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
TDD: (503) 378-5938

June 15, 1998

Germaine A. Cross
P. O. Box 827
Silverdale, WA 98383-0827

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

Dear Ms. Cross:

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 June 8, 1998, requests the Attorney General to direct the University of Oregon to make the following records available:

> The historic academic transcript of Opal Whiteley, a former student who attended the university from 1916 to 1918.

ORS 192.502(9) exempts from disclosure public records or information "the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." ORS 192.502(8) exempts from disclosure public records or information "the disclosure of which is prohibited by federal law or regulations." In addition, the Public Records Law specifically exempts student records that "are required by state or federal law to be exempt from disclosure." ORS 192.496(4). We consider first at the relevant state laws and then at the federal laws.

1. State Laws Concerning Student Records

In examining state laws related to postsecondary education, we conclude that state confidentiality requirements do not confer more expansive privacy rights concerning student records than those under the federal Family Educational Rights and Privacy Act (FERPA). ORS 351.070(4)(e) authorizes the State Board of Higher Education to -

> "[a]dopt rules relating to the creation, use, custody and disclosure of student education records of the institutions that are consistent with the requirements of applicable state and federal law."

This statute does not itself establish substantive confidentiality rights beyond those under other provisions of state and federal law; however, it does empower the State Board of Higher Education to adopt substantive rules relating to student records. Pursuant to the authority granted under ORS 351.070(4), the State Board has adopted OAR 588-013-0035(1), which provides that personal student records "designated as confidential pursuant to ORS 351.070 or pursuant to the Federal Family Educational Rights and Privacy Act" may not be released to any person or agency without the student's written consent. This rule adopts as its reference the confidentiality requirements of FERPA. Similarly, rules of the University of Oregon refer to and track the language of FERPA in prescribing confidentiality requirements for student records. *See* OAR 571-020-0010 and 0030. Thus, we do not find under rules of the State Board or the University of Oregon an intent to enlarge or modify student rights to confidential records beyond those rights under FERPA. Accordingly, we next consider your request in light of the FERPA restrictions.

2. The Family Educational Rights and Privacy Act (FERPA)

ORS 192.502(8) exempts from disclosure records the release of which is prohibited under provisions of federal law or regulations. FERPA provides that no federal funds shall be made available to educational institutions that have a policy or practice of permitting the release of educational records without the written consent of the student to whom the records pertain. 20 USC § 1232g(b). We have previously concluded that a federal statute that cuts off funding if an agency discloses specified information amounts to a federal prohibition on disclosure for purposes of ORS 192.502(8). *See* Public Records Order, April 13, 1987, Bristol. Accordingly, the Attorney General will not order disclosure of the academic transcripts sought by the petitioner if their disclosure is prohibited under FERPA.

Education records are defined under FERPA as records containing information directly related to a student and maintained by an educational agency or institution. 20 USC § 1232g(a)(4)(A). *See also* 34 CFR § 99.3. The academic transcripts of Opal Whiteley relate directly to a specific

student and are maintained by the University of Oregon. Thus, these records are "education records" under FERPA.[1/]

We next consider whether a student's rights under FERPA lapse or expire upon the death of the student. The statutory language of FERPA does not expressly answer this question. The Family Policy Compliance Office of the United States Department of Education has taken the position that a student's right to prohibit disclosure of education records does not continue beyond the student's death. *See* attached letter from Leroy Rooker, Director of Family Policy Compliance Office, to Honorable John J. Duncan, Jr., dated March 3, 1993. The Family Policy Compliance Office concluded that the student's right to privacy under FERPA is personal and lapses upon the death of the person who holds it. The United States Department of Education is charged with enforcing the provisions of FERPA through investigating and adjudicating violations of the Act. 20 USC § 1232g(f) and (g). Under federal rules of construction, an administering agency's interpretation of inexact or ambiguous terms of a statute is entitled to deference, and courts examine whether the agency's interpretation of the statute is based on a permissible construction. *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 US 837, 842, 104 S Ct 2778, 81 L Ed2d 694 (1984); *Legacy Emanuel Hosp. and Health Center v. Shalala*, 97 F3d 1261, 1265 (9th Cir, 1996). In addition, the Oregon Attorney General's interpretation of federal laws and regulations is not as authoritative as our interpretation of state law issues. Letter of Advice dated November 1, 1984, to Gerald G. Johnson, Children's Services Division. We find the interpretation of the U.S. Department of Education to be reasonable and consistent with Congress's intent. It seems unlikely that Congress intended to seal indefinitely the records of a student after the student's death, especially since the statute contains no mechanism for disclosure after a student's death.[2/]

[1/] Under FERPA, a student includes both a current and former student of the educational institution. 20 USC § 1232g(a)(2).

[2/] We reached a similar conclusion in a Letter of Advice dated September 23, 1976, to J.D. Bray, Mental Health Division (OP 3708), concerning a statute that prohibited the release of mental health records without the patient's consent. We concluded that the statute's prohibition did not apply to the records of deceased persons. Our reasoning was based in part on the fact that the statute provided no mechanism for release of records following the patient's death.

3. General Public Records Law Exemptions from Disclosure

Having concluded that the consent requirements of FERPA do not apply to the records of a deceased student, we must also consider whether any other provisions of the Public Records Law would exempt these records from disclosure. ORS 192.502(2) exempts from disclosure information of a personal nature such as that kept in a personal, medical or similar file when the public disclosure would constitute an unreasonable invasion of privacy. In such cases, the party seeking the records has the burden to show that disclosure would not constitute an unreasonable invasion of privacy. Student records, including academic transcripts, might in some instances fall under this exemption. There might also be instances in which personal privacy considerations would continue to apply even after the death of a the student. However, we need not address that issue in this instance because ORS 192.495 states:

> Notwithstanding ORS 192.501 to 192.504 and except as otherwise provided in ORS 192.496, public records that are more than 25 years old shall be available for inspection.

Because ORS 192.495 operates "notwithstanding ORS 192.501 to 192.505," the personal privacy exemption under ORS 192.502(2) is no longer applicable after 25 years. Since the academic transcripts of Opal Whiteley were created during the period from 1916 to 1918, the records are not exempt from disclosure under ORS 192.502(2).

Based on the conclusions we express in this letter, the University of Oregon has agreed to disclose these records to you. Accordingly, your petition is denied as moot.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

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c: Peter Swan, College of Law, University of Oregon
Herbert Chereck, Registrar, University of Oregon