



WHAT SHOULD SCHOOLS DO WHEN RECEIVING ANOTHER PUBLIC RECORDS REQUEST?!

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I. The Basics

◆ What is a "Public Records Request"? Any "written request for access to or copies of a public record" triggers Nebraska's public records statutes.

◆ Who can make such a request? Anyone. Specifically, "all citizens of this state, and all other persons interested in the examination of the public records . . ." No explanation of the request is required.

◆ What records are covered? Except where statutes expressly provide that a record shall not be made public, "public records" are all records and documents, regardless of physical form, of or belonging to the state and its various public bodies. The fact that a record is in the possession of a public agency does not make it a public record; conversely, public records need not be in physical possession of an agency to be subject to disclosure.

◆ What may be kept from disclosure? The following (among others) may be kept confidential: personal information regarding students, medical records, attorney work product, labor negotiations, appraisal information regarding a purchase/sale, personal information in personnel records.

◆ How soon do we have to respond? The response time is 4 *business days* after *actual receipt* of the written request. Within that time, the public body must (1) provide access to or copies of the records, (2) provide a written explanation of a denial of access/copies, or (3) provide a written explanation regarding why the request cannot be fulfilled within 4 business days.

▶ A reasonable delay in providing copies/access may be based on the need to obtain legal advice as to the confidential nature of the records at issue.

◆ What can we charge? Currently, the Attorney General will not question copying charges of up to 25 cents per page for copies of public records in addition to other allowable charges. If estimated cost of copies exceeds \$50, the custodian may require a deposit.

◆ What if we deny the request? Must provide (1) a description of the records withheld and a statement of the basis for the denial, (2) the name of the official responsible for the decision, and (3) notification of the requester's right of review.

II. Emerging Issues and Recent Cases

◆ Metadata. "Metadata" is generally defined as "data about data," or more specifically, information regarding the history, tracking, or management of an electronic document." Is it a public record? In *Lake v. City of Phoenix* (Ariz. Ct. App. 2009), the court found it is not. Lake suspected that public information he received was backdated. He then requested the metadata, or "specific file information contained inside the file" relating to when the file was cre-

ated, amended, etc. The court, noting that Arizona law does not specifically define "public record" found that metadata does not fit within the generally accepted meaning of public records in the state. It also noted that if metadata constituted a public record, it would have to be provided every time someone requested a document prepared on a computer.

▶ The court in *O'Neill v. City of Shoreline* (Wash. Ct. App. 2008) reached a different conclusion. The request there involved an email sent by a public official. The court, construing statutes similar to Nebraska's, found that the metadata information at issue fit within the broad definitions in the states public record statutes.

◆ Emails. The Nebraska AG stated "e-mails, faxes or records of other electronic communications between elected officials and between elected officials and governmental staff are public records which are subject to disclosure to the general public . . ." Op. No. 04007. Nebraska appellate courts have yet to address this issue. What about public employees' personal emails that are sent/received using district email accounts and/or district owned computers? This issue is currently before the Wisconsin Supreme Court. At issue is a definition of "record" that is similar to Nebraska's.

◆ Evertson v. City of Kimball (Neb. 2009). The mayor of Kimball hired a private investigator to investigate the police department. Residents of Kimball requested the investigative report. The primary issue was what constitutes a public record. The court found that the reference to "data" in the definition of public records "shows that the Legislature intended public records to include a public body's component information, not just its completed reports or documents." This may contradict a 1991 Attorney General opinion that protected certain "draft" documents from disclosure. The Court also noted that the public's right of access does not depend on where requested records are physically located.

III. Practical Considerations

◆ First things first—respond within 4 business days. Time is of the essence. Even if the district will not provide access or copies in that time, the response must be prepared within 4 business days of the request.

◆ What does the request seek—are the records public records, are they protected from disclosure, is the request voluminous, what is the cost of fulfilling the request, and is legal advice necessary?

◆ Respond as though the request will end up before the Attorney General.

◆ Policy regarding email retention.