

University of Texas System Faculty Advisory Council

Recommended Language Describing Information that Requires Encryption.

Considering that UT System policy will be to require encryption only to protect information that is confidential under FERPA and HIPAA or under contract, we recommend the following language for an appropriate policy.

The purpose of this policy is to describe the kinds of information the institutions within the University of Texas System may protect by requiring encryption¹ of computers or other devices on which the information resides. Information that should be on encrypted devices is of the following three types:

- A) information the university administration creates and uses for its administrative purposes
- B) information the university is legally obligated to protect by FERPA and HIPAA
- C) information that the university is bound to protect by contract.

The obligation to protect information does not imply ownership of that information.

Other work-related information is owned by faculty individually (D), and does not require encryption. It is the policy of the university to provide support and software to assist faculty who wish to protect this information as well.

A. Information the university owns for its internal business purposes. This information cannot be construed as owned by faculty although faculty may have access to it. If a faculty member retains any of this information, it should be on encrypted media. This information may be of the following kinds:

A.1. Business records maintained by any office under the Vice President for Business Affairs unless deemed public information.

A.2. Student records maintained by the University Registrar.

A.3. Records maintained by the Office of the President unless deemed public information.

A.4. Records maintained by the Office of the Provost. These records include those reported by the vice-provosts and academic deans to the Provost, and department chairs or others to the academic deans. Examples include personnel recommendations and upward evaluation of administrators. Exemptions include all information that must be made public under HB 2504 of 2009 and all information defined as public information in the Texas Government Code, 5.A.552. These records include faculty salary information, teaching load information, and course evaluations.

A.5. Information on students, staff, or faculty that could be used for identity theft, impersonation, or embezzlement. Examples are university computer account net-ids and passwords, social security numbers, Medicare numbers, bank account numbers and

¹ The purpose of encryption is to protect information on encrypted media or devices.

information, credit/debit card numbers and information, taxpayer numbers, or copies of identifying documents.

B. Information that the university is legally obligated to protect by HIPAA and FERPA.

B.1. Medical records with personally identifiable information as defined in Health Insurance Portability and Accountability Act of 1996 (HIPAA).

B.2. Education records as defined in the Family Education Rights to Privacy Act (FERPA). Using the subdivisions of the Act itself, these are defined in the Act as meaning:

(a)... those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does **not** include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3) (i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

[Authority: 20 U.S.C. 1232g(a)(4)]

[http://www.ecfr.gov/cgi-bin/text-](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=11975031b82001bed902b3e73f33e604&rgn=div5&view=text&node=34:1.1.1.1.33&idno=34)

[idx?c=ecfr&sid=11975031b82001bed902b3e73f33e604&rgn=div5&view=text&node=34:1.1.1.1.33&idno=34](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=11975031b82001bed902b3e73f33e604&rgn=div5&view=text&node=34:1.1.1.1.33&idno=34)

The implication of (a) is that all records maintained by the registrar are covered under FERPA. Federal courts have construed this as including disciplinary records. The clear sense of (b) (1), however, is that records maintained by individual faculty members for their own purposes and not intended to be communicated to others are not covered under FERPA and are therefore not confidential.

The implication of (b)(3)(i) is that records kept by faculty of their student employees, including Teaching and Research Assistants, are also not included, and that the university similarly has no obligation to assure that computers or media with these records should be encrypted under FERPA. It is desirable, however, to secure them as business records.

B.3. Research information that the university is required to protect as an explicit condition of the grant or contract that is providing funding for the research.

C. Information that the university has a proprietary interest in, and that it may protect.

C.1. Patentable discoveries or inventions in which the university has a proprietary interest, until such time as that patent is applied for or the invention is placed in the public domain, or the university expressly abandons its proprietary interest in accordance with Regents Rule 90101.

C.2. Information and documents that the university has contracted with faculty to produce, when retaining the information in a secure form is explicitly required in the contract. Examples are consulting contracts that faculty members may agree to, or on-line course material they may contract to create.

D. Work-related information that the faculty member owns and the university does not have an obligation to control includes the following:

D.1. All texts or other documents authored by faculty and subject to copyright, beginning with the author's copyright that applies at the time of creation. This includes all notes, drafts, data, and compilations of relevant material that may be used in the creative process, whether exclusively authored by the faculty member or in the form of annotations and notes on material the faculty member has collected through the internet or by any other means.

D.2. Teaching materials such as course notes, syllabi, and web-site files created by the faculty member. The exception is if these materials were developed under written

contract to the university in which the contract specifies that they belong to the university.

D. 3. Letters of recommendation written by faculty in response to requests by students are not prohibited by FERPA and are not educational records maintained by the institution.

D.4. A note or an email from one faculty member to another about a student is not an “educational record” in the meaning of FERPA because it is not a record maintained by the institution. According to the court, “FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar” (Owasso Independent School Dist. v. Falvo, 534 U.S. at 433-45).

D.5. Direct communications with students. Examples include exchanges of emails regarding course assignments or academic progress, appointments, or general advice and counseling.

D. 6. Professional correspondence not subject to copyright, such as correspondence with colleagues; artistic, literary, scholarly and scientific societies; publishers; potential publishers; funding sources; and professional associations such as faculty unions and the American Association of University Professors.

D.7. Private non-professional correspondence through university provided emails or other information services.

D.8. All communications with federal agencies protected by the Privacy Act of 1974.

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