



—2017 UT SYSTEM— LEGAL CONFERENCE

presented by the Office of General Counsel

THE UNIVERSITY of TEXAS SYSTEM | FOURTEEN INSTITUTIONS, UNLIMITED POSSIBILITIES.

Session 3b

TPIA: How It All Connects – The Interplay Between FERPA, Title IX, and the TPIA

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Why are we here?

- Provide a broad overview of the Texas Public Information Act (“TPIA”), FERPA, and Title IX
- Discuss the intersection of the these laws
- Answer your questions



What is the Texas Public Information Act?

- The TPIA is found in [Chapter 552](#), *Texas Government Code*
- The TPIA applies to “governmental bodies” which includes institutions of higher education (that’s all of us!)
- All UT employees and officers are required to comply



The Essentials:

- ALL information *created in the course of business* is subject to the TPIA
- Information is *presumed public* unless a specific exception to disclosure applies



The General TPIA Process

Upon receipt of a valid TPIA request, UT institutions must, *promptly and without undue delay*, but **no later than the 10th business day** after receipt of the request:

Certify that it does not maintain the information

OR

Release the information

OR

Seek a ruling from the Texas Attorney General (“AG”) to withhold the information

OR

Certify a date for future release of documents

OR

Some combination of the previous options



The TPIA Process – Who’s Involved?

- Each UT Institution & UT System has a Public Information Officer (“PIO”)
- The PIO may designate a Public Information Coordinator (“PIC”) to handle requests
- Regardless of whether a PIC is designated, each institution has at least one employee assigned to requests
- Housed in Legal Affairs or Business Affairs



Why does it matter?



Compliance is important not only for transparency and public trust, but also to avoid civil and criminal penalties



The TPIA establishes criminal penalties for both the release of confidential information and the withholding of information that must be released



The TPIA also criminalizes the prohibited destruction, alteration, or concealment of public records



What is FERPA?

- Federal law: [The Family Educational Rights and Privacy Act](#)
 - Includes the associated federal regulations – ([34 CFR Part 99](#))
- FERPA gives **students** the right to:
 - Inspect, review and request amendments to errors in their **Education Records**;
 - Give their consent before their **Education Records** are used or disclosed *unless* a specific FERPA exception applies;
 - FERPA contains specific exceptions which allow the institution to use or disclose an Education Record without students' consent
 - Be notified of their rights under FERPA
 - File complaints with the US Department of Education about alleged FERPA violations



What Do I Need to Know?

FERPA is a federal law

All educational institutions that fail to have policies and procedures to ensure FERPA compliance can be audited and/or subject to legal action by the US Department of Education

In extreme cases they can lose all federal funding



What Do I Need to Know?

Regents Rule 50702 and UTS 183:

- Promote consistency and best practices of FERPA compliance throughout UT System
- Require Education Records to be properly identified as such
- Each institution must identify the offices/departments that create, maintain, or outsource FERPA Data
- All institutions must appoint an official to oversee FERPA compliance
- Requirements for maintaining FERPA Data confidentially and securely must be posted

Each UT institution has its own FERPA policy



Information Subject to FERPA

EDUCATION RECORDS

- Defined by FERPA as any records which:
 - contain information directly related to a student who is, or was in attendance at an educational institution; and
 - are maintained by the institution, or by a party acting for institution



What's an Education Record?

EDUCATION RECORDS include ALL records in ANY format including:

- emails to, from, or about a student maintained by a faculty or staff member in a personal or private email account
- test papers and essays
- computer records
- tracking information from a card swipe
- film and photos
- video and audio recordings
- records of disciplinary hearings
- application files of any individual enrolled or previously enrolled as a student



Personally Identifiable Information

Information obtained from **Education Records** that, alone or combined with other information, can be used to identify a student



EDUCATION RECORDS ARE EVERYWHERE!

EDUCATION RECORDS INCLUDE:

- Employment records of students working in jobs designated as “work-study” positions
- “Education Records” created or maintained by a third party that has a contract to provide a service that the institution could have performed internally



What *Isn't* an Education Record?

- Information that is personally observed by a staff or faculty member or “sole possession records” used only as a personal memory aid
- Records created and maintained by a law enforcement unit solely for law enforcement purposes;
- Employment records of individuals who are employed in a job that *does not require student status* and can be filled by any person;
- [Medical records](#) made and maintained about treatment provided to students by a health care provider including an institution’s Student Health and Counseling Services



What *Isn't* an Education Record?

- Application files of individuals who do not enroll as students;
- Financial information about a student's parent or guardian;
- A record from which all Personally Identifiable Information has been removed such that the record cannot be used alone, or in combination with other information, to identify a student to whom the record pertains;
- Records that only contain information about alumnus not connected with the alumnus' attendance as a student
- Records maintained by teaching hospitals relating to interns and residents are not "education records" subject to FERPA

Reminder: Information not subject to FERPA may still be information pertaining to official business and subject to the TPIA!



Who is a **STUDENT** Under FERPA?

- Any individual who is or was “*in attendance*” at the institution
- At UT System, “student” is defined as any individual enrolled in a course of study leading to a degree
- “Enrolled” for purposes of FERPA means attending class
- “Student” does not include an individual enrolled in community education classes, continuing education, and other similar programs
- Interns and residents at teaching hospitals are not “students” for purposes of FERPA



PARENTS & FERPA

- At the University level, the right to review and provide consent regarding education records transfers to the student, even if the student is under the age of 18 and/or the parent is paying the student's tuition
- A parent cannot obtain FERPA information without the student's consent



Who Must Comply with FERPA?

- All **Workforce members** (employees, trainees, contractors, and volunteers) who access or use “Education Records” of institution’s students for any reason



FERPA Data?

- For purposes of this training, **Education Records** and **Personally Identifiable Information** is referred to as **“FERPA DATA”**
- FERPA limits both the **“Use”** and **“Disclosure”** of FERPA Data:
 - **“Use”** is any access to FERPA Data by (1) an institution’s member for any purpose; or (2) a third party pursuant to a FERPA compliant contract
 - **“Disclosure”** is the granting of access to FERPA Data to a third party outside of the institution



FERPA DATA

FERPA also applies to information disclosed verbally if the information was originally obtained from an Education Record

- i.e., an employee reads a student transcript and then tells a reporter what grade the student received



FERPA Student Consent Requirements

- An educational institution must obtain a student's consent for the use or disclosure of his or her educational records **UNLESS** a specific statutory provision allows its use or disclosure without first obtaining consent
- The regulation ([34 CFR 99.31](#)) lists 16 instances in which student information subject to FERPA may be disclosed **without consent**



FERPA Student Consent Requirements

- UT System has a model FERPA Consent Form that meets the requirements
- Requirements: signed and dated written consent from *all* relevant students, specifying:
 - The records that may be disclosed
 - The purpose for which they may be disclosed
 - The persons or classes to whom they may be disclosed



FERPA Disclosure without Consent: The “University Official” Exception

- The “University Official” Exception (also called the “School Official Exception”) is very broad and allows employees to perform their duties
- It permits institution workforce members to use and disclose an Education Record without student consent for any “legitimate educational purpose”
 - A legitimate educational purpose includes performance of any duty a University employee is required or permitted to perform as a University employee



Other Exceptions to Consent

- To Federal or State authorities, including System Administration and the Board of Regents, authorized by law to audit or evaluate a state or federally funded education program, or to bring an enforcement action regarding an educational program
- To another institution to which a student has applied for enrollment
- To organizations conducting studies on behalf of educational institutions pursuant to a FERPA-compliant agreement



Some Other Exceptions to Consent

- To comply with a valid judicial order or subpoena
- In a health or safety emergency, but on a case by case basis to the extent determined by the institution to be required to address the emergency
- Results of a disciplinary hearing in some specific circumstances
- In connection with financial aid for which the student has applied or received, to determine eligibility, amount, conditions of aid, or enforce conditions and terms of aid received



The Directory Information Exception

- If the data is “Directory Information”
 - i.e., name, address, email address, phone number, dates of attendance and other such directory information designated in the institution’s FERPA policy
 - HOWEVER, if a student has “opted out” Directory Information may not be released without the student’s consent
 - A institution’s FERPA policy and school catalog provide information as to how a student may “opt out” of directory information disclosure
 - An opt out selection remains in effect, even after a student leaves the institution, until the student revokes it in writing



More on the Directory Information Exception

- **NOTE:** Normally only the Public Information Officer, or an official trained and authorized to release information under the Directory Exception, should do so
- In some cases, releasing Directory Information in a particular context may reveal Personally Identifiable Information about a student, which is a FERPA violation
- For example, a requestor asks for the Directory Information about all students who have a GPA under 2.5. If the school releases the requested Directory Information, this will reveal to the requestor that each of these students has a GPA of less than 2.5. That would be a FERPA violation

THIS IS NOT AN EXHAUSTIVE LIST. SEEK HELP BEFORE RELEASING ANY INFORMATION THAT MAY BE SUBJECT TO FERPA!



Contracts & FERPA

- In contracting for services, an institution must determine if the contract will or may involve outsourcing of its FERPA Data to a contractor. This includes contracts under which students are required to give their personal information directly to the contractor, who then maintains or processes it on behalf of the institution
- If so, the contract must contain terms that require the contractor to comply with the institution's specific FERPA compliant confidentiality and security requirements
- You can also get help from your institution's legal department or the UT System Office General Counsel or Privacy Officer if you are not sure if a contract involves FERPA data



FERPA & Information Security

- Unlike HIPAA and other Breach Notification Laws, FERPA is not a Security Rule. However, since FERPA requires institutions to keep FERPA Data confidential, it must be maintained securely at all times
- Employees must know, understand, and follow [UTS 165](#) and their institution's general rules for securely handling and storing confidential data, which includes FERPA Data
- Institution and UT System Information Security offices can help



What is Title IX?

Title 20 USC
Sections 1681-1688

Title IX, Education Amendments of 1972

- “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”



What is Title IX?

- Prohibits discrimination on the basis of sex in federally funded programs and activities
- All public and private universities receiving any federal financial assistance must comply
- Enforced by the US Department of Education (**DOE**) Office of Civil Rights (**OCR**)



Title IX Offenses

Sex-based discrimination includes:

- Denial of Equal Opportunities
 - Employment
 - Athletics
- Sexual Misconduct
 - Stalking
 - Dating/Domestic Violence
 - Sexual Harassment
 - Sexual Violence



Title IX Compliance

- The University **must** comply with Title IX procedural requirements ([34 C.F.R. § 106.8-106.9](#))
 - Widely disseminate non-discrimination policy
 - Designate at least one Title IX Coordinator
 - Adopt and publish grievance procedures
- The University **must** investigate when there is actual or constructive notice of a Title IX violation
- Take **prompt and effective** action to:
 - Stop the misconduct
 - Remedy any effects
 - Prevent the recurrence



The Title IX Process (Generally)

Investigation

Determination
& Interim
Measures

Notification of
Outcome

Disciplinary
Hearing



Due Process

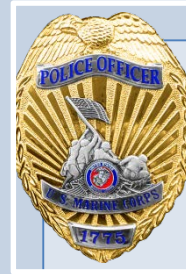
- Prohibits government deprivation of “life, liberty, or property, without due process of law.”
- *Goss v. Lopez* (1975)
 - Admitted Students have a property interest in education
 - Cannot be deprived unless the university provides:
 - Adequate notice of the charges AND
 - A meaningful opportunity to respond.



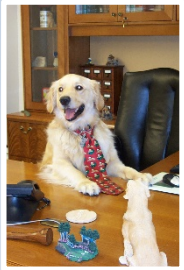
What Types of Records Might Be Part of a Title IX Investigation?



Correspondence with the respondent and complainant



Law Enforcement Records



Employment Records



Other materials (e.g., witness statements, text messages)



TPIA & FERPA & Title IX

What happens when these overlap?!



DON'T PANIC!

We can figure it out together



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TPIA & FERPA

- FERPA Education Records are not generally subject to release under the TPIA
- [Per the DOE](#), the AG Open Records Division does not rule on FERPA information
- Directory information may be released without consent for students who have not opted out
- If a student has provided proper consent to the requesting party, or the information may be adequately de-identified, the TPIA process is followed and information may be released, or an AG opinion may be sought



TPIA & FERPA

A student has a right of access to their own information, which is addressed by [UT System's Model FERPA Policy](#):

- a. A Student has the right, upon request, to review all materials that are in the Student's Education Records, except:
 - i. Financial information submitted by the Student's parents;
 - ii. Confidential letters and recommendations associated with admissions, employment or job placement, or honors, to which the student has waived rights of inspection and review or which were made part of the Student's Education Records prior to January 1, 1975, provided those letters were collected under established policies of confidentiality and were used only for the purposes for which they were collected;
 - iii. Education records containing information about more than one Student, in which case the University will permit access only to that part of the record that pertains to the inquiring student; and
 - iv. Records that are subject to an attorney-client privilege which belongs to the University.



Example: TPIA Request for FERPA Data

TEXAS PUBLIC INFORMATION ACT REQUEST

Requestor

Name: Joe McPublic
Email: JoeMcPublic@gmail.com

Request Details

Date: 9/25/2017
Request: I'd like all class schedules, coursework, and final grades for all undergraduate students during the 2016-2017 school year.

- A member of the public submits a TPIA request for class schedules and other info for ALL undergraduates; can we release this information?
- **NO!**



Example: TPIA Request for FERPA Data

TEXAS PUBLIC INFORMATION ACT REQUEST

Requestor

Name: Jane Reporter
Email: jane.reporter@investigativemedia.com

Request Details

Date: 9/26/2017
Request: Please provide the recent complaint filed against student Joe Quarterback.

- A member of the public submits a TPIA request for information about a named student; can we release this information?
- **NO!** This is a targeted request.
 - The Family Educational Right and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232g, does not authorize The University of Texas to confirm or deny the existence of responsive records.



Example: TPIA Request for Info that *Includes* FERPA DATA

TEXAS PUBLIC INFORMATION ACT REQUEST

Requestor

Name: Veronica Corningstone
Email: reporter@news.com

Request Details

Date: 9/26/2017
Request: Please provide all emails to or from
Professor VonSmartyPants from January 1,
2017 to the present.

You receive a request for a professor's emails, some of which include student's personally identifiable information; can we release this information?

Maybe! *If* we can adequately de-identify the documents and no TPIA exceptions apply.

From: [Redacted]
To: [Redacted]
Subject: Faculty Assignment
Date: Wednesday, September 13, 2017 9:02:51 AM

Professor VonSmartyPants:

I have misplaced my notes from this afternoon's lecture. Can you tell me what the assigned reading is for next week? Thanks!

Best,

[Redacted]
Rory Gilmore



Example: TPIA Request for FERPA DATA

TEXAS PUBLIC INFORMATION ACT REQUEST

Requestor

Name: Rory Gilmore
Email: gilmoregirl@gmail.com

Request Details

Date: 9/27/2017
Request: Please provide all emails to or from any employee in the journalism department about me from August 2016 to the present.

You receive a request from a student for emails about herself; some emails concern other students, while others are correspondence with University attorneys. Can we release this information?

Some of it! We must de-identify the records that concern other students AND seek a ruling where the attorney-client privilege applies.

From: Jack McGoy
To: Business Office
Subject: Issue Regarding Editorial
Date: Thursday, September 14, 2017 12:17:29 PM

Professor Xavier,

I've reviewed the editorial co-authored by staff writers **Rory Gilmore** and **Paris Gellar**. Thank you for bringing this to my attention. While I agree it's problematic, there are First Amendment issues to discuss before taking any action. Please call my office to set up a time for us to meet.

Regards,

Jack McGoy
Senior Attorney
The University of Texas

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Example: TPIA Request for FERPA DATA

TEXAS PUBLIC INFORMATION ACT REQUEST

Requestor

Name: Ron Popeil
Email: ron@sales.com

Request Details

Date: 9/27/2017
Request: Please provide names, email addresses, and mailing addresses for all students.

You receive a request for the contact information for all students. The Requestor is obviously going to solicit the students. Can we release this information?

Yes (Probably)! We must release the information listed as “directory information” in our policy for any student who did not opt out. The Registrar’s Office can assist you with these types of requests.



FERPA and Title IX

- Under Title IX and FERPA
 - A complainant has a right to receive the final results of a disciplinary hearing if the alleged conduct involves a crime of violence or a non-forcible sex offense.
 - If a respondent is found responsible for a crime of violence or non-forcible sex offense, the University may disclose the final results of a disciplinary hearing to *anyone*.
- Sharing FERPA Data with the hearing officer/investigator/Title IX office
 - These individuals are school officials with a legitimate educational interest
- Under Title IX
 - The complainant and respondent must be given similar and timely access to information that will be used at the hearing, *consistent with FERPA*.



FERPA Data and Title IX

- According to OCR, if there is a direct conflict between FERPA and Title IX, “the requirements of Title IX override any conflicting FERPA provisions.” [2001 Revised Sexual Harassment Guidance, page vii.](#)
 - “The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding. Furthermore, [FERPA] does not override federally protected due process rights of persons accused of sexual harassment.” [2001 Revised Sexual Harassment Guidance, page 22.](#)



Worlds Collide: TPIA Requests for Title IX Information that Includes FERPA Data

- Sharing information as required by Title IX is **NOT** a release for purposes of TPIA
- If information can be de-identified in accordance with FERPA, FERPA does not require us to withhold it
- The usual exceptions may apply (e.g., compliance investigation)
- The context and wording of the request matter





Want additional training? Contact us:



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<http://www.utsystem.edu/open-records>





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