

**OPEN RECORDS AND MEETINGS OPINION
2008-O-27**

DATE ISSUED: December 1, 2008

ISSUED TO: University of North Dakota

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mike Jacobs, Publisher and Editor of the Grand Forks Herald asking whether the University of North Dakota violated N.D.C.C. § 44-04-18 by refusing to provide redacted student disciplinary action records.

FACTS PRESENTED

On May 5, 2008, a reporter from the Grand Forks Herald ("Herald") requested records from the University of North Dakota ("UND") describing the sanctions issued against a student or students living in the West Residence Hall regarding the following acts:

1. Taunting a fellow dorm resident concerning his Jewish heritage;
2. Marring university property with graffiti or other destructive acts; and,
3. Possessing or using mock weapons in the residence hall, such as, but not limited to, air rifles.

The reporter qualified his request by allowing UND to excise from these documents the names of the students against whom sanctions were issued as well as other identifying information such as the students' hometowns and courses of study.

UND had interviewed a number of students in April 2008 for possible violations of the UND Code of Student Life and the Residence Hall Handbook. The incidents investigated involved the use of air rifles in a residence hall and possible anti-Semitic behavior that included an incident where a statement was written with ice cream in an elevator regarding a Jewish student. UND issued sanctions to some of the students.

The University Police Department ("UPD") also investigated the ice cream incident. The UPD gave information to the Grand Forks County State's Attorney's office regarding this incident. The State's Attorney's office originally charged one student with

disorderly conduct, but later dismissed the charge. The Herald subsequently ran a story naming two students involved in the incident, one of whom was the victim. Their names had been released by the Grand Forks State's Attorney's office.

UND refused to provide the requested records to the Herald because UND considered the records confidential under the Family Educational Rights and Privacy Act "FERPA", 34 C.F.R. § 99.39 and later cited 34 C.F.R. § 99.31(a)(14)(i).

ISSUE

Whether UND's written denial of the Herald's request was sufficient under N.D.C.C. § 44-04-18(7).

ANALYSIS

"Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours."¹ An exception to the open records law can be found in federal law as well as state statutes.² FERPA is a specific exception to the open records law.³ This office has previously found that records of student discipline are "educational records" under FERPA.⁴

A public entity, such as UND, must furnish the requester one copy of the public records requested.⁵ A denial of a request for records must describe the legal authority for the denial.⁶ A public entity may not deny a request for an open record on the ground that the record also contains confidential or closed information.⁷

FERPA was enacted by Congress in 1974 to protect the privacy of students and their parents.⁸ Under the law, educational institutions such as UND that receive federal funds must keep "education records"⁹ confidential or lose their entitlement to federal

¹ N.D.C.C. § 44-04-18. See also N.D. Const. art. XI, § 6.

² N.D.C.C. § 44-04-17.1(7). See also N.D.A.G. 98-F-13.

³ N.D.A.G. 94-F-28; N.D.A.G. 98-L-51.

⁴ N.D.A.G. 2000-O-04 (letter of discipline that was put in a student's permanent file was an "educational record" protected by FERPA, thus allowing an executive session to be held to discuss the disciplinary record).

⁵ N.D.C.C. § 44-04-18(2).

⁶ N.D.C.C. § 44-04-18(7).

⁷ N.D.C.C. § 44-04-18.10(1).

⁸ 20 U.S.C. § 1232g.

⁹ See 20 U.S.C. § 1232g(a)(4)(A) (defining "education records").

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funds.¹⁰ Under FERPA, an educational agency or institution may not have a policy or practice of disclosing education records, or non-directory personally identifiable information from education records without the prior written consent of the parent or “eligible student,” i.e., a student who has reached 18 years of age or is attending a post-secondary institution at any age, except as provided by law.¹¹ FERPA does, however, expressly permit a post-secondary educational institution, such as UND, to disclose personally identifiable information from an educational record without the student’s consent in situations involving violent crime or non-forcible sex offenses.¹²

FERPA defines “Personally identifiable information” as:

- (a) The student's name;
- (b) The name of the student's parent or other family member;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number or student number;
- (e) A list of personal characteristics that would make the student's identity easily traceable; or
- (f) Other information that would make the student's identity easily traceable.¹³

Courts have determined, however, that when an “education record” is redacted, or the “personally identifiable information” is removed (de-identified), the record ceases to be confidential under FERPA.¹⁴ The Montana Supreme Court recently held that regardless of whether disciplinary records constituted “education records” under

¹⁰ 20 U.S.C. § 1232g(b).

¹¹ 20 U.S.C. § 1232g(b); 34 C.F.R. Subpart D. Under the authority granted by N.D.C.C. § 15-10-17(7), the State Board of Higher Education has adopted rules to protect the confidentiality of student records – the FERPA rules. See SBHE Policies, § 1912(1) (student education records are confidential and access to those records is restricted according to FERPA).

¹² 34 C.F.R. § 99.31(a)(14)(i); see also 20 U.S.C. § 1232g(b)(6)(B).

¹³ 34 C.F.R. § 99.3 (2008).

¹⁴ Osborn v. Bd. of Regents of Univ. of Wis. Sys., 647 N.W.2d 158, 168 n.11 (Wis. 2002); Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trustees of Ind. Univ., 787 N.E.2d 893 (Ind. App. 2003); United States v. Miami Univ., 294 F.3d 797, 824 (6th Cir. 2002).

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FERPA or whether the redacted records remain “education records” under the law, the end result is that FERPA does not prohibit the release of redacted student disciplinary records.¹⁵

In addition, the U.S. Department of Education, the federal agency vested with authority to administer FERPA, also agrees that “student-level information from education records may be disclosed, without consent, if ‘personally identifiable information,’ as defined . . . [in 33 C.F.R. § 99.3], has been removed.”¹⁶ Thus, under FERPA, UND has the ability to release disciplinary records if the “personally identifiable information” is removed.

UND initially cited 34 C.F.R. § 99.39¹⁷ and later 34 C.F.R. § 99.31(a)(14)(i)¹⁸ as its authority to deny the disciplinary records. UND did not believe it had an obligation under FERPA to release the records in a redacted form with “personally identifiable information” removed even though the Herald specifically asked that such information be removed.

UND failed to consider whether personal identifiable information could be removed from the requested records. It was only when asked by this office why it could not release redacted records that UND explained that the definition of “personally identifiable information” under FERPA includes records that are “easily traceable” to the student.¹⁹ UND supported its argument with a letter from the Department of Education stating that a student’s identity may still be “easily traceable” after the personal information is removed and even when information is released in the aggregate.²⁰ According to the

¹⁵ Board of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press, 160 P.3d 482, 488 (Mont. 2007); see also United States v. Miami Univ., 294 F.3d 797, 824 (6th Cir. 2002) (“[n]othing in the FERPA would prevent the Universities from releasing properly redacted records.”).

¹⁶ Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office to Corlis P. Cummings, Senior Vice President for Support Services, Board of Regents of the Univ. Sys. of Georgia (Sept. 25, 2003).

¹⁷ 34 C.F.R. § 99.39 does not specifically state that disciplinary records cannot be released, but rather is a definition section.

¹⁸ 34 C.F.R. § 99.31(a)(14)(i) includes a sentence that states an “institution must not disclose the final results of the disciplinary proceeding. . .” This section addresses disciplinary actions that involve crimes of violence and non-forcible sex offenses.

¹⁹ 34 C.F.R. § 99.3 (e) and (f).

²⁰ Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office to Corlis P. Cummings, Senior Vice President for Support Services, Board of Regents of the Univ. Sys. of Georgia (Sept. 25, 2003).

Department of Education, in those instances FERPA prohibits disclosure of the information without consent.²¹

According to UND, in this instance, one student's records are easily traceable because his name was already released by the media. According to a letter from the Department of Education "[i]f a school reasonably believes that release of information would make the student's identity 'easily traceable,' then the school should not disclose the information to the requesting party."²²

Although UND may be correct that it cannot release the records of the student whose name was publicly released because his records could be easily traced, it failed to conduct this analysis in response to the Herald's request. The Herald's request applies to more than one student and UND failed to consider whether the records of any or all of the students could be released after removing "personally identifiable information."

Previous opinions from this office have established it is a violation of the open records law to deny a record using an inaccurate legal reason.²³ It is my opinion that under FERPA, disciplinary records may be released if "personally identifiable information" is adequately removed. Thus, UND's reliance on 34 C.F.R. § 99.39 and 34 C.F.R. § 99.31(a)(14)(i) to allege that FERPA prohibited the release of disciplinary records under any circumstance was inaccurate and a violation of the open records law.

CONCLUSION

FERPA does not prohibit the release of disciplinary proceeding records if an educational institution can adequately remove all personally identifiable information from those records. The University of North Dakota violated the open records law when it incorrectly responded that FERPA prevented the release of all disciplinary proceeding records and because it failed to consider whether the requested records could be released after removing all personally identifiable information.

²¹ Id.

²² Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office to Diane Walker, Dir., Judiciary Programs, Kennesaw St. Univ. (Sept. 27, 2002); see also Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office to Corlis P. Cummings, Senior Vice President for Support Services, Board of Regents of the Univ. Sys. of Georgia (Sept. 25, 2003).

²³ See e.g., N.D.A.G. 2008-O-05; N.D.A.G. 2006-O-12; N.D.A.G. 2004-O-11.

STEPS NEEDED TO REMEDY VIOLATION

UND must review all educational records related to disciplinary sanctions imposed on students that were requested by the Herald and, after removing personally identifiable information as defined in 34 C.F.R. § 99.3 (2008), disclose the de-identified records to the Herald. If, with respect to any student, any records are still "easily traceable" to the student after removing all direct identifiers and related information, UND may withhold all records relating to that student. UND must provide an accurate explanation to the Herald for its action regarding any records that are withheld.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.²⁴ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁵

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²⁴ N.D.C.C. §44-04-21.1(2).

²⁵ Id.