

June 1, 1999

Dr. Tana Hasart
President
Clark College
1800 E. McLoughlin Blvd.
Vancouver, Washington 98663

Complaint No. []
Family Educational Rights
and Privacy Act

Dear Dr. Hasart:

This is to advise you of our findings in the remaining issues in the complaint filed with this Office by [Complainant] against Clark College (College) alleging that the College violated the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g and 34 CFR Part 99.

Specifically, [Complainant] alleged that the College violated § 99.10 of the FERPA regulations when it denied her the opportunity to inspect and review certain education records. In response to [Complainant]'s November 17, 1995, request to inspect and review her education records under FERPA, you, in your former capacity of dean of students, informed [Complainant] that she had many records coming from different departments, and that the College had their attorney review her records and remove a large stack of documents that fell under the attorney-client privilege. [Complainant] alleged that these were identified as her records and were part of her dispute with the College over P.R.I.D.E. Program issues.

This Office issued partial findings in this matter to your predecessor, Dr. Earl Johnson, in a letter dated October 10, 1997, and asked for additional information regarding items numbered 8, 9 and 19 by the College in its March 5, 1997 letter to this Office. Assistant Attorney General Bonnie Y. Terada provided that information on behalf of the College in a letter dated November 4, 1997. I apologize for the amount of time it has taken us to bring this matter to a close. Due to the large amount of correspondence this Office receives, as well as our present staff limitations, we currently have a backlog that we are working to resolve.

Ms. Terada stated that two documents (items 8 and 9 in her March 5, 1997, letter) contain "a draft and final letter from [her] to Robert Crebo, who is not a 'client.'" They also include two fax cover sheets, one from Ms. Terada to Susan Wolff, and one from Ms. Terada to Dick Fulton and

Susan Wolff, both of whom were previously identified as clients of Ms. Terada who received privileged legal advice concerning [Complainant]. The claim of attorney-client privilege was made as to the fax cover sheets, which were not made in the presence of or to Mr. Crebo.

In regard to the draft and final letter to Mr. Crebo, Ms. Terada explained that one of the two bases on which the College withheld these letters from inspection and review by [Complainant] was that they are not "education records" under FERPA. According to Ms. Terada, [Complainant]'s last day as a student at the College was July 27, 1995, and the final letter to Mr. Crebo is dated August 28, 1995. Since the "document in question was created after the student left the institution," it is not an "education record" as that term is defined in 34 CFR § 99.3(b)(5).

FERPA regulations exclude from the definition of "education records"

Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

34 CFR § 99.3(b)(5). This particular regulatory exception, which is not contained in the statutory exclusion of certain types of records from the definition of "education records" found at 20 U.S.C. § 1232g, was promulgated so that educational institutions could carry on alumni communications and correspondence with a minimum of administrative burden. It was intended to encompass records that concern an individual's activities after he or she ceased to be a student at the institution. It was not intended to cover, and does not cover, records that were created after an individual ceased to be enrolled as a student but that concern that individual's activities as a student. This interpretation is particularly important as the regulatory exception in question might otherwise be construed as restricting an individual's statutory right to inspect and review education records.

There is no indication in Ms. Terada's letters that the draft and final versions of the letter to Mr. Crebo were solely about [Complainant] after she ceased to be a student. There is also no indication when the draft letter (in item 8) was produced. Based on the information provided, these records appear to be education records that are subject to inspection and review by [Complainant] under FERPA. It is unclear from Ms. Terada's March 5, 1997, letter whether she also asserted the attorney-client privilege for the draft and final letters to Mr. Crebo, or whether that claim is made only with respect to the fax cover sheets. However, it is noted that Ms. Terada did state that Mr. Crebo is not a client. Absent any further information, we find that the College improperly withheld the draft and final letters to Mr. Crebo concerning [Complainant].

The final document in question, item #19, is an e-mail dated October 27, 1995, from Dr. Johnson to Kathy Bobula, Social Sciences Division Chair, which reviews advice from Ms. Terada to Ms. Bobula regarding [Complainant]. Ms. Terada explained in her November 4, 1997, letter that while Ms. Bobula is not listed as an official who is authorized to contact her for legal advice, Ms. Bobula received a delegation of authority to implement decisions of the College while the P.R.I.D.E. Director, Nancy Warren, was on medical leave. Ms. Bobula met with Ms. Terada to secure legal advice on the Royer matter as part of her official duties, and the confidential communication between her and Dr. Johnson concerned legal advice provided by Ms. Terada to Ms. Bobula. Ms. Terada explained that the confidential communication between Dr. Johnson and Ms. Bobula concerning legal advice was crucial to Ms. Bobula's duty to carry out Dr. Johnson's instructions and should be protected under the attorney-client privilege.

We agree that Dr. Johnson's confidential communication with Ms. Bobula regarding legal advice that Ms. Bobula received regarding [Complainant]'s complaint is protected under the attorney-client privilege. The relevant Washington statute states only that "[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." RCW 5.60.060(2)(1998). Moreover, it appears that case law for the state of Washington does not address whether communications between school officials regarding legal advice may be privileged.

However, federal courts in other jurisdictions have found that communications between corporate employees about legal advice provided by corporate counsel is privileged. See Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437 (S.D.N.Y. 1995). See also In re Grand Jury 90-1, 758 F. Supp. 1411 (D. Colo. 1991) (finding a communication between president of a corporation and the Board of Directors passing on legal advice obtained from corporate counsel to be privileged). The rationale behind these rulings is that the "decision-making power of the corporate client may be diffused among several employees, [and] the dissemination of confidential communications to such persons does not defeat the privilege." Id. at 442.

We believe that the privilege would most likely be extended to cover confidential communications between Dr. Johnson, President of Clark College, and Ms. Bobula, Division Chair, concerning legal advice regarding [Complainant]'s complaint against the College. Like a corporation, an educational institution may be viewed as an "inanimate entity," and thus the attorney-client privilege should apply to communications making representatives of this entity aware of legal advice. See In re Grand Jury 90-1, 758 F. Supp. at 1413. Accordingly, we find that the College did not violate FERPA by refusing to allow [Complainant] to examine the e-mail communication in question.

In summary, it appears, based on the information provided to this Office, that the College violated FERPA by failing to allow [Complainant] to examine the draft and final versions of Ms. Terada's letters to Mr. Crebo. Since these letters contain information that is directly related to [Complainant] and they are maintained by the College, they are "education records" of [Complainant] as defined by FERPA. Since it also appears that no claim of attorney-client privilege has been made or shown with respect to these letters, they should be provided to [Complainant] for inspection and review under FERPA.

This Office will close the investigation of this complaint upon receipt of assurance that the College has provided [Complainant] with access to these letters (items 8 and 9). Please provide this assurance within four weeks of receipt of this letter.

Thank you for your cooperation in the investigation of this complaint. [Complainant] will be informed of this finding by copy of this letter. Should you have any questions regarding the finding, do not hesitate to contact Ellen Campbell of my staff at 202/260-3887.

Sincerely,

Mr. LeRoy S. Rooker
Director
Family Policy Compliance Office

Enclosure

cc:
[Complainant] Ms. Bonnie Y. Terada
Assistant Attorney General

Senator Gordon H. Smith

[Assurance was received from the College and the complaint was closed.]