

The Salt Lake Tribune

Utah's Independent Voice Since 1871

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State Records Committee
c/o Nova Dubovik
Utah State Archives and Records Service
346 S. Rio Grande
Salt Lake City, UT 84101-1106

Dear Ms. Dubovik,

The Salt Lake Tribune is appealing a denial from Utah State University (USU) for communication regarding a former student accused of sexually assaulting four women in 2015.

On May 31, 2016, we requested that USU "provide any and all correspondence mentioning from 2009 to present between one or more of the following: John Hartwell and/or anyone in the athletic director's office, David Kotulski, Matt Ah You, Manoa Latu, Brad Vonnahme, David Kragthorpe, Matt Wells, Mike Canales, Frank Maile, Wawa Damuni, Kendrick Shaver, Stacy Sturgeon and/or anyone in the Affirmative Action/Equal Opportunity Office of Title IX Office, Utah State University Police Department, and the Logan Police Department."

USU denied the request on June 7, 2016, saying that the requested records were not public under state and federal code. The school did not acknowledge whether there are responsive records.

The Salt Lake Tribune appealed July 1. USU did not respond, which is considered "the equivalent of a determination denying access to a record" under Utah Code 63G-2-204.

We challenge USU's initial argument that this information is protected, and we assert that the public's interest far outweighs any privacy concerns.

Argument: The requested records are not protected under the Family Educational Rights and Privacy Act (FERPA)

USU has failed to meet the standards of the Government Records Access and Management Act outlined in 63G-2-201(2): "A record is public unless otherwise expressly provided by statute." Instead, USU has incorrectly applied a federal statute to a crop of records that courts have already ruled do not apply to FERPA.

USU cited FERPA in denying this request, stating that access is restricted under federal law because "the requested records directly relate to a student." That, however, is only half of FERPA's definition of a student record. As defined in 20 U.S. Code § 1232g, education records are

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.

(emphasis added).

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The statute thus requires that correspondence satisfies both prongs of that definition to qualify as an education record.

We argue that emails or other communication not maintained by the university in the student's official record do not satisfy the definition of an education record, and that there is precedence of this in the courts.

In *Owasso Indep. Sch. Dist. No 1-011 v. Falvo*, the U.S. Supreme Court discussed the definition of the word "maintained" as it relates to FERPA:

The word "maintain" suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database ... Also FERPA requires "a record" of access for each pupil. This single record must be kept "with the education records." This suggests Congress contemplated that education records would be kept in one place with a single record of access. ... FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar ...

Using that logic, the U.S. District Court for the Eastern District of California found in *S.A. v. Tulare County Office of Education et al* that the state board of education correctly determined that emails not in a student's permanent file are not "maintained" by the school:

Emails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read, and deleted within moments. ... emails may appear in the inboxes of many individuals at the educational institution. FERPA does not contemplate that education records are maintained in numerous places.

We argue that access to the communication we have requested is not restricted under FERPA, and as such, nothing in Utah Code 63G-2-201 prevents USU from releasing this communication. The information we seek is not the student's transcripts or grades, but rather the university's response to serious allegations that could threaten the safety of other students on its publicly funded campus. FERPA was not intended to be used as a shield by schools that do not want to disclose information about their actions.

We hope that even if the Committee rules that the records are private, its members use their discretion to determine that the public access outweighs that privacy interest.

Argument: The interests favoring the release of these records outweigh privacy interests

It is the public's right to know how this taxpayer-funded institution is handling student safety. Federal law requires that all colleges respond to complaints of sexual violence:

When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. ... If an investigation reveals that sexual violence created a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects. (Questions and Answers on Title IX and Sexual Violence, U.S. Department of Education, Office for Civil Rights.)

An investigation by The Salt Lake Tribune found that in 2015, four women separately reported to Logan City Police that they had been sexually assaulted by _____ at the time a USU football player. Three of the women were students at USU and also reported to school officials.

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Two of those students left school, arguably because of the hostile environment created by the attack and the school's apparent lack of response.

told The Salt Lake Tribune that the school talked to him about just one accusation. He played in every football game in 2015 and has since graduated.

The school has declined to discuss its response to the women's allegations, also citing FERPA. In a July 28 news release, the university said its goal is not to protect the privacy of anyone accused of a sexual assault, but to protect the privacy of students who report sexual assaults.

One of the women who reported to the school has written her support for the release of these records. It is her view, and ours, that students who report being sexually assaulted should be assured of more than privacy. It is the safety of these students — and their federally guaranteed right to a discrimination-free education — that USU should have protected.

The correspondence requested by The Salt Lake Tribune is likely the only way to know whether school officials — including but not limited to administrators, coaches and Title IX officials — acted responsibly, in the interest of its students and the public, in responding to and investigating these allegations.

The federal government does investigate schools for potential violations of Title IX. But these investigations are triggered only when a student files a formal request with the Office for Civil Rights. And that office, as of July 26, is investigating 200 schools for 257 complaints. More colleges are added to the list every week and only a few investigations are resolved each year. It is not in the interest of the citizens of Utah to wait — likely for years — until such a federal investigation is initiated or completed.

Sincerely,
Alex Stuckey