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[Previous Case](#) [Top Of Index](#) [This Point in Index](#) [Citationize](#) [Next Case](#) [Print Only](#)

Question Submitted by: The Honorable Gary C. Bastin, Oklahoma House of Representatives

1986 OK AG 152

Decided: 01/09/1987

Oklahoma Attorney General

Cite as: 1986 OK AG 152, __ __

¶0 The Attorney General has received your request for an official opinion asking, in effect:

Under the Oklahoma Open Records Act, codified at 51 O.S. 24A.1 et seq. (1986), are public institutions of higher education required to furnish student directory information, including lists of former students, to recruiting representatives of the United States Armed Forces?

¶1 The Oklahoma Open Records Act ("ORA"), codified at 51 O.S. 24A.1 et seq. (1986), became effective on November 1, 1985. The ORA is designed specifically "to ensure and facilitate the public's right of access to and review of government records." 51 O.S. 24A.2. (All statutory references are to Title 51 of the Oklahoma Statutes unless otherwise noted.) The ORA requires that "[a]ll records of public bodies and public officials shall be open to *any person* for inspection, copying, and/or mechanical reproduction during regular business hours" with certain limited exceptions. 51 O.S. 24A.5. (Emphasis supplied). Because the public's right to access to public records does not depend on the identity of the requestor, no significance is attached to the fact that the requesting entity is a branch of the United States armed forces. Thus, the analysis to be applied in answering your question does not depend upon the identity of the requestor.

¶2 Public access to "directory information" maintained by public educational institutions is governed by 51 O.S. 24A.16(B), which was revised by the Legislature in 1986 and now provides:

"If kept, statistical information not identified with a particular student and directory information shall be open for inspection and copying. 'Directory information' includes a 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 educational institution attended by the student. Any educational *agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's or guardian's prior consent or the student's himself if he is eighteen (18) years of age or older.*" (Emphasis supplied).

¶3 The emphasized language in 51 O.S. 24A.16(B) was added by the Legislature following issuance by the Attorney General of Opinion Number 85-167, concluding that:

"[T]he effect of the Family Educational Rights and Privacy Act of 1974 [FERPA], 20 U.S.C.A. 1232g, commonly called the Buckley Amendment, on the requirement in the Oklahoma Open Records Act for public access to "directory information," [citation omitted] is that a school district desiring to retain federal funding may only provide public access to the information contained in the 'directory information' by complying with the provisions of the Family Educational Rights and Privacy Act, specifically 20 U.S.C.A. 1232g(a)(5)(B)."

¶4 The 1986 amendment, see 1986 Okla. Sess.L., c. 116, 1, effective April 9, 1986, brought 51 O.S. 24A.16(B) into even closer alignment with FERPA. See, 20 U.S.C.A. 1232g(a)(5)(B). It should be noted that the 1986 amendment imposed a new requirement: namely, that students eighteen years of age or older (and the parents of younger students), be afforded an opportunity, upon public notice and within a reasonable time, to object to any release of directory information as defined therein. Because this right mirrors that attaching under FERPA, this requirement is assumed to be operative with regard to directory information acquired prospectively from the effective date of FERPA, August 21, 1974. See, e.g., *Benson v. Blair*, 515 P.2d 1363 (Okla. 1973).

¶5 Public institutions of higher education which receive federal funds fall within the regulatory purview of FERPA and the regulations issued by the Secretary of Education. *Kestenbaum v. Michigan State University*, 294 N.W.2d 228 (Mich. App.1980). These institutions may comply with those regulations when they are not clearly contrary to state law. See, 34 C.F.R., Subpart E. See also, A.G. Opin. No. 85-167. (It is assumed, for purposes of this Opinion, that institutions have complied with the public notice requirements of FERPA during the period since its enactment.)

¶6 It should be noted that both FERPA and the ORA limit the notice requirement to "each student *attending the institution.*" 51 O.S. 24A.16(B). (Emphasis supplied). Federal regulations promulgated by the Office of the Secretary of Education pursuant to FERPA have construed the notice requirement under federal law not to apply to students no longer in attendance. 34 C.F.R. 99.37 reads as follows:

"(a) An educational agency or institution may disclose personally identifiable information from the education records of a student who is in attendance at the institution or agency if that information has been designated as directory information (as defined in 99.3) under paragraph (c) of this section.

"(b) *An educational agency or institution may disclose directory information from the education records of an individual who is no longer in attendance at the agency or institution without following the procedures under paragraph (c) of this section.*

"(c) An educational agency or institution which wishes to designate directory information shall give public notice of the following:

"(1) The categories of personally identifiable information which the institution has designated as directory information;

"(2) The right of the parent of the student or the eligible student to refuse to permit the designation of any or all of the categories of personally identifiable information with respect to that student as directory information; and

"(3) The period of time within which the parent of the student or the eligible student must inform the agency or institution in writing that such personally identifiable information is not to be designated as directory information with respect to that student." (Emphasis supplied).

¶7 The foregoing is not meant to imply, however, that the institution of higher education is excused from its duty to notify current students of their right to object to the disclosure of directory information. An objection to disclosure, once given, prohibits the institution from releasing directory information pertaining to that individual even after his or her departure, via graduation or otherwise, from the institution.

¶8 The conclusion therefore follows that student directory information relating to former students may be released without public notice additional to that required *prospectively* by FERPA.

¶9 The following caveats, however, should be noted by public institutions of higher education seeking to comply with 51 O.S. 24A.16(B):

1. If no lists of former students are generated or maintained, none need be created. The institution of higher education is not required to create records to satisfy a particular request. 51 O.S. 24A.18.
2. The disclosure required by the ORA is limited to the specific types of directory information enumerated in 51 O.S. 24A.16(B). If a list of former students contains nondirectory information, the disclosure of which is prohibited by federal law, access to the list should be denied (51 O.S. 24A.13) unless the exempt material can be deleted or segregated (51 O.S. 24A.5(2)).
3. Directory information should not be made available if it pertains to individuals who have previously notified the public body of their objection to its disclosure. 51 O.S. 24A.16(B).

¶10 It is, therefore, the official opinion of the Attorney General that public educational institutions are required, under the Oklahoma Open Records Act, to grant access to any existing lists of former college students to any person who requests it. This obligation is limited to directory information as defined by 51 O.S. 24A.16(B) (1986). It excludes specifically other types of information, the disclosure of which would be violative of applicable federal law. Disclosure is not permitted with respect to those individuals who, exercising their rights either under 20 U.S.C.A. 1232g(a)(5)(B) or 51 O.S. 24A.16(B) (1986), have objected to such disclosure.

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA
NED BASTOW
ASSISTANT ATTORNEY GENERAL

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Cite Name

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Level

<u>51 O.S. 24A.1,</u>	<u>Short Title</u>	Discussed
<u>51 O.S. 24A.2,</u>	<u>Political Power - Public Policy and Purpose of Act</u>	Cited
<u>51 O.S. 24A.5,</u>	<u>Open and Confidential Records</u>	Discussed
<u>51 O.S. 24A.13,</u>	<u>Confidential Federal Legislation Records</u>	Cited
<u>51 O.S. 24A.16,</u>	<u>Confidential Records of Public Educational Institutions - Statistical and Directory Information.</u>	Discussed at Length
<u>51 O.S. 24A.18,</u>	<u>Additional Recordkeeping Requirements on Public Bodies or Public Officials not Imposed</u>	Cited