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December 1, 1992

Kenneth A. Spice, Co-Editor
University Sentinel
P.O. Box 751 VG
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Re: Petition For Public Records Disclosure Order: Portland State University Records

Dear Mr. Spice:

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. The petition was received by the Department of Justice on November 25, 1992. For the reasons that follow, we respectfully deny your petition.

Your petition asks the Attorney General to direct Portland State University ("PSU"), Office of Institutional Research and Planning, to make available for inspection or produce a copy of the 1991-92 computer printouts of grade distributions, broken down by course section ("grade reports"). PSU previously denied this request, stating "that the release of grade distributions for small classes may jeopardize the confidentiality of student records." PSU offered to separate the data for smaller classes from the requested records, but PSU informed you that this would require special charges of approximately $300, and PSU denied your subsequent request for a waiver of these charges. Your petition does not ask us to review the denial of your waiver request; rather, the sole issue before us is whether the entire 1991-92 grade reports are subject to disclosure without any redacting.

The Public Records Law confers the 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 materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. ORS 192.505; Turner v. Reed, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

ORS 192.502 (7) exempts from statutorily mandated 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 disclosure." (Emphasis added.) The pertinent federal law is known as the Buckley Amendment to the Freedom of Information Act, 20 USC § 1232g.

PSU, as an educational institution receiving federal funds, is subject to the privacy-of-student-records requirements of federal law, 20 USC § 1232g(b)(1), (2) and (d), and federal regulation, 34 CFR § 99.1. This federal law and regulation generally prohibit the payment of federal funds to educational agencies and institutions that have a practice or policy of disclosing certain educational records of students.

Generally, an educational agency may not disclose personally identifiable information from a student's education records without an appropriate written consent. 34 CFR § 99.30(a). Education records are those records that are "directly related to a student." 34 CFR § 99.3. Personally identifiable information includes, but is not limited to, "information that would make the student's identity easily traceable." Id.

In other words, if a record relates directly to a student and is disclosed in a manner that would make the student's identity easily traceable, then the records may not be disclosed without jeopardizing the availability of federal funds to the university. 20 USC § 1232g(b)(1), (2). We recognize that the federal law and regulation do not prohibit directly the disclosure of student records. However, we have previously examined this issue and determined that the federal laws involved here sufficiently state a prohibition on disclosure for purposes of the Oregon Public Records Law. In the Attorney General's Public Records and Meetings Manual, at 35 (1989), we said:

> We conclude that a federal law or regulation which expresses a clearly prohibitory policy, such as the Buckley Amendment to the Freedom of Information Act, 20 USC § 1232(g), is to be deemed a prohibition even if the means of enforcing the federal policy - loss of federal funds - is only indirectly prohibitory.

See also Public Records Order, April 13, 1987, Bristol.

Because the information in the grade reports is derived from records that are directly related to individual students, that information may not be disclosed if it is personally identifiable. The grade reports do not disclose students' names, parents' names, addresses, social security or student numbers, or other personal characteristics. Hence, with respect to large enrollment classes, the grade report information is not personally identifiable.

However, the grade report information on smaller classes is personally identifiable. Graduate level thesis and dissertation courses often have very small enrollments. We are advised that it is not uncommon for individuals other than a student to know that a student is taking a particular thesis course from a specific instructor. Thus, disclosing the grade awarded in a single student thesis course carries a significant risk that the student's identity may be easily ascertained. Classes with only two students also pose a problem. In such a situation, each student usually knows the identity of the other student in the course. If unredacted grade reports were disclosed, because each student already knows his or her own grade, that student could easily ascertain the grade awarded to the other student. Similarly, in a small class consisting of several close friends and one nonfriend, the friends could share their grades with each other and thereby deduce the grade awarded to the nonfriend.

PSU has concluded that an individual student's grade is not easily ascertained through the grade reports in classes with more than five students. However, PSU concludes that the grade report information on classes with five or fewer students would disclose personally identifiable student information. Under the facts known to us, we cannot say that PSU's conclusion is unreasonable.

Therefore, we conclude that disclosure of the unredacted 1991-92 grade reports is prohibited by federal law. 20 USC § 1232g(b)(1), (2). Because disclosure if prohibited by federal law, the unredacted grade reports are exempt from disclosure under the Oregon Public Records Law. ORS 192.502(7) and 192.496(4). Hence, we deny your petition for an order compelling disclosure of the grade reports.

Sincerely,

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Opinions Coordinator
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