

NOTE: This letter was reformatted to make it more accessible on the Student Privacy Policy Office's (SPPO's) website. Please note that SPPO administers FERPA and the office's prior name was the Family Policy Compliance Office (FPCO). Some citations in this letter may not be current due to amendments of the law and regulations. SPPO has not revised the content of the original letter. Any questions about the applicability and citations of the FERPA regulations included in this letter may be directed to FERPA@ed.gov.

July 28, 2019

Complaint No. XXXX
Family Educational Rights
and Privacy Act

Dr. Howard Gillman
President
University of California at Irvine
510 Aldrich Hall – ZOT 1900
Irvine, California 92697

Dear Dr. Gillman:

This is to inform you of the finding in the complaint filed against University of California at Irvine (University) by [Student]. The Student alleged that the University violated the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g; 34 CFR Part 99. On July 22, 2016, this Office received a complaint from the Student alleging that the University violated § 99.10 of the FERPA regulations when it denied him access to certain of his education records. Specifically, the Student states that he requested access in September 2015 to his education records maintained by the University's Office of Equal Opportunity and Diversity (Diversity Office), to which the University responded by forwarding his request to the University's Public Records Access office (PRA). The Student notes that although the PRA complied, in part, with his request when it forwarded certain of his education records in an electronic format to him, it denied him access to 126 pages of his records based on the PRA's assertion that such records "because they constitute attorney-client confidential communications." The Student alleged that the University has not provided him with the basis which the University used to assert the privilege for the records that were withheld from him. We apologize for the delay in issuing this letter of finding.

By letter dated March 11, 2019, the Family Policy Compliance Office, now known as the Student Privacy Policy Office (Office), informed the University of the Student's allegation and requested it provide us a written response. By letter dated April 11, 2019, Ms. Thea Bullock, Campus Privacy Official, responded on behalf of the Institution, who stated:

...The redacted pages can be classified into seven (7) groups of documents, six (6) of which are communications between UC Irvine employees (clients) and a member of the bar (attorney), communicating facts for the purpose of securing legal services. The documents have been kept confidential and the privilege has not been waived. During

my review, I determined that two (2) of the pages were not responsive to the request and did not constitute part of [the Student's] educational record.

Relevant Regulations

FERPA is a federal law that protects the privacy of students' education records. The term "education records" means those records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. See § 99.3 "Education records." At the postsecondary level, FERPA affords students ("eligible students") the right to have access to their education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. Under FERPA, an educational institution is prohibited from disclosing personally identifiable information (PII) from students' education records, without consent, unless the disclosure meets an exception to FERPA's general consent requirement. See 34 CFR § 99.30 and § 99.31.

Section 99.10(a) and (b) state:

Except as limited under § 99.12, [an] eligible student must be given the opportunity to inspect and review the student's education records.

* * * * *

The educational agency or institution . . . shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

In this instance, the University asserted the attorney-client privilege doctrine as its basis for denying the Student access to certain education records. While FERPA does exempt certain types of records from the definition of education records, neither the statute nor the implementing regulations specifically provide for denying a student's right to inspect and review an education record based on attorney-client privilege or work product privilege grounds. Nonetheless, an educational agency or institution may deny a request to inspect and review on these grounds in certain circumstances.

In particular, an educational institution's ability under FERPA to assert the privilege against a student seeking access to education records may be inferred by the institution's need to obtain confidential legal advice in certain circumstances. That is, when an institution needs to obtain confidential legal advice, and in so doing creates "education records," the institution may decline to permit inspection and review of those records, or portions of those records, on attorney-client privilege grounds, provided that all of the below conditions are met. In order for an attorney to invoke the attorney-client privilege for his client, he or she must establish that:

- 1) the asserted holder of the privilege is or sought to become a client;
- 2) the communication is between a client and a member of the bar, or his or her

subordinate, who is acting as a lawyer in connection with the communication;

- 3) the communication relates to facts disclosed by the client to the attorney for the purpose of securing either an opinion of law or legal services, and not for the purpose of committing an illegal act or tort;
- 4) the communication is in fact confidential and not made in the presence of anyone outside the particular attorney-client relationship; and
- 5) the privilege has been claimed and not waived.

For each document which an educational institution believes is subject to the attorney work product doctrine, the institution must show that each such document is a:

- 1) document or tangible thing;
- 2) prepared in anticipation of litigation or for trial;
- 3) prepared by or for a party to the litigation for that party's representative.

Analysis & Finding

As discussed above, FERPA generally requires schools to provide a student access to his/her education records within no more than 45 days of receipt of a student's request. While FERPA identifies specific exceptions to permit the denial of education records, none of FERPA's exceptions apply in this instance. Although not an exception under FERPA, this Office recognizes that a school may deny education records or other documents under the attorney-client privilege doctrine as discussed above. In reviewing the University's response, it exercised its discretion to apply this doctrine in this instance and provided the information this Office requested to consider the University's application of the doctrine in this instance.

To further clarify the University's written response, Mr. Bernard Cieplak of my Office spoke with Ms. Bullock on May 30, 2019, to obtain clarification about the documents that were redacted or denied subject to the attorney client privilege doctrine. During that discussion, Mr. Cieplak questioned Ms. Bullock to determine whether the University met the criteria identified in this Office's March 2019 letter to the University to ensure it met all the criteria to permit the University to deny the Student education records. Each of the categories and specific records were discussed to ensure the University complied with FERPA. Based on the information gathered during that conversation, this Office determined that the University met the above criteria to permit it to deny the education records subject to the Student's requests.

We therefore find that the University did not violate FERPA as alleged. Accordingly, we are closing the complaint and will so notify the Student by copy of this letter. Thank you for your cooperation with regard to this investigation.

Sincerely,

/s/

Frank E. Miller Jr.
Acting Director
Family Policy Compliance Office

cc: Student
Ms. Thea Bullock