

Legally Speaking

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Public Records - Part 2

By David Koperski, School Board Attorney

In the last issue of *Legally Speaking*, we discussed the general rules regarding public records contained in the Florida Public Records Act, including the definition of public records, our obligation to retain them and the process the public uses to access them. This article will continue this discussion by addressing public records requests in more detail, and the common exceptions from the rule that we must release public records.

As a brief review, recall that a “public record” is defined as any record, in whatever format, made or received in connection with official business of the District which is used to perpetuate, communicate or formalize knowledge. This encompasses the vast majority of records we make or receive in our jobs, but would exclude personal records, such as a note from a co-worker congratulating you on the arrival of your new grandchild.

Recall further that the primary right protected by the Public Records Act is the public’s right to access the public records of the various governmental agencies. The public exercises this right by making a public records request, or “PRR” for short. By law, we cannot ask who is making the request or why it is being made, and we must respond within a reasonable amount of time. Governmental agencies, including the District, would violate the law if they did not adhere to these



Legal Department Mission Statement

The mission of the School Board Attorney and Staff Attorney Offices is to provide the highest quality legal services to the Pinellas County School Board, the Superintendent and the District by ensuring timely and accurate legal advice and effective representation on all legal matters.

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Equal Access for Student Clubs

By Laurie Dart, Staff Attorney

Last school year, the Fellowship of Christian Athletes (FCA) filed a lawsuit against the Lake County School Board alleging, among other things, that the club members were improperly denied use of the school grounds in violation of the law. Although the lawsuit was quickly resolved, its filing prompted this refresher on the scope of the Equal Access Act which governs requests by student clubs to use school facilities.

The Equal Access Act (EAA) was signed by President Reagan on August 11, 1984 in response to two federal cases, the first involving a university and the second involving a high school. In the first, *Widmar v. Vincent*, the United States Supreme Court held that the University of Missouri violated the Free Speech Clause of the

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Public Records

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rules. However, we can charge the requester a fee for the staff time needed to prepare the response to the request, including reviewing and redacting (see below) the records of any confidential or exempt information. Regarding the fee, we should only charge the amount that is needed to recoup our actual costs, and cannot profit from the request.

Most of the questions regarding public records arise in the area of responding to PRRs. As noted, the definition of “public record” is very broad and would include records such as a student’s IEP, a teacher’s personnel file containing a social security number and many other records held by the district. But, as you might suspect, numerous exceptions exist that preclude the district from releasing certain records and certain information in records, such as IEPs and social security numbers. These exceptions, or “exemptions” as the law refers to them, are contained throughout Florida law and number in the hundreds. Many exemptions are specific to certain subject areas, such as certain voter registration records held by supervisors of elections and certain prisoner records held by the Department of Corrections, while other exemptions are more generic, such as social security numbers.

In responding to PRRs, the district applies numerous public records exemptions to prevent the public from viewing or copying what would otherwise fit the definition of a public record. The most commonly used exemptions in the public arena are:

1. Student Records. Federal and state law dictate that student records held by school districts cannot be released without parental consent, unless one of a limited number of exceptions apply. Student records are generally defined as any record made or received by the District that directly

relates to the student and that the District retains. The rules regarding student records, including the exceptions that allow their release without parental consent, are discussed in articles in Volume XIII, Issues 2 and 3 of *Legally Speaking*.

2. Assessments for Students. All examinations and assessment instruments, including statewide and local assessments, are confidential and exempt from release as a public record. In other words, we cannot release them in response to a PRR asking for them, whether the request is for the blank test or one that a student completed – the latter would also be a student record.
3. Employee Evaluations (temporarily). The evaluations of all instructional and support employees, and those of the vast majority of administrators cannot be made public until the remainder of the school year in which they were completed, plus one more full school year. For example, a teacher’s evaluation that was completed during the 2013-14 school year cannot be released in response to a PRR until July 1, 2015.
4. Social Security Numbers. The District cannot release the SSNs of any person it has, including students, employees and vendors.
5. Medical Information. To the extent that we have any medical information of any student or employee, we cannot release it when we respond to PRRs.
6. Payroll Deductions. While there is no statewide generic exemption for public employees’ payroll deductions, public school district employees do enjoy an exemption for their payroll deductions. So, the District would not release any of its employees’ payroll deductions in response to a PRR. This includes the amount of an

employee’s deductions on their paystub for health insurance, federal income tax, Medicare tax, FICA tax and any other voluntary deduction the employee elects.

7. Criminal History Records. When the District runs a level 2 fingerprint criminal background check of its employees and certain vendors and volunteers, it receives a criminal history report from federal and state law enforcement agencies. These reports cannot be released publicly.
8. Active Employee Disciplinary Investigations. When a district employee is investigated for misconduct and possible discipline, the records relating to the investigation, including any initial written complaint and all witness statements, are not open for public view until the “preliminary investigation” is either concluded or is no longer active. The “preliminary investigation” is not the complete investigation, but rather just the portion that ends with either discipline, charges of misconduct or a finding of probable cause to continue the investigation further.

When a complete record is exempt from release, such as a physician’s report of a medical condition, then it will not be released. However, exempt information is sometimes contained in a record that we are otherwise obligated to release. In this case, we redact (blacken out) the exempt information, make a copy of the document and then release it. For example, if we receive a PRR seeking a copy of an employee’s personnel file, we would first remove any entirely exempt records or pages, such as a physician’s report or a recent employee evaluation. Then, we would make a copy of the remainder of the file, redact additional exempt information such as SSNs and medical information that are only smaller portions of otherwise public pages, and then make a copy of the pages we redacted (so the requester cannot

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Religious Holidays in the Schools

By David Koperski, School Board Attorney

Each year, as we approach several widely-recognized religious holidays, state and local governments, including our District, must remain cognizant of the constitutional issue regarding the acknowledgement of religion in their operations. In our schools, we see the issue arise in the context of holiday displays, music programs and other activities that may have some relation to the various holidays that occur near the end of the calendar year. The primary legal issue is whether the government's (our) acknowledgement of the holidays violates the First Amendment's prohibition against the "establishment of religion," known as the Establishment Clause, or more commonly as the "separate of church and state."

Regarding religious holidays specifically, schools do not need to avoid religion at all costs in their holiday

events, but need to be sure that the event, whether it is a concert, play, or assembly, is presented without a religious purpose and does not have the effect of endorsing, advancing, or inhibiting religion. What does this mean? It means that music about Christmas, Hanukkah, Eid al Adha or any other religious holiday may be included in a program but it should be included in the program to teach children about the different religions and cultures, or due to their traditional and historic significance, and may not dominate the program. Public schools must advance a secular educational purpose and people of all faiths or no faith should feel included in the program. The holiday music program can include some religious music but should include a variety of other songs as well.

Another issue is where to draw the line on seasonal displays and decorations. In short, public schools

should avoid decorating with religious symbols. For example, symbols of an angel or a menorah are not appropriate in the public schools even though courts sometimes uphold the use of these symbols as part of an overall holiday display in non-school settings. Santa Claus, reindeer and decorated trees, on the other hand, may have once carried religious connotations but are now routinely treated by courts as secular symbols which are permitted in holiday displays, as are wreaths and garland.

All schools should ensure their activities and displays do not violate any of these rules. While there is no need to ban all references to religion, just be sure to plan activities that are educational and respectful of all beliefs. ■

Refresher on Subpoenas and Restitution

By Heather Wallace, Assistant School Board Attorney

Schools and departments are often served with subpoenas and restitution information requests. This will serve as a refresher of the proper procedures to follow if such a request is received.

Subpoenas

If you are served with a subpoena, the first step is to determine how the subpoena was delivered. If the subpoena is just for production of records, it can be served by mail. If it requires personal appearance, it must be served by a process server. If the subpoena has not been properly served, a response should be sent to the party that sent it. A standard response can be found on the Legal Services page of the District's website under Subpoena Procedures. If the subpoena has been properly served, the next step is to determine

if it is from a state or federal court located within the State of Florida. If it is not, a response should be sent to the sender. A standard response to an out of state subpoena may also be found at the Legal Services page.

If the subpoena is for student records (with or without an appearance), the school should follow the detailed procedures provided at the Legal Services page on the District's website. One of the most important things to keep in mind is the legal responsibility to notify the parent and/or guardian and provide them an opportunity to object prior to records being released. If a parent wishes to object, they will need to do so through their own attorney. Even if an objection is filed with the court, the District will remain obligated to comply with the subpoena until such time as the court or requesting attorney inform the District otherwise.

Schools often receive subpoenas for employees to testify at hearings in various types of cases including divorce and child custody cases. Unfortunately, these subpoenas are sometimes served in an untimely manner (one or two days prior to the hearing) or served on multiple staff members which can put a burden on your school. If your school receives such subpoenas, please contact the School Board Attorney's office to determine if some relief can be sought.

Restitution

When school district property has been damaged during the commission of a crime, the school district may be entitled to restitution. The Office of the State Attorney will typically send a letter to the school or department along with a Victim Im-

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read through the original redaction). As you can imagine, this process could take a significant amount of time, especially if the PRR is for multiple employees' personnel files or other voluminous records. If a request takes more than 15 minutes of staff time to handle, we can charge the requester as noted above. In addition, if the requester desires copies of the non-exempt public records, we can charge 15 cents per printed page.

We hope these articles on public records have educated you about the basic rules we must follow when dealing with public records, especially when we receive requests from the public to review and/or copy public records. Should you receive a request for public records and have questions, please contact our office or the Office of Strategic Communications. ■

Refresher

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pact Restitution Statement. If you receive such a letter, please forward it to the School Board Attorney's Office via pony or to michelottik@pcsb.org as soon as possible. Our office will contact you if further information is needed. It can be difficult to track these requests as many of them are sent well after the occurrence in question, so please be sure to contact the Risk Management Department if your school or department experiences any such loss as those records allow us to more accurately file our impact statements. Please be sure to keep copies of any incident reports or other documentation of such damage when it occurs. This will increase our likelihood of obtaining restitution for both the district and individual schools or departments. ■

Equal Access

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First Amendment when it denied a religious student group access to university facilities and resources that were provided to other non-religious student groups. The Court rejected the school's Establishment Clause defense, stating that allowing the group to meet on campus does not amount to sponsorship of the group's particular viewpoint or message. The Court in *Widmar* expressly noted that its holding did not necessarily apply to public secondary schools. Three years later, a decision in *Bender v. Williamsport Area School District* was handed down by the Third Circuit Court of Appeals declining to extend *Widmar's* equal access principles to high school students who, like the students at the University of Missouri in the *Widmar* case, sought permission to hold meetings of a religious student group on campus as did other non-religious student groups. The Third Circuit concluded that high school students were less mature and self-guided than college students and therefore, allowing students to pray at a public high school, even if it was not sponsored by the school, violated the Establishment Clause of the First Amendment. That same year, Congress passed the EAA which codified *Widmar* and extended its holding to secondary schools. It states:

"It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."

Under the EAA, a "limited open forum" exists when a school provides an opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time. In essence, once a school opens the door for one group, other groups cannot be denied. Other requirements of the EAA include: that participation is voluntary, that the meetings are initiated and led by students and that they are not sponsored by school agents or employees. The requirements of the EAA and cases interpreting the Act are included in Pinellas County School Board Policy 5730, *Non-District Sponsored, Student Clubs and Activities*. ■

The Legal Department

Wishes You and Your Family

A Safe and Happy Holiday Season