

**OPEN RECORDS AND MEETINGS OPINION
2013-O-08**

DATE ISSUED: May 24, 2013

ISSUED TO: North Dakota State University

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Rob Port asking whether North Dakota State University violated N.D.C.C. § 44-04-18 by refusing to provide student disciplinary records.

FACTS PRESENTED

On October 22, 2012, Rob Port e-mailed North Dakota State University ("NDSU") requesting "the details of any disciplinary action taken against the NDSU football players who were charged and convicted of petition signature fraud earlier this year. I would like the details of any action taken academically, through student government and/or through the athletics department."

NDSU interpreted the e-mail to request student disciplinary records in regards to a widely reported and publicized incident in which ten NDSU football players were charged with petition fraud in the fall of 2012. NDSU directed Mr. Port to an e-mail link that provided NDSU President, Mr. Bresciani's, comments on the matter. NDSU refused to provide any additional records pertaining to students' discipline stating such records were confidential under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, and 34 C.F.R. Part 99 and as indicated in the 2009 version of the Attorney General's Open Record Manual.

ISSUE

Whether NDSU violated N.D.C.C. § 44-04-18 by refusing to provide student disciplinary records.

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 A public entity, such as NDSU, must furnish the requester one copy of the public records requested.² A denial of a request for records must describe the legal authority for the denial.³ A public entity may not deny a request for an open record on the ground that the record also contains confidential or closed information.⁴ If confidential or closed information is contained in an open record, a public entity shall permit inspection and receipt of copies of the information contained in the record that is not confidential or closed, but shall delete, excise, or otherwise withhold the confidential or closed information.⁵

An exception to the open records law can be found in federal law as well as state statutes.⁶ FERPA is a specific exception to the open records law.⁷ FERPA was enacted by Congress in 1974 to protect the privacy of students and their parents.⁸ Under the law, educational institutions that receive federal funds, such as NDSU, must keep “education records”⁹ confidential or lose their entitlement to federal funds.¹⁰ In addition, 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.¹¹ This office has previously found that records of student discipline are “educational records” under FERPA.¹²

In 2008, the University of North Dakota (UND) was faced with a similar situation when it received a request for student disciplinary records related to a highly publicized incident.¹³ UND denied the request because records of students’ discipline are confidential under . . . FERPA. In the opinion to UND, I explained that a student’s

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

² N.D.C.C. § 44-04-18(2).

³ N.D.C.C. § 44-04-18(7).

⁴ N.D.C.C. § 44-04-18.10(1).

⁵ N.D.C.C. § 44-04-18.10(2).

⁶ N.D.A.G. 2008-O-27. See also, N.D.C.C. § 44-04-17.1(8) (definition of “law” includes federal statutes).

⁷ N.D.A.G. 2008-O-27.

⁸ 20 U.S.C. § 1232g.

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

¹⁰ 20 U.S.C. § 1232g(b).

¹¹ See SBHE Policies, § 1912(1) (student education records are confidential and access to those records is restricted according to FERPA).

¹² N.D.A.G. 2008-O-27 N.D.A.G. 2000-O-04.

¹³ N.D.A.G. 2008-O-27.

disciplinary records may only be withheld under FERPA if “personally identifiable information” cannot be adequately redacted from the records.¹⁴

It is inaccurate to state that FERPA explicitly protects students’ disciplinary records because under FERPA, “[a]n educational agency . . . may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student’s identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.”¹⁵

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, student number, or biometric record;
- (e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.¹⁶

In 2009, the Department of Education (“DOE”), the federal agency vested with authority to administer FERPA, amended the definition of “personally identifiable information.”¹⁷

¹⁴ Id.

¹⁵ 34 C.F.R. § 99.31(b)(1).

¹⁶ 34 C.F.R. § 99.3; see also 20 U.S.C. § 1232g.

¹⁷ The current definition of “personally identifiable information,” which became effective Jan. 9, 2009, modified section (f) and added section (g) to 34 C.F.R. § 99.3.

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The amendment clarified and provided guidance to educational institutions about how they may disclose “redacted” educational records that concern students or incidents that are well-known in the school, its community, and to the requestor.¹⁸

The amendment is instructive in this particular situation, as it defines “personally identifiable information” to include specifically:

information that can be used to identify a student including direct identifiers . . . alone or combined with other personal or identifying information that is linked or linkable to a specific individual, including indirect identifiers . . . that would allow a reasonable person in the school or its community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty. . . . Additionally, personally identifiable information includes information that is requested by a person who an agency or institution reasonably believes has direct, personal knowledge of the identity of the student to whom the education record directly relates. This is known as a targeted request.¹⁹

The DOE has consistently issued letter opinions which recognize that occasionally, information could be traced to individual students, even if the records are redacted and even when information is released in the aggregate.²⁰ In those instances, FERPA prohibits disclosure of the information without consent when, taking into account all available information, data, and other information known to have been disclosed by other means such as through the media, the educational institution determines the records could still identify students.²¹ “This may be the case, for example, with a highly publicized disciplinary action, or one that involved a well-known student, where the student would be identified in the community even after the record has been ‘scrubbed’ of identifying data. In these circumstances, FERPA does not allow disclosure of the record in any form without consent.”²²

¹⁸ 73 Fed. Reg. 15574-01 (Mar. 4, 2008) (Sec. 4. De-Identification of Information (§ 99.31(b))) (outlining proposed regulations, reasoning, and analysis).

¹⁹ Id.

²⁰ See Letter to School District re: Disclosure of Education Records to Texas Office of Attorney General (4/6/06); Letter to Miami University re: Disclosure of Information Making Student's Identity Easily Traceable (10/19/04); Letter to Georgia Board of Regents re: Open Records Request (09/25/03); and, Letter to Kennesaw State University, Georgia re: State Open Records Request (9/27/02) all at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/index.html>.

²¹ Id.

²² Letter to Georgia Board of Regents re: Open Records Request (09/25/03) at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/georgialtr.html>.

Further, the DOE recognizes that the educational institute is in the best position to decide whether a record can be redacted and disclosed in response to an open records request based on its own data and any other available information.²³ “If 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. Where a request asks for a specific student’s disciplinary records, then it is reasonable to conclude that the student’s identity would be obvious to the requestor.”²⁴ The DOE advises educational institutions to “take into account other publicly available information” to determine whether redaction would be sufficient to prevent a student’s identity from being traceable especially when incidents are highly publicized and/or when related information has been disclosed by other means that would make a student’s identity easy to trace.²⁵

Here, NDSU explained that it did conduct an analysis to determine whether any of the requested records could be redacted to such an extent that the release would not violate FERPA, although this analysis was not conveyed to Mr. Port. In response to this office’s inquiry, NDSU determined that the requested disciplinary records could not be redacted without retaining some personally identifiable information for the following reasons:

- (1) It was widely reported in the media, as well as on Mr. Port’s blog, that there were 10 NDSU football players criminally charged in the matter. The names of these players were also reported. If NDSU turned over 10 different folders of redacted materials, then it would still be known that each of the players had a disciplinary file on record with the University, and the existence of the disciplinary file is protected.
- (2) Except for one student, all of the students received the same sanction, and the student who received a different sanction would easily be identified, as the individual has been involved in other incidents reported in the mainstream media.
- (3) With the amount of coverage the petition fraud matter has received in media, as well as Mr. Port’s blog, NDSU is reasonable in

²³ Letter to Georgia Board of Regents re: Open Records Request (09/25/03) at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/georgialtr.html>.

²⁴ Letter to Kennesaw State University, Georgia re: State Open Records Request (9/27/02) at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/kennesawuniversity.html>.

²⁵ Letter to School District re: Disclosure of Education Records to Texas Office of Attorney General (4/6/06) at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/tx040606.html>. (then include the remainder of footnote 26 – as corrected.)

assuming that Mr. Port, and the rest of the community, knows the identity of the students involved.

Based on these factors, NDSU determined the records were easily traceable to a specific student because of other publicized incidents and believed Mr. Port knew the identity of the student to whom the education record related. Additionally, it determined that the other students' records, even if identical to each other and even though requested in the aggregate, would still be "linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty."²⁶

NDSU's analysis is consistent with the 2009 amendment to the definition of "personally identifiable information" in FERPA and the subsequent DOE and court interpretations. It is my opinion that because the personally identifiable information cannot be adequately redacted, the entire records must be withheld, unless consent is given under 34 C.F.R. § 99.30.²⁷

However, the response provided to Mr. Port does not reference this analysis, but rather, inaccurately states that student disciplinary records are explicitly confidential. As 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.²⁸

CONCLUSION

NDSU violated the open records law by providing an insufficient written denial to Mr. Port's request under N.D.C.C. § 44-04-18(7) because generally stating students' discipline records are confidential is not accurate. However, because the personally identifiable information cannot be sufficiently redacted, it was not error for NDSU to withhold the records.

²⁶ 34 C.F.R. § 99.3.

²⁷ 34 C.F.R. § 99.31.

²⁸ See, N.D.A.G. 2008-O-27; 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

Because NDSU has provided this office with a reasonable explanation for withholding the information, and because that reasoning was incorporated into this opinion, no further action is necessary on behalf of NDSU.

Wayne Stenehjem
Attorney General

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