Everything old is new again

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State and federal laws on public records and student records have been on the books for many years. Scores of speeches, bulletins and articles have dissected and analyzed record issues. School officials may be tempted to think that the law is settled on these topics. This intuition may seem reasonable, but it also is dangerous. Public record and student record laws are evolving rapidly as courts, legislatures, and agencies respond to new technologies and old practices.

The Open Records Law: Changing public offices into Amazon.com?

Just over a year ago, Senate Bill 78 amended Ohio Revised Code (RC) Section 149.43, the Open Records Law. Many of the changes in this legislation involved matters of limited interest to school officials, such as the public record status of peace officer residential and familial information (the new protections afforded to this information could affect schools only if students are identified as the children of law enforcement personnel). The bill, however, did make some changes to the Open Records Law that are significant for public schools.

SB 78 changes: The right to request records upon a particular medium

The Open Records Law now entitles a person to request that a record be duplicated upon a medium other than the one upon which it was originally created. Before SB 78 was enacted, courts had issued vague and sometimes conflicting guidelines on when a public office or record custodian had to duplicate a public record upon a different medium. RC Section 149.43(B)(2) now generally allows a person making a record request to choose the medium upon which the record is to be provided.

Specifically, a person may request that a record be provided upon: (1) paper; (2) the medium on which it is kept; or (3) any other medium on which the public office or record custodian determines that it reasonably can be duplicated "as an integral part of [its] normal operations." A public office or record custodian must honor any choice of medium that is made within these options.

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So, how does this new law work? For example, is a person entitled to have a public record copied upon the latest technology? Probably not. It appears that a public office or record custodian is not obligated to reproduce a record upon a medium that is not used in the normal course of its business. It also appears that the Open Records Law does not require a public office to purchase new technology (such as equipment to create compact disks) to satisfy a record request. If a requested medium is not available, a public office or record custodian cannot completely ignore a record request, but it probably can fulfill its obligation by providing the record upon a medium that is available "as an integral part of [its] normal operations."

You've got (e-)mail

The Open Records Law also now requires a public office or record custodian to make records available by mail. If a person requests a public record by mail, RC Section 149.43(B)(3) provides that a public office or record custodian must mail a copy of the record within a "reasonable period of time" after the request is received. To ensure that the person pays for the record, the public office or record custodian may require that postage and the cost of other supplies used in the mailing be remitted before the record is delivered. A public office also may adopt a policy to limit the number of records that a person can request by mail for "commercial purposes" to 10 per month. Journalists, citizen watchdog groups and persons conducting nonprofit educational research are exempt from this limit.

The changes in the Open Records Law may create new dilemmas for schools and other public offices. For instance, is a person entitled to obtain a public record by e-mail?

It is unclear whether e-mail is a *medium* upon which a record may be copied or a *means* of delivering a record. If e-mail is a means (like regular US mail), a school district might not be obligated to deliver records in this manner. If e-mail is a medium, the answer would appear to depend upon the nature of the request and whether e-mail and related technology are "an integral part of the normal operations" of the public office or records custodian that receives the request. If a person requests that an e-mail record be sent by e-mail, and a public office or record custodian has ready access to an e-mail system, it is more likely that the record might have to be provided in the manner requested.

A demand to have a large volume of paper records transferred to e-mail presents a more difficult problem. The availability and accuracy of a scanner or similar equipment and the compatibility of different e-mail systems are just some of the concerns that could affect how

schools respond to such questions.

Until the courts take a closer look at the new law, novel public record requests should be referred to legal counsel.

The potential consequences of SB 78 are not all bad. The use of e-mail for public record requests could have some useful applications for schools. If, for example, a record is requested by e-mail, and it can be provided in that manner, both the person requesting the record and the school could realize cost savings. Unlike paper records that must be copied and perhaps mailed, e-mail records can be duplicated and transmitted at little or no cost.

School officials also can create useful evidence of their response by saving e-mail messages and attachments.

Student records: When are they directory information?

Subject to certain exceptions, student records that consist of "personally identifiable information" generally are exempt from the Open Records Law. Records that contain information not likely to be harmful or an invasion of privacy if released (known as "directory information") usually are subject to disclosure. School officials must look to both state law, RC Section 3319.321, and federal law, 20 United States Code Section 1232g and related regulations, for guidance on student record issues. These laws should be read with care, because they are not identical.

Last fall, the United States Department of Education amended the regulations implementing the Family Educational Rights and Privacy Act (FERPA). The regulations, found in 34 Code of Federal Regulations Part 99, created or changed several significant definitions.

For example, before the new regulations were introduced, "dates of attendance," a type of directory information, was not defined anywhere in the state or federal laws. This term now is defined as "... the period of time during which a student attends or attended [a school]." Examples of dates of attendance include an academic year, a semester, or a quarter. Daily records of a student's attendance are not considered as "dates of attendance" and thus are not directory information.

The new FERPA regulations also expanded the definition of "directory information." Data previously considered to be personally identifiable information, including a student's e-mail address, photograph, and grade level, now is directory information under federal law. This change presents a problem in Ohio, because the definition of "directory information" in RC Section 3319.321(B)(1) has not been amended to mirror the federal regulations. As a result, the definition of "directory information" in state law is more restrictive than that found in FERPA.

There does not appear to be any legal authority that reconciles the different definitions of "directory information" in state and federal student record laws. Some attorneys and school officials have suggested that state law could be interpreted to allow schools to use the broader definition contained in FERPA. RC Section 3319.321(B)(2)(a) provides that if a board restricts the "presentation of directory information that it has designated as subject to release *in accordance with [FERPA]*," the restrictions must be uniformly imposed on certain groups, such as the armed forces and colleges and universities.

It is reasonable to read this language to prohibit schools from having a broader definition of "directory information" than that allowed by federal law. It is doubtful, however, that it was intended to nullify the more narrow definition (excluding student e-mail addresses, photographs, and grade levels) found elsewhere in the same statute.

So, what types of data should schools consider as directory information? At this time, it appears that the safest practice is to use the more restrictive definition found in the Revised Code. This may be prudent for several reasons. First, most schools probably did not notify parents at the start of the school year that student e-mail addresses, photographs and grade levels could be subject to release without prior consent. It also is likely that most board policies, administrative guidelines and student handbooks do not categorize this data as

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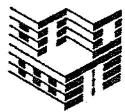

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"directory information."

Finally, the release of such information could carry unintended consequences. For instance, an abusive non-custodial parent could use a photograph on a school's Internet page to trace the whereabouts of a student. E-mail addresses also could be used for harassment or other inappropriate purposes.

At a minimum, school officials should not designate data as directory information without providing parents with prior notice and an opportunity to request that it be withheld. Specific questions about student records should be referred to the board's legal counsel.

Students grading each other's papers violates FERPA

There is one more reason for using extra care when dealing with student record requests. Judges continue to strictly interpret FERPA to prohibit the release of personally identifiable information. Sometimes, courts apply student record laws in ways that produce unusual results.

Many teachers have a practice of allowing students to grade each other's apers. Advocates of this practice believe that, among other things, it affords students a different perspective on an assignment. It allows teachers to make more efficient use of their time. These may seem like reasonable claims. A federal court of appeals, however, concluded that this exercise violates FERPA because it results in the disclosure of students' grades to their peers.

In *Falvo v. Owasso Independent School District No. I-011*, elementary and junior high school teachers permitted students to grade one another's tests and other work, and to call out the grades during class. The mother of three students in the district claimed that this practice violated FERPA and the students' privacy rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The board defended the practice and argued that classroom grades were not "ducation records" (and thus not rsonally identifiable information protected by FERPA) because the district did not maintain them. In support of its position, the board obtained an opinion letter from the Family Policy Compliance Office of the US Department of Education stating that the practice did not violate FERPA.

The United States Court of Appeals, Tenth Circuit, rejected the mother's privacy claim, but ruled that the paper grading practice compromised the students' FERPA rights. The Court of Appeals explained that although the students who graded their peers' papers were not agents or employees of the board, the grades became "education records" once they were entered into the teachers' grade books and later were shared with other persons. As such, the Court concluded that the practice violated FERPA because it resulted in the unauthorized release of personally identifiable information within those records.

Falvo is not binding legal authority in our state because the Tenth Circuit does not have jurisdiction over Ohio. This case may be persuasive, however, because no state or federal court in Ohio has issued a contrary ruling. At the very least, *Falvo* provides school officials with a warning that even widely accepted practices involving student records potentially could be in violation of FERPA.

Conclusion

Public record and student record laws constantly are changing. Tomorrow's technologies and yesterday's practices can provide legal dilemmas. Certainly, the General Assembly might be eligible for a point or two of extra credit if the definition of "directory information" in the Revised Code is amended to mirror the one found in FERPA.

OSBA is monitoring changes to public record and student record laws. Our resources are available to help you stay current on new developments concerning these issues. ❑

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