

## Legal Updates

# Your Privacy : How Does the Law and the University Protect It?



# Privacy:

“The quality or state of being apart from company or observation;...

freedom from unauthorized intrusion.”

*[Webster's Dictionary]*



# Privacy : Legal Origins

Historically ... (English law – pre-US legal system)

Privacy was protected in the common law

Common law = judge-made law  
(judges deciding cases of citizen suing citizen)



# Privacy : Legal Origins

- Common law torts (civil wrongs) related to privacy:
  - Unreasonable intrusion into the seclusion of another person
  - Appropriation of another person's name or likeness
  - Unreasonable publicity of another person's private life
  - Publicity that places another person in a false light



# Right of privacy (an early legal definition) :

“The right to be let alone;

... the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.”

*[Black's Law Dictionary]*



# Privacy : Legal Origins – U.S.

Is “privacy” listed as a right under the U.S. Constitution ? .... No

But ... in the Bill of Rights (1791) ...

- 4<sup>th</sup> Amendment protects citizens against Government intrusion by requiring “reasonable” searches + probable cause warrants



# Privacy : Legal Origins – U.S.

... Still no mention of “privacy” today (after 27 Amendments), but Supreme Court has interpreted Constitution as including some implied privacy rights

(e.g., reproductive rights, right to choose / abortion cases)



# Privacy : Legal Origins

The Modern Era (1950's → present)

Privacy protected by Federal + State statutes

- Laws enacted by Congress + State legislatures
- Regulations enacted by Government agencies



# Privacy : Important Distinctions

- Personal Privacy
- Location Privacy
- Information Privacy



# Privacy: Important Distinctions

## Personal Privacy – “Personhood”

- right to be left alone (seclusion)
- right to control your own life (autonomy)



# Privacy: Important Distinctions

Location Privacy (“Location-Dependent” Privacy)

Is there a “reasonable expectation of privacy” in a certain location?

Constitution – 4<sup>th</sup> Amendment does not protect acts, items, information one knowingly exposes to the public

Technological advances reducing privacy of location : Cell phones, GPS, EZPass, etc.



# Privacy: Important Distinctions

- Information Privacy

The privacy of information about you :

- How it is obtained
- How it is organized
- Who has access
- How it is protected



# Privacy: Important Distinctions

Who is intruding on privacy?

The Government / Public Entities

➔ Constitution limits the Govt. and protects individuals from the Govt.

Private Parties / Private Entities

➔ Constitution does not apply to or limit private parties' actions

➔ Government must be Constitutionally permitted to regulate or protect private parties' privacy  
(usually, power to regulate interstate commerce is used)



# Privacy: Important Distinctions

- Motives for an invasion of privacy matter :
  - To help a person  
(e.g., prevent harm, obtain medical care, prevent suicide)
  - To help others / society  
(e.g., prevent harm, advance societal needs – e.g., prevent terrorism, ensure better-informed decisions)
  - Malicious motives – to embarrass a person
  - Selfish motives –to profit from information about a person



# Privacy: Important Distinctions

- Consequences of an invasion of privacy matter :

## Injury to the individual :

- Damage to reputation + good name in the community
- Mental, emotional, physical injury
  - Effects of embarrassment, humiliation, loss of dignity
- Loss of property interests or income



# What are exceptions to privacy?

- Consent to disclosure
- Emergency – health, safety, order
- Government order or investigation – search warrants, grand jury subpoenas
- Litigation subpoenas
- Parents or guardians of minors or persons not legally competent
- Other ...



# What are exceptions to privacy?

(cont.)

- Sub-categories and subtleties within the exceptions to privacy

## Example : Consent

- Express consent – in writing or verbal consent
- Implied consent
  - Suing in court;
  - Talking about a private subject;
  - Attending an event in public



# What are exceptions to privacy?

(cont.)

- Laws and government regulations requiring disclosure:
  - Freedom of Information Act
  - State public records laws
  - State open meeting (“sunshine”) laws
  - Clery Crime Disclosure Act – requirements concerning info. about registered sex offenders
  - Exceptions within privacy laws :
    - e.g., FERPA – other schools to which a student applies



# What employer interests have been recognized as limiting employee privacy?

- Preventing or ending behavior that violates law or employer policy (e.g., harassment, discrimination)
- Preventing liability
- Preventing loss of productivity
- Preventing theft or disclosure of confidential business information



# What confidential information does the University have?

- Employee personnel records + benefits records
- Student educational records
- Student and parents' financial aid information
- Protected health information
- Alumni records
- Donor financial information
- Financial and credit information (including credit cards)
- Identity of human subjects in research
- Information protected by professional privilege – legal, medical, psychiatric/counseling
- Information in law enforcement investigations
- Identity of individuals or complainants under certain processes (limited)



# Laws Requiring Privacy in Higher Education

- Family Educational Rights & Privacy Act of 1974 (FERPA)
- Health Insurance Portability & Accountability Act of 1996 (HIPAA)
- Gramm-Leach-Bliley Financial Services Modernization Act of 1999



# Family Educational Rights and Privacy Act of 1974

(“FERPA”  
or  
the “Buckley Amendment”)



# Applicability of FERPA:

- FERPA:

Applies to all colleges / univs. (public or private) that receive federal funds from the U.S. Department of Education or whose students receive such funds (e.g., under the Guaranteed Student Loan Program)



# Definitions in FERPA :

- “Student” – Any individual who is or has been in attendance at an institution and regarding whom the institution maintains education records  
(“Eligible Student” = over 18)
- “Record” – Any information recorded in any way, including, but not limited to, handwriting, print, tape, film, microfilm, and microfiche.



## FERPA : Colleges'/Univs.' Ability to Disclose Information from Educ. Records

- Colleges/universities can disclose personally identifiable information from students' education records to parties other than the student if the institution has obtained written consent from the student
- Consent must be specific; FERPA states requirements for consent.



# FERPA : Colleges'/Univs.' Ability to Disclose Information from Educ. Records

(cont.)

- Colleges/universities can also disclose personally identifiable information from students' education records without consent from the student in certain circumstances, including ....



## FERPA : Colleges'/Univs.' Ability to Disclose Information from Educ. Records (cont.)

- Disclosures to other school officials, including teachers, within the institution whom the institution has determined to have legitimate educational interests
- Disclosures to officials of another institution where the student seeks or intends to enroll



## FERPA : Colleges'/Univs.' Ability to Disclose Information from Educ. Records

- Disclosure required to comply with a judicial order or lawfully issued subpoena
- Disclosure in connection with a health or safety emergency
- Disclosure of information designated as “directory information” by the institution (e.g., name, address, phone, date of birth, etc.)



# FERPA Policy

- Student Handbook (pages 100-103) at:  
<http://www.lehigh.edu/~indost/dos/hbook.html>
- A student has the right to “inspect, challenge, correct, and protect” the University’s educational files as they pertain to him or her



# Health Insurance Portability and Accountability Act of of 1996

(HIPAA)



# HIPAA

- Creates first national legal standard for protecting the privacy of individuals' healthcare information.



# HIPAA

- Electronic transmission of “HIPAA Transactions” is triggering event that makes the University a “Covered Entity” under HIPAA.
- “Covered Entities” must comply with HIPAA privacy requirements with respect to all “Protected Health Information” (or “PHI”) (even if not electronically transmitted/stored).



# HIPAA

- Protected Health Information” (PHI) means individually identifiable health information maintained or transmitted by a covered entity in any form or medium.
- PHI excludes educational and other records covered by the Family Education Rights & Privacy Act of 1974 (FERPA).



# HIPAA

- HIPAA Transactions” means the electronic transmission of information to carry out financial or administrative activities related to health care. These include:
  - - Health care claims
  - - Health care payments and remittance advice
  - - Enrollment and disenrollment in a health plan
  - - Health plan premium payments
  - - Referral certification and authorization
  - - First report of injury
  - - Other transactions ...



# HIPAA

- Covered Entities must:
  - establish privacy policies and procedures to protect PHI
  - prepare consent and authorization forms for the release and use of PHI
  - maintain logs of requests for, and disclosures of, PHI
  - establish a complaint process
  - provide computer security (e.g., “fire walls,” etc.) to protect PHI that is electronically-transmitted or stored



# HIPAA Policy

- Since Lehigh is a hybrid entity, privacy policies are maintained by each “covered” University department
- For example: University Health Center’s policy is located at:  
<http://www.lehigh.edu/~inluhc/health/privacynotice.html>



# Financial Services Modernization Act of 1999

(the Gramm-Leach-Bliley Act  
or “GLBA”)



# Enactment of GLBA

- “Modernize” financial services – that is, end regulations that prevented the merger of banks, insurance companies, etc.
- Respond to the increasing digitization and sharing of personal financial information by:
  - Requiring “financial institutions” to ensure the security and confidentiality of such information (i.e., SSN; credit card information; credit histories; etc.)



# GLBA :

## Is Lehigh a “Financial Institution”?

- GLBA definition – “any institution the business of which is engaging in financial activities”
- Financial activities include:
  - Making student loans; and
  - Offering stored value cards in lieu of cash for campus transactions (i.e., GoldPlus)



# GLBA Components

- *Privacy Rule*
  - Governs the collection and disclosure of consumer's personal financial information by financial institutions
  - Requires Notices to customers about privacy policies
  - Colleges & Universities are deemed to be in compliance with the Privacy Rule if they are in compliance with FERPA (at least with respect to financial aid)



# GLBA Components (cont.)

- *Safeguards Rule*
  - Requires all financial institutions to establish, implement and maintain a comprehensive Information Security Program
    - Defined as : the administrative, technical, or physical safeguards used to access, collect, distribute, process, protect, store, use, transmit, dispose of, other otherwise handle customer information



# GLBA Components (cont.)

- *Safeguards Rule (cont.)*
  - Key compliance requirements include:
    - Designate a program coordinator;
    - Identify risks to the security of consumer information, including a risk assessment of computer information systems;
    - Design, implement and test safeguards to control risk



# Information Security Plan

- Lehigh has maintained a comprehensive Information Security Plan since May, 2003
- Resides with the University's Security and Information Policy Officer
- Continuously evaluated and updated to respond to new technologies



# Electronic Communications Privacy Act of 1986



# Electronic Communications Privacy Act of 1986

- Prohibits the “intentional or willful interception, accession, disclosure, or use of one’s electronic communication”



# Electronic Communications Privacy Act of 1986

- Exceptions -- ECP Act does not prohibit monitoring :
  - by provider of electronic communications service (e.g., company-owned e-mail system);  
OR
  - in ordinary course of business (e.g., applies to business-related content and context)  
OR
  - when consent given (e.g., actual or implied consent – notice of monitoring policy and continued use of e-mail system)

# USA PATRIOT Act

## Major Impacts on Privacy in Higher Education

1. Federal Surveillance & Investigatory Powers
2. Visa Monitoring of International Students, Faculty & Scholars
3. Privacy of Student Records
4. Control of Biological Agents & Toxins



# USA PATRIOT Act

## Section 215

### ACCESS TO RECORDS & OTHER ITEMS (FISA Amendment)

- FBI may apply for court order (FISA court) seeking any tangible things (books, records, documents, etc.) from anyone ...
- ... for an investigation to protect against international terrorism or clandestine intelligence activities



# USA PATRIOT Act

## Section 215

### Expansion of prior law and potential problems:

- Prior law: only records of common carriers, public accommodation providers, storage facilities, vehicle rental agencies
- Sec. 215: any tangible things (incl. records) in possession of anyone



# USA PATRIOT Act

## Section 215

- Prior law: FBI had to state specific, articulable facts giving reason that records pertain to person who is foreign power or agent
- Sec. 215: Less specific cause required (needed for international terrorism/clandestine intelligence investigation) and target can be U.S. citizens or permanent residents



# USA PATRIOT Act

## Section 215

### Expansion of prior law and potential problems:

- Person ordered to produce records or things shall not disclose to any other person that FBI has sought or obtained items
- Less senior FBI officials have power to seek orders (Assistant Special Agents in charge of field offices)



# USA PATRIOT Act

## Section 507

- DISCLOSURE OF EDUCATIONAL RECORDS (FERPA Amendment)
- Any Federal officer/employee (above Asst. Atty. General level) ...
- ... may apply to any court with jurisdiction for ex parte order (no notice to student)
- ... to require educational institution to produce educational records of a student



# USA PATRIOT Act

## Section 507

### EMERGENCY DISCLOSURE OF ELECTRONIC COMMUNICATIONS

- Application: specific & articulable facts giving reason to believe that educ. records likely to contain info. relevant to offense/act of domestic or international terrorism
- Educational institution not required to maintain a record of disclosures of educ. records



# USA PATRIOT Act

## Section 212

- Provider of electronic communication service to the public
- ... may voluntarily disclose to law enforcement officials
- ... electronic communication content or info. about a customer / subscriber
- ... if provider reasonably believes emergency involving immed. death / serious injury



# USA PATRIOT Act

## Section 213

### AUTHORITY FOR DELAYING NOTICE OF EXECUTION OF WARRANT

- Authorizes delayed notice of “sneak + peak” search warrants
- Court can issue warrant authorizing law enforcement officers to enter + inspect (physically or electronically) private property
- Delayed notice permitted if adverse effects (life / safety threat, evidence destruction, jeopardize investigation, etc.)

# Americans with Disabilities Act of 1990

Applies to all employers with > 15 employees

- Restricts pre-employment inquiries about disabilities
- Requires separation / confidentiality of records of employee disability / medical condition

# U.S. Constitution

- 4<sup>th</sup> Amendment:

“ The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”



# Federal Law : State Action

Federal Constitution applies to state actors + state action

... does NOT apply to private actors + private action

State action doctrine involves the legal issue of drawing lines between state and private action

# State Actors vs. Private Actors

## State Actors:

Colleges / Universities:  
created by state govts.  
operated by state govts.  
fully or heavily state  
funded  
(tax supported)

Ohio State  
Penn State  
SUNY

## Private Actors:

Colleges / Universities:  
created by private parties  
no state involvement in  
operation  
religiously-affiliated c/u's  
receive very little or no  
state appropriations

Villanova  
Brigham Young  
Swarthmore



# U.S. Constitution

## – 4<sup>th</sup> Amendment

When is a search or seizure “unreasonable”?

- Warrant requirement
- “Reasonable expectation of privacy”
- Public places – “plain view”
- Biological searches
  - Breath, blood, thumb prints, nail scrapings
- Electronic surveillance – audio, visual
- Magnification + technological enhancement beyond human senses



# Lehigh University Policies

- FERPA
- HIPAA
- Information Security Plan
- Privacy Policy Statement
- Policies on the Use of Computer Systems and Facilities
- Others – e.g., Harassment Policy, Disability Accommodation Policy



# Privacy Policy Statement

- Located at:  
<http://www3.lehigh.edu/privacy.asp>
- Outlines the privacy practices for the entire Lehigh University website



# Policies on the Use of Computer Systems and Facilities

- Located at:  
<http://www.lehigh.edu/security/computerpolicy.html>
- Governing philosophy for regulating the use of Lehigh's computing and networking facilities and resources

