

## According to Law



# Can I share this? What Sunshine Laws require

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Ohio's Sunshine Laws were enacted to foster transparency and provide open access to government records, meetings and activities. Sunshine Laws have been a continuing source of inquiry for school boards that have questioned their abilities and responsibilities to disclose information requested by parents, the public and the news media under these laws. This article reviews three categories of information requests that may warrant a closer review before disclosure.

## Requests about executive session discussions

An executive session is part of a meeting closed to the public and media. Ohio law allows public bodies to enter executive session to discuss eight specific topics, seven of which are applicable to boards of education. These topics include things like the board's consideration of various personnel matters, preparations for collective bargaining negotiations and discussions about the district's security and emergency response arrangements. Presumably, the law permits these private sessions to encourage candid discussions of sensitive topics.

Occasionally, OSBA receives questions from board members about what, if anything, can be shared following an executive session. OSBA believes, and its Code of Ethics for board members specifies, that all participants in an executive session should respect the confidentiality of the session. If executive session discussions are revealed, it is more likely that in future executive sessions, board members will be unwilling to candidly express themselves and use the time to have

fair and frank discussions, because the confidentiality of the session is not respected by the entire board.

Revealing executive session discussions can be a sign of poor boardmanship and a lack of understanding a public official's role. Board members have a duty to act in the best interest of the public office they represent, and it is rare when that includes revealing the substance of executive session discussions.

With that said, it is unlikely that revealing information discussed in executive session is illegal. The statute that governs executive sessions does not place limitations on board members' disclosures following the meeting.

However, a board may act to designate information as "confidential" under the provisions of Ohio Revised Code Section 102.03(B), which makes it a criminal offense to reveal information if a notice of confidentiality is given and that designation of confidentiality is necessary for the proper conduct of board business. Although the statute doesn't prescribe a method of designating information as confidential, presumably, a board could act in open session to designate information in an executive session to be held, or having just been held, as confidential.

Keep in mind, however, that even if the board hasn't taken steps to designate the information as confidential, there are other statutes that may limit the board's ability to share information discussed in executive session. Discussions in executive session pertaining to specific students, for example, may be legally prevented from disclosure under the Family Educational

Rights and Privacy Act (FERPA), which is discussed later in this article.

## Requests for employee information

School districts occasionally get requests from the public or media for information pertaining to an employee. These requests may be for information relative to the employee as a professional, such as résumés, application materials, evaluations and disciplinary records, or information more directly related to the employee personally, like his or her home address, cellphone number or email address. Whether a board may share this information is largely dependent upon whether the requested information meets the definition of a public record under Ohio's Public Records Act.

To be a record subject to disclosure, it must document the organization, functions, policies, decisions, procedures, operations or other activities of the district. The Supreme Court of Ohio has held that certain records are not records subject to disclosure, because they do not expose governmental activity to public scrutiny or shed light on any governmental activity. These include records kept by the district solely for administrative convenience, such as employee home addresses, personal cellphone numbers, personal email addresses and other items that don't document the office's formal duties and activities. If the district receives a request for this type of information, the district may redact the information or otherwise deny the request on the basis that it is not a public record.

In contrast, no public records exemption generally protects résumés and

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application materials obtained by public offices in the hiring process. Similarly, employee evaluations and disciplinary action records are not subject to any general public records exemption. These records tend to document the official functions of district employees and, as such, must be available upon request.

In the case of a superintendent's evaluation, at least one court has held that the individual evaluations used by the board president to prepare a composite evaluation, but not kept thereafter, are not public records since board members retained possession of their individual evaluations. If the individual evaluations are maintained by the school district, they likely will be considered public records subject to disclosure.

Ohio law imposes several duties on school districts about how they must maintain records and respond to requests, including penalties for failure to produce records as required by law. The preceding paragraphs provide general information about a district's rights and obligations in this area, but districts are encouraged to consult with board counsel prior to releasing records contained in an employee's personnel file.

### Requests for student information

A school district maintains many records that contain information directly related to a particular student. These education records enjoy unique protections that differ from other district-maintained records. FERPA is a federal law that grants parents both the right of access to and the right of consent prior to publicly disclosing student record information.

Under FERPA, parents have the right to inspect and review their child's education records that are maintained by the school. This right also extends to noncustodial parents — unless there is a specific court order to the contrary — and stepparents when they are present on a day-to-day basis with the natural parent and child and the other natural parent is absent from the home. A grandparent or other caregiver who is acting in the parent's absence also may

be eligible to receive access.

Generally, districts are prohibited from releasing education records or personally identifiable information contained in the records to the public. However, FERPA allows schools to disclose records or information to certain parties under some conditions, which include:

- **Parental consent** — A district may release any information from a student's education record with written permission from the student's parent. The consent must be written and specify the records that may be disclosed; state the purpose of the disclosure; and identify the party or class of parties to whom disclosure may be made.
- **Directory information** — School districts can designate certain information as directory information and disclose it without parental consent, assuming they have provided parents with the right to object to its release within a reasonable period of time. Districts have some flexibility in determining what they designate as directory information, but the category broadly includes things like the student's name, address, telephone number, email addresses, grade level and other information that would not generally be considered harmful or an invasion of privacy if disclosed.

- **Other specified persons and organizations** granted access by law — FERPA contains many other exceptions that allow districts to disclose personally identifiable information from a student's education record without the consent of a parent. This includes disclosure to individuals like school officials who the district has determined have legitimate educational interests in the information, and to comply with a judicial order or a lawfully issued subpoena. For a complete list of FERPA exceptions, visit the U.S. Department of Education's website on FERPA at [www2.ed.gov/ferpa](http://www2.ed.gov/ferpa).

Districts need to familiarize themselves with the categories of records or requests for information that may warrant a closer review before disclosure. If you have questions about whether disclosure would violate laws protecting certain categories of records, call the OSBA legal hotline at (855) OSBA-LAW or (855) 672-2529, or consult with your district's attorney prior to disclosure. ■

*According to Law is designed to provide authoritative general information, sometimes with commentary. It should not be relied upon as legal advice. If legal advice is required, the services of an attorney should be obtained.*

## Ohio's Sunshine Laws: What you need to know

OSBA's "Sunshine Laws for Schools" provides an accurate description of the state and federal laws and regulations pertaining to public records and explains the complex nature of executive sessions and record keeping.

The price is \$20, which includes shipping. Place your order online at [www.ohioschoolboards.org/store](http://www.ohioschoolboards.org/store) or contact Debbie Burda at (614) 540-4000, (800) 589-OSBA or [dburda@ohioschoolboards.org](mailto:dburda@ohioschoolboards.org)

