



February 18, 2021

Office of General Counsel

---

# Data Sharing Issues for College & University Foundations

Sarah McGee & Dan McCabe

MINNESOTA STATE

# Today's Webinar: Based on Lessons Learned

- In July 2020, Blackbaud, used by more than a dozen Minnesota State colleges and universities, had a data breach.
- In investigating that data breach, we learned that colleges and universities were providing their foundations with not public data.
- Had to notify thousands of alumni that their data had been shared improperly and that after it was shared, it was breached.
- Providing this refresher today to ensure that our colleges & universities are in compliance with laws and regulations.

# Today's Outline

- Explanation of why we can't use data sharing agreements or different contracts between campuses and the foundations to address this issue
  - Be cautious of sharing between the foundation and campus, too.
- How to properly share data between campuses and foundations
  - SPOILER: Change the “directory information” and “limited directory information” part of a campus's FERPA policy to allow sharing of data with foundations.

# Foundation Employees Wear Two Hats

- Many foundation staff members are also college or university employees.
- You can't wear two hats at the same time. Must be clear which "function" you are supporting when accessing data.
- If you are working toward the foundation's mission, that is foundation work. If you are working toward the college or university's mission, then it is college or university work.
  - The foundation contract lists examples of what is foundation work (foundation governance, investment policies, authorizing expenditures, determining scope of fundraising campaigns, etc.)
- Must not access college or university data for a foundation purpose and vice versa.

# Data privacy laws apply to government entities

## Minnesota State Colleges and Universities are state entities that are subject to:

- the Minnesota Government Data Practices Act (MGDPA) governs all *government data*, and
- the Family Educational Rights and Privacy Act (FERPA), as modified by the MGDPA, governs education records (records about individual students).

# Data privacy laws (generally) don't apply to foundations

Foundations private entities that are legally separate from their associated colleges & universities.

- Foundations must remain separate from their college or university in order to preserve their charitable status under the tax code.
- Private entities are **not directly subject** to government data privacy laws unless they are *performing the functions* of a public entity.
- Foundation operations described in the standard campus contracts are not performing government functions.

# What is a “government function?”

- “Government Function” is not defined in the MGDPA
  - If a government entity enters into a contract with a private [entity] to perform any of its functions, all of the data created, collected, received, stored, used, maintained, or disseminated by the private [entity] in performing those functions is subject to the requirements of the [MGDPA] as if it were a government entity. Minn. Stat. §13.05 subd. 11
- The Minnesota Supreme Court has said a government function “involves the exercise of power conferred by statute upon local agencies in administering the affairs of the state and the promotion of the general public welfare.”



# What happens if a foundation performs a “government function”?

- A foundation would become subject to the Data Practices Act for the handling of data for those functions.
- The standard contracts between foundations and campuses are drafted to avoid performing such government functions.



# You've Got *Government Data!*

## Creates additional obligations on the foundations:

- Means the Foundation must protect private/not public data so it is not accessible to unauthorized persons or subject to improper alterations.
- The Foundation must respond appropriately to data requests.
- The Foundation, as a contractor with the campus, may only use the data for authorized purposes – not its own purposes.
- The Foundation must comply with all other MGDPA requirements in handling.

# And ...

## Creates additional consequences for the campus

- College or University Data in the Foundation's possession remains College or University data
  - “data maintained by a government entity includes data maintained by a [an entity] under contract with that government entity that provides for the acquisition or access to the data...” Minn. Stat. § 13.055
  - If the Foundation is subject to a data breach, the College/University may be responsible for notifying affected persons.

# Information held by foundations that is **NOT *government data*** . . .

- Is not subject to the MGDPA or FERPA
- Only governed by applicable business or professional data management standards, being mindful of sensitive personal information
- Consider shared reputational risk with campus
- BUT, if foundation data is accessible by campus employees for College/University functions ... then it becomes government data.

# Say what?

## If Campus Employees Can Access Foundation Data, then the Data is Also Government data.

- Foundation data needs to be accessible only to foundation employees (wearing their “foundation hat”)
  - Important to rights-manage databases to limit access
  - College or University employees should not view foundation data (wearing their “system hat”)
  - Otherwise, foundation data becomes system data
- Systems (ISRS, Blackbaud, any CRM, etc.) need to remain separate, even if individual employees have access to both for different purposes.

# In conclusion: Two ways data can become government data

- A college or university can contract with a foundation to do something for it that it would normally do itself ('government function'). The data generated out of that contract is government data.
- A college or university gets access to data maintained by the foundation. If data is collected, created, received, maintained, or disseminated by college or university employees, then it will be government data.
- Avoid both of these wherever possible.

# The BIG Question

What data may the college/university share with its foundation?



# Privacy Classifications

- Under the MGDPA, the default rule for all government data is that it is *public* (generally available to anyone upon request)
- But the default rule for data about individual students or employees is that the data is *private* unless a specific provision in the law says it is public.
- Under FERPA, the default rule is that all education records are *private*, unless it is 'directory information' or subject to a specific exception in the law.

# Sharing Under Data Privacy Laws

**A government entity, such as a college, may only share its data with a third party, such as its foundation, when:**

1. The data is public;
2. The subject consents; or
3. The law authorizes an exception

Sharing private data that a government entity has collected from the individual must also be consistent with the “data privacy notice” provided at the time of the collection.





# What student data is public data?

## Education Records are not public data

- Education Records are all records maintained by a college/university on applicants and enrolled students that is personally identifiable to them
  - Including parent names, addresses
  - Not just academic records
  - Includes metadata
- ALL *private* unless designated as *directory information* or *limited directory information* under a college's FERPA Policy
- All college/university students have the same rights to legally control their data regardless of age.

# What student data is public data?

## Records designated “Directory” or “Limited Directory” Information are Public Data

- School policy determines what is public “directory data” or “limited directory data”
  - Students have the right to opt out or suppress their data and if so, their directory data remains private.
  - Some campuses have a long list of directory data that includes e-mail addresses, mailing addresses and more, but others are quite restricted to information such as name and dates of attendance.
- Directory data is available to anyone upon request (except undergraduate name and contact information **may not be provided to credit card marketers – including by foundations**)
- FERPA is permissive disclosure of directory data, but the MGDPA is required disclosure of directory data (but not limited directory data)

# Limited Directory Information

- Campuses can define a subset of student data as “limited directory data.”
- This means the campus only has to disclose this data to defined persons or for defined purposes or both.
  - Limited directory information is not available to a requestor under the MGDPA.
- A campus’s FERPA policy must define the data and specify to whom the data will be disclosed.
  - Many campus policies need improvement in this area in order to share with foundations.
  - Should say “X, y, z may be shared with the campus foundation for events, fundraising, and membership opportunities.”

# Limited Directory Data and Foundations

- A college or university can define certain student data as “limited directory data” for sharing with the foundations.
  - But it must specifically name the foundation in the annual FERPA notice.
- Once the foundations have this data, the foundation becomes responsible for it.
  - Because limited directory data is technically public, no further agreements are necessary
  - If the data is entered into the foundation’s database, college/university employees should not have on-going access to do the data.
- Must honor student’s opt out requests. Do not share directory or limited directory data if students request suppression.

# With Consent

- Consent must be freely given; cannot require students to consent to data sharing with the foundations



# Data Sharing Authorized By Law

- Lawful Subpoenas
- FERPA's Financial Aid Exception
  - But if the data shared comes from the FAFSA form, consent is required under the HEA.
  - May be subject to change with new administration
- With "School Officials" (explained below)
- Other Exceptions Outlined in FERPA
  - Health/Safety Emergencies
  - Studies exception
  - Crime victims
  - Audits

# Sharing Private Data with School Officials Is Authorized by Law

May be used by employees, agents, or contractors for a college or university to the extent they have a “need-to-know” and are under the campus’s direct control

- FERPA uses the terms “school officials” and “legitimate educational interest” for these concepts relating to education records
  - “school officials” should be defined in each college/university’s FERPA policy
  - Employees in alumni offices that are a part of the college/university are “school officials”

# Foundations Are Not School Officials

- Foundation employees doing foundation work are generally not school officials.
- Foundations' use of the data isn't furthering the college or university's mission, so it cannot be a legitimate educational interest.
  - It is a sound practice to keep Foundation business separate from campus business.
- Furthermore, Foundations aren't under "direct control" of the college or university
  - If they were, their non-profit tax status could be jeopardized.



# In Conclusion

## Student data should NOT be shared with foundations unless it is:

- Defined by the campus as directory information;
- Defined by the campus as limited directory data and the foundation is a listed purpose/recipient;
- The FERPA “financial aid” exception applies and that data was not from a FAFSA form; or
- The subject student has given consent to share the data.

# Other Considerations



# Data Privacy (Tennessee) Notice

**Colleges and Universities must provide notice when collecting private data that states:**

- Who will have access;
- How the information will be used;
- Whether the individual is legally required to provide the information;
- The consequences of providing or not providing the data.
- Sharing of private data that has been collected from the subject individual must be consistent with the notice.

# Of Special Interest: Social Security Numbers

- SSNs (including partial numbers) are *ALWAYS* private data in the hands of the college/university
  - Subject to special notice to the subject when collected about whether they are legally required
  - This is an additional provision in the data privacy notice, described previously.
- SSNs maintained by the campus may be used for alumni purposes only if subject informed at the time collected.

# Of Special Interest: Alumni Data

- Information obtained by the college or university about individuals after they are no longer in attendance at a college/university (“alumni data”) is not an education record
  - And is, therefore, public unless some other classification applies
- Example: e-mail addresses of former students that have been collected by the alumni office after graduation.

# Of Special Interest: Gift Data Minn. Stat. § 13.792

The MGDPA includes a special provision that classifies as private or nonpublic certain donor gift data held by Minnesota State “and any related entity” subject to chapter 13 (the MGDPA)

- This would include the described data held by an Alumni Office, or
- **A related foundation if it is engaged in an activity that makes it subject to the MGDPA (consultation with OGC or AGO recommended).**
- If applicable, donation amounts, estate planning, financial capacity, prospect lists, etc., would all become government data.

# So a Foundation Walks Up to a Registrar . . .

What kind of student data could it have?

- Data for which it has a student's written consent;
- Public data, such as:
  - Directory data or limited directory data (per school's FERPA policy);
  - Statistical information;
  - Alumni data;
- Data needed in connection with an application for or continuing eligibility for financial aid so long as the data was not from the FAFSA form;

# Alternatives to Data Sharing

- If obtaining the data you want is not legally feasible, may consider asking the college/university to make contacts on foundation's behalf (e.g., send out fundraising letters to students where mailing addresses are private).
- Gain direct access for promotional purposes as a presence at campus events.





# MINNESOTA STATE

30 East 7th Street, Suite 350  
St. Paul, MN 55101-7804

651-201-1800  
888-667-2848

[www.MinnState.edu](http://www.MinnState.edu)

This document is available in alternative formats to individuals with disabilities.  
To request an alternate format, contact Human Resources at 651-201-1664.  
Individuals with hearing or speech disabilities may contact us via their preferred Telecommunications Relay Service.  
Minnesota State is an affirmative action, equal opportunity employer and educator.