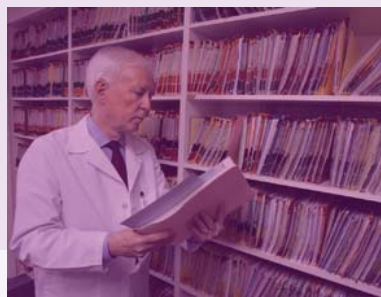
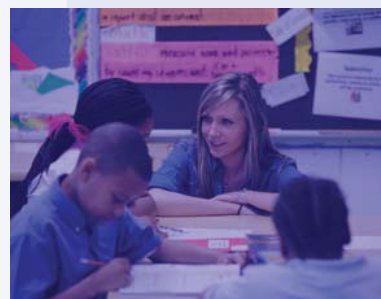


FERPA, HIPAA & DPPA

How federal privacy laws affect newsgathering



The federal laws that control the information a state can disclose about its citizens are usually meant to protect individual privacy rights, but many open government experts say states are interpreting the laws too broadly and it is interfering with journalists' newsgathering ability.



The federal privacy protection laws — including the Family Educational Rights and Privacy Act (FERPA), which applies to student records; the Health Insurance Portability and Accountability Act (HIPAA), which deals with health information and medical records; and the Driver's Privacy Protection Act (DPPA), which deals with records kept by state departments of motor vehicles — can hinder reporters' ability to obtain records under state freedom-of-information laws.



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The Family Educational Rights and Privacy Act (FERPA)

The Family Educational Rights and Privacy Act of 1974 is the federal law that protects the privacy of student education records and requires schools to obtain a student's consent, or, for minor students, the consent of their guardian, prior to disclosing academic records.

The law was aimed at protecting students' grades and disciplinary records from public release, but according to the Society of Professional Journalists, it "has been twisted beyond recognition, keeping school lunch menus, graduation honors and athletic travel records secret."

In practice, the act is frequently abused to deny newsworthy open-records requests for information in which there is no legitimate privacy interest, said Frank LoMonte, executive director of the Student Press Law Center. "Because of the over-the-top way that schools and colleges interpret FERPA, journalists have been denied access even to anonymous statistical information that's necessary to perform their oversight function," he said.

LoMonte cites other extreme examples, including practices at the University of Wisconsin-Milwaukee and Emporia State University in Kansas. Wisconsin "took FERPA literalism to new heights" when it withheld audiotapes and minutes of open, public committee meetings during which students spoke and voted, saying that the students' voices were private information and Emporia claimed that campus parking tickets are private under the act, LoMonte said.

When Congress enacted FERPA during the 1970s, it was designed to protect student records from being released during a time when a substantial amount of social-science research was taking place in elementary and high schools. "The addition of colleges to FERPA was very much an afterthought and some people in fact think it was a mistake," LoMonte said.

Still, at the time, the act was understood to apply only to educational records and not to every document that refers to a student. When courts have interpreted the law they have used this common-sense approach, but the Department of Education has been "openly defiant," even enacting a rule effective in January 2009 that appears to directly contradict the courts' interpretation that documents are no longer FERPA documents once student identities are removed, LoMonte said.

The new Department of Education regulations prevent the release of even anonymous information when those records are requested by someone the institution "reasonably believes" knows the identity of a student involved in the record. This new rule proves especially problematic for journalists because it hinders their ability to make a generalized records request about a widely publicized campus incident when the names of involved students have already been made public.

Because the law is vague and unclear, reporters say, even simple open-records requests are handled differently at different schools. A six-month investigation by the *Columbus Dispatch* in 2009 into how college athletic departments respond to public records requests found that branches of the same state college system had conflicting approaches to dealing with records requests.

The results of the *Columbus Dispatch* investigation "stunned" former U.S. Senator James Buckley, who crafted the legislation in the 1970s to keep report cards and transcripts private. Buckley told the newspaper he never intended for the law to apply to athletic records. "The law needs to be revamped. Institutions are putting their own meaning into the law," Buckley said.

Meaningful reform would hinge on getting rid of the "perception, fueled by a poorly drafted statute, that a school that slips up and mistakenly honors an open-records request will lose all of its federal money and be shut down," LoMonte said. "In the 36-year history of the statute, not one institution has ever been penalized one dime, and yet that perception persists."

LoMonte said the statutory definition of what is an "education record" could also be tightened so that it is clear that a student's parking tickets, job application or any other document that is generated in a non-academic capacity is not a FERPA record. "If the student is just doing something that any member of the general public could do, like getting a traffic ticket, then they're not acting in their 'student' capacity and there shouldn't be two sets of disclosure rules just because one driver was lucky enough to register for a racquetball class," he said.



Health Insurance Portability and Accountability Act (HIPAA)

Congress passed the Health Insurance Portability and Accountability Act in 1996, which required the Department of Health and Human Services to enact federal health privacy regulations known as the Standards for Privacy of Individually Identifiable Health Information. Many media organizations, including The Reporters Committee for Freedom of the Press, the Newspaper Association of America, the National Newspaper Association and the American Society of Newspaper Editors, objected that the proposed rule overly restricted access to information. Still, the law went into effect in 2003. Under the privacy rule, those who violate the law unintentionally can incur civil penalties of \$100 per violation, up to a \$25,000 annual maximum fine. For intentional violations and misuse of individually identifiable health information, criminal penalties can lead to a fine of up to \$250,000 and imprisonment for up to 10 years. A safe harbor provision exists for inadvertent disclosures made by covered entities that exercise reasonable diligence in attempting to comply with the law.

Even with safeguards to protect institutions that make a good-faith disclosure decision, journalists say agencies withhold records that were never intended to be covered under HIPAA because they are unsure about the law — or use it as an excuse.

“Reporters understand the need not to have private health information released willy-nilly,” said Charles Ornstein, a Pulitzer Prize-winning reporter for ProPublica in New York and president of the Association of Health Care Journalists. “The biggest problem, from my estimation, is that HIPAA is misapplied by hospitals and healthcare institutions.”

Many hospitals, for example, refuse to release information even with the consent of the patient. When Ornstein was a reporter for the *Los Angeles Times*, he was assigned to cover the 2005 derailment of a train in Glendale, California, and wanted to talk with survivors in local hospitals. He found that the hospitals had a “radical difference” in willingness to help journalists. Some hospitals relied on HIPAA automatically, refusing even to let survivors know a reporter wanted to speak with them, while others arranged interviews and invited Ornstein and his photographer to approach the patients.

“HIPAA doesn’t say you can’t ask the patient [for an interview], but a hospital that doesn’t want to cooperate just uses HIPAA as a shield,” Ornstein said. “It goes beyond issues of patient privacy. Some hospitals just don’t want to be in the media and will go to unbelievable lengths to say we’re not allowed in, when in fact it’s not that easy.”

Exacerbating the problem are privacy breaches, including reports of nurses and doctors hacking into hospitals’ computers, illegally accessing their friends and family members’ records,

and leaking celebrity patient medical records or financial information to tabloids. Farrah Fawcett’s medical records, for instance, were leaked to the *National Enquirer* in 2007 when she received her cancer diagnosis.

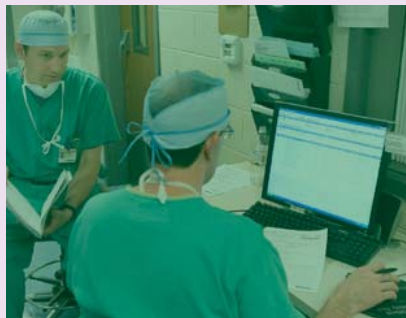
For that reason, hospitals are cracking down on both unintentional and intentional breaches, which makes sense to most journalists. “No reporter would argue with that,” Ornstein said. “It’s an issue of misusing HIPAA where no patient privacy applies.”

According to the Department of Health and Human Services, HIPAA allows the release of hospital directory information containing basic facts about current or recent patients treated by a hospital, unless the patient objects. This includes patients’ names, locations within the hospital, general conditions, including whether a patient has been treated and released or has died, religious affiliations and room telephone numbers. However, despite these guidelines, many hospitals claim information is protected by HIPAA when it is not.

One recent example of widespread HIPAA misapplication is the vast variation in how state and county health departments and government agencies provided information on the H1N1 flu and its related deaths. The Association of Health Care Journalists found that while HIPAA prevents the release of names of patients, when an H1N1-related death occurred, some hospitals were more forthcoming and released the age of the person who died and some underlying medical conditions, while others would go no further than to state a death had occurred.

“Across the country, there can be an attitude of ‘big brother knows best,’ and ‘we know what information the public should know and we’ll tell you what you need to know,’” said Ornstein. “Unfortunately this attitude is not arming the public with the information to decide what the risk is and how to protect themselves.”

Still, health institutions typically release hospital inspection reports, Ornstein said, even when the reports include information relating to a specific patient that can be easily identified. For example, when Dennis Quaid’s newborn twins were among three children who received an overdose of the blood-thinner Heparin, an investigation took place and the inspection report was released, even though the public could surmise that “Patient A” and “Patient B” were Quaid’s children, Ornstein said.



The Driver's Privacy Protection Act (DPPA)

The Driver's Privacy Protection Act was passed in 1994 and amended in 1999 to require drivers' consent before states can release personal information contained in an individual's department of motor vehicles record, even when the information is requested en masse for a generalized marketing purpose.

The protected privacy information includes all of the information attached to a person's driver's license record and application, such as their name, address, telephone number, vehicle description, Social Security Number, driver identification number, photograph, height, weight, gender, age, driving-related medical conditions and fingerprints. The law does not, however, protect a driver's traffic violations, accidents or current license status from release. Whether that information is available upon request depends on each individual state law and many state rules are more restrictive than the federal guidelines.

Senator Barbara Boxer of California created DPPA in the wake of the murder of a famous actress whose stalker hired a private detective to find her address through state motor vehicle records. Ironically, the final version of the law carved out an exemption for licensed private investigators.

The law has other exceptions, which some open government advocates argue swallow the rule. The protected personal information can still be accessed by any federal, state or local agency in order to carry out its governmental function, such as for law enforcement purposes and for use in proceedings involving automobiles — for instance, a recall of motor vehicles or an insurance claim investigation. The personal data can also be released if a requester can show the information will be used for automobile and driver safety purposes, the prevention of auto theft, or for market research activities.

"The biggest irony of this bill is that it makes allowances for nearly every special interest group imaginable — from insurance companies to direct marketers — but it bars access to the public, which pays to collect and maintain the information and which is supposed to benefit from collecting this information," then Society of Professional Journalists Freedom of Information Committee Chairwoman Lucy Dalglish testified before the House Judiciary Committee when it was considering the legislation in 1994.

"The only protection the public has against government incompetence is the ability to scrutinize these records. In a democratic society, the price of government accountability can sometimes be the loss of a small measure of privacy," Dalglish testified on behalf of a coalition of journalism groups.

Despite all the exemptions to the law, there is no provision allowing journalists access to the data for newsgathering purposes and some lay the blame for the lack of a news-related exemption squarely on the shoulders of the news media industry, which fought the legislation but did not pursue a media

exemption. SPJ, for example, did not pursue the newsgathering exemption because "at the time, the leadership did not feel comfortable having rights above and beyond those of the general public," said SPJ Executive Director Joe Skeel.

"I thought it was a terrible idea at the time," said Diane Kennedy, president of the New York News Publishers Association. By turning down a newsgathering exemption, the media industry essentially gave up the public's only hope for accessing important motor vehicle records through news reporting.

The belief that journalists should always be treated the same as members of the public has evolved since 1994, said Skeel, who noted that SPJ recently pursued a federal shield law, which gives reporters more rights than ordinary citizens to resist subpoenas. "Now, if journalists don't have special rights, it's really going to hurt the public more in the long run," he said.

Though no newsgathering exemption exists within the DPPA, reporters in some states are able to rely on various narrow interpretations of the law in order to gain access to the records. In some states, journalists reporting on accident trends or similar issues can pursue disclosure under the driver safety exemption. New York, for example, maintains a database accessible to those who frequently need to gain access to driving records — such as towing operations, insurance companies, and credit bureaus — as well as anyone participating in market research activities.

Until recently, New York journalists who believed their reporting fell under the research function could gain access to the database after signing an agreement promising to use the online lookup system only for research purposes. Every record search cost \$7, with each newspaper running a few thousand searches per year. But in April, the state's motor vehicles department began contacting newspapers to revoke database privileges, saying it had conducted an audit and determined that newsgathering was not a research function, even when used for public safety purposes or to illustrate driving trends.

Kennedy said the Department of Motor Vehicles "has not been forthcoming with plausible reasons why" the audit was conducted in the first place and why its commissioner has refused to meet with news organizations to discuss the issue or clarify the problem.

New York media organizations plan to write a formal letter to the DMV requesting to have their database access reinstated. At the very least, the media industry hopes the database can be retooled so that reporters who already have personal information can use the lookup to verify that they are writing about the correct person.

"The public is deprived of knowing there are these dangerous drivers out there," Kennedy said. She illustrated the importance of motor records in reporting by citing a car accident in which a driver with a long history of reckless behavior hit a



mother and little girl. The police officer on the scene failed to run the driver's license or issue a citation, but a reporter used the database to look up the driver's information. As a result of the reporter's story, the driver's license was revoked.

"I believe the DPPA was passed as part of a knee jerk reaction to something that was not based in reality," said Robert J. Freeman, the executive director of the Committee on Open Government in New York. Part of the problem, Freeman said, is that there are too many privacy laws, and they are not consistent. Voting records, for example, are public and contain the same information expressly made private by the DPPA. Freeman called the law an "aberration" because there is a vast societal distinction between when it was enacted, and now, when people freely publish the very information protected by the act on Facebook, online phone books and other message boards.

"There are numerous sources of that information, but Congress, in its overreaction, decided to limit that information which historically has been open," Freeman said. "There are innumerable situations involving government officials in which it is in the public interest to have access to the kind of information shut off by the DPPA."

Unlike FERPA, however, there is no easy legislative fix for DPPA. Congress likely will not act to remove privacy protec-

tions already in place, since the media industry already gave up their opportunity for a newsgathering exemption. "I think we kind of missed the boat on that," said Kennedy.

At least one state, however, has succeeded in creating a legislative recognition of journalists' right to obtain records under the DPPA exemption for the promotion of highway and vehicle safety. In Minnesota, the head of the state Driver and Vehicle Services testified to her belief that the DPPA safety exemption clearly encompasses journalists.

"Since the inception of DPPA, we have had an agreement with the state Driver and Vehicle Services to get the data we used to get, but under a use agreement," said Minneapolis attorney Mark Anfinson, who represents the Minnesota Newspaper Association. "It's been consistently a good arrangement."

Still, Anfinson says just this past year, the department has been asking news organizations to provide more information on the intended use of drivers' records. Anfinson said that will not be a problem for reporters, since "it is so easy for any news organization to itemize the important public uses this data is put to."

He points to a recent example in which a local ABC affiliate used the data to document that a small community had 77 driver's licenses issued under the same name and birth date and, as a result, the state investigated the scam and revoked all the licenses.

Comparing the federal privacy laws

Unlike with FERPA, reporters aren't calling for a congressional "fix" of HIPAA. Since the real issue appears to be misinterpretation and misapplication of the law, Ornstein said health facilities need further education and retraining about what HIPAA does and does not do.

But LoMonte said FERPA and HIPAA have some troubling similarities. "In both cases there are widespread misperceptions about what is and isn't covered, and the cultural norm has become, when in doubt, to disclose nothing," LoMonte said.

Even though HIPAA only applies to disclosures by health care providers and health insurers, "the idea has become stuck in the general public's heads that anything referring to someone's health is confidential," said LoMonte, who has heard of photographers being banned from taking a picture of an athlete's leg being taped up in the locker room because the school thinks that violates HIPAA. Still, LoMonte said the frequency of those misinterpretations "really pales in comparison" to FERPA.

While both FERPA and HIPAA are frequently misapplied, the DPPA leaves less room for misinterpretation. "The DPPA is so laser-focused on driver license and registration records, there's less room for subjective judgment calls," LoMonte said. "We rarely hear of someone being falsely told that a record is

secret under DPPA. If DPPA was invoked, unlike FERPA, it's usually because DPPA actually does apply."

Both FERPA — with its roots in protecting schoolchildren from embarrassment based on 1970s social science research — and DPPA, which many argue is obsolete in the information-age of the Internet, protect against harms that some see as only a theoretical risk. HIPAA, on the other hand, stems from the widespread and current abuse of patient health information.

"The issue of hacking into financial, insurance and health information by doctors and nurses who should know better is very real and that shouldn't happen," Ornstein said. When institutions are faced with these legitimate concerns about privacy, they are often more likely to err on the side of nondisclosure, which makes journalists' newsgathering especially difficult.

"What all three statutes also have in common is that they have generated such a pervasive fear of the results of non-compliance that impacted institutions would much rather risk a suit under the relevant public records statute than to disclose information covered by either of the three statutes," Harry Hammitt, vice president of the Virginia Coalition for Open Government, wrote in a report on federal controls of information disclosure.

FERPA, HIPAA & DPPA: How federal privacy laws affect newsgathering

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- Secret Justice: Access to Terrorism Proceedings (published Winter 2002)
- Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public's Right to Know (Sixth Edition, September 2005)

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