



April 15, 2014

VIA FACSIMILE: (202) 401-0920
 FOIA Public Liaison
 U.S. Department of Education
 Office of Management
 Privacy, Information and Records Management Services
 400 Maryland Avenue, SW, LBJ 2E321
 Washington, DC 20202-4536

1718 Connecticut Ave NW

Suite 200

Washington DC 20009

USA

+1 202 483 1140 [tel]

+1 202 483 1248 [fax]

www.epic.org

RE: Freedom of Information Act Request and Request for Expedited Processing

Dear Sir or Madam:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the Family Policy Compliance Office ("FCPO") of the Education Department ("Department").

As detailed below, EPIC seeks agency records concerning investigations into alleged violations of the Family Educational Rights and Privacy Act ("FERPA").

Factual Background

The Education Department administers FERPA, a federal student privacy law applicable to educational agencies and institutions receiving federal funds to administer Department programs.¹ Subject to certain exceptions, FERPA grants students the right to prohibit disclosure of their education records.² FERPA also grants students due process rights, like the right to access their education records and the right to amend or delete "inaccurate, misleading or otherwise inappropriate data" within a student's education record.³

In 2008 and 2011, the Education Department issued Final Rules amending key FERPA provisions.⁴ The 2008 and 2011 regulations expanded the narrow exceptions under which educational agencies and institutions could disclose student information without first obtaining written student consent. For example, pursuant to the 2008 regulations, schools may disclose education records to a "contractor, consultant, volunteer, or other party" performing "an institutional service or function for which the agency or institution would otherwise use employees."⁵ These outside contractors and consultants must be under the "direct control" of the school.⁶ The 2011 regulations further expanded the circumstances under which schools may disclose education records without obtaining student written consent.⁷ In 2012, EPIC sued the Education Department for promulgating the 2011 regulations and changing FERPA without

¹ 20 U.S.C. § 1232g.

² Id. § 1232g(b).

³ Id. § 1232g(a)(1)(B), (2).

⁴ Family Educational Rights and Privacy Act Final Regulations, 73 Fed. Reg. 74,806 (Dec. 9, 2008); Family Educational Rights and Privacy Act Final Regulations, 76 Fed. Reg. 75,604 (Dec. 2, 2011).

⁵ 34 C.F.R. § 99.31(a)(1)(i)(B)(1).

⁶ Id. § 99.31(a)(1)(i)(B)(2).

⁷ See *supra* note 4, Family Educational Rights and Privacy Act Final Regulations 2011.

Congressional authorization.⁸ The Court ruled on procedural grounds, and therefore did not determine whether the Education Department had the legal authority to amend FERPA in the manner that it did.⁹

The Education Department's FERPA regulations have increasingly been the subject of national news reports, policy debates, state legislation, and Congressional interest.¹⁰ For example, before announcing his plans to introduce a student privacy bill, Senator Ed Markey wrote a letter to the Education Department, requesting information on the impact that the 2008 and 2011 regulations have had on student privacy.¹¹ Among other questions, Senator Markey asked the Department why it made changes to FERPA, whether the Department "performed an assessment of the types of information" that schools disclose to third party vendors, and whether students and their families can obtain their information held by private companies.¹² The letter states, "By collecting detailed personal information about students' test results and learning abilities, educators may find better ways to educate their students. However, putting the sensitive information of students in private hands raises a number of important questions about the privacy rights of parents and their children."¹³ FERPA violations are at the heart of the current student privacy debate. The Education Department has even issued a "best practices" guide in an effort to prevent FERPA violations.¹⁴

The Education Secretary has designated the Education Department's Family Policy Compliance Office ("FCPO") to "investigate, process, and review complaints and violations under [FERPA]."¹⁵ The FCPO may investigate complaints that parents or students file, or alternatively, the FCPO may conduct "its own investigation when no complaint has been filed or a complaint has been withdrawn, to determine whether an educational agency or institution or

⁸ *Elec. Privacy Info. Ctr. v. U.S. Dep't of Educ.*, CV 12-0327 (ABJ), 2014 WL 449031 (D.D.C. Feb. 5, 2014). See also *EPIC v. The U.S. Department of Education*, EPIC, <http://epic.org/apa/ferpa/> (last visited Apr. 2, 2014).

⁹ See case cited *supra* note 8.

¹⁰ See, e.g., Natasha Singer, *Scrutiny in California for Software in Schools*, N.Y. TIMES, Feb. 20, 2014, at B1, available at <http://www.nytimes.com/2014/02/20/technology/scrutiny-in-california-for-software-in-schools.html?ref=natashasinger>; Natasha Singer, *Schools Use Web Tools, and Data is Seen at Risk*, N.Y. TIMES, Dec. 12, 2013, at A26, available at <http://www.nytimes.com/2013/12/13/education/schools-use-web-tools-and-data-is-seen-at-risk.html?ref=natashasinger>; Natasha Singer, *Deciding Who Sees Students' Data*, N.Y. TIMES, Oct. 5, 2013, at BU1, available at <http://www.nytimes.com/2013/10/06/business/deciding-who-sees-students-data.html?adxnnl=1&ref=natashasinger&adxnnlx=1396465519-yIQik7ZR5dLoUjNqO4Urfw>; Benjamin Herold, *Education Leaders Tackle Student Data Privacy Issues at Summit*, DIGITAL EDUCATION BLOG—EDUCATION WEEK (Feb. 24, 2014, 9:35 PM), http://blogs.edweek.org/edweek/DigitalEducation/2014/02/education_leaders_tackle_stude.html; *Failing Grade: Education Records and Student Privacy*, EPIC, <http://epic.org/events/student-privacy14/> (last visited Apr. 2, 2014); Student Data Accessibility, Transparency, and Accountability Act of 2013, Okla. Stat. Ann. tit. 70, § 3-168 (West); Press Release, Senator Edward Markey, Markey to Introduce Legislation to Protect Student Privacy (Jan. 14, 2014), <http://www.markey.senate.gov/news/press-releases/markey-to-introduce-legislation-to-protect-student-privacy>.

¹¹ Letter from Edward Markey, U.S. Senator, to Arne Duncan, U.S. Sec'y of Educ. (Oct. 22, 2013), available at http://www.markey.senate.gov/documents/2013-10-22_FERPA.pdf.

¹² *Id.* at 2.

¹³ *Id.* at 1.

¹⁴ PRIVACY TECHNICAL ASSISTANCE CTR., U.S. DEP'T OF EDUC., PROTECTING STUDENT PRIVACY WHILE USING ONLINE EDUCATIONAL SERVICES: REQUIREMENTS AND BEST PRACTICES, available at <http://ptac.ed.gov/sites/default/files/Student%20Privacy%20and%20Online%20Educational%20Services%20%28February%202014%29.pdf> (2014).

¹⁵ 34 C.F.R. § 99.60(b)(1).

other recipient of Department funds under any program administered by the Secretary has failed to comply with [FERPA].”¹⁶

Documents Requested

EPIC requests the following agency records in possession of the Department:

1. All FERPA complaints that the FCPO has received since January 8, 2009, the date the 2008 regulations went into effect;
2. All records detailing the number of investigations the FCPO initiated in response to complaints since January 8, 2009, as well as investigations the FCPO has initiated on its own since January 8, 2009;
3. All records related to completed investigations since January 8, 2009.

Request for Expedited Processing

This request warrants expedited processing because it is made by “a person primarily engaged in disseminating information . . .” and it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

EPIC is “primarily engaged in disseminating information.” *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

There is a particular urgency for the public to obtain information about FERPA violations. FERPA governs the confidentiality of millions of student records. As described above, FERPA and student privacy have increasingly been the subject of national interest. Moreover, a recent news reports detail that Google Apps for Education, a popular service that provides “free web-based email, calendar & documents”¹⁷ has been data-mining student emails for commercial purposes.¹⁸ The documents that EPIC requests will inform the public about, *inter alia*, how, and if, schools and their contractors comply with FERPA to protect student privacy.

Request for "News Media" Fee Status

EPIC is a “representative of the news media” for fee waiver purposes. *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on our status as a “news media” requester, we are entitled to receive the requested records with only duplication fees assessed. Release of the requested records will “contribute significantly to public understanding of the operations or activities of the government” because the records will inform the public about, *inter alia*, whether schools are safeguarding millions of student records, as is required by law.

Thank you for your consideration of this request. As 34 C.F.R. § 5.21(i) (2) (iv) provides, we will anticipate your determination on our request within ten (10) calendar days. For questions regarding this request, please contact 202-483-1140 ext. 107 or foia@epic.org.

¹⁶ 34 C.F.R. § 99.64(b).

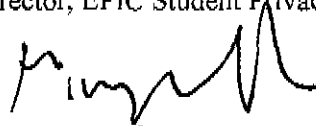
¹⁷ GOOGLE APPS FOR EDUCATION, <http://www.google.com/enterprise/apps/education/> (last visited Apr. 2, 2014).

¹⁸ Benjamin Herold, *Google Under Fire for Data Analysis of Student Emails*, EDUCATION WEEK, Mar. 26, 2014, at 1, 19, 22-23, <http://www.edweek.org/ew/articles/2014/03/13/26google.h33.html>.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Khaliah Barnes". The signature is fluid and cursive, with a large loop at the end.

Khaliah Barnes
Director, EPIC Student Privacy Project

A handwritten signature in black ink, appearing to read "Ginger McCall". The signature is cursive and somewhat stylized.

Ginger McCall
Director, EPIC Open Government Program