

## *What School Records are “Public Records”?*

The following is a legal memorandum dated December 11, 2015 from VSBIT’s legal counsel, Lynn, Lynn, Blackman & Manitsky, P.C., to VSBIT members regarding Hoffman v. South Burlington School District, Docket No. 1069-1115 (VT. Super. Ct.) regarding an order denying a teacher’s motion for preliminary injunction to prevent production of personnel records in response to a Public Records Act request.

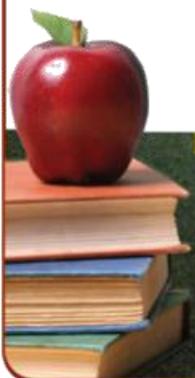
### **Summary**

A recent court decision has significant ramifications concerning what school records constitute “public records.” The court confirmed that virtually any school records other than student education records, attorney communications and medical records are likely subject to disclosure through a request under the Vermont Public Records Act (“PRA”). This includes email communications and disciplinary records concerning employees. Student education records are FERPA protected and exempt under the PRA. Medical records are also confidential under federal and state law. Communications with the school attorney is always privileged and not subject to production where there is a PRA request.

In light of the decision, schools must assume that almost all communications and records concerning employees will be deemed public records subject to disclosure when a request is made. Agreements labeling records “confidential” will not prevent disclosure. While schools should consult with legal counsel prior to releasing records, they should be careful in creating records and communications concerning employees.

### **Background and Analysis**

The South Burlington School District (“SBSD”) received reports that teacher Jay Hoffman engaged in sexual misconduct with a child and placed him on leave. After investigation, the SBSD dismissed Hoffman, who filed for arbitration. The parties entered into a confidentiality agreement concerning the arbitration. Hoffman prevailed at arbitration and the arbitrator ordered that all records concerning the allegations be expunged. Hoffman returned to work. Shortly thereafter, the SBSD learned of additional allegations from a former student. The SBSD again investigated and dismissed Hoffman. Multiple news agencies submitted PRA requests to the SBSD.



The SBSB notified Hoffman of the requests and its intention to produce the requested materials. Hoffman filed suit, seeking a preliminary injunction preventing release of the records, claiming they were exempt generally under the PRA and specifically under the confidential arbitration decision. The SBSB provided the Court with all relevant records, including emails and the arbitration decision for review. The SBSB redacted the identifying information concerning the victims and other information confidential by law.

The Vermont Superior Court issued a decision denying Hoffman's motion and ordering the release of all of the records concerning Hoffman to the media. It concluded that a negotiated confidentiality agreement will not impact the public's PRA rights. Reviewing the exemption for "personal documents" under the PRA, the Court explained it must balance the public interest in disclosure against the harm to the individual. It concluded that the public's interest in knowing the allegations and results of the investigation of teacher misconduct outweighed Hoffman's privacy interest.

The Court's analysis raises an interesting paradigm. The more concerning the allegations of misconduct against an employee, the more heightened is the employee's, and sometimes the employer's desire to keep documents confidential. However, the same factors that would cause an employee or the employer to wish that the information remain private are the same ones that compel the conclusion that the public has a right to know and will support a finding that the materials are public records.

### ***Advice to Members***

1. Where there is employee misconduct, the administrator should always assume the communications within the organization, including those to the employee, will be public.
2. If there is a PRA request for records of employee misconduct, the member should consult the school attorney to evaluate whether the "balancing test" suggests that the records are public records.
3. Be especially careful when withholding documents or in your search for documents requested by the public because the PRA awards attorney's fees to anyone seeking improperly withheld documents.
4. Do not make the mistake of assuming that an agreement negotiated as confidential will fall outside the PRA definition of a public record.

