DEC - 8 2009

Ms. Catherine Robb
Sedgwick, Detert, Moran & Arnold LLP
919 Congress Avenue, Suite 1250
Austin, Texas 78701-3656

Dear Ms. Robb:

This responds to your letter of August 17, 2009, in which you asked for guidance concerning the Family Educational Rights and Privacy Act (FERPA) on behalf of (b)(6), an investigative reporter with (b)(6) This Office administers FERPA and provides technical assistance to educational agencies and institutions to help ensure compliance with the statute and regulations, which are codified at 20 U.S.C. § 1232g and 34 CFR Part 99.

You explained that on February 23, 2009, (b)(6) made a request under the (b)(6) Public Information Act (b)(6) to the University of (b)(6) (University) for information on the University Interscholastic League's State-mandated anabolic steroid testing program for student-athletes in grades 9-12. According to your letter, (b)(6) asked for the following information regarding positive steroid test results:

- Name of school and district
- Sport played by athlete who tested positive
- Substance detected
- Date of positive test

You stated that the University refused to comply with (b)(6) request on the grounds that the requested information was personally identifiable information protected from disclosure under FERPA. The University also refused to seek an opinion from the (b)(6) Attorney General on the matter based on this Office's August 1, 2006, letter to the Chief of the Open Records Division of the (b)(6) Attorney General. You explained further that on June 2, 2009, the (b)(6) Attorney General advised your client that the Office of the Attorney General was not allowed to review whether the University's decision was appropriate because FERPA prevented it from reviewing "unredacted, personally identifiable information contained in education records."

You expressed concern that the University has adopted a much too expansive view of FERPA and its restrictions and has hidden behind FERPA in order to avoid releasing public information. Accordingly, you asked this Office for guidance for your client and other interested parties, including the University and the (b)(6) Attorney General's Office, regarding the appropriate interpretation of FERPA requirements and restrictions concerning public information.

I. Release of De-Identified Information under FERPA

Under FERPA, a parent or eligible student must provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31. 30 CFR § 99.30(a). We assume for purposes of this discussion that the information from the University Interscholastic League that (b)(6) sought from the University is derived from education records subject to FERPA.

Section 99.31(b) of the regulations provides that an educational agency or institution may release records or information without the consent required by § 99.30 after the removal of all personally identifiable information by making 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. "Personally identifiable information" is defined in FERPA to include:

(a) The student's name;
(b) The name of the student's parent or other family members;
(c) The address of the student or student's family;
(d) A personal identifier, such as the students social security number (SSN), student number, or biometric record;
(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
(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 or institution reasonably believes knows the identity of the student to whom the education record relates.

34 CFR § 99.3. See Final Regulations, 73 Fed. Reg. 74806 (Dec. 9, 2008).

Our responsibilities are limited to enforcing FERPA, a privacy statute, and not public information laws. Nonetheless, we have attempted to interpret FERPA in a manner that balances the privacy interests of parents and students in FERPA with other considerations of public interest. In that regard, we noted in the preamble to final FERPA regulations published last year:

> As explained in the preamble to the NPRM [Notice of Proposed Rulemaking], 73 FR 15584-15585, we believe that the regulatory standard for de-identifying information from

> education records establishes an appropriate balance that facilitates the release of appropriate information for school accountability and educational research purposes while preserving the statutory privacy protections in FERPA....
>
> In response to comments that educational agencies and institutions may remove too much information from education records, we note that while we have attempted to provide a balanced standard for the release of de-identified data for school accountability and other purposes, FEPRA is a privacy statute, and no party has a right under FERPA to obtain information from education records except parents and eligible students.

73 Fed. Reg. at 74834.

The preamble to the final FERPA regulations published last year explains some of the considerations that must be taken into account by a party that wishes to release de-identified information from education records:

> The simple removal of nominal or direct identifiers, such as name and SSN (or other ID number), does not necessarily avoid the release of personally identifiable information. Other information, such as address, date and place of birth, race, ethnicity, gender, physical description, disability, activities and accomplishments, disciplinary actions, and so forth, can indirectly identify someone depending on the combination of factors and level of detail released. Similarly, and as noted in the preamble to the NPRM , 73 FR 15584, the existing professional literature makes clear that public directories and previously released information, including local publicity and even information that has been de-identified, is sometimes linked or linkable to an otherwise de-identified record or data set and renders the information personally identifiable. *The regulations properly require parties that release information from education records to address these situations.*

73 Fed. Reg. at 74831 (emphasis added). The preamble to the NPRM also discussed problems and possible solutions regarding the release of numerical or statistical information that contains small data sets that may be personally identifiable, which may be an issue with the data your client requested from the University. See 73 Fed. Reg. 15574, 15583-15585 (March 24, 2008).

In short, while we have attempted to establish general standards for de-identification of education records that strike an appropriate balance between competing interests, we are not able to assume the disclosing party's responsibility for reviewing data sets and making a reasonable determination whether information is personally identifiable under those standards. Likewise, we are not able to prescribe a single method to apply in every circumstance to ensure that students are not personally identifiable in data once direct identifiers have been removed. See 73 Fed. Reg. at 15584; 73 Fed. Reg. at 74834-74836.

II. Review of Education Records by the (b)(6) Attorney General under (b)(6)

Your letter notes correctly that by letter dated July 25, 2006, this Office advised the (b)(6) Attorney General that there is no exception to the written consent requirement in FERPA that allows an educational agency or institution to disclose personally identifiable information from education records to obtain the Attorney General's opinion whether the disclosure or refusal to disclose a record complies with FERPA or an exception in (b)(6). (That is letter is available on our website at www.ed.gov/policy/gen/guid/fpco/ferpa/library/txago072506.html.) We note further that the (b)(6) Attorney General had previously advised in Open Records Decision No. 634 (Dec. 4, 1995), that TPIA has never required a governmental body to request an opinion whether a record was excepted from disclosure because it was protected as an education record under FERPA. Open Records Decision No. 634 also explains that if an educational agency or institution chooses to request a decision under (b)(6) Gov't Code § 552.301(a) regarding information that is protected by FERPA, before sending the record to the Attorney General the agency or institution should either obtain parental consent or edit the record to make sure that it contains no personally identifiable information. As such, while an educational agency or institution may certainly describe the specific considerations it has taken into account, there is no basis on which the (b)(6) Attorney General may review the actual information that an educational agency or institution has determined is personally identifiable under FERPA without consent.

I trust that this guidance is responsive to your request.

Sincerely,

Paul Gammill
Director
Family Policy Compliance Office

(b)(6)

cc