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STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

March 3, 2010

The Honorable William A. Bronrott
Lowe House Office Building
Room 411
Annapolis, Maryland 21401

Dear Delegate Bronrott:

You have asked about the ability of journalists, including students at the University of Maryland College of Journalism, to obtain information about individuals charged with violating rules relating to sexual abuse. In particular, you ask whether student journalists may obtain the identities of individuals who have been charged who have been found to have violated these rules.

For the reasons set forth below, if a University disciplinary proceeding determines that a student has violated University policies or rules concerning a matter related to sexual abuse in the form of a forcible sexual offense, statutory rape, or incest, the student's identity is subject to disclosure under the Maryland Public Information Act ("PIA"). Otherwise, the accused student's identity is protected from disclosure by virtue of a federal law relating to education records at the University.

Maryland Public Information Act

The PIA, which is codified at Annotated Code of Maryland, State Government Article ("SG"), §10-611 *et seq.*, provides members of the public, including journalists, with a broad right of access to records of State units or instrumentalities. The University of Maryland is a unit of the State and its records are therefore accessible under the PIA. *Kirwan v. Diamondback*, 352 Md. 74, 721 A.2d 196 (1998).

As a general rule, under the PIA, all public records are open to inspection and copying by a member of the public. The Act lists a number of exceptions to that general rule. One exception provides that a custodian is to deny access to a record, or a portion of the record,

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if “the inspection would be contrary to ... a federal statute or a regulation that is issued under the statute and has the force of law.” SG §10-615(2)(ii).

A federal law that imposes a degree of confidentiality on some records of the University is the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g (“FERPA”) and regulations issued under that statute by the federal Department of Education, 34 CFR Part 99.

FERPA

FERPA provides that federal funds are to be withheld from any university that has a “policy and practice of permitting the release of education records” without written consent. 20 U.S.C. §1232g(b)(1). “Education records” are defined to include records that “contain information directly related to a student” and that are maintained by a university. 20 U.S.C. §1232g(a)(4); *see also* 34 CFR §99.3.

The Court of Appeals of Maryland has considered the breadth of FERPA confidentiality, although it did not have occasion to construe it concerning disclosure of disciplinary proceedings. *Kirwan v. Diamondback*, 352 Md. 74, 721 A.2d 196 (1998). In that case, the University had denied a newspaper request for campus parking tickets of student athletes, in part on the basis that such records were covered by the confidentiality provision of FERPA.

The Court of Appeals held that FERPA did not preclude disclosure of the parking tickets. While it conceded that the statutory definition of “education record” is “somewhat broad,” the Court found that the legislative history demonstrated that of the statute was not intended to preclude the release of any record containing a student’s name, as Congress wished to prevent universities from operating in secret. The Court stated:

Prohibiting disclosure of any document containing a student’s name would allow universities to operate in secret, which would be contrary to one of the policies behind [FERPA]. Universities could refuse to release information about criminal activity on campus if students were involved, claiming that this information constituted education records, thus keeping very important information from other students, their parents, public officials, and the public.

352 Md. at 91. Thus, the policies underlying FERPA would not necessarily prohibit disclosure of the identity of a student found responsible for sexual abuse.

Almost coincident with the *Diamondback* decision, FERPA was amended to specifically allow educational institutions to disclose publicly the “final results” of any disciplinary proceeding conducted by the institution against a student who allegedly committed a “crime of violence” or a “nonforcible sex offense,” if the institution determines that the student committed a violation of its rules or policies with respect to that crime or offense. 20 U.S.C. §1232g(b)(6)(B). To understand this provision of FERPA, it is necessary to have in mind the definitions of several key phrases:

“Crime of violence” is defined to include, among other things, “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person ... of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person ... of another may be used in the course of committing the offense.” 18 U.S.C. §16. This definition encompasses many offenses involving sexual abuse. *See* 34 CFR §99.39 (“crime of violence” includes forcible sex offenses); 34 CFR Part 99 Appendix A (listing certain forcible sex offenses).

“Nonforcible sex offense” consists of “acts that ... would constitute statutory rape or incest.” 34 CFR §99.39; *see also* 34 CFR Part 99 Appendix A.

The “final results” of a disciplinary proceeding are to include the name of the student, the violation committed, and any sanction imposed on the student. 20 U.S.C. §1232g(b)(6)(C)(i). The names of other students, such as a victim or witness, may only be disclosed with the consent of those students. 20 U.S.C. §1232g(b)(6)(C)(ii).

A federal appellate court has construed the 1998 amendment to “evolve from a base Congressional assumption that student disciplinary records are ‘education records’ and thereby protected from disclosure.” *United States v. Miami University*, 294 F.3d 797, 812 (6th Cir. 2002). Under the reasoning of that court, a university could not disclose publicly the identity of a student who was charged with, but not found guilty of, a disciplinary offense.¹

Analysis

You have asked about the ability of student journalists to obtain information about individuals charged with violating University rules relating to sexual abuse. In particular,

¹ The institution may disclose the final results to the *alleged victim*, even if it ultimately concludes that there was no violation of the institution’s rules or policies. 20 U.S.C. §1232g(b)(6)(A).

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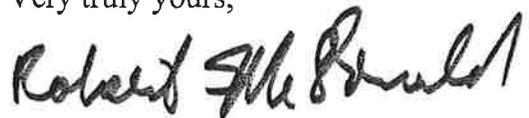
you are concerned whether student journalists may obtain the identities of individuals that the University has found to have violated rules or policies relating to sexual abuse.

A request by a student journalist for such information would be treated as a PIA request to the University. The University would be obligated under the PIA to disclose the requested information, unless an exception to the general rule of disclosure applies. Disclosure of "education records" in violation of FERPA would be "contrary to" a federal statute and thus fall within the exception set forth in SG §10-615(2)(ii). However, as explained above, if the University finds that its rules or policies were violated in a matter involving concerning a forcible sexual offense, incest, or statutory rape, the final results of the disciplinary proceeding – including the identity of the accused student – may be disclosed without violating FERPA. Accordingly, the student's identity would be available in response to a PIA request. If the student is exonerated of the alleged violation, his or her identity would not be publicly available under the PIA.

Conclusion

If a University disciplinary proceeding determines that a student has violated University policies or rules concerning a matter related to sexual abuse in the form of a forcible sexual offense, statutory rape, or incest, the student's identity is subject to disclosure under the PIA. Otherwise, the accused student's identity is likely protected from public disclosure by virtue of FERPA.

Very truly yours,



Robert N. McDonald
Chief Counsel
Opinions and Advice