STATE OF TENNESSEE
OFFICE OF THE
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May 21, 2010

Opinion No. 10-70

Law Enforcement Access to Information

QUESTIONS

1. Is a city/county school, university or college prohibited by the Family Educational Rights and Privacy Act (FERPA) from sharing criminal incident report data with law enforcement?

2. Is a city/county school, university or college prohibited by the Health Insurance Portability and Accountability Act (HIPAA) from sharing criminal incident report data with law enforcement?

3. May information regarding minor children be shared between law enforcement officers and juvenile courts?

OPINIONS

1. No, a city/county school, university or college would not be prohibited by FERPA from sharing criminal incident report data with law enforcement.

2. No, under most circumstances, a city/county school, university or college would not be prohibited by HIPAA from sharing criminal incident report data with law enforcement.

3. Yes, law enforcement officers and juvenile courts may share information regarding minor children when necessary for the discharge of their official duties.

ANALYSIS

1. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, was enacted by Congress to protect the privacy rights of students and their parents with regard to education records. FERPA conditions federal funding to educational institutions on the requirement that such institutions not have a "policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of [the students or] their parents[.]" 20 U.S.C. § 1232g(b)(1). The

Supreme Court has recognized that FERPA does not create an individual enforceable right under 42 U.S.C. § 1983. *Gonzaga University v. Doe*, 536 U.S. 273, 289 (2002). Rather, FERPA's sole enforcement mechanism is the Department of Education's power to withhold federal funds from educational institutions that disclose education records to unauthorized third parties. 536 U.S. at 279.

FERPA defines "education records" as records, files, documents, and other materials which—

> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A).

The term "education records" does not include—

> (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

20 U.S.C. § 1232g(a)(4)(B).

FERPA was intended to deter schools from indiscriminately releasing student educational records. *Bauer v. Kincaid*, 759 F. Supp. 575, 590-91 (W.D. Mo. 1991); *Smith v. Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985). While the Sixth Circuit Court of Appeals has held that student disciplinary records are protected by FERPA, the court has recognized that FERPA does not protect law enforcement records or place restriction on their disclosure. *United States v. Miami University*, 294 F.3d 797, 814 (6th Cir. 2002). The Sixth Circuit Court of Appeals has not specifically addressed the issue of whether law enforcement officers may obtain criminal incident report data from an educational institution. One district court, however, recently addressed this issue. *Young v. City of Omaha*, 2009 WL 4726949 (D. Neb.) In *Young*, the court found that FERPA's text does not prohibit law enforcement officers from obtaining a student's education records from an educational institution. *Id.* at *8. Accordingly, it is our opinion that a city/county school, university or college would not be prohibited by FERPA from sharing criminal incident report data with law enforcement.

2. As a general rule, HIPAA prohibits the use or disclosure of individually identifiable health information by a covered entity. 45 C.F.R. § 164.502(a). A "covered entity" is defined to include: (1) a health plan; (2) a health care clearinghouse; and (3) a health care provider who transmits health information in electronic form in connection with a transaction covered by HIPAA. 45 C.F.R. § 160.103. Whether a particular city/county school, university or college is a "covered entity" subject to HIPAA will depend on whether the school is providing health care services and whether the school has identified the provision of health services as separate from its other functions. *See United States v. Mathis*, 377 F. Supp. 2d 640, 645 (M.D. Tenn. 2005).

HIPAA's prohibition against disclosure of individually identifiable health information is subject to several exceptions. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding in response to an order of a court or administrative tribunal or in response to a subpoena if certain requirements are met. 45 C.F.R. § 164.512(e). A covered entity is also authorized to disclose protected health information for a law enforcement purpose to a law enforcement official if certain conditions are met. 45 C.F.R. § 164.512(f). For example, law enforcement may receive individually identifiable health information, except DNA, if needed for the purpose of identifying or locating a suspect, fugitive, material witness or missing person. 45 C.F.R. § 164.512(f)(2). Law enforcement may also receive protected health information that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity. 45 C.F.R. § 164.512(f)(5). Therefore, a city/county school, university or college is not necessarily prohibited by HIPAA from sharing criminal incident report data with law enforcement.

3. As a general rule, there is a presumption that all governmental records are open to the public unless a specific statutory exception to disclosure exists. *Schneider v. City of Jackson*, 226 S.W.3d 332, 343 (Tenn. 2007). There are two relevant statutes establishing the confidentiality of records involving juveniles and prohibiting the release of such records to the public. It is our opinion, however, that these statutes contain exceptions allowing law enforcement officers and juvenile courts to share otherwise confidential information when necessary for the discharge of their official duties.

First, Tenn. Code Ann. § 37-1-153 provides for the confidentiality of all files and records of the juvenile court except under specific circumstances. Under the provisions of Tenn. Code Ann. § 37-1-153(a)(5), the records and files of juvenile courts are open to inspection, with permission of the court, to any person or agency having a legitimate interest in the proceeding or in the work of the court. Thus, if law enforcement officers should need information contained in juvenile court records for the discharge of their official duties, the files and records may be open for inspection with permission of the court.

Second, Tenn. Code Ann. § 37-1-154 provides for the confidentiality of law enforcement records and files involving juveniles. As provided in Tenn. Code Ann. § 37-1-154(a), there are exceptions to allow inspection of law enforcement records and files regarding juveniles. Specifically, this statute provides:

> Unless a charge of delinquency is transferred for criminal prosecution under § 37-1-134, the interest of national security requires or the court otherwise orders in the interest of the child, the law enforcement records and files shall not be open to public inspection or their contents disclosed to the public; but inspection of the records and files is permitted by:
>
> (1) A juvenile court having the child before it in any proceeding;
>
> * * *

> (4) Law enforcement officers of other jurisdictions when necessary for the discharge of their official duties;

Tenn. Code Ann. § 37-1-154(a).

Accordingly, it is the opinion of this Office that confidential information regarding minor children that is contained in the files and records of juvenile courts and law enforcement may be shared between juvenile courts and law enforcement as necessary for the discharge of their official duties.

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