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## Public records law continues to change; invites legal questions

by *Richard J. Dickinson, director of legal services, and Hollie Reedy, staff attorney*

Cheerleading results are out, and for the second consecutive year, Susie is not selected for the squad. When her mother finds out, she drives to the school and demands records showing who voted against her little girl.

She is very upset and wants to see the cheerleading advisor's personnel file. Must the district produce the records? (Read on for the answer.)

Inquiries to OSBA's legal services division on any given day most often include at least one question on public records.

While public records requests can be thought of as a constant in the operation of your buildings, the variety of situations keep changing to which a school administrator must apply the Ohio Public Records Law (Ohio Revised Code Section 149.43).

Two recent legislative amendments to Ohio's Public Records Law, Senate Bill 78 and House Bill 539 also change the law.

What has not changed is that the direction of the law and cases interpreting the law continue to lean heavily in favor of requiring disclosure of records unless they fall within a recognized exception. It is important to understand that many types of records

kept in the course of school business are not shielded by any exception, and that courts do not recognize the defense of "... we have always done it this way."

Building an awareness of the Public Records Law and its scope can prevent unfortunate situations and litigation.

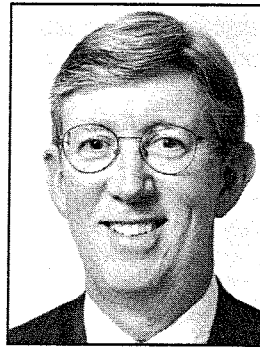
### Changes to the public records law

SB 78 went into effect in December 1999 and amended the Public Records Law by allowing citizens to choose the method by which they want to receive records,

either on paper or in the medium in which it is stored by the keeper (or any other method by which it can reasonably be duplicated). Records must also be mailed to the requesting party, if so

requested. The number of mailed transmissions can be limited by policy which can also require the person requesting records to pay in advance for the cost of copying and postage.

HB 539, which becomes effective July 1, 2000, creates two new exclusions to the Public Records Law. This change may affect how school districts evaluate requests for information.



*Richard J. Dickinson*



*Hollie Reedy*

### Protection for peace officers

The first new ORC section, 149.43(p), excludes from public record, "Peace officer residential and familial information." (A peace officer is a police officer, deputy sheriff, undercover drug agent, park ranger, campus police officer, etc.)

How will this affect you? Are there children of peace officers in your district? Are there administrators, teachers, or other school employees who are married or were formerly married to peace officers? This provision is new and has not yet been interpreted by the courts, but it is possible that the records of these individuals may be entitled to special protection from disclosure.

Records that might ordinarily be subject to disclosure will be protected if they include information already detailed in the statute at ORC Section 149.43(A)(7), subsections (a) through (f). These records include the address of the personal residence of the peace officer, bank account number, credit card number, the name of any beneficiary of employment benefits, phone number or emergency contact number of the peace officer or their spouse, former spouse, or child,

including the employer and the address of the employer of the spouse, former spouse, or child of the peace officer.

Consider a situation where a child of a police officer is employed in a vocational program outside the school. Under the exclusion, this would be information protected from disclosure.

#### Recreational activities of a minor

The other change is an entirely new section that will be found at ORC Section 149.43(A)(1)(r), and the definition at 149.43(A)(8). It exempts from disclosure those records that "... pertain to the recreational activities of a person under the age of eighteen" and that is "... kept in the ordinary course of business by a public office." School attendance is, of course, compulsory and could not be described as a recreational activity. It appears at this time that the impact on schools will

be limited.

#### "You've got mail"

As more school employees begin to use e-mail to conduct business, questions arise as to how to retain these records and the applicability of the Public Records Law to the use of e-mail.

Are e-mail messages public records? Some recent court decisions say yes. The law supports this interpretation. A "public record" is defined as "... any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." [ORC Section 149.43(A)(1)]

In *State ex rel. Wilson-Simmons v. Lake County Sheriff's Department*, the court clearly contemplated that e-mail which meets the definition of a "record" is covered by the law. In that case, however, the court held that because the messages sent via e-mail were personal and did not document any of the policies or functions of the office, they were not "records" under the law (1998), 82 Ohio St.3d 37. In contrast to public records, purely personal notes retained for the sole use of the employee are not subject to the Public Records Law. As long as the messages are personal and do not document the functions, policies, etc., of the office, those records fall outside the definition of a public record.

E-mail messages concerning school business should be available or added to your records retention schedule. One possible policy solution would be to store e-mail until it is no longer administratively necessary for the person by whom received to perform his or her duties. If the information is needed in the future, it could be saved to the drive. If the e-mail is about a student, it should be printed and put in the file.

Can certain information be kept in separate files?

Your school district keeps personnel evaluations and disciplinary actions in a

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separate file from the main personnel file of school employees. Consider the system in which only the most current evaluation of a teacher or administrator kept in the main file. Previous evaluations can be stored elsewhere, in a 'stale materials file'.

Student records are kept in the main office, but student records involving cheerleading tryouts are stored in the athletic director's office. Is it permissible to do so? Yes. The public records law does not require that information be stored or catalogued in any particular way.

Will a public records request for all documents concerning a teacher or student comply with the law if the information from the main file is provided and the separate files are not provided? No. The fact that files are retained separately is within the discretion of your board and its policies, but the law must be applied to the documents requested, not to the location of the files. Therefore, requests for evaluations must be provided in full. Teacher evaluations and disciplinary actions, including any related records, such as complaint letters from the public that formed the basis of the disciplinary action, are public records.

#### Parents getting records

Parents can access any and all records involving their children. However, they

are not entitled to view information on other children. Information concerning other students that may appear in the requested record must be redacted. Non-custodial parents also have the right to review records concerning their children in the absence of a court order to the contrary. Student records to which the Public Records Law applies could include records that administrators may not have considered, such as National Honor Society voting or cheerleading tryout evaluations.

#### Conclusion

The Ohio Public Records Law is continually being modified through legislative changes and court decisions.

Your policies and procedures regarding records need to keep pace.

The answer to the cheerleaders' records request question is "Yes." The school district must give Susie's mom copies of the cheerleader tryout records, if kept by the district, and the cheerleading advisor's personnel file. Be sure to remove non public items such as medical records and social security numbers. □

*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.*

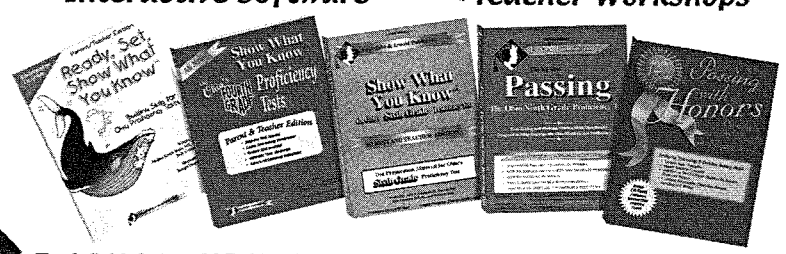
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