

**Information Overload: What You Want to Know (And Don't Want to Know)**  
**About Your Students**

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*“Too much information running through my brain/  
too much information driving me insane . . . .”<sup>2</sup>*

**Introduction**

It is Monday morning and the first call of the day to the Dean of Students is from a parent reporting that he read in the newspaper that his daughter is living on the same residence hall floor as a convicted sex offender.

That afternoon, a student comes to the Dean of Students' office asking the Dean to do something about the Facebook page of the student's ex-boyfriend that portrays her in a very unflattering light.

That evening, the Dean of Students is walking to a restaurant downtown and he sees his student worker entering a café. A large sign posted outside the café says, “Welcome Members of NAMBLA.” Curious, the Dean searches the Internet on his smartphone and learns that NAMBLA is the “North American Man/Boy Love Association.”

Today, with a world of information at our fingertips—on our desktops, on our smart phones—it is easy to find out almost anything we might want to know about anything—or anyone. For postsecondary educational attorneys and administrators, however, this can be both an essential tool and a curse. Depending on the situation, having more or less information may help us avoid liability or make a court find that we were negligent. It may also help us make right or wrong decisions from a good practice and ethical point of view.

With this paper, we intend to examine how to manage information in the context of student issues on campus. Consider the following questions:

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<sup>2</sup> The Police, *Too Much Information*.

- ◆ What should university administrators know about our students?
- ◆ What should university administrators *not* know about our students?
- ◆ What sources should administrators consult in making decisions about students?
- ◆ How should university administrators manage the information they acquire?
- ◆ How do universities avoid liability from knowing either too much or too little about their students?

As any good lawyer will tell you, there are no clear-cut answers to these questions. But as all good philosophers will tell you, knowing the right questions to ask, and knowing what you do not know, is the first step to enlightenment. After reviewing the sources of information, discussing how we come to have information, and then analyzing the risks and benefits of looking and not looking, we will conclude with another series of questions that should help you appreciate if you are properly evaluating the measure of information.

A quick note as to why we chose to focus on students, for certainly this issue arises equally in the employment setting. The debate continues as to whether colleges and universities today stand *in loco parentis* to students as was once the case before the era of the student rights movement.<sup>3</sup> Whether this is true as a formal legal matter, it yet remains that parents, the public, federal and state governments, and students themselves are putting increasing pressure on colleges and universities to oversee the activities of their students. Other things, like changing student demographics manifesting in, for example, the increase in the number of enrolled students with mental illnesses may require us to be more involved in student life<sup>4</sup>. And students

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<sup>3</sup> See, e.g., *Colleges' Increasing Exposure to Liability: The New In Loco Parentis*, James J. Szablewicz and Annette Gibbs, 16 J.L. & Educ. 453 (1987); *Is In Consortio Cum Parentibus the New In Loco Parentis?*, Gavin Henning, NASPA Journal, 2007, Vol. 44, No. 3;

<sup>4</sup> See, e.g., *Changing Demographics and Generational Shifts: Understanding and Working with the Families of Today's College Students*, Judy Donovan, <http://www.colostate.edu/Depts/SAHE/JOURNAL2/2003/Donovan.html>; *The Association for University*

are, after all, the *raison d'être* of postsecondary educational institutions. At the same time, this new generation of students themselves are more public about their information.<sup>5</sup> These forces combine to make the questions asked above inevitable.

### **The Sources of Information**

There are, of course, endless sources from which administrators receive information about students. Colleges and universities have historically come into possession of a lot of information about students as part of their role in providing education, housing, and co-curricular activities for these students. In the past, much of this information came through traditional channels and in paper form, such as documents that students filed as part of the admissions process and records kept by faculty members and administrators about students during their course of study. Administrators have always received information about students through informal channels as well, but there is simply a lot more information “out there” now, and it is increasingly being preserved and catalogued in new ways to make it easily accessible or subject to discovery.

The traditional sources of information about students often come directly from the students themselves. These include the documentation students provide to us during the course of their career as students including information on the admissions application, financial aid information, disciplinary history, and other academic records. Information is also gathered and may be recorded based on the observed behavior of these students. Administrators obtain this information in the ordinary course of conducting university business. Under certain

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*and College Counseling Centers Directors Annual Survey, 2008-2009,*  
[http://aucccd.org/img/pdfs/directors\\_survey\\_2009\\_nm.pdf](http://aucccd.org/img/pdfs/directors_survey_2009_nm.pdf)

<sup>5</sup> See, e.g., *Student Awareness of the Privacy Implications When Using Facebook*, Tabreez Govani and Harriet Pashley, <http://lorrie.cranor.org/courses/fa05/tubzhlp.pdf>

circumstances, information is shared between administrators and faculty consistent with the federal Family Educational Rights and Privacy Act (“FERPA”) which permits sharing student records and student record-information under certain circumstances. Informal hallway conversations and gossip can also play a role in information sharing of observable student behavior.

Public sources have also always been channels of information-gathering about our students. Postsecondary administrators obtain information about students when the local police share a copy of an incident report with them concerning events that may have occurred at an off-campus house party or a sexual assault. Occasionally, our students make the headlines of the local paper before an administrator even knows that a particular incident occurred.

Of course, new technologies have enhanced our ability to conduct more immediate and in-depth information-gathering from even these traditional sources. Sitting at our desk or in Starbucks, we can find out that a particular student has been charged with a crime by looking at our state court access website. The proliferation of social networking sites and students’ willingness to disclose information about themselves has made it easier to access what otherwise might be personal or sensitive information about them.

### **Why Are We Looking?**

But why are we looking? There are many reasons why university professionals might seek out information about particular students. These reasons range from the noble (administrators feel an *in loco parentis* type of responsibility towards students), to the practical (a background check on students participating in internships is required), to the mundane (someone is simply curious). Or, rather than seeking it out, administrators may be presented with particular information about students by other students, faculty, or members of the

community. Whatever the reason, the result is that administrators find themselves knowing more about particular students than is revealed through their education records or personal observation and experience. The following are examples of situations in which administrators may obtain information about students.

A. Evaluation for Clinical Placements or Student Employment

Many programs or internship sites require that a student submit to a criminal background check prior to participation. In the course of evaluating a student for a clinical placement or for employment, an administrator might learn that the student has a criminal record or in certain cases a record of neglect or abuse of a patient. Or, in some cases, a student employee may be involved in reviewing applications for clinical placements and have specific knowledge about a fellow student.

When a student applies for an on-campus job, the screening process may reveal additional information about the student. While the screening for part-time and work-study jobs may not be as involved as those in the general job market, it is interesting to note that in a recent survey of recruiters and human resources professionals, 70% said they have rejected employment candidates based on information they found on-line.<sup>6</sup>

B. Misconduct Investigations

The investigating officer may seek out information from a number of sources to confirm or deny the existence of a conduct code violation. For example, the investigating officer might obtain a copy of a police report which may reveal more information about a particular student than the investigating officer might otherwise have. Interviewing witnesses—including the

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<sup>6</sup> Cross-Tab, *On-Line Reputation in a Connected World* (available at [go.microsoft.com/?linkid=9709510](http://go.microsoft.com/?linkid=9709510)).

student himself or herself—as part of the investigation into the alleged misconduct might also provide insights into the student’s behavior and habits, among other things.

C. Law Enforcement Investigations

In the same way, university police may uncover information about students in the course of investigating university-related crime. This information may be shared directly with university administrators or may surface publicly during the prosecution of the case.

D. Threat Assessments

When a student becomes a “student of concern,” a student behavioral assessment team will accept information about that individual from many different sources to assist it in monitoring the behavior of the student. It may also affirmatively seek out information about the student.

E. By Accident

An administrator passing a pair of faculty members in the hallway overhears part of their discussion about a student in their classes. Staff members socializing at an event talk about a student who has recently visited their offices. While attending the Homecoming football game, the Director of Financial Aid observes one of her students at a tailgate party. Casually surfing the Internet for another purpose causes an administrator to stumble upon student information.

F. Idle Curiosity

Although most of us are not willing to admit it, we are all vulnerable to our need to satisfy our curiosity. Curiosity may lead an administrator to ask a colleague about a student, to Google the student on the Internet, or to “peek” in student files.

## **The Legal Perils of *Too Much Information***

Inhabiting, as we do, the world of academia, it is hard to believe there may be risks to possessing *too much* information about anything. But sometimes having too much information may make an institution susceptible to a number of accusations ranging from “how did you learn,” “what did you do with the information,” “why is it relevant,” among other such things. Many of these accusations find traction in various legal theories.

### A. Discrimination Claims

Too much information might lead staff at the university to wittingly or unwittingly treat students differently. Would a faculty member interact differently with a student whom he knows is on the sex offender list? Might a liberal-minded Dean of Students react differently towards a student who has engaged in a rally against gay students? Recent articles have recognized the challenges students have faced, sometimes from other students, based on the types of information the students themselves or others make public about themselves.<sup>7</sup>

### B. Privacy Claims

The availability of information might lead a student to allege a violation of his or her right to privacy. Privacy is protected in a number of ways—constitutionally (most notably through the Fourth Amendment), through state privacy statutes, through common law invasion of privacy theories, and through federal and state data and record protection laws, such as FERPA. If an institution takes action against a student using information which the student believes should have been private or confidential, the student might assert a claim based on one or more of these theories. For example, a recent article described a lawsuit filed by a student after a high

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<sup>7</sup> For example, “Incoming Gay Freshman face discrimination based on Facebook profiles” (available at <http://kc.csip.org.uk/viewdocument.php?action=viewdox&pid=0&doc=35886&grp=445>.)

school coach made all student-athletes reveal the passwords to their Facebook accounts and the coach logged on and disseminated content to other teachers and the principal.<sup>8</sup>

In addition, accessing content on Facebook or other sites that requires authorization from the account holder (e.g., certain information on an individual's Facebook page is only available to "friends" of the account holder) could violate the Stored Communications Act, 18 U.S.C.

§§2701-11 or parallel provisions of state law. This kind of liability theoretically could arise if a university administrator were to ask a student to provide content from the Facebook page of the student's "friend."<sup>9</sup>

### C. Free Speech Claims

Students may raise free speech claims if disciplinary actions are taken against them because of speech or behavior which administrators may learn about from non-academic sources. Currently, these seem the most viable type of claim for students to advance in this context.

Consider the following:

1. Student posing with guns and "kidding around" on Facebook (<http://cnews.canoe.ca/CNEWS/Crime/2010/01/29/12659196-sun.html>)
2. "Student Files Federal Lawsuit"—Valdosta State University student sued university after being expelled on the basis of a collage he posted on Facebook -- available at <http://www.thefire.org/case/751.html>
3. *U.S. v. Alkhabaz*, 104 F.3d 1492 (6<sup>th</sup> Cir. 1997): University of Michigan student faced felony charges for extremely graphic and violent pseudonymous emails regarding another student. The court upheld dismissal of the charges because the emails did not present a credible threat to the student.
4. "University of Chicago Censors Student's Facebook Photo Album": Citing the university's student conduct manual, a university administrator required a

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<sup>8</sup> Student Press Law Center, "Student files lawsuit after coach distributed private Facebook content" (available at [www.splc.org/newsflash.asp?id=1938](http://www.splc.org/newsflash.asp?id=1938))

<sup>9</sup> See *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 (D.N.J. 2009) (Improper retrieval of information from MySpace.)

student to remove Facebook postings identifying another student. (See <http://thefire.org/article/10560>)

#### D. Due Process Claims

Is it fair to take disciplinary action against a student because of activities he or she engages in when the institution learns of the activities from nonacademic sources? For public institutions, does such action comport with constitutional due process? Students in several recent cases have raised these claims.

1. Millersville (PA) University officials discovered a picture of an Education student on MySpace in which she was wearing a pirate hat and drinking from a yellow cup. With no judicial hearing, they deemed her unfit to be a schoolteacher and denied her an Education degree and awarded her an English Degree instead. She sued on the grounds of free speech and due process. (See, “The Digital Limits of *In Loco Parentis*,” *Chronicle* 3-7-08)
2. *Yoder v. University of Louisville*, 2009 U.S. Dist. Lexis 67421 (W.D. Ky. 2009) – A university dismissed a nursing student for a MySpace blog posting on the grounds that the posting violated the professionalism standards of the program. However, the court found that the student’s blog posting was personal and did not implicate the professionalism standards.
3. *Byrnes v. Johnson County Community College*, Civil Action No. 10-2690-EFM-DJW, (D. Kan. Complaint Filed 12/30/2010) – A community college expelled a nursing student for posting on Facebook a picture of herself and other students holding a human placenta in a class laboratory session. The student claims violation of her due process rights.

#### E. Defamation

Can bringing up extra-institutional information about a student constitute defamation?

1. In *Fiacco v. Sigman Alpha Epsilon*, 528 F.3d 94 (1<sup>st</sup> Cir. 2008), students uncovered old newspaper articles and court records of a university conduct officer and shared them with university administrators in an effort to prevent the conduct officer from proceeding with a disciplinary case against the fraternity.

## **The Perils of *Too Little* Information**

There are risks, too, from having *too little* information. Internal university hearing panels, arbitrators, courts, and the public may judge harshly action or inaction when the university could have readily obtained the appropriate information. Several legal theories could be advanced as a collateral attack on the basis of too little information.

### A. Negligence

The tort of negligent hiring has been gaining some traction. The expectations for background checks—whether criminal history, credential, or personal reference—have been higher in recent years in response to the availability of information. Because they are often transient and part-time, institutions generally put less effort into background checks for student employees than for other categories of employees. Yet the risks in some cases can be just as great for students in confidential or trust positions.

General negligence is also a concern where an assertion that there was a neglect of information-gathering could meet with some success. One might anticipate a claim based on the failure to discover that a student living in a residence hall had a previous criminal history where the student commits a similar offense and a student is harmed as the result. A court might conclude, for example, that given the availability of such information, it was foreseeable that the student could reoffend.<sup>10</sup> The question then becomes: should particular sources of information put the university on notice of potential harm to student or community? Should colleges and

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<sup>10</sup> This question also has arisen in the context of university athletic departments conducting background checks on prospective student-athletes. See Sharp & Sheilley, *Athletic Departments Must Use Caution in Conducting Background Checks on Prospective Student-Athletes*, Sports Litigation Alert Archives, available at [www.hackneypublications.com/sla/archive/000282.php](http://www.hackneypublications.com/sla/archive/000282.php).

universities employ services such as *YouDiligence*,<sup>11</sup> an online reputation management service, or private consulting services to screen their students?

#### B. Breach of Contract

A less obvious claim—one of breach of contract—could arise in the context of an internship, where the institution promises to screen a student and fails to do so. The claim would arise when a student intern harms another and, as the plaintiff might argue, the harm might have been prevented through the proper screening provided for under a contract.

### **Walking the Line Between Too Little and Too Much: Evaluating the Measure of Information**

Whether you possess too much or too little information will, of course, depend upon the context, and often is unfortunately only understood retrospectively. As noted in the Introduction, there is no “right” or “wrong” answer, no clear lines to draw to determine whether you have too much or too little information. Instead, evaluating the measure of information will depend upon consideration of the following questions:

- When do you “look?”
- What are you trying to accomplish?
- What information is relevant to accomplishing that objective and what are appropriate sources of that information?
- How reliable is the information?
- How will you use the information?
- What will you do with the information when you no longer need it?
- Should you develop formal policies?

To further understand how to work with these questions, we will take each in turn.

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<sup>11</sup> [www.youdiligence.com](http://www.youdiligence.com) ("It doesn't matter if a kid uses a PDA, a cell phone, his aunt's computer or is on a class trip to China -- YouDiligence is going to grab it as soon as it's posted.")

### A. When Do You “Look?”

There are certain circumstances in which we recommend “looking.” One such example is when the administrator personally observes troubling behavior or information. Another would be when the higher education professional receives direct information about a concerning issue, such as in the form of a tip or complaint from someone else. Likewise, if the institution has a policy or practice of looking, such as conducting criminal background checks or other credential checks, it would be critical for the administrator to adhere to the policy or practice.

A more difficult question is determining whether a reasonable standard of care requires one to look. Does a reasonable standard require administrators to review the mental health records of students participating in a study abroad program, particularly to a remote locale? Would the standard require “friending” students who are being monitored by a threat assessment team so their social networking could be monitored? Should attention be paid to what administrators at other institutions are doing? Is the institution aware of the practice of its own administrators? Do these latter two situations create a new standard of care?

### B. What Are You Trying to Accomplish?

The nature of your goal will help inform an assessment of whether you have the proper information. For example, the amount, type, and quality of information may differ if you are investigating a tip that a student may commit a violent act as compared to conducting an investigation of an allegation that a student falsified her admissions application.

### C. What Information is Relevant and What are the Sources?

Depending on the nature of your inquiry and what you are trying to accomplish, you may seek out or rely upon various sources of information. Such information will have varying degrees of relevance based on the context and scope of your inquiry.

#### D. What Sources of Information are Generally Reliable and Credible?

The reliability and credibility of information is always an important issue, but is even more important in the information age when we consider information from a variety of sources, some of which are difficult or even impossible to verify. Certainly formal documents, such as governmental records including birth certificates and police records, are more reliable. School records produced by your own institution and certified medical records also fall within that category. Oral and written statements that can be confirmed by another source are also more trustworthy. Less reliable sources could include blogs, posts to social networking sites, and other Internet sites, especially those with a primary mission of spreading gossip and innuendo.<sup>12</sup>

#### E. How Will the Information Be Used?

Asking the question of how the information will be used will assist higher education professionals in determining whether they have too little or too much or the “right amount” of information. If the professional is investigating a case of academic or nonacademic misconduct which may go to hearing, the type, reliability, and sufficiency of information are critical because a student’s rights are at stake. This situation differs significantly from one in which the professional is evaluating a student for an internship. In both situations, however, issues of student privacy and community safety may be involved.

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<sup>12</sup> For example, a recent video secretly recorded in a class and posted on a conservative group’s website and on YouTube purported to show a professor raging against conservative students. However the video had been heavily edited. *Video Seems to Catch Professor in a Liberal Rant but There’s More to the Story*, The Chronicle of Higher Education, November 17, 2010, <http://chronicle.com/article/Video-Seems-to-Catch-Professor/125426>. . . .; Syracuse University’s satirical blog, in which fake quotes were attributed to students, faculty and alumni, *Blog Satirizes Law School Life but Syracuse University Officials Aren’t Laughing*, The Chronicle of Higher Education, December 14, 2010, <http://chronicle.com/blogs/wiredcampus/blog-satirizes-law-school>. The now-defunct *Juicycampus* (<http://juicycampus.blogspot.com/>) site is an example of a campus gossip site.

#### F. What Will You Do with the Information When You No Longer Need It?

Policies and practices need to be established to manage information that an institution may have concluded has served its purpose. A critical question implicated in this is who makes the decision as to the disposition of such information. Institutional records retention and privacy policies and laws should be an important component of this consideration.

#### G. Should You Create Policies?

Prior to creating formal policies to manage the challenges associated with having too little or too much student information, an institution should carefully consider both pros and cons. Policies help administrators know what to do in potentially risky and complicated situations and provide notice of expectations. On the other hand, they require conformity and create potential risk if not adhered to.

Many institutions have found it useful to, at a minimum, create a general informational social networking policy for students. Such policies generally advise students that the institution supports students' use of social media and will typically not monitor such use. They also inform students, however, that information the institution may obtain from social media sites may be used in disciplinary and other proceedings against students.<sup>13</sup> The creation of such policies is particularly recommended for professional programs that may have additional expectations concerning the behavior of students in their programs and students who participate in practicum or internship opportunities as part of their academic program.<sup>14</sup>

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<sup>13</sup>See, e.g., Concordia University's Statement: "Concordia University Wisconsin and its faculty and staff do not monitor online communities and e-communication. Further, the University does not forbid faculty, staff and students from joining and participating in online communities as individuals not acting as agents of the University. However, any behavior that violates this Code which is brought to the attention of a University official will be treated as any other violation and will be referred through channels in this code." See: <http://www.cuw.edu/Departments/residencelife/assets/studentconductcode.pdf>

<sup>14</sup> For example, see Guidelines for Online Professional or Personal Activity in Vanderbilt University Medical Center Social Media Toolkit (<http://www.mc.vanderbilt.edu/root/vumc.php?site=socialmediatoolkit&doc=26923>)