

**OPEN RECORDS AND MEETINGS OPINION  
2014-O-14**

DATE ISSUED: September 22, 2014

ISSUED TO: Minot State University and North Dakota University Systems

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Chad Nodland asking whether Minot State University and the North Dakota University Systems violated N.D.C.C. § 44-04-18 by denying a request for records.

**FACTS PRESENTED**

On May 2, 2014, Mr. Chad Nodland, editor of NorthDecoder.com, sent an email to Alycia Huck, Minot State University (MSU) Director of Public Information, requesting a copy of “[a]ny records of communications between Minot State University and the U.S. Department of Education (DOE) relating to the DOE’s investigation into possible Title IX violations involving the handling of sexual abuse complaints. . . .”<sup>1</sup> The U.S. Department of Education’s Office for Civil Rights (OCR) is conducting investigations into several higher education institutions, including MSU, on whether the institutions violated Title IX over the handling of sexual violence and harassment complaints.<sup>2</sup> North Dakota University Systems (NDUS), on behalf of MSU, denied the request claiming the records were protected under N.D.C.C. § 44-04-19.1(7) as investigatory work product,<sup>3</sup> under N.D.C.C. § 32-12.2-11 as risk management records, and under the federal Family

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<sup>1</sup> Email from editor to Alycia Huck, Minot State Univ. Dir. of Pub. Info. (May 2, 2014; 1:07 PM).

<sup>2</sup> See Press Release, U.S. Dep’t of Educ., May 1, 2014, “U.S. Department of Education Release List of Higher Education Institutions with Open Title IX Sexual Violence Investigations.”

<sup>3</sup> In the original email denying the records request, NDUS incorrectly cited N.D.C.C. § 44-04-19.7(7) as a basis for denial. There is no such statute. Upon request for clarification, NDUS noted the reference should have been cited as N.D.C.C. § 44-04-19.1(7), the definition of “investigatory work product”. The statute that exempts investigatory work product from open records laws is N.D.C.C. § 44-04-19.1(3). See Email from Murray Sagsveen, Chief of Staff/Ethics Officer/Director of Legal Services for NDUS, to Mr. Nodland (May 6, 2014; 9:48 AM) and Letter from Kirsten Franzen, NDUS Compliance Officer, to Att’y Gen’s. office (May 27, 2014).

Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, as “education records.”<sup>4</sup> After denying the records request, and after a request for an opinion was submitted to this office, NDUS and MSU turned over approximately 189 records to Mr. Nodland, with redactions pursuant to FERPA.<sup>5</sup>

## ISSUE

Whether MSU and NDUS’s response to Mr. Nodland’s open records request was sufficient under N.D.C.C. § 44-04-18.

## ANALYSIS

All recorded information regarding “public business” in the possession of a public entity is open to the public except as otherwise specifically provided by law.<sup>6</sup> If a public entity denies a records request, the denial must indicate the public entity’s specific authority for denying access to the requested record and be made in writing, if requested.<sup>7</sup> A public entity may not deny a request for an open record on the ground that the record also contains confidential or closed information.<sup>8</sup> “[I]f 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.”<sup>9</sup>

FERPA is a specific exception to the open records law that protects the privacy of students and their parents.<sup>10</sup> FERPA requires parental or eligible student consent to

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<sup>4</sup> Email from Murray Sagsveen, Chief of Staff/Ethics Officer/Director of Legal Services for NDUS, to Mr. Nodland (May 6, 2014; 9:48 AM). The parties also allude to a telephone call between Mr. Sagsveen and Mr. Nodland on May 2, 2014, in which NDUS’s position regarding the records was discussed.

<sup>5</sup> Email from Kirsten Franzen, NDUS Compliance Officer, to Sandra Voller, Asst. Att’y Gen. (June 20, 2014, 3:33 PM). The analysis in this opinion focuses on whether NDUS and MSU violated open records law by withholding information under FERPA because no documents were actually withheld or redacted under the other claimed exceptions (“investigatory work product,” “attorney work product,” and risk management incident records). Without NDUS or MSU correlating any records to a claimed exception, this office is unable to do an analysis on whether these particular exemptions are appropriate, legally sufficient, or applicable to this case.

<sup>6</sup> N.D.C.C. § 44-04-18.

<sup>7</sup> N.D.C.C. § 44-04-18(7).

<sup>8</sup> N.D.C.C. § 44-04-18.10(1).

<sup>9</sup> N.D.C.C. § 44-04-18.10(2).

<sup>10</sup> See 20 U.S.C. § 1232g; see also N.D.C.C. § 44-04-17.1(8) (definition of “law”) and N.D.A.G. 2013-O-08. Under the law, educational institutions that receive federal funds,

release “education records” which contain “personally identifiable information” of a student.<sup>11</sup> In previous opinions, this office explained that educational institutions cannot deny a request for records without first determining whether any of the requested records could be redacted to such an extent that the release would not violate FERPA.<sup>12</sup>

Generally, an educational institution does not need the consent of a student to produce records if all of the student’s “personally identifiable information” is adequately redacted.<sup>13</sup> An entire record can only be withheld under FERPA if “personally identifiable information” cannot be adequately redacted from the records.<sup>14</sup>

The definition of “personally identifiable information” was amended by the Department of Education<sup>15</sup> (DOE) in 2009 to clarify and provide guidance to educational institutions

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such as MSU, must keep “education records” confidential or lose their entitlement to federal funds. See 20 U.S.C. § 1232g(b); see also N.D.A.G. 2013-O-08.

<sup>11</sup> 20 U.S.C. § 1232g(b).

<sup>12</sup> See N.D.A.G. 2013-O-08; N.D.A.G. 2008-O-27; 34 C.F.R. § 99.31(b)(1). (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.”)

<sup>13</sup> 34 C.F.R. § 99.3; 20 U.S.C. § 1232g. “Personally identifiable information” has been defined to include, but is not limited to:

- a. The student’s name;
- b. The name of the student’s parent or other family members;
- 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 identifies, 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.

<sup>14</sup> See 20 U.S.C. § 1232g; 34 C.F.R. § 99.3; N.D.A.G. 2013-O-08.

<sup>15</sup>The Department of Education is the federal agency vested with the authority to administer FERPA.

about how they may disclose “redacted” educational records. The guidance clarifies that “personally identifiable information” includes:

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.<sup>16</sup>

NDUS did not initially conduct a review of the responsive records to determine whether “personally identifiable information” could be redacted before denying the records request. After the requester asked this office for an opinion, NDUS re-examined the records and performed the required analysis. Ultimately, NDUS provided records with redactions that removed “personally identifiable information” from the records and, in some instances, it withheld “some documents in their entirety because they may reveal ‘the identity of the referenced student or students even with redactions.’”<sup>17</sup>

Mr. Nodland also questions whether NDUS properly redacted and withheld the requested records under FERPA. NDUS refused this office’s request to review these records because it argued that such a release would, in itself, be a violation of FERPA. The DOE advises educational institutions that FERPA does not permit records to be released to an Office of Attorney General, without prior written parental consent, for the purposes of enforcing state open records laws.<sup>18</sup> It is the opinion of the DOE that the educational institution is in the best position to determine whether and to what extent a record can be redacted and disclosed so as not to reveal the student’s identity in

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<sup>16</sup> 73 Fed. Reg. 15574-01 (Mar. 24, 2008).

<sup>17</sup> See Email to Mr. Nodland from Kirsten Franzen, NDUS Compliance Officer (June 6, 2014, 2:28 PM) (citing N.D.A.G. 2008-O-27; 34 C.F.R. § 99.3; and Press-Citizen Co., Inc. v. Univ. of Iowa, 817 N.W.2d 480, 492 (Iowa 2012)). NDUS and MSU must redact records containing “personally identifiable information” on a student and must withhold entire records in which this information cannot be adequately redacted, unless consent is given under 34 C.F.R. § 99.30. See 34 C.F.R. § 99.31. Mr. Nodland takes issue with NDUS and MSU not attempting to obtain the required consent for release of information. However, there is nothing in the law which requires MSU and NDUS to make this attempt and, without such a requirement, no violation of open records law occurred.

<sup>18</sup> Tex. Office of Att’y Gen. re: Disclosure of Education Records by School District (Jul. 25, 2006) <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/txago072506.html>. (recognizing educational institutions must use the guidance provided by the Department of Education to determine what information must be withheld under the definition of “personally identifiable information”).

response to an open records request based on its own data and other available information.<sup>19</sup>

Without the necessary parental or student consent, this office does not have the authority to require NDUS and MSU to produce the records it withheld to this office for analysis. We must rely on NDUS assurances that its analysis is consistent the FERPA interpretations by both the DOE and courts of various jurisdictions.

Based upon the foregoing, it is my opinion that NDUS and MSU violated the open records law when it denied a request for records pursuant to FERPA without first performing an analysis on whether “personally identifiable information” could be adequately redacted from records in compliance with FERPA.

#### CONCLUSION

MSU and NDUS’s response to a request for records violated N.D.C.C. § 44-04-18 because MSU and NDUS denied the request before conducting an analysis of whether “personally identifiable information” could be adequately redacted from records in compliance with FERPA.

#### STEPS NEEDED TO REMEDY VIOLATION

Because all records responsive to Mr. Nodland’s request were eventually provided, no further action is necessary on behalf of MSU and NDUS.

Wayne Stenehjem  
Attorney General

slv/cn/vkk

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<sup>19</sup> 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>.