

ORANGE COUNTY
BOARD OF EDUCATION

AGENDA ITEM ABSTRACT

Meeting Date: March 11, 2013

AGENDA ITEM No. 13-03-11

ACTION ITEM: (Y/N) N

SUBJECT: Work Session: Public Records

INFO. CONTACT: Jonathan Blumberg, Attorney PHONE: 919-732-8126

ATTACHMENTS: 1. North Carolina Public Records Act PowerPoint Presentation.

PURPOSE: The purpose of the presentation is to provide guidance on the public record laws as the Board starts its superintendent search and as the school system continues to respond to request for records.

BACKGROUND: Attorney Blumberg will provide a PowerPoint presentation to the Board on the public record laws. Public records are records made or received in connection with the transaction of public business. Electronic records, including email and text messages, are covered by the law. It is the content of the document that determines whether a record is a public record. Emails related to the transaction of public business are public records even if the emails are sent or received on private accounts. The law requires access to public records (not information). The public records laws do not require the creation of a new record in response to a request.

FINANCIAL IMPACT: There is no financial impact related to this presentation.

RECOMMENDATION: The Superintendent recommends the Board of Education participate in the public records work session.

**North Carolina
Public Records Act**



Orange County Board of Education

March 11, 2013

Jonathan Blumberg

Tharrington Smith, LLP

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Presumption is that records made or received by a public agency are public records (G.S. 132-1)

The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

E-mail messages are public records

"Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, *regardless of physical form or characteristics*, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

(...continued)

Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

**It is the Content That Counts -
In Deciding Whether a Record is a
Public Record**

- E-mails related to school system business are public records whether or not they are sent or received on private e-mail accounts.
- For Example: Individual Board members e-mail debate on deciding the deadline for receiving applications from Superintendent candidates. It is a public record even if the Board members used their private e-mail account for the exchange.

**Private E-mails on the School System E-
mail System are at Risk of Disclosure**

- An employee who uses the school system e-mail account to send a private message risks possible disclosure of the message when the school system responds to a public records request.
- Best Practice is not to use your school system e-mail for private messages. This guidance is also consistent with the school system's Acceptable Use Policy.

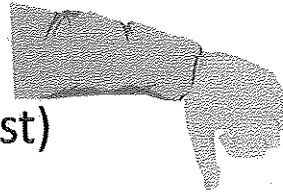
Public Record?

- E-mail message to a Board member's personal account from another Board member - "I really think we need to hire candidate X to be our new Superintendent as he clearly was a strong advocate for keeping wrestling in the Olympics."
- E-mail message from a spouse of Board member to Board member on the school system's account – "Your highness. Please don't forget to pick up Johnny's wrestling uniform as wearing the uniform motivates him to try hard to be an Olympian one day."

Personal Notes or Transitory Communication

- A document is not a public record, if (1) it is a personal note or message of minimal or transitory value and (2) the document has not been stored or maintained by the school official or district. However, if the documents are requested while still in existence, they should be retained and could ultimately be subject to disclosure.

Exceptions (not an exhaustive list)



1. Attorney-client privileged documents (G.S. 132-1.1)

- From attorney to client
- Expires after 3 years

2. "Confidential information" (G.S. 132-1.2)

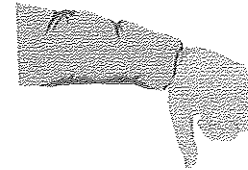


- Trade secrets disclosed by vendors in bidding
- Account numbers for electronic payment
- Social Security Numbers



3. Student records under FERPA (20 U.S.C. 1232g)

- Personally identifiable information about a student apart from “directory information,” when students and parents have been notified of what constitutes “directory information”



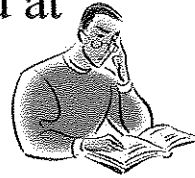
4. Personnel records (G.S. 115C-319 to -321)

- Including criminal record checks of employees and applicants... however, the law requires that certain records and information be available with respect to each employee.

5. Sensitive public security information

- Includes *specific details* of public security plans and detailed plans and drawings of public buildings. General plans are public records.

Custodians of public records must permit them to be examined at reasonable times and under reasonable supervision.

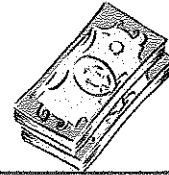


- ✓ Copies must be provided “as promptly as possible”
- ✓ The custodian bears the cost of separating confidential information
- ✓ Record must be made available “in any and all media in which the public agency is capable of providing them.” We may assess different fees for different media. (G.S. 132-6.2) . . .

- ✓ We may charge only “actual cost” of producing copies, “limited to direct, chargeable costs related to the reproduction of a public record as determined by generally accepted accounting principles.” If the request requires significant personnel or technology cost, we may assess a reasonable special service charge based on the actual cost.

Remedy for person seeking records

Right of expedited court hearing, with losing public agency required to pay attorneys fees. The court may require individual employees personally to pay attorney fees for knowing or intentional violation of the law. Defense to individual fees: acting on advice of counsel.



Destruction of Records

Records may be destroyed only with the consent of the Department of Cultural Resources. The Department has issued a records disposition schedule for “local education agencies,” i.e., public school systems.



RECORDS RETENTION AND DISPOSITION SCHEDULE FOR SCHOOLS



Available at:

[http://www.records.ncdcr.gov/local/schools
chedulefinal.pdf](http://www.records.ncdcr.gov/local/schoolschedulefinal.pdf)

E-mail guidance (p. x and p. 20 of the
Schedule)



E-mail normally is ephemeral

Erase electronic mail public records when
reference value ends

Exception: “e-mails that specifically
concern an agency’s policies, procedures,
directives, regulations, rules, and other
information that might provide the public
with evidence of the organization,
functions, and accomplishments of the
agency.”



LITIGATION PROCEDURES FOR OBTAINING RECORDS

- Obligation to maintain when litigation looms.
- Rule 3.4 of the North Carolina Rules of Professional Conduct: “A lawyer shall not ... destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”
- Confidentiality protection may no longer apply.

CONCLUSION

- Presumption is that records made or received by the school system are public records.
- It is the content of the record that is determinative.
- Public discourse on private e-mail accounts = public records.
- Public records should be available to citizens upon request as promptly as possible.
- Records must be retained in accordance with the North Carolina Records and Retention and Disposition Schedule for Schools
- While there are exceptions to what documents meet the definition of a public record, any document made or received may ultimately end up being disclosed through litigation or other avenues.