Information Management
How to Walk the Tightrope Between FOIA and FERPA
and Not End Up in Jail

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The Delicate Balance Between FOIA, FERPA, and Privacy
The Freedom of Information Act (FOIA)
FOIA – Freedom of Information Act

- Three major sections of FOIA:
  - Public Records
  - Public Meetings
  - Executive Sessions
FOIA – Freedom of Information Act

- The main point of Arkansas’ FOIA is to ensure that electors are fully advised of the activities and decisions of their officials.
- FOIA is popularly referred to as the “Sunshine Law”.

FOIA – Freedom of Information Act

Public Records

FOIA allows the public to inspect and receive copies of public records of governmental agencies unless the law makes an exception for them.
“Unless Exempt ... All Public Records Shall Be Open to Inspection and Copying by Any Citizen During Regular Business Hours”
Or . . . Unless You Didn’t Retain ...
You can’t produce what you don’t have.
You don’t have to create a document to produce.
Active inbox/information management can be your friend.
Once A FOIA Request Is Received, It’s Too Late!!!
FOIA MULTIPLE CHOICE

I’ve received a new FOIA request. How long do I have to respond?

a. 3 days
b. Now
c. When I can free up someone to respond
d. As soon as practicable
I’ve received a new FOIA request. How long do I have to respond?

b. Now
FOIA MULTIPLE CHOICE

The FOIA Request I’ve Received Is Harassing – Submitted For An Improper Purpose. Do I have to respond?

a. No

b. Yes

c. Yes, but only to the extent reasonable
The FOIA Request I’ve Received Is Harassing – Submitted For An Improper Purpose. Do I have to respond?

b. Yes
FOIA MULTIPLE CHOICE

... Requesters are under no obligation to do or say anything whatever their "associations" might be. The district and its representatives are obliged to comply with the law promptly. By posing irrelevant questions that submitters are under no obligation to answer you effectively delay response and thus defeat the law.

--Max Brantley, Arkansas Times
March 14, 2016
Bentonville Public Schools,
In accordance with the Freedom of Information Act, I’m requesting the following:

- All communications including but not limited to email, letter, card, fax, etc. from Feb 1, 2016 to current date, from REQUESTOR 1 to School Board Members at BPS, School Staff and Administration, and Superintendent. I am also requesting all communications from these individuals to REQUESTOR 1.
- All communications including but not limited to email, letter, card, fax, etc. from Feb 1, 2016 to current date, from REQUESTOR 2 to School Board Members at BPS, School Staff and Administration, and Superintendent. I am also requesting all communications from these individuals to REQUESTOR 2.
- All communications including but not limited to email, letter, card, fax, etc. from Feb 1, 2016 to current date, from any representative of the Freedom From Religion Foundation to School Board Members at BPS, School Staff and Administration, Superintendent and Mr. Marshall Ney. I am also requesting all communications from these individuals to any representative of the FFRF.
- All communications including but not limited to email, letter, card, fax, etc. from Feb 1, 2016 to current date, from any representative of the media including but not limited to Arkansas Times, Arkansas Democrat Gazette, KNWA News, and 40/29 News to School Board Members, School Staff and Administration, and Superintendent. I am also requesting all communications from these individuals to any representative of the media.
- A copy of all FOIA requests to BPS from February 1, 2016 to current date.

I request all of the above items be emailed to me or made available for me to pick up within the timeframe set forth in accordance with the law.

If you have any questions or need clarity regarding my request, please call me at 479-616-2344.

Thank you,
L. K.
FOIA MULTIPLE CHOICE

How do I respond to the above request?

a. Provide everything responsive
b. Provide nothing because it’s a FOI of a FOI
c. Provide a partial response and ask questions
FOIA MULTIPLE CHOICE

How do I respond to the above request?

a. Provide everything
Controversy = FOIA Requests
FOIA Principles of Interpretation

- FOIA is construed in favor of openness.

- Exceptions are narrowly construed.
Under FOIA, What Documents Can Be Released?

- “Public Records” – writings, recorded sounds, films, tapes, electronic or computer-based information or data compilations in any medium required by law to be kept or otherwise kept and which constitute a record of the performance or lack of performance of official functions
“Public Records”

- All records maintained in public offices or by public employees within the scope of their employment are presumed to be public records
  - The presumption can be rebutted if the records do not reflect the performance or lack of performance of official functions
- Whether a record is a public record depends on its content, *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 371 Ark., 217 (2007)
FOIA TRUE/FALSE

Text messages on my private iPhone are private.

a. True
b. False
FOIA TRUE/FALSE

Text messages on my private iPhone are private.

b. False
“Public Records”

- **Scope**
  - FOIA covers “records” not information
  - An agency need not create new records to comply
  - If records are part public and part exempt, redact exempt material and provide the rest
  - E-mails or letter sent to private email addresses or private residences of public officials are subject to FOIA if they involve the public’s business
  - A public entity can be the custodian of public records even if it does not have physical possession of them, as long as it has “administrative control” of the records
Balance Between FOIA and Personnel Privacy Concerns

- Personnel records are generally open, but FOIA has an exemption for personnel records “to the extent disclosure would constitute a clearly unwarranted invasion of privacy”
  - Exemption applies to both current and former employees
- What is clearly unwarranted?
### What is Clearly Unwarranted?

#### Commonly Exempted Items:

- Social Security numbers
- Medical information
- Insurance, pension & benefits information
- Garnishments
- Educational transcripts
- Home phone numbers and addresses
- Dates of birth
- Anything else which would cause a clearly unwarranted invasion of privacy

#### Common Items Open to Inspection:

- Name
- Salary information
- Contracts
- Employment applications
- Resumes
- Educational background
- Qualifications
- Leave records
- Change of status records
Employee Evaluation or Job Performance Records

- Includes formal evaluations, or any document created by or at the behest of a supervisor to detail job performance
- Are generally CLOSED, unless there has been a:
  - Final administrative resolution of:
    - Any suspension or termination proceeding, where the
    - Records form a basis for the decision to suspend or terminate
      and there is a
    - Compelling public interest in disclosure
- Each employee has a right to see his/her own personnel records despite these exemptions
How Much Information Should You Disclose to the Press About an Incident?

- Only public records under FOIA or student information by consent or an exception to FERPA may be disclosed.
- Always respond to both the press and school community with sensitivity and good PR.
FOIA MULTIPLE CHOICE

What kind of FOIA issue is a text conversation between board members?

a. Records issue
b. Open meetings issue
c. Executive session issue
d. None of the above
e. All of the above
FOIA MULTIPLE CHOICE

What kind of FOIA issue is a text conversation between board members?

a. Records Issue
b. Open Meetings
FOIA MULTIPLE CHOICE

What kind of FOIA issue is a text conversation between board members?

a. Records Issue

Exchange always subject to a proper document request.
b. Open Meetings

*Depends – typically upon whether the text messages are sequential or circular messages that appear to be moving towards a decision.*
FOIA QUESTIONS FROM THE BOARD

“As a board member, am I under a responsibility to save and maintain my school board related e-mail?”
FOIA QUESTIONS FROM THE BOARD

Answer:

“ABSOLUTELY NOT – UNLESS THERE IS AN ACTIVE FOIA REQUEST THAT CAPTURES INFORMATION YOU HAVE, THEN YOU MUST PRODUCE AND NOT DELETE. OTHERWISE, ACTIVE INBOX MANAGEMENT IS A GOOD PRACTICE THAT WILL SAVE YOU FROM SERIAL FOIA REQUESTS.”
FOIA QUESTIONS FROM THE BOARD

“In the context of FOIA are we any different than a state legislator operating on a state owned laptop?”
FOIA QUESTIONS FROM THE BOARD

Answer:

“THE ONLY DIFFERENCE IS THAT IF YOU USE A GOVERNMENT OWNED COMPUTER, ALL EMAILS ARE ESSENTIALLY PRESUMED TO BE SUBJECT TO FOIA, WHEREAS, WITH YOUR PERSONAL DEVICE, THEY ARE NOT. INSTEAD, ONLY YOUR GOVERNMENT RELATED EMAILS ARE SUBJECT TO FOIA.”
FOIA QUESTIONS FROM THE BOARD

“If the Arkansas Democrat Gazette is copied on any email involving school board members, does that eliminate any possible FOIA problems?”
FOIA QUESTIONS FROM THE BOARD

Answer:

“No. Notice must be given prior to a meeting, and both the media and the public are entitled to attend. Simply copying the media on an e-mail exchange does not satisfy this requirement if the exchange is considered to be a ‘meeting.’”
The Family Education Rights and Privacy Act (FERPA)
What is FERPA?

- FERPA is a federal law that protects the privacy of student education records. The law applies to all educational institutions and agencies that receive funds under any U.S. Department of Education Program. FERPA gives parents certain rights with respect to their children’s education records. These rights transfer to the student when he or she turns 18 or attends a postsecondary institution. Students to whom the rights have transferred are “eligible students.”
What is FERPA?

- FERPA protects the rights of parents or eligible students to:
  - Inspect and review education records;
  - Seek to amend education records;
  - Consent to the disclosure of information from education records, except as specified by law.
Under FERPA, What Information Can Schools Provide to Law Enforcement?

- Generally, schools may disclose personally identifiable information (PII) from students’ education records to outside parties, including law enforcement, only if the parent or the eligible student has provided prior written consent.
- “Education records” are defined as those records that are directly related to a student and maintained by a school or a party acting for the school, and include student records such as transcripts, disciplinary records, immunization records, and other similar records.
Exceptions

- There are some exceptions that allow schools to provide student records to law enforcement. These are:
  - School Law Enforcement Unit (LEU) records
  - Directory Information
  - Safety Exception
  - Judicial Order or Subpoena
Exceptions to FERPA

- School Law Enforcement Unit (LEU) records
  - These records are defined as records that are:
    - Created by an LEU;
    - Created for a law enforcement purpose; and
    - Maintained by the LEU.
  - These records are not protected under FERPA and can be disclosed according to school policy or as required by law. Education records that are in the possession of the LEU do not lose their status as education records and must continue to be protected under FERPA.
Exceptions to FERPA

- **Directory Information**
  - This is permitted if the school has provided notice to parents and eligible students of PII from student education records that the school has designated as directory information and if the parents and eligible student have not opted out of directory information disclosures.
  - Directory information is information from an education record that would not generally be considered harmful or an invasion of privacy if disclosed and may include items such as name, address, telephone listing, and participation in sports.
Exceptions to FERPA

- **Safety Exception**
  - When an articulable and significant threat exists – anything from an active shooter to a hazardous weather event to a chemical spill – school official are permitted to disclose PII from education records to appropriate parties, such as law enforcement, in order to protect the health and safety of students or other individuals.
  - Schools are allowed to share this information only during the period of the emergency, and they have to meet certain recordkeeping requirements.
Exceptions to FERPA

- Safety Exception cont’d
  - FERPA permits the disclosure of information from student education records “to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.”
  - Safety concerns warranting disclosure could include a student’s suicidal statements or ideations, unusually erratic or angry behaviors, or similar conduct that others would reasonably see as posing a risk of serious harm.
Exceptions to FERPA

- Safety Exception cont’d
  - This exception does not authorize “knee-jerk” or (in most cases) “broadcast” disclosures, but a limited disclosure to a limited number of people, made on the basis of a good-faith determination in light of the facts available at the time, and is highly unlikely to be deemed a violation of FERPA, even if the perceived emergency later turns out, in hindsight, not to have bee one.

- In general, and when reasonably possible, the initial disclosure should be made to professionals trained to evaluate and handle such emergencies, such as campus mental health or law enforcement personnel, who can then determine whether further and broader disclosures are appropriate.
Exceptions to FERPA

- Judicial Order or Subpoena
  - Prior notification to parents and students is generally required, though there are some exceptions for law enforcement subpoenas where the court or issuing agency has ordered that the existence or contents of the subpoena or the information furnished in response to the subpoena not be disclosed.
To What Extent Can Video of an Incident be Viewed or Copies be Given?
Viewing

- The right to inspect is triggered only for those parents whose students are the cause for the retention of video recordings.
- Parents of students “inadvertently” caught in the video do not have the right to inspect them.
- However, if a student who was not involved in the altercation happened to get pushed by one of the students in the fight, the pushed student’s parents have the right to review the video.
Viewing

- Viewing must be permitted within a “reasonable” period of time, but in no case may it be longer than 45 days.
- If a student’s parent lives beyond a reasonable distance to physically come to view the video, your district may mail the video to a “receiving” school near to the parent, where the parent may view the video and then the receiving school will mail the video back to your district.
  - The personnel at the receiving school should not view the video, but merely arrange for the parent to view it by himself/herself.
A video of a fight between students A and B in which other students happen to have been incidentally included in the background of the video generates the following viewing conditions:

- The parents of students A and B may view the video without having to receive permission from the other students’ parents.
- None of the parents of the “incidental” students have the right to view the video nor do they have to give their permission for the viewing of the video by the “involved” students’ parents.
Copies Given

- The school district is NOT obligated to give a copy of the video to the parent or their lawyer.
- But, if you choose to give the parent a copy of the video, you are obligated to go through all of the hoops that used to be the case for simply viewing the video.
  - Faces of the “involved” student other than that of the parent’s student must be redacted or else you will have to receive written permission from the parents of the other involved students.
Is FERPA an Exemption to FOIA?

Yes. There are cases in some states to the contrary. However, Ark. Code Ann. § 25-19-104(a)(1)(A) provides:

“... the following shall not be deemed to be made open to the public . . . education records as defined in . . . [FERPA] . . . .”
QUESTIONS?
THANK YOU!!
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