

MARQUETTE AREA PUBLIC SCHOOLS

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Deborah L. Veiht, Interim Superintendent

Debra Barry, Assistant Superintendent for Finance

March 23, 2011

Mr. Jarrett Skorup
Research Assistant
Mackinac Center for Public Policy

Dear Mr. Skorup:

This is in response to your March 22, 2011 request for records under the Freedom of Information Act. You requested all electronic correspondence carried out on school computers to or from school employees which include a variety of strike related terms.

The Michigan Court of Appeals recently provided clarification to school districts on the issue of disclosing stored emails under the FOIA. The Court concluded that the law was not intended "to render all personal emails public records simply because they are captured by the computer system's storage mechanism." See the attached information for further clarification.

Based on this decision, the district is not required to disclose any personal electronic correspondence that could exist because such communications are not "public records" as defined under the FOIA. Therefore, your request is denied.

The FOIA provides you the right to appeal this decision. You may make an appeal in writing to the Marquette Area Public Schools Board of Education, 1201 W. Fair Avenue, Marquette, MI 49855. The term "FOIA APPEAL" should be placed in capital letters on the front of the envelope and the written appeal should identify the reason(s) for reversal of the disclosure denial. You may also seek judicial review of the decision by commencing an action in circuit court within 180 days from the date of this letter. If, after judicial review, a circuit court determines that the school district has not complied with the FOIA and orders disclosure of the requested records, you will be rewarded reasonable attorneys fees and actual or compensatory damages.

Sincerely,



Michelle Carne
Human Resources Specialist

c: Deborah Veiht, Interim Superintendent

Attachment


MACKINAC CENTER
FOR PUBLIC POLICY

March 22, 2011

ATTENTION: Marquette Area Public Schools

FOIA REQUEST FOR UNION EMAILS

To Whom It May Concern:

Pursuant to the Michigan compiled Laws Section 15.231 et seq., and any other relevant statutes or provisions of your agency's regulations I am making the following Freedom of Information Act request:

Please provide the following information for your district:

All electronic correspondence (i.e., e-mails) carried out on school computers to or from school employees in which the following terms (or their derivatives) appear:

“crisis activity”

“job action”

“strike”

“work stoppage”

“work-to-rule”

“sickout”

Any other terms indicating a possible employee strike against the district.

This request is ongoing, covering a period beginning on March 1, 2011, and ending June 1, 2011.

Please send the materials requested to the attention of Jarrett Skorup at the following address, fax number, or via e-mail at skorup@mackinac.org.

Mackinac Center for Public Policy
P.O. Box 568
Midland, MI 48640
Fax: 989-631-0964
Phone: 989-631-0900

Since the Mackinac Center for Public Policy is a non-partisan, non-profit research and educational institute, we request that these documents be provided without charge pursuant to Section 4(1) of the Freedom of Information Act.

If you elect to charge fees please notify me of the cost prior to filling this request. If any of this request is denied, please specify all the legal exemptions which you believe justify your withholding of the information. I further request that these reasons identify which document or portion of a document is not provided.

Your prompt attention to this Freedom of Information request is appreciated.

Respectfully,

Jarrett Skorup
Research Associate
Mackinac Center for Public Policy

Court of Appeals: Personal emails are not “public records” under FOIA

The Michigan Court of Appeals recently provided clarification to school districts on the issue of disclosing stored emails under the Freedom of Information Act (FOIA). In the case *Howell Education Association, MEA/NEA v Howell Board of Education*, the Court concluded that individual personal emails sent and received by teachers are not public records solely because they are captured in the school district’s computer system.

The case resulted from a series of FOIA requests received by Howell Public Schools that sought emails sent to and from three teachers who served in officer positions for the Howell Education Association (HEA). Because the emails included union communications, the HEA objected when the District planned to disclose them. The union ultimately filed a lawsuit, claiming that to the extent the emails addressed union matters, the emails were personal and not “public records” as defined under FOIA. A “public record” is a “writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.” After a trial court found that the emails were public records and subject disclosure due to the fact that they were retained by the District, the HEA filed an appeal with the Michigan Court of Appeals.

In addressing the appeal, the Court recognized that it was applying a law that has not been updated or amended to keep up with the technology of internet based communications. The Court compared its situation to “that of a court being asked to apply the laws governing transportation adopted in a horse and buggy world to the world of automobiles and air transport.” Accordingly, the judges called upon the Legislature to resolve future issues involving the application of FOIA to electronic communications by adopting statutory language that takes such technology into account.

The Court, however, still interpreted the current requirements of FOIA and concluded that the law was not intended “to render all personal emails public records simply because they are captured by the computer system’s storage mechanism.” The Court compared emails to physical mailboxes, and emphasized that previous FOIA decisions have never suggested that letters “retained” in teachers’ mailboxes were automatically subject to FOIA regardless of the nature or content of the letters.

Thus, the judges rejected the trial court's determination that the teachers' personal emails were public records because they are "in the possession of, or retained by" the District. The Court observed that mere possession does not make a record a public document, but the use or retention of the document must be "in the performance of an official function." Because the emails at issue were not stored or retained by the District in the performance of an official function, the emails were not public records under FOIA.

In conclusion, the Court did recognize that personal emails may, under certain circumstances, become public records. For example, if a teacher was disciplined for abusing the acceptable use policy and personal emails were used to support the discipline, the use of the emails would be related to one of the school's official functions – the discipline of a teacher – and, thus, the emails would become public records subject to FOIA.