November 23, 2014

Mr. Josh Jones
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Public Access Bureau
100 W. Randolf Street
Chicago, Illinois 60601

Re: FOIA Request for Review – 2014 PAC 31572

The fundamental issue being debated is what the phrase "*specifically prohibited by federal or state law or rules and regulations implementing federal or state law…*"

I believe it means exactly what it says – "*specifically prohibited*"

Everything else that follows is simply building upon the fact that no State of Federal law or rule "specifically prohibits" the release of the information I have requested. It is exactly the opposite – Federal law specifically authorizes its release.

I am responding to COD's response as follows:

Scope of Review

COD is wrong, FERPA does not prohibit releasing the information I requested.

Relevant Facts

FERPA does not prohibit releasing the information I requested. Whether COD included it as "directory information" is moot. If that is not the case, what is to stop schools from including nothing as "directory information"? That is neither the intent of FERPA nor the intent of FOIA.

Relevant Statutes and Regulations

FOIA, 5 ILCS 140/7 (1)(a), emphasis mine: `(a) Information` **`specifically prohibited`** `from disclosure by federal or State law or rules and regulations implementing federal or State law.`

No State or Federal law or rule specifically prohibits releasing the information I requested.

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34 CFR § 99.31

COD quotes a section from FERPA that states: "*…Directory information includes, but is not limited to the student's name; address; telephone listing; electronic mail address…*"

I understand that COD has the ability to determine what it considers "directory information", however, FERPA is clear, in that **Directory information includes, but is not limited to**… That tells me, the Federal Law, FERPA, has determined the minimum requirements of directory information, and allows schools the option of adding to the information that FERPA specifically listed as directory information.

If COD did not include student email addresses in their annual notification of directory information, they did not follow the law and should send out a new notification to all parents and student correctly defining "directory information" in accordance with FERPA's statement that "*Directory information includes*…" Please note it does not say "may include", and it does not say "includes unless the College of DuPage doesn't want to include it."

COD is simply incorrect in their reliance on Kilbort v Westrom, in that it is a case referring to election law and while the Election Code did not specifically prohibit disclosure; it required the election authority to preserve and safeguard the records in such a way that it would effectively prohibit its release thru FOIA. The Election Code's text clearly indicated the purpose of this was to safeguard the records for use in a Court of Law.

From Kilbort v Westrom:

> Section 17-22 required the Commission to "safely keep" the sealed ballot box tapes and poll signature cards for a period of one year, subject only to the use of certified copies of these records as "evidence in all courts, proceedings and election contests." 10 ILCS 5/17-22 (West 2004). These statutory provisions plainly required the Commission to safely keep the ballots, ballot box tapes, and poll signature cards as originally sealed by the election judges, for the statutorily designated time period, unless called upon to deliver the documents, or certified copies thereof, as evidence in a discovery recount, election contest, or other judicial proceeding. As plaintiff's request to inspect the records under the Information Act was not a basis on which disclosure was authorized by sections 17-20 and 17-22, the Commission correctly determined that it was prohibited from unsealing these records to allow plaintiff to inspect them.

Furthermore, in discussing Section 7 (1) (a) of FOIA, the Illinois Supreme Court stated:

> We interpret such language to mean that records are exempt from disclosure under the Information Act in instances where the plain language contained in a State or federal statute reveals that public access to the records was not intended.

"*Where the plain language contained in a state or federal statute reveals that public access to the records was not intended*." FERPA's plain language includes electronic mail addresses as information that can be released to the public – in other words, public access to this information is specifically intended.

FERPA Provides that:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein **other than directory information, as defined in paragraph (5) of subsection (a) of this section**) of students without the written consent of their parents to any individual, agency, or organization....

Please note that conditions set forth in this paragraph state "*other than directory information, as defined in paragraph (5) of subsection (a) of this section*" where it specifically mentions "*as defined*" and does not state "*as defined by the College of DuPage and released under their conditions*".

In the federal case that COD cites, *Chicago Tribune v. BD. OF TRUSTEES, UNIV. OF ILL., 680 F. 3d 1001* – which was remanded back to Circuit Court for want of jurisdiction, not for any other reasons:

> The 1974 Act, by contrast, tells the Secretary of Education when it is lawful to grant federal money to a unit of state government. The district judge understood § 1232g(b)(1) to take state law or policy as a given and provide or withhold federal funds accordingly. The **University**, by contrast, proposes to take the federal grant as a given and treat the conditions as if they were statutory, rather than as terms of state-federal cooperation. As the district court saw things, **Illinois** may commit a breach of contract if it releases the information the **Tribune** requested, but no federal law "prohibits" disclosure within the meaning of 5 ILCS 140/7(1)(a).

Nothing in FERPA "specifically prohibits" release of the requested information, in fact FERPA includes electronic mail in its definition of information that is included as directory information. By the College choosing not to include student email as directory information, it has attempted to place additional restrictions on access to public records.

In short:

1. FERPA defines what directory information includes, and allows schools to add information to the specific items that FERPA designated as directory information
2. Email addresses are Directory Information
3. Student email addresses @COD.EDU or @dupage.edu are public email addresses, as opposed to "personal" email addresses
4. Student public email addresses are not private information as defined in FOIA nor are they private information as defined in FERPA
5. FERPA does not specifically prohibit the release of directory information
6. FERPA does not specifically prohibit the release of any information; it simply places conditions on the receipt of grant funds.
7. Since the requested records are directory information in FERPA, they cannot be labeled as private information by the college.
8. School do not have the authority to limit the contents of directory information as it is defined in FERPA, but they can add to it

Thanks,
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