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November 22, 1978

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ATTORNEY GENERAL OPINION NO. 78-372

Mr. Merle R. Bolton
Commissioner of Education
State Department of Education
120 East 10th Street
Topeka, Kansas 66612

*Disapproved
see AB #79-21*

Re: Legislative Post Audit--Records--Access

Synopsis: Records in the custody of community junior colleges which constitute "education records," as defined by 20 U.S.C.A. § 1232g(a)(3), the Family and Educational Rights and Privacy Act of 1974, are not subject to examination by the Legislative Post Auditor under K.S.A. 1977 Supp. 46-1106(g) or -1114(b). Any access which the Post Audit Division has to such records is subject to the same restrictions and conditions imposed by the cited federal law, including the consent of the parent or student which is required by that act.

* * *

Dear Commissioner Bolton:

You advise that the Legislative Division of Post Audit is considering a proposed study of the transferability of community junior college credit hours to accredited institutions of higher learning in this state. The question has been raised by a number of community junior college administrators whether they may make available to the Post Auditor and his representatives records contained in student files, including transcripts, which relate to individually identifiable students, without the consent of such students. The concern has been based on provisions of the Family Educational Rights and Privacy Act, commonly known as the Buckley Amendment, found at 20 U.S.C. § 1232g.

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Subsection (b)(1) of that Act provides in pertinent part thus:

"No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of information 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 the following--

* * *

(E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974"

In the implementation of the Act, the Secretary of Health, Education and Welfare has adopted a number of regulations. Concerning the language cited above, 45 C.F.R. § 99.31 states in pertinent part thus:

"(a) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is--

* * *

(5) To State and local officials or authorities to whom information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974. This subparagraph applies only to statutes which require that specific information be disclosed to State or local officials and does not apply to statutes which permit but do not require disclosure."

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The question is presented what authority the Legislative Division of Post Audit has to require access to the individually identifiable student records involved here.

The division was created in 1971. See ch. 185, L. 1971. Section 6(f) of that act provided thus:

"The post auditor, in the discharge of his duties under this act, may require state agencies to preserve and make available their accounts, records, documents, vouchers, requisitions, payrolls, cancelled checks or vouchers, and coupons, and other evidence of financial transactions." See K.S.A. 1977 Supp. 46-1106(f).

The records to which access is provided under this section is restricted, in my judgment, to records of financial transactions, and does not extend to records such as those involved in this instance, such as student transcripts and other records relating to the transferability of credit hours from one institution to another, *i.e.*, essentially academic records.

In 1974, the legislature elaborated upon the right of access of the post auditor to various records. Section 3 of ch. 215, L. 1974, provided thus:

"The legislative post audit committee is hereby authorized to direct the post auditor and the division of post audit to make an audit of any type described in K.S.A. 46-1107 or 46-1108 of any records or matters of any person specified in this section, and may direct the object in detail of any such audit. Upon receiving any such direction, the post auditor with the division of post audit, shall make such audit and all persons to which such audit relates shall make all books, accounts, contracts and other records relating thereto available for audit by the post auditor or any officer or employee of the division of post audit. Audits authorized by this section are the following:

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(a) Audit of any local subdivision of government or agency or instrumentality thereof which receives any distribution of moneys from or through the state.

(b) Any person that receives any grant or gift from or through the state.

(c) The contract relationships and the fiscal records thereto of any person that contracts with the state.

(d) Any person which is to any significant degree controlled by any state agency or institution or which operates or functions for the benefit of any state institution, except that this subsection (d) shall not include audit of any person regulated by the corporation commission."

This act was effective April 8, 1974, and accordingly, was in effect on November 19, 1974. This statute mandated disclosure of the kind of information sought to be obtained for the purposes of the audit now under consideration.

However, in 1977, the legislature once again sought to elaborate upon the post auditor's access to records. See ch. 186, § 2, L. 1977. That act amended K.S.A. 1976 Supp. 46-1106 by adding a new subsection (g), which provides in pertinent part thus:

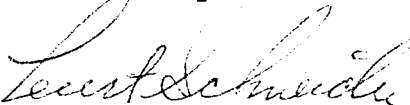
"In the discharge of the duties imposed under the legislative post audit act, the post auditor shall have access to all books, accounts, records, files, documents, correspondence, confidential or otherwise, of any person or state agency subject to the legislative post audit act or in the custody of any such person or state agency Nothing in this subsection shall be construed to supersede any specific prohibition imposed by federal law."

In addition, K.S.A. 1976 Supp. 46-1114(b), which included the right of access enacted in 1974, in ch. 215, § 3, L. 1974, *supra*, was amended to provide that access thereunder was likewise subject to the same restriction, *i.e.*, that it shall not be construed to supersede any specific prohibition imposed by federal law.

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As a result, the statutory right of access to records of state agencies and other entities which are subject to the Legislative Post Audit Act is specifically subject to overriding federal prohibitions. If records are specifically made privileged or confidential by federal law, the Legislative Post Auditor has no statutory right of access under either K.S.A. 1977 Supp. 46-1106(g) or -1114(b). In this instance, where the Legislative Post Auditor seeks access to individually identifiable "education records," as defined by 20 U.S.C. § 1232g(a)(3), access to which is available only upon the consent of the eligible student or parent, the post auditor has no unconditional right of access under K.S.A. 1977 Supp. 46-1106(g) or -1114(b), and the access of the Division of Post Audit is subject to the same restrictions and conditions imposed by the Family Education Rights and Privacy Act.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj