

PIONEER QUESTIONS OPEN RECORDS ACT

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PIONEER: On a regular basis, Media Relations Coordinator Cordell Jordan denies police incident reports to Pioneer reporters. We believe these reports and their contents to be open records, available for public inspection, according to Title 51 of Oklahoma Statutes, Oklahoma Open Records Act, Section 24A.8. Jordan sometimes cites FERPA, HIPAA and ADA as his reason for doing so.

First, let me preface my answers to your questions by saying that my answers are general information for educational purposes only. It is not legal advice. How this general information may apply to any particular factual situation must be determined on a case-by-case basis. I am not making any such case by case analysis.

Second, the Open Records Act requires records of public bodies to be available for inspection and copying during regular business hours. 51 O.S. §24A.5. However, a public body may establish reasonable procedures which protect the integrity and organization of its records and to prevent excessive disruptions of its essential functions. 51 O.S. §24A.5 (5). Moreover, the Open Records Act explicitly does *not* apply to records required by law to be kept confidential. 51 O.S. §24A.5(1). Additionally, the Act explicitly provides for redaction of records to remove from otherwise public records material that is exempt from disclosure. 51 O.S. §24A.5(2). For example, the Open Records Act provides that employment applications of persons who become public officials must be made available. However, public entities are required by statute to keep the address, telephone number and social security numbers of current and former state employees confidential. 51 O.S. §24A.7(D). Thus, this information must be redacted from the employment application before it may be disclosed, even though the application itself is an open record under the Act. In other words, a record that is an open record under the act may still have material redacted if that material is exempt from disclosure.

Finally, you do not define what you mean by incident report and that term is not used in the Open Record Act. The Open Records Act lists eight records that law enforcement agencies must make available for public inspection, including arrest, warrant and conviction records, crime summaries and jail records. 51 O.S. §24A.8. This section also refers to "initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred." Except for the records listed in §24A.8, "law enforcement agencies may deny access to law enforcement records except where a court finds that the public interest or the interest of an individual outweighs the reason for denial." 51 O.S. §24A.8(B).

PIONEER: How does Family Educational Rights and Privacy Act relate to incident reports generated by campus law enforcement?

Section 24A.16 of the Open Records Act specifically provides that public educational institutions and their employees may keep confidential individual student records and communications regarding

individual students. Thus, records about individual students are not subject to mandatory disclosure under the Act. Additionally, the Open Records Act does not apply to records required by law to be kept confidential. 51 O.S. §24A.5(1). The Family Educational Rights and Privacy Act (FERPA), a federal law codified at 20 USC §1232g, protects the privacy of students. FERPA requires, with some exceptions, that in the absence of signed and dated written consent from a student, a college may not release "personally identifiable information" derived from education records. 34 C.F.R. §99.30. An "education record" under FERPA is *any* record maintained by the college that is directly related to a student. 34 C.F.R. §99.3. "Personally identifiable information" includes, not just names and social security numbers, but any other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates. 34 C.F.R. §99.3. Under FERPA, records and information created and maintained by a college law enforcement unit remain confidential if (1) they are created or maintained for a purpose other than enforcement of the law; or (2) the information in the record was derived from another record that is confidential under FERPA. 34 C.F.R. §99.8. Finally, except for the records listed in §24A.8, "law enforcement agencies may deny access to law enforcement records except where a court finds that the public interest or the interest of an individual outweighs the reason for denial." 51 O.S. §24A.8(B).

How does the *Americans with Disabilities Act* pertain to incident reports generated by campus law enforcement?

The Open Records Act does not apply to records required by law to be kept confidential. 51 O.S. 24A.5(1). The Americans with Disabilities Act is a federal law codified at 42 USC §12101 *et seq.*, which requires employers to treat any medical- or health-related information voluntarily provided by an employee or obtained from an employee as a result of an employer inquiry as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA. 42 U.S.C. §§12112(d)(3)(B), (4)(C)(1994); 29 C.F.R. §1630.14(b)(1)(1998). Therefore, information about an OCCC employee provided or shared with a campus police officer in connection with a first-aid or medical call remains confidential even if that information is included in an incident report or initial offense report. 51 OS 24A.5(1). Finally, except for the records listed in §24A.8, "law enforcement agencies may deny access to law enforcement records except where a court finds that the public interest or the interest of an individual outweighs the reason for denial." 51 O.S. §24A.8(B).

How does HIPAA pertain to incident reports generated by campus law enforcement?

The Open Records Act does not apply to records required by law to be kept confidential. 51 O.S. §24A.5(1). The Health Insurance Portability and Accountability Act, Pub. L. 104-191 (HIPAA) is another federal law that requires individually identifiable health information be kept confidential. The HIPAA Privacy Rule imposes confidentiality requirements on covered entities, and applies to all forms of an individual's health information, whether written, oral or electronic. Covered entities include health care providers, paraprofessionals such as EMTs and paramedics, and health care plans. Covered entities that share information with non-covered entities as business associates must enter into agreements that include certain protections for the information provided. To the extent information protected by HIPAA

or a business associate agreement were to appear in a law enforcement incident report or initial offense report, that information is exempt from disclosure under the Open Record Act. Finally, except for the records listed in §24A.8, "law enforcement agencies may deny access to law enforcement records except where a court finds that the public interest or the interest of an individual outweighs the reason for denial." 51 O.S. §24A.8(B).

Secondly, we believe we do not receive many OCCC police incident reports in a timely manner as required by the open Records Act. Attorney General Scott Pruett [sic] has determined one week to be the maximum amount of time it should take a law enforcement entity to provide a public record. Yet it is common for the Pioneer to receive incident reports that are two or three weeks old, sometimes older.

Neither the Open Records Act nor any Oklahoma court case or Attorney General Opinion provides a "maximum amount of time" by which a public body must respond to an Open Records Act request for a general class of records. Rather, the Act requires that a public body provide prompt and reasonable access. The determination of what constitutes prompt and reasonable access is made on a case-by-case basis. Factors to be considered include the nature of the request for public records, the number of records requested and the format sought, and the efforts necessary for the public body to compile those records. 1999 OK AG 58. For example, the Oklahoma Supreme Court has ruled that access provided in "several months" and 35 days was sufficiently prompt under the specific circumstances presented. Merrill v. Oklahoma Tax Com'n, 831 P.2d 634 (Okla. 1992).

You suggest that the age of the records indicates you are not being given prompt access. However, the age of the records received is not an indicator of whether access was provided promptly. Instead, you must look at the length of time between the date the record was requested and the date the record was made available, and then consider the factors discussed above. The age of the record is immaterial.

What does the college determine to be a reasonable timeline in which an incident report should be made available for public inspection?

The determination of what constitutes prompt and reasonable access is made on a case-by-case basis. Factors to be considered include the nature of the request for public records, the number of records requested and the format sought, and the efforts necessary for the public body to compile those records. Compiling the records includes the process of reviewing records to ensure the college does not disclose material made confidential by law and/or not covered by the Open Records Act.

Last, there have been instances when we believe the college failed to comply with Open Records statute Section 24A.5: "Inspection, copying and/or mechanical reproduction of records." It states: "All records of public bodies and public officials shall be open to any person for inspection, copying, and/or mechanical reproduction during regular business hours. . . ." When Jordan is not available to fill an Open Records Request, who is qualified to act in his place? On March 13, 2012, we were told Jordan was on vacation until March 26, and that the remainder of the Marketing and Public Relations staff would be out of the office starting Thursday, March 15. When we inquired as to who would be available to fill open records requests during that time, we were told no one would. That appears to

be a violation of the statute. This is not an isolated incident but one that has happened many times in the past.

I am not aware of any instance in which the college has failed to accept a request for records during regular business hours. I note that the period you reference above was mostly Spring Break, when College offices were closed. The Act requires that a public body have at least one person available to release records during regular business hours. 51 O.S. §24A.5(6). However, the Act also provides that a public body may establish reasonable procedures which protect the integrity and organization of its records and to prevent excessive disruptions of its essential functions. 51 O.S. §24A.5(5).