

UNPACKING ESSENTIAL C'S CONFIDENTIALITY: A Campus Guide



Delves into the varying legal mandates of federal and state law and what campuses responsibilities are in sharing information and helping preserve complainant confidentiality.

Ohio campuses frequently have questions about the intersection between state and federal law and how to operationalize these laws in their daily work.

The purpose of this Guide is to:

- Clarify the intersections between state and federal law;
- Discuss the differences between confidentiality and privilege;
- Provide additional guidance regarding roles and responsibilities; and
- Assist campuses with developing and operationalizing a confidentiality best practices protocol.

There are three components of this Guide to help campuses achieve the above goals. They are:

- 1 Charts to provide guidance on these intersections**
 - Ohio Reporting Responsibilities by Campus Designation, which provides guidance on reporting responsibilities for Responsible Employees, Confidential Sources and Campus Security Authorities.
 - Ohio Campus Reporting Responsibilities by Role, a worksheet designed for campuses to identify the persons on their campus who are Responsible Employees and Campus Security Authorities.
- 2 Updated Intersection of Title IX and the Clery Act¹ chart with the inclusion of Ohio law.**
- 3 Frequently Asked Questions (FAQs)** to address the most pressing issues faced by campuses in Ohio with regards to confidentiality and the intersection of state and federal law. There are sections on who enforces the laws and responses of Sexual Assault Nurse Examiners, the criminal justice system, advocates, counselors, and case outcomes. At the top of each section, there is a list of pertinent questions that are answered to that corresponding topic.

1 This chart was originally developed by the White House Task Force to Protect Students from Sexual Assault. available at <https://notalone.gov/assets/ferpa-clerychart.pdf>.

As referenced in the introduction of the Toolkit, this is not an exhaustive list of all state and federal laws, but rather a compilation of the most significant issues facing campuses.² This Guide does not replace consultation with general counsel and should not be considered legal advice.

Instead, this document is intended to raise considerations for campuses that can spur further discussion. It is in this realm that definitive answers are scarce. Instead, each situation must be assessed and general best practices must be in place. Therefore, no bright-line guidance can be given across all Ohio campuses.

Title IX Coordinators and Title IX staff should be designated as the lead authorities and viewed as experts on their respective campus when collaborating with general counsel in the interpretation of this area of law. It is critical for Title IX Coordinators and general counsel to build relationships within the campus and in the county as these decisions are being made at each campus in Ohio.

While there are not always easy answers to the ever-changing nature and complexities of gender-based violence, it is through collaboration and building institutional expertise on these issues will result in achieving the ultimate goal: Changing Campus Culture and supporting all students' rights to an education, free from gender-based violence.

REMEMBER

OCR is the Office for Civil Rights and ORC is the Ohio Revised Code.

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2 The laws and guidance cited are current as of the printing of this Toolkit (July 2016).

Ohio Campus Reporting Responsibilities by Campus Designation

	Report Identifiable Info to Title IX Coordinator	Report Aggregate Data to Title IX Coordinator	May Report Aggregate Data to Title IX Coordinator	Report Identifiable Info to Police	Report Aggregate Data to Police per Ohio Revised Code § 2921.22***	May Report Aggregate Data to Police per Ohio Revised Code § 2921.22	Exempt from Reporting to Police per Ohio Revised Code § 2921.22	Report Identifiable Info to Clery Coordinator	Report Aggregate Data to Clery Coordinator	Exempt from Reporting for Title IX & Clery Act
Confidential Sources*		●	●			●				
Pastoral and professional counselors							●			●
Responsible Employees**	●				●					
Campus Security Authorities									●	
Non-Professional Counselors or Advocates									●	

*Note that under Ohio Revised Code § 2921.22 confidential sources who are not exempt from reporting felonies may be required to report aggregate data to law enforcement. For a full listing of exempt persons under Ohio Revised Code § 2921.22 see Chart 2. Additionally, pastoral and professional counselors are exempt from reporting under Title IX, Clery Act and Ohio law. See the second chart to develop a comprehensive campus-specific reporting protocol under Title IX, Clery Act and Ohio Revised Code § 2921.22. Reporting responsibilities vary from campus-to-campus. In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women's centers, or order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor.... Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information.

**Responsible Employees reporting aggregate data to the Title IX Coordinator are fulfilling their Ohio felony reporting requirement by reporting to the Title IX Coordinator who then may report aggregate data to police when the campus protocol includes this information.

*** An individual who has reporting responsibility under 2921.22 may meet that obligation by reporting to deputized campus police. The information in this document only pertains to adult reports and is intended for educational purposes only. Do not rely on it as legal advice to address your specific situation. For more information or assistance, contact OAESV at campus@oaesv.org or 216-658-1381. While this chart is not endorsed by the Ohio Department of Higher Education, it is based on federal guidance and campuses should review it with their general counsel and make revisions as each campus feels appropriate before implementing.

Ohio Campus Reporting Responsibilities by Role

This worksheet is designed for campuses to identify the persons on their campus who are Responsible Employees and Campus Security Authorities.

	Report Identifiable Info to Title IX Coordinator	Report Aggregate Data to Title IX Coordinator	May Report Aggregate Data to Title IX Coordinator	Report Identifiable Info to Police	Report Aggregate Data to Police per Ohio Revised Code § 2921.22***	May Report Aggregate Data to Police per Ohio Revised Code § 2921.22	Exempt from Reporting to Police per Ohio Revised Code § 2921.22	Report Identifiable Info to Clergy Coordinator	Report Aggregate Data to Clergy Coordinator	Exempt from Reporting for Title IX & Clergy Act
Title IX Staff										
SANE Nurse										
Rape Crisis Center/bona fide program for providing counseling services to victims of crimes that are violations of section 2907.02 or 2907.05 of the Revised Code or to victims of felonious sexual penetration in violation of former section 2907.12 of the Revised Code. As used in this division, "counseling services" include services provided in an informal setting by a person who, by education or experience, is competent to provide those services										
Bona fide program of treatment or services for drug dependent persons or persons in danger of drug dependence, which program is maintained or conducted by a hospital, clinic, person, agency, or services provider certified pursuant to section 5119.36 of the Revised Code										
Peer Advocates										
Clergy, Rabbi, Minister or Priest										

Ohio Campus Reporting Responsibilities by Role

	Report Identifiable Info to Title IX Coordinator	Report Aggregate Data to Title IX Coordinator	May Report Aggregate Data to Title IX Coordinator	Report Identifiable Info to Police	Report Aggregate Data to Police per Ohio Revised Code § 2921.22***	May Report Aggregate Data to Police per Ohio Revised Code § 2921.22	Exempt from Reporting to Police per Ohio Revised Code § 2921.22	Report Identifiable Info to Clery Coordinator	Report Aggregate Data to Clery Coordinator	Exempt from Reporting for Title IX & Clery Act
Pastoral or Professional Counselors							●			
Licensed psychologist or licensed school psychologist; licensed professional clinical counselor; licensed professional counselor; social worker, independent marriage and family therapist, or marriage and family therapist							●			
Non Law Enforcement Campus Security Personnel					●					
Campus Law Enforcement					●					
Dean of students who oversees student housing, a student center or student extracurricular activities					●					
Director of athletics, all athletic coaches (including part-time employees and graduate assistants)					●					
Faculty advisor to a student group					●					
Student resident advisor or assistant					●					

Ohio Campus Reporting Responsibilities by Role

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Student who monitors access to dormitories or buildings that are owned by recognized student organizations					●					
Coordinator of Greek affairs					●					
Ombudsperson (including student ombudspersons)						●				
Director of a campus health or counseling center						●				
Victim advocates or others who are responsible for providing victims with advocacy services, such as assisting with housing relocation, disciplinary action or court cases, etc.						●				
Members of a sexual assault response team (SART) or other sexual assault advocates						●				
Officers from local law enforcement who are contracted by the institution to provide campus safety-related services					●					
Physicians in a campus health center							●			

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Counselors, including peer counselors (except for professional or pastoral counselors)					●	●				
Health educators, including peer health educators					●					
Faculty (including adjunct) with significant responsibility for student and campus activities					●					
Faculty member who does not have any responsibility for student and campus activity beyond the classroom					●					
Clerical or cafeteria staff					●					
Husband or wife							●			
Communications assistant and those who are a party to a telecommunications relay service call							●			

****Responsible Employees reporting aggregate data to the Title IX Coordinator are fulfilling their Ohio felony reporting requirement by reporting to the Title IX Coordinator who then may report aggregate data to police when the campus protocol includes this information.
 *** An individual who has reporting responsibility under 2921.22 may meet that obligation by reporting to deputed campus police.
 The information in this document only pertains to adult reports and is intended for educational purposes only. Do not rely on it as legal advice to address your specific situation. For more information or assistance, contact OAESV at campus@oaesv.org or 216-658-1381. While this chart is not endorsed by the Ohio Department of Higher Education, it is based on guidance and campuses should review it with their general counsel and make revisions as each campus feels appropriate before implementing.

INTERSECTION OF TITLE IX, THE CLERY ACT, AND OHIO LAW:

The purpose of this chart is to clarify the reporting requirements of Title IX and the Clery Act in cases of sexual violence and to resolve any concerns about apparent conflicts between the two laws. To date, the Department of Education has not identified any specific conflicts between Title IX and the Clery Act. This document adds Ohio Law and was partially modified from the White House Task Force to Protect Students from Sexual Assault document, Intersection of Title IX and the Clery Act, <https://notalone.gov/assets/ferpa-clerychart.pdf>, with permission to modify.

1. WHAT TYPES OF INCIDENTS MUST BE REPORTED TO SCHOOL OFFICIALS?

TITLE IX	THE CLERY ACT	OHIO LAW
<p>Overview: Title IX promotes equal opportunity by providing that no person may be subjected to discrimination on the basis of sex under any educational program or activity receiving federal financial assistance. A school must respond promptly and effectively to sexual harassment, including sexual violence, that creates a hostile environment. When responsible employees know or should know about possible sexual harassment or sexual violence they must report it to the Title IX coordinator or other school designee.</p> <p>Sexual Harassment: Sexual harassment is unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.</p> <p>Sexual Violence: Sexual violence is a form of sexual harassment. Sexual violence refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent (e.g., due to the student’s age or use of drugs or alcohol or an intellectual or other disability that prevents the student from having the capacity to give consent). Sexual violence includes rape, sexual assault, sexual battery, sexual abuse and sexual coercion.</p>	<p>Overview: The Clery Act promotes campus safety by ensuring that students, employees, parents, and the broader community are well-informed about important public safety and crime prevention matters. Institutions that receive Title IV funds must disclose accurate and complete crime statistics for incidents that are reported to Campus Security Authorities (CSAs) and local law enforcement as having occurred on or near the campus. Schools must also disclose campus safety policies and procedures that specifically address topic such as sexual assault prevention, drug and alcohol abuse prevention, and emergency response and evacuation. The Clery Act also promotes transparency and ongoing communication about campus crimes and other threats to health and safety and empowers members to take a more active role in their own safety and security.</p> <p>Criminal Offenses: Criminal homicide; rape and other sexual assaults; robbery; aggravated assault; burglary; motor vehicle theft; and, arson as well as arrests and disciplinary referrals for violations of drug, liquor, and weapons laws.</p> <p>Hate Crimes: Any of the above-mentioned offenses against persons and property and incidents of larceny-theft, simple assault, intimidation or destruction/damage/vandalism of property, in which an individual or group is intentionally targeted because of their actual or perceived race, gender, religion, national origin, sexual orientation, gender identity, ethnicity, or disability, 20 U.S.C. §1092(f)(1)(F)(ii). Use FBI definitions, and the modifications from the Hate Crime Statistics Act. 20 U.S.C. §1092(f)(7).</p> <p>VAWA: The reauthorization of the Violence Against Women Act of 1994 amended the Clery Act to include disclosure of statistics regarding incidents of dating violence, domestic violence, and stalking as defined in 20 U.S.C. §1092(f)(1)(F)(iii) and 20 U.S.C §1092(f)(7).</p>	<p>Overview: Ohio law does not specifically require employees of an academic institution to report incidents to school officials in a manner similar to Title IX or the Clery Act. Instead, Ohio statutes mandate reporting of the following activities to specified authorities:</p> <p>Felonies against Adults or Children: Ohio Revised Code § 2921.22(A) requires any person aware that a felony has been committed to report that felony to law enforcement. Please note that certain persons are exempt from this reporting requirement, as detailed in the response to question #3 below.</p> <p>O.R.C. § 2921.22(G)(1). Sexual violence felonies include:</p> <ul style="list-style-type: none"> • 2907.02 Rape; 2907.03 Sexual Battery; 2907.04 Unlawful Sexual Conduct with a Minor • 2907.07 Importuning; 2907.08 Voyeurism (certain classifications) • 2907.21 Compelling Prostitution; 2907.22 Promoting Prostitution; 2907.23 Enticement or solicitation to patronize a prostitute; procurement of a prostitute for another (minor victim); 2907.24 Solicitation; 2907.25 Loitering to Engage in Prostitution; 2907.26 Prostitution • 2907.31 Disseminating Material Harmful to Juveniles; 2907.32 Pandering Obscenity; 2907.322 Pandering sexually oriented matter involving a minor; 2907.323 Illegal use of Minor in Nudity-Oriented Material or Performance; 2907.34 Compelling Acceptance of Objectionable Materials • 2905.01 Kidnapping; 2905.02 Abduction; 2905.05 Criminal Child Enticement • 2905.32 Trafficking in Persons <p>Child Abuse or Neglect: Ohio Revised Code § 2151.421 mandates school employees acting in their official or professional capacity who know or have reasonable suspicion (or should have reasonable suspicion) that a minor has suffered or may suffer physical or mental wound, injury, disability, or neglect, must immediately report to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. See the response to question #3 below for a detailed response of persons responsible for reporting.</p>

2. OCCURRING WHERE?

TITLE IX

Recipients must respond to sexual violence that occurs:

In the context of a school's education programs and activities:

This includes academic, educational, extracurricular, athletic, and any other school programs, whether those programs take place in a school's facilities, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere. Additional examples include school-sponsored field trips, school-recognized fraternity or sorority houses, and athletic team travel, and events for school clubs that occur off campus.

Off-campus: Even if the sexual violence did not occur in the context of an educational program or activity, a school must process such complaints and consider the effects of the sexual violence when evaluating whether there is a hostile environment on campus or in an off-campus education program or activity.

THE CLERY ACT

Institutions must disclose crime statistics for Clery-reportable offenses that occur on its so-called "Clery Geography." Clery Geography includes three general categories:

Campus: Any building or property that an institution owns or controls within a reasonably contiguous area that directly supports or relates to the institution's educational purposes. On campus also includes residence halls and properties the institution owns and students use for educational purposes that are controlled by another person (such as a food or retail vendor). The definition of "controlled" includes all such properties that are leased or borrowed and used for educational purposes. 20 U.S.C. §1092(f)(6)(ii).

Non-campus building or property:

Any building or property that is owned or controlled by a recognized student organization. And, any building or property that is owned or controlled by the institution that is used in support of its educational purposes but is not located within a reasonably contiguous area to the campus. 20 U.S.C. §1092(f)(6)(iii).

Public property: All public property within the reasonably contiguous geographic area of the institution that is adjacent to or accessible from a facility the institution owns or controls and that is used for educational purposes. Examples include sidewalks, streets, and parking facilities. 20 U.S.C. §1092(f)(6)(iv).

OHIO LAW

Everywhere:

Under Ohio law's mandatory reporting and felony reporting laws, non-empty persons must report to appropriate authorities regardless of where the crime took place. See generally Ohio Revised Code § 2921.22, Ohio Revised Code § 2921.22(A).

3. WHO MUST REPORT DETAILS OF AN INCIDENT OF SEXUAL VIOLENCE, INCLUDING PERSONALLY IDENTIFIABLE INFORMATION?

TITLE IX	THE CLERGY ACT	OHIO LAW
<p>Responsible employees: A responsible employee is any employee who has the authority to take action to redress sexual violence, who has been given the duty to report to appropriate school officials about incidents of sexual violence or any other misconduct by students, or who a student could reasonably believe has this authority or responsibility.</p> <p>Schools must make clear to all of its employees and students which staff members are responsible employees.</p>	<p>Campus law enforcement officers, non-law enforcement campus safety officers, and local law enforcement officers: These individuals are normally required to fully document all operative facts of an incident that are reported or that are developed throughout the course of a criminal investigation. The information collected during such an investigation will normally include personally-identifiable information (PII).</p> <p>CSAs other than law enforcement/campus safety officers: Most of these CSAs are not typically required to disclose PII as part of their normal reporting obligations. (see CSA definition below)</p>	<p>Ohio statutes mandate reporting of the following activities to specified authorities:</p> <p>Felonies against Adults or Children: Ohio Revised Code § 2921.22(A) requires any person aware that a felony has been committed to report that felony to law enforcement. Please note that the following persons with privilege are exempt from this reporting requirement: attorney; doctor; licensed psychologist or licensed school psychologist; licensed professional clinical counselor; licensed professional counselor; independent social worker, social worker; independent marriage and family therapist, or marriage and family therapist; member of the clergy, rabbi, minister, or priest and any person communicating information confidentially to the member of the clergy, rabbi, minister, or priest for a religious counseling purpose of a professional character; husband and wife; telecommunications assistant and those who are a party to a telecommunications relay service call.</p> <p>Additionally, disclosure of information is not required when any of the following applies:</p> <ul style="list-style-type: none"> • The information would tend to incriminate a member of the actor's immediate family. • Disclosure of the information would amount to revealing a news source, privileged under section 2739.04 or 2739.12 of the Revised Code. • Disclosure of the information would amount to disclosure by a member of the ordained clergy of an organized religious body of a confidential communication made to that member of the clergy in that member's capacity as a member of the clergy by a person seeking the aid or counsel of that member of the clergy. • Disclosure would amount to revealing information acquired by the actor in the course of the actor's duties in connection with a bona fide program of treatment or services for drug dependent persons or persons in danger of drug dependence, which program is maintained or conducted by a hospital, clinic, person, agency, or services provider certified pursuant to section 5119.36 of the Revised Code. • Disclosure would amount to revealing information acquired by the actor in the course of the actor's duties in connection with a bona fide program for providing counseling services to victims of crimes that are violations of section 2907.02 or 2907.05 of the Revised Code or to victims of felonious sexual penetration in violation of former section 2907.12 of the Revised Code. As used in this division, "counseling services" include services provided in an informal setting by a person who, by education or experience, is competent to provide those services. • Child Abuse or Neglect: Ohio Revised Code § 2151.421 mandates school employees acting in their official or professional capacity who know or have reasonable suspicion (or should have reasonable suspicion) that a minor has suffered or may suffer physical or mental wound, injury, disability, or neglect, must immediately report to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. Anyone employed by a school must report child abuse or neglect, examples therefore include but are not limited to: licensed school psychologists; speech pathologist or audiologist; school teachers; school employees; school authorities; superintendents; board members

4. WHO CAN PROVIDE COMPLETELY CONFIDENTIAL SUPPORT SERVICES TO VICTIMS OF SEXUAL VIOLENCE?

TITLE IX	THE CLERY ACT	OHIO LAW
<p>Professional and pastoral counselors: A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the institution, but are under contract to provide counseling at the institution. This also includes an individual who is not yet licensed or certified as a counselor, but is acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the institution.</p> <p>A pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition. In this context, a pastor or priest who is functioning as an athletic director or as a student advocate would not be exempt from the reporting obligations.</p> <p>Professional and pastoral counselors are not required to report any information regarding an incident of alleged sexual violence. The exemption from reporting obligations for professional and pastoral counselors under Title IX is consistent with the Clery Act.</p>	<p>Professional and pastoral counselors: A professional counselor is a person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification. This definition applies even to professional counselors who are not employees of the institution, but are under contract to provide counseling at the institution. This also includes an individual who is not yet licensed or certified as a counselor, but is acting in that role under the supervision of an individual who is licensed or certified. An example is a Ph.D. counselor-trainee acting under the supervision of a professional counselor at the institution.</p> <p>A pastoral counselor is a person who is associated with a religious order or denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition. In this context, a pastor or priest who is functioning as an athletic director or as a student advocate would not be exempt from the reporting obligations.</p> <p>Crimes reported to a pastoral or professional counselor are not required to be reported by an institution under the Clery Act; however, institutions are strongly encouraged to establish voluntary, confidential reporting processes so that incidents of crime that are reported exclusively to professional and pastoral counselors will be included in the annual crime statistics. 34 C.F.R. §668.46(b)(2)(iii).</p>	<p>Persons Granted Privilege by Ohio Revised Code § 2317.02 & Certain Bona Fide Program Employees: Under Ohio law, rape crisis center advocates, and similarly situated persons, are not permitted to provide privileged (not completely confidential?) services to victims of sexual violence. As of June 2016, advocates have no statutory privilege. See R.C. § 2317.02. Thus, rape crisis center employees are not clearly exempt from the duty to report felony sex offenses to law enforcement and are not shielded from their obligation to submit to subpoena.</p> <p>Persons granted privilege by R.C. § 2317.02: Persons whose communications are privileged by R.C. § 2317.02 may not be compelled to testify regarding communications made during the provision of services. In addition, Ohio Revised Code § 2921.22 Failure to report a felony or knowledge of a death or burn injury exempts from the duty to report, individuals whose communications are protected by privilege. The following types of service providers may provide completely confidential support to victims: attorney; doctor; licensed psychologist or licensed school psychologist; licensed professional clinical counselor; licensed professional counselor; independent social worker, social worker, independent marriage and family therapist, or marriage and family therapist; member of the clergy, rabbi, minister, or priest and any person communicating information confidentially to the member of the clergy, rabbi, minister, or priest for a religious counseling purpose of a professional character; husband and wife; communications assistant and those who are a party to a telecommunications relay service call.</p> <p>Certain Bona Fide Program Employees: Ohio's felony reporting statute contains an additional exemption if disclosure would amount to revealing information acquired by the actor in the course of the actor's duties in connection with a bona fide program for providing counseling services to victims of crimes that are violations of section 2907.02 [Rape] or 2907.05 [Gross sexual imposition] of the Revised Code or to victims of felonious sexual penetration in violation of former section 2907.12 of the Revised Code. As used in this division, "counseling services" include services provided in an informal setting by a person who, by education or experience, is competent to provide those services. Ohio Revised Code § 2921.22(G)(6). However, proceed with caution when relying on this provision, as the Ohio Revised Code does not define "Bona Fide Program".</p> <ol style="list-style-type: none"> 1 Privilege (also known as a privileged communication) is a legal term describing certain specific types of relationships that enjoy protection from disclosure in legal proceedings. Privilege is granted by law and belongs to the client in the relationship. It can either be absolute or qualified; each affording a different level of protection. Privileged relationships vary by state law. 2 Confidentiality pertains to the treatment of information that an individual has disclosed in a relationship of trust and with the expectation that it will not be divulged to others without the individual's permission in ways that are inconsistent with the understanding of the original disclosure. It is the process of ensuring that information is accessible only to those authorized to have access. During the informed consent process, if applicable, individuals must be informed of the precautions that will be taken to protect the confidentiality of the information and be informed of the parties who will or may have access. This allows individuals to decide whether to release information given the available protections and the possibility of release of private information. Confidentiality is not the same as privilege, under state law.

5. WHO CAN PROVIDE SERVICES AND KEEP PERSONALLY IDENTIFIABLE INFORMATION ABOUT INCIDENTS OF SEXUAL VIOLENCE CONFIDENTIAL?

TITLE IX	THE CLERY ACT	OHIO LAW
<p>Non-professional counselors or advocates:</p> <p>Individuals who are not professional or pastoral counselors, but work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers, including front desk staff and students, and provide assistance to students who experience sexual violence, should report aggregate data, but are not required to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student.</p>	<p>Most non-law enforcement/campus safety officers who are CSAs because of they have significant responsibilities for student and campus activities:</p> <p>The definition of campus security authority includes campus police and/or security personnel; any individual who has responsibility for campus security but is not part of a campus police or security department; an individual or organization specified in an institution's statement of campus security policy as one to which students and employees should report criminal offenses; and an official of an institution who has a significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings.</p> <p>Most of these mandatory reporters are specifically not required by the Clery Act to disclose PII. 34 C.F.R. §668.46(a).</p> <p>Because specific occupational titles, descriptions and statements of duties vary so significantly, each institution must conduct a substantive review of all of its officials, including students with official duties for example, resident assistants, and evaluate whether the Clery Act designates the individual a CSA and thereby confers reporting obligations. CSAs must be identified, notified of their reporting obligations, be properly training, and provided with a mechanism for communicating reported incidents to the appropriate officials. (Handbook, 75).</p>	<p>Though it is best practice to keep identifiable information about incidents of sexual violence confidential, if prompted by the Ohio felony reporting statute, R.C. § 2921.22(A), or the Ohio child abuse and neglect reporting statute, R.C. § 2151.421, non-exempt persons may have to disclose identifiable information known to them. In addition, non-privileged individuals may be compelled to disclose identifiable information if subpoenaed to do so.</p>

6. WHAT SHOULD NON-PROFESSIONAL COUNSELORS, ADVOCATES, AND CSAs REPORT ABOUT INCIDENTS OF SEXUAL VIOLENCE?

TITLE IX	THE CLERY ACT	OHIO LAW
<p>Aggregate Data:</p> <p>In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers.</p> <p>Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting information that would personally identify a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.</p>	<p>Aggregate Data:</p> <p>Typically, most non-law enforcement/campus safety officer CSAs must only report the nature, date, time, general location, and the current disposition of the incident, if known.</p> <p>Most non-law enforcement/campus safety officer CSAs typically are not required to disclose PII or other information that would have the effect of identifying the victim.</p>	<p>As noted, no Ohio statute requires individuals to report incidents to academic institutions. Instead, Ohio laws require that non-exempt individuals report to law enforcement or the appropriate state agency. When determining what information non-exempt employees must disclose, see the Confidentiality Toolkit for Campuses, and these individuals should refer to the Ohio felony reporting statute, R.C. § 2921.22(A), for adult cases, or the Ohio child abuse and neglect reporting statute, R.C. § 2151.421, for child cases.</p> <p>Felony Reporting Statute:</p> <p>This statute does not specify what, if any specific, information is required under this reporting statute. Sexual Assault Nurse Examiners only report aggregate data, for example, to comply with Ohio's felony reporting statute.</p> <p>Child Abuse or Neglect: To comply with R.C. § 2151.421, individuals must include in their report:</p> <ul style="list-style-type: none"> • The names and addresses of the child and the child's parents or the person or persons having custody of the child, if known; • The child's age and the nature and extent of the child's injuries, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist, including any evidence of previous injuries, abuse, or neglect; • Any other information that might be helpful in establishing the cause of the injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist.

7. WHAT MUST A SCHOOL TELL THE COMPLAINANT ABOUT THE OUTCOME OF A SEXUAL VIOLENCE COMPLAINT AND HOW DOES FERPA APPLY?!

TITLE IX	THE CLERY ACT	OHIO LAW
<p>Notice of the Outcome:</p> <p>Title IX requires a school to tell the complainant whether or not it found that the sexual violence occurred, any individual remedies offered or provided to the complainant or any sanctions imposed on the perpetrator that directly relate to the complainant, and other steps the school has taken to eliminate the hostile environment, and prevent recurrence.</p> <p>Sanctions that directly relate to the complainant include, but are not limited to, requiring that the perpetrator stay away from the complainant until both parties graduate, prohibiting the perpetrator from attending school for a period of time or transferring the perpetrator to another residence hall, other classes, or another school.</p> <p>The Department of Education interprets FERPA as not conflicting with the Title IX requirement that the school notify the complainant of the outcome of its investigation, i.e., whether or not the sexual violence was found to have occurred, because this information directly relates to the victim. FERPA also permits the school to notify a complainant of sanctions imposed upon a student who was found to have engaged in sexual violence when the sanction directly relates to the complainant.</p> <p>The FERPA limits on re-disclosure of information do not apply to information that institutions are required to disclose under the Clery Act, 34 C.F.R. §99.33(c). Institutions may not require a complainant to abide by a nondisclosure agreement, in writing, or otherwise, that would prevent the re-disclosure of this information in any Title IX complaint that involves a Clery Act offense, such as sexual violence.</p>	<p>Results of Institutional Disciplinary Proceedings:</p> <p>The Clery Act specifically mandates that “each institution shall develop and distribute procedures for simultaneously notifying the accuser and accused of the outcome of institutional disciplinary proceedings.” 20 U.S.C. §485f(1)(J)(8)(B)(iv)(III)(aa).</p> <p>FERPA includes a provision that specifically allows schools to disclose to alleged victims of any crime of violence or rape and other sexual assaults, the final results of any disciplinary proceedings conducted by the institution against the alleged perpetrator of the offense. 20 U.S.C. §1232g(b)(6).</p> <p>The “final results” of any proceeding are defined as: the name of the student, the findings of the proceeding board/official, any sanctions imposed by the institution, and the rationale for the findings and sanctions (if any). The presence of names of any other student, such as a victim or witnesses, may be included only with the consent of that student. 20 U.S.C. §1232g(c).</p> <p>The FERPA limits on re-disclosure of information do not apply to information that institutions are required to disclose under the Clery Act, 34 C.F.R. §99.33(c). Institutions may not require a complainant to abide by a nondisclosure agreement, in writing, or otherwise, that would prevent the re-disclosure of this information.</p>	<p>Outcome:</p> <p>Ohio law does not regulate notice procedures for complainants of sexual violence within schools.</p> <p>FERPA Application to Student Records in School Sexual Violence Cases: If, pursuant to Ohio Revised Code § 3319.45, a principal has knowledge that an activity that would amount to R.C. § 2907.02 Rape or § 2907.05 Gross sexual imposition, if the perpetrator were an adult, and the offense was committed on property owned or controlled by the school or at a school activity, the principal must make a report to the superintendent within one day and may make a report to law enforcement (in addition to the felony reporting duty imposed by R.C. § 2921.22). In this instance, the principal is not required to obtain the consent of the perpetrator or the perpetrator’s parent, guardian, or custodian prior to making the report. R.C. § 3319.45(G). Ohio law does not supersede FERPA. As such, persons responsible for complying with O.R.C. Chapter 3319 must ensure any actions also comply with FERPA. See, e.g., R.C. § 3319.45(G); Ohio Rev. Code § 149.43(A)(1)(v).</p>

¹ This chart also addresses how the Family Educational Rights and Privacy Act (FERPA) applies to Title IX and the Clery Act. Once again, the Department of Education has not identified any specific situations where compliance with Title IX or the Clery Act will cause an institution to violate FERPA.

8. HOW DOES FERPA APPLY TO OTHER OBLIGATIONS UNDER TITLE IX AND THE CLERY ACT?

TITLE IX	THE CLERY ACT	OHIO LAW
<p>All Other Title IX Obligations: FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.</p>	<p>Timely Warnings: The Clery Act requires institutions to issue timely warnings to the campus community about crimes that have already occurred but may continue to pose a serious or ongoing threat to students and employees. Timely warnings are only required for Clery-reportable crimes that occur on Clery Geography although institutions are encouraged to issue appropriate warnings regarding other criminal activity that may pose a serious threat as well. 20 U.S.C. §485f(1)(J)(3); Handbook, 118. FERPA does not preclude an institution's compliance with the timely warning provision of the Clery Act. FERPA recognizes that information can, in the case of an emergency, be released without consent when needed to protect the health and safety of others. 34 C.F.R. §99.36(a). Further, if institutions utilize information from the records of campus law enforcement to issue a timely warning, those records are not protected by FERPA. 20 U.S.C. §1232g(a)(4)(B)(ii). However, timely warning reports must withhold the names and other identifying information about victims as confidential. 34 C.F.R. §668.46(e).</p> <p>Emergency Response Procedures: The Clery Act requires institutions to have and disclose emergency response and procedures. As part of these procedures, institutions must immediately notify the campus community about <i>any</i> significant emergency or dangerous condition that may pose an immediate threat to the health or safety of students or employees occurring on the campus. 20 U.S.C. §485f(1)(J)(1)(i). An institution that follows its emergency notification procedures is not required to issue a timely warning based on the same circumstances; however, the institution must provide adequate follow-up information to the community as needed. 34 C.F.R. §668.46(e)(3). FERPA recognizes that information can, in the case of an emergency, be released without consent when needed to protect the health and safety of others. 34 C.F.R. §99.36(a).</p>	<p>Ohio law does not supersede FERPA. As such, persons responsible for complying with O.R.C. Chapter 3319 must ensure any actions also comply with FERPA. See, e.g., R.C. § 3319.45(G); Ohio Rev. Code § 149.43(A)(1)(v).</p>

ENFORCEMENT OF LAWS DIRECTLY IMPACTING CAMPUSES

Questions Pertaining to Oversight

1. Who enforces laws on Ohio Campuses?
2. What is the role of the U.S. Department of Education and their individual offices in enforcement?
3. What is the role of the Education Section of the Ohio Attorney's General Office?



Who enforces laws on Ohio Campuses?



The U. S. Department of Education enforces both the Clery Act and Title IX. The Violence Against Women Act (VAWA) is enforced by the U.S. Department of Justice. State law, codified through the Ohio Revised Code (ORC) or the Ohio Administrative Code, is enforced by local city and county prosecutors. The Ohio Attorney General's Office can step in by providing legal guidance to public universities or taking over a prosecution, when invited or asked in to assist.



What is the role of the U.S. Department of Education and their individual offices in enforcement?



The Office For Civil Rights³

"The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights."

OCR serves student populations facing discrimination and the advocates and campuses promoting systemic solutions to civil rights problems. An important responsibility is resolving complaints of discrimination. Agency-initiated cases, typically called compliance reviews, permit OCR to target resources on compliance problems that appear particularly acute. OCR also provides technical assistance to help campuses achieve voluntary compliance with OCR-related civil rights laws. Partnerships are an important part of OCR's technical assistance which is designed to develop creative approaches to preventing and addressing discrimination.

The Office for Federal Student Aid

Additionally, the Federal Student Aid office conducts reviews to evaluate a campus' compliance with the Clery Act requirements. A review may be initiated when a complaint is received, a media event raises certain concerns, the campus' independent audit identifies serious non-compliance, or through a review selection process that may also coincide with state reviews performed by the FBI's Criminal Justice Information Service (CJIS) Audit Unit. Once a review is completed, the U.S. Department of Education issues a Final Program Review Determination. In addition, it conducts general assessment compliance reviews and audits which may also result in fine actions against a campus for violations of the Clery Act.⁴ Clery reviews and accompanying documentation, which may include the complaint, campus response, or final action that resulted from the program review in addition to documents related to fine actions initiated from other compliance reviews, is available online.⁵

The Family Policy Compliance Office

The Family Policy Compliance Office (FPCO) serves to "meet the needs of the Department's primary customers--learners of all ages--by effectively implementing two laws that seek to ensure student and parental rights in education: the Family Educational Rights and Privacy Act (FERPA) and the Protection of Pupil Rights Amendment (PPRA)."⁶

3 About OCR, U.S. DEPT. OF EDUC., OFF. FOR CIV. RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.

4 Clery Act Reports, U.S. DEPT. OF EDUC., OFF. OF FED. FINANCIAL AID, <https://www.nsls.ed.gov/sa/about/data-center/school/clery-act-reports>.

5 Id.; See also National Student Loan Data System - Background Information: Clery Act Reviews, U.S. DEPT. OF EDUC., OFF. OF FED. FINANCIAL AID, <https://www.nsls.ed.gov/sa/es/sites/default/files/fsawg/datacenter/cleryact/CleryDataCenterv3.pdf>.

6 About the Family Policy Compliance Office, U.S. DEPT. OF EDUC., OFF. OF FED. FAMILY COMPLIANCE, <http://www2.ed.gov/policy/gen/guid/fpco/index.html>.



What is the role of the Education Section of the Ohio Attorney's General Office?



Higher Education Representation⁷

“The Education Section (Education) represents Ohio’s 13 universities, one free-standing medical university and 23 two-year state community colleges, community colleges and technical colleges. This representation involves coordination of the work of in-house attorneys who handle the day-to-day work for the colleges and universities. The representation also includes working with and overseeing the special counsel who handle matters that the Attorney General’s Office cannot, due to a lack of expertise or manpower.”

Education Assistant Attorneys General provide advice and training on issues relating to higher education, including employment, state contracts, student privacy and discipline. They also represent the colleges and universities in federal and state courts as well as in administrative matters. These attorneys represent the Ohio Department of Education, the State Board of Career Colleges, the Ohio Appalachian Center for Higher Education and the Ohio Association of Community Colleges.

GENERAL CAMPUS RESPONSE

Questions Pertaining to General Campus Responses

1. What is the difference between confidentiality and privilege?
2. Does Ohio’s felony reporting statute require that identifiable information about the complainant be provided? Does the answer change if the complainant is a minor?
3. Can campuses report under the Clery Act without revealing the names of complainants and respondents?
4. What is a timely warning and what crimes prompt one?
5. Does the entire campus community need to be notified about every incident? What details must be shared?
6. What rights does a complainant have if he/she does not want to report the crime?
7. How do you protect the confidentiality of student complainants and work with faculty to implement interim measures?
8. Are faculty members who have clinical licensure, which affords privilege if providing counseling services, required to report under Clery if their sole role on campus is teaching?



What is the difference between confidentiality and privilege?



The Victim Rights Law Center states that:

While statutory privilege provides the strongest privacy protections, communications with confidential employees still allow some privacy protections. For jurisdictions whose statutory privilege laws do not cover all medical and support services that a victim may need, an institution has the ability to designate employees as “confidential,” which exempts them from Title IX reporting with the exception of providing non-identifying aggregate data to the Title IX Coordinator. The Department of Education strongly encourages designating certain employees as confidential, such as those who work in sexual assault centers, victim advocacy offices, women’s centers, and health centers. This is not an exhaustive list, and an institution can and should choose to designate other employees as relevant. It is particularly important for institutions that do not have any privileged employees to designate confidential employees.⁸

7 *Education: Higher Education Representation*, OFF. OF OHIO ATTY. GEN. MIKE DEWINE, <http://www.ohioattorneygeneral.gov/About-AG/Organizational-Structure/education.aspx>.
8 *Where to Start: Understanding and Implementing Your Campus Response Protocol to Confidential Reporting*, VICTIM RIGHTS LAW CENTER, available at <http://changingourcampus.org/application/files/6714/6340/6313/Where-to-Start-Assessment-Tool-Guide-Employee-Sheet.pdf>.

The Toolkit Glossary defines confidentiality and privilege as:

Confidentiality: pertains to the treatment of information that an individual has disclosed in a relationship of trust and with the expectation that it will not be divulged to others without the individual's permission in ways that are inconsistent with the understanding of the original disclosure. It is the process of ensuring that information is accessible only to those authorized to have access. During the informed consent process, if applicable, individuals must be informed of the precautions in place to protect the confidentiality of the information and be informed of the parties who will or may have access. This allows individuals to decide whether to release information given the available protections and the possibility of release of private information. Confidentiality is not the same as privilege under state law.

Privilege, more commonly labeled “privileged communication,” is a legal protection that shields certain communications, made in the context of specified relationships, from forced disclosure in legal proceedings. Privilege is granted by law and belongs to the client in the relationship. This means that though a client can choose to waive privilege, the service provider must uphold the privilege unless the client waives. Privilege can either be absolute or qualified; each affording a different level of protection. Under Ohio law, privilege is assigned to specific relationships in Ohio Revised Code §2317.02.⁹

Why is the distinction between privilege and confidentiality important?

If someone holds a privilege then they can only be required to disclose communications made to them in that relationship under certain circumstances. Confidentiality is a duty, created by law, licensure, or employer guidelines, that prohibits an individual from talking about specific information outside of the work setting. Examples of breaking confidentiality include discussing cases or survivors in public spaces, sharing information with friends or family, or answering media questions about a case.

As it relates to sexual assault reporting, ORC § 2921.22 (G)(1) provides that **persons that become aware of the sexual assault in a privileged context are exempt from reporting adult-victim sexual assault.** Under Ohio law, privilege is assigned to specific relationships in Ohio Revised Code § 2317.02.¹⁰ They are:

- Attorney/client
- Doctor/patient
- Licensed psychologist or licensed school psychologist/client
- Licensed professional clinical counselor, licensed professional counselor, independent social worker, social worker, independent marriage and family therapist, or marriage and family therapist/client
- Member of the clergy, rabbi, minister, or priest and any person communicating information confidentially to the member of the clergy, rabbi, minister, or priest for a religious counseling purpose of a professional character
- Husband and wife
- A communications assistant and those who are a party to a telecommunications relay service call.

To be protected, communications must be made in furtherance of the legal/counseling/medical/treatment service the professional is licensed or employed to provide.¹¹ It is important to note that as of July 2016, rape crisis center advocates are not protected by privilege in Ohio.¹²

What are some common limits on confidentiality for campuses?

Title IX Compliance: Compliance with Title IX requires campuses to take immediate action once it knows or reasonably should know about gender-based violence against a student.¹³ Many campus employees are considered “responsible” for reporting gender-based violence to the campus immediately upon knowledge and/or information that an incident occurred.¹⁴ Employees are “responsible” when they have the authority to respond, have been assigned the duty to report, or if a student could reasonably believe they have the duty to report.¹⁵

9 OHIO REV. CODE § 2317.02 *Privileged communications*, available at <http://codes.ohio.gov/orc/2317.02>.

10 OHIO REV. CODE § 2317.02 *Privileged communications*, available at <http://codes.ohio.gov/orc/2317.02>.

11 *Id.*

12 *See id.*

13 U.S. DEPT OF EDUCATION, OFF. FOR CIVIL RIGHTS, *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts* (April 4, 2011) at 4, available at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf>.

14 Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUCATION, OFF. FOR CIVIL RIGHTS (April 29, 2014) E-3 at 23, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

15 *Id.*, D-2 at 15; *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (January 2001) at 33-34 n.74, available at <http://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf>.

Some employees are exempt from this mandate. OCR does not require the following persons or anyone supervised by such person to report incidents of violence to the school in a way that identifies the student: campus mental health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality.¹⁶ Further, OCR acknowledges that non-professional or pastoral counselors sometimes provide survivors of gender-based violence assistance. “They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers (“non-professional counselors or advocates”), including front desk staff and students.”¹⁷ OCR sees these individuals as “valuable sources of support for students,” and thus “interprets Title IX to give campuses the latitude not to require these individuals to report incidents of gender-based violence in a way that identifies the complainant without that person’s consent.”¹⁸

BEST PRACTICE Campuses are strongly encouraged to designate individuals as confidential sources.¹⁹



Does Ohio’s felony reporting statute require that identifiable information about the complainant be provided? Does the answer change if the complainant is a minor?



Ohio Revised Code § 2921.22 states that “no person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.”²⁰

The Ohio felony reporting statute **does not indicate** whether or not the name or identifiable information about an adult victim is required. As acknowledged in the Ohio Protocol For Sexual Assault Forensic and Medical Exams,²¹ “the law, O.R.C. § 2921.22(A) and (B), does not require that the adult patient’s name be given, but states that any person knowing that a felony has been or is being committed shall report it to law enforcement authorities.” **So what does this mean?** Well, for example, Sexual Assault Nurse Examiners (SANEs) are required to report that a crime occurred (date, time, jurisdiction), but if a survivor does not want that information reported to law enforcement, then the SANE cannot be mandated to give that information. Campuses should develop their protocols with this survivor-centered and compliance lens in mind.

The law is different as to minors. According to Ohio law,²² a minor is anyone “under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age.”

There are certain professionals that are mandated reporters of child abuse and neglect.²³ These individuals must report to the appropriate public children services agency or a municipal or county peace officer, if they know, or have reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a minor has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division.

O.R.C. § 2151.421 also indicates that:

(C) Any report made pursuant to division (A) or (B) of this section shall be made forthwith either by telephone or in person and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

(1) The names and addresses of the child and the child’s parents or the person or persons having custody of the child, if known;

16 Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (April 29, 2014) E-3 at 22, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

17 *Id.*

18 *Id.*

19 *Id.* at E-3 at 22-23.

20 Ohio Rev. Code § 2921.22 *Failure to report a crime or knowledge of a death or burn injury*, available at <http://codes.ohio.gov/orc/2921.22>.

21 *Ohio Protocol For Sexual Assault Forensic and Medical Exams*, OHIO DEPT. OF HEALTH (Sept. 23, 2015) <http://www.odh.ohio.gov/~media/ODH/ASSETS/Files/hpr/sexual%20assault/adultprotocol2011.ashx>.

22 OHIO REV. CODE § 2151.421 *Reporting child abuse or neglect*, available at <http://codes.ohio.gov/orc/2151.421>.

23 OHIO REV. CODE § 2151.421(A)(1)(b), available at <http://codes.ohio.gov/orc/2151.421>.

(2) The child’s age and the nature and extent of the child’s injuries, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist, including any evidence of previous injuries, abuse, or neglect;

(3) Any other information that might be helpful in establishing the cause of the injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist.



Can campuses report under the Clery Act without revealing the names of complainants and respondents?



Yes. The Clery Act does not permit a campus to release identifying information about a complainant. The crime reports should only include the date of the report, the date of the crime, and the general location.

As far as reporting to campus law enforcement, individuals who are classified as Campus Security Authorities can report without providing identifiable information about the complainant.

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”), as amended by the Violence Against Women Act Reauthorization of 2013, requires that campuses notify students of the option to report or not report to law enforcement.²⁴

If a campus receives a subpoena for this information, depending upon the outcome of that merits of the subpoena, personal information may be revealed.

TIP A campus should immediately consult their general counsel if a subpoena is received for information about a complainant or respondent. There are many steps an attorney can take to ensure it is a valid subpoena and respond to it in a way that respects the campus’ protocol and fosters best practice.



What is a timely warning and what crimes prompt one?



A timely warning is a tool to provide the campus community with information regarding a potential threat. Under Clery, the campus must make this warning if (1) one of the specified crimes occurs; (2) on Clery geography; (3) a report is made to campus security authorities or local law enforcement; and (4) the campus perceives a continuing threat to students and employees.²⁵

A timely warning must include available relevant information calculated to prevent similar crimes.²⁶ The warning must be sent in a manner reasonably likely to reach every member of the campus community.

The chart below highlights the specific crimes that may require timely warnings if they occur on specified locations. For simplicity, we will call these “Clery Geographies” and “Clery Crimes.”²⁷

24 20 U.S.C. § 1092(f)(3) *Institutional and financial assistance information for students*, available at <https://www.law.cornell.edu/uscode/text/20/1092>; 34 C.F.R. 668.46(e), available at <https://www.law.cornell.edu/cfr/text/34/668.46>.

25 *Id.*

26 *Id.*; *The Clery Act in Detail, KNOW YOUR IX*, available at <http://knowyourix.org/the-clery-act-in-detail/>

27 See generally, Westat, Ward & Mann, *The Handbook for Campus Safety and Security Reporting*, U.S. DEPT. OF EDUC. (February 2011), available at <http://www.orgsites.com/val/asis151/DOEHandbookforCampusSafetyandSecurityReporting.pdf>.

<p>1 Clery Crime</p>	<p>34 C.F.R. § 668.46(c) specifies that “Clery Crimes” include:</p> <ul style="list-style-type: none"> • Criminal Activities: Murder & Manslaughter Offenses, Forcible & Non-forcible Sex Offenses, Robbery & Burglary, Aggravated Assault, Motor Vehicle Theft, and Arson • Hate Crimes: The above-listed offense, along with Larceny & Theft, Simple Assault, Intimidation, Destruction of Property, and Vandalism, if motivated by bias based on gender, race, sexual orientation, religion, national origin, or disability.²⁸
<p>2 Clery Geography</p>	<ul style="list-style-type: none"> • Buildings or property controlled by the institution and considered part of the campus, if used for purposes related to the institution’s objective. Controlled means owned, rented, or used pursuant to written agreement, and can include entire buildings, isolated floors, or single office units. Examples include but are not limited to student unions, classroom buildings, residence halls, athletic facilities, and libraries.²⁹ • Buildings owned but not controlled by the institution, if used frequently by students, and used for purposes related to the institution’s objective. Examples include but are not limited to: privately run book stores, apparel shops, and restaurants that lease space in the institution’s student unions.³⁰ • Public property within an institution’s campus boundaries or immediately adjacent to and accessible from the campus. Examples include but are not limited to sidewalks, thoroughfares, streets, and parking facilities.³¹ • Buildings owned or controlled by an institution-associated foundation, that are used for purposes related to the institution’s objective. Examples include but are not limited to fraternity houses and sorority houses.³²
<p>3 Campus Security Authority (or local law enforcement) receives report</p>	<p>34 C.F.R. § 668.46(a) defines “Campus Security Authority” as follows:</p> <ul style="list-style-type: none"> • (1) A campus police department or a campus security department of an institution. • (2) Any individual outside of campus police or security [with] responsibility for campus security...such as an individual who is responsible for monitoring entrance into institutional property. • (3) Any individual or organization specified in an institution’s statement of campus security policy as [an entity that receives criminal reports from students and employees]. • (4) An official [with] significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings. [Pastoral or professional counselors are exempt from this classification when acting as a pastoral or professional counselor].
<p>4 Continuing Threat</p>	<ul style="list-style-type: none"> • An immediate or ongoing threat perceived by the institution.

28 *Id.* at 56.

29 34 C.F.R. § 668.46(a), available at <https://www.law.cornell.edu/cfr/text/34/668.46>; see Westat, Ward & Mann *The Handbook for Campus Safety and Security Reporting*, U.S. Dep’t. of Educ. (February 2011) at 12-13, available at <http://www.orgsites.com/va/asis151/DOEHandbookforCampusSafetyandSecurityReporting.pdf>.

30 34 C.F.R. § 668.46(a), available at <https://www.law.cornell.edu/cfr/text/34/668.46>; see Westat, Ward & Mann *The Handbook for Campus Safety and Security Reporting*, U.S. Dep’t. of Educ. (February 2011) at 14, available at <http://www.orgsites.com/va/asis151/DOEHandbookforCampusSafetyandSecurityReporting.pdf>.

31 Westat, Ward & Mann, *The Handbook for Campus Safety and Security Reporting*, U.S. Dep’t. of Educ. (February 2011) at 19, available at <http://www.orgsites.com/va/asis151/DOEHandbookforCampusSafetyandSecurityReporting.pdf>.

32 *Id.* at 13.

Clery Crime + Clery Location + Report to Campus Security Authority

Though the Clery Act only mandates reporting for Clery Crimes, the U.S. Department of Education encourages a more expansive application that includes all crimes, violent or non-violent, that may pose a continuing threat.³³

If the campus determines that there is no continued immediate threat, the campus may decline a timely warning and instead post a report on their daily crime log. This crime log should be easily accessible for all members of the campus community to locate and monitor.

Q

When exactly does an incident have to be reported to everyone on campus? What details must be or should be shared?

A

The Clery Act requires a campus to provide a community-wide “timely warning” after learning of a crime that poses an “ongoing threat to the campus community.”³⁴ Campuses must make independent determinations on a case-by-case basis about which crimes qualify as posing this ongoing threat.

If a campus determines that a timely warning will be issued, it is critical that the Title IX Coordinator or the advocate notify the complainant, so that they are not caught off guard. This also assists with providing safety planning that could arise from issuing a timely warning, particularly on a small campus and/or in an intimate partner violence situation.

If a campus determines that there is no continued immediate threat, the campus may decline a timely warning and instead post a report on their daily crime log.

Q

What rights does a complainant have if he/she does not want to report the crime?

A

Once a survivor has disclosed an act of gender-based violence, the limits of confidentiality depend on the status of the person receiving the disclosure.

Under Title IX, **Title IX Coordinator**: If the Title IX Coordinator has identifying information about the respondent, and the complainant requests confidentiality and/or that the Title IX Coordinator not pursue further investigation, a campus must evaluate such requests in the context of its responsibility to provide a safe and nondiscriminatory environment for all students.

The first thing a Title IX Coordinator should do after receiving a confidentiality request is attempt to understand why the complainant is concerned about having their information revealed to the respondent. Those concerns, which may range from fear of retaliation to concern about the impact the proceeding may have on the complainant’s academic and/or mental health, should be addressed by the Title IX Coordinator with particularity. If, after working to address complainant concerns, the complainant maintains the desire to request confidentiality, the Title IX Coordinator should explain that confidentiality could preclude a meaningful investigation of the perpetrator or adequate sanction implementation, and that a campus must balance these interests and consider a range of factors,³⁵ including:

- Circumstances that suggest an increased risk that the alleged perpetrator will commit additional acts of sexual or other violence
 - Whether there have been other sexual violence complaints about the same alleged perpetrator
 - Whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence

33 *Id.* at 112.

34 34 C.F.R. § 668.46(e), available at <https://www.law.cornell.edu/cfr/text/34/668.46>.

35 Title IX Coordinators should prioritize sharing this information proactively with the student community via comprehensive and regular training and education opportunities, so that students are best positioned to make informed decisions about what they would like to share, when, and with whom.

- Whether the alleged perpetrator threatened further sexual violence or other violence against the student or others, and whether the sexual violence was committed by multiple perpetrators.
- Circumstances that suggest there is an increased risk of future sexual violence under similar circumstances
 - Whether the student’s report reveals a pattern of perpetration, via illicit use of drugs or alcohol, at a given location, or by a particular group
- Whether the sexual violence was perpetrated with a weapon
- Age of the student subjected to the sexual violence
- Whether the school possesses other means to obtain relevant evidence (i.e., security cameras or personnel, physical evidence)
- If a campus determines it cannot honor a complainant’s request, it should take all reasonable steps to mitigate the potential harm to that student through a range of efforts, from interim measures to informing the respondent that the complainant requested no investigation.³⁶

Student complainants essentially have four reporting options:

- Report the gender-based violence off campus to the local police³⁷ and elect to participate in the criminal investigation and potential prosecution of the perpetrator; and/or
- Report the gender-based violence on campus to any responsible employee, which initiates the campus process as outlined in your student handbook;
- Report the gender-based violence on campus to the Title IX Coordinator without providing the respondent’s name, and request interim measures without moving forward with the campus disciplinary process; or
- Not report at all, or decline to report through official channels and just access support and services. (Note that, depending on the staff member’s level of confidentiality, they may be required to report and thus trigger a campus process that the student may not want to participate in. Thus, it is critical that all individuals interacting with students discuss limits of confidentiality for their respective role).

Under O.R.C. §2907.11, victims have a right to confidentiality and anonymity in the criminal justice system. A victim has the right to ask the judge to order that the information included in the police report not be released. *If* such a request is granted by the judge, all names and details will remain confidential until after a preliminary hearing or an arraignment or until the case is dismissed. The agencies involved, as well as the media, have adopted policies that may prevent the release of a victim’s identity³⁸, but Ohio public records law does not currently provide protections from body camera footage or if information is released to the media. Ohio law provides few victim rights and stronger protections exist in federal law.

There may be a campus anonymous reporting line or online system survivors could access to make a report, but anonymity may not be guaranteed by reporting in this way. For example, when a student makes a report on a small campus and identifies the location where the gender-based violence occurred, the university may investigate and through the course of fact-finding they could ascertain the identity of the report. Additionally, an IP (internet protocol) address may be revealed through the course of either a campus or criminal justice system investigation, particularly if the anonymous report is linked to a serial perpetrator who poses an ongoing risk to the community. Campuses should make clear to students any limits to anonymity through an anonymous reporting system.

In order to comply with Title IX and the Clery Act, see the charts referenced earlier in this section designating reporting responsibilities of Responsible Employees and Campus Security Authorities.

Under Title IX, **Responsible Employee:** All relevant details shared.

“Subject to the exemption for school counseling employees...a responsible employee must report to the school’s Title IX coordinator, or other appropriate school designee, all relevant details about the alleged sexual violence that the student or another person has shared and that the school will need to determine

36 Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (April 29, 2014) E-1 – E-2 at 18-20, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

37 Depending on the institution and exact location where the assault occurred, the campus police force may have jurisdiction over the crime. Local law enforcement agencies typically handle felonies, but this will depend on campus-specific agreements signed between the campus and individual law enforcement agency.

38 *Ohio Crime Victim Rights*, OFF. OF OHIO ATTY. GEN. MIKE DEWINE, available at <http://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Victims/Crime-Victims-Publications/Picking-Up-the-Pieces-A-Guide-to-Helping-Crime-Vic>.

what occurred and to resolve the situation. This includes the names of the alleged perpetrator (if known), the student who experienced the alleged sexual violence, other students involved in the alleged sexual violence, as well as relevant facts, including the date, time, and location. A school must make clear to its responsible employees to whom they should report an incident of alleged sexual violence. To ensure compliance with these reporting obligations, it is important for a school to train its responsible employees on Title IX and the school's sexual violence policies and procedures."³⁹

Under Clery Act, **Campus Security Authority:** All information shared.

*"The function of a campus security authority is to report to the official or office designated by the institution to collect crime report information, such as the campus police or security department, those allegations of Clery Act crimes that he or she concludes were made in good faith...A campus security authority is not responsible for determining authoritatively whether a crime took place—that is the function of law enforcement personnel. A campus security authority should not try to apprehend the alleged perpetrator of the crime. That too is the responsibility of law enforcement. It's also not a CSA's responsibility to try and convince a victim to contact law enforcement if the victim chooses not to do so."*⁴⁰



How do you protect the confidentiality of student complainants and work with faculty to implement interim measures?



Oftentimes a complainant requests to remain confidential or to have limited participation in hearings. Federal regulations require that confidentiality be an option. Under the Clery Act:

These regulations require institutions to explain in their annual security report a victim's options for involving law enforcement and campus authorities after dating violence, domestic violence, sexual assault, or stalking has occurred, including the options to notify proper law enforcement authorities, to be assisted by campus authorities in notifying law enforcement authorities, and to decline to notify law enforcement authorities. This requirement does not conflict with an institution's obligation to comply with mandatory reporting laws because the regulatory requirement relates only to the victim's right not to report, not to the possible legal obligation on the institution to report.⁴¹

Faculty should proactively explain their ability keep information confidential to the students with whom they work and revisit this information when speaking to a student they think may be disclosing or is about to disclose being a survivor of gender-based violence, so that the student can make informed decisions.

"Even when a school has determined that it can respect a complainant's request for confidentiality and therefore may not be able to respond fully to an allegation of sexual violence and initiate formal action against an alleged perpetrator, the school must take immediate action to protect the complainant while keeping the identity of the complainant confidential. These actions may include: providing support services to the complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.

*The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of each case. A school should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders). In general, when taking interim measures, schools should minimize the burden on the complainant. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case."*⁴²

39 Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (April 29, 2014) D-3 at 16, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

40 Westat, Ward & Mann, *The Handbook for Campus Safety and Security Reporting*, U.S. DEPT. OF EDUC. (February 2011) at 76-77, available at <http://www.orgsites.com/val/asis151/DOEHandbookforCampusSafetyandSecurityReporting.pdf>.

41 Violence Against Women Act; Final Rule Fed. Reg. 62761 (Oct. 20, 2014), available at <https://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>.

42 Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (April 29, 2014) E-1 - E-2 at 18-20, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

At times, a complainant’s ability to remain confidential conflicts with a campus’ obligations under Title IX. Noting this conflict directly, OCR explains that when a student requests confidentiality after a report is made by a responsible employee or the student, identifying information should only be shared with persons responsible for handling the campus’ response.⁴³ Therefore under FERPA, after a complaint is made, a student may request from the office responsible for FERPA requirements (in some cases this is the Registrar’s office) that (1) their name and other identifiable information be redacted from the complaint and all pertinent documents; (2) such information not be provided to the respondent in any manner; and (3) all information regarding the complaint and its relation to accommodations be kept confidential to all persons except those responsible for investigating the claim and coordinating accommodations.⁴⁴ OCR recommends that the campus inform the complainant preemptively about what information will be disclosed, to whom, and why.⁴⁵ Especially where a responsible employee made the complaint without the survivor’s agreement, complainants should feel comfortable asking to only be involved in the investigation and hearing to the extent necessary.⁴⁶ As noted, confidentiality and compliance can conflict, and a campus must balance the request for confidentiality with the need to prevent further similar crimes against members of the campus community and penalize the respondent.⁴⁷

Note that where minor survivors are an involved⁴⁸, under Title IX, “State mandatory reporting laws may require disclosure, but can generally be followed without disclosing information to school personnel who are not responsible for handling the school’s response to incidents of sexual violence.”⁴⁹



Are faculty members who have clinical licensure, which affords privilege if providing counseling services, required to report under Clery if their sole role on campus is teaching?



Maybe. Privilege applies when a person is acting within their “official responsibilities” per their privilege. In order to determine whether or not an employee’s privileged relationship applies, consider what the employee’s role was at the time of the disclosure and how the campus community might interpret that role. While some instances will be clear, others will require an institution to decide and clearly articulate whether or not the privileged relationship applies.⁵⁰

Under the **Clery Act**, the term “Campus Security Authority” encompasses four groups of individuals and organizations associated with an institution... [including]:

- An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline and campus judicial proceedings. An official is defined as any person who has the authority and the duty to take action or respond to particular issues on behalf of the institution.⁵¹

Because official responsibilities and job titles vary significantly on campuses, the regulations do not provide a specific list of titles. To determine specifically which individuals or organizations are campus security authorities for your institution, consider the function of that individual or office. Look for officials (i.e., not support staff) whose functions involve relationships with students. If someone has significant responsibility for student and campus activities, he or she is a campus security authority. Note that whether or not your institution pays an individual is not a factor in determining whether that individual can be a CSA. Be sure to keep your CSA list current so that you do not omit any individual or organization that fits the definition of a CSA. An example of individuals who would not meet the criteria for status as campus security authorities include a faculty member with no responsibility for student and campus activity beyond the classroom.⁵²

43 *Id.*, E-1 at 18-19.

44 *See generally id.*

45 *Id.*, E-1 - E-3 at 18-22.

46 *Id.*

47 *Id.*, E-1 at 20.

48 For more information, see the response to question 2, which addresses the challenges of maintaining confidentiality when working with minors.

49 Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (April 29, 2014) E-1 at 19, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

50 *Where to Start: Understanding and Implementing Your Campus Response Protocol to Confidential Reporting*, VICTIM RIGHTS LAW CENTER, available at <http://changingourcampus.org/application/files/6714/6340/6313/Where-to-Start-Assessment-Tool-Guide-Employee-Sheet.pdf>.

51 U.S. Dep’t. of Educ., Off. Of Postsecondary Educ., *Handbook for Campus Safety and Security - 2016 Edition* (2016) 4-2 - 4-3, available at <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

52 *Id.* at 4-3.

Even if a faculty member does not rise to CSA status under the Clery Act, they may still be a Responsible Employee under Title IX. If so, the faculty member must report required information to the Title IX Coordinator, who would then report incidences of sexual assault to law enforcement. It is important to understand the distinction between CSA and Responsible Employee status to avoid violation of either governing law.

TIP Campuses should review faculty members’ “official responsibilities” and identify which persons on the campus are designated as “campus security authorities” under the Clery Act.

SEXUAL ASSAULT NURSE EXAMINERS (SANE) AND THE CRIMINAL JUSTICE SYSTEM

Questions Pertaining to SANEs and the Criminal Justice System Responses:

1. Is a SANE required to report identifiable information to the local police about someone who has received a forensic exam? Is a SANE considered a Campus Security Authority (CSA) under Clery?
2. If local law enforcement receives a report of rape from a hospital and it turns out the survivor is a student, does Ohio law require that local law enforcement notify the campus at which the student is enrolled?
3. Can a campus refer cases directly to local law enforcement and bypass their own campus security or campus police department if they don’t specialize in responses to gender-based violence?
4. Can a campus refer cases directly to a prosecutor’s office and bypass a Title IX investigation?
5. Can a complainant be polygraphed in Ohio?



Is a SANE required to report identifiable information to the local police about someone who has received a forensic exam? Is a SANE considered a Campus Security Authority (CSA) under Clery?



No. SANEs in Ohio follow ORC § 2921.22(A) and (B), which “does not require that the adult patient’s name be given, but states that any person knowing that a felony has been or is being committed shall report it to law enforcement authorities.”⁵³ If a survivor wants to remain anonymous, SANEs should uphold that request by collecting an anonymous evidence collection kit and only providing aggregate information to local law enforcement.

SANEs are not specified as CSA’s specifically. If a campus develops an MOU with a hospital this issue should be discussed with regards to protocol.



If local law enforcement receives a report of rape from a hospital and it turns out that the survivor is a student, does Ohio law require that local law enforcement notify the campus at which the student is enrolled?



No. Ohio law does not mandate that local law enforcement inform a campus. However, there may be an MOU or previously established agreement in place between the local law enforcement and campus that provides for this sharing of information.

Local law enforcement may interact with a survivor of gender-based violence and find out that they are a student at a local campus. Frequently, this report comes from a SANE when a survivor goes to a hospital to receive a forensic exam in order to preserve evidence. If a survivor does not want to remain anonymous, local law enforcement should discuss with the survivor about possible notification of the campus and the campus’ responsibility to conduct their own Title IX investigation. However, if a survivor does want to remain anonymous, local law enforcement should not share information that identifies that student in any report to campus.

53 OHIO REV. CODE § 2921.22(A)-(B) Failure to report a crime or knowledge of a death or burn injury, available at <http://codes.ohio.gov/orc/2921.22>.



Q Can a campus refer cases directly to local law enforcement and bypass their own campus security or campus police department if they don't specialize in responses to gender-based violence?



A First, under Clery, campuses are only permitted to refer cases to law enforcement (whether campus or local) IF the complainant wants that to happen. This is a choice of the complainant. As campuses work toward developing the capacity of their on-campus law enforcement unit or if campuses have campus security only, they should execute a MOU with local law enforcement regarding referral protocol that ensures a response to complainants that embodies best practices and recommendations enumerated in this Toolkit.

Know Your IX and the National Alliance to End Sexual Violence (NAESV) conducted an online survey in March 2015 to gauge survivors' beliefs about the criminal justice system, victim autonomy, and reporting. Almost 90% of survivors said that campus victims should retain the right to choose whether and to whom to report. Eighty-eight percent (88%) said that, were campuses required to turn rape reports over to the police (without survivors' consent), they believe fewer victims would report to anyone at all. Seventy-two percent (72%) were concerned that such requirements would lead to survivors being "forced to participate in the criminal justice system / go to trial."⁵⁴

One survivor summed up many recurring themes in the open responses, saying: "When I reported to campus officials, I was not ready to press charges and if I had been forced to report to the police I wouldn't have been able to do it. I wouldn't have told anyone because I would have felt like I had even less control of myself. Having the decision be my own and on my own time made it a lot safer and healthier."⁵⁵



Q Can a campus refer cases directly to a prosecutor's office and bypass a Title IX investigation?



A No. This is consistent with the earlier response that campuses cannot bypass their own Title IX investigation for an investigation by local law enforcement. Under Title IX, campuses cannot abdicate their own independent investigation and adjudication process. The campus process serves a different role than the criminal justice system. This toolkit's *Guide to Campus Response Protocol Development* provides more information about what a campus should include in their response protocols as to complaint process. Additionally, VAWA clearly indicates that survivors should have the autonomy to decide whether or not to participate in the criminal justice system. While the campus must inform complainants about their right to report if they so choose to report to law enforcement, that mandate to inform complainants should not be interpreted by a campus as a mandate to report.

Campuses should strive to have a formal collaboration and MOU with the relevant county prosecutor's office that outlines:

- What information the prosecutor wants/is getting;
- What the prosecutor will do with that information and under what circumstances; and
- What type of contact the prosecutor will have with the complainant, so that the campus can inform the complainant ahead of time.

54 Ask Survivors Survey Results, Know Your IX, <http://knowyourix.org/ask-survivors/>.
55 Id.



Can a complainant be polygraphed in Ohio?



No. Pursuant to ORC §2907.10, survivors of sexual offenses cannot be asked or required to submit to a polygraph examination in order for the criminal investigation to proceed.⁵⁶ Also, a survivor’s refusal to submit to a polygraph cannot be used as a reason for not investigating the crime, filing criminal charges, or prosecuting the crime.⁵⁷

BEST PRACTICE Similar to ORC, VAWA, as reauthorized in 2005 and 2013, states that law enforcement “shall not ask or require a victim of an alleged sex offense to submit to a polygraph examination as a condition for proceeding with the investigation of, trial of, or sentencing for the alleged sex offense,” and “the refusal of the victim of an alleged sex offense to submit to a polygraph examination shall not prevent the investigation of the alleged sex offense, the filing of criminal charges with respect to the alleged sex offense, or the prosecution of the alleged perpetrator of the alleged sex offense.”^{58 59}

ADVOCACY

Questions Pertaining to Advocacy Responses:

1. Under Title IX are individuals with privilege the only people who can be designated as “confidential” sources for students?
2. Do rape crisis centers need to report information about the rapes experienced by the survivors that access their services, pursuant to the Ohio felony law?
3. If a community-based rape crisis center has an MOU with a campus, are they designated a “Campus Security Authority” under the Clery Act?
4. Is an advocate employed by a campus considered a “Campus Security Authority”?
5. Is an advocate who works for a campus and does not individually hold privilege under the law, required to report identifiable information about a complainant to the campus if that advocate is supervised by and reports to a department (i.e. counseling center) primarily providing services by persons with privilege?
6. Are peer advocates or peer educators considered confidential sources?



Under Title IX are individuals with privilege the only people who can be designated as “confidential” sources for students?



No. As explained earlier, confidentiality and privilege have two different meanings.⁶⁰ Campuses should identify who on their campus holds confidentiality and who holds privilege and make that information known to the larger campus population. OCR provided guidance on Title IX, strongly encouraging campuses to designate individuals who could act as confidential sources despite not having privilege. In 2014, OCR stated: “...some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors. They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers (“non-professional counselors or advocates”), including front desk staff and students. OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student’s consent. These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.”⁶¹

56 OHIO REV. CODE § 2907.10(A) Preliminary polygraph test of sex offense victim, available at <http://codes.ohio.gov/orc/2907.10v1>.

57 *Id.*

58 Summary of Changes from VAWA Reauthorization 2013, NATIONAL TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN (2014), available at https://www.isc.idaho.gov/dv_courts/conferences/2014/NTF%20High-Level%20Summary_05.14.pdf.

59 For more general information about the reauthorization, see *The Violence Against Women Reauthorization Act of 2013: Safely and Effectively Meeting the Needs of More Victims*, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, available at http://nnev.org/downloads/Policy/VAWAReauthorization_Summary_2013.pdf.

60 See Toolkit’s Glossary for specific definitions of these terms.

61 Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (April 29, 2014) E-3 at 23-24, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

In the same guidance, OCR explains that “[a] school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence.”⁶²

Q

Do rape crisis centers need to report information about the rapes experienced by the survivors that access their services, pursuant to the Ohio felony law?

A

Possibly, but only aggregate data, if at all. OAESV continues to work to preserve confidentiality of all rape crisis centers. Confidentiality is recognized nationally as a critical component to survivor services. This recognition is reflected in practices, and for example, rape crisis programs cannot receive Violence Against Women Act funding if they do not certify that they provide survivor/advocate confidentiality.⁶³ This is similar to when a survivor goes to an emergency room for collection of evidence and is seen by Sexual Assault Nurse Examiners (SANEs). Ohio SANEs follow ORC §2921.22(A) and (B), which “does not require that the adult patient’s name be given”⁶⁴ to law enforcement.

In Ohio, rape crisis centers have historically operated under ORC §2921.22 (G)(6) which states that disclosure is not required when:

Disclosure would amount to revealing information acquired by the actor in the course of the actor’s duties in connection with a bona fide program for providing counseling services to victims of crimes that are violations of section 2907.02 or 2907.05 of the Revised Code or to victims of felonious sexual penetration in violation of former section 2907.12 of the Revised Code. As used in this division, “counseling services” include services provided in an informal setting by a person who, by education or experience, is competent to provide those services.

However, Ohio law does not define what is considered a bona fide program. Ohio rape crisis programs are required to adhere to a set of comprehensive service standards created by OAESV, the state’s coalition, and supported by the Ohio Attorney General’s Office. These standards ensure that rape crisis programs provide the highest-quality services available to survivors.

“The cornerstone of rape crisis services is confidentiality, which is the ability to maintain the privacy of the survivor’s identity, identifying information, victimization experiences, personal history, and services sought and received. Survivors want, need, and deserve to discuss painful, personal information about their experiences under the assurance that this information will not be shared with anyone.”

62 *Id.*, E-1 at 19.

63 *Acknowledgement of Notice of Statutory Requirement to Comply with Privacy and Confidentiality Provisions of the Violence Against Women Act, as Amended*, U.S. DEPT. OF JUST. OFF. OF VIOLENCE AGAINST WOMEN, available at <https://www.justice.gov/sites/default/files/ovw/legacy/2013/09/24/conf-acknowledgement.pdf>.

64 *Ohio Protocol For Sexual Assault Forensic and Medical Exams*, OHIO DEPT. OF HEALTH (Sept. 23, 2015) <http://www.healthy.ohio.gov/en/sadv/sassault/sadvprot.aspx>.



Q *If a community-based rape crisis center has an MOU with a campus, are they designated a “Campus Security Authority” under the Clery Act?*



A Not necessarily. Campuses and rape crisis centers should discuss this as part of MOU development.

BEST PRACTICE to exclude rape crisis centers from operating as a Campus Security Authority.

Clery Act guidance available at the time of printing does not specify if a community-based non-campus rape crisis center should or should not be designated as a CSA, but the campus should consider placing protections on this relationship to foster survivors receiving the services and supports they need.

As far as Title IX is concerned, OCR recommends:

In order to identify patterns or systemic problems related to sexual violence, a school should collect aggregate data about sexual violence incidents from non-professional counselors or advocates in their on-campus sexual assault centers, women’s centers, or order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor....Such individuals should report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student. Non-professional counselors and advocates should consult with students regarding what information needs to be withheld to protect their identity.⁶⁵

TIP It is imperative for each campus to make it clear who is a CSA and what is the protocol if a CSA receives a report. Under the Clery Act, a crime is “reported” when it is brought to the attention of a campus security authority, the campus’ police department or campus safety office, or local law enforcement personnel by a victim, witness, other third party or even the offender. It doesn’t matter whether or not the individuals involved in the crime, or reporting the crime, are associated with the campus. If a campus security authority receives a report, he or she must include it as a crime report using whatever procedure has been specified by the campus.



Q *Is an advocate employed by a campus considered a “Campus Security Authority”?*



A ODHE recommends that each campus consult legal counsel to assist in identifying CSA’s. CSA’s are identified by their role more than by their title and it is also irrelevant whether the campus is directly paying the individual’s salary. See the side bar for more information about determining who is a CSA.

TIP Campuses should keep their list of CSA’s current so that individuals or organizations that fit the definition of a CSA are not omitted.

How to Identify Your Institution’s CSAs Campus Security Authority definition⁶⁶

“Campus security authority” is a Clery Act-specific term that encompasses four groups of individuals and organizations associated with an institution:

- A campus police department or a campus security department of an institution. If your institution has a campus police or security department, all individuals who work for that department are campus security authorities. A security department can be as small as one person.
- Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department (e.g., an individual who is responsible for monitoring the entrance into institutional property). Include individuals such as those who provide security at a campus parking kiosk, monitor access into a campus facility, act as event security, such as for sporting events or large, registered parties, or escort students around campus after dark (including other students).
- Any individual or organization specified in an institution’s statement of campus security policy as an individual or organization to which students and employees should report criminal offenses. If you direct the campus community to report criminal incidents to anyone or any organization in addition to police or security-related personnel, that individual or organization is a campus security authority.
- An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline and campus judicial proceedings officials.

To determine specifically which individuals or organizations are campus security authorities for your institution, consider the function of that individual or office. Look for officials (i.e., not support staff) whose functions involve relationships with students. If someone has significant responsibility for student and campus activities, he or she is a campus security authority. Examples of individuals (outside of a police or security department) who generally meet the criteria for being

⁶⁶ 34 C.F.R. § 668.46(a) *Institutional security polices and crime statistics*, available at <https://www.law.cornell.edu/cfr/text/34/668.46>; see also U.S. Dep’t. of Educ., Off. Of Postsecondary Educ., *Handbook for Campus Safety and Security – 2016 Edition* (2016) 4-2 – 4-3, available at <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

⁶⁵ Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (April 29, 2014) E-3 at 23-24, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

campus security authorities include:

- a dean of students who oversees student housing, a student center or student extracurricular activities;
- a director of athletics, all athletic coaches (including part-time employees and graduate assistants);
- a faculty advisor to a student group;
- a student resident advisor or assistant;
- a student who monitors access to dormitories or buildings that are owned by recognized student organizations;
- a coordinator of Greek affairs;
- a Title IX coordinator;
- an ombudsperson (including student ombudspersons);
- the director of a campus health or counseling center;
- victim advocates or others who are responsible for providing victims with advocacy services

Be sure to keep your CSA list current so that you do not omit any individual or organization that fits the definition of assisting with housing relocation, disciplinary action or court cases, etc.;

- members of a sexual assault response team (SART) or other sexual assault advocates; and
- officers from local law enforcement who are contracted by the institution to provide campus safety-related services.

If your institution directs students or employees to report crimes to other individuals, then those individuals are also CSAs. These individuals could include:

- physicians in a campus health center;
- counselors, including peer counselors (except for professional or pastoral counselors); and
- health educators, including peer health educators.

Examples of individuals who would not meet the criteria for being campus security authorities include:

- a faculty member who does not have any responsibility for student and campus activity beyond the classroom; and
- clerical or cafeteria staff⁶⁷

67 Westat, Ward & Mann, *The Handbook for Campus Safety and Security Reporting*, U.S. DEPT. OF EDUC. (February 2011) at 75, available at <http://www.orgsites.com/va/asjs151/DOEHandbookforCampusSafetyandSecurityReporting.pdf>.



Q *Is an advocate who works for a campus and does not individually hold privilege under the law, required to report identifiable information about a complainant to the campus if that advocate is supervised by and reports to a department (i.e. counseling center) primarily providing services by persons with privilege?*



A It depends on the campus' protocol and ODHE recommends that each campus consult with their legal counsel before deciding this question. Pursuant to a 2014 OCR resource:

*OCR does not require campus mental health counselors, pastoral counselors, social workers, psychologists, health center employees, or any other person with a professional license requiring confidentiality, or who is supervised by such a person, to report, without the student's consent, incidents of sexual violence to the school in a way that identifies the student.*⁶⁸

Further,

*OCR recognizes that some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors. They include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers ("non-professional counselors or advocates"), including front desk staff and students. OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student's consent. These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.*⁶⁹

Therefore, a non-licensed advocate who is employed by the campus is not automatically, by virtue of this OCR guidance, exempt from reporting identifiable information. However, the campus protocol must first designate the non-licensed advocate as a confidential source and not a responsible employee under Title IX.

TIP Campus-based advocates should immediately seek clarification from their campus regarding their status as a confidential source.

BEST PRACTICE Ohio campuses should, wherever possible, make rape crisis and intimate partner violence advocates confidential sources, even when the individuals do not have licensure that provides privilege under the law.

Taking OCR guidance into consideration each campus should consult with appropriate administrators and general counsel to determine the best way forward while also taking into consideration any obligations that exist under Ohio and other federal laws.

68 Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (April 29, 2014) E-3 at 22-24, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

69 *Id.*, E-3 at 22-23.



Are peer advocates or peer educators considered confidential sources?



No, if not designated by the campus as a confidential source. Summary: Neither peer advocates nor peer educators are protected by privilege. Thus, they may be required to testify to certain details of their conversations with complainants or respondents during a criminal justice proceeding or a civil suit.

However, like others that deliver direct services or work in supportive roles, peer advocates should set up protocols for record-keeping and information-sharing that protects the privacy of those with whom they talk in order to protect information to the extent permitted by law and campus protocol.

Every campus should analyze the role of peer advocates, their duty if any to report incidents of gender-based violence to authorities, and ways to foster confidentiality. All of this should be reflected in a disclaimer that is disseminated widely, and revisited before anyone speaks to the peer advocate.

Note on Peer Educators:

The majority of prevention services are provided to a universal population and typically peer educators do not retain records on individuals that receive the education. If for some reason a campus or agency decides to keep such records, the campus must develop a protocol indicating how it meets the following rule:

Ohio Administrative Code §5122-26-08 Confidentiality

(A) This rule describes the minimum written policies and procedures for maintaining confidentiality in accordance with applicable federal and state laws and regulations; including, but not limited to, 42 C.F.R. part 2, confidentiality of alcohol and drug abuse client records, and the health insurance portability and accountability act of 1996.

(B) A provider staff person's access to an individual client's records, treatment information, diagnosis or other protected information is limited to access and disclosure in accordance with applicable federal and state laws and regulations.

(C) Storage of client records shall be in accordance with all applicable federal and state laws and regulations.

All staff would be required to follow the protocols related to confidentiality.

COUNSELING

Questions Pertaining to Counseling Responses

1. Can a campus employee who has a social work degree, but who is not yet licensed, provide confidential counseling to students?
2. Are there different levels of protections on mental health records depending upon whether the counselor involved is employed by a campus or in the community?
3. In what circumstances, under federal law, are campus Counseling Center's records open to examination?
4. Does Ohio's felony reporting law require licensed clinicians to report when they learn about the commission of a felony through a client's counseling session?



Can a campus employee who has a social work degree, but who is not yet licensed, provide confidential counseling to students?



No. Even with a social work degree, individuals cannot perform social work duties until they sit for the exam and obtain their license. Prior to that, the only time the Ohio Counselor, Social Worker, Marriage and Family Therapist Board, can register someone as a Social Work Trainee is if they are in an internship/practicum in their master's social work program. That would be a time-limited situation and they would be registered with the Board as a trainee. Social worker privilege only applies if someone has their license or is registered with the Board as a trainee.

Board confidentiality rules would not apply to the unlicensed person unregistered as a trainee. Similarly, this person would only be afforded privilege if supervised by an individual with privilege, and only to the extent that the communications were necessary to further the purpose of the supervisor's privileged relationship with the client.

TIP Campuses should create confidential resources for students so that there are some places that students feel safe and protected in their communications.

Q

Are there different levels of protections on mental health records depending upon whether the counselor involved is employed by a campus or in the community?

A

Yes, in certain circumstances. For example, if a student sues a campus, then a campus-employed mental health professional's records can be subjected to disclosure⁷⁰ but a community-based mental health professional would not have the same disclosure requirements.⁷¹

TIP Campuses should work with their general counsel to identify how and where disclosure of records can occur, absent litigation, for example, with a student's consent through a signed valid release of information form, pursuant to court order, or under subpoena. It is important for campuses to seek ways to preserve record confidentiality in both the way the records are maintained and the process for release. Campuses should develop valid release of information forms and conduct periodic reviews of how records are stored.

Q

In what circumstances, under federal law, are campus Counseling Center's records open to examination?

A

Under Clery, any confidential service (i.e. services offered by someone who legislatively holds a privileged relationship)⁷² does not have to submit any information about the crime or services to the campus. The federal government recognizes the importance of providing confidential services on campuses as a way to foster safety for survivors of gender-based violence. Therefore, campuses are exempt from submitting Clery information for crimes reported to professional counselors.⁷³ Similarly, a campus is not required to provide a timely warning to members of the campus community for crimes reported to a professional counselor.⁷⁴

The Clery Act defines a "professional counselor" as "[a] person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification."⁷⁵ Counseling centers should be aware of the following restrictions:

- a.) An individual who is counseling students, but who does not meet the Clery Act definition of a professional counselor is not exempt from reporting.⁷⁶
- b.) A professional counselor who has other significant responsibility for student and campus activities must report crimes reported to them outside of the professional counseling setting and should seek preemptive clarification on their obligations in each setting from the U.S. Department of Education Office for Civil Rights. See id.

CAVEAT If a student files a report to OCR about the campus, then OCR has the right to access the Counseling Center's files. The information that OCR examines as part of its investigation, remains confidential.^{77 78}

TIP Read through the OCR Dear Colleague Letter issued on August 18, 2015 for more guidance on this topic. According to [this letter](#), the Family Policy Compliance Office issued a draft Dear Colleague Letter on this topic and additional guidance may be forthcoming.^{79 80}

- 70 34 C.F.R. § 99.31(a)(9)(iii)(B) *Under what conditions is prior consent not required to disclose information?*, available at <https://www.law.cornell.edu/cfr/text/34/99.31> ("If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.")
- 71 The answer to this question does not pertain to instances in which patients file suit against mental health professionals for malpractice, or provide a detailed explanation of the legal processes that require mental health professionals to turn over patient files in civil or criminal litigation.
- 72 For a list of privilege holders in Ohio, see text accompanying fn. 8-12.
- 73 34 C.F.R. § 668.46(c)(6) *Institutional security polices and crime statistics*, available at <https://www.law.cornell.edu/cfr/text/34/668.46>. Note, however, that "Postsecondary institutions should be aware that an individual who is counseling students, but who does not meet the Clery Act definition of a pastoral or professional counselor, is not exempt from being a campus security authority if he or she otherwise has significant responsibility for student and campus activities." Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (April 29, 2014) at 23 n.27 available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.
- 74 34 C.F.R. § 668.46(e)(2); see also Lhamon, E-3 at 23.
- 75 34 C.F.R. § 668.46(a); see also Lhamon, E-3 at 23.
- 76 Lhamon, at 23 n.27, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.
- 77 See 34 C.F.R. § 99.31(a)(3)(iii), available at <https://www.law.cornell.edu/cfr/text/34/99.31#>; 34 C.F.R. § 100.06(c), available at <https://www.law.cornell.edu/cfr/text/34/100.6>.
- 78 34 C.F.R. § 100.6(C) (2015), available at <http://www2.ed.gov/policy/rights/reg/ocr/34cfr100.pdf>.
- 79 Kathleen M. Styles, *Dear Colleague Letter to School Officials at Institutions of Higher Education*, U.S. DEPT OF EDUCATION, FAMILY POLICY COMPLIANCE OFF. (August 18, 2015), available at <http://ptac.ed.gov/sites/default/files/DCL%20Final%20Signed-508.pdf>; see also U.S. DEPT OF EDUCATION, FAMILY POLICY COMPLIANCE OFF, *Guidance on this Issue* (Oct. 2, 2015), <http://familypolicy.ed.gov/dear-colleague-letter-to-school-officials-at-institutions-of-higher-education>.
- 80 Under current law, it appears that an institution may legally access the counseling records of a student who files suit against that institution, regardless of whether a release is signed. *Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records*, U.S. DEPT. OF HEALTH & HUMAN SERVICES, U.S. DEPT OF EDUC. (2008), available at <http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf> ("it is important to note, that a school may disclose an eligible student's treatment records for purposes other than the student's treatment provided that the records are disclosed under one of the exceptions to written consent under 34 CFR § 99.31(a)"); 34 C.F.R. 99.31(a)(9)(iii)(B) ("If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.")



Q Does Ohio’s felony reporting law require licensed clinicians to report when they learn about the commission of a felony through a client’s counseling session?



A It depends. In Ohio, licensed professionals do have limits to confidentiality, particularly if a client poses an imminent risk to self or others. In those circumstances, a report is mandated. Clinicians should consult with supervisors and relevant licensure boards regarding specific cases in question. For many privileges, like attorney-client and physician-patient, this felony exception does not apply if communications were made during the course of a professional relationship (there are a few exceptions⁸¹).

Thus, in general, when an adult student reports that they were raped during a counseling session to a Ohio licensed professional, pursuant to ORC § 2921.22, that professional is not required to report knowledge of a felony.⁸²

TIP The term “counselor” is protected under Ohio Revised Code §4757.02(B)(1).⁸³ That means individuals who are holding themselves out as mental health professionals but are not licensed with the Ohio Counselor, Social Worker, Marriage and Family Therapist Board are not allowed to call themselves a “counselor.”

CASE OUTCOMES

Questions Pertaining to Case Outcomes

1. What information and to whom can a campus release information about the outcome of a gender-based violence complaint?
2. Are campuses allowed to require a complainant to abide by a nondisclosure agreement?
3. Are campus police records at private institutions public records?



Q What information and to whom can a campus release information about the outcome of a gender-based violence complaint?



A First and foremost, Clery dictates that both the complainant and respondent must be notified, in writing about the outcome. However, FERPA also influences what information campuses can share at the conclusion of adjudication.⁸⁴ Under FERPA, a campus is permitted to tell the complainant if the respondent was found responsible and if so, what sanctions were imposed that relate directly to the complainant. FERPA also permits campuses to disclose to anyone—not just the complainant—the final results of a grievance proceeding if it determines that the respondent is an alleged perpetrator of a crime of violence or a non-forcible sex offense.



Q Are campuses allowed to require a complainant to abide by a nondisclosure agreement?



A No.⁸⁵

81 State Medical Board of Ohio, *Medical Board Regulatory Statement Regarding the Duty of a Physician to Report Criminal Behavior to Law Enforcement* (2013), available at http://dw.ohio.gov/med/pdf/NEWS/Duty%20to%20Report_March%202013.pdf.

82 OHIO REV. CODE § 2921.22 *Failure to report a crime or knowledge of a death or burn injury*, available at <http://codes.ohio.gov/orc/2921.22>.

83 OHIO REV. CODE § 4757.02 *Unauthorized practice*, available at <http://codes.ohio.gov/orc/4757.02v1>.

84 Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (April 29, 2014) at 19, 19 n.25, 25-28, 37, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Russlynn Ali, *Dear Colleague Letter*, U.S. DEPT. OF EDUC., OFF. FOR CIVIL RIGHTS (April 4, 2011) at 13-14, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

85 Ali, at 14, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.



Are campus police records at private institutions public records?



Yes. In June 2015, the Ohio Supreme Court ruled in *State ex rel. Schiffbauer v. Banaszak*⁸⁶ that a private college or university’s police department is a public office. Therefore, they can be compelled to provide their records. In that case, the court determined that the private university’s police department was established by state statute to enforce criminal laws and that function makes the police department a public office under Ohio’s Public Records Act. The university argued that the police department is not a public office because the university is private and the police department is a subdivision of the university. However, the court found that because the university campus police department was established by state law for the purpose of exercising a core function of government - the enforcement of criminal laws - it met the definition of a public office and must produce public records upon request.

TIP Private campuses should think through the impact of this decision by the Ohio Supreme Court and how it relates to its potential impact on all students’ confidentiality. Campuses should proactively account for this change in policy and revise their protocols and practices as necessary to protect student confidentiality to the greatest extent possible. It is also recommended that campuses consult with their general counsel regarding this matter.

BE ON THE LOOKOUT
Ohio House Bill Number 504, which as of July 2016 is pending in the House Government Oversight Committee, proposes to amend the law governing private institutions of higher education. This amendment would protect private colleges from liability that arises from the campus’ disclosure of public records, such as for a breach of confidentiality.

ADDITIONAL RESOURCES FOR CONSIDERATION⁸⁷

Responsible Employee Training Video

LINK <http://clerycenter.org/store/educational-videos/responsible-employee-training-video>.

OCR 2014 Q&A

LINK <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

Campus TA and Resource Project

LINK <http://changingourcampus.org/application/files/6714/6340/6313/Where-to-Start-Assessment-Tool-Guide-Employee-Sheet.pdf>.

Guidelines for Child Abuse Reporting of Consensual Sexual Activity

LINK <http://www.healthy.ohio.gov/~media/HealthyOhio/ASSETS/Files/SADVP/Ohio%20Protocol/Appendix%2019.pdf>.

Age of Consent in Ohio

LINK <http://www.oaesv.org/wp-content/uploads/2012/12/Ohio-Age-of-Consent-Fact-Sheet.pdf>.

86 *State ex rel. Schiffbauer v. Banaszak*, 142 Ohio St. 3d 535, 2015-Ohio-1854, available at <https://www.supremecourt.ohio.gov/ROD/docs/pdf/0/2015/2015-Ohio-1854.pdf>.
87 The Online Resources component of the Toolkit offers a tremendous listing at well.