

Opinion No. 2012-083

September 21, 2012

The Honorable Nate Bell
State Representative
Post Office Box 2103
Mena, Arkansas 71953-2020

Dear Representative Bell:

You ask two questions about how the Arkansas Freedom of Information Act (“FOIA”)—which is codified at A.C.A. §§ 25-19-101 to 25-19-110—applies to certain records maintained by a law school:

1. Assume that an FOIA request has been made for an existing Excel document that contains the LSAT scores, undergraduate GPA (“uGPA”), law-school GPA (“GPA”), race, gender, and age data for all students who, over a seven-year period, graduated from a certain law school and took the bar exam. Is that law school obligated to provide the requested Excel document, after making any appropriate redactions?
2. Assume that an FOIA request has been made to a law school for the undergraduate and law-school transcripts of all students who started and completed a certain semester in a certain year. Further, assume that the request seeks only the “letter grade” for each class on each transcript with everything else redacted. Is a law school, after making any required redactions, obligated to provide each set of transcripts?

BRIEF RESPONSE

The answer to both questions turns on the relationship between the FOIA and the Family Education Rights and Privacy Act of 1974 (“FERPA”). Specifically, as

explained more fully below, the answer turns on whether (and to what extent) the FOIA requires the so-called “de-identification” of education records. Although no Arkansas court has addressed this question, in my opinion such a court may well be persuaded that under certain limited circumstances, which are explained below, the FOIA does require custodians to redact an education record so that it is de-identified. (As also explained below, these limited circumstances do not include what may well be the most common kind of FOIA request for students’ records: requests seeking students’ names or other identifying information.) Regarding your first question, determining whether the custodian is required to de-identify the Excel document depends on some factual issues that I am not able to resolve in an opinion. Given the nature of transcripts and the way they typically display grades, a court faced with your second question would, in my opinion, probably hold that the FOIA does not oblige a school to redact everything on a transcript so that only the letter grade shows.

DISCUSSION

The same general legal principles apply to both questions. So I will explain those principles and then, to the extent I am able, I will apply them to the two questions.

I. General principles

A document must be disclosed in response to a FOIA request if all three of the following elements are met. First, the FOIA request must be directed to an entity subject to the act. Second, the requested document must constitute a public record. Third, no exceptions allow the document to be withheld.¹ For purposes of this opinion, I will assume that the first two elements are met.

These assumptions mean that the Excel document and transcripts must be disclosed unless some specific exception shields them both from disclosure. The most relevant potential exception, which is found at A.C.A. § 25-19-105(b)(2), shields from disclosure all public records that are “education records as defined in the Family Education Rights and Privacy Act of 1974 [(“FERPA”)], [which is codified at] 20 U.S.C. § 1232g, unless their disclosure is consistent with the provisions of that act.”

¹ Please see Opinion No. 2012-063 for more information on these first two prongs.

II. Relation between FOIA and FERPA

As this office has noted before, subsection -105(b)(2) incorporates FERPA into the FOIA.² Before this incorporation, educational institutions were potentially caught between FOIA and FERPA because the latter declared that the release of certain documents could jeopardize a school's federal funding, while the former could require the school to release them. This tension was caused by the fact that FERPA is not an absolute prohibition on the release of anything.³ Rather, it rewards schools with federal funds if the schools comply with FERPA's privacy rules regarding student records.⁴ So, in 2001, the General Assembly resolved this tension by incorporating FERPA's privacy rules—and exceptions—into the FOIA.

Given this incorporation, we can briefly state the relation between FOIA and FERPA as follows: (1) FOIA is the basis for the obligation to shield qualifying "education records" from disclosure; and (2) a custodian must consult FERPA to determine whether a document qualifies for FOIA's non-disclosure obligation.

A. FERPA's privacy rules

Accordingly, to understand whether -105(b)(2) exempts a record from disclosure, one must understand FERPA's requirements. FERPA establishes the following general rule: Educational institutions risk losing their federal funding if they have a "practice or policy" of disclosing "education records" or "personally identifiable information contained therein" without the consent of the student (whose records they are) or the student's parents.⁵ I call this a "general rule" because there are several exceptions, none of which need concern us here.

FERPA defines the term "education record" to include "records, files, documents and other materials" that both "(i) contain information directly related to a student and (ii) are maintained by an educational agency or institution or by a person

² *E.g.*, Op. Att'y Gen. 2002-169.

³ *E.g.*, Op. Att'y Gen. Nos. 2004-348 ("Because FERPA does not directly prohibit disclosure of education records, it does not preempt state law or qualify as [an] exemption under the Arkansas FOIA" quoting J. Watkins & R. Peltz, *The Arkansas Freedom of Information Act* (m & m Press, 4th ed. 2004), at 104 n.105.); 96-044.

⁴ *See* 20 U.S.C. § 1232g(b)(1).

⁵ 20 U.S.C. § 1232g(b)(1).

acting for” it.⁶ The regulations implementing FERPA define the term “personally identifiable information” broadly. The term includes the names and addresses of students and their family members and personal identifiers, whether direct (e.g., social security number or student ID number) or indirect (e.g., a student’s date of birth or mother’s maiden name).⁷ The two broadest sub-categories of the term “personally identifiable information” are:

- (f) Other 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; or
- (g) Information requested by a person who the educational agency reasonably believes knows the identity of the student to whom the record relates.⁸

Before going any further, it is worthwhile to pause and notice how restrictive these provisions are. It is inconsistent with FERPA to release any “information requested by a person” when the school “reasonably believes” that the requestor knows the identity of the student to whom the records relate. Because the FOIA incorporates FERPA, this means that subsection 25-19-105(b)(2) requires that most requests for the records of *a specific student* will have to be denied either because the request specifically seeks a student’s name or because the requestor already knows the student’s name and is seeking other information about the student.

Nevertheless, FERPA does recognize that there are scenarios in which schools can redact an education record so it no longer contains any “personally identifiable information.” FERPA calls this redaction process “de-identification”:

De-identified records and information. An educational agency...may release the records or information without the [student’s or parent’s] consent...after the removal of all personally identifiable information

⁶ 20 U.S.C. § 1232g(a)(4)(A).

⁷ 34 C.F.R. § 99.3.

⁸ 34 C.F.R. § 99.3.

provided that the educational agency...has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.⁹

While FERPA does not require schools to de-identify records so as to make them discloseable, the just-quoted regulation makes it clear that releasing a de-identified record is consistent with FERPA. The federal agency tasked with ensuring compliance with FERPA agrees,¹⁰ as do state and federal courts.¹¹ Accordingly, the mere fact that a public record contains "personally identifiable information" does not, by itself, mean that it is inconsistent with FERPA to disclose the document. Instead, if the document can be de-identified, then FERPA "permits" the document to be released.

⁹ 34 C.F.R. § 99.31(b)(1).

¹⁰ The Family Policy Compliance Office, which is part of the U.S. Department of Education, is responsible for issuing advisory letters regarding FERPA compliance. It has held that a de-identified record may be released because such a record does not implicate FERPA's general rule. See Letter from LeRoy S. Rooker, Director, FPCO to Matthew J. Pepper, Policy Analyst, Tennessee Department of Education, Nov. 18, 2004, *available at* U.S. Department of Education, FERPA Online Library, http://www2.ed.gov/policy/gen/guid/fpc/ferpa/library/nashville_tn2004.html (last visited Aug. 6, 2012).

¹¹ See *United States v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir. 2002) (holding that "[n]othing in the FERPA would prevent the Universities from releasing properly redacted records."); *National Collegiate Athletic Assn. v. Associated Press*, 18 So. 3d 1201, 1211 (Fla. Dist. Ct. App. 2009); *Miami Univ.*, 294 F.3d at 824 (holding that persons "may still request student disciplinary records that do not contain personally identifiable information. Nothing in the FERPA would prevent the Universities from releasing properly redacted records."); *Ragusa v. Malvern Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 293–94 (E.D.N.Y. 2008) ("[T]here is nothing in FERPA that would prohibit [schools] from releasing education records that had all 'personally identifiable information' redacted."); *Osborn v. Bd. of Regents of Univ. of Wisconsin Sys.*, 647 N.W.2d 158, 168 n.11 (Wis. 2002) ("[O]nce personally identifiable information is deleted, by definition, a record is no longer an education record since it is no longer directly related to a student"); *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 908–09 (Ind. App. 2003) (holding that a school may properly release a public record after redacting information that could personally identify a student) *Bd. of Tr., Cut Bank Pub. Sch. v. Cut Bank Pioneer Press*, 160 P.3d 482, 487 (Mont. 2007) (noting that "other jurisdictions have held that once a record is redacted, it no longer contains 'information relating directly to a student' and is therefore not an educational record under FERPA.").

B. The scope of FOIA's non-disclosure obligation

With this understanding of FERPA in mind, the question turns to whether the FOIA requires custodians to de-identify education records. Because no Arkansas appellate court has considered this question, I cannot be very definitive in my response. Nevertheless, at least one state supreme court has held that custodians are obliged to de-identify records. In *Osborn v. Bd. of Regents*, the Wisconsin Supreme Court held that a law school had to de-identify student records to comply with an FOIA request that sought data on several years' worth of students; specifically, the students' GPA, uGPA, LSAT scores, race, and gender. The school argued, among other things, that Wisconsin's FOIA allowed the school to refuse to de-identify the documents because doing so was overly burdensome.¹²

The court disagreed. It cited a redaction provision in Wisconsin's FOIA that is very similar to A.C.A. § 25-19-105(f)(1). The Wisconsin provision, as it existed in 2002, framed custodians' redaction obligations as follows: "If a record contains information that is subject to disclosure...and information that is not subject to such disclosure, the [custodian] shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release."¹³

The *Osborn* court read this provision in Wisconsin's FOIA as, what we might call, an "absolute obligation" to redact. That is to say, there were no considerations that might mitigate or limit the custodian's obligation to redact education records. All that mattered for the redaction analysis was whether the document contained some discrete piece of non-exempt information. If it did, then the custodian had to disclose that piece.

Arkansas's FOIA frames a custodian's redaction obligation as follows:

(f)(1) No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information.

(2) Any *reasonably segregable portion* of a record shall be

¹² *Osborn*, *supra* note 11.

¹³ *Osborn*, 647 N.W.2d at 174.

provided after deletion of the exempt information.¹⁴

Subsection (f)(1), like Wisconsin's FOIA, establishes a general obligation to redact. Both the Wisconsin Supreme Court and, apparently, the law school in that case agreed that, as a general rule, Wisconsin's FOIA required schools to redact from education records. The only dispute was whether Wisconsin's FOIA contained an exception to that general rule for redactions that would be unduly burdensome. While two noted commentators on the FOIA note that the *Osborn* analysis is "consistent with" Arkansas's FOIA,¹⁵ I cannot predict with certainty whether an Arkansas court would follow the *Osborn* analysis. Given the similarities between Wisconsin's and Arkansas's redaction provisions, however, it may be reasonable to assume that an Arkansas court faced with the question would likewise interpret the FOIA in such a way that—with one caveat, explained below—when requestors seek the kind of aggregated information sought in *Osborn*, schools are generally required to de-identify education records.

The important caveat is that, unlike the Wisconsin provision, Arkansas's FOIA *limits* custodians' redaction obligations. Subsection (f)(2) conditions the obligation to redact on whether the non-exempt information is "reasonably segregable" from the exempt information. So while Wisconsin has an absolute obligation to redact, Arkansas appears to have a conditional obligation to redact.

But what does it mean for a piece of information to be "reasonably segregable"? While the FOIA does not define the term, the process leading to its adoption sheds some light.

In 2000, the legislature commissioned the Electronic Records Study Commission, to propose certain amendments to the FOIA. The foregoing redaction provision, which was drafted by the commission and adopted by the legislature, was part of the Commission's recommendations. Thus, the Commission's commentary on that provision helps illumine its meaning.

¹⁴ A.C.A. § 25-19-105(f)(1), (2) (emphasis added).

¹⁵ John J. Watkins & Richard J. Peltz, *The Arkansas Freedom of Information Act*, 5th ed. (Arkansas Law Press 2009), p. 120.

In its commentary on this provision, the Commission explained that the provision “state[s] a principle commonly found in FOI laws but missing from the Arkansas act, i.e., that a request may not be denied on the ground that a record contains exempt as well as nonexempt information.”¹⁶ As support for this claim, the Commission cites the redaction provision found in the federal FOIA. That the Commission modeled Arkansas’s redaction provision on the federal provision can be seen by viewing the two provisions side-by-side:

Federal FOIA
5 U.S.C. § 552(b):
Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

Arkansas FOIA
A.C.A. § 25-19-105(f)(2):
Any reasonably segregable portion of a record shall be provided after deletion of the exempt information.

Given this clear relationship between the Arkansas and federal redaction provisions, federal case law on the meaning of the phrase “reasonably segregable portion of a record” will be highly persuasive to an Arkansas court trying to examine the same phrase.

The federal courts appear to have reached a common view that the term “reasonably segregable” means that non-exempt portions of a documents must be disclosed unless they are “inextricably intertwined” with exempt portions.¹⁷ That

¹⁶ Report of the Electronic Records Study Commission & Recommendations for Amendments to the Arkansas Freedom of Information Act, December 15, 2000, at p. 31.

¹⁷ **D.C. Circuit:** *Mead Data Cent., Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 260 et seq. (D.C. Cir. 1977); **Eighth Circuit:** *Missouri Coalition for Env. Found. v. U.S. Army Corps of Engineers*, 542 F.3d 1204, 1211–12 (8th Cir. 2008); **Ninth Circuit:** *Willamette Industries, Inc. v. U.S.*, 689 F.2d 865, 867–68 (9th Cir. 1982); **Penn. District:** *Cozen O’Connor v. U.S. Dept. of Treasury*, 570 F. Supp. 2d 749, 771–72 (E.D. Penn. 2008); **Calif. Districts:** *L.A. Times Communications LCC v. U.S. Dept. of Labor*, 483 F. Supp. 2d 975, 986 (C.D. Cal. 2007); *Wilkinson v. F.B.I.*, 633 F. Supp. 336, 350 (C.D. Cal. 1986); *Winter v. Natl. Sec. Agency/Central Sec. Service*, 569 F. Supp. 545, 549 (S.D. Cal. 1983); **Fl. District:** *Bilderbeek v. Dept. of Justice*, 2010 WL 1049618 (M.D. Florida, March 22, 2010) (unreported); **Nev. District:** *Burgess v. Clark County D.A.*, 2011 WL 691322, *1 (Feb. 18, 2011) (unpublished); **N.Y. Districts:** *Gabrielli v. U.S. Dept. of Justice*, 594 F. Supp. 309, 316 (N.D.N.Y. 1984); *Lamont v. Dept. of Justice*, 475 F. Supp. 761, 767, n.20 (S.D. N.Y. 1979); **Tex. District:** *Driggers v. U.S.*, ___ F. Supp. 2d, 2011

view, which originates in the D.C. Circuit Court of Appeals, has been adopted by the Eighth Circuit Court of Appeals:

In a FOIA action....[t]he withholding of an entire document by an agency is not justifiable simply because some of the material therein is subject to an exemption. *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 553 (6th Cir.2001). Rather, non-exempt portions of documents must be disclosed unless they are “inextricably intertwined” with exempt portions. *Mead Data Cent., Inc. [v. U.S. Dept. of Air Force]*, 566 F.2d [242,] 260 [(D.C. Cir. 1977)].¹⁸

The court, again quoting the D.C. Circuit Court of Appeals, then went on to explain the standard for determining whether non-exempt information is “inextricably intertwined”:

[T]he reasonableness of [redaction is] dependent upon the proportion and distribution of non-exempt information in a given document:

For example, if only ten percent of the material is non-exempt and it is interspersed line-by-line throughout the document, an agency claim that it is not reasonably segregable because the cost of line-by-line analysis would be high and the result would be an essentially meaningless set of words and phrases might be accepted. On the other extreme, if a large proportion of the information in a document is non-exempt, and it is distributed in logically related groupings, the courts should require a high standard of proof for an agency claim that the burden of separation justifies nondisclosure or that disclosure of the non-exempt

WL 5525337, **8–9 (N.D. Tex. Oct. 26, 2011); *Church of Scientology v. I.R.S.*, 816 F. Supp. 1138, 1162 (W.D. Tex 1993).

¹⁸ *Missouri Coalition for Env. Found. v. U.S. Army Corps of Engineers*, 542 F.3d 1204, 1211–12 (8th Cir. 2008).

material would indirectly reveal the exempt information.¹⁹

We can summarize Section II into four propositions: (1) If the release of an education record is consistent with FERPA, then -105(b)(2) does not shield the record from disclosure. (2) The release of a de-identified record is consistent with FERPA. (3) Therefore, -105(b)(2) does not shield de-identified records from disclosure. (4) Assuming an Arkansas court followed the *Osborn* analysis, then in some circumstances, the FOIA requires schools to de-identify education records and then disclose them.²⁰

III. Application

We are now in a position to apply the foregoing to your two specific questions.

A. *Question 1*

In your first question you ask whether the FOIA requires a law school to disclose an Excel document that contains the age, gender, race, LSAT scores, uGPA, and GPA for a certain set of students. If an Arkansas court were to address this question, it would, in my opinion, first have to resolve the threshold question whether the Excel document contains other kinds of data than those specifically just mentioned. If it does, then the court will want to know whether that data qualify as “personally identifiable information.” If the document *does* have such data, then the question moves to the largely factual issue of whether the data is reasonably segregable from the document.

If the Excel document does not contain other kinds of data, then the question becomes whether the specific data sub-sets requested—i.e. age, gender, race, LSAT scores, etc.—qualify as personally identifiable information, whether taken individually or together. This inquiry will turn on whether these data sub-sets are “linkable to a specific student” in such a way that “a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances” would be able “to identify the student with reasonable certainty.” This inquiry requires the finding of at least two facts. First, a fact finder must

¹⁹ *Missouri Coalition for Env. Found.*, 542 F.3d at 1212, quoting *Mead Data Cent., Inc.*, 566 F.2d at 261.

²⁰ The conclusion that, sometimes, custodians must redact from education records is not new. *Cf.* Op. Att’y Gen. Nos. 2001-123, 2007-061.

determine what the actual numbers are for any given data sub-set. For example, there might be a single student who is 60 years' old. Second, the fact finder must determine whether, in light of those actual numbers, the data are personally identifiable.²¹ Because I am not authorized or equipped to find either of these kinds of facts when issuing opinions, I cannot definitively opine on whether a law school is required to disclose the data.

B. Question 2

Your second question asks about students' undergraduate and law-school transcripts, both of which are clearly "education records" under FERPA. Specifically, you ask whether the school is required to redact each transcript so that only its letter grades show. The answer to this general question turns on two issues: (1) whether a letter grade, by itself, qualifies as "personally identifiable information"; and (2) if not, whether the letters are "reasonably segregable" portions of the transcripts such that the school would be required to redact everything else.

In my opinion, if an Arkansas court were faced with this first sub-question—the question reflected in (1), above—it would hold that the letter grade, standing by itself, does not qualify as "personally identifiable information," for the grade does not meet any of the above-listed sub-categories of "personally identifiable information."

If an Arkansas court were to apply the foregoing analysis of subsection 25-19-105(2)(f) to the second sub-question—the question reflected in (2), above—it would, in my opinion, probably hold that the letter grades on a transcript are not reasonably segregable. For, applying the words of the Eighth Circuit Court of Appeals, the letter grades make up a very small percentage of the otherwise exempted material and are "interspersed line-by-line throughout the document." If a school were to redact everything but the letter grades, it would result in "an

²¹ The Wisconsin Supreme Court, in *Osborn*, unanimously held that a law school was required to respond to an FOIA request for the LSAT scores, uGPA, law-school GPA, race, and gender of hundreds (perhaps thousands) of law students over a multi-year period. But the court did note that, in so holding, it did "not intend" to "deprive the University of a discretionary decision, in an individual case, to conclude that providing [these data sub-sets] would involve disclosure of personally identifiable information." In such cases, the court said, the University should "comply with FERPA, and in those few situations, refuse to disclose the information." *Osborn*, 647 N.W.2d at 171. This "hedging" was required because, apparently, the court did not know what the actual numbers were for any given data sub-set.

essentially meaningless set of” letters. Accordingly, in my view, a court would probably hold that the letters are not reasonably segregable portions of a transcript, which means the school would not be required to disclose the redacted transcript.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh