NO. 95795-9

SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST,

Petitioner,

v.

THE EVERGREEN STATE COLLEGE BOARD OF TRUSTEES; FRED GOLDBERG; DAVID NICANDRI; ANNE PROFFITT; GRETCHEN SORENSEN; JAMES WIGFALL; NICHOLAS WOOTEN; and the STATE OF WASHINGTON,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g, 34 C.F.R. Part 99), is a federal law that protects student privacy by prohibiting disclosure of students' education records and personally identifiable information from those records without consent. Applying this Court's precedent, the Court of Appeals held that FERPA falls squarely within the "other statutes" exemption of the Public Records Act (PRA). It also held that The Evergreen State College (College) complied with FERPA when it withheld or redacted student education records and personal information from those records in response to a PRA request by Petitioner Arthur West.

Mr. West has not established a conflict with this Court's precedent, the existence of a significant constitutional question, or an issue of substantial public interest that requires determination by this Court. His Petition for Review should be denied.

II. COUNTERSTATEMENT OF THE ISSUES

For the reasons set forth in Section IV, below, the issues raised in Mr. West's Petition for Discretionary Review are not appropriate for review under RAP 13.4(b). If review were accepted, however, the only issue before this Court would be:

> Whether the Court of Appeals properly ruled that FERPA is an "other statute" exemption under the PRA.

Because the purported constitutional issues raised by Mr. West in his Petition were not properly preserved, the Court of Appeals declined to address them on appeal. This Court should decline to do so as well. *See* RAP 2.5(a).

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

On October 21, 2014, Mr. West submitted a public records request seeking the following:

> 1. All records concerning the application and enforcement of the TESC[1] Criminal Trespass Policy, January 1, 2014 to present.
>
> 2. Any grant voucher or certification by the college that it will comply with Civil Rights laws as a condition of receiving any federal or state grants or funding, 2010 to present.

CP 501, ¶¶ 7 & 8; CP 512. The College timely responded and sought clarification of the request. CP 501, ¶ 9. In response, Mr. West sent the following clarification:

> 1. Other types of records, as well as the policy
>
> 2. Please produce any records concerning compliance with any conditions as a condition of applying for or receiving federal funding.

[1] TESC is an acronym for The Evergreen State College.

CP 501, ¶¶ 10-11; CP 516.

Given the broad scope of Mr. West's request, the College produced records in installments each month between November 2014 and October 2015, with the exception of August 2015. CP 501-02, ¶ 13, CP 519-34. The College produced 1,219 pages to Mr. West, along with a number of hyperlinks to College policies believed to be responsive. CP 502, ¶ 14; *see also* CP 519-34.

Of the 13 installments provided to Mr. West, only five (Installments 2, 4, 5, 6, and 7) contained redactions based on FERPA.[2] *See* CP 501-02, ¶¶ 13 & 17; CP 519-34. CP 359-60, ¶¶ 10-12. All of the FERPA-redacted information fell within one of the following categories: (a) student names; (b) parent names; (c) student identification numbers (Internal Number) that are assigned to students by the College for educational purposes; (d) student identification photos that are taken by the College and used for educational purposes, such as the student identification card; and (e) communication/information relating to student discipline issued from the College's student conduct office regarding student discipline (e.g., emails from the senior conduct administrator in student affairs or disciplinary letters). CP 503-05, ¶¶ 21 & 24; CP 505-06, ¶¶ 28 & 30; CP 507, ¶ 33.

[2] Installments 1, 9, 10, 11, 12, and 13 do not contain any FERPA-related redactions. CP 502, ¶ 16. Installments 3 and 8 contain no redactions at all. *Id.*

There is nothing in the record to support Mr. West's contention that "all of the requested records in the present case involved law enforcement" and were not education records. Pet. at 21. To the contrary, the unrefuted evidence in the record reflects that the records produced in Installments 4, 5, 6, and 7 contain emails, attachments to those emails, and records from the College's Student Affairs Office. CP 504, ¶ 22; CP 507, ¶ 31.

Installment 2, which contained records from Campus Police Services, consisted primarily of reports and trespass warnings. CP 503, ¶ 20. Of the 80 pages contained in that installment, 16 contained personally identifiable information from student education records that was redacted under FERPA. CP 503-04, ¶ 21. Contrary to Mr. West's assertions, these limited redactions did not deprive the public of knowledge about law enforcement activities or conceal the identity of individuals who were trespassed from the College. The FERPA-based redactions in those 16 pages were limited to redactions of: (a) emails and disciplinary letters from the student conduct office; (b) student identification numbers (Internal Number) that are assigned to students by the College for educational purposes; and (c) student identification photographs that are taken by the College and used for education purposes, such as the student identification card. CP 503-04, ¶ 21.

B. Procedural History

Mr. West prematurely filed his complaint in May 2015, five months before the College produced the final installment in response to his PRA request. *Cf.* CP 4 and CP 534. However, by the time the College's summary judgment motion was heard by the trial court, the final installment had been produced and the parties argued the case on the merits. *See* CP 30-41; CP 54-56; CP 251. Relying on established precedent from this Court, both the Superior Court and the Court of Appeals held that FERPA falls within the "other statute" exemption of the PRA. CP 54-56; *West v. TESC Board of Trustees*, 3 Wn. App. 2d 112, 119, 414 P.3d 614 (2018). The Court of Appeals also declined to address Mr. West's constitutional arguments as beyond the scope of appeal under RAP 10.3. *See West*, 3 Wn. App. 2d at 124 n.8. Mr. West filed a timely Petition for Review, which was subsequently amended with leave of the Court. This Answer responds to the Amended Petition for Review.

IV. ARGUMENT/REASONS WHY REVIEW SHOULD BE DENIED

Mr. West seeks review under RAP 13.4(b) sections 1, 3, and 4. Pet. at 6. None of the criteria in those sections is met.

A. The Court of Appeals' Decision is Consistent With Previous Decisions by This Court

Contrary to Mr. West's arguments, the Court of Appeals' decision is entirely consistent with previous case law, and the Court should deny review under RAP 13.4(b)(1).

1. The Court of Appeals followed this Court's precedent when it held that FERPA is an "other statute" under the PRA

The Court of Appeals followed PRA precedent to determine that FERPA qualifies as an "other statute" exemption. *West*, 3 Wn. App. 2d at 118-24. While the PRA provides for the broad disclosure of most public records, it also contains several important exemptions, including the "other statutes" exemption. RCW 42.56.070(1).

Washington courts have applied the "other statutes" exception to find disclosure exemptions outside of the PRA on multiple occasions.[3]

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[3] *See, e.g.*, *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 528, 326 P.3d 688 (2014) (police dashboard video statute creates time limited exemption); *Ameriquest Mortg. Co. v.Wash. State Office of the Attorney Gen.*, 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010) (federal Gramm-Leach-Bliley Act); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (RCW 5.60.060(2)(a), attorney-client privilege); *Limstrom v. Ladenburg*, 136 Wn.2d 595, 601, 604, 963 P.2d 869 (1998) (Criminal Records Privacy Act); *PAWS v. Univ. of Wash.*, 125 Wn.2d 243, 262-64, 884 P.2d 592 (1994) (State Uniform Trade Secrets Act); *White v. Clark Cty.*, 199 Wn. App. 929, 935–38, 401 P.3d 375 (2017), *review denied*, 189 Wn.2d 1031, 407 P.3d 1144 (2018) (statutes and regulations protecting secrecy of tabulated ballots); *Anderson v. DSHS*, 196 Wn. App. 674, 682-85, 384 P.3d 651 (2016), *review denied*, 188 Wn.2d 1006, 393 P.3d 786 (2017) (statute protecting privacy of child support records); *Planned Parenthood of the Great Nw. v. Bloedow*, 187 Wn. App. 606, 623, 350 P.3d 660 (2015) (statute protecting health care data where the patient of provider can be identified); *Freedom Found. v. Dep't of Transp., Div. of Wash. State Ferries*, 168 Wn. App. 278, 289, 276 P.3d 341 (2012) (post-accident drug and alcohol tests under federal statute); *Deer v. DSHS*, 122 Wn. App. 84, 90-92,

The Court of Appeals in this case relied on clearly-established criteria for determining whether a statute constitutes an "other statute" under the PRA, under which federal laws and regulations, like FERPA, can form the basis for an "other statute" exemption where they "expressly prohibit or exempt the release of records." *West*, 3 Wn. App. 2d at 118-19 (citing *John Doe A ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 372, 374 P.3d 63 (2016), and *Ameriquest Mort. Co. v. Wash. State Office of the Attorney Gen.*, 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010)). Applying these criteria, the Court of Appeals held that FERPA qualifies as an "other statute" because it exempts student education records. *West*, 3 Wn. App. 2d at 119-24.

Congress enacted FERPA in 1974 "to protect [students'] rights to privacy by limiting the transferability of their records without their consent." *Joint Statement in Explanation of Buckley/Pell Amendment*, 120 Cong. Rec. 39858, 39862 (1974). The explicit purpose of FERPA is "to set out the requirements for the protection of privacy of parents and students." 34 C.F.R. § 99.2. FERPA expressly prohibits the disclosure, constrains use when authorized disclosure occurs, and prohibits re-disclosure, unless a student consents or an explicitly identified exception exists.

93 P.3d 195 (2004) (statute governing dependency records held by juvenile justice or care agencies); *Comaroto v. Pierce Cty. Med. Exam'rs Office*, 111 Wn. App. 69, 75-76, 43 P.3d 539 (2002) (medical examiner's records statute).

20 U.S.C. § 1232g(b)(1) (requiring written consent in order to release education records); 20 U.S.C. § 1232g(b)(2) (requiring written consent in order to release personally identifiable information from education records); 20 U.S.C. § 1232g(b)(4)(B) (requiring third parties to comply with FERPA thus limiting nonconsensual re-disclosure). *See also* 20 U.S.C. § 1232g(d) (affording students who are over 18 or attending an institution of higher education all the rights accorded to parents of K-12 students under FERPA).

As noted by the Court of Appeals below, *West*, 3 Wn. App. 2d at 122-23, FERPA is similar to the Gramm-Leach-Bliley Act (GLBA) (Pub. L. No. 106-102, 113 Stat. 1338 (1999)) and its implementing regulations, which were found to fall within the PRA's "other statute" exemption by the court in *Ameriquest Mortgage*. Both statutes protect the privacy interests of specified individuals by precluding disclosure and re-disclosure of that information. *Cf.* 15 U.S.C. § 6802(c) and 16 C.F.R. § 313.11(c)-(d) (GLBA); 20 U.S.C. § 1232g(b)(4)(B) and 34 C.F.R. § 99.33(a)(1) (FERPA); *see also* 34 C.F.R. § 99.33(a)(2). This is precisely the type of statutory language required by the other statute criteria set out by this Court in *John Doe A*, 185 Wn.2d at 372.

Mr. West argues that the Court of Appeals' decision conflicts with the decisions of the Washington State Supreme Court and the United States Supreme Court. Pet. at 6-7. Only one of the cases cited by Mr. West, *John*

Doe A, is relevant to the determination of whether FERPA qualifies as an "other statute" under the PRA. As noted above, the Court of Appeals applied the standard set out in *John Doe A* and properly concluded that FERPA satisfies the "other statute" criteria under the PRA because FERPA contains explicit nondisclosure language that "exempts certain student education records and personal information from disclosure." *West*, 3 Wn. App. 2d at 123.

Mr. West also argues that *Gonzaga v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002), somehow precludes a finding that FERPA is an "other statute" under the PRA. Pet. at 7 and 15. As the Court of Appeals noted, West's characterization of *Gonzaga* is highly misleading. *West*, 3 Wn. App. 2d at 121. *Gonzaga's* holding that FERPA did not confer a private right of action under 42 U.S.C. § 1983 has no bearing on whether FERPA qualifies as an "other statute" under the PRA.

2. Mr. West's alternative argument identifies no conflict with this Court's precedent

In the alternative, Mr. West argues that if FERPA qualifies as an exemption it should only apply "to a limited class of centrally located education records." Pet. at 7 & 18. His "limited class" of records would not include any records held by Campus Police Services. Pet. at 11. In support of this contention, he cites *Owasso Independent School District No. I-011*

v. Falvo, 534 U.S. 426, 122 S. Ct. 934, 151 L. Ed. 2d 896 (2002), and *Lindeman v. Kelso School District No. 458*, 162 Wn.2d 196, 172 P.3d 329 (2007). Neither case requires such a limited definition, which would contravene the plain language of FERPA.

FERPA broadly defines "education records" as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). FERPA also prohibits nonconsensual disclosure of personally identifiable information contained in education records. *See* 34 C.F.R. § 99.3. 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 members;
>
> (c) The address of the student or student's family;
>
> (d) A personal identifier, such as the student's social security number, student number, or biometric record;
>
> (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
>
> (f) *Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty*; or

> (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3 (emphasis added).

Records created and maintained by an education agency's law enforcement unit for purposes of law enforcement are generally not considered education records under FERPA. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.3(b)(2)(definition of "education records"); 34 C.F.R. § 99.8(b) (definition of "records of law enforcement"). However, "[e]ducation records, and personally identifiable information contained in education records, *do not lose their status as education records and remain subject to [FERPA]*, including the disclosure provisions of § 99.30, *while in the possession of the law enforcement unit*." 34 C.F.R. § 99.8(c)(2) (emphasis added).

In *Owasso*, which contains no analysis of Washington's PRA, the United States Supreme Court addressed the limited issue of whether peer-graded papers that had not yet been turned in were protected under FERPA. *See* 34 C.F.R. § 99.3(b)(6) (education records do not include peer graded paper before they are collected and recorded by a teacher). *Owasso* did not address whether those same papers would become education records once turned in to the teacher.

Although *Lindeman* interpreted a provision of Washington's PRA, it did not address FERPA or the "other statute" exemption under the PRA. Mr. West suggests that *Lindeman* "implicitly" interpreted FERPA. Pet. at 18. However, this is not supported by the *Lindeman* decision, which focused entirely on the explicitly enumerated PRA exemption contained in former RCW 42.17.310(1)(a) ("personal information in any files maintained for students in public schools"). The plain language of the exemption at issue in *Lindeman* is limited to "personal information in any files maintained for student in public schools," whereas FERPA protects: "records, files, documents, and other materials . . . maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). By its plain language, FERPA includes documents and materials maintained not just by the institution but its agents or employees. FERPA also prohibits the nonconsensual disclosure of personally identifiable information[4] contained in education records. *See* 34 C.F.R. § 99.3.

The Family Policy Compliance Office (FPCO) of the United States Department of Education issues guidance relating to FERPA.

[4] Personally identifiable information includes, among other things, "information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 C.F.R. § 99.3(f).

See 34 C.F.R. pt. 99; FPCO Enforcement Webpage, https://www2.ed.gov/policy/gen/guid/fpco/index.html (last visited June 25, 2018). FPCO guidance states that while law enforcement unit records are excluded from the definition of education records, "personally identifiable information from education records that is provided to the school's law enforcement unit officials remains subject to FERPA and may be nonconsensually disclosed only in accordance with the exceptions to consent at 34 CFR § 99.31." FPCO, *Addressing Emergencies on Campus* (June 2011), at 6, http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf.

The Court of Appeals' decision correctly applied this Court's precedent in determining that FERPA is an "other statute" under RCW 42.56.070(1). Mr. West fails to show a conflict with any decision of this Court, and review should be denied.

B. Mr. West's Constitutional Arguments Lack Merit

Mr. West contends that FERPA constitutes unconstitutional spending clause legislation and violates the privileges and immunities clause of Washington's constitution, and that these arguments are significant questions of law under the Constitution of the State of Washington or of the United States. RAP 13.4(b)(3). Because he did not raise the spending clause claim in his complaint and cited no legal authority

that supports his privileges and immunities argument, the Court of Appeals declined to consider them. *West*, 3 Wn. App. 2d at 124 n.8. This Court also should decline to consider them.

1. Mr. West did not challenge Congress's Spending Clause authority in his complaint, he lacks standing to bring such a claim, and the claim is not supported by the law

Mr. West argues that Congress lacks authority under the Spending Clause of the United States Constitution to link receipt of federal funds to FERPA compliance. Mr. West did not raise this claim in his complaint. CP 4-11. As such, the Court of Appeals properly declined to consider this argument. *See* RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court.").[5]

Even if he had properly preserved the argument, Mr. West lacks standing to challenge spending clause legislation because he does not fall within the implicated zone of interests, he is not a state agency being subjected to spending clause constraints, and he has suffered no injury in fact. *See Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (citing *Save a Valuable Env't v.*

[5] RAP 2.5(a) permits exceptions to the general rule that issues not raised in the superior court may not be considered on appeal, including an exception for "manifest error affecting a constitutional right." RAP 2.5(a)(3). Mr. West has made no attempt to meet that standard. *See In re Disability Proceeding Against Diamondstone*, 153 Wn.2d 430, 443, 105 P.3d 1 (2005) (observing that RAP 2.5(a) was not designed to allow parties a means for obtaining new trials whenever they can identify a constitutional issue not litigated below, and holding that the party making the new constitutional argument must show "a concrete detriment to the claimant's constitutional rights such that actual prejudice has resulted.").

City of Bothell, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970))); *see also Bond v. U.S.*, 564 U.S. 211, 225, 131 S. Ct. 2355, 180 L. Ed 2d 269 (2011) (plaintiffs must establish standing and in challenges based on state sovereign immunity the state may be the only entity that can establish standing).

Moreover, Mr. West's argument is not legally supported. He seems to assert that the Court of Appeals' decision conflicts with *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012), because he believes that Congress lacks authority under the spending clause provisions to link receipt of federal funds to FERPA compliance. Pet. at 9 & 16-17. But *National Federation of Independent Business* does not preclude Congress from requiring States to comply with conditions in exchange for receipt of federal funds; it simply held that Congress could not take away existing funding in order to require compliance with supplemental requirements. 567 U.S. at 537, 588; *see also Reno v. Condon*, 528 U.S. 141, 150-51, 120 S. Ct. 666, 145 L. Ed. 2d 587 (2000) (Legislation that regulates state activities without requiring state officials to enact laws, regulations or "assist in the enforcement of federal statutes regulating private individuals" does not implicate anti-commandeering principles). No such circumstances

exist here. Congress has long conditioned receipt of federal education funding on compliance with FERPA without mandating legislation or seeking to control or influence state regulation of private parties. FERPA simply requires educational entities to maintain the confidentiality of educational records if they choose to accept federal funding.

2. FERPA does not violate article I, § 12 of the Washington Constitution, and Mr. West cites no relevant authority supporting his contrary argument

The Court of Appeals also properly declined to address Mr. West's unsupported article 1, § 12 argument. Mr. West misapprehends the purpose and application of Washington's privileges and immunities clause. The privileges and immunities protected by article 1, § 12 of Washington's Constitution are limited to "fundamental rights" guaranteed to Washington citizens by reason of their citizenship. *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 778, 317 P.3d 1009 (2014); *see also State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902). "Generally, rights left to the discretion of the legislature have not been considered fundamental." *Ockletree*, 179 Wn.2d at 778. "If there is no privilege or immunity involved, then article 1, section 12 is not implicated." *Id.*, at 776.

In this case, Mr. West identifies no fundamental right implicated by FERPA's protections and, thus, cannot invoke the protections of article 1, § 12. His argument is "not sufficient to command judicial consideration and

discussion." *See State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (internal quotes omitted). *See also State v. Donaghe*, 172 Wn.2d 253, 264 n.11, 256 P.3d 1171 (2011) ("RAP 10.3(a)(6) requires citation to legal authorities. We do not review issues inadequately briefed or mentioned in passing." (Citation omitted)).

The Court should reject Mr. West's effort to raise constitutional arguments that were not alleged in his complaint and that are unsupported by legal authority.

C. This Case Raises No Issue of Substantial Public Interest

This Court may accept review if the case presents "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). As demonstrated above, this case involves the routine application of this Court's "other statute" precedent to a federal statute. It presents no issues of substantial public interest that need to be decided by this Court. Mr. West simply disagrees with the plain language of FERPA and the Court of Appeals' appropriate application of this Court's established precedent. Such a disagreement does not give rise to an issue of substantial public interest that warrants review by this Court.

Moreover, Mr. West's argument that there is a "substantial public interest in public disclosure" would eviscerate the RAP 13.4(b)(4) standard as applied to cases brought under the PRA by effectively requiring all PRA

cases to be reviewed by this Court. *See* Pet. at 10. This is not, and has never been, the standard for determining whether a case raises a substantial public interest.

V. CONCLUSION

The Court of Appeals correctly applied established precedent to conclude that FERPA qualifies as an "other statute" under the PRA. Nothing in the decision below conflicts with prior case law, raises a significant constitutional question, or involves an issue of substantial interest. Accordingly, discretionary review should be denied.

RESPECTFULLY SUBMITTED this 25th day of June 2018.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington that the foregoing document was served upon filing at the below-listed email address:

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DATED this 25th day of June 2018 at Olympia, Washington.

s/
Jennifer Swearingen
Legal Assistant

ATTORNEY GENERAL'S OFFICE-EDUCATION DIVISION

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