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Closing Time: Open Records Law and College Athletics

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Members of the public, journalists, and other stakeholders have a significant interest in maintaining access to government records. This paper examines the current state of open records laws in relation to college athletics. The central finding is the current set of incentives facing institutional leaders, legislators, and athletics department staff members may undermine the public policy goals of open records laws. The topic of open records laws is significant for athletics department employees, journalists, academics, and other stakeholder groups. The foundational principles underlying open records laws can be traced back to the founding of the United States and are a critical aspect of democracy. However, athletic departments use a variety of tactics to avoid or delay providing documents in response to public records requests. These tactics are a product of the incentives faced by coaches and athletics directors, and they contribute to a situation where these stakeholders advocate for policy changes that ultimately undermine the public's ability to access records relating to intercollegiate sport. The solution to this problem will require a coordinated grassroots effort to ensure access to records in intercollegiate athletics and promote accountability among decision-makers in college athletics for years to come.

In January 2017, New Mexico State Athletics Director Paul Krebs called a meeting to discuss a concern that would ultimately lead to his resignation: public records requests (Libit, 2017). The concern Krebs wanted to address did not come from another institution's playbook or recruiting strategies; it came from a journalist named Daniel Libit, who had been submitting numerous requests for documentation under New Mexico's open records law (Tracy, 2017). Department sources reported Krebs instructed coaches and staff to refrain from emailing sensitive information for fear they would be revealed in these public records requests (Libit, 2017). Krebs resigned six months later, after Libit uncovered expense reports for a lavish trip to Scotland that Krebs allegedly attempted to conceal (Libit, 2020). Krebs was acquitted after a trial in 2023 on two charges of embezzlement related to the trip (Cruz, 2023).

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Krebs' story is one of many experiences that display the power journalists and ordinary citizens can wield by utilizing public records requests authorized under state open records laws (Libit, 2017, 2019, 2020, 2023). Although most athletic directors and public employees will not engage in behavior that could potentially end in criminal charges, these laws still have a substantial impact on behavior in college athletics. Open records laws contribute to an "observer" effect in which individuals who are observed behave in a manner that is more closely aligned with societal expectations (Aftergood, 2008; Ariel et al., 2018). In addition to the observer effect, open records have a detection effect because they increase the public's ability to monitor and potentially correct systematic problems and other concerns about government operations (Moore, 2020; Stewart, 2010). Given the importance of college athletics in contemporary discourse, the public interest in maintaining robust access to athletic department records is immense.

In this article, I analyze the ongoing public policy struggle between the college athletics departments subject to open records laws and the stakeholders these laws are intended to protect. In doing so, I consider the following research questions:

1. What are the goals of open records laws?
2. How do these goals apply in the context of college athletics?
3. How do the incentives facing institutional leaders, athletic administrators, and legislators in this context affect the application of open records laws?
4. How can lawmakers better promote the efficacy of open records laws in college athletics and beyond?

This topic is significant for two primary reasons. First, the public policy goals of open records laws may be undermined if states and institutions are incentivized to engage in a "race to the bottom" to gain advantages over their peers (LoMonte & Jones, 2023, p. 37). Second, employees at public institutions must navigate these open records laws every day, and the impact that these laws have on the conduct of coaches and teams is substantial. Inconsistent enforcement of open records laws may create actual or perceived competitive advantages for certain institutions. The public policy ramifications of restricting access to records in competitive environments extends beyond the context of college athletics (Gainey, 2024; Geevarghese, 1996; Moore, 2020). Accordingly, the processes and political challenges discussed in this paper may illustrate some of the broader tensions surrounding the public's right to access records.

This article proceeds as follows. In the following section, I review the literature addressing the broader policy goals and tensions associated with open records laws, and then I discuss how scholars have examined these principles in the context of college athletics. The following section is a brief discussion of methodology. Next, I provide examples of institutional tactics used to avoid disclosing information under open records laws. In the next section, I discuss the problems associated with maintaining access to records in the context of college athletics and discuss potential

policy solutions to address these problems. The final section concludes the paper by summarizing my findings and emphasizing the importance of public engagement with this topic and the broader governance of intercollegiate sport.

Literature Review

In this section, I outline the public policy considerations behind open records laws and use existing literature to explain how the competing interests affected by open records policies impact these goals. This provides necessary context when exploring the difficulties in applying these laws in the specific contexts of higher education and intercollegiate sport. The interests of specific groups – legislators, athletic department employees, and senior leadership teams at universities and governing bodies – are often juxtaposed to the interests of ordinary citizens, journalists, and academic stakeholders. Understanding these competing interests is necessary to understand the current state of open records laws in college athletics.

Policy Objectives and Stakeholder Tensions in Open Records Laws

Public access to government proceedings is a foundational principle of American democracy. Presidents and public officials have outwardly supported this sentiment since the founding of the United States. James Madison argued "the right of freely examining public charters and measures, and free communication thereon" was "the only effective guardian of every other right" (Madison, 1906, p. 103, as cited in Stewart, 2017, p. 268). Supreme Court Justice Louis Brandeis (1913) famously stated "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman" (p. 10).

Contemporary literature confirms public access to official records remains a key mechanism of holding those in power accountable (Aftergood, 2008; LoMonte & Jones, 2023; LoMonte & O'Keeffe, 2020; Sheinkopf, 1996). LoMonte and Jones (2023) identified two "primary and complementary" purposes for openness in government: "[1] enabling citizens to have well-informed input into the formulation of government policy and [2] promoting better government by enlisting the press and public as watchdogs over malfeasance" (p. 3). The underlying assumption behind these two justifications is that informing citizens about government proceedings results in governance more effectively promotes the interests of the people they are serving. Another policy objective served by open records laws is the creation of a self-awareness effect amongst government officials that they are being observed (Ariel et al., 2018). Sociology literature describes how this self-awareness effect leads individuals to "react in socially desirable ways to even the slightest cues indicating that someone may be watching. Therefore, self-awareness of being observed heightens the need to cooperate with rules" (Ariel et al., 2018, p. 22). Open records laws promote a closer alignment between the actions of government officials and societal expectations for how these officials should behave. The alignment between governance and citizen expectations is a core principle of democratic government,

and this principle is better served when citizens have access to government proceedings (Madison, 1906). Obviously, access to government proceedings is not the only requirement for a functioning democracy, but it is a key component of any functioning system of democracy (Aftergood, 2008).

Any analysis of public policy inherently involves balancing the interests of certain stakeholders against other groups of stakeholders (Becker, 1983; Easton, 1965; Keim, 2001; Pildes, 1999). The notion of public access to government records generally has support amongst politicians and leaders of government institutions (Brandeis, 1913; Madison, 1906; Stewart, 2010). Lawyers, journalists, and other stakeholders have learned the "teeth" of public records laws – i.e., the actual enforcement mechanisms – are inconsistent across states, agencies, and institutions. Stewart (2010) described the incentives facing government officials in relation to open records laws. On one hand, public officials want to *appear* transparent because of the policy and historical reasons mentioned above. On the other hand, public officials may not want to *be transparent* for several reasons (Aftergood, 2009; Stewart, 2010). The problems surrounding public access to government records are well documented in the literature and extend far beyond the institutions that are the subject of this paper (Orlin & Rogerson, 2020; Rodenberg, 2019).

In the context of open records laws and higher education, there are additional competing interests in the policymaking equation. Horsley and Sun (2012) outlined the legal framework governing disclosure of records in the context of higher education. Specifically, they note that state open records laws require publicly funded universities to operate under a "presumption of disclosure" (p. 5). Most state legislatures exclude private universities from state open records laws, however, Horsley and Sun (2012) note "due to their increased funding dependency on both State and Federal sources, the difference between public and private universities has eroded in some respects" (p. 6). Reporting requirements that apply to federally funded research impose reporting obligations on private universities, and there are some states, such as Texas, that specifically apply to portions of an entity "supported in whole or in part by public funds" (Horsley & Sun, 2012, p. 6; Texas Government Code Annotated Title 5 §552.003(1)(A)(xii)). Horsley and Sun (2012) also identified the three sets of competing interests facing universities in the context of state disclosure requirements: "public accountability, or the public's right to know; the university's need for institutional autonomy to preserve academic freedom and function effectively; and the right of faculty, staff and students to privacy" (p. 1).

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The competing interests identified by Horsley and Sun (2012) may be more pronounced in the context of college athletics. Specifically, regarding the public's right to know, athletics departments are known as the "front porch" of the University, which means they are the most public-facing component of these institutions (Bass et al., 2015). In 2015, the Atlanta Journal Constitution reviewed public employee salaries and found college athletics department employees were the highest paid public employees in 40 out of 50 states, which means the public has an immense interest

in ensuring these individuals are held accountable. On the other hand, coaches and administrators in college athletics have an interest in maintaining autonomy; playbooks, recruiting tactics, and other competitive advantages may be nullified if disclosed to the broader public.

LoMonte and Jones (2023) explained the beneficiaries of open records laws in the context of college athletics are citizens and the press. Daniel Libit, now a journalist at Sportico, has extensively used public records requests to hold athletic departments accountable to the stakeholders that they serve (Libit, 2017, 2019, 2020, 2023b). Additionally, the academic community frequently utilizes open records requests to facilitate academic research and the study of a variety of issues in college athletics, including legal analysis (Rodenberg, 2019), sports economics (Garcia-del-Barrio & Szymanski, 2009), and numerous other areas of research (Bush Kimball, 2003; Estep, 2019; Mayer, 1996; Menaker et al., 2021; Menifield, 2021; Minkus et al., 2015; Oltmann et al., 2015; Winkles et al., 2024). For example, Menaker et al. (2021) used open records requests to assess field invasion and stadium access policies across the autonomy conferences in the NCAA and noted the promising utility of "incorporating FOIA requests as part of a study's methodological approach" (p. 454). Accordingly, analyzing the application of open records laws in the context of college athletics can inform our collective understanding of the tensions inherent in open records laws in higher education and illuminate some of the broader political incentives that face legislators, institutional leaders, and citizens.

State open records laws apply to both high school and collegiate institutions, and the patchwork of state laws creates problems in both contexts (LoMonte & Jones, 2023; LoMonte & O'Keeffe, 2020). Existing literature has identified several unique characteristics in college athletics that make the implementation and enforcement of open records laws more challenging than in other contexts. For example, institutions of higher education must comply with privacy laws protecting student records (i.e. FERPA) and medical information (i.e. HIPAA). Conflicts with privacy laws are often treated differently depending on the institution or choice of counsel (Huml & Moorman, 2017).

Differing state laws and policies also create opportunities for states to gain competitive advantages over other states – both in the context of college (LoMonte & Jones, 2023) and high school athletics (LoMonte & O'Keeffe, 2020). A recent application of educational privacy laws relates to name, image, and likeness documentation maintained by institutions (Boston, 2022; LoMonte & Jones, 2023; Rainsberger, 2022). LoMonte and Jones (2023) provide an in-depth analysis of how states are creating specific exemptions for documentation related to name, image, and likeness deals with student-athletes, and note, in states without carve-outs, "legislators predictably will feel competitive pressure for their states to follow suit" (p. 37). They argue, given the lack of centralized enforcement from the NCAA on NIL activities in the aftermath of the *Alston* case, the importance of public oversight in this area is more important than ever (LoMonte and Jones, 2023). Despite this, records in college athletics are steadily becoming more inaccessible, particularly in relation to NIL activities (Boston, 2022; LoMonte & Jones, 2023; Prisbell, 2022; Rainsberger,

2022; Wittry, 2023a).

The tensions surrounding access to NIL documentation reveal an environment where legislators, campus leaders, and members of the public sacrifice accountability for competitive advantages over institutions in other states. LoMonte and Jones (2023) characterized this as a "race to the bottom" (p. 37). This phrase appears frequently in economics (Brueckner, 2000; Davies & Vadlamannati, 2013) and political science literature (Basinger & Hallerberg, 2004; Berry et al., 2003). Justice Brandeis introduced the concept in his dissent in *Ligget v. Lee,* 288 U.S. 517 (1933), when he described the trend of states lowering the costs of incorporation within their borders in comparison to other states: "The race was one not of diligence but of laxity" (p. 559). For the purposes of this paper, the phrase "race to the bottom" refers to situations in competitive environments where institutions are incentivized to undermine public policy goals to reclaim competitive advantages. The economics literature on the race to the bottom characterizes it as a product of "strategic interaction" between states (Brueckner, 2000, p. 508). In the context of welfare reform, Brueckner (2000) discussed how state leaders act rationally within a strategic interaction when determining the optimal level of welfare benefits for their state. While it may be tempting to assign moral value to these actions, this sentiment is misguided considering, in most cases, these entities are trying to optimize the outcome for their constituents. In other words, most of the behavior described in this paper and other literature on the race to the bottom is a product of individuals doing their jobs to the best of their abilities. However, it is worth analyzing these strategic interactions so that voters and legislators can intervene before they reach their endpoint.

In the context of college athletics, differences in institutional responses to record requests may be indicative of this race to the bottom. Scholars have noted how institutions have varying responses to requests about stadium access policies (Menaker et al., 2021), NIL endorsement restrictions (Ehrlich & Ternes, 2021), and Title IX investigations (Tracy, 2016). Daniel Libit, then at The Intercollegiate, submitted requests to Division 1 institutions requesting documentation relating student-athlete exit interviews and NCAA interpretations (Libit, 2019). The database compiled by The Intercollegiate shows varying levels of detail in the amount of information institutions provided in response to these requests. Depending on the situation, coaches (Libit, 2023b), governing associations (*NCAA v. Associated Press*, 2009), athletics compliance staff (Libit, 2019), athletics directors (Libit, 2017), general counsel (Tracy, 2016), and others who work at collegiate institutions may be incentivized to withhold working documents from the public. In the hypercompetitive environment of college sports, withholding documents can – and does – result in a competitive advantage for certain institutions (Butt, 2016).

To summarize the literature, scholars are aware that institutions provide a wide range of justifications for providing non-responsive answers to requests for public information, including "ambiguous and inconsistent" applications of privacy laws (Huml & Moorman, 2017), exempting third-party entities associated with athletic departments (Ehrlich & Ternes, 2021), and adopting specific exemptions to open records laws in state legislation (LoMonte & Jones, 2023). The issue of access to

public records is typically analyzed within the narrow research topics these articles are addressing. LoMonte and Jones (2023), for example, provide an indispensable exploration of secrecy relating to NIL documents. Menaker et al. (2021) assessed responses to stadium access policies. Geevarghese (1996) analyzed how university foundations operate in a legal gray zone in the context of open records laws. These projects have all identified specific barriers or challenges to accessing public university records in discrete areas. In this project, I adopt a more holistic approach and address the collective impact of avoidance tactics and strategic interactions between states in relation to open records laws. Given the breadth of information that can be gathered from public records requests (Oltmann et al., 2015), and the unique challenges encountered when seeking records from educational institutions, it is worth examining the wider range of tactics used by institutions to avoid, minimize, or delay public access to athletic department records.

Methodology

In the next section, I examine the mechanisms through which the broader erosion of access to public records occurs in the context of college athletics. To accomplish this, I conducted a qualitative exploration of institutional tactics used to avoid disclosure obligations under open records laws and surveyed open records laws across all 50 states. This survey is presented in Table 1 in the appendix. The exploration of institutional tactics is based primarily off exchanges reported in academic literature and popular media. This is necessary because these tactics, when used effectively by institutional staff, create blind spots in systematic data collection and reporting. In addition to these methods, I rely on court cases and other archival material, such as statutes, to provide a more complete description of the contemporary landscape.

Institutional Tactics

In this section, I explain how institutions structure their behavior to minimize their obligations to provide documents under state open records laws. Exploring these forms of avoidance helps explain why institutions provide different responses to the same public records requests (LoMonte & Jones, 2023; Menaker et al., 2021; Musa, 2018). This section is also useful from a practical perspective for employees at these institutions, as well as the citizens, journalists, and academics who submit open records requests. It is also important to understand the process of submitting a public records request, so I will explain that process first before discussing specific tactics institutional staff use to avoid open records requests.

How to File an Open Records Request

Open records laws that apply to college athletics departments are state-specific, which means the exact process for filing a request may differ across states. It may be helpful, but not necessary, to cite a state's public records law in a records request so the recipient is aware of the statutory basis for the request. The next step is determin-

ing the appropriate entity to submit the public records request to. For college athletics, an institution's office of general counsel or communications staff will typically identify a designated recipient for public records requests. The next step is to include a specific description of the documents sought within the body of the request. Once this information is compiled into the request, it can be submitted to the appropriate contact.

Once a request has been submitted, the staff at the institution will (typically) have a limited amount of time to respond to the request or provide a justification for not responding to the request. If a response is not received within the statutorily designated timeframe, the person who submitted the request should follow up, or, alternatively, ensure they have submitted the request to the appropriate contact. One note of caution: institutions often employ a variety of tactics that exist in a legal "gray zone" to avoid responding to a public records request. The remainder of this section will discuss these tactics.

Avoidance Tactic 1: Going Offline

The most frequent and pervasive avoidance of public records laws in college athletics comes from a simple notion: records can only be requested if they have been created. Records are defined by state law, and the common criterion across states is that records *are recorded*. Practically, many institutions can withhold information from the public by simply changing the format in which conversations and deliberations occur. Recall the sources in New Mexico's athletics department who stated they were asked to avoid emailing "sensitive" information in response to the requests from the journalist at NMFishbowl (Libit, 2017). Although this is an effective and legal way to withhold information, it creates inefficiencies for institutions, as there can be a greater delay when a conversation must be conducted in a format that is not recorded.

New Mexico is not the only institution that uses this technique to maintain secrecy over certain information within the department. At public institutions, managers in particularly sensitive areas recognize the value in avoiding email and other written communication methods to work through issues that could potentially be damaging if released in a public records request. This principle even affects head coach contracts. Deion Sander's contract with Colorado included a provision allowing him to report outside income verbally to avoid creating a record of his outside contracts and income (Libit, 2023b). When a reporter requested these records from Colorado, their general counsel responded that, "no such records existed" (Libit, 2023b).

Private institutions are at a distinct advantage because employees may email sensitive information with minimal risk that the contents of the email will be publicized later, subject to the exceptions outlined by Horsley and Sun (2012). However, there are still instances where private universities are incentivized to avoid a paper trail. For example, in 2016, Baylor commissioned an investigation into the response to sexual assaults over a multiple year-span on campus (Tracy, 2016). The final report was delivered as an oral presentation to Baylor's Board of Trustees, which meant the lengthy paper trail many were hoping for never came to light (Tracy, 2016). In this

context, the report was likely delivered in a verbal format to reduce the likelihood of leaks to the media rather than out of concern relating to state open records laws. Regardless, this example illustrates the underlying principle that modifying the form of communication may reduce the likelihood of disclosure of that information in the future.

The use of verbal communication over other methods that would create a record (i.e. email) is an important example of the types of inefficiencies inherent in certain avoidance tactics. There is a reason why the use of email and written communication is prevalent in the workplace. Written communication can save time, reduce the need for coordination, and provide parties with easily accessible records of communication. If employees are instructed to refrain from written communication to avoid creating a record, there is a cost associated with that change in behavior. Employees at institutions who are not subject to open records laws (i.e., employees at most private institutions) may be less likely to alter their behavior in this way, which allows them to spend more time and resources on other tasks that contribute to the competitive success of a program. This practice and the next one discussed – third parties – both support Orlin and Rogerson's (2019) theory that the format of information has a profound impact on its accessibility to the public. And both examples illustrate that university leadership has learned to prioritize form over substance in response to the specter of open records requests.

Avoidance Tactic 2: Third Parties

In 2021, emails obtained through a public records request revealed another method institutions use to avoid disclosing information: secure third-party portals. The *Washington Post* obtained an email chain from a number of leaders in the Big 10 conference relating to their response to COVID-19, in which Wisconsin Chancellor Rebecca Blank stated: "I would be delighted to share information, but perhaps we can do this through the Big 10 portal, which will assure confidentiality?" (Giambalvo & Maese, 2021, para. 3).

The portal she referred to was hosted by the Big Ten Conference, which is headquartered in Chicago, Illinois. Under Illinois State law, the Big 10 is not a "public body" subject to the disclosure requirements of their public records law (5 ILCS 140/1.2, 2 (2024)). Despite this rationale, the *Post* story quoted experts who argued "a third party system doesn't nullify public records laws" (Giambalvo & Maese, 2021, para. 14). However, the attorneys and administrators who processed public records requests at these institutions took a different approach. For example, the University of Wisconsin's public records custodian stated: "If anybody suggests that documents on a Big 10 secure site can be accessed through [Wisconsin] public records law, please let me know immediately. This is incorrect. These documents are not in my possession" (Giambalvo & Maese, 2021, para. 18).

This was not the first time the use of a secure portal had been contested. In 2007, the Associated Press and other news organizations sued the NCAA alleging the NCAA was using its secure portal to withhold documents related to an alleged academic integrity violation at Florida State University (*NCAA v. Associated Press*,

18 So. 3d 1201 (Fla. Dist. Ct. App. 2009)). The background of the investigation itself was fairly standard; Florida State officials discovered an academic advisor and a learning specialist were providing improper help to student-athletes and conducted a "thorough internal investigation." (pp. 1201-2). Florida State reported the results of that investigation to the NCAA, who opened their own investigation into the case. At the time, the NCAA used a password-protected portal to communicate with institutions and their counsel about enforcement matters. Media outlets filed requests for FSU to provide all documents related to the case. The NCAA informed FSU that two documents from the portal (the original Notice of Allegations document and the transcript of FSU's hearing before the Committee on Infractions) were property of the NCAA and should not be disclosed in response to these requests.

The Florida Court of Appeals held that use of the portal did not shield the documents from Florida's robust public records laws. The court began their analysis by defining what types of documents are subject to public records requests: "a document may qualify as a public record under [Florida's] statute if it was prepared by a private party, so long as it was 'received' by a government agent and used in the transaction of public business" (*NCAA v. Associated Press*, p. 1207). The NCAA argued the use of secure portal meant the institution never received the document, however, the court disagreed: "The term 'received' in section 119.011(12) refers not only to a situation in which a public agent takes physical delivery of a document, but also to one in which a public agent examines a document residing on a remote computer" (p. 1208). Ultimately, the court ruled against the NCAA on the grounds that FSU's counsel used the documents that were subject to the request to conduct official business – i.e., prepare FSU's defense to the Notice of Allegations.

The NCAA also argued these records were exempt from disclosure under the Family Educational Rights and Privacy Act, commonly known as FERPA. The court rejected this argument as well, holding that the requested documents did not qualify as "education records" because "they did not reveal the identity of the student." (p. 1211).

There are some notable takeaways from this case. First, the precise language of each state's law makes a significant difference in how courts and institutions apply these laws. The result may have been different had Florida's statute been restricted to documents within the "possession" of state agencies. Second, institutions should be wary of the blanket assertion that a portal assures confidentiality. Using the example at the beginning of this section, if one institution in the Big Ten were subject to a law with language similar to Florida's, then documents within the portal would be subject to open records requests if they were used in connection with public business in that state. Last, the NCAA is not alone in advocating for broad interpretations of privacy laws such as FERPA and HIPAA when it comes to these requests. Huml and Moorman (2017) detailed the inconsistent and ambiguous ways institutions apply FERPA in the context of NCAA academic scandals. Reporters have also noted how institutions expand their interpretation of the scope of these laws as much as possible to minimize disclosure obligations under open records laws (Rippenhoff & Jones, 2009).

These examples show the ways individuals and organizations use technology and "secure" portals to attempt to circumvent public records laws. Some public records laws – such as Florida's – are designed to combat the idea that entities can put form over substance and "assure confidentiality" by manipulating how documents are shared. Others are not as effective, and, as the example in the next section will demonstrate, policymakers have little incentive to close these loopholes.

Another avoidance tactic occurs when institutions create separate entities for the purposes of running an athletics department or fundraising (Ehrlich & Ternes, 2021; Geevarghese, 1996; LoMonte & Jones, 2023). These entities then claim to be immune from open records laws because they are not government entities. Litigation surrounding this tactic has emerged in recent years. Daniel Libit won a lawsuit against the University of New Mexico's "Lobos Club", the athletics department fundraising organization, after the university refused to provide documents related to a sponsorship agreement (*Libit v. University of New Mexico Lobo Club*, 516 P.3d 217, 2022 N.M.C.A. 43 (N.M. Ct. App., 2022)). The institutional defendants claimed the fundraising organizations possessed the documents and were separate entities from the university, which meant the documents were not in the university's possession. The court disagreed, holding that the language in New Mexico's open records laws required the documents possessed by the Lobos Club to be disclosed. In 2024, Libit filed another lawsuit, this time against the University of Wisconsin-Madison and the University of Wisconsin Foundation, alleging they were using a similar tactic to illegally withhold documents relating to a third-party NIL services contract (*Complaint*, *Libit v. University of Wisconsin, Madison,* Case No. 24-CV-0005511; Wisconsin Co. Cir. Court, Feb, 21 2024; Kamenick, 2024).

Avoidance Tactic 3: Buying Time

Mandatory response times also vary widely across states and institutions. These response times can provide competitive advantages, particularly in recruiting. Consider the following hypothetical:

> Institution 1 is in Georgia. Institution 2 is in Tennessee. On December 1, both institutions receive requests from a media member seeking records of any self-reported NCAA violations that occurred in the past year. Coaches at both institutions are concerned that the information released in this request will result in negative press and reduce the likelihood that a recruit will sign with them. This is a particular concern given the upcoming signing day on December 14. Tennessee state law provides that public records requests will be responded to within seven days (Tennessee Pub. Chapter 1720-01-11, 2023). Georgia State law provides athletics departments with up to 90 days to respond to open records requests (Georgia Code § 50-18-70, 2023).

The institution in Georgia has a competitive advantage over the institution in Tennessee because it has a legal basis to delay fulfilling the request until after a crucial point in the recruiting cycle. However, the institution in Tennessee may have the discretion to deny the request or provide an estimate of time needed to produce the documents. In this scenario, administrators at the institution in Tennessee are incentivized to ei-

ther delay or deny the request until after signing day. A delay or denial of this manner may go against the intent of the legislation, but, absent aggressive enforcement, it likely occurs at institutions that are afforded discretion with response times.

This tactic is emblematic of the race to the bottom concept discussed earlier in this paper. If both institutions had the same response time and knew the other institution would comply with the law, they could theoretically both comply with minimal threats to their ability to compete. However, if one of these institutions successfully lobbied for legislation to reduce the response time, then they could gain a potential advantage over their rival in the other state. In this scenario, both institutions may be incentivized to compete, which, if unchecked by citizen-stakeholders, would result in both states minimizing public access to records of college athletics departments.

University of Georgia head coach Kirby Smart recognized the benefits inherent in more lengthy response times when he lobbied for a bill that drastically expanded the window for response times for open records requests in 2016. One of the sponsors of the bill, which extended the response time for athletics programs from three days to ninety days, described Smart's involvement in the process:

> It's a similar subject that, from what I understand, came to light through Kirby Smart at UGA. It had to do with football teams or athletic departments that are recruiting people in state of Georgia. They had a (shorter) window where the documents were not yet public, but other states had 90 days. (Butt, 2016, para. 6)

SB323, also known as "Kirby's Law," was passed by a 166-2 margin in the Georgia House of Representatives and signed into law on April 11 (Emerson, 2016). This was a preview of what was to come in the name, image, and likeness (NIL) era, where state governments drafted and re-drafted legislation to reclaim competitive advantages related to collectives and institutional involvement with NIL (Boston, 2022; LoMonte & Jones, 2023). Thus, one of the most innocuous ways of evading public records requests – delay – paved the way for a race to the bottom that would go far beyond the response times that Georgia officials were concerned about.

Maintaining Access to Public Records in College Athletics

The tactics discussed above are symptoms of two main problems. First, while all citizens benefit from public records laws via improved accountability and the observer effects described earlier in this paper, efforts to secure open access to public records are being undermined by legislative attempts to secure comparative advantages for local institutions. This ultimately comes down to an issue of stakeholder salience. Elected officials who vote to expand response times or create exemptions for athletics entities are responding to perceived pressure to assist institutions within their state to succeed on the recruiting trail and playing field. The trend of exempting records relating to NIL documentation described by LoMonte and Jones (2023) is emblematic of how advocates for open access currently receive second priority to these competitive concerns.

The second problem is that there is a lack of coordination across states regarding open records laws. In other contexts, having 50 different state laws relating to open records may not be problematic because these laws are, in theory, a reflection of public preference. However, in the context of college athletics, it may be appealing for lawmakers to restrict access to minimize burdens on athletic department staff (i.e., facilitate the use of written communication without fear of disclosure) and gain perceived advantages over peer institutions in other states through expanding response times or creating exemptions for fundraising entities or athletics departments. To put it bluntly, the incentives to undercut other states and reduce access to public records are greater in the context of college athletics. These incentives lead to a lack of cooperation, which, if left unchecked, could result in a policy equilibrium in which access to records in intercollegiate athletics is substantially reduced. An ultimatum game framework from the economics literature (Thaler, 1988) provides a useful model for understanding the incentives facing both institutions. States may be engaged in a form of a prisoner's dilemma deciding whether to "cooperate" or "compete" with other states. If states compete, the result is a lack of access to records for citizens and short-term competitive advantages for each state. If states coordinate, policymakers can facilitate robust access to records while maintaining their competitive position relative to other states. In the short term, the incentive is to compete.

Table 1 in the Appendix summarizes the statutorily required response times and exemptions to open records requests in all 50 states. One thing that is immediately clear is there is no uniform response time across states. Most states require a response between three and 10 business days, but many of these states provide a basis for government agencies to delay responding to requests if a request is burdensome, confusing, or could potentially contain confidential information. This leeway creates the opportunity for officials to drag their feet when responding to open records requests, and is the type of delay discussed in the hypothetical in the previous section. If Institution A knows Institution B will likely delay a response to a request, Institution A is incentivized to delay their response as well. Some states, such as Georgia, Alabama, and North Dakota, contain either no deadline or a deadline that could potentially extend for months.

To add to the coordination challenge, response times are only one dimension through which states can differentiate themselves in open records laws. Statutory definitions of "records" vary across states, and, on top of that, judicial interpretations of these definitions will also vary depending on the court system. The lawsuits discussed earlier in Florida, New Mexico, and Wisconsin all centered around statutory interpretation of the term "possession". Small changes in these statutory definitions can be the difference between disclosure or nondisclosure for entire categories of documentation; the Utah state records appeal committee ruled NIL documents were included in the definition of "records" within their public records law (*Utah State Records Appeal Decision 2023-55* (2023)), while other states (e.g., Kentucky, Louisiana, Missouri, Texas) passed legislation to specifically exempt NIL documentation from disclosure. On top of this, states can also differ in whether they provide broad exemptions for certain entities. The laws in Pennsylvania and Delaware both contain

exemptions for entire universities (29 Del. Laws, c. 100 § 10001 et seq. (2024); 65 Pa. Stat. § 67.101 et seq. (2024)), while Florida exempts specific units associated with public athletics departments (FL Stat. § 119.01 et seq. (2024); Geevarghese, 1996). This lack of coordination across states poses challenges for stakeholders hoping to coordinate collection efforts across states.

This current "patchwork" of state laws, which LoMonte and Jones (2023) criticized in relation to open records requests for NIL documentation, has resulted in a race to the bottom that threatens the policy objectives of open records laws generally. The race to the bottom extends outside of the context of NIL documentation. The legislators who passed SB323 in Georgia indicated reclaiming a competitive advantage in recruiting was a motivation for passing that legislation (Butt, 2016). Lawmakers in Texas indicated the state relied on language used in other state's legislation to draft a 2023 revision to their law which exempted NIL documentation from public records requests (Libit, 2023a). While the patchwork of NIL legislation has accelerated the race to the bottom (LoMonte & Jones, 2023), the trend of reducing public access to these documents has implications for the other areas that open records requests can shed light on, including conference realignment (Gutman, 2023), fundraising (Musa, 2018), Title IX issues (Tracy, 2016), NCAA investigations (Huml & Moorman, 2017), and financial incentives facing head coaches (Libit, 2023b). Anecdotal evidence and previous literature support the notion that lack of coordination is a particularly troublesome issue in the context of athletics (Boston, 2022; Lavigne & Murphy, 2022; LoMonte & Jones, 2023; LoMonte & O'Keeffe, 2020; Menaker et al., 2021; Musa, 2018).

Proposed Solutions

The lack of coordination in state laws and their application across institutions is not a simple problem to fix. This lack of coordination is emblematic of some of the broader policy dilemmas facing stakeholders in college athletics in the aftermath of the *Alston* decision and the advent of NIL legislation, as Lomonte and Jones (2023) have correctly identified. In many ways, the lack of coordination regarding NIL legislation and the lack of coordination in open records laws are inextricably linked. Reclaiming competitive advantages has incentivized policymakers at the state level to roll back NIL laws (Prisbell, 2022), just as it incentivized policymakers in Georgia to enact SB323 (Butt, 2016). One solution would be for each state to adopt model legislation with consistent language across states. However, while this solution is desirable from a theoretical perspective, it has proved difficult from a pragmatic perspective.

Policymaking is inherently a balance of the desires of various groups of stakeholders – some more salient than others. Game theory and previous literature on the race to the bottom in competitive regulatory environments suggest the adoption of a uniform standard across 50 states may be unlikely (Greenwood, 2005; Menashe, 2020; Ribstein & Kobayashi, 1994). Even if a realistic uniform standard were adopted across all 50 states, policymakers in individual states would be pressured by salient stakeholder groups to adopt a more lenient approach in the name of reclaiming

a competitive advantage. These are the same pressures Lomonte and Jones (2023) identified as an obstacle to consistency in access to NIL records. Coaches, athletes, senior institutional leadership, and members of the public would likely pressure lawmakers to renege on any collective agreement across states, especially given the economic benefits that a substantial competitive advantage can provide in revenue-producing sports. This is what has happened with NIL legislation (Prisbell, 2022; Wittry, 2023a), as the National Conference of Commissioners on Uniform State Laws (NCCUSL) suggested a uniform NIL law in 2021, and it has yet to gain traction (Uniform Law Commission, 2021).

Despite these political difficulties, a state-level approach is likely the most feasible solution to this problem. Specific components to include in state open records legislation would include response times that are consistent with other states, specific exemptions for student privacy, specific exemptions for trade secrets (i.e., playbooks and practice film), penalties for noncompliance (including a cause of action for private plaintiffs), processes for costly or time-intensive requests, and specific definitions of what constitutes a "record" subject to disclosure. These mechanisms would help reduce the effectiveness of the avoidance tactics discussed in this paper and foster a more level playing field across college athletics.

Given the incentives facing policymakers at the state level, some may suggest a federal solution is the best realistic alternative to stopping the race to the bottom. A federal statute to provide uniformity in access to records laws in college athletics could potentially be included as part of a larger package related to the economic rights of college athletes. The benefit of federal legislation is that it would provide a mechanism to overcome the coordination problem inherent in state open records law. However, there are reasons to doubt a federal solution would be viable. First, building a consensus around federal legislation related to college athletics has proven difficult, despite immense lobbying efforts by the NCAA, conference commissioners, and institutional leadership (Henderson, 2023). Second, there is a question of whether Congress would have the legal authority to override state open records laws, as the 10th Amendment's anti-commandeering rule reserves legislative power not conferred on Congress by the Constitution for the states (*Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018)).

Given these challenges, the responsibility for stopping this race to the bottom falls upon the stakeholder groups open records laws are intended to protect. To address this at the state level, invested citizens need to coordinate a proactive grassroots effort to close the loopholes discussed in this paper, shorten response time windows, and hold elected officials accountable. The citizens who have the most to gain from robust access to public records also happen to be some of the most influential voices in political discourse: journalists, academics, and ordinary taxpayers whose money supports college athletic programs. Ultimately, those who care about college athletics need to demand accountability from legislators, institutional leaders, and the multitude of staff members who have authority over college athletes during the most formative years of their lives. Invested stakeholders should demand that these leaders seek the light of public accountability rather than hiding from it.

Conclusion

The central premise of this article is that existing incentives for employees and lawmakers are counterproductive to the public policy goals of open records laws, especially in the context of college athletics. Some of the most significant debates in public discourse are illuminated through public records requests to college athletics departments, including conference realignment (Gutman, 2023), Title IX investigations (Tracy, 2016), and the financial incentives facing head coaches (Libit, 2023b). LoMonte and Jones (2023) emphasized the importance of public oversight in relation to NIL activities, and this oversight is important outside of the context of NIL. In LoMonte and Jones's (2023) words:

> Now that the post-Alston NCAA has largely ceded NIL standard setting to state legislatures, the traditional check of NCAA oversight has become less meaningful. The NCAA's abdication portends something of a perfect storm for potential corruption: vast new sums of money pouring into athletics, with no centralized oversight by any regulatory entity**. If the public is not keeping watch, it is legitimate to ask, is anyone?** (p. 36, emphasis added)

The public's interest in maintaining open records in college athletics is immense. This article addressed the policy goals behind open records laws and explained how these goals are undermined in the current policymaking environment in college athletics. Institutions use several tactics to reduce their potential exposure to open records requests, and the lack of consistency in open records laws across states has resulted in a race to the bottom, which could potentially have consequences outside of college athletics. Coordinated legislation across states is necessary to ensure the light of public scrutiny – which Brandeis claimed is the best disinfectant – can continue to shine in college athletics. By advocating for the solutions proposed in this paper, citizens invested in democratic governance can secure robust oversight of some of the most important decisions made in sport for years to come.

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Appendix

Table 1
Open Records Laws Across States

State	Statute Citation	Residency Requirement	Response Time	Notes
Alabama	AL Code § 36-12-40 et seq.	Yes	Not legislated.	The average response time across public entities is 146 days.[a]
Alaska	AK Stat. § 40.25.110	No	10 business days	
Arizona	AZ Rev. Stat. § 39-121.01	No	5 business days	
Arkansas	AR Code Ann. § 25-19-101 et seq.	Yes	3 business days	
California	CA Govt. Code § 7920 et seq.	No	10-day limit for initial response, fulfilment times vary	.
Colorado	CO Rev. Stat. Ann. § 24-72-200 et seq.	No	3 working days, or 7 working days if extenuating circumstances exist	
Connecticut	CT Gen. Stat. § 1-200 et seq.	No	No specific deadline. Denial must be made within four days.	
Delaware	29 Del. Laws, c. 100 § 10001 et seq.	Yes	15 days	University of Delaware and Delaware State are exempt but may be required to release "documents relating to the expenditure of public funds."[b]
Florida	FL Stat. § 119.01 et seq.	No	No specific deadline. Only a "reasonable delay" permitted to retrieve and redact private information.[c]	"Considers athletics an exempt direct support organization, but often fulfills requests anyway."[b]

State	Statute Citation	Residency Requirement	Response Time	Notes
Georgia	O.C.G.A. § 50-18-70 et seq.	No	90 calendar days for athletics departments; within 3 business days for all other government entities.	SB 323 (2016) expanded window for athletic departments to 90 days.
Hawaii	HI Rev. Stat. § 92F-1 et seq.	No	10 business days	
Idaho	ID Stat. § 74-101 et seq.	No	Notification within 3 days; maximum of 10 days for fulfilment	
Illinois	5 ILCS 140/1	No	5 business days	
Indiana	IN Code § 5-14-3-1 et seq.	No	7 business days	
Iowa	IA Code § 22.1 et seq.	No	10 business days, up to 20 days if confidential information may be included in request	
Kansas	K.S.A. § 45-215 et seq.	No	3 business days for initial notification; delay permitted in specific circumstances	
Kentucky	KRS § 61.870 et seq.	No	5 business days	NIL document exemption
Louisiana	LA Rev. Stat. § 44:1 et seq.	No	3 business days	NIL document exemption
Maine	ME Rev. Stat. Tit. 1 § 400 et seq.	No	5 working days for initial notification; agency must provide "good faith" estimate for response time.	
Maryland	MD General Provisions Code § 4-101 et seq.	No	30 days	
Massachusetts	MA Gen. Laws Ch. 66 § 1 et seq.	No	10 business days; agencies may send notice of a 10 day extension.	

State	Statute Citation	Residency Requirement	Response Time	Notes
Michigan	MI Comp. Laws § 15.231	No	5 business days; agencies may send notice of a 10 day extension.	
Minnesota	MN Stat. § 13.03	No	10 business days	
Mississippi	MS Code Ann. § 25-61-1 et seq.	No	7 working days	
Missouri	MO Rev. Stat. §610.010 et seq.	Yes	3 days	NIL document exemption
Montana	MT Code Ann. § 2-6-1001 et seq.	No	Not legislated	
Nebraska	NE Rev. Stat. § 84-712 et seq.	No	4 business days	
Nevada	NV Rev. Stat. § 239.001 et seq.	No	5 business days	
New Hampshire	NH Rev. Stat. § 91-A:1 et seq.	Yes	5 business days	
New Jersey	NJ Rev. Stat. § 47:1A-1 et seq.	No	7 business days	
New Mexico	NM Stat. § 14-2-1 et seq.	No	15 business days	
New York	NY PBO Article 6 § 84 et seq.	No	5 business day limit for initial response; fulfilment times may vary depending on request.	
North Carolina	NC G.S. § 132-1 et seq.	No	No specific time; agencies must respond "as promptly as possible."	
North Dakota	ND Cent. Code § 44-04-18 et seq.	No	No specific time; agencies must respond "within a reasonable time."	
Oklahoma	OK Stat. Tit. 51 § 24A.1 et seq.	No	Not legislated	
Ohio	OH Rev. Code § 149.43	No	3 business day limit for initial response; fulfilment times may vary depending on request.	

State	Statute Citation	Residency Requirement	Response Time	Notes
Oregon	ORS § 192.001 et seq.	No	10 business days, but there are exceptions for certain requests depending on volume, etc…	
Pennsylvania	65 Pa. Stat. § 67.101 et seq.	No	5 business days for initial response, agencies may invoke a 30 day extension period.	Penn State, Pittsburgh, and Temple University are exempt under state law.[b]
Rhode Island	R.I. Gen. Laws § 38-2-1 et seq.	No	10 business days unless extended "for good cause" pursuant to R.I. Gen. Laws § 38-2-3(e).	
South Carolina	SC Code § 30-4-10 et seq.	Yes	20 days	
South Dakota	SD Cod. Laws § 1-27-1 et seq.	No	Initial response required within 10 days; no specific deadline if agency requests extension.	
Tennessee	Tenn. Code Ann. § 10-7-503 et seq.	Yes	7 business days	
Texas	TX Stat. Gov. Code § 552.001 et seq.	No	10 business days	NIL documents exemption
Utah	UT Code § 63G-2-101	No	10 business days; 5 business days if requester made an expedited response request	NIL documents are public records.[d]
Vermont	1 V.S.A. § 315 et seq.	No	Initial response within 3 business days; extension up to 10 days.	
Virginia	VA Code § 2.2-3700 et seq.	Yes	12 days; agencies may petition courts for extension.	
Washington	RCW 42.56	No	5 business days	
West Virginia	WV Code § 29B	No	5 business days	

State	Statute Citation	Residency Requirement	Response Time	Notes
Wisconsin	WI Stat. § 19.21 et seq.	No	No statutory deadline, general guidance is 10 business days for "a simple and straightforward request"[e]	
Wyoming	WY Stat. Ann. § 9-2-405 et seq.	No	30 calendar days	

Note: In constructing this table, I relied on existing surveys from both the National Conference of State Legislatures (NCSL) and *The Intercollegiate*.

[a] Stephenson (2023)
[b] The Intercollegiate, "Division I FOIA Directory"
[c] *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Florida Supreme Court, 1984).
[d] Utah State Records Appeal Decision 2023-55 (2023)
[e] Wisconsin Department of Justice. (n.d.)