



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 28, 2014

Mr. John Kraft
7060 Illinois Highway 1
Paris, Illinois 61944

RE: FOIA Request for Review – 2014 PAC 31572

Dear Mr. Kraft:

The Office of the Attorney General, Public Access Bureau, has received the enclosed response to your Request for Review from the College of DuPage (College).

You may, but are not required to, reply in writing to the public body's enclosed response. If you choose to reply, you must submit your reply to this office within 7 business days of your receipt of this letter. 5 ILCS 140/9.5(d) (West 2012). Please send a copy of your reply to the College as well.

If you have any questions about this matter, please contact me at 100 West Randolph Street, Chicago, Illinois 60601.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Jones", is written over the typed name.

JOSHUA M. JONES
Assistant Attorney General
Public Access Bureau

Cc: Ms. Nanci N. Rogers (will receive letter only)
Robbins, Schwartz
55 West Monroe, Suite 800
Chicago, Illinois 60603

NANCI N. ROGERS
nrogers@robbins-schwartz.com

October 24, 2014

Mr. Josh Jones
Assistant Attorney General
Office of the Illinois Attorney General
Public Access Bureau
100 W. Randolph St.
Chicago, IL 60601

VIA E-MAIL: jjones@atg.state.il.us

Re: FOIA Request for Review – 2014 PAC 31572

Dear Mr. Jones:

Please be advised that this office serves as legal representative for the College of DuPage (the "College"). The College has asked that we respond to the above-referenced Request for Review on its behalf. As such, this correspondence serves as the College's response to your October 15, 2014 further inquiry letter.

Scope of Review

The records at issue are student email addresses. The College declined to provide these records to Mr. Kraft pursuant to FOIA Section 7(1)(a) because the College has not designated student email addresses as "directory information" and, accordingly, this information is prohibited from disclosure under the Family and Educational Rights and Privacy Act (FERPA). 5 ILCS 140/7(1)(a), citing 20 U.S.C. 1232g, 34 CFR Part 99. See College's September 29, 2014 response to Mr. Kraft's September 20, 2014 FOIA request.

You have asked the College to provide a detailed explanation of the legal basis for the College's redaction of student e-mail addresses in light of the inclusion of e-mail addresses in the definition of "directory information" in 34 C.F.R. §99.3.

Relevant Facts

The College is an institution of higher education and receives funding from the U.S. Department of Education. As such, FERPA is applicable to the College.

In accordance with its obligations under FERPA, the College annually notifies students of their rights under FERPA ("Annual Notification"). The College provides this Annual Notification via the Student Handbook, which is updated annually and distributed to students. A copy of the relevant section of the College's 2014-2015 Student Handbook is attached as Exhibit A.

The "directory information" identified by the College for 2014-2015 academic year is limited to: student's name, student's community, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, terms

attended, degrees and awards received, and last educational institution attended by the student. See Ex. A. Through the Annual Notification, students are advised that directory information, as designated by the College, can be disclosed without a student's written consent, and that they may request that directory information be withheld from disclosure by contacting the College's Office of Student Records and completing proper documentation. See Ex. A.

Relevant Statutes and Regulations

Specifically prohibited → "Information" specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law", is exempt from inspection and copying under FOIA. 5 ILCS 140/7(1)(a).

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions:

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena;
- Appropriate officials in cases of health and safety emergencies; and
- State and local authorities, within a juvenile justice system, pursuant to specific State law.

34 CFR § 99.31.

"Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. Directory information includes, but is not limited to the student's name; address; telephone listing; electronic mail address..." 34 CFR § 99.3.

An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

- (1) the types of personally identifiable information that the agency or institution has designated as directory information;

- (2) a parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and
- (3) the period of time within which a parent or eligible student has to notify the agency in writing that he or she will does not want any or all of those types of information about the student designated as directory information.

34 CFR § 99.37(a)(1-3).

The College's Argument in Support of Denial of FOIA Request for Student Email Addresses

The College properly denied Mr. Kraft's request for student email addresses because the College has not designated student email addresses as "directory information" under FERPA, or provided notice to students that such information could be released without consent, unless the student notified the College that the student did not want this information released. See Ex. A.

While it is true that the definition of "directory information" in the regulations implementing FERPA includes a student's email address, there is nothing in FERPA or the regulations which requires that an educational institution must designate all "directory information", as defined in FERPA or the regulations, as its "directory information" which will be released without consent, unless a student advises the educational institution otherwise. The College has chosen not to designate student email addresses as directory information. Notably, there are many educational institutions throughout the state of Illinois that do not include all of the categories of "directory information" listed in FERPA or the implementing regulations as their institution's designated "directory information".

In order to release "directory information", as designated by the individual educational institution, written notice must be given to students which (1) designates the specific types of "directory information" that will be released without a student's consent; (2) explains that a student can opt-out of having any or all categories of "directory information" released by the educational institution; and (3) how and when the student can opt-out of having any or all categories of "directory information" released. See 34 CFR § 99.37(a)(1-3). Significantly, the subject of this Section of the implementing regulations is "[w]hat conditions apply to disclosing directory information?" Thus, it is clear from a plain reading of the implementing regulations that these conditions must be met in order for designated "directory information" to be released by an educational institution. Since the College has not included student email addresses as a category of "directory information" in its Annual Notification to students of their rights under FERPA, the implementing regulations prohibits the College from disclosing student email address. 34 CFR § 99.37(a)(1-3).

Assuming, *arguendo*, that Section 99.37(a) does not expressly prohibit the College from disclosing student email addresses, the Illinois Appellate Court's decision in *Kibort v. Westrom* makes it clear that an explicit textual prohibition on disclosure is not required to rely upon the FOIA Section 7(1)(a) exemption. 371 Ill.App.3d 247, 249-50 (2nd Dist. 2007). In *Kibort*, the plaintiff brought an action under FOIA to inspect certain election records that the Illinois Election Code required to be sealed and preserved. *Id.* at 50. The plaintiff argued that the Illinois Election Code did not specifically prohibit the public disclosure of such sealed

Not
compromised
case

records. *Id.* at 255. The appellate court "reject[ed] plaintiff's assertion that section 7(1)(a) of (FOIA) applies only in instances where the relevant statute specifically provides that it is exempt from the provisions of (FOIA) or otherwise contains an explicit prohibition against public disclosure." *Id.* at 256. Rather, the court interpreted the plain language of section 7(1)(a) "to mean that records are exempt from disclosure under (FOIA) in instances where the plain language contained in a State or federal statute reveals that public access to the records was not intended." *Id.* (citing *Roulette v. Department of Central Management Services*, 141 Ill.Spp.3d 394, 400 (1st Dist. 1996)). Here, the federal law at issue is FERPA, and the purpose of FERPA is to protect the privacy of student education records. In support of furthering this important privacy interest, FERPA and its implementing regulations establish specific conditions for releasing a student's education record, including but not limited to, releasing designated "directory information". See "Relevant Statutes and Regulations" above. As such, based upon the holding and rationale in the *Kibort* decision, FERPA and its implementing regulations prohibit the College from releasing student email addresses to Mr. Kraft or any other requester.


Finally, Mr. Kraft is simply incorrect that Public Access Opinion 12-003, 2011 PAC 17006 (the "Opinion"), requires disclosure of student email addresses. First, the records at issue in the Opinion were student names, not student email addresses. Second, the university subject to the Opinion had designated student names as "directory information", and provided the statutory annual notification that student names constituted "directory information" which could be released without consent, unless the student notified the university otherwise. In contrast, the College has not designated student email addresses as "directory information", nor did the Annual Notification it provided to students for the 2014-2015 academic year advise students that email addresses constituted "directory information" which could be released by the College without consent, unless the student notified the College that the student did not want this information released. Third, the PAC's apparent reliance on the holding in *Chicago Tribune v. University of Illinois Board of Trustees*, 781 F.Supp.2d 672, 675 (N.D. Ill. 2011) in support of the Opinion has since been vacated by the Seventh Circuit and, thus, is no longer valid law. *Chicago Tribune v. University of Illinois Board of Trustees*, 680 F.3d 1001 (2012). Specifically, the Seventh Circuit held that "...[w]e do not express any opinion on whether the information the Tribune seeks relates to student records within the meaning of the 1974 Act and the implementing regulations. The district's court's judgment is vacated, and the case is remanded with instructions to dismiss for want of subject-matter jurisdiction." *Id.* at 1006.

For the above reasons, the College respectfully requests that you find that the College properly denied Mr. Kraft's request for student email addresses.

If you have any questions or require further information, please contact me.

Very truly yours,

ROBBINS SCHWARTZ



By: Nanci N. Rogers

cc: Barbara Mitchell, FOIA Officer, College of DuPage
Kenneth M. Florey