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To: Superintendents and Presidents
Admissions Officers and Registrars
Academic Senate Presidents
Community College Attorneys
Consultation Council
Other Interested Parties

From: Steven Bruckman
Executive Vice Chancellor and General Counsel

Subject: Public Records Act Requests for
Disclosure of Faculty Aggregate Grades
Legal Advisory 06-02

Synopsis: We have been asked to provide advice to community college districts regarding an issue that has arisen nationwide involving public records requests by XLIX, a company doing business as "Pick-A-Prof" ("XLIX," see www.pickaprof.com), for data consisting of aggregate grades for each course held during specified semesters, identified by individual faculty member. The requests in California have been made under the California Public Records Act. (CPRA; Gov. Code, § 6250 et seq.)

The System Office is providing this advisory to assist districts in responding to these requests. Please note that applying the information and analysis discussed below to specific situations will require districts to review their recordkeeping practices and to conduct a thorough review of the applicable law. The System Office does not administer or enforce the laws discussed in this advisory. However, we offer this information to provide a starting point for districts that are presented with CPRA requests from XLIX. Please also note that districts should consult with their own legal counsel as specific questions arise.

BACKGROUND

We are informed that higher education institutions initially made efforts to resist CPRA requests from XLIX. In California, this culminated in XLIX filing a lawsuit against the University of California in Yolo County Superior Court earlier this year. The case was settled, a writ was issued by the court in May of this year in favor of XLIX, and UC was required to pay XLIX's attorneys' fees of \$15,000. The court judgment required UC to disclose the following records:

"Public records that evidence, reflect, and/or summarize the grades awarded in the Winter 2004 term for all formal undergraduate courses with an enrollment of 10

or more students, on a course-by-course basis, by each professor who teaches at least one formal undergraduate course at the University."

We also understand that UC and CSU have provided XLIX with the requested information except for classes with an enrollment of less than ten students (due to the small size of the cohort) and classes where all students received the same grade. In addition, major public universities in other states (Texas, Washington, Florida, and Michigan, for example) are providing grade and course information to XLIX, which has served to further weaken the case for other higher education institutions to resist disclosure.

Of course, we cannot anticipate exactly what XLIX might ask for in a particular request. However, based on a recent CPRA request shared with us by one district, it appears that XLIX has refined its requests over time and is not seeking "the names, identification numbers, etc. of individual students or the grades earned by individual students." Our analysis in this advisory will be based on that assumption.

College faculty members are understandably concerned about what is seen as an assault upon academic freedom. There is also the risk that students with access to information about the grades awarded by individual faculty members will seek to enroll in courses taught by those perceived to be lenient graders.

CONCLUSION

There is no statutory exemption which would protect the records typically sought by XLIX from disclosure and colleges are advised to provide the requested records unless they are prepared for the possibility of litigation which could result in payment of attorneys' fees. However, care must be taken to ensure that personally identifiable information about students is redacted, along with Social Security numbers and other sensitive information about employees.

ANALYSIS

All state and local government agencies, including community college districts, are covered by the California Public Records Act. (CPRA; Gov. Code, § 6252(a).) The definition of a "public record" under the CPRA is so broad that virtually every paper or electronic record created, used, maintained, or in the possession of a college district is a "public record."

While the CPRA contains specific statutory exemptions to disclosure for certain types of records, none of these exemptions appear to apply to the types of records requested by XLIX. As a result, we must look to the requirements of other laws incorporated into the CPRA by Government Code section 6254(k) (such as the Family Educational Rights and Privacy Act (FERPA) 20 U.S.C. § 1232g), as well as the public interest "balancing test" contained in section 6255.

Certain student and employee records must be protected from disclosure

If part of a record is exempt, and part is not exempt, Government Code section 6253(a) provides that, "Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law."

A district's records most likely have exempt and public information commingled. For example, an instructor may turn in a grade sheet listing the names of students, their student identification numbers, and the grades they received. Depending on exactly how the request is framed, such a record might be encompassed by a request from XLIX because it lists grades awarded by an instructor, but it also contains personally identifiable information about individual students which must be protected from disclosure pursuant to FERPA.¹ The appropriate response to such a request, and the approach taken by UC, CSU and several community college districts, is to redact personally identifiable information about students.

It is important to keep in mind that a record may not mention a student by name but could nevertheless include information which would make a student's identity easily traceable. This is why UC and CSU have declined to provide information to XLIX for classes involving ten or fewer students or classes where all students received the same grade. In such circumstances, someone might easily be able to deduce what grade a particular student received. Such disclosures would be prohibited by FERPA. (See 34 C.F.R. 99.3, subdivision (f).)

In addition, Government Code section 6254(c) protects employment records that would be considered "personnel records." The general right to privacy under the California Constitution (Cal. Const., art. I, § 1), is also incorporated into the CPRA through Government Code section 6254(k) and protects employees from certain types of disclosures of personal information. With regard to employees, we believe the constitutional right to privacy and the Federal Privacy Act of 1974 (5 U.S.C. § 552a) would protect Social Security numbers and employee position numbers which could be linked to sensitive personal information such as home telephone numbers and addresses, and other information in the employee's personnel file. However, it does not appear that the name of the employee, by itself, is exempted from disclosure. Thus, in responding to a request from XLIX, a district would need to redact employee identification and Social Security numbers from faculty grade reports, but the name of the faculty member would need to remain visible.

In sum, although it appears that XLIX is not generally requesting confidential records, care must be taken not to inadvertently disclose such records in complying with XLIX's records requests.

The "Balancing Test"

Even where no specific exemption applies, a public entity may decline to provide public records if it determines that the public interest in keeping the documents confidential clearly outweighs the public interest in their disclosure. (Gov. Code, § 6255.)

¹ Under FERPA, "education records" are defined as records that are directly related to a student, and maintained by an educational agency or institution. (34 C.F.R. § 99.3.) The FERPA regulations define "personally identifiable information" so that it "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." (34 C.F.R. § 99.3.)

As discussed earlier, some faculty have expressed legitimate concerns that providing information requested by XLIX would interfere with academic freedom, result in possible loss of employment for faculty who grade more strictly, and impact on collective bargaining. It has been suggested that such concerns might justify withholding the requested records under the "balancing test."

The press articles available on the Internet concerning this issue show that a significant number of students feel it is in their interest that these records are public. Under the balancing test, the public interest of the students will have to be weighed against the public interest of the district and the faculty in non-disclosure.

We are aware that some districts have chosen to reject public records requests from XLIX. However, because UC has lost its case against XLIX at the trial court level and a growing number of higher educational entities are complying with XLIX's requests, we believe that refusing to comply is a risky strategy and may well lead to litigation with XLIX. In this connection, it is important to understand that if a request for records is denied and the requesting party prevails in a suit to compel disclosure, the public entity may be required to pay the attorney fees incurred by the requestor. (Gov. Code, § 6259.)

How are your district's records maintained?

Although various statutes and regulations address the types of records colleges are to maintain, districts nevertheless have considerable discretion in the way paper and electronic records are created, used, and stored. Therefore such practices vary from one district or college to another.

The first question to answer is whether you have records which are responsive to a request from XLIX.² Keep in mind that the CPRA does not obligate a public entity to create records--only to provide those public records not exempted from disclosure by the Act.

Assuming you do have records which are responsive to the request, the relative ease or burden of complying with a request from XLIX will vary depending upon how the records are kept. How difficult is it to extract public information from non-public information? How hard is it to provide records with the exempt information redacted?

Unfortunately the degree of the burden, by itself, does not exempt a district from compliance. However, if a request is overly broad and providing the requested records would be extremely burdensome, you may ask that the requestor narrow the scope of the request. In this regard, a public entity has an obligation to assist the requestor in focusing the request by identifying responsive records the entity could make available with less difficulty. (Gov. Code, § 6253.1.) Also, if compliance with a request will be time consuming, you can advise the requestor that additional time (beyond the normal 10 day period for responding) will be required to provide a full response. (Gov. Code, § 6253(c).)

² In this regard, it should be noted that the requests from XLIX typically request aggregate information about "grades" awarded by faculty. Title 5, section 55758 lists a number of "nonevaluative symbols" such as "I" and "W" which are not "grades." Thus, we think a district could decline to provide information related to the numbers of students who receive such notations on their academic records.

Although the CPRA does not require college districts to maintain their records in such a manner as to facilitate easily responding to CPRA requests, the law requires a response. Having to respond to the multiple requests XLIX is likely to make over time for the same type of information is a factor that may be worth considering when making decisions regarding paper and/or electronic record keeping.

What fees can we charge?

The law permits a request for inspection of public records and, in that case, no fee can be charged for simply making the records available for review. However, in most instances the request will ask for copies of records. If so, then fees can be charged to the extent permitted by statute. (Gov. Code, §§ 6253(b) (paper records), 6253.9 (electronic records).)

For paper records, a district may only charge "fees covering the direct cost of duplication" unless there is another specific statute mandating a different fee structure. In this case, we believe that no other statute applies. The "direct cost of duplication" includes the pro rata expense of the duplicating equipment utilized in making a copy of a record and, conceivably, the pro rata expense in terms of staff time (salary/benefits) required to produce the copy. A staff person's time in researching, retrieving and mailing the record is not included in the direct cost of duplication. ("Summary of the California Public Records Act 2004," California Attorney General's Office, pp. 4-5.) The case of *North County Parents Organization v. Department of Education* (1994) 23 Cal.App.4th 144, 147-148, narrowed the definition of what comprises such "direct costs." One trap for the unwary is that public entities often believe they can charge a "reasonable fee" rather than the "direct costs of duplication." It does not appear that a "reasonable fee" standard is lawful under general fee provisions of the CPRA, as the "reasonable" fee concept was amended out of the CPRA in 1976 and further limited by 1981 legislative amendments. (*Ibid.*) Thus there is clear legislative intent to disallow a "reasonable fee" standard and to limit the possible fees that can be charged.

Conversely, with regard to requests for electronic records, when a CPRA request makes it necessary for staff to perform programming in order to compile electronic records or to extract information from such records, the requester must bear the full cost, not merely the direct cost of duplication. (Gov. Code, § 6253.9(a); "Summary of the California Public Records Act 2004" California Attorney General's Office, p. 5.) However, if the information is available in an electronic format without programming and the records are requested or provided in an electronic format, a district may only charge for the direct costs of duplication. (Gov. Code, § 6253.9(a).)

Another variable is that a district cannot make the information available only in an electronic format if other formats (such as paper) are available and the requester insists on obtaining paper records. (Gov. Code, § 6253.9(e).) However, many requesters prefer electronic information, and in spite of the fact that programming may be necessary, a requester may be willing to pay programming fees in order to have the record available electronically, even if the requester did not initially request electronic records. Another consideration is that if a district has the requested record available electronically without programming and only needs to charge for a copy of the record, it may be far less burdensome to offer an electronic copy if it is available.

We have been told by several institutions that XLIX has been willing to pay reasonable programming fees in order to obtain the requested information electronically.

Options for Dealing with Such Requests

We have set forth below some suggested strategies for dealing with CPRA requests from XLIX or other such entities.

- Legislation: Seeking a change to the CPRA that would exempt such records.
- Recordkeeping: Keeping district records in such a manner as to make compliance with such requests less time and labor intensive and thus less burdensome.
- Alternate formats: If the requested records are kept in several formats, offering the requester a format that would impose the least amount of burden on the district.
- Provide online access to the public: If a legislative solution cannot be effected and XLIX continues to make requests for data, districts and faculty may wish to explore the possibility of putting the data online on district and/or college websites. Creative approaches may allow districts and faculty to present the data along with other information that will provide added value for the student and general public. As this information would be presented in a way that is useful and free to the public, it may discourage students from the use of fee-based services such as XLIX.

Please also be aware that the Attorney General's Office has informally advised us in the past that the CPRA does not provide for "standing requests" for public records, i.e. an entity such as XLIX is not allowed to make a request for records that do not exist and that may be available in the future, but must make separate and distinct requests for existing records it seeks to obtain.

Action/Date Requested: Advisory only. Questions concerning responses to CPRA requests should be directed to legal counsel for your district.

SB/RB/FR/sj

Resources

CPRA:

"Summary of the California Public Records Act 2004," California Attorney General's Office
http://ag.ca.gov/publications/summary_public_records_act.pdf

FERPA:

The Family Policy Compliance Office

<http://www.ed.gov/policy/gen/guid/fpc/index.html>

FERPA Online Library (FPCO Opinions)

<http://www.ed.gov/policy/gen/guid/fpc/ferpa/library/index.html>

FERPA Regulations

<http://www.ed.gov/policy/gen/reg/ferpa/index.html>

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