

No. 49120-6-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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ARTHUR WEST,

Appellant,

v.

THE EVERGREEN STATE COLLEGE BOARD OF TRUSTEES, FRED  
GOLDBERG, IRENE GONZALES, KEITH KESSLER, DAVID  
NICANDRI, ANNE PROFFITT, GRETCHEN SORENSON, JAMES  
WIGFALL, NICHOLAS WOOTEN, STATE OF WASHINGTON,

Respondents.

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**RESPONDENTS' BRIEF**

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## I. INTRODUCTION

Federal funding plays a significant role in all levels of the United States' education system. Federal funding is also critical to Washington's higher education institutions, such as The Evergreen State College (College) and almost 13 percent of Washington's primary education funding (Kindergarten through twelfth grade) is federal.

Educational entities that accept federal funds must comply with the federal requirements linked to the receipt of those funds. One such requirement is found in the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g, 34 C.F.R. Part 99), a federal law that restricts access to students' education records and personally identifiable information from those records unless the student consents to the disclosure in writing, or the disclosure falls within the specifically enumerated exceptions. FERPA is clear and explicit in its protection of student education records and personally identifiable information from those records. As such, it falls squarely within the "other statutes" exemption of the Public Records Act (PRA) (RCW 42.56).

The College faithfully discharged its duties under the PRA in both gathering and producing the records responsive to Mr. West's request. It carefully reviewed the responsive documents and appropriately redacted

education records and personally identifiable information from those records.

One installment contained records that meet FERPA's definition of law enforcement records. The College redacted personally identifiable information from education records that was contained in the law enforcement records because FERPA's protections follow that personally identifiable information. The College also properly redacted and withheld documents under the attorney-client privilege exemption.

Mr. West's challenges to FERPA's status as an "other statute," and the College's application of FERPA and the attorney-client privilege, are without merit. His appeal should be denied.

## **II. ISSUES ON APPEAL**

1. Whether the Family Educational Rights and Privacy Act (FERPA) is an "other statute" exemption of the Public Records Act (PRA), RCW 42.56.070(1).
2. Whether the College's attorney-client privilege redactions were proper.

## **III. COUNTERSTATEMENT OF THE CASE**

The College properly relied on FERPA to redact student education records and personally identifiable information from those records, including limited redactions of the small subset of records that fall within FERPA's definition of law enforcement records. The College also properly redacted

(one page) and withheld (12 pages) under the attorney-client privilege “other statute” exemption. As such, the College fully complied with the PRA.

**A. As a Recipient of Federal Funding, the College Is Required to Comply with FERPA**

The College is a public four-year institution of higher education that receives federal funding and is required to comply with FERPA. Clerk’s Papers (CP) 113-14, ¶¶ 3-6; CP 500, ¶ 4. FERPA prohibits the disclosure of student education records and personally identifiable information contained in education records unless an enumerated FERPA exemption exists.<sup>1</sup> CP 359-60, ¶¶ 11-12; CP 500, ¶ 4.

Compliance with FERPA is required in order for the College to receive federal funds, which are essential to the College’s financial viability and stability.<sup>2</sup> CP 113-14, ¶¶ 3-6. In the 2014-15 school year, the College received and distributed 41.6 million dollars of federal financial aid to its students, which was crucial to the ability of the 4,980 recipients to attend

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<sup>1</sup> For example, if a student submits a written waiver authorizing disclosure, the College may disclose that student’s FERPA protected information. CP 500, ¶ 4. No FERPA exemptions are relevant in this case.

<sup>2</sup> Federal funding also plays a significant role in Kindergarten through twelfth grade (K-12) funding. Almost 13% of Washington’s K-12 funding is federal, which translates into about 1.3 billion dollars. A Citizen’s Guide to Washington State K-12 Finance (2015), [http://leg.wa.gov/Senate/Committees/WM/Documents/K-12%20Booklet\\_2015%202-10-15.pdf](http://leg.wa.gov/Senate/Committees/WM/Documents/K-12%20Booklet_2015%202-10-15.pdf), at 16-17 (last visited April 25, 2017). Much of that funding is linked to ensuring that schools have the capacity to meet the needs of underserved, high needs, and low income students.

college. CP 113-14, ¶ 4. The College received an additional 22.3 million federal dollars for contracts and grants in fiscal year 2015. CP 114, ¶ 5.

Other higher education institutions are similarly situated. For example, at the University of Washington, 54 percent of its undergraduate students are receiving some form of financial aid totaling over \$414 million, including 29 percent who are eligible for Pell Grant funding.<sup>3</sup>

In order to ensure compliance with both the PRA and FERPA in the context of public records requests, the College has a Public Records Officer who is familiar with the requirements of the PRA and the exemptions applicable to documents held by the College. CP 499-500, ¶ 3. The Public Records Officer has received training relevant to processing PRA requests and FERPA. CP 500, ¶ 5. The Public Records Officer is also able to consult with the College's Assistant Attorney General as needed. *Id.*

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<sup>3</sup> University of Washington Office of Planning & Budgeting, Fast Facts: 2016, [http://opb.washington.edu/sites/default/files/opb/Data/2016\\_Fast\\_Facts.pdf](http://opb.washington.edu/sites/default/files/opb/Data/2016_Fast_Facts.pdf) (last visited April 25, 2017).

**B. Some of the Records Responsive to Mr. West's Broadly Worded Public Records Request Were Student Education Records and Records Containing Personally Identifiable Information From Those Records**

**1. Mr. West's Request**

Mr. West submitted the public records request at issue in this case on October 21, 2014. CP at 501, ¶ 7. The request was assigned Records Request Number 2014-065. *Id.*

Mr. West sought the following records in his request:

1. All records concerning the application and enforcement of the TESC 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, ¶ 8; CP 512. The College responded within five business days, acknowledging receipt of the request and seeking clarification. CP 501, ¶ 9.

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.

CP 501, ¶¶ 10-11; 516. Given the broad scope of Mr. West's request, as stated in the original and clarifying emails, the College began its search for responsive records by identifying several locations and individuals within

the College where responsive records might be found. CP 501, ¶ 12. The College determined that the request would need to be produced using installments because it was going to take some time to search for, identify, review, and, possibly, redact responsive documents. *Id.*

The first installment was provided to Mr. West on November 7, 2014, and he received an installment each month thereafter, with the exception of August 2015. CP 501-02, ¶ 13, CP 519-34. The final installment was provided to Mr. West on October 15, 2015. CP 534. This was five months after Mr. West filed this lawsuit. CP 4-11 (Complaint). TESC produced 1,219 pages to Mr. West in response to this request, along with a number of hyperlinks to TESC policies believed to be responsive. CP 502, ¶ 14; *see also* CP 519-34.

In total, 13 installments were provided to Mr. West. *See* CP 501-02, ¶ 13; CP 519-34. Each month that the request was pending, the Public Records Officer reviewed the responsive records for possible exemptions. CP 502, ¶ 15. As she identified the exemptions she redacted the documents and provided Mr. West with an exemption index, or log, that described the documents, identified the exemptions, and explained how they applied. *Id.* One of the applicable exemptions identified by the College was FERPA. CP 359-60, ¶¶ 10-12. During a review of the redactions, the Public Records Officer realized that there was some inconsistency in how FERPA had been

applied to some of the document so she revised some of the redactions. CP 502, ¶ 15. The revised redactions, which were made to some documents in Installments 2, 4, 5, 6, and 7, were provided to Mr. West on September 18, 2015.<sup>4</sup> *Id.*

## **2. Installments Containing Challenged Redactions**

Mr. West has challenged the legal basis for redactions made under FERPA and the attorney-client privilege. 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. *Id.* Accordingly, only Installments 2, 4, 5, 6, and 7 contain redactions at issue in this case. CP 502, ¶ 17. Records in these installments were primarily generated by the College's Student Affairs Office and Campus Police Services. *See generally* CP 503, ¶ 20; CP 504, ¶ 22; CP 507, ¶ 31.

## **3. Redaction Under FERPA**

The FERPA redactions in Installments 2, 4, 5, 6, and 7, were made based on the Public Records Officer's knowledge, training and experience. This included, among other things, the Public Records Officer's knowledge of the roles of the individuals who wrote or distributed the information contained in the documents, whether the information was contained in an education record, and whether the information was personally identifiable

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<sup>4</sup> This review occurred before the final installment was produced.

information directly related to a student that was either contained in an education record or derived from an education record. CP 508-09, ¶¶ 34-37. Each redaction, and the basis for the redaction, was recorded on an exemption log. *See* CP 503, ¶ 18; CP 535-616. In some instances, the Public Records Officer believed that the entire document was exempt as an education record. CP 507, ¶ 33. However, in the interests of fullest assistance, she provided the documents with FERPA protected information redacted. *Id.*

Installment 2, which contains 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. The FERPA-redacted information in those 16 pages fell within one of the following categories: (a) student identification numbers (Internal Number) that are assigned to students by the College for educational purposes; (b) student identification photos that are taken by the College and used for educational purposes, such as the student identification card; and (c) communication/information issued from the student conduct office regarding student discipline (e.g., emails from the senior conduct administrator in student affairs or disciplinary letters). CP 504, ¶ 21. This was redacted because personally identifiable information protected under FERPA maintains its protected status. *See* CP 116, ¶ 4; 34 C.F.R. § 99.8(c)(2);

CP 472 (“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 C.F.R. § 99.31.”). CP 252.

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. Again, the Public Records Officer drew upon her knowledge of the College, how it functions, as well as her knowledge of the individuals and their various roles at the College in order to ascertain whether the records, or information contained in those records, were protected by FERPA, or any other exemptions. CP 504, ¶ 22; CP 507, ¶ 33. This included consideration of whether the individual was involved in the College’s administration of residential services (student housing), student discipline, and student medical leave as compared to those individuals who worked for Campus Police Services. CP 508-09, ¶ 37. Those pages that were redacted fell within categories such as student names, parent names, student identification numbers, information relating to student discipline and other personally identifiable information. *See* CP 504-05, ¶ 24; CP 505-06, ¶¶ 28 & 30; CP 507, ¶ 33.

**C. The College Properly Applied the Attorney-Client Privilege**

Installment 4 contained documents that were redacted or withheld under RCW 5.60.060(2)(a), the attorney-client privilege exemption that falls under an “other statute” exemption to the PRA. Page 69 of Installment 4 was redacted, and pages 70 to 82 were withheld under this exemption. CP 505, ¶ 26; CP 560-61, CP 689.<sup>5</sup> The email in question sought advice from Colleen Warren who was the Assistant Attorney General assigned to advise the College during that time frame. *Id.* The documents that were withheld were attachments to the email request for advice that concerned the subject of the request for advice. *Id.*

**D. Procedural History**

Mr. West prematurely filed his complaint in May of 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. The Court held that FERPA falls within the “other statute” exemption of the PRA. CP 54-56.

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<sup>5</sup> While documents in which legal advice was requested and given were withheld, outside the context of the request for legal advice those documents were provided to Mr. West. CP 305, ¶ 5; CP 306-19.

The Court directed Mr. West to “identify the specific documents and redactions that he believes to improperly apply FERPA.” CP 56:1-2. Mr. West subsequently identified all FERPA redactions as the redactions at issue, and the 13 pages subject to the attorney-client privilege exemption. CP 497.

The Court entered a scheduling order, which contained briefing deadlines and a deadline for seeking *in camera* review. CP 498. Local court rule sets out the procedure for obtaining *in camera* review in a public records act case. LCR 16(c)(2). Mr. West did not seek *in camera* review of documents as required by court order and rule. Belatedly, Mr. West filed a motion for *in camera* review, which was denied by the Court. CP 99-101; CP 283-84; CP 861-64.

The parties filed cross motions, the College sought dismissal of the case, and Mr. West sought summary judgment. CP 59-74; CP 75-91. A hearing was held on May 27, 2016 and Mr. West’s motion for *in camera* review and partial summary judgment motion were denied. CP 99-101. The College’s motion was granted and Mr. West’s PRA claim was dismissed. *Id.* The Court found that the College had “properly discharged its obligations under the Public Records Act (PRA)” by carefully reviewing responsive documents and properly applying redactions under FERPA and the attorney-client privilege. CP 110:19-25.

Mr. West filed a motion for reconsideration of the superior court's final order on June 6, 2016. CP 102-04. He did not note the motion for hearing as required by LCR 59(b). *See* Clerk's Papers Index, Pages 1-108, n.1. Thus, no order was issued on West's motion for reconsideration.

#### IV. ARGUMENT

##### A. Standard of Review

This Court reviews a challenge to an agency's actions under the PRA *de novo*. RCW 42.56.550(3); *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009). Interpretations of law and grants of summary judgment are similarly reviewed *de novo*. *Neighborhood All. of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011).

##### B. The Public Records Act

The PRA is a strongly worded mandate for open government that provides the public access to public records. *Burt v. Dep't of Corrs.*, 168 Wn.2d 828, 832, 231 P.3d 191 (2010) (internal citations omitted). "Agencies are required to disclose any public record upon request unless it falls within a specific, enumerated exemption." *Neighborhood All.*, 172 Wn.2d at 715; RCW 42.56.070(1).

In addition to those exemptions enumerated in the PRA, RCW 42.56.070(1) provides that "Each agency . . . shall make available . . . all public records, unless the record falls within the specific exemptions of

... this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1) (emphasis added).

Mr. West challenges the College’s use of two exemptions available under the PRA’s “other statute” language: (1) RCW 5.60.060(2)(a) (attorney-client privilege); and (2) 20 U.S.C. § 1232g; 34 C.F.R. Part 99 (FERPA). Both are valid exemptions under the PRA.<sup>6</sup>

**C. FERPA Is a Valid Exemption Under the Public Records Act**

The trial court properly concluded that FERPA is an “other statute” under the PRA and that the College satisfied its obligations under the PRA when it “carefully reviewed responsive documents and properly applied redactions.” CP 349:20-22. As such, the trial court’s rulings should be affirmed.

**1. The Washington Public Records Act Contains an Exemption for Records That Are Covered by An “Other Statute” Prohibiting or Exempting Their Disclosure**

While the PRA provides for the broad disclosure of most public records, it also contains several important exemptions, including the “other statutes” exemption, which was added to the PRA in 1987. RCW 42.56.070(1); *see also* 1987 Wash. Laws ch. 403 § 1.

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<sup>6</sup> *See* WAC 44-14-06002(3); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453-54, 90 P.3d 26 (2004); and Judge Price’s Order Dismissing Criminal Trespass Claim; Holding FERPA is an Other Statute Under the Public Records Act; and Setting a Status Conference, dated November 20, 2015. CP 54.

Since that time, Washington courts have applied the “other statutes” exception to find disclosure exemptions outside of the PRA. *See, e.g., Limstrom v. Ladenburg*, 136 Wn.2d 595, 601, 604, 963 P.2d 869 (1998) (Criminal Records Privacy Act); *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748-49, 958 P.2d 260 (1998) (Indian Gaming Regulatory Act); *PAWS v. Univ. of Wash.*, 125 Wn.2d 243, 262-64, 884 P.2d 592 (1994) (State Uniform Trade Secrets Act); *Comaroto v. Pierce Cty. Med. Exam’rs Office*, 111 Wn. App. 69, 75-76, 43 P.3d 539 (2002) (medical examiner’s records statute); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (RCW 5.60.060(2)(a) attorney-client privilege); *Ameriquest Mortg. Co. v. Office of Atty. Gen.*, 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010) (Gramm-Leach-Bliley Act); *Freedom Foundation v. Dep’t of Transp., Div. of Washington State Ferries*, 168 Wn. App. 278, 289, 276 P.3d 341 (2012) (post-accident drug and alcohol tests under federal statute); *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). Federal laws and regulations, like FERPA, can form the basis for an “other statute” exemption. *See, e.g., Ameriquest Mortg.*, 170 Wn.2d at 439-40.

## **2. FERPA Is an “Other Statute” That Prohibits the Disclosure of the Student Education Records Absent the Student’s Consent**

The trial court properly held that FERPA is a valid exemption under the PRA’s other statute language. The “other statute” exemption applies when a statute or regulation expressly prohibits or exempts the release of records. *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 372, 374 P.3d 63 (2016); *see also Ameriquest Mortg.*, 170 Wn.2d at 439-40. FERPA explicitly prohibits and exempts the release of student education records and personally identifiable information from those records. As such, it falls within the “other statute” exemption.

FERPA is a federal statute that was enacted in 1974 “to protect [students’] rights to privacy by limiting the transferability of their records without their consent.” Joint Statement, 120 Cong. Rec. 39858, 39862 (1974). FERPA generally prohibits educational institutions receiving federal funding from disclosing education records or personally identifiable information from education records without the written consent of the student(s)<sup>7</sup> to whom the records pertain. 20 U.S.C. § 1232g; 34 C.F.R. Part 99 (implementing regulations). FERPA’s implementing regulations

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<sup>7</sup> FERPA applies to K-12 and higher education institutions, and refers to parents’ and students’ access. Any student in an institution of higher education is considered an “eligible student,” and any rights of access held by a parent in a K-12 context transfer to the student. 34 C.F.R. § 99.5.

explicitly state that FERPA's focus is "the protection of privacy of parents and students." 34 C.F.R. § 99.2.

Two sections in FERPA operate to ensure that education institutions that receive federal funds protect their students' records from nonconsensual disclosure. The first applies broadly (with exceptions not relevant here) to both "education records" and to "personally identifiable information" contained in such records:

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 to the following . . . .

20 U.S.C. § 1232g(b)(1); *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 under FERPA).

The second provision further limits the disclosure of any "personally identifiable information" in education records unless permitted under subsection (b)(1), above, or with written consent:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under

paragraph (1) of this subsection, unless . . . there is written consent from the student's parents . . . .

20 U.S.C. § 1232g(b)(2). FERPA explicitly identifies exceptions to this written consent requirement. *See, e.g.*, 20 U.S.C. § 1232g(b)(1) (allowing for disclosure of directory information); 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1) (allowing for disclosure to other school officials under specified circumstances); 20 U.S.C. § 1232g(b)(1)(C); 34 C.F.R. § 99.31(a)(3) (allowing for disclosure to authorized representative of specified governmental agencies); 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9)(ii) (allowing for disclosure in response to a judicial order or lawfully issued subpoena).

When disclosure of FERPA protected information is allowed, the educational agency can only do so “on the condition that the party to whom the information is disclosed will not disclose the information to any other party without” prior consent. 20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33(a)(1); *see also* 34 C.F.R. § 99.33(a)(2) (limiting use of the information by the third party solely to the purpose for which the disclosure was made).

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. FERPA is similar to the Gramm-Leach-Bliley Act (GLBA) (Pub. L. 106-102, 113 Stat. 1338

(1999)) and its associated regulations, which were found to fall within the 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); 16 C.F.R. § 313.11(c)-(d); 20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33(a)(1); *see also* 34 C.F.R. § 99.33(a)(2).

Mr. West attempts to distinguish FERPA and the GLBA, arguing that the FERPA's language is not as explicit as that in GLBA. West Br. at 14-15. The PRA does not require that statutes under the "other statute" exemptions contain identical language or wording. Rather, the Court analyzes the plain language of the statute to determine whether it is sufficiently explicit in the intent to protect specified records or information so that the Court is not implying an exemption. *SEIU 775 v. State*, 2017 WL 1469319, 5-6 (2017). Here, the plain language of FERPA makes it clear that education records are not to be disclosed absent written consent or other specified exceptions.

Mr. West also suggests that FERPA is similar to the statute in *Washington State Patrol*, but that sex offender information statute explicitly provided for the release of information and contained no language prohibiting disclosure. *Wash. State Patrol*, 185 Wn.2d at 377.

Mr. West further contends that, as spending clause legislation, FERPA does not "prohibit or exempt" the disclosure of student records.

West Br. at 15, 18-19. Mr. West supports his arguments with *dicta* and a lower court decision that did not survive appellate review.<sup>8</sup> His argument would lead to the absurd result of rendering Washington's public educational institutions ineligible for federal funding.<sup>9</sup> Similar arguments have been considered and rejected.

In *U.S. v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002), the United States Department of Education obtained a permanent injunction prohibiting release of student disciplinary records to a newspaper. Upholding the injunction, the Sixth Circuit Court found that "Spending clause legislation, when knowingly accepted by a fund recipient, imposes enforceable, affirmative obligations upon the states," *id.* at 808, and that "educational agencies receiving federal financial assistance *must* comply with certain conditions. One condition specified in the Act is that sensitive information about students *may not be released* without [the student's]

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<sup>8</sup> *Cf.* West Br. at 15-16 and *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 481 (2004) (stipulated legal issue before the court was whether a school bus video was exempt under state law); *Chicago Tribune Co. v. Bd. of Tr. of Univ. of Ill.*, 680 F.3d 1001 (2012) (case dismissed for lack of subject matter jurisdiction); *Student Bar Assoc. Bd. of Governors of the Sch. of Law Univ. of N.C. at Chapel Hill v. Byrd*, 293 N.C. 594 (1977) (open meetings case in which the court ultimately concluded that the meetings in question were not subject to open meeting laws).

<sup>9</sup> If Washington's PRA is interpreted such that education agencies must disclose education records in response to records requests, that state law interpretation would create a policy or practice of releasing education records without consent, which is the very thing FERPA guards against.

consent.” *Id.*, 294 F.3d at 809, citing *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 122 S. Ct. 934, 937 (2002) (emphasis in original).<sup>10</sup>

*DTH Publ’g Corp. v. Univ. of N.C. at Chapel Hill*, 128 N. C. App. 534, 496 S.E.2d 8, 12 (1998), also held that FERPA *prohibited* disclosure of student records. The court noted that “FERPA does not specifically employ the terms ‘privileged’ and ‘confidential’ but it clearly expresses the federal policy that student education records should not be widely disseminated to the public and, except in certain enumerated circumstances, should not be released without proper consent.” *DTH Publ’g Corp.*, 496 S.E.2d at 12.

Additionally, Mr. West argues that FERPA should not be construed to prohibit disclosure of student education records because it “imposes a hypothetical and illusory penalty for the disclosure of educational records.” West Br. at 15. A similar argument was rejected in *An Unincorporated Operating Div. of Ind. Newspapers, Inc. v. The Tr. of Ind. Univ.*, 787 N.E.2d 893, 904 (2003). The Court held that “in the strictest sense” FERPA only provides for the withholding of federal funding from institutions which have

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<sup>10</sup> Citing *Gonzaga v. Doe*, 536 U.S. 273, 122 S. Ct. 2268 (2002), the court expressly limited its conclusion that FERPA imposes a binding obligation on schools that accept federal funds to federal government enforcement actions. *Miami Univ.*, 294 F.3d at n.11. Nonetheless, the *Miami* case clearly stands for the proposition that FERPA is a statute “prohibiting or exempting” disclosure of student records for the purposes of the “other statute” provision of RCW 42.56.070(1).

a policy or practice of permitting the release of education records without consent but it *is*, nonetheless, a federal statute prohibiting the disclosure of education records. *Id.* Mr. West’s argument that an isolated disclosure would not “would not be in violation of FERPA and not jeopardize a school’s federal funding” was also rejected. *Id.* at 903.

The College, as a recipient of federal funds, is bound by FERPA’s prohibitions. Like educational agencies throughout the nation<sup>11</sup> and Washington,<sup>12</sup> the College cannot afford to take those obligations lightly. The College relies heavily on federal student financial aid, contract and grant funding. CP 114, ¶ 5. A ruling that requires Washington’s educational institutions to disclose FERPA protected information would potentially jeopardize millions of dollars of student financial aid and other federal funding and support. Fortunately, there is no basis for such a ruling because FERPA prohibits and exempts student education records and associated information from disclosure and, as such, it is an “other statute” under the PRA.

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<sup>11</sup> Over \$150 billion in federal student financial aid is distributed each year. <https://studentaid.ed.gov/sa/sites/default/files/funding-your-education.pdf>.

<sup>12</sup> See *Section III.A, supra.*, describing the University of Washington’s federal funding as well as the federal funding received for K-12 education in Washington.

**3. FERPA's Definition of Education Records and Personally Identifiable Information Is Broad and Allows for Redaction of Personally Identifiable Information from Law Enforcement Records**

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, not all records created or maintained by a law enforcement unit are excluded from the definition of education record. That is because FERPA defines "law enforcement records" as records: (1) created by a law enforcement unit; (2) for a law enforcement purpose; and (3) maintained by the law enforcement unit. 34 C.F.R. § 99.8(b)(1)(i)-(iii).

"Law enforcement records" do not include records created by a law enforcement unit but "maintained by a component other than the law enforcement unit." 34 C.F.R. § 99.8(b)(2)(i). Nor do they include "[r]ecords created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution." 34 C.F.R. § 99.8(b)(2)(ii). Moreover, "[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). Accordingly, Mr. West's argument that law enforcement records cannot be redacted under FERPA is without merit.<sup>13</sup>

**4. Mr. West's Narrow Reading of FERPA's Definition of Education Record Is Not Supported by the Law**

Mr. West argues that FERPA's protections are limited to a single, centrally located record or file. West Br. at 40. This is contradicted by the plain language of FERPA.

FERPA broadly defines education records to include "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 it 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 contained in education records. *See* 34 C.F.R. § 99.3. Personally identifiable information's broad definition 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).

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<sup>13</sup> The more granular issue of whether the College properly applied individual redactions is not before this Court. *See generally*, West Brief. Nevertheless, only 16 pages of FERPA-defined law enforcement records contain FERPA based redactions. CP 503, ¶ 20; CP 504, ¶ 21; CP 116, ¶ 4. Those redactions were proper.

Nevertheless, Mr. West argues, citing *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 122 S. Ct. 934 (2002), and *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 172 P.3d 329 (2007), that FERPA's definition of education record is "very limited" and should be construed to only encompass a single centrally located file concerning each individual student. Neither case requires such a limited definition, which would contravene the plain language of FERPA.

*Owasso* addressed the limited issue of whether peer-graded papers that had not yet been turned in were protected under FERPA. *Owasso* did not address whether those same papers would become education records once turned in to the teacher. 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). *Lindeman* did not discuss FERPA; it interpreted a provision of Washington's PRA. RCW 42.56.230(1) (formerly RCW 42.17.310(1)(a)).

Unlike the PRA provision at issue in *Lindeman*, FERPA contains a broad, detailed definition of education records. Those provisions have also been addressed in detail in federal regulations and guidance by the Family Policy Compliance Office<sup>14</sup> (FPCO). See 34 C.F.R. Part 99; FPCO Enforcement Letters, <http://www2.ed.gov/policy/gen/guid/fpc/ferpa/library/index.html>.

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<sup>14</sup> The Family Policy Compliance Office is an office in the United States Department of Education tasked with ensuring, among other things, the effective implementation of FERPA. See <http://www2.ed.gov/policy/gen/guid/fpc/index.html>.

FPCO guidance demonstrates the breadth of FERPA's protection. Directly relevant here, is the FPCO's recognition 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), p. 6, <http://www2.ed.gov/policy/gen/guid/fpc/pdf/emergency-guidance.pdf>.

Mr. West simply disagrees with the broad protections provided under FERPA and asks this Court to ignore FERPA's plain language and the unrefuted facts contained in the declarations submitted by the College. Mr. West's position is not supported by the law, or the facts. The College conscientiously reviewed the documents in questions and properly applied FERPA to redact educational records and personally identifiable information from those records.

**5. The College Has Not Asserted That FERPA Preempts the PRA**

Mr. West seems to suggest that the College has argued that FERPA preempts the PRA. West Br. at 20-23. The College has raised no such argument. Here, as in *Ameriquest Mortgage*, a preemption argument would be improper because the PRA's "other statute exemption avoids any

inconsistency and allows the federal regulation's privacy protections to supplement the PRA's exemptions." *Ameriquest Mortg.*, 170 Wn.2d at 440.

Nor is it necessary to give effect to 34 C.F.R. § 99.6, which requires an educational agency or institution to notify the Department of Education if State or local law precludes compliance with FERPA. West Br. at 16-17. A similar argument was rejected in *Ameriquest Mortgage*. See *Ameriquest Mortg.*, 170 Wn.2d at 437. The PRA's other statute exemption essentially eliminates a conflict of laws argument as it allows for FERPA and the PRA to be read in harmony. *Livingston v. Cedeno*, 164 Wn.2d 46, 52, 186 P.3d 1055 (2008).

#### **6. Mr. West Lacks Standing to Challenge Congress's Spending Clause Authority**

Mr. West argues that Congress lacks authority under the spending clause provisions to link receipt of federal funds to FERPA compliance. Mr. West did not raise this claim in his complaint. CP 4-11. Nor does he have standing to bring such a claim. The standing doctrine prohibits a litigant from raising another's legal rights. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032 (1987), *amended* 109 Wn.2d 107, 750 P.2d 254 (1988), *appeal dismissed*, 488 U.S. 805, 109 S. Ct. 35 (1988). If a plaintiff lacks standing to bring a lawsuit, a court lacks jurisdiction to consider it. *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986), *appeal dismissed*, 479 U.S. 1073, 107 S. Ct. 1265 (1987).

Mr. West cannot satisfy the two-part test for standing to bring this claim. *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. 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 (1970))). Mr. West does not fall within the zone of interests implicated by his argument because he is not a state agency being subjected to spending clause constraints. Nor has he suffered injury in fact.

Moreover, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566 (2012), 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. No such circumstance exists here. Congress has long conditioned receipt of federal education funding on compliance with FERPA.

For decades, Washington State education institutions have accepted this condition in exchange for federal funding. This is not coercion, as Mr. West suggests,<sup>15</sup> as Washington's PRA has always contained an exemption for student files, which is similar to FERPA.<sup>16</sup> FERPA's prohibition on disclosure is an appropriate exercise of Congress's spending power because it protects the general welfare of our nation's students, unambiguously conditions receipt of federal funds on compliance with

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<sup>15</sup> See West Br. at 24-25; 28-29.

<sup>16</sup> Laws of 1973, ch. 1, § 31(1)(a).

FERPA, and establishes a clear nexus between the two. *S.D. v. Dole*, 483 U.S. 203, 207-08, 107 S. Ct. 2793 (1987).

Mr. West's challenge to Congress's spending clause authority is not appropriately before this Court. Mr. West lacks standing to raise this challenge, which also fails on the merits.

**7. FERPA Does Not Violate Article 1, § 12 of the Washington State Constitution**

Mr. West misapprehends the purpose and application of Washington's privileges and immunities clause when he argues that it is violated by FERPA. The privileges and immunities protected by article 1, § 12, of Washington's Constitution are limited to "fundamental rights" guaranteed to Washington citizens. *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). Fundamental rights include "the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from." *Moses Lake*, 150 Wn.2d at 813. "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, § 12 is not implicated." *Id.*, 179 Wn.2d 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. Moreover, the logical extension of his argument would invalidate any number of legislatively authorized exemptions under the PRA. For example, the exemptions allowing for the redaction names of child victims of sexual assault and victim and witness complainants from law enforcement records might be invalidated. Such a result would be untenable, and contrary to the law governing the privileges and immunities clause.

**D. Documents Subject to the Attorney-Client Privilege Are Exempt From Public Records Act Disclosure**

It is well established that the attorney-privilege constitutes a valid exemption from disclosure under the PRA. The attorney-client privilege exists under a separate state law, RCW 5.60.060(2)(a), which is an "other statute" incorporated into the PRA. *Hangartner*, 151 Wn.2d at 453-54. It is among "the more frequently invoked exemptions" in the Office of the Attorney General's model rules for the Public Records Act. *See* WAC 44-14-06002(3).

The privilege exists in order to allow clients to communicate freely with their attorneys without fear of compulsory discovery. The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain or are associated with privileged communications. It is considered "a narrow privilege and

protects only ‘communications and advice between attorney and client.’”  
*Hangartner*, 151 Wn.2d at 452.

Here, the College redacted page 69 of Installment 4, and withheld pages 70 to 82, based on the attorney-client privilege. CP 505, ¶ 26; 685-86. Page 69 was an email from the Vice President of Student Affairs seeking advice from Colleen Warren, the Assistant Attorney General who was assigned to advise the College during that timeframe. *Id.* Pages 70 to 82 were documents that were attached for Ms. Warren’s review in conjunction with providing advice. *Id.* In total, these documents were a communication between the College and its attorney for the purposes of obtaining legal advice. As such, the redactions and withholdings were proper.

#### V. CONCLUSION

This Court should affirm the superior court’s determination that FERPA is an “other statute” under the PRA and that the College properly applied FERPA and the attorney-client privilege to the documents in this case.

RESPECTFULLY SUBMITTED this 28th day of April 2017.

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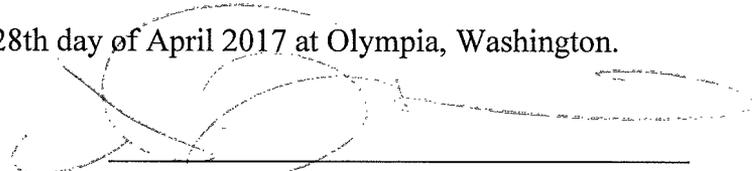
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DATED this 28th day of April 2017 at Olympia, Washington.



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Nancy J. Hawkins  
Legal Assistant

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