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Legal Updates:

Records Management and Retention Practices



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- I. Definitions of “Records”
- II. What types of records do we create and keep and why?
- III. Records Retention Policies and Records Management
- IV. Issues and Examples:
 - A. Personnel Files
 - B. Health and Disability Records
 - C. Student Records
 - D. Litigation Discovery
 - E. Electronic Records
 - F. “Personal” Records, Notes, etc.

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What is a “record”?

There are many definitions ...

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Some sample definitions:

- FERPA:

“Record” - any information recorded in any way, including, but not limited to, handwriting, print, tape, film, microfilm, and microfiche.

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An example from a subpoena:

The term “record” shall be defined to include... any recordation of any intelligence or information, whether handwritten, typed, printed or otherwise visually or aurally reproduced, ...letters, memoranda, data, logs, ... lists of persons attending meetings, ... summaries of telephone conversations, personal conversations, ... including but not limited to all drafts, copies (whether or not identical to originals), or reproductions in the possession, custody or control of You or Your Agents, or known to You or any of Your Agents ... whether or not prepared by them... etc.

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The broadest definition:

“A record is anything intended as a memorial, preservation, or evidence of the matter to which it relates.”

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What kinds of records does the University create and keep?

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Many categories and types, based upon ...

- Function – most important are those pertaining to our educational and research missions
- Form – written, electronic, audio/video
- Whom the records concern – students, employees, healthcare patients, clients, litigants, etc.
- What the records concern – business, contracts, litigation, etc.
- Access – public vs. private / confidential

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Why does the University create
and keep records?

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1. Credentialing (unique to education)
2. Business Continuity
3. Legal / Regulatory Compliance
4. Litigation (as plaintiff or defendant)
5. Disaster Recovery
6. History

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Creating a Records Retention Policy

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Records Retention Policy and Records Management :

The systematic control of the:

- creation;
- receipt;
- maintenance;
- use; and
- disposition

... of records

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Goals of Records Retention and Records Management:

Ensuring:

- authenticity (accuracy, originality)
- reliability (completeness)
- usability (can be located, retrieved, understood)
- security

... of records



How long should we keep records?

Considerations:

1. As long as needed for business continuity (risk if records are unavailable)
2. Legal / Regulatory compliance
3. Litigation – Statutes of Limitations
4. Needs of Internal & External Parties
(Students, Alumni, Others)
5. Expense & Use of Space for Storage

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Who can inspect University records?

- University employees
 - Their own personnel records (with limits)
 - University records for legitimate purposes (“legitimate” depends upon the records + circumstances)
- University students (their own educational records, with limits)
- External auditors
- Government
- Parties in litigation

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Challenges to Records Retention Policy Development :

- The perception that the goal is to eliminate “bad” records
- The perception that any policy for systematically destroying records is unethical or illegal



Challenges to Record Retention Policy Development (cont.) :

- The effects of the increase in electronically stored records – (a sense of overwhelm)
- Legal and regulatory compliance :
There are currently over 10,000 federal, state, and local laws or regulations addressing records creation, storage, access and retention.

[Source: Provisory Services]

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Retention Schedule Preview

Type of Record	Official Repository	Duration
Academic (Transcripts, etc.)	<i>Registrar</i>	5 years from graduation or date of last attendance
Fire Protection System Records	<i>Environmental Health & Safety</i>	5 years
Employee Personnel Files (Staff)	<i>Office of Human Resources</i>	7 years after termination

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Personnel Files



Pennsylvania Inspection of Employment Records Law

- Enacted in 1978
- Protects employee from placement of inappropriate info in his/her personnel file

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Summary of Law:

Authorizes an employee to inspect certain personnel files maintained by his/her employer



Employee (definition)

- Includes:
 - Currently employed; or
 - On leave or laid off with re-employment rights
- Does not include:
 - Applicants for employment; or
 - Any other person (i.e., terminated employees)

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Personnel File (definition)

- Includes:
 - Application for employment
 - Wage or salary information
 - Notices of commendations
 - Warning or discipline
 - Employee benefits information
 - Leave records



Personnel File (cont.)

- Also Includes:
 - Employment history w/employer, including:
 - Salary information
 - Job title
 - Dates of changes
 - Retirement record
 - Attendance records
 - Performance evaluations



Personnel File (cont.)

- Does NOT include:
 - Records related to investigation of possible criminal offense
 - Letters of reference
 - Documents developed for use in civil, criminal, or complaint/investigation procedures

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- Does NOT include (cont.):
 - Materials used by employer to plan for future operations
 - Information available to employee under the Fair Credit Reporting Act
 - Attorney-client privileged documents

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Inspection Is Permitted...

- Upon request by employee or agent designated by employee
- At reasonable times
- During regular business hours
- At office where records are usually kept

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Additional Limitation/Requirements:

- Employer may:
 - Request statement of purpose of inspection or particular parts of file to be inspected
 - Require that an official of employer be present during inspection
 - Limit inspections to once a year

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Additional Limitations/Requirements:

- Employer must allow sufficient inspection time based on volume/content of file
- Employer doesn't have to allow employee to remove personnel file or any part of it
- Employee may take notes

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The Law does not...

Require the employer to retain every record (i.e., record retention policies are permissible)

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Health and Disability Records



Applicable Federal Laws

- Americans with Disabilities Act of 1990
- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- Family Medical Leave Act of 1993 (FMLA)

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Americans With Disabilities Act

- Applies to all employers with >15 employees
- Requires separation / confidentiality of records of employee disability / medical condition

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HIPAA

- First national legal standard for protecting the privacy of individual's healthcare information
- Covered entities must, among other things, establish privacy policies and procedures to safeguard Protected Health Information

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HIPAA

Protected Health Information (PHI):
individually identifiable health information
maintained or transmitted by a covered
entity in any form or medium

...this means “records”

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...privacy policies are in many ways a form of records policies



Family Medical Leave Act

- Covered employers must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12 month period
- For reasons such as: birth of child or care of an immediate family member with serious health condition



FMLA Regulations:

- Set forth types of records the employer must maintain (i.e., payroll data; dates of FMLA leave; records of dispute re: FMLA leave, etc.)
- Required records must be kept for no less than 3 years and must be available for inspection or copying by the DOL upon request

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How Does Lehigh Handle Personnel Files & Medical Records?

- Various Policies on the HR website:
 - Employee Privacy and Inspection of Personnel File
 - ADA Policy
 - Lehigh University Benefit Plans Privacy Policy
 - Family and Medical Leave Act

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Student Records



Student Records

- A direct “product” of the work we do as a University community
- Transcripts and diplomas are a student’s credentials ... so they need to be protected and managed appropriately

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Family Educational Rights and Privacy Act of 1974

(“FERPA” or
the “Buckley Amendment”)

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FERPA:

- Federal law that protects the privacy of student education records
- Applies to all schools that receive federal funds from the U.S. Dept of Education or whose students receive such funds

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Education Records (def.)

- All records which:
 - Contain info directly related to a student; and
 - Are maintained by an educational institution or by agent of institution

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Record (def.)

Any information recorded in any way, including, but not limited to, handwriting, print, tape, film, microfilm, and microfiche.

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FERPA – General Rule

- We may not disclose information about students or permit inspection of their records w/out their written permission
 - Unless the disclosure or inspection is covered by certain exceptions permitted in the Act

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Rules differ depending upon...

- Who is asking
- What information they ask for
- Whether the requester has a “legitimate educational interest”
- Whether the student is involved in a legal proceeding; and
- Additional specific considerations

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Important to Remember...

- FERPA applies to all offices handling or creating student records
 - Many university employees are likely to create and maintain records that fall w/in the scope of FERPA

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Litigation Discovery

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Litigation Discovery

In litigation, both parties (plaintiff and defendant) have the right to discovery of all “relevant” information / evidence in other party’s possession.

“Relevant” = Relevant or could lead to relevant information / evidence (very broad standard)



Litigation Discovery

The right to discovery includes court-ordered production of records (subpoena power) from parties to the litigation

OR

from non-parties (i.e., the University can be compelled to produce records for litigation in which it has no involvement)

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Reason for Caution: Pending or Imminent Litigation

Records should NEVER be destroyed if they concern a subject about which litigation is pending or imminent.

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Spoliation of Evidence

The destruction of evidence or the failure to preserve potential evidence for another's use in pending or reasonably foreseeable litigation.

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Spoliation of Evidence

If records were destroyed with a “culpable state of mind” (includes willful or negligent acts), then a court may instruct a jury to consider the destruction of records to be an adverse inference of liability (or impose penalties or fines)

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Sarbanes-Oxley Act of 2002

“Any person who knowingly and willfully destroys or conceals any record relating to the provision of assistance [under this subchapter] ... or attempts to [do so] with intent to defraud the U.S. or prevent the U.S. from enforcing any right [under this part] shall upon conviction, be fined not more than \$20,000 or imprisoned not more than 5 years.”



Legal Privileges that Protect Records from Discovery

Attorney – Client Privilege :

Protects only records (communications) between attorney and client made for purpose of obtaining legal advice



Peer Review Privilege

- Prior to 1990 (Supreme Ct. decision in Univ. of Pa. vs. EEOC) :
- Many federal courts recognized a qualified privilege of colleges and universities to withhold the identity of confidential peer reviewers ... including in the litigation discovery process



Univ. of Pa. vs. EEOC (1990)

- Public / Govt. interest in uncovering potential evidence of discrimination outweighed confidentiality interest in peer reviews
- Peer reviews no longer protected from disclosure by a blanket privilege

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Electronic Records

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Electronic Records

In many ways, more challenging to manage than paper (“hard copy”) records

1. Much more can be created and stored without analysis and recordkeeping strategies – e.g., several employees can receive an e-mail attachment and then create multiple stored copies.
2. Electronic deletion gives false appearance of destruction.
3. Information (metadata) is created and stored invisibly to ordinary user.

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Metadata

Metadata = Information about a record (a “record about a record”) that is electronically embedded in the record (who created it; how/when it was changed)

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Creation of electronic records
makes creation of metadata
automatic

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Personal Notes and Files

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Are personal notes and files part of the University's records?

Examples:

- personal notes concerning evaluations
- rough drafts of documents
- personal notes from meetings or phone calls



YES -

Records created for any University purpose are University records.

Therefore:

- the University may inspect them
- the University may be required to allow other parties to inspect them
- it does not matter where they are stored (e.g., at office or home)



But note.... (not exceptions)

- FERPA Regulations – Sec. 99.3
- Term “Education Records” does not include:
 - Records kept in the sole possession of the maker,
 - ... are used only as a personal memory aid,
 - ... and are not accessible or revealed to any person except a temporary substitute for the maker.