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Christian Wihtol, Senior Editor
The Register-Guard
3500 Chad Drive
Eugene, OR 97408

Dear Mr. Wihtol:

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 December 28, 2010. You subsequently granted three extensions of time to allow us to more fully consider your petition.

You filed a public records request with the University of Oregon (UO). The UO provided you one document in response to your request for a list of National Collegiate Athletic Association (NCAA) violations and withheld additional documents addressing "any allegations of improper benefits received by student-athletes in the University of Oregon men's basketball program and any investigation conducted by the UO compliance office into such allegations." The UO notified you that it had located all the responsive records but that it would not release any portion of any of them, because they were exempted from disclosure under the Family Educational Rights and Privacy Act, 20 USC §1232g ("FERPA").

Your petition challenges the UO's denial on the grounds that it is an overly broad interpretation of FERPA. You contend that the UO failed to meet its obligation under ORS 193.505 to segregate exempt and non-exempt material and to release the non-exempt material.

SUMMARY OF THIS ORDER

We conclude that all the requested records are exempt from disclosure under ORS 192.420, because they are education records under FERPA that cannot be sufficiently redacted to prevent a student from being identified with reasonable certainty.

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 (2010) ("Manual") at 102 (citing *Turner v. Reed*, 22 Or App 177, 538 P2d 373 (1975)).

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.

For the purpose of preparing this order and discharging our responsibility under the Public Records law, we conferred with the UO's Public Records Compliance Officer, Elizabeth Denecke. Citing the UO's obligation to comply with FERPA, Ms. Denecke informed us that, based on an assessment of all of the factors, the records could not be disclosed even in a redacted format.

With regard to the records you requested, the UO reviewed what had been publicly reported by the Register-Guard, what information the individual, specific records contained and the volume of records. The UO explained that, in making the decision that no records could be released, it had "reviewed all records pertinent to the Register-Guard's Public Records request and concluded that FERPA precluded release of even redacted records based on the foregoing authorities because the information being requested could reasonably be tied to individual students."

1. The requested documents are "education records" under FERPA.

With certain exceptions not applicable here, "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); 34 CFR § 99.3.

Our application of the definition of "education records" to the requested documents is informed by the guidance of the Family Policy Compliance Office (FPCO). In a letter to the University of Oklahoma, the FPCO concluded that "correspondence between the University and the NCAA and/or other institutions, documents related to the internal investigation and other investigative reports, and records regarding student athletics employed at a car dealership" would

be considered "education records" because those records were directly related to a student and maintained by the University. FPCO Letter to Amanda F. Miller (August 11, 2006).

Similarly, the FPCO concluded in a letter to Mississippi State University that a letter of inquiry from the NCAA in which student athletes from the University were personally identified was an "education record." Letter to Charles L. Guest (August 21, 1995). Citing the statutory definition of "education records," the FPCO wrote: "Accordingly, an investigative report, letter of inquiry, or other information, which is directly related to a student and maintained by an educational agency or institution, is an 'education record' under FERPA." *Id.*

The FPCO has also determined that a letter from the University of Mississippi to the Southeastern Conference (SEC) and the University's "redacted self-report" to the NCAA – in their unredacted form – were education records because they were directly related to a student, were maintained by the University, and were "institutional in nature (they relate[d] to the school's responsibility to self-report violations to the NCAA)." FPCO Letter to L. Lee Tyner, Jr. at 2 (February 12, 2002). The FPCO also noted its position that "correspondence to or from the NCAA is an education record." *Id.* at 2 n 2.

The United States Circuit Court of Appeals for the Sixth Circuit has affirmed the FPCO's broad reading of the term "education records." In *U.S. v. Miami University*, 294 F3d 797, 812 (6th Cir 2002), the court concluded: "Under a plain language interpretation of the FERPA, student disciplinary records are education records because they directly relate to a student and are kept by that student's university." *See also Connoisseur Communication of Flint v. University of Michigan*, 230 Mich App 732, 584 NW 2d 647 (1998) (Student-Athlete Automobile Information Sheet in the university's files was an education record protected from disclosure by FERPA); *DTH Pub. Corp. v. University of North Carolina*, 128 NC App 534, 496 SE 2d 8 (1998) (in view of FERPA's broad definition and based on the stipulated facts, records of student disciplinary hearing were "education records" because they contained information directly related to students and were maintained by the University or by persons acting for it). *Cf. Owasso Indep. Sch. Dist. v. Falvo,* 534 US 426, 433, 122 S Ct 934, 151 L Ed 2d 896 (2002) (the Court held that peer-graded papers were not education records because, although the papers contained information directly relating to a student, they were not "maintained" by the school or a person acting for the school).

We note that courts in other jurisdictions have concluded, on significantly different facts, that records relating to NCAA violations were not "education records" under FERPA. Those decisions are not instructive here, for the following reasons.

NCAA v. The Associated Press, 18 So3d 1201, 1210-1211 (Fla App 2009), *rev den*, 37 So3d 848 (Fla 2010), is distinguishable based on the nature of the records at issue. Those records consisted of a transcript of a hearing before the NCAA committee and the committee's response to the university's appeal in an NCAA disciplinary proceeding and appeal. The documents related to allegations "that a learning specialist and an academic tutor had provided improper assistance to a number of students, some of whom were participating in athletic programs." *NCAA*, 18 So3d at 1205. The Florida District Court of Appeal held that the records were not "education records" because the "[did] not contain information directly relating to a

student." Rather, they "pertain[ed] to allegations of misconduct by the University Athletic Department, and only tangentially relate to the students who benefited from that misconduct." *Id.* at 1211.

In contrast, the information you request directly relates to one or more students. Specifically, you requested documents maintained by the UO addressing "any allegations of improper *benefits received by student-athletes in the University of Oregon men's basketball program* and any investigation conducted by the UO compliance office into such allegations." (Emphasis added.) Unlike the information in NCAA v. Associated Press, the information you requested is not "only tangentially related to the students."

In *Kirwan v. The Diamondback, et al.*, 352 Md 74, 90, 94, 721 A2d 196, 203, 206 (1998), the Maryland Court of Appeals concluded that, despite FERPA's "somewhat broad definition of education records," it did not include "records of parking tickets or correspondence between the NCAA and the University regarding a student-athlete accepting a loan to pay parking tickets." Notably, *Kirwan* does not distinguish between the parking tickets and the correspondence regarding the student-athletes in concluding that neither constitutes education records.

The *Kirwan* court relied not on the text of the statute or regulations, but on cases from other jurisdictions interpreting FERPA and the legislative history of the federal statute.[1/] 352 Md at 94, 721 A2d at 206, *citing The Miami Student v. Miami University*, 79 Ohio St 3d 168, 680 NE 2d 956 (1997) (disciplinary board proceedings were not "education records" because they "are nonacademic in nature" and "do not contain educationally related information, such as grades or other academic data, and are unrelated to academic performance, financial aid, or scholastic performance"); *Red & Black Pub. v. Board of Regents*, 262 Ga 848, 427 SE 2d 257 (1993) (records of the University's student court concerning hazing charges against fraternities not "education records" because "not of the type the Buckley Amendment is intended to protect, *i.e.*, those relating to individual student academic performance, financial aid, or scholastic probation" and, moreover, the records were "maintained at the Registrar's Office"); *Bauer v. Kincaid*, 759 F Supp. 575 (WD Mo1991) (campus criminal investigation and incident reports maintained by the university's "Safety and Security Department" and not "education records" because they were not "records relating to individual student academic performance, financial aid or scholastic probation which are kept in individual student files").

[1/] In applying the definition of "education records," the *Kirwan* court wrote that it was "important to keep in mind what Congress intended to accomplish," in particular as demonstrated by the testimony of the legislation's sponsor, Senator Buckley. 352 Md at 90-91, 721 A2d at 204. The court specifically noted that:

> The types of information or education records that were mentioned on the floor of Congress include student IQ scores, medical records, grades, anecdotal comments about students by teachers, personality rating profiles, reports on interviews with parents, psychological reports, reports on teacher-pupil or counselor-pupil contacts and government-financed classroom questionnaires on personal life, attitudes toward home, family and friends. *See* 120 Cong. Rec. at 13951-13954, 14584-14585.

352 Md at 91, 721 A2d at 204. *But see U.S. v. Miami University*, 294 F3d 797, 812 (CA 6 2002) ("Congress made no content-based judgments with regard to its 'education records' definition.").

We do not believe that the Oregon appellate courts would necessarily reach the same result as in *Kirwan*. In interpreting federal statutes, Oregon courts follow the methodology that federal courts have prescribed for interpreting federal statutes. *Friends of the Columbia Gorge v. Columbia River*, 346 Or 366, 377-378, 213 P3d 1164 (2009). In general, that means examining the text, context, and legislative history of the statute. 346 Or at 378. Under that methodology, the legislative history of a statute is not, by itself, dispositive of the legislature's intent.

Therefore, we are particularly mindful of the ruling of the Sixth Circuit Court of Appeals in *U.S. v. Miami University*. The Sixth Circuit concluded from "a plain language interpretation of the FERPA" that student disciplinary records are education records. The court found "nothing in the statute or its legislative history to the contrary" and wrote that "the various state court and federal district court cases cited by [the requestor] do not sway our conclusion." 294 F3d at 812 (footnote omitted). "In fact," the Sixth Circuit court wrote, "a detailed study of the statute and its evolution by amendment reveals that Congress intends to include student disciplinary records within the meaning of 'education records' as defined by the FERPA[,]" as "evinced by a review of the express statutory exemptions from privacy and exceptions to the definition of education records." 294 F3d at 812.

Based on the text of the statute and regulations, we conclude that the documents you requested directly relate to a student or students and that they are "maintained" by the university or a person acting for the university. Thus, we conclude that the information you requested would be considered "education records" under FERPA, because those records are directly related to one or more students and are maintained by the UO. Therefore, FERPA prohibits disclosure of personally identifiable information contained in those records. 34 CFR § 99.3.

2. The records contain personally identifiable information that cannot be sufficiently redacted to prevent identifying a student or students with reasonable certainty.

Personally identifiable information also includes "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 CFR § 99.3.[2/]

For example, in the letter to the University of Oklahoma cited above, the FPCO explained that "redaction of nominally identifying information (student's name, social security number, and the exact date and time of the incident) may not be sufficient to prevent a student's identity from being easily traceable with respect to a highly publicized event[.]" (Applying *former* 34 CFR § 99.3 definition of "personally identifying information".) As the FPCO wrote in a letter to the Board of Regents of the University System of Georgia, a student's identity may be easily traceable even after removal of nominally identifying data, for example, in the case of "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." FPCO Letter to Corlis P. Cummings at 3, (September 25, 2003). In those circumstances,

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[2/] Before its amendment in 2009, 34 CFR § 99.3 defined "personally identifiable information" to include "other information that would make the student's identity easily traceable."

FERPA does not allow disclosure of the record "in any form" without consent because "the irreducible presence of 'personal characteristics' or 'other information' make the student's identity 'easily traceable.'" *Id.*

"Personally identifiable information" also includes "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." 34 CFR § 99.3. This is known as a "targeted request." 73 Fed Reg 15583 (March 24, 2008). An individual can make a targeted request with or without mentioning the student's name. *Id.* The university may not release education records in redacted form if the circumstances indicate that the requested has made a targeted request, *i.e.*, has direct, personal knowledge of the subject of the case. *Id.* at 15583-15584.

Applying the prior version of the regulation, the FPCO concluded in its 2002 letter to University of Mississippi (cited above) that in determining whether a redacted education record would be "easily traceable" if disclosed by the institution, the school "should consider whether the party seeking access to the records has prior knowledge of the students listed in the education record. FPCO Letter to Tyner at 2-3. "In examining the prior knowledge of a potential recipient, the standard the school official should apply is whether the individual can trace the identity of the student without significant amounts of additional searching for information." *Id.* at 3. If the institution determines that the education record remains "easily traceable to a student even after it has been redacted," FERPA prohibits its disclosure without the consent. *Id.* The FPCO's reasoning is consistent with amended 34 CFR § 99.3.

In sum, the documents you request cannot be redacted to prevent the identification of one or more students. Some of the requested documents, even if redacted, contain information that is linked or linkable to a specific student or students that would allow a reasonable person in the school community to identify the student or students with reasonable certainty. Therefore, we conclude, those documents cannot be disclosed under FERPA. In addition, the request itself specifies that it seeks information relating to a particular, named student. As such, it is a targeted request that it must be denied under FERPA.

CONCLUSION

For the reasons explained above, we deny your petition.

Sincerely,

DAVID E. LEITH
Associate Attorney General

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c: Elizabeth Denecke, Public Records Compliance Officer