

### LAWS

- 1974 Family Educational Rights and Privacy Act (FERPA) (education records)
- 1996 Health Insurance Portability and Accountability Act (HIPPA) (protected health information/records)
- 2002 Standard for Privacy of Individually Identifiable Health Information (“Privacy Rule”) | *revises HIPPA*
- 2009 HITECH Act (privacy and security in electronic transmission of health records) | *revises HIPPA*
- Missouri law on privacy and confidentiality (Mo. Rev. Stat. & court decisions)

### GOAL

Develop and implement procedures to address sensitive, private, or confidential materials in Archives.

- Shared responsibility of donors, staff, and users.
- Set restrictions at time of donation/processing.
- Allow general access, shift measure of responsibility to the user, and develop take-down / redaction policy.
- Take into account information context, user identity, subject relationships, and institutional definitions
- May entail physical, technology, and administrative means (including training where necessary), that are “reasonable and appropriate to the circumstances in which the records are maintained.”

### OPTIONS

- ← **Redact**
- ← **De-identify**
- ← **Restrict**
- ← **Individual authorization (informed consent)**

Folder

Series

Item

### [FERPA]

Prohibits disclosure of student identifying information.

Applies to “education records” that are directly related to a student.

Applies to all formats (paper, film, electronic, etc.).

Applies to current and former students.

Students may opt-out of directory information disclosure (decision persists post-graduation).

Does NOT apply to “directory information.”

Does NOT prescribe specific methods to prevent unauthorized access/ disclosure.

Does NOT apply to disclosure to school officials with legitimate educational interests.

Does NOT apply to student information on independent, external platforms and services (e.g. social media sites, personal webpage, blogs, etc.).

NOT intended to interfere with ordinary pedagogical practice.

LOCAL POLICY CHOICE: Do NOT apply to records created  $\geq 75$  years ago (so OK if before 1943). If records from grade, elementary, or secondary school connected to WU, then  $\geq 95$  years.

*Sample materials* <see example of what to look for in each>

Class rosters with names and grades

Class assignments with grades and/or professor comments

Recommendation letters

Academic probation letters

Academic excellence letters

Physical education class with students body measurements and performance notes

### EDUCATION RECORDS (require review)

Transcripts  
Exams  
Papers  
Recommendation letters  
Faculty and staff email to/from/about a student.

### DIRECTORY INFO (ok to disclose)

Full name  
Home and local address  
Telephone #  
Email  
Photographic, video or electronic image (picture)  
Academic division and major field of study  
Dates of attendance  
Previous schools attended,  
Graduation dates and degrees received at WU  
Class (affiliated degree year)  
Academic awards  
Participation in intercollegiate activities  
Height and weight (NCAA DIII athletes only)

Student info on “independent, external” platforms.  
Disclosure to “school officials” w/ legitimate educational interests.

### Recommendations:

[HIPPA]

PHI: any individually identifiable health information in any format (oral, electronic, paper, etc.).

“Health information” means relating to any past, present, or future physical or mental health condition or to healthcare or to payment for healthcare.

Information is identifiable if it provides a “reasonable basis” to identify a person.

HITECH excludes from PHI definition the information of persons who have been deceased more than 50 years (so OK if d. ←1968).

Other uses and disclosures, including scholarly and historical research uses, require individual patient authorization or strict compliance with HIPPA’s “safe harbor” provisions.

Fees for copies should include only cost recovery.

LOCAL POLICY CHOICE: Does WU self-designate whether it is a covered entity, a hybrid entity, business associate, or subcontractor. Our understanding is that WU is “hybrid entity.” An archives that is a non-covered part of a hybrid entity and that holds PHI from the covered function must comply with the Privacy Rule.

LOCAL POLICY CHOICE: “Best practice date” (time by which it can be assumed that patients have been dead > 50 years) :: 135 years?

### REMOVE

Names  
Geographic subdivisions smaller than a state  
Phone/Fax #  
Email address  
SSN  
Medical record #  
Health plan beneficiary #  
Account #  
Certificate/license #  
Biometric identifiers  
Full-face photographic images  
Any unique, identifying number or characteristic

### ACCEPTABLE RISK

Photographs  
General waiting room scenes without diagnosis  
Vaccination and preventive medicine  
Healthy child exams  
Non-specific use of equipment (e.g. glasses, wheelchair)  
Previously published images (consider context of original publication, sensitive of the information, and potential harm in republication)

*Sample materials* <see example of what to look for in each>

Billing statements from medical related establishments including doctor's offices and insurance companies

Pharmacy prescription information

Doctor's notes for excuse for work

Doctor's diagnosis paperwork

Notes from family about relatives' medical condition

### Recommendations:

[Defamation]

Defamation claims for damages typically involve injury to professional standing. Words and accusations (libel is written; slander is oral) that may injure a person's reputation are usually classified into five major categories: (1) committing a crime, (2) acting immoral or unethically, (3) associating with unsavory people or otherwise acting disgracefully or despicably, (4) demonstrating financial irresponsibility, and (5) demonstrating professional incompetence.

List (illustrative but non-exhaustive) of "red flag" words and expressions raising **defamation** concerns:

Addict	Defaulter	Kept woman
Adulteration of products	Divorced	Ku Klux Klan
Adultery	Double crossed	Mafia
AIDS	Drug abuser	Manipulate
Alcoholic	Drunkard	Mental illness
Atheist	Ex-convict	Mobster
Bad moral character	Fawning sycophant	Moral delinquency
Bankrupt	Fraud	Mouthpiece
Bigamist	Gambling den	Nazi
Blacklisted	Gangster	Neo-nazi
Blackmail	Gay	Paramour
Booze-hound	Graft	Peeping Tom
Bribery	Herpes	Perjurer
Brothel	Hit-man	Plagiarist
Buys votes	Hypocrite	Prostitute
Cheats	Illegitimate	Rape/rapist
Child Abuse	Illicit relation	Scan
Collusion	Incompetent	Scoundrel
Con artist	Infidelity	Slacker
Confidence man	Informer	Spy
Corruption	Insider trading	Suicide
Coward	Intemperate	Thief
Crook	Intimate	Unethical
Deadbeat	Intolerance	Unprofessional
	Jekyll-Hyde personality	Unsound mind

Or other words or expressions imputing:

- A loathsome disease;
- A crime, or words falsely charging arrest, or indictment for or confession or conviction of a crime;
- Anti-Semitism or other religious, racial or ethnic intolerance;
- Connivance or association with criminals;
- Financial embarrassment (or implication of insolvency);
- Lying;
- Membership in an organization which may be in disrepute at any given period of time;
- Poverty or squalor;
- Unwillingness to pay a debt.

## [PRIVACY]

Individuals may have actionable claims under state law if publication or disclosure of material in which they are identifiable invade their rights of privacy. Even limited distribution of material (e.g. making an interview transcript available to researchers, including it in public finding aid) can be enough to establish an archives as a re-publisher. The central issue

<intrusion upon seclusion>

<public disclosure of private facts>

<misappropriation of a person's identity>

## Photographs

### **CONCERNS**

Depictions of minors  
Photos from inside a home  
Lack of venue/subject consent  
Promotion/endorsement of product  
Commercially valuable identity

### **ACCEPTABLE**

Matters of public concern  
Consent (i.e. invitation of owner)  
Prior publication

*CONTEXT @ time of photo* is key

## Correspondence

Redact personal addresses, phone numbers, and emails after 1950, unless the individuals are deceased.  
Do NOT redact addresses of public officials, public institutions, businesses and organizations.

## Financial documents

Canceled checks, bank statements, credit card statements, utility bills, other bills, etc.  
Bank signature card  
Audit report  
Income tax returns  
Personal financial statement (declaring assets and liabilities)

**Recommendations:** Close until death. Permit individual-researcher access on ad hoc basis.

## Organizational records

Tenure files  
Letters from third-parties commenting on someone else's work  
Meeting minutes

## Military files/reports

**Recommendations:** If from donor and about donor, then no restriction.

## Experimental data and studies

### Legal Records

**Work Product Privileged Records** - correspondence, memoranda, drafts of briefs prepared in anticipation of litigation, written statements of witnesses, and notes of mental impressions or personal recollections prepared or formed by an attorney.

**Attorney-Client Privileged Records** - any document reflecting an exchange with a client or a potential client (including but not limited to written correspondence, memoranda to the file, notes, or any other report of communication to or from a client or potential client) made for the purpose of furnishing or obtaining professional legal advice and assistance.

#### **CONCERNS**

Law firm letterhead  
Summarized communication of a lawyer  
Information conveyed in a confidential manner

### PROCESS

Consideration for access by others will be given when a written request is presented to the University Archivist and Special Collections Curators. Both the initial request and the review of the University Archivist and Special Collections Curators' decision must be accompanied by sufficient information as to the intended uses of the records. The University may impose whatever conditions on the use of the records it deems necessary to preserve the confidentiality of the information contained in such records.

### RESOURCES

- Behrnd-Klodt, M. L., & Prom, C. J. (2015). *Rights in the digital era*. Chicago: Society of American Archivists.
- Neuenschwander, J. A. (2009). *A guide to oral history and the law*. Oxford: Oxford University Press.
- Sanford, B. W. (2011). *Libel and privacy*. Austin: Wolters Kluwer Law & Business.
- Evans Letocha, P. (2009). *Privacy Issues for Photographs/Film of Health and Medicine*. Society of American Archivists.
- Bingo, S. (2011). *Of Provenance and Privacy: Using Contextual Integrity to Define Third-Party Privacy*. *The American Archivist*, 74(2), 506-521. doi:10.17723/aarc.74.2.55132839256116n4.
- Kaplan, D. (1996). *The Stanley Milgram Papers: A Case Study on Appraisal of and Access to Confidential Data Files*. *The American Archivist*, 59(3), 288-297. doi:10.17723/aarc.59.3.k3245057x1902078.
- Wiener, J. A., & Gilliland, A. T. (2011). *Balancing between two goods: Health Insurance Portability and Accountability Act and ethical compliancy considerations for privacy-sensitive materials in health sciences archival and historical special collections*. *Journal of the Medical Library Association : JMLA*, 99(1), 15-22. doi:10.3163/1536-5050.99.1.005

# Privacy Processing Guidelines **\*\*DRAFT\*\***

