Rights in Conflict:
Freedom of Information Versus
the Family Education Rights and Privacy Act

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Few would argue that governmental openness is not a valuable goal. In a representative democracy like that of the United States, it is vital that the public, and journalists who collect and disseminate information to the public, have access to information about the workings of its government in order to make the best possible decisions about who they want running that government. That the government provides so many of the records it keeps both to journalists and to the public at large is therefore incredibly beneficial. Giving the public access to so much information about what the government is doing at any time prevents them from having to rely on government leaks or basic guesswork as to why something occurred or what the reasoning behind a new law might be.

This is not to say that the government should make all of the information it keeps available to the public all of the time. As the government holds so much information about its citizens, there are many cases in which the wide release of information could cause physical, economic, or moral harm to those citizens. That releasing details of troop locations or battle plans could result in the deaths of soldiers involved is one of the more obvious examples. Government agencies such as Medicare collect information about the health and physical condition of those who use them. This is information that, when connected to individual names, is of little importance to the public at large, but its release would constitute a major invasion of privacy. The U.S. government\textsuperscript{1} therefore has a duty to protect such information and has recognized that duty in some areas, largely as a result of public pressure.

\textsuperscript{1} Which here refers to the totality of the government – the courts, legislature and executive agencies.
Public schools, especially, bear a responsibility to keep information private. The information they keep on students is extensive and mostly mandatory, as enrollment in elementary and high schools is required by law. To help ensure the safety of private information entrusted to the schools, Congress enacted the Family Education Rights and Privacy Act of 1974 (FERPA). That law prohibits school employees from releasing student records without permission from the student or his parents.

A lack of clarity in that law’s wording, though, has many journalists concerned that schools might be going too far in protecting student privacy and, in doing so, infringing on the public’s right to access governmental information. Since the law’s passage, journalists who cover public schools have had numerous public records requests of varying types rejected because of FERPA privacy concerns. Many of them think that schools are interpreting the law far too broadly, applying it to documents that (in the journalists' opinion) should clearly be open to public perusal. While schools may simply be acting to protect themselves – the punishment for FERPA violations is a potential loss of funds from the federal government – some worry that school administrators could use their extensive interpretation of the law to keep information about illegal or embarrassing activities a secret from the public.

In this thesis I intend to examine whether those journalists are correct in their assessment that the interpretation of FERPA by some public institutions is too broad and violates principles of governmental transparency and public record laws.
To ensure that the reader is familiar with arguments of both sides of the debate, the first chapter of this thesis focuses on the basics of privacy theory and law. The second chapter does the same for freedom of information. Along with a discussion of what each right entails, both chapters provide brief histories of the arguments in favor of providing protection for those rights and explanations of why these rights are so important, both to individuals and the society at large. I also describe federal and state laws upholding each and major, relevant court cases in these chapters. This should give the reader a basic understanding of both privacy and the public’s right to know in legal, theoretical and ethical terms.

Chapter three addresses the conflict between these two rights as experienced by journalists. As the laws governing each have been discussed at length in earlier chapters, this legal section focuses mainly on how the courts have ruled when faced specifically with this conflict. I also provide an analysis of the ethical guidelines of three different ethicists, each attempting to balance journalistic concerns for privacy and freedom of information by different degrees. Although the ethical analysis has little direct bearing on FERPA, it should demonstrate to the reader unfamiliar with journalistic mores that journalists have paid attention to and attempted to create extralegal solutions to the privacy vs. freedom of information debate, and that they are aware of the fact that not everything that is legal is also ethical, and vice versa.

In chapter four, we finally delve into FERPA. It includes both a description of the law and of some of the criticisms that have been laid against it. A good portion of the chapter is dedicated to looking at ways in which this law can be and has been
abused or circumvented by public universities. This section also includes my study of different interpretations of FERPA by representatives of various institutions. I expect this study to show a large amount of confusion over the scope of the law.

Chapter five presents my overall conclusions, those resulting both from my interviews of university lawyers and from my research. I intend to show that FERPA, as currently interpreted by university officials, tips the scales too far in the direction of privacy, preventing journalists from fully carrying out their responsibilities as public watchdogs.

1. Privacy

The right to privacy, which allows people to carry out their daily business without public or governmental scrutiny, has been recognized as an essential liberty in the United Nations’ Declaration of Human Rights. Although it has only been defended by the law since the late nineteenth century, the protection of personal information from publication in newspapers was the subject of much discussion long before that time and continues to be so today.

1.1 Theory of Privacy

In their 1890 *Harvard Law Review* article, attorneys Samuel D. Warren and Louis D. Brandeis famously described privacy as “the right to be let alone.” The two recognized an obligation by the government to protect “life, liberty and property,” natural rights originally asserted by philosopher John Locke. Warren and Brandeis argued the right to property had expanded over time to include not only physical
objects, but intellectual property as well. A person’s ownership of his home, possessions and body consequently extended to an ability to enjoy those things in private and without the knowledge or interference of outsiders. The young attorneys acknowledged that this right was not absolute and could be violated by the press when a legitimate public interest existed.

Privacy is sometimes divided into different categories. In *Invasion of Privacy*, Kevin Keenan identifies five separate categories: associational, bodily, communication, data and spatial privacy. Associational privacy is a person’s ability to have relationships with others without outside knowledge or interference. Bodily privacy is one’s power over oneself. This type of privacy allows individuals to make their own medical decisions and protects them from unreasonable physical searches, among other things. Communication privacy involves the ability to communicate information by a variety of methods without others knowing the content of the communication. Spatial privacy allows a person to control who has access to the things that go on in his home, hotel room, office or car. Data privacy, which is also called information privacy, is a person’s right to control who can collect and access information about him. This category will be discussed more thoroughly than the others in this thesis, as it is the type most affected by journalism and by the Family Education Rights and Privacy Act (FERPA).

It should be noted that an individual’s privacy differs greatly from the secrecy of a government, corporation or other organization. While privacy pertains only to

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2 He acknowledges that other forms of privacy, like familial privacy, exist but can generally be integrated into one or more of these broad categories.

3 Such as in person or through a telephone, the mail or e-mail.
information about an individual, government secrecy can prevent the people from
discovering important information about how the country is being run or how their
money is being spent. When regarding individual action, the distinction sometimes has
a moral element, with secrecy referring to the concealment of acts that would be
considered immoral by society or by the individual performing them. Privacy,
meanwhile, can be applied to actions that are considered morally neutral or even
beneficial. Compared to privacy, “(t)hat which is restricted by secrecy, however, is
more likely to be regarded as legitimate public property which must be concealed or
hidden illegitimately through secrecy” (Warren and Laslett 44). The information kept
secret may also be information that would be considered public or commonplace if not
for the circumstances which lead to its being hidden. For example, a person’s name is
normally one of the most public things about her, unless it is kept secret because her
job as a spy requires her to take on a different identity. Secrecy on the part of the
government is sometimes achieved through an appeal to national security, while
businesses invoke secrecy to protect their products from being imitated.

Development of Privacy Arguments

Americans became more interested in privacy during the Jacksonian era, when
economic pressures came into conflict with traditional ideas about the home.
Competition between the immensely popular “penny papers” led each to seek out
increasingly shocking stories about crime and the private lives of citizens. Early critics
of journalistic invasiveness focused on the disreputable character of the reporters and
supposed indecency of their reporting. Journalists were described as “gossipmongers” who ignored the sanctity of the home and of private life (Smith 74).

Outcry against intrusive reporting increased in the Victorian era when, “popular journalism brought the ills and inquisitiveness of the world into the romanticized and privatized Victorian home that was often described as hallowed space for the family” (Smith 76). Attitudes toward privacy in this era largely reflected the class structure of the time. The (probably upper class) intellectuals who criticized the press felt that the “unwholesome” aspects of lower class life should not be so publicly examined, while reporting on the upper class exposed it to “profane” and “hungry eyes” (Smith 76). Despite the obvious classism of these attitudes, people generally came to agree that the press of the time was intruding too far into the lives of private citizens.

Legal scholars had long stressed the importance of tempering freedom of the press with respect for privacy. They were, however, uncertain of how to enforce their ideals of a more responsible press while maintaining Constitutional freedoms. Reporters and editors spoke out in favor of self-regulation, but many outside of the press felt they could not be trusted to police themselves (Smith 82).

This debate led to a discussion of the need for privacy law, which will be dealt with later in this chapter.

**Importance of Privacy**

In an article on “Privacy and the Press,” Lou Hodges asserts that privacy is not simply desirable – preventing the disclosure of potentially embarrassing personal
information – but also a psychological and political necessity (278-280). In a psychological sense, people must have control over who has access to what information about them in order to grow or change as a person. Controlling their so-called “circles of intimacy” allows people to try out new personas or traits. “Privacy provides the opportunity to imagine possible futures without commitment to any until several have been projected” (Hodges 279).

He describes those circles of intimacy as a series of concentric circles, with the level of intimacy decreasing from the innermost circle – which contains only oneself – to the outermost. In that innermost circle, a person keeps her secret thoughts, dreams and plans. These are things that, if exposed or discovered without her consent, would make her feel violated. The next circle may extend to only one other person, like a significant other or doctor, who is entrusted with information he is expected not to share. As the circles move outward, they include more people in whom increasingly less trust is placed until the outermost circle, which contains information the individual considers public. The sense of violation or betrayal the individual would feel if her secrets were made known decreases accordingly (Hodges 277-278).

Besides facilitating personal growth, privacy can also enable individuals to make more informed decisions by allowing for personal reflection and conversation with a select few (Keenan 24-23). Discussions within a small circle of intimacy let people vent – expressing opinions that they would not want shared with everyone in order to get over their frustrations.
Politically, privacy is necessary to resist the power of the state. The more information about its people’s lives a government has, the easier it is for them to manipulate or control them (Hodges 279). By releasing or threatening to release embarrassing information to the public, governments can discredit troublesome citizens or force them to take desired action. Increased independence, meanwhile, actually supports a democratic system of government by allowing the people to become more informed (Keenan 30). In a system where the people are expected to make governmental decisions, informed decision-making is key.

Privacy also supports society by providing relief from social norms. Those norms, which apply to things society considers unusual or improper but probably not immoral, generally regulate public behavior. Privacy allows people to engage in those behaviors without negative societal consequences. This can help them to adhere to social codes when in public by providing an outlet and also allows for alternative cultures to develop (Keenan 27-29).

Right to Privacy

As previously mentioned, privacy is sometimes considered a natural right, derived from John Locke’s ideas about the natural rights to life, liberty and property. This right has been recognized by scholars of ethics, as well.

In an article on privacy ethics, Clifford G. Christians finds a right to privacy in its necessity. “Privacy is not merely a legal right but a human condition or status in which humans, by virtue of their humanness, control the time, place and circumstances of communications about themselves” (Christians 204). Like Hodges, he finds privacy
essential to the functioning of a democracy, arguing that control over one’s self-
identity must be a foundational part of such a government.

Bernhard Debatin explains that a right to self-determination is the underlying concept that supports privacy. He describes self-determination as “the right to freely determine what is necessary and desirable for a fulfilling and meaningful life and to freely pursue one’s social, cultural, political and economic development” (Debatin 51). Self-determination is necessary to privacy, allowing individuals to choose when to withhold or share information within their circles of intimacy. Debatin writes that there are both positive and negative arguments for privacy. It gives a person control over her personal information and social sphere – the positive argument – and provides freedom from the intrusion of others – the negative (Debatin 48). The latter has been reflected in U.S. law to protect privacy in certain areas of one’s life.

1.2 Privacy and the Law

Privacy law in the United States has developed in a fairly unusual way. While many other nations have general privacy laws, the U.S. has sector-specific laws, which afford protection to information generated in certain areas of a person’s life but not others (Privacy and Human Rights 2003). For example, the law gives special protection to students and medical patients; information about people in those roles is subject to more protection than information about them when performing other societal roles. Because new legislation or judicial precedent is required to protect privacy in different areas, the sector-specific method does not establish privacy as a universal right, only a situational one, respected only where special interests groups
have been successful in pushing for laws. This leaves citizens open to privacy violations in other areas of their lives.

The United States Constitution and its amendments do not contain an explicit right to privacy, but courts have found privacy protection in several different places. The broadest of these is the 14th Amendment’s guarantee that states may not “deprive any person of life, liberty, or property, without due process of law.” In cases such as Griswold v. Connecticut, the Supreme Court held that privacy was one of the liberties that require protection under that amendment. The Bill of Rights is also viewed as protecting against government invasion of privacy when it prohibits illegal search and seizure in the Fourth Amendment and forcing a person to provide evidence against herself in the Fifth Amendment. The First Amendment can also be construed as a freedom to think, speak and congregate without government knowledge, while the rarely discussed Ninth Amendment stresses that, by naming certain rights in the Constitution, the government was not denying the existence of other individual rights, like privacy (Keenan 7-8).

The aforementioned 1890 article by Warren and Brandeis essentially created the legal rationale for civil privacy suits. Claims of privacy in civil suits were not recognized in the U.S. until that time (Hodges 280). Prior to the early 20th Century, Americans who felt their privacy had been violated sought legal refuge by referring to those violations as libel or a form of blackmail (Smith 70). Though they found additional assistance in the Comstock Act of 1873, which banned obscene and

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4 To be discussed later in this section
5 Reporters also faced social ostracism and even being beaten on the street after reporting on the doings of the upper class, although these largely served to create public sympathy for the reporter.
indecent material from the mail, the law was mostly targeted toward pornography and contraceptive devices and did little to prevent general privacy invasions by the press (Smith 77-78).

Privacy Legislation

Americans seem to have avoided passing laws that directly affect the kind of information a newspaper can print. Alexis de Tocqueville attributed this to a general desire to preserve freedom of expression (as cited in Smith 69). In other areas, though, privacy was more protected. By the end of the nineteenth century, Americans had been granted a number of legal rights to privacy from trespassing to wiretapping and forced spousal testimony.

However, broad privacy legislation was not created in the United States until the 1970s. At that point, the courts had already recognized a right to privacy\(^6\), and the American people were becoming increasingly concerned with government intrusion in the wake of the Watergate scandal (Keenan 16-17). The revelation of White House involvement in illegal wiretapping and other criminal activities created public outrage and likely led to both unprecedented privacy protection and the creation of the Church Committee.\(^7\)

The Privacy Act of 1974 was intended to protect people from government intrusion (Cullinan 5). It bars government agencies from releasing information about private individuals to other individuals or agencies without permission. Exceptions to

\(^6\) As will be discussed in the following section

\(^7\) This committee was also known as the U.S. Senate Select Committee to study Governmental Operations with Respect to Intelligence Activities. It uncovered widespread abuse of power by the intelligence community (Keenan 17)
this include sharing that information for law enforcement or statistical purposes and for congressional investigations. The law also allows citizens to find out what information the government keeps about them and to correct that information when it is wrong.

Passed in the same year, FERPA was created to give students and their parents more privacy and control over educational records collected by a public school. It allows parents to review their children’s education records until they turn 18, when the students gain complete control of them. The law protects the privacy of those records by threatening schools with a loss of federal funding if records are released without the students’ consent. Like the Privacy Act, FERPA was concerned more with government use of private information than with its exposure by the press.

The Health Insurance Portability and Accountability Act of 1996 (HIPPA), the Video Privacy Protection Act of 1988, the Children’s Online Privacy Protection Act of 1998\(^8\) and other laws have since expanded data privacy to citizens in other capacities.

**Privacy in the Courts**

As discussed above, the right to privacy is not specifically mentioned in the U.S. Constitution but has been recognized by the Supreme Court as implicit in the Bill of Rights. The Court has used privacy not only to protect against traditional invasions of privacy, but also to give people more freedom in procreative, marital, child rearing and other decisions (Privacy and Human Rights 2003).

\(^8\) These protect medical records, video rental records and electronic information about children under the age of 13, respectively.
Thanks in part to the article by Warren and Brandeis, those who feel their privacy has been invaded by the press may now take the offender to court and sue under one of four types of privacy invasion. Those include revealing embarrassing personal information about individuals – such as their medical condition; presenting them in a false light; physically or electronically intruding on their private space; and using their name or image without permission, usually for financial gain. False light differs from libel in that the information communicated may be correct but somehow misleading (Smith 92).

A constitutional right to privacy was first recognized in Griswold v. Connecticut, a 1965 case in which Estelle Griswold was arrested for providing contraceptives as part of her work at a Planned Parenthood office. The Supreme Court found that the state’s laws against the use of contraception violated marital privacy. Though the word “privacy” does not appear in the Constitution, the justices ruled it to be one of the essential liberties protected by that document (Keenan 17-18). This right to privacy was later applied in Eisenstadt v. Baird (1972), which extended contraception rights to unmarried persons, and in Roe v. Wade, the 1973 case that legalized abortion.

In 2002, the Supreme Court found in Board of Education v. Earls that students in extracurricular activities have a lower expectation of privacy and may therefore be subjected to mandatory drug testing. This was very much in keeping with the Court’s pattern of granting fewer rights to public school students than to adults, especially in the arenas of privacy and free speech.
2. Freedom of Information

Freedom of Information, also called “transparency” or the “public’s right to know,” is quite simply the idea that the public has a right to information about what its government is doing. It has long been considered an important aspect of societies that hope to maintain a democratic form of government. For that reason, it was a subject of much debate when the United States was founded – both at the Constitutional Convention of 1787 and during debate over ratification – and was later strengthened by both state and federal laws.

2.1 Theory of Freedom of Information

The importance of freedom of information springs from a belief in the public’s right to know. The people’s right to access information about their government is considered critical to the workings of a republican or democratic society, in which an informed public helps the government to run better.

History of Freedom of Information

The idea of freedom of information has been around at least since 1644, when John Milton asserted a “liberty to know.” He felt that Christianity had created individual liberties, one of which was a right to the truth. Under this theory, he argued for press freedom from censorship, especially from prior restraint, believing that even if falsehoods were published, the truth would win out (Marnell 3-4).

The right to know would later receive a place of importance in theories about democratic government during the American Revolution and the drafting and
ratification of the Constitution. In an article on the subject, Kiyul Uhm finds the roots of a public right to know in the Declaration of Independence, when England’s King George III is criticized for holding public meetings in places that were difficult for the public to access “for the sole purpose of fatiguing them into compliance with his measures” (qtd. in Uhm 397). The Declaration implies that if British citizens knew more about what was going on in their government, they would be better able to decide which laws and actions were just.

The framers of the Constitution acknowledged the importance of freedom of information when they inserted into the document a provision that ordered each house of Congress to keep records and to publish them “from time to time.” Though some believed the legislature could be trusted to publish without being constitutionally required to do so, George Mason of Virginia argued that having an explicit requirement would alert the people to the importance of Congressional transparency and encourage them to monitor it. After the Constitutional Convention, debate over this provision focused on whether the publication requirement was frequent enough. Delegates also recognized the importance of governmental secrecy in some areas, especially when making military decisions and treaties (Uhm 398-399).

In light of the benefits of a free flow of information about government, founding fathers, like Thomas Jefferson, believed a bill of rights that included press freedoms was essential to protecting all of the rights of Americans from government encroachment (Uhm 403).

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9 The Constitution uses the same wording when specifying how often the president must make a State of the Union address to Congress.
The first recorded criticism of government agencies for failing to release information came from the American Bar Association in the 1930s. Those agencies were new creations of President Franklin D. Roosevelt’s New Deal and were not yet subject to any freedom of information regulations. The public began to share this concern when the Cold War began and joined the press in a push for more openness in government (Halstuk and Chamberlin 517-518).

Importance of Freedom of Information

To a citizen of a free country, freedom of information provides two important powers – the ability to make informed decisions and to guard against government malfeasance.

In a republican or democratic form of government, ultimate authority is believed to lie with the people. For this reason, it is essential that those people be informed about the workings of government so that they may make the best decisions and select the best leaders as possible. Freedom of information is so important to a democratic society that it is generally considered a public good. Its acceptance by society as a justified claim on others makes it a right according to the reasoning of Manuel Velasquez, Claire Andre, Thomas Shanks, S.J., and Michael J. Meyer in their article “Rights.” It would likely be considered a positive right, one that claims the active assistance of others to be fulfilled (Velasquez et al).

When examining a government that is already at work, freedom of information lets the public know how its money is being spent and whether the government is respecting the rights of its citizens. On this subject, Massachusetts lawyer William
Bollan argued in 1766 that “the free examination of public matters, with a proper representation by speech or writing of the sense resulting from that examination, is the right of the members of a free state, and requisite for the preservation of their other rights” (qtd. in Uhm 397). Advocates of freedom of information legislation in the 1940s-1960s shared this view (Halstuk and Chamberlin 520).

Early Americans also used Freedom of Information to support the idea of the importance of public education. British loyalists, for example, were thought to have suffered from a lack of information about the revolutionary cause, and an early Congress suggested that the states make patriotic material and information about the new form of government more available so that these people could better decide where to place their loyalties (Uhm 397-398).

Right to Know

While the public’s need for information about the government is generally accepted, the so-called right to know is less clearly defined. Journalists often use the term to justify their pursuit of information, but they rarely, if ever, take the time to articulate the limits or implications of that right.

Some scholars, like James E. Sayer, argue that journalists wrongly use the lack of a strong formal definition of the right to know to justify printing anything they feel like, anything they consider newsworthy. In support of that point, he references Kent Middleton and Bill Chamberlin. “News has been said to include ‘all events and items of information which are out of the ordinary hum-drum routine’” (qtd in Sayer 5). This information caters to a public interest in information rather than a need to know. Sayer
worries that by providing that kind of information, journalists are both invading privacy and drowning information the public actually needs in the sea of trivialities (Sayer 5-10). These concerns are valid. As will be discussed in the next chapter, the right to know frequently conflicts with an individual’s right to privacy, and is frequently so broadly defined as to allow privacy violations with little real basis.

According to Jeffrey J. Maciejewski and David T. Ozar, to have moral power, a right must have both a strong justification and a clear definition of what action is necessary to uphold it. In their quest to find a definition of the right to know that meets both of these qualifications, the two present twelve possible interpretations of the law, asking a variety of questions about its implications. These include whether the right is unconditional, to what type of information it applies, whether it requires positive or negative action on the part of citizens and whether it applies more to individuals or to social institutions set up to communicate information. They conclude by combining two of their proposed interpretations to create what they believe is the most morally defensible explanation of the right to know (Maciejewski and Ozar 123-126).

That definition requires individuals not to interfere with the formation of institutions that will communicate information to the public, nor to interfere with the actions of those institutions, so long as those actions are not “harmful to other persons or institutions” (Maciejewski and Ozar 129). When the release of information could be harmful – when it conflicts with privacy or security interests, for example – those
concerns do not automatically outweigh the right to know, but they must be taken into account in the decision-making process\textsuperscript{10}.

Maciejewski and Ozar also specify what kind of information should be subject to the right to know – only “information on which the well-being (or basic needs) of the public (or a significant portion of the public) is significantly dependent” (129). Though they do not provide many specifics, this does limit the information beyond mere newsworthiness. It could be reasonably assumed to include news about the workings of government, the actions of public officials, natural disasters and other safety concerns. Stories about private individuals would most likely not fall under this definition of the right to know.

The one important part of the right to know Maciejewski and Ozar do not discuss in much detail is what that right requires of the government; their definition applies only to individuals. As will be discussed in the next section, the U.S. government and many state governments have recognized the public’s right to know and have enacted laws requiring disclosure of many of the records held by government bodies. Their acceptance of the right springs in part from its necessity to democracy, and some evidence of Constitutional right to know. By guaranteeing free speech and freedom of the press, the founders implied a right for information to be received (Maciejewski and Ozar 131).

**2.2 Freedom of Information and the Law**

Like the right to privacy, the public’s right to know is not specifically mentioned in the U.S. Constitution, often putting its legal status up for debate. Lillian

\textsuperscript{10} The ethical decisions involved will be discussed in section 3.2 of this paper.
BeVeir, a law professor at University of Virginia, called it “a ‘rhetorical’ rather than constitutional right” (Uhm 394). It has been recognized by the courts, however, and is protected by both federal and state laws, though those entities have tended to focus on limiting, rather than expanding, freedom of information.

**Freedom of Information Legislation**

Members of the government became concerned about government secrecy in the 1930s, pushing for laws that would give them greater access to information. In 1946, Congress passed the Administrative Procedure Act to provide more guidance to the federal agencies that had been created under the New Deal of the 1930s. It included a provision that required these agencies to provide the public with information about their structures and activities. The act was largely unsuccessful in this goal, with a 1965 Senate report describing it as “full of loopholes which allow agencies to deny legitimate information to the public” (qtd in Halstuk and Chamberlin 522). This fact, combined with increased government secrecy during the Cold War led to a large movement for stronger and broader information laws (Halstuk and Chamberlin 521-523).

President Lyndon B. Johnson signed the Freedom of Information Act (FOIA) into law on July 4, 1966. Upon its passage, he stressed the importance of a free flow of information to democracy, saying, “A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest” (quoted in Halstuk and Chamberlin 531).
Most recently amended in 1996, the law stipulates that certain types of information must be made available to the public by government entities, specifically federal agencies of the executive branch and government-controlled corporations. It does not apply to records held by courts, Congress or state agencies. It includes nine exemptions and three exclusions, which specify the types of information that should remain private or secret. These include trade secrets, some information about ongoing law enforcement procedures and records that the president’s office has classified as secret in the name of national security or foreign diplomacy. Medical, personnel and “similar” records about government employees are also exempt from FOIA. The act originally required that agencies respond to requests within 10 days. It also includes an appeals process to be followed if someone thinks his request has been denied unfairly.

FOIA has been amended several times since its original passage. The Privacy Act of 1974, for example, gave citizens the right to review government-held information about themselves. In 1996, Congress passed the Electronic Freedom of Information Act, requiring that government agencies make certain information available on the Internet, whether or not a citizen had specifically requested it. Perhaps in exchange, it also extended the amount of time an agency may take before responding to a request to 20 days.

Since the passage of FOIA, both popular and governmental support for freedom of information has fluctuated greatly, with many presidential administrations preferring to downplay the importance of a free flow of information. Johnson himself was privately apprehensive about the bill, and had a section added to protect the
president’s power to keep certain information confidential. He ended up signing largely because of pressure from Congress (Halstuk and Chamberlin 531-532).

More recently, President George W. Bush’s administration seemed to stress the importance of national security over freedom of information, especially after the September 11, 2001 attacks on the World Trade Center and Pentagon. Later that same year, Attorney General John Ashcroft made the following statement about the Bush Administration’s stance on the public’s right to know.

“The Department of Justice and this administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.”

Ashcroft’s reasons for keeping information secret are wide-ranging and speak to a general belief among members of that administration in the value of secrecy over transparency.

All 50 states have also passed some form of sunshine laws,11 providing public access to government documents and meetings. While the first open records law was passed in Wisconsin in 1848, most other states passed their own in the 1970s, following FOIA. Several open meetings laws were passed around the same time. These laws vary greatly in extent and strength, though in a 2002 comparative study, Investigative Reporters and Editors found them all to be relatively weak. In the study, states were given both a GPA and letter grade based on five criteria, including

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11 So called because they were intended to shine light on secretive government activity.
response time, appeals process and how offending agencies are punished. The group ranked Nebraska’s laws the highest, while Alabama and South Dakota tied for last place. No state’s sunshine laws received an A (Freedom of Information in the USA).

According to the Ohio Revised Code, any record kept by a public office is considered public, with such exceptions as medical records, trial preparation documents and adoption records. None of the 27 exemptions relates specifically to education records, although information about the “recreational activities” of people under the age of 18 is not considered public. Any public record must be made available “to any person at all reasonable times during regular business hours” (“Availability of public records for inspection and copying”). Records that contain information that is exempt from the law must still be open to the public, but with all classified information removed. The law also sets procedure for requesting records or copies of records and requires that records be organized and maintained in a manner that facilitates availability to the public. The law also states that members of the public who request records cannot be not required to identify themselves or provide the reason for their requests to government officials.

The Ohio law makes its focus on helping citizens to better understand their government clear when it places restrictions only on those who request a significant amount of documents for “commercial purposes,” which do not include “reporting or gathering news, reporting or gathering information to assist citizen oversight or

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12 Each criterion could earn up to five points and was compared to a “gold standard” of law created by the researchers.

13 These restrictions only affect the amount of records that a requester can have mailed to him- or herself without having to pay for the postage in advance.
understanding of the operation or activities of government, or nonprofit education research” (“Availability of public records for inspection and copying”).

In the Investigative Reporters and Editors ranking, Ohio’s open records laws received a D grade, earning only six of a possible 25 points. The authors complain that the law doesn’t provide a concrete timeframe in which requests must be answered, only using such phrases as “a reasonable period of time.” The appeals process for denied requests was also criticized, as citizens are required to appeal directly to the court, rather than a department head or ombudsman. The law then neglects to instruct courts to deal with such appeals quickly and does not allow them to charge officials or agencies that were in the wrong with civil or criminal penalties. Ohio’s laws only did well in that they allow someone who wins her public records appeal to recover attorney’s fees and court costs.

**Freedom of Information and the Courts**

While the Supreme Court has recognized a right to know, most of the related cases have restricted that right. The 1919 case Schenck v. United States, for example, limited the right to know to information that did not pose “a clear and present danger” to the country or its citizens. In that case, Charles T. Schenck and Elizabeth Baer were arrested under the Espionage Act of 1917, after distributing pamphlets that urged draftees to resist the draft. Though the two asserted this to be a proper exercise of their First Amendment rights, the court disagreed (Marnell 12-13).

The “clear and present danger” test did not always work against the press. In New York Times Co. v. United States, the Supreme Court ruled that the famous
Pentagon Papers, containing previously secret information about U.S. involvement in Vietnam, did not pose enough of a threat to warrant prior restraint of the *New York Times* and *Washington Post* (Marnell 37-41). This case was a victory for the press in general but not necessarily for the public’s right to know. When giving a speech at Yale University in 1974, Justice Potter Stewart said about the case, "[t]he press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information or to require openness from the bureaucracy” (qtd. in Uhm 394).

In Houchins v. KQED, decided in 1978, the Supreme Court recognized a right to information about the government, but found that the press does not have any rights of access beyond those of the general public. In this case, the San Francisco television station KQED sued the government for better access to prisons, one of which had prohibited the station from filming inside. Members of the press had argued that, because they had special first amendment protection, they had a stronger right to access information and to gather the news. The majority of the court disagreed, ruling that the right of access existed to keep the public informed and not to benefit the small group of citizens that make up the press (Schwartz 31-32).

When interpreting FOIA, the courts have found the term “record” to apply to a broad range of information, including reports, letters, photographs and videos, making all those modes of information available to the public through records requests (Halstuk and Chamberlin 516).
3. Privacy versus Freedom of Information

By their very nature, an individual’s right to privacy and the public’s right to know come frequently into conflict. Freedom of information is the idea that people should be as informed as possible about the workings of their governments, and laws supporting it are therefore primarily concerned with preventing governmental secrecy, rather than giving citizens access to private information about others. Records held by the government often contain information about private citizens, though, and it can be difficult for individuals involved to discern whether such records should be considered public or private and whether publishing them will result in an invasion of privacy. This issue has been the subject of much debate, both legal and ethical.

3.1 Legal History of the Conflict

Legislators have clearly displayed interest in protecting and furthering both of these rights; passing laws that require the government to turn over information and that prevent the release of private information, especially as it relates to certain types of records. While new laws and amendments to existing ones have broadened protection of both rights, interpretations by the Supreme Court have tended to value personal privacy over the public’s right to know.

Privacy and FOI Legislation

As previously stated, the Freedom of Information Act of 1966 (FOIA) grew out of a movement for more government openness during World War II and the Cold War. This original act included an exemption intended to protect privacy, and a second
was added in 1974. Exemption 6 states that government agencies should withhold personnel, medical and “similar files” that “would constitute a clearly unwarranted invasion of personal privacy” (Halstuk and Chamberlin 539). Exemption 7 (C) expanded on a protection of law enforcement records to include those whose release would violate personal privacy. From 1999 to 2003, at least half of the FOIA requests rejected cited these sections (a potential invasion of personal privacy) as the explanation (Halstuk and Chamberlin 513).

Congress has also protected individual privacy with the Privacy Act of 1974, the Family Education Rights and Privacy Act of 1974 (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Though created partly in response to FOIA, each of these acts attempts to define the protected records in such a way that the public will still have access to important governmental information.

Privacy vs. FOI in the Courts

Over the years since FOIA’s passage, the Supreme Court has expanded privacy protection at the expense of a free flow of information. Halstuk and Chamberlin argue that the following court decisions have offset the original balance between freedom of information and privacy intended by Congress. They have lowered the level of privacy interest necessary to prevent disclosure, increased the amount of information a citizen must provide to overcome privacy concerns and determined that FOIA’s central purpose was to expose government wrongdoing, allowing the nondisclosure of information that will not assist in that goal (541-542).
In Department of State v. *Washington Post* (1982), the newspaper’s request for the passport information of two Iranian officials was denied under arguments of privacy invasion. The court found that information did not have to be of a highly personal nature to be considered private and was, therefore, exempt from FOIA under Exemption 6. Chief Justice William Rehnquist wrote that, although most of the information contained on a passport is not usually considered personal, the release of a government file containing this information would meet the “clearly unwarranted invasion of privacy standard” set by the law (Halstuk and Chamberlin 542-543).

The 1989 decision in Department of Justice v. Reporters Committee for Freedom of the Press limited the type of information available to the public. The group sued the government after it failed to release an individual’s rap sheet to CBS. The court found that, although the information about the individual’s previous crimes was public, the Federal Bureau of Investigation’s compilation of that information was a private record, and its release would constitute an invasion of privacy. Justice John Paul Stevens took this decision further in the majority opinion, writing that FOIA’s purpose was to provide information about the workings of government and, because the rap sheet would reveal nothing about the Department of Justice’s conduct, it fell outside of the public interest protected by the law. The release of law enforcement records, according to Stevens, always constitutes an invasion of privacy under Exemption 7(C), unless the documents contain information about the actions of the government agency that holds them (Halstuk and Chamberlin 543-546).
National Archives and Records Administration v. Favish (2004) introduced a new test for FOIA requests that requires the citizen to provide evidence of government wrongdoing in order to overcome privacy concerns. Attorney Allan J. Favish sued the government, hoping to obtain photos of the 1993 death of White House Deputy Counsel Vincent Foster, which had been ruled a suicide. Government officials refused to release the photos, saying they would invade the privacy of Foster’s family, and the Supreme Court agreed. The justices rejected Favish’s argument that FOIA gives a person control only over information about herself, writing that this ignored other essential privacy rights. They ruled that when a FOIA request threatens to violate an individual’s privacy, the requester must show that there is sufficient public interest in the requested information and that the release of the documents in question will advance that interest. Oddly, when one is investigating supposed government impropriety, the test is even stronger – the requester must show evidence that such impropriety has occurred (Halstuk and Chamberlin 546-551).

The court ruled in favor of privacy over freedom of information interests again in 2004 in Department of Defense v. Federal Labor Relations Authority. In that case, the Supreme Court found that the Privacy Act prevents the disclosure of employee addresses to collective bargaining representatives. In the decision, the justices weighed employee privacy against the public benefit that could proceed from the release of the addresses and found privacy to be the superior interest.
3.2 Journalistic Ethics and Privacy Theory

As disseminators of information, journalists are often forced to decide how much private information is appropriate to print. The sector-specific nature of privacy law in the United States makes it perfectly legal for them to print private information on a variety of subjects, although they may open themselves up to lawsuits by doing so. However, the lack of criminal sanctions does not automatically make it moral for a journalist to print private details of citizens’ lives. As Clifford Christians points out in “The Ethics of Privacy,” it is even legal to print lies about public officials, so long as there is no actual malice or reckless disregard for the truth. Publishing falsehoods could not be considered a moral act, though; it lacks any benefit to society and could be harmful both to the individual and those who base their decisions on such lies. “Though the law does not explicitly rule out falsehood, innuendo, and exaggeration – or invasion of privacy – human decency and basic fairness do” (Christians 203). When determining what to publish, the journalist must weigh the importance of respecting a subject’s privacy with the public’s right to know the information in question.

Technology has exacerbated this conflict – making it easier for journalists to access private information via social networks and putting more pressure on them to provide salacious details. With all the information available on the Internet, journalists need to provide something new and interesting to get their stories read. The Internet also provides journalists with unlimited space to fill, while storage and search features mean whatever is printed could be easily viewable long after the public would normally have forgotten the event (Cameron-Dow 72-76).
That conflict is dealt with in several professional ethics codes. These codes can be vague, however, and some theorists, such as those whose ideas are discussed in the next section, think they do not do enough to protect individual privacy. The Code of Ethics created by the Society for Professional Journalists, for example, clearly values the public’s right to know over privacy, asking only that journalists keep in mind the effect news coverage will have on subjects and that they afford more privacy to people who are not public officials. Professional codes like this leave a lot of room for personal discretion, but several ethicists have proposed more complex solutions to the dilemma.

It should be noted that the same ethical discussions are not as relevant outside of the United States, where laws and expectations regarding privacy are often very different. In Europe, for example, privacy is accepted as a basic human right and the individual is often given more legal and theoretical power over it (Debatin 49). This is evident even on the Internet, where sites are frequently required to let users opt-in to disclosure of information, rather than opting-out, as is common in the U.S. (Debatin 53-54).

Some Ethical Standpoints

In “Privacy and the Press,” Lou Hodges says “it is just for a journalist to violate the privacy of an individual only if information about that individual is of overriding public importance and the public need cannot be met by other means" (280). This two-pronged test provides a stricter standard than does the SPJ code, for example, which only requires an overriding public interest in the information.
According to Hodges, only government officials and public figures – who hold prominent
non-governmental positions – should be afforded less privacy than others. These
people make decisions that have consequences for the general public. Even
information about the private lives of these people is appropriate to print if it could
affect their decision-making. (Interestingly, the lives of celebrities are considered even
less private, although their actions arguably have no effect on the life of the average
reader.) Victims of crime and tragedy are traditionally given the highest degree of
privacy protection, while those who commit crimes are considered by Hodges to have
surrendered that right (Hodges 282-285). No matter the subject, though, reporters must
consider and accept the consequences that publishing will have on them.

Candace Cummins Gauthier, in “Understanding and Respecting Privacy,”
similarly believes that different groups of people should be afforded different levels of
privacy protection, although her test for whether information should be released to the
public is more complex than Hodges’s. Like him, Gauthier recognizes the difference between a public need and a public desire for information about individuals. She relies, in part, on the Utilitarian Principle. Drawn from the writing of John Stuart Mills, this principle requires that benefit be maximized and harm be minimized in ethical decision-making. When deciding whether to print information about a specific person, journalists should consider both the negative effect publication could have on that person and the benefits it will bring to the public, the journalist, and the news organization. If the harm outweighs the public benefit or if the information stems from a public desire rather than a necessity, it should not be published. To determine benefit
to the public, Gauthier looks at the relevance of the information. For example, she considers much information about the private lives of political officials to be relevant because it may affect their job performance or the public’s ability to trust them and is therefore necessary for the public to make informed political decisions. Information about the private lives of celebrities, meanwhile, provides only entertainment to the public and satisfies a desire, rather than a need. Their privacy, therefore, should be more protected than that of politicians. Gauthier rejects the idea of a “public figure,” arguing that this term is too easily applied by journalists to those who do not see themselves as public persons and never sought out the spotlight.

By contrast, Christians argues in “The Ethics of Privacy” from a communitarian point of view that a person’s control over his privacy should be nearly absolute. In his opinion, journalists should not rely on professional codes when making privacy decisions, but on general moral norms that apply equally to all people. He asserts that protection of privacy upholds the common good and that privacy is a human condition, rather than a legal right. When determining whether information should be made public, Christians thinks journalists should consider “if a reasonable public considers it permissible in terms of the common good“ (209). Comparing his test to Hodges’s two-pronged one, Christians argues that his allows journalists less control over the rights of other people, as they are not given the power to determine what is of “overriding public importance” (Hodges 280). In the case of “innocent victims of tragedy” (209), journalists have no right to publish any information about
them without their permission. Criminals are to be afforded less privacy, meanwhile, because they have violated the common good.

These theorists also differ on the idea of private versus public spaces. Most professional codes of ethics allow journalists to report relatively freely on events that happen or things that are said in public, where others could easily have witnessed them. More protection, meanwhile, is given to private spaces, like one’s office or home. In support of this idea, Gauthier says that journalists should not report on things the subject said or did when he had a reasonable expectation of privacy. Her theory of privacy allows for the publication of information about things that occurred in public, while differentiating between actions a person chose to commit in public and those he did not, like being taken from his home in a stretcher or participating in a public, though unexpected, display of grief. Christians disagrees with Gauthier and other journalists on this matter, arguing that changing locations should not give a person any less control over information about herself.

Analysis

Of these three tests for when publication of private information is moral, Gauthier’s strikes the best balance between protection and practicality. Her insistence on differentiating between a public want and a public need for information affords subjects more privacy than Hodges does without placing undue burden on journalists. Christians’s test, meanwhile, provides the strongest amount of privacy protection and is perhaps the most morally defensible.
Hodges’s test is likely the one that is most familiar to journalists. It is a bit stronger than a simple test of newsworthiness, but still places a good deal of faith in the reporter’s ability to determine what information is most important to the public. By failing to distinguish between the public’s wants and needs, though, Hodges allows for unnecessary invasions of privacy. He specifically allows for intrusion into the lives of celebrities, although that intrusion appears to fail his test. One would have difficulty arguing that celebrity gossip is of overriding public importance, and the entertainment the public receives from reading it could certainly be achieved in other ways. This type of private information has become so expected by society that many journalists would probably agree with Hodges here, but the economic benefits of the invasion of privacy do not necessarily make that act moral.

Christian’s test suffers slightly from his failure to provide any sort of exception for public spaces. True, a person in a public space should have just as much control over her private information as when she is in private, and is not required to give even her name to a reporter or photographer when caught up in a public event. However, things that occur in public often become public whether or not the individuals involved intend them to. A person’s attendance of a political rally, for example, may have been kept secret from even his most intimate friends and intended as a private act. This should not preclude a photographer from publishing a photograph of the event that includes him. His suggestion that private information about victims of tragedy should never be published without their permission is a good one, though, and journalists would do well to adopt it. Indeed, journalists should
strongly favor honoring the privacy of persons reacting in public to forces outside their control. In those situations, citizens may have a need – and corresponding right – to know about potential dangers to their own safety but not to details of the lives of persons involved.

With his test, Christians attempts to place disclosure decisions firmly in the hands of individuals, making exceptions only for public officials and criminals. One of his main concerns is that journalists have too much power over the privacy of others and believes his test works against this. In this analysis, he is correct. Putting the decision to invade others’ privacy in the hands of journalists is morally problematic. Unless there is a drastic change in the laws, journalists will always have the decision-making power when deciding what to publish. Applying a stricter test, as Christians suggests, does not take away that power, but it does ask the journalists to put themselves in the place of a public that places a higher value on privacy. A strong test for privacy, coupled with existing civil tort rights, will not completely eliminate abuse of publishing power by journalists, but it should cut down on instances in which privacy is invaded without thought or for frivolous reasons.

Although it is not quite as strong as Christians’s test, I believe Gauthier’s provides sufficient privacy protection by requiring journalists to weigh the benefit of publishing against the harm it will cause the individual whose privacy is violated and to differentiate between information their readers want to know and information they need to know. While journalists will still have professional and economic motivations to publish personal information that caters to a public interest, I agree with Gauthier’s
statement that under her method of reasoning, “it will be very hard to justify invading privacy to provide information that is based merely on the individual preferences of some members of the society” (Gauthier 218), as opposed to the information about government that is actually needed. When applied properly, this test would protect individual privacy rights in many areas that are currently considered public, making celebrity gossip far less common. (One would imagine that certain celebrities would willingly consent to the release of private information for the attendant publicity.) The privacy of individual citizens would meanwhile be given more consideration than is common today in accordance with this test.

Gauthier does tend to give journalists too much leeway to report on victims of crime and natural disasters. In one case she endorses writing an article about a drowned child and the reaction of his family, while condemning the publication of a photograph. She might do better to require journalists to get permission from the family to print information about them, as Christians does.

In short, I think a combination of the tests of Christians and Gauthier would be most beneficial to this debate. Christians’s emphasis on privacy as a common good and the importance of obtaining consent are excellent goals for journalists, while the two questions posed by Gauthier’s test – Is this information the public actually needs to know? Will printing it do more harm to the individual than good to the public? – give journalists an easy-to-understand method of determining whether they are invading privacy unnecessarily.
4. FERPA

The United States Congress passed the Family Education Rights and Privacy Act (FERPA) in 1974 to ensure the privacy of student records.

As explained above, privacy law in the United States is unusual because of its sector-specific nature. The law provides privacy protection only for certain groups of citizens, like government workers, students and medical patients. Each privacy law is fairly narrow in scope and only protects information generated in one specific area. The Health Insurance Portability and Accountability Act, for example, protects a person’s medical records but not his education or work records. Different types of technology also usually require individual pieces of legislation to prevent their use in privacy invasion.

4.1 FERPA

FERPA essentially serves two purposes; it gives students and their parents greater access to education records held by all institutions that receive federal funds and prevents the schools from releasing those records without consent. The first goal is clearly of equal (if not greater) importance, being addressed in the first section of the law. Schools are required to grant those parents a hearing to consider changing the record if its veracity is in question. Violation of any part of FERPA can result in a loss of federal funding for the school, although no school has ever suffered that fate (McDonald).

Under the law, schools must grant access to records to the parents of the student concerned within 45 days of the request. When students turn 18 or enter into a
postsecondary institution, the rights to access records and to give consent for release transfer to them.

FERPA defines as private "those records, files, documents, and other materials which - (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution” (20 USC Sec. 1232g). Some records are specifically exempted from privacy protection. These include law enforcement records, medical records, directory information and the personal records of school employees that were not officially maintained.

As the Department of Education clarified in 2011’s “Addressing Emergencies on Campus,” FERPA protects records about students, not information about them.

“FERPA does not prohibit a school official from disclosing information about a student that is obtained through the school official’s personal knowledge or observation and not from the student’s education records. For example, if a teacher overhears a student making threatening remarks to other students, FERPA does not protect that information from disclosure.” (“Addressing Emergencies on Campus” 4).

In Gonzaga University v. Doe (2002), the Supreme Court ruled that FERPA does not give someone whose privacy rights have been violated by a public school the right to sue that school. The only negative effects from violating the law would therefore come from the Department of Education.

4.2 Conflicts

As a privacy law, FERPA naturally comes into conflict with the Freedom of Information Act and general concerns about the public’s right to know. Over the years since its adoption, many different groups have criticized the law for preventing the
release of important information. A few others have complained, though, that the law (or interpretations of the law) does not do enough to protect student privacy.

In recent years, FERPA has come under vehement criticism from journalists and freedom of information advocates, who think its vague wording allows schools to keep too much information from the public. They complain that schools have refused to release records as seemingly innocuous as parking tickets\(^\text{14}\) because of FERPA (Riepenhoff and Jones).

The law has also created health and safety concerns because some believe it prevents colleges and universities from alerting the parents of students with mental health issues. This was especially evident in the wake of the shooting at Virginia Polytechnic Institute and State University (Virginia Tech) in 2007. Some felt that FERPA stopped employees of the school from communicating concerns they had about Seung Hui Cho’s behavior, which if reported to the appropriate authorities, could have prevented the murder of 32 of his classmates and professors. This can largely be attributed, though, to a lack of communication and confusion about the scope of the law (Ward).

4.3 Potential for Abuse

Complaints by journalists of FERPA abuse – of schools refusing to release records that fall outside of the scope of the law or making unnecessary redactions – have abounded in recent years. In 2009, the *Chicago Tribune* filed a lawsuit against the University of Illinois after the school refused to release test scores and high school grade point averages of applicants who the *Tribune* suspected were admitted because

\(^{14}\) When held by police departments, these records are normally considered public.
of their connections to administrators. In 2011, ESPN sued Ohio State University for claiming FERPA protection for records relating to recent, highly publicized NCAA violations. In both of these cases, the courts eventually sided with the schools. Other schools have refused to release records such as campus police-issued parking tickets or the minutes of public meetings at which students spoke, both types of records whose protection under FERPA is suspect.

**Athletic Department Study**

A 2009 series\(^\text{15}\) by *The Columbus Dispatch* shows that athletic departments around the country have used FERPA to prevent possibly embarrassing information from becoming public. Interested in determining how different universities interpreted the law, *Dispatch* reporters requested a set of four documents from each of the 119 Football Bowl Subdivision schools: flight manifests from football team trips to away games, lists of people designated to receive complimentary tickets to football games, summer employment records for football players, and records about National Collegiate Athletic Association (NCAA) violations. The journalists argued that each of these records was important to the public because they provide information on how athletic departments are run and could expose wrong-doing (Riepenhoff and Jones).

According to Department of Education officials with whom *Dispatch* reporters spoke, passenger lists and information about who receives complimentary tickets is public information, while records of NCAA violations should probably be considered

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\(^{15}\) The main article in that series, simply titled “Secrecy 101” and published on May 31, 2009, is the source for all of my information. A number of sidebars were published the same day. Additional articles in the series by Riepenhoff and Jones were: “Oversight vs. Privacy at OSU,” published May 31, “NCAA has ways to dodge scrutiny,” published June 22. Riepenhoff wrote one article by herself, “Privacy laws kept son’s woes secret,” published on June 7, 2009.
private. The Department was unclear about the status of summer job forms (Riepenhoff and Jones).

The responding schools demonstrated widely different interpretations of how FERPA classifies these documents, with eight schools refusing to release any of the requested information. Others failed to release them in the six months allowed for in the study. Some were willing to provide information, but at a prohibitively high price. Maryland, for example, wanted $35,330 for the records. Michigan State University, meanwhile, did not even acknowledge the newspaper’s request.

The 69 schools that did release records to The Dispatch provided unedited records in the percentages shown in table 1.

Table 1:

<table>
<thead>
<tr>
<th>Record requested</th>
<th>Approx. percent of schools that released unedited</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ticket lists</td>
<td>80 percent (about 56 schools)</td>
</tr>
<tr>
<td>Flight manifests</td>
<td>50 percent (about 35 schools)</td>
</tr>
<tr>
<td>Football players’ summer jobs</td>
<td>20 percent (about 14 schools)</td>
</tr>
<tr>
<td>NCAA violations</td>
<td>10 percent (about 7 schools)</td>
</tr>
</tbody>
</table>

Source: Secrecy 101

For that series, reporters Jill Riepenhoff and Todd Jones showed their findings to former Senator James Buckley, the primary supporter of FERPA at the time of its passage. Buckley told them he didn’t see how releasing the requested information would hurt students and that interpreting the law this way is contrary to Congress’s
original intent. He disagreed with the Department of Education’s suggestion that records of NCAA violations should be private, saying that the law was intended only to protect “grades and academic matters.” (Riepenhoff and Jones).

In my opinion, these findings suggest that a majority of schools take a broad view of the term “education records,” perhaps extending it, as the legal director at one school did, to any record kept by the school with a student’s name on it. By failing to even respond to requests or setting prohibitively high costs for their fulfillment, several of these schools also demonstrated a complete lack of regard for the public’s right to know. Indeed, those schools could be in violation of state or federal laws requiring that they respond to public records requests in a reasonable amount of time and refrain from monetarily penalizing those who want the records for non-commercial purposes. It would not perhaps be fair to accuse these schools of malice as most of their actions can of course be attributed to perfectly legitimate concerns.

4.4 Varying Attitudes toward FERPA

To measure the different attitudes that different legal experts hold toward FERPA, I decided to interview the legal counsel of several public universities in Ohio about their interpretations of the law. I also wanted to get the opinions of a few outside experts, such as free press advocate Frank LoMonte of the Student Press Law Center and Ohio Attorney General Mike DeWine. From their responses, I hoped to gain a more complete understanding of the different ways in which the law is interpreted and the complications that arise as a result of those differences.
Because this method has only been applied to a small number of participants, they cannot be considered a representative sample, from which percentages could be drawn. Therefore, this research is a preliminary case study and not a comprehensive and representative survey. Future researchers might consider surveying a larger number of school attorneys in order to look at those responses as data points.

Method

I contacted the offices of general counsel or legal affairs at every public university in Ohio and at some of the private universities to request permission to e-mail a list of questions about FERPA, which will be discussed at greater length later in this section, to one of the attorneys. Those attorneys then submitted their responses to me in writing. The only exceptions to this were LoMonte and Barbara Nalazek of Ohio University, who I interviewed in person. I originally intended to verbally interview all of them but decided that asking them to provide written answers would be a quicker and easier method for me and would allow my subjects more time to reflect on their responses. When someone was unavailable to answer my questions, I tried to include their opinion on the subject as laid out in related documents, such as university FOIA guidelines or the individual’s writing on the topic.

I also originally planned only to survey legal experts who worked at public universities, as private universities are not bound by law to comply with either FERPA or FOIA. On the advice of one of my interview subjects, though, I decided to speak with at least one private school official, believing it would provide my study with an interesting perspective, whether or not it is completely relevant to the debate.
However, the private school officials I contacted either did not respond to my attempts to make contact or failed to return their responses to my questions.

In order to obtain consistent and contrastable results, I asked each of my interview subjects the same seven questions, before giving each an opportunity to share further information with me if they so desired. The interview questions were as follows.

1. How do you interpret the term “education records?”
2. Based on that definition and your understanding of the law, when should a school refuse to release records?
3. What kinds of records is a school required to release?
4. Are there times when schools should redact student names?
5. Why do students need extra privacy protection?
6. Do you think FERPA provides enough protection? Too little? Too much?
7. Do you think the law values privacy over freedom of information?

The first four questions were intended to elicit more information about each subject’s legal reasoning, while the latter three asked for an opinion about the law and the motivations behind it. I felt it was important to ask subjects for their interpretation of the term “education records” because it is on this term that so much of the debate over the law hinges. Questions #2-4 cover what I considered to be the full spectrum of responses to a FOIA request that involves student records. In asking for types of records that should be held, released or redacted, I was hoping that subjects would provide me with specific examples, giving me a deeper insight into how they
interpreted the law. The opinion questions, meanwhile, were designed to give me insight into how each interview subject felt about the law.

When giving their interpretations of different parts of FERPA, I asked that these lawyers use their personal, rather than official, interpretations. Because of this, the responses I received cannot be considered to be the exact opinions of the universities themselves. I thought that my interview subjects were more likely to answer my questions thoroughly if they didn’t feel as if they were representing their employers, although it is likely that the opinions they stated here are similar to those they share with the universities.

Similarly, while in most cases the people I spoke to are responsible for advising their universities on FERPA questions, there is no way of knowing how much, if any, input they had in responding to The Columbus Dispatch records requests discussed above, and if questioned about their involvement, it is unlikely any would provide specifics. Because we cannot know that information for certain, I have included information about each school’s performance in that study in the section below only for ease of comparison between the schools, and I will not interpret responses to The Dispatch with any individual’s answers to my questions. Because of this inclusion, responses to my survey are detailed in the following section under the name of the institution at which each lawyer works.

Results

Bowling Green State University. After agreeing to take part in the survey, Bowling Green officials did not respond to voicemails requesting further information.
Cleveland State University. When defining “education records,” George Hamm, associate general counsel at Cleveland State University, stuck closely to the definition provided in the text of the law.

“Education records, with certain specific exceptions, means those records, files, documents, and other materials that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution,” he said.

Hamm said a school could only release records when they fall under one of the specific exceptions included in the law, or if the student to whom the record pertains has signed a waiver.

A school is never required to release records, except in the case of a subpoena, according to Hamm. He called the release of records under an exception “discretionary,” pointing out that the law states, “the institution ‘may’ release records that fall into one of the excepted categories.”

Hamm felt there were instances in which a school should release records with student names redacted but did not name specific situations in which this should occur.

Students are entitled to privacy protection under the Constitution as “citizens or residents of the USA,” Hamm said. He said he could not say whether the law provides too much or too little protection because “measuring degrees of protection is impossible.”
According to Hamm, FERPA clearly values the privacy of private citizens over the public’s right to know, while the law of the United States in general values both.

Cleveland State was not included in *The Dispatch’s* study of FERPA-compliance because it is not a member of the Football Bowl Subdivision of the NCAA.

**Kent State University.** Like most of the other lawyers who responded to my survey questions, Michael Pfahl, associate counsel at Kent State University, cited the text of the law as his “education records” definition.

“The university cannot release records without the student's consent, unless one of the several exceptions under law applies,” Pfahl said. A school can, however release records that are not educational records or that are specifically considered to be public information, like directory information.

Kent State redacts all “personally identifiable information” from all public records requests, except for some court-ordered documents, according to Pfahl.

Students need extra privacy protection simply because “the law requires it,” he said. Pfahl had no opinion as to whether FERPA provides too little, enough or too much protection.

“The law provides the student protection against unauthorized access (to her information),” he said. The student is free to provide that information to whomever she chooses. In that way, he implied he thinks the law does not infringe on freedom of information.
Kent State does not keep athletes’ summer job forms but blacked out names of students and non-students on complimentary tickets lists and NCAA violation records requested by Dispatch reporters. All information on flight manifests was released.

**Miami University.** Robin Parker, general counsel at Miami University, said she was too busy to participate.

Miami University blacked out the names of student athletes in all records released to The Columbus Dispatch, as well as the names of some non-students on lists of complimentary tickets. The school does not keep records of athletes’ summer jobs.

**Ohio Attorney General.** In a 2011 Public Records and Open Meetings Act Bulletin, state Attorney General Mike DeWine defined FERPA in the same manner many of the university lawyers did, using language from the text of the law, but he displayed a markedly different idea of how that definition should be interpreted. Throughout the document, he stressed the importance of freedom of information, saying that privacy concerns should be weighed against an “overarching presumption in favor of disclosure.” According to DeWine, the definition of education records is constrained by the statement that such records must be directly related to a student.

DeWine reasoned that any documents unrelated or only indirectly related to a student are subject to open records law. He cited complaints of sexual harassment against university faculty as an example of indirectly related records. Although students would likely be named in said records, and their experiences described, the record is about the faculty member, not the students. Along the same vein, NCAA
records that detail the violations of a university’s athletics department would have to be released to the public because of its indirect relation to students.

He wrote that universities can redact private information about students, but the remainder of the documents containing that information should be released in compliance with open records law. In the above examples, the universities might opt to black students names out of an NCAA report or sexual harassment complaint but release the rest of the document. DeWine said the universities must make such redactions “in good faith.”

A school should refuse to release records, according to DeWine, only if the private information within them is “inextricably intertwined with the whole.”

**Ohio University.** When asked about her interpretation of FERPA, Barbara Nalazek, associate director of Legal Affairs at Ohio University, began by saying that she tries to strictly follow the law, not interpret it. She then applied this statement to the term “education records,” which she defined as the law does: documents that “contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency or institution.”

“It’s obviously a very broad definition,” Nalazek said.

When asked when a school should refuse to release records, she again pointed to the language of the law.

“Nothing that FERPA says ever requires the release of student records.” Nalazek added that it is the Ohio open records law and FOIA that require certain types of records be made available to the public. She referred to disciplinary records in the
case of violent crimes as an example of this, although she added that private schools might not have to release that kind of information. Similarly, Nalazek said any FERPA-protected information could be redacted from public records.

She thinks many school officials have difficulties when trying to determine whether documents personally identify students without naming them, which would render them private. This consideration can make deciding whether to release records or redact certain information more difficult.

Nalazek said she was not entirely sure why Congress decided to provide student records with special legal protection but that she did feel universities have a responsibility to protect the information.

“From a very philosophical standpoint, when students have entrusted us with very private information, it’s only right for us to protect that,” she said.

While Nalazek feels FERPA provides enough privacy protection overall, she thinks students should be made more aware of the type of information about them that can be made public, specifically directory information.

Nalazek said there are some times when the public’s right to know outweighs privacy concerns, but she did not feel the law could be tailored to reflect every such instance.

“I’m sure there have been times when FERPA has been used very cynically, but I like to think that at OU we hit the right balance.”

In *The Dispatch*’s study, Ohio University returned all of the requested records but blacked out students’ names. In the case of complimentary ticket lists and NCAA
violations, even some of the names of non-students were redacted (Riepenhoff and Jones).

**Ohio State University.** One of the few attorneys to refuse to answer my questions, Michael Layish, who is assistant general counsel at Ohio State University (OSU), said he thought sharing his FERPA interpretation would be a violation of attorney-client privilege. Black’s Law Dictionary defines attorney-client privilege, in part, as “client’s privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between he [sic] and his attorney” (Black 118). It also prevents the attorney from having to “testify as to communications from client to him” (Black 118).

In the *Dispatch* study, OSU redacted names of students in all instances, names of non-students on ticket lists and details of violations on both summer job forms and NCAA violation records.

**Student Press Law Center.** As executive director of the Student Press Law Center (SPLC), Frank LoMonte is a strong proponent of freedom of information. The SPLC advocates for the rights of student journalists, and LoMonte has frequently been cited in news articles about FERPA, as well as others about press censorship.

LoMonte said education records “ought to refer to things generated about students in their capacity as students.” He cited examples of documents that obviously reflected the student’s academic interactions with the school, like attendance records and grades.
“It has to be an education record, it should not be a record of something that any person on the street can do,” like receiving a parking ticket, he said. He added that to be private a record must contain information that is actually private, unlike the testimony a student gives at a public meeting. Both of those examples are from cases LoMonte has come across at the SPLC.

“The default is that anything not expressly exempt from disclosure is subject to disclosure.”

While police and other safety records should not be redacted, LoMonte said that some disciplinary records should be made available without the names of the students involved.

LoMonte questioned whether college students need the extra privacy protection afforded to them by FERPA. While younger students are required to attend school and to turn over certain pieces of information – information they might otherwise not share – college attendance and concurrent release of information is voluntary.

LoMonte also said he thinks FERPA provides too much privacy protection and that it clearly values privacy over the freedom of information. He criticized the law for failing to acknowledge a public interest in disclosure of information and for not setting up a penalty for schools that misuse it to conceal information.

University of Akron. Scott Campbell is assistant general counsel and records compliance officer at the University of Akron. Rather than answering my questions
directly, he directed me to the school’s fairly extensive written policy on FERPA, as well as a portion of its site that advises students of their FERPA rights.

The school’s policy defines an education record as any record directly related to a student that is “maintained by the university, an employee of the university or an agent of the university.” It then lists documents that are not considered to be education records, including medical and law enforcement records kept by the university16 or those that relate to the student as an alumnus or applicant for admission. University employment records are not considered education records unless the student receives a grade for his work or the job is conditional on her status as a student.

Records containing information that could lead to the identification of a student is implied to be private. These “personal identifiers” include the names of a student or his parents, the student’s address or social security or identification number and lists of the student’s characteristics.

The policy also includes a list of situations that require disclosure of records, including Ohio law that was adopted before the passage of FERPA. This includes Ohio’s open records law.

The University of Akron either ignored the records request from Dispatch reporters or wanted too much money for the request to be fulfilled. The article did not specify which of these was the case.

**University of Cincinnati.** Douglas Nienaber, assistant general counsel at the University of Cincinnati, said he could not participate in my study because “as legal

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16 Which are subject to a different set of privacy rules
counsel to the University of Cincinnati, it is simply not appropriate for me to render opinions in other contexts.”

When responding to records requests from Dispatch reporters, University of Cincinnati officials redacted names of student athletes from flight manifests and lists of complimentary tickets, while apparently leaving names of non-students alone. They refused to release summer job forms, citing privacy concerns, and blacked out details of NCAA violations and names of violators.

University of Toledo. Public Records Officer Joe Conley of the University of Toledo said FERPA defines education records “as records files, documents, and other materials which contain information directly related to a student, and are maintained by an educational agency or institution or by a person acting for such agency or institution.”

Conley thinks schools should refuse to release records when the student has restricted the release of directory information and “when a school can reasonably determine that the requesting party knows who the FERPA-restricted records belong to. For example if someone requests a document that pertains to one or two students, redacting the names does not protect the privacy of the student – because we can reasonably guess that the (requesting party) knows who the data belongs to.”

According to Conley, the only information school was specifically required to release is directory information, which includes a student’s e-mail address, dates of attendance, rank, status and field of study.
Conley said the University of Toledo would redact student names from records when someone makes a request that falls under the Ohio Public Records Act for which the documents “cannot be attributed to a particular student.” He said they often base the decision whether to release a redacted document on the size of the group of students at issue. Records for a large class or the school’s football team are more likely to be released than those from a small class or the golf team because with more students, there is a smaller chance that any will be personally identified.

Conley listed student safety as a main reason education records should be kept private.

“For anyone to be able to walk off the street and get class or schedule or residency information is dangerous in this day and age, especially with the increase in identity theft,” he said. College students are sometimes careless with their own technology and information and therefore need extra protection. He also said class grades and similar records should be private because of their personal nature.

While he thinks FERPA provides a good level of protection, Conley also thinks the fact that students are allowed to restrict access to directory information should be publicized more. He said he thought this could help protect students from credit card companies and other marketers who use that information to gain access to them.

17 Local residency is commonly included under the definition of directory information and therefore available to the public under FERPA.
Conley feels that the law values privacy over freedom of information and pointed out that it allows students to restrict access even of their directory information, an option that is not available with state open records laws of which he is aware.

In all of the records requested by *The Dispatch*, University of Toledo officials blacked out the names of students. Names of non-students were redacted from flight manifests and NCAA violations, while details of any violations were redacted from summer job forms.

**Youngstown State University.** The Office of the General Counsel at Youngstown State never responded to my initial attempts to make contact. Their Web site does contain some information about both FERPA and public records requests. A document on student’s rights says students may consent to the school releasing personally identifiable information about them, except in cases where FERPA allows disclosure without consent. The only of these specifically mentioned are the sharing of records among school employees, the release of certain records to other schools where a student hopes to enroll, and disclosing relevant information during emergencies. Students are told what constitutes directory information and that they may prevent its release by contacting the Registrar.

In a separate document, the University promises to strictly adhere to public records law and, among other things, to respond to public records requests in a timely manner and to provide explanations for all refusals. This document does not mention FERPA or education records.
Results Summary  The information I collected from these individuals will be analyzed in the following section. For a chart summarizing their responses, please see the appendix on page 75.

5. Analysis and conclusions

Although I did not receive as many responses to my survey as I would have liked, it did produce some interesting results. Nearly all of the university lawyers in my survey group defined FERPA in the same way, by quoting the language of the law. Few of them acknowledged the broadness of that language in any satisfying way. By sticking to the text, they were playing it safe, attempting to avoid any controversy by not appearing to interpret the law at all. In doing so they somewhat disregard the fact that the law must be interpreted in order to be applied.

Several of the lawyers pointed out the law does not require them to release any records at all. This is supported by the text of the law. FERPA’s purpose, as far as privacy is concerned, is to specify when schools are prohibited from disclosing records without student consent and when they are not. The task of requiring schools to make information available to the public is left to the Freedom of Information Act (FOIA) and state laws, and some of my respondents pointed that out. Others, however, seemed to think that all records relating to a student are exempt from freedom of information laws, even when FERPA says they may be released. George Hamm of Cleveland State University, for example, said exceptions to FERPA are “discretionary,” implying that a school could choose to keep those records private. Whether or not he really believes
that or acts accordingly is uncertain, but it does display a troubling lack of regard for freedom of information.

The University of Akron deserves credit for considering the role the student is performing in the records requested. When an individual is acting as an alumnus, prospective student or university employee who does not earn academic credit, Akron says records about him are not education records. I believe this policy to be very much in line with the spirit of the law and much more considerate of the public’s right to know than some of the other interpretations.

Most of these lawyers and schools seem to favor redacting all student names and personally-identifying information when they do choose to release records. Redacting this information can be beneficial, from a free flow of information standpoint, as it gives journalists and the public access to public documents while protecting the privacy of any students mentioned. When a document is truly exempt from FERPA, however, it is not clear that the law requires even the names of specific students be redacted. This practice therefore lies in something of a grey area.

In general, the university attorneys seemed more concerned with privacy than the public’s right to know. A few of them said they felt students should be more informed about their privacy rights and especially their ability to prevent disclosure of directory information. When dealing with FOIA requests, they seem to put little thought into whether the documents contain information that should be considered private, only whether someone reading that document could identify a student mentioned. In the case of the University of Toledo, even redacting student names
might not be enough to make records public. According to Joe Conley, the school would probably not release a document that referred to a small group of students, out of fear someone would piece together which of those students goes with which piece of information. This kind of thinking would bar schools from releasing NCAA violations of entire teams, so long as those teams were small enough, or records of student complaints about faculty members who teach small classes. This is taking concern for privacy too far, at the expense of the public’s right to know what public schools are doing with their money.

These results do not reveal any instances of schools abusing FERPA, but that was not the intent of the survey. Indeed, it would be difficult in most situations to prove a school was withholding documents for nefarious purposes and not simply because it believed the law required it to do so. I believe these results show a clear potential for abuse, though. If the agreed-upon interpretation of the law were that all records containing a student’s name could be considered private, it would be extremely easy for corrupt school officials to keep information from the public simply by adding the name of a student or two to sensitive documents.

To combat the present, broad interpretation of FERPA protection, both Frank LoMonte of the Student Press Law Center and Ohio Attorney General Mike DeWine put forward interpretive tests that would help school officials determine whether records fall under the scope of FERPA. As these men stressed the value of disclosure, both of these tests would limit the number of records considered private, while presumably also protecting students’ rights.
DeWine’s test places its emphasis on the inclusion of the word “directly” in the law’s definition of education records. He argues that, under that definition, records must be directly related to a specific student in order to deserve FERPA protection. The document must not simply mention a student to be considered private; it must be about that student. All other records should be considered public and should be released when a FOIA request is made. Applying this test to the document requested by the *Columbus Dispatch*, it would seem to require the release of flight manifests and ticket lists, provided student names were redacted, as did the Department of Education. NCAA violations would be considered public if they could be determined to be directly related to the actions of a university employee or athletic department, rather than an individual student. Student employment records would likely be private.

LoMonte’s test, meanwhile, is far more stringent and would result in more documents being made available to the public. According to him, FERPA-protected documents should not only be directly related to a student but should also relate only to that student in her capacity as a student. He makes the term “education record” not simply a record held by a school but one which actually relates to education, allowing for documents about students’ out-of-classroom brushes with campus security and parking violations to be released to the public. Since such records are considered public when made about non-students, they should also be public when relating to students who are not actively being students. This test would probably make all of the documents requested by the *Columbus Dispatch* public, unless the record in question referred to a student in her role as a student and not an athlete or university employee.
Records of NCAA violations or student employment records could be considered private in certain cases.

LoMonte’s ideas about how FERPA should be applied certainly make logical sense and allow disclosure of information to apply equally to all. They are, however, supported neither by the text of the law nor related court rulings, and making disclosure decisions with those guidelines could put schools at risk of losing funding. This test should therefore not be adopted by schools in general but should be considered by Department of Education officials and lawmakers interested in reinterpreting or amending the law. His suggestion that university students do not deserve special privacy protection, as their college attendance and subsequent disclosure of information were voluntary, is less logical. Trips to the doctor are also voluntary, but it’s unlikely LoMonte would argue medical information garnered at such a visit is similarly undeserving of protection.

DeWine’s interpretation was supported by a March 2012 ruling by a Montana district court. In that case, the Bozeman Daily Chronicle requested documents from Montana State University about the school’s decision to put a professor on administrative leave. MSU refused the newspaper’s request on privacy grounds. In her decision to release the records, Judge Holly B. Brown cited similar decisions by courts in other states\(^\text{18}\), concluding that “records are ‘directly related to the employee and only tangentially related to any involved student’” (Bozeman v. MSU 3) and therefore not subject to privacy protection from FERPA. In any cases where specific students

\(^{18}\) Including two in Ohio: Briggs v. Board of Trustees Columbus State Community College and Ellis v. Cleveland Municipal School District.
were mentioned, Brown allowed the university to redact their names. The fact that this
direct vs. indirect test has already been applied to the law by some courts shows it to be a safe and legal method for university employees to evaluate records.

The main benefit of applying such a test to requested documents is that it opens more government records to the public, while still protecting individual student privacy. The types of records the original legislation was meant to protect – student grades and evaluations, for example – would clearly be considered as directly related to that specific student as a student and, therefore, private. Reporters and other concerned citizens would simply be allowed more access to information about the schools themselves. In their arguments, DeWine and Brown both make allowances for further protecting students by redacting their names while releasing the remainder of the requested record. This would prevent any invasion of privacy or personal muckraking on the part of outsiders, while allowing journalists to fulfill their watchdog obligations.

One downside of this interpretation is that it would likely mean more work on the part of school officials. They would be required to carefully examine and consider the contents of each record requested to determine whether it passed the test, which could take up a lot more time and effort than what is currently expended on records requests. I believe maintaining an appropriate balance between two such important rights merits careful reflection, though. Furthermore, even with this test, it would not be difficult for schools to decide certain classes of records are inherently direct or indirect. The test papers and transcripts of a specific student, for example, would
always fall into the directly-related category, while grades for entire classes – with student identifiers redacted – could probably be considered related to the professor or class as a whole.

As previously stated, using the direct relation test would pose little danger to schools because of its legal precedent. Even if some students did feel their rights had been violated by the release of a document, they would have no legal right to sue the school, and the Department of Education, having never yet punished for a FERPA privacy violation, is unlikely to begin doing so over a test that so clearly sticks to the language of the law.

One of the main problems with the proposed test – from the point of view of a transparency advocate – is that it leaves the decision in the hands of school officials. Some of those may already feel that they are applying such a test accurately, while others may be actively abusing the law and will continue to do so, no matter how interpretations of the law may change. For this reason, I think the legislature would do well to consider imposing penalties\(^\text{19}\) of some kind on those who deliberately withhold documents or egregiously misapply the law in favor of privacy. Schools are already subject to being sued if someone thinks they have refused a public records request unfairly, but the threat of some penalty connected specifically with FERPA could be beneficial. Short of such a change, a general agreement to use this test and an increased emphasis on freedom of information would encourage those schools already working in good faith – no doubt the majority – to treat the law with more consideration.

\(^{19}\) An idea LoMonte brought up in his interview
The “directly related” test should not create too many concerns for privacy advocates. Students will still enjoy the protection of FERPA when it comes to the vast majority of information schools collect about them, and will continue to have the option to protect even directory information about themselves, although they should perhaps be better educated about that right. Journalists in these situations would do well to remember, though, that just because it is legal to publish information collected from records requests, it might not always be ethical to do so. To determine the ethics of printing data that appear to be private, journalists should apply the balancing tests of Gauthier and Christians (as discussed in section 3.2 above).

Education records deserve to be protected. One’s grades and evaluations are personal on a level similar to one's medical records, and this makes FERPA an incredibly important law. By interpreting it too broadly, however, schools can venture into the territory of governmental secrecy – keeping hidden information that is not private but of legitimate public interest and subject to the public’s right to know. The distinction can be a difficult one to make, but I am convinced that by applying the test described in this section, schools can satisfy their obligations to protect the private information with which students have entrusted them and to disclose that information to which the public has a right.
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Appendix – Table of Responses
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<td>Cleveland State University, George Hamm</td>
<td>• Definition from text of law with “certain specific exceptions”</td>
<td>• Always, unless the record falls under an exemption or student has consented</td>
<td>• None, except in case of a subpoena</td>
<td>• Yes</td>
<td>• Entitled to protection under U.S. Constitution</td>
<td>• “Measuring degrees of protection is impossible”</td>
<td>• FERPA values privacy while U.S. law in general values both</td>
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<tr>
<td>Kent State University, Michael Pfahl</td>
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<td>• Records that are not considered education records</td>
<td>• Yes, Kent State redacts names and identifying info from all records except in case of court order</td>
<td>• “The law requires it.”</td>
<td>• No opinion</td>
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<td>• Definition from text of law • Emphasis on “directly related”</td>
<td>• When private information is “inextricably intertwined with the whole”</td>
<td>• Records that mention students but are not directly related to them</td>
<td>• Yes, private information about students can be redacted</td>
<td>• Not addressed</td>
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<tr>
<td>Ohio University, Barbara Nalazek</td>
<td>• Definition from text of law</td>
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<td>• None, under FERPA • Open records law do require the release of some records</td>
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<td>• FERPA provides enough protection • Students should be more informed about directory information</td>
<td>• FERPA values privacy over Freedom of Information • Difficult to craft laws that reflect all necessary exceptions</td>
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<td>Student Press Law Center, Frank LoMonte</td>
<td>• Records that reflect student’s academic interaction with school</td>
<td>• When they fall under his interpretation</td>
<td>• Anything not prohibited</td>
<td>• Yes, student names should be redacted from some disciplinary records</td>
<td>• Unsure they do need extra protection, as they voluntarily attend the school that requires private information</td>
<td>• Too much protection</td>
<td>• FERPA values privacy over freedom of information</td>
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<td>Definition from text of law</td>
<td>When they fall under his interpretation</td>
<td>Records that fall under Ohio open records law</td>
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<td>University of Akron, School Guidelines</td>
<td>Does not include medical or law enforcement records or records about applicants or alumni</td>
<td>• When they fall under his interpretation</td>
<td>• Records that fall under Ohio open records law</td>
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<td>University of Toledo, Joe Conley</td>
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<td>• When the student has refused consent</td>
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