

# LEGALINSIGHTS

FOR SCHOOL DISTRICTS

OTTOWEN BRITZ KELLY COOPER & GILBERT, LTD.

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## Freedom of Information Act Reform

by Matthew Roeschley

On August 17, 2009, Governor Pat Quinn signed into law Public Act 96-0542, a comprehensive overhaul of the Illinois Freedom of Information Act (5 ILCS 140/1 *et seq.*) (the "Act" or "FOIA"). The new law, which takes effect January 1, 2010, attempts to foster greater transparency by creating a presumption that all records are public, endowing the Office of the Illinois Attorney General with new oversight and enforcement powers, and outlining a clearer process for FOIA requests. However, the legislation also creates additional burdens and responsibilities for school districts. This article will focus on the changes in the law that promise to impact school districts most significantly.

### *Public Access Counselor*

Foremost among the many new amendments to the Act is the creation of a Public Access Counselor ("PAC") position in the Office of the Illinois Attorney General. The PAC is charged with the power to review and determine whether a school district's denial of a FOIA request was proper under the Act. The PAC will also have subpoena power and the authority to issue advisory opinions to public bodies. Moreover, the PAC's decisions in particular disputes will be binding and reviewable under the Illinois Administrative Review Law (735 ILCS 5/3-101 *et seq.*). Previously, the process for review of a dispute regarding a FOIA request in-

cluded an appeal to the "head of the public body." No such process exists under the new law, as appeals will now be submitted directly to the PAC.

### *Training / FOIA Officers*

Another important change is that all school districts must now designate employees, officers, or members to receive required annual training on compliance with the new Act. The trainings will be developed and administered by the PAC.

Moreover, each school district is required to designate one or more official or employee to act as its Freedom of Information officer(s). The Freedom of Information officer(s) will be responsible for accepting requests under the Act, ensuring that the school district responds in a timely manner to such requests, and issuing responses to requests. The Freedom of Information officer(s) will also be responsible for keeping records of all requests.

### *Exemptions*

While the personal privacy exemption still exists under the new law, it is no longer a "per se" exemption. Instead, the Act now exempts a narrow, clearly defined category of "private information" (e.g., social security numbers, driver's license numbers, medical or financial records, personal telephone

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## U.S. Supreme Court rules on student searches and the Fourth Amendment

by David Zafiratos

In *Safford Unified School District #1 et al. v. Redding*, 129 S.Ct. 2633 (June 25, 2009), the United States Supreme Court clarified the Fourth Amendment's protection of students from unreasonable searches. *Safford* involved a strip search ordered by school officials investigating whether a student was in possession of drugs banned by school policy. The Court held, given the surrounding circumstances, that the search performed in this case was unreasonable. The Court further ruled, however, that school officials who ordered the search were protected from liability by qualified immunity.

On October 8, 2003, a student informed Safford Middle School Assistant Principal Kerry Wilson that an over-the-counter anti-inflammatory pill and several prescription strength Ibuprofen pills found in a day planner belonged to 13-year-old Savana Redding. The day planner also contained several knives, lighters, a permanent marker, and a cigarette. Wilson called Redding into his office, where she admitted the day planner was hers but denied knowledge of the pills or other contents. Wilson and administrative assistant Helen Romero searched Redding's backpack, which did not contain any prohibited items. Wilson then instructed Romero to take Redding to

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## Illinois Supreme Court narrows FOIA exceptions

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by Thomas Farnell

**O**n May 21, 2009, in *Stern v. Wheaton-Warrenville Community Unit School District 200*, 2009 WL 1416105 (Ill. 2009) the Illinois Supreme Court ruled that a public school superintendent's employment contract is not exempt from disclosure under the Freedom of Information Act (FOIA) even if it is located in the superintendent's personnel file.

On January 26, 2006, Mark Stern submitted a FOIA request to Wheaton-Warrenville Community Unit School District 200 (the District) for a copy of the employment contract of the District's then superintendent, Dr. Gary Catalani. The District's record keeper denied

Stern's FOIA request on the basis that the contract was contained within the superintendent's personnel file and thus exempt from disclosure.

After having his request denied, Stern contacted the Illinois Attorney General's Office. The Attorney General's Public Access Counselor sent a letter to the District stating that employment contracts are considered public information under the FOIA. After this letter was sent to the District, Stern renewed his FOIA request. The District's legal counsel denied Stern's request, and Stern appealed the decision to the school board president, who also denied the appeal.

After both requests were denied, Stern again contacted the Attorney General's Office. This time the Attorney General's Public Access and Opinions Division sent a letter to the District's legal counsel restating its position and requesting that the District reconsider Stern's request. However, the District still did not comply with the request. As a result, Stern filed a complaint against the District in the Circuit Court of Du Page County seeking injunctive relief under FOIA.

In May 2006, a local newspaper staff reporter (not Stern), conducting research for an article on superintend-

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## Student searches

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the nurse's office for a search of her clothing. Romero and Nurse Peggy Schwallier conducted a strip search in the nurse's office, requiring Redding to pull out her bra and the elastic on her underpants. No pills were found in this search. Redding's mother sued the School District alleging Wilson, Romero, and Schwallier had violated her daughter's Fourth Amendment rights.

The United States District Court for the District of Arizona dismissed the lawsuit, ruling the search did not violate the Fourth Amendment. The plaintiff then appealed the district court's decision. The Ninth Circuit Court of Appeals reversed the District Court's dismissal and held that the search did violate Redding's right to not be subject to an unreasonable strip search.

On appeal to the U.S. Supreme Court, the Court agreed that the search was unconstitutional. Citing its prior decision in *New Jersey v. T.L.O.*, 469

U.S. 325 (1985), the Court explained that the level of suspicion needed to justify a search in the school setting is one of "reasonable suspicion," a lower standard than the "probable cause" standard required when a police officer searches a member of the public. Even under the lower standard, the search was not reasonable in its scope. A student search will be permissible in its scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

The Supreme Court offered some guidance on this issue by contrasting the required knowledge component of probable cause and the required knowledge component of reasonable suspicion. Under the probable cause standard, a law enforcement officer's search meets the required knowledge component if the officer knows there is a "fair probability" or a "substantial chance" of find-

ing evidence of wrongdoing. School personnel are held to a lower required knowledge component, which the Court described as knowledge of a "moderate chance" of finding such evidence.

After explaining the requirements of the reasonable suspicion standard for student searches, the Court examined whether the actions taken by school officials in this case were justified under the circumstances. First, the Court noted that the school's policy strictly prohibited the use, possession, or sale of any drugs on school grounds. This prohibition included prescription and over-the-counter medications which a student does not have permission to use. Next, the Court explained school personnel had been informed that the day planner containing the pills belonged to Redding, and Redding eventually admitted ownership of the day planner. These facts gave school personnel the neces-

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## Student searches

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sary “reasonable suspicion” to search Redding’s outer clothing and backpack.

These facts did not justify the strip search, however. The very fact of performing the strip search implicated “subjective and reasonable societal expectations of personal privacy,” and required “distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.” In this case, “the content of the suspicion failed to match the degree of intrusion.”

School personnel knew before performing the strip search that the pills were common pain relievers and, therefore, posed a limited threat. Additionally, the Court explained that school personnel should not have suspected Redding was hiding common pain relief pills in her underwear. The Court held this search to be unreasonable, because there was no indication of danger to students, nor any reason to think Redding was carrying pills in her underwear. With this holding, the Court clarified that a strip search of a student is only valid when there is a reasonable suspicion of danger or a reasonable suspicion that the student has hidden evidence in his or her underwear.

Finally, the Court discussed the issue of immunity for Wilson, the school official who ordered the strip search. The Court concluded that Wilson should be granted qualified immunity in this case, since the law pertaining to qualified immunity in these types of cases was previously not sufficiently clear. The School District itself may still be subject to liability, as the Court has remanded the case to the District Court for a determination of that issue. ■

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## Illinois Supreme Court narrows FOIA exceptions

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ents’ salaries submitted a FOIA request for the superintendent’s employment contract. Two days after receiving the request, the superintendent himself faxed the reporter a copy of his employment contract.

In court, Stern argued that the District waived any statutory exemption when it disclosed the employment contract to other individuals, including members of the media. He further argued that the personnel file exemption found in FOIA did not apply because the superintendent’s employment contract “bears on his public duties” and must be disclosed.

The District filed a motion for summary judgment, claiming that the exemption in Section 7 of FOIA for personnel files applied to the superintendent’s contract. The Circuit Court adopted the District’s argument, holding that the employment contract could reasonably be expected to be found in the employment file. Furthermore, the court held that exemptions under Section 7 are *per se*, or automatically exempt from disclosure, therefore, the superintendent’s contract was *per se* exempt from disclosure.

On appeal, the Second District reversed the summary judgment and remanded the matter to the circuit court. The Second District stated that Section 8 allows for the disclosure of nonexempt material contained in exempt items through redaction. Citing Section 11(f), the Second District directed the circuit court to make an *in camera* inspection of the requested records to determine which parts are exempt from disclosure.

The Illinois Supreme Court stated that the purpose of the FOIA is “to open governmental records to the light of public scrutiny.” Therefore, under FOIA, public records are presumed to be open and accessible. When a party denies a FOIA request, it must demonstrate that the records requested fall within the claimed exemption. The Court reasoned

that the superintendent’s contract is not exempt from disclosure because it constitutes “information that bears on the public duties of public employees and officials.” While Section 7 does identify specific items such as personnel files that are exempt from disclosure, the General Assembly has placed limitations on the reach of the personal privacy exemption.

The Illinois Supreme Court stated, “an employment contract is not the kind of record that the General Assembly intended to keep from public view and does not fall within the exemption for personnel files in section 7(1)(b) of the Act.” Furthermore, the Court held that the mere commingling of exempt and non-exempt material does not prevent a public body from disclosing the nonexempt portion of the record.

According to the Court, a public record is “all information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds of public bodies.” (5 ILCS 140/2(c) (vii))

The Court also held that an *in camera* inspection of the contract is appropriate, but solely to determine whether it contains personal information such as a social security number or bank account information. Any personal information must be redacted. Thus, with the exception for personal information, Catalani’s employment contract must be disclosed under FOIA.

FOIA requests received by school districts regarding employment contracts must be disclosed, with only personal information such as social security numbers or bank information redacted. School districts may not reject a FOIA request for a document solely on the basis that it is contained in the personnel file. Any non-exempt information, even if located in an otherwise exempt location, must be disclosed. If you have any questions regarding your obligations under the FOIA, please contact one of our attorneys at (630)682-0085. ■

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numbers, etc.) that is exempt from disclosure, as well as the disclosure of personal information that would result in a “clearly unwarranted invasion of personal privacy.”

Additionally, if a school district wishes to assert either the personal privacy exemption or the preliminary draft exemption under the new law as a basis for denying a FOIA request, it must notify the PAC, who will review the claimed exemption to determine its applicability.

### ***Responding to Requests***

Another change under the new law is that the time for responding to most FOIA requests has been condensed from 7 to 5 business days. The time of an extension for responding, if granted, is also now 5 additional business days instead of the previous 7 additional days.

Moreover, school districts must now respond to all FOIA requests within the prescribed time frame or waive their right to assert exemptions like the personal privacy or preliminary draft exemption. Also, a school district may no longer charge copying fees if it responds late to a FOIA request.

### ***Copying Charges Now Limited***

The new law further provides that copying charges imposed by school districts shall be limited to 15 cents per page for black and white copies, and that the first 50 pages in black and white are free, as long as they are letter- or legal-sized copies. For color copies or for a size other than letter or legal, a school district may not charge more than its actual cost. Actual costs shall not include personnel costs incurred in searching for and reproducing the requested records.

### ***Expanded Definition of “Public Records”***

Under the new changes, “public records” now include electronic communications.

### ***Civil Penalties / Attorneys’ Fees***

The new legislation also provides that, where a person denied access to copy or inspect records files suit for injunctive or declaratory relief, courts may impose civil fines of \$2,500 to \$5,000 upon school districts if it is determined that they have willfully and intentionally failed to comply with the law or have otherwise acted in bad faith.

In addition, courts are now required to award attorneys’ fees to members of the public who are forced to resort to a lawsuit in order to access public records and who prevail in such litigation.

The sweeping changes to the Illinois Freedom of Information Act will most certainly necessitate a substantial overhaul of the Freedom of Information policies maintained by school districts. However, because the new law is not set to take effect until January 1, 2010, school district employees and officials will have a brief window of time to become familiar with the FOIA changes, any additional duties and responsibilities arising under it, and to work with their attorneys to revise policies and procedures accordingly.

While this article addresses many of the most important changes in the law, it is not exhaustive. Consequently, if additional questions should arise about any aspect of the new legislation, do not hesitate to contact your OBKCG attorney for further guidance. ■

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