

Understanding Connecticut's FOIA

Lights, Cameras and the FOIA: Are School Videos (and Student Statements) Subject to Disclosure?

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Connecticut's Freedom of Information Act ("FOIA") generally provides access to records created by public agencies (including school districts). There is an exception under the FOIA that provides that school districts do not have to release those educational records (or "personally identifiable information" concerning students) which are not subject to disclosure under the Family Educational Rights and Privacy Act ("FERPA"). While FERPA generally prohibits school districts from disclosing educational records or personally identifiable information contained in those records without parental consent, FERPA also requires that parents have the right to inspect and review **their own** child's education records. These FOIA and FERPA requirements sometimes collide when the records of one student contain personally identifiable information and/or educational records concerning of another student.

There has been a long standing debate as to whether a school district can withhold from a parent those student records containing personally identifiable information pertaining to other students, or whether it is still required to disclose the records, albeit with appropriate redaction of information that could personally identify these other students. Connecticut's Freedom of Information Commission ("FOIC") has held that there are circumstances where simply redacting the names of other students would not adequately protect student privacy rights. For example, while a school district may have to disclose information to a parent concerning his/her own child, the FOIC has found that a district need not disclose information or records to that parent about the other students involved in a bullying episode (without the written permission of all of the other students' parents), and thus could withhold from disclosure an entire record. See, e.g., *Smith v. Superintendent, Middletown Public Schools*, #FIC 2013-333 (January 30, 2014). School districts could meet their obligations under FOIA, FERPA (and laws concerning bullying and harassment) by summarizing the records solely as they pertain to a parent's child.

Similarly, and in light of FERPA and previous formal guidance from the U.S. Department of Education; *Letter re: Berkeley County School District* (Family Policy Compliance Office, February 10, 2004); the FOIC has repeatedly upheld decisions by school districts **not** to release videotapes (for example, security videos) containing student images, especially where 1) the requested videotape would reveal a student image to someone other than that student's parent, and 2) the videotape could not be edited (for example, via pixelating) to obscure or delete the images of the other students in the videotape.

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However, is it possible that “the times are a-changing”? While not expressly repealing or withdrawing its prior formal guidance, the U.S. Department of Education recently issued a guidance letter indicating that parents of a student may have the right under FERPA to inspect and review information in videotapes (and witness statements) even if the video also includes the images of other students. *Letter to Wachter* (Office of the Chief Privacy Officer, December 7, 2017). This guidance dealt with records that were being maintained and used in student disciplinary matters; the U.S. Department of Education found that such records would constitute “educational records” for both the student “victims” and student “perpetrators.” This “right” to inspect would apply even in circumstances where it is not possible to edit or obscure the images of the other students. This new guidance would still not require a school district to provide **copies** of records to parents (but merely permit parents to view/“inspect” them). Furthermore, this new guidance only speaks to the right of access as to the parents of students who appear in the video or about whom the statements are written. It does not create a blanket obligation to provide access to the general public (or even other parents of students not in the video) to school videos.

Frankly, the U.S. Department of Education’s latest interpretation of FERPA may be inconsistent with the law itself, which merely provides that when an educational record contains information on more than one student, the parent may inspect and review **or “be informed of” only** the specific information **about his or her own child**. It remains unclear if this latest guidance letter will be adopted by the courts or FOIC, which have both expressly recognized that school districts may be prohibited from providing access to records to the parents of one student that contain information about other students unless they can be redacted to remove the ability to identify the other students. Indeed, to date, the FOIC appears to be sticking with its prior guidance and upholding a school district’s refusal to provide access to records (including videos) to parents that reveal information about other students (unless they can be redacted to remove the ability to identify other students). See, e.g., *Ezzo v. Superintendent of Schools, Berlin Public Schools*, #FIC 2017-0663 (March 14, 2018). Until the courts or the FOIC rule otherwise, it may be acceptable for school districts to continue to follow prior FOIC and court precedent and refuse disclosure of such videos (and statements).

Attorney Sommaruga is the author of “Understanding Connecticut’s Freedom of Information Act” (5th Edition), which will be released in summer 2018. This is the first in a new quarterly column about FOIA issues.

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