



April 20, 2020

M. Roy Wilson
Office of the President
Wayne State University
56 W. Kirby
4200 Faculty/Administration Building
Detroit, Michigan 48202

Sent via Electronic Mail (president@wayne.edu)

Dear President Wilson:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned by Wayne State University's ongoing misinterpretations of the Family Educational Rights and Privacy Act (FERPA) as applied to Professor Barrett Watten. As we are routinely called upon to provide expertise and insight into the interpretation of FERPA, we write to supplement the July 3, 2019 memo written by Watten's counsel, Mark Clark of Traverse Legal, with additional information that you may find useful in developing your understanding of the law as it applies to the circumstances here.

None of Watten's activities violate FERPA. Accordingly, WSU's repeated wrongful invocations of FERPA amount to censorship incompatible with WSU's obligations, both as an academic institution and as a public entity bound by the First Amendment. Worse still, these actions suggest some Wayne State administrators have a limited understanding of FERPA's scope and implementation, potentially subjecting all faculty and students to interpretations that violate the First Amendment.

Whatever resolutions Wayne State seeks to achieve on the outstanding issues, it must stop abusing FERPA to achieve them. Please share the following information with Wayne State staff and encourage them to seek clarification on future novel interpretations of FERPA before implementing them.

I. Wayne State's FERPA Allegations Against Watten

The July 3, 2019 letter by Mark Clark of Traverse Legal is attached; please consider the facts listed there as incorporated by reference. If you have additional facts, we would welcome that information and invite you to share it with us, to the extent permitted by law. Barring some substantially different factual grounding, however, none of Watten's activities are prohibited by FERPA.

Specifically, Wayne State has alleged the following:

1. Watten violated FERPA by requesting a copy of a student's thesis from a prior institution for the purpose of determining whether the student had re-submitted work from his Master's degree for his Ph.D.
2. Watten violated FERPA by sharing a student's in-class worksheet with a visiting Ph.D student outside of class.
3. Watten violated FERPA by discussing a student-led campaign against him in Facebook posts that shared his personal experiences with some of the students involved; the students were not named.

None of these interpretations, which we take in turn below, are accurate.

II. It Does Not Violate FERPA To Request Coursework From a Prior Institution For a Legitimate Educational Purpose

Wayne State has alleged that Watten violated FERPA by requesting a copy of a student's thesis from a prior institution for the purpose of determining whether the student violated Wayne State policy by reusing work submitted for a prior degree. This is not a correct interpretation of FERPA.

Attorney Clark's key points, from his enclosed letter, are correct: To the extent there could even potentially be a FERPA violation here, it would have been committed by [REDACTED], the institution disclosing the thesis to Watten. Even then, the disclosure would have to be part of a "policy or practice" and not an isolated event.

Watten's actions do not violate FERPA for at least three additional reasons.

- A. Structurally, no one can violate FERPA with respect to a record they do not possess.***

As Attorney Clark explained, [REDACTED], not Watten, is the entity with an obligation to protect the education records of [REDACTED]. There is a related, but slightly different, point that bears underscoring: Nothing can become a FERPA record with respect to a specific

institution until it is *maintained* by an institution or its agent(s).¹ Maintenance requires possession; that possession need not be physical (for example, it could be in a cloud-based database), but possession does need to temporally precede the vesting of FERPA rights.²

This point is crucial to understand, both because it explains how the alleged violation here is impossible, and because it is an essential part of determining when FERPA properly applies in general. Watten is accused of violating FERPA by requesting a record from another institution. Our analysis of FERPA must begin, as always, with: Does the record meet the definition of an “education record?”³ That definition requires that the document be “preserved or retained” by the entity or agent alleged to have the FERPA obligation.⁴ Watten did not, at the moment of the request, “preserve or retain” the document, as he did not possess it; therefore, it is not an education record with respect to him. At that time, it is not *any* kind of a record with respect to him, because he does not have it.

Once Watten receives a record, it could hypothetically become an education record if later incorporated into a student file in some way (e.g., used as part of a disciplinary proceeding). But until that obligation attaches, Watten is incapable of violating FERPA with respect to that specific document.⁵ Interpretations of the statute that fail to understand this are categorically wrong, and Wayne State will find itself consistently acting outside the scope of the law until it cabins its understanding to the mechanics of the statute.

The specific action alleged to have violated FERPA here—a request for a record—can *never* violate FERPA, because no one can “maintain” a record they do not possess, and FERPA does not apply unless you “maintain” the record. It is possible for *fulfillment* of such a request to violate FERPA *with respect to the institution with a custodial obligation*; that determination must be made by the custodial institution.⁶

B. The implementing regulations authorize inter-institutional disclosures between former and present educational institutions.

Watten did not violate FERPA through these actions because each is contemplated and permitted under FERPA’s authorizing regulations. FERPA’s regulations explicitly permit the disclosure of records from a former school to one where the student is already enrolled “so

¹ 20 U.S.C. § 1232g(a)(4)(A)(ii); 34 CFR § 99.3 (definition of “Education Records”).

² See *Owasso v. Falvo*, 534 U.S. 426, 427 (2002) (“That word’s ordinary meaning is to preserve or retain.”).

³ 20 U.S.C. § 1232g(a)(4)(A)(i) and (ii); 34 CFR § 99.3 (definition of “education record”).

⁴ See *id.* and *Owasso*, 534 U.S. at 427.

⁵ As we will review *infra*, this specific argument that Wayne State seems to be putting forth—that records an institution anticipates maintaining should be considered education records before they’re maintained—was used by the Tenth Circuit in the *Owasso* case and was precisely the rationale wholly rejected by every member of the Supreme Court. *Owasso*, 534 U.S. at 426.

⁶ See *supra* n. 27 and accompanying text for why third parties are functionally incapable of accurately determining the FERPA obligations of an unrelated institution.

long as the disclosure is for purposes related to the student’s enrollment or transfer.”⁷ These regulations also permit the disclosure of education records to other school officials within the same institution when they “have legitimate educational interests.”⁸

As you know, unauthorized reuse of work product is an enumerated violation of the Wayne State Student Code of Conduct, and the potential sanctions include expulsion.⁹ Wayne State requires “faculty, staff, and students to comply with university policies at all times.”¹⁰ Watten’s interest was not only legitimate—it was mandated by your own rules.¹¹

FERPA envisions and accommodates such rules. The specific regulation authorizing the inter-institutional transfer of records, 34 CFR § 99.31(a)(2), was amended in 2008 to include institutions in which a student is already enrolled. The Department of Education discussed the purpose of this amendment in announcing the change:

The regulations are intended to eliminate uncertainty about whether, under § 99.31(a)(2), an educational agency or institution may send education records to a student’s new school even after the student is already enrolled and attending the new school. **The requirement that the disclosure must be for purposes related to the student’s enrollment or transfer is not intended to limit the kind of records that may be disclosed under this exception.** Instead, the regulations are intended to clarify that, after a student has already enrolled in a new school, the student’s former school **may disclose any records or information**, including health records and information about disciplinary proceedings, **that it could have disclosed when the student was seeking or intending to enroll in the new school.**¹²

In other words, 99.31(a) is not a limitation on the use of records for purposes of enrollment or transfer; it is a reflection that anything that could be transmitted at the time of transfer or enrollment can be transmitted at any time thereafter. It would be surprising if Wayne State did not look at prior educational work before enrolling someone in a graduate program. 99.31(a) is therefore satisfied.

⁷ 34 CFR § 99.31(a)(2). If the only purpose of this exception was to determine one-time enrollment eligibility, it would not apply to schools where the student is already enrolled.

⁸ 34 CFR § 99.31(a)(1)(i)(A).

⁹ See *Student Code of Conduct*, WAYNE STATE UNIV., Jan. 27, 2017, <https://doso.wayne.edu/pdf/student-code-of-conduct.pdf>, at 2.11 (“Unauthorized Reuse of Work Product”), 5.8 (“Expulsion”), and 13.0 (“Procedure in Academic Misbehavior Cases”).

¹⁰ University Policies, WAYNE STATE UNIV., <https://wayne.edu/policies/>.

¹¹ Had Watten ignored the policy, he could have been subject to discipline on that basis as well. Surely it cannot be Wayne State’s position that employees are expected to anticipate which policies should be ignored, especially when the university’s basis for that determination has an insufficient basis in legal fact.

¹² 73 Fed. Reg. 74806, 74818 (emphasis added).

The contrary interpretation would lead—and has led—to illogical interpretations of Wayne State’s own policies. In an internal memo concerning the application of Wayne State policy to the student, Caroline Maun, Associate Professor and Interim Chair of English, stated that she would “not support any grade change that used this improperly obtained MFA thesis as evidence.”¹³ The conclusion that the thesis was improperly obtained led Maun to restrain Watten’s academic freedom by preventing him from issuing grades;¹⁴ that conclusion, as explained above, is also incorrect.¹⁵ If Maun’s reading of the policy were correct, Wayne State could only enforce it against students bold enough to submit work twice to the same professor, because any other enforcement would require engaging in a FERPA violation.

C. Extrinsic evidence indicates that there may have been consent for the disclosures.

One of the logical problems with Wayne State declaring that another institution’s records have been improperly disclosed is that Wayne State is not in a position to know what agreements another institution has executed, or where that institution’s records have been distributed.¹⁶

In this specific instance, the thesis in question has already been disseminated to an external library, OhioLINK. OhioLINK is a division of the Ohio Department of Higher Education that functions as an inter-institutional library.¹⁷ In the section for Electronic Theses and Dissertations (ETD), the work in question is listed, though full text release has been delayed until [REDACTED]—long after the same work will have earned the student a degree from your institution.¹⁸

¹³ Memo from Caroline Maun, Associate Professor and Interim Chair of English, Wayne State University, to Stephanie Hartwell, Dean of the College of Liberal Arts and Sciences, Wayne State University (March 13, 2019) (on file with author).

¹⁴ The right to issue a grade is an essential part of the academic freedom of faculty members. *See generally* *Contours of Academic Freedom*, AAUP, <https://www.aaup.org/i-need-help/workplace-issues/contours-academic-freedom> (last visited Apr. 14, 2020).

¹⁵ Even if, for the sake of argument, we suppose that the thesis was improperly obtained under FERPA, FERPA is not a generalized privacy right that gives rise to downstream (or “fruit of the poisoned tree”) problems. FERPA is no more than a mechanical limitation on policymaking by member institutions.

¹⁶ The central theme of Wayne State’s characterization of [REDACTED] activity—see *infra* note 26 and accompanying text—is that [REDACTED] is an unreliable custodian of student records, such that their decision to disclose records cannot be trusted; yet [REDACTED] may still be fully relied upon to report when and how they disclosed student records, such that Wayne State can draw legal conclusions about the implications of those decisions. With this convenient duality, Wayne State can reinforce whatever conclusion it wants to reach by sorting facts into one category or the other.

¹⁷ *See generally* *Frequently Asked Questions*, OhioLINK, https://www.ohiolink.edu/content/frequently_asked_questions (last visited Apr. 14, 2020). That Miami University helped found OhioLINK does not make it an identical institution for FERPA purposes.

¹⁸ [REDACTED] Whether an embargo to a third-party library exists is irrelevant for the purpose of noting that the dissertation has already left the

OhioLINK, however, is not an entity authorized to handle student education records *without* prior written consent under FERPA.¹⁹ Accordingly, *some* form of authorization must have been obtained to make such a disclosure, and it would not be unusual if that authorization included broader disclosure rights. While ordinarily we would turn to the written consent to determine the scope of an authorized disclosure, written consent is not necessary in the context of a thesis.

D. Written consent is not required to make a thesis available to the public.

A thesis is an atypical education record in that publication is not only envisioned, but in many cases mandatory. The only entity authorized to enforce FERPA has recognized this fact by stating that making a thesis publicly available in a library does not require written consent.

The Family Policy Compliance Office (renamed in 2017 to the Student Privacy Policy Office) of the Department of Education has overseen the administration of FERPA for decades. As LeRoy S. Rooker—who served director of that office for more than twenty years²⁰—observed in a 1993 opinion letter, a thesis is routinely disseminated:

However, while these documents are clearly “education records,” [. . .] we recognize that undergraduate and graduate “theses” often differ in nature from typical student research papers and other education records, such as written examinations, in that they are published or otherwise made available as research sources for the academic community through the institution’s library.

[. . .]

Consequently, **an institution need not obtain a student’s signed and dated specific written consent to disclose or publish a thesis in the library or elsewhere at the institution.** Neither the statute, the legislative history, nor the FERPA regulations require institutions to depart from established practices regarding the placement or disclosure of student theses **so long as students have been advised in advance that a particular undergraduate or graduate thesis will be made publicly available as part of the curriculum requirements.**²¹

hands of the institution. That distribution to a third party, even if not yet distributed to the broader public, must be pursuant to some form of consent or agreement.

¹⁹ See generally 34 CFR § 99.31 (listing disclosures that do not require authorization).

²⁰ See generally LeRoy S. Rooker, LINKEDIN, <https://www.linkedin.com/in/leroy-rooker-8a512770>.

²¹ As cited in the American Library Association Washington Office Newslines, Vol. 2, No. 37 (Sept. 8, 1993), <http://serials.infomotions.com/alawon/alawon-v2n37.txt> (emphasis added). FPCO opinion letters have been inconsistently maintained and released; a Freedom of Information Act request may well dislodge one from the Department’s grasp, a few years from now.

Rooker subsequently clarified for *The Chronicle of Higher Education* that, as summarized by the reporter, “written permission was not needed to place theses in libraries as long as students were told in advance that their papers would be made available that way.”²² ██████████ —again, the relevant institution for FERPA purposes—does inform students of this fact, repeatedly, such as in their Guide for Writing Theses and Dissertations.²³ In fact, publication of the thesis to OhioLINK is a requirement for graduation.²⁴ A different department clarifies that even if a thesis is embargoed for online publication, the hard copy enters the physical library.²⁵

In her memo, Maun states that the work was embargoed and that no hard copy was actually available.²⁶ Indeed, this could be an element that would suggest whether a student would have understood when a record became public.

But the absence of a hard copy is not, by itself, an indication that a thesis is not being distributed, particularly when this entire analysis is taking place *because the thesis was distributed* to Watten and OhioLINK. To argue that the thesis, which has been distributed, should not have been distributed, because it is not distributed, is a counterfactual thought exercise. Furthermore, the embargo seems addressed specifically to OhioLINK; it is not clear in what way ██████████ is bound by it.²⁷

E. Nothing about the thesis acquisition violated FERPA.

Far from a FERPA violation, Watten’s efforts to obtain the student’s Master’s thesis fall somewhere between enforcement of Wayne State’s academic integrity policy and an inter-library loan. FERPA’s regulations authorize disclosures for the specific purpose in which Watten engaged. It is not entirely clear what consent was given to distribute the work, since in

²² Scott Jaschik, *About Those Student Theses? Never Mind*, CHRONICLE OF HIGHER EDUCATION (Sept. 15, 1993), <https://www.chronicle.com/article/About-Those-Student-Theses-/92551>.

²³ ██████████

Memo from Caroline Maun, Associate Professor and Interim Chair of English, Wayne State University, to Stephanie Hartwell, Dean of the College of Liberal Arts and Sciences, Wayne State University, March 13, 2019, on file with author.

²⁷ Note that Maun’s rationale swallows itself. Maun seems to be predicating her argument on the theory that ██████████ has an agreement with the student that changes the basic understanding of the ability to disclose a thesis. If such an agreement existed, however, it would be an education record. If soliciting the thesis was a violation, then soliciting the substance of the agreement is also a violation (as information from a record maintained by an institution that pertains to an identifiable student is protected by FERPA). By Maun’s rationale, then, she should not be able to restrict Watten’s academic freedom or disciplinary discretion, as her own investigation is nothing but “poisoned fruit.” If, on the other hand, her investigation was a justifiable attempt to determine if Wayne State’s rules were violated, then she stands precisely in Watten’s shoes.

the case of a thesis any such consent need not be recorded, but it is clear that *some* authorization has been provided to [REDACTED], and Wayne State lacks the information necessary to ascertain the scope of that consent. To the extent Wayne State seeks to characterize this transaction as a FERPA violation, it should direct those concerns to the Senior Associate Registrar and General Counsel of [REDACTED], who would be responsible, and not Watten, who cannot be.²⁸

To the extent Wayne State seeks to accuse Watten of some sort of FERPA-adjacent wrongdoing, FIRE is curious to know where in law it believes such an offense exists.

III. It Does Not Violate FERPA to Share Ungraded Class Exercises, Especially When Health and Safety Concerns Are Implicated

Wayne State has also accused Watten of violating FERPA by sharing an ungraded class worksheet with another Ph.D student outside of class.²⁹ This is not a correct interpretation of FERPA.

Once again, Attorney Clark’s key point is correct: This form of peer review does not violate FERPA. FERPA does not now—and has not ever—protected ordinary, ungraded coursework. As a review from its inception to the Supreme Court’s *Owasso Independent School District v. Falvo* decision will underscore, the debate about when to attach the label “education record” has centered around whether it attaches when the grade is *received* or the grade is *recorded*.³⁰ At no point has it ever applied to work that is merely *submitted*.

This is because FERPA’s prohibition on distribution is coextensive with the obligation it imposes on institutions to permit access and hold hearings when requested by an eligible student to determine if the record must be corrected. FERPA has exactly one definition of an education record, and everything within its ambit both binds the institution to privacy and obligates it to an iterative process of correction at the election of the student.³¹

²⁸ [REDACTED]

While it is not necessary to delve deeply into this analysis, given that general classwork is not protected by FERPA, the document in question was a creative writing handout circulated among class members. Other students discussed the work and contributed feedback. Unlike even the unprotected peer-graded tests in *Falvo*, the document here is not the work of a single student, but the product of a collaborative process. It can only fulfill its educational purpose when shared. As we will discuss *infra*, the government has taken the position that FERPA should not be read to disturb “such common and longstanding teaching methods” (*see infra* note 48 and accompanying text).

³⁰ 534 U.S. 426 (2002).

³¹ As noted in *Owasso*, 534 U.S. 426, 435, these hearings must be conducted “in accordance with regulations of the Secretary,” which requires a neutral decision-maker and the opportunity to be represented by counsel. “It is doubtful Congress would have provided parents with this elaborate procedural machinery to challenge the accuracy of the grade on every spelling test and art project the child completes.” *Id.* Parents are the focus of the

It was not Congress' intent for FERPA to include classwork in that protection; it is not the Department of Education's position, or the U.S. Government's position, that FERPA includes classwork in that protection. No less an authority than the Supreme Court has rejected attempts to interpret FERPA as offering that protection. Accordingly, classwork—particularly when it is ungraded, and particularly when it originally arose in a workshop context designed to be shared—is not protected by FERPA, and its disclosure is not prohibited.

A. *FERPA's first amendment was accompanied by a joint statement clarifying that it was not intended to reach classwork.*

It was clarified in the first amendment to FERPA after its enactment that the statute was not intended to reach ordinary coursework. This is because FERPA is not merely a privacy statute, but a statute that imposes obligations on the institution that include, among other things, the right for students to demand inspection of the work and a hearing to correct errors. If FERPA included coursework, every student could demand a hearing to contest every graded item. Accordingly, from 1974 onward, general coursework has been understood to be outside the scope of FERPA.

In its original iteration, FERPA was offered as a floor amendment to the Education Amendments of 1974; that provenance left it a number of ambiguities and inconsistencies, as well as a truncated legislative history that deprived the result of context.³² Instead of a definition of “education records,” the May 1974 FERPA (so called here to distinguish it from its future iteration) relied on a laundry list of documents captured in what feels like a stream-of-consciousness:

[...] any and all official records, files, and data directly related to their children, including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background

Owasso discussion because the case's dispute took place in a secondary school. FERPA gives rights to “parents or eligible students”; all students enrolled in higher education are “eligible,” regardless of age. 34 CFR § 99.3 (definition of “eligible student”). For our purposes, we will discuss students.

³² See Joint Statement in Explanation of Buckley/Pell Amendment, 120 CONG. REC. 39862 (Dec. 13, 1974) (“Since the language was offered as an amendment on the Senate floor, rather than having been the subject of Committee consideration, traditional legislative history reports have not been available as a guide to educational institutions, to students, and to the Department of Health, Education, and Welfare in carrying out their various responsibilities under the act.”) Among the ambiguities corrected in the November amendment was that the list of covered entities was inconsistently stated throughout the act. *Id.*

information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.³³

The conjunctions and commas leave some degree of ambiguity about what was intended. On the one hand, the list explicitly includes “academic work completed;” on the other hand, a protected record must be “official” and “intended for school use or to be available to parties outside the school or school system.”³⁴

The problems with this definition were realized within months. Beyond the labyrinthine construction, a finite list enabled incentivized institutions to “game the system” by declaring that whatever record they wanted to cover up went by a different name. Accordingly, in the first amendments to FERPA, the list was replaced with the definition of “education records,” more or less as we know it today.³⁵

Since at least the November 1974 FERPA, every document within the definition of “education record” can be challenged at a hearing. “An individual should be able to know, review, and challenge information—with certain limited exceptions—that an institution keeps on him”³⁶ The covered institutions balked at the proposal; if they were obligated to provide a hearing to every parent or eligible student who didn’t like the grade received, these institutions would shortly hold more hearings than classes.

In a joint statement, Senators Buckley and Pell addressed the concerns, rejecting the idea that FERPA’s protections reached coursework:

There has been much concern that the right to a hearing will permit a parent or student to contest the grade given the **student’s performance in a course**. That is not intended. It is intended only that there be procedures to challenge the **accuracy of institutional records which record the grade which was actually given**. Thus, the parents or student could seek to correct an improperly recorded grade, but could not through the hearing required pursuant to this law contest whether a teacher should have assigned a higher grade because the parents or students believe that the student was entitled to the higher grade.³⁷

³³ 120 CONG. REC. 13,952 (May 9, 1974). The “May 1974 FERPA” was signed into law on August 21, 1974; the amendments in the “November 1974 FERPA” were signed into law on December 31, 1974.

³⁴ *Id.*

³⁵ 120 CONG. REC. at 39,862 (“In addition, the material subject to challenge is defined generally as ‘education records,’ eliminating the long list of illustrative examples contained in existing law. ‘Education records’ are described as those records, files, documents, and other materials directly related to a student which are maintained by a school or by one of its agents.”).

³⁶ *Id.*

³⁷ *Id.* (emphasis added).

To this day, it is not entirely clear whether FERPA even covers teachers' record books, precisely because they are not necessarily the "institutional records which record the grade," described above.³⁸

B. The U.S. Government in general, and the Department of Education specifically, have both stated that FERPA does not protect classwork.

The only Supreme Court case to have directly interpreted FERPA, *Owasso Independent School District v. Falvo*, arose from a recurring set of facts starting in 1997 at a school district near Tulsa, Oklahoma.³⁹ Kristja Falvo objected to the school's practice of "peer grading," where students trade papers and mark answers as the teacher calls them out, saying it "severely embarrassed her children by allowing other students to learn their grades."⁴⁰ Falvo sued, arguing the practice violated her children's Fourteenth Amendment rights and FERPA.⁴¹

On summary judgment, the District Court ruled in favor of the school district, finding there was no constitutional privacy interest and that the coursework in question did not constitute an "education record."⁴² In its ruling, the court noted that the position of the Family Policy Compliance Office, as articulated in a 1993 opinion letter, was that peer grading does not offend FERPA as the papers and grades are "not, strictly speaking, 'maintained'" by an educational agency or institution at that point.⁴³

On appeal to the U.S. Court of Appeals for the Tenth Circuit, the school district argued, based on the legislative history discussed *supra*, that Congress did not intend to include classwork within the scope of educational records.⁴⁴ The circuit court reversed the dismissal of the FERPA claim, reasoning that "education records" was sufficiently clear that it need not consider Congressional intent.⁴⁵

The Supreme Court invited the Solicitor General to express the view of the United States at both the petition and merits phases of the eventual case.⁴⁶ Accordingly, the United States filed

³⁸ See *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433 (2002) (noting that whether a teacher's grade book is an education record is "a point the parties contest and one we do not decide here").

³⁹ 534 U.S. 426 (2002), *granting cert. from* Falvo v. Owasso, 229 F.3d 956 (10th Cir. 2000); the 10th Circuit opinion articulates the facts of the case at 961–62.

⁴⁰ 229 F.3d at 962.

⁴¹ *Id.*

⁴² 146 F. Supp. 2d 1137 (N.D. Okla. 1999).

⁴³ As cited by Rhonda Leigh Wilson, *An Analysis of the Family Educational Rights and Privacy Act as Interpreted by the United States Supreme Court in Owasso v. Falvo*, 31 (Dec. 2004) (Ed.D dissertation, University of Georgia) (at https://getd.libs.uga.edu/pdfs/wilson_rhonda_l_200412_edd.pdf).

⁴⁴ 229 F.3d at 1217.

⁴⁵ *Id.* at 956, 1217.

⁴⁶ Brief for the United States as *Amicus Curiae*, *Owasso v. Falvo*, 532 U.S. 902 (2001), No. 00-1073, <https://www.justice.gov/osg/brief/owasso-indep-sch-dist-no-i-011-v-falvo-invitation> (petition brief) (hereinafter "U.S. Petition Amicus"); Brief for the United States as *Amicus Curiae*, *Owasso v. Falvo*, 533 U.S. 927 (2001), No. 00-1073, <https://www.justice.gov/osg/brief/owasso-independent-school-dist-v-falvo-amicus-merits> (merits brief) (hereinafter "U.S. Merits Amicus").

a brief at each of those stages. (For simplicity's sake, we will refer to them as the "U.S. Petition Amicus" and the "U.S. Merits Amicus," respectively.)

In summarizing the position of the U.S. government in the petition phase, the Solicitor General wrote:

The court of appeals' interpretation of the term "education records," as set forth in [FERPA], is contrary to the statutory text and framework and inconsistent with the interpretation of the Department of Education [...]. In our view, therefore, the court of appeals erred in concluding that FERPA prohibits students from grading the homework and tests of other students in the classroom.

[...]

Even if the grading student submitted the other student's paper or grade directly to the teacher, rather than handing it back to the student who produced the paper, the fact that the teacher may maintain the grade (or the student's paper) on behalf of the school, thereby making it an education record, does not mean that any grade or paper that potentially may be so maintained for the educational institution becomes an education record from its inception.⁴⁷

The U.S. Merits Amicus goes farther:

The definition of "education records" in FERPA is most naturally read as referring to records that are retained or preserved as institutional records, but not student homework or classroom work. [...] Student work like the homework and classroom tests at issue in this case are typically not kept by the teacher, let alone maintained as a school record. The fact that a particular classroom practice may disclose a grade given on a particular homework or classroom assignment does not mean that the practice violates FERPA. FERPA does not invalidate such common and longstanding teaching methods.⁴⁸

⁴⁷ U.S. Petition Amicus. Unfortunately, the Justice Department does not provide pagination in their online briefs; the quoted graf opens the Discussion portion of the brief.

⁴⁸ U.S. Merits Amicus (first paragraph following "Summary of Argument").

C. *The Supreme Court has ruled that ordinary classwork is not protected by FERPA.*

As you no doubt are aware, the Supreme Court ultimately ruled in favor of the school district in *Owasso v. Falvo*, finding that peer grading does not violate FERPA.⁴⁹ The majority opinion cabins FERPA to centralized records: “FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar, not individual assignments handled by many student graders in their separate classrooms.”⁵⁰

As is the case with many Supreme Court opinions, there is another opinion, and we may better understand the majority view (joined by eight Justices, here) by reading the explanation for why a Justice did *not* join the majority (in this case, Justice Antonin Scalia, concurring in the result). Justice Scalia explained:

I agree with the Court that peer-graded student papers do not constitute “education records” while they remain in the possession of the peer grader [. . .] I cannot agree, however, with the other ground repeatedly suggested by the Court: that education records include only documents kept in some central repository at the school.⁵¹

The centralization argument was not merely dicta; it was essential enough to the majority’s holding that Scalia wrote separately to separate himself from the eight justices that endorsed it.

D. *FERPA has an exception authorizing disclosures for health and safety “emergencies,” as rationally defined by the institution.*

Missed in the above analysis is precisely *why* Watten shared the class worksheet with a visiting Ph.D student. As the worksheet is not covered by FERPA at all, its disclosure does not violate FERPA in any event. Nevertheless, it is critical that your employees understand when FERPA permits disclosure of records to third parties for health and safety reasons. If the worksheet had been covered by FERPA, this exception likely would have applied.

Under FERPA’s regulations, institutional agents “may determine that it is necessary to disclose personally identifiable information (PII) from a student’s education records to appropriate parties in order to address a health or safety emergency.”⁵² According to Watten,

⁴⁹ 534 U.S. at 426.

⁵⁰ *Id.* at 434–35.

⁵¹ *Id.* at 436 (Scalia, J., concurring).

⁵² *When is it permissible to utilize FERPA’s health or safety emergency exception for disclosures?*, Student Privacy Policy Office, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/when-it-permissible-utilize-ferpa%E2%80%99s-health-or-safety-emergency-exception-disclosures>.

and corroborated by narratives posted by his detractors,⁵³ there were [REDACTED] concerns with the activity of some students in the class. Based on my conversations with Watten, as a result of these concerns, an unknown person called police officers to the classroom later that week.⁵⁴

Based on the environment in the classroom and the disturbing content of the worksheet itself,⁵⁵ and after raising these concerns with the department chair, Watten sought a further opinion on whether the content merited reporting to [REDACTED] authorities. He took the worksheet, which had been shared with a classroom full of students already, and shared it with one additional student who had seen the worksheet's author one day earlier, seeking to get a second opinion on whether, based on what the recipient had personally observed, the worksheet indicated the need to involve [REDACTED] officials.

FERPA envisions and authorizes such disclosures.⁵⁶ It encourages schools to take into account “the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals.”⁵⁷ If the school rationally determines that there is an “articulable and significant threat,” information from education records may be disclosed “to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.”⁵⁸ And if the determination is rational “based on the information available at the time,” the Department of Education’s regulations specify that must defer to that decision.⁵⁹

All of this is academic, as the record disclosed was never an education record. We review it only to underscore that, to the extent reasonably possible, FERPA has attempted to authorize disclosures for health and safety when based on a rational interpretation of the facts at the time. It would place Wayne State employees in an unconscionable position to direct them that, in the face of [REDACTED] and alleged deadly weapons,

⁵³ [REDACTED]

According to Watten, the police visit was connected to an unsubstantiated rumor that one student’s social media post had been intended as a threat motivated by in-classroom issues.

⁵⁵ Without recreating the content of the worksheet here, in summary, [REDACTED]

⁵⁴ 34 CFR § 99.36.

⁵⁷ *Id.* at (c).

⁵⁸ *Id.* As explained in the following sentence, whether a disclosure was actually “necessary” in the cold light of day is not the standard in this specific emergency provision, because the text protects decisions that are rational under the totality of circumstances. Accordingly, in weighing the actions of its employees under this FERPA exemption, the correct question is not “was the determination of necessity *correct*,” but “was the determination of necessity *irrational*.” If the disclosure advances understanding of the situation in a useful way, it is not irrational to think it is necessary, even if it’s later proven there were alternatives.

⁵⁹ *Id.*

the only two options for helping the student are “total silence” or “removal [REDACTED].” FERPA imposes no such requirement.

E. Sharing a poetry class worksheet outside of the classroom did not violate FERPA.

A point made in the beginning of this section bears repeating: At no point in the history of FERPA has any authority of consequence taken the position that FERPA’s protection should encompass ungraded classroom work or classroom work separated from its grade. The Supreme Court did not take that position; when invited on two occasions, the U.S. Government did not take that position; the Tenth Circuit did not take that position; in myriad opinion letters, the Department of Education did not take that position; Senators Buckley and Pell, who together authored FERPA’s definition of “education record,” did not take that position; even the plaintiff in *Owasso*, who sought to prohibit peer grading, did not take the position that the *ungraded* classwork is protected by FERPA.⁶⁰ And even if such a rule existed, the health and safety exception would apply here.⁶¹

If there is a source for this interpretation, please share it with us.

IV. It Does Not Violate FERPA to Post About Personal Experiences With Students

Wayne State has accused Watten of violating FERPA by discussing the campaign against him in Facebook posts that shared his personal experiences with some of the students involved; the students were not named. This is not a correct application of FERPA.

The specific nature of this allegation is oblique enough that it bears further elaboration, in case the summary above is incomplete. At some point, Watten made the following posts on his personal Facebook page:

- “Grooming—from the Avital Ronnel article—becomes an imaginary for some kind of inauthentic being that hasn’t decided what it is, and wants someone to tell them.”
- “A public shaming campaign because a grad student can’t get his incomplete [*sic*] done? That is what this amounts to, but without context no one knows—it could be anything. For the record, 20 minutes after throwing a temper tantrum before me and the chair, grad student goes postal on social media. Hence, there is a series of actions that I must undertake, and will.”

⁶⁰ For a deeper look into how many sources do not support the idea that ungraded classwork could be subject to FERPA, see Rhonda Leigh Wilson, *An Analysis of the Family Educational Rights and Privacy Act as Interpreted by the United States Supreme Court in Owasso v. Falvo* (Dec. 2004) (Ed.D dissertation, University of Georgia) (at https://getd.libs.uga.edu/pdfs/wilson_rhonda_1_200412_edd.pdf).

⁶¹ See *supra* n. 56 and accompanying text.

- “I am afraid that you will give me a B. Me too, that is absolutely the worst. A B is an unacceptable grade. Don’t be a B.”

On April 26, 2019, Louis Lessem, Wayne State University General Counsel, sent screenshots of the post to Joseph Golden, an attorney for Watten, writing:

This sort of thing violates the Federal Family Rights and Privacy Act. If he is your client, he will wish to know that the Feds have little sense of humor in this area.⁶²

Similarly, on April 24, 2019, Watten sought Maun’s assistance in addressing the faculty to respond to the charges being made against him on social media. Maun directed him not to do so, citing FERPA.⁶³ Attorney Clark’s memo did not directly address this situation; FIRE is happy to do so.

A. *Personal observations recorded only in memory are not education records under FERPA.*

FERPA is concerned with the dissemination of student records. Personal experiences and observations, even observations made of students in class during instructional time, are not student records.

The Student Privacy Policy Office—the entity which enforces FERPA—answers this question in a list of frequently asked questions:

FERPA applies to the disclosure of education records and of personally identifiable information (PII) from education records that are maintained by the school. Therefore, FERPA does not prohibit a school official from releasing information about a student that was obtained through the school official’s personal knowledge or observation, rather than from the student’s education records. For example, if a teacher overhears a student

⁶² Email from Louis Lessem, General Counsel, Wayne State University, to Joseph Golden, Attorney, BSG Law Firm (April 26, 2019 11:48 AM) (on file with author). To the extent the implication of the statement is that FERPA is strictly interpreted, this is only true to a point. FERPA has only one sanction—the total loss of federal education funding—and it has never been invoked *for any reason*. FERPA has no individual sanction or private cause of action. If the statute’s nearly 46-year history is our guide, the most severe outcome a disclosure of education records can trigger is a letter addressed to the institution asking it to clarify that it does not have a policy permitting such a disclosure.

⁶³ E-Mail from Barrett Watten to Caroline Maun (Apr. 24, 2019 11:54 PM) and from Caroline Maun to Barrett Watten (Apr. 24, 2019 11:31 PM) (on file with author).

making threatening remarks to other students, FERPA does not protect that information from disclosure.⁶⁴

While it is possible to envision a set of facts where a Facebook post might actually include an education record, as properly defined, it is hard to apply those hypotheticals to these facts. Even if we assume for the sake of argument that (1) the persons referenced in the posts are identifiable by the general public; (2) the posts reflect information from a centralized record; *and* (3) that Watten has access to the record, the only post that even touches on education is the one mentioning work that has not been submitted—which is the *absence* of a record.

The absence of a record is not a record. If it were, FERPA would prohibit all disclosures of any kind, ever, because every record would either exist (and be a record) or be absent (and be a record).

B. Even if underlying educational records existed, these posts would not meet the threshold of identifiability required to trigger FERPA's limitations.

For a disclosure to fall under FERPA's rules, it must be of "personally identifiable information" contained in "education records." Information is "personally identifiable" if a reasonable member of the school community could identify the student in question.⁶⁵ As the posts do not name any students, community identification would only be possible if the average person in the Wayne State community knew the identity of the student described in each post. Then, to be a FERPA violation, that identity would have to be coupled with information sourced from "education records."

Wayne State has a total enrollment of 24,808 for the Winter 2020 semester and thousands of non-student employees, faculty, and community members who participate in the "school community."⁶⁶ While this dispute has engineered some attention in higher education circles, it would be a stretch to characterize the hypothetical "reasonable member of the school community" as someone likely to have followed it closely enough to make the students identifiable. And even then, absent an underlying education record, FERPA would not apply.

C. FERPA does not prohibit an employee from speaking about personal knowledge on a matter of public concern.

As explained above, FERPA does not prohibit disclosing information from "personal knowledge or observation."⁶⁷ It also does not permit using state authority to prohibit other

⁶⁴ *Does FERPA permit school officials to release information that they personally observed or of which they have personal knowledge?*, Student Privacy Policy Office, U.S. Department of Education, <https://studentprivacy.ed.gov/faq/does-ferpa-permit-school-officials-release-information-they-personally-observed-or-which-they>.

⁶⁵ 73 Fed. Reg. 74806, 74831-32 (Dec. 9, 2008).

⁶⁶ Wayne State at a Glance – Enrollment Head Count Quick Facts, Wayne State Univ., <https://oira.wayne.edu/institutional-data/enrollment-headcount>.

⁶⁷ See *supra* note 64 and accompanying text.

employees from doing so. Accordingly, Maun’s decision to prohibit Watten from speaking to the faculty about the campaign against him is not authorized by FERPA. Instead, it is a violation of the First Amendment.

Employees of government institutions like WSU retain a First Amendment right to speak as private citizens on matters of public concern; that right may not be curtailed or punished unless the government employer demonstrates that the expression hinders “the effective and efficient fulfillment of its responsibilities to the public.”⁶⁸ These protections extend to faculty members⁶⁹ and remain intact even if the matter of public concern relates to the speaker’s employment.⁷⁰

Watten’s circumstances are a matter of public concern; any debate on that point ended when the students mounted a public campaign against him. As part of that campaign, they have released documents related to his employment obtained from Wayne State. Watten’s expressive rights are particularly pronounced when his speech is clearly a citizen’s expression about his employment, rather than an employee’s expression in furtherance of government activity.⁷¹

V. There is a Specific Waiver Doctrine Applicable to FERPA That May Permit Greater Disclosures to Certain Third Parties, Such as Conference Organizers

In his letter, Attorney Clark analogizes the use of FERPA as a “sword” against a professor (as opposed to a “shield” against disclosures) to abuses of privacy against other professionals, “such as attorneys, who . . . have waivers for such privileged information when the client files a grievance or lawsuit against the holder of such information.”⁷² Clark theorizes that a court would find an implied waiver existed to the extent Watten needed to defend himself from allegations of wrongdoing that hinged on FERPA-protected material.

The Department of Education has recognized the existence of a FERPA waiver on some occasions, and the contours of that waiver are similar to those described by Clark. In fact, as described by the Department, the waiver could specifically be invoked to the extent necessary to push back against Watten’s disinvitation from an upcoming conference. Watten or Wayne

⁶⁸ *Connick v. Myers*, 461 U.S. 138, 150 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

⁶⁹ *See generally* *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (reaffirming that “the nonrenewal of a nontenured public school teacher’s one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights”) (internal citations omitted).

⁷⁰ *Pickering*, 391 U.S. at 573–74 (finding teacher’s “erroneous” public criticism of his employer protected by the First Amendment).

⁷¹ *See, e.g.*, *Boals v. Gray*, 775 F.2d 686, 691–93 (6th Cir. 1985) (“no doubt” that an employee disciplined for “membership in and support of a union states a valid” First Amendment claim). Additionally, restricting an employee’s ability to communicate with co-workers can create a “chilling effect” with contract or labor law implications, though they are beyond the scope of our present analysis.

⁷² Letter from Mark Clark, Attorney, Traverse Legal, to Barrett Watten, Professor, Wayne State University, July 3, 2019, at 3 (enclosed).

State should contact the Student Privacy Policy Office to further determine the scope of its applicability.

In a 2000 guidance letter, then-director Rooker responded to an inquiry from Cornell University, which sought to imply a waiver of FERPA's written consent requirement when a student contacted a professor emeritus to discuss her education records.⁷³ In explaining why this situation did not merit a waiver, Rooker provided the general outlines that would justify finding an implied waiver:

The Department will support an educational agency or institution that has inferred an implied waiver of the student's right to consent to disclosure when:

1. the student has taken an adversarial position against the educational agency or institution;
2. the student has initiated the involvement of the third party by contacting that party in writing, and, in so doing:
 - a) set forth specific allegations against the educational agency or institution; and,
 - b) requested that action be taken against the educational agency or institution or that the third party assist the student in circumventing decisions made about the student by the educational agency or institution;
3. the third party's special relationship with the educational agency or institution:
 - a) gives the third party authority to take specific action against the educational agency or institution; or,
 - b) reasonably could be significantly adversely affected if the educational agency or institution cannot refute the allegations; and
4. the disclosure is as limited as is necessary for the educational agency or institution adequately to defend itself from the student's charges or complaint. The third party should follow

⁷³ Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Hunter Rawlings III, President, Cornell University, filed as Feb. 28, 2000, <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/cornell.html>. The Department of Education's FERPA Online Library index dates the letter to February 28, 2000; the letter itself references events that took place in April of that year.

the procedures set forth in 34 CFR § 99.33 on limitations that apply to the redisclosure of information derived from education records.⁷⁴

Applying the test outlined above to Watten’s situation, where he had been disinvited from an upcoming conference, suggests an implied waiver might well be justified to the extent necessary for Watten to defend himself against the public allegations made by the students in question. The students (1) have taken an adversarial position; (2) involved a third party (the conference organizers) and requested that action be taken; (3) severely impacted Watten’s relationship to the third party (to the extent they disinvited him); and (4) the disclosure would be necessary for Watten to fully defend himself against the allegations made by the student. These requirements track precisely the events that led to Watten’s disinvitation from the Louisville Conference.⁷⁵

The 2000 letter suggests seeking the guidance of the Student Privacy Policy Office before invoking a waiver.⁷⁶ Accordingly, Watten should attempt to consult with the office before releasing underlying education records to the conference organizers. But the existence of the waiver doctrine reflects the Department of Education’s foresight that FERPA should not function as a weapon against agents of covered institutions.

VI. Wayne State’s FERPA Policy Does Not Reflect the Current State of the Law

During the course of this analysis, it was necessary to refer to Wayne State’s FERPA policy.⁷⁷ At times, the concerns outlined in this letter reflect a failure to adhere to that policy. But some of these failures seem to reflect the application of a policy that is no longer compliant with current interpretations of FERPA.

There are a number of problems, some of which are too nuanced to justify inclusion here. A reanalysis of this section in light of the most recent law available would benefit Wayne State’s future applications. Two specific problems do merit inclusion, however, as they likely influenced some of the actions described by Wayne State.

A. *The definition of education records encompasses works that are not education records.*

The most glaring of these problems is the definition of “education records,” which states:

“Education records” include not only Registrar’s Office records, transcripts, papers, exams and the like, but also non-academic student information database systems, class schedules, financial

⁷⁴ *Id.*

⁷⁵ Letter from Barrett Watten to Beth A. Boehm, Executive Vice President and Provost, University of Louisville, and David Owen, Dean, College of Arts and Sciences, University of Louisville (Feb. 5, 2000) (on file with author).

⁷⁶ *Id.*

⁷⁷ *FERPA – Student Privacy Issues*. WAYNE STATE UNIV. <https://generalcounsel.wayne.edu/legal/ferpa>.

aid records, financial account records, disability accommodation records, disciplinary records, and even “unofficial” files, photographs, and e-mail messages.⁷⁸

This is not a correct definition of “education records.” It encompasses a great deal of material not within the scope of that term as interpreted by the legislative, judicial, or executive branches. It encompasses material that Congress never intended to authorize hearings to correct; is not centralized, as envisioned by the Supreme Court; and that may not be regularly maintained by any instructor or school official, as explained in the U.S. briefs in *Owasso*. Among documents that would meet this definition but have been rejected as FERPA records by the courts are sheets recording therapist interactions with a student;⁷⁹ video recordings of a class;⁸⁰ e-mails identifying a student;⁸¹ student statements to misconduct investigators;⁸² incident reports and witness statements about altercations between students and employees;⁸³ and, of course, in-class work with unrecorded grades.⁸⁴

This is not to say that any of these things could *never* be FERPA records under specific circumstances, if maintained in a centralized location for an academic purpose; it is to say that they are not categorically, intrinsically FERPA records, wherever they may be found. The threshold articulated in Wayne State’s policy is simply set so low as to be irreconcilable with FERPA’s actual obligations.

B. The definition equates “possession” with “maintenance.”

The policy states:

An “education record” is “maintained” by the institution whenever it is in the possession, custody, or control of any employee or agent of the institution.

This was, at one point, a reasonable interpretation of the statute. Over the years, however, that understanding has evolved and been clarified by numerous opinion letters and court decisions, such as those listed above, which recognize that maintaining a document is an obligation higher than merely possessing it. All of the records listed in the prior section here were “possessed” by a school official. None were education records; for some of them, like e-mails, this is because the possession was not “maintenance.”⁸⁵

⁷⁸ *Id.*

⁷⁹ *Bd. of Educ. of the Toledo City Sch. Dist. v. Horen*, 2010 U.S. Dist. LEXIS 98231 (N.D. Ohio Sept. 8, 2010), *aff’d*, 2011 U.S. App. LEXIS 2644 (6th Cir. May 26, 2011).

⁸⁰ *Matter of Jacobson v. Ithaca City Sch. Dist.*, 39 N.Y.S.3d 904 (N.Y. 2016).

⁸¹ *S.A. v. Tulare County Office of Educ.*, 2009 U.S. Dist. LEXIS 88007 (E.D. Cali. Sept. 24, 2009).

⁸² *Wallace v. Cranbrook Educ. Comm.*, 2006 U.S. Dist. LEXIS 71251 (E.D. Mich. Sept. 27, 2006).

⁸³ *Ellis v. Cleveland Mun. Sch. Dist.* 309 F. Supp. 2d 1019 (N.D. Ohio 2004).

⁸⁴ *Owasso*, 534 U.S. at 426.

⁸⁵ *S.A.*, 2009 U.S. Dist LEXIS 88007 at *2.

A useful thought exercise in weighing whether a specific record is “possessed” or “maintained” is to ask whether the agent or employee in question has the authority to destroy the record. If so, is the record really “maintained” at all?

VII. Conclusion

FIRE is concerned that Wayne State continues to invoke FERPA improperly in ways calculated to silence Watten’s speech. FIRE is more concerned, however, that Watten’s experience may not be isolated. At other institutions, we have seen administrators invoke FERPA in contexts unrelated to its scope or purpose, generally to paper over institutional wrongdoing. Wayne State’s current posture finds it on the path to joining these institutions.⁸⁶

At the same time, we understand that FERPA is a complex area of the law that few people have the luxury of reflecting on at great length. Taking an incorrect reading of FERPA, by itself, is not a major problem for an institution. Using that incorrect reading as the basis of a series of actions that restrain due process and the First Amendment is.

We request both that you share this information with the employees you believe have a reason to know of Watten’s dispute and that you further direct them to exercise more care when invoking FERPA. FERPA is a specific set of law and regulations with specific, limited, predictable outcomes. It is not a “magic wand” your employees can tap on a professor to make his voice disappear.

We request a response by May 4, 2020. If you anticipate needing additional time to respond in light of strains created by the COVID-19 crisis, please don’t hesitate to let us know when you expect to be able to respond substantively.

Sincerely,



Adam Goldstein
Senior Research Counsel

Cc:

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⁸⁶ For a list with some examples of FERPA abuses, see Zach Greenberg & Adam Goldstein, *Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interest*, 44 J. LEGIS. 22 (2017), at <https://scholarship.law.nd.edu/jleg/vol44/iss1/2>.

Encl.

Letter from Mark Clark, Traverse Legal, dated July 3, 2019

Authorization and Waiver for Release of Personal Information executed by Barrett Watten