Section 3:
Privacy Issues

This section addresses the following points:

- Federal and State privacy laws prevent government agencies from disclosing personally identifiable information

- Disclosures of records that do not include names and direct identifiers can nevertheless violate privacy law if a person's identity is easily traceable

- Our request for Bar records uses heightened privacy precautions by clustering certain types of information and disallowing the disclosure of records if fewer than five people share a combination of characteristics.

Most of the opposition to our 2007 collaborative research proposal to the State Bar centered around the Family Education Rights and Privacy Act ("FERPA"). While the privacy concerns raised last year were, in our view, far-fetched (since we proposed that the files never leave the computers of the Bar's data analysts), it is clearly relevant now that we are seeking release of public records. This memorandum summarizes the applicable privacy law and describes how the privacy protocols incorporated in our public records request are more than sufficient to guard against disclosure risks.

Privacy Law

FERPA is a federal law proscribing schools from releasing student records without the permission of the student. It also prevents third parties who receive student files through legitimate means from disclosing student information. Since the Bar received transcript and graduation information from the bar-takers' law schools (presumably with the permission of the graduates), and since some of that information (law school GPA and graduation year) are included in the public records request, the request has been designed to comply with FERPA.

FERPA prohibits the disclosure of "personally identifiable information" kept in student files. Even if information does not explicitly refer to an individual by name or obvious identifiers, it will still be considered personally identifiable if it provides a set of characteristics that would make a student's identity "easily traceable". (20 USC 1232g.)

The set of variables requested from the Bar would not trigger FERPA's "easily traceable" standard. Indeed, in *Osborne v. Board of Regents of University of Wisconsin,* 254 Wis.2d 266 (Wis. 2002), the Wisconsin Supreme Court considered a request for law school

records that were similar to the request before the Bar. That court found that a database including many variables (including race, admissions credentials, and grade point average) was generally releasable under FERPA except in specific, unlikely cases that an individual's identity could be deduced using publicly knowable traits.

The Family Policy and Compliance Office, the federal regulatory agency charged with the duty to enforce FERPA, has promised forthcoming guidelines for determining if records have been sufficiently anonymized. It has indicated that these guidelines will not interpret FERPA in a way that interferes with the public interest in research. In its published letter regarding *The Disclosure of Anonymous Data*, the FPCO states:

> In addition to FERPA, Congress has also recognized that scientifically valid educational research, including applied research, basic research, and field-initiated research, can provide parents, educators, students, researchers, policymakers, and the general public with reliable information about educational practices that improve academic achievement. Such research can also provide important information about the effectiveness of Federal and other education programs…. In particular, academic accountability is a central focus of the No Child Left Behind Act of 2001, and high-quality research is one of the ways to show whether the achievement gap is closing. A key component of such research is the use of longitudinal studies in which individual student performance is evaluated over a period of time.

The Privacy Protocols in the Request for Bar Records

The requested Bar records will not include any individual identifiers, such as names, contact information, or social security numbers. We have also included procedures to monitor the interaction of variables that are "publicly knowable." These are variables that are available to the public at large and that might be combined with the requested information in ways that would allow deduction of an individual's identity.

The standard and accepted way of avoiding this problem is to make sure that no combination of the "publicly knowable" variables (specifically, school, race, graduation year, and bar outcome) produces few enough cases that an individual's identity can be determined. Typically, demographers and statisticians use a minimum cell size of three, but we have asked the Bar to use a more stringent standard of five. In other words, if a particular law school had only three members of a certain race that failed the bar exam, that cell would be flagged, and information would be redacted and combined with other cells until it contained five or more members. In order to prevent predictable cell size problems, the request instructs the Bar to band graduation years into three-year clusters, and to take a few other precautions. Cells that contain fewer than five individuals after following these procedures will be redacted.

Project SEAPHE has consulted with experts in the field who confirm that the privacy protections built into the Bar request meet (and generally exceed) best practices in the

field of educational research.
The California Bar's Statistical Reports

By way of comparison, the Bar itself adheres to much lower standards for protecting privacy than those suggested in the public records request. The Bar often reports cells of fewer than five bar-takers. Consider the following examples from the Bar's recent reports:

Example 1: Cross-Tabulations by Race and Type of School.

JULY 2007 CALIFORNIA BAR EXAMINATION
NUMBER OF TAKERS AND PERCENT PASSING BY RACIAL/ETHNIC GROUP
GENERAL BAR EXAMINATION FIRST-TIME TAKERS ONLY*

School Type	White		Black		Hispanic		Asian		Other Minority	
	Took	% Pass	Took	% Pass	Took	% Pass	Took	% Pass	Took	% Pass
CA ABA Approved	2292	80.4	93	48.4	295	63.7	561	74.9	235	69.8
Out-of-State ABA	891	74.3	80	35.0	113	49.6	237	68.4	105	55.2
CA Accredited	179	36.9	16	0.0	45	26.7	28	25.0	18	27.8
CA Unaccredited	16	18.8	6	16.7	12	33.3	3	0.0	1	0.0
Correspondence	48	27.1	3	33.3	4	25.0	6	66.7	2	50.0
Other	223	59.6	19	26.3	28	32.1	83	37.3	34	32.4
Total*	3649	74.5	217	36.9	497	54.3	918	68.0	395	60.5

Source: General Statistics Report, July 2007 California Bar Examination

The chart pictured above is taken from the statistical report on the July 2007 exam (the larger of the two most recent graded exams.) It reports bar passage rates broken down by race and type of law school. Note the highlighted cells. For law school graduates in each of these three groups – Black takers from CA Accredited schools, Asian takers from CA Unaccredited Schools and Other Minority takers from CA Unaccredited schools –every bar-taker failed the exam (producing a cell size of zero for passers.)

Example 2: Cross-Tabulations by School and First Time or Repeat Taker Status, California Schools.

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION
GENERAL BAR EXAMINATION STATISTICS
CALIFORNIA ABA APPROVED LAW SCHOOLS

LAW SCHOOL	FIRST-TIMERS			REPEATERS		
	TOOK	PASS	%PASS	TOOK	PASS	%PASS
University of California – Berkeley	13	11	85	38	19	50
University of California – Davis	1	0	0	53	21	40
University of California – Hastings College of The Law	18	10	56	74	46	62

Source: General Statistics Report, February 2007 California Bar Examination

In addition to giving passage rates by type of school, the Bar also reports passage rates individually for all California schools. Above is an example from the February 2007 report. In this example, there was only one student from the University of California - Davis who took the bar for the first time, and he or she failed. All of the highlighted examples would have been subject to redaction using the privacy protocols prescribed in the request for Bar records. In fact, the last twenty-two bi-annual reports contained thousands of small cells that would not have met the standards of the public records request. We aren't aware of any negative consequences caused by the Bar's publication of these small statistical cells.