



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

January 18, 2012

**Public Access Opinion 12-003
(Request for Review 2011 PAC 17006)**

FREEDOM OF INFORMATION ACT:
Names of State University Students
and Graduation Information Are Not Exempt
from Disclosure under Sections 7(1)(a),
7(1)(b), or 7(1)(c)

Mr. Brendan J. Healey
Senior Counsel, Media and Promotions
Tribune Company
435 North Michigan Avenue
Chicago, Illinois 60611

Mr. Patrick B. Cage
General Counsel
Chicago State University
9501 S. King Dr. / ADM 318
Chicago, Illinois 60628

Dear Mr. Healey and Mr. Cage:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2010), as amended by Public Act 97-579, effective August 26, 2011). The question presented in this Request for Review is whether Chicago State University properly withheld names of students and information concerning students' graduations pursuant to any of the three exemptions cited by the University. For the reasons set forth below, we conclude that the University has violated FOIA and must provide the withheld information to the requester.

BACKGROUND

On August 16, 2011, Ms. Jodi S. Cohen, a reporter for the *Chicago Tribune* (*Tribune*) submitted a FOIA request to Chicago State University seeking:

- The names of all 405 first-time, full-time Chicago State University freshmen who began in Fall 2005
- The names of all undergraduates who were included in the May 2011 graduation ceremony, and the degrees they received
- The names of any students included in the Fall 2005 freshman cohort who graduated prior to May 2011.¹

On August 23, 2011, the University submitted to the Public Access Counselor notice of its intent to deny² Ms. Cohen's request for students' names pursuant to section 7(1)(c) of FOIA.³ 5 ILCS 140/7(1)(c) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452 effective August 19, 2011. This notice to the Public Access Counselor included the following explanation of the University's intention to deny the names of students as personal information:

Based on the number of hostile and negative articles that Ms. Cohen has written about Chicago State University, its students, faculty and administrators, the University asserts that it would be an unwarranted invasion of personal privacy to release any of the names of individuals requested by the Tribune. * * * A reasonable person would find the use of his or her name published in association with one of the Tribune's negative articles highly objectionable.

¹Letter from Jodi S. Cohen, *Chicago Tribune*, to Patrick B. Cage, FOIA Officer, Chicago State University (August 16, 2011).

²Prior to amendment by Public Act 97-579, effective August 26, 2011, section 9.5(b) of FOIA (5 ILCS 140/9.5(b) (West 2010)) required a public body to provide written notice to the requester and to the Public Access Counselor of its intent to assert section 7(1)(c) or 7(1)(f) of FOIA (5 ILCS 140/7(1)(c), (f) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452 effective August 19, 2011) to deny a request in whole or in part.

³Letter from Patrick B. Cage, General Counsel, Chicago State University, to Sarah Pratt, Acting Public Access Counselor, Office of the Illinois Attorney General (August 23, 2011); see 2011 PAC 16489, closed September 7, 2011.

Mr. Brendan J. Healy
Mr. Patrick B. Cage
January 18, 2012
Page 3

The University sent copies of articles concerning the University by the *Tribune* with its August 23, 2011, letter to the Public Access Counselor.

On August 26, 2011, Public Act 97-579 eliminated the requirement that public bodies seek approval from the Public Access Counselor prior to asserting section 7(1)(c) of FOIA to deny access to public information. Accordingly, on September 7, 2011, we directed the University to promptly respond to the *Tribune's* August 16, 2011, FOIA request, and to assert any exemptions that it deemed applicable.⁴

On September 9, 2011, the University responded to the *Tribune's* August 16, 2011, FOIA request by providing a one page document that it asserted contained requested information about the 2005 freshman class. The document contains a list of majors, and columns labeled Bachelor of Arts, Bachelor of Science, and Bachelor of Science in Education, along with numbers in each category. The University also asserted that it was partially denying the request pursuant to sections 7(1)(a), 7(1)(b), and 7(1)(c) of FOIA. 5 ILCS 140/7(1)(a), (b), (c) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452 effective August 19, 2011.⁵ Section 7(1)(a) of FOIA authorizes public bodies to withhold "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." Section 7(1)(b) of FOIA permits public bodies to redact "private information" as defined in section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2010)) from public records. Section 7(1)(c) of FOIA allows public bodies to redact "personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." "Unwarranted invasion of personal privacy" is defined in the Act to mean "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." 5 ILCS 140/7(1)(c) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452 effective August 19, 2011.

Specifically, the University's September 9, 2011, response asserts that the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. §1232g) and regulations enacted pursuant to FERPA (34 C.F.R. Part 99 (2011)) prohibit it from releasing the requested information because the two categories of information requested could be used to determine who "failed to make satisfactory academic progress." This information, the University stated, is not "directory information" and, therefore, FERPA prohibits its release. The University's response did not specify the particular information withheld under each exemption (although it is apparent

⁴Letter from Sarah L. Pratt, Acting Public Access Counselor, Public Access Bureau, to Patrick B. Cage, General Counsel, Chicago State University (September 7, 2011).

⁵Letter from Patrick B. Cage, General Counsel, Chicago State University, to Jodi S. Cohen, Higher Education Reporter, *Chicago Tribune* (September 9, 2011).

that names of students for each of the three categories requested is the information being denied by the University) nor explain its basis for asserting sections 7(1)(b) and 7(1)(c). We note, however, that the University did not re-assert its position that student names were exempt under 7(1)(c) because of prior media coverage. Finally, the University asserted that fourteen members of the 2005 freshman cohort had officially requested that the University exclude their names from directory information.⁶

On October 4, 2011, the *Tribune* filed a Request for Review of the University's September 9, 2011, partial denial of Ms. Cohen's FOIA request.⁷ On October 7, 2011, we forwarded a copy of the *Tribune's* Request for Review to the University and asked the University to provide more detailed information concerning its partial denial, including a written explanation of its basis for asserting that FERPA prohibited release of the requested information.⁸ The University responded on October 20, 2011, asserting that the requested information constitutes "personally identifiable information" that it cannot release under FERPA.⁹ The University then stated that it "did not disclose the names of the students because to do so would involve the disclosure of private and personal academic progress information prohibited by privacy provisions of both" 7(1)(b) and 7(1)(c) of FOIA.

We forwarded the University's response to the requester, and the *Tribune* replied on November 7, 2011.¹⁰ The *Tribune* asserted that FERPA did not prohibit the release of the requested records, that none of the information requested fit under the section 7(1)(b) "private information" exemption, and that the information requested "does not implicate the privacy concerns of section 7(1)(c)."

⁶"Directory information" will be discussed later in this opinion. However, the *Tribune* does not seek the names of the fourteen students who exercised their option to have the University exclude their names from directory information. (Telephone conferences between Rebecca Riddick, Assistant Attorney General, Ms. Cohen, requester, and Brendan Healey, Senior Counsel, Tribune Company, December 28, 2011.)

⁷A Request for Review was originally filed by the *Tribune* on August 29, 2011, in response to the University's August 23, 2011, letter notifying the Attorney General of its intent to deny the request pursuant to section 7(1)(c). See 2011 PAC 16563. However, after the Public Access Counselor advised the University to respond, the *Tribune* submitted a new Request for Review of the September 9, 2011, denial. See 2011 PAC 17006. Letter from Brendan J. Healey to Sarah Pratt, Acting Public Access Counselor, Office of the Attorney General (October 4, 2011).

⁸Letter from Rebecca Riddick, Assistant Attorney General, Public Access Bureau, to Patrick B. Cage, General Counsel, Chicago State University (October 7, 2011).

⁹Letter from Patrick B. Cage, General Counsel, Chicago State University, to Rebecca Riddick, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (October 20, 2011).

¹⁰Letter from Brendan J. Healey, to Sarah Pratt, Acting Public Access Counselor, Office of the Attorney General (November 7, 2011).

ANALYSIS

FOIA requires that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act." 5 ILCS 140/3(a) (West 2010). The limited exceptions to public access are to be construed narrowly. 5 ILCS 140/1 (West 2010). Further, all public records retained by a public body are "presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2010). A public body "has the burden of proving by clear and convincing evidence" that a record is exempt from disclosure.

Section 7(1)(a) and FERPA

The purpose of FERPA is to ensure access to educational records for students and parents and to protect the privacy of such records from the public at large. *Student Press Law Center v. Alexander*, 778 F. Supp. 1227, 1228 (D.D.C., 1991). "The statute takes a carrot-and-stick approach: the carrot is federal funding; the stick is the termination of such funding to any educational institution 'which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein...) of students without the written consent of their parents.'" *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 68 (1st Cir. 2002). The fact that the only penalty under FERPA for the unauthorized release of educational records is a potential loss of Federal funding prompts the question of whether FERPA "specifically prohibit[s]" the release of educational information, within the meaning of section 7(1)(a) of FOIA.¹¹ As is discussed more fully below, however, it is not necessary to resolve this issue in order to complete this review.

FERPA categorizes certain information that would otherwise be precluded from disclosure as "directory information." Directory information is defined as "information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed." 34 C.F.R. §99.3 (2011). Directory information "includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended." 20 U.S.C. §1232g(5)(A); 34 C.F.R. § 99.3(a) (2011).

¹¹See *Chicago Tribune v. University of Illinois Board of Trustees*, 781 F. Supp. 2d 672,675 (N.D. Ill., 2011), in which the court held that because FERPA does not "specifically prohibit" the disclosure of educational records, the University could not rely on section 7(1)(a) of FOIA to withhold requested admissions records.

Pursuant to 34 C.F.R. § 99.37 (2011):

(a) An educational agency or institution *may disclose directory information* if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request[.] (Emphasis added).

The University's Policy on Family Educational Rights and Privacy Act of 1974 provides that students' names, dates of attendance, full- or part-time status, degrees and awards received, and honors received are directory information which may be released to "any or all inquirers."¹² The information requested by the *Tribune* (the names of students who first entered the University in the Fall of 2005, the names and degrees of students who graduated in May 2011, and the names of any student in the first category who graduated prior to May 2011) clearly falls within the category of "directory information" under both FERPA and the University's policy definition. Therefore, because FERPA does not limit the release of this

¹²Chicago State University – Office of the Registrar, <http://www.csu.edu/recordsandregistration/officeofregistrar.htm> (last visited Nov. 9, 2011). The University's website informs students that they may elect to withhold this information from requesters by sending a written request to the Registrar.

information generally, the University may not rely upon section 7(1)(a) to withhold the responsive records from the *Tribune*.

Section 7(1)(b)

Section 7(1)(b) exempts from disclosure "private information," which is defined in section 2(c-5) of FOIA as "unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates[.]" The examples of "unique identifiers" cited in section 2(c-5) include information, such as a social security number, that is alone sufficient to identify a particular individual, as well as information which is both unique to an individual and of a type in which there is a significant personal privacy interest, such as medical or financial records. Names are not specifically included in the definition of "private information," and a name is not ordinarily sufficiently unique to identify a specific individual because many persons have the same name. See *U.S. v. Mitchell*, 518 F.3d 230, 234 (4th Cir. 2008). As pointed out by the Illinois Supreme Court in *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill.2d 401, 412 (1997), if basic identification were exempt from FOIA that would lead to absurd results, such as the public having no right to learn the names of government employees or elected officials.

Further "[w]here the legislature intended to exempt a person's identity from disclosure, it did so explicitly." *Lieber*, 176 Ill.2d at 412. For example, section 7(1)(d)(iv) of FOIA exempts records that would "disclose the *identity* of a confidential source" and section 7(1)(j)(iii) exempts information concerning school disciplinary cases that would "reveal the *identity* of the student." (Emphasis added.) 5 ILCS 140/7(1)(d)((iv), (j)(iii) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-385, effective August 15, 2011; 97-452 effective August 19, 2011. Section 7(1)(b) exempts only private information, and nothing in that definition or in reading FOIA as a whole suggests that a person's name, or basic identification, is private information. Accordingly, neither a person's name nor the fact that he or she enrolled in the University and graduated is "private information" which may be withheld from disclosure under section 7(1)(b) of FOIA.

Section 7(1)(c)

Section 7(1)(c) allows public bodies to withhold:

Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information.

"Unwarranted invasion of personal privacy" means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.

As the Supreme Court stated with respect to an earlier version of the exception, "the phrase 'personal information' must have been intended by the legislature to be understood not in the sense of basic identification, but in the sense of information that is 'confidential' or 'private'." *Lieber*, 176 Ill.2d at 412. This office has consistently concluded that names do not qualify as "personal information" under the section 7(1)(c) exemption. *See* Ill. Att'y Gen. PAC Pre-Auth. dl11157, issued December 9, 2010 and Ill. Att'y Gen. PAC Pre-Auth. dl14195, issued May 24, 2011.

Further, the disclosure of an individual's status as a member of the incoming freshman class in 2005, or his or her receipt of a degree would not constitute an unwarranted invasion of personal privacy. The University argues that the *Tribune* could use the information to determine "who did not graduate within the six year time frame." However, there are a myriad of reasons why a student may not receive a degree within a specific span of time. For example, he or she may transfer to another institution, may decide to withdraw or attend part-time because of work, family or financial considerations, or decide to pursue a different career, none of which would be reflected in the information requested. The fact that a student does not receive a degree within a particular six year period is not confidential or private documentary information concerning the student. Therefore, the disclosure of the requested information would not constitute an unwarranted invasion of personal privacy, even if the recipient may use the information to draw inferences regarding academic performance.

Moreover, the University may not treat FOIA requests from the *Tribune* differently than FOIA requests from any other person or entity. "[S]elective disclosure by the government 'is offensive to the purposes underlying the FOIA and intolerable as a matter of policy. Preferential treatment of persons or interest groups fosters precisely the distrust of government that FOIA was intended to obviate.'" *Lieber*, 176 Ill.2d at 413 (quoting *State of North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978)).

FINDINGS AND CONCLUSIONS

After full review and giving due consideration to the arguments of the parties, the Public Access Counselor's findings, and the applicable law, the Attorney General finds:

Mr. Brendan J. Healy
Mr. Patrick B. Cage
January 18, 2012
Page 9

1) On August 16, 2011, Ms. Jodi S. Cohen, a reporter with the *Chicago Tribune*, submitted a FOIA request to Chicago State University seeking: the names of all first-time, full-time Chicago State University freshmen who began in Fall 2005; the names of all undergraduates who were included in the May 2011 graduation ceremony and the degrees they received; and the names of any students included in the Fall 2005 freshman cohort who graduated prior to May 2011.

2) On September 9, 2011, the University partially denied the FOIA request, asserting that portions of the responsive records were exempt from disclosure under sections 7(1)(a), 7(1)(b), and 7(1)(c) of FOIA. The University provided Ms. Cohen with an untitled table listing majors and degrees awarded that it said pertained to the 2005 freshman class.

3) On October 4, 2011, the Public Access Bureau received a Request for Review of the University's September 9, 2011, response. The Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA. 5 ILCS 140/9.5(a) (West 2010), as amended by Public Act 97-579, effective August 26, 2011. Therefore, the Attorney General may properly issue a binding opinion with respect to the disclosure of the requested records.

4) The records requested by Ms. Cohen are public records that the University is required to produce for inspection or copying pursuant to section 3 of FOIA (5 ILCS 140/3 (West 2010)), unless the documents are exempted from disclosure under section 7 of FOIA.

5) The University has not met its burden under section 1.2 of FOIA (5 ILCS 140/1.2(West 2010)) of proving by clear and convincing evidence that the names of students are exempt for the following reasons:

a) The requested information is "directory information," as defined in FERPA. FERPA does not specifically prohibit the release of directory information. Therefore, the University may not rely on the provisions of FERPA to withhold the requested information under section 7(1)(a) of FOIA;

b) None of the information requested is "private information" as defined by section 2(c-5) of FOIA. Therefore, the University has not met its burden to exempt the requested information from disclosure under section 7(1)(b) of FOIA; and

c) None of the information requested by the *Tribune* is "personal information" the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." Therefore, the University has not met its burden of demonstrating that the records are exempt under section 7(1)(c) of FOIA.

Mr. Brendan J. Healy
Mr. Patrick B. Cage
January 18, 2012
Page 10

Therefore, it is the opinion of the Attorney General that the University violated FOIA by improperly denying Ms. Cohen's August 16, 2011, FOIA request. Accordingly, the University is directed to take immediate and appropriate action to comply with this opinion by furnishing the requested public records to Ms. Cohen and the *Tribune*.

Under section 9.5(f) of FOIA, the University must either immediately comply with this binding opinion or initiate administrative review under section 11.5 of FOIA (5 ILCS 140/11.5 (West 2010)).

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 (West 2010). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision by naming the Attorney General of Illinois and Ms. Jodi S. Cohen as defendants. See 5 ILCS 140/11.5 (West 2010).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
Counsel to the Attorney General