

RECORDS ACCESS MANUAL



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I.

INTRODUCTION

This manual provides an overview of the three most significant statutes governing access to records in the possession of the California State University – (1) the California Public Records Act, which is now embedded in the constitution; (2) the Information Practices Act; and (3) the Family Educational Rights and Privacy Act (commonly known as FERPA or the Buckley Amendment). There is also a section on other miscellaneous records access statutes that arise from time to time. Inquiries about any other statutes should be directed to University Counsel assigned to the campus where the questions arise.

It is important at the outset to understand that the public purposes served by these three principal statutes are different. The Public Records Act was enacted to give the public information about how their business is being conducted; it calls for the **disclosure** of public records. The Information Practices Act and FERPA, by contrast, were enacted to protect the privacy of persons who are the subject of public records; they mandate **non-disclosure** of those records. These fundamental differences should be kept in mind when evaluating the disclosure of any records that are subject to these statutes.

The discussion in this manual is necessarily a summary of the law. Consultation with University Counsel assigned to the campus on which specific questions arise is encouraged.

II.

CALIFORNIA PUBLIC RECORDS ACT

A. The Public's Access to Records

The purpose of the California Public Records Act is to promote “access to information concerning the conduct of the people’s business [which is] a fundamental and necessary right of every person in this state.”¹

In 2004, California voters passed a ballot proposition amending the California Constitution to protect the public’s right of access to government records and government meetings.² This constitutional provision does not go beyond those rights already present in the Public Records Act, but gives greater emphasis to the public’s right to access government information. This new constitutional amendment makes clear that the public’s right of access must be broadly construed, and all exceptions narrowly construed.

B. Definition of a “Public Record” Subject to the Act

Public records subject to disclosure are defined to include “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”³

The term “writing” is further broadly defined to include:

“...any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”⁴

¹ Cal. Gov. Code § 6250.

² Cal. Const. Art. I, § 3.

³ Cal. Gov. Code § 6252(e) (emphasis added).

⁴ Cal. Gov. Code § 6252(e).

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All records maintained by the CSU are potentially subject to disclosure under the Act, including both electronic and hard copy, unless they fall into a clearly authorized exception. Records of another organization or individual may become formally subject to disclosure under the Act where they have been made a part of CSU records, or used by a CSU employee in the performance of his/her job. As stated in *California State University v. Superior Court*, 90 Cal. App. 4th 810, 824 (2001):

“The mere custody of a writing by a public agency does not make it a public record, but if a record is kept by an officer because it is necessary or convenient to the discharge of his official duty, it is a public record.”

C. Records Exempt from Disclosure

There are numerous exceptions established by the Act. Some of the more common are:

- preliminary drafts, notes, or memoranda not retained in the ordinary course of business, when the public interest in withholding clearly outweighs the public interest in disclosure;⁵
- records pertaining to pending litigation to which the CSU is a party until the litigation has been finally adjudicated or otherwise dismissed;⁶
- certain personnel, medical, or similar records, the disclosure of which would constitute an unwarranted invasion of personal privacy;⁷
- records exempted or prohibited from disclosure by federal or state law, including the law of privilege;⁸

⁵ Cal. Gov. Code § 6254(a).

⁶ Cal. Gov. Code § 6254(b).

⁷ Cal. Gov. Code § 6254(c).

⁸ Cal. Gov. Code § 6254(k).

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- information technology security records where disclosure would reveal vulnerabilities to, or otherwise increase the potential for an attack on, the University's information technology system.⁹
- any record, where the public interest served by withholding clearly outweighs the public interest to be served by disclosure.¹⁰ This includes records that reflect the decision-making process of the CSU, which often involves multiple individuals, who need to converse about issues candidly. Referred to as the "deliberative process" exemption, this is a specific application of the more general rule that protects records where the public interest served by withholding clearly outweighs the public interest served by disclosure.¹¹ Consultation with University Counsel is required before asserting this exemption.

An agency is not required to provide a list of documents withheld under an exemption.¹² However, courts have sometimes ordered such a list when a lawsuit seeking to compel the disclosure of public records is filed.

The application of these exceptions to a particular set of circumstances is rarely free from doubt. If challenged, the courts are required to construe every exception narrowly, and CSU has the burden of establishing that the record was properly not disclosed.

D. Response to a Public Records Act Request

CSU must respond to a Public Records Act request within ten calendar days after receipt. The response can, but does not have to, include the actual records. There can be confusion about what constitutes a request under the Act, as opposed to an ordinary request for information. Obviously, something in writing that formally references the Act

⁹ Cal. Gov. Code § 6254.19.

¹⁰ Cal. Gov. Code § 6255.

¹¹ *Rogers v. Superior Court* (1993) 19 Cal. App. 4th 469; *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325; *California First Amendment Coalition v. Superior Court* (1998) 67 Cal. App. 4th 159; Cal. Gov. Code § 6255.

¹² *Haynie v. Superior Court* (2001) 26 Cal. 4th 1061, 1073-1074.

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constitutes such a request. But something less formal, which does not reference the Act at all, can also be considered a Public Records Act request. In terms of good relationships with the public, it may be a good practice in some instances to construe a less formal request for records or information as a formal request under the Public Records Act. Consultation with University Counsel on the proper construction of a particular request is encouraged.

The Public Records Act requires public agencies to assist members of the public in making “a focused and effective request that reasonably identifies an identifiable record or records.”¹³ This means that, in some instances, CSU must engage in a dialogue with a requesting party to assist in record identification, describe the information technology and physical location, and/or provide suggestions to overcome any practical basis for denying access to records or information. CSU must always facilitate, not frustrate, the production of relevant information to the public to the extent reasonable under the circumstances.

If the records requested are clear from the request and are made available, or if the requested records are protected by one of the specific exceptions in the law, further dialogue with the requesting party is not required.¹⁴

CSU may, when appropriate, respond to a Public Records Act request by stating that no records exist that respond to the request and therefore none can be produced. However, this response is permissible only if CSU has first made a reasonable effort to obtain additional clarifying information from the requester that will help identify the information sought, and conducted a reasonable search of available records.¹⁵

It is not necessary to provide the actual records within the ten-day initial response time, but rather a written response as to whether records will or will not be disclosed. If records are available for disclosure, they must be made available for inspection or copying within a **reasonable** amount of time based on their volume and complexity. If records are exempt from disclosure, the written response must indicate the legal reasons why, and

¹³ Cal. Gov. Code § 6253.1(a).

¹⁴ Cal. Gov. Code § 6253.1(d).

¹⁵ Cal. Gov. Code § 6253.1(b).

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identify the names and titles or positions of each person responsible for the denial.¹⁶ The reasons for not disclosing records should be stated clearly and should be sufficient to justify the University's decision in a later court dispute.¹⁷

In unusual circumstances,¹⁸ the ten-day time limit for CSU's initial response may be extended by written notice for up to 14 more days, but an extension on the initial response requires the responding party to set forth the reasons why an extension is required, the specific date on which the response will thereafter be provided and an estimated date on which the records will be available. These requirements do not apply to an initial response provided within the initial ten-day time limit.

When the requested records are available on a CSU website, it is sufficient to provide the url, rather than printed records. However, if the requester desires another format (e.g., printed copies or other electronic format), the Act requires compliance with that request, subject to payment of CSU's direct copying costs first.

Each campus should have a central contact point for coordination of Public Records Act requests. The CSU General Counsel should be notified of all incoming requests, so they can be coordinated throughout the system. Each campus should respond to requests for records maintained at that campus. University Counsel are available to respond to questions and provide advice.

E. Providing the Records

Public records are generally open to inspection at all times during CSU's normal business hours. There is no charge for inspecting records. A charge may be imposed for the "direct" cost of copying the records.¹⁹ This includes the expense of the duplicating equipment, supplies, and the cost of the staff operating the equipment. It does **not** include

¹⁶ Cal. Gov. Code § 6253(d).

¹⁷ Cal. Gov. Code § 6255.

¹⁸ "Unusual circumstances" means the need: (1) to search for and collect records from distant locations; (2) to search for, collect and appropriately examine a voluminous amount of records; (3) for consultation with another agency also having substantial interest in the matter; or (4) to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

¹⁹ Cal. Gov. Code § 6253(b).

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the cost of locating, retrieving, or inspecting records.²⁰ Records are not required to be copied or provided until appropriate costs have been paid by the requester.

CSU's direct cost of duplication has been established at \$0.20 per page (per side), for records up to 8½ x 14 in size, irrespective of whether they are produced in hard or electronic format.²¹ The CSU's direct cost of duplicating unusual records – e.g., blueprints, records larger than 8½ x 14 – are calculated on a case-by-case basis. Note that some statutes establish specific charges for specific types of records, which supercede the CSU's established charge.²² Unless there is a specific statutory exception, CSU's duplication charge should always be \$0.20 per page for records up to 8½ x 14 in size.

F. Electronic Records

If a request seeks records in a specific format – e.g., hard or electronic format – they must be produced in that format, so long as they were created in that format originally.²³ The responding party is not required to convert records that were originally electronic into hard copy format, nor vice versa.²⁴ The responding party may produce hard copy records in an electronic format, but only if acceptable to the requester.²⁵ It is not necessary, even when requested, to produce hard copy records in electronic format if the conversion would jeopardize the security or integrity of the original record or any proprietary software in which it is maintained.²⁶

In addition to CSU's \$0.20 per page charge, the requester *must* bear any added cost of producing electronic records if (1) the request calls for production out of sequence with otherwise regularly scheduled intervals; or (2) the request requires data compilation,

²⁰ *North County Parents Organization for Children with Special Needs v. Department of Education* (1994) 23 Cal. App. 4th 144.

²¹ CSU Coded Memorandum AD 08-01

http://www.calstate.edu/sfo/CodedMemos/coded_memos_2008/AD08-01.pdf.

²² Cal. Gov. Code § 6253(b). For example: (1) The charge for records containing personal information about the requester, including employee and student records, shall not exceed \$0.10 per page (see Section II of this Manual); (2) Costs for copying California Conflict of Interest Form 700s are set by statute at \$0.10 per page (see Section V of this Manual); (3) Costs for certified payroll records are governed by the California Labor Code (see Section V of this Manual).

²³ Cal. Gov. Code § 6253.9(a)(2).

²⁴ Cal. Gov. Code § 6253.9(c).

²⁵ Cal. Gov. Code § 6253.9(d), (e).

²⁶ Cal. Gov. Code § 6253.9(f).

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extraction, or programming.²⁷ These additional costs cover the “cost to construct a record,” and the “cost of programming and computer services necessary to produce a copy of the record.”²⁸

Questions are sometimes raised about why CSU imposes a charge for the production of records in electronic format which appears to be “free.” The per page cost authorized by the Government code for the production of hard copy was never intended to cover the cost of the paper on which it is reproduced alone, but also the costs that are associated with the operation and maintenance of equipment which allows the copying to occur. The same type of costs (e.g., machinery, electricity, maintenance staff, staff time to make copies, etc.) are incurred in connection with providing records in electronic format and therefore the same per page charges are appropriate under the law.

G. Remedy for Violations of the Public Records Act

A person who has been denied access to a public record may file a lawsuit to enforce his/her right to inspect or receive a copy of the public record. If the court finds that refusal to disclose the record was unjustified, the court may enter an order requiring its disclosure. The court may also order the public entity to pay reasonable attorneys’ fees and court costs. If the court finds the refusal to disclose was justified, the CSU may recover its attorneys’ fees only where it can demonstrate that the request was clearly frivolous.

²⁷ Cal. Gov. Code § 6253.9(b).

²⁸ *Id.*

III.

CALIFORNIA INFORMATION PRACTICES ACT

A. Purpose

The California Information Practices Act was enacted in 1977 to protect individuals' privacy rights in "personal information" contained in state agency records. The Act reflects the Legislature's determination that the right to privacy was in jeopardy and that the maintenance and dissemination of private information should be subject to strict limitations.²⁹

B. Definition of "Personal Information" Protected by the Act

"Personal information" protected by the Act is defined as any information maintained by a state agency that identifies or describes an individual, including, but not limited to, name, Social Security Number, physical description, home address, home telephone number, education, financial matters, medical or employment history, and statements made by or attributed to the individual.³⁰

C. CSU's Obligations Under the Act

A state agency is obligated to maintain only that personal information which is relevant and necessary to accomplish its purpose.³¹ It must collect that information, to the extent practicable, from the individual directly and not from other sources.³² Where information is obtained from other sources, the agency must maintain a record of those sources from which the information was obtained.³³ The agency must designate an employee to be responsible for the agency's compliance with the Act.³⁴

²⁹ Cal. Civ. Code § 1798.1.

³⁰ Cal. Civ. Code § 1798.3.

³¹ Cal. Civ. Code § 1798.14.

³² Cal. Civ. Code § 1798.15.

³³ Cal. Civ. Code § 1798.16.

³⁴ Cal. Civ. Code § 1798.22.

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D. Authorized Disclosures

A state agency may not disclose personal information except in certain limited circumstances specified in the Act. The more common exceptions permit disclosure in the following circumstances.³⁵

- to the individual to whom the information pertains;
- where the individual to whom the information pertains has given voluntary written consent to disclose the information to an identified third party no more than 30 days before the third party requested it, or within the time limit agreed to by the individual in the written consent;
- to an appointed guardian or conservator or a person representing the individual provided it can be proven with reasonable certainty through CSU forms, documents or correspondence that the person is the authorized representative of the individual to whom the information pertains;
- to persons within the agency who need the information to perform their functions;
- to another governmental agency when required by law;
- in response to a request for records under the California Public Records Act (unless the Public Records Act provides an exception);
- where there is advance written assurance that the information is to be used for purposes of statistical research only and where the information will only be redisclosed in a form that does not identify any individual;

³⁵ Cal. Civ. Code § 1798.24

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- where the agency has determined that compelling circumstances exist which affect the health or safety of the individual to whom the information pertains, and notification is transmitted to the individual at his or her last known address, and disclosure does not conflict with other state or federal laws;
- pursuant to a subpoena, court order, or other compulsory legal process if, before disclosure, the agency notifies the individual to whom the record pertains, and if the notification is not prohibited by law;
- pursuant to a search warrant;
- to a law enforcement or regulatory agency when required for an investigation of unlawful activity or for licensing, certification, or regulatory purposes, unless the disclosure is otherwise prohibited by law.

The above list is a general summary of permitted disclosures under the Act. Some of these disclosures may impose requirements not included in this discussion. Consultation with University Counsel before releasing personal information covered by the Information Practices Act is encouraged.

E. Individuals' Rights Under the Act

Individuals have the right to inquire and be notified about whatever personal information a state agency maintains concerning them.³⁶ An opportunity to inspect any such personal information must be afforded within 30 days of any request.³⁷ If the record containing the personal information also contains personal information about another individual, that information must be deleted from the record before it is disclosed. Individuals may request copies of records containing any personal information about them, and those

³⁶ Cal. Civ. Code § 1798.32.

³⁷ Cal. Civ. Code § 1798.34(a).

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copies must be provided within 15 days of the inspection.³⁸ The agency may charge up to 10 cents per page for making any copies.³⁹ Individuals may request an agency to amend personal information concerning them and, if the request is denied, the individual may request a review of that decision by the head of the agency or his/her designee.⁴⁰

F. Required Disclosure of Security Breach

An agency that owns or licenses computerized data that includes personal information must disclose any breach of system security to California residents whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person.⁴¹ The disclosure must be made as quickly as possible and without unreasonable delay, consistent with the legitimate needs of law enforcement or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the system.⁴² “Personal information” in this context means an individual’s first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted: (1) Social Security number; (2) driver’s license number or California Identification Card number; (3) account number (which could include a student identification number), credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual’s financial account.⁴³ The statute provides specific methods for providing the required disclosure to affected individuals. Contact University Counsel if such a disclosure is required.

G. Remedies for Violation of the Act

Individuals may file suit for failure to comply with the Act, and are entitled to an award of reasonable attorneys’ fees, if successful.

³⁸ Cal. Civ. Code § 1798.34(b).

³⁹ Cal. Civ. Code § 1798.33.

⁴⁰ Cal. Civ. Code §§ 1798.35 and 1798.36.

⁴¹ Cal. Civ. Code § 1798.29(a), effective July 1, 2003.

⁴² Cal. Civ. Code § 1798(a), (c).

⁴³ Cal. Civ. Code § 1798(d).

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H. Use of Social Security Numbers

CSU restricts the use of Social Security numbers, and as a consequence it is unlawful to do any of the following:

- (1) Intentionally communicate or otherwise make an individual's Social Security number available to the general public;
- (2) Print an individual's Social Security number on any card required for the individual to access products or services, such as a library card or University identification card;
- (3) Require an individual to transmit his or her Social Security number over the internet, unless the connection is secure or the Social Security number is encrypted;
- (4) Require an individual to use his or her Social Security number to access an internet web site, unless a password or unique personal identification number or other authentication device is also required to access the internet web site;
- (5) Print an individual's Social Security number on any materials that are mailed to the individual, unless state or federal law requires the Social Security number to be on the document to be mailed. Social Security numbers may be included in applications and forms sent by mail, including documents sent as part of an application or enrollment process, or to establish, amend or terminate an account, or to confirm the accuracy of the Social Security number. Even if where is permissible to mail a Social Security number, the number may never be printed, in whole or in part, on a postcard or other mailer that does not require an envelope, or which is visible on the envelope or without the envelope having been opened.

IV.

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

A. Purpose and Scope

The purpose of the Family Educational Rights and Privacy Act (commonly known as FERPA or the Buckley Amendment) is to provide access for students and parents (in limited circumstances) to their own “education records.”⁴⁴ FERPA also protects parents’/students’ privacy in those records by prohibiting their disclosure, or information contained in them, without written consent. FERPA applies to student records at any school that receives federal funds.

B. Definition of an “Education Record” Protected by the Act

FERPA defines an education record subject to the Act to include “those records, files, documents, and other materials that (1) contain information directly related to a student and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution.”⁴⁵ Education records do not include records that are created or received by an institution after an individual is no longer a student or are not directly related to the individual’s status as a student (e.g., alumni records created or received after the student’s attendance ends).⁴⁶

C. Records Exempted from the Act

For purposes of FERPA, the term “education records” does not include:

- records of instructional, supervisory or administrative personnel kept in the sole possession of the maker, that are used only as a personal memory aid, and that are not accessible or revealed to any other person except a temporary substitute for the maker of the record;⁴⁷

⁴⁴ The Department of Education has a useful series of question-and-answers about parents’ access to student information at: <http://www.ed.gov/policy/gen/guid/fpco/hottopics/ht-parents-postsecstudents.html>

⁴⁵ 20 U.S.C. § 1232g(a)(4)(A).

⁴⁶ 34 C.F.R. § 99.3.

⁴⁷ 20 U.S.C. § 1232g(a)(4)(B)(i) and 34 C.F.R. § 99.3.

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- records separately maintained by a law enforcement unit of an educational institution that were created by the law enforcement unit for the purpose of law enforcement;⁴⁸
- records made in the normal course of business concerning an employee of an educational institution who is also a student, provided that the records relate exclusively to the individual in his or her capacity as an employee and are not available for use for any other purpose. (*Note, however, that records relating to a student who is employed as a result of his or her status as a student are not subject to this exception, but rather are education records as defined by FERPA.*);⁴⁹
- records of a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting or assisting in a professional capacity, made, maintained or used only in connection with the provision of treatment to the student, and which are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.⁵⁰ (For purposes of this exclusion, "treatment" does not include remedial education or activities that are part of a program of instruction.)

D. Directory Information

FERPA defines "directory information" as "information contained in an education record that would generally not be considered harmful or an invasion of privacy if disclosed, and may include, the student's name, address, telephone listing, e-mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially

⁴⁸ 20 U.S.C. § 1232g(a)(4)(B)(ii).

⁴⁹ 20 U.S.C. § 1232g(a)(4)(B)(iii).

⁵⁰ 20 U.S.C. § 1232g(a)(4)(B)(iv).

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recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.⁵¹ A student ID, user ID, or other unique personal identifier used by the student for purposes of accessing or communicating in electronic systems may also be directory information provided that the identifier cannot be used to gain access to education records without one or more factors that authenticate the user's identity (such as a PIN, password or other factor known or possessed only by the authorized user).⁵² FERPA permits, but does not require, that any or all of these items be designated as directory information at a particular campus. Each CSU campus makes its own determination of which categories of information are appropriate to designate as directory information in the specific locale.

The University may disclose directory information where it has given public notice to students of the types of information the University has designated as "directory information," and provided students the opportunity to opt out of having any or all of those types of information disclosed as "directory information."⁵³ When a student "opts out" of having his/her information be included within the University's "directory information," that information cannot be disclosed to the public.

E. Individuals' Rights Under FERPA

FERPA entitles parents/students access to and copies of their own educational records within a reasonable period of time, but in no case later than 45 days after the request is made.⁵⁴ If a record contains information about more than one student, the requesting student is only entitled to the portion of the record relating to him/her.⁵⁵ Students are not entitled under FERPA to the financial records of their parents.⁵⁶

FERPA allows institutions to charge students and parents for copies of education records, but does not set a specific amount.⁵⁷ Since education records are records containing

⁵¹ 20 U.S.C. § 1232g(a)(5)(A) and 34 C.F.R. § 99.3

⁵² 34 C.F.R. § 99.3.

⁵³ 34 C.F.R. § 99.37.

⁵⁴ 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. §§ 99.10 and 99.11

⁵⁵ 20 U.S.C. § 1232g(a)(1)(A) and 34 C.F.R. § 99.12(a).

⁵⁶ 20 U.S.C. § 1232g(a)(1)(C)(i) and 34 C.F.R. § 99.12(b)(1).

⁵⁷ 34 C.F.R. § 99.11.

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personal information about the requester, the duplication charge should be \$0.10 per page, whether electronic or in hard copy, as set forth in the Information Practices Act, when requested by the person to whom the records pertain.⁵⁸

The University must use reasonable means to identify and authenticate that the parents, students, school officials, and any other parties requesting records under FERPA are who they claim to be, before education records are disclosed. The University may determine which identification and authentication means are most suitable under the circumstances, but is not expected to eliminate all risk of unauthorized disclosure. The University's obligation is to limit the risk to a level commensurate with the likely threat and potential harm.⁵⁹

FERPA entitles students/parents to:

- challenge the contents and seek amendments of their education records, including providing a hearing upon request, with a full and fair opportunity to present evidence relevant to the issues raised;⁶⁰
- receive annual notification of their rights under FERPA;⁶¹
- file complaints with the Department of Education regarding the failure of the institution to comply with FERPA.⁶²

F. Disclosure of Protected Education Records or Information to Third Parties

Except as otherwise provided, a valid written consent to disclose any record subject to FERPA is required before that record may be provided to any third party.⁶³ The consent must be in writing and must be signed and dated by the student/parent whose records are involved. It must state the purpose of the disclosure and specify to whom the disclosure is

⁵⁸ Cal. Civ. Code § 1798.33.

⁵⁹ 34 C.F.R. § 99.31(c).

⁶⁰ 34 C.F.R. § 99.20-99.22.

⁶¹ 34 C.F.R. § 99.37.

⁶² 34 C.F.R. § 99.63.

⁶³ 34 C.F.R. § 99.30.

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to be made. Disclosure is strictly limited to the party designated, and that party does not gain authority to disclose the record to any other party by virtue of having the record disclosed to him/her. When a disclosure is made with consent, and if the student or parent requests, the University must provide the student (not the parent) with a copy of the records that were disclosed.⁶⁴

G. Electronic Signatures

FERPA permits signed and dated written consents in electronic form.⁶⁵ According to the Family Policy Compliance Office, “The...regulation is purposefully narrow in scope and intended to be technology neutral” so that schools will have unlimited flexibility as the technology changes. FPCO recognizes the Federal Student Aid standards for accepting electronic signatures: <http://www.ifap.ed.gov/dpcletters/gen0106.html>. (Note the set-up and security measures described, particularly sections 3 through 7.)

Steps should always be taken to ensure that the eligible student, and not some other party, is the person giving the consent. PIN numbers may be appropriate that are encrypted and maintained in a secure database to ensure that they are not generally accessible to school officials or others.

H. Disclosures to the U.S. Citizenship and Immigration Services (USCIS)

The USCIS requires foreign students attending an educational institution under an F-1 visa to sign Form I-20, which contains a consent provision allowing disclosure of information to the USCIS. The provision states, “I authorize the named school to release any information from my records which is needed by the USCIS pursuant to 8 C.F.R. 214.3(g) to determine my nonimmigrant status.” According to the Department of Education, “This consent is broad enough to permit an educational institution to release personally identifiable information of a student who has signed a Form I-20 to the USCIS for the purpose of allowing the USCIS to determine the student’s nonimmigrant status.”

⁶⁴ Id.

⁶⁵ 34 C.F.R. § 99.30(d) (effective May 21, 2004).

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Students who have an M-1 or J-1 visa have signed similar consents, and their education records may also be disclosed to the USCIS.⁶⁶

I. Disclosures Permitted Without Consent

A written consent to disclose records subject to FERPA to third parties is not required in certain circumstances, including the following:⁶⁷

- to parents of a minor student, if that minor is still claimed by the parents as a dependent for income tax purposes;⁶⁸
- to other officials of the agency who the agency has determined to have legitimate educational interests in the records (which may include contractors, consultants, volunteers or other outside parties providing services or functions or otherwise acting for the University, who must be under the direct control of the institution with respect to the use and maintenance of education records);⁶⁹
- to officials of another school where the student seeks or intends to enroll, if the affected student has been notified and provided an opportunity to challenge the content of any records to be released;⁷⁰
- to authorized representatives of the Comptroller General of the United States, the Secretary of the Department of Education or state educational authorities where the information is necessary to audit

⁶⁶ “Dear Colleague” letter dated 4/12/02, LeRoy S. Rooker, Director, Family Policy Compliance Office.

⁶⁷ 34 C.F.R. § 99.31.

⁶⁸ 34 C.F.R. § 99.31(a)(8).

⁶⁹ 34 C.F.R. § 99.31(a)(1). Note that the University is required to use “reasonable methods to ensure that school officials have access to only those education records in which they have legitimate educational interests.” If an institution does not use physical or technological access controls, it must ensure that its administrative policy for controlling access to education records is effective and that it continues to comply with the “legitimate educational interest” requirement. The U.S. Department of Education allows institutions flexibility in determining which method(s) is best suited to their circumstances. 34 C.F.R. § 99.31(a)(1)(ii).

⁷⁰ 34 C.F.R. § 99.31(a)(2).

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and evaluate federally supported education programs or to enforce legal requirements that relate to such programs;⁷¹

- in connection with a student's application for, or receipt of, financial aid;⁷²
- to organizations conducting studies for educational agencies in connection with predictive tests, student aid programs, or improvements to instruction;⁷³
- to accrediting organizations for accrediting functions;⁷⁴
- to appropriate parties, including law enforcement officials, public health officials, trained medical personnel, and parents, in connection with a health or safety emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.⁷⁵
 - the University need not be absolutely certain that there is an imminent crisis before invoking this exception (it is enough that, based on the totality of the circumstances and on the basis of the facts that are available at the time, there is a rational basis for concluding that there is a threat to health or safety);⁷⁶
 - a record of any disclosure under this section and the nature of the perceived threat and the parties to whom the disclosure was made is required;⁷⁷

⁷¹ 34 C.F.R. § 99.31(a)(3).

⁷² 34 C.F.R. § 99.31(a)(4).

⁷³ 34 C.F.R. § 99.31(a)(6).

⁷⁴ 34 C.F.R. § 99.31(a)(7).

⁷⁵ 34 C.F.R. §34 CFR § 99.31(a)(10) and § 99.36.

⁷⁶ 34 C.F.R. §34 CFR § 99.36 (c). See also, *Balancing Student Privacy and School Safety* (<http://www2.ed.gov/policy/gen/guid/fpco/brochures/postsec.html>)

⁷⁷ 34 C.F.R. §34 CFR § 99.32(a)(5).

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- to comply with a judicial order or subpoena so long as a reasonable effort is made to notify the student in advance of compliance unless the disclosure is in response to:⁷⁸
 - a Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or
 - any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;
- to comply with a court order to produce education records sought by the U.S. Attorney General (or designated federal officer or employee in a position not lower than Assistant Attorney General) based on “specific and articulable facts giving reason to believe that the education records are likely to contain information” relevant to the investigation or prosecution of terrorist acts;⁷⁹
- to counsel or the court when the student whose records are being disclosed has sued the University, provided such a disclosure is relevant for the University to defend itself in the lawsuit;⁸⁰
- the final results of a disciplinary hearing conducted by the University against an alleged perpetrator of a “crime of violence”⁸¹ or of a “non-

⁷⁸ 34 C.F.R. § 99.31(a)(9)(i-ii).

⁷⁹ 20 U.S.C. § 1232g(j).

⁸⁰ 34 C.F.R. § 99.31(a)(9)(iii)(B).

⁸¹ For these purposes, a “crime of violence” includes the following: arson, assault offenses, burglary, criminal homicide (manslaughter by negligence), criminal homicide (murder and non-negligent manslaughter, destruction/damage/vandalism of property, kidnapping/abduction, robbery, and forcible sex offenses. 99 C.F.R. § 99.39. See also, definitions of these “crimes of violence” in Appendix A to 34 C.F.R. Part 99.

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forcible sex offense,”⁸² when the charges are upheld; disclosure to the victim only is appropriate where the charges are not sustained;⁸³

- to parents of a student under the age of 21 regarding a violation by their child of laws or University policy relating to alcohol use or drug use or possession;⁸⁴
- to federal military recruiters under the Solomon Amendment which requires the University to provide access to certain student directory-type information, unless the student has expressly opted out of the disclosure of “directory information” under FERPA.⁸⁵

Nothing in FERPA prohibits a campus official from disclosing to Federal, State, or local law enforcement authorities information that is based on that official’s personal knowledge or observation and not derived from an education record. A campus official may, based on his or her own observations, notify law enforcement officials of suspicious activity or behavior.

The fact that a record, or information contained in a record, may be disclosed without violating FERPA does not mean that the University must disclose that record or that its disclosure would not violate another law. For example, the exception in FERPA for disclosure to parents of drug or alcohol violations by students under the age of 21 specifically states that it does not preempt state privacy laws that bar disclosure.⁸⁶ In California, the Information Practices Act (discussed above) bars this disclosure except in

⁸² For these purposes, a “non-forcible sex offense” includes the following: statutory rape and incest. 99 C.F.R. § 99.39. See also, definitions of these “non-forcible sex offenses” in Appendix A to 34 C.F.R. Part 99.

⁸³ 34 C.F.R. § 99.31(a)(13).

⁸⁴ 34 C.F.R. § 99.31(a)(15).

⁸⁵ 10 U.S.C. § 983; 32 C.F.R. § 216.4. Information called for under the Solomon Amendment consists of student names, addresses, telephone numbers, date and place of birth, education level, degrees received, and the most recent educational institution enrolled in by the student. Note that the Solomon Amendment refers to this information as “directory information” – a term which is already used to refer to certain kinds of information in FERPA. These two references should not be confused. The information required by the Solomon Amendment is limited to the list above—even if the campus’ FERPA directory information is broader. To provide military recruiters information that goes beyond that listed could be a violation of FERPA.

⁸⁶ 34 C.F.R. § 99.31(a)(15)(ii).

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very limited circumstances.⁸⁷ Therefore, there may be reasons other than FERPA that call for non-disclosure.

J. Recordkeeping of Disclosures

The campus must maintain a record of every request for access and every disclosure of personally identifiable information from each student's education records.⁸⁸ This requirement does not apply to Federal grand jury or other law enforcement subpoenas where a court or the issuing agency has ordered nondisclosure,⁸⁹ nor to court orders that were sought by the U.S. Attorney General (or appropriate designee) based on "specific and articulable facts giving reason to believe that the education records are likely to contain information" relevant to the investigation or prosecution of terrorist acts.⁹⁰

K. Challenging the Contents of an Education Record

Parents/students are required to have an opportunity for a hearing to challenge the contents of education records in the possession of CSU that they believe are inaccurate, misleading, or the disclosure of which would violate their privacy or other rights.⁹¹ If the challenge is sustained, the hearing procedures must include an opportunity to correct or delete the record or to insert a written explanation regarding its content.⁹²

L. Remedy for Violation of FERPA

The Secretary of the Department of Education is authorized to enforce FERPA. There is no private right of action for an individual who is aggrieved under the Act, except to file a complaint with the Secretary.⁹³ Enforcement may include all "appropriate actions," up to the termination of federal funding for an institution that violates the Act. That sanction is only available, however, where the Secretary has first attempted to secure compliance with the Act through voluntary means.

⁸⁷ See, e.g., Civil Code § 1798.24(i).

⁸⁸ 34 C.F.R. § 99.32(a).

⁸⁹ 34 C.F.R. § 99.32(c)(5).

⁹⁰ 20 U.S.C. § 1232g(j)(4).

⁹¹ 34 C.F.R. § 99.20.

⁹² 34 C.F.R. § 99.21.

⁹³ *Gonzaga v. Doe* (2002) 536 U.S. 273.

V.

OTHER RECORDS ACCESS STATUTES

A. California Labor Code—Certified Payroll Records

Requests for payroll records on capital projects are governed by California Labor Code section 1776, not the California Public Records Act. Unless CSU is the payroll compliance officer, neither the Chancellor's Office nor the campuses maintain payroll records on projects managed by contractors or subcontractors beyond two weeks. All contractors and subcontractors on public works projects must maintain accurate, certified payroll records, showing the name, address, Social Security number, work classification, straight time and overtime hours worked each day and week of the project, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by the contractor/subcontractor in connection with the public work.

A member of the public can request inspection or copies of certified payroll records maintained by contractors and subcontractors *through* the CSU.⁹⁴ Before being provided copies of these records, the requesting party must reimburse the following costs to the entity that incurs the cost: \$1 for the first page copied and \$0.25 per page for each additional page, plus \$10 for handling costs.⁹⁵ The public may *not* be given access to the records at the contractor's principal office so the inspection normally takes place at the campus.

Individual employees' names, addresses, and Social Security numbers must be redacted from the payroll records. The name and address of the contractor or subcontractor must be visible. The contractor/subcontractor must file a certified copy of the requested payroll records with the CSU within 10 days after receipt of a written request.⁹⁶ If the contractor/subcontractor fails to do so, CSU can impose a penalty of \$25 for each worker

⁹⁴ Cal. Labor Code § 1776(b)(1)-(3).

⁹⁵ 8 C.C.R. 16402.

⁹⁶ Cal. Labor Code § 1776(d) and (g).

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for every calendar day, or portion, until the records are provided. A contractor is not subject to this penalty for a subcontractor's failure to comply.⁹⁷

B. California Health & Safety Code—Medical Records

California Health and Safety Code section 123110 provides that a patient or former patient is entitled to inspect or obtain copies of his or her medical records, including those maintained by a Student Health Service. The health care provider may charge up to \$0.25 per page (or \$0.50 per page for records that are copied from microfilm), and any additional reasonable clerical costs that are incurred in making the records available. The records must be provided within 15 days after receipt of a written request.⁹⁸

A patient or former patient is entitled to a copy, at no charge, of records needed to support an appeal over eligibility for a public benefit program, unless the patient is represented by an attorney who is paying for the patient's appeal costs. Where the patient succeeds, the health care provider may then bill the patient for the copies previously provided free of charge.⁹⁹

C. California Education Code—CSU Employee Records

Education Code section 89546 gives CSU employees broad rights to their own employment records, including all reports, documents, correspondence or other material which pertain to the employee and are kept by the University. Upon written request, the employee shall, within 10 calendar days of the request, be provided a copy of all or any portion of the employee's records. The employee is responsible to pay the duplication costs at \$0.10 per page.¹⁰⁰ Each employee may also have another person of the employee's choosing accompany the employee to inspect the employee's records.¹⁰¹

If, after examination of the records, an employee believes that any portion of the material is not accurate, relevant, timely, or complete, the employee may make a written request to correct or delete the record or portion of the record. Such request shall include a written

⁹⁷ Cal. Labor Code § 1776(g).

⁹⁸ Cal. Health & Safety Code § 123110(b).

⁹⁹ Cal. Health & Safety Code § 123110(d) and (e).

¹⁰⁰ Cal. Educ. Code § 89546(b); Cal. Civ. Code § 1798.33.

¹⁰¹ Cal. Educ. Code § 89546(a).

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statement by the employee as to the specific corrections and deletions, and the reasons for those changes. This statement shall become part of the employee's personnel file.¹⁰²

Within 21 calendar days of the request for correction or deletion, the campus President (or delegee) shall either accede to the employee's request or notify the employee in writing of the refusal to grant the request. If the President refuses to grant the request, the President shall state the reasons for the refusal in writing, and the written statement shall become part of the employee's personnel file.¹⁰³

If the requirements of the Education Code are in conflict with a collective bargaining agreement, the collective bargaining agreement controls.¹⁰⁴

D. California Form 700's—Statements of Economic Interests

Form 700 Statements of Economic Interests filed under the CSU Conflict of Interest Code are public documents. The University must permit any member of the public to inspect and copy these statements. The statutory reproduction charge for these documents is \$0.10 per page.¹⁰⁵

E. Higher Education Employer-Employee Relations Act

Though not expressly stated in HEERA, exclusive bargaining representatives are entitled under HEERA to obtain information (whether contained in an existing record or not) that is necessary and relevant to the discharge of their duties to represent employees and may submit requests for information, distinct from their rights as members of the public, to make requests under the Public Records Act. Requests are typically made under HEERA but sometimes also under the PRA, the Education Code, the IPA, a specific collective bargaining agreement, or some combination of these. These requests should be directed to the appropriate Human Resources unit, whether on the campus or at the Chancellor's Office.

¹⁰² Cal. Educ. Code § 89546(c).

¹⁰³ Cal. Educ. Code § 89546(d).

¹⁰⁴ Cal. Educ. Code § 89546(h).

¹⁰⁵ Cal. Gov. Code §§ 81000-91015.

VI.

FREQUENTLY ASKED QUESTIONS

A. California Public Records Act

1. Does a campus have to create records that do not otherwise exist in response to a Public Records Act request?

No. The Act requires only disclosure of documents that are already in existence. Some care should be exercised in construing a request too narrowly, however, as a refusal to produce any records (on the ground that none exist) may provoke a more onerous request. In addition, if records exist in electronic form, even if they have never been printed out in hard copy form, the agency must provide the records by extracting data from a database upon request. (See, pages 4-7.) In some instances, it may be more efficient to create a new record, even though the law does not require it.

2. What if records contain a mix of public and non-public information?

CSU must make available “any reasonably segregable portion of a record” after redacting the non-public information.¹⁰⁶ Records cannot be withheld simply because they contain easily segregable information. CSU is required to disclose public records that also contain information that is not public but can easily be redacted (e.g., purely personal information like Social Security numbers, third party proprietary or trademark information, or other exempt information). Where redacted information renders the entire record meaningless, the entire record may be withheld. Consultation with University Counsel is advised.

¹⁰⁶ Cal. Gov. Code § 6253(a).

3. Are textbook lists subject to the Public Records Act?

Yes. Also, the Higher Education Opportunities Act requires that University book lists and information be available and on the University's website for the public.¹⁰⁷

4. Does a Public Records Act request have to be in writing?

No. A public agency must comply with an oral request for records, although it is probably a good idea for purposes of clarity to either request that it be put into writing or state in the written response what the request is understood to be. (See, pages 4-5.)

5. Can the University consider the reason for a particular request in preparing its response?

No. The University may not consider the identity of the requester or the purpose or motive of the request in making its determination and responding to a request. The University does have the right to make sure that a request is specific, focused and sufficiently precise to permit the location of the requested records.¹⁰⁸

6. Are records protected by the Information Practices Act or FERPA subject to disclosure under the Public Records Act?

Yes, as to the Information Practices Act, but no as to FERPA. The Information Practices Act expressly permits disclosure of otherwise protected records in response to a Public Records Act request. Therefore, records protected by the Information Practices Act are subject to disclosure under the Public Records Act if they meet the definition of "public records" and there is no applicable Public Records Act exception. FERPA does not permit a similar disclosure of education records merely

¹⁰⁷ 20 U.S.C. 1015, sec. 133.

¹⁰⁸ *Rogers v. Superior Court* (1993) 19 Cal. App. 4th 469.

because a Public Records Act request has been made. Because FERPA prohibits disclosure of education records, they are exempt from disclosure under the Public Records Act.¹⁰⁹

7. Are records created in confidence subject to production under the Public Records Act?

Yes. Records protected by a recognized legal privilege (*e.g.* attorney/client communication); they do not lose that protection because they are in the possession of CSU. Many documents created with an expectation between the parties that they will be held in confidence, or marked “confidential,” are not protected by any recognized legal privilege, however, and must be produced in response to a Public Records Act request.

8. Can a party in litigation with the CSU use the Public Records Act instead of general discovery to obtain information related to the claim?

Yes. The party may use the Public Records Act instead of general discovery unless the records are covered by the pending litigation exemption, which protects them only if they were specifically prepared for use in litigation.¹¹⁰ In fact, a litigant may be entitled to receive documents under the Public Records Act even if a court has already denied the party’s motion to compel their disclosure under general discovery procedures, or the civil discovery cutoff date has passed, if the records are public.¹¹¹ Any Public Records Act request by a party in litigation with the CSU should immediately be brought to the attention of University Counsel and the litigation attorney handling the lawsuit.

¹⁰⁹ See, Cal. Gov. Code section 6254(k).

¹¹⁰ *City of Hemet v. Superior Court* (1995) 37 Cal. App. 4th 1411, 1420-1421. Attorney-client privileged documents are also protected under a separate exception that protects privileged documents. Cal. Gov. Code § 6254(k).

¹¹¹ *County of Los Angeles v Superior Court (Axelrad)* (2000) 82 Cal. App. 4th 819.

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9. Are agreements to settle a lawsuit or claim subject to the Public Records Act?

Yes, after the lawsuit has been dismissed.

10. Should a request that references the federal Freedom of Information Act, or some other disclosure law, be treated as a request under the Public Records Act?

Yes. The written response should notify the requester that the other statute does not apply but that CSU is treating the request as having been made under the California Public Records Act.

11. How extensive a search must be made to locate records in response to a Public Records Act request?

CSU has an obligation to make a reasonable search for records in its possession. What is reasonable under any particular set of circumstances will vary, and consultation with University Counsel in response to a specific request is encouraged. In addition, CSU has an obligation to assist members of the public in making public records requests. Specifically, to the extent reasonable, CSU must: (1) assist a member of the public to identify records and information that are responsive to his/her request or to the purpose of the request, if it has been identified; (2) describe the information technology and physical location in which the records exist; and (3) provide suggestions for overcoming any practical basis for denying access to the records or information sought.¹¹²

12. How should a campus respond if some records are located on the campus and others are located in a systemwide office?

CSU is one legal entity, and a Public Records Act request is directed to that entity, including records both on the campuses and the systemwide office. As a practical matter, however, there may be circumstances where

¹¹² Cal. Gov. Code § 6253.1.

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it is appropriate to direct the requester to another office within the CSU. Discretion is required, and CSU will be held to a standard of “reasonableness.” Consultation with University Counsel in response to a specific request is encouraged.

13. At what point does contract bid information become subject to a Public Records Act request?

After the bids have been opened and a determination of the lowest responsible and responsive bidder has been made.¹¹³ However, bidder prequalification applications (questionnaires and financial statements) are not public records and are not open to public inspection.¹¹⁴ Other records submitted or prepared in connection with the prequalification process may also be exempt from disclosure or subject to redaction of private, privileged or proprietary information. Consultation with University Counsel is advised.

14. Should a campus inform students or employees if a request is made for records pertaining to them?

Yes. While the Public Records Act does not impose such a requirement, the Information Practices Act requires state agencies to make a reasonable attempt to notify individuals before disclosing “personal information” pursuant to a “compulsory legal process.”¹¹⁵ If the request seeks records that are exempt from disclosure and therefore will not be produced, there is no obligation to notify. In addition, please refer to FAQ No. 1 in Subsection C, below, regarding the treatment of student records under FERPA. Consultation with University Counsel in response to a specific request is encouraged.

¹¹³ Cal. Pub. Cont. Code § 10780.

¹¹⁴ Cal. Gov. Code §6254(k); Cal. Pub. Cont. Code § 10763.

¹¹⁵ Cal. Civ. Code § 1798.24(k).

15. Are telephone records of public officials subject to the Public Records Act?

Yes, for telephones provided and paid for by CSU. However, personal information should be redacted because it may disclose decision-making processes¹¹⁶ and for protection of third party privacy. This generally means that the last four digits of all phone numbers must be deleted, so that third parties are not subject to reverse phone directory engineering.

16. Are names and qualifications of applicants for a public position subject to the Public Records Act?

No. Information provided by job applicants who are not hired by CSU is not subject to disclosure. The public interest in protecting the privacy interest of third parties by withholding these records outweighs the public interest to be served by disclosure.¹¹⁷

17. Is the University required to produce records pertaining to uncashed warrants or checks in response to a Public Records Act request?

Yes. Warrant or check numbers may be redacted to prevent counterfeiting, as well as purely personal, private information such as Social Security numbers and information protected by FERPA.¹¹⁸

18. Are all personnel records subject to the Public Records Act?

No. The public has a right to know who it employs/hires and on what terms. Appointment letters, employment contracts, employee qualifications (e.g., resumes, employment applications), general non-personal employee benefits information, and salary information are all subject to disclosure. Purely personal information contained in those records – e.g., Social Security numbers, individual taxes/withholding, individual selection of benefits, personal retirement plan information,

¹¹⁶ *Rogers v. Superior Court* (1993) 19 Cal. App. 4th 469.

¹¹⁷ Cal. Gov. Code §§ 6254(c) and 6255.

¹¹⁸ *Connell v. Superior Court* (1997) 56 Cal. App. 4th 601.

home/personal address and telephone numbers – is exempt and should be redacted prior to disclosure.¹¹⁹ Performance evaluations are *not* subject to disclosure.¹²⁰

19. Are records of ongoing personnel or other investigations, or pre-disciplinary records, required to be disclosed?

No. Records or reports of ongoing, incomplete investigations and disciplinary decisions are not required to be disclosed because disclosure might compromise the investigative process.¹²¹ Names of the individuals involved in the investigation are also protected by reason of privacy while the investigation is underway.¹²² The investigative results are subject to disclosure where the charges are substantial and substantiated (see FAQ #20). Preliminary drafts, notes or memoranda are also exempt from disclosure, even after the investigation is complete, so long as there is no custom and practice of retaining such records, and the public interest in nondisclosure clearly outweighs the public interest in disclosure.¹²³

20. Are complaints, final investigation reports, underlying records and final disciplinary notices subject to disclosure under the Act?

Disclosure depends on a number of factors. The general rule is that records that evidence criticism of public employees should be disclosed where the allegations are substantial (as opposed to trivial or baseless), and there is reasonable cause (often, but not always, after investigation) to believe that they are well-founded.¹²⁴ Good judgment is called for in determining when criticisms or findings are “substantial” and/or sustained. Consultation with University Counsel is encouraged. Disciplinary notices should not be disclosed until after a final decision is reached.

¹¹⁹ Cal. Gov. Code § 6254(c) and § 6255; *see also*, *Braun v. City of Taft* (1984) 154 Cal. App. 3d 332.

¹²⁰ *Versaci v. Superior Court* (2005) 127 Cal. App. 4th 805.

¹²¹ Cal. Gov. Code § 6255.

¹²² Cal. Gov. Code § 6254(c).

¹²³ Cal. Gov. Code § 6254(c); *see also*, *Citizens for a Better Environment v. Cal. Dept. of Food and Agriculture* (1985) 171 Cal. App. 3d 704.

¹²⁴ *AFSCME v. Regents* (1978) 80 Cal. App. 3d 913; *Bakersfield City School District v. Superior Court* (2004) 118 Cal. App. 4th 1041.

21. Are whistleblower complaints, investigation reports and records subject to disclosure under the Act?

No. CSU's Improper Governmental Activities Act mandates that investigative audits of whistleblower complaints are confidential, except when the CSU decides that release of the information serves the interests of the state.¹²⁵ This requirement does not apply to whistleblower retaliation complaints. A summary of the allegations and the investigation, regardless of whether the allegations were substantiated, and what actions, if any, were taken, must be provided to the whistleblower, and is subject to disclosure under the Act. Consultation with University Counsel is encouraged.

22. Are police officer personnel records, including complaints, final investigation reports and disciplinary notices, subject to disclosure under the Act?

No. Police officer personnel records and misconduct complaints are exempt from disclosure and can only be obtained using special procedures. Consult with University Counsel regarding such requests.¹²⁶

23. Are records of donors or potential donors subject to the Public Records Act?

No. If, however, a "donation" is more in the nature of a contract for services – such as where the donor receives something of value in return for the donation – disclosure of donor records may be compelled under the Public Records Act.¹²⁷

¹²⁵ Cal. Educ. Code § 89574 *et seq.*, and Cal. Gov. Code § 6254(k).

¹²⁶ Cal. Evid. Code § 1043.

¹²⁷ *California State University v. Superior Court* (2001) 90 Cal. App. 4th 810.

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24. Are campus directories containing student or employee contact information subject to disclosure?

Hardcopy directories intended for campus use only should not be disclosed, nor should the information in them. If hardcopy directories are readily available to the public, then they must be disclosed. Contact information in directories on the web is subject to disclosure by reference to the url.¹²⁸

25. Are campus police incident reports, rap sheets and arrest records subject to disclosure under the Act?

No, they are exempt from disclosure. However, information in the “police blotter” (time and circumstances of calls to police; name and details of arrests, warrants, charges, hearing dates, etc.) must be disclosed unless disclosure would endanger an investigation or the life of an investigator. Police investigative files may be withheld, even after an investigation is over.¹²⁹

26. Is access to a computer database required by the Act?

No. Information that is easily extractable from a computer database fits within the Act’s definition of a “writing” and is therefore subject to disclosure, but direct access to the database is not required. This results in creation of a new record, even though such is not generally required by the Act.

¹²⁸ See Cal. Gov. Code § 6254.5.

¹²⁹ Cal. Gov. Code § 6254(f); Cal. Penal Code §§ 11075, 11105, 11105.1; *Williams v. Superior Court* (1993) 5 Cal. 4th 337; *County of Los Angeles v. Superior Court* (1994) 18 Cal. App. 4th 588.

B. California Information Practices Act

- 1. Does the Information Practices Act prohibit a campus from providing for commercial purposes any lists in its possession, including alumni lists?**

Yes.¹³⁰ It is also impermissible to provide such lists to an affiliated organization, where that affiliated organization, in turn, intends to use the lists for commercial purposes, unless it also meets the specific requirements of California Education Code section 89090. Under the Information Practices Act, “commercial purpose” means any purpose that has financial gain as a major objective.¹³¹

C. FERPA

- 1. Does FERPA protect education records from subpoena?**

No. But FERPA does require that, before any records are produced in response to a subpoena, an effort be made to contact the student affected so that s/he may have an opportunity to object to the subpoena. If records are produced, the institution must keep a record of the disclosure. A court may order that the existence of the subpoena, its contents, or the institution’s response not be disclosed. In such cases, the institution is neither required to notify the student, nor to keep a record of the disclosure.

- 2. Does FERPA protect the records of deceased students or alumni?**

No, as to deceased students. The privacy rights established by FERPA die with the student. Yes, as to the records of alumni, except for directory information. But alumni who opted not to have their directory information disclosed while they were attending the University should not be included in an alumni directory.

¹³⁰ Cal. Civ. Code § 1798.60.

¹³¹ Cal. Civ. Code § 1798.3(j).

3. Who has a legitimate educational interest in records otherwise subject to FERPA?

University officials and employees who require the records to perform the functions of their job (which may also include contractors, consultants, volunteers or other outside parties providing services or functions or otherwise acting for the University, who must be under the direct control of the institution with respect to the use and maintenance of education records). Discretion should be exercised in arriving at this determination, and consultation with University Counsel is encouraged.

4. Does FERPA protect records or information?

FERPA protects records and the information contained in them. If the same information is independently obtainable from another source not protected by FERPA, however, the fact that the information may also be in a record protected by FERPA does not make the information itself confidential.

5. Does FERPA protect student disciplinary records?

Yes. However, FERPA does allow disclosure of student disciplinary hearing records in specific circumstances. If the student's wrongful acts are "crimes of violence" or "non-forcible sex offenses" (the former includes date rape) and they are sustained, FERPA allows for – but does not require – disclosure of the "final results" of the discipline, including the charged student's name, the violation and the sanction. If the charges are not sustained, the results may only be disclosed to the victim. Whether or not this disclosure implicates the California Information Practices Act is a determination that must be made on a case-by-case basis; the student's reasonable expectation of privacy may turn on whether there has been a criminal conviction or other publication of the underlying facts. Consultation with University Counsel is necessary prior to any such disclosure.

- 6. Does FERPA preclude disclosure to parents of violations of Federal or State laws or University policy regarding drug/alcohol use or possession by students under the age of 21?**

No. However, in California, the Information Practices Act bars this disclosure, except where the University determines that compelling circumstances exist that affect the health or safety of the individual to whom the information pertains and, upon disclosure, the University transmits notice of the disclosure to the individual at his or her last known address. Consultation with University Counsel prior to such a disclosure is encouraged.

- 7. Does FERPA allow a campus to disclose information from education records directly to a student based on the student's electronic request?**

Yes, so long as the institution uses a PIN combined with the student's ID number to authorize the disclosure, and only if the eligible student is the only one with access to that PIN. If anyone else has access to the PIN, including administrative staff, there's no assurance that disclosure will be made only to an authorized party as required by FERPA.

- 8. Does FERPA permit a campus to honor a student's electronic request to have his or her transcript sent to another school?**

Yes.¹³² The FERPA regulations allow a college to send a student's education records to another school in which the student is seeking enrollment if the student initiates the request. It doesn't matter whether the request to have a transcript forwarded is made in person, in writing, on the telephone, or by electronic transmission. But if the student makes the request by telephone or email, the school should be reasonably sure that the student actually made the request.

¹³² Letter dated June 30, 1994, to Dr. David S. Yeh, contained in *NACUA Family and Educational Rights and Privacy Act, A legal Compendium*, 2d Edition, edited by Steven J. McDonald, at p. 229.

9. Does FERPA permit disclosure of education records when warranted by a health or safety emergency?

Yes.¹³³ An institution may disclose education records to appropriate parties without consent if the institution finds an “articulable and significant threat to the health or safety of a student or other individuals.” The institution may consider the “totality of the circumstances pertaining to a threat” in light of information available at the time in making such determinations. The University must record the threat that justified the disclosure and the parties to whom the information was disclosed. Such determinations will be held appropriate if the disclosure decision had a “rational basis” in light of information available at the time of the threat.

10. Does FERPA prohibit disclosure of student information requested by federal military recruiters pursuant to the Solomon Amendment?

No. The Solomon Amendment takes precedence over FERPA and requires the University to provide access to student information to federal military recruiters, unless the student has expressly opted not to release to anyone “directory information” under FERPA.¹³⁴ Information called for under the Solomon Amendment consists of student names, addresses, telephone numbers, date and place of birth, education level, degrees received, and the most recent educational institution enrolled in by the student.

¹³³ 34 C.F.R. §§ 99.32(a)(5), 99.36.

¹³⁴ 10 U.S.C. § 983; 32 C.F.R. § 216.4.