Opinion No. 2013-027

May 24, 2013

The Honorable Nate Bell
State Representative
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Mena, Arkansas 71953-2020

Representative Bell:

You have asked additional questions as a follow-up to Opinion No. 2012-083, which addressed, in general, how the Arkansas Freedom of Information Act (FOIA)[1] relates to the Family Education Rights and Privacy Act of 1974 ("FERPA").[2] More specifically, that opinion addressed whether, upon receiving an FOIA request, a law school was obliged to disclose certain student-related data, including highly-redacted transcripts.

As a follow-up to this earlier opinion, you now ask two questions:

1. Is a law school obligated to provide undergraduate and law school transcripts of current or former students, ***after redacting*** every piece of information on the transcripts except for the actual letter grades listed therein, if such records are requested under the FOIA ***by a person acting in his or her capacity as a member of the public***?

2. Is a law school obligated to provide undergraduate and law school transcripts of current or former students, ***without redacting*** any information contained on the transcripts except, if such records are requested under the FOIA ***by a member of the law school's faculty*** because the professor needs the records in furtherance of grade

[1] The FOIA is codified at A.C.A. §§ 25-19-101 to 22-19-110.

[2] The FERPA is codified at 20 U.S.C. § 1232g.

> inflation research the professor is conducting to fulfill his or her professional responsibilities and public service.

RESPONSE

In my opinion, the answer to Question 1 is "no." Regarding Question 2, the general rule is that FERPA permits the release of unredacted education records to a teacher who has a "legitimate educational interest" in the records. Whether any given teacher has a "legitimate educational interest" is a question of fact that must be determined by the school, subject to review by a court. Accordingly, I cannot say whether—in any given case—a school is obliged to disclose records to a teacher under the "legitimate educational interest" exception.

DISCUSSION

Much of the current opinion relies on the argumentation found in Opinion No. 2012-083. Rather than repeat large portions of that opinion, I will simply state three of its conclusions and refer the reader to that opinion for their justification:

- Transcripts are considered "education records" under FERPA.

- The FOIA relates to FERPA is such a way that if the release of an education record is consistent with FERPA, then the FOIA—more specifically, A.C.A. § 25-19-105(b)(2)—does not shield the record from disclosure.

- FERPA establishes a general rule, subject to several exceptions, that education records can only be released when the student (whose records they are) has consented to their release.

This general rule has several exceptions, two of which are relevant to your questions: (1) education records can be released when they are "de-identified," a notion that was explained in detail in Op. 2012-083; and (2) education records can be released to "school officials, including teachers within the [school] whom the [school] has determined to have legitimate educational interests" in the educational record.[3]

Your first question asks about the exception noted above involving de-identification. Specifically, you ask whether the professor can view the mere letter

[3] 34 CFR § 99.31(a)(1).

grades on the transcript after everything else on the transcript has been redacted. This question was addressed in Op. 2012-083, but you question part of that analysis. I will start by reiterating enough of the previous analysis to give context for your current question and my response.

Earlier, I said that letter grades, standing by themselves, do not qualify as "personally identifiable information." Hence, given the set of transcripts being requested, transcripts could be de-identified in such a way that the release of the letter grades would be consistent with FERPA. Yet letter grades are never the only items on transcripts. Instead, letter grades are interwoven with lots of other information. So the next question I addressed in Op. 2012-083 was whether a school is obligated to redact everything on the transcript except the letter grade. In assessing this question, I said that a custodian's obligation to redact is only triggered when non-exempt information is "reasonably segregable" from the exempt information. I further opined, that an Arkansas court would probably adopt and employ the following test to determine whether something is "reasonably segregable": (1) the non-exempt data is a small percentage of the overall data, (2) it is physically interwoven with the exempt data by being interspersed line-by-line throughout the document, and (3) the non-exempt information would be an essentially meaningless set of words and phrases. I concluded that the FOIA did not require the custodian to redact the letter grades because all three of these elements were met.

In your current opinion request, you object to this conclusion because you disagree with how I assessed the third prong. Specifically, you say that "[t]he grades on a transcript ... are not meaningless to any person **with educational experience who understands the significance of letter grades**." (Emphases added.)

The problem with this objection is that a requester's identity—and, *a fortiori*, his or her unique expertise or knowledge—is generally irrelevant to assessing the custodian's disclosure obligations.[4] Justice Ginsburg, who was assessing a similar

[4] *See generally* Op. Att'y Gen. Nos. 2012-014 ("The FOIA requestor's identity or motive for making the request is generally irrelevant to whether a non-exempt public record should be released."), 2006-218 ("[T]he identity of the FOIA requester is not ordinarily pertinent to the analysis in applying the provisions of the FOIA."), 2006-142 ("The identity of the requester is ordinarily not relevant to the analysis under the FOIA."). The professor's identity is relevant to whether he can receive *unredacted* records because the FERPA makes his identity relevant. That is, he must be a teacher and he must have certain educational interests. But the FOIA, as opposed to the FERPA exception for teachers dealt with in your second question, generally does not make the requester's identity relevant to disclosure.

rule in the federal FOIA, noted that "the identity and particular purpose of the requester is irrelevant under the [federal] FOIA." This rule, she continued, "serves as a check against selection among requesters, by agencies and reviewing courts, according to idiosyncratic estimations of the request's or requester's worthiness."[5]

Therefore, in my opinion, the answer to your first question continues to be "no." Custodians are only required to redact-and-disclose that which is reasonably segregable. And your question specifically seeks only the letter grades, which—for the reasons detailed in the earlier opinion—are not reasonably segregable.

Your second question relates to releasing education records to school officials. Whether any specific teacher has a "legitimate educational interest" is a question of fact that is determined by the school. This is made clear by the language of FERPA's exception, which permits a school to release unredacted educational records—without student consent—to "teachers within the [school] ***whom the [school] has determined*** to have legitimate educational interests." You say that a professor needs the grades on the student transcripts for statistical research. I assume that the professor has made the school aware of his or her interest in the transcripts and the reasons for that interest. If the school refused to give the professor access to the transcripts, then I assume it must have (at least implicitly) determined that the professor's interest did not qualify as a "legitimate educational interest." Whether that decision was correct is a factual question that is properly referred to a finder-of-fact, which is (in this case) a court. [6]

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

Sincerely,

DUSTIN MCDANIEL
Attorney General

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[5] *Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 508 (1989) (Ginsburg, J., concurring in judgment).

[6] *See, e.g.*, *Medley v. Bd. of Ed. of Shelby County*, 168 S.W.3d 398 (Ky. App. 2004) (remanding to trial court for a factual finding on whether a teacher/FOIA-requester had a legitimate educational interest).