95795-9

COA No. 49120-6-II

**In the Supreme Court
of the State of Washington**

Arthur West,

Appellant,

v.

TESC TRUSTEES, STATE OF WASHINGTON, et al

Respondents.

Petition for Review

Arthur West
120 State Avenue NE #1497
Olympia, WA 98501
360-593 4588

A. IDENTITY OF PETITIONER

Comes now Appellant West and respectfully moves for relief designated in Part B of this petition.

B. RELIEF REQUESTED

West requests review of the decision of the Washington State Court of Appeals for Division II in Case No. 49207-5-II filed February 28, 2017, along with the final Order Denying Reconsiderion of April 3, 2018. (See Appendices I and II)

These decisions meet the criteria for RAP 13.4 (b), and the Washington State Supreme Court should accept review, reverse and establish that FERPA, when properly applied, has no greater reach than existing state exemptions for a narrow class of educational records.

The February 28 2018 decision of the Court of Appeals is appended as Appendix A, and a Copy of the April 3 decision denying reconsideration is attached as Exhibit B.

C. WHY REVIEW SHOULD BE ACCEPTED

This case presents the unique central issue of whether the *Family Educational Rights and Privacy Act of 1974* (FERPA), as federal Spending Clause legislation subject to the constitutional limitations of Selibus, can properly be seen to meet the strict requirements necessary to qualify as an "other statute" exemption in the Washington State Public Records Act and

justify the withholding of campus law enforcement records, in accord with the rulings of the Supreme Court in Doe and Oswego.

Appellant asserts that in order for FERPA to meet the requirements set by this Court as an "other statute" under the PRA it would have to mandate and control state education and law enforcement activities in a manner that would be undully coercive under the 10th Amendment and the majority ruling of Justice Roberts in Sebillius.

As interpreted by the Court of Appeals, FERPA compels the manner in which state educational and law enforcement institutions maintain and disclose records and creates a speccially favored class of campus criminals, under a coercive funding for secrecy scheme which individual institutions such as TESC are not at liberty to transgress.

These coercive imperatives violate not only sovereign state rights under the 10th Amendment, but also create a specially favored class of campus criminals in violation of the Privileges and Immunities clause of the Constitution of the State of Washington as set forth in Article 1 section 10.

RAP 13.4(b) sets forth the following grounds for review, by the Sureme Court, of decisions of the Courts of Appeals:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The issues posed by this case are properly subject to review under sections one, three and four of this rule.

RAP 13.4(b) Section 1 - The ruling of the Court of Appeals conflicts with decisions of the Supreme Court of Washington and the Supreme Court of the United States

The ruling of the Court of Appeals conflicts with the rulings in State ex Rel Doe v. Washington State Patrol, 374 P.3d 63, 185 Wash.2d 363 (2016), Gonzaga University v. Doe, 536 U.S. 273 (2002), Owasso Independent School District v. Falvo, 534 U.S. 426 (2002), and Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004), and National Federation of Independent Business v. Sebelius, 567 U.S. 519, (2012).

In Doe, this Court set forth the requirements for a statute to qualify as an "other statute" under the PRA:

> The legislature's response to our opinion in Rosier makes clear that it does not want judges any more than agencies to be wielding broad and mal[l]eable exemptions. The legislature did not intend to entrust to ... judges the [power to imply] extremely broad and protean exemptions ....125 Wn.2d at 259-60. Therefore, if the exemption is not found within the PRA itself, we will find an "other statute" exemption

> only when the legislature has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production in response to a public records request. State ex Rel Doe v. Washington State Patrol, 374 P.3d 63, 185 Wash.2d 363 (2016)

However, in regard to FERPA, this language cannot be reconciled with the ruling of the Supreme Court in Gonzaga v. Doe:

> FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions. Gonzaga University v. Doe, 536 U.S. 273 (2002)

In addition, even if FERPA might be applied properly to a limited class of centrally located education records, the decision of the Court of Appeals confilcts with the very limited definition of "Education Records" of the Supreme Court of the United States, in Owasso Independent School District v. Falvo:

> Also FERPA requires "a record" of access for each pupil. This single record must be kept "with the education records." This suggests Congress contemplated that education records would be kept in one place with a single record of access. By describing a "school official" and "his assistants" as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar,...Owasso Independent School District v. Falvo, 534 U.S. 426 (2002)

Further, as the Supreme Court observed in Falvo:

> The Court of Appeals' logic does not withstand scrutiny. Its interpretation, furthermore, would effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation. Owasso Independent School District v. Falvo, 534 U.S. 426 (2002)

Further, as the U.S. District Court for the Western District of Missouri ruled in Bauer v. Kincaid, 759 F.Supp. 575 (1991):

> Nothing in the legislative history of FERPA refers to a policy or intent to protect campus law enforcement unit records which contain student names or other personally identifiable information....
> ...an individual's enrollment at a state university should not entitle him or her to any greater privacy rights than members of the general public when the privacy interest relates to criminal investigation and incident reports. Nor could the federal government have reasonably intended to make university students a specially protected class of criminal suspects.

Under this logic the interpretation of FERPA by the Court of Appeals in this case also conflicts with Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004), where this Court found that the Washington State Constitution provided additional protection against laws which improperly grant special privileges and immunities to a favored class, as FERPA does in regard to the records of campus criminals.

Finally, the coercive requirements of FERPA set forth in the decision violate the 10th Amendment anti-coercion principles recognized in NFIB v. Sebelius.

RAP 13.4(b) Section 3 - The integrity and independence of sovereign state interests in education, law enforcement, and disclosure present a significant question of law under the Constitution of the State of Washington and the United States.

Education and Law enforcement are traditional areas subject to state regulation without overt federal control. The Constitution of the State of Washington, in Article IX, states that it is "the paramount duty of the State" to make ample provisions for education. Needless to say, the federal government has no such role.

It is a significant question of law whether the sovereign activities of the state in both education and law enforcement, and the implementation of a state sunshine law should be subject to the coercive commandeering control of federal spending clause legislation in the manner contemplated by the Court of Appeals.

The Governor and Attorney General of this State have recently challenged federal overreaching on 8 occasions, yet in this matter they remain silent while the federal government mandates how schools are administered, and the manner in which administative and law enforcement records are withheld from the public under a state law.

The Court of Appeals, in publishing the decision below, recognised the significance of its ruling. This Court should accept review.

RAP 13.4(b) Section 4 – The integrity public disclosure of campus law enforcement records implicates substantial public interests

There is substantial public interest in public disclosure and in the independence and integrity of state regulation in areas traditionally left to state control, such as education and law enforcement. This Court should accept review.

D. ISSUES PRESENTED FOR REVIEW

1. Can federal Spending Clause legislation such as FERPA which has an aggregate focus, does not expressly prohibit anything, acts upon the Secretary of Education, and has a provision for notification if an there is a conflict with state law, qualify as an "other statute" under the PRA, and justify a broad protean exemption that includes campus law enforcement records?

2. If FERPA, as federal Spending Clause legislation operating on individual institutions, has the coercive and imperative effect sufficient to meet the requirements of an "other statute" under the PRA, can it meet the test of Selinus and Dole that declares such coercive laws unconstitutional?

3. May the federal government, in conformity with the 10th Amendment, compel the manner in which state educational and law enforcement institutions maintain records and compel the State to create a speccially favored class of campus criminals in violation of the Privileges and Immunities Clause of the Constitution of the State of Washington?

E. STATEMENT OF THE CASE

This case involves a public records request of October 28, 2014, plaintiff submitted a request under the Public Records Act to TESC for records relating to the TESC Trespass Policy as well as any records related to conditions for the receipt of federal funds or grants. (CP 6)

May 12, 2015 the Complaint was filed. (CP 4-29)

On October 23, 2015 a hearing was held on defendant's Motion for Summary Judgment. (CP 54-56)

The issues were defined in a Sheduling Oreder of January 22 to include 1, Whether the defendants violated the PRA by improperly applying FERPA redactions... and 2. and whhether the defendants improperly withheld records under the Attorney-client privilege (CP 290-291)

Plaintiff repeatedly requested in camera review (CP 260, 280-281, Transcript of Oct. 23, Page 7, lines 10-11, Page 8, lines 14-15, Page 15, lines 11-12) Plaintiff identified specific records and groups of records that were improperly redacted (Transcript of October 23, Page 9 line 10 through Page 10, line 14)

At that time the Court ruled that FERPA qualified as an other statute under the PRA. (CP 54-56)

On May 27, 2016, a further hearing was held on cross motions for Summary Judgment. (CP 99-100)

The defendants argued that FERPA provides students with broad protection of their education records (CP 303, lines 18-19) and that the redacted records fell within "FERPA's broad definition of education records" (CP 304, line 18-19)

The defendants also certified that "Federal funding is a significant funding source for the college and essential to its financial viability and stability" and that the college was required to abide by FERPA in order to remain eligible for such funds. (approximately $64,000,000 in fiscal year 2015 (CP 261-262)

Plaintiff argued that...If you're looking at criminal trespass notices, if you're looking at police reports, if you're looking at disciplinary files shared with law enforcement, they are used as a basis for applying the criminal law. Those aren't held in a central repository. They're not educational records. They're not maintained for an educational purpose. Transcript of page12, lines 14-21

Defendant argued that...in FERPA, education records are "broadly defined" (Transcript, page 16-17, CP 293-296), that..."the narrow construction that he is urging is not found. It's not even consistent in the context of the plain language of FERPA"(Transcript, page 16, lines 4-6),

and that..."were the courts in Washington to conclude that FERPA could not be complied with... – all public institutions in Washington would be unable to function because federal money is so significant in the context of education." Transcript, page 17-18)

The Court ruled that despite the circumstance that all of the records concerned the enforcement of the Criminal Trespass Laws, and were related to law enforcement, the redactions resulting from the extremely broad provisions of FERPA were in accord with the PRA. (CP 99-101)

On June 27, 2016, Plaintiff filed a timely notice of appeal (CP 105-111)

On February 27, 2018, the Court of Appeals denied review, holding that FERPA qualified as an "other statute" under the PRA.

On April 3, 2018, the Court denied Plaintiff's Motion for Reconsideration and granted the parties' motions to publish.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The clash between what privacy interests students may have and the public's right to newsworthy information about the workings of schools and colleges can be a frustrating one.

Many of the arguments raised against disclosure of government records turn out to be based on myths and misunderstandings about what are – and are not – confidential student records. *See Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 Cardozo L. Rev. 1555, 1556–57 (2012) ("The goal is

nondisclosure. The chorus is student privacy. The tool: the FERPA defense."); Salzwedel & Ericson, supra note 12, at 1112 ("It is sadly ironic that institutions whose rea-son for being is to search for truth are home to at best a myth—at worst, a lie—shielded by the Buckley Amendment [FERPA].").

The Family Educational Rights and Privacy Act ("FERPA"), contains a funding provision that creates no substantive rights, and encourages schools to enact and enforce policies to safeguard the confidentiality of students' "education records." Virtually every State with a records law similar to that of Washington that has been asked to define "education records" has applied a limited and common sense understanding of the term, like this definition by a Maryland appeals court:

> [FERPA] was not intended to preclude the release of any record simply because the record contained the name of a student. The federal statute was obviously intended to keep private those aspects of a student's educational life that relate to academic matters or status as a student. Kirwan v. The Diamondback, 721 A.2d 196, 204 (Md. Ct. App. 1998).

Or, as one North Carolina Judge memorably declared in an April 2011 memorandum:

> "FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at (college)."News & Observer Publ'g Co. v. Baddour, No. 10CVS1941, Memorandum Ruling of Hon. Howard E. Manning, Jr. at 2 (N.C. Super. Ct. April 19, 2011)

Nevertheless, schools and colleges, (and TESC) persistently cite FERPA to deny requests for public records, even when the records have little relation to a student's "educational life,":

Significantly, Congress amended FERPA in 1992 expressly to remove privacy protection for records created by a police or campus security agency "for the purpose of law enforcement." As a result of this change, it is illegitimate for a police or public safety department to cite FERPA in refusing to release an arrest record, an incident report, or the identities of students named in those documents.

The Department of Education reemphasized in a June 2011 memo to educational institutions that FERPA does not prohibit the release of records gathered by a campus safety agency: "[S]chools that do not have specific law enforcement units may designate a particular office or school official to be responsible for referring potential or alleged violations of law to local police authorities. Some smaller school districts and colleges employ off-duty police officers to serve as school security officers. Investigative reports and other records created and maintained by these law enforcement units are not considered 'education records' subject to FERPA.

Accordingly, schools may disclose information from law enforcement unit records to anyone ... without consent from parents or eligible students." See U.S. Department of Education, "Addressing Emergencies on Campus" at 5 (June 2011), available at http://www2.ed.gov/policy/gen/guid/ fpco/pdf/emergency-guidance.

In Kirwan v. The Diamondback, the Maryland Court of Appeals directly addressed – and rejected – the argument that FERPA prohibited a college from releasing copies of students' parking tickets. The case was brought by the University of Maryland student newspaper, whose

reporters had been tipped off that athletes and coaches were being granted special forgiveness for parking violations. The court stated that FERPA was "obviously intended to keep private those aspects of a student's educational life that relate to academic matters," and therefore did not cover parking tickets.

More recently, a North Carolina state court followed the reasoning of Kirwan and granted media organizations' requests for parking tickets issued to student athletes at the University of North Carolina- Chapel Hill, rejecting UNC's argument that the tickets were "education records" just because disciplinary sanctions were among the possible punishments. (The court also ordered disclosure of coaches' cell-phone records, finding that the phone numbers of student athletes also are not "education records.")

Since all of the requested records involve, by definition the TESC "Criminal" Trespass Policy, they are not "education records and should be disclosable under the Public Records Act, even if FERPA is interpreted in a manner, as the State argues, that would violate the 10th Amendment and the Anti-commandeering principles of Prinz that prohibit such heavy handed federal commandeering of State agents. (See Printz v. United States, 521 U.S. 898 (1997).

The Supreme Court of the united States, in one of the few cases it has considered FERPA, adopted a very limited definition of "Education Records"

> Also FERPA requires "a record" of access for each pupil. This single record must be kept "with the education records." This suggests Congress contemplated that education records would be kept in one place with a single record of access. By describing a "school official" and "his assistants" as the personnel responsible for the custody of the records, FERPA implies that education records are

> institutional records kept by a single central custodian, such as a registrar,...Owasso Independent School District v. Falvo, 534 U.S. 426 (2002)

This very limited scope of Education Records should be adopted by the Court if it finds that FERPA applies at all, in order to harmonize FERPA with the decision of the Supreme Court of the State of Washington in Lindeman v. Kelso.

As one commentator (Lynn M. Daggett, FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students, 58 Cath. U. L. Rev. 59 (2009), has noted...

> Most complex is the situation where the state public records exemption for student records does not match up with FERPA, as illustrated by a recent Washington Supreme Court case. (Lindeman v. Kelso School District, 162 Wn.2d 196, 172 P.3d 329 (2007) The relevant state public records statute exempted "[p]ersonal information in any files maintained for students in public schools. The court interpreted the public records exemption narrowly, equating it to "the protection of material in a... student's permanent file, such as a student's grades, standardized test results, assessments, psychological or physical evaluations, class schedule, address...
>
> This case demonstrates the difficult situation that schools face when records are requested under state public records statutes, which are arguably not exempt under those state statutes. Schools that refuse such requests on the grounds that the records are protected by FERPA risk the consequences that befell the school in this case: defending, and losing, a claim under the state public records statute, with resulting responsibility for the claimant's attorney's fees and costs, as well as statutory penalties. To be blunt, this is a stiffer set of risks than those that loom under FERPA if the school hands over the records in

> violation of FERPA. After Gonzaga, there is no meaningful private remedy for the student whose records are disclosed; there may be an FPCO complaint, but as discussed above, the FPCO is on record as stating that FERPA does not preempt conflicting state law.

For the foregoing reasons this Court should accept review, and FERPA should be seen to be no more broad than the actual exemption to disclosure recognized in Lindeman to be contained in the Public Records Act itself.

Under the 10th Amendment federal power to regulate is limited, especially in areas like criminal law enforcement and education where States historically have been sovereign. See, United States v. Lopez, 514 U.S. 549, 564 (1995).

In NFIB v. Sebelius, the Supreme Court for the first time deemed a federal spending program unconstitutionally coercive. This decision transformed the coercion principle from a mere rhetorical device into a legitimate restraint on federal conditional spending. Specifically, the coercion principle addresses the risk that Congress will use its spending power to subvert state regulation in areas in which states have a reserved right to regulate. As this principle has developed over recent decades, federal spending for elementary and secondary education has steadily increased. See ***Coercion by the Numbers****: Conditional Spending Doctrine and the Future of Federal. Education Spending, Case Western Law Review, Volume 64, Issue 2*

The ruling of the Court of Appeals in the present case supplants State interests in accountability and open government "deeply rooted in local feeling and responsibility" with "judicially manufactured policies" cobbled together from "freewheeling[1], extratextual, and broad evaluations of the 'purposes and objectives' embodied within federal law" (See e.g. Wyeth v. Levine, 129 S. Ct. 1187, 1211 (2009) (Thomas, J., concurring in judgment)

Significantly, while the federal Government may have powers under the spending clause to suggest policy options, it cannot act directly in the manner the State asserts has occurred in respect to FERPA. See State Preemption of Federal Law: The Strange Case of College Student Disciplinary Records Under F.E.R.P.A., 149 Educ. L. Rep. 283, 297 n 57 (2001)

In addition, the view of federal powers the State seeks to pander to in order to evade disclosure is in direct contrast to the 10th Amendment and the principles recognized in the Anti-Commandeering Doctrine. As the Court in Oswego noted...

> The Court of Appeals' logic does not withstand scrutiny. Its interpretation, furthermore, would effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation.

[1] See also ***Against Freewheeling, Extratextual Object Preemption:*** Catherine Sharkey, NYU Journal of Law & Liberty, Vol. 5, No. 1, 2010

FERPA cannot be seen to commandeer State officers in their administration of the PRA as it applies to the uniquely State concerns of State college or university records in that, as James Madison asserted in *Federalist 45,* the powers of the federal government are "few and defined" actually extending into only a few spheres, with most power and authority was left to the states and the people.

Even within those areas that the federal government does exercise authority, it cannot force state or local governments to cooperate in enforcement or implementation. The federal Government must exercise its authority on their own, unless the state and local governments choose to assist. Simply put, the federal government cannot force state or local governments to act against their will.

In National Federation of Independent Business v. Sebelius, 567 U.S. ___ (2012), 183 L. Ed. 2d 450, 132 S.Ct. 2566 (2012), the Court held that the federal government can not compel states to expand Medicaid by threatening to withhold funding for Medicaid programs already in place. Justice Roberts argued that allowing Congress to essentially punish states that refused to go along violates constitutional separation of powers.

Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system "rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" Bond, 564 U. S., at ___ (slip op., at 8) (quoting Alden v. Maine, 527 U. S. 706, 758 (1999)).

For this reason, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." New York, supra, at 162. Otherwise the two-government system established by the Framers would give way to a

system that vests power in one central government, and individual liberty would suffer.

Taken together, these Supreme Court cases firmly establish a legal doctrine holding that the federal government has no authority to force states to cooperate in implementing or enforcing its acts in the manner that the State asserts in respect to FERPA in the instant case.

Although the amounts of money are lrss in this case, this is counterbalanced by the unique individual impact on FERPA, which acts not on an entire state budget, but on a vastly more limited institutional budget. As TESC certified, and the Court of Appeals explicitly recognized, TESC is not free to renounce federal funding if it seeks to continue to operate. This is the very essence of improper coercion and commandeering.

Worse yet for TESC is the fact that Article 1, Section 12 of the State Constitution requires that an individual's enrollment at a state university should not entitle him or her to any greater privacy rights than members of the general public when the privacy interest relates to criminal investigation and incident reports.

Article I, section 12 of the Washington State Constitution prohibits special privileges and immunities. It provides: “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” (see generally, *Independence for Washington's Peivileges and Immunities Clause,* Andrew Rorholm Zellers, WLR 87, at 331-367, Gunwall)

In conformity with these principles, in Bauer v. Kincaid, 759 F.Supp. 575 (1991) the U.S. District Court for the Western District of Missouri ruled as follows:

> *Rios v. Read,* 73 F.R.D. 589, 598 (E.D.N.Y.1977) stated that it is "obvious that the 1974 Act (FERPA) does not provide a privilege against disclosure of student records.... Rather by threatening financial institutions, it seeks to deter schools from adopting policies of releasing student records." *Id...*
> FERPA is not a law which prohibits disclosure of educational records. It is a provision which imposes a penalty for the disclosure of educational records. *Student Bar Ass'n v. Byrd,* 293 N.C. 594, 239 S.E.2d 415, 419 (N.C.1977) stated that the Buckley amendment (FERPA) does not forbid disclosure of information concerning a student. FERPA provides for the withholding of federal funds otherwise available to an educational institution which has a policy or practice of permitting the release of educational records...
>
> The limited legislative history available demonstrates that FERPA seeks to deter schools from indiscriminately releasing student educational records. Nothing in the legislative history of FERPA refers to a policy or intent to protect campus law enforcement unit records which contain student names or other personally identifiable information....
>
> Furthermore, an individual's enrollment at a state university should not entitle him or her to any greater privacy rights than members of the general public when the privacy interest relates to criminal investigation and incident reports. Nor could the federal government have reasonably intended to make university students a specially protected class of criminal suspects. This Court concludes that the records sought by plaintiff are not educational records

FERPA cannot be seen to have the effect argued by the State in this case without violating both the federal and State Constitutions in a manner

at variance with the spending power, the entire system of dual sovereignty protected by the 10th Amendment, and equal protection of law as it is recognized under the 14th Amendment, and, more particularly in the Privileges and Immunities clause of the Constitution of this sovereign State.

This Court should accept review and reverse.

G. CONCLUSION

As the previosly cited Law Review article entitled "Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Laws to Hide Their Scandals" notes, "The goal is nondisclosure, the chorus is student privacy, the tool, the FERPA defense." Similarly, as Salzwedel and Ericson in their article note, "It is sadly ironic that institutions whose reason for being is a search for the truth are home to at best a myth, at worst a lie, shielded by the Buckley Amendment."

This Court should accept review of the ruling of the Court of Appeals and enter a determination harmonizing FERPA with the existing state law exemptions for narrowly defined educational records.

Only in this manner will the legitimate interests of the state, federal government, and the public be recognized and preserved.

Done this 3rd Day of May, 2018.

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s/Arthur West
ARTHUR WEST

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on April 3, 2018, I caused the foregoing document to be served on counsel of record for the State of Washington, by email at their email address of record:

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s/Arthur West
ARTHUR WEST

Filed
Washington State
Court of Appeals
Division Two

February 27, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ARTHUR WEST, Appellant, v. TESC BOARD OF TRUSTEES; FRED GOLDBERG; DAVID NICANDRI; ANNE PROFFITT; GRETCHEN SORENSEN; JAMES WIGFALL; NICHOLAS WOOTEN; STATE OF WASHINGTON. Respondents.	No. 49120-6-II UNPUBLISHED OPINION

MELNICK, J. — Arthur West sued The Evergreen State College (Evergreen) after Evergreen, relying on the Family Educational Rights and Privacy Act of 1974 (FERPA),[1] redacted or withheld certain records when responding to West's public records request. FERPA conditions receipt of federal higher education funding on compliance with its student information nondisclosure requirements. West argued that because FERPA imposes funding constraints on Evergreen rather than directly regulating its disclosure activities, the law cannot fall within the "other statute" exemption of the Public Records Act (PRA).[2] The Superior Court found in favor of Evergreen. We affirm.

[1] 20 U.S.C. § 1232g.

[2] Ch. 42.56 RCW.

FACTS

I. BACKGROUND

A. Evergreen

Evergreen, a four-year institution of higher education in Washington, receives federal funding.[3] Federal education funding is often conditional on the institution's compliance with federal laws, including FERPA. 20 U.S.C. § 1232g; 34 C.F.R. § 99. FERPA restricts school disclosure of students' education records and personally identifiable information. *See* 20 U.S.C. § 1232g.

On October 21, 2014, West submitted a records request to Evergreen under the PRA. West requested:

> 1. All records concerning the application and enforcement of [Evergreen's] 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.

Clerk's Papers (CP) at 512. After communicating with Evergreen, West clarified his request as follows:

> 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 at 516. Due to the breadth of West's request, Evergreen determined that it would share the relevant records with West in installments. With the exception of August 2015, Evergreen

[3] In the 2014-15 school year, Evergreen distributed 41.6 million dollars of federal financial aid to students. Evergreen received an additional 22.3 million dollars in grants and contracts in the 2015 fiscal year.

delivered one installment each month from November 2014 to October 2015. In total, Evergreen produced 1,219 pages in response to West's request.

B. Evergreen Redacts Records

As Evergreen's public records officer processed West's request, she identified FERPA as a possible PRA exemption. 20 U.S.C. § 1232g. Evergreen redacted documents believed to contain either student education records or personally identifiable information within five of the installments.[4] The relevant records were primarily generated by Evergreen's Student Affairs Office and its Campus Police Services. The responsive documents in some installments contained records, e-mails, and e-mail attachments. Evergreen redacted personally identifiable information, including names, student numbers, and disciplinary records. With respect to the Campus Police Services' installment, Evergreen redacted the 16 pages that contained personally identifiable information from student records. The redactions included student identification (ID) numbers, student ID photos, and disciplinary e-mails to students.

Evergreen also redacted records it believed to be subject to the attorney-client privilege stated in RCW 5.60.060(2)(a). According to Evergreen's redaction log, the redacted document was an e-mail requesting advice from Assistant Attorney General Colleen Warren. The withheld documents were attachments to that e-mail relating to the same subject.

II. PROCEDURAL HISTORY

On May 12, 2015, West filed a complaint against Evergreen. West accused Evergreen of putting into practice an "unwritten and illegal Criminal Trespass Policy." CP at 4. More to the point, West argued that Evergreen's failure to disclose "records of completed criminal investigations related to" the alleged criminal trespass policy violated the PRA, and that Evergreen

[4] Other installments did not contain FERPA redactions and are not at issue in this case.

had improperly relied on FERPA to redact the files. CP at 4. Evergreen argued that its FERPA redactions were proper under the "other statute" exception to the PRA, and moved for summary judgment.

The trial court granted summary judgment to Evergreen on the FERPA issue. The trial court ruled that FERPA fell within the "other statute" exception of the PRA. However, the court needed further information to determine whether FERPA was properly applied in this case. The trial court directed West to identify "the specific documents and redactions that he believe[d] to improperly apply to FERPA," instructed Evergreen to explain its redactions, and scheduled a status conference for the following month. CP at 56.

West identified the challenged redactions. Evergreen asserted it properly exempted these redactions as protected student information under FERPA. West moved for summary judgment, and Evergreen filed a cross motion for dismissal.

After a hearing, the trial court issued a second order. The trial court ruled that Evergreen had "properly discharged its obligations" under the PRA. CP at 110. Accordingly, the trial court denied West's summary judgment motion and dismissed the case. West appeals.

ANALYSIS

I. APPEAL OF PARTIAL SUMMARY JUDGMENT AND DISMISSAL

West argues that FERPA does not qualify as an "other statute" authorizing the redaction of otherwise public records under the PRA. West also argues that Evergreen improperly relied on the attorney-client privilege to withhold requested records. We disagree.

A. Standard of Review

We review PRA cases de novo. *Nissen v. Pierce County*, 183 Wn.2d 863, 872, 357 P.3d 45 (2015); RCW 42.56.550(3). With the appellate court standing in the shoes of the trial court,

the party seeking to prevent disclosure bears the burden of establishing that an exemption applies. *Ameriquest Mortg. Co. v. Office of Att'y Gen.*, 177 Wn.2d 467, 486, 300 P.3d 799 (2013) (*Ameriquest II*); RCW 42.56.550(1).

A superior court's decision on summary judgment is also reviewed de novo. *Didlake v. State*, 186 Wn. App. 417, 422, 345 P.3d 43 (2015). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

B. The PRA Requires Disclosure of Non-Exempt Public Records

The purpose of the PRA is to increase "governmental transparency and accountability by making public records accessible to Washington's citizens." *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, 371, 374 P.3d 63 (2016). Accordingly, the PRA mandates the broad disclosure of public records. *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013). The statute's provisions are to be "liberally construed and its exemptions narrowly construed." RCW 42.56.030. Unless an exemption applies, an agency must disclose public records upon request. RCW 42.56.070(1).

There are two broad categories of PRA exemptions, specific exemptions within the PRA itself, and exemptions based on other laws. RCW 42.56.210-.470;[5] RCW 42.56.070(1). RCW 42.56.070 is the source of the "other statute" exemption at issue in this case. Agencies "shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of . . . this chapter, or other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1).

[5] The PRA, similar to FERPA, specifically exempts "[p]ersonal information" and "[e]ducational information." RCW 42.56.230; RCW 42.56.320.

An "other statute" does not need to "expressly address the PRA, but it must expressly prohibit or exempt the release of records." *John Doe A*, 185 Wn.2d at 372. This provision does not permit courts to imply exemptions. *PAWS v. Univ. of Wash.*, 125 Wn.2d 243, 259-60, 884 P.2d 592 (1994) (*PAWS II*). The "[l]egislature did not intend to entrust to . . . judges the [authority to imply] extremely broad and protean exemptions." *PAWS II*, 125 Wn.2d at 260.

By contrast, if a law contains a specific exemption that "expressly prohibit[s]" or exempts the disclosure of specific information or records, it may qualify as an "other statute" exemption under the PRA. *John Doe A*, 185 Wn.2d at 372; *PAWS II*, 125 Wn.2d at 262. Courts finding an "other statute" exemption have also identified a "legislative intent to protect a particular interest or value." *John Doe A*, 185 Wn.2d at 378.

C. FERPA Qualifies as an "Other Statute" Because it Exempts Student Education Records

A federal law may be an "other statute" under the PRA. *Ameriquest Mort. Co. v. Office of Atty. Gen.*, 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010) (*Ameriquest I)*, held that the Gramm–Leach–Bliley Act (GLBA), 15 U.S.C. §§ 6801–6809, was an "other statute" exempting records from PRA disclosure. As the *Ameriquest I* court explained, the "other statute exemption . . . allows the federal regulation's privacy protections to supplement the PRA's exemptions. We have held numerous other state statutes' disclosure prohibitions are thus incorporated into the PRA [and] see no reason why a federal law should be treated differently."[6] *Ameriquest I*, 170 Wn.2d at 440.

[6] In context, this quote rejected Ameriquest's argument that the GLBA preempts Washington's PRA. *Ameriquest I*, 170 Wn.2d at 440. West also raises preemption in this case, apparently in response to his mistaken belief that Evergreen asserts that FERPA preempts the PRA. West is incorrect; Evergreen does not argue preemption. Therefore, we do not address West's preemption argument.

Washington courts draw no distinction between state and federal laws in terms of what constitutes an "other statute" under the PRA. *Ameriquest I,* 170 Wn.2d at 440.

As discussed above, FERPA is an "other statute" if it expressly exempts the relevant records from disclosure. *John Doe A,* 185 Wn.2d at 372. In this case, FERPA qualifies as an "other statute" because it exempts student education records like those redacted or withheld by Evergreen.

1. FERPA Student Privacy Protections

The purpose of FERPA is "to set out requirements for the protection of privacy of parents and students." 34 C.F.R. § 99.2; 120 Cong. Rec. 39858, 39862 (1974). FERPA prohibits educational institutions that receive federal funding from disclosing education records or personally identifiable information from those records without first receiving the students' written consent. 20 U.S.C. § 1232g(b), (d); 34 C.F.R. Part 99.

In furtherance of FERPA's privacy goals, the statute expressly addresses two categories of records relevant to this case: student "education records" and students' "personally identifiable information." 20 U.S.C. § 1232g(b)(1) states:

> 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 students without [ ] written consent.

The following section, 20 U.S.C. § 1232g(b)(2), further restricts disclosure of "personally identifiable information":

> 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 [without written consent.].

FERPA explicitly identifies narrow exceptions to these disclosure limitations. 20 U.S.C. § 1232g(b)(1)-(2) (permit disclosure of directory information); 34 C.F.R. 99.31(a)(9)(ii) (permits disclosure in response to judicial order or lawful subpoena). Even when such exceptions apply, protected information may only be disclosed if the recipient will not redisclose the information to a third party without prior written consent. 20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33(a)(1).

2. What FERPA "Requires"

West's primary argument is that FERPA cannot qualify as an "other statute" because it fails to "clearly or expressly require anything." Appellant's Br. at 14. West argues that FERPA's provisions speak only to the Secretary of Education, and that "spending legislation like FERPA fails to confer any . . . rights" that could be enforced against Evergreen. Appellant's Br. at 18. Evergreen argues that it is bound by FERPA due to its reliance on federal funds, and that the statute's explicit nondisclosure language is sufficient to qualify it as an "other statute." We agree with Evergreen.

West argues that FERPA controls only Department of Education funding allocations, and does not require Evergreen to follow its student privacy guidelines. West asserts that the United States Supreme Court has already determined that FERPA "fails to confer any enforceable rights." Appellant's Op. Br. at 18 (citing *Gonzaga v. Doe*, 536 U.S. 273, 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002)). West's characterization of *Gonzaga* is highly misleading. West presents the case as establishing that spending legislation can never bind entities like Evergreen; *Gonzaga* actually addresses which statutory violations support a cause of action brought under 42 U.S.C. § 1983. 536 U.S. 273. *Gonzaga's* holding that FERPA did not confer the type of unambiguously

enforceable right necessary for a student to sue Gonzaga under 42 U.S.C. § 1983, is irrelevant to whether FERPA is an "other statute" under the PRA.

The parties each cite federal or foreign jurisdiction cases to support their arguments on whether FERPA imposes binding obligations. *Student Bar Ass'n Bd. of Governors v. Byrd*, 293 N.C. 594, 239 S.E.2d 145 (N.C. 1977); *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48 (Fla. Dist. Ct. App. 2004); *DTH Pub'g Cor. v. Univ. of N.C. at Chapel Hill*, 128 N.C. App. 534, 496 S.E.2d 8 (1998); *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002). While these authorities provide useful context, the PRA's "other statutes" exemption properly focuses on the factors outlined in *John Doe A* and whether the statute "expressly" exempts the records in a manner consistent with a clear expression of legislative intent to protect the relevant interest.[7] 185 Wn.2d at 372.

We conclude that the "other statute" exemption applies when the plain language of the statute explicitly exempts a given category of records or information. In *Ameriquest I*, the GLBA provided that "the receiving nonaffiliated third party may not reuse or redisclose the nonpublic personal information to another nonaffiliated third party unless an exception applies or the reuse or redisclosure would be lawful if done by the financial institution." 170 Wn.2d at 426. *Ameriquest I* held the GLBA was an explicit "other statute" and that the third party in question could not disclose the records in response to a PRA request. 170 Wn.2d at 439-40.

Fisher Broadcasting–Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 526, 326 P.3d 688 (2014), held that RCW 9.73.090(1)(c), which directs that "[n]o sound or video recording [made by

[7] We note that, as a practical matter, Evergreen's dependence on federal funds makes FERPA binding in practice. West does not dispute the College's assertion that it could not survive without federal funding, and provides no support for his assertion that the relevant FERPA provisions represent an empty threat. Accordingly, we reject West's argument that Evergreen could simply walk away from federal funding.

camera mounted in a law enforcement vehicle] may be duplicated and made available to the public . . . until final disposition [of litigation] which arises from the event or events which were recorded," was an "other statute" that temporarily exempted the recording from production. By contrast, courts will not find an "other statute" exemption if the statutory language is not specific. For example, in *Belo Management Services, Inc. v. Click! Network*, 184 Wn. App. 649, 660-61, 343 P.3d 370 (2014), the court concluded that 47 C.F.R. § 0.459(a)(1) was not an "other statute" because it did not "specifically state" that the records at issue were "confidential and protected from disclosure."

FERPA contains nondisclosure language. It strips funding from universities that disclose their students' "education records (or personally identifiable information contained therein.)." 20 U.S.C. § 1232g(b)(1). FERPA further restricts disclosure of "personally identifiable information in education records other than directory information." 20 U.S.C. § 1232g(b)(2). The statute's implementing regulations then define "education records" and "personally identifiable information." 34 C.F.R. § 99.3; 20 U.S.C. 1232g(a)(4). Similar to the GLBA in *Ameriquest I*, FERPA's implementing regulations further tighten disclosure by expressly prohibiting re-disclosure of otherwise disclosable information. 34 C.F.R. § 99.33(a)(1); 20 U.S.C. § 1232g(b)(4)(B). This type of language is what *John Doe A* requires. 185 Wn.2d at 372.

Exempting education records from disclosure is also consistent with a clear "legislative intent to protect" student information. Congress passed FERPA "to set out requirements for the protection of privacy of parents and students." 34 C.F.R. § 99.2; 120 Cong. Rec. 39858, 39862. FERPA's implementing regulations, which enumerate the specific and narrow exceptions to its nondisclosure requirements, further underscore the statute's focus on protecting student privacy.

Withholding or redacting student information in this case, including students' photos and disciplinary communications, is consistent with this purpose.

FERPA exempts certain student education records and personal information from disclosure. It satisfies the *John Doe A* criteria for qualification as an "other statute" under the PRA. *See* 185 Wn.2d at 373. FERPA is therefore an "other statute" under the PRA. Evergreen, having already accepted federal funding and assumed the obligation of complying with FERPA, is bound by FERPA's disclosure restrictions.[8]

D. Evergreen Appropriately Redacted Student Education Records Associated with Law Enforcement

Having determined that FERPA is an "other statute" under the PRA, we now consider West's assertion that Evergreen adopted an overbroad definition of "education records," and thus redacted student disciplinary records it should have disclosed. We conclude Evergreen properly redacted the information.

FERPA defines "education records" as "those records, files, documents, and other materials which . . . contain information directly related to a student[,] and . . . 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); 34 C.F.R. § 99.3(a). Law enforcement records are records "[c]reated [and maintained] by a law enforcement unit . . . for a law enforcement purpose." 34 C.F.R. § 99.8(b)(1).

West's challenge most directly relates to redacted Campus Police Services records. The redacted information included student identification numbers, student photos, and student

[8] West later revisits this issue by asserting that, if FERPA is an "other statute" that binds the College, it is unconstitutional under the anti-commandeering doctrine. *See generally, e.g., Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997). Because West's argument is beyond the scope of appeal, we decline to consider it. RAP 10.3. For the same reason, we also decline to address West's unsupported argument that the trial court's interpretation of FERPA and the PRA violates the privileges and immunities clause of the Washington Constitution.

disciplinary correspondence. Under the plain language of FERPA, these types of records are protected from disclosure. 20 U.S.C. § 1232g(b). They are "[e]ducation records" because they contain information "[d]irectly related to a student" and are "[m]aintained by an educational agency" or agent thereof. These records are also "personally identifiable information" because they include or are likely to include "[t]he student's name . . . [a] personal identifier, such as the . . . student number . . . [or] information that, alone or in combination . . . would allow a reasonable person in the school community . . . to identify the student with reasonable certainty." 34 C.F.R. § 99.3. Therefore, the records fall within document categories that FERPA exempts from disclosure. 20 U.S.C. § 1232g(b)(1)-(2).

As applicable to the redactions of the Campus Police Services information the records are not classified as "law enforcement" records. 34 C.F.R. § 99.8(b)(2)(i). These records are not stripped of their protected status solely because they passed through Campus Police Services' possession. "Education 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). Viewed in context of FERPA's implementing regulations, the redacted records in this case retain their protected status as education records.

The redacted Campus Police Services records fall within the scope of FERPA disclosure exemptions, and the Superior Court did not err in finding Evergreen appropriately applied FERPA.

E. Evergreen Properly Withheld Records Protected by Attorney-Client Privilege

Finally, West argues that Evergreen improperly invoked the attorney-client privilege to withhold records relevant to his request. West asserts that the information withheld pursuant to this exception were "factual matters" rather than confidential communications and "can not [sic] be transformed into a privileged document merely by being forwarded to an attorney." Appellant's Br. at 42. We disagree.

West provides no citations to the record and cites a single case on this issue. He cites *Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968), which stands for the general proposition that privilege is not absolute. Because West does not support his position, we decline to consider the argument. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

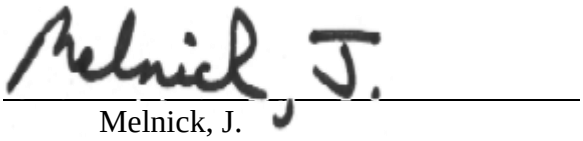
We do note, however, that the documents which were attachments to an e-mail seeking advice from assigned counsel were privileged communications. In addition, Washington's attorney-client privilege statute, RCW 5.60.060(2)(a), is also an "other statute" under the PRA.

II. ATTORNEY FEES

In addition to reversal and remand, West requests "the imposition of penalties and fees." Appellant's Br. at 44. Under RCW 42.56.550(4), a party prevailing against an agency in a PRA suit is entitled to an award of fees and costs. Because West does not prevail in this action, he is not entitled to an award of fees and costs.

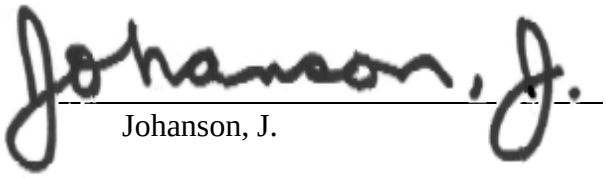
We affirm the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

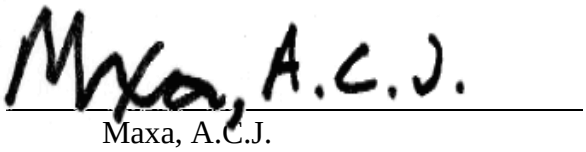


Melnick, J.

We concur:



Johanson, J.



Maxa, A.C.J.

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