FERPA FOR EVERYBODY

What YOU Need to Know about Student Privacy & System-wide Requirements for Protecting Education Records

UT System Office of General Counsel’s Education Seminars
Overview

• Why now?

• What is FERPA? (from about 10,000 (x 10,000) feet

• Components of the obligations created by Regents Rule 50703 and UTS 183 for UT System institutions

• Developing an Implementation Plan
Regents Rule 50702 & UTS 183: Consistency & Best Practices

Why Now?

• Technological advances enable us to create and store huge amounts of records in electronic form.

• Courts and the Department of Education have confirmed that the definition of Education Records that are subject to FERPA is very broad.

• Increased legislative, public and media scrutiny of institutional privacy practices. (Virginia Tech, highly publicized data breaches in public and private sectors, increase in Big Data) and longitudinal data studies.

• Amendments to FERPA provide more flexibility in exchanges of student data for research.

• Increasing demand for transparency- Title IX, Public Information Act requests, etc..

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Caution!

- FERPA is complex, detailed, and, at times, appears to defy common sense.
- Lawyers explaining FERPA can be really annoying, even when they mean well.
- This is just basic awareness training - not a master class!
PART ONE

FERPA FROM
10,000 (x 10,000) FEET
WHAT IS FERPA?

- The Family Educational Rights and Privacy Act is a federal law, 20 U.S.C. § 1232g, and federal regulations (34 CFR Part 99)
- An educational institution that fails to have policies and procedures sufficient 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.
FERPA provides Students with specific rights:

• Inspect and review their own “Education Records;
• Give voluntary consent before their Education Records are Used or Disclosed without their permission; (unless a specific FERPA EXCEPTION applies) and
• Seek amendment of erroneous Education Records.
• Be notified of the Student’s privacy rights under FERPA
• File complaints with the U.S Department of Education about allegations of FERPA violation.
FERPA and UT Institutions

FERPA applies to all educational institutions that:

• provide educational instruction or services, or both to students; and

• receive any funds from a program operated by the US Department of Education.

All nine of UT System’s academic institutions and each of its six health science institutions are subject to FERPA. UT Rio Grande Valley will be too, once it begins to enroll students.
FERPA and UT System Administration

FERPA also applies to agencies that
• Direct or control educational institutions, and
• Receive any funds from a program operated by the US Department of Education.

UT System Administration does not receive such funds so it is not directly subject to FERPA. However, when accessing, maintaining or sharing a UT institution’s Education Record, UT System Administration offices, must comply with FERPA.
STUDENT

• FERPA defines a Student as any individual who is or was “in attendance” at an institution.
• At System, a student is considered to be “in attendance” only if enrolled in a course of study leading to a degree.
• Applicant records are not subject to FERPA unless the student was admitted. Once a student is “in attendance”, that student’s application records become subject to FERPA.
• At the post-secondary level, “Student” includes an individual under the age of 18.
“Education records” are any records that
- contain information directly related to a “Student” who is, or was, in attendance at a UT System institution; and
- are maintained by the institution or by a party acting for institution; AND

- Personally Identifiable Information obtained from an Education Record
- Includes any record: emails, computer data basis, paper, video or audio tape, film, photos.
Personally Identifiable Information- De-identification

- Redaction
- Targeted Requests
- Aggregation
What is NOT an Education Record

- Information that comes from a personal observations
- Records created and maintained by a law enforcement unit for law enforcement purposes;
- Employment records of individuals who are not employed in a job that requires student
- Medical records made and maintained in the course of treatment and disclosed only to those individuals providing treatment (Student Health Services, Counseling Centers);
- Records that only contain information about an alumnus not connected with the alumnus’ attendance as a student
- “Directory Information” but only about students who have *not* opted out of the Directory Information Exception
Examples of Education Records

• Transcripts
• The electronic records of a card swipe by students to gain entry into their dorm
• Emails between a faculty member and a student about an exam in the faculty member’s email account
• Time cards for work-study students who work in the Maintenance Department
• Check issued to a student for a tuition refund
Exceptions- Using and Releasing Education Records Without Consent

The University (or School) Official’s Exception

Permits an individual with legitimate educational interest in an Education Record to use or disclose an Education Record without seeking consent from the student to whom the record pertains

- For University officers or employees, legitimate educational interest equals the need to perform an official duties on behalf of the University
- University must notify students the individual or types of individual who are designated a University Officials
- Can include employees, Regents, volunteers, third party contractors
- Recipient is obligated to follow the institution’s FERPA policies, including the requirement to maintain the records confidentially and securely that pertain to that record

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Exceptions- Using and Releasing Education Records Without Consent – other examples

• To Federal or State authority (including BOR, System Administration, State Coordinatin Board) authorized to evaluate a state or federally funded education programs.

• To organizations conducting studies on behalf of educational institutions.

• To comply with a valid judicial order or subpoena.

• In a health or safety emergency as determined by a University Official authorized to determine if an emergency exists and only to the extent justified by the emergency.

• Results of a disciplinary hearings in some circumstances.

• Record is “Directory Information” and student has been notified of the student’s right to “opt out” of the exception and has not elected to opt out of the release of his or her Directory Information under this exception.

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QUESTIONS ON PART ONE?
PART TWO

Regent Rule 50702
UTS 183
Regents Rule 50702 - Confidentiality & Security of Education Records Subject to FERPA

- Promotes consistency and best practices throughout U. T. System with regard to FERPA compliance
- Chancellor to adopt a System-wide policy that requires each UT Institutions to:
  - Have policies and procedures that incorporate the OGC model policy and ensure compliance with FERPA
  - Ensure that all contracts that involve third party access to FERPA Data have FERPA compliant language.
- Failure to comply by a faculty or staff member is grounds for disciplinary action
UTS 183- Maintenance of Education Records Subject to the Family Educational Rights and Privacy Act (FERPA)

It is the Policy of U. T. System to ensure that Education Records, including records maintained by third parties acting on behalf of an institution or System Administration, are:

a. properly identified as Education Records;
b. maintained confidentially and securely;
c. available for inspection and review as authorized by FERPA; and
d. available to The Board of Regents of the U. T. System and/or System Administration, as permitted by FERPA, to allow (each) to carry out their respective duties and responsibilities under Texas and federal law.
UTS 183- Elements

Each UT institution and System Administration must:

• Identify offices/departments that creates/maintains/outsources FERPA Data
• Appoint an official to oversee FERPA compliance
• Publish requirements for maintaining FERPA Data confidentially and securely
UTS 183- Elements (More)

- Implement a contract review process
- Adopt the OGC Model FERPA policy as part of its Handbook of Operating procedures

TRAINING
- Ensure that all personnel get some level of FERPA awareness training on FERPA and the institution’s polices and practices for compliance
- Development of specific training for each area of the institutions tailored to the type of FERPA Data that a particular office or department accesses or creates.
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 kept securely.
FERPA & INFORMATION SECURITY (more)

• Understand and follow UTS 165 and institutions specific rules for handling and storing confidential data securely.

• If FERPA Data is subject to unauthorized access, it must be reported as a potential security breach to the Information Security Offices for investigation and risk analysis to determine if the type of FERPA data and the nature of the access that occurred requires [institution to comply with applicable state Breach Notifications laws.
Contracting and FERPA

Every University department or office that proposes to enter into a contract must first determine if the contract will or may involve outsourcing of the University’s FERPA Data to a contractor. This includes contracts where students are required to give their personal information to the contractor, who then maintains or processes it on behalf of the University.
Contracting and FERPA (more)

• If a potential contract involves FERPA Data, the contract must require the contractor to comply with specific FERPA compliant confidentiality and security requirements. If you are not sure if FERPA Data will be involved in a contract you are working on, it is your obligation to find out.

• The OGC model contract template contains FERPA compliant language that the department or office can use to ensure FERPA compliance.

• The designated Privacy Official at the institution, in-house legal officers and the Office General Counsel at UT System can all assist you if you aren’t sure if a contract involves FERPA data.

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QUESTIONS ON PART TWO?
PART THREE

WHAT NOW?
What now?

• Identify and Appoint a FERPA Coordinator
• Adopt the OGC Model Policy
• Identify what kind FERPA data each area of the institution creates, maintains and accesses
• Review/amend/adopt internal processes, contracts, data security requirements
What now? (more)

• Adapt and implement new employee training (OGC and System-wide Compliance will provide training templates).

• Develop training and resources on the specific requirements aspects of FERPA that apply to your college, office or department.
RESOURCES

• Board Rule 50702
  Links to
  – UTS 183
  – FERPA Regulations and Statute
  – OGC Model FERPA Policy and Notice

• OGC Training at a Glance- Privacy
  http://www.utsystem.edu/ogc/training.htm
  – Whitepapers on specific FERPA topics
WRAP UP

• More QUESTIONS? (if time!)
• This is the first of a series of seminars that OGC will be offering this year.
• For more on FERPA, please contact Barbara Holthaus at 512 499 4617 or bholthaus@utsystem.edu.
• We will be emailing you a written set of all of the questions (and answers) we didn’t get through today.
Thank you for your support

- We hope you will tune in again next month!
- If you would like to set up a training on another legal topic through the UT System Office of General Counsel, please contact Tamra English (tenglish@utsystem.edu) or Jason King (jking@utsystem.edu).