

 Clark Hill

FOIA AND FERPA UPDATES & REMINDERS

RETAINER WORKSHOP APRIL 2023

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


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FOIA: Overview

- A person may "inspect, copy, or receive copies of the requested public record of the public body." MCL 15.233(1)
- Public record: "a writing prepared, owned, used, in the possession of, or retained by a public body in the **performance of an official function**, from the time it is created." MCL 15.232(i)
- "Writing" means "handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, hard drives, solid state storage components, or other means of recording or retaining meaningful content." MCL 15.232(j)
- Includes electronic records like texts and emails




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FOIA: Overview

- Purpose of FOIA: "all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process."
- FOIA operates as pro-disclosure, while exemptions are narrowly construed
- Without a legal basis for an exemption, the document likely needs to be disclosed (schools cannot assert that they would rather not disclose it)




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FOIA and the Use of Personal Devices

Can Messages on a Personal Device Be Subject to FOIA?

- The answer: it depends...
- Rather than **where** the messages are coming from – the inquiry focuses on **what** they contain
- Thinking about whether the messages were created for an official function
- These messages include personal text messages, writings that originate from a personal device, emails from a personal email address
- But remember: MCL 15.243(1)(a) (exemption for information of personal nature)



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FOIA and the Use of Personal Devices

- Consider:
 - Are you using your personal device for performance of an administrative function?
 - Or rather, are the contents of the writings personal exchanges?
 - Is the writing one that an official/administrator/board member used in preparing to officially act/engage in official district business?
- To avoid personal devices being subject to FOIA – try to limit them to personal use only
 - Though this is not always possible, multiple phones not always available for use...



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From Michigan's FOIA Handbook (2023)

What is NOT a public record?

"A **record** that, while prepared, owned, used, in the possession of, or retained by a public body, is **not done so in the performance of an official function** is not a public record. A personal email not transmitted in performance of an official function is not a public record. It should be noted however, that **personal email could become a public record if it relates to one of the public body's official functions**. For example, email used to support a disciplinary action for abusing the public body's computer acceptable use policy would be related to one of the public body's official functions - discipline of an employee."



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From the National School Boards Association

But It's My Cell Phone: Methods and Consequences of Using a Personal Device for School Business

- "Cases have developed regarding email, text messages and electronically stored data that would be a public record if in print within the school district. **Courts have found that those "records" maintain their public nature** (unless protected from public disclosure by some exemption to the public records statute)"
- "Just like its paper counterpart, **whether an electronic record is a public record is determined by its author, content, and storage**. The basic question to ask in determining whether an electronic record is a public record is, 'Was it created in the furtherance of public business?'"
- Records on personal devices may be subject to state record retention schedule (employers might not know the record even exists)



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From the National School Boards Association

But It's My Cell Phone: Methods and Consequences of Using a Personal Device for School Business

- When parents request a teacher's personal cell phone number – this could help to build the relationship and help the parents trust the teacher
- NSBA recommends that teachers remain transparent about the potential of having records disclosed even while exchanged on a personal device
- Discussing with parents is an option to consider – though speaking to parents on personal devices is a common practice



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From the National School Boards Association

But It's My Cell Phone: Methods and Consequences of Using a Personal Device for School Business

"[P]arents may understand limitations on the use of employee personal devices if they understand the records issues created by using the employee's personal cell phone, the burdensome nature of extending the locations to search for potential student records, and the end result possibly being that student records are not retrievable for the school district when a parent requests"



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This Issue Creates Reasonable Apprehension!

- Most school officials do not fear any discovery of wrongful or illegal activity
- It is mostly the discomfort associated with publicly disclosing information that is on a personal device
- Personal writings would not be subject to disclosure, but could be reviewed to be able to sort what is related to official business and what is personal in nature
- The extreme view is: don't use personal devices for any school business-related activity
- The reality: just be aware that it is possible that personal devices could be subject to a FOIA request



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CASE LAW










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FOIA and the Use of Personal Devices- Case Study #1

Howell Education Association MEA/NEA v Howell Board of Education, 287 Mich App 228; 789 NW2d 495 (2010)

- Emails sent on public school employee's school email account that involved entirely personal and private matters
- Were these "public records" under FOIA?
- Michigan Court of Appeals said: **NO**.
- These emails are not "public records" under FOIA simply because they are held in the district's email system







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FOIA and the Use of Personal Devices- Case Study #1

Howell Education Association MEA/NEA v Howell Board of Education, 287 Mich App 228; 789 NW2d 495 (2010)

- Court rejected the argument that anything on the school's computer system was "retained" by the district and subject to FOIA
- For the emails to be subject to FOIA in this case, the messages would need to actually relate to the public body's function.
- Personal messages, even on a district-owned account, fall outside of FOIA's reach



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FOIA and the Use of Personal Devices- Case Study #1

Howell Education Association MEA/NEA v Howell Board of Education, 287 Mich App 228; 789 NW2d 495 (2010)

- "There is nothing about the personal e-mail, given that by their very definition they have nothing to do with the operation of the schools, which indicates that they are required for the operation of an educational institution"
- "[W]e are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA."



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FOIA and the Use of Personal Devices- Case Study #2

Progress Michigan v. Palmer, No. 357610, 2022 WL 2081071 (Mich. App. June 9, 2022)

- Plaintiff sought communication records from Board (related to presidential election).
- Plaintiff initially received response that none of the Board members had a county email address or cell phone, and therefore, there were no records responsive to Plaintiff's request
- Defendants argued: because the messages were exchanged on personal devices, they were not subject to FOIA disclosure.
- Defendants claimed "records being sought were not public records subject to disclosure under FOIA, but rather, were limited to private communications"



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FOIA and the Use of Personal Devices- Case Study #2

Progress Michigan v. Palmer, No. 357610, 2022 WL 2081071 (Mich. App. June 9, 2022)

- Plaintiff argued that defendants:
 - 1) committed "FOIA violations by refusing to disclose public records that were created using their personal devices, services, and accounts" and
 - 2) used the personal devices to communicate about official business "thus subjecting these communications to disclosure under FOIA."



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FOIA and the Use of Personal Devices- Case Study #2

Progress Michigan v. Palmer, No. 357610, 2022 WL 2081071 (Mich. App. June 9, 2022)

- The Court of Appeals held: "the **fact that defendants may have used personal devices**, services, and accounts in conducting official business of the Board is **inconsequential to the issue of whether the writings [including text messages] are subject to FOIA.**"
- "Although the personal communications were not read into the Board's official meeting minutes, we are persuaded that **if the contents of those communications 'served as the basis for a decision to refrain from taking official affirmative action,'** those communications must be **considered a 'public record,'** as defined by the FOIA"



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FOIA and the Use of Personal Devices- Case Study #3

Blackwell v. City of Livonia, 339 Mich. App. 495, 984 N.W.2d 780 (2021)

- FOIA request for communications sent to mayor's personal Facebook account
- Facebook profile was not used or maintained by the office of the mayor
- Plaintiff relied on general principle that posts made by public officials on private social media accounts could constitute a public record
- Defendant argued: messages were not owned, used, in the possession of, or retained by the city and should be withheld from disclosure



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FOIA and the Use of Personal Devices- Case Study #3

Blackwell v. City of Livonia, 339 Mich. App. 495, 984 N.W.2d 780 (2021)

- Court of Appeals: Found for the city, noting that the "direct messages were not owned, used, in the possession of, or retained by the city of Livonia mayor's office in the performance of an official function"
- This case offers another example that highlights that the *content* of the messages dictates whether they could be subject to FOIA disclosure



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FOIA and the Use of Personal Devices

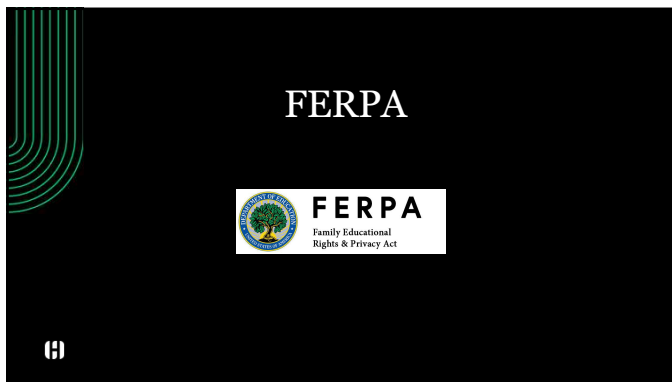
To Keep in Mind:

- “unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee”

Kestenbaum v. Michigan State Univ., 414 Mich. 510, 327 N.W.2d 783 (1982)



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FERPA: Overview

- Education records are defined as those records that are: 1) directly related to a student; and are 2) maintained by an education agency or institution or by a party acting for the agency or institution. (34 CFR 99.3.)
- For photos and videos; must be directly related to a student and maintained by the school district or educational agency. *Frequently Asked Questions on Photos and Videos under FERPA (Student Privacy Policy Office)*



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FERPA: Directly Related to a Student

- No statutory definition.
- Generally regarded as synonymous with "personally identifiable information."



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FERPA: "Maintained by an education agency or institution"

- What if a teacher takes photos on a personal device?
- "While the term 'maintained' is not defined in FERPA, we believe that common sense should guide its application. It appears that the photographs were taken by [the teacher], developed at her expense, and maintained by her as personal property. If this is the case, the photographs are not education records subject to FERPA's privacy protections."
- (Letter to Parent, SPPO, 1996)



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FERPA: Personally Identifiable Information

- Includes, but is not limited to:
- Student's name;
- Name of the student's parents or other family member;
- Address of the student or student's family;
- A personal identifier, such as the student's SSN, student number, or biometric record;



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FERPA: Maintaining Compliance While Working Remotely

- Maintain student data security by ensuring that records are not left unattended
- Keep computer or other devices locked
- Try to separate work life from business life – even with downloading documents or communicating on personal devices
- Make sure WiFi is secure and communicate any concerns with IT (use VPN if available)
- Try to limit meetings or other discussions regarding confidential information from taking place in a setting where others may hear



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Resources

- FERPA Regulations available at: <https://studentprivacy.ed.gov/ferpa-regulations>
- USDOE, Privacy Technical Assistance Center at <https://studentprivacy.ed.gov>
- IDEA and FERPA Confidentiality Provisions guidance document at <https://www2.ed.gov/policy/gen/guid/ptac/pdf/idea-ferpa.pdf>
- FAQ regarding School Resource Officers, School Law Enforcement Units, and the FERPA (February 2019).
- FAQ on Photos and Videos under FERPA (April 2018).
- Final Report of the Federal Commission on School Safety, (2018), Chapter 13 – Training School Personnel to Help Ensure Student Safety available at: <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>



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FAQ on Photos and Videos under FERPA

(April 2018)

- Guidance addresses FERPA issues related to access to video recordings
- Factors to determine whether photo or video is "directly related" to student:
 - educational agency or institution uses the photo or video for disciplinary action (or other official purposes) involving the student (including the victim of any such disciplinary incident)
 - photo/video depicts activity that resulted in educational institution's use of photo/video for discipline; shows student in violation of law; shows student getting injured/attacked/victimimized



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FAQ on Photos and Videos under FERPA

(April 2018)

- Factors to determine whether photo or video is "directly related" to student:
 - The person or entity taking the photo or video intends to make a specific student the focus of the photo or video (e.g., ID photos, or a recording of a student presentation); or
 - The audio or visual content of the photo or video otherwise contains personally identifiable information contained in a student's education record.
- Without meeting these factors – photo or video NOT directly related to student under FERPA



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FAQ on Photos and Videos under FERPA

(April 2018)

- Videos such as surveillance showing a fight might be an education record or faculty meeting recording with discussion of specific student's grades
- If image is merely incidentally captured as part of the background or if student is shown participating in school activities open to the public and without specific focus on any individual, should not be considered directly related.



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FAQ on Photos and Videos under FERPA

(April 2018)

- From FAQ #2 & #3:
- **Can the same recorded image be the education record of more than one student under FERPA?**
 - Yes. For example, a surveillance video that shows two students fighting on a school bus that the school uses and maintains to discipline the two students, would be "directly related to" and, therefore, the education record of both students.
- **Video for multiple students?**
 - Parent can inspect and review to "be informed" of what the video includes
 - Educational agency or institution **not required** to provide copies
 - <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa>



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FERPA Exceptions

- General Rule is: Written parental consent is required before can release personally identifiable information from a student's education record unless one of FERPA's exceptions apply.
- Exception: Personal Notes
 - Records kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
 - E.g., staff notes, notes taken during IEP meetings, counselor notes. (But, can be subject to subpoena or production orders)



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Staff Writings in Emails...

FOIA & FERPA Overlap

- USDOE has not yet opined
- Can't on one hand disclose under FOIA and then on the other hand claim it is an educational record under FERPA
- Must rethink this issue, especially due to the prevalence
- Some hearing officers and courts have taken the position that emails that briefly reference a child but are only used as a communication tool and not maintained as part of the student's education record, are not FERPA records.



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Staff Writings in Emails...


FOIA & FERPA Overlap

- Not clear cut given the broad definition of education record.
- Conservative advice is, if meet the definition of an education record, disclose.
- Even if not considered an education record under FERPA, may require disclosure via FOIA requests, subpoenas, etc.
- Exercise caution with emails!!!!




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QUESTIONS?





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Thank You

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