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Private communications and FOIA: Policy questions in search of answers

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Although both the Illinois Open Meetings Act ("OMA")[1] and the Illinois Freedom of Information Act ("FOIA")[2] have been revised in the last decade to address many of the new electronic means of communicating, meeting, producing and retaining records, both the law and the limited number of decisions under that law still leave unanswered a number of practical questions about availability of public records. For municipal practitioners, it may seem as if the unanswered questions arise on almost a daily basis. This article revisits one of those recurring questions: Are all e-mails of anyone associated with a public body that relate in any way to public business subject to FOIA regardless of the device or email address from which they were sent?

We have seen multiple iterations of problems that have arisen related to the use of private devices or private e-mail addresses by public officials. These include the questions Hilary Clinton has faced related to her use of a private email server for certain State Department communications,[3] the resignation of the University of Illinois' Chancellor following revelations that she had deliberately used private email addresses in an effort to avoid scrutiny of those emails under FOIA,[4] a recent lawsuit by the *Chicago Tribune* against the City of Chicago for refusal to produce email correspondence by the Mayor that he conducted on his private device,[5] and allegations made several years ago against Sarah Palin regarding her use of private emails while Governor of Alaska.[6, 7] In each of these cases, the public's right to know and access certain communications runs directly into unanswered questions about what information belongs to the public and what belongs to the individuals sending or receiving them. Because this matter has only been partly considered in Illinois, it seems reasonable to expect that within the next few years we will see new court decisions further fleshing out the application of FOIA to elected officials' communications. Therefore, a quick review of the state of the law is in order.

What electronic communication is and is not subject to disclosure to the public?

When FOIA was significantly revised in 2010, it was done in part to address changes in technology. In that regard, the Act provides specifically that:

> …The General Assembly further recognizes that technology may advance at a rate that outpaces its ability to address those advances legislatively. To the extent that this Act may not expressly apply to those technological advances, this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption….[8]

This general statement of intent, however, does not supersede the explicit definition of "public record" that is included in the Act and provides that:

> (c) 'Public records' means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been

> prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.[9]

This definition makes clear that the term "public record" is expansive and applies to multiple forms of communication including electronic communication. But it also limits "public records" to only those records that were prepared by or for a public body, those used by a public body, those received by a public body, and those in the possession of or control of a public body. This means that not every document or communication related to public business necessarily becomes a "public record." Instead, whether a communication that is related to public business constitutes a public record partly depends on whether such communication is a communication of the "public body" itself.

While the term "public body" is expansively defined in the Act,[10] it refers only to "bodies" and not directly to specific individuals associated with the public body. Thus, any evaluation of a FOIA request for emails depends on a determination of whether an email is one that was prepared by or for a public body or whether it was used by, received by or is in the possession or control of the public body.

Is every document related to public business subject to FOIA?

There has been little challenge in Illinois to the notion that emails or texts related to the business of the public body that are sent by employees of a public body are public records. That is, documents related to public business that have been prepared by or controlled by an employee of a public body, almost by definition, pertain to the transaction of public business since such work is within the job description and expectation of employees who perform work for a public employer.[11] As a result, regardless of the device used or the contact address used for such communication or records, in practice these generally are presumed to be public records and subject to FOIA unless an appropriate exemption applies.[12]

However, the same reasoning does not necessarily apply to the elected officials of multi-member governing bodies who use their private devices and private email addresses. That is because, acting alone, no single Council, Board or committee member can decide the policy or work of the entire body.[13] Each is only one voice among many, and it is the voice of the majority or super-majority of the entire governing body that can set the policy or actions of the body. Or, if considered through an Open Meetings Act lens, elected governing body members are just individuals unless a majority of a quorum of their members have gathered in some way. [14] This, at least, is essentially what the one Illinois Court to consider this issue has held.

In the 2013 *City of Champaign v. Madigan* case[15] the fourth district Illinois appellate court considered whether correspondence about government business conducted by elected officials on their personal devices constituted public records of the public body. The court found that elected officials were not by themselves a "public body" and that, for instance, an email from a constituent to an elected official on the official's private email address and private device, would not be subject to FOIA. In contrast, however, the court found that messages sent between elected officials during public meetings—that is when a majority of a quorum was present and sitting as a public body—were subject to FOIA as public records of a public body. The court specifically noted that if the General Assembly meant for city council members' communications pertaining to public business on their personal devices to be subject to FOIA in every case, then it should pass a law making that clear.[16]

The *City of Champaign* court also made it clear that correspondence to an elected official's government email address or on a government issued device would also be subject to FOIA. FOIA would also apply to a message pertaining to public business that was received on a private device but was forwarded to a quorum of the public body since then it would be directed to the body and not just an individual.[17]

In short, the test laid out by the *City of Champaign* court carefully followed the statutory language to the effect that: "… communications from an individual city council member's personal electronic devices do not qualify as "public records" unless they (1) pertain to public business, and were (2) prepared by, (3) prepared for, (4) used by, (5) received by, (6) possessed by, or (7) controlled by the "public body."[18] We do not yet know if this same "public body" analysis will be applied by other Illinois courts, nor is it clear that this is a distinction that can be clearly understood or practically implemented in any way by elected officials or FOIA officers. However, at this point, the critical Illinois test regarding communication on private devices will depend on whether or not such communications constitute "public records."

How far does the *City of Champaign* analysis extend?

Even if the *City of Champaign* rule proves to be the generally accepted rule in other districts, this still leaves unanswered whether the same analysis should apply to other elected officials who have the legal authority to act on their own as a representative of the public body. Thus, for instance, the current *Chicago Tribune* lawsuit seeking Chicago Mayor Emmanuel's correspondence from his private device may provide an opportunity for a court to carve out a distinction from the reasoning of the *City of Champaign* case.[19]

It is reasonable to ask whether the definition of "public record" can be met in such a case. That is, are the communications of an elected official who does have authority to bind or represent the public body more like those of an employee than those of a council or board member? In the case of Chicago, while many of the Mayor's appointment powers are subject to the advice and consent of the City Council, the Mayor is still given a

great deal of supervisory and enforcement authority under the City's code.[20] Using the analysis laid out by the *City of Champaign* court and the FOIA statute, do such communications—even on a private device or sent from a private address—pertain to public business? And if so, is it fair to say that communications of a mayor working on city affairs in his capacity as chief executive of the city are prepared for and used by the city which is a "public body."

Even if the court in the *Chicago Tribune* case concludes that the Mayor does, in fact, act in a manner that can be said to represent communications of the public body, would this same analysis apply to all mayors, presidents, treasurers or clerks, chairs of committees or commissions or other appointed and elected officials who have some separate authority to act apart from the actions of their governing boards? Would a careful analysis of their codes and the scope of their powers be required in each case? And would it be good policy to make FOIA analysis depend on the exact nature of each official's responsibilities rather than on larger considerations of public policy about what information should or should not be subject to public disclosure?

Is it good policy to subject to FOIA any document whatsoever, held by anyone who is in any way formally associated with a public body, if it pertains to public business? Such a rule would treat all documents equally regardless of the device on which they are held and regardless of the manner in which they are sent. A bright line test or clearly established statutory guidelines might be much easier to implement than a standard based solely on the job description of each party, but any such guidelines first should be the subject of careful policy reflection. They will implicate a host of public policy questions and the best interests of the public may not be well served without such consideration.

For instance, do we want to subject to public scrutiny *every* communication related to a public body by *each* individual elected official—not just the public body as a whole—or are there competing legitimate and policy privacy interests that deserve serious consideration? Does the public have a right to know how and why each elected official formulates every policy? How should competing interest be reconciled? For instance:

- What if that official has received a note on their personal email address from a neighbor who is concerned about possible code violations at another neighbor's house or who believes that the city should support a controversial policy and is telling their elected official neighbor as much? Should the fact that the elected official is subject to FOIA mean that their neighbor has no right to communicate their private concerns to their elected representative and have them remain private?
- What if a public body's member responds to emails from her local school board members who are opposed to a TIF at the same time that the Chamber of Commerce head emails answers to her questions explaining how the TIF project could help the local industrial community? Should that be public?
- What if that same public body member is approached by their religious leader to urge them to expand services for the homeless or to support a variance for a food bank or housing for the disabled? Is that equally public?
- What if that same public body member gets a text from their teenage daughter asking that she consider approving a puppy adoption program in a local park one weekend a month? Is that also public?
- What if the public body member gets an offer from a local business to pay $1000 to their favorite charity or to their spouse if the official will consider voting to let the business expand or get a government contract? Is that something that the public has a right to see?

In each of these cases the communication may be on a private device or a private address, and in each case the public body member acting alone cannot make public policy. But what should the public have a right to know about how individual policy positions are arrived at? That the official listens to and is concerned about the privately expressed opinions of their neighbors but might not wish to subject their neighbors to the same public scrutiny as the elected official has signed up for? That the official is seeking the opinions of interested parties or that the official is carefully studying a controversial topic? That the official has deeply held religious beliefs that influence their decision making? That the official cares about what their adolescent daughter believes is important? That local businesses believe the public official can be corrupted? And do any of the answers to these same questions change if the same communications are directed to a Mayor or other official with independent authority to act?

There are privacy, first amendment, policy formulation and other considerations that all play into these questions. While Illinois' public policy may be based upon the belief that open records laws protect that public, it is worth considering at what point the public has a right to know everything and at what point the public interest is perhaps compromised by unlimited openness. For instance, is the public, in fact, protected if elected officials feel that every action—even the collection of information to help educate themselves about a policy matter before them—will be subject to public scrutiny and challenge even before they have arrived at a decision? Will an elected official be afraid to ask questions or learn about an issue if that research is public? Will elected officials avoid using efficient communication like email and texts if they fear that every communication will become a public one? Should, at a minimum, the FOIA exemption for records in which opinions are expressed, or policies or actions are formulated[21] be expanded to make it clear that pre-decision-making communication of non-executive public body members should be exempt from public scrutiny to ensure that this education and analysis process is not compromised? While public policy in Illinois currently holds that the actions of a public body should be open to scrutiny, before this policy is expanded to reach into the communications of elected members of public bodies who do not have the authority to speak or act alone for

the public body, each of these questions deserve careful consideration.

In the meantime, what's a poor FOIA officer to do?

As a practical matter, what is a poor FOIA officer to do when asked to respond to FOIA requests for communications of the body and its members if not all of the correspondence or work is readily accessible on government servers or through a search of the body's emails. And is the FOIA officer required to undertake this nuanced analysis or consult with their lawyers for every FOIA request? Do they need to ask elected officials for "public records" on their private devices each time a request is received and rely on the elected officials to undertake this complicated and detailed analysis for each of their own emails or communications or documents? Is simply asking for the records—regardless of the response—a reasonable search? Will the public be assured that FOIA is being properly implemented if this is what must happen for each FOIA request? Or will the uncertainty around these issues result in greater skepticism about government transparency?

A public body can and should set up clear parameters for maintaining and producing public records. Ideally bodies can provide every employee and official with their own email address and require that those be used for all public body communication. And ideally they might be able to provide municipally owned phones, computers or tablets to make it easy to get access to those records. But that is not the reality for many public bodies today. Many officials keep their own email addresses or have public-related communications forwarded to their personal email addresses. Moreover, it is not realistic to assume that every public body has the resources to provide every official with their own government issued electronic device and to support such devices. Nor, is it realistic to expect officials to use one device for public communications and a different one for their private work. It would be naïve and unenforceable to expect that this alone would avoid the confusion around communications from private devices or private addresses. Any policy should reflect the reality that 21st Century communications take place across multiple platforms and often are intermingled with officials' personal and professional communications. Creating a system for reaching/archiving public communications must not become so overly burdensome that elected officials, most of whom have other fulltime jobs or commitments outside their civil roles, are forced to shy away from public service because of such burdens.

Given the many competing privacy, policy and administrative implications, it is time for a robust statewide consideration of these issues. It is not enough for one side to claim that the administrative burden is too high or for the other side to dismiss legitimate policy concerns as efforts to withhold information from the public. Nor is it sufficient to have these questions addressed in a piecemeal and haphazard fashion in Springfield or by courts being forced to carve out exception after exception to define the parameters of which communications are properly subject to public scrutiny. Instead, it is time for the municipal bar, the media, public leaders and sunshine activists to engage in a respectful but thoughtful examination of these policy questions. ■

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1. 5 ILCS 120/1 *et. seq.*

2. 5 ILCS 140/1 *et. seq.*

3. See, e.g. Michael S. Schmidt, New York Times, Hilary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules, available at <http://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html?_r=0>.

4. See e.g., Potential FOIA Compliance Issue Discovered and Reviewed at <http://uofi.uillinois.edu/emailer/newsletter/77321.html>.

5. *Chicago Tribune Co. v. City of Chicago Office of the Mayor and Mayor Rahm Emanuel*, 2015 CH 14058 (Cook County Circuit Court) filed Sept. 24, 2015. See also Steve Mills, Chicago Tribune, Tribune Sues Emmanuel Over Use of Private Email, available at <http://www.chicagotribune.com/news/local/breaking/ct-chicago-tribune-sues-rahm-emanuel-met-20150924-story.html>; Foia Issue of Emails on Private Devices Goes Back to Court, The State Journal Register, Oct. 11, 2015 available at <http://www.sj-r.com/article/20151011/news/151019933>.

6. See e.g., Karl Vick, Washington Post, Palin had another private e-mail account, Company Says, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/30/AR2008093002699.html>.

7. A situation receiving a great deal of attention in Philadelphia that arose out of an investigation into the Sandusky matter did not involve private devices but did involve the use of government e-mail by several government officials including members of the Pennsylvania Attorney General's office who used their work emails to exchange pornographic and racist emails. See, e.g., Kathleen Kane, Pennsylvania Attorney General, Is Suspended From Practicing Law at http://www.nytimes.com/2015/09/22/us/kathleen-kane-pennsylvania-attorney-general-is-suspended-from-practicing-law.html?_r=0; Union County Prosecutor Mixed Up in Kane Email Mess, available at <http://wnep.com/2015/09/01union-county-prosecutor-mixed-up-in-kane-email-mess/>.

8. 5 ILCS 140/1.

9. 140 ILCS 2(c).

10. 5 ILCS 140/2(a) ("Public body" means all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof, and a School Finance Authority created under Article 1E of the School Code. "Public body" does not include a child death review team or the Illinois Child Death Review Teams Executive Council established under the Child Death Review Team Act, or a regional youth advisory board or the Statewide Youth Advisory Board established under the Department of Children and Family Services Statewide Youth Advisory Board Act.").

11. This is not to suggest that there are not legitimate privacy and control questions related to this question. It is just that this notion appears not to have been formally challenged or much disputed in Illinois. For an interesting though non-binding discussion of this issue, see City of san Jose v. Superior Court, 225 Cal App. 4th 75 (2014) (not citable; superseded by Grant of Review).

12. Similarly, FOIA makes clear in the definition of "public records" that documents prepared by third parties for a public body are also subject to FOIA. 5 ILCS 140/2(c).

13. *See City of Champaign*, 2013 IL App (4th) 1202662 ¶40 ("In this case, we agree with the First District's view in *Quinn* an individual alderman is not a "public body" under FOIA. We recognize the Attorney General argues on appeal *Quinn* only answers the question of who is a proper defendant in a FOIA action. However,

even in reading *Quinn* solely for the proposition individual aldermen cannot properly be served with FOIA requests, the underlying reasoning, i.e., an individual alderman is not himself the public body, cannot be ignored. Indeed, an individual city council member, alone, cannot conduct the business of the public body. For example, a city council member is unable to individually convene a meeting, pass ordinances, or approve contracts for the city. Instead, a quorum of city council members is necessary to make binding decisions. See *Village of Oak Park v. Village of Oak Park Firefighters Pension Board*, 362 Ill. App. 3d 357, 367 (2005) ("A 'quorum' is the number of assembled members that is necessary for a decision-making body to be legally competent to transact business.")" citing *Quinn v. Stone*, 211 Ill. App. 3d 809 (1991)).

14. 5 ILCS 120/1.02.

15. 2013 IL App (4th) 120662.

16. *Id.* at ¶44.

17. *Id.* at ¶41 ("Under this interpretation, a message from a constituent 'pertaining to the transaction of public business' received at home by an individual city council member on his personal electronic device would not be subject to FOIA. However, that communication would be subject to FOIA if it was forwarded to enough members of the city council to constitute a quorum for that specific body, regardless of whether a personal electronic device, as opposed to a publicly issued electronic device, was used. At that point, it could be said the communication was 'in the possession of a public body.' However, as the City conceded, a communication to an individual city council member's publicly issued electronic device would be subject to FOIA because such a device would be 'under the control of a public body.' Thus, if that same individual city council member who received a message from a constituent on his personal electronic device forwards it to his publicly issued device, that message would be subject to FOIA as it would now be 'under the control of a public body.'").

18. *Id.*

19. *See supra*, n. 5.

20. *See* City of Chicago Municipal Code, Title 2, Chapter 2-4.

21. 5 ILCS 140/7(1)(f).