The Firehouse Lawyer

Volume 19, Number 12E

December 2021 Extra

Be sure to visit firehouselawyer.com to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

The law firm of Quinn and Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-590-6628

Email Joe at joequinn@firehouselawyer.com
Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at: firehouselawyer.com

Inside this Issue

1. Important Information Re WA CARES Fund
2. When is an Employee's Private Information Exempt from Public Disclosure?

Important Information Regarding the Washington CARES Fund

According to the Washington State Employment Security Department (ESD), "Per direction from [Governor Jay Inslee], ESD will not collect [long-term care] premiums from employers until April 2022 or until the Legislature gives further direction…However, the existing law still directs employers to begin collecting [long -term care] premiums from their employees beginning Jan. 1. Each employer will need to decide whether they will implement the law as it stands or await legislative action."[1] We have advised our clients to wait until you receive guidance from the Washington Legislature prior to collecting premiums. And of course, all persons subject to collection of the WA Cares Fund premiums should be informed that your agency may need to retroactively collect the premiums pursuant to legislative direction. Consult with your agency's attorney to address this new wrinkle.

What Files are "Maintained For" a Public Employee?

The Washington Court of Appeals, Division One, in *Baxter v. Western Washington University,*[2] recently decided a Public Records Act (PRA) case of significance. *Baxter* dealt with an exemption that applies to "[P]ersonal information in any files maintained for students in public schools" under RCW 42.56.230 (1).

[1] https://wacaresfund.wa.gov/employers/

[2] https://www.courts.wa.gov/opinions/pdf/824180.pdf

Although this exemption may not be relied on by a public agency that is not a "public school,"[3] we find this case to be instructive of what it means for a file to be "maintained for" a public employee. That becomes relevant in the context of claiming an exemption under RCW 42.56.230 (3). That exemption permits non-disclosure of "[P]ersonal information in files *maintained for* employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy." (emphasis added).

Importantly, the word "privacy" does not exist under the "public school" exemption above; that exemption is "categorical" in that sense, because the public school student would *not* have to show that disclosure would violate their right to "privacy" under the PRA. Consequently, we focus, again, on what constitutes a file "maintained for" a public employee, and save the privacy discussion for another day.[4]

Again, the phrase "maintained for" exists in RCW 42.56.230 (3), cited above, which is often cited by our clients to prevent disclosure of sensitive employee information—such as information pertaining to vaccination status, on-duty injuries or performance concerns.[5] Therefore, *Baxter* is important in the analysis of whether certain objectively private information of public employees falls within RCW 42.56.230 (3), even though the case did not discuss this statute.

The *Baxter* court found that the final disciplinary results of an investigation into a student's misconduct constituted records that were "maintained for" a student because those results "would logically and reasonably be located in a student's permanent file." The court distinguished final disciplinary results from a video recording of two students engaged in misconduct that would eventually be used against them. The court found that the videotape would *not* be "maintained for" the students even though the videotape might *eventually* be used to establish final disciplinary results.

In other words, to the *Baxter* court, "maintained for" means that the record must be of the kind that would be included in an employee's personnel file, such as disciplinary records, social security numbers, performance evaluations, psychological or physical assessments and test results, and other records of a similar nature. The logical conclusion then, to the *Baxter* court, is that the investigative report

[3] The central issue in *Baxter,* which we will not discuss here, is whether a public *university* is a "public school," which the *Baxter* court found it was *not*.

[4] We have written extensively about the issue of "privacy" under the PRA here:

https://www.firehouselawyer.com/Newsletters/v13n04apr2015.pdf

https://www.firehouselawyer.com/Newsletters/JuneJuly2020FINAL.pdf

https://www.firehouselawyer.com/Newsletters/November2019FINAL.pdf

[5] Of course, certain employee information may constitute "health care information" under RCW 70.02 which may be disclosable by a fire department which is a "health care provider," as we have discussed before:

https://www.firehouselawyer.com/Newsletters/MarchApril2019.pdf

https://www.firehouselawyer.com/Newsletters/March2016.pdf

leading up to discipline would not fall within RCW 42.56.230 (3) even if that report was used to establish the facts leading to potential discipline.

But what about emails that contain sensitive information of an employee? Some might argue that an email pertaining to whether an employee has contracted COVID or is applying for FMLA leave is *not* information that would be located in that employee's personnel file. In the alternative: Although it may be true that such emails would not be *immediately* located in the employee's personnel file, such emails are surely relevant to return-to-work dates, fitness for duty assessments and records of leave status, both of which would surely end up in a personnel file.

Consequently, we would argue that records collected by an employer for purposes of finalizing records, that will soon be included in some fashion in an employee's personnel file, are files "maintained for" a public employee because those files are truly being maintained for the benefit of the employee. Importantly, the *Baxter* court found that the "*compilation* of disciplinary results" (emphasis added) would be "maintained for" the students. Logically then, the compilation of emails that are intended to establish a record of leave requests, performance issues etc. would also be "maintained for" the employee.

But again, that is not the only inquiry under RCW 42.56.230 (3): The next question is whether disclosure would violate that employee's right to privacy, which again, we have discussed before. And of course, with respect to private files that are *not* "maintained for" a public employee, we must also consider Article I Section 7 of the Washington Constitution, which states as follows: "No person may be disturbed in his private affairs, or his home invaded, without authority of law." That constitutional provision—along with the Fourth Amendment—surely becomes relevant in the context of records requests calling for the disclosure of objectively private employee information.

Importantly, the *Baxter* court also concluded that a *regulation*—such as a provision of the Washington Administrative Code—cannot be relied on as an "other statute" that would create an exemption when "there is no corresponding and related statutory provision" underlying that regulation. So, to be clear, pursuant to *Baxter,* an agency could not rely on a WAC or a CFR provision alone to argue that a record is exempt.

Surprisingly, the Washington Courts have not issued a tremendous amount of guidance[6] regarding what files are "maintained for" a public employee, and therefore we anticipate issuing further articles on this issue.

And most importantly: Happy New Year from the Firehouse Lawyer!

DISCLAIMER. The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Quinn & Quinn, P.S. and the reader. Those needing legal advice are urged to contact an attorney licensed to practice in their jurisdiction of residence.

[6] *See Tacoma Public Library v. Woessner*, 951 P.2d 357 (1998) (Washington Court of Appeals finding that "the focus is whether the requested file contains personal information that is normally maintained for the benefit of employees.")