

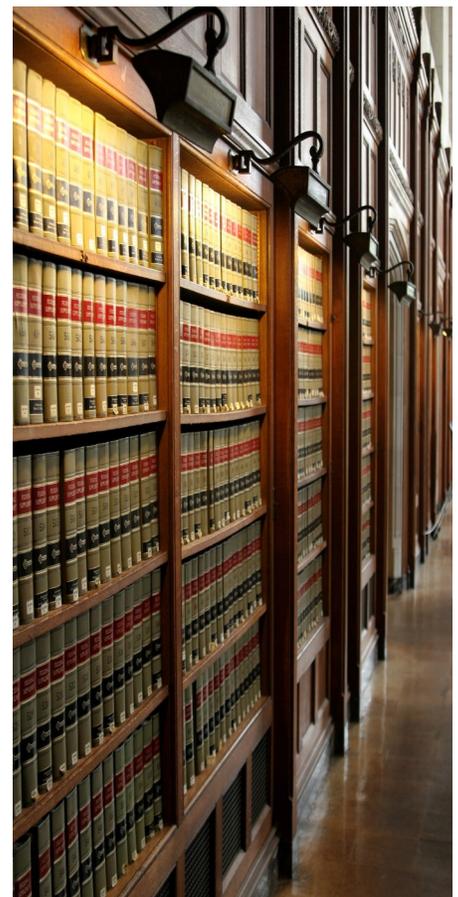
**RECENT BINDING PAC OPINION HOLDS PUBLIC BODIES MUST SEARCH  
PERSONAL EMAIL ACCOUNTS FOR RESPONSIVE RECORDS**

The Public Access Counselor (“PAC”) recently issued a binding opinion addressing the interplay between personal email accounts and public records.

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.

The PAC first had to determine whether communications on public employees’ personal email accounts were subject to the requirements of FOIA. The CPD argued that any such communications sent from personal email accounts 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 more information about matters discussed in this issue, please feel free to contact Klein, Thorpe and Jenkins Ltd.



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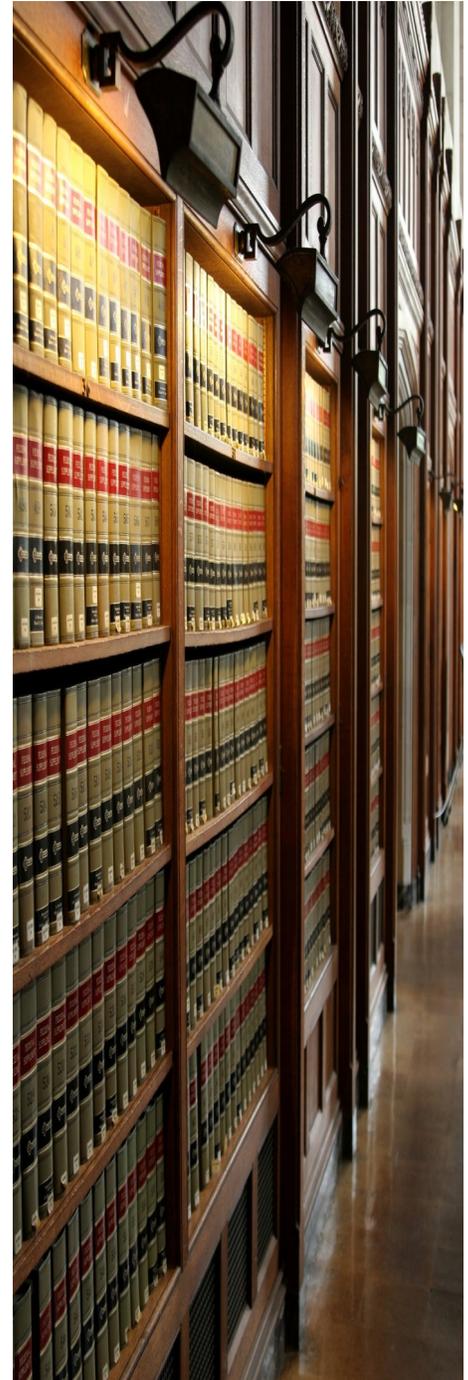
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The PAC similarly rejected CPD's argument that the search of personal email accounts would subject employees to unreasonable and unnecessary invasions of personal privacy, finding that Section 7(1)(c) of FOIA, (5 ILCS 140/7(1)(c)), expressly provides 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 statutory exemptions.

The PAC further noted that CPD's search for responsive records was woefully inadequate in that no search was 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 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.



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