

Obtaining Public Records

BY BETSY HAMMOND

Obtaining public records is essential to covering public education. Fortunately, the law is on the side of reporters: Public agencies generally must disclose their records to the public and to the media—with important exceptions.

Public agencies are often reluctant to hand over records, however, even when the law clearly says they should. Sometimes they don't know or understand the laws well; other times, they just don't want their information in the public eye. Reporters need to be familiar with state and federal records laws and, in consultation with their editors, skillfully use those laws to get maximum transparency from schools, school districts, universities, education departments and other public agencies.

What are some common public records that education reporters request and use?

The list is long and includes:

- Contracts, from the superintendent's or university president's agreement with the board to contracts with outside vendors.
- Student achievement records of all kinds: Test scores, grades, graduation rates, and remediation rates.
- Financial records: Employee salaries; pay and overtime; yearly budgets and expenditures; charges on employer-issued credit cards; travel and expense records.
- Routine records that sometimes contain gems: School board agendas, meeting minutes, subcommittee reports, the packets every board member gets for meetings.
- Records about teachers: Teacher pay, teacher years of experience, teacher turnover, teacher discipline, and teacher performance evaluations. Reporters can and should get many same or similar records for professors and other college faculty and staffers.
- Documentation you need when there's a scandal or alleged scandal: Police reports, audits, email exchanges, discipline records, investigation reports, and records of degrees earned or not earned.

Education reporters should make a habit of requesting and looking through records in each of these categories. They contain a treasure trove of potential stories to hook readers or listeners, and the public will never get that all that information except from an enterprising reporter.

What are the first steps to take to get started on making a public records request?

Simple: First, know your state and federal laws. Second, find out as much as you can about what records exist and what information they contain.

KNOW YOUR LAWS

While reporters often short-hand their attempts to get public records as "FOIAing" records—referring to the acronym for the federal Freedom of Information Act—education reporters are much more likely to use their states' open records laws to pry information from the schools, colleges and state education agencies they cover.

Laws differ from state to state, but most statutes are based on the presumption that all significant government records are public unless specifically exempted

and that government openness is healthy for government agencies as well as citizens. You can often draw on that language, whether from the law itself or from court rulings on it, to make your written records request stronger and remind keepers of records of the value to the public of giving them to you. (Think of those phrases as a carrot.) Many state public records laws include deadlines for agencies to respond or penalties for agencies that don't turn over public records, or both. (Make sure to make good use of those provisions, or sticks, in your state's law, if they're there.)

The laws will also list the exceptions of records you are unlikely to get permission to see or that you'll never get to see unless they're leaked. Those typically include draft documents, most employees' job reviews, documents that would reveal "trade secrets" and documents that could give away an agency's legal defenses, plans to buy real estate or strategies for negotiating with unions. Individual and corporate income tax returns are almost always private, although property tax records are public.

Only when requesting records from a federal agency such as the U.S. Department of Education do reporters need to rely on the Freedom of Information Act.

Most states publish guides to their state records laws intended to help reporters and others understand the law and how courts have interpreted it. California's attorney general's office, for instance, offers a "Summary of the California Public Records Act." Most states also have reporter-friendly groups such as the state press association or a pro-government-openness organization that will help explain the law and offer samples of good records requests.

One excellent place to start learning your state's law is at the Reporters Committee for the Freedom of the Press. That nonprofit organization has well-organized links to every state's law at rcfp.org/open-government-guide. Staffers there have carefully culled every state's law to determine how it works, including how it treats emails, whether reporters can insist on getting records in a particular format (getting data in an Excel spreadsheet, for example, instead of harder-to-use PDFs and how to appeal a decision if an agency turns down your request for records.) It also offers an app for your smart phone with the laws you need.

KNOW WHAT YOU'RE ASKING FOR

Before making a public records request, it's smart to talk informally with someone at the agency who knows how the records you're interested in are kept and used. Interested in what appears to be a particularly lucrative contract? Make a call to find out how such contracts are solicited, what kind of records are kept to show which firms respond, and how different evaluators rated each bid. Learning the agency's terms for those records will help you make an airtight request. Similarly, ask about record-keeping processes to figure out if you should simply request the contract, or whether there are amendments, appendices, exhibits or updates that you should ask for, too.

Key elements to include in every records request:

- Your name
- Your news outlet's name
- A reference to the applicable public records law
- A clear description of the records you seek
- A phrase such as "and related documents, if any" to make sure your request is not too narrow
- An offer to help clarify the request and your contact information
- A request that any denial of your request be put in writing and cite specifics of the law
- A requirement that any charges for the records, and the rationale for them, be put in writing

The idea is to get enough information that you can make your written request for the information clear and specific, but not so specific that you're shutting yourself off from getting the full picture that's available. Many records requests use a phrase such as "and any related documents" to avoid giving the agency a justification to withhold juicy stuff that may be tucked into a separate document from the one you've requested.

NOW MAKE YOUR REQUEST

Your request should be as direct and polite as you can make it. Make it clear the request comes from you and from the news outlet for which you are working. Cite the state's open records law. Outline the documents you seek as clearly as possible. Mention any deadlines the law offers. ("As you know, the Georgia open records law provides for a response to this request within three days, so I look forward to hearing from you no later than Thursday.")

Always offer to help the agency give you what you need. ("If this request is unclear in any way, please do not hesitate to contact me at 202-555-1212 so I may clarify it.) Always ask for a written response. ("If you decline to provide the requested records in whole or in part, please provide the basis for that decision in writing, citing the specific provision(s) of the law that allow the information to be kept confidential.")

WHAT ABOUT MONEY?

How to handle the potential costs to obtain public records can require diplomacy. Talk to your editors about how your news outlet generally handles that issue and about the track record of the agency from which you plan to make the request. Most state laws spell out how much agencies can charge, at least for some aspects of public records production.

No matter what the law says, some agencies cite a huge price tag for culling or redacting records to get reporters to back down from a request. If an agency has a history of turning over information for free, it's usually best not to raise the money issue.

When you do expect to be asked to pay, make sure you don't incur charges you can't afford and to be sure to get the bill and its underlying logic in writing. ("If you anticipate it will cost more than \$25 to fulfill this request, please provide a written estimate of the expected charges and the rationale for calculating them before incurring any costs.")

WHAT IF I GET TURNED DOWN?

Know the law. Every state law spells out how you can appeal an agency's refusal to disclose records. A decision by a state university or state agency usually goes to the state's attorney general's office. Decisions by local school districts often

go to the local district attorney. Some states have a designated public records official who handles appeals. Eventually all paths lead to court. But that can be expensive. Make your best case to the next administrative level first.

Read the specific provision of the law they cite carefully. How to prevail? You were smart enough to require the agency to spell out its denial in writing and to cite the specific provision in the law that allows for non-disclosure. Read that provision of your state's law carefully and in context. Does it really say what the agency thinks it does? If not, make that case in writing in your appeal. Does the law require non-disclosure or merely allow it? If it says an agency can withhold that information but does not have to, make your case for how it will help foster good government or inform important public policy matters to get the information in the public eye.

Turn to good-government lawyers for help. Your state probably has lawyers who work with the state press association or a pro-sunshine group who will give you a little bit of free help. If not, national groups such as the Reporters Committee for a Free Press or the National Freedom of Information Coalition probably will. Journalists stand in solidarity on this issue. The Society of Professional Journalists is also a good resource.

WHAT ABOUT FERPA?

The Family Educational Rights and Privacy Act, or FERPA, comes up a lot when education reporters request records. FERPA applies to any school district, university or other education agency that receives federal funds—which is pretty much every public school and every college or university, public or private, in the country.

Important for every education reporter: When an agency cites FERPA as a reason to deny your records request, be prepared to push back.

FERPA is the opposite of an open records law—it is intended to ensure that educational records of individual students are kept private. Put yourself in the place of a student or his parents: Why should the student's grades, test scores, behavior records or economic circumstances be the public's business,

How to respond when an agency wants to charge a fortune:

Know the rules. Know what the state law allows agencies to charge for and what it doesn't; many states disallow charges to gather the records; some disallow charges for lawyers to review or redact the records.

Calculate yearly rates. Be sure to get the hourly charge for any programming or redaction and call them on any excess. Programming charges of \$75 an hour might not sound crazy, but how many public agencies have a lowest-paid competent programmer earning \$156,000 a year ($\$75 \times 40 \text{ hours} \times 52 \text{ weeks} = \$156,000$)

Talk to the folks in IT. When necessary, talk to the technical folks at the agency about exactly what they need to do to fulfill your request. Sometimes non-technical folks assume that gathering and ordering electronic records is much more complex and time-consuming than it is.

Who else gets the info? Ask the agency who else gets the information from them and in what format (do they report to a state agency, a federal agency, other regulators, the IRS, the state audit division?). Can you get a copy of the records as turned over to that other party?

Publicize big price tags. The best, last resort in many tussles over records is to make an agency's refusal to play nice part of the news coverage. Let your school district or university know you plan to post a news story saying they want \$20,000 to disclose how they awarded a contract or how employees used their university-awarded credit cards.

even if the student attends a public school? FERPA makes it clear that all those details are private.

The reality, however, is that FERPA gets misused to protect schools and universities from scrutiny or controversy in the name of protecting students.

FERPA explicitly says that the public is entitled to "directory information" about every student unless a parent or an adult student explicitly requests the information about a particular student not be disclosed. Every year, districts and colleges must spell out to parents and students what they deem "directory information" to be shared. Typically it will include students' names, their grade levels, and their "dates of attendance," which is normally interpreted to mean when they first enrolled at the school or university and when they left, if that applies. Reporters therefore can obtain the names of every student in every school (except those whose parents opted them out) every year.

FERPA also allows for the release of education records that cannot be tied to an individual student or used to figure out a particular student's grades, test scores or other private education information. (Such information is frequently referred to as "de-identified." Redacting a student's name, address, date of birth, and other identifying or potentially identifying information from a record or many records makes that information fine to share with journalists and the public under FERPA.) A spreadsheet showing the grade-point average (but not the name or other demographic identifier) of every senior at the local high school last year and 10 years earlier, for instance, would give a journalist the chance to see how grades have changed—without compromising the privacy of individual students.

State and federal courts repeatedly have ruled that releasing education records is in the public interest and that schools and universities must cut back on their overly imaginative conceptions of how releasing de-identified student records might violate FERPA. An excellent example of that is the Wisconsin Supreme Court decision in a case brought by J. Marshall Osborn, (link.nacua.org/documents/Osborn_v_UofWisconsin.pdf) who asked the University of Wisconsin to provide him with the GPA, test scores, class rank, gender, and race or ethnicity of all admitted and rejected applicants.. If an agency cites FERPA as a reason it can't provide you with public records, be prepared to insist it make a solid written case for how the information could disclose education records about a particular student.

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