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24-ORD-196

September 17, 2024

In re: Patrick Cahill/University of Kentucky

Summary: The University of Kentucky (“the University”) did not violate the Open Records Act (“the Act”) when it denied a former student’s request for a copy of a hearing video under KRS 61.878(1)(k) and 20 U.S.C. § 1232g (FERPA), when the video recorded multiple students.

Open Records Decision

On May 17, 2024, former University student Patrick Cahill (“the Appellant”) requested a copy of the video record of his disciplinary hearing before the University Appeals Board (“the Board”). In response, the University stated the Appellant could “review the footage,” but “due to the FERPA protections due to the other students involved” he could not be given a copy of the video. The University explained that the other students were student members of the Board who were “on the footage of the Zoom call.” This appeal followed.

The Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, is incorporated into the Act under KRS 61.878(1)(k). Under the relevant subsection of FERPA, 20 U.S.C. § 1232g(b)(1), “[n]o 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 . . .) of students without the written consent of their parents to any individual, agency, or organization, other than to” specified individuals under conditions listed at § 1232g(b)(1)(A)–(J). When a student reaches the age of 18, “the rights accorded to, and consent required of, parents” under FERPA are transferred to the student. 34 C.F.R. § 99.5.

The Appellant claims the membership of students on the Board is “directory information” and therefore not subject to FERPA restrictions. “[D]irectory information’ relating to a student” may include “*the student’s name*, address,

telephone listing, date and place of birth, major field of study, *participation in officially recognized activities* and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous education agency or institution attended by the student.” 20 U.S.C. § 1232g(a)(5)(A) (emphasis added). Directory information may also include other categories of information “that would not generally be considered harmful or an invasion of privacy if disclosed.” 34 C.F.R. § 99.3. It is the decision of the educational institution to designate certain information as “directory information,” subject to the applicable right of the student (or parents of a minor) to opt out of such designation. 34 CFR § 99.37(a). Once the institution has made that determination, it may no longer rely on FERPA to withhold information so designated. *See, e.g.*, 19-ORD-194; 05-ORD-081.

Here, the University has given public notice on its website¹ that its designation of “directory information” includes a student’s name² and photograph, as well as “[p]articipation in officially recognized activities and sports.” Thus, it is the Appellant’s position that the identities of the student members of the Board are not information subject to FERPA because serving on the Board is an officially recognized activity.

On appeal, however the University explains that the video record of the hearing contains more than the students’ names and the fact that they are members of the Board. According to an affidavit from the associate professor who served as hearing officer, the Appellant’s hearing was conducted via Zoom video teleconference and the student members of the hearing panel “were visible to all other attendees,” so that “anyone watching the [Z]oom recording would see the faces [and] hear the voices of the student members.” Thus, the video record of the hearing depicts the students’ conduct. Video footage of students is an “education record” containing personally identifiable student information within the meaning of FERPA. *See, e.g., Medley v. Bd. of Educ. of Shelby Cnty.*, 168 S.W.3d 398, 404 (Ky. App. 2004); 22-ORD-073; 99-ORD-217 (finding that FERPA prevents even the parent of a student recorded on video from inspecting such recording when the video also captured other students). Although the University has designated a student’s “photograph” as directory information, it has not so designated audiovisual footage of students.

The Appellant claims the University could comply with FERPA by providing him a copy of the video with portions of the screen obscured. However, according to an affidavit from the University’s Educational Zoom Administrator, “Zoom does not

¹ *See* <https://registrar.uky.edu/ferpa> (last accessed July 18, 2024).

² Although “name” is not listed as a separate item of directory information on the University’s FERPA page, the page gives notice that “opting out of directory information release” will render the University “unable to include [a student’s] name in any publications, such as a dean’s list or the commencement program.” Thus, by implication, a student’s name is directory information.

offer a native feature to redact a participant's presence, audio or comments directly within the platform." When personally identifiable information of other students "is inextricably intermingled and therefore nonsegregable," video footage cannot be disclosed in keeping with FERPA. 99-ORD-217. Furthermore, even if it were possible to redact the Zoom recording, the Appellant knows the identities of those students because he was a participant in the hearing. Under 34 C.F.R. § 99.3, "personally identifiable information" includes "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." Therefore, obscuring the names and faces of the student Board members would not alter the status of the video as an education record containing personally identifiable information of the students under FERPA. *See, e.g.,* 22-ORD-073. The Appellant has not obtained written consent from the other students (or their parents) for the release of the footage. Accordingly, the University did not violate the Act when it denied the Appellant's request for a copy of the video.

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

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/s/ Zachary M. Zimmerer
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Distributed to:

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