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Client Alert

To: Local Government Clients
From: Ancel Glink

Use of Private Cell Phones and Computer for Government Business - Text Messages Held to be Public Records

All local government bodies and officials should be aware of a new Attorney General (Public Access Counselor) opinion concerning the use of private devices to send electronic communications about government business. In a binding opinion dated November 15, 2011, the Illinois Attorney General determined that the City of Champaign violated the Illinois Freedom of Information Act when it partially denied a request for text messages sent between city council members on their personal cell phones during city council meetings.

A news reporter had filed a FOIA request for all electronic communications, including cell phone text messages on city-issued and personal cell phones, city-issued and personal email addresses, and Twitter accounts. The city approved the request in part by releasing those records that were in the city's possession, including communications that "passed through" city equipment. However, the city denied the request for emails, text messages, and other electronic communications on city council members' private computers or cell phones. The city's justification for the denial was that these communications were not "public records" under FOIA. The reporter appealed the city's decision to the Public Access Counselor's (PAC) office of the Attorney General.

The PAC's analysis turned on "what is a public record?" The PAC first determined that electronic communications that do not relate to city business (such as messages regarding personal meetings or family matters) are not public records subject to FOIA, whether those communications are sent via city-owned equipment or personal equipment.

The PAC next determined that electronic communications by public officials that relate to city business are public records subject to FOIA, regardless of how the communications are sent. In this case, the PAC determined that the city violated the Act by not providing text messages and emails between city council members that pertained to city business, even if the communications were created on private equipment that the city had no control over. The city was ordered to furnish copies of the records to the reporter.

This opinion raises a number of interesting issues for public bodies and officials. First, the statute that authorizes the PAC to issue binding opinions on FOIA matters states that the opinion is binding on the requestor and the public body. The statute is silent as to whether a binding opinion creates any precedent, raising the question whether this particular opinion would apply to other governmental bodies. Of course, even if the opinion were not binding precedent similar to an

appellate court decision, in all likelihood, the PAC would take the same position if faced with similar circumstances in another community.

The next question is whether the retention obligations under the Local Records Act are also triggered for these records, meaning that local governments would have to maintain and retain these electronic communications unless permission is granted to destroy them?

That raises a more practical issue: how can a local governmental entity respond to a FOIA request within the statutory time frame when the records being requested are not under the control of the government body? How would the government even know about the existence of a text message on a public official's phone? A related question is how can a local government meet its retention obligations under the Local Records Act where it has no control or possession over the records?

Although this opinion is binding only on the City of Champaign and the reporter who requested the records, public bodies and officials need to be aware of the position being taken by the PAC with respect to electronic communications. Local officials who use their personal cell phones, computers, tablets, and other electronic devices to communicate on government business should be advised that their communications may be subject to FOIA, even if they do not "pass through" city equipment.

As a rule, public officials should be cautious about all electronic communications, regardless of how they are transmitted. Here is a summary of the rule: Any communication regarding the transaction of public business will likely be subject to disclosure (absent an appropriate exemption) whether that communication occurs on a government or private device. The flip side is that a personal communication will likely be exempt from disclosure, whether on a government or private device.

We recommend that our clients consider establishing a local policy or amending current electronic use policies to address the use of personal equipment for communications about government business consistent with the PAC's opinion.

Please contact [Keri-Lyn Krafthefer](#) or [Julie Tappendorf](#) at 312.782.7606 if you have any questions.

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