

March 30, 2007

The Honorable Dwight A. Loftis  
Member, House of Representatives  
530-A Blatt Building  
Columbia, South Carolina 29211

Dear Representative Loftis:

We received your letter inquiring as to the Commission on Higher Education's ("CHE's") ability to release student-level data under the Family Educational Rights and Privacy Act ("FERPA"). Specifically, you request an opinion on the following issues:

- 1) Is CHE a state governmental agency that is subject to laws applicable to state agencies?
  
- 2) Is CHE a "public body" under the Freedom of Information Act? Is information in possession of or retained by CHE a "public record" subject to disclosure unless otherwise exempted from disclosure under the law?
  
- ...
  
- 3) Does FERPA bar from disclosure all student-level data in possession of or retained by CHE?

### **Law/Analysis**

We are unsure as to what you are asking in your first question and under which law you request we analyze whether CHE would be a governmental agency. However, in speaking with you, we understand you are concerned with the applicability of both the South Carolina Freedom of Information Act ("FOIA") and FERPA to CHE. Thus, we proceed to your second question of the application of FOIA to CHE. Under section 30-4-30 of the South Carolina Code (2007), "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." Thus, you first inquire as to whether CHE is a "public body" pursuant to FOIA. Section 30-4-20(a) of the South Carolina Code (2007) defines "public body" as

any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.

As you noted in your letter, this Office issued an opinion in 1992 finding FOIA applicable to CHE. Op. S.C. Atty. Gen., April 28, 1992. In that opinion, we found CHE is a public body within the definition provided in section 30-4-20(a) cited above. Id. In addition, we concluded records and documents submitted to CHE as part of an application for a licence by a proprietary school are public records pursuant to section 30-4-20(c). Thus, if these records and documents are not exempt under a provision of FOIA, CHE must disclose them upon request. Id.

We stated on numerous occasions, “[t]his Office recognizes a long-standing rule that we will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law.” Op. S.C. Atty. Gen., September 29, 2006. In finding our prior opinion well reasoned and noting no changes in the law, we continue to opine that CHE is a public body pursuant to section 30-4-20(a).

Whether information in possession of CHE is a public record depends on whether the information falls under the definition of “public record” contained in FOIA. Section 30-4-20(c) of the South Carolina Code (2007) defines a public record as follows:

all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Records such as income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records, records related to registration, and circulation of

library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or records which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, and other records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act; nothing herein authorizes or requires the disclosure of those records where the public body, prior to January 20, 1987, by a favorable vote of three-fourths of the membership, taken after receipt of a written request, concluded that the public interest was best served by not disclosing them. Nothing herein authorizes or requires the disclosure of records of the Board of Financial Institutions pertaining to applications and surveys for charters and branches of banks and savings and loan associations or surveys and examinations of the institutions required to be made by law. Information relating to security plans and devices proposed, adopted, installed, or utilized by a public body, other than amounts expended for adoption, implementation, or installation of these plans and devices, is required to be closed to the public and is not considered to be made open to the public under the provisions of this act.

Because CHE is a public body, we presume records retained by CHE are public records within the meaning of section 30-4-20(c). Thus pursuant to section 30-4-30, should the information sought fall under this definition, such information must be disclosed to a requester barring one of the exceptions provided under section 30-4-40.

You also inquire as to the impact of FERPA on CHE's ability to disclose student-level data in its possession. FERPA, regulating the release of student records, is codified as section 1232g of title 20 of the United States Code. This provision states:

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than [certain enumerated exceptions]

...

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

20 U.S.C.A. § 1232g. Thus, FERPA does not prohibit the release of educational records, but rather imposes a penalty on those educational agencies and institutions who release such records.

As you mentioned in your letter, in an opinion issued in 1980, this Office considered whether FERPA applied to a doctoral candidate's request for National Teacher Examinations and Scholastic Aptitude Test scores from the University of South Carolina at Spartanburg. Op. S.C. Atty. Gen., May 19, 1980. Based on the language in section 1232g(b)(1), we interpreted section 1232g to allow information to be released so long as it is not personally identifiable. Id. According to the regulations promulgated in association with FERPA:

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 member;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number or student number;
- (e) A list of personal characteristics that would make the student's identity easily traceable; or
- (f) Other information that would make the student's identity easily traceable.

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34 C.F.R. § 99.3. Relying on this definition, we determined that the information requested, barring an unusual distribution of the student's race, sex, and test scores, would not be easily traceable to the students and thus, "should not come within the restrictions of the [FERPA]." Op. S.C. Atty. Gen., May 19, 1980.

We came to a similar conclusion regarding the application of FERPA to CHE in an opinion issued in 1996. Op. S.C. Atty. Gen., November 18, 1996. In that opinion, we responded to a request by a CHE commissioner to address whether CHE may release data related to students' SAT scores when the "student identifier" is not released. Id. We cited to a federal district court opinion and a New York Supreme Court opinion indicating that "the removal of identifying information may permit the release of information in student records . . . ." Id. (citing Doe v. Knox County Bd. of Educ., 918 F.Supp. 181 (E.D. Ky. 1996); Kryston v. Bd. of Educ., East Ramapo Cent. Sch. Dist., 77 A.D.2d 896 ( N.Y. App. Div. 1980)). However, we noted because determination of whether the requested information is personally identifiable is a question of fact, such a determination was beyond the scope of an opinion of this Office. Id. (citing Op. S.C. Atty. Gen., December 12, 1983).

Our belief that student information may be released so long as it does not contain personally identifying information is further supported by the two federal district court decisions mentioned in your letter. In Naglak v. Pennsylvania State University, 133 F.R.D. 18 (M.D. Pa. 1990), the United States District Court for the Middle District of Pennsylvania considered whether Pennsylvania State University could release information concerning student transferees. The Court held the University could not release the names and addresses of the transferees due to FERPA. Id. at 24. However, it held the information requested could be released in the form of a statistical summary listing "the number of transferees, the exams which they took for transfer purposes, the schools which sponsored them, etc., but omitting the students' names and addresses." Id.

Relying on Naglack, the United States District Court fo the Eastern District of Louisiana, in an unreported case, addressed whether certain educational records of medical residents may be obtained from the defendant's residency program. MacKenzie v. Ochsner Clinic Found., 2003 WL 21999339 (E.D. La. 2003). That court concluded, like the Court in Naglack,

[t]he use of statistical summaries in the place of the approximate eighty to ninety "educational records" sought will provide the plaintiff with the essential information she seeks and protect the substantial, competing interests of other resident students and of Ochsner Clinic Foundation.

Id.

Because we are not privy to what student-level data to which you refer in your letter, we cannot opine as to whether all such information may be released by CHE without running afoul of FERPA. However, based upon the cases and opinions cited above, we believe information contained

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in student records may be released in the form of a statistical summary without violating FERPA so long as it does not contain identifying information. As we stated in our 1996, whether or not requested information is personally identifiable is a question of fact only a court may decide. However, we suggest CHE look to the regulations promulgated under FERPA in order to assist it deciding to whether the student information sought is personally identifiable.

### **Conclusion**

In accordance with our analysis above, we believe CHE is a public body subject to the provision of FOIA. Thus, CHE is required by section 30-4-30 of the South Carolina Code to disclose information qualifying as a public record under section 30-4-20(c), barring the applicability of one of the statutory exceptions. Furthermore, while FERPA does not bar disclosure of educational records and other information, it seeks to prevent the disclosure of educational records and students' personally identifiable information by withholding federal funds due to the release of such information. Thus, in order comply with FERPA, CHE may not release educational records or personally identifiable information. However, based on the decisions of several federal district courts and in accordance with our prior opinions, CHE may release information contained in student records as a statistical summary so long as such information does not contain personally identifiable information. Whether or not the student-level data to which you refer contains personally identifiable information is a question of fact, which is beyond the scope of an opinion of this Office. However, we suggest CHE look to the regulations promulgated in accordance with FERPA in determining whether such information is personally identifiable.

Very truly yours,

Henry McMaster  
Attorney General

By: Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook  
Assistant Deputy Attorney General