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 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
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:

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<th>Option</th>
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<td>Certify that it does not maintain the information</td>
<td>Release the information</td>
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<td><strong>OR</strong></td>
<td><strong>OR</strong></td>
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<td>Seek a ruling from the Texas Attorney General (“AG”) to withhold the</td>
<td>Certify a date for future release of documents</td>
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<td>information</td>
<td><em>[Some combination of the previous options]</em></td>
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**Certify a date for future release of documents**

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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
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
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

- 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

• 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

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.
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.
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