News for School Law Clients

FYI

June 2015

Two Recent Court Cases Involving Records Are Significant For School Districts

In the last month, there have been two court cases involving the Wisconsin Public Records Law that provide significant guidance for school districts. In both cases the courts ruled in favor of the actions taken by the records custodian. This FYI will briefly discuss each case and then consider the impact of these cases on school districts.

"Notes" Compiled During Investigation Not Subject to Disclosure

One case, *Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Public School District*, Case No. 2014AP1256 (June 4, 2015), involved a request to the Wisconsin Rapids Public School District for records related to allegations of impropriety surrounding a school athletic program. The District had conducted an investigation into these allegations, including interviews conducted by District employees. The employees had created documents regarding the interviews.

In response to the request, the District withheld documents for various reasons, including that the requested documents did not qualify as "records" under the Public Records Law because they were "notes" that are excluded from the definition of a "record." The definition of "record" under the law states that "'[r]ecord' does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use." The District noted that the withheld documents were notes created for the personal use of District employees since they were never exchanged, shared with anyone, or otherwise available to anyone other than the person drafting the notes.

The Wisconsin Court of Appeals concluded that the documents were "notes" and therefore were not "records" subject to disclosure under the law. According to the Court, the term "notes" covers a broad range of frequently created, informal writings. The "notes" in this case were this type of writings since they were mostly handwritten and at times barely legible; included copies of post-it notes and telephone message slips; and reflected hurried, fragmentary, and informal writing. In light of the above, the Court concluded that the writings were in the nature of notes -- created for and used by the originators as part of their preparation for, or as part of their processing after, interviews that they conducted.

After the Court determined that the documents were "notes," it then focused on whether the "notes" were "prepared for the originator's personal use." In its analysis, the Court adopted the rationale set forth in a Wisconsin Attorney General opinion. In the opinion, the Attorney General noted that the exclusion of material "prepared for the originator's personal use" is to be construed narrowly. Most typically, this exclusion may be invoked properly where a person takes notes for the sole purpose of refreshing his or her recollection at a later time. If the person confers with others for the purpose of verifying the correctness of the notes (but the sole purpose for such verification and retention continues to be to refresh one's recollection at a later time), the notes continue to fall within the exclusion. However, if one's notes are distributed to others for the purpose of communicating information (or if notes are retained for the purpose of memorializing agency activity), the notes would go beyond mere personal use and would therefore not be excluded from the definition of a "record." In this case, the Court held that, based on the specific facts, the notes taken by the employees were for their personal use and therefore were not "records."

No Unlawful Denial or Delay By Municipality When No Record Existed

In another case, *Journal Times v. City of Racine Board of Police and Fire*, 2015 WI 56 (June 18, 2015), the Wisconsin Supreme Court reviewed whether the City of Racine Board of Police and Fire Commission unlawfully denied or delayed disclosure of minutes of a meeting. The newspaper had requested to know the vote from a closed session meeting during which the Commission had decided to reopen the process of hiring a police chief.

Although no records existed at the time of the request (the person who normally took notes and drafted minutes attended by telephone and did not draft minutes), the request was denied based on policy reasons. Shortly after the denial, the newspaper filed a complaint. After the complaint was filed, an attorney for the Commission informed the newspaper of the vote taken during the closed session (even though no minutes were prepared). However, the newspaper did not drop the lawsuit; instead, it argued that it was entitled to attorney fees because the Commission unlawfully denied or delayed the release of the minutes.

The Supreme Court concluded that the newspaper was not entitled to its requested relief based on the facts of the case. The Court based its decision in part on the fact that no responsive record existed at the time of the request and that a reasonable interpretation of the request was that it was for "information," rather than a specific record. Further, the Commission responded to the newspaper with reasonable diligence and released the requested information, even though it was not required to provide the information in response to the request. As a result, the newspaper was not entitled to attorney fees because it did not prevail in substantial part in the lawsuit.

Important Considerations for Records Custodians

Both of these cases provide good reminders for school district records custodians related to initial steps in response to any records request.

One initial step is to determine whether any records exist that are within the scope of the records request. If no record exists, then the records custodian can simply reply to the requester that no record exists that is within the scope of the request. The Public Records Law does not require district officials to create records by extracting information from existing records and compiling it into a new format, nor does it require responses to requests for information that is not in a record.

Another initial step is to determine whether the documents within the scope of the request are actually "records," as that term is defined under the Public Records Law. Some documents may fall outside of the definition of "records" because they are either "notes" or "drafts" or purely personal in nature. A careful examination of the documents and the circumstances surrounding the creation of the documents is important before making any determination to disclose the documents.

B & C News & Events

July 9, 2015, Tess O'Brien-Heinzen will present "Accommodating Disabilities in Higher Education: Requirements Under Section 504 and the ADA" as part of a webinar for EducationAdminWebAdvisor. For more information, visit the EducationAdminWebAdvisor website.

July 29-31, 2015 – Mike Julka will present "Dealing with Challenging School Board Members: Legal Principles and Strategies for the District Administrator" as part of the Wisconsin Association of School District Administrators (WASDA) Legal Seminar, held at the Stone Harbor Resort in Sturgeon Bay, WI. For more information, visit the WASDA website.

July 29, 2015, JoAnn Hart and Tess O'Brien-Heinzen will present "Disciplining Students with Behavioral Issues" as part of a live webcast for National Business Institute (NBI). For more information, visit the NBI website.

August 11, 2015, Rick Verstegen will present "K-12 Student Records Management: Mastering FERPA, NCLB, and PPRA Record Handling Requirements and Avoiding the Penalties" as part of a webinar for EducationAdminWebAdvisor. For more information, visit the EducationAdminWebAdvisor website.

B & C Awards

Andrew DeClercq recently was recognized for his significant pro bono work by the State Bar of Wisconsin. Andy put in more than 300 hours on pro bono cases in 2014, and in light of his exemplary service to pro bono clients, he recently received the 2014 Pro Bono Attorney of the Year Award from the State Bar's Legal Assistance Committee.

■ Michael J. Julka	(608) 286-7238	■ Richard F. Verstegen	(608) 286-7233	■ David P. Weller	(608) 286-7235
■ James K. Ruhly	(608) 283-1738	■ William L. Fahey	(608) 286-7234	■ M. Tess O'Brien-Heinzen	(608) 283-1798
■ Steven C. Zach	(608) 283-1736	■ David E. Rohrer	(608) 286-7249	■ Rhonda R. Hazen	(608) 283-1724
■ JoAnn M. Hart	(608) 286-7162	■ Frank C. Sutherland	(608) 286-7243	■ Todd J. Hepler	(608) 286-7160
■ Douglas E. Witte	(608) 283-7529	■ Jennifer S. Mirus	(608) 283-1799		