HARDY MYERS
ATTORNEY GENERAL

DAVID SCHUMAN
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310-0506
Telephone: (503) 378-4400
TTY: (503) 378-5938

September 20, 1999

Brian Michael
2620 S.W. Western #209
Corvallis, OR 97333

Re: *Petition for Public Records Disclosure Order: Oregon State University Records*

Dear Mr. Michael:

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 August 24, 1999,[1] asks the Attorney General to direct Oregon State University (OSU) to make available an unaltered copy of a gradebook to BA 522 with the student names and identification numbers deleted. For the reasons that follow, we respectfully deny your petition.

BA 522 was a course offered Winter Term 1999. The course had 59 or 60 students in it, divided into two sections. The grades given in the class included six assignments, two mid-terms, three case analyses, an optional final exam (taken by only seven students), and a class participation grade.

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

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[1] Although this office received your petition on August 24, 1999, because it was not in the statutory form for a public records petition, *see* ORS 192.470, it was not identified as such until September 14, 1999. Accordingly, this order is being issued within seven days of that latter date when your letter was recognized as a petition.

Federal Law Exemption – ORS 192.502(8)

ORS 192.502(8) exempts information "the disclosure of which is prohibited under federal law or regulations." The Family Educational Rights and Privacy Act (FERPA), 20 USC § 1232g, governs the release of student records for all educational institutions or agencies receiving federal funds. FERPA prohibits the payment of federal funds to educational institutions that have a practice or policy of disclosing student education records that violate its proscriptions. Because OSU receives federal funds, it is subject to this provision. This office has concluded that a federal law or regulation that expresses a clearly prohibitory policy, such as FERPA, is a prohibition even though the means of enforcing the federal policy is only indirectly prohibitory. OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1997) at 59.

FERPA defines an education record as those records that:

(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. The grades that students receive in classes offered by an educational institution are education records.

FERPA generally prohibits the release of personally identifiable information from student education records without consent from the student. *See* 20 USC § 1232g(b). Personally identifiable information includes "other information that would make the student's identity easily traceable." 34 CFR § 99.3. The issue here is whether a list of all the grades a student received in a course is personally identifiable to that student because it would be easily traceable to that student by another person.

What constitutes "easily traceable" information under FERPA has not been extensively discussed. However, some guidance can be gleaned from various letters from Leroy Rooker in the United States Department of Education, which has the authority to investigate FERPA violations. In a letter to Assistant Attorney General Joe McKeever dated May 15, 1995, Mr. Rooker confirmed the conclusion of this office that the Shared Information System, which would share education records among state agencies using coded social security numbers which could be decoded only by the agency sending the education records and where only a computer would be matching the education records, did not constitute a violation of FERPA. *See also* 47 Op Atty Gen 1 (1993). In this situation, there was no disclosure of student education records because only the computer would be matching the education records to the student.

In a letter to Dr. Robert Wagoner, Superintendent, Henry County Public Schools, Kentucky, dated March 10, 1999, Mr. Rooker further explained what would constitute "easily traceable" information.

> We note that FERPA does not specifically define "easily traceable" and that situations regarding disclosures of information that could be considered easily traceable must be analyzed on a case by case basis. A school needs to take into consideration the types and quantity of information that is being released. Additionally, when a school district discloses information from an educational record to a third party, it must take into consideration whether the party who is seeking access to the records has prior knowledge as to the names of the students to whom the records relate or may relate and whether any subsequent parties to whom the information may be further disclosed could ascertain the identities of the students to whom the records relate.

You are asking for a copy of the gradebook in BA 522 with all of the information on students' grades, but with the students' identities deleted. You already have knowledge of the names of some, or all of the students in the class, or at least of those students in your section. Because students often discuss particularly unusual grades, such as a very high grade or a very low grade, it is likely that you might know what grade a particular student received on a particular assignment or exam. Consequently, receiving the complete list of grades for all students in a class with 60 students could enable you to determine, for at least some students, what grades they received. Although disclosure by particular students of their individual grades may be voluntary, the school's disclosure of the rest of their grades would be without their consent and, to the extent the identity of any student would be "easily traceable" from that information, its disclosure would be a violation of FERPA. Moreover, because only seven of the students took the final examination, the likelihood that one or more could be easily identified with the grade received is substantial.

For all of these reasons, we conclude that release of an unaltered copy of the gradebook in BA 522 would result in release of "easily traceable" information regarding the educational records of other students in the class. Thus, disclosure of this information is prohibited under FERPA, 20 USC § 1232g(b).[2] Because disclosure is prohibited by federal law, that information is exempt from disclosure under the Oregon Public Records Law, ORS 192.502(8). Accordingly, we respectfully deny your petition.

Sincerely,



DAVID SCHUMAN
Deputy Attorney General

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[2] We understand that OSU has offered to provide you with a copy of the gradebook with the information scrambled so that the students are not in alphabetic or student identification number order and the students' grades are scrambled within each assignment or exam. Because the identity of any particular student would no longer be easily traceable, the school's disclosure of the information in this format would not violate FERPA. Yet, because you would be able to see all of the grades received for each particular assignment or exam, this format would still permit you to determine whether the class grade point average was too high prior to the eleventh week of the term.