

OFFICE OF THE SUPERINTENDENT

Millburn Public Schools

INFORMATION ITEM

February 1, 2010

To: Board of Education Members

From: Ellen E. Mauer, PhD

Subject: First Reading-Access to District;s Public Records - Policy 2:250

This policy has been updated to show significant changes in our most current legislation. We are now required to:

- Assign me as the Freedom of Information Officer or delegate that to several people
- Shorten the timeline to 5 business days
- Not charge for the first 50 pages of the request for paper. Other fees are limited.
- Give yearly training to the Freedom of Information Officers

Public records are very clearly defined and nothing seems left to chance. Requests may be made in any format and we cannot require a person to give a reason for the request.

School Board

Access to District Public Records 1

Full access to the District's *public records* is available to any person as provided in the Illinois Freedom of Information Act (FOIA), this policy, and implementing procedures.

Freedom of Information Officer 2

The Superintendent shall serve as the District's Freedom of Information Officer and is assigned all the duties and powers of that office as provided in FOIA and this policy. The Superintendent may delegate these duties and powers to one or more designees but the delegation shall not relieve the Superintendent of the responsibility for the action that was delegated. The Superintendent or designee(s) shall report any FOIA requests and the status of the District's response to the Board at each regular Board meeting.

Definition 3

The District's *public records* are defined as records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of the School District.

Requesting Records 4

A request for inspection and/or copies of public records must be made in writing and may be submitted by personal delivery, mail, telefax, or email directed to the District's Freedom of Information Officer. Individuals making a request are not required to state a reason for the request other than to identify when the request is for a commercial purpose or when requesting a fee waiver.

The footnotes are not intended to be part of the adopted policy; they should be removed before the policy is adopted.

1 The Illinois Freedom of Information Act (FOIA) governs the subject matter in this policy (5 ILCS 140/, amended by P.A. 96-542, eff. 1-1-10). State law does not explicitly require boards to adopt a policy on access to their records. However, a board policy is the logical instrument to memorialize the actions that are required to implement FOIA.

2 Each board must designate one or more official(s) or employee(s) to act as its freedom of information officer(s) (5 ILCS 140/3.5, added by P.A. 96-542). Amend this sentence to identify by job title the freedom of information officer or use one of the following:

Alternative 1: The Board will appoint an employee to serve as the District's Freedom of Information Officer who is assigned all the duties and powers of that office as provided in FOIA and this policy.

Alternative 2: The Superintendent shall appoint an employee, who may be himself or herself, to [continue as with alternative 1].

The School Code requires the FOIA report described in the second sentence of this section (105 ILCS 5/10-16); it is optional, however, for districts governed by a board of school directors.

3 The definition is quoted from 5 ILCS 140/2(c), amended by P.A. 96-542. Substitute the following alternative for this paragraph if desired: "The definition of *public records*, for purposes of this policy, is the definition contained in Section 2(c) of FOIA without amendment."

4 This section restates 5 ILCS 140/3(c), amended by P.A. 96-542. Districts may, but are not required to, accept oral requests. Compliance with an oral request may stave off the formal written request and permit more flexibility in the response. Add this option if the district wants to accept oral requests: "Oral requests may be accepted provided personnel are available to handle them." The response to an oral request should be documented. Districts may provide a request form for convenience but may not require its use. See 2:250-E1, *Written Request for District Records*.

All requests for inspection and copying shall immediately be forwarded to the District's Freedom of Information Officer or designee.

Responding to Requests

The Freedom of Information Officer shall approve all requests for public records unless:

1. The requested material does not exist; ⁵
2. The requested material is exempt from inspection and copying by the Freedom of Information Act; ⁶ or
3. Complying with the request would be unduly burdensome. ⁷

Within 5 business days after receipt of a request for access to a public record, the Freedom of Information Officer shall comply with or deny the request, unless the time for response is extended as specified in Section 3 of FOIA. The Freedom of Information Officer may extend the time for a response for up to 5 business days from the original due date. If an extension is needed, the Freedom of Information Officer shall: (1) notify the person making the request of the reason for the delay, and (2) either inform the person of the date on which a response will be made or agree with the person in writing on a compliance period. ⁸

When responding to a request for a record containing both exempt and non-exempt material, the Freedom of Information Officer shall redact exempt material from the record before complying with the request. ⁹

Copying Fees ¹⁰

Persons making a request for copies of public records must pay any applicable copying fee. The Freedom of Information Officer shall, as needed, recommend a copying fee schedule for the Board's approval. Copying fees, except when fixed by statute, are reasonably calculated to reimburse the District's actual cost for reproducing and certifying public records and for the use, by any person, of its equipment to copy records. No fees shall be charged for the first 50 pages of black and white, letter

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⁵ FOIA does not require a public body to create a record (5 ILCS 140/1).

⁶ 5 ILCS 140/7 and 140/7.5, amended/added by P.A. 96-542, describe numerous explicit exceptions to the presumption that all public records are available for public inspection. Each record is "presumed to be open to inspection or copying" and the district will have "the burden of proving by clear and convincing evidence that it is exempt," (5 ILCS 140/1.2 and 140/11(f), added/amended by P.A. 96-542). A person who prevails in a court proceeding to enforce FOIA will be awarded attorney fees; the public body may incur a civil penalty of between \$2,500 and \$5,000 for a willful or intentional violation of FOIA or other action in bad faith (5 ILCS 140/11(i) and (j), amended by P.A. 96-542). School officials should seek the board attorney's advice concerning the denial of a record request.

Appellate decisions from the former FOIA may be, but are not necessarily, relevant to several exemptions. See Chicago Tribune Co. v. Chicago Bd. of Ed., 773 N.E.2d 674 (Ill.App.1, 2002)(student records are *per se* prohibited from disclosure); Copley Press, Inc. v. Peoria Sch. Dist., 834 N.E.2d 558 (Ill.App.3, 2005)(upheld a board's denial of a request for the superintendent's evaluation); and Gekas v. Williamson, 912 N.E.2d 347 (Ill.App.4, 2009)(all investigatory records for an employee are disclosable, despite a finding that the allegations were unfounded and no discipline was imposed).

⁷ 5 ILCS 140/3(g), amended by P.A. 96-542.

⁸ 5 ILCS 140/3(e) and (f), amended by P.A. 96-542.

⁹ 5 ILCS 140/7, amended by P.A. 96-542. Redacting exempt portions is permitted, but not required, except that contractors' employees' address, telephone numbers, and social security numbers must be redacted before disclosure (5 ILCS 140/2.10, amended by P.A. 96-542). Reviewing past responses to FOIA requests will promote uniform treatment of requests for similar records.

¹⁰ 5 ILCS 140/6, amended by P.A. 96-542. The statute contains additional limitations on fees, including a prohibition on charging for the costs of any search for and review of the records or other personnel costs. The fee for black and white, letter or legal sized copies may not exceed 15 cents per page.

or legal sized copies. No fee shall be charged for electronic copies other than the actual cost of the recording medium.

Access 11

The inspection and copying of a public record that is the subject of an approved access request is permitted at the District's administrative office during regular business hours, unless other arrangements are made by the Freedom of Information Officer.

Many public records are immediately available from the District's website including, but not limited to, a description of the District and the methods for requesting a public record. 12

Preserving Public Records

Public records, including email messages, shall be preserved and cataloged if: (1) they are evidence of the District's organization, function, policies, procedures, or activities, (2) they contain informational data appropriate for preservation, (3) their retention is required by State or federal law, or (4) they are subject to a retention request by the Board Attorney (e.g. a litigation hold), District auditor, or other individual authorized by the School Board or State or federal law to make such a request. 13 Unless its retention is required as described in items numbered 3 or 4 above, a public record, as defined by

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11 Public bodies may adopt rules for the time and places where records will be made available (5 ILCS 140/3(h), amended by P.A. 96-542). Amend this sentence to reflect where records will be made available.

12 Web-posting of high-interest records is an easy way to reduce paperwork. FOIA requires that the records identified in this sentence be posted at each administrative office, made available for copying, and posted on the district website, if any (5 ILCS 140/4, amended by P.A. 96-542). Many other records are required to be web-posted and this sentence may be amended to include them. If the district does not have a website, change this sentence as follows: "Some public records are available for immediate access including a description of the District and the methods for requesting a public record, and a list of all types or categories of records under its control." For a list of required web-postings, see exhibit 2:250-E2, *Immediately Available District Public Records*. Using the district's website is also a convenient way to comply with FOIA's requirement to identify documents that are *immediately* available (5 ILCS 140/3.5(a), added by P.A. 96-542). However, lawyers disagree as to whether having material web-posted suffices for having it *immediately* available without also having printed copies on-hand to distribute *immediately* on request. Although not required to be web-posted, a list of all types or categories of records under its control must be prepared and made available (5 ILCS 140/5). See 2:250-AP1, *Access to and Copying of District Public Records*.

13 The Local Records Act, 50 ILCS 205/3, requires the preservation of records described in items #1-3. The preservation of records described in item #3 is also required by the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, and the Ill. School Student Records Act, 105 ILCS 10/, among other laws. An example of a record described in item #4 is a record subject to a *litigation hold* or a document preservation requirement pursuant to Federal Rules of Civil Procedure, Rules 16 and 26.

Categorizing email messages is complicated because two laws apply and the rules differ when a board member is a party. See sample policy 2:140, *Communications To and From the Board*, for a discussion of email between or among board members. When employees or agents are using email for school purposes, the email messages may be *public records*, but will not necessarily be subject to disclosure depending on the topic discussed. FOIA's list of exemptions from disclosure determines whether these emails are subject to disclosure. For exemptions, see 5 ILCS 140/7 and 140/7.5, amended/added by P.A. 96-542.

Not all email messages between or among employees must be preserved, even if they are *public records* for purposes of FOIA. The definition of *public record* in the Local Records Act, 50 ILCS 205/, is narrower than its definition in FOIA. Thus, staff email, like all district records, must be retained only when it contains material described in #1-4. While this is a slippery slope without definitive parameters, employee email that is conversational or personal, or contains brainstorming may generally be deleted.

The Prevailing Wage Act (820 ILCS 130/5) requires contractors, while participating on public works, to keep records of all laborers, mechanics, and other workers employed by them on the project and to submit this record monthly to the public body. The public body in charge of the project must keep these records for a period of not less than 3 years. These records must be made available in accordance with FOIA except that contractors' employees' address, telephone numbers, and social security numbers must be redacted before disclosure (5 ILCS 140/2.10, amended by P.A. 96-542).

the Illinois Local Records Act, may be destroyed when authorized by the Local Records Commission. ¹⁴

LEGAL REF.: 5 ILCS 140/, Illinois Freedom of Information Act.
105 ILCS 5/10-16.
820 ILCS 130/5.

CROSS REF.: 2:140 (Communications To and From the Board), 5:150 (Personnel Records),
7:340 (Student Records)

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¹⁴ 50 ILCS 205/. Preservation and destruction of documents is covered in 2:250-AP-2, *Protocols for Record Preservation and Development of Retention Schedules*. See also the Ill. Secretary of State's website for information on preserving and destroying records, www.cyberdriveillinois.com/departments/archives/records_management/recman.html.

Board of Education

Access to District's Public Records

The District will respond to all requests under the Illinois Freedom of Information Act from all persons desiring access to and copying of the District's public records. Access and/or copying will be allowed unless the record is exempt from inspection and copying under the Illinois Freedom of Information Act, as it is amended from time-to-time. Electronically stored public records, including E-mail messages containing material that a school official or employee made or received as part of his or her official responsibilities and that contains informational data appropriate for preservation, shall be preserved and cataloged separately from non-public electronic communications. The Board President or Superintendent shall report to the Board at each regular meeting any requests made under the Freedom of Information Act and will also report the status of the response.

The Superintendent shall implement this policy with administrative procedures. Copy fees are set periodically by the Board.

LEGAL REF.: 5 ILCS 140/1 et seq. (Illinois Freedom of Information Act).
105 ILCS 5/10-16.

CROSS REF.: 5:150 (Personnel Records), 7:340 (Student Records)

ADOPTED: May 20, 2002