

OPINION NO. 90-099**Syllabus:**

1. Public schools may obtain records of prior illegal drug or alcohol use by a student from law enforcement agencies. (1987 Op. Att'y Gen. No. 87-010, clarified.)
2. Public schools may, but are not required to, call appropriate law enforcement agencies to investigate suspected cases of illegal drug or alcohol abuse on school property.
3. R.C. 3319.321 prohibits the release, without proper consent on behalf of the student, by public school officials of information concerning illegal drug or alcohol use by students to law enforcement agencies when such information is "personally identifiable information other than directory information concerning any student attending a public school."

To: Michael R. Fegen, Huron County Prosecuting Attorney, Norwalk, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 31, 1990

I have before me your request for my opinion concerning the confidentiality of records pertaining to juveniles accused of a first-time drug or alcohol offense. You have asked that I clarify 1987 Op. Att'y Gen. No. 87-010 by addressing these specific questions:

1. As further clarification of Attorney General Opinion 87-010, with respect to first-time use of illegal drugs or alcohol by students, what is the definition of "first-time use"?
2. As further clarification of OAG Opinion 87-010, may a public or private school, in determining whether a drug/alcohol offense by a student is a first offense, contact local law enforcement agencies for a record of prior informal or formal violations/charges?
3. As further clarification of OAG Opinion 87-010, with respect to the use of drugs or alcohol by a student on school property constituting a violation of law, does the confidentiality of personal information outweigh the duty of a school official to report a crime, and if so, does the law provide the school or school official with immunity from potential charges of obstruction of justice, cover up, or failure to report a crime?

A careful review of Op. No. 87-010 and relevant Ohio statutes reveals that the terms "first-time use" and "first offense" are not defined by either the opinion or the Ohio Revised Code. Instead, Op. No. 87-010 appears to have adopted those particular phrases as a convenience from the letter of the Lucas County Prosecuting Attorney who requested my opinion; these terms merely served to define the parameters of his question. As such, they do not have independent legal significance, and it would not be proper for me to presume the meaning he intended to attribute to these terms. I, therefore, am unable to respond to your first question. Further, for purposes of this opinion, I will treat your second and third questions as referring to *any* illegal use of alcohol or drugs.

Your second question is whether a public or private school,¹ may obtain records of prior informal actions with respect to, or formal adjudication of, drug or

¹ In 1987 Op. Att'y Gen. No. 87-010, I noted that private schools need not follow the dictates of R.C. 3319.321, R.C. 149.43, or R.C. Chapter

alcohol offenses from local law enforcement agencies. An answer to this question requires reference to Op. No. 87-010. Therein, at 2-59, I stated that "law enforcement agencies may share information on first-time juvenile chemical abusers...with schools." In Op. No. 87-010, the questions posed were limited to records of law enforcement agencies where no formal charges were brought. The rationale in Op. No. 87-010, however, applies equally well to records where formal charges are involved. Op. No. 87-010, however, notes that schools are restricted in sharing with law enforcement agencies information regarding the use of drugs or alcohol by a student on school property. As made clear by Op. No. 87-010, the prohibition applicable to the school is the release of records, *not* the receipt of information. Therefore, to the extent that information from law enforcement agencies regarding use of drugs or alcohol by students is relevant and necessary to determine appropriate disciplinary measures, or to facilitate some other purpose closely related to the school's educational functions,² a local board of education may request such records from law enforcement agencies. Law enforcement agencies may share information regarding alcohol or drug use by juveniles contained in the public records of those agencies.³

Your third question concerns the duty of a school official to report the use of drugs or alcohol. The concern underlying your question is whether an act of delinquency committed on school property must be reported as a crime. The duty to report serious crimes is codified at R.C. 2921.22(A), which states that "[n]o person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities." A juvenile is, however, charged with committing an act of delinquency, not a felony. *See, e.g.*, R.C. 2151.01(B) (one of the purposes of R.C. Chapter 2151 is "[t]o protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts"); R.C. 2151.02(A) ("delinquent child" includes any child "[w]ho violates any law of this state, the United States, or any ordinance or regulation of a political subdivision of the state, which would be a crime if committed by an adult"); R.C. 2151.23(A) (juvenile court has exclusive original jurisdiction to adjudicate a child as "delinquent"). Further, R.C. 2921.22(A) does not require the reporting of acts of delinquency. Even an act by a juvenile which would constitute a felony if committed by an adult must be treated as an act of delinquency, with the judicial process commenced by the filing of a complaint alleging delinquency. *See, e.g.*, R.C. 2151.26; Ohio R. Juv. P. 9(B); W. Kurtz & P. Giannelli, *Ohio Juvenile Law* 77 (2d ed. 1989). It is, therefore, necessary to determine if a school official is mandated to report acts of delinquency.

1347. I again note, however, that release of student information by private schools that receive federal funding is subject to the conditions imposed by 20 U.S.C. §1232g. No provision of state or federal law, however, prohibits a private school from receiving information from law enforcement agencies regarding a student's use of illegal drugs or alcohol.

² A local board of education may regulate the illegal use of drugs and alcohol by its students pursuant to its duty to govern and control its schools and students. *See* R.C. 3313.20; R.C. 3313.47. Information from law enforcement agencies regarding use of illegal drugs or alcohol may be necessary and relevant to school discipline, particularly where the school has an active counseling program as an integral part of its disciplinary scheme. To the extent that information about other drug or alcohol use would indicate a possible behavioral pattern, such information would be helpful in tailoring a counseling program. School officials, in furtherance of the school's educational function, may obtain records of prior illegal drug or alcohol use from law enforcement agencies in order to determine prior illegal drug or alcohol use by a student.

³ R.C. 2151.313, however, restricts the release of records of the arrest or custody of a juvenile, if fingerprints or photographs are taken.

A statute parallel to R.C. 2921.22(A) applicable to juveniles is R.C. 2151.27(A), which states that "[a]ny person having knowledge of a child who appears to be a...delinquent...may file a sworn complaint with respect to that child in the juvenile court of the county..." See also Ohio R. Juv. P. 10. Unlike R.C. 2921.22(A), however, R.C. 2151.27(A) is permissive, not mandatory. Since the filing of a complaint alleging delinquency is not mandated, there is no duty to report an act of delinquency.

While no duty to report an act of delinquency exists under R.C. 2921.22(A) or R.C. 2151.27(A), a school official may exercise discretion in determining whether to bring an act of delinquency to the attention of law enforcement authorities. Inasmuch as a board of education has a duty to control its schools and students under R.C. Chapter 3313, a board of education may enlist the assistance of law enforcement agencies. For example, as noted in Op. No. 87-010 at 2-62, school authorities "could call the appropriate law enforcement agency to investigate any future cases of suspected chemical abuse.... In this way, the law enforcement agencies would have the necessary information about the youths involved in suspected chemical abuse."

Because R.C. 2151.27(A) authorizes the filing of a complaint alleging the commission of an act of delinquency, the applicability of R.C. 2151.27(A) to Ohio public school's personnel must be determined inasmuch as a significant amount of information about public school students kept by Ohio public schools is made confidential by R.C. 3319.321. That provision states, in relevant part, at division (B):

No person shall release, or permit access to, personally identifiable information other than directory information concerning any student attending a public school, for purposes other than those identified in division (C) or (E) of this section, without the written consent of the parent, guardian, or custodian of each such student who is less than eighteen years of age, or without the written consent of each such student who is eighteen years of age or older.

"Directory information" is defined as including "a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, date of graduation, and awards received." R.C. 3319.321(B)(1). In Op. No. 87-010 at 2-62, I expressly stated the general rule enunciated by R.C. 3319.321, as applied to information concerning student drug or alcohol use, is that:

Information concerning drug offenses is not included as "directory information" under R.C. 3319.321 and, thus, may not be disclosed without the written consent of the parent, guardian, or custodian of the pupil, or of the pupil himself if he is eighteen or older, unless such disclosure is permitted under R.C. 3319.321(C) or (E).

....

Therefore, R.C. 3319.321 prohibits the release of the records in question by a public school to a law enforcement agency unless consent is obtained.

There are, however, two exceptions to this general rule of non-disclosure. The first of these, the administrative use exception, as outlined by R.C. 3319.321(C), states, in pertinent part, that:

Nothing in this section shall limit the administrative use of public school records by a person acting *exclusively* in his capacity as an employee of a board of education or of the state or any of its political subdivisions, any court, or the federal government, and nothing in this section shall prevent the transfer of a student's record to an education institution for a legitimate education purpose. However, except as provided in this section, public school records *shall not be released or made available for any other purpose....* The provisions of this

division regarding the *administrative use* of records by an employee of the state or any of its political subdivisions or of a court or the federal government *shall be applicable only when the use of the information is required by state statute* adopted before November 19, 1974, or by federal law. (Emphasis added.)

Thus, the exception set forth in R.C. 3319.321(C) is for the administrative use of public school records under certain circumstances by an employee of the board of education, state, or political subdivision. It can be argued, therefore, that the school records of prior illegal drug or alcohol use by a student may be released to law enforcement agencies, since the employees of such agencies are employees of the state or a political subdivision. This "administrative use" exception, however, only applies "when the use of the information is *required* by state statute adopted before November 19, 1974, or by federal law." R.C. 3319.321(C) (emphasis added). I, however, have found no state or federal statute which requires the use of such information. Therefore, the "administrative use" exception does not apply.

The second exception to the non-disclosure mandate of R.C. 3319.321 is found in R.C. 3319.321(E), which authorizes access for the limited law enforcement purpose of missing children investigations pursuant to R.C. 2901.30. Even this information, however, may only be used by the law enforcement agency to solve the case, R.C. 3319.321(E), and "shall not be admissible as evidence against the minor who is the subject of the fingerprints, photographs, or records in any proceedings in any court." R.C. 3319.321(C).

Both the "administrative use" and "missing children" exceptions are narrow and explicitly set forth in the statute. The general rule explicit in the statute is that the information covered may only be released with prior written consent of the student, or the student's parent, guardian or custodian. Only directory information is categorically excepted from the prohibition against release.

R.C. 3319.321 does not appear, however, to prohibit the reporting of an *incident* of delinquency which law enforcement agencies may investigate. To the extent that law enforcement officers develop information about the alleged act of delinquency independently from personally identifiable information other than directory information, access to which is prohibited under R.C. 3319.321, they may investigate acts of delinquency on school premises. A school official or employee is prohibited by R.C. 3319.321(B) only from releasing personally identifiable information.

Further prohibitions against release of public school student records are imposed by 20 U.S.C. §1232g (Family Educational Rights and Privacy Act (F.E.R.P.A.)) and the regulations thereunder. F.E.R.P.A. applies to any educational agency or institution that receives federal funds under programs administered by the Secretary of Education. 20 U.S.C. §1232g(a) and (b); 34 C.F.R. §99.1. F.E.R.P.A. prohibits the release of student education records other than directory information, without consent, except to education and related officials for "legitimate educational interests," for audit purposes, to state and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to state statute adopted prior to November 19, 1974, the student or the student's parents, and in connection with an emergency, to protect the health and safety of students or others. 20 U.S.C. §1232g(b); 34 C.F.R. §99.31. "Education records" means records that are "[d]irectly related to a student, and...[m]aintained by an educational agency or institution." 34 C.F.R. §99.3; 20 U.S.C. §1232g(a)(4)(A). If the prohibitions against release are violated, a termination of federal assistance may result. 20 U.S.C. §1232g(f). Because F.E.R.P.A. explicitly prohibits the release of educational records without student consent except to specified persons or for specified uses, the nonexistence of a law enforcement exception in the statute precludes the release of education records concerning a particular student's use of drugs or alcohol to law enforcement officials without the student's consent. Therefore, a board of education and its employees are prohibited from releasing student educational records for law enforcement purposes if the board of education has received federal funds from a program administered by the Secretary of Education.

Your third question also raises the issue of the confidentiality of personal information. R.C. 1347.01(E) defines "personal information" as:

any information that describes anything about a person, or that indicates actions done by or to a person or that indicates that a person possesses certain personal characteristics, and that contains, and can be retrieved from a system by, a name, identifying number, symbol, or other identifier assigned to a person.

No provision of R.C. Chapter 1347 makes personal information confidential. Confidentiality is, instead, granted by specific statutory provisions. 1990 Op. Att'y Gen. No. 90-007. Two such provisions germane to student drug or alcohol use on school property are R.C. 3319.321 and F.E.R.P.A., already discussed. Inasmuch as those provisions restrict access to public school student records, such records are confidential according to the terms of the statutes.

It is, therefore, my opinion, and you are hereby advised that:

1. Public schools may obtain records of prior illegal drug or alcohol use by a student from law enforcement agencies. (1987 Op. Att'y Gen. No. 87-010, clarified.)
2. Public schools may, but are not required to, call appropriate law enforcement agencies to investigate suspected cases of illegal drug or alcohol abuse on school property.
3. R.C. 3319.321 prohibits the release by public school officials of information concerning illegal drug or alcohol use by students to law enforcement agencies when such information is "personally identifiable information other than directory information concerning any student attending a public school."