

TABLE OF CONTENTS

I.	Regulation of Cell Phones and Other Electronic Communication Devices.....	1
A.	Overview.....	1
B.	Use of Cell Phones in Schools Under State Law.....	1
C.	School District Best Practices.....	3
II.	Search and Seizure of Electronic Communication Devices.	4
A.	The Legal Standard for Searching a Student’s Cell Phone.....	4
B.	School Officials’ Right to Search Students’ Cell Phones is not Unlimited.....	4
III.	Laws Affecting Electronic Communications.	6
A.	Electronic Communications Privacy Act (ECPA) (Federal Wiretap Act), 18 U.S.C. §§ 2510-2521. <i>See also</i> Wis. Stat. § 968.31 (containing similar provisions).....	6
B.	Electronic Communications Privacy Act (ECPA) (Stored Communications Act), 18 U.S.C. §§ 2701-2711.	7
C.	Computer Crimes Act, Wis. Stat. § 943.70(2).	8
D.	Unlawful Use of Computerized Communication Systems, Wis. Stat. § 947.0125.....	8
IV.	Current Issues Relating to Cell Phone Use in Schools.	8
A.	“Sexting.”	8
B.	Cell Phone Video and YouTube.....	9
C.	Cell Phones and Cyber Bullying.....	10
V.	Regulating Electronic Communications Over District Computers.	11
A.	Employee Acceptable Use Policies: Developing an Acceptable Use Policy.....	11
B.	Non-Exhaustive Checklist of Elements for an AUP.....	11
C.	Student AUPs.....	13
VI.	Electronic Communications and the Public Records Law.....	15
A.	Public Policy of the Wisconsin Public Records Law.	15
B.	Definition of Record.	15
C.	Restrictions On Access To Records.....	16
D.	Private Email Accounts and Public Records Law.....	16
E.	Record Retention and Email.....	16

I. Regulation of Cell Phones and Other Electronic Communication Devices.

A. Overview.

1. There has been a rapid proliferation of cellular telephone (cell phone) use and abuse in schools over the last several years.
2. Although cell phones may be beneficial in some instances, they have raised concerns with school officials in other instances because of the potential for causing a disruption in the classroom, invading the privacy of others in the school, or being used for other improper or illegal purposes.
3. As a result, school officials have been faced with the difficult task of addressing these concerns through the development of board policies and through administrative enforcement while still ensuring that any benefits for students from these devices are maintained in the schools and avoiding any legal risks associated with regulating such devices.

B. Use of Cell Phones in Schools Under State Law.

1. In Wisconsin, a school board generally has the power to do all things reasonable to promote the cause of education, including the power to make rules pertaining to the conduct of students in order to maintain good decorum and a favorable academic atmosphere. Wis. Stat. § 120.13(1).
2. Current Wisconsin law allows school boards to decide whether to allow student cell phone use at school.
 - a. In 1990, the Wisconsin Legislature recognized that school boards' promulgation of rules relating to the possession or use of communication devices were consistent with a school board's powers when the Legislature enacted a law requiring school boards to adopt rules on this very issue. Specifically, this law required school boards to adopt a rule prohibiting a student from possessing or using an electronic paging or two-way communication device while on school premises owned or rented by or under the control of a public school. Wis. Stat. § 118.258(1), (2)(a), (2)(b) (1991-1992).

- b. Under the law, the school board could only allow for the use or possession of such a device by a student if the school board or its designee determined that the device is used or possessed for a medical, school, educational, vocational or other legitimate use. The law also required the school board to provide each student enrolled in the school district with a copy of the rules.
 - c. The Wisconsin Legislature has since amended this state law relating to electronic communication devices. Effective April 2006, school boards were no longer required to adopt rules prohibiting a student from using or possessing an electronic communication device while on premises owned or rented by or under the control of a public school. Wis. Stat. § 118.258(1), (2) (2007-2008). Instead, the law currently states that a school board “may” adopt such rules, thereby granting school boards the discretion to adopt such rules. The Legislature also eliminated the statutory language stating that the rules may allow for the use or possession of such a device only if used or possessed for a medical, school, educational, vocational or other legitimate use. The new law still requires school boards to annually provide each student enrolled in the school district with a copy of any rules relating to such electronic communication devices, but only if the school board adopts such rules.
3. A recent change to Wisconsin law criminalizes the intentional taking of nude or partially nude photos of another person in a locker room, and sets forth specific requirements for school districts (and other persons or entities) that own or operate locker rooms.
- a. Whoever, while present in a locker room, intentionally captures an image of a nude or partially nude person in the locker room is guilty of a Class B misdemeanor (with a fine not to exceed \$1,000 or incarceration up to 90 days or both) and, further, whoever exhibits or distributes the image of a nude or partially nude person taken while that person is in a locker room is guilty of a Class A misdemeanor (with a fine up to \$10,000 or incarceration up to 9 months or both). Wis. Stat. § 942.09(5).

- b. Any person, including a school district, who owns or operates a locker room must have a written policy that does all of the following: (a) specifies who may enter and remain in the locker room to interview and seek information from any individual in the locker room; (b) specifies the recording devices that may be used in the locker room and the circumstances under which they may be used; (c) reflects the privacy interests of individuals who use the locker room; and (d) specifies that no person may use a cell phone to capture, record, or transfer a representation of a nude or partially nude person in the locker room. Wis. Stat. § 175.22.

C. School District Best Practices.

1. Wisconsin Stat. § 118.258 now provides greater flexibility for school boards in adopting rules related to two-way electronic communication devices. As a result, school boards may want to review current policies and consider whether they want to maintain existing rules that prohibit the possession or use of such devices in school
2. School boards may want to incorporate language that places limitations on the use of such devices in the school to minimize disruption. To this end, such language may include (1) requiring such devices to be turned off and secured out of sight during the instructional day; (2) prohibiting the use of such devices by elementary school students; (3) restricting the use of such devices during school activities held off campus; and (4) prohibiting such devices with photographic capabilities in locker rooms, bathrooms or other areas of privacy. Policies should also be revised to ensure that they cover all recent technologies.
3. School boards should also consider whether the policies appropriately address different areas of abuse, such as communicating test answers during class or engaging in “cyber-bullying,” which is when a student makes cellular telephone calls or sends text messages that ridicule, threaten, or harass another student. Policies can be revised to specifically identify such actions as prohibited.
4. In addition, there should be appropriate sanctions for students who do not comply with the policy. Some school board policies provide for a progressive discipline system that increases sanctions for repeated violations of the policy and for more severe sanctions for more extreme misconduct.

5. Students must be provided notice and made aware of these policies and any related rules; such notice is typically accomplished in a student handbook.
6. If the school board decides to adopt such policies, school district officials then should enforce these rules in a consistent and lawful manner.

II. Search and Seizure of Electronic Communication Devices.

A. The Legal Standard for Searching a Student's Cell Phone.

1. Important legal issues arise with regard to the search and seizure of a student's cell phone school officials suspect a cell phone has been or is being used inappropriately. For example, school district officials may receive information that a student has secretly taken photographs of other students in locker rooms. If so, school district officials may decide to seize the cell phone and search its contents to determine the validity of the allegations.
2. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), is the seminal case with respect to search and seizure of students and their possessions, including cell phones. In order to be legal, the search of a student, including his or her cell phone, must be: (a) reasonable at its inception; and (b) reasonable in scope.
 - a. Before conducting a search of a student's possessions, including a cell phone, school officials must have reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.
 - b. The scope of the search must be reasonably related to the objectives of the search and not excessively intrusive.

B. School Officials' Right to Search Students' Cell Phones is not Unlimited.

1. One federal case, *Klump v. Nazareth Area School District*, 425 F. Supp. 2d 622 (E.D. Penn. 2006), serves as a warning to school administrators regarding their investigative techniques that may include a review of the contents of a student's cell phone. In *Klump*, school officials confiscated a high school student's cellular

telephone because he displayed it during school hours in violation of school policy. While the school officials had the telephone, they accessed the student's phone directory and began making telephone calls with the student's telephone. They called nine other high school students listed in the directory to determine whether they too were violating the school's cellular telephone policy. The officials also accessed the student's voicemail and text messages and conducted an instant message conversation with the student's brother without identifying themselves as being anyone other than the primary user of the telephone. Based on these actions by the school officials, the student and his parents filed a ten-count complaint in federal district court against the school district, superintendent, assistant principal, and teacher alleging several federal and state claims.

2. Included in the complaint were allegations that, by accessing the student's telephone directory, voicemail, and text messages and by using the cellular telephone to call individuals listed in the directory, the school officials violated the student's federal and state constitutional right to be free from unreasonable searches and seizures. The school officials asked the court to dismiss these allegations in the complaint, claiming, in part, that they were entitled to immunity from such lawsuits. The court, however, denied the school district's request and permitted the student and his parents to proceed with their lawsuit on this claim.
3. The federal court concluded that the school officials were justified in seizing the cellular telephone because the student had clearly displayed it at school, violating the school's policy prohibiting the use or display of cell phones during school hours. However, the court decided that the school officials failed to meet the reasonableness standard that is required when they accessed the telephone directory, voice mail, and text messages and called other students. According to the court, the school officials did not have any basis for initiating a search because they had no reason to suspect that such a search would reveal that the student himself was violating another school policy. Instead, the court concluded that the school officials were unlawfully conducting a search to find evidence of other students' misconduct. Before conducting any search of such non-contraband items, school district officials must make sure that they have reasonable grounds to believe that such a search will turn up evidence that the student has violated or is violating either the law or the rules of the school.

4. In *Klump*, the court found that the school officials violated the Pennsylvania state wiretap law (see discussion of the Federal Wiretap Act and Stored Communications Act, below) by accessing stored voicemail and text messages, and that such accessing of stored messages was outside the scope of a reasonable *T.L.O.*-type search. Whether a search of the content of a student's cell phone would violate federal and Wisconsin law has not yet been decided. Therefore, although school officials may have reasonable grounds to search a student's possessions (such as a purse or backpack) and *confiscate* a cell phone that is used in violation of school rules, they should be hesitant to access content stored on the phone without authorization.

III. Laws Affecting Electronic Communications.

A. Electronic Communications Privacy Act (ECPA) (Federal Wiretap Act), 18 U.S.C. §§ 2510-2521. *See also* Wis. Stat. § 968.31 (containing similar provisions).

1. It is unlawful to *intercept* and disclose wire, oral, or electronic communication, including telephone conversations and e-mail, while it is in transit.
2. An electronic communication consists of the *transfer* of the signals, data, and other items, but does not include their electronic storage. Interception occurs when it is captured or re-directed in any way through the use of a mechanical or electronic device. This may include obtaining access to in-storage wire communications (e.g., obtaining access to someone's voice-mail mailbox and forwarding it to your own).
3. Ordinary course of business exception: the employer is allowed to monitor or record employee communications if it is done for a legitimate purpose and all employees have been informed about the monitoring device. It may be limited, however, to determining whether the nature of the communication is business related. The employee must be given prior notice.
4. Consent exception: It is not unlawful to intercept communications, such as e-mail and voice mail, while it is in transit if one party to the communication has given his or her consent to the interception. This may be inferred either through an employment contract or through a well-disseminated e-mail policy.

B. Electronic Communications Privacy Act (ECPA) (Stored Communications Act), 18 U.S.C. §§ 2701-2711.

1. It is unlawful to access *stored* electronic communications, such as e-mail, pagers, and voice mail, while it is in electronic storage.
2. Whoever intentionally accesses without authorization a facility through which an electronic communication service is provided or intentionally exceeds an authorization to access that facility, and thereby obtains, alters, or prevents authorized access to an electronic communication while it is in electronic storage in such system shall be punished. Accessing e-mail from a stored database without authorization is prohibited, including read or sent e-mail that is saved on the user's server or hard drive.
3. Provider exception: the prohibitions against accessing stored electronic communications do not apply to conduct authorized by the person or entity providing an electronic communications service. The provider is the entity that provides the terminals, computers, software, pagers, etc. Therefore, if an employer provides access to e-mail through an in house e-mail server, the employer is free to monitor an employee's stored e-mail. This may not apply if access to e-mail is provided through a commercial Internet service provided, such as America Online.
4. User exception: the prohibition does not apply to users of the service with respect to a communication of or intended for that user. This exception includes individuals who expressly or impliedly have been given authorization to access the user's stored e-mail.
6. Although the law is unclear regarding employer rights in this area, it is best to provide employees with prior notice of the employer's intent to monitor employee-stored e-mail.
7. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008). A federal appeals court recently interpreted the Stored Communications Act in the context of text messaging. The case involved a cell phone service provider that released to the city the content of text messages sent by city employees who had been provided with a cell phone that was paid for by the city. The court found that such a release of the content of text messages violated the Stored Communications Act. Notably, the court found that individuals have a reasonable expectation of privacy regarding text messages that are stored on a service provider's network, and reasonably expected that the messages would not be reviewed without the consent of the sender or recipient.

C. Computer Crimes Act, Wis. Stat. § 943.70(2).

Willful, knowing, and unauthorized offenses against computer data and programs, including copying, modifying, destroying, taking possession of, accessing, or disclosing restricted access codes to unauthorized persons, of data, computer programs or supporting documentation is a crime.

D. Unlawful Use of Computerized Communication Systems, Wis. Stat. § 947.0125.

Intentional conduct consisting of frightening, intimidating, threatening, abusive, or harassing messages sent to a person on an electronic mail or other computerized communication system with the threat to inflict injury or physical harm to any person or property is a crime.

IV. Current Issues Relating to Cell Phone Use in Schools.

A. “Sexting.”

1. “Sexting,” according to Wikipedia, “is the act of sending sexually explicit messages or photos electronically, primarily between cell phones.” Recent examples in the news have included teenage girls sending racy photos of themselves to their teenage boyfriends, girls taking semi-nude photos of each other and sending them to others at school, and teenage boys being criminally charged for being in receipt of such photos. *See, e.g.,* Martha Irvine, *Porn charges for 'sexting' stir debate*, Associated Press (Feb. 4, 2009); *Castalia police look into complaint of nude photos sent by cell phone*, Sandusky Register (Mar. 20, 2009).
2. Sexting among students has become a disturbing and problematic new issue that school officials are more frequently being forced to address.
3. In states across the country, students are facing criminal charges of child pornography and/or sexual exploitation of a minor as a result of being found with such images on their cell phones for any length of time longer than it takes to delete the image.
4. Wisconsin’s mandatory child abuse reporting laws may require reporting to the appropriate county authorities any discovered incidents of “sexting” among minor students.

5. School officials must take extreme care in the manner in which they respond to incidents of “sexting” that are discovered in the school. School officials should *not* copy such images onto school computers for preservation as evidence, but instead should work with local law enforcement if they desire to initiate a referral to social services or for criminal prosecution. In one case, an assistant principal at Freedom High School in Loudon County, Virginia, was criminally prosecuted for possession of child pornography after he was assigned the task of investigating rumors of sexting at his Virginia high school. When he found such an image on a male student’s phone, the principal instructed the vice principal to preserve a copy on an office computer, which he did by first sending the photo to his own cell phone, and then copying to the computer. Although the judge ultimately dismissed the charges (after a year and \$150,000 in legal fees), the case stands as a stark warning to school officials (and even to students) of the risks of possessing such “sexting” images. *See, e.g., Ting-Yi Oei, My Students. My Cellphone. My Ordeal, The Washington Post (April 19, 2009).*
6. School boards may wish to consider adopting a policy, or adding language in the student handbook, that explicitly addresses such inappropriate use of cell phones. Sample policy language is as follows:

“The taking, disseminating, transferring, or sharing of obscene, pornographic, lewd, or otherwise illegal images or photographs, whether by electronic data transfer or otherwise (commonly called texting, sexting, emailing, etc.) may constitute a crime under state and/or federal law. Any person taking, disseminating, transferring, or sharing obscene, pornographic, lewd, or otherwise illegal images or photographs will be reported to law enforcement and/or other appropriate state or federal agencies, which may result in arrest, criminal prosecution, and lifetime inclusion on sexual offender registries.”

B. Cell Phone Video and YouTube.

1. Another recent development among student cell phone users is the attempt by students to use their cell phone cameras (many of which have video capabilities) to secretly capture teachers in compromising or embarrassing situations, with the goal of posting the content on YouTube.

2. Examples in the media have a teacher angered that a student's cell phone rang in class taking and smashing the student's phone, a sex ed teacher attempting to use humor to demonstrate the dangers of unsafe sex, and included a student capturing on video a band teacher jokingly pretending to sleep in class, a cheerleading coach doing a cheer in an effort to excite her students for Spirit Week that some viewed as inappropriate or sexually suggestive, and an angry teacher forcing a child to stand during the National Anthem by yanking the student's chair out from under him. *See, e.g.,* Lisa Grace Lednicer, *Sex ed teacher tries humor; student posts video on YouTube*, The Oregonian (Feb. 12, 2009); Kellie Hayden, *YouTube, cell phones, and teachers*, Suite101.com (Sep. 27, 2008).
3. Teachers (especially substitute teachers, who may be easy targets), coaches, and administrators should be vigilant at all times about student cell phone use at school, and should immediately enforce board policy and take action accordingly when students are discovered to be using their cell phones at inappropriate times, or for inappropriate purposes.

C. Cell Phones and Cyber Bullying.

1. Cyber bullying, which has become increasingly prevalent among students via e-mil and websites such as Facebook, also may occur via cell phone, when students send harassing or threatening text messages or e-mails to another from their cell phones.
2. In Wisconsin, certain such activities may be criminal under Wis. Stat. § 947.0125. The following activities, among others, may constitute criminal activity under the law:
 - a. Sending a message to a person on an electronic mail or other computerized communication system that threatens to inflict injury or physical harm to any person or a person's property, with intent to frighten, intimidate, threaten, abuse or harass another person.
 - b. Sending a message to another person on an electronic mail or other computerized communication system that uses obscene, lewd or profane language or suggests any lewd or lascivious act, with intent to frighten, intimidate, threaten, abuse, harass, annoy, or offend another person.

- c. Sending a message to another person on an electronic mail or other computerized communication system while intentionally preventing or attempting to prevent the disclosure of one's own identity, with intent to frighten, intimidate, threaten, abuse or harass another person.
 - d. Sending repeated messages on an electronic mail or other computerized communication system, with intent solely to harass another person.
3. School boards may wish to consider adopting a policy or otherwise notifying students of the potential for criminal prosecution related to improper cell phone use.

V. Regulating Electronic Communications Over District Computers.

A. Employee Acceptable Use Policies: Developing an Acceptable Use Policy.

1. *Written Agreements.* Acceptable Use Policies, or "AUPs," often take the form of written agreements between employers and employees, and, at a minimum, set forth permissible uses of the Internet and e-mail.
2. Reasons for implementing an AUP
 - a. To address/prevent lost productivity.
 - b. To provide a shield against liability.
 - c. To address technological and budgetary concerns.
 - d. To provide uniformity and fairness. All employees' expectations of privacy are equitably limited by AUPs. Also, discipline for inappropriate use can be more readily justified and evenly applied.

B. Non-Exhaustive Checklist of Elements for an AUP.

1. *Purpose.* A purpose statement will often provide that the agreement is intended to identify the appropriate use of e-mail and the Internet, establish ownership of information, define limits of personal privacy, and state specific prohibitions. It should include a statement that the computers and their software are educational tools owned by the district.

2. *Privacy of Communications.* It is important to state clearly that Internet and e-mail communications are not private. An employer may also warn employees that e-mail is significantly less secure than other traditional forms of communications because messages can be printed and backed-up on disk.
3. *Monitoring.* If the employer wants to monitor such activities, it is advisable to include a statement in an AUP that the employer reserves the right to monitor and access an employee's Internet activities and e-mail account at all times and without notice.
4. *Access and Identification of Authorized Users.* It is worthwhile to identify authorized users, define access limitations, require use of passwords and ensure that employees shut down their terminals at the end of each day to help control access.
5. *Unacceptable Use Computer Systems.* When drafting an AUP, employers must determine what activities to prohibit, e.g., use for personal business, soliciting or lobbying for political or religious causes, use for unethical or disruptive activities, sending junk mail or chain letters for becoming a member of non-work related listserves.
6. *Nondiscrimination and Sexual Harassment.* An AUP should contain a statement which is consistent with the employer's general policy on sexual harassment and discrimination. For example, a statement may provide that neither e-mail nor the Internet should be used to send jokes or other comments that may be discriminatory, harassing or offensive to others or material that defames an individual, company or business, or discloses personal information without authorization. Penalties may include criminal sanctions under Wis. Stat. § 947.0125 for threatening, abusive, or intimidating messages sent to another person through e-mail or other computerized communication system. Employers should also advise that, while monitoring may occur, it is not possible to check and evaluate every communication and, therefore, employee reporting is essential to address harassment.

Provide notification, consistent with the employer's policy on sexual harassment, that employees are not to access pornographic sites or display images of a sexual nature on their monitors. Penalties for such use may include criminal sanctions under 18 U.S.C. § 2252 and Wis. Stat. §§ 948.11, 948.12.

7. *Restrictions on Copying and Distribution of Electronic Messages.* An AUP may define the duration and method of retention for all of the employer's electronic records. It may include a statement of copyright restrictions, including the illegal copying or publication of material in digital format. Penalties may include personal liability when employees violate copyright laws.
8. *Supervisory Responsibility and Enforcement.* An AUP may identify personnel who are responsible for enforcement and administration of the AUP. An enforcement section may describe procedures for identifying and investigating incidents of unauthorized system use. This section might include:
 - a. Identification of the person(s) in the organization that is to be notified upon discovery of an incident that violates the provisions of an AUP.
 - b. Instructions regarding how the person to be notified of such incidents should be apprised of the situation.
 - c. Instructions advising individuals who discover evidence of unauthorized use to immediately print and preserve a hard-copy version of monitor screens that substantiate the incident.
9. *Penalties.* An AUP should contain a statement regarding the penalties for violating the agreement including, but not limited to, termination, revocation, suspension, and potential criminal sanctions. The AUP may include a statement that user access may be terminated if identified as repeat offender.
10. *Consent Form.* A consent form should accompany the policy, whereby an employee acknowledges and agrees to the provisions of the AUP. The form should state that the employee is consenting to the monitoring and access of both their e-mail and Internet usage.
11. *Copy of Agreement.* A copy of the AUP should be given to all employees in hard copy, and, generally, a signed acknowledgement should be secured from the employee.

C. Student AUPs.

1. In addition to the provisions contained in the employee AUP, a student AUP should also include the following elements:
 - a. A statement that Internet usage is a privilege, not a right.

- b. A statement regarding a pupil's potential exposure to obscene or objectionable material.
 - c. A statement regarding the penalties for failure to abide by the policy.
 - d. Parental authorization for a pupil's use of the Internet, including a statement and signature reflecting the consent to the monitoring and interception of the pupil's Internet and e-mail activities.
 - e. Parental notification and verifiable consent if the school operates a website or online service and collects or maintains personal information from or about children under the age of 13.
2. The statement on penalties for failure to abide by the policy should be, to the extent possible, consistent with existing policies for misbehavior and the use of print media. Possible penalties include:
- a. Revocation of Internet or e-mail privileges.
 - b. Student discipline including suspension or expulsion depending on the behavior in question.
 - c. Criminal sanctions under Wis. Stat. § 947.0125 for threatening, abusive, or intimidating messages sent to another person through e-mail or other computerized communication system.
 - d. Criminal sanctions under Wis. Stat. § 943.70 for offenses against computer data and programs, including copying, modifying, accessing, destroying, or disclosing restricted access codes to unauthorized persons, of data, computer programs, or supporting documentation.

VI. Electronic Communications and the Public Records Law.

A. Public Policy of the Wisconsin Public Records Law.

1. In recognition of the fact that a representative government is dependent upon an informed electorate, the Legislature has declared that the public policy for the Public Records Law is that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Wis. Stat. § 19.31.
2. The Legislature has also declared that providing persons with such information is an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. Wis. Stat. § 19.31.
3. The Public Records Law shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. Wis. Stat. § 19.31.
4. The denial of public access is generally contrary to the public interest, and only in an exceptional case, may access be denied. Wis. Stat. § 19.31.

B. Definition of Record.

1. A record is “[a]ny material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.” Wis. Stat. § 19.32(2). A record “includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks.” *Id.*
2. A record does not include:
 - a. Drafts, notes, preliminary computations and like materials prepared for the originator’s personal use or prepared by the originator in the name of a person for whom the originator is working. Wis. Stat. § 19.32(2).
 - b. Materials which are purely the personal property of the custodian and have no relation to his or her office. Wis. Stat. § 19.32(2).

C. Restrictions On Access To Records.

1. The Public Records Law limits access to certain information under various state and federal statutory exemptions. Statutory exemptions are to be narrowly construed. Further, redaction of the record may be required if a record contains information that is subject to disclosure and information that is not subject to disclosure. Wis. Stat. § 19.36(6).
2. The balancing test may limit access to public records. The balancing test examines the public interest in maintaining the confidentiality of the record against the public interest in disclosing the record. Evidence of such an overriding interest may be found in state or federal statutory law, case law, and other similar sources of the public policy.

D. Private Email Accounts and Public Records Law.

1. An e-mail regarding school district business that is created or kept by a school district employee within a private e-mail account, rather than a school district e-mail account, probably does not change the conclusion that such e-mail is a record.
2. The statutory definition only looks at whether the e-mail is created or kept by an authority and whether it relates to the affairs of the school district. In an informal opinion, the Wisconsin Attorney General's office concluded that the requirement to maintain e-mail applies "to home computers as well as office computers, if the topic of the email is the business of the governmental unit, rather than personal communications." *See* Wisconsin Attorney General Informal Opinion (March 12, 2004); *see also* Wisconsin Attorney General Informal Opinion, (Sept. 25, 2006).

E. Record Retention and Email.

1. Wisconsin Statute § 19.21(6) sets forth the general requirement for record retention for school districts. It states:

A school district may provide for the destruction of obsolete school records. Prior to any such destruction, at least 60 days' notice in writing of such destruction shall be given to the historical society, which shall preserve any records it determines to be of historical interest. The historical society may, upon application, waive the notice. The period of time a school district record shall be kept before destruction shall be

not less than 7 years, unless a shorter period is fixed by the public records board under s. 16.61(3)(e) and except as provided under sub. (7). This section does not apply to pupil records under s. 118.125.

2. The Records Retention Schedule for School Districts (RRSSD) only addresses retention periods for hard copy (paper) and microfilm records. The Wisconsin Public Records Board has been considering adding email to the retention schedule for some time, but, to date, has not finalized any such schedule.
3. School boards can adopt policies for shorter retention periods for records, but must do so with approval from the Public Records Board. However, the Public Records Board does not approve blanket retention periods for email. The best practice is to retain emails related to school district business for seven years.
4. School board members and school district administration should formulate procedures to ensure that records are properly managed and preserved. Presently, it does not appear that a public record that originates in electronic form must be maintained in electronic form. However, it is possible that records created in electronic form may contain unique information in their original format that would be lost by transferring the record to another format. Therefore, districts might consider developing policies regarding what type of computerized documents may be transferred to, and retained in, an alternative format.
5. The technological limitations of a given district may affect the district's decisions regarding the format in which records will be retained. Districts that choose to maintain documents solely in electronic format should carefully review the requirements of Wisconsin's Administrative Code, Chapter Adm. 12, which apply exclusively to records retained solely in electronic form, and determine whether the district has the technological and managerial capacity to meet these requirements.