

*The City University of New York*  
*Office of the General Counsel and Vice Chancellor for Legal Affairs*  
*535 East 80<sup>th</sup> Street, New York, N.Y. 10021*  
*Phone: (212) 794-5382*  
*Fax: (212) 794-5426*

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OFFICE OF THE PROVOST G.C.

*Writer's direct phone: (212) 794-5506*  
*Writer's e-mail: frederick.schaffer@mail.cuny.edu*

*Frederick P. Schaffer*  
*General Counsel*

*Jane Sovern*  
*Deputy General Counsel*

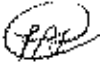
*Jane E. Davis*  
*Marina B. Ho*  
*Abby L. Jennly*  
*Richard Malina*  
*Daphna H. Mitchell\**  
*Linda Myles*  
*Katherine Raymond*  
*Dantel Simonette*  
*Michael D. Solomon\**  
*Jo-Anne Weissbart*

*\*Associate General Counsel*

## STUDENT ADVISORY MEMORANDUM

April 5, 2005

To: College Presidents

From: Vice Chancellor Frederick P. Schaffer 

Re: Student Records Access Policy and the  
Family Educational Rights and Privacy Act ("FERPA") and USA Patriot Act

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This memorandum provides guidance on the requirements of federal and state law and Board of Trustees policy on access to student records, and supersedes Student Advisory Memoranda 2000-4, 2000-3, as well as the April 29, 2002 memorandum on the USA Patriot Act. The Board's Student Records Access Policy requires the University and its colleges to be in full compliance with the Federal Education Rights and Privacy Act ("FERPA," also known as the Buckley amendment), and provides for a student appeal procedure to the General Counsel and Vice Chancellor for Legal Affairs, subject to the approval of the Board Committee on Student Affairs and Special Programs. FERPA provides that a student's personally identifiable education records may not be disclosed without the student's written consent, except for directory information and specific exceptions permitted by FERPA. The purpose of this memorandum is to review recent changes and court decisions affecting FERPA, as well as to again circulate the "Guidelines for the Implementation of the CUNY Student Records Access Policy and FERPA," a copy of which is enclosed. The important aspects of FERPA, including directory information and emergencies will also be reviewed.

As a result of the events of September 11, 2001, and the subsequent adoption by Congress of anti-terrorism legislation (USA Patriot Act), questions have arisen about requests from law enforcement authorities for the education records of CUNY college students. We have been dealing with such requests on a case by case basis to protect the individual rights of privacy of our students and faculty, while continuing to help the nation in these times of great concern for national security. In 1970, even before FERPA was enacted, the Board adopted "Guidelines for Access to Student and Faculty Records by Non-College Authorities," providing that student records, "by their very nature, carry with them an assumption by the students that academic and non-academic records accumulated during their attendance will be treated with the utmost circumspection and prudence." (Board Minutes, February 24, 1970, Cal. No. 3b) The Board policy provides that before the release of student or faculty records, notification should be provided to the student or faculty member, the President, and the General Counsel, of the receipt of the subpoena. It is important that the University continue to examine each request carefully to insure consistency and compliance with FERPA, as well as with University policies. Accordingly, if you receive any such requests for student, faculty, or staff records, please contact me, Michael Solomon, or Lisa Ortiz at this office.

The United States Supreme Court recently decided two major FERPA cases, the first such cases since the law's adoption in 1974. In Owasso Independent School District v. Falvo, 122 S. Ct. 934 (2002), the Court decided that peer grading (papers exchanged among students for purpose of grading) does not violate FERPA, because at least at that point of time the grades and papers are not being maintained by the school as educational records, and in Doe v. Gonzaga, 122 S. Ct. 2268 (2002), the Court decided that FERPA does not create a private right of action which can be maintained by an individual. As a result, the only penalty for a FERPA violation may be a loss of federal funds.

On the legislative side, FERPA was amended by the Campus Sex Crimes Prevention Act which requires registered sex offenders to report to the state authorities each college at which they are a student or employee, and requires colleges to notify the campus community where they can find information on requested sex offenders. The law amends FERPA to allow for the release of information related to the conviction of sex offenders who are students, and is dealt with in more detail in a separate advisory on that subject.

### **Disclosure to City University and College Officials**

A college may disclose personally identifiable information from an education record of a student without prior consent if the disclosure is to a college, Central Office or Board of Trustees official, employee or agent, whom the college has determined to have a legitimate educational interest in that student's record.

### **USA Patriot Act**

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA Patriot") Act of 2001, added a provision to FERPA which empowers the United States Attorney General (or any federal employee of the rank of

assistant attorney general or higher, designated by the U.S. Attorney General) to obtain a court order for the production of education records, relevant to an investigation of terrorism, by certifying to the court that there are "specific and articulable facts" giving reason to believe that the education records are likely to contain information relevant to the investigation and prosecution of terrorism. Furthermore, under the USA Patriot Act, the U.S. Attorney General may obtain a court order for the confidential production of student records, which could be applicable to one or more campuses. Such an order supersedes the usual FERPA requirements regarding record keeping and student notification. If you receive any court order pursuant to the USA Patriot Act, please call this office immediately. This statute, however, did not eliminate the CUNY requirement for student notification. A student must still be notified unless there is also a non-disclosure order.

### **Emergency Exception to FERPA**

Under the emergency provision of FERPA, a college may disclose a student's personally identifiable information in connection with an emergency if such disclosure is necessary to protect health or safety. The FERPA regulations require that this exception be "strictly construed." The factors to be considered include: (a) the seriousness of the threat to health or safety; (b) the need for the information to meet the emergency; (c) whether those to whom the information is disclosed are in a position to deal with the emergency; and (d) the extent to which time is of the essence. If you receive such a request, please call my office immediately. When such a request is made, the college should obtain a written statement from a law enforcement officer that the information is needed because of a serious threat to health or safety, and that time is of the essence. A record must then be maintained of the disclosure, but notice need not be given to the student.

### **Subpoenas**

Law enforcement authorities may also seek student information through lawfully issued subpoenas. When information is to be disclosed pursuant to a subpoena, the college must notify the student by mail five days in advance of compliance, unless a shorter notification period is authorized by this office. Sometimes, for law enforcement purposes, subpoenas will direct that their contents not be disclosed to the student. (See below regarding Non-Disclosure Order.) Such subpoenas may also be directed to more than one college on the same matter. Subpoenas for records which are served upon CUNY or its colleges must be signed by a judge (i.e., so ordered), in accordance with Section 2307 of the New York State Civil Practice Law and Rules (CPLR). While there are certain exemptions to the requirement (e.g., grand jury subpoenas), you should contact this office whenever you receive a subpoena. When college officials receive routine subpoenas (e.g., negligence or matrimonial matters), they should be faxed to Lisa Ortiz in this office for guidance. Any subpoenas which may relate to investigations into terrorism or other criminal activities, or to immigration matters should be faxed to Michael Solomon.

### **Non-Disclosure Order (Subpoenas)**

The University's "Guidelines for the Implementation of the [Board's] Student Records Access Policy" (Attached, Section I(E)(6)), provide that where there is a judicial order or court-

ordered subpoena, the college must notify the student by mail of the subpoena five days in advance of compliance, except a shorter period may be authorized by the General Counsel. Generally, the only exception is when a court has ordered that the existence or the contents of the subpoena not be disclosed. If you receive a request not to disclose a subpoena, whether or not there is also a non-disclosure order, you should contact Michael Solomon of this office before taking any action to turn over documents or to notify the student.

### **Directory Information**

Some categories of student data constitute “directory information” and may be provided to persons with a legitimate interest in such information, without an emergency determination, court order, or subpoena. Directory information includes: a student’s name, attendance dates (not daily records), address, telephone number, date and place of birth, photograph, e-mail address, full or part-time status, enrollment status (undergraduate, graduate, etc.), level of education (credits) completed, major field of study, degree enrolled for, participation in recognized activities and sports (teams), previous schools attended, and degrees, honors and awards received. Directory information does not include: a student’s social security number, identification number, class schedule, race or ethnicity, or a class roster (register or list). Prior to releasing any directory information, the college should check with the registrar whether the student has filed a Directory Information Non-Disclosure Form prohibiting the release of such information. If so, the college must follow the non-disclosure directive.

### **Non-Disclosure Form for Directory Information**

Since directory information records are not protected from disclosure by federal law, these records are also subject to being released pursuant to the State Freedom of Information Law (FOIL). It is therefore important to notify students about directory information and of their right to file a request with the Registrar not to have any part of, or all, directory information released. If a student files such a request, the directory information will also not be released pursuant to FOIL because it is then protected by federal law. Attachment D to the Guidelines is a Directory Information Non-Disclosure Form which should be made available to students at the Registrar’s office. Attachment E is the Notification Under FERPA of Student Rights Concerning Education Records and Directory Information which must be provided to students in an annual publication or other notification. Emphasis has been given in the FERPA notification to the student’s right to object to the disclosure of directory information. I also recommend that the college print a copy of Attachment D in a registration booklet and post it on your website.

### **Litigation By or Against a Student**

A student’s records may be used in litigation brought by the student against CUNY, or litigation commenced by CUNY against the student. FERPA also permits CUNY to provide information to a third party where the student has complained about his treatment by CUNY (e.g., student writes to a legislator complaining about a grade or dismissal).

### **Social Security Numbers**

State Education Law Section 2-b, which became effective July 11, 2001, prohibits the use of student social security numbers for any public identification purpose, and itemizes four common uses of social security numbers as meeting that definition: (1) the posting or public listing of grades; (2) placement on class rosters or other lists provided to teachers; (3) placement on student identification cards; and (4) use in student directories or similar listings. With the exception of class rosters which are not publicly circulated, all of the enumerated uses are also prohibited by FERPA. The statute does not prohibit use of a student's social security number to identify the student for internal record keeping purposes. Colleges may continue to use a student's social security number to identify the student for internal purposes such as admissions, financial aid and other functions where the social security number is used to track students or to match the student's records with those of other schools, colleges or governmental agencies.

### **Disclosure to Parents**

Records may not be released to a parent unless the student is a dependent of the parent as defined in the Internal Revenue Code (Section 152). A dependent student is: (a) one who will not have attained the age of 19 by the end of the calendar year or (b) one for whom the parent(s) provides more than one-half of the student's support, not taking into account scholarship monies, provided that the student is full-time for at least five months of the calendar year. A copy of the parent's latest tax return may be requested as documentation.

### **Sole Possession of the Maker Records**

This category of records is not required to be disclosed to a student requesting the same. Such records are defined to be records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the records. These personal notes or "memory aids" are the only records maintained by faculty members or administrators which do not have to be shown to students upon request. Other limited exceptions such as letters of reference are discussed in the Guidelines.

### **FERPA Appeals Officer**

The College President designates a FERPA Appeals Officer, who may be the college's Legal Affairs Designee. The FERPA Appeals Officer will hear student appeals from the denial of access to records, requests to correct records, or the denial of other rights under FERPA. You need to inform me of your designee as FERPA Appeals Officer only if it is someone other than your Legal Affairs Designee.

### **Federal Inquiries on Computer, Library, Voicemail, E-mail, Network Information, Etc.**

The USA Patriot Act is a long statute (more than 100 pages) with many provisions regarding access by law enforcement agencies to different types of stored electronic information. Many of the provisions are amendments to statutes and are very technical in nature. Call this office immediately if you receive any requests for such information.

## Faculty and Staff Records

Safeguards for privacy are also accorded to faculty and staff pursuant to Board and University policy. Subpoenas should be forwarded to this office; they should be ordered by a court; and five days notice should be given to the employee prior to compliance, unless the court has issued a non-disclosure order.

Any questions about the implementation of FERPA in specific situations should be addressed to this office.

Encls.

c: Chancellor's Cabinet  
Chief Academic Officers  
Chief Administrative Officers  
Chief Student Affairs Officers  
Legal Affairs Designees  
Registrars  
Chief Librarians  
Chief Information Officers  
Deputy Chief Operating Officer  
University Chief Information Officer  
University Dean for Institutional Research  
University Director of Public Safety  
University Librarian