The Use of Email by School Board Members and Other School Officials

Answers to Recurring Questions and Some Practical Considerations

Prepared and Presented by:
Kimberly A. Fanniff
Senior Staff Counsel
NYS School Boards Association, Inc.

The Use of Email by School Board Members and Other School Officials
Answers to Recurring Questions and Some Practical Considerations

Email is a convenient and easy to use communication tool that has become an indispensable part of modern society, including in a school district setting. Ask school board members and other school officials and they all will agree that the volume of emails they send and receive on a daily basis oftentimes can be daunting. Still, emails are an inexpensive and easy way to communicate with groups of people small and large.

Often, however, the actions of school board members and other school officials are subject to legal and practical considerations that are not applicable to the public at large. The use of email communications is no exception. As a result, questions often come up regarding the use of email by school board members and other school officials to convey their views on school related matters. Are email communications by and among school officials subject to public disclosure? Must such communications be saved?

Written in a question and answer format, what follows provides some guidance on recurring questions in this area.

Permissible v. Impermissible Email Communications

Can individual school board members communicate by email?

Yes, except that a series of email communications between individual board members which results in a collective decision, or a vote taken by email, would be inconsistent with the Open Meetings Law, according to the Committee on Open Government (NYS Dep't of State Committee on Open Government, OML-AO-3257 (Dec. 237, 2000); OML-AO-3787 (Aug. 4, 2004)). Pursuant to that law, such actions can take place only in a properly convened school board meeting. Virtual meetings, as described above, are prohibited.

A New York court might find the situation to be no different than in the case where a town board majority, through a series of telephone calls, discussed the town's policy on tax assessment reductions and decided to publish a newspaper article explaining such policy. In that case, the court voided the decision made (see *Cheevers v. The Town of Union*, Index. No. 98-1401 (Broome Cnty. Sept. 3, 1998)).

Courts outside New York that have addressed deliberations taken by school boards via email exchanges have found them to be in violation of their respective state's open meetings law. One of those cases involved the crafting of a response to a newspaper editorial via a series of emails (*White v. King,* 60 N.E.3d 1234 (OH 2016)). Another involved the active exchange of information and opinions via email, as opposed to passive receipt of information, on an ongoing personnel matter and related potential litigation. (*Wood v. Battle Ground School District,* 107 Wash. App. 550 (2001)).

Can school board members receive their board meeting packet by email prior to the board meeting?

Yes. According to the Committee on Open Government the Open Meetings Law is not implicated when a superintendent or a board clerk transmits materials to school board

members prior to a school board meeting to enable board members to prepare for the meeting (NYS Dep't of State Committee on Open Government, (OML-AO-3787 (Aug. 4, 2004)).

Can school board members ask questions by email regarding the contents of a school board meeting packet delivered to them by email?

Yes. School board members can ask clarifying questions regarding packet materials. According to the Committee on Open Government, the exchange of information, knowledge or expertise is not inconsistent with the Open Meetings Law, as long as the receipt of messages and responses does not result in a vote (NYS Dep't of State Committee on Open Government, (OML-AO-3787 (Aug. 4, 2004)).

How can school board members and other school officials avoid engaging in impermissible email communications?

To avoid such an outcome, school board members and other school officials communicating by email need to be mindful that New York's Open Meetings Law requires "public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (Pub. Off. Law § 100).

Emails as School District Records

Are emails by school board members and other school officials considered to be school district records?

Yes, if the emails discuss school district business (NYS Dep't of State, Committee on Open Government FOIL-AO-16969 (Jan. 30, 2008); FOIL-AO-15893 (April 6, 2006)).

The Local Government Records Law (LGRL) requires the preservation of local government records, including school district records. That covers "any book, map, photograph, or other information-recording device, regardless of physical form or characteristic that is made, produced, executed or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business" (Arts & Cult. Aff. Law § 57.17(4); see also § 57.25(1); Pub. Off. Law § 2).

The Freedom of Information Law gives the public access to records of local and state government officials (Pub. Off. Law § 87), including school districts (see Pub. Off. Law § 86(3)). It applies to "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes" (Pub. Off. Law § 86(4)).

Can emails by school board members and other school officials be considered a school district record even if they are transmitted using a private email address?

Yes. To be considered a school district record, documents, emails and other materials do not need to be in the possession of the school district (*Encore College Bookstores v. Auxiliary*

Services Corp. of the State Univ. of New York at Farmingdale, 87 N.Y.2d 417 (1995); see also NYS Committee on Open Government, FOIL-AO-17045 (Mar. 17, 2008); FOIL-AO-16969 (Jan. 30, 2008)). If an email discusses school district business, it is considered a school district record (NYS Dep't of State, Committee on Open Government FOIL-AO-16969; FOIL-AO-15893 (April 6, 2006)).

School board members and other school officials who have been provided an official district email address should use that for district related business. This will allow school districts to maintain copies of emails by school board members and other school officials for the appropriate retention period (see discussion below) and to preserve any necessary email correspondence beyond that period to the extent required by law. In addition, the use of an official school district email address will help minimize the need to invade the privacy of a personal email account in order to respond to FOIL requests and subpoenas searching for school business related communications.

School districts that do not provide school board members and other school officials an official district email address should have in place protocols that ensure emails discussing school district business are appropriately preserved. One such protocol could be to email copies or to cc the board clerk on emails that discuss school district business which have been sent from a personal account.

Retention of Emails

Can school board members and other school officials delete emails that can be considered a school district record?

A board member may delete emails only as permitted by law. For example, under the Local Government Records Law, school district records must be retained to adequately document the transaction of public business. No such records may be destroyed or disposed of without the consent of the commissioner of education (Arts & Cult. Aff. Law § 57.25; see also Pub. Off. Law § 2). In accordance with that authority, the commissioner of education has promulgated a records retention and disposition schedule available at: http://www.archives.nysed.gov/records/retention_ed-1). The schedule categorizes records and dictates how long each type of record must be maintained before it is destroyed. Therefore, the length of time an email must be retained will depend on the contents of the email. As a result, board members should be familiar with the requirements of the retention schedule to ensure they do not delete email prematurely.

According to one federal court in New York, school districts have a duty to preserve electronic evidence used by employees and school superintendents on their personal computers (*Alter v. Rocky Point School District*, 2014 WL 4966119 (EDNY 2014)). Another court might expressly determine that the same rule applies to emails in the private computers of school board members and other school officials.

Guidance on best practices for email management systems available from the State Archives, recommends managing email electronically from a place of central control in order to avoid unnecessary duplicates and ensure legal compliance (NYS Archives, Government Records Services, *Developing a Policy for Managing Email, Publication No. 85* (2010)). That guidance is available at: http://www.archives.nysed.gov/common/archives/files/mr_pub85.pdf).

What happens if a school board member fails to preserve emails that discuss school district business?

Under the Local Government Records Law, school board members are responsible for maintaining records that adequately document the transaction of pubic business and the services and programs for which they are responsible, to adequately protect such records, and to dispose of them in accordance with legal requirements (Arts & Cult. Aff. Law § 57.25; see also Pub. Off. Law § 2). Therefore, the failure of a school board member to preserve email records that are considered to be school district records could be deemed a dereliction of a statutory duty that violates a school board member's oath of office (see generally *Appeal of Nett and Raby*, 45 Ed Dept Rep 259 (2005)).

In addition, the failure to preserve electronic evidence (such as emails by school board members and other school officials) that is relevant to ongoing litigation could result in court rulings adverse to the interests of the school district, and sanctions for the destruction of evidence including the payment of attorneys' fees (Fed. Rules Civ. Procedure Rule 37(a)(5), (e), N.Y. C.P.L.R. § 3126; 22 NYCRR § 292.12(b)). That would be the case even if the failure to preserve the emails was not willful or in bad faith (*Ahroner v. Israel Discount Bank of New York*, 79 A.D.3d 481 (1st Dep't 2010); *915 Broadway Associates LLC v. Paul, Hastings, Janosfksy & Walker LLP,* 34 Misc.3d 1229(a) (New York Cnty. 2012)).

Disclosure of Emails

Are emails by school board members and other school officials subject to disclosure?

It depends. Under the Freedom of Information Law, emails that are considered school district records because they discuss school district business (see NYS Dep't of State, Committee on Open Government FOIL-AO-16969 (Jan. 30, 2008); FOIL-AO-15893 (April 6, 2006)), would be subject to disclosure and accessible by the public, unless one of that law's exceptions apply (Pub. Off. Law § 87(2)(a)).

Nonetheless, such emails may also be subject to disclosure as electronic evidence in a lawsuit under both federal and state electronic discovery rules, discussed above.

What exceptions might excuse the disclosure of emails by school board members and other school officials?

Under the Freedom of Information Law, emails considered to be school district records would be exempt from public disclosure if they discuss matters that, for example:

- Are protected from disclosure by confidentiality statutes such as the federal Family Education Rights and Privacy Act, which generally prohibits disclosure of student record information without prior parental consent (Pub. Off. Law § 87(2); see also 20 USC § 1232(g)).
- Relate to inter and intra-agency documents but do not contain statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations, or external audits (Pub. Off. Law § 87(2)(g)).
  The purpose of this particular exception is to "protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their

opinions freely to agency decision makers (*Matter of Xerox Corp v. Town of Webster*, 65 N.Y.2d 131, 132 (1985)). To the extent that a school superintendent and other school officials serve in an advisory role to the school board, emails from these individuals to the board while serving in such a role would fit within the purpose of this exception.

Are emails between school board members and the school superintendent subject to disclosure?

It depends. Consistent with the Freedom of Information Law, the content of the email will dictate the extent to which it is disclosable.

In addition, some portions of an email might be subject to disclosure, while others might not. For example, opinions exchanged in email communications can be redacted in response to a disclosure request, but factual data cited in support of an opinion would be disclosed (NYS Committee on Open Government, FOIL-AO-17045 (Mar. 17, 2008); FOIL-AO-16969 (Jan. 30, 2008)).

Practical Takeaways

There are both positive and objectionable aspects to the use of email communications in a school district environment, and the breath and complexity of electronic communications is continuously evolving. Therefore, to both serve and protect the interests of their school district, it is important that school board members and other school officials:

1. Understand what is permissible and what is not with respect to the content of emails they send and receive in their respective roles.

2. Comply with their responsibilities regarding the preservation of emails that discuss school district business.

3. Avoid unintended effects that can result in a violation of the various laws discussed above.