

Introductions

Name: Steven M. Richart, Speaker

- *Partner*

- *Hodges Loizzi Eisenhammer Rodick & Kohn*



Name: Cathy Nelson, Moderator

- *Asst. Superintendent of Business, CSBO*

- *Crystal Lake Community Consol. Sch. Dist. No. 47*



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FOIA 101

This presentation is to be informative and not to promote specific products, services companies, etc. Illinois ASBO Member Programs are permitted to promote products and services in accordance with the Service Associate Ethics Policy and Code of Conduct.



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APPLICATION FOR EMPLOYMENT

I refer to the recent death of the technical Manager at your Company and hereby apply for the replacement of the deceased manager.

Each time i apply for a job, i get a reply that there is no vacancy but in this case i have caught you red-handed and you have no excuse because i even attendended attended the funeral to be sure that he was truly dead and buried before applying.

Attached to my letter is a copy of my C.V. and his death Certificate.



Concepts

- FOIA Basics
- FOIA and Student-Related Confidentiality Laws
- FOIA and Copyrighted/Curricular Materials
- Personnel Record Confidentiality Laws
- FOIA Exemptions for Personnel Records
- FOIA and Emails
- FOIA and Bidding/Procurement Issues



Typical FOIA Request

- FOIA request from a parent of a student in Teacher's 3rd grade class via e-mail at 9:30 p.m. on December 1, 2023:
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FOIA Basics

- Purposes
- Transparency
- Public access to documents
- Does not require answering questions
- Does not require creating new records (w/exceptions – must produce electronic records in format requested, if feasible)



FOIA Basics

- Timelines – 5 business days + 5 more business days with extension letter
- Commercial Requesters – 21 business days
- Voluminous Request – more than 500 pages or more than 5 categories – notice within 5 business days
- Undue Burden – invite to narrow before denying



FOIA Basics

- FOIA Officer
- Annual training (<https://foiapac.ilag.gov/>)
- Posting duties
- Fees



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FOIA Basics

- Public Records Under FOIA
- Essentially all documents, recordings, and electronic information;
- Maintained by a public body, pertaining to the transaction of public business;
- Regardless of physical form or characteristics.
- Rule of Thumb: The use, NOT format, of a document determines whether it is a public record under FOIA.



FOIA Basics

- Employee personal account emails/texts: public records if content pertains to public business
- Board member personal account emails/texts:
- *Champaign v. Madigan* (2013): these are public records if:
 - pertain to public business; and
 - sent/received during a meeting OR by a majority of the Board
- *BGA v. City of Chicago* (2020): Mayor's texts are public records if pertain to public business



FOIA Basics

- General Disclosure Rule: Records must be disclosed unless specifically exempted.
- Exemptions:
 - Prohibited by law;
 - Prohibited from disclosure by ISSRA;
 - Private information/unique identifiers;
 - Personal information;
 - Preliminary drafts, notes, recommendations, etc.;
 - Certain records pertaining to educational matters.
- Exemptions are optional unless release is prohibited by another law. However, districts may have policies, collective bargaining agreements or practices not to release this information.



FOIA Basics

- Denials – Must cite exemptions/factual basis, consider redaction/release, state person(s) responsible, and include notice of rights
- Remedies
- Public Access Counselor
- Courts



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FOIA Basics

- Search requirements:
 - Statute doesn't address
 - AG/court cases:
 - Must be reasonable and designed to uncover all responsive records
 - Must search personal accounts if requested
 - Single word search (e.g., "Laquan McDonald") may not be enough



FOIA Basics

- No “personnel file exemption” anymore
- Each personnel document must be considered on a case-by-case basis



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FOIA Basics

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FOIA Basics

Questions:

What is the initial due date? 12/11/23. Date of receipt = 12/4/23 = day 0.

Is it voluminous? Likely more than 500 pages; likely more than 5 categories (personnel file alone will include many categories of records) – check with District’s legal counsel. If voluminous, can send voluminous request notice and ask to amend (ask legal counsel). Requires further follow up.

Is it unduly burdensome? Depends on number of emails and anticipated staff/attorney time -check with District’s legal counsel. If undue burden, send letter inviting to narrow & explaining burdens (ask legal counsel).
Counts as a denial; no further follow up needed until narrowed request is submitted.



FOIA and Student Confidentiality

Which basic laws apply?

- Illinois School Student Records Act (“ISSRA”)
- Family Educational Rights and Privacy Act (“FERPA”)



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FOIA and Student Confidentiality

What Are Student Records?

- Any writing or other record concerning an individually-identifiable student maintained by a school or at its direction by a school employee, regardless of how or where the information is stored
- Emails may be student records if they identify a student and are “maintained” by the school



FOIA and Student Confidentiality

What Are NOT Student Records, but still prohibited from disclosure under FOIA?

- Personal staff notes that are not shared
- Information maintained by law enforcement in the school
- Videos and other electronic recordings created for security/safety reasons (including those made on school buses)
 - Note: Recordings may become student record if school officials use and maintain them for a particular reason (e.g., disciplinary action, compliance with a student's IEP) regarding that specific student
- Any information received from law enforcement concerning a student under 17 years old who has been arrested/taken into custody



FOIA and Student Confidentiality

What if a parent submits a FOIA request for student records?

- Deny under FOIA
- If desired by parent, process it as a student records request
- Use ISSRA timelines/procedures for providing access to the records
- Final response from Student Records Custodian



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FOIA and Student Confidentiality

What is the duty to redact student records under FOIA?

- *Bowie v. Evanston (1989)*:
 - District was required to release masked and scrambled test results by race under FOIA where masked scores couldn't be linked to particular students.
 - If there were so few students of one race in a class that disclosure of the test records would result in their identification, district must withhold.
- Public Access Binding Opinion 12-014: test scores were only available in alphabetical order in hard copy and could not be scrambled; nonetheless, district was required to either cut scores into strips to prevent identification of students or create a Word or Excel document using the data from the paper record.



FOIA and Student Confidentiality

What about a FOIA request for directory information?

- Directory information may be disclosed under ISSRA/FERPA without consent, but requires annual notice
- Check District's policies/procedures/annual directory information notice
- If properly designated, could be required to release class roster under FOIA



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FOIA and Student Confidentiality

Questions:

The teacher's emails include emails about individual students. Do you withhold them?

- Yes, unless you can redact/release them without being individually identifiable to any student.

What information do you redact?

- Names, pronouns and all identifiers.

MAP scores only print out in alphabetical order. Do you withhold them?

- Maybe. Check with your legal counsel!



FOIA and Copyright/Curricular Materials

Garlick v. Naperville Township: copyright law may prohibit disclosure of copies under FOIA (involved license agreement/trade secret material)

FOIA exempts:

- (i) test questions, scoring keys and other examination data used to administer an academic examination; ...
- (iv) course materials or research materials used by faculty members

BUT *School Code* § 28-19.1 provides: “any member of the public may inspect all text and instructional material used in the public schools.”



Personnel Record Confidentiality Laws

Personnel Record Review Act

- Generally provides access to personnel files by employees and prohibits employers from using personnel record information which was not included in the personnel record in judicial or quasi-judicial proceedings
- Prohibits an employer from releasing disciplinary actions that are more than four years old
- Requires employer to provide notice to employee of any disclosure of disciplinary actions, on or before date of disclosure



Personnel Record Confidentiality Laws

Personnel Record Review Act

- Prohibits release of performance evaluations in response to a FOIA request
- Provides exceptions to employee's access to certain records, e.g., letters of reference, test documents, certain staff planning materials, certain investigatory/security records



Personnel Record Confidentiality Laws

Personnel Record Review Act

- Prohibits employer from gathering or keeping a record of an employee's associations, political activities, publications, communications or nonemployment activities, unless the employee submits the information in writing or authorizes the employer in writing to keep or gather the information or the activities interfere with the employee's duties or are criminal or could cause the employer harm.
- Prohibits employer from gathering or keeping a record identifying an employee as the subject of an investigation by the Department of Children and Family Services if the investigation resulted in an unfounded report



Personnel Record Confidentiality Laws

Americans with Disabilities Act

- All medical information about employees must be kept confidential
- Must be maintained apart from personnel file
- Accessed only by supervisors and managers as needed for work accommodations
- May be released only for limited purposes, including first aid or emergency personnel, worker's compensation proceedings



Personnel Record Confidentiality Laws

Personal Information Protection Act

- Requires notice to affected individuals in the event of breach (third party disclosure) of health insurance policy/subscriber number, medical records or other “personal information”
- “Personal information” constitutes an individual’s first name or first initial and last name, in combination with one or more of the following: SSN, DL or State ID #, account # or credit/debit card #, medical info, health insurance info, biometric info, username or email address with password



Personnel Record Confidentiality Laws

School Code

- Superintendent, principal and teacher evaluations are prohibited from disclosure except as allowed under Article 24A
- Criminal background check results are prohibited from disclosure

FMLA

Drug test results



Personnel Record Confidentiality Laws

Illinois Educational Labor Relations Act (IELRA)

- Prohibits disclosure of:
 - An employee's home address (including zip code and county);
 - Date of birth;
 - Home and personal phone number;
 - Personal email address;
 - Union dues deduction or union membership information; or
 - Emails between the union and its members.



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Personnel Record Confidentiality Laws

Illinois Educational Labor Relations Act (IELRA)

- Employer must forward any requests for prohibited information to the union (or to the employee if no union represents the employee), as soon as practicable after receiving the request
- Employer must provide a copy of its response within 5 business days after sending it out
- Employee or union may file a ULP if any prohibited personal information is disclosed



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Personnel Record Confidentiality Laws

Questions:

- Does the District need to notify the union of the request? (Yes) Why?
- What documents in the personnel file will be prohibited from disclosure? (evals, criminal background check results, any medical certifications, any discipline more than 4 years old, any instances of home address or other info prohibited under the IELRA or Personal Information Protection Act)



FOIA Exemptions for Personnel Records

Exemption 7(1)(n): records relating to adjudication of employee grievances or disciplinary cases, except for the final outcome of a case in which discipline is imposed.

- “Adjudication” has to be a formal hearing; does not apply to investigation records.

Exemption 7(1)(m): Communications between a public body and its attorney or auditor that would not be subject to discovery in litigation, and materials compiled at the request of the attorney in anticipation of litigation

Exemption 7(1)(p): records relating to collective negotiating matters between public bodies and their employees or representatives, except that any final contract or agreement shall be subject to inspection and copying



FOIA Exemptions for Personnel Records

- Settlement Agreements are not exempt and must be redacted for any exempt information - 2014 PAC 27773
- Letters of reprimand – non-exempt except in specific circumstances
- Board written disciplinary resolutions or actions – generally non-exempt
- Employee must be given written notice of release of any “disciplinary report, letter of reprimand, or other disciplinary action,” including release pursuant to FOIA, on or before the day the information is divulged (via mail or email) (Personnel Record Review Act § 7)
 - But prohibited from disclosure if more than 4 years old (Personnel Record Review Act § 8)



FOIA Exemptions for Personnel Records

Exemption 7(1)(b): private information, defined as unique identifiers including home addresses, personal email addresses, home or personal phone numbers, social security numbers, driver's license number, employee identification numbers, medical records, personal financial information, and biometric identifiers. 5 ILCS 140/2(c-5)

- includes income tax withholding amounts (see also 7(1)(c))
- includes optional deductions and withholdings (see also 7(1)(c))



FOIA Exemptions for Personnel Records

Exemption 7(1)(c): Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of privacy

- Balancing test
- Transcripts/GPA's are exempt – e.g., 2011 PAC 14379
- Employment References – mixed (2010 PAC 9252 – references were exempt) (2011 PAC 14747 – references were not exempt)
- Sick time balances – not exempt, e.g., 2011 PAC 14415
- Health/family information – exempt (various)



FOIA Exemptions for Personnel Records

Exemption 7(1)(c): Continued

- Applicants for employment (unsuccessful) – exempt, e.g., 2010 PAC 6805
- Resume and application for successful candidate – not exempt, but can redact, e.g., 2014 PAC 30785
- Date of birth – exempt - 2011 PAC 16348
- Race/ethnicity – exempt – e.g., 2010 PAC 5602 (approved redaction of race)



FOIA and Emails

Exemption 7(1)(c): Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of privacy, unless the disclosure is consented to in writing by the individual subjects of the information. "Unwarranted invasion of personal privacy" means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information.

- “Parents and students should feel free to address the administration without fear their correspondence will be on the front page of the morning newspaper. If the student or parents wanted their concerns and opinions to be publicized, they could have easily contacted the media in order to express those opinions.” State J.-Reg. v. Univ. of Illinois Springfield (2013)
- FOIA “was not designed to provide information about private individuals seeking access to information regarding the affairs of government. As previously noted, ‘the core purpose of the FOIA is to expose what the government is doing, not what its private citizens are up to.’” Chicago Alliance for Neighborhood Safety v. City of Chicago (2004)
- PAC has approved redaction of names/identities of individuals contacting the District to express opinions.



FOIA and Emails

Exemption 7(1)(f): Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body.

- Exempts “predecisional materials used by a public body in its deliberative process”
- Includes “inter- and intra-agency predecisional and deliberative material”
- “Intended to protect the communications process and encourage frank and open discussion”
- Harwood v. McDonough (2003)
- PAC and courts have approved redaction or withholding of internal deliberative emails under this exemption.



FOIA and Bidding/Procurement

FOIA exemption 7(1)(h): Proposals and bids for any contract, grant, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contractor agreement with the body, until an award or final selection is made. Information prepared by or for the body in preparation of a bid solicitation shall be exempt until an award or final selection is made.

- If choose to release info re: pending bid, send to all bidders.
- Check FOIA's preliminary draft/predecisional exemption as well.



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Typical FOIA Request

You are preparing FOIA response. Personnel file contains the following. What exemptions apply?:

Letter of reprimand for repeatedly showing up to work late, dated December 15, 2019

- What if dated December 15, 2018?

Workers comp records from a work injury



Typical FOIA Request

You are preparing FOIA response. Emails include the following. What exemptions apply?:

Parent complaint concerning teacher's treatment of a student

Teacher's emails to spouse on family matters

Teacher's emails to principal about responding to a parent complaint



THIS IS INTENDED SOLELY TO PROVIDE GENERAL INFORMATION. IT IS NOT LEGAL ADVICE OR A SUBSTITUTE FOR LEGAL COUNSEL. PLEASE CONSULT WITH LEGAL COUNSEL CONCERNING SPECIFIC FOIA REQUESTS.



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Questions and Answers

We thank you for your time!



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Presenter:

SPEAKER INFO:

Steven M. Richart, Partner
Hodges Loizzi Eisenhammer Rodick & Kohn
(847) 670-9000; srichart@hlerk.com

MODERATOR INFO:

Cathy Nelson, Asst. Superintendent of Business, CSBO
-Crystal Lake Community Consol. Sch. Dist. No. 47
(815) 788-5021; canelson@d47.org



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