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Accreditation Information Produced By United States Law Schools To The American Bar Association Should Be Made Available To The Public From Both Law and Policy Perspectives

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ACCREDITATION INFORMATION PRODUCED BY UNITED STATES LAW SCHOOLS TO THE AMERICAN BAR ASSOCIATION SHOULD BE MADE AVAILABLE TO THE PUBLIC FROM BOTH LAW AND POLICY PERSPECTIVES

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This article argues that, from a legal perspective, the American Bar Association ("ABA") is the functional equivalent of a government agency and so is subject to the United States Freedom of Information Act. Under *Soucie v. David* and related cases, the fact that the ABA has the final decision-making authority to decide whether a United States law school is or is not to be accredited renders it the functional equivalent of a government agency, and the ABA's refusal to make available to the public the voluminous amount of important information produced to the ABA by law schools going through the accreditation and accreditation review processes is illegal and would not likely survive a challenge in court. In addition, as the closure of a number of United States law schools over the last few years, and in particular the closure of the Charlotte School of Law in 2017, make clear, a strong public policy also exists for the ABA to make available to the public the information it obtains from law schools during accreditation and accreditation review processes.

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I. THE UNITED STATES DEPARTMENT OF EDUCATION HAS DELEGATED THE AUTHORITY TO ACCREDIT AMERICAN LAW SCHOOLS TO THE AMERICAN BAR ASSOCIATION ("ABA")

The American Bar Association ("ABA"), and specifically the ABA's Council of the Section of Legal Education and Admissions to the Bar ("Council"), is the accrediting agency for law schools in the United States.[2] In 1921, the ABA adopted the first minimum standards for prospective attorneys, and in 1952, the United States Department of Education ("DOE") formally recognized the Council as the accrediting agency for American law schools.[3]

The DOE's role in delegating accrediting authority to the Council is important. While most oversight of educational institutions occurs at the state level, the federal government also regulates educational institutions, including institutions of higher learning such as universities, graduate schools, and professional schools.[4] The federal government conditions its provision of student aid funding to those institutions of higher learning in the United States on their compliance with numerous federal regulations, and those regulations are generally imposed and enforced by the DOE, ostensibly for the purpose of protecting students and other institutional stakeholders.[5]

Specific examples of such DOE regulations include, first, the DOE's requirement that institutions of higher learning comply with certain financial responsibility standards.[6] In addition, such institutions only receive federal funding if they comply with the Clery Act, which requires disclosures pertaining to campus security and discrimination.[7] The DOE has also proposed regulations which require

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[2] *Institutional Accrediting Agencies,* U.S. DEP'T OF EDUC. (Sept. 29, 2021), https://www2.ed.gov/admins/finaid/accred/accreditation_pg6.html#RegionalInstitutional.

[3] *ABA Timeline,* AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/timeline/; U.S. DEP'T OF EDUC. *supra* note 2.

[4] *Overview of Accreditation in the United States*, U.S. DEP'T OF EDUC. (Sept. 29, 2021), https://www2.ed.gov/admins/finaid/accred/accreditation.html#Overview.

[5] ALEXANDRA HEGJI, CONG. RSCH. SERV., R43826, AN OVERVIEW OF ACCREDITATION OF HIGHER EDUCATION IN THE UNITED STATES 6 (2020).

[6] *Financial Responsibility Standards*, NAT'L ASS'N OF COLL. & UNIV. BUS. OFFICERS, https://www.nacubo.org/Advocacy/Issues/Department-of-Education-Regulations#Financial_Responsibility_Standards (last visited April 15, 2020).

[7] *Title IX and Campus Safety & Security*, NAT'L ASS'N OF COLL. & UNIV. BUS. OFFICERS, https://www.nacubo.org/Advocacy/Issues/Department-of-Education-Regulations#Title_IX_and_Campus_Safety (last visited March 30, 2020).

institutions of higher learning to disclose their graduation and employment rates of their students after graduation.[8] If an institution of higher learning fails to comply with such regulations, the DOE may terminate, suspend, or otherwise limit the federal funding that institution receives.[9]

The crux of the DOE's role in regulating institutions of higher learning in the United States, however, is the DOE's recognition of accrediting agencies. In 1952, having no uniform system to ensure quality in institutions of higher learning, the DOE outsourced this quality control function to a number of accrediting agencies.[10] Importantly, the DOE outsourced its oversight function to the accrediting agencies only after it first considered creating its own accreditation system for institutions of higher learning.[11] The specific purposes for the DOE's recognition of the accrediting agencies are enumerated in Title 34 of the Code of Federal Regulations, Part 602.[12]

Accrediting agencies must satisfy a number of criteria before the DOE will recognize them.[13] For example, an accrediting agency must demonstrate its experience in accreditation, as well as that the accrediting agency's standards will ensure that the institutions of higher learning it accredits are able to provide educational instruction of sufficient quality.[14] In addition, an accrediting agency must employ certain methods to assess whether the institutions it accredits are in compliance with its standards.[15] The DOE continues to maintain oversight over the accrediting agencies by determining which specific institutions the accrediting agencies are entitled to accredit, as well as by requiring the accrediting agencies to submit to the DOE a number of reports and other relevant information.[16] As discussed below, however, certain other documents generated by the accrediting agencies during the accreditation process are designated as confidential by and remain internal to those accrediting agencies and are thus shielded from public scrutiny.

The federal Higher Education Act ("HEA") also plays an important role with regard to the accreditation of institutions of higher

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[8] Press Release, Justin Hamilton, Department on Track to Implement Gainful Employment Regulations; New Schedule Provides Additional Time to Consider Extensive Public Input, U.S. DEP'T OF EDUC. (Sept. 24, 2010) (on file with author).
[9] 34 C.F.R. § 600.41 (2019).
[10] HEGJI, *supra* note 5 at 7.
[11] *Id.*
[12] 34 C.F.R. § 602.1 (1999).
[13] HEGJI, *supra* note 5 at 8.
[14] 34 C.F.R. § 602.12 (2019); 34 C.F.R. § 602.16 (2019).
[15] 34 C.F.R. § 602.17 (2019).
[16] *See* 34 C.F.R. § 602.27 (2019).

learning in the United States. The HEA mandates that only institutions accredited by an accrediting agency recognized by the DOE may receive federal funding.[17] Many, if not most, institutions of higher learning rely heavily on that federal funding, with some institutions receiving as much as ninety percent of their revenue in the form of federal financial aid.[18] While participating in the HEA and receiving federal funding is technically voluntary, many institutions of higher learning likely have no real choice but to comply with the DOE's regulations and obtain federal financial aid if they are to remain competitive in the tightening educational market.

II. LAW SCHOOLS ARE REQUIRED TO PRODUCE A VOLUMINOUS AMOUNT OF IMPORTANT INFORMATION TO THE ABA AS PART OF THE PROVISIONAL ACCREDITATION AND ACCREDITATION REVIEW PROCESSES

As noted above, the agency recognized by the DOE to accredit American law schools is the ABA and, specifically, the Council. Law schools seeking ABA accreditation must comply with the Council's Standards and Rule of Procedure for Approved Law School ("Standards").[19] The Standards attempt to ensure that law schools provide an effective legal education, and they also define the process by which law schools may obtain ABA accreditation.[20] The first step a law school seeking accreditation must take is to obtain provisional approval from the Council.[21]

The Council will confer provisional approval upon a law school that "has achieved substantial compliance with the Standards and presents a reliable plan for bringing the law school into full compliance with each of the Standards within three years after receiving provisional approval."[22] A law school's application for provisional

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[17] HEGJI, *supra* note 5 at 7.

[18] *See* Robert Kelchen, *How Much Do For-Profit Colleges Rely on Federal Funds?* BROOKINGS (Jan. 11, 2017), https://www.brookings.edu/blog/brown-center-chalkboard/2017/01/11/how-much-do-for-profit-colleges-rely-on-federal-funds/.

[19] *Schools Seeking ABA Approval*, AM. BAR ASS'N. https://www.americanbar.org/groups/legal_education/accreditation/schools-seeking-aba-approval/ (last visited February 27, 2020).

[20] *Id.*

[21] *Id.*

[22] AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021, at 5 (2020),

approval must include a significant amount of information, including a feasibility study detailing the law school's goals, its prospective students, and the resources it will require to remain operational.[23] The law school must also provide its financial statements for the previous three years and certain other information required by the Council.[24] To receive provisional approval, the law school must also demonstrate to the Council that it will be providing a legal education in a geographic area having sufficient employment demand for the law schools' graduates.[25] Thus, from the outset of the law school accreditation process, the Council possesses a considerable amount of detailed information regarding the law schools it accredits, information which would obviously be relevant and of interest to prospective students and other stakeholders of those law schools.

The amount of detailed information the ABA possesses about a particular law school and the viability and success of its operations only increases once that law school has been fully accredited. Accredited law schools are required to undergo a comprehensive site evaluation by the ABA at least once every ten years.[26] During each site evaluation, the law school must submit a voluminous amount of additional information to the ABA regarding the law school's program of legal education and compliance with the Standards, as well as all underlying documents supporting that information.[27] Based upon the authors' personal experiences with the ABA site evaluation process, during the site evaluation process a great deal of correspondence, both electronic and otherwise, is exchanged by the law school and the ABA. The information submitted by a law school during the ABA's site evaluation process, together with the correspondence exchanged by the law school and the ABA during the site evaluation process, will be referred to collectively herein as the "Site Evaluation Information."

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https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf.

[23] AM. BAR ASS'N, *supra* note 19.

[24] AM. BAR ASS'N, *supra* note 22, at 63.

[25] AM. BAR ASS'N, *supra* note 19.

[26] AM. BAR ASS'N, *supra* note 22, at 52.

[27] *Id.* at 53.

III. DESPITE ITS OBVIOUS INTEREST AND BENEFIT TO CONSUMERS, THE ABA HAS DECLARED THE SITE EVALUATION INFORMATION TO BE CONFIDENTIAL AND REFUSES TO PRODUCE IT IN RESPONSE TO VALID REQUESTS UNDER THE UNITED STATES FREEDOM OF INFORMATION ACT

The Site Evaluation Information is extremely comprehensive and would obviously be extremely relevant and of great interest to prospective law students and other stakeholders in the law schools accredited by the ABA. The ABA, however, designates the Site Evaluation Information as confidential[28] and refuses to make it available upon request. For example, on May 4, 2020, the authors submitted a request for information pursuant to the United States Freedom of Information Act, 5 U.S.C. § 552 et seq. ("FOIA") to William E. Adams, who is the Managing Director of the ABA's Section of Legal Education and Admissions to the Bar. The authors requested that the ABA provide copies of:

- The most recent Site Evaluation Questionnaire ("SEQ") submitted to the Section, the ABA, and/or any other department, section, council, or subdivision thereof by Lewis & Clark Law School[29], also known as the Northwestern School of Law of Lewis and Clark College, located at 10015 S.W. Terwilliger Boulevard, Portland, Oregon 97219; and

- The most recent Self-Assessment submitted to the Section, the ABA, and/or any other department, section, council, or subdivision thereof by Lewis & Clark Law School, also known as the Northwestern School of Law of Lewis and Clark College, located at 10015 S.W. Terwilliger Boulevard, Portland, Oregon 97219.

On May 22, 2020, ABA Senior Associate General Counsel Deborah K. Boling replied to the authors' FOIA request and refused to produce the requested Site Evaluation Information. Ms. Boling cited two legal bases for the ABA's refusal:

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[28] *Id.* at 76.

[29] Lewis & Clark Law School is the alma mater of one of this article's authors, Henry Webb, who graduated from that law school in 1996.

> FOIA, which is part of the Administrative Procedure Act, codified at 5 U.S.C. §§ 551-559, provides that "agency" as defined in 5 U.S.C. § 551(1) includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f)(1). Neither the ABA nor its entity, the Section, is an "agency" under this definition. Therefore, the ABA and the Section are not subject to FOIA. (See also Thomas M. Cooley Law School v. American Bar Association, 459 F.3d 705, 712 (6th Cir. 2006) (finding that "the ABA . . . is not a government authority and thus is not governed by the [Administrative Procedure] Act."))
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> Further, the Section's accreditation process is governed by the Rules of Procedure for Approval of Law Schools (the 'Rules'). Pursuant to Rule 44, except as provided elsewhere in the Rules or Internal Operating Practices, all matters relating to the accreditation of a law school are confidential. The Section [of Legal Education and Admissions to the Bar] is bound by the Rules under U.S. Department of Education regulations, including 34 CFR §§ 602.16-602.28.

IV. AS THE FUNCTIONAL EQUIVALENT OF A GOVERNMENT AGENCY WITH FINAL DECISION-MAKING AUTHORITY, THE ABA IS SUBJECT TO FOIA REQUESTS UNDER *SOUCIE* AND ITS PROGENY

As demonstrated below herein, however, neither of the ABA's stated legal bases for its denial of the authors' FOIA request have merit. The authors opine that if this specific issue were ever actually litigated, the ABA would likely be held to be an "agency" as defined by FOIA, and would be required to produce the Site Evaluation Information upon request, subject to the redaction of the information and documents specifically exempted from production under FOIA.

FOIA plainly requires any agency of the United States federal government to produce to the public upon request all responsive records or information in that agency's possession or control.[30] FOIA is generally interpreted in favor of broad disclosure, and an agency refusing to disclose records or information properly requested under

[30] 5 U.S.C. § 552(a) (2016).

FOIA bears the burden of demonstrating why the nondisclosure is justified under nine, narrowly-construed exemptions: (1) information classified to protect national security; (2) information related solely to the internal personnel rules and practices of an agency; (3) information prohibited from disclosure by another federal law; (4) trade secrets or commercial or financial information that is confidential or privileged; (5) privileged communications within or between agencies; (6) information that if disclosed would invade another individual's personal privacy; (7) information compiled for law enforcement purposes; (8) information concerning the supervision of financial institutions; and (9) geological information on wells.[31]

FOIA originally defined an "agency" subject to FOIA as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," which definition is for all material purposes identical to the definition of "agency" included in the United States Administrative Procedure Act, 5 U.S.C. § 551 et seq. ("APA"). As a result, "interpretations of the phrase 'authority of the Government of the United States' have been applied interchangeably by courts in the FOIA and APA contexts."[32] In 1974, FOIA was amended to expand the scope of the agencies subject to FOIA requests: "[A]gency as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President; or any independent regulatory agency . . ."[33]

In determining whether an entity is an "agency" subject to FOIA, the courts have applied three tests: (1) the substantial control test; (2) the functional equivalency test; and (3) the categorical test. Under the functional equivalency test, first articulated by the court in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), it is clear that the ABA is the functional equivalent of a governmental agency, and so is in fact an "agency" for purposes of FOIA.[34]

In *Soucie*, the court concluded that the APA "confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions."[35] In that case, the court determined that the Office of Science and Technology was an "agency"

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[31] 5 U.S.C. §§ 552(a)(4)(B), 552(b) (2016).
[32] *Flaherty v. Ross*, 373 F. Supp. 3d 97, 104 n.2 (2019).
[33] H.R. 12471, 93rd Cong. (1974).
[34] *Flaherty*, 373 F. Supp. at 104.
[35] *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

for purposes of FOIA because it engaged in the "independent function of evaluating federal programs."[36]

Similarly, in *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168, 95 S.Ct. 1492, 44 L.Ed. 2d 57 (1975), the court examined entities known as "Regional Boards" which aided the government's Renegotiation Board in the review and renegotiation of federal government contracts.[37] The *Grumman* court concluded that the Regional Boards were "agencies" for purposes of the APA, as they had been "granted what *Soucie* termed 'substantial independent authority.'"[38] The court found it important that the Regional Boards had their own investigating and negotiating personnel and that they negotiated directly with private contractors before any involvement by the Renegotiation Board.[39] The court also emphasized that the Regional Boards were "empowered to make final decisions not even reviewable by the Renegotiation Board in certain cases that did not meet a minimum contract amount.[40]

In *Washington Research Project, Inc. v. Dept. of Health, Education, and Welfare*, 504 F.2d 238, 246 (D.C. Cir. 1974), the court, applying *Soucie* and *Grumman*, reached the opposite conclusion, holding that initial review groups ("IRGs") established by the National Institute of Mental Health ("NIMH") were not agencies for purposes of FOIA, because they "confine[d] themselves to making recommendations."[41] In effect, the court held, the IRGs were merely consultants without final decision-making authority. According to the court, "[t]he important consideration [was] whether [the IRG] ha[d] any authority in law to make decisions." Because in that case the final decision-making authority rested with the NIMH rather than with the IRGs, the IRGs were held not to be "agencies" for purposes of FOIA.[42]

Finally, in *Dong v. Smithsonian Institute*, 125 F.3d 877 (D.C. Cir. 1997), the court determined that the Smithsonian did not constitute an "agency" under the Privacy Act, 5 U.S.C. § 552(a)., which, like FOIA, incorporates the APA's general definition. Crucially, the court

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[36] *Flaherty*, 373 F. Supp. at 104 (citing *Soucie*, 448 F.2d at 1075 n.27).

[37] *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 482 F.2d 710 (D.C. Cir. 1973).

[38] *Id.* at 714-15.

[39] *Id.* at 715.

[40] *Flaherty*, 373 F. Supp. at 105 (citing *Grumman Aircraft Eng'g*, 482 F.2d at 714 n.20, 715).

[41] *Washington Rsch. Project, Inc. v. Dept. of Health, Educ., and Welfare*, 504 F.2d 238, 246 (D.C. Cir. 1974).

[42] *Flaherty*, 373 F. Supp. at 105 (citing *Washington Rsch. Project, Inc.*, 504 F.2d at 248).

found that the Smithsonian did not exercise the "final and binding" authority required in order for an entity to be designated an "agency" under the Privacy Act, FOIA, or the APA.[43]

In *Flaherty v. Ross*, cited above, the court reviewed the above cases and noted that "[i]n determining whether [an entity] is an 'agency' under the APA, these cases provide instructive principles. They repeatedly emphasize that the touchstone of agency status is the exercise of 'substantial independent authority.'"[44] The *Flaherty* court ultimately concluded that the Fishery Management Council under consideration was not an "agency" for purposes of the APA. Even though "[t]he Council, along with its regional peers, is provided considerable resources to conduct research, issue reports, and develop proposals, ... the Council's plans and accompanying regulations still do not 'achieve the dignity of an agency's final decision' until the Secretary reviews and adopts them. . . . And thus the Council does not 'by law ha[ve] authority to take final and binding action affecting the rights and obligations of individuals.'"[45]

Returning to the issue of whether the ABA is an "agency" for purposes of FOIA, if this specific issue were ever actually litigated, it seems likely that a court, applying *Soucie* and its progeny, would determine that the ABA is in fact an "agency" as defined in 5 U.S.C. § 551 et seq., as the ABA acts as the functional equivalent of the DOE for purposes of law school accreditation. In accrediting American law schools, the ABA clearly exercises the "substantial independent authority" required for "agency" status under those cases, as the ABA independently investigates law schools applying for either provisional accreditation or full accreditation and, upon the conclusion of the ABA's investigation, it is the ABA itself which makes the final decision regarding a law school's accreditation.

Like the Regional Boards at issue in *Grumman*, the law school accreditation process is conducted by the ABA's own personnel. When the ABA conducts a site evaluation of a law school, it is a team of ABA employees, not DOE employees, who communicates with the law school, obtains the required information from the law school, and ultimately visits the law school itself. Any negotiations between the law school and the ABA regarding its accreditation status and any additional requirements the ABA wishes to impose on the law school are also conducted by the ABA's employees, not by the DOE upon recommendation of the ABA. Although the ABA is required to make

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[43] *Flaherty*, 373 F. Supp. at 106 (citing *Dong v. Smithsonian Inst.*, 125 F.3d 877, 881 (D.C. Cir. 1997)).

[44] *Flaherty*, 373 F. Supp. at 106.

[45] *Id.* at 107.

certain reports to the DOE about the ABA's Standards, the entire process of investigating a law school and ultimately making the decision whether to accredit that law school is conducted by the ABA without the DOE's direct involvement or oversight.[46]

Most importantly, it is the ABA itself, and not the DOE, which makes the final determination of whether a law school is accredited. An ABA publication, *The Law School Accreditation Process,* provides that "[w]hen a school seeks provisional approval, the final decision on the school's application is made by the Council. . . . Decisions on full approval are made only by the Council, by reviewing the findings, conclusions, and recommendations of the Accreditation Committee. If the decision of the Council is to grant full approval, that decision is final and effective immediately upon notice to the school."[47] It is thus clear that, with regard to law school accreditation, the ABA possesses the final decision-making authority the *Washington Research Project, Inc.* court deemed so important. Further, unlike the IRGS in that case, which "confine[d] themselves to making recommendations," and so were held to be "consultants without final decision-making authority," the ABA does not merely make recommendations about accreditation decisions to the DOE; instead, the ABA itself makes the final decision with regard to a law school's accreditation, and as such possesses the requisite final decision-making authority for "agency" status under FOIA.

In sum, under the functional equivalency test articulated in *Soucie* and its progeny, the ABA is an "agency" for purposes of FOIA, as it possesses the "substantial independent authority" and "final decision-making authority" those cases require for "agency" status under 5 U.S.C. § 551 *et seq.*

As noted above, in denying the authors' FOIA request the ABA also cited the case *Thomas M. Cooley Law School v. American Bar Association*, 459 F.3d 705 (6th Cir. 2006) for the proposition that "the ABA . . . is not a government authority and thus is not governed by the [Administrative Procedure] Act." While the court in that case did make the above statement regarding the ABA not being a government authority governed by the APA, that statement was a one-off, conclusory statement made by the court without any analysis, citation to authority, or other support whatsoever. As demonstrated herein, however, the actual determination of whether an entity like the ABA is an "agency" for purposes of FOIA (or the APA) is considerably more

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[46] *See* AM. BAR ASS'N, *supra* note 22 (recognizing the Council of the American Bar Association's occupation as "accreditor" and "approver" of law school programs).
[47] AM. BAR ASS'N ABA., THE LAW SCHOOL ACCREDITATION PROCESS 6-7 (2016).

nuanced than the court's offhand statement in *Thomas Cooley Law School* would indicate.

In *Flaherty, supra*, at 104, the court noted as follows: "[a]s the D.C. Circuit has recognized, that definition [of "agency" under the APA] is 'not entirely clear.' . . . Since *Soucie*, the Circuit has repeatedly grappled with the contours of the 'substantial independent authority' standard."[48] Further, as noted above, the *Flaherty* court also held that the "touchstone of agency status is the exercise of 'substantial independent authority."[49] Finally, the *Flaherty* court noted that while the cases it considered presented certain examples of that substantial independent authority, those cases also "underscore the need to examine the structure, function, and mandate of [the agency] itself. . . . Indeed, the Circuit has recognized that given 'the myriad organizational arrangements for getting the business of government done[,] . . . the unavoidable fact is that each new arrangement must be examined anew and in its own context."[50]

Given the above statements of the *Flaherty* court regarding the complexities involved in determining whether an entity is an agency under FOIA, one aside by the court in the *Thomas M. Cooley Law School* case is a weak and unconvincing legal basis upon which to base the ABA's position that it is not an "agency" for FOIA purposes.

V. THE ABA'S ARGUMENT THAT THE SITE EVALUATION INFORMATION IS CONFIDENTIAL IS UNCONVINCING

In addition, the second legal basis articulated by the ABA in its denial of the authors' FOIA request is similarly unconvincing. As noted above, the ABA stated in its denial that because the ABA's own Standards for law school accreditation state "all matters relating to the accreditation of a law school are confidential," and because the applicable DOE regulations require the ABA to develop and follow the Standards, the ABA is thus required to maintain the confidentiality of the Site Evaluation Information requested by the authors in their FOIA request.

Importantly, nothing in the DOE regulations cited by the ABA, 34 C.F.R. §§ 602.16-602.28, specifically requires the ABA to maintain the confidentiality of the Site Evaluation Information. Instead, those sections of the Code of Federal Regulations require only that an

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[48] *Flaherty*, 373 F. Supp. at 104.

[49] *Flaherty*, 373 F. Supp. at 106.

[50] *Flaherty*, 373 F. Supp. at 106 (quoting *Washington Research Project, Inc. v. Dept. of Health, Educ., and Welfare*, 504 F.2d 238, 246 (D.C. Cir. 1974)).

accrediting agency develop and follow certain standards for accreditation, and it is the ABA itself, rather than the DOE, the United States Congress, or any other agency or department of the federal government, which has designated the Site Evaluation Information as confidential: "Except as otherwise provided in these Rules or Internal Operating Practices, all matters relating to the accreditation of a law school, including any proceedings, hearings or meetings of the Council, shall be confidential. . . . Except as provided in Part IX of these Rules, site evaluation and fact-finding reports shall be confidential."[51]

It is thus self-serving for the ABA, in response to a request for a law school's Site Evaluation Information, to claim that federal law somehow prevents the ABA from releasing that "confidential" information, when it is the ABA's own Standards, rather than anything specific to the applicable federal law, which arguably renders that information confidential in the first place. The ABA unilaterally decided to protect the Site Evaluation Information as confidential, and the ABA could revise the Standards to eliminate that confidentiality as it deemed fit or as it was directed to do by the DOE. Further, as demonstrated in more detail below, the ABA's designation of the Site Evaluation Information as confidential, and its refusal to disclose the Site Evaluation Information to prospective students and other stakeholders, is harmful to consumers. In sum, not only as a legal matter, but also as a matter of policy, the ABA should immediately modify its Standards to make the Site Evaluation Information freely available to the public, subject to any of the nine applicable FOIA exemptions discussed above.

VI. FROM BOTH LEGAL AND POLICY PERSPECTIVES, THE DOE SHOULD REQUIRE THE ABA TO MAKE THE SITE EVALUATION INFORMATION AVAILABLE TO PROSPECTIVE STUDENTS AND OTHER STAKEHOLDERS

The ability of prospective students and other stakeholders of United States law schools to obtain the Site Evaluation Information maintained as confidential by the ABA is of increased importance given the recent failures of a number of ABA-accredited law schools and the disastrous effects those failures have had upon those law schools' students, alumni, faculty, staff, and other stakeholders. In the last few years alone, a number of ABA-accredited law schools have ceased to operate, including the Charlotte School of Law and the Indiana Tech Law School in 2017, the Arizona Summit Law School in

[51] AM. BAR ASS'N, *supra* note 22, at 76.

2018, and Whittier Law School and the Valparaiso University School of Law in 2020. At least two additional ABA-accredited law schools, the University of La Verne College of Law and the Thomas Jefferson Law School have lost their ABA accreditation.[52]

The failure and subsequent closure of the Charlotte School of Law perhaps best illustrates why, as a matter of policy, the ABA should eliminate the Standards' requirement that the Site Evaluation Information be kept confidential or, if the ABA remains unwilling to eliminate that requirement voluntarily, the DOE should mandate that it do so. From the perspective of prospective students and other stakeholders of the Charlotte School of Law, nothing was amiss in the law school's operations until October 2016, when the ABA's Council announced it was placing the Charlotte School of Law on probation for its failure to comply with the ABA's accreditation Standards, including specifically the Standards' requirement that the law school make certain disclosures to students.[53] Immediately thereafter, the law school's enrollment began to plummet and the law school lost its ability to participate in federal student loan programs.[54] In 2017, the North Carolina attorney general's office determined that the Charlotte School of Law's license to operate within the State of North Carolina had been allowed to expire[55], and by August 2017, the Charlotte School of Law had shut down completely.[56]

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[52] Paul Caron, *Western State May be Sixth ABA-Accredited Law School to Close Since 2016*, TAXPROF BLOG (Mar. 23, 2019), https://taxprof.typepad.com/taxprof_blog/2019/03/western-state-may-be-sixth-aba-accredited-law-school-to-close-since-2016.html; *State Bar of California Accreditation*, UNIV. OF LA VERNE, *https://law.laverne.edu/accreditation/;* Lyle Moran, *It's Official: Thomas Jefferson Law Will Lose its National Accreditation*, VOICE OF SAN DIEGO (Nov. 21, 2019), https://www.voiceofsandiego.org/topics/education/its-official-thomas-jefferson-law-school-will-lose-its-national-accreditation/.

[53] Public Notice of Council of Am. Bar Ass'n Decision to Place Charlotte School of Law on Probation, AM. BAR ASS'N (Oct. 2016), https://data.lawschooltransparency.com/documents/aba_actions/2016_10_Charlotte.pdf.

[54] Elizabeth Olson, *For-Profit Law School Faces Crisis After Losing Federal Loans*, N.Y. TIMES (Feb. 7, 2017), https://www.nytimes.com/2017/02/07/business/dealbook/for-profit-charlotte-school-of-law-loans.html.

[55] Stephanie Francis Ward, *Charlotte School of Law's State License Expires After Missed Deadline*, AM. BAR ASS'N JOURNAL (Aug. 11, 2017), https://www.abajournal.com/news/article/charlotte_school_of_law_missed_state_license_deadline_what_happens
_next.

[56] Elizabeth Olson, *For-Profit Charlotte School of Law Closes*, N.Y. TIMES (Aug 15, 2017), https://www.nytimes.com/2017/08/15/business/dealbook/for-profit-charlotte-school-of-law-closes.html.

The failure and closure of the Charlotte School of Law inflicted enormous damage upon its students and other stakeholders. Hundreds of former students filed lawsuits[57] alleging that the law school engaged in fraud by intentionally misleading them regarding the viability and strength of the law school's program of legal education and compliance with ABA standards: "During [2016], CSL continued to represent that it was ABA accredited and in full compliance with all ABA standard without informing prospective or current students about the ABA's findings. . . . [In 2016], the [DOE] denied CSL's Recertification Application to Participate in the Federal Student Financial Assistance Program based, in part, on its findings that CSL had improperly misrepresented its accreditation status and bar passage rates to its students."[58]

The more than one hundred students who were still enrolled at the Charlotte School of Law when it closed were stuck with an average of more than $100,000 in non-dischargeable law school loans, no law degree, and no law school to attend.[59] While some Charlotte School of Law students were eligible for federal loan forgiveness, students who withdrew from the law school more than two hundred and twenty-four days prior to the school's closure were not eligible for that loan forgiveness and so remained stuck with hundreds of thousands of dollars' worth of non-dischargeable law school loan debt.[60] For students who did manage to graduate from the Charlotte School of Law before it closed, their bar exam passage rates for first-time takers of the North Carolina bar exam were abysmal: twenty-five percent passed in February 2017, forty-five percent passed in July 2017, and zero percent passed in February 2018.[61]

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[57] Ken Otterbourg, *After a Law School Shuttered, Aspiring Lawyers Hired Real Lawyers to Sue It*, WASH. POST (June 13, 2018), https://www.washingtonpost.com/lifestyle/magazine/after-a-law-school-shuttered-aspiring-lawyers-hired-real-lawyers-to-sue-it/2018/06/12/ef116450-5dc6-11e8-9ee3-49d6d4814c4c_story.html.

[58] Herrera v. Charlotte Sch. of Law, LLC, 2018 NCBC LEXIS 15 at ¶¶ 42, 44 (N.C. Super. Ct. Apr. 20, 2018).

[59] Andrew Kreighbaum, *Department Lays Out Options for Charlotte Students*, INSIDE HIGHER ED (Aug. 25, 2017), https://www.insidehighered.com/news/2017/08/25/charlotte-law-makes-closure-official-education-department-sets-
loan-discharge-rules.

[60] Press Release, Secretary DeVos Extends Closed School Discharge to More Charlotte School of Law Students, U.S. DEP'T OF EDUC. (Mar. 9, 2018) (on file with author).

[61] Staci Zaretsky, *Law Schools Duel for the Worst Bar Exam Passage Rates Ever*, ABOVE THE LAW (Mar. 29, 2017, 12:46 PM), https://abovethelaw.com/2017/03/law-schools-duel-for-the-worst-bar-exam-passage-rates-ever/; Staci Zaretsky, *Bar Exam*

Much of the carnage arising out of the failure and closure of the Charlotte School of Law could have been avoided if the Site Evaluation Information gathered by the ABA during the law school's final site evaluation in 2014 had been shared with prospective students and other stakeholders of the law school. In fact, in September 2014:

> [T]he ABA provided CSL with a 72-page Inspection Report (Report) and invited the school to provide comments and note factual errors. The ABA informed CSL that the Report would provide the basis for its determination of whether CSL's programs were operating in compliance with the ABA Standard for the Approval of Law Schools (Standards). Among its topics, the Report discussed CSL's program of legal education (pp. 6-24), students (including both admissions qualifications and output metrics, including a discussion of bar passage statistics) (pp. 34-49), and financial operations (pp. 67-71. . . . [In January 2015,] the [ABA Council's Accreditation] Committee issued a decision (the "First Committee Decision") announcing that it had "reason to believe" that CSL had "not demonstrated compliance" with certain ABA Standards.[62]

The ABA's investigation into the Charlotte School of Law's noncompliance with the Standards continued for months after the date of the above letter, but for the purpose of this article the relevant point is this: As early as the ABA's site visit to the Charlotte School of Law in March of 2014, and certainly no later than the ABA's issuance of the 72-page Inspection Report on September 15, 2014, the ABA had in its possession information and documents demonstrating that the Charlotte School of Law was out of compliance with a number of key ABA accreditation Standards, as well as negative information about a number of crucial areas of the law school's operations and viability, including its program of legal education, its students and their bar examination performance, and its financial operations.

Passage Rates Soar Thanks to Law School's Closure, ABOVE THE LAW (Sept. 8, 2017, 12:02 PM), https://abovethelaw.com/2017/09/bar-exam-passage-rates-soar-thanks-to-law-schools-closure/; Staci Zaretsky, *First Results Are Out from February 2018 Bar Exam, and They are Not Good*, ABOVE THE LAW (Apr. 12, 2018, 1:59 PM), https://abovethelaw.com/2018/04/first-results-are-out-from-february-2018-bar-exam-and-they-are-not-good/.

[62] Letter from Susan D. Crim, Dir. Of Admin. Actions and Appeals Serv. Grp., U.S. Dep't of Educ., to Chidi Ogene, President, Charlotte Sch. of Law (Dec. 19, 2016), https://studentaid.gov/sites/default/files/csl-recert-denial.pdf.

All of that information was of enormous relevance and interest to prospective students and other stakeholders of the Charlotte School of Law, as if it had been available to them, those prospective students and other stakeholders would have been able to have made better-informed decisions about whether to matriculate or remain enrolled at the Charlotte School of Law.

However, because of the ABA's unilateral requirement that such information remain confidential, students who were already enrolled in the Charlotte School of Law as of March 2014 were prevented from learning about the law school's significant, and ultimately existential, problems - and so remained enrolled at the law school - for the remainder of 2014, 2015, and the spring of 2016. Similarly, because of the ABA's requirement that the Site Evaluation Information remain confidential, the Charlotte Law School was able to admit several entirely new classes of students between March 2014 and the law school's closure in 2017.

Nearly all of the immense damage done to the students, alumni, faculty, staff, and other stakeholders of the Charlotte School of Law between March 2014 and the law school's closure in 2017, not to mention the economic harm done to the Charlotte community and the huge burden of lawsuits forced upon the state and federal court systems, could have been avoided if the Site Evaluation Information gathered by the ABA as early as March 2014 had simply been made available to the public.

VII. CONCLUSION

As demonstrated above, in addition to the likelihood that a court would find the ABA to be an "agency" for purposes of FOIA under the functional equivalency identified by *Soucie* and its progeny, a strong public policy argument exists for the ABA to voluntarily make available to the public the Site Evaluation Information it obtains from United States law schools during the accreditation process.

Further, if the ABA refuses to make that information available to the public voluntarily, the DOE should mandate that the ABA do so. Making a law school's Site Evaluation Information available to the public would promote transparency and greatly benefit consumers, as the public availability of that information would ensure that prospective students and other stakeholders of a law school had the ability and opportunity to obtain a complete understanding of that law school's program of legal education, compliance with the ABA's accreditation Standards, and financial condition.