

Time for Records in Record Time!


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Your Burning Questions!

- What things constitute "public records?"
- How long do schools have to keep all these different kinds of records?
- What do schools have to do to respond to requests to review public records?

What Constitutes a "Public Record?"

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"Remember, once you get past my secretary, assistant, and security, my door is always open."

Public Records

▪84-712.01: "public records shall include all records and documents, regardless of physical form, of or belonging to the [district].... Data which is a public record in its original form shall remain a public record when maintained in computer files."

E-mails and Other Electronic Information

- AG: Emails are public records "if they relate to official school business"
 - Includes "home and private" e-mails
 - Nebraska Attorney General's Office, Disposition Letter re Hyannis Area Schools (2007)
- Applies to websites
- Applies to security video footage
- Probably applies to social media messages
- Must follow SOS Record Retention Schedules

Public Records and "Private" Messages

FIRST IN THE WORLD-HERALD

Amid superintendent search, OPS board members sniped at each other into the night, texts show

By Erin Duffy // World-Herald staff writer May 9, 2017

Should exchanges be open for viewing?

Mayor Stothert's use of text messages raises public records concerns

By Roseam Moring // World-Herald staff writer Apr 21, 2015

Public Records and "Private" Messages

- AG Disposition Letter, 2015
 - To the extent text messages by and between city officials relate to the official business of the City of Omaha, they are public records subject to disclosure under §84-712
 - We believe generally that text messages made in the course of public business by governmental officials are public records

Scanned Documents?

- Revisions to Schedule 10 will allow transfer to durable media (except for meeting minutes and materials and yearbooks)
- Data in its original form and then digitized remains a public record if the original was a public record—think time cards, PPACA reports, etc.

Public Records and Hiring



Public Records and Hiring

- Neb. Rev. Stat. §84-712.05(15)
 - Job application materials means employment applications, resumes, reference letters, and school transcripts
 - Finalist means any applicant ... (i) who reaches the final pool of applicants, numbering four or more, from which the successful applicant is to be selected, (ii) who is an original applicant when the final pool of applicants numbers less than four, or (iii) who is an original applicant and there are four or fewer original applicants

Steckelberg v. Neb. State Patrol (2016)

- State Patrol Trooper applies to be Executive Protection Trooper; doesn't get the job
- Requests candidate scorecards; request is denied
- NE Supreme Court
 - Personal information does not need to be in a personnel file to be exempt from disclosure
 - Candidate score sheets, notes, comments, and ultimate recommendation are NOT job application materials

Public Records and Open Meetings

- Open Meetings Act wins over public record exceptions
 - Public record exceptions allow a public body to withhold certain records, but do not require it
 - AG: "The Board's good faith motivation for the closed sessions, i.e., protecting non-finalists' names and applications from disclosure, is not a cure for noncompliance of the Open Meetings Act."
 - Formulation of interview questions, screening of candidates, should be done in open session, absent the threat of injury to the candidate's reputation

Public Records and FERPA

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"Before I write my name on the board, I'll need to know how you're planning to use that data."

Education Records are "Public Records"

- Federal Law: FERPA
 - "education record" means materials which "contain information directly related to a student [and] maintained by an educational agency"
 - Includes "print or computer media"
- Under FERPA parents have a right to inspect* student's records
 - School must comply with request within 45 days
 - Parents can request explanation and amendment of records

Education Records are "Public Records"

- Key FERPA definitions:
 - "maintained"
 - Records kept in one place with a single record of access
 - Sole possession notes are not "education records" under FERPA (but are they public records?)
 - "Directory information"
 - Check your policy
 - And check the retention schedule

Education Records are "Public Records"

- State Law: "The following records . . . may be withheld from the public by the lawful custodian of the records:"
 - (1) Personal information in records regarding a student . . . when such records are maintained by and in the possession of a public entity, other than routine directory information specified and made public consistent with 20 U.S.C. 1232g. . .
 NEB. REV. STAT. 84-712.05

Education Records are "Public Records"

- Nebraska's student record statute:
 - Each public school may establish a schedule of fees representing a reasonable cost of reproduction for copies of a student's files or records for the parents or guardians of such student, except that the imposition of a fee shall not prevent parents of students from exercising their right to inspect and review the students' files or records....
 NEB. REV. STAT. 84-712.05(2)

**Owasso Ind. Sch. Dist. v. Falvo,
534 U.S. 426 (2002)**

- Parent sued over peer grading
- Supreme Court: No FERPA violation
- Grades not "education records" until recorded in grade book
- Peer-graded items were not "maintained" – students only handled items for a few moments
- Student graders not "person acting for an educational institution"

**Red Lion Area Sch. Dist.,
112 LRP 2720 (Penn. SEA 2011)**

- Long history of litigation between family and school
- Parents demanded all e-mail:
"correspondence among members of the IEP team and/or district staff that may or may not consider themselves or be considered IEP team members either through e-mail or hard copy communication."
- The district provided only e-mails from student's permanent file

**Red Lion Area Sch. Dist.,
112 LRP 2720 (Penn. SEA 2011)**

- Produced two bankers' boxes worth of documents to the parents
- District had created two storage archives for Student on its server
- Hearing officer: no violation of FERPA

**Ellis v. Cleveland Muni. Sch. Dist.,
104 LRP 14907**

- Student suing over corporal punishment by subs
- Sought records involving allegations of physical altercations
- School claimed student records therefore protected by FERPA and not public records

**Ellis v. Cleveland Muni. Sch. Dist.,
104 LRP 14907**

- Court: School must disclose
 - Records not "education records" as defined by FERPA, therefore public records
 - "Congress did not intend FERPA to cover records directly related to teachers and only tangentially related to students."

**Special Education Records as
Public Records**

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"If I have to fill out one more behavior chart,
I'm gonna need a behavior chart!"

Special Education Records

- IDEA requires notification of SpEd parents prior to deleting ed records which contain "personally identify information collected, maintained, or used"
- If e-mail is special ed record, you'll have to notify parents before hitting "delete" (!!)

**S.A. v. Tulare County Office of Educ.,
109 LRP 60382 (E.D. Cal. 2009)**

- Parents asked for copies of all e-mail sent or received by the district concerning or personally identifying their autistic son
- District sent only e-mails which were printed and in file
- Parents claimed all e-mails that specifically identify the student, are education records

**S.A. v. Tulare County Office of Educ.,
109 LRP 60382 (E.D. Cal. 2009)**

- Cal. Dept. of Ed. upheld the district's interpretation
- Parents appealed, arguing that all e-mails are "maintained" in the district's electronic mail system and could be located with tech. search

**S.A. v. Tulare County Office of Educ.,
109 LRP 60382 (E.D. Cal. 2009)**

- Court: Ruled for School
 - FERPA contemplates that ed. records be kept in one place
 - "An e-mail may be sent, received, read and deleted within moments"
 - Rejected idea that all e-mails on any computer that identify student are "maintained" by school

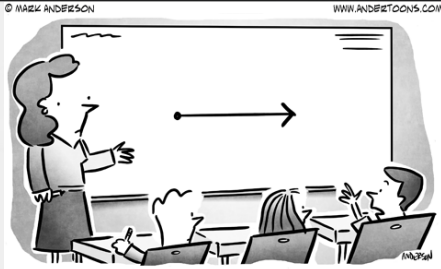
**To Ponder: Does Your Staff Know
These are Public Records?**

- E-mail?
- Text messages?
- Security video?
- Lesson plans?
- Websites?
- Your school's Twitter/Facebook page?
- Your school's all-call messages?

**Questions about what constitutes a
"public record?"**

Text Karen at (402) 499-0547

How Long Do Schools* Have to Retain Records?



"So that goes on forever? Should we warn people in the hallway?!"

Destroy at Will (with no report required)

- Employee "fringe activities"
- Extra copies
- Junk
- "Non-record communications"

The Good News!

- Under the new Schedule 10, schools can scan records to digital format and destroy originals
- (with some exceptions)

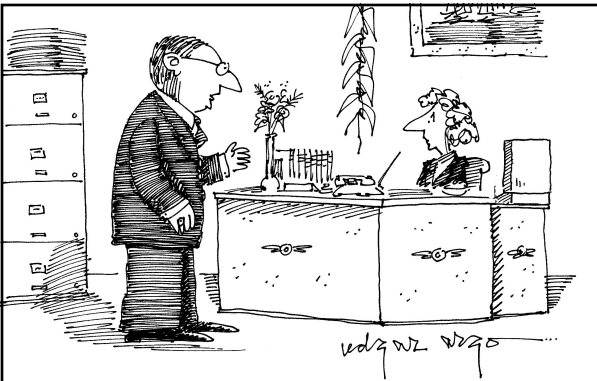
Schedule 10 is Currently *DRAFT*



IT'S THE LATEST GOVERNMENT GUIDANCE ON 'MANAGING PAPERWORK FOR SMALL BUSINESSES'

The Not So Good News!

- All of these destructions need to be documented with a records destruction report
- Sample from Secretary of State's Office



"GO THRU THE FILES AND GET RID OF EVERYTHING THAT'S OVER TEN YEARS OLD... BUT MAKE COPIES!"

**Destroy at Discretion
(report required when destroyed)**

- Drafts/Working Copies
- Report Cards and Attendance Records
(after transferred to permanent records)

**Retain for 6 Months
(report required when destroyed)**

- Short-term communications
 - "Communications related to work/agency but has no documentary or evidentiary value."
 - "May include generic requests for replies to information, notices including memoranda and other records that do not serve as the basis for official actions or professional interest materials retained for short-term reference."

**Retain for 1 year
(report required when destroyed)**

- Employers Quarterly Report
 - NDOL Unemployment Insurance Division
 - 1 year applies only to reimbursable agencies
- I9 Forms - later of:
 - 1 year after termination
 - 3 years after date of hire
- Press Releases
 - Must contact State Archives before destroying

**Retain for 2 years
(report required when destroyed)**

- Calendars
 - "desk and pocket calendars, appointment books and planners, both paper and electronic, including but not limited to Lotus, Exchange, PDAs and similar devices"
- Garnishments
- Logs
 - Visitors logs
- Public Records requests that you have replied to

**Retain for 2 years
(report required when destroyed)**

- "Medium-term Communications"
 - "Communications related to agency operations and administration of agency programs which are not included in another schedule."
 - "Does not have long-term significance, establish legal rights or have policy implications"

**Retain for 3 years
(report required when destroyed)**

- Audit Reports
- Complaints
- Student Disciplinary Records
 - all disciplinary material **shall** be removed and destroyed after a student's continuous absence from the school for a period of three years." NEB. REV. STAT. 79-2,104
- Subsidiary Student Records
 - "Dispose of all subsidiary student records upon the student's graduation or after the student's 3 year continuous absence from school"

Subsidiary Student Records (examples, not exhaustive)

- | | |
|--|---|
| 1. Results of standardized achievement, aptitude, ability, interest and intelligence tests | 12. Data summary reports |
| 2. Early entrance to Kindergarten | 13. Transcripts of school hearings concerning students (non-disciplinary) |
| 3. Protocols of tests administered to the class or student body as a whole | 14. Student's or student's parents' written consent of release of subsidiary student records |
| 4. Psychological examination reports | 15. Parents' written consent permitting special examination of their child |
| 5. Diagnostic education evaluations | 16. Anecdotal records |
| 6. School social worker's case study reports | 17. Signatures of people who are required to sign for access to subsidiary student records and statement of purpose for such access |
| 7. School Educational Specialists' Report | 18. Extra copies of permanent student records (confidential record) |
| 8. Truancy reports | 19. Limited English Proficient Individual Student data |
| 9. Final reports by non-school special consultants | |
| 10. Correspondence concerning student | |
| 11. Educational, medical and family histories and data particular to individual students | |

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Retain for 4 years (report required when destroyed)

- Applications and other documents related to job openings
- Complaints alleging harassment
- W-4 and W-2

**Retain for 5 years
(report required when destroyed)**

- Most business records*
 - Bank records, audits, accounts payable* and receivable, contracts, etc.
- Building and grounds maintenance
- Contractual Interest Statement Ledger
- Class Rosters
- Documents underlying NDE reports
- Documents related to any purchase using federal funds
- Leave request forms

**Retain for 5 years
(report required when destroyed)**

- Legal advice
- Event-Driven Communications
 - "Communications with open-ended, event-driven retention periods which occur at some future date"
- Fiscal Communications
 - Communications created or received documenting purchases, financial obligations, fiscal revenues, etc."
- Special Education Records

**Subsidiary Student Records
(examples, not exhaustive)**

- | | |
|--|---|
| 1. Results of standardized achievement, aptitude, ability, interest and intelligence tests | 12. Data summary reports |
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**Retain for 6 years
(report required when destroyed)**

- 1099s
- Policy Manuals

**Retain for 8 years
(report required when destroyed)**

- Long-Term Communications
 - "Communications containing information related to the mission of the agency i.e. documents major transactions, establishes or implements policy, establishes legal rights or responsibilities, or has other long-term ramifications to the operation of the agency"
 - Elected officials: subject to review by State Archives for possible accession

**Retain for 10 years
(report required when destroyed)**

- Bonds (treasurer, etc.)
- Employee's insurance file
- Public records requests that you've denied
- Report of records destruction

**Retain for 50 years
(report required when destroyed)**

- Personnel file (after termination)
 - Any staff member who qualifies for NPERS
 - Non-NPERS staff retain for 10 years after termination of employment

**Retain for 75 years
(report required when destroyed)**

- Payroll

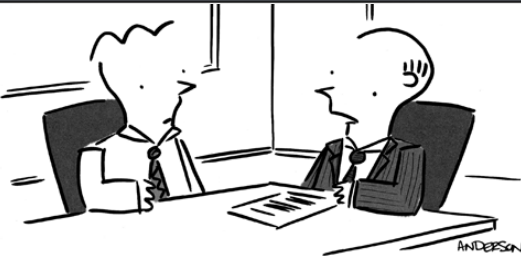
**Retain Permanently
(report required when destroyed)**

- Directory Information
- Meeting Minutes, Agendas and Materials
 - Must be kept in original form, even if scanned
- Permanent student records
 - May be scanned after graduation or 3 years' continuous absence
- Teacher evaluation policies
- Yearbooks
 - Must transfer one copy to state historical society librarian

Questions about retention of records?

Text Karen at (402) 499-0547

How to Respond to Requests to Review Records



"First, we deny any wrongdoing. Then we'll want to play up any rightdoing."

Examples of Requests



SmartProcure

Obligation to Produce Public Records

- Neb. Rev. Stat. §84-712 et seq
 - Broadly interpreted
 - All public records and documents unless exception specifically exists
 - Proceedings for failure to comply are given priority in court
 - Denial must be in writing and contain certain required disclosures
 - Fees may be charged under certain circumstances
 - Timeline for reply

Denial

- If you deny a public record request, you must reply within four business days, and the denial must include:
 - A description of the contents of the records withheld and a statement of the specific reasons for the denial
 - The name of the public official or employee responsible for the decision to deny the request; and
 - Notification to the requester of any administrative or judicial right of review

Production

- If you grant a public record request, your reply must be made within four business days, and must include:
 - Access to or, if copying equipment is reasonably available, copies of the public record, or

Production

▪If the entire request cannot be fulfilled within four business days due to difficulty or extensiveness of the request, a written explanation, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request

Production

▪If the entire request cannot be fulfilled within four business days due to difficulty or extensiveness of the request, a written explanation, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request.

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Production

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Production

- If you don't receive a response to your reply within ten business days you do not have to fulfill the request
- Business days exclude weekends and any day the offices of the custodian of the records is closed

Production

- 84-712(3)(a)
 - "This section shall not be construed to require a custodian to copy any public record that is available to the requester on the custodian's web site on the Internet."
 - Must inform requester of location of requested documents
 - May still have to produce if requester does not have internet access

Public Records

- A few quick points:
 - You do not need to create documents to respond to records requests
 - Groups like SmartProcure will ask for records repeatedly, so keep track of the time you spend
 - Data in its original form and then digitized remains a public record if the original was a public record—think time cards, PPACA reports, etc.

Fees for Production



"Tom, come quick! Kinney in accounting has come up with a way to put a price on happiness!"

Fees for Production

- NEB. REV. STAT. §84-712(3)
 - Shall not exceed actual cost of production
 - Reasonably calculated additional actual added cost
 - For computer records, can include programming or IT services
 - Labor that exceeds four cumulative hours of searching, identifying, physically redacting, or copying
 - The fee for records shall not include any charge for the services of an attorney to review the requested public records seeking a legal basis to withhold the public records from the public

Fees for Production

- NEB. REV. STAT. §84-712(3)
 - If estimated fees exceed \$50, district may require a deposit prior to fulfilling the request
 - If the district uses a vendor to create an online portal, a reasonable fee schedule for access to the portal must be created and approved by the State Records Board

Exceptions

- NEB. REV. STAT. §84-712.05
 - Student records
 - Medical records
 - Trade secrets
 - Attorney/client work
 - Law enforcement investigations (need clarification)
 - Appraisals and negotiations of real estate
 - Personal information of personnel other than salaries and routine directory information

Exceptions

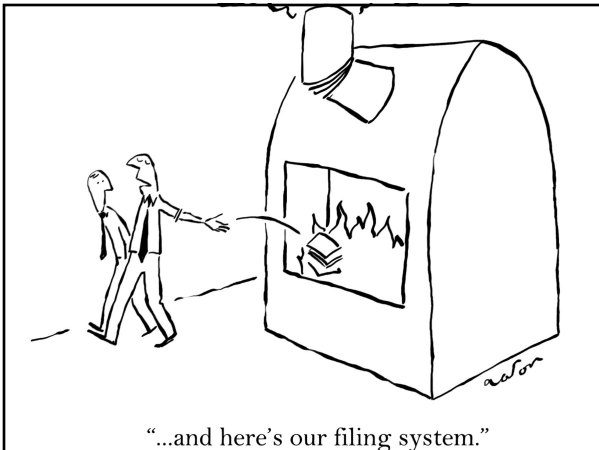
- NEB. REV. STAT. §84-712.05
 - Security information and standards
 - Job application materials (non-finalists)
 - SSN, financial account numbers

Questions about retention of records?

Text Karen at (402) 499-0547

A couple of last words:

- Provide training on and follow your record retention policies
 - All staff
 - Board members
- Review your routine e-mail deletion protocols
- Keep logs of deletions of any records
- Consider a policy addressing social media
- Put in a "if in doubt" provision applicable to all staff



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