



THE LEGAL ISSUE

Fall 2006

Volume 1, Number 1

What is "The Legal Issue"?

The Office of University Counsel has created this newsletter as a means of keeping you apprised of developments in state and federal laws, rules, regulations and University policies. It is intended to serve as a means of highlighting issues that may affect the University. Topics will include new legislation, recent employment cases, and significant rule changes. It will be sent out each quarter, and past issues will be kept on our website, located at www.uchsc.edu/ouc. Also included will be a section called "The Back Page," which will focus on frequently misunderstood or new University policies. We will also provide bios for new attorneys who have recently joined the Office of University Counsel. We hope that "The Legal Issue" will be a valuable resource for you and we urge you to contact us with suggestions for topics you'd like to see included in future issues. Please send suggestions to mary.stone@uchsc.edu. As our disclaimer indicates, "The Legal Issue" is not a substitute for legal advice from your advising counsel.

House Bill 06S-1023

Verification of Lawful Presence for Recipients of Public Benefits

By Annalissa Philbin, Legal Staff Associate/Researcher, UCDHSC

On July 31, 2006, Governor Owens signed into law House Bill 06S-1023. The Act requires State entities to verify the lawful presence in the United States of each person over eighteen who applies for a state, local, or federal public benefit. C.R.S. § 24-76.5-103(1). The purpose of this article is to provide general guidance regarding the implementation of this Act at the University. This new law has a significant impact on University registrars, financial aid offices, and health clinics.

What Are Public Benefits under the Act?

The Act defines public benefits broadly and includes any grant, contract, or loan, provided by a federal, state or local agency and any health, postsecondary education, or other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit.

Under this broad definition, several expenditures or in-kind benefits provided directly to individuals by the University trigger the requirements of the Act. Examples include:

- University, state, or federal financial aid;
- University or state scholarships;
- Resident tuition;
- Stipend payments from the College Opportunity Fund;
- Free or reduced cost health services provided by University clinics or funded by the state; and
- University contracts, grants, and loans with individuals.

The definition of public benefits does not include general state services that are supported in whole or in part by state funds. For example, the requirements of the Act are not triggered simply by an application for admission or when a member of the public wishes to use a University library or facility.

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House Bill 06S-1023

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The Act also defines limited exceptions, specifically providing that verification is not required for the provision of public benefits that are:

- ♦ Necessary for the treatment of an emergency medical condition;
- ♦ A part of short-term, non-cash, in-kind emergency disaster relief;
- ♦ For immunizations for immunizable diseases;
- ♦ For the testing and treatment of symptoms of communicable diseases;
- ♦ In-kind community health services necessary for the protection of life or safety not conditioned on an individual recipient's income or resources; or
- ♦ For prenatal care.

Additionally, verification is not required for education/information or similar programs intended to serve the general public or certain populations of the general public. Moreover, verification is not required where the services are provided without an individualized application process. Finally, verification is only required where the public benefits are to be provided to persons eighteen years of age or older. Where a parent applies for a public benefit on behalf of his or her child, verification of lawful presence of the child is not required, and verification of the parent is also not required.

What Are the Verification Requirements of the Act?

The Act requires that, *upon application* for any described benefit, the agency must require the applicant to provide a specified form of photo identification AND execute an affidavit stating that that he or she is a U.S. citizen or a legal permanent resident or that he or she is otherwise lawfully present in the U.S. pursuant to federal law.

The Act specifies the following acceptable forms of identification, which must be provided in-person (faxed copies of acceptable photo identification will not meet the requirements of the Act):

- ♦ Valid Colorado driver's license or a Colorado identification card (which includes only a current Driver's License, Minor Driver's License, Probationary Driver's License, Commercial Driver's License, Restricted Driver's License, an Instruction Permit, or an Identification Card);
- ♦ U.S. Military card or a Military dependent's identification card;
- ♦ U.S. Coast Guard Merchant Mariner card; or
- ♦ Native American tribal document.¹

In addition to presenting a valid form of identification, the individual must also execute an affidavit in which the individual swears or affirms under penalty of perjury that the statement made in the affidavit is true and complete. The affidavit does not need to be notarized, and may be accepted electronically. Affidavit language that has been approved by the Attorney General's Office as meeting the affidavit requirements of HB1023 is available at your campus Office of University Counsel.

These are general guidelines to help University departments that provide publicly funded benefits to comply with the requirements of the Act. The Office of University Counsel will do its best to inform University constituents of future changes to this law and any rules or regulations implementing this new law. If you have specific questions regarding your particular program, please contact your campus Office of University Counsel.

¹ Until March 1, 2007, the Department of Revenue has approved additional forms of identification including driver licenses from a limited number of other states, a valid unexpired Resident Alien Card, Permanent Resident Card, Temporary Resident Alien Card, or Employment Authorization Card. You may contact your campus Office of University Counsel for a complete list of acceptable identification.

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Edited by Mary Stone, UCDHSC Office

Religious Discrimination in Higher Education

By Jennifer Watson, Senior Legal Staff Associate/Researcher, UCDHSC

As institutions of higher education struggle with the challenges of creating and maintaining a diverse student body, student requests for religious accommodations are arising more frequently. Examples of such requests on college campuses across the country include the following:

- Student requests to carry religious ceremonial knives;
- Student requests for exemption from mandatory meal plans on the basis that their religious beliefs impose dietary restrictions that cannot be met by campus dining facilities;
- Student requests for excused absences from classes that meet during times that conflict with the students' prayer times;
- Student requests for exemptions from mandatory immunization requirements; and
- Students in health professional programs requests to be exempt from clinical practices that the students disagree with on the basis of religious beliefs.

University administrators should be aware of the legal issues that arise when students request accommodations on the basis of religious beliefs. Requiring a student to participate in practices that conflict with his/her religious beliefs or prohibiting a student from engaging in religious practices may violate the student's First Amendment right to freely exercise religion.

In general, the state may not implement a rule or policy that places a significant burden on a practice that is sufficiently related to a student's sincerely held religious belief. The meanings of "significant burden," "sufficiently related," and "sincerely held" have been widely litigated by the courts. However, any rule or policy that substantially burdens a student's religious beliefs is likely to implicate the student's First Amendment free exercise rights.

A state or government rule or policy that does significantly burden a student's sincerely held religious beliefs is not necessarily unconstitutional. The rule or policy may be upheld if it is (1) generally applicable and (2) neutral in both its purpose and effect. A generally applicable regulation is a regulation that applies to all persons or activities. Exceptions to generally applicable regulations may occur for reasons of public health or safety. For example, a highway speed limit is considered generally applicable, even though ambulances are allowed to exceed the speed limit to preserve life or health. Allowing exemptions for secular or nonreligious reasons, but not allowing exemptions for religious reasons, breaches the principle of general applicability. For example, excusing students from mandatory attendance requirements for health or personal reasons, but not excusing students for religious reasons would fail the principle of general applicability.

In addition to being generally applicable, regulations that effect an individual's sincerely held religious beliefs must also be religiously neutral. The principle of neutrality requires a regulation to be neutral in both its purpose and effect. A court will examine the regulation's objective, the history and content of its enactment, and its intended consequences. In addition, a court will look at the manner in which an otherwise neutral regulation is applied. A facially neutral regulation applied in a discriminatory manner will be considered non-neutral. For example, a regulation prohibiting all students from burning incense in residence halls – even though generally applicable – may be deemed non-neutral if the regulation was adopted with the intent, or has the effect, of only prohibiting religious activity.

The following measures can be taken by University administrators in order to reduce the risk of a student filing a religious discrimination claim:

- Approach all religious accommodation requests seriously.
- Treat all religions equally.
- Accord equal consideration to religious and nonreligious requests.
- Implement policies and procedures for requesting and responding to accommodations.
- Consult with legal counsel.

Unpaid Internships

What U Should Know About the Appropriate Use of Student Work

By Manuel Rupe, Senior Assistant University Counsel, UCDHSC

Students at higher education institutions often participate in unpaid internships at health care institutions, businesses, governmental agencies, as well as educational and non-profit organizations. These "real world" experiences, particularly for undergraduate students, are intended to provide students with an opportunity to explore their future careers and professions before entering the workforce. While internships and experiential education are becoming important components of higher education curriculum, students and educational administrators involved in internship coordination and placement need to understand the appropriate legal limitations that are placed on students' work. Student internships should be valuable educational experiences, and employers should not be allowed to exploit students' free labor for their own financial gain.

The Fair Labor Standard Act, 29 U.S.C. § 210 et seq., which applies to most employers, generally requires employers to pay employees a minimum wage and overtime compensation. Student interns are typically not considered employees and, therefore, are not covered under FLSA. However, if student interns are used inappropriately the students may be considered employees, depending on six factors set forth in the U.S. Department of Labor's Wage and Hour Field Operations Manual:

- ◆ Employer must not derive any immediate advantage by using the student intern, whose presence may on occasion actually impede the employer's operations (i.e., student intern services are not for the convenience of the employer: in the clinical context, for example, it will be typical for procedures and efficiencies to be slowed dramatically to accommodate instruction for a student intern);
- ◆ Student intern must perform services primarily for his or her own benefit (i.e., student interns should not be performing tasks that only benefit the employer);
- ◆ Student intern must not displace regular employees and should be under continual supervision and direction (i.e., employer should not terminate employees and hire student interns as replacements);
- ◆ Student intern's training should be related to the position the student will apply for after graduation; thus, the training should not be for a specific position with the employer (i.e., if CU educational requirements extend beyond one job classification, employer should facilitate student intern working in different job classifications);
- ◆ Employer should not offer or guarantee the student intern a job at the end of the internship, and no offer or guarantee of employment should be made during or prior to the conclusion of the internship (i.e., employer should not promise a job to student intern to attract the student to their particular program or facility); and,
- ◆ The employer should clearly communicate to the student intern that he or she will not be compensated (or employer should communicate clearly whether any portion of the internship will be paid).

Importantly, various exceptions exist for particular careers and professions. However, if student interns are being misused, under FLSA employers may be liable (in addition to fines) to the student intern for twice the amount of wages owed to the employee, in addition to the employee's attorney fees. Student internships should be opportunities to grow and learn, but if the internship is little more than free labor for an employer, the student should be compensated for their work. Clear communications with internship sites can prevent these issues. You are encouraged to direct questions to the Office of University Counsel.

THE BACK PAGE

What is "The Back Page"?

The Back Page is where you'll find articles focusing on University policies. Some of these policies may be new, and some may simply be existing policies that we have found to be frequently misunderstood. Examples of topics include how to respond to subpoenas and Open Records requests, Family and Medical Leave, background investigations, disability accommodation. If there is a particular University policy you'd like us to address here, please send your suggestion to mary.stone@uchsc.edu.

Introductions

Christine M. Arguello

Managing Senior Associate University Counsel, UCB

Christine Arguello is a Colorado native who received her B.A. in Elementary Education from CU-Boulder, and her J.D. from Harvard Law School. She practiced law in Florida and Colorado for 15 years as a civil litigator before joining the faculty of University of Kansas School of Law to teach bankruptcy and contract law, where she also taught and directed the Trial Advocacy Program. She then worked in Colorado's Attorney General's Office from 1999 to 2002, including serving as Chief Deputy Attorney General for over two years. In 2002, Ms. Arguello returned to private practice as a Partner at Davis Graham & Stubbs LLP in Denver, where she practiced creditors' rights law and commercial litigation, focusing on employment law, including internal investigations of employment discrimination and sexual harassment. She joined the University's Office of University Counsel in April 2006.

Rebecca "Becki" S. Currey

Senior Associate University Counsel, UCB

Becki Currey earned her B.A. in biology and chemistry from Carroll College and her J.D. at the University of Montana. She began her law practice in Montana, where she worked for several years in both public and private practice before moving to Arizona where she had a private litigation practice. She then worked for six years in the employment litigation section of the Arizona Attorney General's Office. For the next seven years, and prior to joining the Office of University Counsel, she worked as assistant general counsel at Maricopa County Community College District in Phoenix, Arizona. The Maricopa County Community College District consists of 10 colleges and approximately 250,000 students. Her focus throughout her career has been public employment and education law. She joined the University's Office of University Counsel in August 2006.

Manuel R. Rupe

Senior Assistant University Counsel, UCDHSC – Downtown Denver Campus

Manuel Rupe graduated with a B.A. in History and Political Sciences from Kalamazoo College, received his J.D. from DePaul University College of Law, and recently earned a Ph.D. in Educational Leadership, with a concentration in higher education leadership, from Western Michigan University. Prior to joining the Office of University Counsel, Dr. Rupe worked in private practice as an Associate Attorney with Kreis, Enderle, Callander & Hudgins, P.C., in Kalamazoo, MI, for three years, and served as Assistant General Counsel at Ferris State University in Big Rapids, MI, from 2001 to 2006. Dr. Rupe also played varsity baseball during the four years he was a student at Kalamazoo College. Dr. Rupe joined the University's Office of University Counsel in August 2006.

Jessica Chavez Salazar

Legal Staff Associate/Researcher, UCB

Jessica Chavez Salazar is also a Colorado native, and she received a B.S. in Psychology from Colorado State University. Following graduation, she worked with CSU's Upward Bound Program. She earned her J.D. from the CU School of Law in 2004, and clerked for two years for The Honorable Thomas R. Ensor, District Court Judge for the Seventeenth Judicial District in Brighton, CO. She joined the University's Office of University Counsel in August 2006.



THE LEGAL ISSUE

Winter 2006

Volume 1, Number 2

"You've Got Mail" – And We *May* Ask You to Keep It

By Manuel Rupe, Senior Assistant University Counsel, UCDHSC

The University of Colorado has had, since 1938, an obligation under the Federal Rules of Civil Procedure to preserve and, if requested, produce to an opposing party paper documents that may be relevant in a federal lawsuit. On December 1, 2006, changes to the federal rules took litigation into the *information age* and extended this obligation to specifically cover "electronically stored information" that is reasonably accessible by the University. Additionally, the University has an obligation to preserve and produce electronic information or records unless to do so would be an "undue burden or cost" to the University. Although this obligation exists under the federal rules, state courts are likely to adopt procedures similar to the federal courts.

What are electronic records? The vast majority of University business and communications are completed through the use of electronic records or media. Electronic records may include electronic mail, voice mail recordings, Microsoft Word documents, spreadsheets, calendars, digital photographs or recordings, and other records or information maintained in an electronic or digital form. Electronic records, in many respects, are rapidly replacing the paper world just as electronic mail is replacing snail mail. Just as many different forms of electronic records exist, the hardware that is used to store, manage, and transmit such electronic records is continually expanding. Electronic records may be stored or maintained on University servers, desktop or laptop computers, compact disks, flash drives and other portable devices, disks, and other electronic data storage devices. The federal rules, importantly, compel the University: (1) to have a clear understanding of the type of electronic records that may be relevant in a particular case; and (2) to know where to locate such electronic records so that they may be preserved (this is a significant responsibility shared by all University employees). University Counsel will work closely with our information technology professionals to identify and maintain (if necessary) electronic information at the University.

What triggers or creates an obligation to preserve electronic records?

The University's obligation to preserve and produce electronic information or records is "triggered" or created based on certain events, such as when the University receives a summons and complaint (including from state or federal agencies), certain types of subpoena, a notice of claim under the Colorado Governmental Immunity Act, a demand letter from an attorney, or when a serious event takes place on campus. These are generally referred to as "triggering events." Under the federal rules, "[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'" Committee Note to Federal Rule 37. Therefore, upon receipt of any of the documents that may be considered a

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Edited by Mary Stone, UCDHSC Office

“You’ve Got Mail”

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“triggering event,” an employee should immediately call a University Counsel office so that University Counsel may begin immediately placing a litigation hold on relevant electronic records. All University employees should be prepared to assist University Counsel in identifying and retaining relevant electronic records.

What didn’t the federal rules change?

The changes in the federal rules create obligations to preserve and produce electronic records, but the changes did not eliminate or modify common protections for communications, such as the attorney-client privilege or the work product doctrine. Additionally, the federal rules did not expand the ability of opposing parties in litigation to receive records or information from the University as part of discovery. Opposing parties must still demonstrate that the records or information they seek is relevant to the case, or is reasonably likely to lead to the discovery of records or information relevant to the case.

Moreover, the federal rules do not prohibit the routine deletion or destruction of electronic records, provided such destruction is conducted in “good faith.” Therefore, automated electronic record destruction completed in accordance with routine University practices (or in accordance with the University’s Record Retention Policy, upon its adoption) are permissible, *provided* that University Counsel has not specifically requested that such electronic information or records be preserved. Additionally, the federal rules do not dictate how individual employees must manage (including how they preserve or destroy, i.e., delete) their electronic records.

However, routine deletion or destruction of electronic records must be done in “good faith” under the federal rules. “The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.” Committee Note to Federal Rule 37; *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Therefore, if University Counsel directs you to save or maintain electronic records, you (and the University) may not rely upon your prior practice of deleting similar records to excuse the deletion of records you were specifically directed to preserve. Simply put: if you wonder whether you should keep an electronic record once you’ve been directed by University Counsel to retain certain records, please call University Counsel to obtain direction. If in doubt – save!

What happens if an electronic record central to a case is destroyed?

If an electronic record central to a case is accidentally or intentionally destroyed after a triggering event the University may be sanctioned. This may include monetary sanctions, denial of certain testimony favorable to the University, or even an “adverse inference” ruling, which means that the judge could instruct a jury that it should infer that the lost or destroyed electronic record (which the University believes would support the University’s case) *supports the opposing side’s case*. Maintaining electronic records includes preventing a records’ deletion. Therefore, ensuring that electronic records are maintained on a system that is continuing backed up is important. If you have questions about where your electronic records should be maintained, contact your campus University Counsel office.

Beyond the Abstract: A ‘Real Life’ Application for U

By Manuel Rupe, Senior Assistant University Counsel, UCDHSC

The following is a hypothetical situation provided to illustrate some of the possible electronic records that *may* be relevant in litigation.

John Doe, an assistant professor in the College of Excellence, has been denied a promotion to associate professor from assistant professor and has left the University. Dr. Doe has filed a federal lawsuit against the University claiming that he was denied his promotion because he is male, in violation of Title VII of the Civil Rights Act of 1964. Dr. Doe’s lawsuit alleges that the primary unit was pressured by the college’s Dean, a woman, to deny his promotion because she wanted

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Beyond the Abstract: A 'Real Life' Application for U

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to bring in more women to eliminate the "good old boy" mentality in the college's faculty. Dr. Doe mentions in his lawsuit a series of e-mail communications and personal hand written notes that he heard about among the primary unit members during the course of its month-long review which he says supports his claims. Additionally, he claims that a few internal memoranda between the primary unit and the Dean's advisory committee criticize two of his articles in his dossier as being "inconsistent with professional standards in his discipline," despite the fact that last year similar articles were given widespread praise as "exceptional works" by a primary unit committee when it recommended promotion of his female colleague, Sally Roe, to associate professor. Dr. Doe also claims that the Dean's advisory committee had agreed by e-mail before his review even started that since there were not any women in his department, he should not be promoted. Dr. Doe claims that the Dean's advisory committee had a secret, off-campus meeting with the primary unit to seek to influence the primary unit's decision, which Dr. Doe claimed was cloaked in the guise of a "holiday party." You are the Dean of the College of Excellence, and you were just personally served with a copy of the lawsuit. The Dean believes the lawsuit is without merit, and is confident the records support this position.

What happens from here?

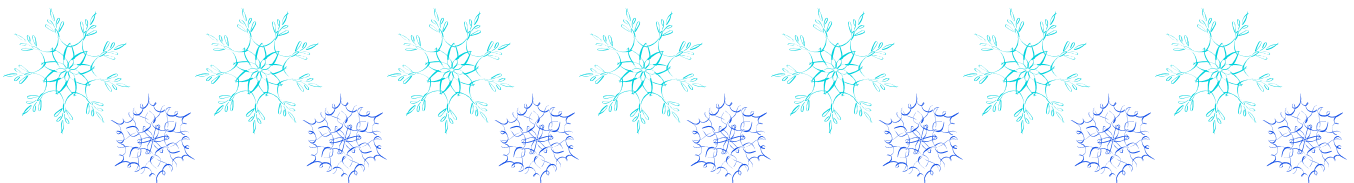
First, you should immediately call University Counsel and advise them that you have been served with a lawsuit. University Counsel will review the lawsuit and advise you by letter (and probably in person) of the paper and electronic information and records you should maintain. Additionally, you may expect University Counsel to discuss with you the claims set forth in the lawsuit. Your obligation to maintain records does not begin and end with you as the Dean. Your help will be essential in identifying persons who may have relevant records, and in ensuring that others assist in identifying and maintaining relevant electronic records.

What electronic information and records may be subject to a "litigation hold"?

The following electronic information or records would likely be subject to the litigation hold:

- (1) the Dean's e-mail communications with the primary unit members and Dean's advisory committee before, during, and after the primary unit's review;
- (2) the Dean's e-mail communications with anyone else related to Dr. Doe's and Dr. Roe's promotion;
- (3) electronic versions of the internal memoranda (if any) between the primary unit and the Dean's advisory committee related to Dr. Doe's and Dr. Roe's promotion;
- (4) e-mail communications among primary unit members related to Dr. Doe's and Dr. Roe's review;
- (5) e-mail communications among the Dean's advisory committee members related to Dr. Doe's promotion;
- (6) electronic versions of any records related to Dr. Doe's and Dr. Roe's promotion;
- (7) e-mail communications between or among academic administrative leadership related to Dr. Doe's and Dr. Roe's promotion;
- (8) any e-mail communications regarding the gender composition of the faculty in the College;
- (9) electronic calendar records for the primary unit and the Dean's advisory committee members; and
- (10) e-mails related to the holiday party.

Moreover, remember that paper copies of all relevant records or documents related to Dr. Doe's denial of promotion must also be maintained, including paper copies of the electronic records described above. Relevant paper records would include not only the internal memoranda and personal hand written notes specifically mentioned by Dr. Doe, but also paper copies of his (and Dr. Roe's) dossier, articles, and the paper communications among the members of the primary unit(s), the Dean's advisory committee(s), and the Dean. Coordination of the retention of records (*paper or electronic*) should be made through University Counsel.



The Federal Rules: *Common Questions and Answers*

By Manuel Rupe, Senior Assistant University Counsel, UCDHSC

Record Retention and Organization

- Q:** If I receive a letter from University Counsel asking me to keep my electronic records, should I create a separate e-mail folder and electronic document folder and place e-mails and relevant documents in such folders?
- A:** Yes, putting e-mails in a separate folder will allow you (and us) to retrieve your relevant e-mails without having to sort through unrelated e-mails. This is also true for Microsoft Word documents, spreadsheets, and similar documents. This process will assist University Counsel in preserving (and presenting) the most relevant evidence and will save you retrieval time if at a later date a particular e-mail or document becomes relevant.

Access by Opposing Party

- Q:** If we save everything that's related to a lawsuit, won't that give the opposing party access to all of the University's privileged or confidential communications?
- A:** The new federal rules do not give opposing parties greater rights to University communications, such as e-mail, than they had before the new rules went into effect. In the process of requesting documents and communications from the University, an opposing party must still establish that what they are requesting is relevant to the matter or is reasonably calculated to lead to the discovery of admissible evidence.

My Home Computer

- Q:** I occasionally work on University matters on my home computer. Will an opposing party have access to my home computer?
- A:** According to the proposed University's Record Retention Policy, University business should be conducted on University computers. If you work on University matters on your home computer, it's possible that the electronic documents on your computer may be relevant to a complaint and you may be asked to produce the electronic documents or the computer. Therefore, it's in your best interest to conduct all University business on University computers and through University servers.

Aren't Paper Copies Good Enough?

- Q:** I always print out my e-mails and save the printed copies of the e-mails in a labeled folder. Can I delete the e-mail once it's printed?
- A:** If you receive a letter asking you to maintain your e-mails, you should not delete the e-mails if they are reasonably related to the complaint. Although the electronic version of the e-mail may seem identical to the paper version, the electronic version contains important data such as to whom the e-mail was sent, the date and time when it was sent (or received), and other information that may be relevant at a later date.
- Q:** I maintain paper copies of my Microsoft Word documents. Can't I just delete the electronic versions of these documents once I receive a letter from University Counsel asking me to preserve such documents?
- A:** Electronic versions of documents may contain important information regarding the creation of the document and its revision. For example, changes offered through "track changes" in a Microsoft Word contract document may be relevant in determining the course of a contractual negotiation and whether parties intentionally added/removed relevant language. The Committee Note to Federal Rule 26, for example, provides: "Production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as

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The Federal Rules: Common Questions and Answers *(Continued from page 4)*

“embedded data” or “embedded edits”) in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image.” Therefore, if you’re asked to keep electronic versions of documents, please do so.

Q: I have ten versions of an electronic record (i.e., a contract) starting with the first draft and ending with the final draft that was signed. You asked me to save my electronic versions of the contract. Can’t I delete everything but the final version?

A: No, all versions of the electronic document should be maintained. Although a prior version of the final draft may seem irrelevant, it may be very important in the course of litigation.

Don’t we Have Software Programs that can do this Automatically?

Q: Why can’t the University just back up my e-mails so that I don’t have to save or organize any of my e-mails?

A: The purpose of saving e-mails and electronic versions of documents is so that these records may be easily retrieved at a later date. These e-mails or documents may assist the University in disproving claims in a lawsuit (including possibly claims against you). While the University may elect to back up e-mail communications or electronic versions of documents saved on a server, having these e-mails or documents organized will assist in their retrieval.

What’s Related to a Complaint?

Q: If I receive a letter asking me to save e-mails and records related to a matter, how do I know if something is related?

A: You must exercise your judgment: if you have a question as to whether a communication or electronic record is related to a complaint, you should save the e-mail.

O.k., so How do I Save an E-mail?

Q: If I send an e-mail, how do I save it?

A: If you send an e-mail in Microsoft Outlook you can open the “sent items” folder, click on the e-mail to capture it, and then drag it to your labeled folder for saving.

Q: Does this mean I have to save all of my e-mails?

A: You only need to save the e-mails related to the matter. You may continue to delete unrelated e-mails.

Attorney Communications: Is that a Triggering Event?

Q: I received a letter from an attorney demanding that a student be given credit for a course the student did not complete, and threatening to sue the University if this does not happen. Should I send that letter to University Counsel?

A: Yes, any communications received from an attorney related to any aspect of the University’s business should be immediately sent to University Counsel.

Q: If I receive a call from a person claiming to be an attorney and threatening to sue the University, do I have to start saving everything immediately related to the attorney’s concerns? What should I do?

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The Federal Rules: Common Questions and Answers (Continued from page 5)

A: Simply because an attorney contacts you doesn't mean that the University will automatically begin saving everything related to that matter. Many times attorneys call the University and a matter is resolved (typically because the attorney does not have accurate information and once informed, discontinues asserting any claim against the University).

How Long Must I Save This Stuff?

Q: How long do I have to continue to save my e-mails and electronic records related to a matter?

A: The length of time you'll be asked to maintain your e-mail and records will vary and will depend, to a great extent, on the nature of the complaint. More than likely, if it appears that the matter will be protracted, University Counsel will coordinate the retrieval of the electronic records from you so that you do not have to maintain prior records indefinitely.

Q: What if you ask me to save my e-mails and electronic records and I do hear from you for a year: may I assume that you don't need these items?

A: No, do not delete e-mails or records related to a matter unless you get express written consent or instructions from University Counsel. If you have questions, please ask University Counsel.

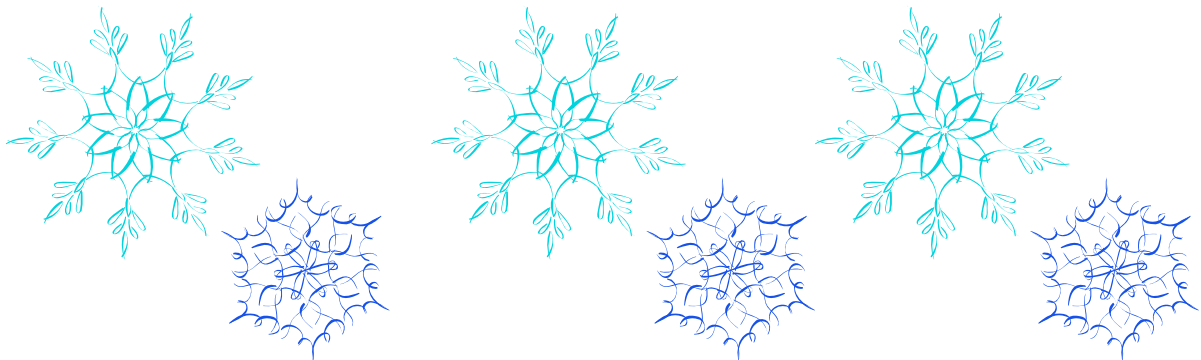
Q: I have a Blackberry (wireless device for e-mail, etc.) and use this often to read, send, and reply to e-mails. Is there anything special I need to do with these communications?

A: If these e-mails are through your University e-mail account (as they should be), the server should already be capturing these communications for you to place into appropriate folders at a later time. Maintaining folders that organize your e-mail communications may be very useful later if the communications become relevant in litigation.

More Questions? Let us Know.

Q: Who do I contact with questions?

A: Please contact your campus or system University Counsel office if you have any questions. We're here to help.





THE LEGAL ISSUE

Spring 2007

Volume 1, Number 3

FERPA: What Is It And How Does It Apply To CU?

By Jennifer Watson, Senior Legal Staff Associate/Researcher, UCDHSC,
and Jessica Chavez Salazar, Legal Staff Associate/Researcher, UCB

The University of Colorado's new Administrative Policy Statement ("APS") entitled "Access to Student Records" goes into effect on May 1 of this year. The APS directs each campus to develop guidelines and procedures to ensure the responsible management of education records in compliance with the **Family Educational Rights and Privacy Act** ("FERPA"). This article is intended to serve as a refresher of FERPA principles as each campus reviews its current FERPA guidelines and procedures and makes any necessary changes in order to comply with the APS.

A draft of the APS is available at <https://www.cusys.edu/policies/drafts/CUonly/Access-Student-Ed-Records.pdf>

During the early 1970's, privacy issues in all areas became hot political topics. Parents and students submitted horror stories of schools creating education records and then refusing to allow the parents and students to look at the contents of those records. Students were being passed over for honors and university admissions, and were being disciplined for reasons that were not disclosed. Not only were students not allowed to correct their own education records, but in some cases, students were being refused access to their own records. In response, Congress passed FERPA, a federal law governing the privacy of education records. FERPA grants four specific rights to any student who is or has been in attendance at an institution of higher education in relation to their education records:

1. The right to inspect and view education records;
2. The right to seek amendment to education records if there are inaccuracies;
3. The right to consent to any disclosure of education records; and
4. The right to file a complaint with the U.S. Department of Education FERPA Compliance Office.

In connection with the third right listed above, FERPA imposes certain restrictions on the ability of any federally-funded school, college or university to release information pertaining to a student's education record. Because all University of Colorado campuses receive federal funds, each campus has adopted procedures that comply with FERPA restrictions.

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Edited by Mary Stone, UCDHSC Office

FERPA: What Is It And How Does It Apply to CU?

(Continued from page 1)

What are Education Records?

As stated above, students who are or have been in attendance at a campus of the University of Colorado are entitled to inspect and review their own education records. "Education record" is broadly defined and includes virtually all information directly related to the student regardless of how the record is maintained and who maintains it, i.e., an education record consists of paper as well as electronic data. Besides grades, education records include information such as test scores, evaluations, financial aid records, papers or assignments submitted by the student, housing records, and other similar information about a student maintained by an instructor, counselor, or any other school official.

FERPA specifically excepts the following from its definition of education records:

- Private notes of individual faculty or staff members, if the notes aren't accessible or revealed to any other person except one performing the same function temporarily;
- Campus police records;
- Medical/counseling records used for treatment;
- Financial records of a parent or spouse; and
- Aggregate (statistical) data that contains no personally identifiable information about a student

FERPA prohibits the improper disclosure of a student's education records by any person connected to the University, including faculty and administrators. The right to protect an education record "belongs" to a student once he or she enrolls at the University; therefore, even the parents of the student do not have any right to obtain any information pertaining to the student's education record unless the student authorizes such disclosure in writing or the parent provides the University with a signed copy of his or her most recent federal tax return demonstrating that the student is the parent's dependent for tax purposes.

What Student Information Can Be Disclosed?

Directory Information

With the passage of FERPA, Congress attempted to create a balance between a student's right to privacy and the institution's need to release certain types of information that would not generally be considered private or confidential. Directory information includes the following student identifiers¹:

- Student name;
- Address;
- E-mail address;
- Telephone number;
- Dates of attendance;
- Registration status;
- Class level;
- Major field of study;
- Awards, honors, and degrees conferred;
- Past and present participation in officially recognized sports and activities; and
- Physical factors (height and weight) of athletes.

Although these items are designated by the University as directory information, the University retains the discretion to refuse to disclose directory information if it believes the disclosure would be an infringement of students' privacy rights. Moreover, a student can request in writing that his or her directory information not be disclosed and that request must be honored by the University. Prior to disclosing "directory information" to anyone, you should consult with your campus registrar to determine whether your campus releases student directory information and whether a student has placed a privacy block on his or her directory information.

Continued on page 3.

¹ The Boulder and Colorado Springs Campuses have designated additional information as directory information. You should consult your campus registrar for a complete list of what your campus has designated as directory information.

FERPA: What Is It And How Does It Apply to CU?

(Continued from page 2)

Other Exceptions

Non-directory information contained in education records may not be disclosed, unless the information falls within one of FERPA's exceptions that allows for its release. For example, FERPA provides that the University can disclose non-directory information:

- To University faculty or staff members with a legitimate educational interest
- To officials from other education institutions in which a student intends to enroll
- To state and local education authorities
- When responding to a lawfully issued subpoena or judicial order. If your office receives a subpoena or judicial order, contact the Office of University Counsel immediately.

FERPA also allows the release of student information to appropriate parties in emergency situations, but only if the information is necessary to protect the health and safety of the student or other individuals.

In creating the rights outlined by FERPA, Congress charged the U.S. Department of Education with enforcing its provisions, including the authority to revoke federal funding from an institution found to have violated students' rights under FERPA. With that in mind, it is important that University employees with access to students' education records use great care to not improperly disclose information from such records.

More Information

Each campus has its own procedures regarding FERPA compliance and the release of student information. The **Boulder Campus's** Notice of Student Rights and Procedures on the Designation and Release of Directory Information is available at http://registrar.colorado.edu/regulations/ferpa_confidentiality_records.html. The **Denver and Health Sciences Center Campuses'** Notification of Student Rights is available at <http://www.cudenver.edu/Student+Life/NSO/FERPA.htm>. The **Colorado Springs Campus's** FERPA Notice of Student Rights is available at <http://www.uccs.edu/studentsuccess/newsite/pates/currentstudents/ferpa.html>.

Specific questions should be directed to your campus registrar.

FERPA: Common Questions and Answers

By Jennifer Watson, Senior Staff Associate/Researcher, UCDHSC
and Jessica Chavez Salazar, Staff Associate/Researcher, UCB

Education Records and Rights Involved

Q. If a student is employed by the University, do her employment records fall under FERPA?

A. Student employment records are part of education records only if the employment is dependent on the student's status as a student. Therefore, employment records of graduate teaching or research assistants, work-study students, etc., *are* education records and FERPA clearly applies. Access to and release of those records are governed by FERPA.

Q. Are records of campus disciplinary proceedings considered protected education records under FERPA?

A. Yes. However, FERPA **permits** the University to disclose the results of a disciplinary proceeding to the victim of a violent crime. In addition, under the Student Right-to-Know and Campus Security Act, when a sex offense is involved, The University is **required** to disclose the results of a disciplinary proceeding to both the accused and victim.

Continued on page 4.

FERPA: Common Questions and Answers

(Continued from page 3)

Q. May a student's transcripts be released to his parents or spouse?

- A. Any student enrolled in an institution of higher education, regardless of the age of the student, is protected by FERPA. In order to obtain access to a student's transcripts or other education records, the parent must either submit a written consent from the student or prove that the student is a dependent student, as defined in the Internal Revenue Service Code.

There is no "spousal" exception to FERPA. Information in a student's education record cannot be disclosed to a student's spouse without written consent from the student.

Q. What are the rights of alumni with respect to education records?

- A. FERPA protects the education records of former students, but the University may release a former student's directory information, even if he or she requests nondisclosure. FERPA does not protect the education records of deceased students, although a campus may institute privacy policies addressing records of its deceased students.

Q. What if we receive a request for a list of all female African-American students?

- A. We cannot comply with this request. Neither gender nor race is considered to be directory information and the release of this information would violate the law. FERPA specifically prohibits the release of a student's social security number, race/ethnicity, and gender.

Q. How do we respond if we receive a subpoena requesting portions of a student's education record?

- A. Generally, education records may be released in order to comply with a lawfully issued subpoena. However, the student must be notified in advance of the release of any records. All subpoenas must be promptly directed to the Office of University Counsel.

Directory Information

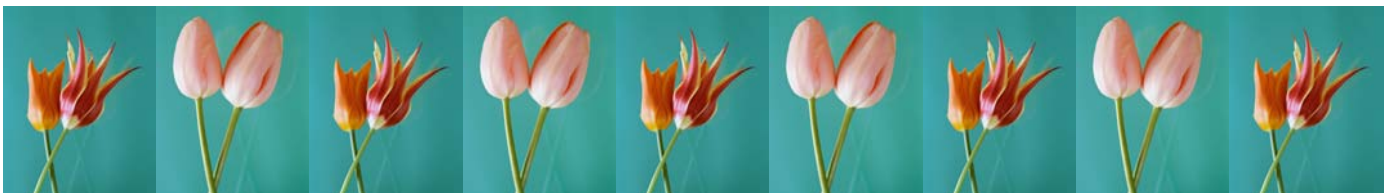
Q. Does FERPA require the release of student directory information?

- A. FERPA permits the University to designate specific portions of a student's education record as "directory" information, which information the University **may** disclose to third parties without obtaining the student's written consent. However, FERPA does not **require** the University to release this directory information.

Q. Is there any way a student can restrict the disclosure of directory information?

- A. Students have the right to request that their directory information not be disclosed to third parties, i.e., the student may place a privacy block on his or her directory information. Before releasing directory information, records custodians must check with the registrar's office to determine if the student has placed a privacy block on his or her directory information. Please consult your campus policies or contact your campus University Counsel with questions regarding what information qualifies as directory information.

Continued on page 5.



FERPA: Common Questions and Answers

(Continued from page 4)

Legitimate Educational Interest

Q. What is a "legitimate educational interest"?

A. The University official probably has a legitimate educational interest if the official is participating in activities related to the education of a student, which may include the following examples:

- Performing a task specified in his or her position description;
- Performing a task related to a student's education;
- Performing a task related to the discipline of a student;
- Providing a service or benefit related to the student;
- Providing a service or benefit relating to a student's family; or
- Maintaining campus safety and security.

Q. May a career advisor access a student database containing records on students other than the students directly working with the advisor?

A. Under FERPA, the advisor may be permitted access to the database, provided that the advisor is instructed not to access the records of students other than the students with whom he or she is directly working. An official who has access to a data base that contains the records of many students should not, and in fact does not have authority to, review the records of students unless that review is supported by a legitimate educational interest.

Q. The local Rotary Club scholarship committee has requested the grade point averages for the children of club members in order to award academic honors. May we provide this information?

A. While this may appear to be a "legitimate educational interest," the individual or entity requesting the information is not a "university official." Therefore, the scholarship committee may not have access to the information requested without the written consent of the students in question. Only a **University official** with a **legitimate educational interest** may access a student's education record without written consent.

Q. How do we handle emergency situations where access and review of a student's education record may be necessary?

A. Under FERPA, non-directory information may be released if the information is "necessary to protect the health or safety of the student or other persons." This exception is strictly construed and may only be used in the case of a bona fide emergency. Remember that any University official with access to student information is responsible for the proper handling of the records and must be prepared to be held accountable for the handling of those records.

How FERPA-Savvy Are You?

By Jennifer Watson, Senior Staff Associate/Researcher, UCDHSC,
and Jessica Chavez Salazar, Legal Staff Associate/Research, UCB

Test your knowledge with this quiz. Answers are at the end.

1. A student acquires FERPA rights when:
 - a. the student completes her application for admission.
 - b. the student is formally admitted to the institution.
 - c. the student fully pays her tuition bill.
 - d. the student registers and attends her first class.

Continued on page 6.

How FERPA-Savvy Are You?

(Continued from page 5)

2. To be considered an "education record" under FERPA, the information must be:
 - a. kept in the Office of Admissions.
 - b. personally identifiable to the student.
 - c. maintained by the University.
 - d. all of the above.
 - e. b and c only.
3. Directory information may contain all of the following EXCEPT the student's:
 - a. address.
 - b. phone number.
 - c. class level.
 - d. class schedule.
4. Which of the following method(s) of posting grades is/are prohibited by FERPA?
 - a. posting grades using student ID numbers.
 - b. posting grades using student social security numbers.
 - c. posting grades using student names.
 - d. none of the above.
 - e. all of the above.
5. Under FERPA, which of the following is **not** an "education record"?
 - a. a student's campus speeding ticket.
 - b. a student's grade point average from last semester.
 - c. the time frame in which a student lived in the residence hall.
 - d. the amount of grant money received from the federal government.
 - e. a work-study student's employment record.
6. According to FERPA, parents of a non-dependent University student:
 - a. have the same rights of access and review as the student.
 - b. may only review their student's records after receiving permission from a senior administrator.
 - c. may only review their student's records and grades if the parents have paid for a portion of the student's tuition bill.
 - d. none of the above.
7. After a student requests to review his education records, within what time frame must the University comply?
 - a. 10 days.
 - b. 20 days.
 - c. 25 days.
 - d. 30 days.
 - e. 45 days.
8. Faculty have a right, for any reason, to review education records of any student attending the University:
 - a. True. Faculty are considered University officials and have access to all records.
 - b. False. Faculty must demonstrate a legitimate educational interest to access education records.

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How FERPA-Savvy Are You?

(Continued from page 6)

9. A mother calls to get her son's class schedule so that she can have a care package delivered. This is permissible under FERPA.
 - a. True. The University should accommodate considerate mothers.
 - b. False. A student's class schedule is considered an education record.

10. A student reviews her education record and believes that a portion of that record is false. FERPA provides the student the right to:
 - a. a hearing to challenge information she believes is incorrect.
 - b. have her record reflect her objection.
 - c. have an attorney present at a hearing.
 - d. have the University pay for any investigation necessary to resolve her objection.

Quiz answers: 1.d, 2.e, 3.d, 4.e, 5.a, 6.d, 7.e, 8.b, 9.b, 10.a.

All questions regarding access to student records and FERPA should be directed to your campus registrar's office.

- | | | |
|---------------------------|----------------|----------------|
| • Boulder | Carol Mash | (303) 492-6907 |
| • Downtown Denver Campus: | Thomas Hartman | (303) 556-2737 |
| • Health Sciences Center: | Diana Warren | (303) 315-7676 |
| • Colorado Springs: | Steve Ellis | (719) 262-3375 |





THE LEGAL ISSUE

Summer 2007

Volume 1, Number 4

Beyond Privacy: FERPA Exceptions And Communication Within The University Regarding Student Conduct

By Manuel R. Rupe, Senior Assistant University Counsel, UCDHSC

Recent events at higher education institutions throughout the country, including the tragic events at Virginia Tech, have raised many questions regarding how information is shared within higher education institutions regarding students, and how common misperceptions regarding legal limitations on the disclosure of information can create harmful institutional inertia. Appropriately, many higher education institutions place considerable emphasis on respecting student's privacy and protecting their personal information. The federal Family Educational Rights and Privacy Act ("FERPA") provides significant legal protections for students, and generally requires a student's consent to disclose information within a student's educational record. However, FERPA includes some important, and often times overlooked, exceptions that provide higher educational institutions with opportunities to share and disclose information within the institution that may assist the institution in protecting its students and employees.

Importantly, FERPA does not prohibit a higher education institution from disclosing information to persons within the institution related to disciplinary action taken against a student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community. However, such persons must have a legitimate educational interest in the behavior of the student. 34 C.F.R. § 99.36(b)(1) and (2). This exception to FERPA covers not only risks of harm to other students (e.g., student who live in the same residence hall) and faculty (e.g., faculty who have the student in their class), but also the risk that a student may harm themselves. The focus of the exception is on the student's conduct or behavior, however, which presents challenges when institutions are, for example, addressing a student's comments, i.e., suicidal ideation.

At many higher education institutions, students experience significant difficulties with alcohol or substance abuse or other self-destructive behaviors. This often includes students (whether or not of the legal drinking age) who engage in excessive or binge drinking. In addition to diversion or other substance abuse treatment programs, institutions often struggle with whether or not they may contact a student's parents, who may be able to provide additional support or assistance to students dealing with a substance abuse issue. Under FERPA, a higher education institution may disclose information from an educational record if the disclosure "is to a parent of a student . . . regarding the student's violation

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Edited by Mary Stone, UCDHSC Office

Beyond Privacy (Continued from page 1)

of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if (A) the institution determines that the student has committed a disciplinary violation with respect to that use or possession; and (B) the student is under the age of 21 at the time of the disclosure to the parent.” 34 C.F.R. § 99.31(a)(15)(i). Thus, FERPA allows institutions to communicate with parents regarding a student’s disciplinary violation and their difficulties with alcohol or substance abuse. Additionally, FERPA permits such disclosure if the violation is of an institutional rule or policy, such as a policy related to the use, possession, or consumption of alcohol in residence halls, even if the student did not violate a state or federal law.

Moreover, in emergency situations, higher education institutions are generally able to disclose information to first responders, such as law enforcement, to assist persons in determining how to effectively respond to an incident. Specifically, under FERPA a higher education institution “may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.” 34 C.F.R. § 99.36(a). This exception is not limited to the health or safety of students, but includes all persons.

While FERPA provides important protections for student privacy and information, it also allows for disclosures that meaningfully impact the campus community. The exceptions to FERPA provide higher education institutions with the opportunity to disclose information within the institution, as well as with parents, so that such institutions may be more responsive to, and aware of, students who are experiencing problems or challenges and may need help. Importantly, higher education institution employees should consult with legal counsel if they believe they have information regarding students that may impact employee or student health or safety, but are concerned as to whether such disclosure may violate FERPA.

Student Privacy: Electronic Information & FERPA

By Jessica Chavez Salazar, Legal Staff Associate/Researcher, UCB

Technology constantly creates new ways to manage student information. When I was in college and needed a transcript, I walked over to the Records Office, filled out a paper request form (using an actual pen), paid the fee, and waited for the transcript to arrive in the mail. Today, students are often able to request transcripts using the Internet. There’s even a school in Japan that uses an infrared device to read and recognize the unique vein pattern found in each student’s hand. This pattern is then recorded on the student’s ID card, which may be used to access transcripts and student records at campus kiosks simply by scanning the card and placing his or her hand over a reader.¹ While we are not at that extreme, and regardless of the method used, it is always important to be vigilant in maintaining the security of electronic information. Grades, schedules, and tuition records are all records maintained on computers. These documents, even in digital format, still fall under FERPA’s definition of “education records.”² This article briefly points out three specific privacy concerns related to FERPA and electronic student records.

FERPA addresses student education records maintained by a school or its agent. Student information maintained on a university computer system may meet the definition of “education records.”³ Under FERPA, schools are prohibited from disclosing student education records, outside of directory information, without prior written consent from the student or unless an exception applies. An “education record” may include a student e-mail message if the message is “maintained” by the university. One court found that e-mail messages generated by a student, directed to a faculty advisor, were

Continued on Page 3.

¹ Vincent Kiernan, *Show Your Hand, Not Your ID*, THE CHRON. HIGHER EDUC., Dec. 2, 2005, at A28. Available at <http://chronicle.com/weekly/v52/i15/15a02801.htm>.

² “Education records” means, except as otherwise provided for in the statute, “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. §1232(g).

³ The definition of “record” was amended in 1996 to add “computer media.” See 34 C.F.R. § 99.3.

Student Privacy: Electronic Information

(Continued from page 2)

education records because they directly related to the student and were sent for the purpose of seeking the advice of a person acting on behalf of the college.⁴ However, another court found that an e-mail message being drafted on a student's computer was not being maintained by the institution and, therefore, was not an education record.⁵ Determining which e-mails are properly considered to be student education records heavily relies on the specific facts involved. As such, questions regarding this area should be directed to the Office of University Counsel.

While FERPA prohibits obvious actions, such as releasing a student's transcripts to a third-party without consent, it may also address security measures used by the university to prevent unauthorized access to electronic student education records. A university with inadequate security measures resulting in unauthorized access to student education records through "hacking" may arguably be engaging in a FERPA violation.⁶ Unauthorized access to records is not unique to our university system. According to the Privacy Rights Clearinghouse, there have been over 70 data breaches at institutions of higher education since January 2005.⁷ As computer systems become more complex, combined with the seemingly limitless motivation of hackers to break into these systems, even more privacy issues will be revealed. While there is no private right of action in enforcing FERPA,⁸ a university found to have a "policy or practice" in violation of FERPA may be subject to sanctions enforced by the Department of Education Family Policy Compliance Office ("FPCO"). A "policy or practice" may possibly include the use of inadequate computer security measures, or using systems known to be easily "hacked" into by others.⁹

This same responsibility to protect electronic student records extends to unauthorized access by university officials. In an opinion letter to Tazewell County, Virginia School Board, the FPCO discussed the software used by many higher education institutions to manage student and employee information.¹⁰ In that letter, FPCO Director Leroy S. Rooker, stated that the FPCO "would consider a record management system that allows unauthorized individuals to have access to education records to constitute a policy or practice of violating FERPA."¹¹ He pointed out that a teacher would not be allowed to leave a stack of report cards in a location that students could freely look through. In the same manner, a university should not have an electronic system in place that allows unauthorized access, even by university officials.¹² Additionally, universities that have computerized systems such as PeopleSoft or Banner may need to keep track of which school officials are accessing a student record, depending on the system's parameters. For example, if a university system allows broad access to student records, that system must be able to track exactly who accesses a particular student's education record in order to address and remedy any inappropriate access to that student's record. Otherwise, allowing university officials to operate on an "honor system" may result in a policy or practice of permitting access to student education records without the university previously determining if the official has a legitimate educational interest.¹³

With the current wide-spread usage of computers, universities must be willing to frequently revisit FERPA and its application to electronic student education records. Appropriately determining which electronic records receive FERPA protection, maintaining adequate campus technology security measures in order to prevent a breach of the campus computing system, and properly managing access to electronic student education records by school officials are all areas that raise possible FERPA concerns. I recognize and appreciate all of the conveniences associated with computers, but after reading an article about yet another major data breach,¹⁴ there are definitely times when I miss the good-old days of my typewriter.

⁴ See *President of Bates College v. Congregation Beth Abraham*, 2001 WL 1671588, (Me.Super., Feb. 13, 2001).

⁵ See *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002).

⁶ Beth Cate, Shakespeare on Cyberliability, NACUA Annual Conference, June 27, 2005. Available at http://counsel.cua.edu/FERPA/03G_Cate.pdf.

⁷ <http://www.privacyrights.org/ar/ChronDataBreaches.htm> (current as of July 10, 2007). See also Tom Zeller Jr., "Some Colleges Falling Short in Data Security," *The New York Times*, April 4, 2005.

⁸ *Gonzaga Univ. et al. v. Doe*, 536 U.S. 273 (2002).

⁹ Cate, *supra* note 2.

¹⁰ <http://www.ed.gov/policy/gen/guid/fpc/ferpa/library/tazewellva-mcgraw.html>.

¹¹ *Id.*

¹² Only school officials with a "legitimate educational interest" may have access to student educational records without written consent from the student, i.e. officials who need access to student records in order to perform their legitimate institutional functions. See 34 C.F.R. §99.31.

¹³ Interview available at <http://counselonline.cua.edu/archives/interviews/rooker.cfm>.

¹⁴ Data Breach Occurs at Northwestern, June 1, 2007. Available at <http://www.northwestern.edu/newscenter/stories/2007/06/data.html>.

FERPA: Not the Only “Privacy” Statute to Which CU Needs to Pay Attention

By Prentice R. Ehret, Senior Legal Staff Associate/Researcher, UCB

Above in this issue, as well as in the last edition of *The Legal Issue* (available at <http://www.uchsc.edu/ouc/legalissue.php>), we have addressed the Family Educational Rights and Privacy Act (“FERPA”), the primary statutory scheme applicable to privacy issues in higher education. FERPA, however, is not the only federal law concerning such privacy issues. This article will address two other federal statutory schemes which may apply to the functions of various departments on the campuses of the University of Colorado, and will also briefly discuss the manner in which they both “interface” with FERPA. While this article will limit itself to those two statutes, it is not meant to imply that these are the only two other than FERPA to concern themselves with privacy issues.

The federal laws in question are the Gramm-Leach-Bliley Act (“GLBA”), also known as the Financial Services Modernization Act of 1999, and the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). While the applicability of these statutes may differ on the various campuses and within the departments of those campuses, it behooves all campuses to assess the functions of their departments and components in light of the requirements of these two statutory and regulatory schemes.

The following is a summary of an informational booklet written by Christine R. Williams, former Associate General Counsel at the University of Akron, and published by the National Association of College and University Attorneys in March, 2007. The booklet is entitled *FERPA, GLBA & HIPAA: The Alphabet Soup of Privacy*.

The Gramm-Leach-Bliley Act (GLBA)

The Gramm-Leach-Bliley Act (“GLBA”) applies to “financial institutions,” a term which is defined broadly within the statute as any institution engaging in the financial activities enumerated under the Bank Holding Company Act of 1956, including “making, acquiring, brokering, or servicing loans” as well as “collection agency services.” Because institutions of higher education participate in financial activities, such as making Federal Perkins Loans, they are considered under the regulations of the Federal Trade Commission (“FTC”) to be “financial institutions” for purposes of GLBA. While these functions would certainly place financial aid departments under the coverage of the act, GLBA may also apply to bursar’s offices if they perform services such as cashing checks. However, merely accepting credit cards for such purposes as the purchase of books or making tuition payments does *not* bring an institutional department under GLBA.

GLBA has both “privacy” provisions and “security” provisions; however the privacy provisions do not apply to institutions of higher education as long as they are in compliance with the privacy provisions of FERPA. This is because the FTC reasoned that higher education institutions should not be burdened with having to comply with two different regulatory schemes regarding the privacy of student records. As is noted further down in this article, the Department of Health and Human Services (“HHS”) applied similar reasoning in exempting student medical records from HIPAA coverage. Thus institutions of higher education need only comply with the security provisions of GLBA, which require a minimum level of security for “confidential consumer information,” which is defined as nonpublic personal information which the institution obtains from customers seeking a financial product or service, e.g., students or parents of students applying for financial aid. This includes any such information regardless of format (paper or electronic).

In order to be in compliance with the security provisions of GLBA, colleges and universities must develop an information security program designed to protect the security and confidentiality of customer information and to guard against unauthorized access to such information. This requires designating an individual who is responsible for coordinating the program, and conducting a risk assessment in order to identify reasonably foreseeable risks to the security of customer information. Institutions of higher education must also implement procedures for selecting and retaining service providers who will have access to protected nonpublic customer information, and must obtain a written commitment from these providers to implement and maintain appropriate safeguards to protect such information.

At present, the FTC has not issued regulations outlining the potential sanctions that will apply to higher education institutions which are not in compliance with the security requirements of GLBA. Nonetheless, it is incumbent on the financial aid and bursar’s offices of all of CU’s campuses to conduct a survey and assessment of the functions within their departments to ascertain what functions fall under the coverage of GLBA, and what is required in order to be in compliance with the act.

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More Privacy Statutes

(Continued from page 4)

The Health Insurance Portability and Accountability Act (HIPAA)

The Health Insurance Portability and Accountability Act, commonly known as "HIPAA," was enacted by Congress to create rules to provide for the portability of health care insurance, and to simplify the administration of both health care and insurance. It also addresses the privacy and security of "protected health information" ("PHI"), which is defined as any *individually identifiable* health information. *Identifiable* refers not only to data that is explicitly linked to a particular individual, but also includes health information with data items which reasonably could be expected to allow individual identification.

As a statutory and regulatory scheme, HIPAA constitutes a "floor" rather than a "ceiling," i.e., it does not preempt state laws that may be more restrictive. Like GLBA, HIPAA has "privacy" regulations and "security" regulations. While the privacy regulations restrict access to PHI in any form, the security regulations apply only to PHI in electronic form.

In order to be subject to regulation under HIPAA, an institution must be either a "covered entity" or be a "hybrid entity" which has "covered components." In order to be a covered entity or a covered component of a hybrid entity, an institution or institutional department must not only provide health care, but must also transmit health information *in electronic form* at any stage related to the process of obtaining insurance reimbursement. Consequently, most institutions of higher education are either not covered entities, or are hybrid entities with covered components. The University of Colorado falls into the latter category.

The HIPAA privacy regulations primarily limit the manner in which PHI can be used and disclosed. Even permitted uses and disclosures are limited to the "minimum necessary," i.e., an employee of a health treatment facility or insurance provider should have access only to the information necessary for them to complete their designated tasks.

Just as in the case of GLBA, there is a "FERPA exception" to the application of HIPAA to the medical treatment records of students in postsecondary institutions. Since such records are addressed under FERPA, they are not subject to regulation under HIPAA. This leads to the rather counter-intuitive prospect that these records are not protected by *either* FERPA *or* HIPAA as long as they are not shared with anyone other than the treatment provider either inside or outside the institution. If they are shared with someone other than the treatment provider (which is almost always the case), they are subject to FERPA protection as "education records," but are not subject to protection under HIPAA.

However, while student health centers on the various campuses are not subject to HIPAA regulation as to student health records, regardless of whether or not they transmit health records electronically, they would be subject to the HIPAA privacy requirements as to the records of *non-students*, such as faculty, staff, or family members of students, if electronic transmission is involved at any stage. This is an evaluation that has to be performed on a campus-by-campus basis.

Records relating to research involving human subjects where health care or health information is implicated will be subject to HIPAA protection and regulation. On the other hand, any health records obtained or retained by the University as a result an employment relationship (e.g., pre-employment physicals, workers compensation records, etc.) are excluded from coverage under HIPAA.

Sanctions for failure to comply with any applicable privacy or security regulations under HIPAA can range from civil penalties of \$100 for each violation to a maximum of \$25,000 per year for the same violations. Much more drastic criminal penalties can be enforced where there was a knowing and deliberate violation of HIPAA regulations, and can result in as much as ten years' imprisonment where such knowing violation was for personal gain or malicious harm.

More Information

Each campus has its own procedures regarding FERPA compliance and the release of student information. The **Boulder Campus's** Notice of Student Rights and Procedures on the Designation and Release of Directory Information is available at http://registrar.colorado.edu/regulations/ferpa_confidentiality_records.html. The **Denver and Health Sciences Center Campuses'** Notification of Student Rights is available at <http://www.cudenver.edu/Student+Life/NSO/FERPA.htm>. The **Colorado Springs Campus's** FERPA Notice of Student Rights is available at <http://www.uccs.edu/studentsuccess/newsite/pates/currentstudents/ferpa.html>.

All questions regarding access to student records and FERPA should be directed to your campus registrar's office.

- Boulder Carol Mash (303) 492-6907
- Downtown Denver Campus: Thomas Hartman (303) 556-2737
- Health Sciences Center: Diana Warren (303) 315-7676
- Colorado Springs: Steve Ellis (719) 262-3375

