



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

Lisa Madigan  
ATTORNEY GENERAL

March 20, 2015

*Via electronic mail*

Mr. John Kraft  
7060 Illinois Highway 1  
Paris, Illinois 61944  
john@illinoisleaks.com

*Via electronic mail*

Ms. Barbara Mitchell  
Freedom of Information Officer  
College of DuPage  
425 Fawell Boulevard  
Glen Ellyn, Illinois 60137  
mitchell@cod.edu

RE: FOIA Request for Review – 2014 PAC 31572

Dear Mr. Kraft and Ms. Mitchell:

This determination letter is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2012), as amended by Public Act 98-1129, effective December 3, 2014). For the reasons that follow, the Public Access Bureau concludes that the partial denial of Mr. John Kraft's September 20, 2014, FOIA request by the College of DuPage (College) violated the requirements of FOIA.

On that date, Mr. Kraft submitted a FOIA request to the College seeking every e-mail address that the College manages or maintains. On September 29, 2014, the College provided Mr. Kraft with certain responsive records but redacted the addresses of student e-mail accounts hosted by the College's e-mail service provider under section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2013 Supp.), as amended by Public Act 98-695, effective July 3, 2014), which exempts from disclosure: "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The College asserted that it was prohibited by the provisions of the federal Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. §1232g (2014)) and a related provision of the Code of Federal Regulations (34 C.F.R. Part 99 (2014)) from releasing the student e-mail accounts. On October 1, 2014, the Public Access Bureau received the above-captioned Request for Review contesting the College's partial denial.

Mr. John Kraft  
Ms. Barbara Mitchell  
March 20, 2015  
Page 2

On October 15, 2014, this office forwarded a copy of the Request for Review to the College and asked it to provide a detailed explanation of its basis for withholding the student e-mail addresses in light of the inclusion of student e-mail addresses in the definition of releasable "directory information" in title 34, section 99.3 of the Code of Federal Regulations (34 C.F.R. § 99.3 (2014)). On October 24, 2014, this office received the College's written response. On November 23, 2014, this office received Mr. Kraft's reply.

### DETERMINATION

All public records in the possession or custody of a public body are presumed to be open to inspection and copying. 5 ILCS 140/1.2 (West 2012); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure. 5 ILCS 140/1.2 (West 2012). "[T]he exceptions to disclosure set forth in the FOIA are to be read narrowly so as not to defeat the FOIA's intended purpose." *Southern Illinoisan*, 218 Ill. 2d at 416.

The College based its assertion of section 7(1)(a) on FERPA. FERPA does generally prohibit educational institutions from releasing personally identifiable student education records to third parties without first obtaining the student or parents' permission. In a binding opinion, the Attorney General explained that the purpose of FERPA is to:

ensure access to educational records for students and parents and to protect the privacy of such records from the public at large. [Citation.] "The statute takes a carrot-and-stick approach: the carrot is federal funding; the stick is the termination of such funding to any educational institution 'which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein...) of students without the written consent of their parents.'" [Citation.] Ill. Att'y Gen. Pub. Acc. Op. No. 12-003, issued January 18, 2012, at 5.

The College contends that it properly withheld the requested student e-mail addresses because it has not designated student e-mail addresses as "directory information" under FERPA and, thus, did not notify students that their e-mail addresses are subject to disclosure. The College first cited title 34, section 99.31 of the Code of Federal Regulations (34 C.F.R. § 99.31 (2014)), which provides that an educational agency or institution may disclose "information the educational agency or institution has designated as 'directory information', under the conditions described in § 99.37." Next, the College cited the definition of "directory information" in title 34, section 99.3: "[d]irectory information *includes*, but is not limited to, the

Mr. John Kraft  
Ms. Barbara Mitchell  
March 20, 2015  
Page 3

student's name; address; telephone listing; [and] *electronic mail address*[" (Emphasis added.)  
Lastly, the College cited title 34, section 99.37(a) (34 C.F.R. §99.37(a) (2014)), which provides:

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 or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

Taken together, these provisions permit an educational entity to disclose student e-mail addresses if it provides proper notice to a parent or eligible student, as the case may be. Accordingly, the asserted impediment to providing the responsive information is a result of the College's inaction, rather than a consequence of a statutory prohibition. The College has not identified any provision of FERPA that specifically prohibits student e-mail addresses from being disclosed pursuant to a FOIA request.

The College, however, contends that "an explicit textual prohibition on disclosure is not required to rely upon the FOIA Section 7(1)(a) exemption[," citing *Kibort v. Westrom*, 371 Ill. App. 3d 247, 249-50 (2nd Dist. 2007).<sup>1</sup> In *Kibort*, the court construed 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." *Kibort*, 371 Ill. App. 3d at 256. In these circumstances, it is not apparent that FERPA was intended to prohibit the disclosure of student e-mail addresses in response to State FOIA

---

<sup>1</sup>Letter from Robbins Schwartz by Nancy N. Robbins to Josh Jones, Assistant Attorney General, Office of the Illinois Attorney General, Public Access Bureau, at 3.

Mr. John Kraft  
Ms. Barbara Mitchell  
March 20, 2015  
Page 4

requests. To the contrary, the plain language of the provisions cited by the College allows public access to directory information (including student e-mail addresses), subject to the College providing appropriate notice to students and parents.

Significantly, FERPA merely "condition[s] the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records"; it does not impose any mandate. *Gonzaga University v. Doe*, 536 U.S. 273, 279 (2002). In *Chicago Tribune Company v. University of Illinois Board of Trustees* 781 F. Supp. 2d 672 (N.D. Ill. 2011) (*rev'd on other grounds*), the Court concluded that FERPA did not specifically prohibit the disclosure of student records requested under Illinois FOIA. Rather, the court emphasized that "the state has the option to choose whether or not to accept FERPA's conditions." *Chicago Tribune Co.*, 781 F. Supp. 2d at 676. Because the state could choose to disclose students' personally identifiable information and forego federal education funding, the court found that "FERPA does not specifically prohibit Illinois from doing anything, so the University may not use the federal law as authority to withhold the records pursuant to" section 7(1)(a) of FOIA. *Chicago Tribune Co.*, 781 F. Supp. 2d. at 676-77. Thus, educational institutions like the College may opt not to abide by the requirements of FERPA. Alternatively, the College may notify parents of students and eligible students that student e-mail addresses constitute directory information.

Accordingly, this office concludes that the College has not sustained its burden of demonstrating by clear and convincing evidence that FERPA specifically prohibits student e-mail addresses from disclosure for purposes of section 7(1)(a) of FOIA. We direct the College to disclose the withheld e-mail addresses to Mr. Kraft.

The Public Access Counselor has determined that resolution of this issue does not require the issuance of a binding opinion. Should you have questions, you may contact me at (312) 814-8413 or [jjones@atg.state.il.us](mailto:jjones@atg.state.il.us). This letter shall serve to close this matter.

Very truly yours,



JOSH JONES  
Assistant Attorney General  
Public Access Bureau