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The Balance Between Transparency, Efficiency, and Privacy Protection: Keeping student and school employee information safe without limiting the public's right to know

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THE BALANCE BETWEEN TRANSPARENCY, EFFICIENCY, AND PRIVACY PROTECTION:

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A. INTRODUCTION:

There are two rights an educational entity must weigh in response to a public request for information: the public's right to know, and the right to privacy of both students and education agency employees. For public records requests, educational entities must ground their approach not only in the federal and state laws that shape public right to public agency information, but also in an understanding of what is known as derivative disclosure: how the context of a provided record can lead to inference of a student or employee's identity alongside other information about them that should have been protected from disclosure under federal and state law, or that goes beyond the intent of the educational entity when sharing that record.

In Massachusetts, there is no single consistent standard for how to effectively apply all relevant law in order to protect privacy rights and prevent derivative disclosures without compromising the ability of an educational entity to respond to a public records requests in a timely manner. Determination of what information may be appropriately disclosed is necessarily fact-based, and this contextual requirement does not allow for a single, universally applicable rule for balancing transparency with the risk of derivative disclosure. There is still the opportunity, however, for greater standardization of the review process

This research paper aims to articulate the governing law surrounding student privacy protections and public record requests, and to identify where the friction points between the two agency obligations develop. This paper will look to how educational entities use contract law as an added layer of protection for student and employee information when partnering with third parties as a potential model and path forward for standardizing decision making around information sharing and protection against derivative disclosure of protected personal information.

While this research paper focuses on Massachusetts, an example from Virginia can be used to illustrate why this consideration is of such importance. In 2018, a Virginia super PAC filed a state public records request to obtain the cell phone numbers of thousands of students, to whom the super PAC then sent mass texts about voter registration. Justin Mattingly, *Virginia Senate approves bill to shield student contact information*. Richmond Times-Dispatch. Feb. 19, 2018. Under existing federal privacy law, written with telephone books in mind, phone numbers are generally considered directory information, and thus not protected from disclosure. 34 C.F.R. § 99.31(b)(1). It was perfectly legal for the super PAC to use the state's FOIA request process to build a database of new voters – valuable currency for any political organization.

In the public uproar that followed, the state senate passed legislation requiring a student to consent in writing before that student's contact information can be disclosed in response to a VA FOIA request. Va. Code Ann. § 23.1-405. While this legislation does prevent a repeat of the super PAC's specific actions by any other third party, the wider reaching outcome was placement of further burden on the reviewing administrative agency. The reactive nature of the bill elided opportunity to clarify and standardize the review process for public records requests, which would allow administrators room to more thoroughly evaluate the context of any given public records request to allow them to spot and prevent other novel attempts to exploit access to student information. Instead, it simply adds another step to the records review process, and fails to address what allowed the super PAC to gather data this way in the first place: the state lacks overarching regulation designated to student information acquired by third parties, and the administrative agencies responsible for reviewing public records requests lack a standard way to approach and evaluate their task.

B. WHY THIS APPROACH?

At first glance, championing a standardization of public records reviews could be criticized for narrowing a record custodian's ability to consider the wide nuance of each request a troubling doubling-down on bureaucratic inflexibility. A closer look, however, can illuminate the opportunity this provides for bureaucratic *flexibility*.[1] Greater standardization can improve state and local education agencies' ability to protect the privacy of students and staff without sacrificing the governmental transparency to which the public is statutorily and constitutionally entitled. Moreover, a standardized protocol can accomplish this while lightening the load of overburdened records custodians.

While an algorithm cannot[2] engage in the contextual, nuanced analysis required for a records custodian to determine what information can be disclosed in response to a public records request, there is still value in a statewide *algorithmic* approach, which manifests as a standardized review protocol when applied to qualitative data.

There will always be scenarios in which determination regarding disclosure comes down to the subjective judgement of a records custodian. Working within this reality, the standardization of review and reduction of as many variables as possible to if/then and ultimately yes/no considerations serves two purposes. First, if all records custodians start with the same review standards, they can reduce opportunities for contradictory decisions regarding disclosure that would ordinarily come from differing approaches. This can apply not only to decisions that can be made on a standardized metric, but also to decisions that records custodians must make when they inevitably arrive at a record or piece of information that requires more complex, contextual consideration than a standard protocol can provide. Second, when records custodians

[1] A certain degree of neuroticism may still be acknowledged.
[2] And, arguably, *should* not.

orient to the same review standards, they can reduce the time it takes to analyze common variables, allowing for grater bandwidth when nuanced decision making is required. More time spent on these truly complex considerations can prevent both excessive redactions that unjustly restrict information the public has a right to know, and inadequate redactions that can lead to derivative disclosure of student identities or other protected information about students and staff.

At the Department of Elementary and Secondary Education (DESE), Massachusetts' state education agency (SEA), current practice puts responsibility on a records custodian to judge the motive and context of a party who submits a public records request, and to ensure that there are no indicators in the record that could lead to derivative disclosure of personally identifiable information (PII) of both students and school employees. Since context can vary according to the person requesting, review requires a fair amount of discretion and time on the part of the records custodian. While it does provide a degree of response flexibility to the SEA or local education agency (LEA)[3] tasked with review, this approach is dependent on an individual or a small team's judgement, and it forces DESE to grapple with its own redaction decisions alongside the potential for public dissatisfaction with the limits of the disclosed information. Consequently, administrative backlog is frequent, and absent clear standards for derivative disclosure, both the unreasonable curtailment of the public's right to know and the disclosure of statutorily protected information loom as a constant worry.

There are, however, already examples of educational entities attempting to standardize and streamline the process for sharing student and employee information without compromising protected PII, particularly once that shared data is no longer under the entity's full control.

[3] The term "local education agency" can refer to a school district, a charter school, or other public authority with administrative control of a K-12 school. *See* 34 CFR § 303.23

Consider: computer software that schools use to store student grades. Payroll software for employees throughout a district. Automated calling services that inform families about snow days. Cloud storage employment contracts and other critical documents. Curriculum purchased to support specific learning needs for students with disabilities. Proposals for state-wide technology grants from private philanthropic institutions. No K-12 school operates in a vacuum. It would be impossible for schools and supervisory LEAs and SEAs to function without contracting out to third parties for vital services.

In Massachusetts, multiple school districts have begun using a standardized contract language and structure specifically developed by a consortium of data privacy-focused organizations to allow for a greater degree of protection for student and employee PII. While adaptable to the specific needs of each agreement, the availability of a use-tested template keeps individual schools from having to decide between either expending already limited bandwidth to determine how to best protect PII or using generic or third-party dictated contract language that could lead to a greater disclosure of protected PII than intended. The value of PII protection-focused contracts also means that in the event of derivative disclosure of student or employee PII due to third-party overreach, schools can move quickly to curtail the issue and seek remedy under breach of contract.

In order to apply lessons learned from the way that schools protect student and employee PII when contracting with third parties to how educational entities can better respond to public records requests, it is necessary to understand the landscape in which these issues arise.

C. PUBLIC RECORD DISCLOSURE OF EDUCATIONAL RECORDS AND STUDENT PII.

i. The Massachusetts Public Records Law and related case law

In Massachusetts, the public has the right to request access to the public records of government agencies under G.L. c. 66 § 10, the Public Records Law. *See* G.L. c. 66 § 10. Established to "give the public broad access" to "a wide array of documents and data made or received by employees, agencies, or other instrumentalities of the Commonwealth," the court favors disclosure in the interest of the public's right to know if public servants and public agencies are performing their duties legally and adequately. G.L. c. 66 § 10; *see Globe Newspaper Co. v. Bos. Ret. Bd.*, 446 N.E.2d 1051 (1983); *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 787 N.E.2d 602, 604 (2003); *People for the Ethical Treatment of Animals, Inc. v. Dep't of Agric. Res.*, 76 N.E.3d 227, 231 (2017), quoting *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 609 N.E.2d 460 (1993), citing G. L. c. 4, § 7, Twenty-sixth (1990 ed.); *Attorney General v. Collector of Lynn*, 385 N.E.2nd 505, 509. Should a member of the public submit a public records request, the burden is on the records custodian to "prove with specificity" that a record qualifies for exemption. G.L. c. 66 § 10; *PETA*, 76 N.E.3d at 231.

a. The role of a records custodian in the review process

The designation of "records custodian" refers to an employee who has custody of specific records within a county or municipality. G.L. c. 66 § 17. While state and local education agencies appoint records access officers[4] to help coordinate public records requests, the responsibility to provide access ultimately lies with the records custodian. G.L. c. 66 § 10; *see PETA*, 76 N.E.3d at 230. However, a member of the public dissatisfied with the disclosure

[4] Every state and local education agency must appoint at least one employee as a records access officer. These officers are responsible for "coordinat[ing] an agency's or a municipality's response to requests for access to public records" in conjunction with the records custodian. GL c. 66 § 6A (a).

determined by the records custodian may challenge the record custodian's decision; the record custodian's word is not necessarily final. *See PETA*, 76 N.E.3d at 238; *Wakefield Teachers Ass'n v. Sch. Comm. of Wakefield*, 731 N.E.2d 63, 63 (2000); *Champa v. Weston Pub. Sch.*, 39 N.E.3d 435, 435 (2015).

The court requires that a records custodian review records and requests on a "case-by-case" basis in order to decide whether a record(s) or information contained within a record qualifies for exemption from disclosure. *Matter of a Subpoena Duces Tecum*, 840 N.E.2d 470 (2006). While Massachusetts law, federal statutes, and case law provide a conceptual framework that records custodians may use as a guide, there is no specific, explicitly standardized approach by which the records custodian responsible for reviewing documents is expected to determine eligibility for exemption from disclosure in response to a public records request. *See* G. L. c. 4 § 7; *PETA*, 76 N.E.3d at 231; *Globe*, 446 N.E.2d at 1051; *Wakefield*, 731 N.E.2d at 66, citing *Hull*, 609 N.E.2nd at 460.

ii. FERPA, IDEA, and harmonious state statutes.

The Family Educational Rights and Privacy Act (FERPA) is the primary federal statute that governs rights and protections regarding the educational record of a student in an educational agency that receives federal funding. 20 U.S.C. § 1232g; Family Policy Compliance Office, U.S. Department of Education, *FERPA General Guidance for Parents*. https://www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html. Education records are records that "contain information directly related to a student" and "are maintained by an educational agency or institution or by a person acting for such agency or institution" – in Massachusetts, the records custodian.[5] 20 U.S.C. § 1232g(a)(4)(A); G.L. c. 66 § 17. Massachusetts adds a "harmonious" layer of state protection to student records under 603 CMR 23.00, promulgated to protect "parents' and students' rights of confidentiality, inspection, amendment, and destruction of student records." 603 CMR 23.01.

Under this statute, a student record is comprised of their transcript,[6] information not on their transcript but of clear "importance to the educational process,"[7] and any materials, in any documentation format, from which a student "may be individually identified." 603 CMR 23.02. For the purposes of this analysis, the term "education record" will be used when discussing both FERPA and 603 CMR 23.00.[8] When responding to a public records request involving education

[5] The records custodian is not the only education agency employee responsible for maintenance of a student's education records. Teachers, office staff, and administrators within a school and a district are also involved with maintenance of students' education records. However, responsibility for and ultimate decision-making power regarding disclosure does lie with the records custodian. *See* G.L. c. 66 § 6(a), 17.

[6] "Transcript shall contain administrative records that constitute the minimum data necessary to reflect the student's educational progress and to operate the educational system. These data shall be limited to the name, address, and phone number of the student; his/her birth date; name, address, and phone number of the parent or guardian; course titles, grades (or the equivalent when grades are not applicable), course credit, highest grade level completed, and the year completed, and highest performance level achieved on all MCAS tests required for the competency determination." 603 CMR 23.02.

[7] "Such information may include standardized test results, class rank (when applicable), extracurricular activities, and evaluations by teachers, counselors, and other school staff. 603 CMR 23.02.

records, a significant task for the records custodian is reviewing the records to ensure that no personally identifiable information is shared in a way that can lead to identification of a student by a party not authorized to do so. *See* 20 U.S.C. § 1232g; 603 CMR 23.00.

Where exemptions from disclosure under G.L. c. 4 § 7 are construed quite narrowly, FERPA protections against disclosure of education records and students' personally identifiable information are quite stringent. *See* 20 U.S.C. § 1232g; G.L. c. 66 § 10; *Globe*, 446 N.E.2d at 1051; *Worcester* 787 N.E.2d at 604; *PETA*, 76 N.E.3d at 231. Students are not school employees, and thus public interest in governmental transparency served by the Public Records Law is weighed against state and federal interest in the student protections, as the right to receive a quality education should not come at the expense of student privacy. *See* 20 U.S.C. § 1232g; 603 CMR 23.00; G. L. c. 4, § 7, Twenty-sixth (a),(c). To preserve this privacy, while parents and eligible students have the right to view their own education records, they may "only inspect the parts of the record that relates to themselves." 20 U.S.C. § 1232g(a)(1)(A). If part of a student record contains information that could be used to identify another student, that information must be redacted prior to viewing. *See* 20 U.S.C. § 1232g(a)(1)(A).

Under the Public Records Law, a parent or other individual is entitled to request and receive information from a school, local education agency, or the state education agency in Massachusetts, provided that information falls under the statutorily defined ambit of "public record." G. L. c. 66 § 10; *see Champa*, 39 N.E.3d at 440. While both FERPA and 603 CMR 23.00 provide a broad range of protections regarding educational records, the burden still falls on the records custodian to prove "with specificity" that an exemption to disclosure applies, and to walk the delicate line between transparency and protection against derivative disclosure of personally identifiable student information. G. L. c. 66 § 10 (c); *see Champa, 39 N.E.3d at* 440.

To this end, federal and Massachusetts statutes allows for de-identification of education records to allow for disclosure in response to public records request or other public-facing uses. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.31(b)(1); *Champa*, 39 N.E.3d at 441. De-identification is designed to prevent derivative disclosure; all personally identifiable information must be scrubbed to prevent identification of a student when "taking into account other reasonably available information" regarding the request and the information provided. 34 C.F.R. § 99.31(b)(1); *Champa*, 39 N.E.3d at 441. This involves explicit consideration of contexts that could lead to derivative disclosure: "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty," and "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." *Champa*, 39 N.E.3d at 442, quoting 34 C.F.R. §§ 99.3. Alternately, if a school determines redaction will not prevent the derivative disclosure of other students' personally identifiable information within the information requested, the school may choose to inform the requesting student about the applicable parts of the record without providing the actual record for inspection. *See* 20 U.S.C. § 1232g(a)(1)(A). This case-by-case consideration is necessary to ensure no derivative disclosure of personally identifiable student information occurs, but the complexity of the records request and the surrounding context can require significant amounts of time and effort to untangle, and any decision to withhold records can face challenges from the requesting party. See *Champa*, 39 N.E.3d at 442; *PETA*, 76 N.E.3d at 231

Such was the case in *Champa v. Weston Public Schools*, an influential case in Massachusetts regarding the intersection between the Public Records Law's intent to allow for

the right to access public records and the intent of federal and state protection of students' educational records. 39 N.E.3d at 442. In *Champa,* a record custodian's decision not to disclose records regarding special education funding agreements between district schools and parents of students with individualized education plans (IEPs) was challenged by a district resident. 39 N.E.3d at 438.

The record custodian contended that disclosure of the requested information would be in violation of both FERPA and 603 CMR 23.00, while the district resident sought court injunction for the disclosure of the information and for declaration that the agreements did indeed qualify as public records. 39 N.E.3d at 438. In its analysis, the court also factored the Federal Individuals with Disabilities Education Act (IDEA) and Massachusetts special education law into its analysis, as the records in question involved students with IEPs. *See* 20 U.S.C. §§ 1400 et seq; G.L. c. 71, § 34D; *Champa*, 39 N.E.3d at 436. Both Massachusetts law and IDEA provide additional protections for disclosure about information regarding students with disabilities. *See* 20 U.S.C. §§ 1400 et seq; G.L. c. 71, § 34D.

The court held that information about "a student's disability, progress, and needs" is "unquestionably" of educational importance, and thus part of the student record. *Champa*, 39 N.E.3d at 435; *see* 20 U.S.C. §§ 1400; G.L. c. 71, § 34D. However, the court was also clear that neither Massachusetts nor Federal statutes prevent a record "relating to students" from becoming a public record subject to disclosure, provided all personally identifiable information is removed. *Champa*, 39 N.E.3d at 444. This removal is authorized (and is in fact required) under G.L. c. 66 § 10 (a), which requires a records custodian to disclose "any segregable portion of a public record" in response to a public records request. G.L. c. 66 § 10 (a); *see Champa,* 39 N.E.3d at 443.

However, records are not always segregable. This issue often arises when a record custodian considers the larger context of a public record request. *See Champa,* 39 N.E.3d at 442. Here, a resident of the school district, sent a public records request for… "[c]opies of all agreements entered into by the [school district] with parents and guardians, as part of the [individualized education program (IEP)] process, in which the [school district] limited its contribution to education funding or attached conditions for it for out of district placements" for school years 2007–2012." *Champa,* 39 N.E.3d at 438. Given the small number of families to which this arrangement applied, the record custodian determined that there was no way to provide the data without providing the resident educational records to which he was not entitled. *See id.*

Should a records custodian be unable to meaningfully redact personally identifiable student information from a record, the entirety of that record may be considered exempt from disclosure under 67 G.L. c. 4, §7, Twenty-sixth (a), which allows for exemption of information that is "specifically or by necessary implication exempted from disclosure by statute." 67 G.L. c. 4, §7, Twenty-sixth (a). Application of both federal and state statutes led the court to determine that the personally identifying student information in the records requested in *Champa* were exempt from disclosure under FERPA, IDEA, Massachusetts special education law and 603 CMR 23.00, and thus were also exempt from disclosure under Twenty-sixth (a). *See Champa,* 39 N.E.3d at 445-46.

iii. Consideration of employee records

In order to fully comply with a public records request, in addition to prevention of derivative disclosure of a *student's* personally identifiable information, a records custodian must

also ensure that information regarding educational agency *employees* is handled in accordance with Massachusetts statutes and case law. *See Wakefield*, 731 N.E.2d at 70-71; *Worcester*, 787 N.E.2d at 608; *Globe*, 446 N.E.2d at 1054. While FERPA, IDEA, and related Massachusetts statutes generally apply to educational agency employees only insofar as their presence in a record can contribute to derivative disclosure of personally identifiable student information, the court applies exemptions to disclosure under the Public Records Law articulated in 67 G.L. c. 4, §7, Twenty-sixth to student and employee alike. *See Champa*, 39 N.E.3d 446.

In Massachusetts, there are twelve categories of public records that do not need to be disclosed in response to a public records request. 67 G.L. c. 4, §7, Twenty-sixth et seq. The majority of case law regarding what teacher information is exempt from disclosure in response to a public records request centers around Twenty-six (c). *See* 67 G.L. c. 4, §7, Twenty-sixth; *See Wakefield*, 731 N.E.2d at 70-71; *Worcester*, 787 N.E.2d at 608; *Globe*, 446 N.E.2d at 1054; *PETA*, 76 N.E.3d at 227.

The exemptions in this subsection can be divided into two categories. 67 G.L. c. 4, §7, Twenty-sixth (c); *see PETA*, 76 N.E.3d at 227. The first category exempts "personnel and medical files or information" from disclosure, and the second category exempts "any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." 67 G.L. c. 4, §7, Twenty-sixth (c). What constitutes a public record is broadly defined, and the sparse language of Twenty-six (c) led the court to look to legislative intent for guidance. *See Wakefield*, 731 N.E.2d at 66, citing *Hull*, 609 N.E.2nd at 460; *Globe*, 446 N.E.2d at 1051; *Wakefield*, 731 N.E.2d at 67, citing *Sterilite Corp. v. Continental Cas. Co.*, 494 N.E.2d 1008 (1986) ("court should interpret statutes to give effect to Legislature's intent.") Unlike the broad presumption of disclosure afforded government agency

records under G.L. c. 66, § 10, the court has instructed that all exemption categories within 67 G.L. c. 4, §7, Twenty-sixth be "strictly construed" in order to allow for necessary exemptions without providing loopholes that can be abused. *See* Wakefield, 731 N.E.2d at 66; *Hull* 609 N.E.2nd at 460.

The first exempted category within Twenty-six (c) relevant to the consideration of a records custodian regards "personnel... files or information." 67 G.L. c. 4, §7, Twenty-sixth; *Wakefield*, 731 N.E.2d at 66. The statute's plain language "absolutely" exempts "personnel and medical files or information" from disclosure. Globe, 446 N.E.2d at 1051. However, the mere identification of a record as a "personnel file" by an administrator or records custodian does not automatically make it so. *Worcester*, 787 N.E.2d at 606; *Globe*, 446 N.E.2d at 1051; *Hastings* 299. A records custodian may not simply label something “personnel file” in order to justify nondisclosure. *Worcester*, 787 N.E.2d at 606; *Globe*, 446 N.E.2d at 1051; *Hastings* 299. The "essential nature and character" of records "derive from their function" in the files of a governmental agency, that “essential nature and character” is used to determine whether a record qualifies as a personnel file. *Worcester* 607.

Thus context, once again, shapes the definition of what a personnel file entails. *Wakefield*, 731 N.E.2d at 67-68. However, even within the qualitative evaluation required to determine if a record can be appropriately called a personnel file, hiring, promotion, and termination information, and disciplinary information are generally considered part of the personnel file under "the plain statutory language" of Twenty-six(c). 67 G.L. c. 4, §7, Twenty-sixth (c); *Wakefield*, 731 N.E.2d at 67-68. While it is not unreasonable for a parent or community member to want to know information about school employees, particularly the disciplinary history of an educator, there is state and federal statutory agreement on the inclusion of

disciplinary reports in the generally exempt category of "personnel [files]." 5 U.S.C. § 552(b)(6); *Wakefield*, 731 N.E.2d at 67-68*; *Globe*, 446 N.E.2d at 1051. There is less agreement on whether the investigation leading up to a disciplinary decision is exempt from disclosure here, however. *See Worcester*, 787 N.E.2d at 608; *Globe*, 446 N.E.2d at 1051. This discrepancy reflects the role that public policy plays in determination of the level of disclosure required of government agencies. *See Worcester*, 787 N.E.2d at 608; *Globe*, 446 N.E.2d at 151

Public policy concerns dictate that much like the record itself, the function of an agency's investigation into an employee determines whether or not an investigation record qualifies as exempt from disclosure under Twenty-six (c). *Wakefield*, 731 N.E.2d at 68, *Worcester*, 787 N.E.2d at 608, Globe, 446 N.E.2d at 1051. In *Worcester*, the court ruled that records pertaining to a police department's internal affairs *investigation* were not necessarily covered under Twenty-six (c), despite the fact that the final *disciplinary record* was exempt. *Worcester*, 787 N.E.2d at 608. In contrast, in *Wakefield*, the court ruled that both the record of the investigation and the record of disciplinary action taken against an educator were exempt from disclosure in response to a public records request. *Wakefield*, 731 N.E.2d at 68; *Worcester*, 787 N.E.2d at 602, 608. The difference in court decisions lies in the intent of the investigating agency, and in the legislature's intent in enacting the statute in question. *See Worcester*, 787 N.E.2d at 608; *Globe*, 446 N.E.2d at 1051. For a police department, a primary function of an internal affairs investigation is to "inspire public confidence" in the ability of the department to police itself. *Worcester*, 787 N.E.2d at 608. To deny the public the right to access information regarding an internal affairs investigation would run counter to that intent. *Worcester*, 787 N.E.2d at 608.[9]

[9] Professor Kanstroom noted that this section needs better framing and legislative history. I agree!

In an education agency, public accountability is certainly important, but that consideration must be balanced against the ability of an education agency to "function effectively as an employer." *Wakefield*, 731 N.E.2d at 70-71. This function includes the ability to conduct comprehensive investigations into employee behavior with full employee cooperation. *See Wakefield*, 731 N.E.2d at 70-71. Thus, determination of how clear the public's window into an investigation conducted by a state agency that may or may not lead to disciplinary action must include consideration of the effect of public disclosure on any future investigations. *See Wakefield*, 731 N.E.2d at 70-71. The ability of a school or district to "function effectively as an employer" is a necessary part of a record custodian's analysis of whether a document falls within the personnel file exemption of Twenty-six(c).[10] *Wakefield*, 731 N.E.2d at 70-71; *Worcester*, 787 N.E.2d at 608.

In *Wakefield*, the court made the observation that if the school district were required to disclose full records of its investigation and deliberation regarding discipline of the educator under investigation, the next time it had to conduct an investigation, educators could be unwilling to participate. *Wakefield*, 731 N.E.2d at 71. The court posited that legislative intent when enacting 67 G.L. c. 4, §7, Twenty-sixth (c) was motivated by reasoning articulated by the trial judge in the instant case: "in an era where even a hint of impropriety in the relations between teachers and young students may produce a public reaction wholly disproportionate to the actual or suspected nature of the impropriety," the "forced public disclosure of investigatory reports" may significantly dampen not only on educators' willingness to fully participate in investigations, but on the kinds of interactions educators have with students. *Wakefield*, 731 N.E.2d at 71. If an individual's record could have this kind of dampening effect on the ability of

a school, district, or state education agency to "function effectively as an employer," a records custodian could reasonably consider that record as part of a personnel file exempt from disclosure. *Wakefield*, 731 N.E.2d at 70-71; *Worcester*, 787 N.E.2d at 608; *Globe*, 446 N.E.2d at 1054.

It is important to note, however, that not all personal information is personnel information. *Wakefield*, 731 N.E.2d at 68-69, Globe, 446 N.E.2d at 1051. Personnel information relates to employment, while personal information refers to a much wider swath of information and data about an individual. This is where the second category within Twenty-six (c) applies. Under the plain language of the statute, the court has also made it clear that information "relating to a specifically named individual" only applies to the exemption category within Twenty-six (c), and only when it "may constitute an unwarranted invasion of personal privacy." 67 G.L. c. 4, §7, Twenty-sixth (c); *Wakefield*, 731 N.E.2d at 68.

Just as in the first category within 67 G.L. c. 4, §7, Twenty-sixth (c), this second exemption category must also balance the public interest served by disclosure with an individual's right to privacy. *PETA*, 76 N.E.3d at 239; *Attorney Gen. v. Collector of Lynn*, 385 N.E.2d 505 (1979). Context, as always, governs specific determinations regarding exemption; the court notes that "information about a person, such as his name and address, might be protected from disclosure as an unwarranted invasion of privacy in one context and not in another." *PETA*, 76 N.E.3d at 239, quoting *Torres v. Attorney Gen.*, 460 N.E.2d 1032 (1984). When specifically considering inclusion of names and addresses, this statement does not hold true for students' education records, as FERPA has much stricter standards for what may be disclosed about a student without parent permission. This observation is made by the court in reference to agency employees.

From the macro to the micro, factors including the number of people affected by disclosure or whether an individual is a public or private employee are relevant considerations when considering disclosure. See *Georgiou v. Commissioner of Dept. of Industrial Accidents*, 941 N.E.2d. 726 (The fact that around 36,000 employees would be affected "weighs against disclosure," of employees' names and addresses, as does their status as private employees.) The names contact information for public school employees is data clearly "relating to a specifically named individual," but the court does not generally consider release of that information an invasion of privacy, as that is information easily available elsewhere. *Pottle v. School Committee of Braintree*, 482 N.E.2nd 813, 817. As such, personal information that may be found in public directories or other databases maintained by the school will usually not be exempt from disclosure.[11] See *Wakefield*, 731 N.E.2d at 68, *Hastings & Son Publ. Co. v. City Treasurer of Lynn*, 375 N.E.2nd 299 (1978). As an example of how the courts determine whether "substantially the same information is available from other sources," the court cites the public availability of "street lists" of all Commonwealth residents' car registration records containing resident names and addresses, and the telephone book. G.L. c. 51, §§ 4, 6, 7; G.L. c. 90, §§ 3, 30; *Pottle,* 482 N.E.2nd at 817. While a physical phone book is of dubious accessibility in 2021, the statutes compiling resident information in street list and car registration databases remain in effect, and thus access to individuals' names and addresses remains for the general public. G.L. c. 51, §§ 4, 6, 7; G.L. c. 90, §§ 3, 30; *see Wakefield, 731 N.E.2d at* 68; *Hastings* 299.

Consideration of a phone book is, in fact, a perfect example of how existing statutes and regulations may not be adequate to address the way that PII sharing and use occurs for

[11] Despite the commonality with which they may be found in public directories, home addresses have been subject to a certain degree of litigation about whether they qualified for exemption from disclosure. *See Georgiou v. Commissioner of Dept. of Industrial Accidents.*

increasingly networked and technology dependent educational entities. This is where PII consideration in the context of public record requests overlaps with PII consideration in the context of how educational entities share data with third parties.

D. THIRD PARTY USE OF PII AND EDUCATION RECORDS

i. Alone, FERPA lacks teeth for enforcement.

The Department of Education's stance is "that regulating the specifics of data sharing would drive up costs, not reduce them," but it explicitly leaves decisions regarding data sharing to "the discretion of educational agencies or institutions." Family Educational Rights and Privacy, 76 FR 75604-01. This is, in large part, because the federal Department of Education has no statutory authority to enforce sanctions or assess fines against third parties that misuse student data. Family Educational Rights and Privacy, 76 FR 75604-01. Under FERPA alone, the reach of its statutory authority extends only as far as its ability to compel a data-sharing educational institution to rescind data access from a third party misusing students' PII. 20 U.S.C. 1232g(b)(4)(B). Family Educational Rights and Privacy, 76 FR 75604-01. While this can prevent future misuse of student data, its lack of teeth does little to deter misuse in the first place.[12] Department guidance suggests that in absence of additional state laws that provide remedy or sanction in the event of data misuse, "FERPA-permitted entities" can write further sanctions or remedies into contracts with entities that use student PII. Family Educational Rights and Privacy, 76 FR 75604-01. The Department of Education released updated guidance regarding student PII use in 2018 – a year that raised collective awareness about how PII can be used – and misused –

[12] The FTC is currently the primary administrative agency that has significant civil enforcement power against entities that misuse PII. USC § 45(a) gives the FTC authority to bring administrative actions against companies with "unfair or deceptive acts or practices in or affecting commerce," and *FTC v. Wyndham* explicitly extends that authority to insufficient cybersecurity practices.

and is a good example of why a proactive framework for how schools handle both student and employee PII is increasingly necessary. *See id*.

ii. A warning sign for the potential for abuse of data access

In 2018, the Cambridge Analytica scandal broke. Cambridge Analytica was a third party firm that used personal data and access permissions that were legitimately obtained from Facebook users to gather data from millions of other users without their knowledge or consent. Kurt Wagner, *Here's how Facebook allowed Cambridge Analytica to get data for 50 million users*. RECODE, Mar. 17, 2018; Cecilia Kang and Sheera Frenkel, *Facebook Says Cambridge Analytica Harvested Data of Up to 87 Million Users*. N.Y. TIMES, Apr. 4, 2018. Of the roughly 87 million Facebook users in Cambridge Analytica's database, around "30 million [profiles] contained enough information, including places of residence, that the company could match users to other records and build psychographic profiles." Kang and Frenkel, *supra*. In 2019, the FTC found that Cambridge Analytica "used deceptive tactics to collect personal information from tens of millions of Facebook users for voter profiling and targeting." *Cambridge Analytica, LLC, In the Matter of*, No. 9383 (FTC Act. Dec. 18, 2019). The FTC's complaint stemmed from an app the company used to collect personally identifiable information (PII) from Facebook users, despite explicitly stating that the app would not collect PII. *See id*. The psychometric profiles that Cambridge Analytica created of millions of Facebook users, however, despite only 270,000 users explicitly "opting in," was reportedly within the bounds of Facebook's rules.[13] Wagner, *supra*. It was only after the scandal broke that Facebook changed its terms of service to

[13] Facebook denies this allegation, although Mark Zuckerberg has "acknowledged that the company had committed serious errors by not ensuring that robust safeguards were in place for users." Kang and Frenkel, *supra*

require explicit consent from users before third parties are allowed to "collect information beyond their names and addresses." Kang and Frenkel, *supra*.

While the education field has not faced a scandal as big as Cambridge Analytica and Facebook, in the last five years alone, there have been multiple instances of third parties using student PII in ways that, if not technically illegal, appeared unethical enough to raise outcry from targeted students and educational entities. *See* Natasha Singer, *For Sale: Survey Data on Millions of High School Students*, N.Y. TIMES, Jul. 29, 2018. For example, in the wake of Cambridge Analytica, the College Board, the company responsible for administering the SAT, came under scrutiny for the way it provided opportunities for other companies to gather student information then used to target those students in marketing campaigns. *See id*.

iii. What we can learn from proactive school contracting

Multiple school districts in Massachusetts have taken more active positions to protect student and employee PII. Cambridge Public Schools has been lauded as a model of how an educational entity can be proactive in providing a framework for responsible use of PII, and for the way the district makes its data policies and practices accessible and understandable to its students, their families, and school employees. *CPS Student Data Landing Page*, https://www.cpsd.us/cms/One.aspx?portalId=3042869&pageId=35199550. Other districts have used model frameworks from nonprofit organizations like the Data Quality Campaign and the A4L Student Data Privacy Consortium that provides standards for student data use by third parties and language that schools can use in their contracts with third party vendors. Data Quality Campaign, *Fact Sheet*. Jan. 1, 2020. https://dataqualitycampaign.org; Aug. 20, 2020, *MA Student Data Privacy Agreement Version (2018)*, posted at

https://sdpc.a4l.org/agreements/Ruvna_Natick_post.pdf. When Natick Public Schools partnered with Ruvna, a private company with an app that coordinates communication in the event of a school emergency or crisis, their contract (also called a student DPA, or "Data Privacy Agreement") set out the terms of how the company can use the student PII provided by the district. *See DPA, supra*. Although signed in 2020, the language in Natick's DPA uses a model put forth by the A4L Student Data Privacy Consortium in 2018. *See Access 4 Learning Community* at https://www.a4l.org/page/AboutA4L.

E. CONCLUSION

States like Massachusetts have the opportunity to fill in the gaps left by FERPA when it comes to taking a proactive approach to how third parties can use student PII. A standardized statewide approach, informed by how educational entities ensure student PII is safely disclosed in public record requests, can allow educational entities to partner with third parties in ways that provide comprehensive, innovative student support, without sacrificing student privacy to do so. The ever-increasing use of technology across all educational entities can provide exciting opportunities for students, but also means that educational entities will face ever-increasing scenarios that require a thoughtful approach to how student PII is used. A review standard for public record requests and a common framework for how student PII is shared with third parties can help Massachusetts "future-proof" its approach to student privacy. No matter how technology changes, students' right to privacy remains.