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July 11, 2008

SENT VIA REGULAR MAIL & E-MAIL

Michael Moradian
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Dear Mr. Moradian:

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. We received your petition on June 23, 2008. You subsequently granted an extension to allow us to more fully consider your petition.

You filed a public records request with the University of Oregon (UO) "for the professor grade distributions for every course with more than 10 students enrolled, in a comma delimited (CSV) format or Excel Sheet format . . . ." An "Excel Sheet" refers to software in which information is contained in a field described as a "cell." In this order, "cell" denotes a field containing the number of students who earned the same grade in the same section of the same course.

Had the UO provided all of the information you requested and had it used the Excel Sheet format, each cell in its report would have contained the number of students earning the same grade, regardless of the number. The UO provided you with all the information that you requested as to cells containing information about grades earned by 10 or more students enrolled in classes of 10 or more. As to each of those cells, the UO disclosed de-identified[1] information about the number of students earning like grades.

[1] We use the term "de-identified," instead of its more common cousin "anonymous," to more clearly contrast personally "identifiable" information – disclosure of which is prohibited by the federal Family Educational Rights and Privacy Act (FERPA) – from de-identified information that the UO may release without violating FERPA.

The UO, however, did not provide you with all the information that you requested. It redacted all of the information from all cells containing the number of like grades earned by less than 10 students. Your petition challenges the UO's denial of your request. Your petition asks the Attorney General to direct the UO to make available "Course Grade Distributions (redacted for classes under size of 10 students) from Fall 2003 onwards."

SUMMARY OF THIS ORDER

We deny your petition to the extent that it seeks an order compelling the UO to make available, without redaction, information in every cell, including cells containing grades earned by fewer than ten students. We also deny your petition as to cells containing *any* number of students to the extent that the UO has a particularized factual basis from which it reasonably concludes that disclosure of the de-identified information would make a student's identity easily traceable.

We grant your petition to the extent that your petition challenges the UO's position that disclosure of cells containing fewer than ten students will *invariably* yield information from which the individual identities of students is "easily traceable." The UO has provided us, however, with information from which we conclude that in many cases, disclosure of de-identified information from cells containing fewer than ten individuals would make a student's identity easily traceable to an individual student whose grade is one of the grades subsumed in the de-identified information. The UO may reduce the complexity and cost of compliance with federal Family Educational Rights and Privacy Act (FERPA), 20 USC § 1232g, by presumptively redacting cells containing grades from fewer than ten individuals. In any subsequent petition challenging any such redaction, however, the UO will bear the burden of coming forward with cell-by-cell evidence demonstrating that a particularized factual basis existed from which the UO reasonably concluded that disclosure of the de-identified information from a particular cell would make a student's identity easily traceable.

DISCUSSION

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. If a public record contains exempt and nonexempt material, the public body must separate the nonexempt material and make it available for examination. ORS 192.505. This requirement applies where it can reasonably be accomplished. See ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (2008) ("MANUAL") at 105 (citing *Turner v. Reed*, 22 Or App 177, 538 P2d 373 (1975)). Here, the statistical data at issue can reasonably be redacted.

For the purpose of preparing this order and discharging our responsibility under the Public Records law, we conferred with the UO and with representatives of other institutions of higher education in Oregon. The UO informed us that it provided you with an estimate of the cost of producing the documents, which you paid. On April 3, 2008, the UO provided you with records of course grade distributions based on whole grades. Citing its obligation to comply with FERPA, UO redacted from that disclosure all information in cells containing fewer than 10

grades. The UO initially disclosed a course number, professor, semester, and the number of students receiving A, B, C, D, and F grades. For instance, in a class in which 27 students earned an "A" grade, UO entered a "27" in the data cell corresponding to grade "A". However, in a course in which nine students earned a grade of "F," UO entered an asterisk ("*")in place of the "9."

You then requested that the records be further broken down by "+/-" grade distributions. The UO explained to you that such a breakdown would result in an increased number of cells containing an entry of less than 10. For example, in the hypothetical course described above, if nine students earned an "A+," nine earned an "A," and nine earned an "A-", information from all three cells would be redacted. Records redacted in this manner were provided to you by the UO on April 10, 2008.

ORS 192.502(8) exempts from disclosure "[a]ny public records or information the disclosure of which is prohibited by federal law or regulations." More specifically, ORS 192.496(4) exempts from disclosure "[s]tudent records required by state or federal law to be exempt from disclosures."

As an educational institution receiving federal funds, the UO is subject to the student privacy requirements of FERPA. 20 USC § 1232g. Under FERPA, the UO may not have a "policy or practice" of disclosing personally identifiable information from certain education records without the written consent of the parent or eligible student. 20 USC § 1232g(b); 34 CFR § 99.3. "Education records" are defined as records that are "directly related to a student," and maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3. Grades are education records.

Federal administrative rules define "disclosure" for purposes of FERPA. The term "disclosure" means "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means." 34 CFR § 99.3. "Personally identifiable information" includes "information that would make the student's identity easily traceable." 34 CFR § 99.3.[2]

[2] The United States Department of Education, Office of Planning, Evaluation and Policy Development, opened in 2008 a rulemaking docket for the purpose of considering possible amendments to 34 CFR § 99.3. Docket ID ED-2008-OPEPD-0002, http://www.ed.gov/legislation/FedRegister/proprule/2008-1/032408a.html (Last viewed July 11, 2008). This Public Records Order interprets and applies current federal law and regulations; substantive amendments to FERPA or to federal regulations effectuating FERPA could require modification of this Public Records Order.

The U.S. Department of Education Family Policy Compliance Office (FPCO) has indicated that data from education records can be released if scrubbed of information that would tie it to a particular student:

> [D]ata that cannot be linked to a student by those reviewing and analyzing the data are not "personally identifiable." As such, the data are not "directly related" to any students. Accordingly, a document containing only non-personally identifiable data, even when originally taken from a student's education record, is not a part of the student's education records for purposes of FERPA. Thus, because the document – established or created under the requirements below and given to a researcher – contains no personally identifiable information, it does not constitute a disclosure proscribed by the regulations.

FPCO Letter re: Disclosure of Anonymous Data (November 18, 2004) (available at http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/nashville_tn2004.html). Moreover, the FPCO has suggested that removal of explicitly identifying data generally satisfies FERPA. FPCO Letter to Georgia Board of Regents re: Open Records Request (September 25, 2003) (available at http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/georgialtr.html) (discussing various scenarios in which removing personal information prior to disclosure satisfies FERPA).

There are, however, limits to this principle. The September 25, 2003 FPCO letter notes that:

> Occasionally a student's identity may be "easily traceable" even after removal of nominally identifying data. This may be the case, for example, with a highly publicized disciplinary action, or one that involved a well-known student, where the student would be identified in the community even after the record has been "scrubbed" of identifying data. In these circumstances, FERPA does not allow disclosure of the record in any form without consent because the irreducible presence of "personal characteristics" or "other information" makes the student's identity "easily traceable."

The November 18, 2004 FPCO letter also states that "if cell size or other information would make a student's identity 'easily traceable,' that information would be considered 'personally identifiable.'" This statement appears in the context of discussion of "longitudinal studies in which *individual student performance is evaluated over a period of time*," (emphasis added). To facilitate the study, each student was identified by a unique identifier. Because the identifier for a single student is constant from class to class, this information could be combined with other information, including information about a particular student's schedule or dates of attendance, to deduce the student's identity. The letter goes on to state that, even in the context of these longitudinal studies, an "educational agency or institution should use generally accepted statistical principles and methods to ensure that the data are reported in a manner that fully prevents the identification of students."

The FPCO has also recognized that "agencies and institutions are themselves in the best position to analyze and evaluate these requirements based on their own data," and that the burden is on the agency or institution not to release de-identified information if the agency or institution believes that personal identity is easily traceable based on the specific circumstances under consideration. FPCO Letter to Georgia Board of Regents re: Open Records Request (September 25, 2003) (available at http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/georgialtr.html). Because the information you requested has been scrubbed of names and other identifiers, the question is whether students' identities would be "easily traceable" from this information if the UO were disclose the information for cells holding the grades of less than 10 students. This is a factual question.

We have previously examined a similar factual question. On December 1, 1992, we denied a petition for a Public Records Order filed by one Kenneth Spice, who was then the co-editor of the school's newspaper. Mr. Spice sought from Portland State University (PSU) printouts of grade distributions, broken down by course section. PSU had informed Mr. Spice that it would redact information for classes of five or fewer students. We agreed with PSU that releasing grade distributions for classes that small could enable other students to deduce the grades awarded to their classmates. Public Records Order, December 1, 1992, Spice, at 3. We also indicated, however, that "with respect to large enrollment classes, the grade report information is not personally identifiable." *Id.* at 2.

Just as we concluded in the Spice Public Records Order that de-identified data about a small class could easily be traced to the identities of the individual students in that class, we conclude here that at some point the number of students receiving like grades – and thus reported in the de-identified form in a single cell – becomes small enough to facilitate easy individual identification. The boundary between anonymity and easy identification depends on the factual question of whether students' identities would be "easily traceable" from disclosure of the number of students in the cell in question. The UO is compelled by FERPA and permitted by the Public Records Law to redact the contents of every cell so small that a person could easily trace the identities of the students whose grades are reported in that cell. For this reason, we deny your petition as to cells containing *any* number of students to the extent that the UO has a particularized factual basis from which it reasonably concludes that disclosure of the aggregate number of students in that cell would make a student's identity easily traceable.

We have, however, no facts upon which to sustain the UO's position that disclosure of cells containing fewer than ten students will invariably yield information from which the individual identities of students is "easily traceable." The burden of coming forward with evidence justifying a redaction is on the UO. ORS 192.450(1). It has not come forward with such evidence as to its proposed invariable redaction of all information in all cells containing fewer than ten grade reports. For this reason, we grant your petition to the extent that you challenge the UO's position that disclosure of cells containing the grades of fewer than ten students will *invariably* yield information from which the individual identities of students is "easily traceable."

The foregoing orders do not in themselves establish an exact numeric boundary, below which the UO invariably is required by FERPA and invariably is authorized by the Public Records Law to redact the information, and above which the UO invariably is authorized by FERPA and invariably is compelled by the Public Records Law to disclose the information without redaction. The UO informs us that the cost of applying on a cell-by-cell basis the principles described above likely would be so large that tracing the boundary would deter rather than facilitate the full disclosure of information pursuant to the Public Records Law. We have therefore examined the applicable law to determine whether the UO may establish a presumptive numeric limit. We believe FERPA and the Public Records law permit the UO to do so.

In searching for a principle that will more efficiently guide the UO's determination as to the boundary, we are mindful of the FPCO's guidance indicating that schools themselves are "in the best position" to decide how the privacy requirements apply. We do not understand this to mean that this office must defer to unsubstantiated claims by the UO as to the ease of tracing individual identities from disclosures of de-identified data. We understand the guidance to mean instead that the FPCO, in its enforcement of FERPA, permits institutions some latitude to apply their experience and expertise in the implementation of FERPA. FPCO has indicated, for example, that its enforcement of FERPA's requirements will focus on "whether the school official reasonably could have concluded, at the time of the disclosure, that the disclosure would not make the student's identity easy to trace." FPCO Letter to University of Mississippi (February 12, 2002) (available at http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/leetyner.html). The FPCO thus leaves open to the UO the application of a cost-reducing rule of reason requiring presumptive redaction of small numbers of grade reports within a given cell and requiring presumptive disclosure of cells containing the grades earned by more students. We believe that the Public Records Law in turn permits the University to establish a presumptive lower limit on the number of grade results that it will report from a given cell.

During our deliberations on this order, the UO and other institutions of higher education in Oregon provided us with grade distribution reports for some of the courses taught at those institutions. For example, at one of Oregon's institutions of higher education, in the Spring of 2007, 11 students earned grades in a particular course. Nine students earned A's, one a B and one an F. If the count for each of those cells were publicly disclosed, the students who earned the B or F, respectfully, would need only to learn the other's identity in order to conclusively establish the identity of the nine students who earned A's. At the same institution, the same or functionally identical patterns occurred in at least four other courses during the same term, in five courses in the Fall, 2006 term, and in three courses during the Winter, 2007 term. Given this information, the UO reasonably could conclude that FERPA presumptively requires redaction of cells containing the grades of 10 or fewer students.

In sum, the UO must disclose the number of students whose grades are reported in any cell, unless the UO has a particularized factual basis from which it reasonably concludes that disclosure of the de-identified information would make a student's identity easily traceable. The UO may redact the number otherwise to be displayed from a given cell, regardless of the size of the number, if the UO has a particularized factual basis from which it reasonably concludes that

disclosure of the de-identified information would make a student's identity easily traceable. Given the cost and complexity of applying the foregoing rules, however, the UO may presume that the disclosure of ten or fewer grades from a given cell would make a student's identity easily traceable.

Within seven days, the UO must review its determination in light of the requirements of this order. You may file a new petition if the UO makes or adheres to redactions that you believe are unjustified in light of this order.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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