Most American public colleges and universities contend with state public records laws. These provisions go by such names as "public records," "right-to-know," or "open records" laws, as well as "freedom of information acts." The effect of these mandates is to open for public inspection many, if not most, of the records an institution keeps in the ordinary course of business. While many states' public records laws are patterned after the federal Freedom of Information Act, that statute typically does not apply to records maintained by a public postsecondary institution. *State ex rel. Warren v. Warner*, 84 Ohio St.3d 432, 704 N.E.2d 1228 (1997).

As the examples presented in this paper demonstrate, public records laws come to exist in various ways. Some states, such as Michigan and Illinois, have enacted statutes which purport to detail conclusively those records that are public and those that are not. Other states, such as Arizona, rely almost exclusively on common law, and feature little if any direction from the legislature. Still others, such as New Jersey, recognize rights to public records under both statute and common law.

Public records laws frequently provide a right to sue in state court allowing a requester to seek an order compelling disclosure when an agency opts to decline a records request. The agency may also preempt such an action, however, by itself commencing litigation to prevent a records request. Each court relies on the public records laws of its respective state in deciding these cases. Despite the significant differences among the laws, however, virtually every consideration of a public records request entails a detailed public policy analysis, and every such analysis is unique to both the nature of the records sought (e.g., investigative reports, executive searches, employment records) as well the agency that possesses them (e.g., law enforcement agency, public school, college or university).
I. Balancing of interests

Not all records an institution might maintain are open for public inspection. Records that are clearly exempt by law from public inspection will not be disclosed. Some are exempt under a separate law that protects their confidentiality, such as documents protected by the attorney-client privilege, or a student’s education records under the Family Educational Rights and Privacy Act (20 U.S.C. 1232g). Others may be deemed confidential by some provision of the public records law itself. As to the rest, however, a central part of the policy analysis that courts undertake in determining whether a record is a public record is a process of balancing: **whether the policy considerations supporting an agency's release of records (invariably based on the public's interest in open government and accountability) outweigh privacy or confidentiality interests that militate against disclosure.**

In a typical public records case, the court will employ such a balancing test regardless of whether the state public records law is based in common law or statute. In common law states, the weighing of interests is the lynchpin of the ultimate decision. The process also occurs, however, in those states whose public records laws are based in statute. Those statutes usually attempt to be one-size-fits-all, and apply to all public agencies. Consequently, they purport to articulate the kinds of records exempt from disclosure requirements using necessarily vague categories that cannot contemplate all the various kinds of record an agency must maintain. To resolve the vagaries of the law, courts are usually inclined to resort to a balancing of interests.

*Keddie v. Rutgers State University*, 148 N.J. 36, 689 A.2d 702 (1997) is a good illustration of the balancing process in a state that recognizes both statutory and common-law access to agency records. Keddie, a Rutgers professor and president of the American Association of University Professors chapter at the university, demanded that administrators deliver to him attorney bills in connection with labor relations, civil rights, and other employment-related claims which the university had litigated. The university denied the request, arguing that Kiddie was entitled to them under neither New Jersey's Right to Know statute nor state common law. The New Jersey Supreme Court agreed
with Rutgers on the statutory claim; the statute applied only to records an agency was required to maintain, and no authority required that the university maintain attorney bills.

On the common law claim, however, Rutgers failed. Under New Jersey law, the court determined, a common law right to access public records requires that the person seeking the records establish an interest in the subject matter in the material, and that the citizen's right to access "be balanced against the State's interest in preventing disclosure." 689 A.2d at 709. The court noted that the public interest in preventing disclosure is typically based on interests of confidentiality, and recited the balancing test: "Where a claim of confidentiality is asserted, the applicant's interest in disclosure is more closely scrutinized. In that context, courts consider whether the claim of confidentiality is 'premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest.' [Citations] However, where the interest in confidentiality is 'slight or non-existent,' standing alone will be sufficient to require disclosure to advance a legitimate private interest." 689 A.2d at 710.

A balancing approach is expressly prescribed under the Illinois public records statute, and served to deny a request for the names of public scholarship recipients in Gibson v. Illinois State Board of Education, 289 Ill.App.3d 12, 683 N.E.2d 894 (1997). There, a Chicago Tribune reporter demanded disclosure of the names of high school students who had been awarded scholarships pursuant to an Illinois law allowing each member of the state legislature to award two publicly-funded "General Assembly scholarships" annually to individuals from his or her district. When the reporter sought this information from the University of Illinois, the university refused the request.

The University contended that, while the Illinois Freedom of Information Act listed several categories of records exempt from inspection, the scholarship recipient information was protected by a general exemption in the law. That exemption prohibited the disclosure of information that, if released, would constitute a "clearly unwarranted invasion of personal privacy." In considering this exemption, the court relied upon a four-factor analysis that implies a balancing approach. Those factors were: the plaintiff's interest in disclosure, the public interest in disclosure, the degree of invasion of personal privacy, and the availability of alternative means of obtaining the information. In upholding the university’s denial of the request, the court noted that disclosure of the
students' names "would reveal more about those students than simply that they were admitted or enrolled at the University. By the very nature of the category of names and addresses sought, disclosure would reveal that these people are "receiving . . . educational [and] . . . financial . . . care or services directly or indirectly from . . . public bodies." 683 N.E.2d at 900.

Finally, in Bradley v. Saranac Community Schools, 455 Mich. 285, 565 N.W.2d 650 (1997), the court analyzed a parent's request for a teacher's personnel file under Michigan's Freedom of Information Act. That statute includes specific categories of records exempt from disclosure. It also includes, however, a general exemption from disclosure of information whose release would constitute a clearly unwarranted invasion of a person's privacy. Citing prior Michigan court decisions, the Michigan Supreme Court noted that the exemption merely protects an individual from disclosure of "intimate or embarrassing details" of that person's private life; as the personnel files contained only personnel evaluations and disciplinary actions, the files could not be deemed an invasion of privacy under the statute. The court took the next step, however, and invoked a balancing process by citing the countervailing public interest in disclosure of the records: "Making such documents publicly available seems more likely to foster candid, accurate, and conscientious evaluations than suppressing them because the person performing the evaluations will be aware that the documents being prepared may be disclosed to the public, thus subjecting the evaluator, as well as the employee being evaluated, to public scrutiny." 565 N.W.2d at 657.

Common law standards for public records questions will almost certainly include a weighing of public interests favoring disclosure against privacy and confidentiality interests favoring non-disclosure. Even public records statutes, however, which might purport to define with clarity the records that are exempt from disclosure, will require some balancing of these countervailing interests. The public policy analysis that inevitably accompanies the balancing process makes decisions in particular higher education contexts all the more useful. Those analyses transcend differences among state public records laws.
II. Employment records

Most public employees, including those at institutions of higher education, readily accept that—with accountability laws such as those regarding public records, open meetings, and conflicts of interest—employment means the potential for scrutiny by their taxpayer constituencies over their exercise of professional duties. Indeed, many courts have expressly held that public employees have a narrower right and expectation of privacy than other citizens. See, e.g., Pottle v. School Community of Braintree, 395 Mass. 861, 482 N.E.2d 813 (1985); Denver Post Corp. v University of Colorado, 739 P.2d 874 (Colo. App. 1987).

Some states include in their public records statutes specific exemptions for personnel records, protecting them from disclosure. An employee's personnel records, however, obviously can include many varieties of documents. Depending on the degree to which a legislature defines with specificity the sort of personnel records that might be exempt from disclosure, courts will likely be forced to employ a balancing analysis for various kinds of writings even in the presence of a general personnel records exemption in statute.

The Michigan court in Bradley found ample justification in the name of the public interest to order disclosure of a K-12 teacher's personnel evaluations to a parent. In Missoulian v. Board of Regents of Higher Education, 675 P.2d 962 (Mont. 1984), however, the Montana Supreme Court was not so sanguine on the issue of evaluations performed on university presidents. The Montana Board of Regents had prescribed a two-level evaluation system for its university presidents: a somewhat informal annual review, and a more comprehensive evaluation performed every three years. The latter called for interviews with faculty, staff, students and alumni over each president's job performance. These interviews, as well as the evaluations of the presidents themselves, were performed under an assurance of confidentiality. When the local newspaper requested access to all the presidential evaluations, the Board refused. The newspaper ultimately sought to compel release of the evaluations under a general "right-to-know" provision of the Montana constitution. Those provisions guaranteed access to documents
of state agencies and other public bodies "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

The Montana Supreme Court upheld the trial court's denial of the newspaper's request. Its analysis is useful for any institution faced with a similar request. It noted that the presidents themselves, as well as the Board of Regents, placed substantial reliance on the evaluations in order to improve job performance. "These evaluations," the court observed, "allow the Board and the president to gain an accurate view of the effectiveness of the administration, its strengths and weaknesses." The court also approved of the trial court's holding that candid evaluations could not occur without confidentiality: "The state's ability to attract top presidential candidates or retain its current presidents would suffer." Finally, the court concluded that the evaluations--with the inclusion of discussion of personal relationships and personalities, "may make interesting or sensational news copy," but that did not mean that disclosure was in the public interest. 975 P.2d at 972.

As to other kinds of records that might be found in the personnel file of a public college or university employee, however, privacy or confidentiality interests may carry less weight in the balancing process. For example, in Denver Publishing Company v. University of Colorado, 812 P.2d 682 (Colo. App. 1991), after the university president fired the chancellor of the University of Denver at Colorado, an arbitrator negotiated a written settlement between the chancellor and the institution. The administration placed the settlement agreement in the chancellor's personnel file. When the Rocky Mountain News requested a copy of the settlement agreement, the university refused, citing an exemption under Colorado's Open Records Act for "personnel files, except applications and performance ratings." The court rejected the claim that the chancellor had a legitimate expectation of privacy in the documents, and deemed it "unreasonable" for the university and chancellor to "have assumed they could restrict access to the terms of employment between a public institution and those it hires merely by placing such documents in a personnel file." 812 P.2d at 684.

As to the public policy considerations, the court discounted the university's suggestion that ordering disclosure of the settlement agreement would prejudice its ability to settle employment disputes in the future: "While such an effect is possible, the
The public's right to know how public funds are expended is paramount considering the public policy of the Open Records Act." 812 P.2d at 685.

The Maryland Court of Appeals was even more dubious of a claim by the University of Maryland College Park regarding alleged personnel records in *Kirwan v. The Diamondback*, 352 Md. 74, 721 A.2d 196 (1998). After the National Collegiate Athletic Association notified the university that a student athlete had accepted money from a former coach to pay the student's parking tickets, a campus newspaper made a broad request to the university for records that might indicate parking infractions. Among the records requested was those that would document parking violations by the head coach of the men's basketball team. Rejecting the claim that such records would be a personnel record (exempt from disclosure under Maryland's Public Information Act), the Maryland Court of Appeals noted that a parking ticket received by anyone else at his or her job would typically not be deemed a personnel record. In its policy analysis, the court reasoned: "Whether Coach Williams received parking tickets has little or nothing to do with his employment, his status as an employee, or his ability to coach. It means only that he was alleged to have parked illegally." 721 A.2d at 200.

Despite the fact that persons employed at public institutions have diminished expectations of privacy, the mere fact that their salaries are paid with public dollars does not justify wholesale disclosure of any record created in connection with employment. Nevertheless, courts are inclined to hold strongly to the view that the public has a right to know how public resources are expended. Absent compelling countervailing policy considerations (such as those the Montana court listed in *Missoulian*), that public dollars are spent in connection with employment will typically weigh in favor of disclosure of many records an institution maintains regarding its employees.

### III. Hiring executives

Conventional wisdom among institutional governing boards holds that the most important function ever to be exercised by a board of trustees is the hiring of a chief executive officer. A good indicator of the magnitude of the responsibility is often the degree of public interest in the process. This interest, however, can yield a clash between
the trustees (who believe that only a closed process can produce the best candidate for the job) and the media (who presume to represent the public and its desire to know the details of a process to select a leader of a public institution).

*Board of Regents v. Phoenix Newspapers*, 167 Ariz. 254, 806 P.2d 348 (1991) not only presents an attempt at a workable reconciliation between such opposing forces, but also illustrates a classic balancing analysis. At the beginning of the process to hire a new president at Arizona State University, the local newspaper had sought names and other information concerning each of the more than 250 individuals under initial consideration by the Board of Regents. As the process progressed, Board officials and newspaper representatives had attempted to reach an agreement on what could be disclosed; those attempts ultimately failed. While the Board was considering the three finalists for the position, the newspaper sued to obtain a wide array of information regarding all persons who had been in any way considered for the job.

The Arizona Supreme Court first drew a distinction between a "prospect" and a "candidate." A prospect, the court reasoned, is part of a large initial group under consideration for the position; the prospect may be nominated by another person, and therefore unaware that he or she has been nominated. Accordingly, a prospect may not even wish to be a prospect, and find disclosure of that fact embarrassing or harmful to a career. "Revealing the names of all prospects, those nominated without their permission, and even those nominated with the prospects' tacit permission, could chill the attraction of the best possible candidates for the position. The interests of ASU and the citizens of this state are best served by not discouraging the 'cream' from applying." 806 P.2d at 352.

A candidate, however, is a prospect who is seriously considered for the position. In all likelihood, the court speculated, persons interested in the process will "already know who is being considered for the job. Consequently, persons who pursue the job to that level "run the risk of their desire becoming public knowledge. Because they are candidates, they must expect that the public will, and should, know they are being considered. The public's legitimate interest in knowing which candidates are being considered for the job therefore outweighs the 'countervailing interests of confidentiality, privacy [and] the best interests of the state.'” 806 P.2d at 352.
The Phoenix Newspapers case well illustrates the presence of the public interest on both sides of the balancing scheme. In favor of disclosure is the public interest in knowing how public entities are managing public resources. On the other side, however, are not only the privacy and confidentiality interests of those potentially affected by disclosure, but also how disclosure of such arguably confidential information would ultimately undermine the public interest as well.

IV. Electronic mail

A typical computer use policy at a public college or university includes provisions regarding the use of the institution's electronic mail network. Such policies commonly restrict use of the network to institutional purposes, and prohibit the use of e-mail for personal reasons. Moreover, it is not uncommon that the policies are accompanied by some sort of admonition that the substance of any electronic mail transmission might be deemed a public record, and therefore subject to a request for disclosure.

Two recent cases address the issue of whether the contents of e-mail messages sent over a public agency's network which were personal in nature (admittedly in violation of the agency's computer use policy) might be deemed a public record. Both decisions uphold the privacy rights of the employees despite their failure to comply with their employer's e-mail policies. In Tiberino v. Spokane County, 13 P.3d 1104 (Wash. App. 2000), Tiberino, who worked in the Spokane County prosecutor's office, had long been suspected of excessive use of the office's e-mail network for personal reasons. When Tiberino forgot to turn off her computer one day before she went home, a co-worker found that Tiberino had been sending many personal e-mails to her sister or mother on work time, and that the e-mail contained "coarse and vulgar language." The county later fired Tiberino, who responded with both a letter from her attorney objecting to the action, and a complaint with the state's Human Rights Commission. As a result of the threatened litigation, Tiberino's former employer printed the contents of the "Sent" folder on her e-mail account. Of the 551 total sent items in the folder, 467 were personal messages sent to a total of five addresses.
When a local newspaper caught wind of the printed messages, it requested a copy of the documents under Washington's Public Records Act. The Act prohibited disclosure of "personal information" to the extent that disclosure would violate an employee's privacy interests. The act further provided that those interests would be violated if the information in question were "highly offensive to a reasonable person" and "not of legitimate concern to the public." While the Washington court of appeals conceded public interest in the efficient administration of government, it deemed Tiburino's non-work-related e-mails exempt from disclosure. The court noted that, while the public had a legitimate interest in knowing that Tiberino "sent 467 e-mails over a 40 working-day time frame," the substance of what she had included in those messages was "of no public significance." 13 P.3d at 1110.

The Washington court's holding is consistent with that of the Florida Supreme Court in *State v. City of Clearwater*, SC02-1694 (Fla. 2003). There, a local newspaper reporter requested all e-mails either sent or received by two city employees over a one-year period. Pursuant to the city's procedures, the two employees sorted their e-mails into two categories: public and private. The city delivered printed versions of the public e-mails to the newspaper, but withheld the private ones.

Under Florida statute, public records are records "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." In upholding the city's denial of the reporter's request for the personal e-mails, the court held that the personal e-mails did not meet Florida’s definition of "public records" in that the personal e-mails had not been created or received in connection with official business. The court noted that to hold otherwise would yield an "absurd" result: "If the Attorney General brings his household bills to the office to work on during lunch, do they become public record if he temporarily puts them in his desk drawer? If a Senator writes a note to herself while speaking with her husband on the phone does it become public record because she used a state note pad and pen?"

The effect of both *Tiburino* and *City of Clearwater* is to conclude that the privacy interests of the employees outweighed the public’s right to know. The *Tiburino* court saw no public benefit to be gained by revealing the personal details contained in the employee's e-mails. Moreover, the “absurd result” the Florida court sought to avoid in
City of Clearwater would have compelled disclosure of all things personal in the public official's life. The Florida court would not allow the balance to produce such an outcome.

V. Conclusion

Public college and university officials are by now accustomed to operating under the spotlight created by the various states' sunshine laws. Wary of requests for official records by the media and others, employees are often admonished to assume every record they create is a public record. Despite the interest in open government, confidentiality and privacy interests can prevent disclosure of certain records an institution maintains. Whether a record is public or private, however, will depend upon a balance between these two countervailing interests.