IN THE SUPREME COURT OF IOWA

Press-Citizen Company, Inc., Plaintiff/Appellee, **v.** **The University of Iowa,** Defendant/Appellant.	**Supreme Court No. 09-1612**

Brief of *Amici Curiae* The Iowa Freedom of Information Council, Des Moines Register & Tribune Company, Iowa Newspaper Association, The Reporters Committee for Freedom of the Press, Gazette Communications, Inc. and The Associated Press In Support of Plaintiff/Appellee

Appeal from The Iowa District Court in and for Johnson County
The Honorable Douglas S. Russell, Judge

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STATEMENT OF INTEREST AND IDENTITY OF *AMICI CURIAE*

The Iowa Freedom of Information Council, Des Moines Register & Tribune Company, Iowa Newspaper Association, The Reporters Committee for Freedom of the Press, Gazette Communications, Inc., and The Associated Press (the "News Organizations") represent Iowa's major publishers, broadcasters and news media. The News Organizations employ hundreds of journalists who provide around-the-clock news and information to Iowans delivered to all 99 counties by newspapers, radio, broadcast and cable television, and websites available on the Internet.

The News Organizations hold a substantial, continuing interest in this case as they seek to preserve rights of access to government records and crime information. Their ability to gather and report news and their role in providing oversight on government conduct are implicated by the issues in this case. The News Organizations have a unique, public policy-based perspective why the *Iowa Open Records Act* should not be subordinated to generalized federal privacy notions.

Through this Friend of the Court brief the News Organizations seek to provide independent comment and authority in support of Appellee Press-Citizen Company, Inc., and affirmance of the District Court's ruling.

ARGUMENT

The Iowa Open Records Act, Which Places The Highest Priority On Public Access And Government Accountability, Requires Disclosure of Law Enforcement And Crime Information Held By The University Of Iowa Without Limitation By The Federal Family Educational Rights Privacy Act And Without Regard To The Status Or Knowledge Of The Party Exercising Copying and Inspection Rights.

This case involves public and news media access to government information about criminal activity, and in particular the time, date, location and circumstances of a reported rape on The University of Iowa campus and how University and local law enforcement officials handled investigation and prosecution of the crime. Despite the clear directives of Iowa Code Chapter 22 (2009), the *Iowa Open Records Act* (the "Act"), securing access rights in general and specifically to crime data, Appellant, The University of Iowa ("Appellant" or the "University"), asserts that a federal educational privacy statute overrides Iowa law and excuses it from providing records to the Iowa City *Press-Citizen* newspaper because it could lose federal funding by disclosing such otherwise public information.

Iowa law, practice and public policy make clear that disclosure of government records and information serves the needs and interests of the State and its people. This follows because the Act and the cases applying and enforcing it: (i) start with a presumption of openness, and (ii) favor results that

enhance the public's ability to stay informed about governmental activities, the citizenry's right to hold officials accountable and the taxpayers' prerogative to know how agencies spend their money.

The Act "is designed 'to open the doors of government to public scrutiny'" and "to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." *Gannon v. Bd. of Regents*, 692 N.W.2d 31, 38 (Iowa 2005) (citations omitted); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999). Indeed, the Act expressly states that "the policy of this Chapter [is] that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others." Iowa Code §22.8(3).

The Act provides that "any person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record." *Id.* §22.2. The paramount public interest in securing access to government information is reinforced by the penalty provisions of Iowa Code §22.6:

> It shall be unlawful for any person to deny or refuse any citizen of Iowa any right under this chapter, or to cause any such right to be denied or refused. Any person knowingly violating or attempting to violate any provision of this chapter where no other penalty is provided shall be guilty of a simple misdemeanor.

Exemptions in the Act create categories where the lawful custodian may elect to keep public records confidential. *Id.* §22.7. The rules for interpreting the scope and application of those exemptions are well settled. The Act "establish[es] a liberal policy of access from which departures are to be made only under discrete circumstances." *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 299 (Iowa 1979); *see also City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d 523, 526 (Iowa 1980) ("It is plain that our analysis must start from the premise that [the Act] is to be interpreted liberally to provide broad public access to * * * public records.").

While exemptions are not interpreted to defeat the evident intent of the legislature as set forth in them, the "legislature intended for the disclosure requirement to be interpreted broadly, and for the . . . exceptions to be interpreted narrowly." *DeLaMater v. Marion Civil Serv. Comm'n,* 554 N.W.2d 875, 878 (Iowa 1996). "Disclosure is favored over non-disclosure, and exemptions from disclosure are to be strictly construed and granted sparingly." *US West Commcn's, Inc. v. Office of Consumer Advocate*, 498 N.W.2d 711, 713 (Iowa 1993).

In addition, where another Iowa statute declares a category confidential, records within that category can be exempted from disclosure under the Act even though the exemption is set forth in a separate statute and is not listed in

Iowa Code §22.7. *Burton v. Univ. of Iowa Hosps. and Clinics*, 566 N.W.2d 182 (Iowa 1997). In that situation, the party "seeking the protection of one of the statute's exemptions bears the burden of demonstrating the exemption's applicability." *Clymer*, 601 N.W.2d at 45; *see also Telegraph Herald*, 297 N.W.2d at 527 (requiring the "government to carry the burden of justifying nondisclosure").

Finally, an agency may keep otherwise public records secret where disclosure definitely would result in a loss of federal funding. Thus, Iowa Code §22.9 provides:

> If it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information.

That provision, however, appears unavailable to the University in this case. To apply, under the remaining language of Iowa Code §22.9, the State Board of Regents must have adopted "as a rule, in each situation where this section is believed applicable, its determination identifying those particular provisions of this chapter that must be waived in the circumstances to prevent the denial of federal funds, services, or information." Appellant's Brief does not cite any such rule. Further, the *Amici* failed to locate any such required

statement in the regents' rules in the Iowa Administrative Code, including 681 I.A.C. §17.1 *et. seq.*, the sections concerning access to university records.[1]

Even if an exception to disclosure applies, where a public record contains both exempt and non-exempt information, the government custodian may not withhold the entire record based on the claim of partial confidentiality and cannot keep it secret until the requestor acquiesces in the custodian's claim of confidentiality for the disputed portion. Instead, the custodian must redact the information it claims to be exempt and disclose the rest. *Des Moines Ind. Cmty. Sch. Dist. Public Records v. Des Moines Register & Trib. Co.*, 487 N.W.2d 666, 670–71 (Iowa 1992); *1982 Iowa Op. Atty. Gen. 538*, 1982 WL 42749 (October 7, 1982).

Measured against this backdrop of openness, the University's case falters and fails.

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[1] Although the State Board of Regents enacted 681 I.A.C. 17.13(p), which includes a generalized statement that "confidential records include Records exempted from public inspection under any other provision of law," no specific rule required by or referencing Iowa Code §22.9 appears to have been enacted to cover the federal funding loss the University claims would occur because its compliance with the Act arguably runs afoul of the Federal Family Educational Rights Privacy Act, 20 U.S.C. §1232g.

A. The Act mandates timely and meaningful public access to crime information and police records.

The Court need not pause long over the issue of whether the information at issue here constitutes public records. It plainly does. The Act defines "public records" as "includ[ing] all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state . . . or any branch, department, board, bureau, commission, council, or committee of the foregoing." Iowa Code §22.1(3). Even in its exception allowing withholding of law enforcement information in limited situations, Iowa Code §22.7(5) requires that:

> [t]he date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual.

See also id. §22.7(18).

Further, the Act is an "on demand" statute that mandates immediate access to inspect and copy public records upon request. *See id.* §22.2(1) ("Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record"); *id.* §22.4 ("The rights of persons under this chapter may be exercised at any time during the customary office hours of the lawful

custodian of the records"); *id.* §22.8(4) (allowing reasonable delay only when a lawful custodian has legitimate doubt about confidentiality or wishes to weigh seeking court relief and, at subpart (d), stating reasonable delay shall not exceed 20 calendar days and "ordinarily should not exceed ten business days.").

Ready access to police records and crime information is part of Iowa's tradition of openness. Access to police information permits community assessment of the propriety and effectiveness of officials charged with enforcing the law. Accordingly, in a case involving police conduct and records, the Court observed in *Hawk Eye v. Jackson*, 521 N.W.2d 750, 754 (Iowa 1994), "So long as it is barred from seeing the report, the newspaper is effectively prevented from assessing the reasonableness of the official action."

Access to campus crime information also serves paramount public interests. *See Student Press Law Ctr. v. Alexander*, 778 F. Supp. 1227, 1234 (D.D.C. 1991) (enjoining Department of Education from barring universities from releasing personally identifiable information regarding students in law enforcement records or threatening to withdraw federal funding after finding the public interest in greater access to information "is at its highest in matters that bear on personal safety and the prevention of crime.").

Iowa law extends this right of access to crime information including victim names. In *1990 Iowa Op. Atty. Gen. 85*, 1990 WL 484903 (August 24, 1990), the Attorney General's Office analyzed the legislative history of Iowa Code § 22.7(5) and concluded that a 1981 amendment generally prohibited withholding of crime details, including names of sexual assault victims:

> Since the amendment, it is our understanding that most if not all police departments routinely disclose the names of crime victims in those crimes other than sexual assault. Your question requires an analysis of whether subsection 5 provides authorization for nondisclosure of the names of a subclass of crime victims, i.e. sexual assault victims, and whether that subsection provides authorization for nondisclosure of name and address when disclosure of other information is required. As a matter of statutory construction, we find no such authorization.
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> Even if contained in "investigative reports," the subsection specifically requires the disclosure of "the date, time, specific location and immediate facts and circumstances surrounding the crime or incident." Unless specifically exempted, we cannot say that the legislature intended that listing of information types which must be disclosed would exclude name and address of the victim.

The information the *Press-Citizen* requested undeniably was contained in public records held by the University, which had the duty to allow immediate access upon request. Appellant's refusal to do so, it now claims, was excused by a possible loss of funding under a federal law it never cited in

rulemaking required by Iowa Code §22.9 or by privacy protections of that law, which, as discussed below, do not apply to the withheld information.

B. Federal education funding law does not override the Act so that a crime suspect or victim who is a state university student becomes entitled to greater privacy rights than members of the general public with respect to criminal incident information.

The Federal Family Educational Rights Privacy Act, 20 U.S.C. §1232g ("FERPA" or the "Buckley Amendment"): (i) protects only educational records, which by statutory definition excludes law enforcement records, *see* 20 U.S.C. §1232g(a)(4)(B), and (ii) does not create a private cause of action for disclosure of protected information, *see Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002), but instead regulates colleges indirectly as the federal government may withhold funding to schools that have a policy or practice of releasing protected education records. *See* 20 U.S.C. § 1232g(b)(1); 20 U.S.C. §1232g(b)(2); *U Jain, Adm'r of the Estate of S. Jain, Deceased*, 617 N.W.2d 293, 298 (Iowa 2000).

The University skips over these important factors, first, by ignoring how FERPA excludes law enforcement records from its application and, second, by arguing the Buckley Amendment overrides the Act by requiring secrecy when, instead, it at most creates a potential for loss of funding for schools consistently violating its confidentiality requirements.

As to the first point, through amendments adopted in 1992, Congress revised FERPA and "expressly exempted campus police records from the definition of 'education record.'" Matthew R. Salzwedel and Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 Wis. L. Rev. 1053, 1068 n. 72 (2003).[2] FERPA does not apply to law enforcement records because under 20 U.S.C. §1232g(a)(4)(B): "The term 'education records' does not include . . . (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." *See Bauer v. Kincaid*, 759 F. Supp. 575, 594–95 (W.D. Mo. 1991) ("[C]riminal investigation and incident reports are not exempt from disclosure under the Missouri Sunshine Law or protected as educational records by the Buckley Amendment. If FERPA is interpreted

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[2] The authors of that article, who included a Drake University provost, further noted at p. 1098:

> One of the most egregious defects of the Buckley Amendment is its propensity to allow colleges and universities the wherewithal to manipulate the law, thereby protecting the institution while giving the appearance of protecting student privacy. As one administrator has observed, "what seems apparent . . . is that some college and university officials have grown accustomed to using the act—indeed, abusing it—as a defensive shield against disclosure of information that the public has a

(footnote continued)

otherwise, to impose a penalty for disclosure of the criminal investigation and incident reports, it is unconstitutional."); *see also Ohio ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956, 958 (Ohio 1997). *But see U.S. v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002).

As to the second point "FERPA's nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure." *Gonzaga Univ.*, 536 U.S. at 288. As noted in *U.S. v. Miami University*, 294 F.3d at 806, FERPA's confidentiality provisions relate to educational privacy interests imposed on colleges to protect academic information and are controlled through purse strings rather than direct regulation:

> Congress provides funds to educational institutions via the FERPA on the condition that, *inter alia*, such agencies or institutions do not have a "policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of [the students or] their parents[.]" 20 U.S.C. § 1232g(b)(1).

Thus, FERPA "takes a carrot-and-stick approach: the carrot is federal funding; the stick is the termination of such funding to any educational

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(footnote continued from previous page)

> right to know and to which the Buckley Amendment has never had any relevance.

institution" that has a policy or practice of impermissible releases of educational records. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 68 (1st Cir. 2001).[3]

Accordingly, the University's position is unsupportable under FERPA. As the court in *Bauer*, 759 F. Supp. at 590, aptly described:

> The fact that the statute specifically exempts records maintained for law enforcement purposes demonstrates that Congress did not intend to treat criminal investigation and incident reports as educational records. The underlying purpose of FERPA was not to grant individual students a right to privacy or access to educational records, but to stem the growing policy of many institutions to carelessly release educational information. *Smith v. Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa.1985).

Instead, as noted in a FERPA case involving parking tickets issued to students and a coach at the University of Maryland:

> The federal statute was obviously intended to keep private those aspects of a student's educational life that relate to academic matters or status as a student. Nevertheless, in addition to

[3] As noted above, this renders the University's asserted defense under Iowa Code §22.9 inapplicable; first, because it is not at risk of losing federal funds as FERPA does not extend to law enforcement records, and, second, because the regents have not adopted a disclosure rule required by section 22.9. "Moreover, the Buckley Amendment specifically provides that the sanction of loss of federal funding does not occur when the institution furnishes information in compliance with a judicial order." *Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y.1977); *Red & Black Pub. Co., Inc. v. Bd. of Regents*, 427 S.E.2d 257, 262 (Ga. 1993). Here, as in the Georgia case, "[b]ecause the trial court ordered the records released, the Buckley Amendment cannot trigger either of the exemptions argued by the defendants." *Id.*

> protecting the privacy of students, Congress intended to prevent educational institutions from operating in secrecy. Prohibiting disclosure of any document containing a student's name would allow universities to operate in secret, which would be contrary to one of the policies behind [FERPA]. Universities could refuse to release information about criminal activity on campus if students were involved, claiming that this information constituted education records, thus keeping very important information from other students, their parents, public officials, and the public.

Kirwan v. The Diamondback, 352 Md. 74, 91 (Md. 1997).

Beyond that, as the Ohio Supreme Court noted in rejecting use of FERPA as justification for not complying with a student newspaper's request for crime information under that state's open records act:

> Unfortunately, at present, crimes and other student misconduct are escalating at campuses across the nation. For potential students, and their parents, it is imperative that they are made aware of all campus crime statistics and other types of student misconduct in order to make an intelligent decision of which university to attend. Likewise, for students already enrolled in a university, their safety is of utmost importance. . . . By our decision today, we believe we are following the dictates of R.C. 149.43, which is to foster openness and to encourage the free flow of information where it is not prohibited by law.

Ohio ex rel. The Miami Student, 680 N.E.2d at 959; *see also Alexander*, 778 F. Supp. at 1234.

The analysis in *Bauer*, 759 F. Supp. at 591, fits here:

> [A]n individual's enrollment at a state university should not entitle him or her to any greater privacy rights than members of the general public when the privacy interest relates to criminal investigation and incident reports. Nor could the federal

> government have reasonably intended to make university students a specially protected class of criminal suspects. This Court concludes that the records sought by plaintiff are not educational records the release of which could result in a loss of federal funding under FERPA.

Thus, the District Court correctly ordered the University to make the crime information in issue available to the *Press-Citizen*.

C. Implementation of the government's suggestion that access to public records in the possession of the University should be granted or denied based on the knowledge or identity of the requestor would violate the Act and as applied to the press would offend federal and state constitutional free press and equal protection provisions.

The University's brief argues that "[s]ince the *Press-Citizen* admits that it already knows the identity of the students involved in the sexual assault case and investigation, personally identifiable information cannot be removed and the records cannot be released even in redacted form." Br. at 25; *see also id.* at 33 (stating with regard to Category 3 Records that the "*Press-Citizen* knows the student's identity, so by definition it contains personally identifiable information."). In the University's view, FERPA regulations dictate this by defining "personally identifiable information" as "information requested by a person who the educational agency or institution reasonably believes knows the identity of the student." 34 C.F.R. §99.3. Based on this, the University states, "There can be little doubt that the intent of the federal regulations is to

prohibit release of education records when the requestor knows the identity of the students involved." Br. at 24.

Whatever the intent of the federal regulations, the University asserts they permit it to consider the identity of the *Press-Citizen* and what its journalists may or may not know about the subjects of requested records and, based on those considerations, choose to deny it access to records the University might elect to provide to other members of the press, including the *Press-Citizen*'s competitors. Yet, application of FERPA to prohibit release of Category 3 and 4 Records in that manner violates the Act and the free press and equal protection clauses of the U.S. and Iowa constitutions.[4]

In addition, application of the Buckley Amendment in this and similar situations would discourage narrowly tailored records requests while encouraging anonymous, broad, generic requests that require unnecessary expenditure of administrative resources. It would also have the unintended result of forcing educational institutions to engage in the formidable—if not impossible—task of tracking what they gave to who and when they did so,

[4] *See* U. S. Const. Amend I, XIV. Independent state grounds also bar the University from deciding access in this manner. *See e.g.* Iowa Const. Art. I, §6 and §7; *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004).

and how the recipient used or shared that information. For all of these reasons, FERPA cannot and should not be applied to block release of Category 3 and 4 Records.

1. Application of FERPA to prohibit release of Category 3 and 4 Records as the University requests would violate state and federal law.

To reach the question whether a person might know the identity of the student who is the subject of the records it requests, the educational institution first must know the requestor's identity. Yet protection of the anonymity of persons seeking access to public records is imbedded in Iowa law for good reason—if access is pre-conditioned on the requestor's disclosure of his or her identity, the purpose of the request or how the requested information will be used, the government can impede the exercise of access rights, discriminate among those granted public information and outright chill some persons from exercising their rights to inspect public records in the first instance.

Thus, Iowa law allows a person to request records either in writing, by telephone, or by electronic means. Iowa Code §22.3(1). Iowa law further does not condition access to public records on the requestor's willingness to provide identification. The Iowa Attorney General's advisories on openness in government laws state that records request forms "should not force requestors to identify themselves or explain why they want to examine or

copy public records." *Sunshine Advisory Bulletin* (Nov. 2003), available at http://www.iowa.gov/government/ag/sunshine_advisories/2003/november.html.

Indeed, "Public officials should not require requestors to supply *any* additional information unless it is needed to send the records by mail, or to comply with laws limiting access to certain records." *Id.* (emphasis added); *see also Quad-City Cmty. News v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971) (holding that once police records were disclosed to persons outside the police department, defendants could not withhold the same reports from an underground newspaper on ground such reports were confidential under the Act); *Ne. Council on Substance Abuse, Inc. v. Iowa Dep't of Pub. Health, Div. of Substance Abuse*, 513 N.W.2d 757, 761 (Iowa 1994) ("We reject NECSA's contention that release of the applications should depend on the status of the party seeking them. Such a procedure is impracticable and is nowhere supported by statutory language."); *Head v. Colloton*, 331 N.W.2d 870, 877 (Iowa 1983) ("If public access is available at all under [the Act], it is right of general public access. The statute does not permit the singling out of one member of the public for special access on special terms.").

Recapping this law in a case involving a newspaper's request for access to police information, the Court in *Hawk Eye*, 521 N.W.2d at 754 (citations omitted), stated:

> Release of the report does not depend on the status of the party seeking it. The newspaper has the same right of access as any member of the general public. It is in that representative capacity that its interest in disclosure must be evaluated.

Likewise, in interpreting the federal equivalent of the Act, the U.S. Supreme Court consistently has held that "withholding information under [the Freedom of Information Act] cannot be predicated on the identity of the requester." *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 170 (2004). More broadly, the Court routinely rejects laws and regulations that favor one speaker over another.

Indeed, in a recent high-profile decision on campaign finance law, the Court stated that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others. . . . *Speech restrictions based on the identity of the speaker are all too often simply a means to control content.*" *Citizens United v. Fed. Election Comm'n*, __ U.S. __, 2010 WL 183856, *19 (Jan. 21, 2010) (emphasis added); *see also Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").

Thus, although the *Press-Citizen* voluntarily disclosed its identity in requesting the records at issue, it did not need to do so and should not be

punished for its own openness. And, if the lesson from this case is that the government may use a requestor's identity as grounds to deny access to public records, then its effect will be to increase the number of anonymous requests made through straw men such as law firms. In other words, application of FERPA in this case will not better protect the privacy of students—it will merely force journalists to hire intermediaries to request records on their behalf, thereby further straining the budgets of financially strapped newsrooms.

An even bigger problem follows from reliance on a person's identity or motivation as grounds to deny access to what otherwise are public records. Under the equal protection clause, a record open to one must be open to all. *See Quad-City Cmty. News*, 334 F. Supp. at 11. There, the court held such discrimination against a member of the press based on its status presented "an obvious case of denial of equal protection of the law in violation of the Fourteenth Amendment of the federal Constitution." *Id.* at 15.

In doing so, the court subjected the classification of "legitimate" and "illegitimate" media to strict scrutiny and found defendants could not show that the classification was necessary to promote a compelling governmental interest. *Id.* It also rejected the argument that because disclosure of the record

was discretionary in the first place the defendants could choose among those to whom access would be permitted. *Id.* at 15–16.

Further support that such unequal treatment is impermissible follows from how the Supreme Court often considers equal protection issues as they apply to freedom of speech or of the press in the context of content-based restrictions on access to public places. The Court repeatedly has held that once the government grants the public access to a particular place, it cannot discriminate against individuals by denying them the same right of access others are afforded. *See, e.g.*, *Police Dept. v. Mosley*, 408 U.S. 92 (1972) (invalidating city ordinance that restricted picketing; stating that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

Although the Supreme Court has not expressly extended this rationale from public *places* to public *records*, the same analysis applies, and to hold otherwise would enable the government to silence those with whom it disagrees merely by cutting off their access to vital information. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) ("[C]ontent discrimination 'raises the specter that the government may effectively drive certain ideas or

viewpoints from the marketplace.'" (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991))).

FERPA regulations ignore this equal protection requirement to any extent that they allow or require the University to "read the mind" of the *Press-Citizen* and, based on the subjective judgment of a state employee, deny it a document that might be freely disclosed to another.

Finally, the Court consistently has held that neither the press—nor certain members of the press—can be singled out for special regulation or restrictions. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 475 U.S. 575, 591 (1983) ("Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers."); *see also Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974), *cited in Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 735 n.2 (2d Cir. 1985) ("The [*Saxbe*] Court's approach strongly suggests that if the Bureau of Prisons decided to afford the general public broader access to inmates, it would have to permit the press the same degree of access even though the broader access was not constitutionally mandated.").

The Second Circuit extended *Minneapolis Star* outside the taxation context in *Legi-Tech, Inc. v. Keiper*, which involved a state bill tracking

service. New York allowed certain members of the news media to subscribe to the service, but prohibited Legi-Tech, owner of a competing service, from subscribing. The court found that "[r]ather than seeking special access in addition to that enjoyed by the public, Legi-Tech [sought] access equal to that offered the public," and held that even if general access to the service was not constitutionally mandated, "discriminatory denial of access to an organ of the press" may still affect First Amendment rights. 766 F.2d at 734; *see also McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951) ("[C]learly the refusal of the defendants to accord the plaintiffs their right of inspection while granting such right to a competitor . . . constitutes a denial of equal protection of the laws.").

Just as deferential treatment of members of the press raised constitutional problems in *Minneapolis Star* and *Legi-Tech*, applying FERPA so that a university may decide on a case-by-case basis which citizens or journalists should have access to certain records raises constitutional problems. Although FERPA instructs educational institutions to consider only what a requestor *knows* in deciding whether to release certain records, a real possibility exists that these educational institutions will consider what a requestor *has said or may say*.

In other words, allowing a university to withhold records based merely on a unilateral, conclusory decision that a requestor already knows "too much" provides it with a tool to covertly but unfairly discriminate against journalists it believes have been injudicious in their reporting of public events. As such, application of FERPA in this case would violate long-established case law by giving government officials unbridled discretion to discriminate against speakers under pretext of protecting student privacy.

2. Allowing government to withhold records based on the identity of the requestor or the nature of the request would breed inefficiency and would not effectively protect student privacy.

Application of FERPA in this case would violate state and federal law, and for that reason alone the Court should reject the University's attempt to restrict access to the Category 3 and 4 records. In addition, use of the Buckley Amendment in the manner urged by Appellant would have unintended and negative practical consequences, which perhaps can best be considered in the context of scenarios addressed by the U.S. Department of Education (the "Department") itself.

In a hypothetical that the University quotes *verbatim* at page 23 of its brief, the Department creates a scenario in which rumors circulate that a political candidate who graduated from a certain university in 1978

plagiarized other students' work, causing a local reporter to ask the university for redacted disciplinary records (as contrasted with law enforcement information) for students graduating in 1978 who were disciplined for plagiarism. The Department asserts that a school may not release the records in redacted form because "the circumstances indicate that the requestor has made a targeted request."

The practical problem with this result, however, is that once journalists realize that a narrow request reduces their chances of obtaining records, they simply will make overly inclusive, labor-intensive requests, and will decline government requests to tailor them. In this hypothetical, for example, a journalist might request *all* disciplinary records over a *ten-year* period, broken down by year and cause for discipline. Such a request might effectively veil the journalist's intent in seeking the records and would require the university to gather and produce a great deal more information than the journalist actually wants, yet it would do nothing to safeguard the privacy of the political candidate. Applying FERPA to encourage this gamesmanship while discouraging cooperation between journalists and public record custodians is unworkable and unwise.

To continue the hypothetical, suppose the journalist's broad request is not a ploy at all—she cares nothing about whether the political candidate was

disciplined for plagiarism; rather she is investigating how views of cheating at the local university have changed over the years. Further, suppose the university misunderstands the journalist's intent and incorrectly surmises she is seeking information about the political candidate. It therefore provides the records but refuses to break them down by year or cause for discipline.

As a result, the journalist cannot write an important, newsworthy report because she has no statistical information upon which to rely. To add yet another twist, suppose the journalist requests these records several years after the election, after the candidate has retired from public service and is out of the public eye. However, the university remembers the rumors and believes that the journalist may, as well. Could it still decline to release the requested information and thereby prevent—forever—the journalist from writing about cheating trends? Or does information that is private one year become public years later, once people cease to care about it?

FERPA does not answer these questions. Under the University's suggestion, the Buckley Amendment simply gives it unbridled discretion to guess at the "target" of a journalist's request and, upon finding that target impermissible, deny access to information that is sought for an altogether independent reason. It would give government editorial discretion to decide

when a news item has gone stale so that newsworthy information private on one day may be released on the next.

This is not permissible.

Now, consider the case where a university denies records to a requestor because of what it believes he has learned from records disclosed in response to prior requests. The Department considered this scenario in a 2004 letter to Miami University, which Appellant cites at page 18 of its brief. In that letter, the Department described three requests a Cleveland television station submitted to Miami University and stated "your planned decision to release redacted copies of incident reports and victim statements relating to certain disciplinary proceedings . . . would not comply with FERPA." It continued:

> While the redaction of these items of information . . . may generally be sufficient to remove all "personally identifiable information" under FERPA . . . the facts are clearly different here because the university has already disclosed other documents to Channel 8 that contain information that you state will make the identities of student victims and witnesses easily traceable. As we have advised previously, redaction of nominally identifying information may not be sufficient to prevent a student's identity from being easily traceable . . . with respect to a series of requests for information that make a student's identity easy to trace due to the disclosure of related information.

LeRoy S. Rooker, Director, Family Policy Compliance Office, *Letter to Miami University re: Disclosure of Information Making Student's Identity*

Easily Traceable (October 19, 2004) at p. 6, available at http://www.ed.gov/policy/gen/guid/fpco//ferpa/library/unofmiami.html.

What this analysis overlooks, however, is the limited ability of educational institutions to track a requestor's identity, much less how the requestor is using and sharing the records it receives. As discussed above, if a journalist believes his identity will be used against him, he may make his request anonymously, perhaps through a law firm, and for serial requests he might use several law firms.

Alternatively, news organizations might join together so that the local newspaper requests records under one set of parameters, the local television station requests records under another set of parameters, a national service uses a third set of requests and the organizations pool whatever records they receive. Even assuming the records produced in response to each request did not identify any students, their cumulative effect may allow the news organizations to link the information to students' names. Requiring this method of newsgathering imposes undue burden on the press without advancing the privacy interests the University asserts underlie its secrecy argument.

Thus, to use the Department's language, whether journalists use straw men or quietly exchange records, a university could not know if a student's

identity were revealed "through a series or combination of requests that are available to *those in possession of the data*." *Id.* at 4. With the FERPA rules so easily circumvented and rendered ineffective—allowing journalists to obtain indirectly what they cannot secure directly—they should not be applied here to override the Act.

Finally, faced with the complications of straw men or partnerships among journalists, a university might decide that it simply will not produce records to a law firm or news organization if reading those records in conjunction with records already produced to *another* law firm or news organization might lead to disclosure of personally identifiable information. But this, of course, would result in a race to the records department: the first journalist to make a request would get a response, while his competitors would be denied—perhaps forever—simply because they asked for records under a slightly different rubric. That result is indefensible as a matter of equal protection.

Further, the University's suggestion that access decisions should be based on government's judgment of what a requester may learn from records based on what that person already knows, disregards the obvious:

> FERPA does not protect information which might appear in school records but would also be "known by members of the school community through conversation and personal contact."

> *Frasca v. Andrews*, 463 F. Supp. 1043, 1050 (E.D.N.Y.1979). "Congress could not have constitutionally prohibited comment on, or discussion of, facts about a student which were learned independently of his school records." *Id.*

Daniel S. v. Bd. of Educ. of York Cmty. High Sch., 152 F.Supp.2d 949, 954 (N.D. Ill. 2001).

In sum, application of FERPA in the manner urged by the University would violate the Act and the free press and equal protection clauses of the U.S. and Iowa constitutions. If the Court were to so apply FERPA, journalists and others seeking public records will find legal but effective ways to fly under its radar. The University will not further student privacy, but it will impede newsgathering and timely dissemination of important information to the public that the *Amici* seek to serve.

CONCLUSION

For the reasons stated in the District Court Rulings, Appellee's Brief, and here, the District Court correctly ordered the release of public records in the possession of The University of Iowa to the Iowa City *Press-Citizen*. Accordingly, the District Court's Rulings should be affirmed.

Dated: March 5, 2010.

Respectfully submitted,

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***Pro hac vice* motion pending

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies:

1. This Brief of *Amici Curiae* The Iowa Freedom of Information Council, Des Moines Register & Tribune Company, Iowa Newspaper Association, The Reporters Committee for Freedom of the Press, Gazette Communications, Inc. and The Associated Press complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because according to the software described below this brief contains 6,869 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g). (This number is within the 7,000 word count permitted for *amicus* briefs under Iowa R. App. P. 6.903(1)(g) and 6.906(3)).

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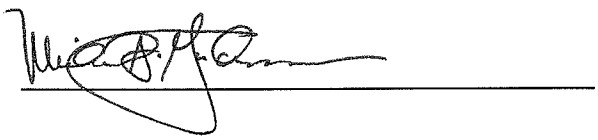
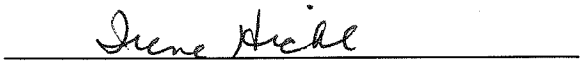


CERTIFICATE OF FILING

The undersigned hereby certifies that on the 5th day of March, 2010 he/she will file by personally delivering 18 true copies of this Brief of *Amici Curiae* The Iowa Freedom of Information Council, Des Moines Register & Tribune Company, Iowa Newspaper Association, The Reporters Committee for Freedom of the Press, Gazette Communications, Inc. and The Associated Press to the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, 50319, in accordance with Iowa Rule of Appellate Procedure 6.31.



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The undersigned hereby certifies that in compliance with Iowa Rule of Appellate Procedure 6.31, he/she served the foregoing Brief of *Amici Curiae* The Iowa Freedom of Information Council, Des Moines Register & Tribune Company, Iowa Newspaper Association, The Reporters Committee for Freedom of the Press, Gazette Communications, Inc. and The Associated Press this 5th day of March, 2010 by mailing (via U.S. Mail) two (2) true copies of it with full postage prepaid to each of the following attorneys of record at the addresses shown:

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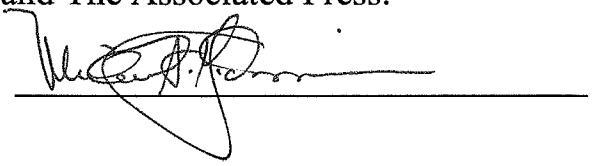
The undersigned certifies the actual cost of reproducing the necessary copies of the preceding Brief of *Amici Curiae* The Iowa Freedom of Information Council, Des Moines Register & Tribune Company, Iowa Newspaper Association, The Reporters Committee for Freedom of the Press, Gazette Communications, Inc. and The Associated Press was $ 260.87 and that amount has been paid by the attorneys for *Amici Curiae* The Iowa Freedom of Information Council, Des Moines Register & Tribune Company, Iowa Newspaper Association, The Reporters Committee for Freedom of the Press, Gazette Communications, Inc. and The Associated Press.



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