

Remarks to the Virginia Tech Review Panel
By Kay Heidbreder, University Legal Counsel
May 21, 2007

Colonel Massengill and Members of the Review Panel, if I may.....

My name is Kay Heidbreder. I serve as the University Legal Counsel and Assistant Attorney General assigned to Virginia Tech. In this capacity, I provide legal advice under the direction of the Attorney General to the University. Given my position, Dr. Steger has asked me to provide an overview of the legal mandates under which Virginia Tech operates with respect to the protection of student information. This overview is not meant to be legal advice to this panel. Rather, Dr. Steger believes that it is crucial for this Panel to have some context of the legal landscape for institutions of higher education. In addition, he has asked that my remarks center on the interplay between the Counseling Center, the student disciplinary system, faculty interaction with students and the police department. He has also asked me to share the constraints that the University faces in providing student records to the public at large.

At any institution of higher education in Virginia, there are a number of laws protecting the privacy of students and student records. These laws include The Family Educational Rights and Privacy Act, 20 U.S.C.A. 31232g, HIPAA 42 U.S.C. Section 1320, the Virginia Freedom of Information Act, Section 2.2-3700, Code of Virginia, as amended, and the Government Data Collection and Dissemination Practices Act, Section 32.2-3800, Code of Virginia, as amended. The Family Educational Rights and Privacy Act (aka FERPA or Buckley Amendment) sets forth criteria for the dissemination of information to protect a student's rights of privacy.

The University is restricted in its ability to share a student's educational records with third parties, external to the University, absent a properly executed release or a court order. While it is debatable whether the FERPA protections end at the student's death, the other laws contain no such limitation. Exceptions to these non-disclosure requirements include sharing records with employees within the University who need the information to do their job. For example, an instructor can share grade information with the Registrar. However, there is never permitted a disclosure for medical or counseling records. This absolute prohibition tracks the restrictions covering disclosure of medical records as provided in HIPAA or the federal legislation that protects health information for every individual treated by a medical professional in the United

States. FERPA also provides a quirky privacy provision that places a wall between the educational records at an institution and the law enforcement records maintained by the campus police department. To put this in concrete terms, educational records cannot be freely disclosed by the administrative offices with the police department. To give an example, a student is charged in the University's disciplinary system with a violation of the acceptable use policy that prohibits sending harassing e-mails to a fellow student. The University's hearing officer is precluded from sharing the outcome of the hearing with the campus police. Another example is that police are not informed when students are treated for psychiatric problems. In the same vein, the police are not given health information when a patient is released from a hospital. This latter example actually relates to the privacy protections contained in HIPAA.

In addition to the federal statutes, state law also restricts the University's ability to disseminate student records. The General Assembly has articulated the privacy concerns in the Virginia Freedom of Information Act by exempting from mandatory disclosure a student's scholastic records. While the Freedom of Information Act permits limited disclosure of records at the University's discretion, FERPA and other state laws preclude disclosure. In particular, I would draw your attention to the Government Data Collection and Dissemination Practices Act, Section 2.2-3800 Code of Virginia, as amended. Specifically, that statute authorizes the University to collect, maintain and share information with third parties only to the extent necessary to accomplish the University's mission of educating the student. It does not provide for unlimited disclosure in the law enforcement context to third parties.

The protections afforded by federal and state laws to the individual are most absolute in the medical context. For example, a medical screening is not part of the University's admissions process. The Code of Virginia, Section 23-7.5, requires that each prospective student provide a health history, but this history is not all encompassing. The health history is really a listing of diseases against which the student has been immunized. The purpose of this code requirement is to guard against the potential outbreak of controlled diseases in the close confines of a residence hall. Even this modest requirement is not absolute as the General Assembly has waived the immunization requirement on a student's religious grounds.

Given the legal framework, let me tell you what I can about Mr. Cho based on police records. There was a narrow window in late 2005 to early 2006 that his behavior was called into question. The Virginia Tech Police made a referral to the University's disciplinary system for an incident in

which he sent an unwelcomed e-mail to a female student in late 2005, or approximately sixteen (16) months before April 16, 2007. The disciplinary system contacted the e-mail recipient to determine whether she wanted to pursue the matter. She declined to do so. Therefore, there was no cause for action on the part of the University. Since Mr. Cho's enrollment in Fall 2003, he had no other interaction with the disciplinary system.

As has been reported publicly, the Virginia Tech Police Department also received an inquiry during the 2005-2006 academic year from the Chair of the English Department concerning Mr. Cho's classroom behavior based on the content of some of his writings and the fact that Mr. Cho took pictures of other students with his cell phone camera. The Chair of the Department did not share the specific writings with the Police, nor did she file a formal police report. As determined by an informal review conducted by the Police Department, the behavior was not criminal in nature. The Police offered to provide any necessary assistance. Instead of further Police involvement, the Chair talked to Mr. Cho and the Chair and he agreed that he would attend private tutoring sessions that would allow him to complete the class assignments without the necessity of his returning to the class. Records show no further class based complaints related to inappropriate behavior. Further, no referral was made to the student disciplinary system about this event.

An additional contact on December 13, 2005, between Mr. Cho and the Virginia Tech Police has been documented. According to public records maintained by the Montgomery County General District Court, the Virginia Tech Police brought Mr. Cho to the attention of the Department of Mental Health, Mental Retardation and Substance Abuse Services as a result of a concern raised by a fellow student who knew Mr. Cho. In turn, Mr. Cho was brought before the General District Court Special Justice, who ordered Mr. Cho to undergo evaluation at the Carilion St. Albans Behavioral Facility. On December 14, 2005, the Special Justice for the General District Court ordered Mr. Cho to follow-up out-patient treatment because of the danger he presented to himself as a result of mental illness. No follow-up report was made to the Virginia Tech Police.

In summary, the impact of these laws that I have outlined is to limit what can be shared about students publicly or with third parties, within the organization, and even with the police department. Given the constraints imposed by the law, there are restrictions on what Virginia Tech can share about Mr. Cho publicly. This was the reason why Virginia Tech did not release Mr. Cho's academic records to the F.B.I. until the F.B.I. had obtained a subpoena. It is also

important to stress that it is not just Mr. Cho's records that are protected by these laws. Virginia Tech would be precluded from releasing similar information about any of the victims of the events of April 16. Furthermore, any complaints filed by third party students about Mr. Cho could not be shared publicly, not just to protect Mr. Cho, but also to protect the identity of those third party complainants as well.

Thank you for your time today. Next David Ford, Vice President for Academic Affairs, will speak with you about the events of April 16, 2007.