

Employee Records

Understanding requirements of the Illinois Personnel Records Review Act

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Thank You . . .

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Cautionary Note

This publication is intended as general information, not legal advice. School board policies and administrative procedures should be reviewed by an attorney prior to adoption.

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PREFACE

School board policies and administrative procedures governing employee records need to comply with the Personnel Records Review Act¹ as enacted in 1984 and amended in 1988. However, compliance with this Act won't always be enough to keep a school district out of legal difficulty. There are additional considerations.

Prior to 1984, there were no statutory restrictions or directions on what was filed in the employee's records or who was or was not given access to those records. Hence, employee access to records often became an issue at the bargaining table. Decisions as to what to file in the personnel record and what to divulge to third parties were governed by common sense and/or the fear of being sued for libel or invasion of privacy. They still are to a large extent, or should be.

Although the Freedom of Information Act² exempts employee personnel files from public inspection, the exemption is permissive. Moreover, the Personnel Records Review Act places only modest restrictions on the information that may be released to third parties (see page 5). Therefore, school officials must be guided by the same common sense restraints that governed the release of such information prior to 1984.

Moreover, the Personnel Records Review Act presents some constitutional uncertainty. The Act was amended in 1988 to correct constitutional deficiencies identified by the Illinois Supreme

Court³. However:

- the Supreme Court ruled that one section of the Act was unconstitutionally vague but did not address other sections, leaving open the question of constitutionality of the other sections;
- the Supreme Court has never been asked to review the amended section of the act, leaving open the question of whether the legislative amendment overcame the Court's earlier objections;
- the legislature did not re-enact the entire law in 1988, but only amended the offending section, leaving open the question as to whether an Act that has been declared void can be brought back to life in that manner.

This Report reviews the provisions of the Personnel Records Review Act and assumes that the Act as amended is constitutional.⁴

¹ 820 ILCS 40/0.01 et seq.

² 5 ILCS 140/1 et seq.

³ *Spinelli v. Immanuel Lutheran Evangelical Corporation*, 118 Ill. 2d 389 (1987)

⁴ The amended act was challenged and found constitutional by the First District Illinois Appellate Court in *Landover v. Sci-Tex American Corp.*, 238 Ill. App. 3d 403 (1992) but the matter has not been further considered by the Supreme Court.

Overview of the Act

Stated briefly, the Personnel Records Review Act does the following:

- Describes certain kinds of information that may not be maintained in an employee's personnel records;
- Provides that information that is not in the employee's record may not be used against the employee in a judicial or administrative hearing (such as for dismissal);
- Requires the employer to allow an employee to inspect and copy the contents of his or her personnel records within seven working days of a written request;
- Establishes a procedure enabling the employee to correct, remove or explain information contained in the record;
- Exempts certain types of documents from employee inspection;
- Prohibits divulging certain types of information from the employee's record to third parties; provides procedures for divulging certain other types.

What to file and what not

Under the Act, the employer may not keep records of an employee's activities or associations that are not related to the job. This would include political activities and communications, religious and civic affiliations, and the like.

This prohibition does not apply, however, where (a) the employee consents to the inclusion of such information in the personnel record or (b) such activities occur on the job and constitute criminal conduct or harm the employer.

Thus, for example, the employer should not keep a record of an employee's involvement in political campaigns. However, if the employee lets work slide in order to distribute political literature on the job, a record of that fact might reasonably be put into the file — in fact, it would have to be put in the file before it could be used in a dismissal proceeding.

The prohibition against filing information about an employee's outside activities is the only restriction on file content imposed by the Act.

On the other side of the coin, the employer *must* file in the record any documents or information that may be used against the employee in a dismissal hearing or other disciplinary action. If the information is not in the file where it is accessible to the employee, the information may be inadmissible as evidence. (Such "unfiled" information may be admitted as evidence, however, where the judge or hearing officer determines that the exclusion was not intentional and the employee agrees to its use or is given a reasonable time to review the information.)

On the other hand, the employee may use as evidence any personnel information which should have been included in the file but was not.

School officials, therefore, should make every effort to

ensure that each employee's personnel file is complete. The completeness of the file becomes crucial should an employee challenge a dismissal or other disciplinary action.

Employee access to records

The primary purpose of the Act was to establish the right of employees to review their personnel records. Specifically, an employee is entitled to examine and receive copies of any documents or information that the employer may use "in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge, or other disciplinary action" As indicated earlier, only information that is accessible to the employee may be used in defending personnel decisions if they are challenged through legal channels.

The Act defines "employee" to include any person who is:

- currently employed, or
- on layoff and subject to recall, or
- on leave of absence with a right to return to work, or
- a former employee terminated within the past year.

Unless more frequent inspections are authorized in a collective bargaining agreement, the employer must grant at least two inspection requests by an employee in a calendar year when requests are made at reasonable intervals. When an employee asks to inspect his or her personnel file, the employer has seven working days in which to comply. An additional seven days for compliance can be obtained if the employer can show that the deadline cannot be met with reasonable effort.

The employer may require that requests for inspection be in writing on a form provided by the employer. (See Appendix.)

The personnel records must be made available during normal business hours at a place near the employee's place of employment. The employer may allow the employee to review his records at another time and place if it would be more convenient to the employee. The Act, however, does not require a school to jeopardize the integrity of its records by allowing the removal of records from the premises. If the employee is unable to inspect records in person, the employer must mail a copy of the requested record upon written request.

After a review is permitted, an employee may request a copy of personnel documents, and the employer may charge the actual cost incurred in reproducing the records.

The Act requires that inspection and copying rights be extended to the employee. The employer is not required to grant these rights to anyone else. However, the employee may designate in writing a representative to inspect the employee's personnel file when a grievance is pending.

As noted earlier, the Act does not prevent the employer from sharing the contents of the personnel file (with certain exceptions to be noted later) with third parties. Most school officials, however, wisely restrict access to personnel files to persons with appropriate purposes in order to avoid potential litigation and to protect the privacy of their employees.

Documents exempt from employee inspection

Certain types of documents are exempt from inspection. Among the types of documents which employees do not have the right to inspect are the following:

- 1) Letters of reference, such as those received from the employee's former teachers and employers;
- 2) Test documents, except for the cumulative test scores. Presumably this applies to tests used as a basis for hiring and promotion and exempts the graded questions and answers;
- 3) Materials used by an employer for staff planning, including matters relating to the development of the employer's business, expansion or closing, or relating to the operational goals of the employer. The materials must relate to or affect more than one employee. This exception does not apply when the materials have been or are intended to be used by the employer to determine whether an individual employee is qualified for employment, promotion, transfer, or additional compensation, or in determining whether to discharge or discipline an employee;
- 4) Records relevant to a pending claim between the employer and employee which are subject to discovery in a lawsuit;
- 5) Security records incident to an investigation of criminal conduct or other harmful activities by an employee. These security records are exempt until the employer files legal charges or takes disciplinary action against the employee based on such records.

Personnel records corrections

Under the Act, an employee may seek to correct or remove personnel information with which the employee disagrees. If mutual agreement between the employer and the employee cannot be reached, the employee may submit a written statement explaining his or her position. This position statement must be attached to the disputed record and shall be included whenever the disputed record is released to a third party.

The employer or the employee may take legal action to have false information expunged from the personnel record.

Divulging information to third parties

An employer may not divulge to third parties any disciplinary reports, letters of reprimand, or evidence of other disciplinary action that are more than four years old unless the

school district is ordered to do so by a judge in a legal action or arbitration. Further, such disciplinary reports that are less than four years old may be divulged only when written notice is sent by first-class mail to the employee on or before the day when the information is disclosed. There are a few exceptions to this written notice requirement. Records of disciplinary actions that are less than four years old may be divulged to third parties without written notice if:

- the employee has signed an employment application with another employer waiving written notice; or
- the disclosure is ordered to a party in a legal action or arbitration; or
- disclosure is requested by a government agency involved in a claim or a complaint by an employee or a criminal investigation.

School districts would be wise to incorporate waivers of notice in their employment applications, making it as easy as possible for previous employers to share relevant information about job applicants. (See Appendix D.)

These are the only statutory restrictions imposed on the divulging of employee personnel records. For the most part, decisions to divulge such information must be based on local school board policy. Such policy should narrowly restrict third party access to personnel files, of course. Even school officials, including individual members of the school board, should not be granted access to employee files except as their official duties require. Such restrictions are based on a common sense respect for individual privacy and civil law.

Enforcement

There are a number of remedies available in the event that violations occur under the Act. An employee may file an action in the appropriate circuit court in order to compel compliance with the Act's requirements. Failure to comply with an order of the court may be punished as contempt. In addition, the court may award an employee the employee's actual damages plus costs which may result from a violation of the Act. For a willful violation, an employee would be awarded \$200 plus costs, reasonable attorney's fees, and actual damages.

Steps toward compliance

To ensure satisfactory compliance with the personnel records law, school officials should first review their current policies and collective bargaining agreements. Keep in mind that employee's rights with respect to reviewing their personnel records may be expanded, but not curtailed, by the terms of a collective bargaining agreement.

Unless otherwise provided in a collective bargaining agreement, district policy should do at least the following:

- 1) Restrict access to, and disclosure of, personnel records

except as provided by school board policy and the Act.

- 2) Provide that records will not be removed from the premises where they are maintained and that inspection will be conducted under the supervision of a responsible staff member.
- 3) Direct the superintendent to develop procedures for collecting and maintaining employee records and for responding to employee and third-party requests to inspect and/or copy personnel records.
- 4) Provide for a fee schedule based on actual costs for duplicating records.

Also, the district superintendent should:

- 1) Review employee records to remove inappropriate information related to an employee's outside activities and to be sure the record includes information that might be needed to defend personnel actions against

legal challenge by the employee.

- 2) Assign the responsibility for responding to requests for records inspection to one or more staff members, and provide them with forms for employees to use in submitting requests in writing.
- 3) Provide for a written record of how each employee request for records inspection is handled and develop a file for retaining such requests in an organized fashion. The record should show, for example, whether the request was handled within seven working days as required by law or whether an additional seven days was invoked. It also should show whether any specific records were denied as being exempt from employee inspection.

Some sample forms that may be adapted to local needs are shown in Appendices A through D.

Appendix A

Sample – Personnel Records Inspection Request Form

Employee's Name _____

Address _____

Telephone No. _____

As provided by the Personnel Records Review Act (820 ILCS 40/0.01 et seq.), I hereby request:

- An opportunity to review and/or copy the documents from my Personnel Records listed below; or,
- Because I am unable to review my Personnel Records at my employing unit, I request that you send me a copy of the documents from my Personnel Records listed below. I understand that I will be charged for the actual cost of duplicating these documents; or
- Because a grievance is pending, I ask that my representative, _____, be granted an opportunity to review the documents listed below in my behalf.

The documents I wish to inspect and/or copy are as follows:

- Any personnel documents which are, have been or are intended to be used in determining my qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action except as provided in Section 10 of the Personnel Records Review Act; or
- Only these selected documents (clearly identify specific items you wish to inspect):

Signature of Requesting Employee _____

FOR OFFICE USE ONLY

Date Request Received _____ Request No. _____

Request Received by _____

Title _____

Date response due _____ Date response made _____

Time extended to _____ (date) Employee notified of extension _____ (date)

Copies made _____ How many _____ Cost _____

Denied _____ (attach copy) _____ (date)

Signature of employee responding _____

Appendix B

Sample – Memorandum Regarding Employee Request For Personnel Records

(This form is for districts that do not require a common form for all requests
such as the sample in Appendix A.)

Employee name _____

Address or other employee identification _____

On the ____ day of _____ 20____, at the hour of _____ M., the employee
named above:

- presented a request to inspect/copy his/her Personnel Records (attach copy of request); or
- designated in writing a representative to inspect/copy his/her Personnel Records where a grievance was pending (attach copy).

Said request was accommodated as follows (Check all items that apply):

- Requested Personnel Records were presented to _____ for inspection
at the hour of _____ M., on the ____ day of _____ 20____.
- Requested records were copied and mailed to _____ on the
____ day of _____ 20____.
- Copies of requested documents were provided and the employee named above was billed
for the actual cost of duplication in the amount of \$_____.
- Some or all of the requested records were denied for inspection as being exempt under
Section 10 of the Personnel Records Review Act (820 ILCS 40/0.01 et seq.). (Attach copy
of denial.)

Date and time of memorandum: _____

By: _____

Title: _____

Witness: _____

Appendix C

Sample – Form for Denial of Exempt Employee Records

Dear (name of employee):

You are hereby notified that your request to review the following items from your Personnel Records:

(here list requested documents that are exempt and not presented for inspection)

is hereby denied under the exemptions checked below as provided in Section 10 of the Personnel Records Review Act (820 ILCS 40/0.01 et seq.):

- | | |
|--|--|
| <input type="checkbox"/> Letters of reference. | <input type="checkbox"/> Such personnel records are not maintained. |
| <input type="checkbox"/> Portions of a test document | <input type="checkbox"/> Records relevant to another pending claim which may be discovered in a judicial proceeding. |
| <input type="checkbox"/> Materials used for staff planning. | <input type="checkbox"/> Investigatory or security records maintained prior to the taking of adverse personnel action. |
| <input type="checkbox"/> Information that would constitute a clearly unwarranted invasion of another person's privacy. | |

School District No. _____ Date: _____

By: _____ Title: _____

Appendix D

Sample – Waiver of Notice for Job Applicants Regarding Release of Disciplinary Information By Previous Employers

I hereby waive written notice from my current employer and/or any previous employers, as provided by Section 7 of the Illinois Personnel Records Review Act (820 ILCS 40/0.01 et seq.), and authorize them to release information regarding any disciplinary actions taken against me within the past four years.

Signature of Applicant _____

Consider placing a waiver of notice on the school district's employment application in such a way that it can be readily copied and shared with previous employers who require a copy before they will release information regarding past disciplinary actions. The waiver can be an integral part of the job application and the applicant's signature can be made a condition for employment consideration.