



# Public Records, FERPA, COPA and CIPA

*By*

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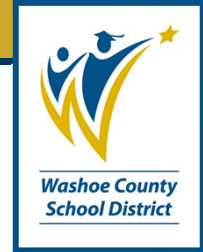
General Counsel

Washoe County School District



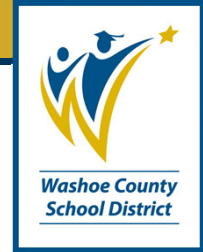
# Outline

- Public Records, in general, NRS 239
- FERPA - Family Educational Rights & Privacy Act
- COPA - Child Online Protection Act
- CIPA - Children's Internet Protection Act



# Public Records Act, NRS 239

- Legislative Declaration, 239.001:
  - Further democratic principles by providing public access to public records and books;
  - Chapter must be construed liberally to carry out that purpose;
  - Any exemption, exception, or balancing test must be construed narrowly;
  - The use of private entities for public services does not limit the public's access; and
  - If a record is declared open by law, such a declaration does not imply that a record not declared open is considered confidential.



# Public Records Act, NRS 239

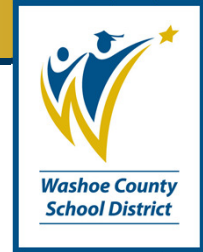
- NRS 239.0107 Actions by Governmental Entities
  - By the end of 5<sup>th</sup> business day:
    - Allow person to inspect or provide a copy;
    - If do not have custody, provide notice and the name of who does;
    - If unable to produce (volume/complicated), provide notice and a date and time record will be available or provided;
    - If denying request, provide notice and a citation to statute or legal authority\* \* \* .
  - If readily available, shall allow person to inspect, copy or provide copies.



## Public Records, NRS 239

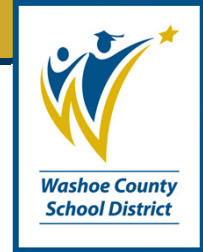
- If a request is denied pre-litigation, the public entity must provide notice and legal citation with *some type of explanation why*.
- If suit filed under public records act, government entity must provide a log of what is not provided unless government entity can show requesting party has enough information to meaningfully contest the claim of confidentiality.
  - This is known as a *Vaughn* index under FOIA.

*Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873  
(2011)



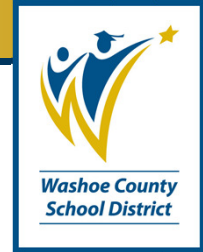
# Public Records, NRS 239

- NRS 239.052 permits a government entity to charge the actual cost unless
  - Law permits a particular fee to be charged, or
  - Law specifically states that it shall be provided at no cost.
- NRS 239.055 permits additional fee when extraordinary use of personnel or resources is required
- NRS 239.010:
  - (3) A government entity must redact confidential information, if feasible.
  - (4) A requester may request a particular medium in which the records should be provided, and government entity should comply.



# Public Records, NRS 239

- What is a public record? (NRS 239.010)
  - All public books and records of a government entity.
  - They must remain open to the public during business hours.
  - This includes:
    - Electronic forms of communication such as e-mails, texts, etc.



# Public Records, NRS 239

- Public Record or Not?
  - Facts: Clark County and CenturyLink, a private telecommunications provider, entered into a contract for the provision of inmate telephone services for the Clark County Detention Center (CCDC). Under the contract, CenturyLink provides a telephone system that could generate records of inmate telephone calls “for use in administrative and investigative purposes.” The records include, among other details, the number dialed, the call duration, the station originating the call, the call's cost, and the method of call termination. The system provides CCDC personnel with access to historical detail records containing multiple types of data, including calls to specified destination numbers, calls from specific inmates, completed and incomplete calls, and calls from specific inmate telephones.





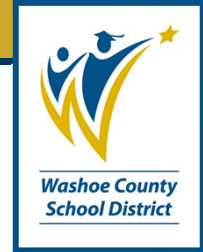
# Public Records, NRS 239

- Public Record or Not?
  - Facts: Blackjack Bonding, Inc., made a public records request to the Las Vegas Metropolitan Police Department (LVMPD), the governmental entity that runs the CCDC. In the request, Blackjack sought “all call detail records from telephones used by [CCDC] inmates ... for 2011 and 2012”—specifically, “a call log that details the description of the phone used ..., the call start time, dialed number, complete code, call type, talk seconds, billed time, cost, inmate id, and last name.” Additionally, Blackjack asked for “a list of all phones used by inmates and the phone description, including whether the phone is used to place ... free calls, collect calls, or both.” .
  - Are These public records?



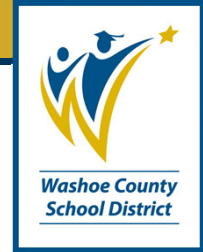
# Public Records, NRS 239

- Records for telephones used by county jail inmates were related to the provision of a public service and thus were “public records” under the Nevada Public Records Act even though private telecommunications provider contracted with county to provide telephone services to inmates **and calls between private individuals were detailed in call histories**; services assisted police department's facilitation of inmates' statutory right to use a telephone, and right contemplated making calls to private parties.
- *LVMPD v. Blackjack Bonding*, 343 P.3d 608 (2015)



# Public Records, NRS 239

- Note, the public agency carries the burden of proof by preponderance of the evidence to prove that the records are not public records because they are confidential or subject to a common law exception
- If the public agency loses in court, subject to payment of the attorney fees of the requestor.



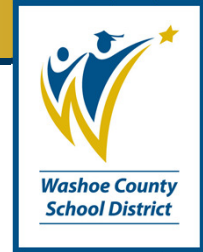
# Public Records, NRS 239

- Specific exemptions applicable to Districts:
  - NRS 49.095 - Attorney-Client Privilege;
  - NRS 385A.830 - Accountability systems must protect pupil information;
  - NRS 385B.100 - NIAA hearing, any student under 18's information must be redacted;
  - NRS 387.626 - Information gathered by a consultant for management principles of a District;
  - NRS 387.631 - Preliminary report confidential until final.



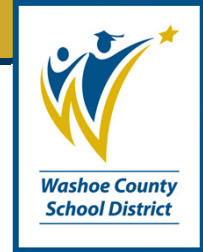
# Public Records, NRS 239

- More Specific Exemptions:
  - NRS 388.1455 - Safe to Tell Programs
  - NRS 388.259 - Crisis and Emergency Response Plan
  - NRS 392.029 - FERPA
    - NAC 392.301 to NAC 392.360
  - There are others that can be found in 239.010.



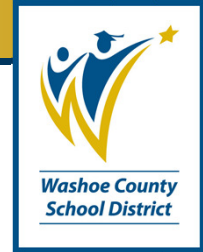
# Public Records, NRS 239

- Common Law exceptions:
  - Deliberative process privilege
    - Protects executive branch decision making;
    - Allows for frank exchange of opinions and recommendations on policies;
    - Must be:
      - Pre-decision (limited to communications occurring before policy adoption)
      - Deliberative (reflecting the processes by which policy alternatives are assessed)
  - *DR Partners v. Bd. of County Comm'ers. Clark County*, 116 Nev. 616 (2000)



# Public Records, NRS 239

- Common Law exceptions continued:
  - Balancing Test adopted in *Donrey v. Bradshaw*, 106 Nev. 630 (1990).
  - Discussed in *Reno Newspapers v. Haley*, 126 Nev. 211 (2010), the test is:
    - Private or law enforcement interests for nondisclosure v. general policy in favor of open government.
    - This is the test used to keep certain employment issues confidential not issues related to Superintendent, NRS 241.031.



# Statutory Exceptions to Public Records

- Student records or student personally identifiable information
  - Family Educational Rights and Privacy Act (FERPA)
    - Also in Nevada law at NRS 392.029; NAC 392.301 to NAC 392.360
  
- What is FERPA?





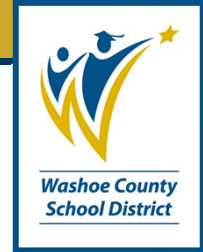
# FERPA

- FERPA is the Federal law that protects the privacy of students' education records (20 U.S.C. § 1232g; 34 CFR Part 99)
- FERPA applies to educational agencies and institutions that receive funds under any program administered by the Secretary of Education (§ 99.1)



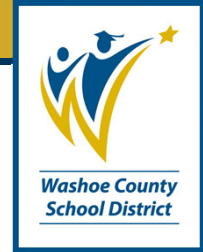
# Education Records

- “Education records” are records that are –
  - Directly related to a student; and
  - Maintained by an educational agency or institution or by a party acting for the agency or institution



# What Are NOT Education Records?

- Some exceptions to “education records” include:
  - Records created and maintained by a law enforcement unit for a law enforcement purpose
  - Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
  - Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.
  - Grades on peer-graded papers before they are collected and recorded by a teacher.



# Personally Identifiable Information

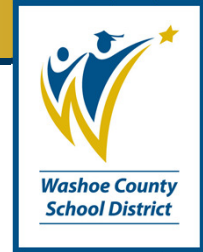
“Personally identifiable information” (PII) includes, but is not limited to:

- The student’s name
- The name of the student’s parent or other family members
- A personal identifier, such as the student’s social security number, student number, or biometric record
- Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name



# Personally Identifiable Information (cont.)

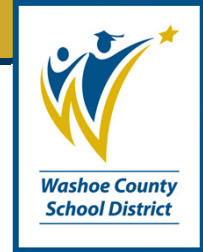
- “Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty
- Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education records relates



# Directory Information

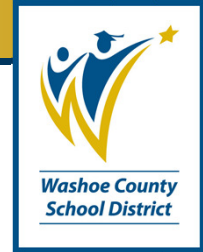
“Directory information” is -

- Information not generally considered harmful or an invasion of privacy if disclosed. Includes, but is not limited to:
  - name, address, telephone listing, electronic mail address
  - date and place of birth, photographs
  - participation in official recognized activities and sports
  - field of study
  - weight and height of athletes
  - enrollment status (full-,part-time, undergraduate, graduate)
  - degrees & awards received
  - dates of attendance
  - most previous school attended
  - grade level
- Generally cannot be student ID or Social Security Number



# Disclosure of Education Records

- Under FERPA, a school may not generally disclose personally identifiable information from an eligible student's education records to a third party unless the eligible student has provided written consent. However, there are a number of exceptions to FERPA's prohibition against non-consensual disclosure of personally identifiable information from education records. Under these exceptions, schools are permitted to disclose personally identifiable information from education records without consent, though they are not required to do so.



# Exceptions to Consent Requirement

“School officials,” including teachers, within a school may obtain access to personally identifiable information contained in education records provided the school has determined that they have “legitimate educational interest” in the information.

- Although the term “school official” is not defined in the statute or regulations, the U.S. Department of Education generally interprets the term to include parties such as: professors; instructors; administrators; health staff; counselors; attorneys; clerical staff; **trustees**; members of committees and disciplinary boards; and a contractor, volunteer or other party to whom the school has outsourced institutional services or functions
- Schools must define these officials in the annual notice





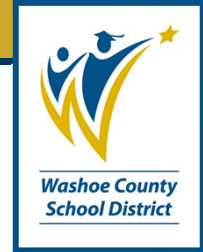
# Exceptions to Consent Requirement (cont.)

- “To schools in which a student seeks or intends to enroll
- To Federal, State, and local educational authorities conducting an audit, evaluation, or enforcement of education programs
- To organizations conducting studies for or on behalf of the school
- To parents of a dependent student
- To comply with a judicial order or subpoena (reasonable effort to notify)
- In connection with a health or safety emergency
- Directory information
- To State and local officials in connection with serving the student under the juvenile justice system (established by State law)



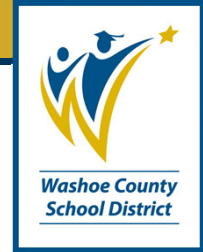
# Children's Online Privacy Protection Rule ("COPPA")

- COPPA imposes certain requirements on commercial operators of websites or online services directed to children under 13 years of age, and on operators of other websites or online services that have actual knowledge that they are collecting personal information online from a child under 13 years of age.



# What is personal information?

- First and last name;
- A home or other physical address
- Online contact information;
- A screen or user name that functions as online contact information;
- A telephone number;
- A social security number;
- A photograph, video, or audio file, where such file contains a child's image or voice;
- Information concerning the child or the parents of that child that the operator collects online from the child and combines with an identifier described above.



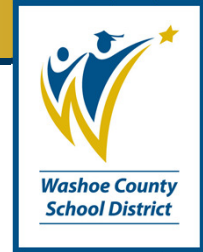
# How Does COPPA Apply to School Districts?

- Schools – which are usually part of the local government – do not fall within the legal definition of who is covered by COPPA because they aren't commercial “operators.”
- However...



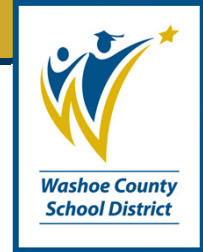
# How Does COPPA Apply to School Districts?

- Many school districts contract with third-party website operators to offer online programs solely for the benefit of their students and for the school system
- In these cases, the schools may act as the parent's agent and can consent to the collection of kids' information on the parent's behalf.
- However....



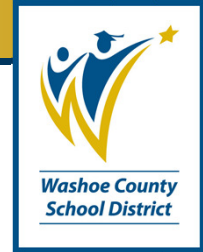
# How Does COPPA Apply to School Districts?

- The school's ability to consent for the parent is limited to the educational context – where an operator collects personal information from students for the use and benefit of the school, and for no other commercial purpose.



# How Does COPPA Apply to School Districts?

- In order for the operator to get consent from the school, the operator must provide the school with all the notices required under COPPA.
- In addition, the operator, upon request from the school, must provide the school a description of the types of personal information collected; an opportunity to review the child's personal information and/or have the information deleted; and the opportunity to prevent further use or online collection of a child's personal information.”
  - Parents can request that the school request this information



# COPPA

- In sum, COPPA provides important protections for children's personal information in the commercial space, and also recognizes the special role that schools may play in providing consent for the online collection of information from kids exclusively for educational services - for example, online testing.





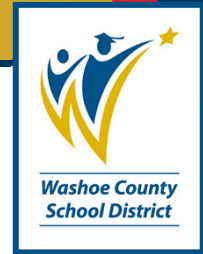
# The Children's Internet Protection Act (CIPA)

- Enacted by Congress in 2000 to address concerns about children's access to obscene or harmful content over the Internet. CIPA imposes certain requirements on schools or libraries that receive discounts for Internet access or internal connections through the E-rate program - a program that makes certain communications services and products more affordable for eligible schools and libraries.



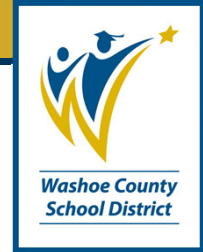
# The Children's Internet Protection Act (CIPA)

- Schools and libraries subject to CIPA may not receive the discounts offered by the E-rate program unless they certify that they have an Internet safety policy that includes technology protection measures.
- The protection measures must block or filter Internet access to pictures that are: (a) obscene; (b) child pornography; or (c) harmful to minors (for computers that are accessed by minors). Before adopting this Internet safety policy, schools and libraries must provide reasonable notice and hold at least one public hearing or meeting to address the proposal.



# The Children's Internet Protection Act (CIPA)

Internal Networks	<a href="http://m.iamnaughty.com">m.iamnaughty.com</a>	172.26.3.188	207.197.114.251	Blocked	Nudity, Pornogra
Internal Networks	<a href="http://pics.onsizzle.com">pics.onsizzle.com</a>	172.26.10.239	207.197.114.251	Blocked	Pornography
Internal Networks	<a href="http://api.digits.com">api.digits.com</a>	172.25.164.152	207.197.114.251	Blocked	Nudity, Pornogra
AD Users	<a href="http://pics.onsizzle.com">pics.onsizzle.com</a>	10.1.23.122	207.197.114.186	Blocked	Pornography
AD Users	<a href="http://www.dailyhaha.com">www.dailyhaha.com</a>	10.58.33.30	207.197.114.186	Blocked	Adult Themes, N
AD Users	<a href="http://tse1.explicit.bing.net">tse1.explicit.bing.net</a>	10.101.23.80	207.197.114.172	Blocked	Adult Themes, N
Internal Networks	<a href="http://bm.phncdn.com">bm.phncdn.com</a>	172.25.193.241	207.197.114.251	Blocked	Nudity, Pornogra
Internal Networks	<a href="http://pics.onsizzle.com">pics.onsizzle.com</a>	172.26.10.239	207.197.114.251	Blocked	Pornography
AD Users	<a href="http://www.twitfall.com">www.twitfall.com</a>	10.58.33.30	207.197.114.186	Blocked	Pornography
Internal Networks	<a href="http://bm.phncdn.com">bm.phncdn.com</a>	172.25.193.241	207.197.114.251	Blocked	Nudity, Pornogra
Internal Networks	<a href="http://m.iamnaughty.com">m.iamnaughty.com</a>	172.26.3.188	207.197.114.251	Blocked	Nudity, Pornogra
AD Users	<a href="http://www.dailyhaha.com">www.dailyhaha.com</a>	10.58.33.30	207.197.114.186	Blocked	Adult Themes, N
AD Users	<a href="http://www.allweirdpics.com">www.allweirdpics.com</a>	10.57.23.138	207.197.114.186	Blocked	Nudity, Pornogra
Internal Networks	<a href="http://m.iamnaughty.com">m.iamnaughty.com</a>	172.26.3.188	207.197.114.251	Blocked	Nudity, Pornogra
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# The Children's Internet Protection Act (CIPA)

- Schools subject to CIPA have two additional certification requirements:
  - 1) their Internet safety policies must include monitoring the online activities of minors; and
  - 2) as required by the Protecting Children in the 21st Century Act, they must provide for educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms, and cyberbullying awareness and response.



# The Children's Internet Protection Act (CIPA)

- Schools and libraries must certify they are in compliance with CIPA before they can receive E-rate funding.
- CIPA does not apply to schools and libraries receiving discounts only for telecommunications service only;
- An authorized person may disable the blocking or filtering measure during use by an adult to enable access for bona fide research or other lawful purposes.
- CIPA does not require the tracking of Internet use by minors or adults.