



LEGAL ALERT



February 14, 2017

USE OF PERSONAL ELECTRONIC DEVICES MAY CREATE PUBLIC RECORDS

Based upon the recent opinion of the Public Access Counselor ("Public Access Opinion 16-006") addressing the interplay between personal email accounts and public records, a review of your policies and training on use of official and unofficial email accounts for public business may be useful to clarify proper and authorized means of communication by public officials.

Public Access Counselor Issues Binding Opinion – Public Records Can be Created on Personal Phone or Email

The Chicago Police Department received a FOIA request for "all emails related to Laquan McDonald from Police Department email accounts and personal email accounts where business was discussed" for 12 named CPD officers for certain time periods. In response, the CPD searched its official email system for the named officers and the requested time periods, and produced the responsive records. The Department did not conduct a search of any of the officers' personal email accounts for records, contending such communications were not public records. The Public Access Counselor disagreed and concluded that communications pertaining to the transaction of public business that were sent or received on the Chicago Police Department employees' personal email accounts were "public records" subject to FOIA.

A detailed summary of this decision is available on page 2.

For any questions or comments you might have regarding this newsletter, please feel free to contact:

Authored By:

Scott F. Uhler
sfuhler@ktjlaw.com
(312) 984-6421



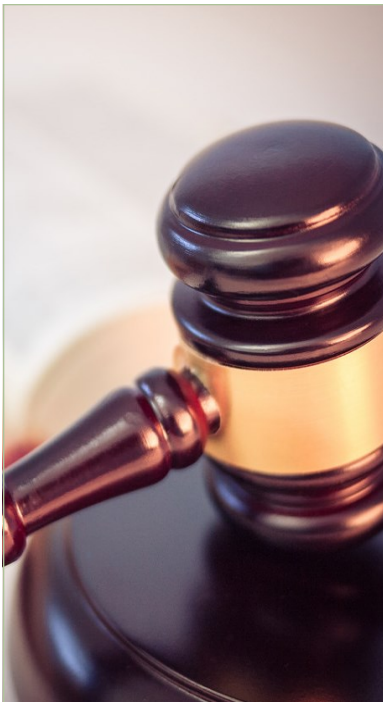
Scott E. Nemanich
senemanich@ktjlaw.com
(312) 984-6418



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A copy of the full decision can be accessed at the following link:

[Public Access Opinion 16-006](#)

Sample policies from the Office of the Attorney General addressing electronic file management, prohibiting the use of private email accounts for official or work-related business and prohibiting the use of text messaging for official business are available for reference at the following link:

[Sample Policies](#)

PUBLIC ACCESS OPINION 16-006 (Disclosure of Emails from Public Employees' Personal Email Accounts Pertaining to Transaction of Public Business; Duty to Conduct Reasonable Search for Responsive Records)

SUMMARY

FACTS

On August 9, 2016, the PAC issued binding opinion 16-006 in response to a request for review alleging a violation of the Freedom of Information Act ("FOIA") by a public body relating to a request for public records. A news outlet submitted a FOIA request to the Chicago Police Department ("CPD") seeking "all emails related to Laquan McDonald from Police Department email accounts and personal email accounts where business was discussed" for 12 named CPD officers for certain date ranges. In preparing a response to the FOIA request, the CPD FOIA officer searched the CPD email system for the named officers and the requested time periods, and produced the responsive records. However, CPD did not conduct a search of personal email accounts for any responsive records, asserting that emails on such accounts are not public records.

ANALYSIS

The PAC first had to determine whether communications on public employees' personal email accounts were subject to the requirements of FOIA.

The PAC found that interpreting the definition of "public records" under FOIA to exclude communications relating to the transaction of public business which were sent from or received on the personal email of public officials and employees would be contrary to the General Assembly's intent of ensuring public access to full and thorough information regarding governmental affairs. The PAC concluded that such an interpretation would yield absurd results by allowing public officials to sidestep FOIA and keep information from the public about how they conduct their public duties simply by using personal electronic devices to communicate. The PAC notes that the fact that FOIA does not include express language that public bodies must search and recover records in personal e-mail accounts of its officials and employees which may be responsive is not material given the statute's absence of any express directives about how a public body must search relevant recordkeeping systems.

The CPD argued that any such communications sent from personal email accounts did not fall within FOIA because they were not "prepared by or for" a public body, and that because they were not stored on a City server, they could not be "used by" or in the possession or under the control of a public body. The PAC, however, disagreed, finding that such a finding "would undercut the principle that public bodies act through their employees, by excluding from the definition of 'public records' communications sent or received by employees of a public body on personal devices or accounts, regardless of whether the communications pertain to the transaction of public business." The PAC held that the proper inquiry should focus on the content of the communication and not the method by which it was transmitted.

For any questions or comments you might have regarding this newsletter, please feel free to contact:

Chicago Office

20 N. Wacker Drive, Ste. 1660
Chicago, IL 60606

T: (312) 984-6400

F: (312) 984-6444

Orland Park Office

15010 S. Ravinia Ave., Ste 10
Orland Park, IL 60462

T: (708) 349-3888

F: (708) 349-1506

www.ktjlaw.com

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The PAC similarly rejected CPD's argument that the search of personal email accounts would subject employees to unreasonable and unnecessary invasions of personal privacy, finding that Section 7(1)(c) of FOIA, (5 ILCS 140/7(1)(c)), expressly provides that the disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy, and that any personal matters unrelated to the transaction of public business are not subject to the requirements of FOIA. As a result, the PAC clearly held that any communications pertaining to the transaction of public business that were sent or received on employees' personal email accounts are "public records" under FOIA and should be produced subject to any other statutory exemptions.

The PAC emphasized that the mere fact that a personal e-mail account is used to send or receive public records does not transform all communications sent or received on that account into public records that must be disclosed in accordance with FOIA, in particular such records have no connection to the transaction of public business. Those communications pertaining to the transaction of public business however that were sent or received on the CPD employees' personal e-mail accounts are "public records" under the definition of that term in section 2(c) of FOIA.

The PAC further noted that CPD's search for responsive records was woefully inadequate in that no search was even made of personal email accounts, despite a specific request for the same. The PAC negated CPD's asserted privacy concerns by noting that the search itself was inadequate, as CPD took no action to ascertain whether the employees named in the FOIA might possess any responsive records. According to the PAC, "depending on the circumstances, ordering CPD officers to produce any responsive records may satisfy the requirement that CPD conduct a reasonable search." However, the public body cannot simply decline to search for e-mails contained on personal accounts. For that and other reasons related to the limited search terms used, the PAC determined the CPD failed to conduct an adequate search for responsive records.

This binding opinion emphasizes the need for clear policies and communication to public officials and employees about proper procedures for conducting public business by email or text, particularly when using personal electronic devices or email. It also reiterates the need for public bodies to conduct thorough and targeted searches for responsive documents when processing FOIA requests. Moreover, to the extent public records may be stored in personal email accounts or on personal devices, the public body must make adequate search of those personal accounts to determine whether any responsive public records exist.