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COMPLYING WITH THE CLERY ACT: THE ADVANCED COURSE

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This Whitepaper is offered for the purpose of assistance in compliance with the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act. This Whitepaper is not offered as legal advice, and should not be taken as such. Before acting on any of the ideas and suggestions contained herein, readers are cautioned to consult with licensed counsel in their own jurisdictions.

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Complying With The Clery Act: The Advanced Course

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This Whitepaper has been co-written by three people who have extensive involvement with and knowledge of Clery Act compliance issues. The authors have identified some of the tougher questions they have been asked, and have written short explanations to twelve complicated Clery Act issues. To indicate which segment has been written by which author, that author's initials follow the segment.

How should “unfounded” complaints be addressed?

The documentation requirements for unfounded complaints stand as examples of areas where the interplay of the Clery Act's requirements and the procedures that police agencies follow when completing Uniform Crime Reports (UCR) can cause confusion. Let's first consider the disclosure requirements related to the institution's *Crime Log*.

Each institution that has a campus police or security department must maintain a written, easily understood daily crime log that records, by the date the crime was reported, any crime that occurred on campus, in or on noncampus buildings or property, on public property, or within the patrol jurisdiction of the campus police or security department and is reported to that campus department. The crime log must include--

- (i) The nature, date, time, and general location of each crime; and
- (ii) The **disposition** of the complaint, if known.

“Complaint”, in this instance, is police-speak for “case.” So **every** crime that is reported to a campus police or security agency as having occurred within one of the listed geographic areas must be recorded in the crime log. If a complaint is determined to be “unfounded” (false or baseless – meaning that the offense neither occurred nor was attempted), then “unfounded” is the **disposition** that should be recorded for the case in the crime log. UCR protocol stipulates that a decision to “unfound” a complaint can only be made by the investigating police agency. The assignment of this disposition would be appropriate in an instance where the investigation has established that the initial report of the offense was fabricated.

An example is a case from several years ago where a woman reported that a knife-wielding assailant had sprung from the bushes and made an unwitnessed attempt to sexually assault her as she walked past a fraternity house on her way to a morning French exam. Through investigation it was eventually determined that her “slashed” shorts had been cut with scissors, and that her report had been motivated by a lack of preparedness for the exam. Circumstances such as these are relatively infrequent and should not be confused with situations where a report might be described as “unproven”, perhaps because of investigators’ inability to solve a case due to a lack of sufficient evidence, to apprehend a suspect, or to obtain a conviction in court - none of which would render a complaint “unfounded”. Nor would a victim’s unwillingness to cooperate, the fact that the value of the property loss involved may be small, or the subsequent recovery of stolen property result in an “unfounded” case.

Given this standard, a disposition of “unfounded” could not appropriately be assigned to any case that was not referred to law enforcement personnel – on campus or off – for investigation. It should be noted that a determination that the disposition of a case is “unfounded” will rarely be reached within two days of the initial report of a crime, so virtually all such cases will initially be logged by the campus agency with a disposition of “pending”, and that disposition will subsequently need to be updated (within two days of the determination of the change in case status). More about the 2-day crime log time frame later.....

Although every crime that is reported to a campus police or security agency must be “logged”, the requirements that govern the inclusion of crime statistics in the annual report are in some ways more restrictive – and in some ways less so.

Unfounded complaints - those cases in which appropriate law enforcement officials conclude that the crime did not occur with the same degree of certainty they would require for purposes of reporting under the FBI's Uniform Crime Reporting System - need not be disclosed in the annual campus security report. However, this standard [articulated in the Final Rule of April 24, 1994, and still relevant to the annual report aspect of the Clery Law] requires the inclusion of **any reports** of occurrences of the statute's itemized list of crimes that were made known to campus security authorities **other than** campus law enforcement – and that were not subsequently reported to and investigated by law enforcement personnel. So, no law enforcement investigation = no

possibility of a disposition of “unfounded”, and therefore no justification for deleting a reported offense from the annual statistical tally. Put another way, there is no explicit requirement in the Clery Law for investigation and substantiation of all statistical reports. They are reports, and just that, not verified crimes. This is what allows campus judicial cases and anonymous reports from counselors to be eligible for statistical counting despite the fact that campus law enforcement has not investigated. **DFT**

Forcible v. non-forcible sex offenses.

I visited a college recently that reported 19 non-forcible sex offenses last year. While it is possible that this institution experienced a rash of incest or statutory rape cases, it is much more likely that these incidents were misclassified. And this isn't just happening at this one institution. Many people assume non-forcible sex offenses to have the intuitive meaning of sex offenses in which physical force is not used, such as in many date and acquaintance rapes. In reality, non-forcible sex offenses don't involve force, but they don't include consent-based offenses, such as date or acquaintance rape. The FBI's Uniform Crime Reporting (UCR) System is the source of the definitions that we use for Clery Act reporting. According to the Appendix E to Part 668 of the Student Assistance General Provisions, forcible and non-forcible sex offenses are defined according to the National Incident-Based Reporting System (NIBRS) of the UCR Program. Nonforcible sexual intercourse, which are defined to include, only:

- A. Incest. Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- B. Statutory Rape. Nonforcible sexual intercourse with a person who is under the statutory age of consent.

Most sex offenses that colleges and universities will report are forcible sex offenses, which is a broad category under the NIBRS system. Forcible sex offenses include, “Any sexual act directed against another person, forcibly and/or against that person’s will; or not forcibly or against the person’s will where the victim is incapable of giving consent.” This definition is interpreted broadly to include the offenses we address on campuses as date and acquaintance rapes or assaults, because in nearly all such offenses, the act was against the will of the victim and/or where the victim was incapable of giving consent, often as a result of the use of alcohol or other drugs. In fact, the NIBRS definition is interpreted to cover offenses in which a victim was incapable of giving legal consent, which is not the same as factual consent. As we know, some people may give factual consent as a result of the use of alcohol, drugs or rape drugs, but not be legally capable of so doing.

Much has been made of the fact that college policies do not often coincide in terms of terminology with the NIBRS standards. Often college policies make reference to issues of consent and incapacity. But, for Clery Act purposes, a campus offense must be evaluated based on the NIBRS definition, not the campus definition. The requirement

that the sexual activity be against the will of the victim is not a requirement for proof of resistance, but for a showing that the sexual activity took place without the victim's consent. A campus hearing or criminal trial is not required for a reported incident to qualify as a Clery Act statistic, as long as the reported act meets the definition of the offense. Clery does not require substantiation that a crime took place, only that a crime was reported and not unfounded (see discussion of unfounding, above).

As a practical note, it is also helpful to know that though the Clery Act is unclear on this point, forcible and non-forcible sex offenses are not intended to be reported together in the same tally, and must be separate sub-categories of the sex offense category, with their respective statistics distinct from each other. **BAS**

What if an “acquaintance rape” involves a minor – how is this classified and does the hierarchy rule apply?

The purpose of the UCR Hierarchy Rule is to isolate a single aspect of a criminal incident as its “defining characteristic” – specifically, the “most serious” offense committed during an incident is the statistic that gets counted. A classic example would be a robbery of the campus bookstore during which a clerk is struck with the butt of the robber's weapon, and then the getaway is accomplished in a car that's stolen from the curbside in front of the store. This criminal incident involved three “Part I” UCR offenses: robbery, aggravated assault, and motor vehicle theft. Although many criminal

charges may be leveled once the perpetrator is apprehended, under the hierarchy rule the incident would be classified as a robbery.

The hierarchy rule actually has no bearing on the classification of a case involving the “acquaintance rape” of a minor. Whether the alleged perpetrator of the offense was an “acquaintance” of the victim or not, if the sexual act was directed against the victim forcibly and/or against that person’s will, or if the victim was incapable of giving consent, the crime would be generally be classified as a forcible sex offense. If, however, the crime involved sexual intercourse with a victim who was under the statutory age of consent in a given jurisdiction, then the offense would classified as non-forcible sex offense if there was no use or threat of force. If force was used or threatened, the offense would be classified as a forcible sex offense, regardless of the age of the victim. **DFT**

Who is a campus security authority?

A recent campus visit revealed a college with over 7500 community members, and no more than 100 total reported Clery Act statistics. This might be believable if it was a seminary, but it was a medium-sized rural public institution. I suspect that campus police were recording for statistical purposes only those incidents reported directly to them. Partly, the definition of campus security authority is counter-intuitive, because it covers much more broadly than just those who are campus law enforcement or public safety personnel. A campus security authority is:

- 1) Anyone the college designates as someone to whom crimes should be reported;
- 2) Campus and local law enforcement or public safety;
- 3) Any official of the institution who has significant responsibility for student and campus activities, except for pastoral and professional counselors as defined by regulation;
- 4) Nonpolice individuals responsible for campus security.

Clergy are exempt, when they meet the regulatory definition of a pastoral counselor.

Licensed professional and pastoral counselors functioning within the scope of their counseling/clergy roles are exempt. And, people with medically-conferred confidentiality, such as health center nurses and doctors, are likely to be exempt. Other than these few exceptions, colleges must ensure that the annual security report includes available statistics collected from: student affairs, judicial affairs, student activities, residence life (including RA's), Greek advisors, campus law enforcement, local law enforcement, affirmative action, campus health educators, non-counseling rape crisis staff, team coaches, athletic directors, and any other official whom your institution may have self-defined as having significant responsibility for student and campus activities.

Faculty members will also be considered campus security authorities when their level of student involvement reaches beyond the basic requirements of their professional roles, such as when faculty serve as advisors to student groups, clubs, organizations, or run internship programs, study-abroad activities, or other programs which add to the level of responsibility faculty members have for student and campus activities. **BAS**

What is the difference between non-campus buildings/property and a branch campus?

A client conducts classes in an office building 120 miles from its main campus. The classes are given by the college's professors at this remote location five nights a week. The college considers the site an extension campus, and leases or owns the space. If a crime occurs there, should it be listed by the college in its Annual Security Report as an incident at a branch campus, and therefore on an independent statistical grid from its main campus statistics, or should it be listed on the main campus statistical grid as having taking place in the category of Non-Campus Buildings and Property? What is the difference between a branch campus and Non-Campus Buildings and Property, and how do we know what to classify where? Quite simply, crimes are placed on separate branch campus grids only when those crimes take place at a site that has applied for and been granted branch campus status by the Department of Education. A branch campus is defined in Section 600.2 of the Title IV (Higher Education Act) Institutional Eligibility Regulations.

Thus, our crime at the remote office building site would only be classified as having taken place at a branch campus if that site was recognized by the Department of Education as a qualified branch campus. Simply because the college considers it to be a branch or extension campus does not make it so. The next question is whether the crime qualifies for inclusion in the main campus' Annual Security Report as an incident occurring in/on Non-Campus Buildings or Property. Included in the definition of Non-

Campus Buildings or Property are five elements pertaining to institutionally owned or controlled property (as opposed to student organization owned or controlled property):

1. any building or property (other than a branch campus);
2. that is owned or controlled by an institution of higher education;
3. that is used in direct support of, or in relation to, the institution's educational purposes;
4. is frequently used by students;
5. and is not within the same reasonably contiguous geographic area of the institution.

This definition functions as a set in which each of the five elements must be satisfied in order for the categorization to be made. Under this definition, our off-campus office building would meet the test as a Non-Campus Building, because it satisfies all five elements. It is a building other than a branch campus that is controlled (see discussion of control, below) by the institution. It is used in direct support of, and in fact as a part of the institution's educational mission, and is frequently used by the institution's students. And, it is 120 miles from campus, so that it is not reasonably contiguous to the main campus. **BAS**

The Making of the Clery Act Annual Report

For some reason, it slipped under the radar screens of many colleges that in addition to new statistical reporting requirements, the 1998 amendments to the Clery Act added several new policy disclosure mandates. One of those requirements is to include a description in the Annual Report of the institution's procedures for preparing the annual disclosure of crime statistics. The disclosure need not be overly detailed. It need only provide a general description of the process for preparing the report, including the offices surveyed. There is no requirement to disclose every detailed step in the report's preparation. I suggest that the statement include the basics on:

- *What office is responsible for compiling the annual statistical information and policy disclosures;*
- *Who reports crime incident information to that office;*
- *How double counting of incidents is minimized;*
- *How crimes are classified;*
- *How crimes are substantiated;*
- *How anonymous reports are addressed;*
- *Whether a reporting form is used.*

BAS

What conditions must be met for web disclosure?

One of the most beneficial changes included in the new regulations for the Campus Security Act makes it much easier for institutions to utilize the Internet for disseminating the Annual Security Report. This change was facilitated by a regulatory distinction between notice and disclosure. Institutions are still required to provide direct written

notice to all enrolled and prospective students and current and prospective employees.

This notice must contain the following information:

- A statement of the report's availability;
- A brief description of the report's contents;
- The exact electronic address at which the information is posted; and
- A statement that the institution will provide a paper copy of the information on request.

The Department of Education has provided the following sample notice statement:

A copy of [name of institution]'s annual security report. This report includes statistics for the previous three years concerning reported crimes that occurred on campus; in certain off-campus buildings or property owned or controlled by [name of institution]; and on public property within, or immediately adjacent to and accessible from, the campus. The report also includes institutional policies concerning campus security, such as policies concerning alcohol and drug use, crime prevention, the reporting of crimes, sexual assault, and other matters.

You can obtain a copy of this report by contacting [name of office] or by accessing the following website [address of website].

By mailing this notice statement to students and employees, the institution may meet the disclosure requirements of the law through placing the full contents of the Annual Security Report on the web. **JWL**

What to do if our institution has no reported hate crimes?

One of the difficulties in complying with the Campus Security Act lies in the regulations which were developed to apply to all institutions of higher education in the United States from major research universities to community colleges. Smaller institutions often struggle with how best to report or address those areas of the statistical reporting which do not apply to their situation or for which no crimes have been reported. For example, one of the institutions that the Department of Education cited for failing to comply with the legislation had failed to present the required information regarding hate crimes. The institution had not had any hate crimes reported, but failed to address the issue at all. If the institution does not have any hate crimes, the annual security report should include either a statement that clearly explains that none have been reported or simply present the table with 0 in each cell of the table. In addition, institutions which do not have residence halls or non-campus buildings or property should either include empty cells in the tabular presentation of the data or clearly state that those categories do not apply to the institution. **JWL**

What is more important under Clery – the date of occurrence of a crime or the date when it was reported?

The Final Rule of November 11, 1999 has clarified what was a confusing situation on some campuses. Previously, at least one program review had faulted an institution for not amending its crime statistics from the previous year to reflect a late report that was filed some time after December 31st. In response to comments received during 1999 regarding the proposed rules, the FBI's crime reporting standard was adopted and clearly

articulated: “An institution must record a crime statistic in its annual security report for the calendar year in which the crime was reported to a campus security authority.”

Similarly, the daily crime log entries are to be recorded “by the date the crime was reported”. This practical approach recognizes that fact that many crimes are discovered after they occur, making the date of occurrence unknown or uncertain. It also eliminates any need to amend published numbers for a prior calendar year in the event of a late report. **DFT**

What exactly is the “two day rule” regarding the Daily Crime Log?

Institutions must make an entry or an addition to an entry to the Daily Crime Log within two business days [defined as Monday through Friday, excluding any day when the institution is closed] of the report of the information to the campus police or security department, unless that disclosure is prohibited by law or would jeopardize the confidentiality of the victim. This permitted 2-day “lag” between the making of the initial report and the preparation of the crime log will not generally be required at most institutions, but it should be used to the extent required to ensure some level of supervisory review of the crime log prior to its public release. Not every crime is correctly classified when it is initially reported, and not every event that is reported to – and generally documented by – campus police or security department is a **crime**. Institutions should regard the 2-day window as “quality control” time.

The statute does permit an institution to temporarily withhold some of the information required to be included in the campus crime log if there is clear and convincing evidence that the release of the information would:

- (A) Jeopardize an ongoing criminal investigation or the safety of an individual;
- (B) Cause a suspect to flee or evade detection; or
- (C) Result in the destruction of evidence.

The institution may withhold **only** that information that would cause the adverse effects described above, and must disclose any such temporarily withheld information once the anticipated adverse effect is no longer likely to occur.

A separate and distinct 2-day period applies to the public's access to the Daily Crime Log, once it has been prepared. Crime log entries for the most recent 60-day period must be open to public inspection during normal business hours. This means that the relatively current information contained in the Daily Crime Log must be produced for inspection **at the time of a request** if it is during normal business hours. It is not necessary for the lone officer patrolling campus on the midnight shift to return to and open the security office to accommodate the campus media's need to meet their deadline – but it is necessary to respond directly and immediately to office-hour walk-in requests **from anyone**. Any portion of the log older than 60 days must be made available within two business days of a request for public inspection. This requirement currently applies to all campus crime logs entries recorded since October of 1998. **DFT**

Do you report alcohol/drug/weapons violations by category of location? What happens if you take campus judicial jurisdiction over an offense that is not within these geographical zones? Do you still report it?

Some institutions have been unclear as to whether the geographical categories for the reporting of major crimes also apply to the liquor, drug, and weapons law arrests and referrals for disciplinary action. They do. Institutions that have disciplinary authority over alcohol, drug or weapons violations that occur in areas beyond these geographic categories are not required to include this information in their Annual Security Report. For example, if the institution took disciplinary action against a student for a liquor law violation which occurred at a public bar off-campus, or a student was arrested in a public bar off-campus, this information would not be included. **JWL**

What is included within the scope of liquor law violations?

When I present on complying with the Campus Security Act at conferences and in other training settings, I can almost always predict what statement will produce the most surprise in my audience. In speaking about defining alcohol violations, I discuss clearly that public drunkenness and driving under the influence of alcohol are NOT liquor law violations. The definition from the Uniform Crime Reporting Handbook clearly states:

The violation of laws or ordinances prohibiting: the manufacture, sale, transporting, furnishing, possessing of intoxicating liquor; maintaining unlawful drinking places; bootlegging; operating a still; furnishing liquor to a minor or intemperate person;

using a vehicle for illegal transportation of liquor; drinking on a train or public conveyance; and all attempts to commit any of the aforementioned. (Drunkenness and driving under the influence are not included in this definition.)

Institutions should understand clearly how the statistics for persons referred for disciplinary action should be compiled. First and foremost, if a student is arrested and referred for disciplinary action for an offense meeting the definition, only the arrest would be counted. Only if a person is not arrested, but only referred for disciplinary action is the statistic included in this category.

Under the current regulations, only a student can be referred for disciplinary action. However, the Department of Education has revised the definition to include any person referred for disciplinary action because the statute uses the word person, thereby not limiting referrals to students only. The Department will post the revised regulations at <http://ifap.ed.gov> when they are cleared by the appropriate parties. For example, a student referred for public drunkenness or a student over the age of 21 referred for violating a campus ban on the possession of alcohol would not be including in these statistics. It should be noted that some groups including Security on Campus, Inc., have advocated expanding the definition of liquor law violations to include public drunkenness and driving under the influence. However, no proposals have been introduced to date. **JWL**

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