

March 20, 2017

MEMORANDUM

To: College Presidents
From: Jane Sovern 
Re: Further Guidance on CUNY Response to Immigration Enforcement

This memorandum provides further guidance to the CUNY community regarding procedures to be followed if agents from Immigration and Customs Enforcement (ICE) seek access to the college campus or if ICE or other federal agents seek information regarding CUNY students. This memorandum also details steps that the University is taking to protect the confidentiality of student immigration status information.

ICE Access to the CUNY Campuses

In his messages to the University community on December 14, 2016 and January 29, 2017, Chancellor Milliken stated, among other things, that “CUNY will not permit immigration enforcement officials to enter its campuses except to the extent required by warrant or court order.” The warrant referred to in the Chancellor’s statement is a judicial warrant, signed by a judge, which clearly orders access to the campus. Should an immigration agent request access to a campus, College Public Safety employees must ask for the agent’s badge or credentials, the reason for access, and any documentation permitting access. Because ICE officers need a judicial warrant to enter those areas of a college where there is a reasonable expectation of privacy, Public Safety should not permit ICE officials to enter those areas without a proper judicial warrant. College Public Safety must show any documentation to the college’s legal counsel before permitting entry. If that is not possible for some reason, College Public Safety should contact the University Director of Security, Bill Barry.

When ICE agents seek entry onto a CUNY campus, they may present a so-called “administrative” warrant rather than a judicial warrant. An administrative warrant is signed by an ICE official, not a judge, and no showing of probable cause is required to obtain it. The immigration regulations and applicable case law make clear that administrative warrants do not

give ICE the authority to enter a place where there is a reasonable expectation of privacy, if the owner or other person in control of the site does not consent.

Whether a reasonable expectation of privacy exists in particular areas of the college is a factual determination that each campus President must make in conjunction with the Campus Public Safety Director and clearly communicate to Public Safety and the college legal counsel. At many CUNY campuses, we understand that members of the public may enter the outdoor or lobby areas of the campuses without showing an ID card. There is no reasonable expectation of privacy in those areas. However, at many campuses, a college ID card is required to enter campus buildings. We consider CUNY employees and students who use those buildings to have a reasonable expectation of privacy in those ID-required areas because members of the public are not permitted inside. On the other hand, there are one or more campuses where an ID is necessary to enter the college premises from the perimeter. In those cases, there would be a reasonable expectation of privacy on the entire campus and ICE would need a judicial warrant for entry. Please feel free to contact my office if you wish to discuss the application of this distinction to your particular campus.

In the past, ICE has taken the position that, absent an emergency, ICE enforcement actions should not occur at sensitive locations, such as churches and schools, including colleges and universities. This is most recently reflected in an October 24, 2011 ICE memo. It is not known whether the Trump administration will continue this practice, and it is possible that ICE agents will attempt to undertake enforcement actions on a college's premises.

Access to Information Regarding CUNY Students

As Chancellor Milliken has stated, CUNY has and will continue to protect student records in compliance with the Federal Educational Rights and Privacy Act ("FERPA"). FERPA protects the privacy of student education records, and prohibits CUNY from divulging those records, or the contents thereof, without the student's consent. In particular, students' immigration status information must be treated with utmost confidentiality and only divulged when legally required, as determined by college legal counsel.

FERPA provides that student education records may be disclosed pursuant to a "lawfully issued subpoena." ICE has statutory authority to issue an administrative subpoena, signed by an ICE official, or may seek a judicial subpoena, signed by a judge. A subpoena for records does not give an ICE agent permission to access the campus other than to serve the subpoena. If an ICE agent appears with a subpoena for records, the college's legal counsel should accept service. Public Safety must ask for the agent's badge or credentials and escort the ICE agent to and from the counsel's office. If the subpoena is an administrative subpoena, college legal counsel must consult with the Office of the General Counsel to discuss the subpoena and the available legal options before providing any records.

The only exception to the subpoena requirement is that higher education institutions are required by law to provide specified information regarding foreign students on F-1 visas to ICE officials upon request. If you have any questions regarding this exception, please contact my office.

In addition, FERPA allows the release of “directory information” which is information that has traditionally not been considered particularly private. This includes the student’s address, telephone number and dates of enrollment, among other things.¹ While it is not a FERPA violation to provide directory information to federal officials, such disclosure is not mandatory. **It is now CUNY’s position that campuses may not provide directory information to ICE officials without a subpoena.** This supersedes the general rule permitting the release of directory information, set forth in the February 25, 2009 memorandum from Frederick P. Schaffer to College Presidents regarding the Family Educational Rights and Privacy Act (“FERPA”) and the February 2009 Guidelines for the Implementation of the Student Records Access Policy and the Federal Family Educational Rights and Privacy Act (FERPA), promulgated by the Office of the General Counsel.

We have also received questions about how to handle situations where federal agents seek student records for employment background checks pursuant to a release electronically signed by the student. The “Authorization for Release of Records” form used by the federal government constitutes a student’s consent to the release of education records and complies with FERPA. Colleges should accordingly release student records based on these authorizations, after requiring the agent (who may be an independent contractor) to provide a credential or badge and checking with the student to make sure that the student in fact authorized the disclosure. If the individual who signed the authorization is a former student, the college must use its best efforts to locate the student to confirm that the student consented to the disclosure.

Protecting the Confidentiality of Student Information

CUNY maintains information about the immigration status of its students, as necessary to meet legal and operational requirements. Since President Trump’s Executive Order issued on January 27, 2017 (first travel ban), the University has significantly limited the number of employees who have access to this information to only those few employees with an essential need to know. As stated above, CUNY treats its students’ immigration status information with utmost confidentiality and will only divulge such information when legally required, as determined by college or University legal counsel.

¹Directory information at CUNY consists of a student’s name, attendance dates (not daily records), address, telephone number, date and place of birth, photograph, e-mail address, full or part-time status, enrollment status (undergraduate, graduate, etc.), level of education (credits) completed, major field of study, degree enrolled for, participation in officially recognized activities and sports (teams), the height and weight of members of athletic teams, previous school attended, and degrees, honors and awards received.

If you have questions about any of these topics, please contact me, Senior Associate General Counsel Katherine Raymond at katherine.raymond@cuny.edu or Senior Litigation Counsel Hilary Klein at hilary.klein@cuny.edu.

c: Chancellor James B. Milliken
Cabinet
University Director of Public Safety William Barry
Provosts
Vice Presidents for Student Affairs
Vice Presidents for Finance & Administration
Campus Chief Information Officers
Senior Registrars
Campus Public Safety Directors
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