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October 20, 2000

Andrea Barnum, Editor
THE VANGUARD
PO Box 347
Portland, OR 97207

Re: Petition for Public Records Disclosure Order:
Portland State University Records

Dear Ms. Barnum:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on October 11, 2000,[1] asks the Attorney General to order Portland State University [PSU] to make available for inspection "[r]eports or other documents describing the final outcome of the disciplinary case against William Elk III involving sexual assault against a female student." You requested access to the specified records on May 22, 2000. PSU, acting through its associate vice provost and dean for enrollment and student services, Susan L. Hopp, denied your request on August 16, 2000.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Any person denied the right to inspect or to receive a copy of a public record may petition the Attorney General to determine whether the record may be withheld from inspection. ORS 192.450(1).

You requested records from PSU describing the "final outcome" of the disciplinary case against a student, William Elk III. While not explicitly stated in your petition, from your reference to the Family Educational Rights and Privacy Act of 1974 (FERPA), we assume that your request for "final outcome" information is co-extensive with this federal statute's delineation of information constituting the "final result" of a student disciplinary proceeding, i.e.,

[1] We appreciate your extending the time by which the law would have otherwise obligated us to respond.

(i) the name of the student who was the subject of the disciplinary case,[2] (ii) the violation committed, and (iii) any sanction imposed by PSU on the student. 20 USC § 1232g(b)(6)(C). As explained below, FERPA provides a university with the discretion to disclose the final result of a student disciplinary proceeding. 20 USC § 1232g(b)(6)(B). Ms. Hopp's letter to you recognizes the discretion provided under FERPA but states that, because Oregon law prohibits the disclosure of student discipline information without the student's consent, PSU must deny your request. As authority for the denial, Ms. Hoppe's letter cites ORS 351.070(4)(e), OAR chapter 580, division 13, and OAR chapter 577, division 30.[3]

ORS 351.070(4)(e) authorizes the State Board of Higher Education (board), or an educational institution to which the board delegates such authority, to adopt administrative rules relating to the disclosure of "student education records."[4] The board delegated rulemaking authority to PSU and other institutions in OAR 580-013-0005(1). The PSU rules define "education records" to mean "personal records which contain information directly related to a student and which are maintained by the University or a person acting for the University." OAR 577-030-0010(1)(b). In turn, the PSU rules define "personal records" as "files, documents [or] materials * * * kept by the University * * * which contain information concerning a student and which are furnished by the student or by others about the student at the request of the student [or] the University * * * including, but not limited to, * * * information concerning discipline." OAR 577-030-0010(1)(a). We have reviewed the record identified by PSU as containing the "final outcome" information you requested and find that the record constitutes an education record of William Elk III under PSU's rules.

With certain exceptions not relevant to your request, the rules adopted by PSU provide that information maintained in a student's education records that is identifiable by individual is treated as confidential and PSU may not disclose that information without the student's written

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[2] Under FERPA, the name of any other student, such as the victim or a witness, may also be considered as final result information only with that student's written consent. 20 USC § 1232g(b)(6)(C).

[3] OAR chapter 580 contains rules promulgated by the State Board of Higher Education while PSU's rules are contained in OAR chapter 577. Because the PSU rules are consistent with those of the board and we find the PSU rules dispositive, we do not address the rules contained in OAR chapter 580.

[4] We conclude that, by its use of the term "student education records" in ORS 351.070(4)(e), the legislature was referring, at a minimum, to "education records" as provided in FERPA. In 1993, ORS 351.070(4)(e) was amended, in part, to refer to "student *education* records" rather than "student records." Or Laws 1993, ch 806, § 7(2)(e). A significant concern driving the 1993 amendments was the need for consistency with FERPA in state law. *See* Testimony of Greg McMurdo, Oregon Department of Education, Senate Committee on Education (HB 2062), June 8, 1993, tape 77, side A at 011; Testimony of Connie Bull, Oregon Department of Education, Senate Committee on Education (HB 2062), June 8, 1993, tape 77, side A at 022. While HB 2062 was revised and simplified before its enactment, the intent to make Oregon law consistent with FERPA remained.

Under FERPA, "education records" means "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 USC § 1232g(a)(4)(A).

consent. OAR 577-030-0015(1), (3). Under this rule, the information you seek is confidential and may not be disclosed without the written consent of William Elk III.

In delegating rulemaking authority to the board, the legislature required that administrative rules governing disclosure of student education records be "consistent with the requirements of applicable state and federal law." Under FERPA, a student's education records are confidential and may not be released without the student's written consent. 20 USC § 1232g(a)(4)(A), (d). But, as you note in your petition and as referenced above, FERPA states an exception to this confidentiality requirement in the following circumstance:

> Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence * * * or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

20 USC § 1232g(b)(6)(B). The exception from FERPA's confidentiality requirement for the final results of certain disciplinary information is permissive rather than mandatory. In other words, the federal provision quoted above allows the board and PSU to disclose the specified information regarding a disciplinary proceeding, but it does not require them to disclose such information. Because FERPA gives institutions a choice whether or not to disclose this information, and PSU's rule exercises that choice, PSU's rule is consistent with the applicable federal law. There is no provision in ORS 351.070 or any other state law that requires the board or a university such as PSU to disclose the information you seek.

Under the Public Records Law, "student records" are exempt from disclosure if such exemption is required by either state or federal law. ORS 192.496(4). Because the Oregon legislature in ORS 351.070(4)(e) expressly delegated to the board and, in turn, its institutions, the authority to adopt rules related to disclosure of student education records, we consider the rules adopted by PSU that prohibit or restrict the disclosure of a student's education records to be "state law" for purposes of the exemption from disclosure under ORS 192.496(4) of the Public Records Law. Although the Public Records Law does not define "student records," the plain meaning of that term encompasses "education records" as defined by PSU. Therefore, we conclude that the records you requested from PSU are exempt from disclosure under ORS 192.496(4). In addition to ORS 192.496(4), the records are also exempt under ORS 192.502(9), which exempts public records from disclosure if disclosure is "prohibited or restricted or otherwise made confidential or privileged under Oregon law."

For these reasons, we conclude that the rules promulgated by PSU are controlling in this matter. Because those rules prohibit the disclosure of the records that you requested, the records are exempt from disclosure under ORS 192.496(4) and 192.502(9) of the Public Records Law.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

AGS05648
c: Susan L. Hopp, PSU