

Buckley Amendment

INTRODUCTION

Questions have been raised on a number of CSU campuses about the legal propriety of entering into arrangements with banks or other financial institutions which offer affinity cards to alumni, students and/or staff. This is a common mechanism used by colleges and universities across the country to raise significant money to support a variety of their operations.

In California, the CSU is in a unique and generally unfavorable position with respect to these arrangements because of the peculiarities of the law. The recent legislation obtained, which exempts the CSU from being grouped together with all other state agencies, will be extremely important in avoiding such issues in the future. It does not, however, impact the statutes discussed below.

There are some short and long term solutions to be considered to provide some relief for this situation. Ultimately, each campus will have to decide its willingness to undertake the risks presented.

FERPA

The Family Educational Rights and Privacy Act (20 U.S.C. Section 1232g) (commonly referred to as FERPA or the Buckley Amendment) is a federal statute applicable to every institution which receives federal funds. It protects students (and former students) from the release of information about them, including their names and addresses. Every institution which receives federal funds faces a FERPA hurdle in connection with affinity card agreements, but there is an exception which, so long as certain conditions are met, permits the transfer of lists of names and addresses.

FERPA allows the disclosure of “directory information” (which can include names and addresses), so long as: 1) the University provides public notice of the type of information that it intends to treat as “directory”; 2) students are provided an opportunity to object to having their own information disclosed; and 3) students are given a reasonable time to notify the University that they do not wish to have their information disclosed, in which case it cannot, of course, be included in any “directory.”

CSU campuses commonly meet these three requirements, and some release “directory information” for a variety of purposes. So long as the three requirements are met, FERPA does not pose an obstacle to entering into an affinity card arrangement which calls for the CSU to release lists of names and addresses of those students who have not objected to having their information disclosed.

Interestingly, the federal regulations exempt alumni from the three requirements applicable to students for the release of “directory information.” There is no clear logic for this exemption. Presumably it results from an assumption that while enrolled as students, alumni would have had the opportunity to object to the disclosure of their information, and therefore a further opportunity should not be required. That assumption, of course, may, or may not, be correct.

INFORMATION PRACTICES ACT

The Information Practices Act (California Civil Code Section 1798 et seq.) is a statute applicable to California state agencies which prohibits the disclosure of “personal information” without the prior written consent of the individual to whom it pertains. It is premised on an expressly stated legislative concern that public agencies do not sufficiently protect the “personal information” provided to them by their constituents:

“The right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies.”

“The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information.”

“In order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits.” (Civ. Code Section 1798.1)

“Personal information” is very broadly defined in the statute and includes:

“Any information that is maintained by an agency that identifies or describes an individual, including his or her name, home address, home telephone number,” [Emphasis added] (Civ. Code Section 1798.3(a))

In a separate section of the statute, the distribution of names and addresses for commercial purposes is expressly prohibited¹, except where specifically authorized by law:

“An individual's name and address may not be distributed for commercial purposes, sold, or rented by an agency unless such action is specifically authorized by law.” (Civ. Code Section 1798.60)

There is no guidance as to how the prohibitions in the statute are to be interpreted together. Hence, there is an argument that prior written consent overcomes the sale of names and addresses. But this is a rather dubious interpretation. Out-of-state and in-state private institutions are not governed by the Information Practices Act and do not have to consider its

¹ Commercial purpose is defined as any purpose which has financial gain as a major objective. (Civ. Code section 17198.3(1))

restrictions.²

Specific legislation would be the best solution for the CSU to overcome this statute. Since other private institutions are permitted to do this in California, and it has become common throughout the nation, there does not appear to be any principled reason why the CSU should not be on an equal footing with its sister institutions, particularly in these times when the legislature has encouraged the CSU to become entrepreneurial. If legislation were to be introduced this session, even on an emergency basis, it would not take effect until Spring at the earliest.

Given the CSSA opposition to the one-card possibility, it is likely that any such legislation will be opposed.

As a short term solution in the meantime, to the extent that lists of names and addresses have already been provided to auxiliary organizations consistent with the requirements of the Information Practices Act, those auxiliaries are not agencies of the state and therefore are not limited by the prescriptions of the Act. A new transfer of lists to auxiliaries in an effort to circumvent the law is problematic. Any transfer would have to fit within an exception in the Information Practices Act.

Finally, if a campus has created a directory in accord with the FERPA exception described above, it is a public document and the information in it is therefore available to the public generally, including both auxiliary organizations and outside banking institutions. If a bank wants to enter into an agreement with an auxiliary or the CSU to gain information that is contained in a public directory, the Information Practices Act is not a bar to that arrangement.

TITLE 5

Section 42396.2(d) of Title 5 confirms the fundamental right to privacy in California and states an intent to implement it within the CSU. That section then goes on expressly to prohibit the transfer of “personal information” outside the CSU except where “compatible with the disclosed purpose for which it was collected.” “Personal information” is defined in this context broadly to include “any record of information which is retrieved by the name of a person or by some identifying particular assigned to the person.” Since it is unlikely that campuses have disclosed to constituents the possibility that information about them might be provided to outside purveyors for credit card solicitations, they will either have to begin to provide that information, or adjustments to this broad language in Title 5 will be required.

² We are Informed that even though private Institutions In California are not governed by this law, some (including USC) do not sell lists of current students because they regard it as inappropriate as a matter of policy. We are also Informed that even though other public Institutions in California are governed by this statute, some (including some UC campuses) Ignore its provisions on a don't ask, don't tell basis.

CONCLUSION

Policy considerations need to be weighed in connection with any direction the campuses may choose with respect to this issue. Legislation and changes in Title 5 appear to be the best long term solution to bring affinity card arrangements within the law.