

FROM THE IVORY TOWER TO THE GLASS HOUSE: ACCESS TO “DE-IDENTIFIED” PUBLIC UNIVERSITY ADMISSION RECORDS TO STUDY AFFIRMATIVE ACTION

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Admissions processes at public universities are too often and too extensively shielded from public view, a policy that minimizes these schools' accountability to the public and obstructs legitimate inquiry into government policies in politically volatile areas such as affirmative action. Although officials of “ivory tower” public institutions often invoke privacy laws to justify this shield against disclosure, such laws are mistakenly applied in this context. The specter of individual student privacy should not, and need not, prevent the sunshine of public scrutiny from filtering through the glass house of the public university admissions office. Educational institutions are entirely capable of protecting the privacy of individual students as mandated by federal law, while also complying with state freedom of information laws designed to ensure the accountability of public authorities,—by redacting personally identifying information from public educational records and disclosing only anonymous, or “de-identified,” student data. With affirmative action an especially hot-button political issue—ballot initiatives were proposed in Arizona, Colorado, Missouri, Nebraska, and Oklahoma for the November 2008 election¹—voters should be permitted to access redacted public edu-

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1. E.g., Peter Slevin, *Affirmative Action Foes Push Ballot Initiatives*, WASH. POST, Mar. 26, 2008, at A02; Lindy Royce, *Affirmative Action Ban Heads for Ballot in 5 States*, CNN, Mar. 7, 2008, <http://www.cnn.com/2008/POLITICS/03/07/affirmative.action/index.html>. At the time of this writing, in October 2008, the proposals in Arizona, Missouri, and Oklahoma have been disqualified for failing to meet signature re-

cation records that will help them make informed decisions on these and other important political issues. This article explains how state and federal laws, including a newly proposed rule of the U.S. Department of Education, already harmonize needs for both privacy and access in permitting or requiring the disclosure of “de-identified” student data.

I. INTRODUCTION

For the past thirty years, affirmative action in higher education has persisted as a battleground issue in the United States. March 1996’s *Hopwood v. Texas*² marked the onset of the latest phase in this battle. In *Hopwood*, the Fifth Circuit ruled unconstitutional the affirmative action admissions policy of the University of Texas Law School and called into question³ the U.S. Supreme Court’s *Bakke*⁴ decision of nearly twenty years prior. In November 1996, California banned race preferences⁵ upon voter approval of the now landmark “Proposition 209.”⁶ Encouraged by that victory, affirmative action opponents, such as Ward Connerly and the American Civil Rights Coalition, succeeded in pressing a similar ballot measure, “Initiative 200,” in Washington State two years later.⁷ Lawsuits over University of Michigan affirmative action policies were filed in 1997; these suits culminated in the U.S. Supreme Court’s controversial split decision in the 2003 companion cases *Gratz v. Bollinger*⁸ and *Grutter v. Bollinger*⁹. In 2004, Professor Richard Sander published his influential and

quirements, and the proposals in Colorado and Nebraska face legal challenges on similar technical grounds. A useful website to find the latest information on ballot initiatives is Ballotpedia.org—although, as a public wiki, the site should be viewed with skepticism. It is likely at this point that the Colorado and Nebraska initiatives will reach voters, who favor adopting these initiatives. In any event, promoters of these civil rights initiatives have roundly vowed to persist in pressing for their approval, and technical shortcomings are inevitably surmountable.

2. 78 F.3d 932 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).
3. *Id.* at 944 (“Justice Powell’s view in *Bakke* is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale.”).
4. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that admissions policies, short of quotas, that use race as a “plus factor” are constitutional).
5. The terms “affirmative action” and “race preferences” are used interchangeably without intending to import any connotation of support or opposition. Arguably, the term “race preference” is sometimes more precise, as it is here, where “affirmative action” may be understood more broadly to include, for example, diversity-oriented recruitment efforts that do not inject any preference into the ultimate selection process. Indeed, the likelihood of confusion over the broad term “affirmative action” is exactly why public inquiry into the affirmative action policy is warranted, irrespective of whether the inquiry comes from the supporter who desires a more aggressive form of affirmative action, or the ardent opponent who supports government blindness to race.
6. CAL. CONST. art. 1, § 31.
7. Washington Civil Rights Initiative, WASH. REV. CODE ANN. § 49.60.400 (West 1998).
8. 539 U.S. 244 (2003) (invalidating undergraduate admission race preferences at University of Michigan where an automatic point distribution based on race did not depend on an assessment of the individual applicant).
9. 539 U.S. 306 (2003) (sustaining law school admission race preferences at University of Michigan where race was but treated as one factor used to assess applicants on an individual basis).

much-debated study on affirmative action in law school admissions.¹⁰ Michigan voters subsequently banned race preferences with a 2006 ballot initiative.¹¹ Affirmative action ballot initiatives were pressed in five states—Arizona, Colorado, Missouri, Nebraska, and Oklahoma—in the 2008 election cycle.¹²

With voters called upon to decide the hotly-contested affirmative action question, their ability to access information is crucial. Irrespective of its resulting consensus on affirmative action, an ill-informed electorate deserves democratic governance. Amid the passions and vitriol of this debate, the voter has a difficult chore in understanding what affirmative action is, how it works,¹³ and ultimately, how well it advances the objective of remedying historical inequalities based on race.¹⁴

Even in the absence of a ballot question on affirmative action, both opponents and proponents of affirmative action are entitled to have at their disposal the information necessary to test their hypotheses and develop their positions.¹⁵ Opponents of affirmative action might wish to examine admissions data to determine whether a public institution acts in compliance with the law under *Gratz* and *Grutter*. Would-be plaintiffs under a *Gratz* “reverse discrimination” theory are entitled to examine public records to determine whether they were lawfully denied admission to a public institution; without access to such information, unsuccessful applicants might not be aware that they have a cause of action, or, alternatively, might expend resources (and thereby force the state to expend resources in response) in pursuit of a frivolous claim. At the same time, proponents of affirmative action might wish to examine admissions data to determine whether public institutions are complying with their obligations under the Equal Protection Clause of the Fourteenth Amendment and human rights laws. Disparity in the qualitative numeric credentials of successful and unsuccessful applicants could reveal ordinary race discrimination as readily as it implicates so-called “reverse discrimination.” A lack of significant disparity in admissions data might bolster public acceptance of affirmative action policies that embrace “plus” factors rather than quotas. Even admissions data that reveals a preference

10. Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

11. MICH. CONST. art. 1, § 26.

12. See *supra* note 1.

13. See *supra* note 5.

14. An abundance of other theories also have been advanced to support affirmative action. See generally Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1067-81 (2006). The Supreme Court wrote in *Grutter*, “[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.” 539 U.S. at 328.

15. Admissions data are a mine of information for socially useful research. See, e.g., Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309 (2006) (advocating use of race and LSAT score to promote diversity in admissions). Secondary uses of admissions data by schools themselves, whether pursued for socially useful or other purposes, is the general subject of Marin C. McWilliams, Jr.’s article, *Applicants Laid Bare: The Privacy Economics of University Application Files*, 34 HOFSTRA L. REV. 185 (2005).

for historically oppressed classes, when viewed in conjunction with data indicating that affirmative action beneficiaries are later unsuccessful at an inordinate rate, might provide fodder for the sort of arguments made by civil rights activists; in particular, this information may lend credence to the notion that certain institutions bely their commitment to diversity by admitting applicants who manifestly face disproportionate academic challenges, yet failing to provide those students with the on-campus support services they would need to succeed.¹⁶

Although there are myriad ostensible public interests that would be served by freely circulating admissions data, information of this sort, regarding the day-to-day operation of affirmative action in public university admissions, can be hard to come by. The Supreme Court's "split double header" in *Gratz* and *Grutter* demonstrates how difficult it can be to assess what constitutes a legitimate use of affirmative action in university admissions.¹⁷ In a full-file admissions review of the sort the Court approved in *Grutter*, race may be regarded as one factor out of many, considered in an uncertain, unspecified proportion that may vary with each individual applicant.¹⁸ Accordingly, a meaningful evaluation of the implementation of affirmative action—whether undertaken to achieve an objective assessment or to advance a political position—demands the skillful scientific assessment of records to analyze and recognize statistically significant trends.¹⁹ What complicates such inquiries is that unbundled access to the records subject to assessment—be they applications for public employment or student admission—implicates concerns for the privacy of the individuals named in the records.²⁰

This collision of the important public interest in information access with individual privacy concerns has generated conflict in freedom of information (FOI) requests for admissions records made in the course of inquiry into affirmative action policies.²¹ Statutorily, this conflict has pit-

16. Cf. *infra* note 23 (describing an allegation made by an African-American-attorney organization that a law school impeded the success of African-American students).

17. *Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part) ("Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation.").

18. *See id.* at 334 ("[T]ruly individualized consideration demands that race be used in a flexible, nonmechanical way. . . . Universities can . . . consider race . . . flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."). *See generally* Johnson, *supra* note 15.

19. *See, e.g.,* Sander, *supra* note 10, at 390-418.

20. Cf. Matthew R. Salzwedel, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 WIS. L. REV. 1053, 1109-11 (2003) (recognizing the need to reconcile federal privacy law and public access policy to permit scrutiny of college admission standards for athletes).

21. Interaction of FERPA and rights of access in the public interest has been examined by scholars in other contexts. *See, e.g.,* Sarah Ann Bassler, *Public Access to Law School Honor Code Proceedings*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207 (2001); Laura Khatcheressian, *FERPA and the Immigration and Naturalization Service: A Guide for University Counsel on Federal Rules for Collecting, Maintaining and Releasing Information about Foreign Students*, 29 J.C. & U.L. 457 (2003); Salzwedel, *supra* note 20; Nancy Tribbensee, *Privacy and Confidentiality: Balancing Student Rights and Campus Safety*, 34

ted the Family Educational Rights and Privacy Act of 1974 (FERPA)²² against state freedom of information acts (FOIAs).

This article examines clashes between the FERPA and state FOIAs in the course of public inquiry into affirmative action policies. Its principal aim is to demonstrate that the FERPA and FOIAs have been successfully and appropriately reconciled, and that sufficient information about affirmative action should be publicly available, but with the identities of individual students redacted. To illustrate the currency of this problem, the article begins with a recent and still unresolved conflict over access to law school admission records in Arkansas.

II. CASE STUDY: ACCESS DENIED IN ARKANSAS

In July 2007, a distinguished Little Rock, Arkansas, attorney filed a request under the Arkansas FOIA with the William H. Bowen Law School, University of Arkansas at Little Rock, seeking to understand how the school employed affirmative action in admissions.²³ She sought, in relevant part,

[a]ll records that reflect the [Law School Admissions Council]-scaled undergraduate grade point average, [Law School Admissions Test] score, Law School index score, admission status, race, or gender of every student who applied for Law School admission for the 2004, 2005, 2006, 2007, or 2008 entering class, with the information organized, or ascertainable, by individual student, to the extent reasonably possible.²⁴

J.C. & U.L. 393 (2008). On the influence of social norms on FERPA compliance, see Margaret L. O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679, 706-17 (2003).

22. 20 U.S.C. § 1232g (2002).

23. Whatever the requester speculated at the time of her initial request, she later obtained records that aggravated her concerns. Telephone Interview with requester, in Little Rock, Ark. (Aug. 30, 2008). In one of a series of letters between an African-American attorney organization and the law school dean, the organization president accused the law school of "discriminatory mistreatment of African Americans" and "attempts to thwart the advancement of African Americans in the field of law." Letter from Eric Spencer Buchanan, President, W. Harold Flowers Law Society, to Dean Charles Goldner, William H. Bowen School of Law, University of Arkansas at Little Rock (Oct. 16, 2006) (copy on file with author). Meanwhile, one school official recommended in a memorandum concerning prospective faculty committee assignments, "PLEASE don't put someone on [the Admissions Committee] who lacks common sense (you know who they are) or doesn't believe in affirmative action." Memorandum from Professor Lynn C. Foster, William H. Bowen School of Law, University of Arkansas at Little Rock, to Acting Dean John M.A. DiPippa, William H. Bowen School of Law, University of Arkansas at Little Rock (undated) (copy on file with author).

24. Letter from Little Rock attorney-requester to Office of the Dean, William H. Bowen School of Law, University of Arkansas at Little Rock (July 23, 2007) (copy on file with author) [hereinafter *Letter from requester*]. The identity of the requester is here withheld for reasons explained in the text accompanying note 36, *infra*. While her identity is ascertainable from public records, there is no need here to tie her nascent legal career, nor the identity of her reputable employer, to this issue for the purposes of this article.

The requester instructed that “individual students’ names may be redacted.”²⁵

The university complied in part, providing the requester with records showing, line-by-line, applicants’ race, gender, and admission status (affirmative or negative), but no qualitative data.²⁶ The law school dean wrote, “You will not be provided any grade point averages, test scores or index scores, as those matters are protected under FERPA and the FOIA.”²⁷ FERPA and the Arkansas FOIA are co-extensive; exempt from disclosure under the latter are “education records as defined in [FERPA], unless their disclosure is consistent with the provisions of that act.”²⁸

The only course of action that the Arkansas FOIA offers to the disappointed, ordinary-citizen requester, other than when government-personnel records are the documents at issue, is for the citizen to bring a costly lawsuit.²⁹ In this case, however, the requester appealed informally to the Arkansas Attorney General.³⁰ The Arkansas Attorney General is not obliged to opine on FOIA matters unrelated to government personnel records, and only rarely does so;³¹ it is therefore unsurprising that the Attorney General declined to opine on the requester’s FERPA question.³²

Although the Attorney General did not resolve the matter, the University’s reliance on FERPA was explained in a letter from University counsel to the Attorney General. Counsel wrote:

For certain admission years, there will be a very small pool of certain combinations of races and genders. For that reason, if the Dean now divulged undergraduate grade point averages, LSAT scores and other FERPA protected information, it is very conceivable that [the requester] could ascertain which grade points or scores were achieve [sic] by certain students of races and/or genders. Information such as individual grade point averages, LSAT scores and Law School index scores are unquestionably protected by FERPA.³³

However, University counsel did not explain how the risk of “small pool” student identification justified denial of access to *all* applicant-qualifying data. The university position might also have been indirectly revealed in a record later obtained by the requester concerning university

25. *Id.*

26. Telephone Interview with requester, *supra* note 23.

27. Letter from Dean Charles W. Goldner, Jr., William H. Bowen School of Law, University of Arkansas at Little Rock, to requester (Aug. 29, 2007) (copy on file with author).

28. ARK. CODE ANN. § 25-19-105(b)(2) (West 2007). For analysis and history of this provision, see generally JOHN J. WATKINS & RICHARD J. PELTZ, *THE ARKANSAS FREEDOM OF INFORMATION ACT* § 3.04[b][4] (4th ed. 2004).

29. ARK. CODE ANN. §§ 25-19-105(c)(3), 25-19-107 (West 2007); WATKINS & PELTZ, *supra* note 28, § 5.01.

30. Telephone Interview with requester, *supra* note 23.

31. WATKINS & PELTZ, *supra* note 28, § 1.06.

32. Ark. Op. Att’y Gen. No. 2007-259 (2007).

33. Letter from Jeffrey A. Bell, Senior Associate General Counsel, University of Arkansas System, to Dustin McDaniel, Arkansas Attorney General, (Sept. 10, 2007) (copy on file with author) (citing WATKINS & PELTZ, *supra* note 28, § 3.04[b][4], at 107).

compliance with her initial request: in notes apparently documenting consultation with counsel, a university official wrote, "We say FERPA, they can challenge if they want."³⁴

The requester ultimately abandoned her request when someone from the law school contacted the requester's employer, a prominent Little Rock law firm, by e-mail³⁵ and indicated that the requester's use of the Arkansas FOIA had disrupted the operation of the law school.³⁶ Although her employer was supportive of her personal activity, the requester voluntarily abandoned her request so as to avert any friction between her employer and the law school.³⁷ Employers cannot risk jeopardizing their relationships with law schools in this manner because they depend on the good graces of these schools for privileges such as access to students through school-run career services.³⁸

III. ACCESS UNDER FEDERAL AND STATE LAW

FERPA does not provide for the blanket non-disclosure of state university records, but instead governs only records that are defined as "education records"—records of "an educational agency or institution" that "contain information directly related to a student."³⁹ "[D]irectory information"⁴⁰ is excluded from this definition, although students may opt out of directory information disclosure.⁴¹ In the 1990s, FERPA clashed with state sunshine laws over public access to student disciplinary records.⁴² Subsequent clarification by statutory amendment, Department of Education regulatory enforcement, and court interpretation established that the

34. Memorandum, "Questions for University Counsel" (Aug. 1, 2007) (copy on file with author) (handwritten note of ambiguous authorship). Under Arkansas law, when the FOIA pertains, it supersedes the attorney-client privilege and attorney work product doctrine. *WATKINS & PELTZ*, *supra* note 28, § 3.04[b][9][F].

35. The person who sent the e-mail has not identified herself or himself to the requester or to this author. The dean of the law school reported in a faculty meeting that neither he nor the academic associate dean made or authorized the communication, so he concluded that no further investigation was warranted. After the requester abandoned her request, the author of this article, in his capacity as a member of the law school faculty, asked the dean of the law school for access to the same admissions data. The dean denied the request, asserting that a faculty member not on the Admissions Committee lacks any legitimate pedagogical interest in admissions records.

36. Telephone Interview with requester, *supra* note 23.

37. *Id.*

38. See, e.g., UALR William H. Bowen School of Law Employer Services, <http://law.ualr.edu/careerservices/employer.asp> (describing the school-imposed guidelines that employers must follow in order to be able to conduct on-campus interviews with students) (last visited Aug. 30, 2008).

39. 20 U.S.C. § 1232g(a)(4)(A) (2002).

40. Directory information includes "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." *Id.* § 1232g(a)(5)(A).

41. See *id.* § 1232g(a)(5)(B), (b)(1), (d).

42. See, e.g., *Red & Black Pub. Co. v. Bd. of Regents*, 427 S.E.2d 257, (Ga. 1993) (holding records of campus court proceedings to be outside the scope of FERPA privacy protection and within the scope of state FOIA disclosure requirements).

law enforcement records of campus disciplinary actions and proceedings are FERPA-protected against disclosure,⁴³ but records of campus law enforcement generally are not.⁴⁴ A student's grades and test scores are certainly information that FERPA protects against disclosure.⁴⁵

FERPA and state sunshine laws have co-existed uneasily for some time. As a rule, federal law takes precedence over conflicting state laws.⁴⁶ But this dynamic is more complicated in the case of FERPA, since the federal law does not directly control the conduct of state authorities to preclude the disclosure of FERPA-protected information;⁴⁷ rather, FERPA rewards voluntary compliance by state officials with the carrot of federal funding.⁴⁸ Consequently, where a state law affirmatively requires the disclosure of records that contain FERPA-protected information, one can argue that the state legislature knowingly took the risk of not complying with FERPA, which it is entitled to do. As a result, many state sunshine laws specifically accommodate FERPA, thereby averting any conflict.⁴⁹ But where the scope of state exemption from disclosure for education records⁵⁰ is not co-extensive with the scope of FERPA, there exists the potential for conflict between federal and state law.

Before questions were resolved in the 1990s over the status of student disciplinary records under FERPA, two state supreme courts came close to addressing the problem of FERPA-FOIA conflict before ultimately

43. 20 U.S.C. § 1232g(a)(4)(B)(ii) (2002); *see, e.g.*, *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1152–54 (S.D. Ohio 2000) (citing 34 C.F.R. § 99.8 (1999)), *aff'd*, 294 F.3d 79 (6th Cir. 2002). *But see* Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2008) (requiring affirmative publication of campus crime statistics).

44. *See, e.g.*, *Bauer v. Kincaid*, 759 F. Supp. 575, 588–91 (W.D. Mo. 1991).

45. *See, e.g.*, *Cypress Media, Inc. v. Hazleton Area Sch. Dist.*, 708 A.2d 866 (Pa. Commw. 1998); *see also* 120 CONG. REC. 13,951–56, 14,582–95 (1974) (recording Senate sponsors' hearing testimony and discussion concerning the scope of personally identifying student information intended to be within the protection of FERPA). Courts have disagreed over application of the FERPA to rejected applicants for student admission. *Compare* *Tarka v. Franklin*, 891 F.2d 102, 105–07 (5th Cir. 1989) (finding FERPA inapplicable, citing, *inter alia*, 34 C.F.R. § 99.3 (1989)), *with* *Osborn v. Bd. of Regents of Univ. of Wis. Sys.*, 634 N.W.2d 563, 570–71 (Wis. Ct. App. 2001) (finding FERPA applicable), *rev'd on other grounds*, 647 N.W.2d 158 (Wis. 2002). The Department of Education has indicated that FERPA protection may attach to an applicant's records as early as when the applicant accepts an offer of admission since the applicant may, at that point, be reasonably labeled "in attendance." Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office (FPCO), to Jonathan D. Tarnow, Drinker, Biddle & Reath, LLP (Aug. 16, 2007), *available at* <http://www.ed.gov/policy/gen/guid/fpc/ferpa/library/vasexoffenderlaw081607.html>. FERPA would not attach to the records of an applicant who does not accept admission. *Id.* However, a FERPA-covered institution is responsible to protect the FERPA-protected records of other institutions, such as high school transcripts. *Id.* The problem is examined with citations in McWilliams, *supra* note 15, at 186 n.7.

46. U.S. CONST. art. VI, cl. 2.

47. Direct operation of federal law upon state officials would invite a federalism challenge. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 933 (1997).

48. *See* 20 U.S.C. § 1232g(b) (2002).

49. *See* OPEN GOVERNMENT GUIDE: ACCESS TO PUBLIC RECORDS AND MEETINGS IN ARKANSAS (John J. Watkins & Richard J. Peltz eds., 5th ed. 2006).

50. Most state sunshine laws expressly exempt education records in some manner. *See id.*

ducking the issue. In a 1993 decision allowing access to the student disciplinary process at the University of Georgia, the Georgia Supreme Court expressed doubt that the FERPA, with its funding carrot, triggered a state exemption from disclosure for records “specifically required by the federal government to be confidential.”⁵¹ Because the Court decided that the records at issue were not contained within the FERPA definition of educational records, the Court “assume[ed], without deciding, that the threat of withdrawal of federal funding is equivalent to a prohibition of disclosure (as the defendants argue).”⁵² In 1997, the Ohio Supreme Court, relying on the Georgia decision and citing an access-friendly rule of construction under state law, decided that requested disciplinary records at Miami University were outside the scope of the FERPA; it thereby avoided the need to interpret an Ohio sunshine exemption for “[r]ecords the release of which is prohibited by state or federal law.”⁵³

Before the Arkansas General Assembly in 2001 amended its state FOIA exemption for educational records to be co-extensive with the federal FOIA,⁵⁴ the FERPA-FOIA conflict played out uncomfortably for state officials. The previous statutory language exempted from disclosure a narrower class of records than did FERPA.⁵⁵ Considering the Arkansas Supreme Court rule of narrow construction for FOIA exemptions,⁵⁶ the Arkansas Attorney General determined that the FERPA funding carrot did not constitute a “law[] specifically enacted to provide [for non-disclosure]”⁵⁷ under the Arkansas FOIA.⁵⁸ Furthermore, in an effort to reduce the threat of losing federal funding, the Attorney General invited the Arkansas General Assembly to clarify the state FOIA, which the legislature chose to do in 2001.⁵⁹

Putting aside the problem presented by federal-state privacy law conflict, a second significant uncertainty exists as to the disclosure disposition of records that have been redacted of information that would otherwise personally identify students. By construction, practice, or, most often, express statutory mandate, nearly all state FOIAs provide that records containing information that is otherwise exempt from disclosure must be disclosed if state officials can, with reasonable effort, first segregate and redact exempt portions of the records.⁶⁰ Thus, a state law man-

51. *Red & Black Pub. Co.*, 427 S.E.2d at 261 (emphasis added) (raising “serious questions” about the interaction of quoted GA. CODE ANN. § 50-18-72(a)(1) (West 1993) and FERPA, 20 U.S.C. § 1232g(b) (1993)).

52. *Id.*

53. *State ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956, 958 – 59 (Ohio 1997) (quoting OHIO REV. CODE ANN. § 149.43(A)(1)(o) (since recodified at *id.* § 149.43(A)(1)(v) (West 2008))).

54. 2001 Ark. Acts 1653

55. See WATKINS & PELTZ, *supra* note 28, § 3.04[b][4], at 104 n.105 (citing *Arkansas Gazette Co. v. Southern State Coll.*, 620 S.W.2d 258 (Ark. 1981)).

56. See *id.* § 1.03[b].

57. ARK. CODE ANN. § 25-19-105(a)(1)(A) (1996).

58. Ark. Op. Att’y Gen. No. 96-044 (1996) (citing *Troutt Bros., Inc. v. Emison*, 841 S.W.2d 604 (Ark. 1992) (construing federal statute similar to FERPA)), cited in WATKINS & PELTZ, *supra* note 28, § 3.04[b][4], at 104 n.105.

59. WATKINS & PELTZ, *supra* note 28, § 3.04[b][4], at 104 n.105.

60. See OPEN GOVERNMENT GUIDE, *supra* note 49.

dating disclosure may be read as consistent with the FERPA once the record is redacted of information that would identify individual students. The U.S. Department of Education has accordingly construed the FERPA to disallow the disclosure of personally identifying student information only when disclosure “would make the student’s identity *easily traceable*.”⁶¹

Here, then, arises the problem of general research into student records. Researchers do not necessarily need to know the identity of any individual student. For example, in 1996, an investigative reporter in Kentucky sought seven years of student disciplinary records from two county school districts.⁶² The reporter “acknowledged that the names of students were privileged,” but asked for other details of disciplinary offenses.⁶³ One school district balked at the disclosure of a “statistical compilation” that, according to an intermediate appellate court, “d[id] not directly relate to any particular student.”⁶⁴ In the 2001 *Hardin County Schools v. Foster* decision, the Kentucky Supreme Court repudiated the position of the holdout school district, concluding that “[t]he identity of the school, year of occurrence, reason for the disciplinary action and the type of action”—absent any student’s “name, address, or personal characteristics”—did not meet the “easily traceable” standard of the FERPA regulations.⁶⁵

While *Hardin* was proceeding in Kentucky’s appellate courts, a case specifically concerning research into affirmative action was progressing through the Wisconsin court system. Both the Center for Equal Opportunity, an opponent of race preferences, and mathematician J. Marshall Osborn sought five years of application records from various University of Wisconsin campuses, including the University of Wisconsin Law School and the University of Wisconsin Medical School.⁶⁶ In particular, the requesters asked Wisconsin undergraduate institutions for applicant information such as “high school grade point averages, SAT scores, race, socio-economic background, and class rank;”⁶⁷ from the Wisconsin professional schools, the requesters sought applicants’ scores on the LSAT or Medical College Admissions Test, and undergraduate grade point average and class rank, in addition to race and socio-economic background.⁶⁸ Significantly, the record requests specifically authorized the redaction of personally identifying student information.⁶⁹ Nonetheless, the university system substantially denied access to “test scores, class rank, grade point average, race, gender, ethnicity, and socio-economic background,” claim-

61. 34 C.F.R. § 99.3 (2008) (emphasis added) (definition of “[p]ersonally identifiable information,” subparts (e) & (f)). Department of Education regulations pursuant to the FERPA are codified at 34 C.F.R. §§ 99.1-.67 & app. A (2008).

62. *Hardin County Sch. v. Foster*, 40 S.W.3d 865, 866 (Ky. 2001).

63. *Id.*

64. *Id.* at 866-67.

65. *Id.* at 869. The Court voiced its expectation that the school district would redact any personal student characteristics appearing in the disputed records. *Id.*

66. *Osborn v. Bd. of Regents of Univ. of Wis. Sys.*, 647 N.W.2d 158, 160 (Wis. 2002).

67. *Id.*

68. *Id.* at 161 n.4.

69. *Id.* at 161.

ing that the data constituted “personally identifiable information” under FERPA.⁷⁰

In *Osborn v. Board of Regents of the University of Wisconsin System*, decided in 2001, the Wisconsin Supreme Court sided with the record requesters.⁷¹ The Court concluded that Osborn had not sought “personally identifiable information” under the FERPA because he did not solicit any “student’s name, the name of the student’s parent or other family member, the address of the student or student’s family, or a personal identifier such as the student’s social security number.”⁷² The “minimal information” Osborn sought was “not sufficient, by itself,” to render “a student’s identity easily traceable.”⁷³ The court conceded that in “a small number of situations,” or “very few situations”—e.g., if one Wisconsin campus admitted only one person of a particular ethnicity—even the minimal information Osborn desired might render that student’s identity traceable.⁷⁴ In such an “individual case,” the court would permit the University to make a “discretionary decision” to withhold information;⁷⁵ however, by broadly denying access under the instant circumstances, “the University inappropriately relied on FERPA.”⁷⁶

The redaction rule of the Arkansas FOIA is at least as forceful as the redaction rule of the Wisconsin public records law in demanding maximum disclosure. The Wisconsin law provides simply that when information subject to disclosure and exempt information are both present, the information subject to disclosure “shall” be provided after “delet[ion]” of the exempt information.⁷⁷ The Arkansas FOIA stipulates that “[n]o request . . . shall be denied” merely because exempt and non-exempt information are “commingled.”⁷⁸ As in the Wisconsin statute, commingling demands disclosure “after deletion of the exempt information,” such that “[a]ny reasonably segregable portion of a record” is released.⁷⁹ The Ar-

70. *Id.* at 170. At minimum to accomplish his research objective, Osborn’s counsel told the court that he required “test scores, grade point average, race, gender, and ethnicity.” *Id.* The university also claimed, *inter alia*, that extracting the requested data from individual student records would constitute the creation of a new record, which the Wisconsin public records law does not require. *Id.* at 162. The court rejected the “new record” argument and affirmed the statutory redaction requirement. *Id.* at 175-76. Because state FOIAs typically do not require that officials create new records upon request, *see* OPEN GOVERNMENT GUIDE, *supra* note 49, researchers require access to individual records to create the researchers’ own statistical compilations for study.

71. 647 N.W.2d at 177. The court did recognize that “on its face,” FERPA “does not prohibit disclosure of any documents.” *Id.* at 167 (citing 20 U.S.C. § 1232g(b)(1) (2002)). But the court chose “not [to] question the importance of, and the University’s interest in, receiving funding; therefore, we interpret FERPA here according to what records or information the University can disclose without jeopardizing its eligibility for funding.” *Id.*

72. *Id.* at 170.

73. *Id.* at 171.

74. *Id.*

75. *Id.*

76. *Id.*

77. WIS. STAT. ANN. § 19.36(6) (West 2007).

78. ARK. CODE ANN. § 25-19-105(f)(1) (West 2008).

79. *Id.* § 25-19-105(f)(2).

kansas law further specifies that “[t]he amount of information deleted shall be indicated on the released portion of the record and, if technically feasible, at the place in the record where the deletion was made.”⁸⁰ Finally, when redaction is required, “the custodian shall bear the cost of the separation.”⁸¹ Acting in harmony with this strict language, the Arkansas Supreme Court has favored disclosure and applied a rule of broad construction to the Arkansas FOIA.⁸² For example, the court recently upheld a circuit court order, issued to county officials, to disclose racy electronic mail messages exchanged between an amorous public officer and a public contractor because the personal content of the records was inextricable from content that might afford public insight into the conduct of county business.⁸³

There is little doubt that the *Osborn* result would pertain in Arkansas. Like *Osborn*, who sought law students’ LSAT scores, undergraduate grade point averages, class ranks, race, and socio-economic backgrounds, the Arkansas requester similarly sought LSAT scores, scaled undergraduate grade point averages, law school admissions index scores,⁸⁴ and information on admission status, race, and gender. Neither *Osborn* nor the Arkansas requester sought the name or address of any student, the identity of any student’s family members, nor any unique student identifier such as a social security number. Finally, like *Osborn*, the Arkansas requester was met with a blanket denial of access to qualitative admissions data. Thus, it stands to reason that where the *Osborn* court concluded that the University of Wisconsin “inappropriately relied on FERPA,” so too would the Arkansas Supreme Court decide that the University of Arkansas, operating under the demanding Arkansas FOIA regime, inappropriately relied upon FERPA. Moreover, the comment of a university official—“We say FERPA, they can challenge if they want”—evidences less-than-zealous university compliance with the FOIA,⁸⁵ which, upon a showing of mere negligence, introduces the possibility of criminal penalties, for public officials who shirk their legal duties to disclose.⁸⁶

80. *Id.* § 25-19-105(f)(3).

81. *Id.* § 25-19-105(f)(4).

82. See WATKINS & PELTZ, *supra* note 28, § 1.03[b]. The Wisconsin public records law is also animated by a strong presumption in favor of disclosure. See Leanne Holcomb & James Isaac, Comment, *Wisconsin’s Public-Records Law: Preserving the Presumption of Complete Public Access in the Age of Electronic Records*, 2008 WIS. L. REV. 515, 518 (2008).

83. *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, No. 07-669, 2007 WL 2874774, at *3 (Ark. Oct. 4, 2007).

84. The admissions index was a number derived from LSAT score and undergraduate grade point average by a constant mathematical function. The law school now uses “a ‘holistic’ approach to admissions” rather than its former system of index and discretionary admissions. UALR William H. Bowen School of Law Admissions, <http://law.ualr.edu/admissions/> (last visited Aug. 27, 2008).

85. In making the university’s case to the Attorney General, university counsel acknowledged *Osborn*, but argued that the decision “[wa]s not well-reasoned, and certainly not binding in Arkansas.” Letter from Bell, *supra* note 33, at 4. Counsel further pointed to the “small number of situations” language in *Osborn*, but failed to explain how the university’s blanket denial of access was appropriately accommodating of only a “small number of situations.” *Id.* (quoting 647 N.W.2d at 171).

86. ARK. CODE ANN. § 25-19-104 (West 2008).

IV. ACCESS TO “DE-IDENTIFIED” INFORMATION UNDER REGULATIONS OF THE U.S. DEPARTMENT OF EDUCATION

A disclosure-friendly outcome— supported by the *Hardin* case in Kentucky, the *Osborn* case in Wisconsin, and statute and precedents in Arkansas—is, furthermore, consistent with the Department of Education’s (the “Department”) interpretation of FERPA. The Family Policy Compliance Office (FPCO) of the Department manages FERPA compliance and provides policy guidance to students, parents, teachers, and education administrators.⁸⁷ In 2004, the FPCO issued a letter ruling on “Disclosure of Anonymous Data Under FERPA,” suggesting that *Osborn* was, in the opinion of the Department, correctly decided.⁸⁸ In March 2008, the Department Office of Planning, Evaluation, and Policy Development published a notice of proposed rulemaking (NPRM) that would codify that 2004 FPCO position and provide further guidance to educational institutions in disclosing public records after information that personally identifies students had been redacted.⁸⁹

In the fall of 2004, the FPCO fielded a query from a Tennessee Department of Education (TDOE) official struggling to develop a policy that would allow researchers access to “student-level data,” also known as microdata.⁹⁰ The TDOE wished to reveal the information about individual students after changing students’ unique social security numbers to unique numerical identifiers (without, of course, disclosing the transformative formula) to protect the students’ identities.⁹¹ It is likely that the TDOE worried that these disclosures to researchers still might run afoul of the FERPA prohibition on the release of individual students’ education records, primarily because the unique numerical identifiers and the underlying data still could be described as “information directly related to a student.”⁹²

The FPCO allayed the TDOE’s concerns, advising that “[e]ducation records may be released without consent if all personally identifying information has been removed.”⁹³ Once data can no longer “be linked to a student by those reviewing and analyzing the data,” the data are no longer “directly related to any students,” and thus fall outside the definition of educational records, the release of which would be prohibited.⁹⁴

The FPCO provided some additional guidelines. First, the “non-personal identifier[s]” may not, of course, be traceable to any student’s per-

87. Family Policy Compliance Office Home Page, <http://www.ed.gov/policy/gen/guid/fpco/index.html> (last visited Aug. 26, 2008).

88. Letter from LeRoy S. Rooker, Director, FPCO to Matthew J. Pepper, Policy Analyst, Tennessee Department of Education, Nov. 18, 2004, *available at* U.S. Department of Education, FERPA Online Library, http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville_tn2004.html (last visited Aug. 26, 2008).

89. Family Educational Rights and Privacy (NPRM), 73 Fed. Reg. 15,574, 15,583-85 (Mar. 24, 2008) (fourth significant proposed regulation, “De-Identification of Information,” proposing amendment to 34 C.F.R. § 99.31(b)).

90. Letter from Rooker to Pepper, *supra* note 88.

91. *Id.*

92. 20 U.S.C. § 1232g(a)(4)(A)(i) (2002).

93. Letter from Rooker to Pepper, *supra* note 88.

94. *Id.*

sonal identifier, or social security number, without disclosure of the transformative formula, or “linking key.”⁹⁵ Second, the linking key must be safeguarded as a FERPA record not subject to disclosure.⁹⁶ Third, the data population must be comprised of “sufficient cell and subgroup sizes,” “us[ing] generally accepted statistical principles and methods” so that no student’s identity is “easily traceable.”⁹⁷ In other words, disclosure is not permitted as to some discrete, descriptive category—say, “female Pacific islanders”—when the number of persons in that category is so few as to risk revelation of their personal identities. These safeguards would ensure the disclosure only of “anonymous data,” and, if adopted, would ensure the TDOE’s compliance with FERPA.⁹⁸

In the TDOE letter, the Department expressed its “inten[t] to promulgate regulations in the future defining this type of non-personally identifying (anonymous) data, thus allowing disclosure,”⁹⁹ and in March 2008, the Department published an NPRM on the subject of “De-Identification of Information.”¹⁰⁰ The proposal would codify the Department’s approach in the TDOE letter, “provid[ing] objective standards under which educational agencies and institutions may release, without consent, education records, or information from education records, that has been de-identified through the removal of all personally identifiable information.”¹⁰¹ The proposal does not countenance the release of information about a student when the student, or an incident in which the student was involved, is “well-known in the school or its community.”¹⁰² Similarly, the proposal does not apply in the case of “a targeted request,” *i.e.*, when the requester “has direct, personal knowledge of the subject of [a] case,” such that the requester would perceive the personal identity of a student in otherwise anonymous data.¹⁰³ At the same time, though, the proposal does not demand absolute anonymity as a precondition to the disclosure of generally anonymous data. The Department explained:

Clearly, extenuating circumstances sometimes cause identity to be revealed even after all identifiers have been removed, whether in aggregated or student-level data. In these situations, the key consideration in determining whether the information is personally identifiable is whether a reasonable person in the school or its community, without personal knowledge of the relevant circumstances, would be able to identify a student with reasonable certainty.¹⁰⁴

In this manner, the proposed standard strikes a realistic balance between privacy and access.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Letter from Rooker to Pepper, *supra* note 88

100. Family Educational Rights and Privacy, 73 Fed. Reg. at 15,583-85.

101. *Id.* at 15,583.

102. *Id.*

103. *Id.* at 15,583-84.

104. *Id.* at 15,584.

The challenge, then, is for educational institutions to draw exactly the “discretionary decision” line that the *Osborn* court referenced, but did not cement. The Department reported that “[s]ome schools have indicated, for example, that they would not disclose that two Hispanic, female students failed to graduate,” because they could be identified too easily.¹⁰⁵ The Department admitted that there can be no one-size-fits-all rule, and for guidance, it referred institutions to Statistical Policy Working Paper 22 of the Federal Committee on Statistical Methodology.¹⁰⁶ Drawing on the experience of agencies such as the U.S. Census Bureau, the paper offered a primer and recommendations in “statistical disclosure limitation,” *i.e.*, identifying and handling subgroups that are too small to permit individual identities to be protected effectively.¹⁰⁷ A number of strategies described in the paper were later mentioned by way of example in the Department proposal, including minimum cell size and controlled rounding in cases of aggregated data disclosure,¹⁰⁸ and “‘top coding’ a variable (e.g., test scores above a certain level are recoded to a defined maximum)” in cases of microdata disclosure.¹⁰⁹

The Department proposal provided additional guidance in three respects: First, the Department instructed institutions to consider that “the re-identification risk of any given release is cumulative, *i.e.*, directly related to what has previously been released.”¹¹⁰ In other words, the institution should be sensitive to the possibility that disclosed anonymous data, such as a list of personal characteristics with birth dates but no names, could be cross-referenced with previously disclosed non-anonymous data, such as a public directory arranged by name that lists birthdays.¹¹¹ Second, the Department cautioned that institutions should be reserved in their publication of directory information, so as to minimize the ranges of data in the public domain that could be used to effect re-identification of subsequently disclosed anonymous data.¹¹² Third, the Department urged institutions to be consistent in their de-identification

105. *Id.*

106. Subcommittee on Disclosure Limitation Methodology, *Report on Statistical Disclosure Limitation Methodology* (Fed. Committee on Stat. Methodology, Statistical Policy Working Paper No. 22, 1994) [hereinafter PAPER 22].

107. *See id.* Cf. Douglas J. Sylvester & Sharon Lohr, *The Security of Our Secrets: A History of Privacy and Confidentiality in Law and Statistical Practice*, 83 DENV. U. L. REV. 147 (2005) (examining the history of confidentiality in federal statistical data collection).

108. Family Educational Rights and Privacy, 73 Fed. Reg. at 15,584. The report pointed to a minimum cell size of three as common. PAPER 22, *supra* note 106, at 38. Alternatively, statisticians informally sometimes mark the upper threshold of rarity with a five-percent rule. A wise and whimsical application of the five-percent rule can be found in Dean Antanas Suziedelis, Address at the Catholic University of America Freshman Convocation: On Being Significant (Sept. 12, 2001), <http://publicaffairs.cua.edu/RDSpeeches/01SuziedelisConvocation.cfm>. Controlled rounding, which requires appropriate computer software, manipulates the up or down rounding of non-whole numbers to whole numbers to effect the suppression of data at a level of detail that would more likely than otherwise result in personal identification. PAPER 22, *supra* note 106, at 15.

109. Family Educational Rights and Privacy, 73 Fed. Reg. at 15,584.

110. *Id.*

111. *See id.*

112. *Id.*

strategies.¹¹³ Much as the TDOE sought to do, institutions “may attach a unique descriptor to each de-identified record that will allow the recipient to match other de-identified information received from the same source.”¹¹⁴

The position of the Department and its FPCO in the 2004 TDOE letter, further articulated in the 2008 NPRM, remains wholly consistent with the conclusion of the court in *Osborn*. Where a state public records law compels disclosure with the redaction of exempt information, the de-identification strategy endorsed by the Department allows educational institutions to satisfy both state and federal laws. The University of Wisconsin in *Osborn* had failed to demonstrate any statistical basis to support its blanket non-disclosure, and the Wisconsin court accordingly rejected the University’s position. Similarly, the position of the University of Arkansas in the Arkansas case is indefensible, because the University failed to demonstrate any statistical basis to support its blanket non-disclosure.

V. CONCLUSION

All state and federal authorities that have attempted to harmonize federal privacy and state access law in regard to university records have met a consensus that strongly favors disclosure. Moreover, the jurisdictions discussed—Kentucky, Wisconsin, and Arkansas—are not outliers in the design of their open record regimes. Multistate FOI norms dictate the release of non-exempt information in public records after information exempt from disclosure is segregated and redacted.¹¹⁵

In the five jurisdictions in which affirmative action ballot initiatives were proposed for the November 2008 election cycle—Arizona, Colorado, Missouri, Nebraska, and Oklahoma—the *Osborn* analysis would pertain. Arizona law concerning the public availability of education records incorporates FERPA by express reference.¹¹⁶ The Colorado public records law, like FERPA, exempts from disclosure “scholastic achievement data on individual persons, other than . . . group scholastic achievement data from which individuals cannot be identified.”¹¹⁷ In Missouri, the definition of a public record excludes from general public inspection “personally identifiable student records maintained by public educational institutions.”¹¹⁸ The Nebraska public records law exempts “[p]ersonal information in records regarding a student,” excluding “directory information specified” by the FERPA.¹¹⁹ Oklahoma law, also echoing FERPA, provides for the confidentiality of “[i]ndividual student records,” but not “statistical

113. *Id.* Thus, for example, if a minimum cell size of three is adopted, that rule should apply to all disclosures, unless statistical variation in another data set requires the use of a different minimum cell size. Unsupported variation in rules among multiple similar disclosures would otherwise enhance the risk of re-identification by cross-reference between disclosures.

114. *Id.* at 15,585.

115. See OPEN GOVERNMENT GUIDE, *supra* note 49.

116. ARIZ. REV. STAT. ANN. § 15-141(A) (West 2008).

117. COLO. REV. STAT. ANN. § 24-72-204(3)(a)(I) (West 2008); see also *id.* § 24-72-204(3)(e) (tracking FERPA allowance for disclosures to specified persons).

118. MO. REV. STAT. ANN. § 610.010(6) (West 2008).

119. NEB. REV. STAT. ANN. § 84-712.05(1) (West 2008).

information not identified with a particular student.”¹²⁰ Arizona and Colorado courts have identified redaction as a means of reconciling state access law with privacy exemptions,¹²¹ and Missouri, Nebraska, and Oklahoma laws call expressly for disclosure of public records after the “practicable” or “reasonabl[e]” segregation and redaction of exempt information.¹²² Like Arkansas law, Missouri law provides for the production of a description of redacted information.¹²³

Withholding information from the public about how affirmative action works serves little purpose other than to deprive the voter, the researcher, and any other interested person of the opportunity to reach informed conclusions concerning the efficacy of affirmative action in general or a specific policy in particular. Administrators in public institutions of higher education are not entitled to substitute their own judgments for the will of the electorate, regardless of whether the administrator favors or disfavors any form of affirmative action. If affirmative action proponents fear that the public would unfavorably misinterpret data on the use of affirmative action, then the solution is to encourage the release of more—not less—information, in order to empower the voter to meaningfully assess the state of equality or inequality in our society, and to advocate for desired policy choices accordingly. Proponents of affirmative action are entitled to access data that will test their hypotheses about affirmative action, which can then be used as instruments to press for the wider adoption of affirmative action mechanisms, or to ensure that existing policies are employed effectively to achieve their stated objectives. Just the same, opponents of affirmative action are entitled to access the data that will test their hypotheses or bolster their positions.

As a broader proposition, public university administrators in pursuit of their own agendas may not thwart democratic governance by refusing to disclose information to which the public is entitled. Such substitution of judgment for the popular will manifests the sort of arrogance that gives the ivory tower a bad name. The far superior approach is one that protects individual student privacy while ensuring that the admissions process at a publicly funded institution occurs, to the maximum extent possible, in a glass house, penetrated by the light of public scrutiny. To this end, it is imperative that those as-yet unresolved federal and state authorities, such as the Arkansas Supreme Court, continue to find that federal and state privacy laws cooperate in order to promote the maintenance of integrity and disclosure at the upper echelon of the ivory tower.

120. OKL. STAT. ANN. tit. 51, § 24A.16(A)(1), (B) (West 2008).

121. *E.g.*, *Phoenix Newspapers, Inc. v. Ellis*, 159 P.3d 578, 583-84 (Ariz. Ct. App. 2007) (citing *Cox Ariz. Pub., Inc. v. Collins*, 852 P.2d 1194, 1198 (Ariz. 1993)); *Sargent Sch. Dist. No. RE-33J v. Western Servs., Inc.*, 751 P.2d 56 (Colo. 1988).

122. MO. REV. STAT. ANN. § 610.024(2) (West 2008) (“practicable”); NEB. REV. STAT. § 84-712.06 (2008) (“reasonabl[e]”); OKL. STAT. ANN. tit. 51, § 24A.5(2) (West 2008) (“reasonabl[e]”).

123. MO. REV. STAT. ANN. § 610.024(2) (West 2008).

