



School Administrators Association of New York State

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Does Your District Provide You with or Pay for Your Cell Phone? If So, Beware of the Freedom of Information Law (FOIL) and What it Means for What You May Consider Your Personal Cell Phone Records and Data.

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Once upon a time, Suzy Smith was a Principal of the Middle School located in Imaginary, New York. Ms. Smith was employed by the Imaginary Central School District (CSD). Due to the significant number of communications Ms. Smith had daily with other administrators, teachers, building staff, and parents, all of which were in the furtherance of Ms. Smith's job duties as principal of the middle school, Imaginary CSD provided Ms. Smith with a cell phone.

The cell phone, a brand-new Apple iPhone 14 Pro, was part of a wireless cellular plan hosted by Verizon Wireless. The plan was invoiced to Imaginary CSD on a monthly basis. From a property ownership standpoint, Imaginary CSD is the owner of Ms. Smith's cell phone, whereas Ms. Smith was the authorized user and in technical legal terms the bailor [1]. Why is this relevant you may ask? School districts are considered municipal corporations (see General Municipal Law § 119-N) and as such, are subject to the incredibly powerful tool known as the Freedom of Information Law (FOIL). While the applicability of FOIL to state, county, and local agencies is more narrowly defined by *Public Officers Law* § 86, for the purposes of this analysis, it is only relevant that school districts, as municipal corporations, are subject to FOIL request(s).

Briefly stated, a FOIL request may be made by virtually any individual of the public, and may seek any record of the school district so long as said record is not specifically statutorily exempted. What does this mean? Virtually any and all records of a school district are subject to FOIL so long as they fall within the meaning of "Record" as prescribed by *Public Officers Law* § 86 and as set forth here:

"Record means 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." See *Public Officers Law* § 86(4).

In furtherance of the foregoing, in recent years, given the digitization of records and significant advances in technology, courts in the State of New York have more broadly interpreted "records" within the constraints of FOIL to mean those stored in electronic format and even, system metadata, which is the electronic equivalent to notes on a file folder indicating when the documents stored therein were created or filed. See *Irwin v. Onondaga County Resource Recovery Agency*, 72 A.D.3d 314, 895 N.Y.S.2d 262 (4th Dept. 2010).

It has been even more recently held that records held by third parties on behalf of a government agency are records which are presumptively subject to disclosure pursuant to FOIL. See *N.Y. Public Officers Law* § 86(4); see also *McGee v. Bishop*, 192 A.D.3d 1446, (3d Dept. 2021). Further, as briefly set forth above, under FOIL, all government records (remember school districts are considered part of the government) are presumptively

open for public inspection and copying unless they fall within one of the enumerated exemptions. See *McKinney's Public Officers Law § 87(2)*; see also *McFadden v. Fonda*, 148 A.D.3d 1430 (3d Dept. 2017).

While it has been long held by the courts that a FOIL request that could or would cause “an unwarranted invasion of personal privacy under the provisions of [*Public Officers Law § 89(2)*]” should be denied, the burden is on the responding government agency (school district) to show that the request rises to the level of an “unwarranted invasion of personal privacy.” See *Public Officers Law § 87[2][b]*. Further, as it relates to the statutory exemptions mentioned herein above, [n]othing in [FOIL] shall require the disclosure of the home address of an officer or employee” of the state see *Public Officers Law § 89[7]*; see also *Public Officers Law § 87[2][a]*; cited by *Suhr v New York State Dept. of Civ. Serv.*, 193 AD3d 129, 137 [3d Dept 2021], *lv to appeal denied*, 37 NY3d 907 [2021].

Transitioning back to our fictitious principal, Suzy Smith of Imaginary Middle School. As mentioned, Imaginary CSD provided Ms. Smith with and pays for on a regular monthly basis, her brand-new Apple iPhone 14 Pro. Imaginary CSD provides no guidance and/or restrictions on the time, place, or manner in which Ms. Smith may utilize her iPhone. Imaginary CSD does not expressly prohibit Ms. Smith from utilizing her iPhone for personal purposes. Ms. Smith's iPhone, and all text messages, photographs, phone calls, voice mails, e-mails, and documents thereon, which were produced during Ms. Smith's regular workday schedule, are subject to FOIL. To provide context, on Wednesday, April 26, 2023, Ms. Smith exchanged text messages with her soon to be ex-husband John Smith regarding their dissolution of marriage. Said text messages took place during the school day while Ms. Smith was in her office reviewing documents. These text messages are subject to FOIL due to the fact that they transpired on a district provided iPhone during Ms. Smith's scheduled workday, although it was a private conversation.

Suppose the above text messages took place at 10:00 p.m. at night while Ms. Smith was watching television and preparing for bed. While generally, in said instance, that correspondence would fall outside of FOIL because it did not transpire during Ms. Smith's regularly scheduled and defined workday. However, if Ms. Smith was simultaneously interacting or corresponding with any other individual in her official capacity as building principal of Imaginary Middle School, these communications, even at 10:00 p.m. at night may be subject to FOIL.

Further, suppose that Imaginary CSD had a districtwide policy in place that district issued iPhones were not to be used for personal purpose but exclusively for work-related purposes. Let's further say that Ms. Smith, although aware of the district policy, sometimes inadvertently and without the intent to break the district policy, interacts with her son, Johnnie Smith by way of text message on her district iPhone. Although these interactions utilizing the district iPhone are few and far between, they generally occur on the weekends or at night, when Ms. Smith is handling other work-related business and her personal cell-phone is not nearby. In the foregoing scenario, ALL of Ms. Smith's iPhone records, regardless of the time, place, and manner in which such records were created, are subject to FOIL. Why is this disclosure permissible? It is because the district policy prohibited personal use, all district iPhones are presumed to be strictly comprised of district records.

As a wrinkle, suppose Ms. Smith had a personal cell phone in which she infrequently used it for school business. Is her phone's data subject to FOIL? SAANY'S position is no because her personal phone is not subject to FOIL. A gray area is if the district reimbursed Ms. Smith for the cost of her personal cell phone bill for use on official district business.

Considering all the foregoing, be smart, be cautious, and most of all, be thoughtful should you find yourself or a fellow unit-member utilizing any technology that is provided or paid for by the school district. Should you have any questions or concerns arising from this subject matter, please do not hesitate to contact your SAANY'S Legal Department, who is committed to keeping you apprised of these risks.

[1] A “bailor” is an individual or entity who is entrusted with the possession of defined property for a defined purpose. In this example, Ms. Smith is entering into a mutual benefit bailment with Imaginary CSD, Ms. Smith is entitled to use and possess the cell phone and in return, Imaginary CSD has an administrator who is better equipped to communicate at any time necessary.

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