

# The Public Records Act: It Affects You More Than You Think

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# Agenda

- General overview
- Exceptions
- Public Records Act vs. FERPA and State Human Resources Act
- Recent ruling in *DTH Media Corp. v. Folt*
- Protecting research data from disclosure
- Best practices while working remotely
- Scenarios



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# General Overview



# What is a public record?

- All documents of any type “**regardless of physical form or characteristics...**made or received...in connection with the transaction of public business by any agency of North Carolina...”
- “The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the **people.**”



# The law

- The status of a record under the law is determined based on its content, not its location.
- Location
  - Personal devices, computers, smart phones, iPads, etc.
- Format
  - Paper, correspondence, maps, books, photographs, e-mails, text messages, voicemail messages, tweets, etc.



# The law

- North Carolina Public Records Act
  - Requires public entities to retain public records
  - Requires public entities to disclose public records
    - When asked unless an exception applies
- Retention periods vary for different types of records
  - Retention, Disposition, and Security of University Records
  - [University Policy 605.3](#)
    - Personnel file – 30 years retention after separation
    - Student disciplinary records – 8 years (non-expulsion)



# Public records requests

- **Anyone** can request a public record (even non-residents)
- Must allow for inspection
- May not demand the identity of the requester
- May not ask the reason for the request
- No written request requirement
- May charge for copies
  - Actual cost (\$.09/black and white and \$.30 color copies)
  - Extensive services (\$18/per hour after 4 hours)



## Denial of access

- Anyone who is denied access to a public record may seek a court action to compel release of the records
- The burden is on the agency
- The presumption is that all public records are open to the public unless there is an explicit exception





## Responding to requests

- Must respond as “promptly as possible”
- Do not have to create new records, provide:
  - Whatever format exists
  - Must redact confidential information



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# Exceptions



# Exceptions

- Students records (Family Educational Rights and Privacy Act [FERPA]) restricts information that can be released without consent (**20 U.S. Code 1232g; 34 CFR Part 99**)
- Personnel file is confidential under State Human Resources Act, EXCEPT items listed under (**NCGS § 126-23**)
- Information about employees and applicants for employment (**NCGS § 126-22**)



# Exceptions

- Trade Secrets (**NCGS § 66-152**)
- Certain law enforcement records (i.e. security cameras) (**NCGS § 132-1.4(a)(b)(1)**)
- Certain personally identifiable information (including information from or about an applicant for admission to UNC Charlotte maintained by University) (**NCGS § 132-1.1(f)**)



# Exceptions

- Bids for state contracts BEFORE the award of the contract (NCGS § 143-52)
- Certain written communication by an attorney representing the State agency in the scope of the attorney's duty. (NCGS § 132-1.1(a)).
- Research data, records, and information of a proprietary nature (NCGS § 116-43.17)
- Other records made confidential by law



## Legal holds

- “Litigation holds” issued when pending or threatened litigation
- Upon legal hold notice:
  - Immediately suspend deletion of relevant records
  - Preserve any electronic records generated OR received
  - Preserve hard copies of documents under your control
  - Receipt **MUST** be acknowledged
  - You **MUST** continue to monitor compliance



## Violation of legal holds

- It is against the law to destroy, alter, withhold, or obscure “evidence” once a legal hold has been initiated
- This is called “spoliation”





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# Public Records Act and State Human Resources Act





# What is the State Human Resources Act?

- Established a set of laws related to employment of state workers in North Carolina.
- Defines a personnel file as “...any employment-related or personal information gathered by the University as an employer”.



## Personnel records that are *Public*...§126-23

1. Name
2. Age
3. Date of original hire
4. Term of employee contract (written or verbal)
5. Current position
6. Title
7. Current salary
8. Date and amount of each increase/decrease in salary
9. Date and type of each change in position classification
10. Date and general description of the reasons for each promotion
11. Date and type of each dismissal, suspension, or demotion for disciplinary reasons (if dismissed, a copy of the final decision)
12. Office or department assigned



## Does an employee have access to his/her personnel file?

- **Yes.** An employee may examine their personnel file with these exceptions:
  - Letters of reference solicited **prior** to initial employment
  - Information concerning medical disabilities (mental or physical) that a physician may not have disclosed to the employee.



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# Public Records and FERPA

# FERPA basics

- FERPA (Family Education Rights and Privacy Act)
- What is an “education record” according to FERPA?
  - Information that is **directly related** to the student (other than directory information) **and**
  - **Maintained** by the University

\***Format:** Essentially any format that exists.

# What is not an education record?

- Campus police records
- Employment records (unless dependent on status as a student)
- Non-circulating faculty or staff records made for personal use
- Peer-graded assignments BEFORE collected by instructor

# What is not an education record? (cont.)

- Treatment records (medical/counseling)
- Certain alumni records
- Information about a student based on your personal observation (i.e. “He’s a hard worker.” = okay, based on your perception, not based on records maintained by university)



# What is Personally Identifiable Information?

- Specific information (i.e. name, address, SSN, DOB, etc.)
- “Other information, alone or in combination, can be used to distinguish or trace an individual’s identity either directly or indirectly through linkages with other information.”





# Legitimate Educational Interest

- FERPA permits university employees to have access to a student's education records if they have a "legitimate educational interest" without prior written consent from student
- What constitutes "legitimate educational interest"?
  - **Not** curiosity or solely being an employee
  - It is limited to specific record(s) that is(are) essential to do your job
  - "Need to know basis"

# School Officials

- School officials with a **legitimate educational interest**
  - Questions to consider
    - Are they a **properly qualified** school official?
    - Have they **clearly articulated the interest**?
    - Do they **need** the information to perform their duties?
    - Is the interest **educationally related**?
    - Is the interest **narrow in scope**?
    - Have they **been informed** as to the **restrictions/dissemination** to others?

# Directory Information

- "Directory Information" means information in a student's education record that would not generally be considered harmful or an invasion of privacy if disclosed.
- At UNC Charlotte, directory information consists of:
  - the student's name,
  - major field of study,
  - dates of attendance,
  - enrollment status, and
  - degrees and awards (including scholarships) received.

# Limited Use Directory Information

- Photographs, videos, or other media containing a student's image or likeness and University-issued student email addresses are designated by UNC Charlotte
- Use and disclosure of Limited Use Directory Information will be restricted to:
  - 1. publication in official **University publications** or on **social media sites or websites hosted or maintained by, on behalf of, or for the benefit of the University**, including the University's online directory and internal email system;
  - 2. **University officials** who have access, consistent with FERPA, to such information and only in conjunction with a **legitimate educational interest**
  - 3. external parties contractually affiliated with the University (provided such affiliation requires the sharing of limited use directory information)

# Social Media

- What about the RISK associated with **social media**?
  - Be careful NOT to reveal protected student information when writing a blog, tweeting, or posting to other social media outlets
  - Same rules apply, but risks are greater with social media (posts go viral, newspapers search, pay attention to online info, etc.)



# What is consent?

- Student may consent to disclosure of education records:
  - Must be written
  - Must be signed
  - Must include:
    - Specific records to be disclosed
    - Purpose of disclosure
    - Identify person to whom records will be disclosed
    - (What, Why, and Who)



# Exceptions to written consent

- Directory Information
- To university officials (with legitimate education interest)
- To parents (if student is dependent)
- To another university (if student transfers)
- Health/Safety emergency
- Judicial order/subpoena
- Certain disciplinary information (§99.31(a)(13); (14) and (15))
  - Crimes of violence (just victim or victim and public) or
  - Alcohol/drug violations (student under 21)

# Crimes of Violence (added in 1998)

- Two crimes of violence exceptions in FERPA
  - Disclose final results of disciplinary proceeding to victim (regardless of responsibility finding)
  - Disclose publicly if student found responsible for alleged crime of violence or non-forcible sex offense
    - **ONLY** release:
      - Student name
      - Violation committed
      - Sanction imposed against student
- May **NOT** disclose the name of any other student, including a victim, without the prior written consent





- FERPA is a “permissive” law
  - All FERPA exceptions to written consent are permissive, not mandatory, disclosures
  - What we CAN release, not what we are REQUIRED to release

# Public Records and FERPA

- FERPA
  - Federal Law
  - Protects identifiable student information, including information that, combined with other available information, could identify a student
  - Permits, but does not require, a university to disclose name, violation, and sanction of students disciplined for crimes of violence
    - Prohibits universities from disclosing identifiable victim or witness information

# Public Records and FERPA

- North Carolina Public Records Act
  - State law
  - Requires disclosure of records made by public entities unless a specific exception applies
  - Student information (other than application information) is not a listed exception
    - Note: North Carolina Public Records Act treats records of University applicants (whether admitted or not) as confidential. Immediately upon attendance, those records are fully covered by FERPA.





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## *DTH Media Corp. v. Folt*

841 S.E.2d 251 (N.C. 2020), *cert. denied sub nom. Guskiewicz v. DTH Media Corp.*, 141 S. Ct. 1126 (U.S. Jan. 11, 2021) (No. 20-527)



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# Issue before the North Carolina Supreme Court

- Is a University *required* to release a student's information when that student has been found responsible for sexual misconduct under University policy?



# Background – Original Request

- September 30, 2016: “copies of all public records made or received by [UNC-CH] in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by [UNC-CH’s] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office.”
- October 28, 2016: UNC-CH expressly denied the news organizations’ request.



# Background – Narrowed Scope of Request

- “(a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by the [UNC-CH] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office;
- (b) the date and nature of each violation for which each such person was found responsible; and
- (c) the sanction[ ] imposed on each such person for each such violation.”



# Plaintiffs' Argument

- Plaintiffs – DTH Media Corporation; Capitol Broadcasting Company, Inc.; The Charlotte Observer Publishing Company; The Durham Herald Company
- N.C. Public Records Law *requires*, and FERPA *allows*, “only the disclosure of the name of the student, the violation committed, and any sanction imposed by the institution on that student upon the release of the final results of any disciplinary proceeding”.





# University's Argument

- Defendants – Chancellor of UNC-CH; the Senior Director of Public Records of UNC-CH (in their official capacities)
- Student disciplinary records are protected by FERPA
- Not required to release the records under FERPA because they are “education records” and fall under the crime of violence exception
- Releasing the information would “breach the confidentiality of the University’s Title IX process . . . and deter victims from coming forward.”
- Doctrine of Federal Preemption – “Generally, if a state law conflicts with a federal law that regulates the same conduct, the federal law prevails.”



# North Carolina Supreme Court's Decision

- 4 to 3 decision
- UNC-CH must disclose the three pieces of information permitted under FERPA and required under N.C. Public Records Act
- FERPA “did not grant implied discretion to UNC-CH to determine whether to release the results of a student disciplinary proceeding emanating from rape, sexual assault, or sexual misconduct charges in absence of language expressly granting such discretion.”



# Supreme Court of the United States

- UNC Chapel Hill filed a petition for writ of certiorari to the U.S. Supreme Court
- U.S. Supreme Court denied the petition on January 11, 2021
- The decision in this case will stand unless the N.C. legislature amends the N.C. Public Records Act



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# Protecting Research Data from disclosure



# What about Research Data?

- Legislature has now provided an exemption for certain “research data.”
- “Research data” is data that is collected, observed, or created, for purposes of analysis to produce original research results.



## General Statutes §116-43.17

- Confidentiality of research data, records, and information of a proprietary nature.
  - “Research data, records, or information of a proprietary nature, produced or collected by or for state institutions of higher learning in the conduct of commercial, scientific, or technical research where the data, records, or information has not been patented, published or copyrighted **are not public records** as defined by G.S. 132-1.” [emphasis added].



# Best Practices while working remotely



## Managing your inbox

- Emails are public – if made or received by state employees in connection with state business. (Remember: **content** is the key.)
- Emails considered public records must be retained according to the University Retention Schedule.
  - Note:
    - Personal emails are not public records.
    - Purely administrative emails that are transitory or have no real value may be destroyed when you determine that it no longer is considered necessary or valuable.





## Things to consider...

- Use subject lines that are clear and informative
- Be mindful prior to sending your response (i.e. use discretion)
- Manage email based on its content and according to the appropriate record retention policy
- Limit document edits using email...instead use OneDrive or a shared drive
  - Note: If a public records request comes in for your emails pertaining to a subject with those documents, every document draft sent to and from you is subject to be included in the response to the records request.



## Things to consider...

- Texting vs. email or conventional letter
- Be mindful and professional in your communications
- DO NOT mix personal with business-related content
  - Political purposes
  - Personal business activities
  - Private commercial transactions



# COVID's Impact on Public Records Requests

- State colleges and universities receive funding from the state and are subject to state public records laws.
- Still must respond “as promptly as possible” regardless of extenuating circumstances
- More requests aimed at COVID procedures: testing, vaccination requirements and exemptions

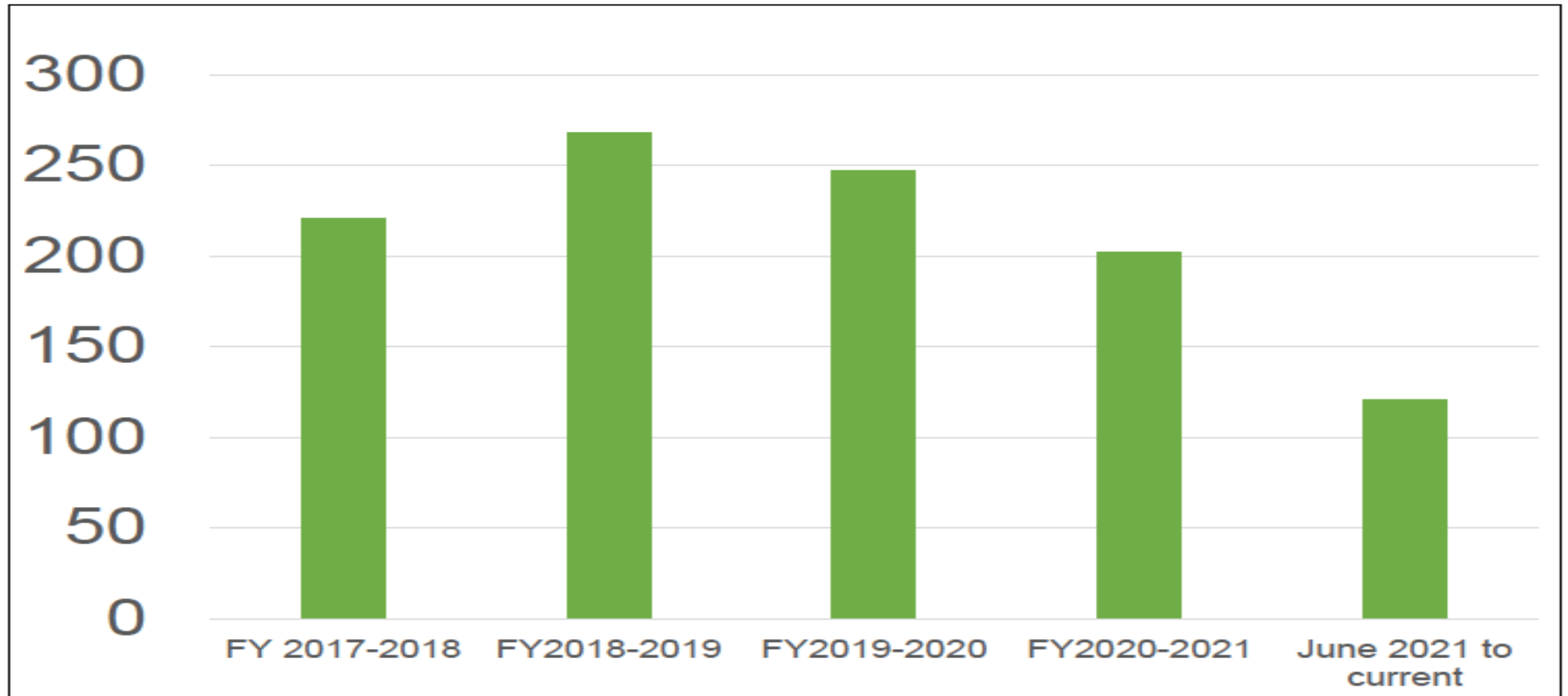


# Classroom Recordings

- Classroom technologies continue to evolve
- Impact of remote and hybrid classes
- Common inquiry: Are instructor's classroom videos and recordings subject to FERPA?
  - Answer: It depends!
    - If recording only includes voices of professor and students
    - Does not include any personally identifiable information (PII)
    - Portions containing PII of students (other than TAs) constitute as student education records and are subject to FERPA
- More information –please visit [Classroom Recordings & FERPA FAQs](#)



# Requests by the Numbers..





# Scope of Requests

- Roughly 10 percent of public records requests are complex searches that include multiple email addresses or large data set
- A complex search averages 6-10 hours of administrative review (not including redaction, production, etc.)
- One review resulted in over 18,000 emails
- Common topics include: COVID-19 policies and procedures, litigation settlement terms, law enforcement reporting, Board of Trustees communications, sports headlines, financial reporting

# Scenarios



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# Scenario #1: Responding to a Subpoena

Charlotte recently received a letter and subpoena from Judge Judy. The subpoena states that Charlotte must produce the names and addresses of every student that has been suspended in the past ten years to the court within 60 days. Is Charlotte required to provide this information?

- A. No, the school does not have to comply with the subpoena since FERPA preempts Judge Judy's authority to issue a subpoena for a student's personally identifiable information.
- B. No, the school does not have to comply with the subpoena unless the students consent to the release of this information.
- C. Yes, the school has to comply with the subpoena but that's it.
- D. Yes, the school must comply with the subpoena and also provide the affected students with notice of it.

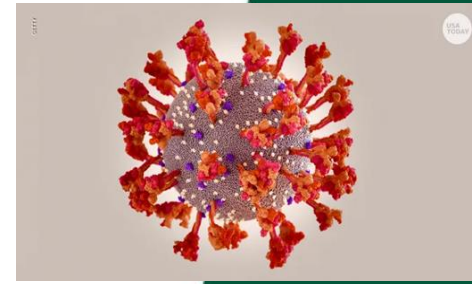




# FERPA Exception

- **Answer:** (D) Charlotte must comply with the subpoena and notify the students so they have the opportunity to take legal action to protect their information.
- Under 34 C.F.R. § 99.31(a)(9), an institution must comply with a lawfully issued judicial order or subpoena which requires the disclosure of information that would otherwise be protected under FERPA.
- The school must also make a “reasonable effort to notify the . . . student of the order or subpoena in advance of compliance, so that the . . . student may seek protective action” (unless the subpoena prohibits notifying the student).
- Practically speaking, this means that:
  - Charlotte cannot fight a valid subpoena
  - Charlotte isn’t bound by a student’s wishes regarding whether to comply with a subpoena
  - You should notify someone from the Office of Legal Affairs if you receive notice of a subpoena for records.

# Scenario #2: Coping with COVID



The students have just returned to the University of North Carolina at Charlotte (“Charlotte”) from Christmas Break. Unfortunately, the Omicron variant has been rapidly spreading in recent weeks. Several local counties have imposed mandatory lockdowns because hospitals are becoming overwhelmed with the influx of new cases. You receive an email confirming that John Doe, a student who lives on campus at Charlotte, has tested positive for COVID after going on a school sponsored retreat with other students. Can you share this information with anyone?

- A. No, because FERPA prohibits the disclosure of this information.
- B. No, because John has not consented in writing to the disclosure of the information.
- C. Yes, you can notify John’s Residential Advisor.
- D. Yes, you can notify Emergency Management.

# FERPA Exception

- **Answer:** (D) You can notify Emergency Management.
  - FERPA allows the disclosure of otherwise protected information to school officials who have a legitimate educational interest in the information.
  - The Department of Labor has affirmed that, “FERPA is not intended to be an obstacle in addressing emergencies and protecting the safety of students.”
- Practically speaking, you should contact Emergency Management or the Office of Legal Affairs when you receive information relating to a health/safety emergency.
  - Under 34 CFR § 99.31(a)(10) and 34 CFR § 99.31 99.36, an institution can disclose information when there is an “articulable and significant threat to the health or safety of a student or other individuals.”
  - This permits the disclosure of “information [that] is necessary to protect the health or safety of the student or other individuals.”
  - However, disclosure may only be made to “appropriate parties.”
- The decision of whether to disclose, how much to disclose, and to whom must be made on a “case by case basis” – this is why it is important to only reach out to Emergency Services or the Office of Legal Affairs!!!

# Scenario # 3: A Media Inquiry (Crimes of Violence)

Jane, a 21-year-old living in Charlotte, NC, received a friend request from a stranger. She did a quick online search of the person's name, and discovered he was a reporter from the Charlotte Observer. Curious, she messaged him and asked how they were acquainted. The reporter told Jane that he had received her name from a public records request made to UNC-Charlotte and wanted to talk to her about her expulsion from the University after being found to have violated Chapter 5, paragraph (p)(1) – Sexual Act without Consent, of University Policy 406, the Code of Student Responsibility. The reporter then told Jane he had received the names of several student witnesses and planned to contact them, as well.



# Scenario # 3: A Media Inquiry (Crimes of Violence)

## **Did UNC-Charlotte violate FERPA and the N.C. Public Records Act when responding to the reporter's public records request?**

A. Yes, because FERPA and the N.C. Public Records Act prohibit the University from releasing a student's name, the violation committed, any sanction imposed against the student, and student-witness names.

B. No, because FERPA and the N.C. Public Records Act allow the University to release a student's name, the violation committed, any sanction imposed against the student, and student-witness names.

C. Maybe. FERPA and N.C. Public Records Act permit the University to release a student's name, the violation committed, and any sanction imposed. Additionally, the University may release a student-witness's name with the written consent of that other student.

D. Yes, because even though FERPA and N.C. Public Records Act permit the University to release a student's name, the violation committed, and any sanction imposed, the laws do not permit the University to release student-witness names in response to a public records request.

# FERPA Exception

- **Answer: C.** Maybe. FERPA and N.C. Public Records Act permit the University to release a student's name, the violation committed, and any sanction imposed. Additionally, the University may release a student-witness's name with the written consent of that other student.
- The N.C. Supreme Court concluded that a University “must comply with the North Carolina Public Records Act and allow plaintiffs to have access to the name of the student, the violation committed, and any sanction imposed by the University on that student in response to plaintiffs’ records request.” *DTH Media Corp. v. Folt*, 841 S.E.2d 251, 263 (N.C. 2020).
- Additionally, FERPA authorizes the release of a student-witness's name “only with the written consent of that other student.” 20 U.S.C. § 1232g(b)(6)(C). In this instance, we do not know if the University obtained written consent from the student-witnesses before providing their names to the reporter. If it did receive signed, written consent, then it did not violate FERPA or the N.C. Public Records Act.



For additional information relating to Public Records, check out the Office of Legal Affairs' online resources:

Remember – When in doubt, contact the Office of Legal Affairs

