BEFORE THE ATTORNEY GENERAL OF THE STATE OF NEBRASKA

OMAHA WORLD HERALD, Petitioner, v. CITY OF OMAHA and THE HONORABLE MAYOR JEAN STOTHERT, Respondents.	)	**PETITION FOR DETERMINATION BY ATTORNEY GENERAL**

Petitioner, the Omaha World-Herald Company, Inc. (the "OWH"), respectfully submits this Petition pursuant to Neb. Rev. Stat. § 84-712.03 (2013 Supp.) requesting that the Attorney General for the State of Nebraska determine whether text messages relating to City of Omaha ("City") business on the personal mobile devices of The Honorable Mayor Stothert, City Council members, City Department heads, and other employees of the City—regardless of whether the personal mobile device is paid for in whole or in part by the City—are public records which must be preserved and produced pursuant to Nebraska's public records laws. On April 13, 2015, the OWH, through reporter Roseann Moring, submitted a written public records request for such text messages between March 23, 2015, and April 15, 2015, but the City and Mayor Stothert have refused to disclose the text messages.[1] In further support of this motion, the OWH states and shows as follows:

Parties

1. Petitioner, the OWH, is a newspaper of general circulation in the city of Omaha and throughout Nebraska.

---

[1] Despite her refusal to disclose her text messages or consider them public records subject to disclosure, Mayor Stothert nonetheless allowed the OWH to view her text messages for a single day—but not for a date within the OWH's public records request—and yet despite knowing the controversy her refusal to regard the text messages as public records, Mayor Stothert continues to delete such text messages at the end of every day.

2. Roseann Moring is a reporter for the OWH.

3. Respondent City of Omaha is a city of the metropolitan class in Douglas County, Nebraska.

4. Respondent Mayor Jean Stothert, was elected to the office of Mayor of Omaha in May 2013.

The OWH's Public Records Request and Mayor Stothert's Denial

5. On April 13, 2015, Ms. Moring sent an email to Paul Kratz, City Attorney for Omaha, requesting "to review or obtain copies of all text message correspondence between Mayor Jean Stothert and any Omaha City Council member or city of Omaha department head between March 23, 2015, and today [April 13, 2015]." (Exhibit 1).

6. On April 21, 2015, Paul Kratz responded to Ms. Moring by letter stating that while Mayor Stothert voluntarily showed the OWH her text messages for one particular day, the City of Omaha was denying the public records request on the basis that the text messages did not constitute public records under Neb. Rev. Stat. § 84-712.01(1). (Ex. 2). Mr. Kratz' letter relied heavily on *Everston v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009), to reason that text messages sent through a personal mobile device and stored, however briefly, by a private, non-governmental cellular provider such as Verizon, Sprint, and AT&T, do not constitute public records because the same are not "of or belonging to" the City of Omaha. *Id.* at 1-2. Mr. Kratz' letter also relied on the Stored Wire and Electronic Communications and Transactions Act, 18 U.S.C. § 2701 *et seq.* (the "Stored Wire Act"), which the City of Omaha argued prohibits the disclosure of the contents of communications or records in the possession of telecommunication providers to the public unless a specific legislative exception existed. *Id.* at 3-4.

7. However, the City's reliance on *Everston* and on the Stored Wire Act are misplaced because *Everston* explained that the definition of what constituted a public record was to be broadly defined and was "regardless of whether the public body takes possession [of the record]." *Everston*, 278 Neb. at 9, 767 N.W.2d at 759. *Everston* involved the public records request for the investigative report on racial profiling of Hispanics by police, conducted by a private investigator hired by the city. Everston interpreted and applied the definition of public records under Neb. Rev. Stat. § 84-712.01(1)—the very section relied upon by the City of Omaha here—and made several important findings that do not support the City of Omaha's position:

a. *Everston* held that the "[t]he reference to 'data' in the last sentence shows that the Legislature intended public records to include a public body's component information, not just its completed reports or documents." *Everston*, 278 Neb. at 9, 767 N.W.2d at 759.

b. *Everston* also noted that section 84-712.01(3) required courts to liberally construe the public records statutes for disclosure particularly when the records relate to a public body [such as the City of Omaha] expending funds. *Id.*

c. "Section 84-712.01 does <u>not</u> require a citizen to show that a public body has actual possession of a requested record. Construing the 'of or belonging to' language liberally, as we must, this broad definition includes any documents or records that a public body is entitled to possess—regardless of whether the pubic body takes possession. The public's rights of access should not depend on where the requested records are physically located." *Everston*, 278 Neb. at 9, 767 N.W.2d at 759-60 (emphasis added).

d. *Everston* expressly rejected the City of Kimball's argument that the "of or belonging to" language in section 84-712.01 means a public body must have ownership of, as distinguished from a right to obtain, materials in the hands of a private entity." *Everston*, 278 Neb. at 9, 767 N.W.2d at 759. In rejecting this argument, *Everston* explained that the city's "narrow reading of the statute would often allow a public body to shield records from public scrutiny. It could simply contract with a private party to perform one of its government functions without requiring production of any written materials." *Id.* *Everston* explained that section 84-712.01(1) "does not permit the City's nuanced dance around the public records statutes." *Everston*, 278 Neb. at 9, 767 N.W.2d at 759-60.

e. Based on the particular facts before it, *Everston* proceeded to adopt a functional equivalency test to analyze whether the investigator's reports were subject to disclosure. As part of that analysis, *Everston* explained that "[s]ection 84-712.01(3) does not permit public bodies to conceal public records by delegating their duties to a private party." *Everston*, 278 Neb. at 12, 767 N.W.2d at 761. The same would be true here. Because Mayor Stothert admits that she conducts business for the City of Omaha through text messages, including texts with City Council members and department heads, she must preserve and disclose those text messages as public records.

f. *Everston* concluded that the investigative reports at issue constituted a public record, but the same was exempted from disclosure because the exemption in section 84-712.05(5) for investigations applied. However, this exemption does not apply here, nor is it relied upon by the City of Omaha, with respect to Mayor Stothert's text

messages. The City's only basis for denial is its position that the text messages are not "or or belonging to" the City of Omaha. (Ex. 2 at 1).

8. The City of Omaha's reliance on the Stored Wire Act also fails to support its position in this case. The Stored Wire Act prohibits a person or entity providing an electronic communication service to the public from knowingly divulging the contents of an electronic communication stored by that service. 18 U.S.C. § 2702(a). However, there are many exceptions, including disclosure to (1) the addressee or intended recipient of the communication, or their agent; and (2) with the lawful consent of the originator or of the addressee or intended recipient of the communication, or their agent. 18 U.S.C. § 2702(b). In any event, the City of Omaha's reliance on the Stored Wired Act fails because it entirely ignores that every public record at issue is, quite literally, in Mayor Stothert's hands until she knowingly and intentionally deletes them from her cell phone. The records are also in the hands of the recipient of each text message until also deleted from the recipient's cell phone. Furthermore, there are various technological solutions to this issue including, but not limited to, the use of email, saving the texts, or transferring the texts to an email file, just to identify a few. Indeed, depending on the cell phone service and settings on Mayor Stothert's personal phone, her text messages can be and may be stored on "the cloud" and available to her almost immediately. Thus, it is clear that each and every text can be preserved and available to her--and therefore available in response to a public records request—until she chooses to delete them from her phone.

Text Messages are Public Records

9. Mayor Stothert and the City of Omaha admit—and certainly could never deny—that Mayor Stothert conducts business of the City of Omaha through text messages sent from and received by her personal cell phone. *See* Exs. 3-5. Mayor Stothert sends text messages to City

Council members about city issues, including during City Council meetings, and some of them send texts to her as well, also sometimes occurring during City Council meetings. Ex. 3. The texts she showed the OWH confirm this conduct. Ex. 3.

10. Mayor Stothert states that "[she has] nothing to hide" and that she is "committed to conducting government transparently" yet her position and conduct with respect to her text messages on City business are at odds with her statements. Ex. 3. She admits to conducting city business using text messages, yet she refuses to produce them, she rejects considering them public records, and she intentionally fails to preserve them.

11. Indeed, Mayor Stothert stated "I believe in transparent government organizations. We cannot pick and choose or make exception about public information when we are spending the taxpayer's money." Ex. 3. Yet Mayor Stothert attempts to downplay her texts by claiming she uses texts as a "convenience" and not to conduct "major city business" and that she considers texts to be more like a phone call than an email (the latter of which there is no dispute constitutes a public record). Exs. 3-5. However, there is no qualification in the definition of what constitutes a public record under section 84-712.01 that exempts records subjectively described as a mere "convenience" or not intended to be "major city business."[2] "[P]ublic records shall include **all** records and documents, **regardless of physical form**, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files." § 84-712.01(1)(emphasis added). Similarly, Mayor Stothert's characterization of her texts as more like a phone call than an email is inconsistent

[2] City Council members have stated that while texts are often used for routine matters and scheduling, texts have been used to discuss major issues too. Ex. 3.

with section 84-712.01. Unlike a phone call—but very much like an email—a text message generates a viewable record that exists in physical form and can be maintained until deleted. Furthermore, section 84-712.01 expressly states that the determination of what constitutes a public record does not rely on the physical form of the record at issue. Indeed, if texts were more like cell phone calls as Mayor Stothert suggests, she would not have been able to show the OWH her texts for a particular day as she did.

12. Similarly, the fact that Mayor Stothert's text messages do not travel through the City's email servers, and instead travel over the airwaves and through the cell phone company system, is not an excuse or argument that insulates them from qualifying as public records. The text messages could be—and should be preserved—while on the phones and in the hands of Mayor Stothert and the City Council members. Nebraska's Records Management Act governs the handling of public records and "shall apply to all state and local agencies…." Neb. Rev. Stat. § 84-1217. "Local agency means any agency of any county, city, village, township, district, authority, or another public corporation of political entity, whether existing under charger or general law…." § 84-1202(1). Notably, "[a]ll records made or received by or under the authority of or coming into the custody, control, or possession of state or local agencies in the course of their public duties are the property of the state or local agency concerned and shall not be mutilated, destroyed, transferred, removed, damaged, or otherwise disputes of, in whole or in part, except as provided by law." § 84-1213(1). Furthermore, there must be an implied duty inherent in the public records laws to preserve records so that citizens and other interested persons can inspect them as permitted. The public records laws would be meaningless if the City of Omaha could destroy records before the public could request to inspect them. Mayor Stothert cannot be allowed to continue deleting every day those records that she creates or receives in the

course of conducting the city's business. As the chief executive of the city, Mayor Stothert clearly holds a responsibility to preserve records generated in the course of conducting city business, regardless of how she might subjectively characterize the records. *See also Frederick v. City of Falls City*, 289 Neb. 864, 871-72, 857 N.W.2d 569, 575 (2015)(explaining that the Court held in *Everston* that the phrase "of or belonging to" in § 84-712.01(1) should be construed liberally to include documents or records that public body is entitled to possess, regardless of whether public body actually has possession of documents). Indeed, this is consistent with the position the Nebraska Attorney General's office explained in a July 2, 2012 letter by Assistant Attorney General Dale Comer, when Mr. Comer explained that "the key question in determining whether any particular record is a public record is not where that record is located, but rather whether that record is a record 'of or belonging to' government." Ex. 6 at 2 (citing Op. Atty Gen. No. 97033 (June 9, 1997)).

13. Furthermore, the City of Omaha cannot rely on the fact that Mayor Stothert uses her personal cell phone as a basis to deny a request for text messages relating to city business. As discussed above, neither possession of the record nor its physical form are relevant factors in determining whether a text message constitutes a public record. Furthermore, the fact that the text messages at issue are found on the mayor's phone highlights the ability of the City to obtain a copy of all such text messages, particularly in light of Mayor Stothert's duty to preserve rather than destroy records generated while conducting city business.

14. The Court of Appeals of Washington faced exactly this issue in *Nissen v. Pierce County*, 183 Wash.App. 581, 333 P.3d 577 (2014), when the text messages on a county prosecutor's personal cell were sought under the state's public records laws. *Nissen* found that text messages on the prosecutor's personal cell phone that were prepared and used in his capacity

as a public official constituted a public record. *Nissen*, 183 Wash.App. at 593-94, 333 P.3d at 583. "That such government-business-related text messages were contained on a personal cellular phone is immaterial. Our Supreme Court has refused to exempt personal device communications from records subject to the [public records laws], stating, 'If government employees could circumvent the [public records laws] by using their home computers for government business, the [public records laws] could be drastically undermined.'" *Nissen*, 183 Wash.App. at 593-94, 333 P.3d at 583. *See also City of Champaign v. Madigan*, 992 N.E.2d 629, 639-40 (Ill. Ct. App. 2013)(holding under specific language of Illinois open records laws that city council members' communications from personally owned electronic devices made during city council meetings and study sessions were subject to public records disclosure; also "encourage[ing] local municipalities to consider promulgating their own rules prohibiting city council members from using their personal electronic devices during city counsel meetings"). Following *Nissen*, the Washing Secretary of State's office issued a "Records Management Advice" just this month stating that text messages were public records, including text messages sent to or received by a personally-owned device, if the text message related to the work of the agency. Ex. 14.

15. Other state and local governments have recognized or are recognizing that text messages relating to the conduct of public business are public records, even when found on private cell phones, to wit:

a. The Mississippi Ethics Commission issued an opinion on April 11, 2014, finding that a mayor's text messages on the mayor's personal cell phone (not reimbursed by the city) which related to city business were public records that must be preserved and disclosed. Exhibit 7 at ¶ 2.4. The Commission reasoned that the mayor served as the

chief executive officer of the city and was charged with supervising all department of the municipality, as well as enforcing the city's charter and ordinances, and therefore text messages concerning city business sent by the mayor in his role as chief executive officer of the city qualify as public records. *Id.* The Commission further explained that the fact the text messages were on the mayor's personal cell phone was not determinative; rather, it was the purpose and use of the text message for city business that was determinative. *Id.* at ¶ 2.5.[3]

b. On July 26, 2012, the the Attorney General of Texas issued an opinion explaining that information on a personal cellular telephone, including text messages, constituted public records subject to disclosure when the text messages were used in the course of government business. Ex. 8 at p. 140. The Texas Attorney General expressly rejected the argument that the county did not possess or have control over the records on a personal cell phone because the county employee admitted that he used his personal cell phone in performance of his official duties for the county. *Id.* (noting also that county provided a stipend for cell phone, but reiterating that information constituted public records if it related to official business of a governmental body and was maintained by public official or employee of the governmental body).

c. In 2013, following the above-described opinion of the Texas Attorney General, the Texas Legislature expressly included "text message" in the list of what constitutes "public information" subject to a public records request. Tex. Gov't Code § 552.002(c).

[3] The Commission further explained that "purely personal text messages having absolutely no relation to city business" would not be subject to production under the public records laws. Ex. 7 at ¶ 2.5.

d. On May 13, 2009, the Attorney General of Oklahoma issued an opinion answering whether e-mails, text messages, and other electronic communications made in connection with the transaction of public business, the expenditure, of public funds, or the administration of public property was subject to the Oklahoma Open Records and Management Act when the records were created, received, transmitted, or maintained by public officials on privately owned equipment and communication devices. The Oklahoma Attorney General answered in the affirmative, excepting only that information which some provision of law made confidential. Ex. 9 at 339. The Oklahoma Attorney General explained that the answer was not based on who owns the electronic communications equipment but rather on whether the electronic communications created or received by public bodies or officials on that equipment qualified as "records" under the public records laws. *Id.* at 339-40 (citing prior opinion holding that emails created or received by public agencies and officials and made in connection with transaction of public business were public records). The opinion also relied upon Oklahoma's Records Management Act, which uses virtually identical language to define public records and the duty of officials to maintain and preserve public records as does the Nebraska Open Records Act. *Id.* at 341 ("record" means document, book, paper....or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business, the expenditure of public funds, or the administration of public property" and defining duty to preserve as "[a]ll records made or received by or under the authority of or coming into the custody, control, or possession of public officials of this state in the court of their pubic duties shall not be mutilated, destroyed, transferred, removed, altered or otherwise damaged or

disposed of, in whole or in part, except as provided by law"). "In summary, we conclude that ownership of electronic communications equipment is irrelevant in determining whether information therein is subject to the ORA and/or the RMA. Rather, that determination depends upon whether the information qualifies as a record as defined in the ORA and/or RMA." *Id.* at 342.

e. In Jacksonville, Florida, the Daily Record reported that the City Ethics Commission Subcommittee on Transparency and Open Government met to discuss how to capture and preserve text messages. Ex. 10. A member of the Commission was quoted as admitting "The first area of concern was whether or not text messages, <u>which are public record if they are discussing City business on either city or personal phones</u>, are being kept." *Id.* (emphasis added). At issue were city-issued Blackberry devices as well as personal cell phones. Another member of the council explained, "We shouldn't prohibit the use of new technology. The vehicle is not the issue. The issue is capturing the content." *Id.*

f. In August 2013, the Orlando Sentinel reported that after a six-month investigation, prosecutor Jeff Aston concluded that commissioners violated Florida law by deleting text messages that were public records, though they may not have done so knowingly. Ex. 11. While the Orlando Sentinel reporter clearly took issue with the finding that the violation might not have occurred "knowingly," it was also reported that the investigation prompted the county to install new policies to capture text messages. *Id.*

g. In October 2012, the La Crosse Tribune reported a similar problem in Madison, Wisconsin, when council members and representatives of a hotel developer exchanged text messages to discuss potential votes to approve a construction project. Ex.

12. "It's recorded information," said a local attorney and expert in public records laws, "that should be archived and retrieved if it concerns public business." *Id.* at 2. The article explained further that the City of Madison's policy provided that text messages by public officials were permissible if they are saved as public records and do not otherwise violate the law. That was consistent with the position of the La Crosse City Attorney, whose default rule about written communication is that if it relates to city business, it is a record that needs to be retained regardless of its origin. *Id.* at 1.

h. Charles Davis, the executive director of the National Freedom of Information Coalition at the University of Missouri was quoted in an article by the USA Today and re-broadcast by ABC News: "I don't care if it's delivered by carrier pigeon, it's a record. If you're using public time or your public office, you're creating public records every time you hit send." Ex. 13.

16. Based on the above discussion, Mayor Stothert's text messages created or received in the course of conducting the business of the city constitute public records. The overwhelming authority on the issue reveals that it is not the the form of the record, or the possession of the record, or that the record was created on a personal cell phone; rather, the sole dispositive factor is whether the record pertains to the business of the city. Mayor Stothert admits her text messages at issue pertain to city business. As a public record, the text messages must be both preserved and produced, but Mayor Stothert is currently refusing to do either.

Wherefore, the Omaha World-Herald Company respectfully requests that the Attorney General for the State of Nebraska determine whether text messages relating to City business on the personal mobile devices of Mayor Stothert, City Council members, City Department heads, and other employees of the City—regardless of whether the personal mobile device is paid for in

whole or in part by the City—are public records which must be preserved and produced pursuant to Nebraska's public records laws.

Dated this 29 day of April, 2015.

OMAHA WORLD HERALD, Petitioner,

By: Michael C Cox

Michael C. Cox, #17588
Daniel J. Fischer, #22272
Koley Jessen P.C., L.L.O.
1125 South 103rd Street, Suite 800
Omaha, NE 68124
402-390-9500
402-390-9005 (facsimile)
Mike.Cox@koleyjessen.com
Dan.Fischer@koleyjessen.com

Attorneys for Petitioner

From: Moring, Roseann
Sent: Monday, April 13, 2015 3:08 PM
To: paul.kratz@cityofomaha.org
Subject: request as discussed

April 13, 2015

Dear Mr. Kratz:
As we discussed on the phone, and pursuant to the state open records law, Neb. Rev. Stat. Secs. 84-712 to 84-712.09, I am requesting to review or obtain copies of all text message correspondence between Mayor Jean Stothert and any Omaha City Council member or City of Omaha department head between March 23, 2015, and today.

I can review the text messages in the way that is the most convenient for you.

If you expect costs to exceed $50, please contact me beforehand.

If you choose to deny this request, please provide a written explanation, including a reference to the specific statutory exemption(s) upon which you rely. Also, please provide all redacted portions of otherwise exempt material.

Please don't hesitate to call if you have any questions about fulfilling this request.
Thank you for your assistance.

Sincerely,
Roseann Moring
Omaha World-Herald
(402) 444-1084
roseann.moring@owh.com

EXHIBIT 1

City of Omaha
Jean Stothert, Mayor

Law Department
Omaha/Douglas Civic Center
1819 Farnam Street, Suite 804
Omaha, Nebraska 68183-0804
(402) 444-5115
FAX: (402) 444-5125

Paul D. Kratz
City Attorney

April 21, 2015

Ms. Roseann Moring
OMAHA WORLD HERALD
1314 Douglas Street
Omaha, NE 68102

Re: Public Records Request

Dear Ms. Moring:

This letter is in response to your April 13, 2015, public records request for text messages between Mayor Jean Stothert and any of the City Councilmembers of the City Omaha or the City of Omaha department heads between March 23, 2015, and April 13, 2015. A similar request was made of all of the City Councilmembers. It should be noted that all cell phones involved are personal phones of the Mayor and Councilmembers. Even though the Mayor and most of the City Councilmembers have voluntarily showed you their text messages, it is the opinion of the Omaha Law Department that text messages on private cell phones are not public records for the reasons set forth below.

Your request is made pursuant to the Nebraska Public Records Act, NEB. REV. STAT. § 84-712, et seq. This is the response required by NEB. REV. STAT. § 84-712.04. The contents of the many text messages within your request are so varied that I am unable to provide the description required by that statute.

NEB. REV. STAT. § 84-712.01(1) defines a public record as "all records and documents, regardless of physical form, of or belonging to this state, any county, city . . . Data which is a public record in its original form shall remain a public record when maintained in computer files." The Nebraska Supreme Court has stated "[t]he reference to 'data' in the last sentence shows that the Legislature intended public records to include a public body's component information, not just its completed reports or documents." *Everston v. City of Kimball*, 278 Neb. 1, 9, 767 N.W.2d 751, 759 (2009).

To determine whether a record or document qualifies as a public record under Nebraska statute, one must determine whether the record, document, or data is "of or belonging to" the public entity. NEB. REV. STAT. § 84-712.01(1). Nebraska courts must construe this language liberally, to include "any documents or records that a public body is entitled to possess – regardless of whether the public body takes possession" of the record. *Everston* at 9. In the case of text messages, one must first determine who actually possesses them.

Unlike e-mail communication, which travels from a computer to a data server and is then stored on that server, text messages are created on mobile telecommunication devices. The message is sent using radio frequencies to a wireless telecommunication provider's receiver and is then routed through the provider's computer network, where it remains until the recipient's mobile communication device is ready to receive the text message. It is then transmitted using radio frequencies from a transmission station to the recipient's own mobile device. The text message does not pass through a computer server owned or operated by the sender or the recipient, but instead uses radio frequencies and bandwidth reserved by the Federal Communications Commission (FCC), licensed to telecommunication providers to establish public communication services. Any computer server the text message passes through or is stored on is owned and operated by the telecommunications provider and is deleted in three to seven days.

Wireless telecommunication providers (such as Verizon, Sprint, and AT&T) are private, non-governmental entities. To determine whether data or text messages possessed by these telecommunication providers qualify as records "of or belonging to" the City, one must seek guidance from the Nebraska Supreme Court. In *Everston*, the Court established a four-part test to determine "whether a public body is entitled to documents in a private party's possession for purposes of disclosure." *Everston* at 12. The test requires:

(1) the public body, through a delegation of its authority, to contract with a private entity to perform a government function;

(2) the private party to prepare records or documents under the public body's delegation of authority;

(3) the ability of the public body to possess materials necessary to monitor the private party's decision; <u>and</u>

(4) the documents and records requested are used to make a decision affecting the public interest.

Id. When a public employee or official, in that employee or official's individual capacity, contracts with a telecommunications provider for personal cellular and wireless telecommunication services, that individual is not delegating governmental authority or contracting with the provider to perform a governmental function. The individual is a market participant, contracting for personal services from a federally regulated telecommunications provider. Likewise, a text message, as a record, document, or data, is not prepared under a delegation of public authority, because the contract for service is between two private entities, the individual and the provider.

Further, the City has no way to compel a telecommunications provider to disclose the text messages or other data transmitted over airwaves and frequencies licensed by the FCC. The Stored Wire and Electronic Communications and Transactional Records Act (the Stored Wire Act), 18 U.S.C. 2701 *et seq.*, provides that a "person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service . . ." 18 U.S.C. § 2702(a)(1). While 18 U.S.C. § 2702(b) authorizes disclosure exceptions, disclosure to a government entity is only authorized by court order or warrant issued pursuant to jurisdictional rules of criminal procedure, or by the provider when it "believes that an emergency involving danger of death or serious physical injury to any person" is imminent. 18 U.S.C. § 2702(b)(8). As for the fourth part of the *Everston* test, it is theoretically possible, but high improbably, for a text message with limited character and data capabilities to have such an influence on a public employee or official that it affects the public interest.

As noted above, the Stored Wire Act prohibits wireless telecommunication providers from disclosing the contents of a communication unless disclosure is made pursuant to specific statutory exceptions. Congress has permitted disclosure to (1) the intended recipient of the message, (2) as necessary to persons or entities incident to the transmission of the communication, (3) to the National Center for Missing and Exploited Children, (4) to a law enforcement agency if related to the commission of a crime, and (5) to a government entity if the provider in good faith believes that an emergency involving death or serious injury is imminent. 18 U.S.C. § 2702(b). Disclosure is also authorized pursuant to a court order or authorized warrant issued pursuant to jurisdictional rules of criminal procedure or for certain counterintelligence purposes. 18 U.S.C. §§ 2703 and 2709. Importantly, Congress created no exception for disclosure pursuant to the Federal Freedom of Information Act or a state equivalent.

The Stored Wire Act states that the contents of a wireless communication may only be disclosed to certain enumerated individuals or entities. If a Nebraska court was to determine that NEB. REV. STAT. § 84-712(1) requires wireless telecommunication providers to disclose the contents of certain wireless communications to "all citizens of this state and all other persons" as a matter of right, such a holding would place Nebraska statute in direct conflict with a provision of federal law. However, NEB. REV. STAT. § 84-712.01(1) begins with the exception, "[e]xcept when any other statute expressly provides that particular information or records shall not be made public, public records shall include . . ." The Stored Wire and Electronic Communications and Transactions Act, 18 U.S.C. § 2701 *et seq.*, contains a provision that expressly prohibits the disclosure of the contents of communications or records in the possession of telecommunication providers to the public, unless disclosure is made pursuant to specific legislatively authorized exceptions. Because the Stored Wire Act prohibits disclosure of wireless communications, text messages fall within the general exception contained in NEB. REV. STAT. § 84-712.01(1) and are not public records.

I am the public employee responsible for the decision to deny your request. NEB. REV. STAT. § 84-712.03 may grant you the right to administrative or judicial review, and you should consult that statute.

Respectfully,

Paul D. Kratz
City Attorney

PDK/dlm

c: Jean Stothert, Mayor
City Councilmembers
Jim Dowding, Chief of Council Staff
Buster Brown, City Clerk

ONLY IN THE WORLD-HERALD

Stothert's flying fingers raise records concerns

Are text messages about city business open to the public? Should they be? The city attorney researches the matter

By Roseann Moring
World-Herald Staff Writer

Jean Stothert The Omaha mayor has developed a reputation for frequently texting City Council members about issues, some with kinder language than others.

Dozens of people came to Omaha City Hall a couple of weeks ago to hear a public discussion about how the city can direct more jobs to high-poverty areas. It was their chance to directly and publicly speak to the City Council about a controversial ordinance.

That day, Mayor Jean Stothert also made her opinions known to the council. But not from the podium.

She used text messages instead.

Stothert sent the ordinance sponsor, Councilman Chris Jerram, a text message asking if he would delay his proposal. "You told me - you would table it. What is the reality of this?"

Jerram responded, also via text message. "Nothing has changed." He added that if the mayor agreed to part of his plan, he'd back off the rest. "You have not agreed to the pilot yet so the ordinance continues."

"Are you kidding me?" Stothert fired back. "Blackmail Chris?"

And they continued to trade heated text messages during the meeting and after.

As a method of communication, texting has become a common practice among Omaha city leaders. City business is increasingly conducted by text

See Texts: Page 2

THE MODERN-DAY MEMOS

Read more of Mayor Jean Stothert's text exchanges on **Omaha.com/metro**

Texts: Stothert says she deletes messages on pers

Continued from Page 1

message, particularly by Stothert — who has garnered a reputation as a frequent texter.

Councilman Franklin Thompson, a fellow Republican and a close ally of the mayor, said Stothert has texted him during council meetings. He described texts that contain both positive and negative interactions.

"She texts most people, I think, when she's unhappy," he said. "That's just her style. And it's a style that's different from the other mayors."

The rise in texting raises open-government questions; Stothert has promised to bring more transparency to Omaha City Hall.

The text messages exist in an electronic world outside city government's public email servers. Stothert she deletes text messages at the end of every day. The city attorney doubts that the text messages — which are on elected officials' private phones — are public records.

Now a discussion has begun among Omaha city officials over the practice.

Stothert, who uses her own phone for city business, said she considers the text messages private and sees them as a substitute for a phone call, rather than email. Still, she allowed The World-Herald on Thursday to review her city-related text messages from that day.

"I have nothing to hide," she said.

The World-Herald submitted a public records request last week to review correspondence that is being sent via texts by the mayor or City Council members.

Most council members, including Jerram, allowed The World-Herald to review their text messages.

There's no question that — with few exceptions — government-related emails or letters between officials are a part of the public record, and anyone can file a request to review that correspondence.

City Attorney Paul Kratz said that he's not sure whether text messages are public records that must be disclosed, even if elected officials are conducting public business.

"We are still researching the legal issues and the recoverability of text messages pursuant to your records request," he said in an email Friday. "We should be able to respond next week."

But John Bender, who teaches media law at the University of Nebraska-Lincoln, said that if city-related text messages aren't a public record, they should be.

"I think it's pretty clear that the public records law applies to any records, no matter what physical form they're in," he said.

City Clerk Buster Brown, whose job includes maintaining City of Omaha records, was among the officials brought into the discussion last week. He said he has encouraged officials to communicate through email rather than text message so the record can be preserved. The city automatically saves emails, so even if an official deletes a message, the record is stored on city servers.

Stothert and some council members questioned the logistics of releasing text messages that are stored on their personal cellphones. They said they should be allowed to have an expectation of privacy for texts with their children or spouse, for example.

Pete Festersen

Garry Gernandt

Ben Gray

Chris Jerram

Aimee Melton

Public record laws are intended to allow citizens access to important information about how government operates.

A similar issue came up nationally recently when Democratic presidential candidate Hillary Clinton disclosed that when she was Secretary of State she used a personal email address to do government business. Clinton ended up voluntarily releasing 55,000 emails to the State Department.

Most other states don't specify whether text messages are public records, said Pam Greenberg, an expert on information technology from the National Conference of State Legislatures. Texas and Georgia are the exceptions: Their laws explicitly say that text messages can be public information.

In Nebraska, the open records law, which was last amended in 2000, says that all records and documents of a government entity, regardless of physical form, should be public. The law applies to the State of Nebraska and all its many government subdivisions, including municipalities.

There are some exceptions, such as records that contain medical information, trade secrets or attorney-client communications.

Stothert and the council members don't have city-issued phones — they're sending these texts from their private cellphones.

An assistant attorney general has previously advised that if officials conduct government business through private email, those records could still be public.

"A key question in determining whether any particular record is a public record is not where the record is located, but rather whether that record is a record 'of or belonging to the government,'" wrote Dale Comer in a 2012 letter about a dispute between the Beatrice Daily Sun and the Gage County Board.

In response to a query from The World-Herald about whether text messages are public records, a spokeswoman for the Attorney General's Office issued a statement: "We believe that text messages are public records if they are of or belonging to the State of Nebraska and pertain to public business."

Stothert often says that she's committed to conducting government transparently.

For instance, she has pushed the Metropolitan Entertainment and Convention Authority, the nonprofit group that manages the CenturyLink Center and TD Ameritrade Park, to release more information about its operations.

"I believe in transparent government organizations," she wrote in a letter to the MECA board chairman last month. "We cannot pick and choose or make exceptions about public information when we are spending the taxpayer's money."

Stothert also said she has worked to make herself more available to the media and the public than her recent predecessors.

Stothert said she has previously asked Kratz to review whether text messages would be public and to explore whether the city needs a clear policy.

She said that she prefers to talk to people face-to-face or by phone, but when she can't do that, she uses text messaging for the convenience. She said she generally conducts routine matters such as scheduling via text message.

"I'm not using it to do major city business," she said.

Her texts often start early in the morning and continue at night. She said she will often have a thought she wants to share but doesn't want to wake someone up with a phone call.

Stothert said she deletes messages at the end of the day because she sees them as "unimportant."

"It's not like there's this big secret argument going on all the time," she said.

The text messages she provided Thursday were generally routine. The texts included discussions with staffers about the logistics of a press conference and an exchange with U.S. Sen. Ben Sasse about being the commencement speaker at Midland University. She texted Police Chief Todd Schmaderer to ask about an update of a case.

She said she would be comfortable routinely providing the public with text messages that she has sent. But she would balk at showing others' texts to her, saying that would be a "betrayal" of confidentiality.

Last week, Stothert continued to delete messages after the newspaper made the records request. Stothert said she was unaware of the newspaper's request for her texts, though she had discussed with Kratz that he planned to research whether text messages would be public records. Both Stothert and Kratz said that he did not recommend that she stop deleting texts.

On the council side, most council members expressed a willingness to comply with the request.

One council member, Garry Gernandt, said he deletes text messages and didn't have any such messages on his phone.

Three council members — Jerram, Pete Festersen and Ben Gray — agreed to comply within a day and provided The World-Herald with copies of their text messages.

"It's public record," Jerram said. "It's city business."

Friday, Councilwoman Aimee Melton allowed The World-Herald to review her messages on her phone. The same day, Councilman Rich Pahls agreed to do the same.

But Councilman Franklin Thompson said he wouldn't provide access to his city texts unless he was told to do so

nal phone at the end of each day

Rich Pahls

Franklin Thompson

by a lawyer or ordered by a judge. Later he said he contacted Verizon and was told that the company would not provide him a transcript of his text messages without a subpoena.

Melton said she would like to see the issue clarified so everyone, especially constituents, knows the rules.

"We probably need to have a policy in place that we all know, whether these are public records or not," Melton said.

The council members' text messages show that they generally send texts about routine matters or logistical planning. The texts show that council members have discussed some major city issues, most notably Jerram's proposal about city contractors, which is still pending before the council.

Stothert's texts with Melton — and their shared texts with fellow Republicans Pahls and Thompson — show a more collegial relationship than she shares with the Democrats.

The four share thoughts about city issues and impressions of City Hall happenings.

Stothert occasionally lobbies the Republican council members, including asking them to support a resolution condemning State Sen. Ernie Chambers.

The four spoke about their disagreement with Jerram's north Omaha jobs ordinance. Melton, an attorney, said she considers it unconstitutional.

Democrats, however, have shared the occasional pointed remark about Stothert. At one point, for example, Gray used the word "petty" to describe Stothert's action.

During their jobs discussion, Jerram called Stothert "Sneaky Jean." She said he is "one rude, insulting man."

As the council was conducting the public hearing on Jerram's ordinance, Stothert texted the council Republicans: "OMG! This is ridiculous."

Festersen said it's inappropriate for the mayor to text council members during public meetings.

Bender, the UNL professor, suggested that texting during council meetings could violate the state's open meetings law, which is intended to ensure that discussion about legislation takes place in an open forum.

Stothert said council members also occasionally send her a text during council meetings, often to ask what she thinks of a particular issue.

She acknowledged that she disagreed with Jerram through texts and said she's comfortable with how she expressed it.

"I would tell Chris Jerram in front of you that I was unhappy," she said.

Jerram said the mayor texts him frequently and often aggressively.

Gray agreed.

"They come in barrages. It'll be this and that and this and that," he said. "As a matter of fact, I don't know how she has time to text like that."

Contact the writer: 402-444-1084, roseann.moring@owh.com

A COMMON GOAL

Mayor Stothert's messages are below on the left. Councilman Gray's are on the right.

< Back (106) Jean Details

I am not as dumb as you may think I am. Those attending the meetings - keep me very informed. Drafts are what they are Ben - a working document - open for input and improvements. I invited Preston to come to my office today and talk with me - he declined. We want a solution - not a war.

I never said anything about you being dumb. This is getting nowhere. We'll have to agree to disagree on this.

I would prefer we would work together on this. No need to disagree. We agree on the end result.

[illegible]

TESTY TEXTS

Stothert's texts, left, and Councilman Jerram's on his jobs proposal.

< Messages Jean Details

Sorry - I forwarded your text to Amy - she was suppose to call you this morning. I will find out - I am at Heroes in the Heartland lunch

Also - we tried to set up a standing meeting with every Councilmember. All meetings are set up and we are meeting - but we never heard back from you. I would still like to set up a standing meeting

I am briefing CMs on my Heartland Workforce Solutions workforce proposal at 11 on Tuesday. Would you like to meet before?

Fri, Mar 13, 12:12 PM

Why in the world are you meeting with Erin from HWS about the program onMonday when she is scheduled with us for our meeting on Tuesday????

We were to provide all of the answers and info at our meeting Tuesday. Seems insulting and like you are going around me on my proposal

I am NOT happy about this!

Why would you not wait for Tuesday's meeting with me when we were going to give you all of that info? Sneaky Jean

OPINION

Terry Kroeger, Publisher • Larry King, Vice President of News and Content • Michael Holmes, Editorial
Editorial Staff: Jim Anderson, Jeff Koterba, Aaron Sanderford, Geitner Simmons

TUESDAY, APRIL 21, 2015 Omaha World-Herald

'TXT MSGS' AND PUBLIC BUSINESS

Law's spirit covers texts

Times have changed since government officials picked up quill pens when they wanted to send one another a message.

But the principles behind our open government laws remain the same. The public's business ought to be conducted in public.

> Despite evolving technology, the spirit of Nebraska's open government laws rings clearly. The formation of public policy is public business.

That precept has followed pen and paper to the typewriter and carbon paper to the fax machine to computers and email.

Today, as Omaha Mayor Jean Stothert's fondness for smartphone text messages illustrates, government communication evolves with the times.

The World-Herald's Roseann Moring reported Monday that text messaging has become a common practice among Omaha city leaders, and city business is increasingly being conducted via text. But these messages exist in an electronic world outside of city government's public email servers and the established procedures for compiling and storing public records.

The mayor said she deletes her text messages at the end of each day. Stothert argues that the text messages are private and a substitute for phone calls, rather than email.

The city attorney says he's not sure that the text messages, which are made on elected officials' private phones, are public records. The state attorney general's office says texts are public records "if they are of or belonging to the State of Nebraska and pertain to public business."

The state's public records law leaves no question that — with a few specific exceptions — government-related emails and letters between officials are part of the public record. Anyone can request to review that correspondence. The state's open meetings law leaves no doubt about the purpose of open government laws, saying "the formation of public policy is public business and may not be conducted in secret."

The technology of text messaging complicates matters. Phone companies, not the city, may have custody of the messages, especially on officials' personal phones. For how long can deleted texts be recovered? And the various forms of electronic communications continue to evolve and multiply. A phone company may keep a record of traditional text messages but not those sent in a chat application or more secure software.

Despite such complications, the spirit of Nebraska's open government laws rings clearly and should apply in these situations.

City Clerk Buster Brown says he has encouraged officials to use email rather than texts, so that records can be preserved.

This could offer a simple solution. Emailing on a smart phone is just as convenient as texting and, if linked to the city's system, those emails could be preserved on city servers. Officials could use texts for personal messages and email for city business.

No one wants to see the mayor's grocery list or a family member's reminder that a council member should pick up the dry cleaning.

However, text messages about official business do fall within the spirit of our open government laws.

Texting officials should know and respect that.

EXHIBIT 4

MIDLANDS

Omaha World-Herald
WEDNESDAY, APRIL 22, 2015
SECTION B

Texts aren't public, city attorney says

Stothert says she'll keep sending messages, while one City Council member says he'll switch to city email instead

By Roseann Moring
WORLD-HERALD STAFF WRITER

Omaha Mayor Jean Stothert said she plans to continue to use text messaging after City Attorney Paul Kratz issued a legal opinion that text messages are not a public record.

At least one City Council member, however, said he plans to use email more often after The World-Herald raised questions about city business being conducted through texts on private cellphones.

Unlike city emails, text messages on private phones are not tracked and preserved as official public documents.

Kratz, in response to a World-Herald request for city-related text messages to or from the mayor and City Council members, cited a Nebraska Supreme Court opinion in a case involving the City of Kimball. Kratz argued that the Omaha officials' text messages don't apply to the test that came from that decision.

In the Kimball case, the Supreme Court ruled that documents created by a private investigator on behalf of the mayor were a public record, even though the documents were not

See Texts: Page 3

Jean Stothert
"My feelings on it haven't changed. ... I'll still do it because it's more convenient."

TURNED DOWN
Read Omaha City Attorney Paul Kratz's response to The World-Herald's request for city-related texts. **On Omaha.com/metro**

Texts: Some on council disagree

Continued from Page 1

held by the city itself. However, the court ruled that the records in the case were covered by an exemption to the public records law, and so the city did not have to release them.

Kratz said the Omaha officials' text messages are held by the wireless carriers they contract with. The officials, he wrote, are not delegating government authority to those carriers or contracting with the providers to perform a government function.

Kratz said the city can't compel a telecommunications provider to disclose text messages without a court order.

"It is theoretically possible, but highly (improbable), for a text message with limited character and data capabilities to have such an influence on a public employee or official that it affects the public interest," Kratz wrote.

Stothert said that after The World-Herald published some texts between city officials, others in the community said they might choose to call her instead. But she said she will continue to text others because it's more convenient.

"Will I stop texting? I won't," she said. "My feelings on it haven't changed. We'll be very cautious about what we do. I'll still do it because it's more convenient."

Last week, Stothert allowed a World-Herald reporter to review her texts messages from that day; she says she deletes her text messages at the end of every day.

Tuesday, the mayor said she still would allow a reporter to review her text messages, though she doesn't think she should disseminate text messages she has received.

Stothert said she wants to be accessible to constituents in any way they want to communicate with her, be it social media, texting or some other outlet.

"We try to use every tool we can that's available now to communicate quickly, accurately and efficiently," she said.

Councilman Chris Jerram said that after a meeting with City Clerk Buster Brown — the official keeper of city records — the councilman decided to use email more instead of text messaging. Tuesday he set up his city email to come directly to his cellphone.

He said he will continue to text occasionally but only for mundane matters, and he will try to communicate mostly through email so the messages can be preserved for the record.

Jerram, along with fellow council members Pete Festersen and Ben Gray, have said they believe text messages containing city business are a public record.

"I handle the vast majority of city business by city email and will continue to do so but believe both email and texts regarding city business should be considered public information," Festersen said. "It's just a matter of time before public records laws and opinions catch up with technology, and they should."

Council members Franklin Thompson and Rich Pahls said they text infrequently and will probably continue to respond to text messages via text.

Pahls showed The World-Herald his city-related text messages Tuesday. He communicates with a handful of other officials through text message, though the texts are infrequent.

Five council members, all except for Thompson and Garry Gernandt, showed the newspaper their texts.

Councilwoman Aimee Melton said she was glad Kratz issued an opinion, and she considers the matter settled.

An assistant Nebraska attorney general has previously advised that if public officials conduct government business through private email, those records still could be public.

"A key question in determining whether any particular record is a public record is not where the record is located, but rather whether that record is a record 'of or belonging to the government,'" Dale Comer wrote in a 2012 letter about a dispute between the Beatrice Daily Sun and the Gage County Board.

In response to a query last week from The World-Herald, a spokeswoman for the Attorney General's Office issued a statement: "We believe that text messages are public records if they are of or belonging to the State of Nebraska and pertain to public business."

Contact the writer:
402-444-1084, roseann.moring@owh.com

STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

DALE A. COMER
ASSISTANT ATTORNEY GENERAL
CHIEF, LEGAL SERVICES BUREAU

July 2, 2012

Shawn D. Renner
Cline Williams
Wright Johnson & Oldfather, L.L.P.
233 South 13th Street
1900 U.S. Bank Building
Lincoln, NE 68508-2095

Re: *File No. 12-R-116; Gage Co. Board of Supervisors; Beatrice Daily Sun.*

Dear Mr. Renner:

This letter is in response to your correspondence dated June 19, 2012, regarding access to records of the Gage County Board ("Board") under the Nebraska Public Records Statutes, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (2008, Cum. Supp. 2010). We received your correspondence on June 21, 2012, and we considered that correspondence to be a petition for access to public records under § 84-712.03 on behalf of the *Beatrice Daily Sun*. Our response to the newspaper's petition is set out below.

FACTS

Our understanding of the facts in this case is based upon your letter along with the materials which you provided to us with it. We were provided with additional information in a conversation with Mr. Schreiner, the Chief Deputy Gage County Attorney.

At its public meeting on May 25, 2012, the Board went into closed session to discuss a personnel matter. After coming back into open session, the Board announced that it was accepting the resignation of Dr. Don Rice, the Gage County Medical Director. Subsequently, on June 5, 2012, Chris Dunker with the *Beatrice Daily Sun* made a written public records request to the Gage County Clerk seeking a copy of "any correspondence between the Gage County Board of Supervisors and former Gage County Medical Director Dr. Don Rice including any emails and written letters in the month of April and May." Gage County Attorney Roger Harris responded to Mr. Dunker on behalf of the County Clerk on June 7, 2012. Mr. Harris provided Mr. Dunker with

Printed wth soy ink on recycled paper

copies of some invoices and email correspondence between members of the Board and Dr. Rice during the specified time period. However, Mr. Harris also indicated that information contained on personal email accounts maintained by individual board members is not a public record under Nebraska law. None of the Gage County Supervisors has a county email. However, on Gage County's website, the email addresses listed for several individual Board members are apparently personal email accounts, and members of the public may send email correspondence to Board members there.

You asked us to determine if emails which Board members have on their personal accounts which reflect county business are public records. You also asked us to require Gage County to produce copies of any emails sent or received via Board members' personal email accounts which are responsive to Mr. Dunker's request.

ANALYSIS

Under § 84-712.01 (1), "public records" in Nebraska include "all records or documents, regardless of physical form, *of or belonging to*" governmental agencies, including counties. In that regard, we have indicated in the past that, in our view, the mere fact that a record is in the possession of a public officer or public agency does not make it a public record. Op. Att'y Gen. No. 97033 (June 9, 1997). Conversely, records need not be in the physical possession of any agency to be public records under the Public Records Statutes. *Id.* Therefore, the key question in determining whether any particular record is a public record is not where that record is located, but rather whether that record is a record "of or belonging to" government. *Id.* If a record does belong to government, then it is a public record no matter where it is located.

In the present instance, given the circumstances described in your letter, it appears to us that Gage County Supervisors may well have public records belonging to Gage County which are responsive to the newspaper's records request on their personal emails. For that reason, we believe that Board members (or whomever is the actual custodian of those records) have an obligation to search for such records on members' personal email accounts. However, that obligation is also subject to the other provisions of the Public Records Statutes. For example, the custodian of the records in question may recover the actual cost of providing copies of any public records discovered as a result of such a search, including the cost of the search itself. And, any responsive documents located as a result of a search which are subject to the confidentiality provisions of § 84-712.05 may be kept confidential.

We have discussed this matter with counsel for the County. It is our understanding that counsel will review your correspondence and this letter, and act accordingly. Consequently, we do not believe that there is any need for further action by this office at this time, and we are closing this file.

If you disagree with the analysis set out in this letter, you may wish to review the Public Records Statutes to determine what additional remedies, if any, might be available to your client.

Sincerely,

JON BRUNING
Attorney General

Dale A. Comer
Assistant Attorney General
Chief, Legal Services Bureau

cc: Roger Harris, Gage County Attorney

05-400-30

BEN H. STONE, Chairman
Gulfport

WALLEY R. NAYLOR,
Vice Chairman
Madison

BILLY R. POWELL, Secretary
Madison

ROBERT G. CLARK
Pickens

MISSISSIPPI ETHICS COMMISSION

Post Office Box 22746
Jackson, Mississippi 39225-2746
Telephone: 601-359-1285
Telecopier: 601-359-1292
www.ethics.state.ms.us

PAUL V. BREAZEALE
Jackson

BRENDA T. REDFERN
Richland

DANA S. STRINGER
Brandon

SEAN A. MILNER
Clinton

TOM HOOD
Executive Director and Chief Counsel

PUBLIC RECORDS OPINION NO. R-13-023

April 11, 2014

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-61-13(1)(b), Mississippi Code of 1972, as reflected upon its minutes of even date.

I. FACTS/PROCEDURAL HISTORY

1.1 On November 25, 2014, Robbie Ward ("Ward") of the Northeast Mississippi Daily Journal requested the City of Tupelo (the "city") provide "digital copies of all text messages Mayor Jason Shelton sent in his role as Mayor from [a cell phone number] between October 23, 2013 and October 26, 2013."

1.2 On December 9, 2013, the city attorney timely responded to Ward and denied the request. The city attorney explained that the mayor maintains a personal cell phone over which the city has no possession or control. The city also stated that the records of the city do not include the individual records of appointed or elected public officials. Finally, the city asserted that text messages containing governmental subject matter but stored on private hardware are not public records.

1.3 Ward filed this public records opinion request claiming that the mayor utilizes his personal cell phone to conduct official city business through text messaging. Additionally, Ward notes that the city has created a cell phone list of elected leaders and other officials. Ward asserts that the city has utilized this list since at least 2002, providing the city "a reasonable length of time to comply with laws related to public and electronic records including text messages."

1.4 In response to the public records opinion request, the city reiterates that the mayor's cell phone is a personal cell phone and that the city does not pay or reimburse the mayor for the cost of the cell phone. The city also recognizes this request presents a question of first impression in Mississippi and requests guidance from the Commission. The response also states the city maintains sixty (60) city-owned cell phones. The city asserts that "[o]f the remaining

400-plus employees [of the city], it can be inferred that most own their own private cell phones and conduct some manner of city business throughout the day. . . ." As it relates to the specific public records request at issue in this matter, the city does not deny that the mayor utilizes his cell phone to conduct city business.

1.5 The city also discusses the difficulty in differentiating between personal text messages and text messages concerning official city business. The city urges the Commission to differentiate text messages from more widely accepted methods of electronic communication such as email. The city points out that accessing text messages is more difficult than other forms of electronic communication. The city also explains that text messaging is widely used for "transitory communications" which are casual and routine messages that are not required to be maintained under guidelines applicable to email messaging. Ultimately, the city posits that treating texts messages as public records will "have a chilling and burdensome effect on the use of a now universally-utilized means of instant and efficient communication of transitory information."

II. ANALYSIS

2.1 At issue in this matter is whether text messages concerning city business but stored on a personal cell phone belonging to a mayor are subject to disclosure under the Mississippi Public Records Act of 1983 (the "Act"), codified at Section 25-61-1, et seq., Miss. Code of 1972. The Commission is asked to opine on this subject in the abstract because the city has not requested the mayor search his cell phone and provide any text messages responsive to the request.

2.2 The Act provides that public records shall be available for inspection by any person unless otherwise provided by law and places a duty upon public bodies to provide access to such records. Section 25-61-2 and Section 25-61-5, Miss. Code of 1972. The term "public records" is defined by the Act as follows:

> "Public records" shall mean all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body, or required to be maintained by any public body.

See Section 25-61-3(b). A public body must provide access to public records upon request of any person, unless a statute or court decision "specifically declares" a public record to be confidential, privileged, or exempt. Section 25-61-11.

2.3 Text messages, similar to other electronic records, constitute documentary materials. The Act applies equally to paper and electronic records and provides that documentary materials are records "regardless of physical form or characteristics." The Legislature has instructed that "[a]s each agency increases its use of and dependence on electronic record keeping, each agency must ensure reasonable access to records electronically maintained, subject to the rules of records retention." See Section 25-61-1 and 25-61-2.

2.4 Mr. Ward's public records request is inexact and broad in that it does not request a specific text message or even a category of text messages. Instead, the request broadly seeks all text messages sent by the mayor in his role as mayor for a specific time period. The City of Tupelo operates under the mayor-council form of government. The mayor serves as the chief executive officer of the city and is charged with supervising all departments of the municipality, as well as enforcing the charter and ordinances of the city. Notwithstanding the inexact and broad nature of the request, text messages concerning city business that are sent by the mayor in his role as chief executive officer of the city qualify as public records subject to the Act. The city should direct the mayor to forward any responsive documents to the city for review and production.

2.5 The fact that text messages reside on the mayor's personal cell phone is not determinative as to whether text messages must be produced.[1] Rather, it is the purpose or use of the text message that is determinative. Any text message used by a city official "in the conduct, transaction or performance of any business, transaction, work, duty or function of [the city], or required to be maintained by [the city]" is a public record subject to the Act, regardless of where the record is stored. However, purely personal text messages having absolutely no relation to city business are not subject to production under the Act. Documents described by the city as "transitory communications" should be reviewed for production on a case-by-case basis. Any doubt about whether records should be disclosed should be resolved in favor of disclosure. Harrison County Development Commission v. Kinney, 920 So.2d 497, 502 (Miss. App. 2006).

2.6 As the city notes in its response, the Mississippi Department of Archives and History (MDAH) has not developed records retention requirements specifically for text messages as it has for emails. However, MDAH's Local Government Records Office website states that "[e]lectronic [r]ecords are subject to the same retention guidelines as paper records and existing retention schedules apply to all records regardless of format unless noted otherwise in the approved retention period."[2] The city should instruct city officials that all public records, regardless of where they are created or stored, should eventually be stored on city equipment or in city files if those records are subject to an applicable retention schedule. All questions concerning retention requirements should be directed to MDAH.

MISSISSIPPI ETHICS COMMISSION

BY: ______________________________
Tom Hood, Executive Director and
Chief Counsel

[1] See Comments to Rule 3, Mississippi Model Public Records Rules, http://www.ethics.state.ms.us/ethics/ethics.nsf/webpage/A_records (March 5, 2010).

[2] See http://mdah.state.ms.us/recman/electronic.php (April 11, 2014). MDAH has developed records retention schedules applicable to municipalities, pursuant to Section 39-5-9. See http://mdah.state.ms.us/recman/schedulemain.php (April 24, 2012). Additionally, MDAH has also developed specific guidelines for retention of emails pursuant to Section 39-5-9 and the Mississippi Archives and Records Management Law (Sections 25-59-1 through 25-59-31). The email standards cite Section 29-59-3 for the proposition that work-related emails "must be managed the same way that other public records, whether paper or electronic, are managed." See http://mdah.state.ms.us/recman/email_guidelines.pdf (emphasis added). Section 29-59-3 defines "public records" as "documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other materials regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency or by any appointed or elected official." (emphasis added).

25 of 66 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS

No. OR2012-11623

2012 Tex. AG Ltr. Rul. LEXIS 10504

July 26, 2012

REQUESTBY:

[*1]
Ms. Donna L. Johnson
For Harris County
Olson & Olson, L.L.P
2727 Allen Parkway, Suite 600
Houston, Texas 77019

OPINIONBY:

Kenneth Leland Conyer, Assistant Attorney General
Open Records Division

OPINION:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID # 460035 (Ref: 12PIA0235).

The Harris County Attorney's Office (the "county attorney's office"), which your represent, received a request for cellular telephone records, **text messages**, and videos or photos from a specified time period from any Harris County (the "county") issued cellular telephone assigned to a named individual. n1 You state the county attorney's office has released some of the requested information. You claim the information submitted as Exhibit B is not subject to the Act. You also claim this information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.1175, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information. n2

n1 You inform us that the county attorney's office received clarification from the requestor regarding his request. *See Gov't Code § 552.222(b)* (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott, 304 S.W.3d 380, 387 (Tex. 2010)* (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

[*2]

n2 We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested re-

cords to the extent those records contain substantially different types of information than that submitted to this office.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Initially, we note you have marked portions of Exhibit B as being non-responsive to the request. Upon review, we find most of this information, and the additional information we have marked, is not responsive to the request because it is not from the specified time period. This decision does not address the public availability of the non-responsive information, and the county attorney's office need not release that information in response to the request. However, a portion of the information you have marked as non-responsive, which we have marked, is from the specified time period and, thus, is responsive to the present request. Accordingly, we will consider the arguments [*3] you raise for this and the remaining responsive information.

Next, you assert the responsive information in Exhibit B is not subject to the Act. The Act is applicable only to "public information." *See Gov't Code §§ 552.002*, .021. *Section 552.002(a) of the Government Code* defines "public information" as:

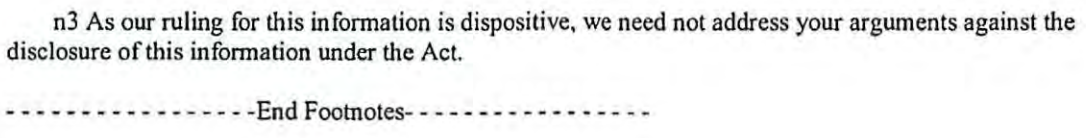
> information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
>
> (1) by a governmental body; or
>
> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access [*4] to it. *Gov't Code § 552.002(a)(2)*; *see* Open Records Decision No. 462 at 4 (1987).

We further note that the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that the county attorney's office does not possess the information at issue does not take the information outside the scope of the Act. *See id.* Furthermore, we note information [*5] in a public official's personal cellular telephone records may be subject to the Act where the public official uses the personal cellular telephone to conduct public business. *See* ORD 635 at 6-7 (appointment calendar owned by public official or employee is subject to Act when it is maintained by another public employee and used for public business).

You inform us that the named individual, not the county attorney's office, owns the cellular telephone at issue and has sole access to his cellular telephone records, **text messages**, videos, and photos. However, you state this individual uses his cellular telephone in the performance of his official duties with the county attorney's office. You also acknowledge that the county provides the named individual with a stipend for his cellular telephone. We reiterate that information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body. *See Gov't Code § 552.002(a)*. You

state some of the information at issue is purely personal and was not transmitted for purposes of the county attorney's [*6] office's official business. After reviewing this information, we agree the information we have marked in Exhibit B does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the county attorney's office. *See id.* § 552.021; *see also* ORD 635 (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, this information is not subject to the Act, and the county attorney's office need not release it in response to this request. n3 However, the remaining information at issue consists of information related to the transaction of the county attorney's office's business. Thus, this information consists of public information under the Act. Accordingly, we will address your arguments against disclosure under the Act for this information and the remaining information at issue.



n3 As our ruling for this information is dispositive, we need not address your arguments against the disclosure of this information under the Act.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*7]
You raise common-law and constitutional privacy for the remaining information in Exhibit B. *Section 552.101 of the Government Code* excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Gov't Code § 552.101*. This section encompasses the doctrines of common-law and constitutional privacy. The doctrine of common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd., 540 S.W2d 668, 685 (Tex. 1976).* To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id. at 681-82.* The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric [*8] treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id. at 683.* This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also determined common-law privacy encompasses certain types of personal financial information. Personal financial information related only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information [*9] furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

Constitutional privacy consists of two inter-related types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe, 429 U.S. 589, 599-600 (1977);* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected by constitutional privacy is narrower than that under common-law privacy; constitutional [*10] privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex., 765 F.2d 490 (5th Cir. 1985)).*

Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Thus, the county attorney's office must withhold this information under *section 552.101 of the Government Code* in conjunction with common-law privacy. n4 However, we find you have not demonstrated

that any of the remaining information at issue is highly intimate or embarrassing and not a matter of legitimate public interest. Furthermore, you have failed to demonstrate how any of this information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the county attorney's office may not withhold any of the remaining information under section 552.101 in conjunction with common-law or constitutional privacy.

n4 As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*11]
Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch., 990 S.W.2d 337, 340* (Tex. App.--Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as [*12] administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson, 954 S.W.2d 180, 184* (Tex. App.--Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at [*13] any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996)* (privilege extends to entire communication, including facts contained therein).

You raise section 552.107(1) for the remaining information in Exhibit B. You assert this information consists of communications between an attorney employed by the county attorney's office and individuals seeking legal advice. You also inform us that these communications were not intended to be and have not been disclosed to any third parties. However, we note you have not identified any of the individuals who you state were seeking legal advice. Furthermore, you have not identified the information you contend is privileged. *See Gov't Code § 552.301(e)(2)* (governmental body must label information to indicate which exceptions apply). Accordingly, we find you have failed to demonstrate how any [*14] of the information at issue consists of communications between privileged parties. Therefore, the county attorney's office may not withhold any of the remaining information under *section 552.107(1) of the Government Code.*

You assert sections 552.117 and 552.1175 for portions of the remaining information in Exhibit B. *Section 552.117(a)(2) of the Government Code* excepts from public disclosure the home addresses and telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or *section 552.1175 of the Government Code. See id.* § 552.117(a)(2). Section 552.117(a)(2) adopts

the definition of peace officer found at *article 2.12 of the Code of Criminal Procedure*. We note section 552.117(a)(2) protects a peace officer's personal cellular telephone number if the officer pays for the cellular telephone service with his or her personal funds. [*15] *See* Open Records Decision No. 670 at 6 (2001) (section 552.117(a)(2) excepts from disclosure peace officer's cellular telephone number if officer pays for cellular telephone service). Upon review, the county attorney's office must withhold the information we have marked under *section 552.117(a)(2) of the Government Code* to the extent this information pertains to a peace officer currently or formerly employed by the county, including any cellular telephone numbers not paid for by a governmental body. However, you have not demonstrated how any of the remaining information consists of the home addresses or telephone numbers, emergency contact information, social security numbers, or family member information of a peace officer, and it may not be withheld under section 552.117(a)(2).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under *section 552.024 of the Government Code* [*16] . *Gov't Code § 552.117(a)(1)*. We note section 552.117(a)(1) encompasses an official's or employee's personal cellular telephone number if the official or employee pays for the cellular telephone service with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Accordingly, to the extent the information we have marked under *section 552.117 of the Government Code* is not protected by section 552.117(a)(2), [*17] the county attorney's office must withhold this information under section 552.117(a)(1) to the extent it pertains to a current or former county official or employee who timely requested confidentiality for the information under *section 552.024 of the Government Code*, including any cellular telephone numbers not paid for by a governmental body. However, you have not demonstrated how any of the remaining information consists of the home addresses or telephone numbers, emergency contact information, social security numbers, or family member information of a current or former county official or employee, and it may not be withheld under section 552.117(a)(1).

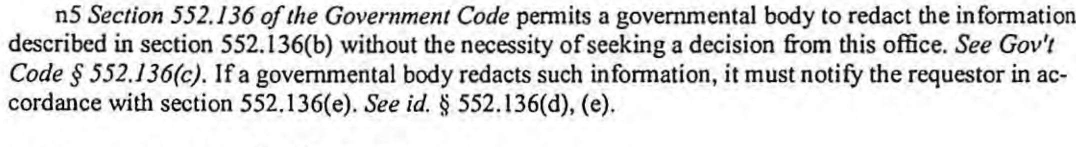
Section 552.1175 of the Government Code protects information relating to a peace officer, as defined by *article 2.12 of the Code of Criminal Procedure*, and employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters. *See Gov't Code § 552.1175(a)(1)*, (5). Section 552.1175 provides in part:
[*18]

> (b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:
>
> > (1) chooses to restrict public access to the information; and
> >
> > (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

See id. § 552.1175(b). Section 552.1175(b) also encompasses an individual's personal cellular telephone number if the individual falls within the scope of section 552.1175(a) and pays for the cellular telephone service with his or her personal funds. Accordingly, to the extent the responsive information we have marked under *section 552.117 of the Government Code* is not protected by section 552.117(a)(1) or section 552.117(a)(2), the county attorney's office must withhold this information under *section 552.1175 of the Government Code* [*19] to the

extent this information pertains to an individual who is or was employed by a governmental entity other than the county, falls within the scope of section 552.1175(a), and elects to restrict access to the information in accordance with section 552.1175(b), including any cellular telephone numbers not paid for by a governmental body. However, you have not demonstrated how any of the remaining information consists of the home addresses or telephone numbers, emergency contact information, social security numbers, or family member information of a peace officer or district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters, and it may not be withheld under section 552.1175.

We understand you have redacted a cellular telephone account number and a foundation account number contained in the remaining information pursuant to *section 552.136(c) of the Government Code*. n5 We note the remaining information at issue contains a cellular telephone account number and partial cellular telephone account number. Section 552.136 provides in part that [*20] "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *See id.* § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). Accordingly, the county attorney's office must withhold the cellular telephone account number and partial cellular telephone account number we have marked under *section 552.136 of the Government Code*.



n5 *Section 552.136 of the Government Code* permits a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See Gov't Code § 552.136(c)*. If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Section 552.137 of the Government Code excepts [*21] from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Upon review, we find the remaining information does not contain any e-mail addresses. Accordingly, none of this information may be withheld under *section 552.137 of the Government Code*.

We note some of the submitted information may be protected by copyright. A custodian of **public records** must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and [*22] the risk of a copyright infringement suit.

In summary, the responsive information we have marked in Exhibit B is not subject to the Act, and the county attorney's office need not release this information in response to the present request. The county attorney's office must withhold the information we have marked under *section 552.101 of the Government Code* in conjunction with common-law privacy. The county attorney's office must withhold the information we have marked under *section 552.117(a)(2) of the Government Code* to the extent this information pertains to a peace officer currently or formerly employed by the county, including any cellular telephone not paid for by a governmental body. To the extent the information we have marked under *section 552.117 of the Government Code* is not protected by *section 552.117(a)(2) of the Government Code*, the county attorney's office must withhold this information under *section 552.117(a)(1) of the Government Code* to the extent it pertains to a current [*23] or former county official or employee who timely requested confidentiality for the information under *section 552.024 of the Government Code*, including any cellular telephone numbers not paid for by a governmental body. To the extent the information we have marked under *section 552.117 of the Government Code* is not protected by *section 552.117(a)(1) of the Government Code* or *section 552.117(a)(2) of the Government Code*, the county attorney's office must withhold this information under *section 552.1175 of the Government Code* to the extent this information pertains to an individual who is or was employed by a governmental entity other than the county, falls within the scope of *section 552.1175(a) of the Government Code*, and elects to restrict access to the information in ac-

cordance with *section 552.1175(b) of the Government Code*, including any cellular telephone numbers not paid for by a governmental body. [*24] The county attorney's office must withhold the cellular telephone account number and partial cellular telephone account number we have marked under *section 552.136 of the Government Code*. The county attorney's office must release the remaining information, but any information protected by copyright may only be released in accordance with copyright law.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the [*25] Attorney General, toll free at (888) 672-6787.

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawTelephone ServicesCellular ServicesGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsLocal GovernmentsFinance

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA

Attorney General Opinion 09-12

2009 Okla. AG LEXIS 10

May 13, 2009

REQUESTBY:

[*1]
Susan C. McVey, Director
Oklahoma Department of Libraries
200 N.E. 18th St.
Oklahoma City, Oklahoma 73105-3298

OPINIONBY:

W.A. DREW EDMONDSON, ATTORNEY GENERAL OF OKLAHOMA; DEBRA SCHWARTZ, ASSISTANT ATTORNEY GENERAL

OPINION:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

> **Are e-mails, text messages, and other electronic communications made in connection with the transaction of public business, the expenditure of public funds or the administration of public property, subject to the Oklahoma Open Records Act and the Records Management Act when they are created, received, transmitted, or maintained by public officials on privately owned equipment and communication devices?**

The answer is yes, unless some provision of law makes the information confidential. Electronic communications that qualify as "records" are subject to the Open Records Act and Records Management Act. Moreover, to conclude otherwise would allow public officials and employees to circumvent the open records laws simply by using privately owned personal electronic communication devices to conduct public business.

BACKGROUND

Your question [*2] is prompted by government officials' and employees' increasing use of computers, laptops, cell phones, PDAs, smart phones, and other personal electronic communication devices in conjunction with their work. In some cases, the governmental entity purchases the equipment and pays for its use. In other cases, public officials or employees personally pay for the equipment, either outright or from an allowance given by the governmental entity to cover the expense. Your question focuses on the latter situation, in which the public officials or employees, rather than the governmental entity, own the equipment.

The answer to your question is based not on who owns the electronic communications equipment, but on whether the electronic communications created or received by public bodies or officials on that equipment are "records" as

defined in the Open Records Act and/or Records Management Act. This office has already addressed this question in Attorney General Opinion 01-46, which established that e-mails created or received by public agencies and officials and made in connection with the transaction of public business, the expenditure of public funds, or the administration of public property [*3] are records subject to the Oklahoma Open Records Act and the Records Management Act. *Id.* at 241-42. There is no need to repeat here the extensive analysis in A.G. Opin. 01-46; rather, we will only examine the issue of whether the ownership of communications equipment is relevant in deciding when the Open Records Act or Records Management Act applies to electronic communications.

OPEN RECORDS ACT

Under Oklahoma's Open Records Act, 51 O.S.2001 & Supp.2008, §§ 24A.1 - 24A.29 ("ORA"), a "record" is subject to disclosure unless some provision of law allows it to be kept confidential. The ORA defines "record" as follows:

> "Record" means all documents, including, but not limited to, any book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, disk, record, sound recording, film recording, video record or other material regardless of physical form or characteristic, ***created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering*** [*4] ***of public property.***

51 O.S.Supp.2008, § 24A.3(1) (emphasis added).

This broad definition of the term "record" makes no distinction based on who owns or pays for a communication device and the services associated with it; rather, the ORA concentrates on who creates, receives, controls, or possesses a record ("public officials, n1 public bodies, n2 or their representatives") and the context in which it was created or received by those persons (in connection with the transaction of public business, the expenditure of public funds, or administering public property). Neither here, nor anywhere else in the ORA, is ownership of equipment mentioned as a factor in determining what is or is not a record. We conclude that who owns an electronic communications device has no bearing on whether an electronic communication created or received on that device is a record. Thus, a communication that meets the definition of a record under the ORA is subject to disclosure regardless of whether it is created or received on a publicly or privately owned personal electronic communication device, unless some provision of law allows it to be kept confidential.

n1 "'Public official' means any official or employee of any public body as defined herein[.]" *51 O.S.Supp.2008, § 24A.3(4).*

[*5]

n2

> "Public body" shall include, but not be limited to, any office, department, board, bureau, commission, agency, trusteeship, authority, council, committee, trust or any entity created by a trust, county, city, village, town, township, district, school district, fair board, court, executive office, advisory group, task force, study group, or any subdivision thereof, supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property, and all committees, or subcommittees thereof. Except for the records required by Section 24A.4 of this title, "public body" does not mean judges, justices, the Council on Judicial Complaints, the Legislature, or legislators[.]

Id. § 24A.3(2).

Nor does the location of the electronic communications equipment matter, whether it is used in a governmental office, in a public official's or employee's home, or somewhere in transit between them. As stated in the definition cited above, Section 24A.3(1) of the ORA applies equally to individual public officials as well as to public bodies; [*6] accordingly, if a communication qualifies as a record it makes no difference under the ORA whether it is in the sole possession of a public official or in the possession of that official's public body. In an opinion regarding the application of Texas's freedom of information act to an individual public official's e-mail communications on privately owned equipment, that state's Attorney General reasoned as follows:

> Records that clearly relate[] to official business are **public records** subject to the act regardless of whether an individual member of a governmental body, the governmental body's administrative offices, or the custodian of records holds the records. (cites omitted). If a governmental body could withhold records relating to official business simply because they are held by an individual member of the governmental body, it could easily and with impunity circumvent the act merely by placing all records relating to official business in the custody of an individual member. The legislature could not have intended to permit governmental bodies to escape the requirements of the act so easily.

Tex. Atty. Gen. Op. OR2001-1790, 2001 WL 949328; [*7] *accord N.D. Op. Atty. Gen. O-07, 2008 WL 773339* (Regarding communications on public officials' privately owned electronic communication devices, if the officials were "acting within the scope of their public positions and created a record regarding public business, that record is subject to the open records law regardless of whether it is located at their private homes or businesses. The open records law applies to **public records** regardless of where a public employee or board member possesses the record.").

Given the expressed legislative intent that Oklahoma's ORA exists "to ensure and facilitate the public's right of access to and review of government records," *51 O.S.2001, § 24A.2*, we agree with this reasoning. We note that whether any particular electronic communication is a record as defined in the ORA, and whether any provision of law makes a particular record or parts thereof confidential, are questions of fact that cannot be answered in an Attorney General's Opinion. *74 O.S.2001, § 18b(A)(5).*

RECORDS MANAGEMENT ACT

Your question also refers to the Records Management [*8] Act, *67 O.S.2001, §§ 201 - 215* ("RMA"), which deals with the maintenance and disposition of **public records.** n3 Using language similar to that in the ORA, the RMA defines "record" as follows:

> "Record" means document, book, paper, photograph, microfilm, computer tape, disk, record, sound recording, film recording, video record or other material, regardless of physical form or characteristics, ***made or received pursuant to law or ordinance or in connection with the transaction of official business[,] the expenditure of public funds, or the administration of public property. n4***

67 O.S.2001, § 203(a)(emphasis added)(footnote added). The RMA imposes a duty upon state and local entities and their officials to keep and maintain their records as follows:

> ***All records made or received by or under the authority of or coming into the custody, control or possession of public officials of this state in the course of their public duties*** shall not be mutilated, destroyed, transferred, removed, altered or otherwise damaged or disposed of, in whole or in part, except as provided by law.

Id. [*9] (emphasis added).

n3 The RMA further distinguishes between "state records" (related to state governmental entities, the Legislature, and courts) and "local records" (related to counties, cities, towns, districts, authorities, or "any public corporation or political entity whether organized and existing under charter or under general law.") *67 O.S.2001, § 203(b)*, (c). The RMA is mandatory for state records and shall be followed "as far as practical" for local records. *Id.* § 207.

n4 The Archives and Records Commission, the entity responsible for implementing the RMA, has promulgated rules that distinguish between "substantive" and "ancillary" records. Substantive records document a public body's "organization, functions, policies, procedures, operations and essential transactions." *OAC 60:10-3-5* (1998). Ancillary records are routine and have no informational or evidentiary value "beyond the immediate use for which they were created or received, nor do they contain supporting documentation for financial or business transactions of [a public body]." *Id.* For a thorough discussion of this issue and how it affects the disposition of records, see A.G. Opin. 01-46, at 235-36.

[*10]
Like the ORA, the RMA makes no distinction between records that exist on publicly owned electronic communication equipment and those on privately owned equipment. Therefore, public officials may not partially or wholly mutilate, destroy, transfer, remove, alter, or otherwise damage or dispose of records on their personal electronic communication devices, except as provided by law. n5 Whether any particular electronic communication is a record subject to the RMA is a question of fact that cannot be answered in an Attorney General's Opinion. *74 O.S.2001, § 18b(A)(5)*.

n5 State records cannot be destroyed or otherwise disposed of unless the Archives and Records Commission determines that they have "no further administrative, legal, fiscal, research or historical value." *67 O.S.2001, § 210*. However, the Commission's authority "shall not apply to records and archives of political subdivisions of the state." *67 O.S.Supp.2008, § 305*.

[*11]
In summary, we conclude that ownership of electronic communications equipment is irrelevant in determining whether information thereon is subject to the ORA and/or the RMA. Rather, that determination depends upon whether the information qualifies as a record as defined in the ORA and/or RMA.

It is, therefore, the official Opinion of the Attorney General that:

> **E-mails, text messages, and other electronic communications made or received in connection with the transaction of public business, the expenditure of public funds or the administration of public property, are subject to the Oklahoma Open Records Act, 51 O.S.2001 & Supp.2008, §§ 24A.1 - 24A.29, and the Records Management Act, 67 O.S.2001, §§ 201-215, regardless of whether they are created, received, transmitted, or maintained by government officials on publicly or privately owned equipment and communication devices, unless some provision of law makes them confidential.**

Legal Topics:

For related research and practice materials, see the following legal topics:
[*12] Estate, Gift & Trust LawTrustsGeneral OverviewGovernmentsLocal GovernmentsDuties & PowersGovernmentsLocal GovernmentsFinance

Selling Quickly
Learn More
BeaconRiverside.com | (904) 696-9200
BEACON RIVERSIDE

City plans to start saving text messages Monday

Article reprints available.
Find out more.

07/10/2012

by Joe Wilhelm Jr., Staff Writer

City BlackBerry users will find their text messages saved starting next Monday.

The City Ethics Commission Subcommittee on Transparency and Open Government met Monday to discuss how to capture and preserve text messages.

"The first area of concern was whether or not text messages, which are public record if they are discussing City business on either City or personal phones, are being kept," said James Young, a member of the City Ethics Commission.

The City Ethics Commission Subcommittee on Transparency and Open Government met Monday at City Hall to discuss how the Sunshine Law applies to text messages and how long they should be stored.
Photo by Joe Wilhelm Jr.
purchase this photo

The subcommittee met at City Hall with Cole Cartledge, director of Intra-Governmental Services for the City, and Adam Mathews of the City Information Technology Division to discuss the procedures for storing text messages sent on City -issued cell phones.

Cartledge asked Mathews if the messages were being held.

"No they are not presently held," said Mathews.

"I've directed our staff to start holding those indefinitely and we are going to coordinate with the Office of General Counsel to see how long we need to hold those," said Cartledge.

Former Florida Attorney General Bill McCollum announced a policy in 2009 regarding open government and transparency. The Attorney General's Office began treating Blackberry PIN messages and Blackberry text messages as public records by automatically retaining those messages that travel through the agency server.

Subcommittee member Larry Pritchard approved of the transparency but said he worried about the cost.

"What you are talking about sounds great, but it's not recoverable in any kind of economical fashion," said Pritchard, referring to the number of documents that would need to be searched and produced and the labor costs to find the documents.

It was explained that the City is able to control those costs if it has to search its own system, but those costs grow when it has to use outside service providers to retrieve the messages. An example would be City Council, where some members use personal cell phones with different providers to conduct City business.

Cartledge suggested a policy change, such as not allowing text messaging during open meetings, but subcommittee member Joe Jacquot was not comfortable with that idea.

"We shouldn't prohibit the use of new technology. The vehicle is not the issue. The issue is capturing the content," said Jacquot.

The subcommittee voted to bring the issue to the full Ethics Commission at 11 a.m. today at City Hall.

jwilhelm@baileypub.com

356-2466

@photojoe71

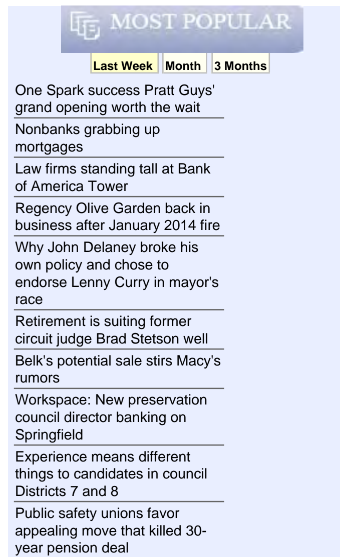
Back to home E-mail this article print this article

Article reprints available.
Find out more.

Tuesday, July 10, 2012 Headlines:

City Council President Bill Bishop: 'I can't do it myself'

State report: Workforce dropouts lowered the unemployment rate



▶ Next Dine with Us Downtown planned at Olio

▶ Development today

▶ Real Estate Sale of the Day

▶ City plans to start saving text messages Monday

▶ Wallace takes lead at Rotary

▶ Nonprofit News: Highlighting Jacksonville's Philanthropic Community

▶ Nonprofit CEO Showcase: John Cone

Covering events in the Realty and Building communities in Northeast Florida.

10 North Newnan Street · Jacksonville, FL 32202 · (904) 356-2466 · Fax (904) 353-2628

© 2015 Bailey Publishing & Communications, Inc. All Right Reserved.

Privacy Policy · Refund Policy

$0.99*.COM
THE domain at THE price.

Recommend 8
2
Tweet
0
g+1

'Textgate' crowd got off easy for destroying records

August 29, 2013 | Scott Maxwell, TAKING NAMES

My dad used to say, "Ignorance is no excuse for breaking the law."

Dad never lived in Florida.

Here, authorities say Orange County commissioners broke the law many times over — but got off with a slap on the wrist — all because they claimed they didn't know they were doing wrong.

Start Download
fromdoctopdf.com
Convert Any File to a PDF - Word, Jpeg, Gif, Rtf - Free Download!

Free Quit Claim Deed Form
onlineforms.lawdepot.com
Edit, Download and Print. Create a Quit Claim Deed in Minutes

Imagine how well that tactic might work for you:

What that's, Officer? Cocaine *is* illegal? Why, if only you'd told me earlier, I would've found something else to snort. Thank you for letting me know … and I hope we're cool.

At the end of a six-month investigation, prosecutor Jeff Ashton concluded that commissioners "violated Florida law" when they deleted text messages that were public records — but said he couldn't prove that they did so "knowingly."

So there was no criminal prosecution, only $500 civil fines.

I'm sorry, Your Honor. I had no idea that stealing TVs *was* illegal. If only someone had let me know society frowned on such things, I would've gone to Best Buy and purchased one myself.

Perhaps you think I'm being simplistic. But look at the logic these guys used to claim ignorance:

They knew that correspondence in every fashion — from snail mail to email — was a public record that they couldn't legally destroy or delete. But somehow, they were clueless about text messages.

Anybody who knows anything about public records (and supposedly, these guys do) knows that any form of communication can be a public record.

It doesn't matter if you deliver a message on a foot-long sausage. If that message is directed to a public official and related to public business, that wienerwurst is public record.

I'm not sure I blame Ashton for the anemic punishment. Legislators carefully drafted public-records law to make them harder to prosecute than your average crime. If you steal a TV, prosecutors don't have to prove you knew you were doing wrong. But to prosecute some records laws, they do.

At least Ashton and the Florida Department of Law Enforcement dove into this matter. Other prosecutors might have given it a pass. And the investigation did prompt reforms. The county installed new policies to capture texts. And from now on, no local pols can claim ignorance on the matter.

A lawyer for the fined commissioners — Scott Boyd, Fred Brummer, Jennifer Thompson and former Commissioner John Martinez — called Ashton's findings a "vindication" for his clients.

SUBOXONE® Sublingual Film
suboxone.com
(buprenorphine and naloxone) CIII. Find a doctor.

That made me wonder if he understood the meaning of the word "vindication" … unless his clients had also been arguing they broke the law.

Related Articles

Orange leaders face $500 fines in 'textgate' scandal
August 28, 2013

All Orange leaders to pay $500 'textgate' fine
September 4, 2013

Orange leaders settle 'textgate,' pay $90,000
January 13, 2014

'Textgate' has yet to bring major reforms in Orange
April 14, 2013

Proving 'textgate' crime will be tough, expert says
February 4, 2013

Find More Stories About

Florida Law

Penalties aside, these guys will probably pay a political price. Future opponents can call them lawbreakers and quote the state attorney saying so.

If there's an unfair casualty to this investigation, it's probably Mayor Teresa Jacobs. While I haven't had kind words for the way she generally handled the sick-time affair, she was the only one who quickly and publicly reproduced all of her text messages.

The public knows everything Jacobs texted. The same can't be said for all the commissioners who swapped texts with lobbyists from Disney, Universal, Darden, Mears Transportation or any of the moneyed interests that may have been telling them what to do.

And that's really the shame of all this. The public will never know exactly what transpired.

We know the lobbyists were in close contact with the politicians. But we don't know all that they said, what orders they may have given or even if they promised the politicians anything in exchange for voting the "right" way.

The commissioners all claim no such thing happened.

But they deleted the texts — and any chance to prove what they are saying is true.

smaxwell@tribune.com

Federal Tax ID (EIN)

gov-tax.com

Get your Tax ID Number in minutes. Fast, Secure online form.

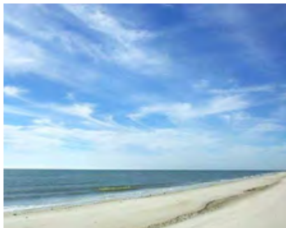
See Also

1. Pancreas Cancer Signs
2. Best Exercise to Lose Belly Fat
3. Cars to Buy in 2015
4. Rheumatoid Arthritis Signs
5. 5 Foods to Never Eat
6. Diet Pills That Work
7. Top 10 SUVs of 2014
8. 10 Best Mutual Funds

Featured Articles

Daytona Pier reopens with Joe's Crab Shack

Florida's got beaches for dog day afternoons


Florida beaches moving up on Dr. Beach best beaches in the U.S. list

MORE:

Puerto Rico birth certificates: How to get a new one

Lottery results for Powerball, Florida Lotto

Lottery results for Powerball, Florida Lotto

Lottery results for Powerball, Florida Lotto

Do your homework before painting or sealing cool deck

Vero plaza sells for $11.5M

Please note the green-lined linked article text has been applied commercially without any involvement from our newsroom editors, reporters or any other editorial staff.

Texts. Tweets. Public record? Elected officials in legal quandary over new media, devices

OCTOBER 28, 2012 12:00 AM • BY BETSY BLOOM | BBLOOM@LACROSSETRIBUNE.COM

It has become a common sight in society: someone with phone in hand, busily tapping away.

But when done by a public official, that practice might be more than an annoyance or a breach of etiquette.

The growing use of Twitter and texting has some wondering whether such electronic communications by government officials should be considered public record. Public officials now must retain all emails that relate to their position, even if sent from a personal computer or other electronic device.

It's why La Crosse council President Audrey Kader advises her colleagues to use their city-provided laptops, or at least their city email accounts, when responding in any official capacity. Otherwise, they could be forced to submit a home computer for search if an open records request is made.

But text messages have been a gray area. They're written communications but done from phones that might have little storage capacity and few means for downloading.

So are texts like phone calls? Or like emails? Several legal experts contend they are a form of public record, even if state law now has no clear guidelines on what's acceptable for meetings or other communications from personal electronic devices.

La Crosse City Attorney Stephen Matty said his default rule about written communications, no matter where sent from, has been, "if you're doing stuff that's city business-related ... then that's a record that needs to be retained."

The crux of texting

These types of electronic communications haven't been much of an issue locally. Virtually every La Crosse city council and county board member interviewed for this story said they'd never used texts to communicate with other officials, if they even texted at all.

But it came under scrutiny in Madison after the city council in November 2011 approached a final vote on whether to keep $16 million in tax incremental financing for a proposed $98 million downtown hotel, according to the Wisconsin State Journal.

While Madison council members — and even representatives of the hotel developer — exchanged texts on the project and speculated on potential votes to approve, no open debate took place before the vote, which deadlocked 10-10, killing the proposal.

The State Journal examined hundreds of those texts and found no apparent violation of the Open Meetings Law. But the behind-the-scenes discussions seemed to skirt the spirit, if not the letter, of government operating openly.

“Fundamentally, it’s not a lot different from passing notes back and forth (on a council),” said Dan Thompson, executive director of the League of Wisconsin Municipalities, “except that has a record.”

And text messages often don’t, unless the person makes an effort to save them, as Madison council members did at the direction of city legal staff.

Most governing bodies have not adapted their policy to the evolving technology, said Madison attorney Robert Dreps, an expert in the state’s Open Meetings and Records laws who spoke on the topic to government attorneys at a State Bar Association conference in September.

“It’s recorded information,” Dreps said, “that should be archived and retrieved if it concerns public business.”

Matty and his counterpart at the county, Corporation Counsel David Lange, both said they have nothing on the books specifically addressing use of texts and other, newer forms of electronic communication.

That’s not uncommon and not surprising, said Thompson of the League of Wisconsin Municipalities.

Most government and elected officials still come from generations that haven’t really adopted texts and social media, Thompson said, adding, “I don’t text.”

La Crosse Mayor Matt Harter has been noticed typing into his cellphone at meetings but said it’s personal, not job-related.

He tries to avoid texting or emailing at all during meetings, Harter said, but during “lull spots” might quickly tap a short message out, something as simple as advising the person at the other end he’s in a meeting.

But he can see why it would become a concern, one perhaps worth examining further, the mayor said.

Madison’s policy states text message communications by public officials are permissible if they are saved as public record and don’t violate state laws, which prohibit emails and instant messaging from creating a “walking quorum” that can decide government business outside a public meeting.

Some communities, such as the cities of Denver, Colo., and Ann Arbor, Mich., have placed limits on electronic communications between council members, according to the State Journal.

Dreps said he knows of no legal decisions so far regarding text messages as public record but expects it’s just a matter of time.

Jim Jorstad, director of academic and information technologies at the University of Wisconsin-La Crosse, said he advises staff to consider anything they send electronically to be open and retrievable.

“If you’re subpoenaed,” Jorstad said, “anything’s fair game.”

A new generation

Andrew Londre, elected to the La Crosse County Board earlier this year in District 9, sees electronic media as a means to keep his constituents informed on what he is doing as a county supervisor and member of the city’s Neighborhood Revitaliz-ation Commission.

He regularly posts on his Facebook page and Twitter feed, sometimes only moments after a vote.

He represents a more urban, younger area of La Crosse that might not be able to attend the meetings. “I think using and embracing new types of media is a way to engage more people, a larger audience,” Londre said.

That hasn’t always sat well with others working with Londre. City Planner Larry Kirch cut short a report to the neighborhood commission in August after noticing Londre and another member of the panel typing on their phones.

It led to a testy exchange on what’s acceptable during a meeting, with Kirch labeling the practice “rude.” Londre said he later apologized to Kirch but explained, “I also was trying to inform people.”

District 12 city council member Sara Sullivan, chairwoman of the commission, said she’s not bothered by the texting but can understand why others might be.

As a UW-L professor, she had to adjust to seeing her students busily typing on their phones. Though some could be cruising the Internet or sneaking a peek at email or social media sites, she came to realize most were taking notes.

“It’s easy to jump to the wrong conclusion,” Sullivan said. “I just think we need to recognize that some people use their phones the way some of us use laptops.”

While she doesn’t text, her children do. “If you want to communicate with young adults,” Sullivan said, “you need to text them.”

Still, if her students are not paying attention in class, that’s their choice, Sullivan said.

A public meeting, she acknowledged, is a different setting and set of rules. Those on the commission would be expected to give their full attention.

Londre agreed that in La Crosse County it’s probably a generational issue, with few county or city officials beyond his few fellow 20-somethings in public office — such as Karin Johnson on county board or city council member Katherine Svitavsky — likely to turn to electronic communication.

And Londre said he would be uncomfortable with the idea of an actual discussion going on electronically outside a public meeting. He doesn't use texts during meetings, he said, and his Twitter feed is posted for all to see.

His aim is to make the process more transparent, he said, not shut the public out.

"That makes me a little queasy," Londre said of texts between members of county board or city council. "Even if it's legal, that doesn't necessarily make it right."

Text messages enter public-records debate

WASHINGTON

By Ledyard King, Gannett News Service

Those supposedly private messages that public officials dash off on their government cellphones to friends and colleagues aren't necessarily private after all.

Courts, lawyers and states are increasingly treating these typed text messages as public documents subject to the same disclosure laws — including the federal Freedom of Information Act — that apply to e-mails and paper records.

"I don't care if it's delivered by carrier pigeon, it's a record," said Charles Davis, executive director of the National Freedom of Information Coalition at the University of Missouri. "If you're using public time or your public office, you're creating public records every time you hit send."

A Texas judge agreed in December, ordering the city of Dallas to turn over e-mails written by some city officials as well as messages sent on handheld devices such as cellphones.

Journalists in Detroit are pressing for a similar ruling. Several media outlets, including the Gannett-owned Detroit Free Press, have sued the city for access to text messages Mayor Kwame Kilpatrick sent using his pager. Gannett also owns USA TODAY's parent company.

Through an independent source, the Free Press already has obtained thousands of text messages that seem to confirm the married mayor and his top aide were having an affair and had decided to fire a deputy police chief investigating the mayor's personal conduct.

Herschel Fink, a lawyer representing the Free Press, said there's no doubt the text messages are public.

"The lesson to public officials is don't do anything crooked because there are myriad ways you can be found out," he said. "And this is one of them."

Kilpatrick's messages were saved for several years because his pager came from a company that archived them, Fink said.

But many such messages don't hang around long enough to be retrieved. They may remain stored inside a pager or cellphone for only a few hours, depending on the device's storage capacity.

Some consider the casually written text messages more like conversations than e-mails and say they don't meet the standard of a traditional public record.

Text messages sent via cellphone are stored on the cellphone company's servers or backup tapes, but they disappear as those records are purged.

Even if the actual text messages have vanished, advocates for open government say the logs of such conversations — which would look similar to a phone bill listing called numbers — should be made public.

That's what Thomas McAfee got last year when he asked the University of Arkansas for the text messages and other cellphone records of the school's head football coach, Houston Nutt. McAfee, an avid Arkansas football fan, wanted to see whether a school booster was unduly influencing Nutt's play-calling decisions.

Arkansas' public records law doesn't mention text messages specifically, but it does cover

HOT RIGHT NOW

1 Elian Gonzalez, 15 Years After US-Cuba Tug of War

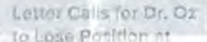
2 Google Doodle Celebrates Earth Day With a Quiz

3 Toddler Born Without Feet Gets Puppy Without a Paw

4 How the Alleged Paris Terror Plot Was Thwarted

5 Cleveland Kidnapping Survivor Describes Moment She Escaped

YOU MIGHT ALSO LIKE...



Letter Calls for Dr. Oz to Lose Position at

Hillary Clinton Says Republicans 'Talking

Woman Visiting

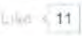
This App Is Quickly Replacing Human

"electronic or computer-based information."

The logs McAfee got from the school show Nutt not only communicated with the booster but also frequently used his university-issued cellphone to text message a female TV news anchor. McAfee subsequently asked the school's board of trustees to investigate the conduct of Nutt, who is married. Nutt has denied any improper relationship.

State lawmakers in New York are working on a revision to the state's open records law that would specifically add text messages to the types of documents covered. Davis, at the National Freedom of Information Coalition, said that shouldn't be necessary.

"If every time a new technology emerges we're going to argue it's not a public record, then our view of public records is very cramped," he said. "If it's not a piece of 8x10 glossy white paper, then it's not a public record? We've got to embrace the future."



Like 11 6 2 g+1 1 0 Comments

PROMOTED STORIES

There Are 7 Types of English Surnames — Which One Is Yours? *(Ancestry)*

This Is the Future of Cities *(Microsoft)*

- Forget The iPhone 6. Next Hit Apple Product Leaked *(The Motley Fool)*
- How the Internet of Things is Changing the Face of Many Industries *(AT&T)*
- The Future Of Retail Isn't What You Think *(PwC Digital Services)*
- Happy Earth Day! Here Are Your Climate Change Deniers *(Dailymotion Video)*
- One Billion Stars, 30,000 Light Years, And Petabytes Of Data *(Oracle on Forbes)*

MORE FROM ABC NEWS

Missing Woman Kept Husband's Abuse a Secret

NASA: Death Star May Have Shredded Planet After Close Encounter

- This Is What Happens to Your Body When You Run a Marathon
- Missing Mother and Daughter Found Safe in New York City
- Cleveland Women, Missing for 10 Years, Found Alive
- Norway Plans to Ditch FM Radio
- Tim Cook Isn't a Cheap Lunch Date

Recommended by

RELATED TOPICS: Kwame Kilpatrick

OFFERS YOU MIGHT LIKE

ADS BY ADBLADE

Forget the iPhone 6

1 small company is the key to Apple's latest device, and its stock has wealth-changing potential.

More >>

Can You Regrow Your Hair?

Could This Unique Method Regrow Your Lost Hair? (Shocking)

More >>

U.S. Dollar Collapse?

22-Year Congressman Explains How And When A Dollar Collapse Could Happen— And How To Prepare

More >>

JOIN THE DISCUSSION

Recommended by

PHOTO GALLERIES

View: This Week in Pictures: Top Photos from Around the Globe

International

SEE IT, SHARE IT

Heidi Gutman/ABC

Cleveland Kidnapping Survivor Describes Moment She Escaped

BSIP/UIG/Getty Images

54-Year-Old Woman Dies in Church Potluck Botulism Outbreak

ABC News

Introducing ABC News on the Apple Watch

Lukas Schulze/AP Photo

How Much Money Facebook Makes Per User

GC Images

Kim Kardashian Steps Out in Shades of Brown

westmercia.police.uk

Police Investigate Diet Pills in Woman's Death

Rob Kim/Getty Images

The Olsens Found Out About the 'Full House' Reboot When You Did

0 Comments ABC News

Recommend Share Sort by Best

Start the discussion...

Be the first to comment.

sponsored offers

Pay Off Your Home In Half
1 Dirty Little Secret To Pay Off Your Home In Half
Smarter Lifestyles

Ron Paul Predicts Crash?
Dr. Ron Paul's #1 Step To Protect Your Finances
Stansberry Research

Omaha In Disbelief
Americans can't believe that new site is legal. Search your name before it gets banned!
Instant Checkmate

ALSO ON ABC NEWS

Boston Bomber Made Obscene Gesture to Camera in ...

Tennessee Judge Scolds Gang Member in Viral Video

Little Girl Asks First Lady (Gasp) 'How Old Are You?'

Mary Kate and Ashley Olsen Found Out About the 'Full ...

AROUND THE WEB WHAT'S THIS?

7 Engagement Ring Trends of 2015

10 Highest Paying Jobs With a 2 Year Degree

#1 Worst Exercise That Ages You Faster

Ultrafast Broadband Is Here, and It's Changing the U.S.

HOME > TECHNOLOGY

© 2015 ABC News Internet Ventures. All rights reserved.

Records Management Advice
Issued: April 2015

Electronic Records Management:
Are Text Messages Public Records?

Purpose: Provide guidance to state agencies and local government entities on whether text messages are public records for the purposes of records retention (chapter 40.14 RCW).

Are text messages public records?

YES – If the text message relates to the conduct of public business (which means it is about the work of the agency), then it satisfies the definition of public records in RCW 40.14.010 (emphasis added):

> *"As used in this chapter, the term "public records" shall include any paper, correspondence, completed form, bound record book, photograph, film, sound recording, map drawing, machine-readable material, compact disc meeting current industry ISO specifications, or other document,* ***regardless of physical form or characteristics, and including such copies thereof****, that have been* ***made by or received by any agency of the state of Washington in connection with the transaction of public business****, and legislative records as described in RCW 40.14.100."*

Are agency work text messages sent or received to a personally-owned device a public record?

YES – If the text messages relate to the work of the agency, then it does not matter if the device involved is agency-owned or personally-owned; the records are still public records.

If you are conducting public business – it's a public record.

What about public records requests for text messages?

For guidance on public records requests for text messages, please consult your agency's legal counsel or the Office of the Attorney General's Open Government Program at:

http://www.atg.wa.gov/open-government-ombuds-function

Additional advice regarding the management of public records is available from Washington State Archives:

www.sos.wa.gov/archives
recordsmanagement@sos.wa.gov

EXHIBIT 14