

BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL



SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 1, 2017

The Honorable Seth A. Howard
159 House Office Building
Annapolis, Maryland 21401

Dear Delegate Howard:

You have asked for advice concerning whether a proposed amendment to House Bill 555, "Anne Arundel County - Board of Education - Selection of Members." Specifically, you have asked whether the proposed amendment, which would require the Chesapeake Regional Association of Student Councils of Anne Arundel County ("Chesapeake"), any successor organization, and any other entity involved in the selection of the student member to conduct its meetings in accordance with the provisions of the Open Meetings Act and comply with the requirements of the Public Information Act ("MPIA"), would violate the Family Educational Rights and Privacy Act ("FERPA"). It is my view that it would not.

As relevant to this inquiry, FERPA generally denies federal funds to any educational facility or institution which has a policy or practice of permitting the release of education records (or personally identifiable information therein) other than directory information of students without the written consent of their parents to any individual, agency, or organization other than those specifically authorized under FERPA. 20 U.S.C. § 1232g(b)(1). The funding restriction also applies to any educational agency or institution which has a policy or practice of releasing or providing access to any personally identifiable information in education records other than directory information, or as permitted under § 1232g(b)(1) unless there is written consent from the student's parents or such information is supplied in compliance with a judicial order, a lawfully issued subpoena, and parents and students are notified of the order or subpoena before compliance. 20 U.S.C. § 1232g(b)(2).

The Chesapeake "is a county-wide representative organization of secondary school student government associations."¹ It:

serves as a forum where students can discuss student related issues, participate in leadership development activities, and collaborate with other students across the

¹ Information about the Chesapeake Regional Association of Student Councils comes from its web site at <http://www.aacps.org/admin/templates/crase.asp?articleid=532&zoneid=20>

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county. As a sounding board for students' feelings and ideas, [Chesapeake] is structured to take these thoughts and present them to the proper policy-making body, whether it be the Board of Education, County Government or the State Legislature.

Chesapeake is under the sponsorship of the Anne Arundel County Schools and is subject to the policies and regulations set forth by the Anne Arundel County Board of Education. Constitution of the Chesapeake Regional Association of Student Councils, Article I, Section 2.

Education records are defined in FERPA as records, files, documents, and other materials that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such institution. 20 U.S.C. § 1232g(a)(4)(A). In *Owasso Independent School Dist. No. 1-011 v. Falvo*, 534 U.S. 426 (2002), the Supreme Court held that class assignments that are graded by peers then handed back to the student who reports the score to the teacher are not "educational records" within the meaning of FERPA. In doing so, they held that the use of the word "maintained" in the definition of educational record indicated that it applied to matters that were preserved or kept and stated that it indicated matters that would be "kept in a filing cabinet in a records room at the school or on a permanent secure database," not handled briefly. *Id.* at 432-433. They also held that a "person acting for" any educational institution "connotes agents of the school, such as teachers, administrators, and other school employees," and not students. *Id.* at 433.

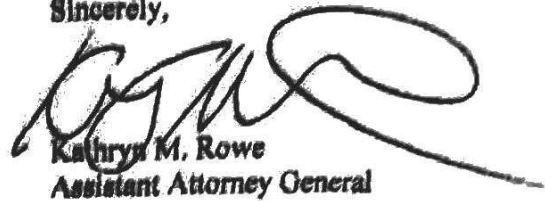
While it is not clear what documents or information or documents it is anticipated Chesapeake might have that would lead to a violation of FERPA if it were to comply with the MPIA or the Open Meetings Act, it would seem that any documents that it would have would be maintained on its own behalf, rather than as agents of the school. Moreover, because of the limits of FERPA, it is unlikely that Chesapeake could get education records from the school as opposed to from the students or other sources. Information from other sources is not covered by FERPA. *Daniel S. v. Board of Educ. of York Community High School*, 152 F. Supp.2d 949, 954 (D. Ill. 2001); *Frasca v. Andrews*, 463 F. Supp.2d 1043, 1050 (E.D.N.Y. 1979).

Even assuming that Chesapeake, because of its status of being "under the sponsorship" of the Board of Education, could be seen as acting for an educational institution with respect to records in its possession, neither the MPIA nor the Open Meetings Act would require disclosure of these records. The MPIA requires that a custodian deny inspection of a school district record about the home address, home telephone number, biography, family, physiology, religion, academic achievement, or physical or mental ability of a student. General Provisions Article, § 4-313(a). Thus, compliance with the MPIA would appear to avoid violation of FERPA. Similarly, the Open Meetings Act permits the closing of a meeting of a public body to discuss "the appointment . . . of an appointee . . . or official over whom it has jurisdiction." General Provisions Article, § 3-305(b)(1)(i). Closed sessions are also permitted where necessary to "comply with a specific . . . statutory . . . requirement that prevents public disclosures about a particular proceeding or matter."

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General Proceedings Article, § 3-305(b)(13).

Sincerely,



Kathryn M. Rowe
Assistant Attorney General

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