FERPA and Open Records Laws

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Colleges and universities sometimes resemble large, complex business enterprises: they market their services to paying customers; they make millions selling logo merchandise; and, they compete to recruit and retain star employees. But state colleges are also agencies of the government, and like all public agencies, they are subject to mandatory disclosure laws that assure citizen stakeholders that their government is soundly managed.

Citizens are empowered to keep watch over their government through state open-records laws, sometimes known as "sunshine laws," that entitle the public to inspect documents and attend meetings at government agencies. The details of open-records laws vary by state, but they all start with the same principle: If a state agency creates or maintains a "record" – and this can include anything that captures information from an Excel spreadsheet to a videotape – the public is entitled to see and copy that record, unless a specific exemption applies.

In recent years, courts have clarified that even e-mails and text messages – including those sent on personal e-mail accounts – can be public records if created in the course of carrying out state business. When a document is a public record, it must be timely gathered and produced in response to a freedom-of-information request. What this means for you is that, if you are employed by a public college and the student media asks you for anything from the number of new members each organization recruited to the outcome of the latest chapter disciplinary case, you must furnish it for them. Failure to do so can bring severe financial and, in extreme cases, even criminal penalties. When the agency is an educational institution, which keeps track of confidential information about tens of thousands of students, tradeoffs arise between privacy and transparency. These tensions at times result in legal battles as journalists and watchdogs try to enforce their right to know over colleges' privacy objections.

A leading source of the privacy-versus-disclosure conflict is the unclear federal privacy law, FERPA, which has proved confusing even to seasoned legal experts. The Family Educational Rights and Privacy Act is a 1974 federal statute that requires colleges and schools to enforce policies safeguarding the privacy of confidential "education records." Because Congress failed to adequately define the meaning of "education records," it has been left to courts to decide what qualifies as a confidential FERPA record.

The U.S. Supreme Court gave some guidance in a 2002 ruling, *Owasso Independent School District v. Falvo*, in which the Court unanimously decided that student quiz papers were not confidential FERPA records. The Court explained that, to be confidential under FERPA, a document must do the following: a) relate directly and not tangentially to a named student, and b) be centrally maintained in that student's personal file, such as a file in the Registrar's or Admissions Office.

Applying the *Falvo* decision, lower courts subsequently have explained that documents such as internal investigations of employee misconduct are not protected by FERPA even if they involve students as victims or as witnesses since those records relate only tangentially to the students.

The U.S. Department of Education is in charge of interpreting FERPA, and has issued two key interpretations that limit the range of what colleges are actually required to keep confidential. In a 2006 advisory to a Maryland school district, the Department's chief privacy enforcer wrote: "As a general rule, information that is obtained through personal knowledge

or observation, and not from an education record, is not protected from disclosure under FERPA." In other words, FERPA is about the integrity of college records, not about facts that might appear in those records.

In a brief filed with the Supreme Court in the *Falvo* case, the Department further explained the consequences of classifying a document as a FERPA record:

> "The designation of a document as an education record under FERPA means not only that it is subject to restrictions against release … but also that [the student or parents] have a right to inspect and review the record, a right to a hearing to challenge the content of the record to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, and a right to insert into such records a written explanation … regarding the content of the records."

In other words, a college should never classify a record as confidential under FERPA unless the college is prepared to produce that record at the request of the student identified in it, to afford the student a chance to insert corrective material into the record and to hold a hearing if the corrective material is refused.

Importantly, once a student enters college – even a student who has not yet turned 18 – the right of FERPA privacy transfers from the parents to the student. This means that even a parent who is paying for her 17-year-old child's college education may not, without the student's written consent, review the student's grades or other "education records."

More recently, the Department has clarified that FERPA should never be a prohibition against the internal sharing of information when necessary to protect public safety. For instance, if school disciplinary authorities learn that a student has committed a string of sex offenses, it will not be regarded as a FERPA violation to turn that student's identity over to police.

FERPA has become a source of misunderstanding because of mythology that has grown up around the statute. One persistent myth is that a college that violates FERPA is subject to losing all of its federal education funding, including eligibility to accept federal financial aid, which for most institutions would be fatal. In fact, Department of Education regulations say no institution can be penalized for a single disclosure. If, after receiving a complaint, the Department decides that a violation did occur, the Department can put the college under a remediation plan to avoid future disclosures. Only if the college refuses to accept the plan can the Department impose sanctions. In the nearly 40-year history of FERPA, there is no record of any institution even being placed under a remediation plan, let alone being fined.

A few other cautions are important to avoid the over-classification of documents as confidential FERPA records:

1. FERPA applies only where the information in the document is actually confidential in the first place. Simply writing down publicly known information does not render the information "confidential." This principle was tested in a public-records lawsuit against the University of Florida, in which a Florida circuit judge ruled in 2011 that recordings of student Senate meetings – meetings that took place in public – were not confidential FERPA records, even though students were identifiable in the videos.

2. FERPA does not apply to records created for law enforcement purposes, regardless of whether the case ultimately is handled as a disciplinary rather than criminal matter.

If police show up at the scene of a fight and write up a report, their report is a matter of public record even though it may contain students' names.

3. Although FERPA does cover the records of typical campus disciplinary cases, FERPA does not apply to the outcomes of disciplinary proceedings if a student is found liable for conduct that equates to a crime of violence or a sex crime. Once a determination of fault is made, the entire determination – including the name of the responsible student – is no longer confidential under FERPA.

4. Finally, FERPA is not an all-or-nothing prospect. If a requester seeks a document that contains confidential information about specific students, the legally correct response is to remove any FERPA-protected material and disclose the remainder of the document. Once a document no longer is identifiable as corresponding to a particular student, it cannot be withheld under FERPA, and – if the record is otherwise covered by state open-records acts – wrongfully withholding it can result in an open-records lawsuit.

If you work for a state institution, you likely receive requests for information on a frequent basis from students, student media, parents, community members, and more. While determining whether or not a certain piece of information is protected under FERPA may be difficult, it is important to understand the open-records laws that apply to you and how to respond accordingly.