PRIVACY AND CONFIDENTIALITY IN HIGHER EDUCATION

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INTRODUCTION

The concepts of privacy and confidentiality take on different meanings in business, academic and clinical research, counseling, psychotherapy, and within higher education. While both concepts, would seem to apply only to student privacy rights regarding educational records, employees, Faculty, and staff should understand their important roles in maintaining the privacy of student and employee information and the confidentiality of university communications and business operations.

From human subject protections in research to email communications between internal university departments, maintaining privacy and confidentiality are among the key elements and tools of mitigating enterprise risk and promoting a culture of corporate ethics and responsibility.

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I. PRIVACY VS. CONFIDENTIALITY: WHAT'S THE DIFFERENCE?

Privacy and Confidentiality are often thought to have the same meanings. There are, however, distinct differences between the terms. The following describes the differences.

Privacy	Confidentiality
1. Provides a reasonable expectation against invasion or disclosure of private facts into the public sphere.	1. Exists with the expectation that information is shared only with authorized individuals or entities, or only shared after prior authorization has been provided.
2. Is a Constitutional protection (Fourth Amendment).	2. Usually remains in effect indefinitely.
3. Has a legal effect and consequence for invasion, improper disclosure, or the dissemination of a falsehood.	3. Has a legal effect and consequence for infraction or violation (e.g. doctor-patient privilege; attorney-client privilege).
4. Can be preempted by a government right to protect the public health or the country from acts of military aggression, terrorism, or bioterrorism.	4. Can involve an ethical duty (such as in the case of a doctor-patient relationship).

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II. PRIVACY AND CONFIDENTIALITY GENERALLY

Universities and colleges, like other businesses, carry responsibilities related to privacy and confidentiality. In the academic and university setting, the following are the areas for which privacy and confidentiality arise:

Privacy

- Student educational records.
- Employee personal identifiable information (e.g. social security number or birthdate).
- Internal, department meetings.
- Meetings between managers and employees.
- Phone conversations (not an absolute privacy right in the context of employment).
- Faculty, Staff, or employee individually, identifiable health information and medical examinations or patient records if the employee is a member of an employer's health plan.

Confidentiality

- Email communications between a university or college legal department and other internal departments.
- Academic, scientific, or clinical research involving human subjects for which there is identifiable data regarding the research subject.
- Discussions regarding student information in private areas (i.e. non-open and non-common areas of the college or university).
- Counseling and psychotherapy records.
- University or college business operations, strategies, and inventions.
- Employment records.
- Management information regarding discussions about employee relations, reductions-in-force, or workplace investigations.

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III. COUNSELING AND PSYCHOTHERAPY

Among the student and employee resources provided by universities and colleges are counseling and psychotherapy services. Both confidentiality and privacy arise in the context of counseling and psychotherapy sessions.

As with most medical and health care treatment professions, confidentiality is a necessary and required part of the psychology industry's code of ethics. Since mental health records are covered under the rules of the Health Insurance Portability and Accountability Act (HIPAA) (Pub. L. No. 104-191), patient privacy rights apply to these medical records.

Confidentiality, however, applies to the content of the counseling and psychotherapy sessions. Such sessions also include counseling provided by an employer through their employee assistance program (EAP).

In some situations, however, confidential information can be disclosed and reported if a licensed mental health counselor or psychotherapist:

1. Believes the patient may cause serious harm to themselves or another person (suicide is an example).
2. Believes ongoing abuse is occurring that is domestic, elderly, disability, or child related,
3. Receives a valid court order.
4. Needs to provide treatment information to a health plan or health insurance company (including government health programs) for coverage and payment purposes, or to another medical provider for additional treatment services.

Beyond the above situations, counselors and psychotherapists cannot disclose information without the patient's or client's prior written consent.

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IV. BUSINESS OPERATIONS AND WORK EMAIL

University human resources, legal, and technology departments have an added challenge of securing and protecting confidential business information from misuse and disclosure. Similar to the HIPAA privacy rules and those of the American with Disabilities Act of 1990 (ADA, 42 U.S.C. § 12101), universities and colleges should adopt a "need-to-know" philosophy that limits access of certain business information to executive officers, managers, department chairs or others who require such information for decision making purposes.

Generally, business, management, and employee information, as well as contractual, legal, and certain financial information, should be maintained confidentially. Business information or operations can include: (1) strategy; (2) contracts or contracts for bid; (3) proprietary information; (4) trade secrets (i.e. processes, methods, business plans, and financial data and forecasts); or (5) any other information that can be attributed to a company's regular course of business that would not otherwise be for public knowledge or regulatory reporting purposes.

Similarly, work email communications between departments and/or between management members and the legal department, or between the legal department and other divisions should be handled with the same degree of discretion as business operations information.

Maintaining the confidentiality of business information and work-related email promotes a culture of ethics, accountability, and responsibility within the university setting. Confidentiality of business operations also helps to galvanize the university or college community around institutional policy- and mission-driven norms.

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V. HUMAN SUBJECT RESEARCH

The confidentiality and privacy protections regarding human subject research are among the National Institutes of Health's (NIH) key regulatory provisions and requirements. Specifically, both NIH and the United States Department of Health and Human Services (HHS) Office for Human Research Protections requires institutional review boards (IRBs) to ensure there are adequate protections regarding the privacy of human subjects and that the confidentiality of research data is maintained (45 CFR § 46.111(a)(7). NIH also requires researchers to provide a Certificate of Confidentiality (CoC) to help the researcher protect the privacy of human participants enrolled in clinical, behavioral, or other health-science related research. The CoC provides the human research subject with permanent, confidentiality protection during the time the CoC is in effect and must be signed by both an authorized institutional official and the principal investigator.

Additional considerations of IRBs to ensure the confidentiality and privacy of research involving human subjects include:

- Provisions and processes to protect research data and samples during use and storage.
- Processes to protect human subject data during recruitment and subsequent follow-up.
- De-identification and destruction processes of subject data and/or specimens

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VI. PRIVACY IN THE SOCIAL MEDIAL AGE

Typically, the only information universities and colleges can release about students without the students' prior, written consent is Directory Information under the Family Education Rights and Privacy Act (FERPA) (34 CFR Part 99; 20 U.S.C. § 1232g). Directory Information includes students' names, addresses, phone numbers, awards, dates of attendance, place of birth, and participation in officially recognized activities and sports. The Directory Information can be disclosed to external entities or listed on the university's directory without consent. Students, however, do have the option of opting out of Directory Information for their own privacy.

In an age of instant information and social media, maintaining the privacy and confidentiality of student information and that of university and college employees and staff can be a complicated, tight-rope walk. Students and employees often post their images and pictures to social media sites; take pictures of their personal injuries or hospitalization and post them to similar social media outlets; or post pictures of significant milestones, family events, and other personal information. Live streaming of personal events, additionally, has made information sharing more immediate.

Instant, social media information, however, can create risks to individual privacy and confidentiality and, on occasion, to the privacy and confidentiality of other individuals who may be in close proximity of any live streaming or photographs.

To provide greater protections to both university employees and students, remember to:

- Obtain prior, signed consent from a student, Faculty, employee, or staff member whenever photos or video are being taken at a private event.
- Obtain prior consent or permission whenever a clear, identifiable photo or video will be used publicly unless the event is a public event for which large crowd shots are taken.
- Obtain prior, signed consent for photographs taken in a university housing or classroom setting.

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REVIEW NOTES AND QUESTIONS

Review Notes

Some review notes and best practices to consider regarding the maintenance of confidential and private information within higher education are as follows:

- Avoid leaving confidential information open on work monitors whenever you are away from your office or work station.
- Refrain from discussing confidential information in public or common areas of the university.
- Ensure proper technology firewalls and encryption of university or college email, programs, student services information, financial information, employee passwords, and other protected and/or proprietary information on work stations and portable devices.
- Avoid transmitting confidential emails to external sources, such as contractors, third-party vendors, contractors for bid, or other parties who are outside of the immediate university or college setting unless otherwise authorized to do so by university counsel, an executive officer, or manager.
- Secure any confidential information on a work station desk or office before leaving the office or work station for the day.
- Electronically "clean" all prior data from old computers before disposing of such systems or technology, and ensure the hard drive is destroyed.
- Limit access to certain data to a "need-to-know" basis, including: (1) employee records; (2) employee personal identifiable information; (3) financial data; (4) bank account and routing numbers of the university; and (5) other business or financial transaction documents.

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REVIEW NOTES AND QUESTIONS CONTINUED

Review Questions

The following are questions to review your knowledge of confidentiality and privacy:

1. Susie received an email opinion from the college's legal counsel about a potential vendor contract. Susie should:

    a. Disclose the information to the potential vendor.
    b. Disclose the information to her coworker across the hall, who also happens to be her best friend.
    c. Maintain the confidentiality of the email and neither transmit nor disclose the information until otherwise authorized to do so.

2. Bob is a university mental health counselor who regularly provides therapy and counseling services to students. During one of Bob's sessions, a student informs him that she hates all bullies and plans to kill several students who have been taunting her. The student goes on to provide Bob with graphic descriptions of how she plans to kill the other students.

Given the above information, Bob should:

    a. Report the information to authorities because he has a duty to report information that may cause harm to the public or to the counseling patient.
    b. Do nothing and say nothing.
    c. Post the information on Facebook, Twitter, Instagram-live, YouTube, Periscope, and Snapchat to warn both the university and the public.

3. Alanna is a financial officer for the university. Alanna has a friend who wants to provide custodial services to the university. During a casual lunch with her friend, Alanna informs the friend about the university's budget for custodial services, as well as the bid amounts of other, competitor custodial services to help the friend submit a lower bid. Alanna also provides the university's bank account information to show the friend how much the university pays each month for their current custodial services.

Are Alanna's actions proper?

    a. Yes
    b. No

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QUESTIONS?

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