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OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

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Smile for the camera: Sharing school photos and videos under FERPA

by Maureen Anichini Lemon

Parents frequently ask to view photos or videos of school incidents involving their child. On April 19, 2018, the Family Policy Compliance Office (FPCO) of the U.S. Department of Education issued a guidance entitled "Frequently Asked Questions on Photos and Videos." The guidance clarifies how schools should respond to such requests under the Family Educational Rights and Privacy Act ("FERPA").

As with any other record, a photo or video of a student is an 'educational' record, subject to specific exclusions under FERPA, when the photo or video is (1) directly related to a student, and (2) maintained by a school district or by a party acting for the school district. (20 U.S.C. 1232g(a)(4)(A); 34 CFR §99.3). FERPA regulations do not define when a record is 'directly related' to a student. The guidance indicates that whether a visual representation of a student is directly related to a student is context-specific and should be determined on a case by case basis. Factors to be considered in this determination include:

- The school uses the photo or video for disciplinary action or other official purposes involving the student;
- The photo or video contains a depiction of an activity that:
  - Resulted in or would reasonably result in a school's use of the photo/video for disciplinary actions involving a student;
  - Shows a student violating a local, state, or federal law; or
  - Shows a student getting injured, attacked, victimized, ill or having a health emergency;
- The person taking the photo/video intends to make a specific student the focus of the photo or video; or
- The audio or visual content of the photo/video otherwise contains personally identifiable information contained in a student's educational record.

According to the guidance, a photo or video should *not* by considered directly related to a student in the absence of these factors and if the student's image is only incidental or part of the background. The guidance notes the following examples of situations in which a record is 'directly related' to a specific student:

- A school surveillance video showing two students fighting in a hallway, which is used as part of a disciplinary action.
- A classroom video that shows a student having a seizure.
- A video recording of a faculty meeting during which a specific student's grades are being discussed.

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When is your personal text or email subject to FOIA?

by Karl Ottosen & Chloe Cummings

In *Ahmad v. City of Chicago*, 16 CH 15152 (2017), the Circuit Court of Cook County re-examined when a public board member's emails and text messages are subject to disclosure under the Freedom of Information Act ("FOIA"). The court followed the holding of *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, that an individual alderman is not a public body because he alone cannot conduct the business of the public body.

Under FOIA, "all records in the custody or possession of a public body are presumed to be open to inspection or copying." (5 ILCS 140/1.2). Further, "each public body shall make available to any person for inspection or copying all public records." (5 ILCS 140/3). Concerns over FOIA disclosure in the electronic age are particularly relevant in society today due to the prevalence of electronic communication in the workplace. Public officials and employees alike must address the issue of whether personal communications on electronic devices are subject to FOIA disclosure.

In *Ahmad v. City of Chicago*, the plaintiff, Ahmad, alleged that an alderman violated FOIA by not producing records responsive to a request for non-city emails discussing Ahmad or his property located in the alderman's ward. The defendant, City of Chicago, moved for summary

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judgment on the grounds that: (1) the alderman is not a public body under FOIA, and (2) messages on personal devices are not public records subject to FOIA disclosure.

In its decision, the court held that the alderman was not automatically subject to FOIA's disclosure requirements because the definition of "public body" refers to the board or council as a whole, not to an individual board member. The court reasoned the legislature intended the term "public body" to encompass the entire group rather than one individual because the legislature used the plural form "bodies" in the FOIA definition. The term "public body" conspicuously avoids naming an individual member except for 'the head of a public body," such as a board president. (5 ILCS 140/2(e)). Although the General Assembly has amended FOIA on several occasions, it has never expanded the definition of public body. Since the alderman is not a public body because he alone cannot conduct the business of the public body, an email or text message sent to the personal device of a single alderman does not on its own constitute a public record.

The *Ahmad* court reaffirmed that a message contained on a *publicly issued* device is subject to FOIA. Whether an email or text message on an individual board member's *personal* device is subject to FOIA depends on the context surrounding the message. Citing the *City of Champaign* case, the *Ahmad* court further recognized that the personal email or text message would constitute a public record *if* it were used, sent, or received during a city council meeting. Similarly, the email or text message would constitute a public record *if* it were used, sent, or received by a quorum of the city council. Thus, if the alderman forwarded the message received on his personal device to enough other alderman to constitute a quorum, the message would become a public record. Such messages would be subject to disclosure under FOIA because the alderman would be acting as part of public body while at a public meeting and/or while conducting public business through a quorum.

FOIA disclosure issues also affect a variety of public workers, including the employees of school districts. For example, in *Schill v. Wisconsin Rapids Sch. Dist.,* 786 N.W.2d 177 (Wis. 2010), the Wisconsin Supreme Court held that a teacher's personal e-mails sent on a school computer were not public records because the communications did not pertain to work-related functions. Yet, if the teachers' personal e-mails did pertain to public business, they would constitute public records subject to possible disclosure pursuant to a FOIA request. Although *Schill* dealt with Wisconsin's FOIA, the same principle applies in Illinois.

With respect to employees, any emails or texts that pertain to public business are subject to FOIA, regardless of whether they are on a personal or district-issued device. Public bodies act through their employees. Accordingly, communications pertaining to the transaction of public business that are sent or received on an employee's personal e-mail account are "public records" under the definition of that term in section 2(c) of FOIA. The Illinois Public Access Counselor for the Office of the Attorney General ("PAC") reached this conclusion in Opinion 16-006. In that matter, CNN filed a complaint against the Chicago Police Department ("CPD") for failing to turn over emails pertaining to the Laquan McDonald shooting from the personal accounts of 12 named police officers. CPD did a search of its own email accounts and devices and found no records responsive to the request. CPD argued that it had no duty to search individual employees' personal email accounts or disclose any pertinent emails discovered on those accounts. The PAC disagreed, noting that any e-mails exchanged by CPD employees concerning the shooting death of Mr. McDonald presumably pertain to those employees' public duties. While the CPD wouldn't have to disclose communications concerning personal matters unrelated to the transaction of public business, the PAC ordered CPD to search the personal email accounts of the 12 police officers.

Similar "public body" FOIA issues will also impact school district employees in their performance of public business. School districts should take note of the court's increasing trend to balance individual privacy rights and public policy concerns. If school board members or employees use personal electronic devices to conduct public business of the District, the communications may be found to be public records subject to disclosure. For this reason, it is recommended that all District related electronic communications be conducted using District e-mail servers and accounts. Such a practice provides the school district the best opportunity to thoroughly search for responsive records when a FOIA request is made. School districts can further try to avoid FOIA disclosure issues by instituting clear policies for their elected officers and employees regarding use of personal electronic devices for school-related communications.

If you have any questions regarding the applicability of FOIA to your board members' or employees' emails and texts, please contact an Ottosen Britz attorney for assistance. ■

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To be governed by FERPA, a photo/video directly related to a specific student must also be maintained by the school. Thus, a photo or video taken by a parent at a basketball game would not be an educational record even if it is directly related to a specific student. By contrast, a close-up photo taken by the school of two or three students playing in that basketball game would be governed by FERPA because the photo is both related to specific students and is maintained by the school.

The FPCO guidance notes that records created and maintained by a law enforcement unit of an educational agency or for law enforcement purposes are excluded from the definition of an educational record. Such a law enforcement video may become a student record if the video is shared with non-law enforcement administrators of the school, is directly related to a specific student, and is maintained by the school.

This is consistent with how the Illinois School Student Records Act ("ISSRA") treats records created and maintained by law enforcement professionals working in the school, or for security or safety reasons or purposes. The Illinois State Board of Education rules governing school student records excludes those records, as well as electronic recordings made on school buses, from the definition of a 'school student record.' (23 Ill. Admn. Code §375.10). The ISBE rules do note that the content of such videos or electronic recording may become part of a school student record to the extent school officials use and maintain the content for a particular reason (e.g., disciplinary action, compliance with a student's Individualized Education Program) regarding that specific student.

What happens if a recorded image is the educational record of two or more students? If one student is harming another student, the video maintained by the school is an educational record for both students. If the parents of one of the students asks to inspect/review the video, the FPCO guidance recommends schools 'redact or segregate out' the portions of the video directly related to other students *if* such redaction or segregation can reasonably be done without destroying the meaning of the record. If such redaction or segregation of the video cannot reasonably be accomplished, or if doing so would destroy the meaning of the video, then the parents of each student to whom the video directly relates would have a right under FERPA to view / inspect the entire video even though it directly relates to other students.

In support of this conclusion, the guidance cites *Letter to Wachter*, a December 2017 correspondence from the U.S. Department of Education Office of the Chief Privacy Officer. That letter responded to a request for clarification regarding a surveillance video maintained by a school depicting a hazing incident of two high school football players by six teammates. Additionally, the video depicted multiple innocent bystanders. The surveillance video was maintained by the school administration and not by the school's law enforcement unit.

The requester asked whether FERPA permitted parents of any of the football players to observe the video. The U.S. Department of Education accepted the school's assertion that it could not afford software that would blur the faces of the other students in the video. The *Letter to Wachter* agreed that a parent could see a greater portion of the video if the information specific to his/her own child cannot be segregated or redacted without destroying the video's meaning.

While FERPA requires a school district to allow a parent to inspect and review their child's educational records upon request, FERPA does not require school districts to release copies of such records. We recommend that schools not provide a copy of a photo or video that is an educational record of a specific student unless that student is the only student depicted in the video.

If you have any questions regarding the legality of your school district's procedures relating to the viewing and/or release of photos and videos, please contact an Ottosen Britz attorney. ■

Ottosen Britz
School Law Conference

Thursday, September 13, 2018

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Lisle, Illinois

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Compensating an employee's FMLA related rest break

by Joe Miller and Amanda McDonough

In an April 12, 2018 opinion letter, the United States Department of Labor (DOL) Wage and Hour Division clarified when a non-exempt employee's 15-minute rest breaks taken throughout the work day due to the employee's serious health condition under the Family and Medical Leave Act (FMLA) are compensable time under the Fair Labor Standards Act (FLSA).

When accommodation breaks benefit the employee rather than the employer, they are not compensable.

In general, an employee is classified as non-exempt when the employee makes at least the minimum wage and is entitled to overtime pay for working over 40 hours in a work week. In the letter, DOL Wage and Hour Division Acting Administrator Bryan Jarrett responded to an employer's inquiry regarding a non-exempt employee. The employee provided the employer with a FMLA certification from a health care provider stating that the employee requires a 15-minute break every hour due to a serious health condition. Because FMLA leave may be taken in periods of weeks, days, hours or even less than an hour, an eligible employee may utilize FMLA leave in 15-minute increments. An employee accessing a 15-minute break each hour would work only six hours in an eight-hour shift.

The United States Supreme Court's decision in *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1994), determined that the compensability of an employee's time depends on "whether it is predominantly for the employer's benefit or for the employee's." Typically, rest breaks up to 20 minutes in length, when provided, are compensable. (29 C.F.R. § 785.18). While different terms may be negotiated in a collective bargaining agreement, it is common for an employer to allow its employees to take two 15-minute rest breaks during an eight-hour shift. Because such rest breaks are "deemed to predominantly benefit the employer by giving the company a reenergized employee", *Naylor v. Securiguard, Inc.*, 801 F.3d 501, 505 (5th Cir. 2015), they are customarily compensable.

In the DOL Opinion Letter, Jarrett noted that the FMLA-protected breaks are given to accommodate the employee's serious health condition and predominantly benefit the employee. Since such accommodation breaks benefit the employee rather than the employer, they are not compensable. "The text of the FMLA itself further confirms that employees are not entitled to compensation for FMLA-protected breaks . . . [it] expressly provides that FMLA-protected leave may be unpaid." The employee could substitute any other available leave, such as sick leave, during the accommodation breaks in the same manner that the employee could substitute such paid leave for larger periods of FMLA leave.

The DOL Opinion Letter concluded by noting that employees who take FMLA-protected breaks must receive as many compensable rest breaks as their coworkers receive. 29 C.F.R. § 825.220 (c). Therefore, if all other non-exempt employees receive two paid 15-minute rest breaks during an eight-hour shift, the employee needing hourly 15-minute rest breaks should also be paid for two of the 15-minute breaks taken during their work day; their additional breaks throughout the day would not be compensable under the FLSA. ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, Ltd.'s newsletter, ***Legal Insights for School Districts,*** is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.
1804 North Naper Boulevard, Suite 350
Naperville, Illinois 60563
630-682-0085
www.ottosenbritz.com

Maureen Anichini Lemon, Editor mlemon@ottosenbritz.com