

## CLIENT NEWS BRIEF

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### RETAINING EMAILS: THE LATEST NEWS

In Lozano Smith's recent statewide consortium "It's An E-World: School Districts in the Electronic Age," our attorneys reviewed the issue of when emails may have to be retained as agency records. As we reported then, efforts were underway to revamp state regulations regarding document retention. The existing regulations failed to address emails or other electronic documents. We have now been informed that the California Department of Education ("CDE") has, for the time being, abandoned its efforts to revise the existing regulations governing the retention of documents, including emails, by school districts. Meanwhile, a federal district court recently concluded that emails that are not printed and placed in a student's file are not "maintained" by a school district and therefore do not constitute education records for purposes of the federal Family Educational Rights and Privacy Act ("FERPA"). (*S.A. v. Tulare County Office of Education* (E.D. Cal. Oct. 6, 2009) 2009 WL 3296653 ("S.A.")). This conclusion may not, however, alter a school district's obligations to retain emails under state law. It seems that despite a need for clarity on these issues, the rules governing what emails a school district must retain – and how – will remain unsettled for some time to come.

#### State Regulations

Since the 1970s, state regulations have required school districts to annually classify records and maintain and dispose of such records according to certain parameters. (Cal. Code Regs., tit. 5, § 16020, *et seq.*) This bulky and outdated system – which fails to take into account the volume of documents, including emails, that a school district must manage in the current information era – has long been ripe for revision. In the fall of 2008, CDE circulated revised regulations regarding records retention by school districts for public comment. Most importantly, the revised regulations would have substantially modernized the rules for retaining records, and would have for the first time addressed the retention of emails and other electronic communications. Whereas existing regulations require all documents to be classified and retained for various periods before destruction, the proposed regulations would have allowed most emails to be deleted after one year. The draft included exceptions for emails that constitute student records and other emails that fell into categories where records must be maintained permanently or for other designated time periods.

CDE received comments from numerous sources and undertook a further revision of the proposed regulations. The comments included concerns from charter schools, which did not

want to be subject to the regulations, and special education advocates, who were worried about the possible deletion of student records. In response to inquiries from this firm, CDE staff has on several occasions over the past year stated that a new version of the draft regulations would be circulated for public comment. However, CDE staff has now informed us that CDE will not continue its efforts to revise the records retention regulations. Therefore, for now it seems that when it comes to determining what records to retain – including electronic communications – school districts must continue to try to comply with the existing cumbersome and outdated regulations.

### Federal Court Ruling on Student Records

Without revisions to the state regulations that clearly address the handling of emails, courts may be turned to with more frequency for decisions regarding the retention of emails by school districts. Most recently, in the S.A. case, a student who had received special education from the Tulare County Office of Education (“TCOE”) requested a copy of any and all electronic mail sent or received by the Department concerning or personally identifying” the student, and asked that the files be sent in their native electronic format rather than in printed pages. In response, the TCOE sent the student hard copies of emails that had been printed and placed in the student’s permanent file. The TCOE advised the student that it could not send the emails electronically because the emails had been purged and were only available in hard copy format.

The student made a compliance complaint against TCOE asserting that TCOE violated state and federal law by failing to provide emails that the student had requested, and by destroying emails without parental notification and consent. CDE found that TCOE had not violated the law, and a legal action in federal court followed.

The federal court determined that under FERPA, and FERPA’s implementing regulations, “an email is an education record only if it both contains information related to the student and is maintained by the educational agency. Conversely, an email that is not maintained by the educational agency is not an education record.” However, the court stated that “emails, whether in hard copy or in electronic format, may be education records so long as the educational institution maintains them.” As a result, because the TCOE turned over to the student all emails that it maintained in the student’s file in hard copy format, and had purged those emails that it did not maintain as student records in the student’s file, the court upheld the CDE’s finding that TCOE did not violate state or federal law regarding student records. The court noted that the word “maintain” suggests that FERPA records will be kept in a hard copy file at the school or on a permanent secure database, and therefore does not include every email a district merely receives regarding an identifiable student.

Although limited to its facts, the S.A. decision provides some guidance regarding both the CDE’s and at least one court’s view of whether an email constitutes a student record. Additionally, how and what records a school district maintains per board policy and administrative regulation may affect the determination of whether emails are “maintained” and thus student records, be it in a school district employee’s email inbox or a student’s hard copy cumulative file.

The ruling in S.A. should also be relied on cautiously, as the case may yet be appealed to the Ninth Circuit, and additionally, federal district court rulings are not binding on other federal courts. Additionally, while the S.A. decision addresses FERPA, it does not expressly address California regulations. The holdings in this case should not be seen to negate the regulations found in title 5 of the California Code of Regulations (discussed above), which specify what documents, records, and information schools must or may maintain, including student records. Furthermore, even if an email is not a “student record” within the meaning of state or federal law, it may still be a district business record that must be maintained pursuant to California law.

### What Next?

In the absence of revised regulations on records retention, a school district must carefully weigh the options for retaining records, and adopt and enforce policies that attempt to fit both the district’s needs and the current state of the law. School districts should also be aware that many existing retention policies, including the policy contained in the California School Boards Association (“CSBA”) policy manual, track the existing regulations, meaning that they too are generally silent on electronic documents and email. School districts may wish to assess their current policies to determine whether they meet existing conditions and needs.

Our firm has assisted school districts in drafting email retention policies, and has given extensive advice regarding responding to Public Records Act requests and litigation document demands for electronic documents. If we can be of assistance or provide additional information regarding electronic records retention and related policies, please contact one of our seven offices statewide.

*As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.*



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## Upcoming Events

Lozano Smith attorney Harold Freiman will be present "Governance Under the Public Records Act" at the California School Boards Association (CSBA) Annual Conference in San Diego on December 9, 2009.

Mr. Freiman and Ms. Lincoln will present the third installment of Lozano Smith's "Technology Legal Issues 101 and 102" program for the California Association of School Business Officials (CASBO) on April 18, 2010, at CASBO's Annual Conference in Sacramento. The presentation will focus significantly on email and electronic records.

If you were not able to attend one of Lozano Smith's E-World workshops, you are welcome to request a free electronic copy of the materials from that program by contacting [clientservices@lozanosmith.com](mailto:clientservices@lozanosmith.com).