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CLAIMING ADMISSIONS DATA TRADE SECRETS— TAKING ADVANTAGE OF STATUTORY AMBIGUITY?

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ABSTRACT—The release of documents in recent legal battles between elite collegiate institutions and the Students for Fair Admissions, a nonprofit group seeking to eradicate the consideration of race in university admissions, has brought to question measures taken by the universities to shield information relating to their admissions processes from public view. These materials included admissions training materials, procedures for evaluating applications, and admitted applicant profiles and statistics. An examination of the universities' justifications to prevent public disclosure of this information provides insight into their varying reliance on intellectual property protections derived for trade secrets. These varying justifications help illustrate the complex, ever-changing nature of trade secret law, in which even the baseline determination of what may properly constitute a trade secret often remains an open question. The SFFA cases further highlight how this ambiguity provides fertile grounds for entities with commercial interests to strain the boundaries of trade secret law to cover business information that, if disclosed to the public, threatens reputational harm but which may not otherwise rise to the level of trade secret.

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INTRODUCTION

The release of documents in the most recent legal battle surrounding affirmative action has shed light on the shadowy world of elite college admissions[1] and has brought to question measures taken by academic institutions to shield their admissions processes from public view. On September 30, 2019, Judge Allison D. Burroughs delivered her much-anticipated ruling regarding the accusations of plaintiff, Students for Fair Admissions ("SFFA"), that defendants, President and Fellows of Harvard College, and The Honorable and Reverend the Board of Overseers ("Harvard"), employ discriminatory admissions practices against Asian American undergraduate applicants.[2] Because Harvard receives federal funding, SFFA argued that Harvard's admissions practices violate Title VI of the Civil Rights Act of 1964.[3] In her ruling, Judge Burroughs concluded that Harvard's undergraduate admissions process "passes constitutional muster," meeting the strict scrutiny standard set out by the Supreme Court for determining the legality of race-conscious admissions practices.[4]

Judge Burroughs's decision comes almost one year after trial for the case commenced in October 2018 in the United States District Court for the District of Massachusetts[5] and almost four years after SFFA filed its initial complaint.[6] Harvard does not stand alone in the litigation crosshairs of SFFA, a nonprofit group whose mission lies in eradicating the consideration of race in university admissions.[7] Targeting elite universities,

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[1] Anemona Hartocollis, *Does Harvard Admissions Discriminate? The Lawsuit on Affirmative Action, Explained*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/us/harvard-affirmative-action-asian-americans.html [https://perma.cc/LZ64-QVF7].

[2] Findings of Fact and Conclusion of Law, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), No. 14-cv-14176-ADB (D. Mass. Sept. 30, 2019).

[3] Complaint, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-cv-14176-DJC (D. Mass. Nov. 17, 2014) [hereinafter SFFA Harvard Complaint]. Harvard receives Federal financial assistance through grants and loans (accepting over $13.4 million in 2013) and by enrolling students directly supported by Federal financial aid. *Id*. at 10.

[4] *See* Findings of Fact and Conclusion of Law, *supra* note 2, at 127. In her 130-page ruling, Judge Burroughs explained that Harvard's admissions process is sufficiently narrowly tailored to serve the compelling interest of "achiev[ing] diversity and the academic benefits that flow from diversity," as the standard of strict scrutiny requires.

[5] *See* Hartocollis, *supra* note 1.

[6] *See* SFFA Harvard Complaint, *supra* note 3.

[7] *About*, Students for Fair Admissions, https://studentsforfairadmissions.org/about/ [https://perma.cc/9B8L-TFN4]. SFFA states that it "believe[s] that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional" and describes its mission as one to "support and participate in litigation that will restore the original principles of our nation's civil rights movement: A student's race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university." *Id.*

SFFA has also accused Princeton University[8] of discriminating against Asian American applicants, and the group shows no signs of slowing its litigious activity any time soon.[9]

The national spotlight on the Harvard SFFA case has only intensified following Judge Burroughs's ruling. A few days following the decision's deliverance, SFFA filed its Notice of Appeal,[10] raising the possibility that the divisive issue of affirmative action will appear before the Supreme Court for the first time since its 2016 ruling upholding race-conscious admissions practices in *Fisher v. University of Texas at Austin*.[11] Offstage, Harvard took measures to prevent documents detailing its admissions processes from entering the public record during trial.[12] Ultimately, Harvard's Motion to Seal proved unpersuasive in court.[13] Princeton University similarly took steps to shield its admissions materials from public view through the filing of a reverse Freedom of Information Act ("FOIA") lawsuit.[14]

BACKGROUND

The admissions information that Harvard and Princeton sought to keep secret are nearly identical in category and scope, including but not limited to admissions training materials, procedures for evaluating applications, and admitted applicant profiles and statistics.[15] The

[8] Complaint, Students for Fair Admissions Inc. v. U.S. Dep't of Educ., No. 1:16-cv-02154-TSC (D.D.C. Oct. 27, 2016) [hereinafter SFFA Princeton Complaint].

[9] Edward Blum, *2019 Students for Fair Admissions Annual Report*, STUDENTS FOR FAIR ADMISSIONS 2 (Sept. 4, 2019), https://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2019/09/2019-Year-End-Review-Sept-4-2019-1-1.pdf [https://perma.cc/NDN9-GM53] (noting filing of summary judgment motion against the University of North Carolina at Chapel Hill and refiling of lawsuit against the University of Texas at Austin in April 2019).

[10] Notice of Appeal, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 1:14-cv-14176-ADB (D. Mass. Oct. 4, 2019); *see also* Camille G. Caldera et al., *Tuesday's Admissions Decision is Only the First Step in a Long Appeals Process, Experts Say*, HARV. CRIMSON (Oct. 11, 2019), https://www.thecrimson.com/article/2019/10/2/admissions-lawsuit-appeals-process/ [https://perma.cc/ET2D-24TZ].

[11] Fisher v. Univ. of Tex. at Austin et al., 136 S. Ct. 2198, 2215 (2016). The Supreme Court in *Fisher* repeatedly affirmed that a compelling interest exists in fostering diversity in educational settings, justifying the use of race-conscious admissions practices. *See also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003).

[12] Harvard's Memorandum of Law in Support of Its Motion to Seal Certain Information Filed in Connection with the Parties' Summary Judgment Motions, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 1:14-cv-14176-ADB (D. Mass. Jun. 22, 2018) [hereinafter Harvard's Motion to Seal].

[13] *See* Hartocollis, *supra* note 1.

[14] Complaint at 1, Tr. of Princeton Univ. v. U.S. Dep't of Educ., No. 17-cv-00485-TSC (D.D.C. Mar. 17, 2017) [hereinafter Princeton's Reverse FOIA].

[15] *See id.* at 8; Harvard's Motion to Seal, *supra* note 12, at 3.

similarities fade, however, when examining the universities' justifications for shielding this information from the public, varying notably in their reliance on intellectual property protections derived for trade secrets.[16] These varying justifications help illustrate the complex, ever-changing nature of trade secret law, in which even the baseline determination of what may properly constitute a trade secret often remains an open question. The SFFA cases further highlight how this ambiguity provides fertile grounds for entities with commercial interests to strain the boundaries of trade secret law to cover business information that, if disclosed to the public, threatens reputational harm but which may not otherwise rise to the level of trade secret.[17]

Though this Note relies upon the SFFA cases to help illustrate ambiguity in trade secret law, it does not focus on providing an opinion on or discussing the merits of SFFA's accusations of discriminatory admissions practices by Harvard and Princeton. Rather, this Note examines the legal justifications employed by the universities to shield their admissions procedures from the public and considers the possibility that these cases illustrate attempts to use trade secret law to suppress reputationally-harmful business information with questionable trade secret designation.

This Note traverses these issues described in two Parts. Part I centers around an examination of the recent SFFA cases against Harvard and Princeton, focusing on efforts by the universities to shield their admissions procedures from public view. This section will examine some of the primary arguments employed by both universities and will highlight differences in their reliance on trade secret protection justifications to shield their admissions procedures from public view. Part II weighs the arguments and counterarguments for whether Harvard and Princeton's admissions data may properly constitute trade secrets. This Part argues that collegiate admissions data should not receive "trade secret" designation, as this would form an improper extension of trade secret law. Part II further considers the role that trade secret law has increasingly played in providing companies a route to prevent public disclosure of information from the public that may not rise to the level of a trade secret but which still possesses controversial material capable of reputational harm. This Part explores the lack of uniformity among the main statutory sources of trade secret law and argues that this discord gives rise to litigation strategies resembling those employed within the SFFA cases, in which statutory

[16] *See* Princeton's Reverse FOIA, supra note 14, at 15; Harvard's Motion to Seal, *supra* note 12, at 12.

[17] Eric E. Johnson, *Trade Secret Subject Matter*, 33 HAMLINE L. R. 545, 546 (2010).

ambiguity allows for a straining of the boundaries of trade secret law to cover information capable of reputational harm but which may not have otherwise qualified for trade secret protection.

I. RECENT SFFA CASES AGAINST HARVARD AND PRINCETON

A. The Princeton Case: FOIA Battles and Reliance on Trade Secret Protections

In early 2016, SFFA submitted a Freedom of Information Act ("FOIA") request to the United States Department of Education ("Department"), seeking access to documents related to a 2015 investigation of the undergraduate admissions practices of Princeton University by the Department and the New York Office for Civil Rights ("OCR").[18] The Freedom of Information Act of 1967 grants citizens the right to request records and documents from the government, subject to nine exemptions.[19] The United States Department of Justice, responsible for overseeing FOIA requests, states that "[t]he basic function of the Freedom of Information Act is to ensure informed citizens, vital to the functioning of a democratic society."[20] The records SFFA wished to obtain detailed the results of an investigation by the Department and the OCR to determine whether Princeton employed discriminatory admissions practices against

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[18] *See* SFFA Princeton Complaint, *supra* note 8, at 2.

[19] Nine FOIA exemptions are as follows:

> Exemption 1: Information that is classified to protect national security.
>
> Exemption 2: Information related solely to the internal personnel rules and practices of an agency.
>
> Exemption 3: Information that is prohibited from disclosure by another federal law.
>
> Exemption 4: Trade secrets or commercial or financial information that is confidential or privileged.
>
> Exemption 5: Privileged communications within or between agencies, including those protected by the: 1. Deliberative Process Privilege (provided the records were created less than 25 years before the date on which they were requested), 2. Attorney-Work Product Privilege, 3. Attorney-Client Privilege.
>
> Exemption 6: Information that, if disclosed, would invade another individual's personal privacy.
>
> Exemption 7: Information compiled for law enforcement purposes . . .
>
> Exemption 8: Information that concerns the supervision of financial institutions.
>
> Exemption 9: Geological information on wells.

U.S. Dep't of Justice*, What is FOIA?,* FOIA.GOV, , https://foia.gov/about.html [https://perma.cc/92D3-QWAJ].

[20] U.S. Dep't of Justice, FOIA.GOV, https://foia.gov/ [https://perma.cc/5J92-NB5J].

Asian American applicants on the basis of race, color, or national origin.[21] The investigation ultimately concluded with a finding that Princeton University had not employed discriminatory practices in its undergraduate admissions processes.[22] Nevertheless, SFFA sought access.

Princeton responded in 2017 with a reverse FOIA[23] in the United States District Court for the District of Columbia, seeking a permanent injunction to "prevent the disclosure of certain confidential and commercially sensitive documents and information relating to the University's undergraduate admissions program . . . ."[24] In its permanent injunction claim, Princeton divided the admissions-related materials into two categories.[25] The first category, titled "Applicant Documents and Information," contained materials about individual undergraduate applicants.[26] This category encompassed the application packets of specific applicants, which included applicants' personal essays and information about their academic and extracurricular performance.[27] It also included data produced for the OCR's 2015 investigation of Princeton's admissions practices, such as "narrative responses" to OCR questions, which described "detailed information about specific applicants and their families."[28] Of higher relevance to this Note is Princeton's second category of admissions data, titled "Admissions Documents and Information," which contained materials about Princeton's confidential, propriety admissions procedures. Specifically, this category included "documents and information" relating to Princeton's admissions program, "demographic and descriptive information" of applicants and current Princeton students, and "narrative responses" about Princeton's admissions program.[29]

In its reverse FOIA, Princeton relied upon trade secret law to argue against mandatory disclosure of both its "Applicant Documents and

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[21] Letter from Timothy C.J. Blanchard, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Christopher L. Eisgruber, President, Princeton Univ. 16 & n.12 (Nov. 5, 2014), http://www2.ed.gov/documents/press-releases/princeton-letter.pdf [https://perma.cc/7TXN-NXLH].

[22] *Id.*; *See also* Princeton's Reverse FOIA, supra note 14, at 1–2.

[23] *Reverse FOIA*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/reverse-foia.pdf [https://perma.cc/ZW36-868X] (describing a reverse FOIA action as a legal measure, typically advanced by an entity who has previously submitted information to a government agency pursuant to a third party's (usually pending) FOIA request to prevent the disclosure of some or all of the submitted information to the requesting third party).

[24] *See* Princeton's Reverse FOIA, supra note 14, at 1–2.

[25] *Id.* at 5.

[26] *Id.* at 2, 6, 8.

[27] *Id.* at 2.

[28] *Id.* at 8.

[29] These "narrative responses" were presumably submitted to the OCR by members of Princeton's Office of Admission, although Princeton's Reverse FOIA does not make this clear. *See id.*

Information" and "Admissions Documents and Information," arguing that these materials derived protections from two statutory sources of trade secret law. First, Princeton argued that FOIA Exemption 4 protected its admissions information from disclosure.[30] Pursuant to a FOIA request initiated by a third party, FOIA Exemption 4 exempts from disclosure "trade secrets and commercial or financial information that is confidential or privileged."[31] Princeton additionally argued that the Trade Secrets Act[32] protects these materials from disclosure.[33]

Princeton's invocation of these trade secret defenses provides the first of many opportunities to illustrate the lack of uniformity across trade secret statutory sources in drawing the line between what constitutes a trade secret and what constitutes confidential business information, and the implications that such designations may have on preventing public disclosure of potentially reputationally-harmful information. The scope of information which may receive trade secret status under FOIA Exemption 4 does not directly align with that of the Trade Secrets Act.[34] The latter, a criminal statute providing for the penalization of government employees who make unauthorized trade secret disclosures, does not define what constitutes a trade secret.[35] However, courts have consistently construed the Trade Secrets Act as proffering a broad view on what information should receive trade secret protection, covering "practically any commercial or financial data collected by any federal employee from any source."[36]

Conversely, FOIA Exemption 4 provides an explicit trade secret definition and seems to narrow the scope for what information may constitute a trade secret. Under FOIA Exemption 4, a trade secret consists of "a secret, commercially valuable plan, formula, process, or device that is

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[30] *See id.* at 3–4.

[31] *See What is FOIA?, supra* note 19 (listing the nine FOIA exemptions).

[32] *See* Princeton's Reverse FOIA, supra note 14, at 4 (noting that information covered by FOIA Exemption 4 is typically also protected from disclosure by the Trade Secrets Act, 18 U.S.C. § 1905, which protects a broader range of information than FOIA Exemption 4 (citing *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997))).

[33] Princeton additionally relied upon FOIA Exemptions 6 and 7(C) and the Privacy Act of 1974 to argue against disclosure of private and personally identifying information held within its "Applicant Documents and Information" category. *See* Princeton's Reverse FOIA, *supra* note 14, at 13. FOIA Exemption 6 covers information that would invade another individual's personal privacy if disclosed, and FOIA Exemption 7(C) covers information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy. *See What is FOIA?, supra* note 19 (listing the nine FOIA exemptions).

[34] *FOIA Guide, 2004 Edition: Exemption 4*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/oip/foia-guide-2004-edition-exemption-4#N_492_ [https://perma.cc/8X8W-7AA2].

[35] 18 U.S.C. § 1905 (2012) (Disclosure of Confidential Information).

[36] *FOIA Guide, 2004 Edition: Exemption 4*, *supra* note 34 (quoting CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987)).

used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[37] The Supreme Court seemingly quashed this statutory discrepancy in scope in its 1978 ruling in *Chrysler Corp. v. Brown*, in which it ruled that any distinction in trade secret scope between the statutes "is at most of limited practical significance in view of the similarity of language between FOIA Exemption 4 and the substantive provisions of § 1905."[38] Despite this ruling, some courts have construed FOIA Exemption 4 as "defin[ing] the outer scope" of the Trade Secret Act.[39]

While FOIA Exemption 4 may provide more guidance than the Trade Secrets Act in determining whether certain information should receive trade secret status, it still allows for ambiguity. The Department of Justice makes clear that FOIA Exemption 4 protects two distinct categories of information, the first being trade secrets, and the second being confidential "commercial or financial information."[40] FOIA Exemption 4 seems to blur the line dividing these two categories by including a "commercially valuable plan" alongside a "formula, process, or device" in its trade secret definition. This may signal to commercial entities that their confidential business information is tantamount to a trade secret. The fact that some FOIA exemptions cover relatively narrow classes of information (Exemption 9, for example, covers "geological information on wells") [41] may further justify such a conclusion, as it may suggest that FOIA's drafters have intentionally left together trade secrets and confidential business information, rather than placing them into separate, narrower exemptions. On the other hand, their simultaneous inclusion may indicate that under FOIA Exemption 4, confidential "commercial or financial information" exists squarely outside of the trade secret realm, as an alternative construction would render at least part of the statute's trade secret definition superfluous.[42]

In its reverse FOIA action, Princeton relied on arguments supporting both an Exemption 4 trade secret designation and an Exception 4 confidential business information categorization for the admissions

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[37] *Id.* (quoting Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983)).

[38] 441 U.S. 281 at n. 49.

[39] Canal Refining Co. v. Corrallo, 616 F. Supp. 1035, 1042 (D.D.C. 1985).

[40] *FOIA Guide, 2004 Edition: Exemption 4*, *supra* note 34.

[41] *See What is FOIA?, supra* note 19 (listing the nine FOIA exemptions).

[42] *FOIA Guide, 2004 Edition: Exemption 4*, *supra* note 34 (citing *Anderson v. HHS*, 907 F.2d 936, 944 (10th Cir. 1990)).

materials it wished to shield from disclosure.[43] Princeton highlighted the fact that it restricted access of the admissions data at issue to only some Admissions Office workers and required these individuals to sign non-disclosure agreements.[44] Princeton also addressed the fact that its admissions data is commercially valuable and that its disclosure risks competitive harm, as required for both Exemption 4 trade secrets and a showing of confidential business information.[45] Specifically, Princeton outlined three negative competitive consequences that would result from the public disclosure of its admissions data.[46] First, disclosure would allow some applicants to tailor their applications based on inferences from the released admissions data, which would in turn hinder Princeton's efforts to select the strongest class of incoming students in relation to competing elite universities.[47] Second, disclosure would allow competing universities to access and utilize Princeton's proprietary admissions strategies and processes.[48] Finally, Princeton argued that disclosure would deter potential applicants from applying by reducing their confidence in Princeton's ability to keep their personal information and admissions materials confidential.[49]

The ambiguity in what information may constitute a trade secret manifests in Princeton's reverse FOIA action, in which the university avoided explicitly applying trade secret designations to any of its admissions material but still relied upon the Trade Secrets Act and remedies typically afforded to trade secrets. Princeton requested injunctive relief, maintaining that the public release of the "Applicant Documents" and "Information and Admissions Documents and Information" would cause the University "irreparable injury."[50] Injunctions are considered "extraordinary relief," even in FOIA matters,[51] and courts are reluctant to

[43] *See* Princeton's Reverse FOIA, *supra* note 14, at 6–12; *see also FOIA Guide, 2004 Edition: Exemption 4*, *supra* note 34 (explaining that a FOIA Exemption 4 confidential "commercial or financial information" designation requires a showing that disclosure will likely cause substantial competitive harm to the submitter of information).

[44] *See* Princeton's Reverse FOIA, *supra* note 14, at 9.

[45] *Id.; see also FOIA Guide, 2004 Edition: Exemption 4*, *supra* note 34.

[46] *See* Princeton's Reverse FOIA, *supra* note 14, at 9–10.

[47] *Id.*

[48] *Id.* at 10.

[49] *Id.*

[50] *Id.* at 10 (Princeton sought a permanent injunction based on its understanding that while the reverse-FOIA action was still pending, the documents at issue would be held in abeyance, and should the threat of disclosure during pendency arise, Princeton could submit a preliminary injunction request).

[51] *Guide to the Freedom of Information Act*, U. S. DEP'T OF JUSTICE, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/litigation-considerations.pdf#p17[https://perma.cc/GQ2E-Q88U].

grant them pursuant to FOIA requests.[52] However, trade secrets often possess a presumption of irreparable harm upon their unwanted release, paving the way for a higher grant-rate of injunctive relief by courts.[53] Strategic litigators could make use of the indefiniteness of the bounds of trade secret law to argue for the heightened levels of protection it may afford, which may help explain the arguments employed in Princeton's reverse FOIA.

In September of 2017, the District Court for the District of Columbia granted the Department of Education's motion to stay the litigation in order to address discrepancies documents planned for release, so the court's view on the merits of Princeton's arguments remains unresolved.[54] Nevertheless, the case provides valuable insight into the ambiguity surrounding trade secret law and perhaps illustrates a reliance on trade secret legal protections to protect information with uncertain trade secret designation.

B. The Harvard Case: Use of Motion to Seal and Reliance on "Confidential Business Information" Protections

While Harvard's objective to shield its admissions materials from the public matched Princeton's, its arguments justifying such protection differed significantly. Like Princeton, Harvard divided its admissions materials into subcategories, listing three classifications in its Motion to Seal.[55] The first classification consisted of data related to undergraduate applicant files, including completed applications, "summary sheets," and correspondences among those in the Admissions Office, alumni interviewers, and high school guidance counselors.[56] This first classification mirrored Princeton's "Applicant Documents and Information." Harvard's second classification consisted of correspondences from external organizations, alumni, and donors.[57] Harvard primarily relied on privacy law protections to prevent disclosure of its admissions materials in these first two classifications, citing the Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232(g)) and privacy rights case law in its Motion to Seal.[58]

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[52] *Id.* at 17 (citing Pinnacle Armor, Inc. v. United States, No. CV F 07-1655 LJODLB, 2008 WL 108969, at *9 (E.D. Cal. Jan. 7, 2008) ("[p]laintiff has not provided any authority for the proposition that the claim for the Freedom of Information Act documents supports a claim for an injunction")).

[53] ELIZABETH A. ROWE & SHARON K. SANDEEN, CASES AND MATERIALS ON TRADE SECRET LAW 448–49 (2d ed. 2017).

[54] *Status Report*, Princeton's Reverse FOIA, *supra* note 16, at 2.

[55] *See* Harvard's Motion to Seal, *supra* note 12, at 3.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 4, 8–12.

The third classification, and the one most relevant to this Note, consisted of Harvard's confidential training materials, admissions procedures, and statistics of admitted students.[59] This classification closely aligns with Princeton's "Admissions Documents and Information."[60] Whether material existing under this classification rises to the level of trade secret remains similarly questionable. Such information, however, almost certainly possesses the potential to impose reputational harm on the institution. Harvard's controversial use of "personal ratings" in its admissions criterion, for example, occupied much of the negative press attention surrounding this case.[61] In her recently delivered opinion, Judge Burroughs discussed the personal ratings metric extensively, first explaining that it "reflects the admissions officer's assessment of what kind of contribution the applicant would make to the Harvard community based on their personal qualities."[62] SFFA relied heavily on admissions data illustrating Harvard's use of personal ratings in its expert report of Dr. Peter Arcidiacono, Professor of Economics at Duke University. Dr. Arcidiacono designed a logistic regression model to examine six years of Harvard undergraduate admissions data, and his report, released at trial and now part of the public record, concluded that Harvard's personal rating scores are biased against Asian American applicants.[63] Attached to his publicly available report are sets of admissions data which Harvard strongly opposed filing unsealed.[64] In her opinion, Judge Burroughs found that while "[t]here is a statistical difference in the personal ratings with white applicants faring better that [sic] Asian American applicants," the reason behind Asian American applicants' lower scores is "unclear [] but not the result of intentional discrimination."[65] Judge Burroughs did, however, acknowledge that the public scrutiny and potential reputational harm resulting from the publicization of these personal ratings may have had an impact on Harvard's admissions procedures going forward, making note of Harvard's overhaul of the use of personal ratings for the class of 2023.[66]

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[59] *Id.* at 3.

[60] *See* Princeton's Reverse FOIA, *supra* note 14, at 2–3.

[61] Anemona Hartocollis, *Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says*, N.Y. TIMES (June 15, 2018), https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html [https://perma.cc/484H-VMRT].

[62] *See* Findings of Fact and Conclusion of Law, *supra* note 2, at 20.

[63] *Id.* at 60–61.

[64] *Id.*; *See also* Joint Pretrial Memorandum, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 14-cv-14176, at 18–19 (D. Mass. Oct. 1, 2018) [hereinafter SFFA Pretrial Memorandum].

[65] *See* Findings of Fact and Conclusion of Law, *supra* note 2, at 55–56.

[66] *Id.* at 8.

Unlike Princeton's reverse FOIA, which cited both FOIA Exemption 4 and the Trade Secrets Act to argue against disclosure of its admissions materials,[67] Harvard's Motion to Seal focused on doctrinal sources which elevated the need to protect competitively harmful business information above the public interest in accessing judicial records.[68] However its arguments, which centered around a showing of competitive harm, closely matched Princeton's. First, Harvard stated that the disclosure of its admissions information may result in competitive harm, as undergraduate applicants may attempt to "game the system" by altering their applications to suit the preferences of Harvard's Admissions Office and potentially impair the ability of the Admissions Office to accurately assess its candidates.[69] In its next competitive harm argument, Harvard asserted that the college-counseling industry may utilize previously confidential admissions data to aid "well-resourced applicants," thereby disadvantaging other potentially well-qualified applicants.[70] Finally, Harvard argued that competing universities might use released admissions materials to refine their own recruiting messages to potential applicants.[71]

Although Harvard did not explicitly call upon trade secret law to justify sealing its admission data from the public record, it relied on case law focusing almost exclusively on the protection of trade secrets. For example, in its Motion to Seal, Harvard cited trade secret misappropriation case *CardiAQ Valve Technologies, Inc. v. Neovasc Inc.* to argue that its admissions data was "business information that might harm a litigant's competitive standing."[72] This suggests that Harvard may consider at least some parts of its admissions materials trade secrets, although it stopped short of explicitly designating them as such. However, unlike Princeton's reverse FOIA, which included an injunctive relief request, a remedy closely associated with trade secret misappropriation, Harvard argued that its admissions data should remain under seal at trial.

II. ADMISSIONS DATA SHOULD NOT QUALIFY AS A TRADE SECRET

Examinations of Princeton's reverse FOIA and Harvard's Motion to Seal, both measures taken to block the release of confidential

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[67] *See* Princeton's Reverse FOIA, *supra* note 14, at 3.

[68] Harvard's Motion to Seal, *supra* note 12, at 7–9 (quoting United States v. Kravetz, 706 F.3d 47, 61 (1st Cir. 2013)).

[69] *Id.* at 13.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 8–9. Harvard also relied upon other trade secrets misappropriation cases, including Hilsinger Co. v. Eyeego, *LLC*, 2014 WL 5475032, at *1 (D. Mass. Oct. 29, 2014), and Bracco Diagnostics Inc. v. Amersham Health Inc., 2007 WL 2085350 at *9–10 (D.N.J. July 18, 2007).

undergraduate admissions data to the public, reveal that the universities seem to rely in varying degrees upon trade secret law for protection of their admissions information. From both statutory and judicial perspectives, this reliance may illustrate an improper extension of trade secret law to cover information that likely does not rise to the level of trade secret. The release of most of Harvard's admissions data into the public record during trial against SFFA certainly seems to support this conclusion. Though Judge Burroughs ruled in favor of Harvard, she found Harvard's arguments to shield its admissions data from the public record unpersuasive.[73] During trial, hundreds of formerly proprietary admissions documents, ranging from Admissions Office reading procedures to inter-office emails, came to light.[74] In addition to denying Harvard's Motion to Seal,[75] Judge Burroughs described Harvard's admissions practices in great detail in her opinion, quoting directly from its Interviewer Handbook[76] and thoroughly describing admissions practices such as the "lop process." Judge Burroughs defined the "lop process" as a mechanism Harvard's Admissions Office employs "[w]hen it becomes necessary to reduce the list of prospective admits. . . ." and described the full committee meetings that took place in the final stages of an admissions cycle, in which admissions officers would discuss candidates again and then "lop," or cut, some from the admitted students list.[77]

The arguments employed by both Harvard and Princeton to protect their admissions materials likely capable of reputational harm but of questionable trade secret designation highlight the ambiguity surrounding what may constitute a trade secret. Specifically, statutory sources exhibit little uniformity with regards to how business information, the broad category encompassing the type of information Harvard and Princeton sought to protect, fits into trade secret law.[78] The discrepancies between FOIA Exemption 4 and the Trade Secret Act in defining the scope of information qualifying as a trade secret, as seen in Princeton's reverse FOIA, exemplifies this lack of uniformity. Two other major statutory sources of trade secret law, the Uniform Trade Secrets Act and the Defend Trade Secrets Act (amending the Economic Espionage Act), provide

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[73] *See* Findings of Fact and Conclusion of Law, supra note 2.

[74] Harvard's Notice of Filing Corrected Admitted Exhibits List, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 1:14-cv-14176-ADB (D. Mass. Nov. 14, 2018).

[75] *See* Hartocollis, *supra* note 1.

[76] *See* Findings of Fact and Conclusion of Law, supra note 2, at 25.

[77] *Id.* at 26.

[78] *See* David S. Almeling, *Four Reasons to Enact a Federal Trade Secrets Act*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 769, 775–76 (2009). ("The dominant failure of a state-based trade secret regime is that trade secret law differs from state to state.").

further illustrations of this statutory discord that may help explain the propensity of entities to strain the boundaries of trade secret law.

The drafters of the Uniform Trade Secrets Act ("UTSA"), enacted in 48 states,[79] lamented the "undue uncertainty concerning the parameters of trade secret protection" in their Prefatory Note to the 1985 version of the Act.[80] Unfortunately, this uncertainty remains present. The UTSA provides a definition for a trade secret,[81] elements of which several states have adopted in their enactments.[82] Unfortunately, applying this definition to the SFFA cases does not result in an immediately obvious conclusion about whether Princeton or Harvard's admissions materials constitute trade secreted information. The admissions data, including application packets, admissions training materials, descriptions of admissions practices, and admitted students' statistics[83] appears to qualify as "information," a "compilation," or a "program," as the UTSA's definition initially requires.[84] However, state-level enactments of the UTSA vary widely even at this initial trade secret definitional question. Some states seem to place strong limitations on the scope of business information eligible for trade secret protection, requiring technical or scientific information to qualify. Courts in such states would likely deny trade secret protection to admissions data, which is neither particularly technical nor scientific. Nevada, for example, has added to the UTSA's trade secret definition preamble "product, system, process, design, prototype, procedure, computer programming instruction

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[79] The District of Columbia, Puerto Rico, and the U.S. Virgin Islands have also enacted the UTSA, in addition to the 48 states mentioned. In 2018, the UTSA was enacted in Massachusetts and introduced in New York. North Carolina has not adopted the UTSA. *See Trade Secrets Act*, UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792 [https://perma.cc/ZTQ7-KCFS].

[80] *See* UNIF. TRADE SECRETS ACT: PREFATORY NOTE, 14 U.L.A. 531 (2005).

[81] The Uniform Trade Secrets Act defines a trade secret as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. § 1(4), at 538.

[82] *Id.* GENERAL STATUTORY NOTE, at 533–535; *see also Trade Secrets Laws and the UTSA: 50 State and Federal Law Survey*, BECK REED RIDEN LLP (Jan. 24, 2017), https://www.beckreedriden.com/trade-secrets-laws-and-the-utsa-a-50-state-and-federal-law-survey-chart/ [https://perma.cc/26SQ-5D85].

[83] *See* Princeton's Reverse FOIA, *supra* note 14, at 2, 6, 8; *see also* Harvard's Motion to Seal, *supra* note 12, at 3.

[84] *See* UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 538 (2005).

or code."[85] On the other hand, some states have amended the UTSA's trade secret definition to expressly include business or financial information, and admissions materials likely face better odds for qualifying as trade secrets in these jurisdictions. Georgia, for example, amended its trade secret definition to include "financial data, financial plans, product plans, or a list of actual or potential customers or suppliers."[86] Colorado's UTSA enactment enumerates references to both technical[87] and confidential business information.[88] The admissions materials also likely meet the UTSA's requirement of a showing of "reasonable efforts" for maintaining secrecy, as both institutions limited access to their admissions documents to a select number of individuals within their admissions offices and required these individuals to sign confidentiality agreements.[89]

The UTSA finally requires a showing of "independent economic value" for information to qualify as a trade secret. The admissions materials likely fail to fulfill this requirement, in which case arguments that they should receive protection as trade secrets would illustrate an improper extension of trade secret law. The "independent economic value" requirement of the UTSA is more subject to state-level variation than the statute's other two trade secret requirements, further obfuscating the line between trade secret and confidential business information. Colorado's statute appears to lower the bar set by the UTSA considerably, requiring only that the information is "secret and of value."[90] Massachusetts, where the trial between SFFA and Harvard took place, replaces "economic value" with "economic advantage" in its UTSA enactment, seemingly emphasizing that information qualifying as a trade secret should not only possess economic value but must also be competitively valuable and capable of producing an economic advantage.[91]

The arguments by Harvard in its Motion to Seal and Princeton in its reverse FOIA that the disclosure of certain admissions materials would result in competitive harm provide starting points for determining whether

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[85] NEV. REV. STAT. § 600A.030(5)(a) (2017).

[86] GA. CODE ANN. § 10-1-761 (2018).

[87] COLO. REV. STAT. § 7-74-102 (2018) ("the whole or any portion or phase of any scientific or technical information").

[88] *Id*. ("improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession").

[89] Harvard's Motion to Seal, *supra* note 12, at 17; Princeton's Reverse FOIA, supra note 14, at 9; *see also* David Almeling, Darin Snyder et al., *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 Gonzaga L. Rev. 57, 82–83 (2010) (noting "confidentiality agreements with employees . . . are the most important factors in the courts' analysis of reasonable measures").

[90] COLO. REV. STAT. § 7-74-102 (2018), *supra* note 88.

[91] MASS. GEN. LAWS ANN. ch. 93, § 42 (West 2018).

these admissions materials possess sufficient economic value to qualify as trade secrets. On one hand, these materials may possess sufficient independent economic value because their release, as both institutions argued,[92] would allow potential applicants to strategically tailor their applications to "game the system" and provide the college counseling industry with coveted information.[93] The measures that both institutions took to keep their admissions procedures secret, such as their use of non-disclosure agreements and restricted access to admissions data, may further suggest that such information possess independent economic value.[94] Colorado's enactment of the UTSA, requiring simply a showing of secrecy and value, rather than independent economic value, would likely classify the admissions materials of Harvard and Princeton as trade secrets.[95]

On the other hand, many courts have required a showing of actual competitive harm to evidence independent economic value,[96] a judicial hurdle that Harvard and Princeton would be less likely to clear. Identifying the institutions' competitors is necessary to these actual competitive harm inquiries, and an examination of the revenue sources of both Harvard[97] and Princeton[98] aids this analysis. Endowments form the highest source of revenue for both universities,[99] and other elite educational institutions likely occupy the associated endowment funding competitive space. It seems unlikely that the release of admissions materials would threaten the endowments awarded to Harvard and Princeton. Although endowments remain subject to donors' restrictions, their funds are typically managed on a long-term basis, "established to exist in perpetuity."[100] Neither Harvard

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[92] *See* Princeton's Reverse FOIA, supra note 14, at 9–10; *see also* Harvard's Motion to Seal, *supra* note 12, at 13.

[93] *See* Harvard's Motion to Seal, *supra* note 12, at 13.

[94] *Id.*

[95] *See* COLO. REV. STAT. § 7-74-102 (2018), *supra* note 87.

[96] *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.*, 923 F. Supp. 1231, 1252–53 (N.D. Cal. 1995) ("A trade secret must have sufficient value in the owner's operation of its enterprise such that it provides an actual or potential advantage over others who do not possess the information.").

[97] *Financial Report: Fiscal Year 2017*, HARVARD UNIV., https://finance.harvard.edu/files/fad/files/final_harvard_university_financial_report_2017.pdf [https://perma.cc/D5MH-J8KT] (Harvard's sources of revenue for 2017 consisted of the following: 36% endowment income, 21% student fees, 18% sponsored support, 9% gifts, and 16% other sources).

[98] *Financial Facts,* PRINCETON UNIV., https://finance.princeton.edu/princeton-financial-overv/financial-facts/index.xml [https://perma.cc/2M38-B2TG] (Princeton's sources of revenue for 2017 consisted of the following: 47% endowment income, 18% student fees, 18% sponsored support, 5% gifts, and 12% other sources).

[99] *Id.*; *See Financial Report: Fiscal Year 2017*, *supra* note 97, at 5.

[100] *Facts About College and University Endowments*, ASS'N OF AMERICAN UNIV. (Jan. 26, 2009), https://www.aau.edu/key-issues/facts-about-college-and-university-endowments [https://perma.cc/X7X6-2SY8].

nor Princeton advanced evidence that the release of their admissions materials would diminish these endowments, their highest revenue sources, and supply competing universities with the increased funding.

Student tuition and fees make up the next highest revenue sources for Harvard and Princeton.[101] Again, competitors in this revenue space likely comprise other elite universities. The likelihood of showing competitive harm, either actual or potential, here is especially low. The number of applications to Harvard and Princeton have continued to climb, with both schools receiving their highest number of applications to date for the class of 2022 (42,749 and 35,370, respectively).[102] More importantly, Harvard and Princeton's overall acceptance rates are the lowest to date and are amongst the lowest in the Ivy League (4.6% and 5.5%, respectively).[103] Such low acceptance rates and high application numbers likely render claims that released admissions data could harm tuition revenue unconvincing. Even arguments that disclosure of data describing previously admitted students may allow admitted students more bargaining power in financial aid negotiations seem to fall flat. Admitted students may use such data to more accurately assess their "worth" in the world of admissions, but revenue from student fees hovers only around 20% for both institutions.[104] Possible decreases in fee revenues resulting from more targeted negotiation practices by admitted students is unlikely to make much of a financial dent for both universities, and thus, is unlikely to support a showing of potential competitive harm. Furthermore, Harvard and Princeton's increasingly low admissions rates indicate that even in the face of increased admissions transparency, the universities retain the ultimate power of choice in their admissions processes, maintaining their abilities to attract the top academic talent.

Harvard and Princeton also both claimed that potential competitive harm may result from other universities' usage of their proprietary admissions training materials and procedures. However, a finding of competitive harm here is also unlikely. While other universities may find

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[101] *See Financial Report: Fiscal Year 2017*, *supra* note 99; *see also Financial Facts*, *supra* note 100.

[102] Rose Lincoln, *1,962 admitted to Class of '22*, HARVARD GAZETTE (Mar. 18, 2018), https://news.harvard.edu/gazette/story/2018/03/1962-admitted-to-harvard-college-class-of-22/ [https://perma.cc/FJ7M-TXAL]; Admission Statistics, PRINCETON UNIV. (July 15, 2018), http://admission-dev.princeton.edu/how-apply/admission-statistics [https://perma.cc/L2HF-UTPJ].

[103] *Ivy League Statistics by College*, IVY COACH, https://www.ivycoach.com/ivy-league-statistics-by-college/ [https://perma.cc/BAZ3-JM78] The other ivy league schools have the following overall acceptance rates for the class of 2022: Columbia 5.5% (tied with Princeton), Yale 6.3%, Brown 7.2%, Penn 8.4%, Dartmouth 8.7%, and Cornell 10.3%.

[104] *See* Financial Report: Fiscal Year 2017, *supra* note 97; *see also* Financial Facts, *supra* note 98.

some value in accessing these admissions materials, they likely will not extract much competitively advantageous information, as the activities of the admissions offices of Harvard and Princeton likely play only a small role in luring applicants. Instead, students often target elite universities such as Harvard and Princeton based on prestigious reputations and opportunities to obtain upward economic and social mobility.[105] Furthermore, in the face of increased competition among student applicants and the relative ease of submitting multiple applications, facilitated by the Common Application, many students now submit twenty to thirty college applications, targeting a broad range of "ultracompetitive" universities.[106] Thus, even if other institutions managed to use released admissions materials to lure more applicants, they likely would not successfully deter these applicants from also applying to Harvard and Princeton. A finding of actual competitive harm to these institutions is therefore unlikely, and the many courts that require such a finding to evidence independent economic value would likely not consider the admissions materials trade secrets. However, given the statutory discord in identifying what information may constitute a trade secret, some courts may reach an alternate conclusion. The Defend Trade Secrets Act of 2016 (DTSA), amending the Economic Espionage Act of 1996, narrowed the UTSA's trade secret definition, aligning closely with certain state-level UTSA enactments which raised the bar for trade secret status.[107] Unfortunately, even with the federal passage of the DTSA, significant ambiguity still arises in trade secret determinations.

Given that Harvard's admissions numbers remain strong following the release of some of its proprietary admissions procedures, it seems that the institution's primary concern was preventing bad publicity and reputational harm. The same likely holds true for Princeton. Many courts have noted that in determining whether information possesses sufficient economic value to constitute a trade secret, economic advantage and competitive

[105] Raj Chetty et al., *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility* (Nat'l Bureau of Econ. Research, Working Paper No. 23618, 2017), http://www.equality-of-opportunity.org/papers/coll_mrc_paper.pdf [https://perma.cc/K5K2-UCKE] (noting that "colleges that channel the most children from low- or middle-income families to the top 1% are almost exclusively highly selective institutions, such as UC–Berkeley and the Ivy-Plus colleges.").

[106] Ariel Kaminer, *Applications by the Dozen, as Anxious Seniors Hedge College Bets*, N.Y. TIMES (Nov. 15, 2014), https://www.nytimes.com/2014/11/16/nyregion/applications-by-the-dozen-as-anxious-students-hedge-college-bets.html [https://perma.cc/Y7RH-8UEG].

[107] Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376, 380–81 (amending 18 U.S.C. § 1839 to read "the term 'trade secret' means all forms and types of financial, business, scientific, technical, economic, or engineering information . . . if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information . . . .").

harm must be present. Reputational harm alone will not satisfy this requirement.[108] Harvard and Princeton's reliance on the elevated legal remedies typically afforded to trade secrets, such higher injunctive relief grant-ratees, seems then to improperly stretch the bounds of trade secret law. Given that companies typically regard their reputations as one of their most valuable assets,[109] litigation strategies pursuing the strongest legal protections available is unsurprising. Accordingly, entities wishing to rely on the protections of trade secret law to shield dubious, embarrassing information from the public "will use all available arguments to their advantage and thus they have an incentive to find, emphasize, and litigate the variations in state trade secret laws."[110]

The varying degrees of reliance by Harvard and Princeton on trade secret law to argue for withholding admissions data fall in line with several recent examples of attempts to use trade secret law to protect reputationally harmful information that has questionable trade secret status. In a gender-based class action employment discrimination lawsuit, decided in February of 2018, Microsoft attempted to claim information related to its company diversity and inclusion data as trade secrets and seal the information from the public record.[111] This information included training materials and "action plans" aimed at enhancing Microsoft's workplace diversity.[112] The court found that the release of this information may competitively harm Microsoft and found that "Microsoft's argument that its diversity initiatives and strategies are trade secrets to be very persuasive."[113] The information Microsoft wished to shield from disclosure also included demographic statistics, the number of internal complaints lodged by Microsoft employees, and the number of times Microsoft determined that its employees violated company policies.[114] Here, however, the court noted that "tension" exists between "information that may harm a litigant's competitive standing and information that is simply embarrassing or incriminating to the business" and ultimately determined that these

[108] Cook Inc. v. Boston Sci. Corp., 206 F.R.D. 244, 248 (S.D. Ind. 2001) ("[B]usiness information whose release harms the holder only because the information is embarrassing or reveals weaknesses does not qualify for trade secret protection.").

[109] James Agarwal et al., *Corporate Reputation Measurement: Alternative Factor Structures, Nomological Validity, and Organizational Outcomes*, J. BUS. ETHICS 130, 485, 502 (2015) ("[G]eneral corporate reputation directly leads to a set of valuable organizational outcomes . . . creating additional value for all its stakeholders").

[110] Almeling, *supra* note 78, at 776.

[111] Moussouris v. Microsoft Corp., No. 15-cv-1483 JLR, 2018 U.S. Dist. LEXIS 34685 (W.D. Wash. Feb. 16, 2018).

[112] *Id.* at *38.

[113] *Id.*

[114] *Id.* at *20, *38.

materials did not constitute trade secrets.[115] The *Microsoft* case illustrates the difficulties in delineating what information is simply reputationally harmful and what information may cause competitive harm worthy of trade secret protection.

CONCLUSION

The recent Students for Fair Admissions cases against Harvard and Princeton help illustrate the ambiguity of trade secret law and the resulting attempts to capitalize on this ambiguity to shield reputationally harmful business information. Statutes vary at the threshold issue of definition for a trade secret, leaving uncertain what information may qualify for trade secret protection. The lack of uniformity among the main statutory sources of trade secret law in determining trade secret status may help explain the amorphous nature of trade secret law.

The existence of at least some ambiguity in statutes is to be expected and, in some cases, is introduced by legislators intentionally to shift more interpretative latitude to the judiciary. With that said, the heightened legal protections afforded to trade secrets almost certainly incentivize strategic litigators to pursue trade secret claims for reputationally harmful business information. Such incentivization may impose societal harm when the disclosure of certain information may have better served the interests of the public. Increased transparency surrounding college admissions may go towards achieving this end, given that experiencing "existential angst" about the admissions process has become "a national rite of passage" for high school seniors.[116] The release of collegiate admissions materials may at least allow students to pull back the curtain slightly on the opaque world of college admissions, hopefully helping to reduce some of their anxieties. The disclosure of Microsoft's diversity and inclusion data similarly may provide public benefit by providing workers the opportunity to make better-informed employment decisions.

The route to preventing public disclosure of information that may not rise to the level of a trade secret but which possesses business information capable of reputational harm, results, at least in part, from trade secret statutory ambiguity. The arguments employed by Harvard and Princeton in the SFFA cases illustrate a straining of the boundaries of trade secret

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[115] *Id.* at *33 (The court further noted that "Microsoft's concern is that the release of the data would have a negative effect on its reputation and not so much that it is a trade secret.").

[116] Bill McGarvey, *We're sacrificing our kids' mental health to the college admission industrial complex*, AMERICA MEDIA (Apr. 4, 2019), https://www.americamagazine.org/politics-society/2019/04/04/were-sacrificing-our-kids-mental-health-college-admission-industrial [https://perma.cc/CD82-FM86].

protections, likely made possible by this lack of uniformity in trade secret statutes. The resulting incentivization for litigators to take advantage of this statutory ambiguity to obtain more favorable legal remedies may threaten the public interest by depriving the public of beneficial information. Trade secret law remains amorphous and in a state of constant flux. Legislators, judges, and others who help define it should remain vigilant in ensuring that it does not give way to pressures to cover information undeserving of its protections.