

**RIGHT-TO-KNOW ACT - PERSONNEL RECORD
(BULLARD-PLAWECKI RIGHT-TO-KNOW ACT - MCLA 423.501 ET SEQ.)**

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Right of Employees to Review Personnel Record

The Bullard-Plawecki, Employee Right-to-Know Act (MCLA 423.501-.512), gives employees the right to periodically review their personnel record, prescribes the conditions under which a review of a personnel record shall take place, and limits an employer's right to retain and disclose certain personnel information.

Definition of Personnel Record

NOTE: A personnel record is not limited to a specific file - it is defined by law. In *Beauchamp v Great West Life Assur. Co.*, 918 F. Supp. 1091 (E.D. Mich 1996), the court ruled that material kept in the employer's corporate offices in another state was part of the employee's personnel record.

A personnel record is any record kept by an employer, including an agent of an employer, which identifies an employee and which is or has been used or may affect an employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action. This includes handwritten notes taken during an employment interview, *Michigan Professional Employee Society v Department of Natural Resources*, 192 Mich App 472; NW2d 460 (1992).

A personnel record does not include the following:

1. Employee references supplied to an employer if the identity of the person making the reference would be disclosed. This includes confidential peer evaluations and chairpersonship ballots unless the authors' names may be deleted and the contents recorded so as to protect the confidentiality of the identity of the author. See *Muskovitz v Lubbers*, 182 Mich App 489; 452 NW2d 854 (1990). This also includes oral references transcribed into handwritten notes by an interviewing panel's chairperson. See *Michigan Professional Employees Society v Department of Natural Resources*, 192 Mich App 472; 482 NW2d 460 (1992).

2. Materials related to the employer's staff planning with respect to more than one employee, regarding such things as salary increases, management bonus plans, promotions, and job assignments. This includes salary increase recommendations which refer to more than one employee. See *Muskovitz v Lubbers*, 182 Mich App 489; 452 NW2d 854 (1990). Such material remains exempt from disclosure even if information regarding employees other than the employee seeking disclosure could be deleted from the requested documents. See *Michigan Professional Employee Society v Department of Natural Resources*, 192 Mich App 472; 482 NW2d 460 (1992).
3. Medical reports and records made or obtained by the employer if the records or reports are available to the employee from the doctor or medical facility involved.
4. Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.
5. Information which is kept separately from other records which relates to an investigation of alleged criminal activity by an employee involving loss or damage to the employer's property.
6. Records of grievance investigations which are kept separately and are not used for purposes of determining an employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action.
7. Records maintained by an educational institution which are directly related to a student and are considered to be education records within the meaning of Title V of the Family Educational Rights and Privacy Act of 1974, 20 USC §1232(g).
8. Records kept by an executive, administrative, or professional employee that are kept in the sole possession of the maker of the record and are not accessible to or shared with other persons.

Procedure for Making Request to Review Personnel Record

Employees who desire to review their personnel file or record may do so by making a written request to their employer. The written request must describe the personnel record the employee desires to review. To insure that the employee is permitted to

review his/her complete personnel record (including all records regardless of whether or not they are maintained in the employee's formal personnel file), a written request should be phrased broadly. A sample request form is attached as Appendix "A." A follow up request form to be used in the event the employee believes that not all personnel records have been furnished is attached as Appendix "B."

Time and Location of Review of Personnel Record

The review of the personnel record is to take place at a location reasonably near the employee's place of employment and during normal business hours. The public school employer may remove documents which are excluded from the definition of "personnel record," pursuant to MCLA 423.501(c). If a review during normal business hours would require an employee to take time off from work with that employer, then the employer must provide some other reasonable time for the review. The employer may allow the review to take place at another time or location which would be more convenient to the employee.

If employees demonstrate that they are unable to review their personnel record at school offices, then the employer, upon the employees' written request, shall mail a copy of the requested record to the employees.

Frequency of Personnel Record Reviews

Upon written request to their employer, employees shall have the right to periodically review their personnel record at reasonable intervals, generally not more than two times in a calendar year, or more frequently if provided by collective bargaining agreement.

Handling the Problem of Multiple Personnel Files or Private Administrative Files

Often, public school employers maintain multiple employee personnel files, such as at the central administration level and the school building level. The Right-to-Know Act does not prohibit the maintenance of dual or multiple personnel files. *Beauchamp v Great West Life Assur. Co.*, 918 F. Supp. 1091 (E.D. Mich 1996). Further, these files may or may not contain duplicate personnel information. However, public school employees have the right to review all of their personnel record regardless of the physical location of such documents.

It is also common for building principals to maintain their own personal notes/files regarding employees assigned to their school building. Records kept by administrators in their sole possession and which are not accessible to or shared with other persons

are not considered personnel records under the Right-to-Know Act. If, however, administrators desire to use a personal note or other document about an employee for employment-related reasons, they must make it a part of an employee's personnel record within six months of the date the occurrence or fact described in the document becomes known.

The sample request to review personnel record attached as Appendices "A," and "B," is intended to compel an employer to reveal all personnel records, regardless of where they are housed or who maintains them. It does not compel disclosure of private notes, such as those maintained by an administrator, which are not utilized as a personnel record as defined under the Right-to-Know Act.

Right to Copy Personnel Record

After reviewing their personnel record, employees may obtain a copy of the record or a part of the record from the employer. There is nothing in the Act which requires an employer to give possession of personnel records to employees for the purpose of allowing the employees to make their own copy of the personnel records.

The employer may charge a fee for providing a copy of information contained in the personnel record to the employee. The fee should be limited to the actual incremental cost of duplicating the information.

Removal or Correction of Information Upon Mutual Agreement Between the Employer and Employee

If there is a disagreement about information contained in a personnel record, removal or correction of that information may be mutually agreed upon by the employer and the employee.

Submission by an Employee of Written Rebuttal to Disputed Personnel Information

Where the employer and employee cannot mutually resolve a dispute concerning a personnel record, the employee may submit a written statement explaining the employee's position or otherwise rebutting information contained in the disputed record. This written statement may be no more than five pages in length on 8 1/2 inch by 11 inch paper. The employer must include it as a part of the employee's personnel record as long as the record it rebuts remains a part of the employee's personnel record. It also must be included with the record it rebuts when that record is disclosed to third parties.

Expungement of False Personnel Information

If either the employer or employee knowingly places false information in a personnel record, the other party may seek to have such information expunged through legal action.

Disclosure of Disciplinary Reports to Third Parties

Conditions of Disclosure by Employer of Disciplinary Records to Third Parties

An employer is required to review a personnel record before releasing information to a third party and must delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than four years old except when the release is ordered in a legal action or arbitration.

An argument may be asserted that negative evaluations and disciplinary reports are generally not discloseable by the public school employer to third parties due to a privacy exemption. In this regard, see the section in this manual entitled Michigan Freedom of Information Act, Article 9, Section D.

An employer or former employer may not divulge disciplinary reports to a third party who is not a part of the employer's organization or the employee's organization without written notice to the employee. If, however, the reports are released in response to a subpoena, notice is not required. *Bowers v Reutter*, 951 F. Supp. 666 (E.D. Mich 1997). Written notice must be sent by first class mail to the employee's last known address on or before the day the information is divulged.

Exceptions to the Pre-Disclosure Written Notice Requirement

An employer is not required to provide an employee with written notice prior to disclosure of disciplinary reports, letters of reprimand, or other disciplinary action if the employee has specifically waived written notice as part of a signed employment application with another employer, the disclosure is ordered in a legal action or arbitration, or information is required by a government agency as the result of a claim or complaint by an employee.

Use of Personnel Information in Judicial or Quasi-Judicial Proceedings

Use of Information Contained in the Personnel Record in Judicial or Quasi-Judicial Proceedings

There is nothing in the Right-to-Know Act which would prohibit an employer from utilizing information contained in a personnel record in a judicial or quasi-judicial proceeding.

Use of Information Not Contained in the Personnel Record in Judicial Proceedings

Generally, personnel information which was not included in the personnel record of an employee as required by the Right-to-Know Act cannot be used by an employer in a judicial or quasi-judicial proceeding. The Act provides an exception for personnel information which, in the opinion of a judge in a judicial or quasi-judicial proceeding, was not intentionally excluded from the personnel record. An employer may introduce unintentionally excluded information either if the employee agrees or if the employee has been given a reasonable time to review the information.

Thus, when faced with an attempt by an employer to introduce personnel documents which have not previously been provided to a public school employee or local association after a request has been made to review the personnel record, the association should assert that the exclusion of the documents was intentional. This may be proven through introduction of the association's (employee's) initial request and any follow up request for review of the personnel record, as well as any specific written or oral denial by the public school employer.

Any information which should have been included in the personnel record but was excluded either intentionally or unintentionally by the employer must be used as a part of the personnel record at the request of the public school employee.

Records Regarding Non-Employment Activities of Employees

Retaining Records of Employees' Non-employment Activities

An employer is prohibited from gathering or keeping a record of an employee's associations, political activities, publications, or communications of non-employment activities, unless the information is submitted by or is authorized to be kept or gathered by the employee to the employer. This prohibition does not apply to activities which occur on the employer's premises or during the employee's working hours with the

employer which interfere with the performance of the employee's duties or duties of other employees. A record which is permitted to be kept by the employer regarding the foregoing must be made a part of the employee's personnel record.

Records Regarding an Investigation of Criminal Activity Resulting in Loss or Damage to Employer Property or Disruption of Employer Operations

Maintenance of Investigatory Information

An employer may maintain a separate file of information relating to an investigation of alleged criminal activity by an employee where the employer has reason to believe that the employee is engaged in criminal activity which may result in loss or damage to the employer's property or disruption to the operation of the education institution.

Disposition of Investigatory Information

Upon completion of an investigation of criminal activity or after two years of such an investigation, whichever comes first, the public school employer must notify the employee under investigation that an investigation was or is being conducted of suspected criminal activity. If disciplinary action is not taken, the investigative file and all copies of material in that file must be destroyed upon completion of the investigation.

Additional Information Regarding Right-To-Know

Right Of Access To Personnel Record Under Other Laws

The rights of public school employees to review personnel records and obtain copies of them under the Right-to-Know Act are in addition to any rights they may have, such as pursuant to the Freedom of Information Act, to obtain records maintained by their employers.

Penalties For Violations Of The Bullard-Plawecki Right-To-Know Act

If a public school employer violates the Right-to-Know Act, an action may be commenced in circuit court to compel compliance with the Act. If the employee prevails in action to enforce the Act, the employee may be entitled to actual damages plus costs. In addition, \$200.00 and reasonable attorneys' fees may be obtained where a willful and knowing violation of the Act is proven.

Negotiating Supplemental Rights

Local associations may wish to consider negotiating a right to access which supplements rights under the Bullard-Plawecki Employee Right-to-Know Act clause. The following is a sample of such a provision:

The _____ [public school employer] _____ agrees to maintain, on a current basis, all personnel records, as defined by law, in an employee's personnel file maintained at the [central administration office]. Public school employees may review their complete personnel record _____ [number] _____ times annually and obtain copies of their record or any part of it at no cost to the employee.

The employer shall not maintain, utilize or publish any document or record which is not contained in an employee's personnel record at the central administration office in connection with any decision regarding an employee, in any judicial or quasi-judicial proceeding, including tenure and arbitration proceedings, or in communicating with any third party.

Recognizing employees' rights to privacy and confidentiality, the employer agrees not to publish or otherwise disclose to any third party other than in connection with a judicial or quasi-judicial proceeding, absent the express written consent or waiver of the employee, any negative personnel record including but not limited to counseling memoranda, investigatory notes, disciplinary letters or documents, or evaluations.

Appendix A Sample Letter

Date

Dear _____:

I, _____ (name) _____, hereby request to review all personnel records of whatsoever nature as defined by MCLA 423.501(c) (Bullard-Plawecki Right-to-Know Act), including but not limited to evaluations, qualifications, disciplinary or counseling memoranda, investigatory notes or interviews, incident memoranda, supervisors'/principals' notes, recommendations, references, letters of commendation or a complaint, and the like which identify me by name, number, or substance, maintained by or in the possession of _____ (public school employer) _____ and any of its board members, officers, administrators, supervisors, building principals, employees, or agents, whether or not such personnel records are maintained in my personnel file or some alternate location.

I further request that you identify by title, date, author, and substance any documents you are excluding from my review pursuant to MCLA 423.501(c).

I shall contact you to confirm a mutually convenient time, date, and location for the review. I reserve the right to request copies of my personnel record or any part of it.

This request is to be considered continuing, thus entitling me to review any personnel records which come into existence on or after the date of this letter.

Appendix B Sample Letter

Date

Dear _____:

By correspondence dated _____ (date) _____, I advised you that I was exercising my rights under the Bullard-Plawecki Right-to-Know Act to review my personnel record as defined by MCLA 423.501(c). On _____ (date) _____, I had an opportunity to review certain personnel records you provided me. However, I note that I was not provided with the following personnel records for review and possible duplication pursuant to my request:

(list)

The foregoing documents are clearly "personnel records" within the meaning of the Bullard-Plawecki Right-to-Know Act and your refusal to allow me the right to review such documents is a violation of the Act. The Act provides that when an employer commits a willful and knowing violation of the Act, the employer shall be liable for \$200.00, plus costs, attorneys' fees, and actual damages suffered by the employee seeking to enforce the Act.

In the hope that you will afford me my statutory rights, short of judicial enforcement, I again request pursuant to the Act to review the aforescribed personnel records.

My request is made not only pursuant to the Bullard-Plawecki Right-to-Know Act, but the Freedom of Information Act, specifically MCLA 15.231 et seq. I will expect compliance with my request within five (5) business days.