

STATE RECORDS COMMITTEE

NOTICE OF PUBLIC MEETING

Thursday, February 11, 2016, at 9 a.m. to 4 p.m.

Utah State Archives Building  
346 S. Rio Grande St.  
Salt Lake City, UT 84101

**NOTE: The Chair may recess at 12 noon and may reconvene at 12:30 p.m. for lunch when there are two or more hearings scheduled.**

AGENDA

HEARINGS:

**Azlen Marchet vs. Utah Department of Public Safety, Bureau of Forensic Services:** Mr. Marchet is appealing access denial to his serology toxicology results. Telephonic.

**Helen Redd at Mumford PC, representing Marc Jensen v. Attorney General's Office:** Ms. Redd, on behalf of Marc Jensen, is appealing access denial to responsive records that support representations of the Office of the Attorney General.

**Reginald Williams vs. Attorney General's Office:** Mr. Williams is appealing the failure of the Attorney General's Office to respond to his appeal requesting employee service history available in the Human Resource Enterprise database on 11 Attorney General Office employees. Telephonic.

**Annie Knox, *Salt Lake Tribune* vs. Utah State University, University of Utah, Weber State University, Southern Utah University, Salt Lake Community College, Snow College, Utah Valley University, Dixie State University:** *Salt Lake Tribune* is appealing access denial by Utah's eight separate public universities and colleges for a list of the names of students found responsible by their institutions for sexual or violent misconduct over the past 5 years (2010-2015), along with corresponding details about disciplinary action.

**Michael Clara vs. Salt Lake City School District:** Mr. Clara is appealing access denial and fee waivers.

## **WITHDRAWN/POSTPONED HEARINGS:**

**Patrick Sullivan vs. Utah Department of Human Resource Management:** Mr. Sullivan is appealing access to denial to multiple UDC staff member disciplinary records/reports, and performance evaluations. Telephonic. (Appeal Withdrawn).

**Reginald Williams vs. Attorney General's Office:** Mr. Williams is appealing the AGO's decision that his initial request does not fall within the scope of his records request for all letters/emails to or from Ken Wallentine regarding reduction-in-force. Telephonic. (Appeal Withdrawn).

**Tammy Halvorson, Diamond Parking Services, LLC vs. Utah State Tax Commission:** Ms. Halvorson, Diamond Parking Services, LLC, represented by Stoel Rives LLP, is appealing the State Tax Commission's denial for Motor Vehicle Information Account record. (Continuance).

**Patrick Sullivan vs. Utah Department of Corrections:** Mr. Sullivan is appealing a fee waiver denial for emails in which he is the subject. Telephonic. (Withdrawn).

**Patrick Sullivan vs. Utah Department of Corrections:** Mr. Sullivan is appealing denial of fee waiver and access to emails on server where he is the subject. Telephonic. (Withdrawn).

## **BUSINESS**

**Approval of January 14, 2016, SRC Minutes, action item**

**Retention Schedules, action item**

**SRC appeals received**

**Cases in District Court**

**Other Business**

**Next meeting scheduled for March 17, 2016, @ 9 a.m. to 4 p.m.**

**ADA:** In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this meeting should notify Nova Dubovik at the Utah State Archives and Records Service, 346 S. Rio Grande, Salt Lake City, Utah 84101, or call (801)531-3834, at least three days prior to the meeting.

**Electronic Participation:** One or more members of the State Records Committee may participate electronically or telephonically pursuant to Utah Code 52-4-207(2) and Administrative Rule 35-1-2. Please direct any questions or comments to: State Records Committee, Utah State Archives, 346 S. Rio Grande, Salt Lake City, Utah 84101 (801) 531-3834.

**APPEALS TO THE STATE RECORD COMMITTEE:  
As of February 2016**

Appeals Request No.	Case Title/ Participants	Records Sought	Notes	Status
<b>Withdrawn, Denied, Incomplete, Pending Review</b>				
2016-06	Calvin Johnson vs. Utah Department of Public Safety, Bureau of Forensic Services (Appealed 20 January)		Telephonic Gunnison	Incomplete
Mr. Johnson is appealing access denial for results of DNA samples. The Notice of Appeal is missing copy of initial GRAMA request and governmental entity denial letter.				
2016-07	Lynn P. Heward, Robert J. Debry & Associates vs. Utah Transit Authority (Appealed 22 January)			Incomplete
Mr. Heward, on behalf of clients, is appealing access denial to Dash Cam Video relative to Trax Fatal crash on August 14, 2015. The chief administrative officer's decision has not been appealed to the Board of Trustees.				
<b>SCHEDULED HEARINGS</b>				
2015-85	Patrick Sullivan vs. Utah Department of Corrections (Appealed 9 November)		Telephonic Draper	Appeal withdrawn
Mr. Sullivan is appealing a fee waiver denial for multiple UDC staff member emails in which he is the subject. January 14, 2016, hearing postponed, both parties in mediation.				
2015-86	Patrick Sullivan vs. Utah Department of Human Resource Management (Appealed 9 November)		Telephonic Draper	Appeal withdrawn
Mr. Sullivan is appealing access to denial to multiple UDC staff member disciplinary records/reports, and performance evaluations classified protected under Subsections 63G-2-305(1) & (13). The records dispute resolved through mediation.				

2015-48	Patrick Sullivan vs. Department of Corrections (Appealed 28 July)	Telephonic Draper	Appeal withdrawn
Mr. Sullivan is appealing denial of fee waiver and access to emails on server where he is the subject created by multiple JDC staff members. Request # 23804, 23809, 23422, and 23287. The Petitioner has requested multiple postponements of scheduled hearings, latest being Dec. 10 <sup>th</sup> , parties are in mediation.			
2015-50	Tammy Halvorson, Diamond Parking Services, LLC vs. Utah State Tax Commission (Appealed 30 July)		Hearing Rescheduled March 17, 2016
Ms. Halvorson, Diamond Parking Services, LLC, represented by Stoel Rives LLP, is appealing the State Tax Commission's denial for Motor Vehicle Information Account record. Parties are in mediation and requested a continuance for March 17 <sup>th</sup> .			
2015-95	Annie Knox, Salt Lake Tribune vs. Utah State University (Appealed 7 December)		Hearing Scheduled February 11, 2016
Salt Lake Tribune is appealing access denial by Utah's eight separate public universities and colleges for a list of the names of students found responsible by their institutions for sexual or violent misconduct over the past 5 years (2010-2015), along with corresponding details about disciplinary action. The Attorney General's Office will be combining and representing all eight universities and colleges.			
2015-96	Annie Knox, Salt Lake Tribune vs. University of Utah (Appealed 7 December)		Hearing Scheduled February 11, 2016
Salt Lake Tribune is appealing access denial by Utah's eight separate public universities and colleges for a list of the names of students found responsible by their institutions for sexual or violent misconduct over the past 5 years (2010-2015), along with corresponding details about disciplinary action. The Attorney General's Office will be combining and representing all eight universities and colleges.			
2015-97	Annie Knox, Salt Lake Tribune vs. Weber State University (Appealed 7 December)		Hearing Scheduled February 11, 2016
Salt Lake Tribune is appealing access denial by Utah's eight separate public universities and colleges for a list of the names of students found responsible by their institutions for sexual or violent misconduct over the past 5 years (2010-2015), along with corresponding details about disciplinary action. The Attorney General's Office will be combining and representing all eight universities and colleges.			
2015-98	Annie Knox, Salt Lake Tribune vs. Southern Utah University (Appealed 7 December)		Hearing Scheduled February 11, 2016
Salt Lake Tribune is appealing access denial by Utah's eight separate public universities and colleges for a list of the names of students found responsible by their institutions for sexual or violent misconduct over the past 5 years (2010-2015), along with corresponding details about disciplinary action. The Attorney General's Office will be combining and representing all eight universities and colleges.			

<b>2015-99</b>	<b>Annie Knox, Salt Lake Tribune vs. Salt Lake Community College (Appealed 7 December)</b>		<b>Hearing Scheduled February 11, 2016</b>
	<i>Salt Lake Tribune</i> is appealing access denial by Utah's eight separate public universities and colleges for a list of the names of students found responsible by their institutions for sexual or violent misconduct over the past 5 years (2010-2015), along with corresponding details about disciplinary action. The Attorney General's Office will be combining and representing all eight universities and colleges.		
<b>2015-100</b>	<b>Annie Knox, Salt Lake Tribune vs. Snow College (Appealed 7 December)</b>		<b>Hearing Scheduled February 11, 2016</b>
	<i>Salt Lake Tribune</i> is appealing access denial by Utah's eight separate public universities and colleges for a list of the names of students found responsible by their institutions for sexual or violent misconduct over the past 5 years (2010-2015), along with corresponding details about disciplinary action. The Attorney General's Office will be combining and representing all eight universities and colleges.		
<b>2015-101</b>	<b>Annie Knox, Salt Lake Tribune vs. Utah Valley University (Appealed 7 December)</b>		<b>Hearing Scheduled February 11, 2016</b>
	<i>Salt Lake Tribune</i> is appealing access denial by Utah's eight separate public universities and colleges for a list of the names of students found responsible by their institutions for sexual or violent misconduct over the past 5 years (2010-2015), along with corresponding details about disciplinary action. The Attorney General's Office will be combining and representing all eight universities and colleges.		
<b>2015-102</b>	<b>Annie Knox, Salt Lake Tribune vs. Dixie State University (Appealed 7 December)</b>		<b>Hearing Scheduled February 11, 2016</b>
	<i>Salt Lake Tribune</i> is appealing access denial by Utah's eight separate public universities and colleges for a list of the names of students found responsible by their institutions for sexual or violent misconduct over the past 5 years (2010-2015), along with corresponding details about disciplinary action. The Attorney General's Office will be combining and representing all eight universities and colleges.		
<b>2015-103</b>	<b>Leslie Chessman, Hepworth Murray &amp; Associates vs. Utah Department of Human Services, Division of Child and Family Services (Appealed 9 December)</b>		<b>Appeal withdrawn</b>
	Ms. Chessman, represented by Hepworth Murray & Associates, is appealing access denial to an investigation file. The records dispute resolved through mediation.		

2015-106	<b>Michael Clara vs. Salt Lake City School District (Appealed 15 December)</b>		Hearing Scheduled February 11, 2016
Mr. Clara is appealing access denial and fee waivers on five appeals sent to the Salt Lake City Board of Education for the following GRAMA requests.			
<ol style="list-style-type: none"> <li>1. School Bus Safety: Appealing two records access denied, classified protected. (CAO response Nov. 16, 2015)</li> <li>2. Columbus Center: Appealing fee waiver. (CAO response Nov. 25, 2015)</li> <li>3. Office for Civil Rights: Appealing fee waiver. (Requester submitted appeal to CAO Nov. 10, 2015)</li> <li>4. Professional Legal Services: Appealing records access denial. (CAO response October 20, 2015)</li> <li>5. Horizonte Alternative High School: Appealing partial response and fee waiver. (CAO response Nov. 25, 2015)</li> </ol>			
2015-107	<b>Reginald Williams vs. Attorney General's Office (Appealed 23 December)</b>	Telephonic Gunnison	Hearing Scheduled February 11, 2016
Mr. Williams is appealing the failure of the Attorney General's Office to respond to his appeal requesting employee service history available in the Human Resource Enterprise database for 11 Attorney General Office employees.			
2015-108	<b>Reginald Williams vs. Attorney General's Office (Appealed 28 December)</b>	Telephonic Gunnison	Appeal withdrawn
Mr. Williams is appealing the AGO's decision "that [his] initial request " do not fall within the scope of [his] records request (#15-126), is incorrect." Mr. Williams disputes the decision based on the original GRAMA he requested "all letters/emails to or from Ken Wallentine regarding reduction-in-force.." 2015-107 and 2015-108 are combined. The records dispute resolved through mediation.			
2015-94	<b>Azlen Marchet vs. Utah Department of Public Safety, Bureau of Forensic Services (Appealed 7 December)</b>	Telephonic Draper	Hearing Scheduled February 11, 2016
Mr. Marchet is appealing access denial to his serology toxicology DNA results.			
2016-01	<b>Helen Redd, Mumford PC representing Marc Jensen vs. Attorney General's Office (Appealed 4 January 2016)</b>		Hearing Scheduled February 11, 2016
Ms. Redd, on behalf of Marc Jensen, is appealing access denial to responsive records that support representations of the Office of the Attorney General.			
2015-75	<b>Edgar Frye vs. Dept. of Human Services (Division of Aging and Adult Services) (Appealed 5 October)</b>	Telephonic	Hearing Rescheduled March 17, 2016
Mr. Frye is appealing access denial to "All records of interviews, phone calls, ect, in the abuse case # 2144836." Parties are in mediation and petitioner is out of town until March. The governmental entity agreed to a continuance.			

<b>2016-02</b>	<b>Joshua Peterman vs. Saratoga Springs (Appealed 7 January)</b>		<b>Hearing scheduled March 17, 2016</b>
Mr. Peterman, attorney at Colme & Kinghorn, is appealing access denial to records showing "shifts, dates, and times" that a Saratoga Springs fire fighter worked from March 1, 2015 to present.			
<b>2016-05</b>	<b>Thomas Cross vs Department of Human Services, Division of Child and Family Services (DCFS) (Appealed 15 January)</b>		<b>Hearing scheduled March 17, 2016</b>
Mr. Thomas Cross, represented by Tripiano Law, PC, is appealing denial of investigative notes and records. The Petitioner made a timely Expedited Hearing request R35-6-2), it was denied because it did not demonstrate that an expedited response to the record request benefits the public rather than the person Subsection 63G-2-204(3)(a).			
<b>2016-04</b>	<b>Sadie Schliaty vs. Utah Department of Human Services (Appealed 8 January)</b>		<b>Hearing scheduled March 17, 2016</b>
Ms. Schliaty is appealing access denial to DCFS records.			
<b>2016-08</b>	<b>Patrick Sullivan vs. Attorney General's Office (Appealed 25 January)</b>	<b>Telephonic Draper</b>	<b>Hearing scheduled March 17, 2016</b>
Mr. Sullivan is appealing the Attorney General's Office decision to not search Google Vault for responsive emails to his GRAMA request.			
<b>2016-09</b>	<b>Colby Frazier, Salt Lake City Weekly vs. Salt Lake City Police Department (Appealed 28 January)</b>		<b>Hearing scheduled March 17, 2016</b>
Mr. Frazier is appealing a fee waiver denial.			
<b>2016-03</b>	<b>Michael Clára vs. Utah Transit Authority (UTA) (Appealed 01 February)</b>		<b>Appeal withdrawn</b>
Mr. Clára is appealing access denial to "Copies of UTAs current Corporate Polices" and fee waiver denial. The records dispute resolved through mediation.			
<b>2016-10</b>	<b>Michael Clára vs. Utah Transit Authority (UTA) (Appealed 01 February)</b>		<b>Appeal withdrawn</b>
Mr. Clára is appealing access denial to requested records he is the subject of. The records dispute resolved through mediation.			

**STATE AGENCIES**



# Utah State Archives

**Parent Agency:** Governor  
Economic Development

**Agency:** Governor. Office of Economic Development (325)  
60 E South Temple  
Third Floor  
Salt Lake City, UT 84111  
801-538-8860

**Records Officer** Alicia Ryans

**AGENCY:** Governor. Office of Economic Development

**SERIES:** 28800

2

**TITLE:** Audit work papers

**DATES:** 1980-

**ARRANGEMENT:** Numerical by project number

**DESCRIPTION:**

These records support the agency's function to evaluate the effectiveness of programs and operations administered by the agency in order to facilitate economic development in the state (Utah Code 63N-1-201(3) (2015)). Records are collected during the course of performing audits and substantiate the findings of the audit. Information may include financial records, feedback from agency staff members, and related correspondence.

**RETENTION:**

Retain 10 years.

**DISPOSITION:**

Destroy.

**FORMAT MANAGEMENT:**

Paper: Retain in Office for 2 years and then transfer to State Records Center. Retain in State Records Center for 8 years and then destroy.

Computer data files: Retain in Office for 10 years and then delete.

**APPRAISAL:**

Administrative

**RETENTION JUSTIFICATION:**

10-year retention period is requested by agency's auditor. Office of the State Auditor has a similar series (9412) with the same retention.

**PRIMARY DESIGNATION:**

Protected Utah Code 63G-2-305(10 and 16)(2015)

**AGENCY:** Governor. Office of Economic Development

**SERIES:** 28800

**TITLE:** Audit work papers

(continued)

**SECONDARY DESIGNATION(S):**

Public

# Utah State Archives

**Parent Agency:** Labor Commission  
Labor/Anti-Discrimination

**Agency:** Labor Commission. Labor and Anti-discrimination Division (580)

160 East 300 South, 3rd Floor  
P.O. Box 146630  
Salt Lake City, UT 84114-6630  
801-530-6921

**Records Officer** Sara Danielson

**AGENCY:** Labor Commission. Labor and Anti-discrimination Division

**SERIES:** 28757

2

**TITLE:** Employment of minors investigation file

**DATES:** 1965-

**ARRANGEMENT:** Numerical by case number.

**DESCRIPTION:**

These records support the division's function to enforce the Employment of Minors Act (Utah Code 34-23-101 (1992)) Records document the investigation of businesses suspected of employing minors in violation of the Act. Information includes details of the investigation and the final decision.

**RETENTION:**

Retain 10 years.

**DISPOSITION:**

Destroy.

**FORMAT MANAGEMENT:**

All Formats: Retain in Office for 10 years after case is closed and then destroy.

**APPRAISAL:**

Administrative

**RETENTION JUSTIFICATION:**

**PRIMARY DESIGNATION:**

Public

**SECONDARY DESIGNATION(S):**

Protected. Utah Code 63G-2-305(10)(a)&(d),(18),(51)(2015)

## Utah State Archives

**Parent Agency:** Attorney General  
Civil Department

**Agency:** Attorney General's Office. Civil Department. State Agency  
Counsel Division (2544)  
P.O. Box 140857  
Salt Lake City, UT 84114-0857

**Records Officer** Amy Casterline

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# Utah State Archives

Page: 1

**AGENCY:** Attorney General's Office. Civil Department. State Agency Counsel  
Division

**SERIES:** 28798

2

**TITLE:** Legal counsel records for the Department of Human Services

**DATES:** 1982-

**ARRANGEMENT:** Alphabetically by client name, thereunder by year.

**DESCRIPTION:**

These records support the agency's function to provide legal services for government agencies (Utah Code 67-5-3(2)(a) (2015)). Records document legal advice regarding drafted rules and legislation, administrative hearings, public record requests, contracts, administrative responses to discrimination complaints, and similar issues.

**RETENTION:**

Retain 10 years.

**DISPOSITION:**

Destroy.

**FORMAT MANAGEMENT:**

Paper: Retain in Office for 2 years and then transfer to State Records Center. Retain in State Records Center for 8 years and then destroy.

Computer data files: Retain in Office for 10 years and then delete.

**APPRAISAL:**

Administrative

**PRIMARY DESIGNATION:**

Protected Utah Code 63G-2-305(17 and 18) (2015)

**SECONDARY DESIGNATION(S):**

Public

UTAH STATE ARCHIVES AND RECORDS SERVICE  
RETENTION SCHEDULE AND CLASSIFICATION REVIEW

JANUARY 15, 2016

AGENCIES SUBMITTING RECORD SERIES

AGENCY NUMBER OF  
RECORD SERIES

STATE AGENCIES

Governor  
Economic Development Office. . . . .1

Labor Commission  
Labor/Anti-Discrimination. . . . .1

Attorney General  
State Agency Counsel Division. . . . .1

TOTAL RECORD SERIES SCHEDULED:	3	
TOTAL VOLUME:	0.00	CUBIC FEET
TOTAL ANNUAL ACCUMULATION:	0.00	CUBIC FEET

I have read the enclosed record series and concur with proposed retentions and dispositions, except for any noted substantive changes.

\_\_\_\_\_  
State Records Committee Member

\_\_\_\_\_  
Date



SCHEDULE 1  
CHILD AND FAMILY SERVICES

SCHEDULE  
CHILD AND FAMILY SERVICES

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CLIENT CASE FILES (Item 1-1)

These are complete case histories of clients receiving services provided in or through a division office. Case files are used to monitor what type of services have been or need to be provided. Records document services provided, counseling, evaluations and other pertinent information provided by the caseworker.

RETENTION

Retain for 50 years and then destroy.

SUGGESTED PRIMARY CLASSIFICATION

Private.

SUGGESTED SECONDARY CLASSIFICATION

Controlled: UCA 63G-2-304(2008)

FAMILY CASE RECORDS (Item 1-34)

These are complete case histories created to monitor services needed and provided to families by a division office. Records include family assessments, studies, counselings, evaluations, family preservation plans, family reunification plans, and other information deemed pertinent by the caseworker.

RETENTION

Retain for 50 years and then destroy.

SUGGESTED PRIMARY CLASSIFICATION

Private.

SUGGESTED SECONDARY CLASSIFICATION

Controlled: UCA 63G-2-304 (2008)

SCHEDULE  
CHILD AND FAMILY SERVICES

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FOSTER PARENT PROVIDER ELIGIBILITY FILES (Item 1-27)

These records document information gathered by staff regarding foster parents who are providing services to children in out-of-home care. Records are used to disperse payments as well as determine potential foster parents eligibility for foster care licensure and ability to provide for the needs of children in their care. Records include agreements, trainings, licenses, case worker's notes, and related information.

RETENTION

Retain for 50 years and then destroy.

SUGGESTED PRIMARY CLASSIFICATION

Private.

SUGGESTED SECONDARY CLASSIFICATION

Controlled: UCA 63G-2-304 (2008).

Public: UCA 63G-2-103 (2008).

THE STUDENT PRESS LAW CENTER

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# COVERING CAMPUS CRIME

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A HANDBOOK FOR JOURNALISTS

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FOURTH EDITION

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FUNDED BY THE SIGMA DELTA CHI FOUNDATION  
THE EDUCATIONAL ARM OF THE SOCIETY OF PROFESSIONAL JOURNALISTS

up or favoritism. Moreover, at a public school, campus courts are administered by government officials, whose conduct, like that of all government officials, should be subject to public oversight. Finally, advocates of greater openness argue that it's hard to justify why a 20-year-old college student accused of a criminal act should be afforded more leniency (and secrecy) than a 20-year-old nonstudent who committed the same type of offense, but must face the charges in an open public court.

## GETTING IN THE DOOR

There are strong public-accountability arguments for allowing media coverage of campus court proceedings. But if you are unable to obtain access by diplomacy, you will have to rely on your state's open meetings and open records laws. Get familiar with the laws before you try to gain access so you can refer the campus court officers to the relevant sections. Look at the language of the statute to see what types of public bodies it covers and be prepared to argue why the campus court fits one of them. And remember that the open-records and open-meetings laws may not be identical — it is at least possible that a document may fall within an exemption to disclosure under an open-records law, yet a meeting where that subject is being discussed remains an open meeting.

## THE FERPA ROADBLOCK

Even where open-meetings and open-records laws do appear to open the door on campus disciplinary hearings, federal privacy law may slam it shut.

The first media organization to sue for access to campus court information was *The Red & Black*, the student newspaper at the University of Georgia in Athens, which in 1991 went to court to force release of disciplinary proceedings and other records regarding alleged hazing at a campus fraternity.

The Georgia Supreme Court sided with the newspaper, finding: (1) that the university's student judicial board was a public body subject to the state's open records law and (2) that the Family Educational Rights and Privacy Act (FERPA), also known as the Buckley Amendment, could not be cited as a reason to keep those records from the public.<sup>36</sup>

In 1997, following a request by the editor of Miami University of Ohio's student newspaper for access to student disciplinary records — with student names and unique ID numbers redacted — the Ohio Supreme Court likewise ruled that the university's student disciplinary board was a public body, whose records were subject to disclosure under that state's open records law. It also found that the redacted records sought by *The Miami Student* were not student "education records" subject to FERPA (The paper sought the records as part of an investigative project looking at the campus justice system, which was spurred, in part, by claims that students charged with similar violations had been punished differently).

The state high court ordered the school to release the requested records that included the general location of the incident giving rise to the disciplinary proceeding, the age and sex of student, the nature of the offense and the type of disciplinary penalty imposed.<sup>37</sup>

Three years later, however, a federal district court in Ohio, in a ruling later upheld by a federal appellate court, ruled that FERPA required Ohio universities to withhold disciplinary records that

included information that identified individual students.<sup>38</sup>

The legal battle over campus court records — and the tension between state disclosure laws and FERPA — continues today. University of Iowa officials cited FERPA as a reason to withhold documents related to the informal investigation of rape charges made by a female student against two Iowa football players. It wasn't until the local newspaper, the *Iowa City Press-Citizen*, filed a lawsuit that the matter was finally pushed forward, although the university did release information piecemeal.<sup>39</sup>

Students can, however, fight improper claims of FERPA secrecy and win. In 2008, the U.S. Department of Education found the University of Virginia in Charlottesville misapplied FERPA when it required students who were sexually assaulted to sign confidentiality agreements to learn about the outcome of their own complaints.<sup>40</sup> While it remains uncertain how much the public and press can demand to know about the workings of campus courts in most states, Congress has provided some clarification.

## THE PROBLEM WITH FERPA

The U.S. Department of Education is the agency in charge of administering FERPA, and it is the sole vehicle for enforcing a FERPA violation. Schools and colleges look to the DOE to provide legal interpretations when there is confusion over whether particular types of information should or should not be kept confidential.

Unfortunately, the DOE has failed for many years to offer clear guidance to schools and colleges about what information is and is not truly exempt from disclosure when requested under a state open-records act. The DOE's approach has historically been one of "secrecy for secrecy's sake," with no consideration for the public's interest in disclosure. In some instances, the DOE has even taken the position that statistics — with no student names attached — can be "confidential student records," which stretches FERPA far beyond what its authors intended. When confused, most schools play it safe and opt to release nothing.

Thankfully, the public is beginning to appreciate how much newsworthy information is being illegitimately withheld on questionable FERPA privacy grounds. The *Columbus Dispatch* set off waves of howls from parents and policymakers alike with a May 2009 series of stories, following a six-month nationwide investigation, that found college athletic departments abusing FERPA to withhold documents about NCAA recruiting violations and other newsworthy matters with no valid student privacy interest. The DOE and Congress are under increasing pressure to reform FERPA so that it protects only legitimately private information such as grades. If you believe that your open-records requests are being blocked because of an improper claim of FERPA privacy — write and editorialize about it, just as the *Dispatch* did. And because there is so much room for interpretation, don't take the first FERPA-based rejection as the last word on the subject.

## FERPA — SOMETIMES — IS NO EXCUSE

Congress amended FERPA in 1998 to explicitly say that certain disciplinary records are not covered by the law:

"Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of

violence ... or nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense."<sup>41</sup>

In other words, the outcomes of disciplinary proceedings involving crimes of violence, or nonforcible sex offenses, are not covered by FERPA when the accused is held responsible in that proceeding. The change answered some, but by no means all, questions about what records from so-called "campus court" proceedings are covered by FERPA and can be properly withheld if requested under state open records law.

#### • Does FERPA require schools to release the outcome of disciplinary proceedings?

Unfortunately, no. Although the 1998 law does not require schools to release the outcome of disciplinary proceedings, it takes away their most frequent excuse for refusing to release that information: FERPA. No school, public or private, can use FERPA as its excuse for refusing to provide disciplinary records that fall within the categories created by 1998 amendments. But because federal law does not itself require the release of disciplinary records, the ability to actually obtain them will require one of two things: (1) willingness by a school to release the records simply because they can or (2) some other legal obligation that requires their release.

Most public schools will be required to provide access to these records under their existing state open records laws. Indeed, within days of the law's passage, Patrick Nolan, a staff member of *The Standard*, Southwest Missouri State University's student newspaper, requested access to the outcomes of campus disciplinary proceedings at his school pursuant to the state's open records law. The case soon went to court, and a Missouri Circuit Court judge, citing the federal law, affirmed the school's obligation to release the information.<sup>42</sup> Although this decision addressed the application of only Missouri's open records law, it provides useful ammunition to journalists in other states seeking similar access.

#### • What kinds of disciplinary records does the 1998 law say schools can release?

The law says a college or university can release the final results of a disciplinary proceeding when (1) the student is an "alleged perpetrator" of a "crime of violence" or a "nonforcible sex offense," and (2) the student has committed a violation of the institution's rules or policies with respect to the allegation.<sup>43</sup>

An "alleged perpetrator" is a student who is alleged to have committed acts that would, if proven, constitute a crime of violence or a nonforcible sex offense (see list below).<sup>44</sup> It does not matter whether the college does or does not report the incident to police, or whether a police investigation is still ongoing.

#### • What constitutes a "crime of violence" or a "nonforcible sex offense?"

According to regulations issued by the Department of Education in 2000, a "crime of violence" means one of the following offenses: (1) arson, (2) assault offenses, (3) burglary, (4) manslaughter by negligence, (5) murder and nonnegligent manslaughter, (6) destruction/damage/vandalism of property, (7) kidnapping/abduction, (8) robbery and (9) forcible sex offenses. A "nonforcible sex offense" means (10) statutory rape and (11) incest.<sup>45</sup>

#### • At what point in the disciplinary process can these records be released?

They can be released when there is a "final result." Final result means "a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution."<sup>46</sup> This allows a school to disclose the results of a proceeding before all internal reviews and appeals have been exhausted.

#### • What constitutes "the final result" of a disciplinary proceeding can be released?

According to FERPA, schools can release four things: (1) the name of the student about whom the allegation is made, (2) the violation committed, (3) any sanction imposed by the institution on the student and (4) the name of any other students, such as victims or witnesses, but only when they have provided their written consent.

"Violation Committed" refers to the institutional rules or code sections that were violated as well as any essential findings supporting the institution's conclusion that the violation was committed. "Sanction Imposed" means (1) a description of the disciplinary action taken by the institution, (2) the date of its imposition and (3) its duration.<sup>47</sup>

#### • Does FERPA prohibit access to campus disciplinary hearings?

The DOE, which is the only administrative agency with authority to enforce FERPA against schools, has said that "FERPA does not prevent an institution from opening disciplinary proceedings to the public."<sup>48</sup>

Thus, where otherwise required by a state open meetings law, FERPA cannot be used as an excuse to prevent public access to campus disciplinary hearings, even if the records of such hearings are off-limits.

This is an important point to highlight, because student journalists frustrated by stonewalling on their open-records requests may be able to get the information they need simply by citing the state open-meetings law and showing up for the disciplinary hearing.

The 1998 changes to FERPA provided an important opportunity for journalists reporting on campus crime.

But even if the records you want were not exempted from FERPA by the 1998 amendments, FERPA does not necessarily override obligations for disclosure created by a state freedom of information law.<sup>49</sup> State legislatures ultimately have the authority to determine whether the records of state agencies should be released.

Finally, remember that FERPA applies only to information that is "directly related" to a student. It should not apply to records that contain only general "non-identifying" information, such as the age and sex of the accused, the offense and the general location of the conduct (*e.g.*, the name of a residence hall, but not an individual room number).

Nor does it apply to any information relating to college faculty, staff or other non-students.

Even for those disciplinary records still subject to FERPA, it can strongly be argued that a state open records law requires a school to remove personally identifiable information from the record (by blacking it out) and turn over the remaining information upon request.<sup>50</sup>

organization...or agency supported in whole or in part by public funds or expending public funds..."); Tenn. Code Ann. sec. 49-7-2206 (specifically including "contract employees" as among those covered by its open police logs law); Utah Code Ann. sec 63G-2-301 (stating that some records created and maintained by an otherwise private entity that contracts with a governmental body may be available for public inspection); Va. Code Ann. sec. 2.2-3701 (defining "public body" to include any organization "supported wholly or principally by public funds"); W. Va. Code sec. 29B-1-2(3) (defining "public body" to include "any other body . . . which is primarily funded by [a] state or local authority"); Wis. Stat. Ann. sec. 19.36 (3) (defining public records to include "any record produced or collected under a contract entered into by a [public] authority.").

29 See, for example, Ala. Code sec. 16-22-1 — 16.22-2; D.C. Muni. Reg. 6a, Chpt. 12; Ga. Code Ann. sec. 20-8-2 (see also Ga. Code Ann. sec. 20-8-7, which requires the disclosure of campus crime records by campus police at public *and* private college and universities); 110 Ill. Comp. Stat. 1020/1; Ind. Code sec. 21-17-5; Ky. Rev. Stat. Ann. sec. 164.948(5) and 164.950-.980 (public and most private schools are also subject to the state's campus crime log law, Ky. Rev. Stat. Ann. sec. 164.9481); La. Rev. Stat. Ann sec. 17:1805; N.Y. Educ. Law sec. 6435 (see also N.Y. Crim. Pro. Law sec. 2.10(72)-(77) (regarding appointment of law enforcement officials at Canisius College, Ithaca College and Syracuse University); N.C. Gen. Stat. sec. 74G-6, see *State v. Ferebee*, 630 S.E.2d 460 (N.C. App. 2006)(finding campus police officers at private Duke University were "public officers" within meaning of statute); Ohio Rev. Stat. Ann. sec. 1713.50; Okla. Stat. Ann. Tit. 74, sec. 360.17(D) (explicitly conferring law enforcement authority on some private school police forces and deeming them "public agencies" for purposes of enforcing state laws); 71 Penn. Stat. Ann. sec. 646 (granting law enforcement authority to state-aided and state related colleges and universities); R.I. Gen. Laws sec. 12-2.1-1; S.C. Code Ann. sec. 59-116-10(2) and 59-116-20 (see also S.C. Code Ann. sec. 59-154-10, known as the Jessica Horton Act, which requires public and private campus police to report cases involving death or sexual assault to state law enforcement officials, presumably subjecting such records to disclosure); Tenn. Code Ann. sec. 49-7-118(f)(1); Tex. Educ. Code Ann. sec. 51.212; Utah Code Ann. Sec. 53-13-103(1)(b)(xi); Va. Code Ann. sec. 23-232.1 (requiring that public *and* private campus "police departments" in Virginia provide public access to criminal incident information under Va. Code Ann. sec. 23-232.2). The Western Association of Campus Law Enforcement Administrators has compiled a list of state statutes applicable to campus law enforcement agencies — including those that confer law enforcement authority status — on their Web site at: <http://www.waclea.org/statelegislation.htm>.

30 Mike Hiestand, "Don't be frightened by HIPAA," *Associated Collegiate Press Trends in College Media* (Jan. 5, 2004), available at: <http://www.studentpress.org/acp/trends/~law0104college.html>

31 *Kirvan v. Diamondback*, 721 A.2d 196 (Md. 1998)

32 <http://www.splc.org/foiletter>

33 Tex. Govt. Code sec. 552.301-.302

34 20 U.S.C. sec. 1232g(a)(4)(B)(ii).

35 34 C.F.R. 99.8(a)(1).

36 *Red & Black Publishing Co. v. Board of Regents*, 427 S.E.2d 257, 263 (Ga. 1993), and *Doe v. Red & Black Publishing Co.*, No. SU-93-CV-0847-S (May 6, 1993 Ga. Superior Ct. of Athens-Clark County), *aff'd*, 437 S.E.2d 274 (Ga. 1993).

37 *Miami Student v. Miami University*, 680 N.E.2d 956 (Ohio 1997).

38 *United States v. Miami University*, et al., 91 F. Supp. 2d 1132 (S.D. Ohio 2000), *aff'd* 294 F.3d. 797 (2002). Based on the Ohio Supreme Court's 1997 decision in *The Miami Student* case, the *Chronicle of Higher Education*, a weekly journalistic publication covering higher education issues, sought

access to student disciplinary records for the calendar years 1995 and 1996 from Miami University and Ohio State University under the Ohio open records law. The *Chronicle* obtained records covering a two-month period. Faced with the *Chronicle's* request, the schools notified the U.S. Department of Education, which filed a lawsuit against the schools seeking to prevent them from releasing further records. The *Chronicle* subsequently joined the case as a party. In March 2000, the federal district issued a permanent injunction prohibiting the schools from "releasing student disciplinary records or any 'personally identifiable information' contained therein..." The court ruled that the records sought — which included personally identifiable information — were "education records" protected by FERPA. The decision was subsequently upheld by the Sixth Circuit U.S. Court of Appeals.

39 Caitlin Wells, "Sweeping under rugs," *Student Press Law Center Report*, Winter 2008-09, available at: [splc.org/report\\_detail.asp?id=1464&edition=48](http://splc.org/report_detail.asp?id=1464&edition=48).

40 Caitlin Wells, "Education department rules UVA former policy incorrectly interpreted FERPA," *Student Press Law Center News Flash* (December 4, 2008), available at: [splc.org/newsflash.asp?id=1843&year=2008](http://splc.org/newsflash.asp?id=1843&year=2008).

41 20 U.S.C. sec. 1232g(b)(6)(B).

42 *Board of Governors of Southwest Missouri State University v. Nolan*, No. 198CC4344 (Greene Cty. Cir. Ct. Jan. 26, 1999) (copy on file with Student Press Law Center).

43 34 CFR 99.31(a)(14).

44 34 CFR 99.39.

45 *Id.*

46 *Id.*

47 *Id.*

48 60 Fed. Reg. 3464, 3465 (1995).

49 In the case of *Student Bar Association v. Byrd*, 239 S.E.2d 415, 419 (N.C. 1977), North Carolina's highest court said that the Buckley Amendment does not "forbid disclosure" of documents — it simply creates a penalty that may or may not be imposed if documents are disclosed. The *Byrd* ruling strongly suggests that, in the view of at least one state court, a college cannot excuse refusal to disclose a document covered by state open-records law by pointing to FERPA. *But see United States v. Miami University*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000), *aff'd* 294 F.3d. 797 (2002).


50 *See, e.g.*, M.D. State Gov't Code Ann. sec. 10-614(b)(3)(iii) (stating that if a records custodian denies public access to any record, it shall permit inspection of any part of the record that is subject to inspection and is reasonably severable).

51 685 P.2d 1193 (Cal. 1984).


52 See, for example, *Shivers v. Univ. of Cincinnati*, 2006 WL 3008478 at \*1 (Ohio App. 2006) (finding that "a university has a duty to warn or protect its students from the criminal conduct of third persons"); *Kleisch v. Cleveland State University*, 2006 WL 701047 at \*7 (Ohio App. 2006) (examining public university's compliance with federal Clery Act campus crime reporting requirements as part of student rape victim's claim the school had failed to adequately warn campus community of crime risks); *Bell v. University of Virgin Islands*, 2003 WL 23517144 at \*4 (D.V.I. 2003) (allowing student assaulted by professor to pursue claim that university failed to warn of professor's propensity for dangerous conduct); *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991) (university liable for injuries suffered as the result of fraternity hazing because incident was foreseeable and fraternity was under university's control); *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983) (college liable for on-campus rape of student where school officials had foreseen risk of crime); *Brown v. North Carolina Wesleyan College*, 309 S.E.2d 701 (N.C. 1983) (school not liable for abduction, rape and murder of student where no "repeated course of criminal activity" existed to render crime foreseeable).



53 *Nero v. Kansas State University*, 861 P.2d 768, 782 (Kan. 1993).

## FERPA changes result in triumph in Mo.

SEARCH... 

### Court rules that the results of campus disciplinary proceedings must be open

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**MISSOURI** - In the first legal actions filed since the 1998 amendments to the Higher Education Act made changes to the federal Family Educational Rights and Privacy Act (FERPA), commonly known as the Buckley Amendment, a state judge ordered Southwest Missouri State University to release student disciplinary records to the school newspaper in a January court decision.

Missouri Circuit Court Judge Henry Westbrook wrote in his ruling in *Board of Governors v. Nolan*, No. 198CC4344 (Mo. Cir. Ct. Jan. 26, 1999), that all final results of any disciplinary proceeding against a student who is an alleged perpetrator of a crime of violence or nonforcible sex offense must be disclosed upon request.

"I am pleased that the court upheld the law," Pat Nolan, the assignment editor for *The Southwest Standard*, said. "I had absolutely no doubt that we were going to win."

But Nolan said that he wishes the ruling would have gone further, requiring that records other than the final results of a disciplinary proceeding be released. As the ruling stands, Nolan said, it is impossible to see if judicial proceedings are being carried out fairly because only the records of those found guilty are released.

"In the last two years, for only five names to turn up in a school of this size is ludicrous," Nolan said.

In November, Nolan asked for a copy of judicial actions on campus from 1997 through November 1998, citing Missouri's open records laws. But University officials, worried they might violate FERPA, did not release the records.

Instead, the university filed a lawsuit against Nolan, asking the court to determine what information the university could legally release.

SMSU, like many other universities, had long relied on FERPA to keep campus court records secret. The law protects the confidentiality of education records that contain personally identifiable information.


But in 1998, President Clinton signed legislation that clarifies FERPA, saying the law cannot be used by schools to avoid releasing the outcome of campus judiciary proceedings concerning crimes of violence.

After the court ruling, *The Southwest Standard* received the requested records and printed the names of five students who had been found guilty in the proceedings.

Since then, Nolan said, the University has been cooperative in releasing judicial proceedings final results. The paper has printed the name of one other student as the result of the school releasing these records.

Though the school maintained that its lawsuit was not adversarial, Nolan said that relations between the paper and university officials have not been without friction. A few weeks after the court ordered the records released, *Standard* reporters were barred from a university committee meeting about the appropriation of student funds.

Nolan said that after he wrote a series of letters to University officials and committee members explaining the right of the reporters to attend the meeting under state sunshine laws, the next meeting was opened.

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## February 2016 State Records Committee Case Updates

### District Court Cases

**Perry City v. Kurt Bailey**, 1<sup>st</sup> District, Box Elder County, Judge Maynard, Case No. 150100150, filed November 23, 2015.

**Current Disposition:** Mr. Bailey filed records request to obtain a copy of a dashboard camera video from the Perry City police department. Perry City asserts that no such record exists. At a hearing held on January 19, 2016, the parties agreed to a voluntary dismissal of the case. However, due to Mr. Bailey requesting extra language being put into the judge's order, the case will proceed. Perry City has obtained leave of the court to file an amended complaint that will include the Committee as a party. An answer will be filed when the amended complaint has been received.

**Paul Amann v. Utah Dept. of Human Resources**, 3<sup>rd</sup> District, Salt Lake County, Case No. 150904275, filed June 24, 2015.

**Current Disposition:** Answer filed on behalf of the Committee. Potential that case may be combined with other GRAMA appeal.

**Swen Heimberg v. Utah Dept. of Public Safety**, 3<sup>rd</sup> District, Salt Lake County, Case No. 150904273, Judge Brereton, filed June 24, 2015.

**Current Disposition:** Committee was not served until December 28, 2015. Answer filed on behalf of the Committee on January 19, 2016.

**Utah Attorney General v. Salt Lake Tribune**, 3<sup>rd</sup> District, Salt Lake County, Case No. 150904266, Filed June 24, 2015.

**Current Disposition:** The parties have agreed to file the disputed records with the court under seal.

**Robert Baker v. Utah Dept. of Corrections**, 3<sup>rd</sup> District, Salt Lake County, Case No. 150903610, Judge Harris, filed May 29, 2015.

**Current Disposition:** Committee did not receive a copy of the Petition for Judicial Review until December 31, 2015. An answer was filed on behalf of the Committee on January 20, 2016, and included a defense that the court had no jurisdiction over the case because of an untimely appeal filed by Mr. Baker. Mr. Baker is appealing a decision made on January 5, 2015 to deny a hearing for him.

**Utah Dept. of Human Resources v. Paul Amann**, 3<sup>rd</sup> District, Salt Lake County, Case No. 150901160, filed February 19, 2015.

**Current Disposition:** Motion to consolidate the case with Case No. 150904275 filed on September 22, 2015.

### Appellate Court Cases

**Salt Lake City v. Jordan River Restoration Network**, 3<sup>rd</sup> Judicial District, Salt Lake County, Case No. 100910873.

**Current Disposition:** A Notice of Appeal was filed on January 29, 2016, indicating an intention to have the District Court's decision reviewed by either the Utah Court of Appeals or the Utah Supreme Court.