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# **I Want Their Personal Emails and Texts!**

## *Preparing for Public Records Requests in 2022*

Florida Charter School Conference 2022

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## *Disclaimer*

This presentation is not intended to constitute legal advice. You should consult with your school's attorney on the specific requirements of complying with Florida's Public Records Act.

How many of you have received  
a public records request before?

# Florida's Public Records Act

- Section 1002.33(16)(b)2., F.S., provides that charter schools are subject to the Public Records Act.
- Charter contracts also specifically require compliance with the Public Records Act.
- The Public Records Act is codified in Chapter 119, Florida Statutes.

# Florida's Public Records Act

- If a document is a “public record,” the Act requires:
  - That the record be open to inspection and copying by the public;
  - Maintenance of the record for a certain time period; and
  - The record may only be destroyed as specified in the Act.
- Limited exceptions

# What is a Public Record?

- Section 119.011(12), F.S., and Fla. Sup. Ct., define public records as all materials, regardless of form, that are made or received in connection with the transaction of official business by or on behalf of an agency which are used to perpetuate, formalize or communicate knowledge.
- Definition is broad -- anything capable of reproduction.

# What is a Public Record?

- Public records may include, but are not limited to:
  - E-mails
  - Text messages
  - Web site content
  - Social media content
  - Electronic Files
  - Papers and letters
  - Maps
  - Books
  - Tapes, DVD, CDs and other recordings
  - Photographs and films



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Key here:

It is the content of the communication that is important,  
not where or how it is stored.

# Quiz #1

- Phil and Suzanne are members of the Very Successful Charter School governing board. Phil emails Suzanne using his official school email account and asks her how her trip to Guatemala went. Suzanne responds using her official email account and tells Phil all about her trip. An individual serves a public records request on the school seeking all emails between board members during the time period when Phil and Suzanne had this exchange.
- Does the school have to provide Phil and Suzanne's email exchange?

# Understanding Different Types of Records

# Emails and Text Messages

- Information stored on a public agency's computer or network is considered a public record just as a written document stored in a filing cabinet.
- E-mail messages made or received by board members or school employees in connection with official business are public records and are subject to disclosure.
  - Private e-mail stored in a government computer does not automatically become public record.
  - Spam or bulk mail received by a public agency does not necessarily constitute a public record.
- Text messages
  - Text messages may be a public record, depending on their content.

# Social Media

- Social media
  - School's Facebook page or other social media pages presumably would be created in connection with the transaction of official business, so it would be a public record. AGO 2009-19.
  - Determination would ultimately depend on the application of the definition of "public record."
- What about social media run by the PTO?
  - If PTO is separate entity, likely not subject to the Act.
  - If PTO is part of the school, then social media content IS subject to the Act.

# Education Records

- The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a federal law that does two things:
  - Protects the privacy of student education records, particularly personally identifiable information.
  - Allows parents/guardians or eligible student to inspect and review the student's education records, request changes to the student's education records, and consent to the release of such records to third-parties.
- What are education records?
  - Includes grades, transcripts, health records, financial information, student discipline files, etc.
  - Does not include directory information, such as name, address, date and place of birth, participation in officially recognized activities and sports, dates of attendance.
- FERPA is complex and this is not intended to be an exhaustive review.

# Education Records

- “Education Records” as defined in FERPA are specifically exempt from disclosure under the Public Records Act.
- To avoid violation of FERPA or the Public Records Act, requests for materials that might be classified as “educational records” need to be reviewed carefully when the requests are made by someone other than the parent/guardian or eligible student.

# Personnel Records

- Personnel records generally are subject to the Act:
  - School employee personnel files
  - Employee contracts
  - Applications for employment
  - Communications from third parties relating to employees
  - Grievance records and investigations (with some exceptions)
  - Resumes
  - Salary information
  - Travel vouchers
  - Evaluations (following the end of the school year immediately following the school year in which the evaluation was made)
- Exemptions include: Employee payroll deduction records, SSN's, medical records, pre-employment examinations (written test, drug test results, questions asked during polygraph examination)



# Security and Firesafety Records

- “Security and firesafety plans” are exempt from disclosure under the Public Records Act.
- The term “security or firesafety system plan” includes: records relating directly to the physical security or firesafety of the facility or revealing security or firesafety systems; threat assessments; threat response plans; emergency evacuation plans; sheltering arrangements; or security or firesafety manuals.
- Building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout and structural elements of a building are also exempt from disclosure.

# Drafts and Notes

- Drafts or notes become public records if they are circulated beyond the author or are not intended for personal use.
- Any material which is intended to perpetuate, communicate, or formalize knowledge is a public record, regardless of whether it is in final form.
- Drafts and notes that may be considered public records include:
  - Intra- or inter-office memos
  - Preliminary or working drafts of documents
  - Proposals submitted for review

# Litigation Records

## Work product

- There is narrow statutory exemption for certain work product of an attorney or a person acting under the direction of an attorney
  - Applies to records prepared in anticipation of *imminent* civil or criminal litigation or adversarial administrative proceedings.
  - Must reflect mental impressions, conclusions, litigation strategy or legal theory.
  - The protection is **temporary**. Upon conclusion of litigation or administrative proceeding, records become subject to the Act.

# Quiz #2

- Phil and Suzanne are members of the Very Successful Charter School governing board. Phil texts Suzanne from his personal cell phone and explains that he believes the school needs to adopt a public records policy. He tells her that he just received a public records request from a hostile member of the community and is concerned they don't have proper procedures in place. Suzanne responds from her personal cell phone and expresses her displeasure with the individual that made the request. The requestor makes a follow-up request asking for all emails and text messages between board members related to his first request.
- Does the school have to provide Phil and Suzanne's text message exchange?

# Preparing for Public Records Requests

# Anyone Can Make a Request

- Any person may make a request.
- How must they request?
  - Can be oral or in writing (i.e. letter, e-mail, etc.)
  - Cannot require written request or ask why it is made.
  - There are no “magic words.” The requestor need not specifically designate the request a public records request.
  - Any request will do!
- Tip: If the requestor only makes an oral request for records, consider following up with an email to the requestor that details the records they have requested.

# Have a Public Records Policy in Place

- Your school should have a public records policy in place that all board members and staff should be made aware of.
- What should your public records policy address:
  - Designation of the public records custodian.
  - Procedures for responding to a request.
  - Policy on charging fees and copying costs.
  - Policy on redacting exempt and confidential information.
  - Policy on retention and destruction of records.
  - Designation of platforms through which board members and staff are permitted to communicate official school business.

# Quiz #3

- Rhonda is a teacher at Very Successful Charter School. She runs her class through ClassDojo. Rhonda is the only teacher at the school that utilizes this platform and the administration is unfamiliar with how it works. One day, the school receives a public records request for certain messages the teacher sent and received through ClassDojo. The teacher has already resigned from the school and the administration never had access to the account. The administration responds stating they do not have any responsive records related to the request.
- Should the school have provided the ClassDojo messages?



# The Policy Should Designate Authorized Channels of Communication

- Set clear expectations in the policy for the means by which board members and staff should be communicating when transacting official business.
  - **Reality:** In 2022, people utilize their personal phones and accounts frequently to communicate.
  - **Issue:** If the school receives a public records request, will the administration have backdoor access to all of the records that are responsive, or will you be relying on individual board members and employees to honestly and thoroughly turn over records? What happens if the board member or employee is uncooperative or not thorough?

# The Policy Should Designate Authorized Channels of Communication

- If you do not have access to accounts used by school personnel, you are creating liability for your school!
- Consider a policy that completely prohibits personnel from utilizing their personal accounts. All business should be transacted using official school accounts that you have backdoor access to.
- Prohibit the use of email forwarding to personal accounts. When an email is forwarded to a personal account, the school will not have access to any responses sent from the personal account.

# The Policy Should Designate Authorized Channels of Communication

- If a teacher or staff member is utilizing an unofficial app or service for their class, it should be authorized by the administration and administration should be given up-to-date access information.
- **Are your teachers utilizing any of the following to communicate with students, parents, or other employees about official school business?**  
**Do you have access?**
  - Facebook, Instagram, or other social media platforms
  - Google Classroom / Google Hangouts
  - ClassDojo
  - Bloomz
  - Slack
  - BeeKeeper

# The Policy Should Address Text Messaging

- Can an individual request text messages off a personal cell phone? Yes, so long as the text messages constitute a public record.
- Your school's public records policy should address how to handle text messages.
- You may prohibit text messages, especially to students and parents. However, many people communicate this way in 2022.
- Consider requiring personnel to screenshot any text messages they do send/receive relating to school business and keep them stored somewhere the administration has access to.

# Ensure Personnel Are Aware of the Policy and Know Who the Records Custodian Is

- Employees should be provided a copy of the public records policy during pre-planning week.
- The policy should generally require that all public records requests be forwarded immediately to the public records custodian.
- A public records custodian should be designated for the school.
- **Prominently display the contact information for the public records custodian in the school's main office AND on the school's website.**

# The Policy Should Establish Procedures for Responding

- The policy should designate procedures and timelines for responding to the request:
  - Immediately acknowledge the request in writing upon receipt. **Do not ignore the request!**
  - If satisfying the request will require extensive use of information technology resources or extensive clerical or supervisory assistance, timely develop an estimate of the cost of the work and communicate that to the requestor.
  - Work towards retrieving, reviewing, and redacting the records in a timely manner and **accurately log all time spent satisfying the request.**
  - No specific time limit to comply with the document request in statute, but the Florida Supreme Court has stated that a custodian has a “reasonable” time to comply.

# Does the School Have an Obligation to Create New Records Responsive to a Request?

- NO! You only have to produce records that exist at the time the response is made.

# The Policy Should Address Charging Fees and Costs

- What can the school charge a person for a public records request?
  - Costs for copying. Section 119.07, F.S., must charge actual cost of duplication. It is not what is listed in the statute.
  - Statute allows for up to 15 cents per one-sided copy for duplicated copies of not more than 14 inches by 8 1/2 inches and no more than an additional 5 cents for each two-sided copy.
- May charge for time needed to gather documents, redact or supervise inspection if it will take an “extensive time period.”
  - No additional charge for document conversion.
- Public records policy should specify whether a deposit is required, and, if so, the amount of the deposit and when its due.
  - Deposit should be reasonable based on the anticipated amount of work. The school need not begin the work of retrieving documents until the deposit is received.



# The Policy Should Address Confidential and Exempt Records

- The school can only refuse to provide public records or a portion of a public record if the record is confidential or exempt.
- If the school claims that any records are confidential or exempt from disclosure, a written statement must be provided to the requestor indicating the specific statutory provision that makes the record confidential or exempt.
- The explanation of confidential and exempt records should be provided with the response.

# Other Tips for Responding to a Public Records Request

- If you're unsure about exactly what the requestor is looking for, ask follow-up and clarifying questions.
- Ensure that you have reliable procedures and systems in place for storing public records that restrict access to those who do not have a need-to-know basis for accessing confidential information.
- Develop a reliable system for cross-checking and ensuring that you have satisfied all components of the request.
- Be thoughtful of what you put into writing.
- Remind your board members and staff that all public records may end up in the hands of someone they would prefer to have not seen the record.

# Penalties for Non-Compliance

- Civil suit against school. School can be required to pay attorney fees if it was found to have unlawfully denied access to the records.
- Section 119.10, F.S., deals with penalties for violations.
  - Unintentional violation: Non-criminal infraction punishable by fine not exceeding \$500.
  - Knowing violation: Misdemeanor of the first degree, punishable by up to one year in jail and a \$1,000 fine.
- Charter contract violation.
- Negative publicity.

The background consists of a dark teal color with a pattern of overlapping, slightly tilted rectangular papers. Each paper has a large, dark teal question mark printed on it. The papers are scattered across the frame, creating a sense of depth and repetition.

Questions?