

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 27, 2012

Mr. Ronald A. Cavallaro
General Counsel
Rhode Island Board of Governors
for Higher Education
The Shepard Building
80 Washington Street, Suite 524
Providence, Rhode Island 02903

Dear Mr. Cavallaro:

This is in response to your April 12, 2012, letter to this office on behalf of the Rhode Island Board of Governors for Higher Education (Board) and its governed institutions of postsecondary education in which you request technical assistance. Specifically, you ask whether a conflict exists between the Rhode Island Access to Public Records Act (Records Act), Chapter 38-2 of the Rhode Island General Laws, and the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g and 34 CFR Part 99). You identify the following institutions as those which the Board governs: the University of Rhode Island (URI), Rhode Island College (RIC), and the Community College of Rhode Island (CCRI). Your Board has received a request from URI which received a records request under the Records Act from the *Providence Journal* (Journal), a Rhode Island newspaper, requesting the names of employees who have been or are currently students and who have received a tuition waiver, information about tuition waivers received by their spouses, domestic partners and children, and names of non-employees who have received tuition waivers, along with tuition waivers received by their spouses, domestic partners and children.

Additionally, the Journal requested tuition waiver information about a specific former student whom you have identified as "Ms. X." You state that the Records Act appears to require disclosure of tuition waiver in personally identifiable form (*i.e.*, by student name), and you question whether the nonconsensual disclosure of such information in response to the recent Records Act request would be permitted to be disclosed or conflict with FERPA's disclosure provisions.

Please note this office administers FERPA and is responsible for providing technical assistance to educational agencies and institutions to ensure compliance with the statute, 20 U.S.C. § 1232g, and its implementing regulations, 34 CFR Part 99. This office does not generally interpret State law, and you may wish to refer any questions regarding the interpretation of your State law to the appropriate authority or the Attorney General in your State. That said, if you or

your governed institutions accept funds under any program administered by the U.S. Department of Education, then you may not have a policy or practice of permitting the release of personally identifiable information from education records absent prior written consent or an applicable exception to consent. *See Owasso Independent School District v. Falvo*, 534 U.S. 426, 428 (2002); *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002). Consequently, based on the information you have provided, this office will respond to the question of whether tuition waivers relating to students is subject to FERPA's protections.

As background, you affirm that your State provides tuition waivers to employees of the Board, its governed institutions, and those employees' spouses or domestic partners and legal dependents. Additionally, you state that tuition waivers are provided to graduate assistants at URI, RIC, but not CCRI. Your State further extends tuition waivers to non-employees who attend/attended these institutions, including persons over age 60; disabled American veterans; members of the Rhode Island National Guard and, in certain instances, their children; and individuals who receive Rhode Island unemployment insurance benefits.

In your letter and in a subsequent phone conversation with this office, you indicated that tuition waiver records requests for graduate assistants employed due to their status as employees (and their spouses, domestic partners, and dependent children) are originally collected by the human resources offices of the institutions and, after the requests have been approved, these records are then sent to the respective institution's enrollment services/bursar office as student tuition records. Furthermore, you stated that the tuition waiver records maintained by the human resources offices and enrollment services/bursar offices of the institutions are the same for these individuals.

You additionally state that each institution's controller's office provides certain payroll information for a subset of the aforementioned graduate assistants and employees (and their spouses, domestic partners, and dependent children) concerning the amount of tuition waived, to the state payroll office and potentially other Federal, State, and local tax agencies. Specifically, you indicated that each institution discloses the name of employees and the dollar value of taxable tuition waivers received on their behalf, or on behalf of their qualified spouses, domestic partners, and dependent children, to tax agencies. From the information you provided, it also appears that this payroll information is solely used for employment purposes, including payroll withholding and tax filing purposes.

In contrast, tuition waivers granted to the other non-employee students excluding the spouses, domestic partners, and dependents of employees (i.e., persons over age 60, disabled American veterans, etc.) are maintained only as student tuition records in the institutions' enrollment services/bursar offices.

You state that the Records Act applies to any "public agency" or "public body" of the State, including the Board, URI, RIC, and CCRI. Section 38-2-2(5) of the Records Act, defines public records to include "all documents, papers, letters, ... or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." You further note that there are twenty-five,

enumerated exceptions in the Records Act which deem certain records non-public, including the following: (1) “records, reports, opinions, information and statements required to be kept confidential by federal law or regulation or state law, or rule of court”; and (2) “all records which are identifiable to an individual applicant for benefits, client, patient, student, or employee, including but not limited to, personnel, medical treatment, welfare, employment security, pupil records...and all personal or medical information relating to an individual in any files” as noted in Section 38-2-2(5).

You further explain that the Records Act limits the second exception referenced above concerning records which are identifiable to an individual with a proviso indicating “with respect to employees” certain enumerated information shall be made public. Accordingly, the Records Act requires the disclosure of “public employee name, gross salary, salary range, total cost of fringe benefits, gross amount received in overtime, and other remuneration in addition to salary, job title, job description, dates of employment and positions held with state or municipality, work location, business telephone number, the city or town of residence, and date of the termination” as provided in Section 38-2-2(5)(A).

In responding to your inquiry, it is important to note that postsecondary institutions subject to FERPA may not have a policy or practice of permitting the disclosure of education records or personally identifiable information contained therein without the written consent of eligible students or an applicable exception to the requirement of consent. 20 U.S.C. § 1232g(b)(1) and (b)(2); 34 CFR § 99.30(a). (An “eligible student” is one who is at least 18 years of age or attends a postsecondary institution at any age. See 34 CFR § 99.3.) Under FERPA, “education records” means those records that are:

- (a) Directly related to a student; and
- (b) Maintained by an educational agency or institution or by a party acting for the agency or institution.

34 CFR § 99.3 “Education records”

The term “personally identifiable information” includes, but is not limited to:

- (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 student’s social security number, 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 “Personally Identifiable Information”

Assuming that the aforementioned postsecondary institutions in Rhode Island receive funds under a program administered by the U.S. Department of Education, records maintained by these institutions that are directly related to students meet FERPA’s definition of “education records.” Additionally, education records that the Board received from those institutions are also subject to FERPA.

However, FERPA also provides limited exceptions from the definition of “education records” including an exception for employment records. In this respect, FERPA states:

(B) The term “education records” does not include –
(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person’s capacity as an employee and are not available for any other purpose....

20 U.S.C. § 1232g(a)(4)(B)(iii).

The FERPA regulations similarly exclude the following from the term “education records”:

(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business:

(B) Relate exclusively to the individual in that individual’s capacity as an employee;

(C) Are not available for use for any other purposes.

34 CFR § 99.3 “Education records” (b)(3)(i).

The FERPA regulations further clarify this provision by explaining that “records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.” 34 CFR § 99.3 “Education records” (b)(3)(ii).

Thus, FERPA provides a narrow exemption for records related to an individual's employment from the protections provided under FERPA. This exemption applies to those records related to the employment of individuals who are employed without regard to their status as students. For instance, if a secretary in the president's office takes a course at any given time, her employment records do not become education records because the secretary is not employed as a result of her status as a student. The FERPA regulations make clear that if an individual is employed at a school as a result of his or her status as a student, then that individual's records are education records under FERPA, such as the records of graduate students who are employed as a result of their status as students.

Based on the above, we conclude that FERPA protects the personally identifiable information from the tuition waivers granted to non-employee students whose records are solely maintained in enrollment services/bursar offices because their tuition waivers directly relate to them as students and are, according to your letter, maintained solely as student tuition records.

We also conclude that FERPA protects the personally identifiable information from the tuition waiver records granted to graduate assistants and employees (and their respective spouses, domestic partners, and dependent children) that are maintained in the institutions' human resources offices and enrollment services/bursar offices. These tuition waiver records contain personally identifiable information that directly relates to students and are maintained by the Board and its governed educational institutions. As stated above, FERPA has a limited exception for employment records. However, the FERPA regulations stipulate that in order for this limited exception to apply, the records "must relate exclusively to the individual in that individual's capacity as an employee" and may not be used for any other purpose. 34 CFR § 99.3 "Education records" (b)(3)(ii) (emphasis added). The tuition waiver records maintained at the human resources office and enrollment services/bursar offices are utilized by each institution in relation to each student's tuition account and consequently in relation to each student's matriculation. Therefore, these tuition waiver records are not exclusively used as employment records and the aforementioned limited exception to FERPA's definition of education records does not apply to these tuition waiver records.

However, this conclusion does not apply to the payroll records of the subset of employees whose records are maintained in the institutions' controller's offices and whose records are maintained as part of the institutions' payroll withholding or tax filing obligations. From the information that you provided, it appears that these payroll records, unlike the records discussed above, relate to individuals employed by the Board or its institutions, are made and maintained in the normal course of business for employment purposes (*i.e.*, payroll withholding and tax filing), relate exclusively to these individuals in their capacity as employees, and are not available for any other purpose. Therefore, the limited employment record exception detailed in 34 CFR § 99.3 applies, and we conclude that the specific payroll records maintained in the institution's controller's offices are not protected under FERPA as education records of students. Furthermore, as FERPA does not protect these specific payroll records and this office generally does not interpret State law, we do not interpret whether these specific payroll records would be deemed public or non-public under the Records Act.

Accordingly, the Board and its governed institutions, assuming as the institutions are the recipients of funds under a program administered by this Department, must comply with FERPA's disclosure provisions and protect the tuition waiver records maintained in the human resources offices and enrollment services/bursar offices for employees and non-employees, including personally identifiable information therefrom, from being disclosed in personally identifiable form, absent the prior written consent of the eligible students or an applicable exception to consent.

Your letter also inquired about a specific individual, Ms. X, and whether her tuition waiver records are protected under FERPA. You indicated that Ms. X is a former student and her tuition waiver records are maintained in an institution's human resources and enrollment services/bursar office. Therefore, FERPA protects the personally identifiable information from Ms. X's tuition waiver records. If you reasonably believe that the Journal already knows the identity of Ms. X, then her tuition waiver records cannot be released in a way that would permit the press to identify Ms. X. However, FERPA does not apply to any information maintained by the institution's controller's office related to Ms. X as these records are solely employment records.

I trust this information is responsive to your inquiry. Please do not hesitate to contact this office if you require further assistance in this regard.

Sincerely,

/s/

Dale King
Director
Family Policy Compliance Office