February 16, 2023

Clery Hot Topics

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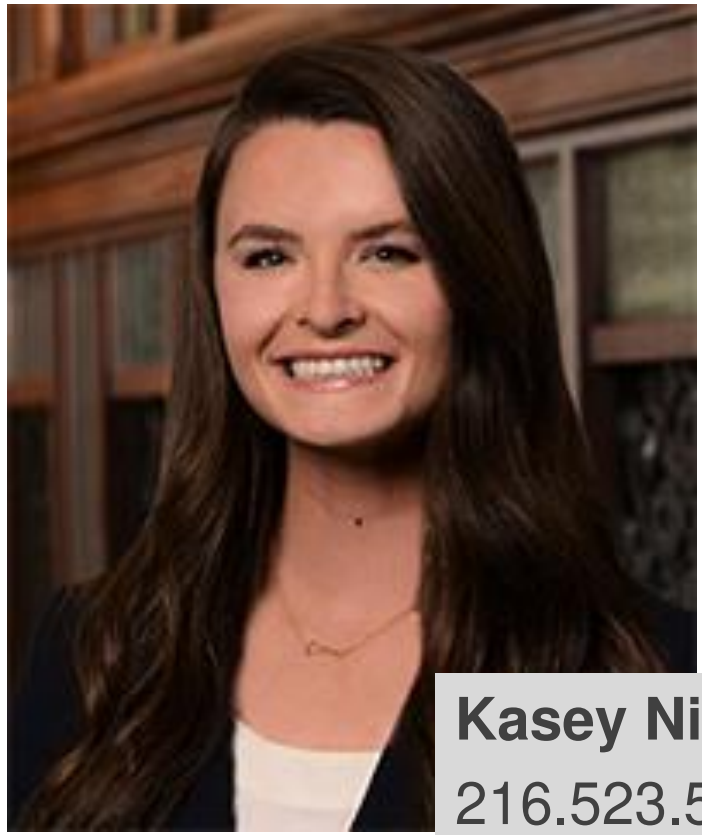

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Disclaimer

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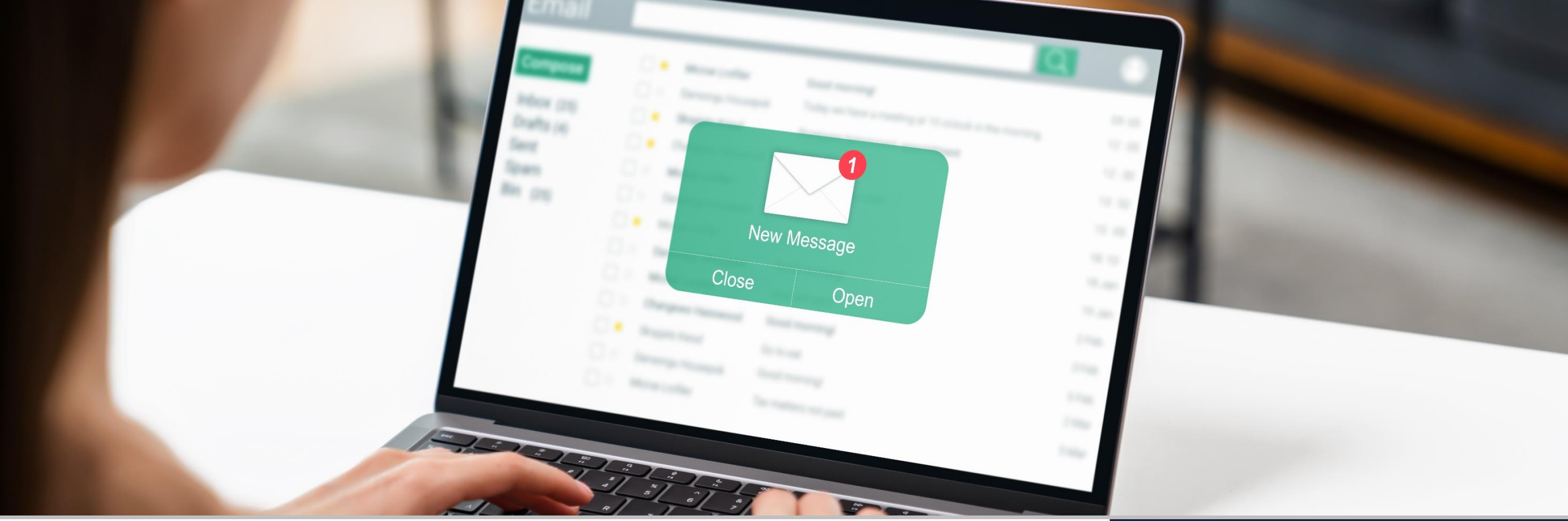
We can't help it – we're lawyers!

- We are not giving legal advice today.
- Please consult with your legal counsel regarding specific situations.
- Use chat function to ask general questions and hypotheticals. We encourage questions!
- Yes, we will send out the slides. If you used your email to register, look for a "Thank You For Attending!" email.

Today's Agenda

- What's new?!
- Counting Crimes
- Timely Warnings and Emergency Notification Scenarios
- Record Keeping for Audits
- Picking CSAs out of a Crowd
- Structural Best Practices



What's new?!

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What's new?!

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VAWA Reauthorization

One interesting case

Interagency Task Force on SV in Education

VAWA Reauthorization: New "Domestic Violence" Definition

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"The term 'domestic violence' includes felony or misdemeanor crimes [~~of violence~~] committed by a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction receiving grant funding and, in the case of victim services, includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior, by a person who—"

VAWA Reauthorization: New "Domestic Violence" Definition

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"By a person who—

- Is a current or former spouse or intimate partner of the victim, or person similarly situated to a spouse of the victim;
- Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
- Shares a child in common with the victim; or
- Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction."

What does this mean?

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For Clery purposes

Use the same definition you've been using

(see 34 CFR Part 668, Subpart D, Appendix A)

For Title IX purposes

Use the new definition

(minus the victim services language)

Could something theoretically fall into Title IX but not Clery?
Run both analyses.

Interagency Task Force on Sexual Violence in Education – Report

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- Part of VAWA Reauthorization
- Analysis of OCR and Clery Group purpose, staffing, efficacy, challenges

https://www2.ed.gov/about/offices/list/ope/vawa.pdf

Interagency Task Force on Sexual Violence in Education – Report

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- On Enforcement re Sexual Violence:

"The most effective way for the Clery Group to enforce compliance is through the conduct of program reviews of institutions with identified risk factors, such as complaints concerning the institution's treatment of sexual assault survivors or discrepant data concerning the reporting of crimes, such as sexual assault."

Interagency Task Force on Sexual Violence in Education

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Request during Investigations

- Original and revised ASRs
- "Audit trail" for crimes
- Call logs
- Crime logs
- Timely Warnings and Emergency Notifications
- CSA list/training
- Police incident reports and complaints
- Correspondence with state and local LEAs
- Educational and training materials re VAWA prevention education
- TIX Grievance process info

One interesting case

Consent definition in ASR is at issue

- April 2016 – College changes to "affirmative" consent and publishes the new definition in its Code of Conduct
- October 2016 – ASR is distributed, which included the old definition of consent
  - April 2016 definition is still in the Code of Conduct and online
- Which definition of consent applies?

Doe v. Williams College, 2022 WL 4099273 (D.Mass Sept. 7, 2022) (MSJ granted for College)

The court ruled…

- The ASR language made the contract ambiguous.
- This means that the Court gets to decide what the terms of the contract would be!
- Ultimately, the Court decided that which definition didn't matter, because Bobby didn't get consent either way. (Whew!)

Doe v. Williams College, 2022 WL 4099273 (D.Mass Sept. 7, 2022) (MSJ granted for College)

Counting Crimes

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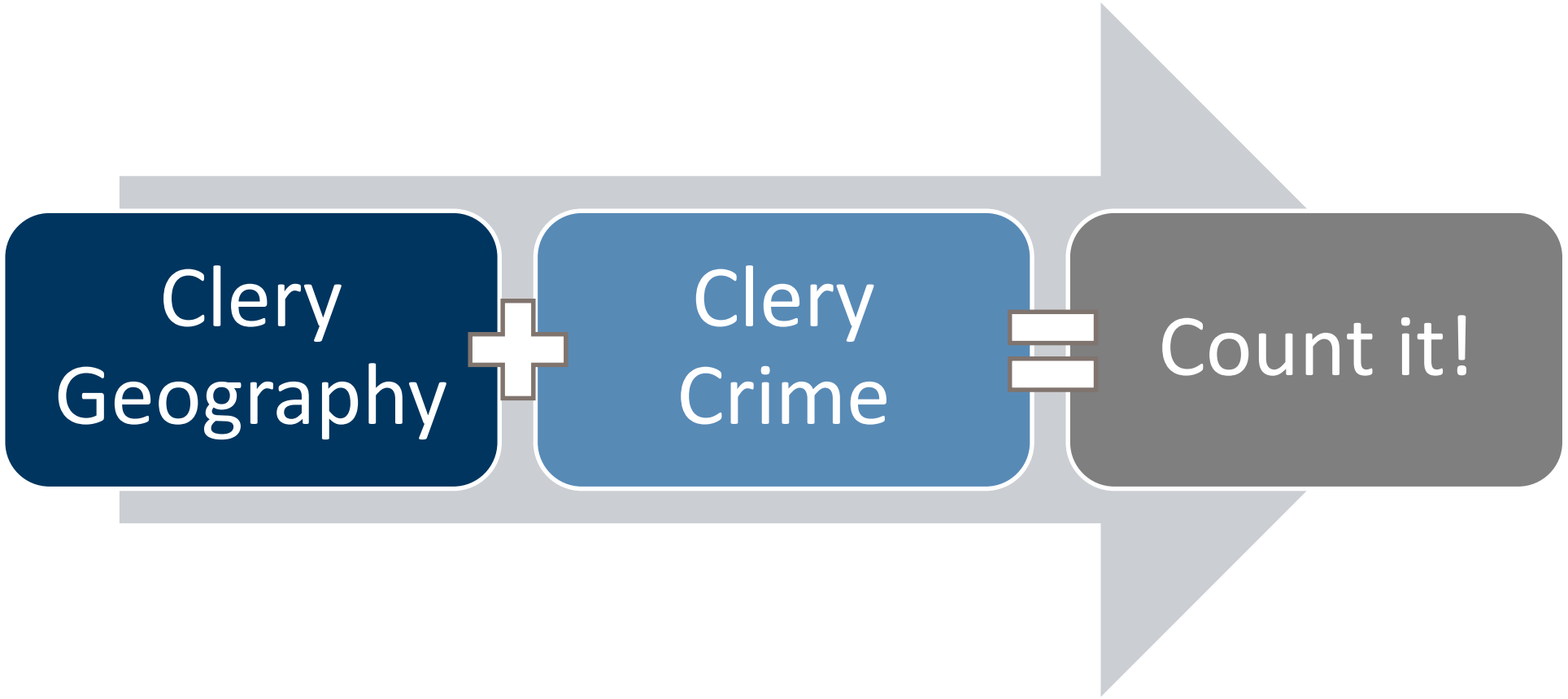
When do you count it?



Clery Geography

On Campus

- **Any building or property owned or controlled by the institution**
- Any building or property that is:
  - (1) Within or reasonably contiguous to the area identified as your "campus"
  - (2) Owned by the institution but controlled by another person
  - (3) Is frequently used by students, and
  - (4) Supports the institution's purposes
- **Residence Halls**
- **Dormitories or other residential facilities for students on campus**

Noncampus

- **Any building or property owned or controlled by a student organization officially recognized by the institution**
- Any building or property that is:
  - (1) owned or controlled by an institution (i.e., leased)
  - (2) that is used in direct support of, or in relation to, the institution's educational purposes,
  - (3) is frequently used by students, and
  - (4) is not within the same reasonably contiguous geographic area of the institution.

Public Property

- Must satisfy all three:
  - (1) public (e.g., publicly-owned);
  - (2) within or adjacent to campus; and
  - (3) accessible from campus

Clery Crimes

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Primary crimes

1. Murder/Non-Negligent Manslaughter
2. Negligent Manslaughter
3. Rape
4. Fondling
5. Incest
6. Statutory Rape
7. Robbery
8. Aggravated assault
9. Burglary
10. Motor vehicle theft
11. Arson

Arrests and referrals for disciplinary actions for:

1. Liquor law violations
2. Drug law violations
3. Illegal weapons possessions

VAWA Offenses

1. Domestic Violence
2. Dating violence
3. Stalking

Hate Crimes: All primary crimes PLUS

1. Larceny-theft
2. Simple Assault
3. Intimidation
4. Destruction/damage/vandalism of property

A note about attempt

- Some crimes include “attempt” as a completion, and some do not.
- If you have both attempt and completion of the same crime in the same incident, **just count the completion**.
- If you have attempt and completion of the same crime in separate incidents, **count them separately** (assuming attempt counts).

Multiple crimes, one incident

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Hierarchy Rule

- Murder and non-negligent manslaughter
- Negligent manslaughter
- Forcible sex offenses
- Non-forcible sex offense
- Robbery
- Aggravated Assault
- Burglary
- Motor Vehicle Theft
- Arrests
- Referrals for Disciplinary Action

Hierarchy Rule Exceptions

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- Always count Arson in addition to the primary crime.
- Always count Hate Crimes in addition to the primary crime.
- If rape, fondling, incest, or statutory rape occurs with murder, count the highest form of sexual assault in addition to the murder
- Hierarchy rule doesn't apply to dating violence, domestic violence, and stalking – they are counted separately

Counting Crimes: Hypo 1

Two underage students break into a car in the faculty parking lot. When they are found, they have open containers of alcohol. There is no indication they were attempting to steal the car. The police officer arrests them for underage drinking and the vandalism to the vehicle, and refers them for student discipline.

- Clery Geography?
- Clery Crime(s)?

Counting Crimes: Hypo 2

A student reports to the Title IX office that they were subjected to dating violence at the hands of their partner on three separate occasions. Two of these occurred in the residence halls. One occurred at an off-campus location. The student says that their partner had been stalking them, both on campus and off campus, which led to the violence

- Clery Geography?
- Clery Crime(s)?

Counting Crimes: Hypo 3

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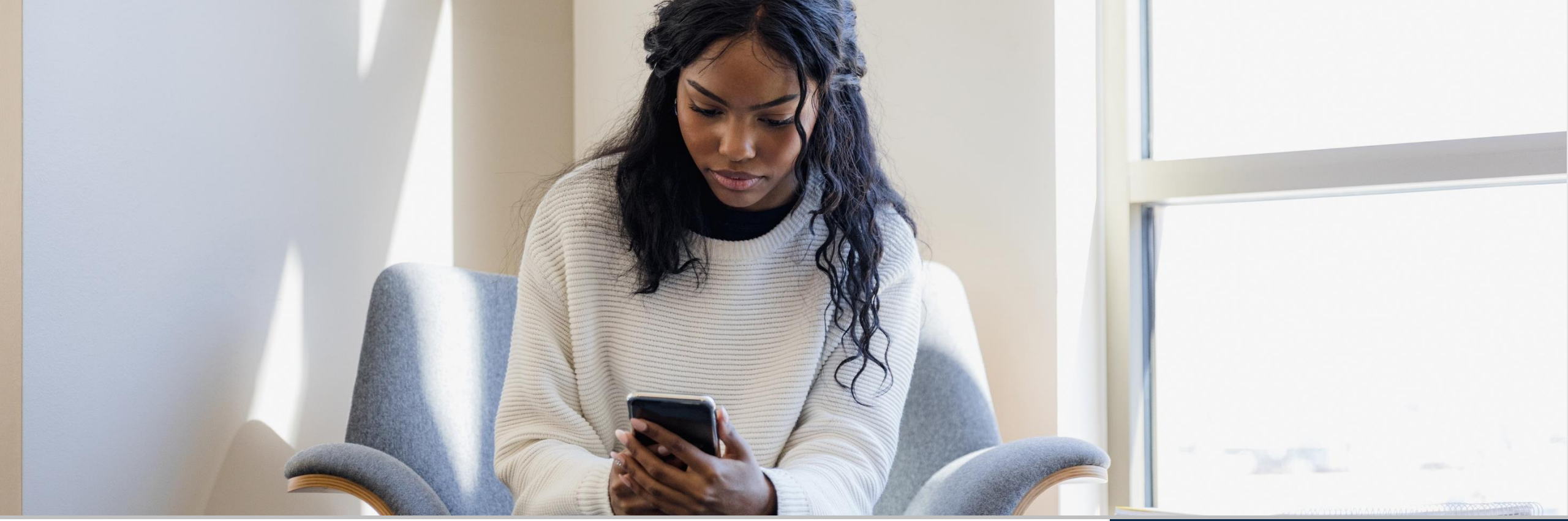
Your institution has a program that it runs yearly on a campus in England. Two of your professors staff it and live in a residence hall that you rent for all 30 student participants. The students stay together but take some classes from your professors in a rented classroom, and other classes through the host campus. One of your students is robbed on the steps of the residence hall the first weekend they arrive.

- Clery Geography?
- Clery Crime(s)?



Emergency Notifications & Timely Warnings Scenarios

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What's the difference?

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	Emergency Notifications	Timely Warnings
What level of concern?	Significant emergency or dangerous situation	Serious or continuing threat
Clery crimes only?	No	Yes
Location?	On campus or imminent threat to campus	Clery Geography
When issued?	Immediately on confirmation	Warning as soon as information is available

Notification or Warning: Hypo 1

- A domestic incident involving a gun occurs three-quarters of a mile from campus in an apartment complex that is mostly students.
- The whereabouts of the person with the gun are unknown, but the person was last seen headed in the general direction of campus.
- The incident involves heavy police response and makes the evening news.
- Neither person involved in the domestic relationship has any relation to campus

➡ **Emergency Notification; Timely Warning; or Neither?**

Notification or Warning: Hypo 2

- A domestic incident involving a gun occurs in one of your residence halls.
- Shots were fired but no injuries are being reported at this time.
- The person with the gun has locked themselves in a room. The building is being evacuated.
- Police are currently on scene and the situation is ongoing.

➡ **Emergency Notification; Timely Warning; or Neither?**

Notification or Warning: Hypo 3

- Two cars in the employee parking lot have been broken into the past two weeks.
- One person had a laptop stolen off the front seat.
- The other person had a power tool stolen out of their locked trunk.
  - This person had a racial slur spray painted on their car that referred to the person's employment as a construction worker.

➡ **Emergency Notification; Timely Warning; or Neither?**

Notification or Warning: Hypo 4

- An all-day protest relating to abortion occurs on the public sidewalk immediately adjacent to one side of your campus.
- Thousands of protestors occupy the sidewalk and the street.
- A counter-protestor assaults a protestor and religious slurs are uttered in both directions. Small physical skirmishes develop down the protest.
- The city police come in with riot gear to help contain the crowd.

➡ **Emergency Notification; Timely Warning; or Neither?**

Record Keeping for Audits

Tips and Tricks

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General Rules

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3 years

If you use it to develop your ASR, keep it for three years after the last ASR is released

Example – 2022 ASR contains crimes from 2019, 2020, 20221. Must maintain records from 2019 until 2025 ASR is released.

7 years

If it relates to Title IX Sexual Harassment (which includes sexual assault, dating violence, domestic violence, and stalking), those regulations require you keep the records for seven years.

So…. Seven years is your safe bet!

Destroy Records When…

The law allows it

+

Your records retention policy permits it

Don’t Destroy Records When

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You are in an audit that is reviewing the records.

The records are subject to a litigation hold.

You are aware of threatened litigation on the matter involving the records.

Auto Deletion?

- Not a fan!
- Consider using flags in your database to help identify when records can be deleted.
  - A seven-year rolling deletion date will **not be perfectly accurate for Clery data**, because a crime on January 1, 2019, no longer needs to be maintained on October 1, 2025 (six years, ten months), while a crime on December 31, 2019 no longer needs to be maintained on October 1, 2025 (five years, ten months)

Organizing records

- You should be able to trace an incident from the report, to the daily crime log entry, to the notation on your ASR.
  - When did the report come in?
  - Where was it located?
  - How was it categorized?
  - Are there unusual circumstances that should be noted to show how your institution exercised good judgment?

What to keep

- Law enforcement has its own records retention that likely goes past your Clery requirements – but check with your internal law enforcement.
- What you are keeping for Clery purposes is the record of your logic. Your judgment.

Picking CSAs out of a Crowd

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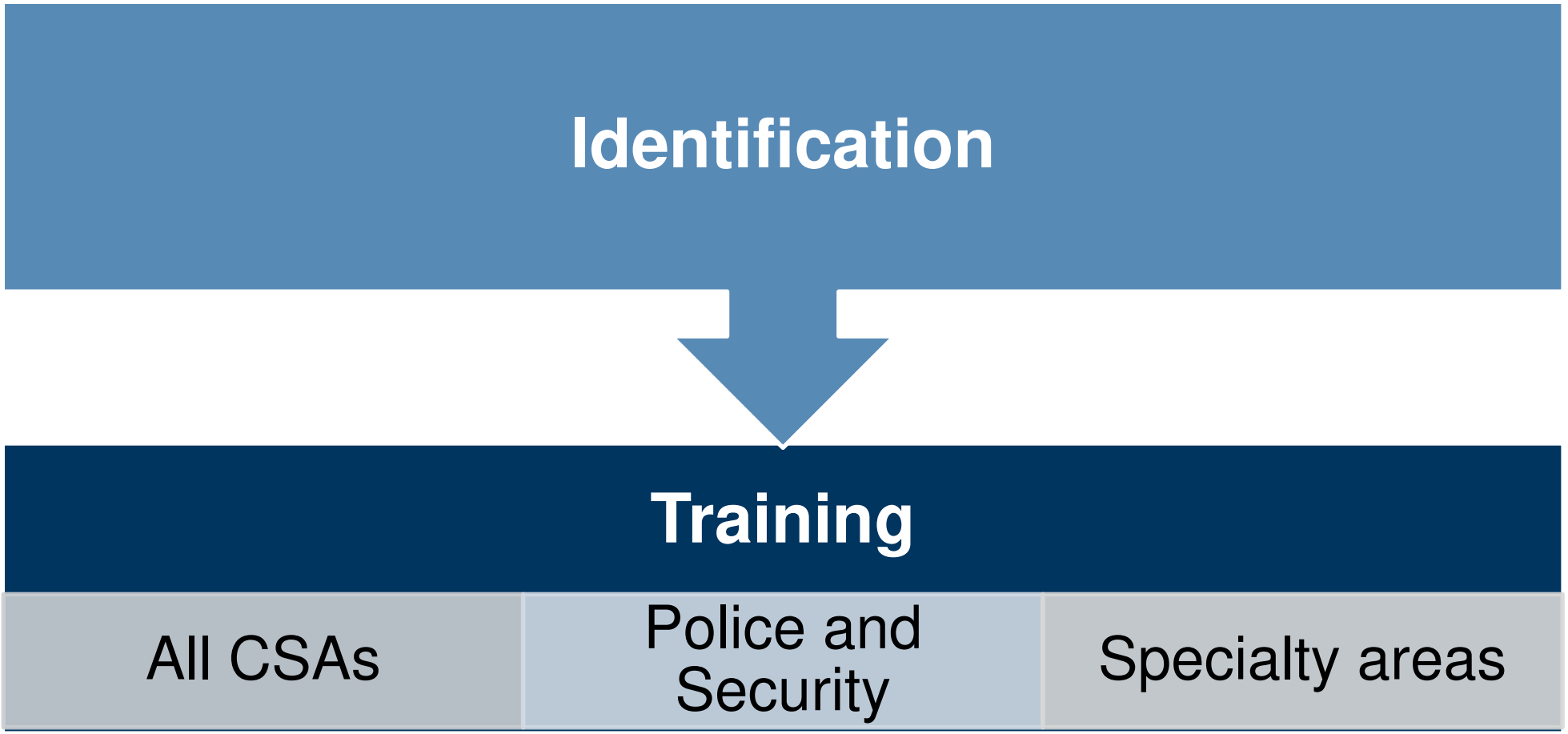
Campus Security Authorities



What does a CSA do?

- Undergo training
- Report crimes within the Clery geography of which you become aware

What is a CSA?

- Any of the following:

A campus police department or campus security department

An individual who has responsibility for campus security but isn't a police/security department (e.g. monitors entrances)

An individual or organization that is included in your campus security policy as someone to whom individuals can report criminal offenses

Official as a CSA (Most complicatedly…)

Official as CSA

Any of the following:

- An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings.
  - Does not include individuals in their capacities as pastoral or professional counselors.

Also, per the Clery Appendix – includes "any official… who has the authority to institute corrective measures" for purposes of actual notice in your Title IX Policy.

Official as a CSA (Most complicatedly…)

Official as CSA examples

Student and Campus Activities?

- Student Affairs/Greek Life?
- Athletic Staff?

Student Housing

- Res Life, RAs, Area Coordinators

Student Discipline/Campus Judicial Proceedings

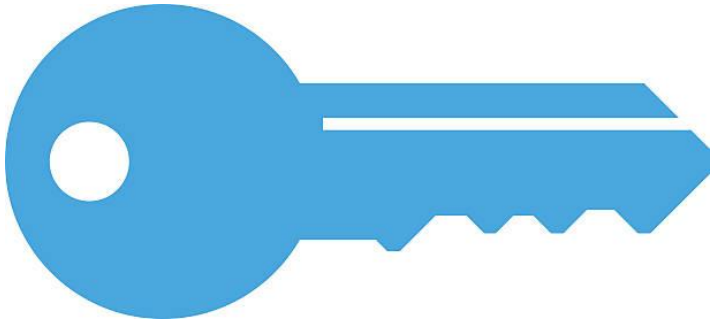
- Conduct administrators
- Appeals officers
- Title IX staff?
- Also Res Life?

Official as a CSA (Most complicatedly…)

Key to CSA Analysis

From the Clery Appendix:

- "The Department will defer to an institution's designation of CSAs as authoritative…"
- "The regulations do not require that an employee with minimal responsibilities for student and campus activities *necessarily* be considered CSAs."
  - Must consider on a case-by-case basis.
  - Example: Individuals who have irregularly scheduled duties, or duties that are not part of an employee's primary job description.
  - Focus on employee's "significant responsibilities"



“Audit Trail” Approach

Academic Medical Centers

- Police/Security
- To whom are crimes reported?
- Who has responsibility over:
  - Student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings?
- Let's brainstorm together

Clery Coordinator: Communication & Collaboration

- Case management software
- CSA reporting
- Special CSA reporting

Structural Best Practices

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Clery Coordinator

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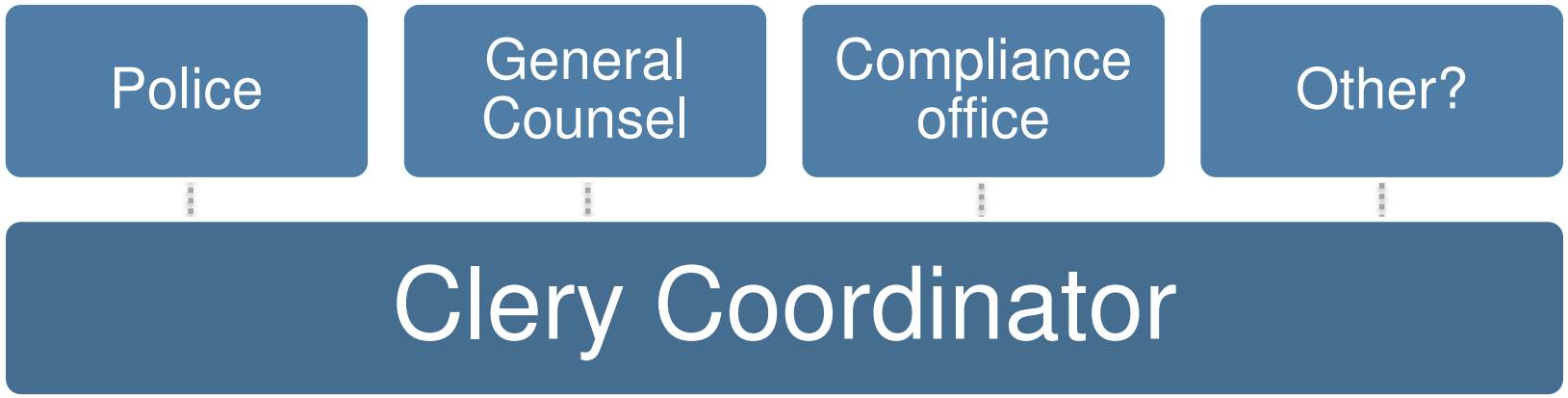
What does a Clery Coordinator do/facilitate?

- CSA reporting and identification
- Athletic, Title IX, and Student Conduct reporting and reconciliation
- CSA Training
- Policy Update Process
- Local police/noncampus property statistics outreach
- ASFSR Prep
- Timely Warning Emergency Notifications

Clery Coordinator

- Full-time or part-time?
- Where should this position be located? Which office?
- Who should have these responsibilities?



Questions?

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Next Events

- **Wednesday, February 22, 2023: Annual Clery Training and Title IX Hot Topics** → **Register here!**
- **Wednesday, March 22, 2023: Clery Act Bootcamp** → **Register here!**
- Free Webinars (all held at noon EST) www.bricker.com/events
- Ongoing Title IX Training Program (K-12 and Higher Ed) www.bricker.com/titleix
  - Level 1: Annual Clery training and intro to Title IX basics
  - Level 2: Investigator, Decision-Maker, Appeals Officer, Informal Resolution Officer, Advisor

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