIA, even if they receive Federal funding.<sup>9</sup>

FOIA was enacted in 1966 to make the Federal administrative process transparent to the public and the media. FOIA, like similar State laws modeled to varying degrees upon it, establishes a presumption that all documents or records held by government agencies must be fully disclosed to the public either proactively or on request, unless such information is specifically exempted from disclosure on such grounds as protecting classified information, personal privacy or confidential commercial information, or is excluded from coverage. The Federal FOIA only applies to “agencies” of the Federal government, which term includes the U.S. Department of Education (DOE) but not universities that are organized under State law.

Nonetheless, certain information provided by universities to the Federal government, including the DOE, or produced by individuals within a university with Federal government funding may be considered to be public records that must be disclosed by the Federal government under FOIA.

Much university research is funded by the U.S. Federal government or by corporations. The public also has the right to see U.S. government and military research contracts and grant applications, subject to privacy, intellectual property and national security protections.<sup>10</sup> For example, pursuant to requests filed under FOIA, Federal agencies make available to the public information about grant applications that they decide to fund, including the name of the project, grantee institution, principal investigator and amount of the award, while protecting any confidential financial information and information that might affect patent or other valuable rights.<sup>11</sup>

The DOE reports that it receives more than 700 requests annually for contracts, grant applications and information about its Federally-funded programs, many of which involve universities and university personnel. DOE has decided to post proactively, in advance of receiving a request, as much of this frequently requested information as possible on its website, at its E-FOIA Reading Room at [http://www2.ed.gov/policy/gen/leg/foia/readingroom\\_2.html](http://www2.ed.gov/policy/gen/leg/foia/readingroom_2.html), as a matter of convenience for the public.<sup>12</sup>

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<sup>9</sup> James T. O'Reilly, *Federal Information Disclosure*, § 4:8, at 65 (3d ed. 2000), stating “A university which receives Federal grants is not Federal and is not directly covered,” citing *Dennis v. U. of Pittsburgh School of Medicine*, 589 F. Supp. 348 (D.V.I. 1984, judgment aff'd, 77- F.2d 1068 (3d Cir. 1985). However, the Shelby Amendment led to new rules by the Office of Management and Budget to open records of data produced with Federal funds and that were “used by the Federal government in developing policy or rules.” OMB Guidance on Circular A-110, “Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” at: [http://www.whitehouse.gov/omb/fedreg\\_a110-finalnotice](http://www.whitehouse.gov/omb/fedreg_a110-finalnotice).

<sup>10</sup> Marsha Woodbury, “A Difficult Decade: Continuing Freedom of Information Challenges for the United States and Its Universities,” *E Law*, Vol. 10, No. 4 (2003), para. 30, available online at: <http://www.murdoch.edu.au/elaw/issues/v10n4/woodbury104nf.html>.

<sup>11</sup> *See, e.g., Progressive Animal Welfare Society v. Univ. of Washington*, 125 Wash.2d 243, 249 (1994).

<sup>12</sup> U.S. Department of Education, FY 2011 Annual FOIA Report, at 33, available at: <http://www2.ed.gov/about/reports/annual/foia/foia-fy11>, and DOE Chief FOIA Officer’s Report 2012, at 5, also available at: <http://www2.ed.gov/about/reports/annual/foia/chieffoiaofficer2011>. The DOE reported it received

American taxpayers may also ask to see the results of the research they fund through the U.S. government, subject to the same privacy, intellectual property and national security protections. In the late 1990's, advocates of government transparency sought to increase public access to Federally-funded scientific data that was used to support regulations, such as the controversial 1997 Environmental Protection Agency air pollution standards. In 1998, the U.S. Congress adopted a legislative change to Federal policy called the Shelby Amendment (after its sponsor) that instructed the White House Office of Management and Budget (OMB), which oversees the Federal government bureaucracy, to require Federal agencies that provide awards or grants to ensure that all data produced under an award "will be made available to the public through the procedures established under the Freedom of Information Act."<sup>13</sup>

In response, OMB put out a proposed policy that attracted over 9,000 comments on the original draft and 3,000 comments on clarifying revisions.<sup>14</sup> After a vigorous public debate on the benefits and potential costs of requiring such disclosure, the revised policy requires Federal agencies that receive a FOIA request for (1) research data relating to "published" research findings, (2) which were produced under an award or grant and (3) which were used by the Federal government in developing an agency action that has the force and effect of law, to request and require the recipient researcher to provide the research data so that it can be made available to the public by the agency through the procedures established under FOIA.<sup>15</sup>

In finalizing this new requirement, OMB sought to balance the need for public access to research data it helps fund against the need to protect the traditional research process to ensure continued cutting edge innovation and development, through an approach that "(1) furthers the interest of the public in obtaining the information needed to validate Federally-funded research findings, (2) ensures that research can continue to be conducted in accordance with the traditional scientific process, and (3) implements a public access process that will be workable in practice."<sup>16</sup>

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2,401 FOIA requests in 2011. *Id.*, at 13. DOE's FOIA Regulations are at: <http://www2.ed.gov/legislation/FedRegister/finrule/2010-2/061410a.html>.

<sup>13</sup> See, OMB Guidance on Circular A-110, *supra* note 9.

<sup>14</sup> See, Advancing Science and Serving Society, "AAAS Policy Brief: Access to Data," updated February 10, 2005, at: <http://www.aaas.org/spp/cstc/briefs/accesstodata/index.shtml>.

<sup>15</sup> New Section 36 of Circular A-110 on Intangible Property specifies for this purpose: "(i) Research data is defined as the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. This 'recorded' material excludes physical objects (e.g., laboratory samples). Research data also do not include: (A) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and (B) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study. (ii) Published is defined as either when: (A) Research findings are published in a peer-reviewed scientific or technical journal; or (B) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law." See, Circular A-110, Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations (11/19/1993) (further amended 09/30/1999), Relocated to 2 CFR, Part 215, available online at: [http://www.whitehouse.gov/omb/circulars\\_a110/](http://www.whitehouse.gov/omb/circulars_a110/).

<sup>16</sup> See, OMB explanation of revisions to Circular A-110 in 1999, at: [http://www.whitehouse.gov/omb/fedreg\\_a110-finalnotice](http://www.whitehouse.gov/omb/fedreg_a110-finalnotice).

The revised policy thus stipulates that FOIA requests will not be granted if the research affects national security, commercial data, trade secrets, medical and personnel records, law enforcement information, or geological data, all of which are exemptions under FOIA. The policy also applies only to data produced with Federal funding that a Federal agency cites in support of a policy or law. In addition, the disclosure requirement only applies to *published* data, and specifically excludes drafts of papers, grant applications, other preliminary information, e-mail, personal notes and physical objects such as cell cultures or lab samples.<sup>17</sup>

In addition, Federal laws other than FOIA require certain other kinds of information to be disclosed by universities that receive Federal funding directly through grants and indirectly through financial aid to students, or where certain Federal statutory rights are involved. Those Federal law requirements are discussed later in this paper.

## B. State Open Records Laws

Since the vast majority of universities are established pursuant to State law, it is State freedom of information or open records laws that establish the basic principles of transparency about the operations of public universities.<sup>18</sup> These open records laws, which exist in all 50 States,<sup>19</sup> follow the basic principles and systems of the Federal FOIA but vary substantially in scope and application to universities and university-related records.<sup>20</sup> In general, however, State-funded universities are typically considered to be government agencies subject to those open records laws.<sup>21</sup>

As the equivalent of government agencies, public universities operate under a presumption of disclosure. For example, the Illinois Freedom of Information Act provides that it is “the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government” and it “is a fundamental obligation of government to operate openly and provide public records as

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<sup>17</sup> See, Woodbury (2003), *supra* note 10, at para. 34, citing the NIH interpretation at:

[http://grants.nih.gov/archive/grants/policy/a110/a110\\_guidance\\_dec1999](http://grants.nih.gov/archive/grants/policy/a110/a110_guidance_dec1999). Access to research data has also become an issue under the United Kingdom’s Freedom of Information Act. See, also, Daniel Cressy, “Research ‘needs exemption from freedom of information act’ say UK politicians.” <http://blogs.nature.com/news/2012/07/research-needs-exemption-from-freedom-of-information-act-say-uk-politicians.html>.

<sup>18</sup> In addition to State open records laws, State open meetings laws similarly may apply to meetings and deliberations by governing bodies of universities and affiliated bodies and are an important mechanism for promoting transparency of university operations and deliberations. These laws are not discussed in this paper.

<sup>19</sup> See, for example, State Public Records Laws, FOIAdvocates, <http://www.foiadvocates.com/records.html>; Open Government Guide, Reporters Committee for Freedom of the Press, <http://www.rcfp.org/open-government-guide>.

<sup>20</sup> Rachel Levinson-Waldman, “Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship,” September 2011, at 10; available online at: [http://www.acslaw.org/sites/default/files/Levinson\\_-\\_ACS\\_FOIA\\_First\\_Amdmt\\_Issue\\_Brief.pdf](http://www.acslaw.org/sites/default/files/Levinson_-_ACS_FOIA_First_Amdmt_Issue_Brief.pdf).

<sup>21</sup> See, e.g., Michigan’s Freedom of Information Act, which defines a covered “public body” to include any body created or primarily funded by or through State or local authority, including public colleges and universities. Michigan State Freedom of Information Act, at: <http://legislature.mi.gov/doc.aspx?mcl-15-232>. A few State open records laws do *not* treat public universities as State agencies. Mathilda McGee-Tubb, “Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Law Must Yield to FERPA,” 53 B.C.L.Rev. 1045, 1057 note 91 (2012), <http://lawdigitalcommons.bc.edu/bclr/vol53/iss3/5>; citing William Kaplin & Barbara A. Lee, *A Legal Guide for Student Affairs Professionals* at 273 (2d ed. 2009).

expediently and efficiently as possible in compliance with this Act.”<sup>22</sup> Accordingly, all records in the custody or possession of a public body which term is defined to include State universities and colleges “are presumed to be open to inspection or copying” and “Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt.”<sup>23</sup>

Thus, public universities like other government agencies must provide a vast array of information to the public either proactively or on request. Information that must be made available to the public ranges from operating rules and procedures, budget and expense information and the salaries of faculty and staff to correspondence (including emails), to investigations of scientific misconduct by faculty or wrongdoing by staff and campus police investigations and suspect booking records, to daily calendars of faculty members and the head of the university, to donor records and information about potential donors (with some exceptions under some State laws) and purchase and sale records of real estate. A recent controversy over the high salary paid to a former University of Connecticut chief of police was triggered by the filing of an information request under Connecticut State’s Freedom of Information Act.<sup>24</sup> Requests filed under the State open records laws, response letters, and responsive documents that were provided may also be disclosed as public records pursuant to information requests.<sup>25</sup>

Many if not most State legislatures continue to exclude private universities from State open records laws. Nonetheless, due to their increased funding dependency on both State and Federal sources, the difference between public and private universities has eroded in some respects.<sup>26</sup> Since most private universities receive governmental research grants and have students whose financial support comes partly from State and Federal sources, they are subject to a variety of reporting and disclosure obligations imposed by Federal law, as discussed below, and to some State open records laws. For example, the Texas Open Records Act applies to the part, section, or portion of any entity that is “supported in whole or in part by public funds”<sup>27</sup> from the State.

State laws also vary widely in their treatment of specific university-related records. According to one study, some are silent on this issue while others contain specific exemptions from disclosure for such information as presidential search materials, certain donor-related information, documents protected by Federal student privacy laws or some categories of student information and scholarly or research materials.<sup>28</sup>

State open records laws and court interpretations, as well as research-specific State laws, may provide requirements and exemptions relating to disclosure of university research that are

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<sup>22</sup> 5 ILCS 140, Section 1, at: <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=85&ChapterID=2>.

<sup>23</sup> *Id.*, Section 1.2.

<sup>24</sup> Jon Lender, “Top UConn Cops’ Pay Doubled Since ‘01,” Hartford Courant, April 17, 2011, at: [http://articles.courant.com/2011-04-17/news/hc-lender-column-uconn-chief-0417-20110416\\_1\\_uconn-trustees-chief-robert-hudd-salaries](http://articles.courant.com/2011-04-17/news/hc-lender-column-uconn-chief-0417-20110416_1_uconn-trustees-chief-robert-hudd-salaries).

<sup>25</sup> See, e.g., the “FOIA Home” website of the University of Illinois, at: <http://www.foia.uillinois.edu/>.

<sup>26</sup> Woodbury (1994), *supra* note 5.

<sup>27</sup> Texas Government Code Annotated Title 5 §552.003(1)(A)(xii), at: <http://codes.lp.findlaw.com/txstatutes/GV/5/A/552/A/552.003>.

<sup>28</sup> Levinson-Waldman, *supra* note 20, at 10; McGee-Tubb, *supra* note 21, at 1058.

different from treatment under the Federal FOIA pursuant to the Shelby Amendment.<sup>29</sup> For example, Michigan State passed a law in 1994 called the Confidential Research Information Act (CRIA) to protect confidential research, intellectual property, and trade secret records maintained by any public university or college in Michigan.<sup>30</sup> CRIA may be cited as an exemption for such records under the State's open records laws. Under CRIA, trade secrets, commercial information and financial information provided to a public university in Michigan by a *private* external source may be withheld from disclosure if all of the following conditions are met:

- (a) The information is used exclusively for research, testing, evaluation, and related activities;
- (b) The information is designated as confidential by the external source before or at the time it is received;
- (c) The University has entered into an authorized agreement to keep the information confidential;
- (d) A document containing a general description of the information to be received under the confidentiality agreement, the term of the agreement, the name of the external entity with whom the agreement was made, and a general description of the nature of the intended use for the information, is recorded by the University within 20 regular working days after it is received.

Under the CRIA, information developed by employees of the University of Michigan also may be protected under the following circumstances:

- (a) Intellectual property created by a person employed by or under contract to the University until a reasonable opportunity is provided for the information to be published;
- (b) Original works of authorship created by a person employed by or under contract to the University until a reasonable opportunity is provided for the author to secure copyright registration;
- (c) Records regarding a patentable invention until a reasonable opportunity is provided for the inventor to secure patent protection;
- (d) Trade secrets or other proprietary information that is determined to have potential commercial value, if a general description of the nature of the information and the University's interest is made available upon request.

New Jersey exempts from the definition of "government record" covered by its Open Public Records Act certain specified information relating to any public institution of higher education that is deemed to be privileged and confidential, including academic research, test questions, donor information in some cases, individual admissions applications and certain student records.<sup>31</sup> Ohio exempts "intellectual property records," defined as records produced or collected by faculty and other employees of State universities "in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly

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<sup>29</sup> See, e.g., "Responding to FOIA Requests: Facts and Resources," containing advice from the National Association for Biomedical Research on procedures and considerations relating to responding to FOIA requests, at: [www.nabr.org/responding\\_to\\_foia\\_requests.aspx](http://www.nabr.org/responding_to_foia_requests.aspx).

<sup>30</sup> University of Michigan FOIA Office website at: <http://www.vpcomm.umich.edu/foia.html>.

<sup>31</sup> New Jersey Open Public Records Law, N.J. STAT.ANN. §47:1A-1.1, available at: <http://www.nj.gov/grc/pdf/act.pdf>.

issue . . . that ha[ve] not been publicly released, published, or patented.”<sup>32</sup> Utah’s open records statute goes even farther to shield all records within the State system of public higher education that have been “developed, discovered, disclosed to, or received by or on behalf of faculty, staff, employees, or students of the institution,” including unpublished lecture notes; unpublished research-related notes, data, and other information; confidential information contained in research proposals; unpublished manuscripts; creative works in progress; and “scholarly correspondence.”<sup>33</sup>

## II. Other Federal Laws Affecting Disclosure by Universities

Despite the variation in treatment of university records, many if not most State open records laws contain a catch-all exemption from disclosure where it would be “otherwise prohibited” by Federal law.<sup>34</sup> The U.S. Federal government does set certain standards for university records maintenance, reporting and disclosure, and for the protection of sensitive information, through a number of laws other than FOIA, principally the Higher Education Act of 1965, as amended (HEA); the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act); the Family Educational Rights and Privacy Act (FERPA); and the Health Insurance Portability and Accountability (HIPAA). The first two basically are information disclosure laws, while the second two are principally information protection or “withholding” laws. These Federal laws in some cases pre-empt and in other cases may be supplemented by State open records laws.

### A. The Higher Education Act of 1965, as amended (HEA)

The Higher Education Act was signed into law on November 8, 1965, as part of President Lyndon Johnson’s Great Society domestic agenda. The law was intended to expand opportunities for individuals from low and moderate income families to obtain a university education. The heart of the legislation was its student aid programs in the form of grants, loans, and work-study assistance under programs administered by DOE.<sup>35</sup> As amended in 2008 by the Higher Education Opportunity Act (HEOA), it also expanded significantly the kinds and scope of information that universities and DOE must provide to “consumers,” who include students, parents, counselors, researchers, legislators and the general public.<sup>36</sup>

In this respect, the HEA can be seen as a significant university disclosure law. Importantly, it requires universities that receive Federal student financial aid funds under Title IV of the HEA to be more transparent about their operations and costs, including obligating them

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<sup>32</sup> OHIO REV. CODE ANN. 149.43(A)(5), available at: <http://codes.ohio.gov/orc/149.43>, which also exempts from disclosure of “donor profile records,” defined to mean all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

<sup>33</sup> Utah State Government Records Access and Management Act, UTAH CODE ANN. § 63G-2-305(39)(a), <http://le.utah.gov/~code/title63g/63g02.htm>.

<sup>34</sup> McGee-Tubb, *supra* note 21, at 1059 and note 104.

<sup>35</sup> Blake Alan Naughton, “A Primer on the Higher Education Act,” Updated March 25, 2008, Congressional Research Report RL34214, at 2, at: <http://wikileaks.org/wiki/CRS-RL34214>.

<sup>36</sup> National Association of College and University Attorneys, “The Higher Education Opportunity Act I: New Reporting and Disclosure Requirements for Colleges and Universities” (the NACUA Report], at [http://www.nacua.org/nacualert/docs/HEOA\\_Reporting.asp](http://www.nacua.org/nacualert/docs/HEOA_Reporting.asp).

to post on their websites “net price calculators” developed by DOE that allow students to calculate the cost of attending that university and compare the cost with other universities.<sup>37</sup>

In order to make more information available regarding the cost of attending specific universities, the HEA requires DOE to publish six lists with information provided by universities regarding their tuition costs: the 5% of institutions with the highest tuition and fees; the 5% of institutions with the highest net price; the 5% of institutions with the largest increase in tuition and fees over the three most recent academic years; the 5% of institutions with the largest increase in net price over the three most recent academic years; the 10% of institutions with the lowest tuition and fees; and the 10% of institutions with the lowest net price.<sup>38</sup> Universities that are included either on (a) the list of largest net increase in tuition and fees or (b) the list of largest increase in net price must report to DOE the reasons for the increases and the steps being taken to reduce those costs.

Altogether, the HEA, as amended by the HEOA, requires universities to disclose approximately 40 items of consumer information if they receive Federal funding.<sup>39</sup> The disclosures range from providing information on costs of attendance and of required textbooks, to information on faculty and educational programs, student activities and career placement services, as well as areas also covered by other Federal laws including graduation rates and campus crime statistics and security policies. Some of the required information must be made available or provided directly to students, while other information must be reported to DOE, which then makes it publicly available. These disclosure and reporting requirements sometimes overlap.<sup>40</sup>

Universities receiving Title IV Federal student aid funding must provide certain statistical information to DOE under the HEA. Universities also disclose that reported information to prospective students and parents, as well as the general public, typically on or with links provided on their own websites. DOE then produces, through the National Center for Education Statistics (NCES), the annual Integrated Postsecondary Education Data System (IPEDS) survey report, which is posted on the website <http://nces.ed.gov/ipeds>. For example, Yale University’s IPEDS information is available at <http://nces.ed.gov/ipeds/datacenter/Snapshotx.aspx?unitId=acaeabb2b4af>,<sup>41</sup> with links to those annual IPEDS reports on Yale’s website at <http://oir.yale.edu/ipeds-surveys>. DOE also maintains a related website and centralized database called College Navigator at

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<sup>37</sup> For example, the University of Washington’s net price calculator is available at <http://www.washington.edu/students/osfa/prospectiveug/aid.est.1.html>, and Yale University’s net price calculator is posted at: <http://www.yale.edu/sfas/finaid/calculator/index.html>.

<sup>38</sup> NACUA Report, *supra* note 36, referencing HEOA §132(c)-(f), codified as amended at 20 U.S.C. § 1015a(c).

<sup>39</sup> Sykes, A., “Information Required to Be Disclosed Under the Higher Education Act of 1965: Suggestions for Dissemination – A Supplemental Report” (NPEC 2012-831) (2011), U.S. Department of Education, Washington, DC: National Postsecondary Education Cooperative, available at <http://nces.ed.gov/pubs2012/2012831.pdf>. Appendix A to that report lists the 40 information disclosure requirements in the form of suggested titles for website disclosure, and is appended to this paper.

<sup>40</sup> *Id.* at 1.

<sup>41</sup> The Yale profile is also available through the NCES program College Navigator at: <http://nces.ed.gov/collegenavigator/?q=Yale+University&s=all&id=130794>. Yale further provides certain “HEOA Data” at <http://oir.yale.edu/heoa-data>. Yale’s data compilation and disclosure of HEOA-required information is handled through its Office of Institutional Research, <http://oir.yale.edu/>.

<http://nces.ed.gov/collegenavigator>, which permits searches and side-by-side comparison of different university information.

Below are some examples of commonly sought information that universities receiving Title IV Federal student aid funding must provide to DOE under the HEA.

Admissions-related information, including:<sup>42</sup>

- Statement of the institution's mission
- Total number of undergraduate students who applied to, were admitted by, and enrolled in the institution
- For institutions that require standardized test scores (SAT or ACT) to be submitted, the reading writing, mathematics, and combined scores on the SAT or ACT for the middle 50% range of the institution's freshman class
- Number of first-time, full-time and part-time students enrolled at the undergraduate and graduate levels
- Number of degree-seeking undergraduate students enrolled at the institution who have transferred from another institution
- Percentages of male and female undergraduate students enrolled
- Percentages of in-State, out-of-State and international students
- Percentage of disabled students and percentages disaggregated by race and ethnic background

Graduation-related information, including:<sup>43</sup>

- Percentage of first-time, full-time degree-seeking undergraduate students who obtain a degree within normal time, 150% of the normal time or 200% of the normal time
- Number of certificates, associate degrees, baccalaureate degrees, master's degrees, professional degrees, and doctoral degrees awarded
- Undergraduate major area of study at the institution with the highest number of degrees awarded
- Career and placement services offered by the institution to students during and after enrolment<sup>44</sup>

Cost of attendance-related information, such as:<sup>45</sup>

- Cost of attendance for first-time, full-time undergraduate students enrolled in the institution who live on and off campus, broken out further for public universities for in-State and out-of-State residents

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<sup>42</sup> Higher Education Act (HEA) § 132(i), codified as amended at 20 U.S.C. §1015a(i)(1)(A)-(I).

<sup>43</sup> *Id.* at § 1015a(i)(1)(J)-(L), (V).

<sup>44</sup> HEA § 485(a)(1)(R), codified as amended at 20 U.S.C. § 1092(a)(1)(R) further requires disclosure of "the placement in employment of, and types of employment obtained by, graduates of the institution's degree or certificate programs."

<sup>45</sup> HEA § 132(i), codified as amended at 20 U.S.C. § 1015a(i)(1)(N)-(S).

- Average annual grant amount (including Federal, State, and institutional aid) awarded to a first-time, full-time undergraduate students enrolled at the institution who receive financial aid
- Average amount of Federal student loans provided through the institution to undergraduate students enrolled at the institution
- Total annual grant aid awarded to undergraduate students enrolled at the institution, from the Federal Government, the State, the institution, and other sources known by the institution
- Percentage of first-time, full-time undergraduate students enrolled at the institution receiving Federal, State, and institutional grants, student loans, and any other type of student financial assistance known by the institution, provided publicly or through the institution, such as Federal work-study funds

HEA also requires a Price Calculator developed by the Secretary of the DOE to be made available on each institution's website to "help current and prospective students, families, and other consumers estimate a student's individual net price at such institution."<sup>46</sup>

In addition to tuition cost information, universities must disclose detailed student loan-related information,<sup>47</sup> and complete the annual IPEDS survey, which collects data on institutional resources such as average salaries and fringe benefits of faculty, the value of the university's endowment, core revenues and expenses and employee statistics and classification breakdown.<sup>48</sup>

Other information that is required to be disclosed under the HEA includes:<sup>49</sup>

- Student-faculty ratio
- Number of full-time and part-time faculty, and number of graduate assistants with primarily instructional responsibilities at the institution
- Student activities offered by the institution
- Services offered for individuals with disabilities
- Campus safety information
- Policies of the institution related to transfer of credit from other institutions

In sum, the HEA as amended by the HEOA requires public and private universities that receive Federal funds to proactively disclose a wide variety of information about admissions, costs, financial aid, student services, graduation rates, career placement and student life.

#### B. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act

Increasingly, universities are being obligated to provide a safe learning and living environment. Federal law has gradually imposed requirements relating to on-campus crime prevention and reporting, drug and alcohol abuse and prevention and related campus security

<sup>46</sup> HEA § 132(h), codified as amended at 20 U.S.C. § 1015a(h).

<sup>47</sup> HEA § 485, codified as amended at 20 U.S.C. § 1092.

<sup>48</sup> HEA § 487 (a)(17), codified as amended at 20 U.S.C. 1094(a)(17). See also <http://nces.ed.gov/ipeds/about/>.

<sup>49</sup> HEA § 132(i)(1)(M), (U), (V), codified as amended at 20 U.S.C. 1015a(i)1(M), (U), (V).

issues. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act),<sup>50</sup> which amended the Higher Education Act of 1965, requires all postsecondary institutions participating in Federal student financial assistance programs to disclose campus crime statistics and security information. The Act, championed by her parents, is named in the memory of a 19-year-old Lehigh University freshman who was raped and murdered while asleep in her residence hall room on April 5, 1986.

The Clery Act requires all universities that participate in Federal financial aid programs to keep, disclose and report information about crime on and near their respective campuses. This includes annual reporting to DOE of crime statistics, publication of an annual security report that is available to the general public, issuing campus alerts of crime incidents as they occur<sup>51</sup> and maintenance of a publicly available daily crime log.<sup>52</sup> Moreover, if the university has on-campus student housing facilities, it must also disclose the procedures for notices of missing students who live in those facilities and keep a fire log that is publicly available, publish an annual fire safety report and report fire statistics to DOE.

This Act, which was supplemented by amendments made by the 2008 HEOA, applies to virtually all public and private universities. For example, in 2011, Yale University, a private university, was cited by DOE after a nearly seven year-long investigation into the Yale Police Department for violating several Federal regulations, including the Clery Act, requiring it to report all sex offenses to the government. Yale faced potential penalties ranging from fines to reduced Federal funding for student aid as a result, but brought its reporting into compliance during the course of the investigation.<sup>53</sup> Yale's campus security and crime statistics information is now posted on the university website, as is common practice for all covered universities.<sup>54</sup>

Compliance with the reporting and disclosure requirements is monitored by DOE, which can impose civil penalties of up to \$27,500 per violation against universities and can suspend them from participating in Federal student financial aid programs. DOE's Office of Postsecondary Education (OPE) collects reported campus crime data and provides customized reports for public inquiries. The data are drawn from the OPE Campus Security Statistics Website database to which universities submit crime statistics annually as required by the Clery Act.<sup>55</sup>

While the Clery Act and HEA require reporting on campus security and crime statistics generically, access to detailed police or incident reports, which provide narrative accounts of crimes, is governed by State open records laws. For example, the University of Washington

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<sup>50</sup> 20 U.S.C. § 1092(f); Implementing Regulations are codified in the U.S. Code of Federal Regulations at 34 C.F.R. 668.46; *see, also*, <http://www.higheredcenter.org/mandates/clery-act>.

<sup>51</sup> At Yale University, these alerts are sent by the University Chief of Police via email to all faculty, staff and students.

<sup>52</sup> U.S. Department of Education, *The Handbook for Campus Safety and Security Reporting* (2011), at 5-6, available at <http://www2.ed.gov/admins/lead/safety/campus.html>.

<sup>53</sup> *See*, Everett Rosenfeld, "DOE cites Yale for underreporting crime, sex assault," at: <http://www.yaledailynews.com/news/2011/may/27/dept-education-cites-yale-underreporting-crime-sex/>.

<sup>54</sup> *See*, Yale University reported campus security information at <http://publicsafety.yale.edu/annual-safety-report-campus-crime-and-fire-incidents>; and, for example, the University of Washington Police Department website for access to crime statistics and reports, at [http://www.washington.edu/admin/police/statistics\\_reports/](http://www.washington.edu/admin/police/statistics_reports/).

<sup>55</sup> *See*, The Campus Safety and Security Data Analysis Cutting Tool at: <http://ope.ed.gov/security/>.

Police Department (UWPD) website<sup>56</sup> instructs victims and alleged perpetrators of criminal incidents to provide certain information when requesting copies of the reports, which of course relate directly to and are thus available to them. The general public is advised that, if they want to review any identifiable police report, they may visit the UWPD during business hours and review an appropriately edited report (redacted to protect confidential information) free of charge. Otherwise, the general public, including media, is directed to the University Office of Public Records and Open Public Meetings, to which information requests can be submitted under Washington State's Public Records Act.

Police departments at most private universities are generally not subject to those State open records laws and are generally reluctant to release more information than what is required by the Clery Act. Nonetheless, in certain circumstances police departments at private universities may be subject to State open records laws. The Connecticut State Freedom of Information Commission (FOIC), for example, held that Yale University's Police Department (YUPD) was the "functional equivalent" of a public agency under Connecticut's Freedom of Information Act (CT FOIA), because a State statute provides that YUPD officers designated to work with the City of New Haven Police have the full range of law enforcement powers enjoyed by the municipal police officers. Accordingly the CT FOIA required disclosure of personnel records of two such YUPD officers involved in a challenged arrest in the City.<sup>57</sup> However, the FOIC in another case held that the YUPD, whose officers are employees of a private university, did not have to provide confidential information about the salaries and benefits of the department chief and senior officers, since the requested records did not relate to the YUPD governmental function of policing, no public funds were involved, and Yale keeps salary information of all managerial personnel confidential.<sup>58</sup>

### C. The Family Educational Rights and Privacy Act of 1974 (FERPA)

While the HEA and Clery Act function as information disclosure laws, the United States Congress enacted FERPA in large part to provide greater protection of certain student records and student privacy, in light of increasing concerns about the unauthorized sharing of personal information about students.<sup>59</sup> FERPA conditions the receipt of Federal funding under any program upon a university's protection of "education records" or personally identifiable information contained therein, other than "directory information."

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<sup>56</sup> "Requesting a Copy of a Police Report," [http://www.washington.edu/admin/police/statistics\\_reports/reports.html](http://www.washington.edu/admin/police/statistics_reports/reports.html).

<sup>57</sup> A Matthew Deal, "OPEN SEASON: Private police facing greater public scrutiny," Spring 2008, available at: [http://www.splc.org/news/report\\_detail.asp?id=1419&edition=45](http://www.splc.org/news/report_detail.asp?id=1419&edition=45); see, also, Bharat Ayyar, "FOIC forces YPD to make records public," *Yale Daily News*, February 2008, at <http://www.yaledailynews.com/news/2008/feb/15/foic-forces-ypd-to-make-records-public>, mentioning that YUPD arrest files are accessible by filing FOIA requests with the New Haven Police Department and that, similarly, in 2003, a New York court ruled that Cornell University's police department had to make its arrest records available to the public, whereas in 2006, the Supreme Judicial Court of Massachusetts rejected a lawsuit against Harvard University's police department seeking access to the HUPD's incident reports.

<sup>58</sup> *Simons v. Chief, Police Department of Yale University*, Final Decision August 2010, available at <http://www.State.ct.us/foi/2010FD/20100811/FIC2009-469.htm>. The FOIC decision also noted that Yale presented substantial evidence to show that the salaries of managerial positions at Yale, such as the positions at issue in that case, are kept confidential and that managerial employees have a high expectation that such salaries will not be disseminated to the general public.

<sup>59</sup> McGee-Tubb, *supra* note 21, at 1052.

Given that Federal government financing through grants and student aid has become essential to university operations, FERPA — like the HEA and the Clery Act — applies to most private and public universities, including medical and other professional schools. If a university receives Federal funds under one or more Federal programs, FERPA applies to the university as a whole, including each of its components, such as a department within a university.<sup>60</sup> This also means that, even if only one student at a university receives Federal financial assistance, the university as a whole is considered to have received Federal funding for FERPA purposes.

FERPA broadly defines protected “education records” to mean records and materials (1) that contain information directly related to a student and (2) that are maintained by an educational agency or institution.<sup>61</sup> Protected education records have been typically construed to include student identification numbers, grades, exam scores, grade point averages, social security numbers, residential address and phone number of parents, course registration, the number of credits enrolled in, and the like.<sup>62</sup>

While FERPA requires that universities may not have a policy or practice of disclosing the personally identifiable information from education records without a parent or eligible student’s written consent, it also permits the release of “directory information” without consent. FERPA stipulates that, for this purpose, “directory information” may include the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.<sup>63</sup> This kind of information is generally not considered to be harmful or an invasion of privacy if disclosed,<sup>64</sup> although FERPA permits universities to designate what kinds of information it will consider to be releasable directory information. However, FERPA also requires universities specifically to publish and notify students of what kinds of information it will treat as directory information and give students the right to “opt out” by requesting that their directory information be withheld.

FERPA also provides several other exceptions to the non-disclosure rule. For instance, education records may be released to school officials with “legitimate educational interests,” meaning officials for whom the information is necessary in order to perform their jobs properly; to officials of other schools in which the student seeks to enroll; to the Secretary of DOE, and heads of local or State educational authorities; in connection with a student’s application for financial aid; to State or local officials who require the information to be reported pursuant to a

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<sup>60</sup> See 34 C.F.R. § 99.1(d); and Joint Guidance on the Application of FERPA and HIPAA to Student Health Records, November 2008, at: <http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>.

<sup>61</sup> 20 U.S.C. § 1232g(a)(4)(A). FERPA specifically excludes some kinds of information from coverage as “educational records,” including employment records, personal notes of a professor or staff member concerning a student intended for their own use, and medical treatment records. 34 C.F.R. §99.3, cited in Wiggins and Dana, “The Family Educational Rights and Privacy Act (FERPA): Overview and Key Issues.”

<sup>62</sup> University of Washington Office of the University Registrar, FERPA for Faculty and Staff, at: [www.washington.edu/students/reg/ferpafac.html](http://www.washington.edu/students/reg/ferpafac.html).

<sup>63</sup> 20 U.S.C. § 1232g(a)(5)(A).

<sup>64</sup> McGee-Tubb, *supra* note 21, at 1055, note 71.

State open records act; to accrediting organizations to carry out accreditation; and as necessary to protect the health and safety of students or other persons.<sup>65</sup>

What precisely constitute “education records” has generated substantial debate. One issue, for example, is the release of student examination scores. The University of Washington (UW) advises that public posting of grades by the student’s name, student identification number or social security number without the student’s written permission is a violation of FERPA, even if it is only posted on a class website or in hallways and departmental offices.<sup>66</sup> UW therefore recommends that instructors post grades by the last four digits of the student number instead, or use randomly assigned numbers that only the instructor and individual student knows. UW further instructs that instructors may not send grades to a student by email, since there “is no guarantee of confidentiality on the Internet” and UW “would be held responsible if an unauthorized third party gained access, in any manner, to a student’s education record through any electronic transmission method.”<sup>67</sup>

There is also substantial debate on whether emails themselves constitute “education records.” Some courts have held that, since student emails are rarely seen or preserved by the educational institution, they are thus not “maintained” as required under FERPA’s definition.<sup>68</sup> The United States Supreme Court opined in 2002 on the meaning of “maintained” for FERPA purposes, noting that “the ordinary meaning of the word ‘maintain’ is ‘to keep in existence; preserve; retain,’” and that “FERPA implies that educational records are institutional records kept by a single custodian, such as a registrar,”<sup>69</sup> thus requiring some degree of effort at centralizing or securing such records. Another court subsequently determined that emails are not education records subject to FERPA unless they contain information related to the student and are “maintained” by the university and that, unless emails are “printed and placed” in a student’s permanent file, they will not be deemed to be “maintained” by the university.<sup>70</sup>

Apart from prohibiting the disclosure of personally identifiable information in education records, FERPA also importantly provides students with the right to inspect, review and seek to correct or amend their own education records. In this respect, FERPA also serves as a disclosure statute, with respect to disclosure of a student’s educational records to that particular student. The student is also entitled to a hearing as to whether the record should be amended and, if after the hearing the university decides not to amend the record, to have a statement inserted into the

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<sup>65</sup> 20 U.S.C. §1232g(b).

<sup>66</sup> *See, supra* note 62.

<sup>67</sup> *Id.*

<sup>68</sup> Frank LoMonte, “Arizona judge narrows scope of FERPA ‘education records’ in Tucson shooter Loughner’s case,” STUDENT PRESS LAW CENTER, MAY 20, 2011, at: <http://www.splc.org/wordpress/?p=2159>; *See, also*, FERPA, OFFICE OF GENERAL COUNSEL, CATHOLIC UNIVERSITY OF AMERICA, at: <http://counsel.cua.edu/ferpa/questions/index.cfm>.

<sup>69</sup> *Owasso Independent School District v. Falva*, 534 U.S. 426, 433 (2002) (quoting statute) (practice of peer grading in which students exchange papers to grade them does not violate FERPA because such papers to that point are not “maintained” by the school).

<sup>70</sup> *S.A. v. Tulare County Office of Education and California Dept. of Ed.* (E.D. Cal., Sept. 24, 2009/Oct. 6, 2009, No. CV F 08-1215) 2009 WL 3126322/2009 WL 3296653, discussed in Fagen Friedman and Fulfroft LLP, “Emails Are Not Education Records if They Are Not ‘Maintained,’” October 2009, at: <http://www.fagenfriedman.com/newsflash.php?nf=123>.

record commenting on the contested information or stating why the student disagrees with the university's decision.<sup>71</sup>

#### D. The Health Insurance Portability and Accountability (HIPAA)<sup>72</sup>

HIPAA is a Federal law that, while focused on other issues, created a national minimum standard for protection of individually identifiable health care information and records. It was enacted in response to the growing concern about the use and disclosure of health information in an age when computers allow easy sharing of data. Although not originally targeted at educational institutions, HIPAA applies to all universities with student health care services and medical research using patients<sup>73</sup> that *also* engage in a covered electronic transaction. Basically, any public or private university that utilizes healthcare personnel, including nurses, doctors or counselors, in its daily operations, administers medications to students, deals with physical or mental medical information or implements a group health plan for employees needs to comply with HIPAA.<sup>74</sup> HIPAA also applies to protect subjects of clinical research.<sup>75</sup>

The Office of Civil Rights of the U.S. Department of Health and Human Services (HHS) enforces the privacy and security regulations issued under HIPAA. As explained by HHS, "The Privacy Rule gives people rights over their protected health information and sets rules and limits on uses and disclosures of that health information. The Security Rule protects health information in electronic form by requiring entities covered by HIPAA to implement physical, technical and administrative safeguards to ensure that people's electronic protected health information remains private and secure."<sup>76</sup>

HIPAA also allows for the application of more stringent State privacy and other laws for protecting medical records.<sup>77</sup> Thus, this is another area in which Federal and State laws overlap and interact.

### III. Methods of Disclosure

Universities are subject to proactive information disclosure requirements under both State open records laws that apply to public universities and Federal laws like those discussed above, which apply to both public universities and private universities that accept Federal funding. As described in this paper, both public and private universities provide a great deal of information and data that is required to be disclosed under the HEA and the Clery Act on their websites, as well as through Federally-maintained databases. Public universities also make available in the

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<sup>71</sup> Wiggins and Dana, *supra* note 61, at 8, and citations therein.

<sup>72</sup> Pub. L. 104-191, 110 Stat. 1936 (1996).

<sup>73</sup> See, Sitko, Kenigsberg, McMilan and Scarglino, "Life with HIPAA: A Primer for Higher Education," at <http://net.educause.edu/ir/library/pdf/ERB0307.pdf> (hereafter, "HIPAA Primer").

<sup>74</sup> HIPAA Solutions, "Universities and Schools," at: <http://www.hipaasolutions.org/education.htm>.

<sup>75</sup> However, a health record that is used for research purposes, such as part of a clinical trial, may be or become a "research record" and not be entitled to HIPAA protection. Observation of Eliza A. Saunders, Director of the Office of Public Records and Open Meetings at the University of Washington.

<sup>76</sup> U.S. Department of Health and Human Services Press Office, "University of California settles HIPAA Privacy and Security case involving UCLA Health System facilities," July 7, 2011, at: <http://www.hhs.gov/news/press/2011pres/07/20110707a.html>.

<sup>77</sup> HIPAA Primer, *supra* note 73, at 4.

equivalent of physical “reading rooms” as well as on their websites certain information that is required to be made available to the public pursuant to State open records laws.<sup>78</sup>

The public can also obtain information about university operations, particularly those of public universities, through filing information requests pursuant to State open records laws, and universities can charge fees for responding to such requests.<sup>79</sup>

Since public university disclosure obligations apart from those required by Federal law are governed by State open records laws, the procedure for filing such requests varies among States. Not all State open records laws require State agencies to establish a centralized information office. Thus, not all public universities have set up specific FOIA or open records offices and officers. Some that have established centralized open records offices include the University of Washington,<sup>80</sup> the University of Michigan,<sup>81</sup> and the University of Virginia.<sup>82</sup>

In other universities, requests can be filed with offices of public communications, university relations or institutional research. Typically information disclosure responsibilities are shared among different offices, as is the case with Yale University, where the Office of the Registrar handles FERPA issues and student records requests,<sup>83</sup> the Office of Institutional Research supplies “Yale Data” required to be disclosed by the HEA,<sup>84</sup> and the crime and security information required under the Clery Act is reported on a Public Safety website.<sup>85</sup>

Universities also take a variety of approaches in disclosing information on their websites. According to a report by DOE, this has led to a complex amalgam of information disclosure tools and offices, creating confusion for U.S. students and other consumers. As one study found:

“Institutions may have multiple offices responsible for collecting and distributing information. Decentralized information management means that even within a single institution, processes and standards for information collection, formatting and dissemination may be varied. In addition, the unit responsible for the information at one institution may be different than the unit responsible for the same information at another institution. . . . This problem can be compounded by the inconsistency in how the information required under the HEA is provided to [the public] by institutions. Some institutions mix the HEA-required disclosures with other information in varying combinations. Other institutions maintain a “portal” web page that provides a single entry

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<sup>78</sup> See, e.g., the list of “Available Records” posted by the University of Illinois on its FOIA website, at: <http://www.foia.uillinois.edu/cms/one.aspx?portalId=1017570&pageId=1020593>.

<sup>79</sup> See, e.g., discussion of State FOI requests filed with and fees charged by three Michigan universities relating to a controversy over collective bargaining, discussed in Levinson-Waldman, *supra* note 20, at 5.

<sup>80</sup> See, the University of Washington Public Records and Open Public Meetings Office website at: <http://www.washington.edu/publicrecords>.

<sup>81</sup> See, the University of Michigan FOIA Office website at: <http://www.vpcomm.umich.edu/foia.html>, with information on how to contact the chief FOIA Officer under “How to file a FOIA request with the University.” The University also calls on a Director of University Relations and an Assistant to the Vice Chancellor to handle FOIA requests at regional campuses.

<sup>82</sup> See, <http://www.virginia.edu/foia>.

<sup>83</sup> See, <http://www.yale.edu/sfas/registrar/>.

<sup>84</sup> See, <http://oir.yale.edu/>.

<sup>85</sup> See, <http://publicsafety.yale.edu/annual-safety-report-campus-crime-and-fire-incidents>.

point from which HEA-required disclosure information can be obtained through hyperlinked lists. Although these portals help students and others find relevant information, [the public needs] to know that such a website exists in order to find it.”<sup>86</sup>

Moreover, this study discovered that existing consumer information portal pages of universities have a wide variety of webpage titles ranging from “Consumer Information,” “Public Disclosure,” and “Your Right to Know,” to “Federal Compliance,” “Federal Disclosure Notices,” and “Federal Compliance and Student Consumer Information.”<sup>87</sup> This widespread lack of uniformity in how institutions categorize and label information that is required by Federal law to be disclosed makes it difficult for students and others to locate the information. Consequently, the authors of the study offered suggestions and called upon universities to harmonize their disclosure information. These suggestions included, for instance, the development of a single web page on the university’s website that provides hyperlinks to the HEA disclosure information, using a common set of content titles and presenting HEA disclosure information in a consumer-friendly manner.<sup>88</sup> A follow-up study of 40 universities found in 2011 that all of them had developed a single “portal” webpage that includes many of the HEA disclosure requirements and were using user-friendly terminology, but that they were still struggling with coming up with common content titles.<sup>89</sup>

#### **IV. Recent Calls for Enhanced Transparency of Universities**

Reflecting the development of greater transparency requirements required by Federal law and the reality that virtually all universities accept Federal or State funding in some form, certain citizens and legislators are now calling for greater information disclosure by private as well as by public universities. For example, a student sexual abuse case in Pennsylvania sparked calls to bring Penn State and the other “State-related universities,” which are independently operated but receive State funding, under Pennsylvania’s Right to Know Law.<sup>90</sup> The 14 universities within the State System of Higher Education must comply with that State law, but Penn State, University of Pittsburgh and Lincoln and Temple universities — which were formerly private but now collectively receive more than \$500 million in State aid — are largely exempt from most State disclosure requirements.<sup>91</sup> The four universities only need to provide to the Internal Revenue Service the Form 990 for tax-exempt non-profit institutions and the salaries of all officers and directors each year, and they are specifically exempted from disclosing donor information.<sup>92</sup> As Andrew Kelly, an education expert at the American Enterprise Institute observed, “We have funded colleges and universities very generously and generally ask for very little in return.... [They] bristle when it’s suggested that they should be more transparent about their business. But

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<sup>86</sup> National Postsecondary Education Cooperative, “Information Required to be Disclosed Under the Higher Education Act of 1985: Suggestions for Dissemination,” updated November 2009, at 3; available at <http://nces.ed.gov/pubs2010/2010831rev.pdf>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 6.

<sup>89</sup> Sykes, *supra* note 39, at 2.

<sup>90</sup> “Lawmakers seek to change laws to better protect children and bring transparency to State-related universities,” July 31, 2012, [http://www.pennlive.com/midState/index.ssf/2012/07/lawmakers\\_seek\\_to\\_change\\_laws.html](http://www.pennlive.com/midState/index.ssf/2012/07/lawmakers_seek_to_change_laws.html).

<sup>91</sup> *Id.*

<sup>92</sup> Pennsylvania Right to Know Law, amended 2008, Pa. Cons. Stat. Ann. Tit. 65, 66..1 to .4 , Chapter 15; available at: <https://www.dced.State.pa.us/public/oor/righttoknow.txt>.

some folks within higher education are taking the initiative, and increased transparency is coming.”<sup>93</sup>

As another example, California State in 2011 enacted a law that made public university subsidiary organizations known as “auxiliaries,” which were set up to run campus operations such as food services, parking facilities, housing and bookstores, subject to the State public records act. The intent of this law was to bring greater transparency and accountability to the ways in which fees, revenues from campus businesses and private donations are managed and spent in the California university system.<sup>94</sup>

A proposed Massachusetts State bill titled the Higher Education Transparency Act would increase financial transparency by private universities, putting them on a par in this area with public universities, under the premise that private, non-profit universities are taxpayer-subsidized institutions;<sup>95</sup> they receive State and Federal subsidies through tax-exempt status as well as through Federal grants and student aid. In the wake of the financial crisis that caused many university endowments to shrink, leading to layoffs, cut-backs in services and tuition increases, various groups are calling for more financial disclosure. As one Harvard University employee wrote, while universities provide a valuable service to society as a whole, “as tax-exempt organizations these institutions are benefactors of favorable public and financial policies. Colleges, particularly those with sizeable real estate holdings and endowments, derive an undetermined amount of financial benefit from sources above and beyond their functions as educators. As such, they should be obligated to bear the same if not a greater fiduciary responsibility to the public than that of for-profit organizations in disclosing their financial performance and relationships. Public colleges and universities in Massachusetts are already required to provide similar information as that proposed in the bill. Shouldn’t private colleges and universities be held to the same standard?”<sup>96</sup>

Similar bills calling for increased financial transparency by universities have been filed in the U.S. Senate and other States.<sup>97</sup>

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<sup>93</sup> Lawmakers, *supra* note 90.

<sup>94</sup> “Governor signs landmark CSU Transparency Bill into law,” September 7, 2011, <http://www.calfac.org/post/governor-signs-landmark-csu-transparency-bill-law> .

<sup>95</sup> United for a Fair Economy, “Why Support the Higher Education Transparency Act?,” February 1, 2011, at: [http://faireconomy.org/enews/why\\_support\\_the\\_higher\\_education\\_transparency\\_act](http://faireconomy.org/enews/why_support_the_higher_education_transparency_act): “The bill would strengthen the financial disclosure requirements for Massachusetts’ private, non-profit colleges and universities by mandating more thorough reporting on employee compensation; how endowments are invested; agreements with outside consultants; and the total tax subsidies they receive.” The bill was still pending as of April 2012; *see*, Sam Fouad, “BU Students petition senate, gather signatures for transparency,” *The Daily Free Press*, April 30, 2012, at: <http://dailyfreepress.com/2012/04/30/bu-students-petition-senate-gather-signatures-for-transparency/>.

<sup>96</sup> John Carbone, “Massachusetts Higher Education Transparency Act: SEIU Local 615,” March 4, 2011, at: <http://openmediaboston.org/node/1723>.

<sup>97</sup> *See, e.g.*, S.2835 -- Increased Transparency in Higher Education Act of 2012 (Introduced in Senate - IS), requiring each university that receives Federal financial assistance and is required to file a tax return as a nonprofit institution to post such tax return on its website, at: <http://thomas.loc.gov/cgi-bin/query/z?c112:S.2835.IS>; ; proposed South Carolina Higher Education Transparency Act of 2011, calling for enhanced financial disclosures, including the posting on their websites of more financial information, at [http://www.scStatehouse.gov/sess119\\_2011-2012/bills/3185.htm](http://www.scStatehouse.gov/sess119_2011-2012/bills/3185.htm).

## Conclusions

State open records laws in the United States provide the public with access to much detailed information about the operations of public universities, which are typically deemed to be government agencies, including financial information such as budgets and specific salary information of university officials, faculty and staff. While private universities continue to be exempted from most State open records laws with their broad disclosure requirements, Federal law increasingly blurs the lines between public and private universities with respect to certain disclosure obligations. Although the Federal FOIA does not apply directly to state-organized universities, it does provide access through FOIA requests to certain information relating to or resulting from Federally-funded research conducted on both public and private university campuses. Moreover, other Federal laws impose affirmative reporting and disclosure obligations on both private and public universities that accept Federal funding — which includes most universities — with respect to admissions, tuition and other costs, graduation and career placement, student services, campus safety and security, etc.

Both Federal and State law also seek to protect the individual privacy of faculty, staff and students, the traditional academic freedom to pursue research and inquiry and make important innovations in technology and ideas, and intellectual property rights pertaining to innovations made within university communities.

As discussed at the beginning of this paper, balancing the many competing interests of individuals in their privacy, universities in their academic autonomy and the public in their right to know how their tax dollars are being spent is not an easy task. Nor does U.S. law provide a straightforward and clear model of how this balancing act should be performed. Nonetheless, the authors hope that this discussion of the complex information disclosure situation of American universities will provide useful examples of the legal and policy considerations brought to bear on a number of important disclosure issues that face not only American universities but also universities around the world in this age of globalization and rapid technological innovation.

## **Appendix A: Student Consumer Information Required to be Disclosed under HEA on Institutional Web Portal Page**

- Notice of Availability of Institutional and Financial Aid Information
- Contact Information for Assistance in Obtaining Institutional or Financial Aid Information
- General Institutional Information
  - Privacy of Student Records–Family Educational Rights and Privacy Act (FERPA)
  - Facilities and Services for Students with Disabilities
  - Student Diversity
  - Price of Attendance
  - Net Price Calculator
  - Refund Policy and Requirements for Withdrawal and Return of Federal Financial Aid
  - Textbook Information
  - Educational Programs
  - Instructional Facilities
  - Faculty
  - Transfer of Credit Policies and Articulation Agreements
  - Accreditation, Approval, and Licensure of Institution and Programs
  - Copyright Infringement–Policies and Sanctions
  - Computer Use and File Sharing
  - Student Activities
  - Career and Job Placement Services
- Teacher Preparation Program Report
- Student Financial Assistance
  - Assistance Available From Federal, State, Local, and Institutional Programs
  - Federal Student Financial Aid Penalties for Drug Law Violations
  - Student Loan Information
    - Initial Loan Counseling for Student Borrowers
    - Exit Counseling for Student Borrowers
    - Institutional Code of Conduct for Education Loans
    - Preferred Lender Lists
    - Preferred Lender Arrangements
- Health and Safety
  - Drug and Alcohol Abuse Prevention Program
  - Vaccination Policies
  - Campus Security Policies, Crime Statistics and Crime Log
  - Fire Safety Policies, Fire Statistics and Fire Log (On-Campus Housing Facilities)
- Student Outcomes
  - Retention Rate
  - Graduation Rates (Student Right-to-Know Act)
  - Transfer-out Rates (Student Right-to-Know Act)

- Graduation Rates for Students Receiving Athletically Related Student Aid (Student Right-to-Know Act)
- Transfer-out Rates for Students Receiving Athletically Related Student Aid (Student Right-to-Know Act)
- Job Placement for Graduates
- Job Placement Rates for Graduates
- Graduate and Professional Education Placement for Graduates
- Intercollegiate Athletic Program Participation Rates and Financial Support Data (Equity in Athletics Disclosure Act)
- Voter Registration

This list, Appendix A to the 2011 report for the National Postsecondary Education Cooperative (NPEC) by Andrea Sykes, “Information Required to Be Disclosed Under the Higher Education Act of 1965: Suggestions for Dissemination – A Supplemental Report” (NPEC 2012-831) (2011), <http://nces.ed.gov/pubs2012/2012831.pdf>, was used in the 2009 NPEC Report, *Information Required to Be Disclosed Under the Higher Education Act of 1965: Suggestions for Dissemination*, which was prepared by Carol Fuller and Carlo Salerno of Coffey Consulting for the NPEC. Appendix A of that 2009 report, available online at <http://nces.ed.gov/pubs2010/2010831rev.pdf>, provides much more detail on the required information.