

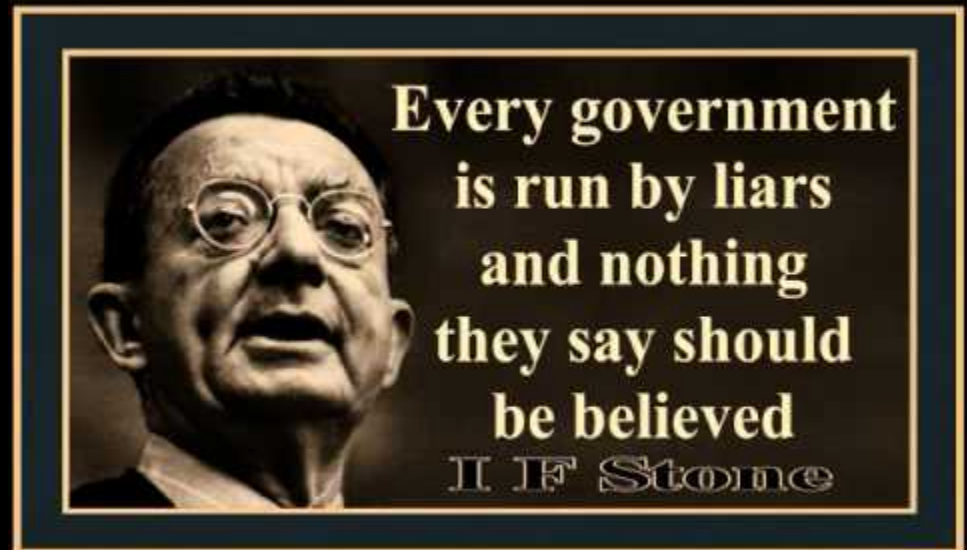
Privacy v. Transparency

Examining Trends and Best Practices in
Complying with Open Records Laws

Louis D. Kelly
General Counsel,
Kentucky Board of Physical Therapy

PURPOSE:

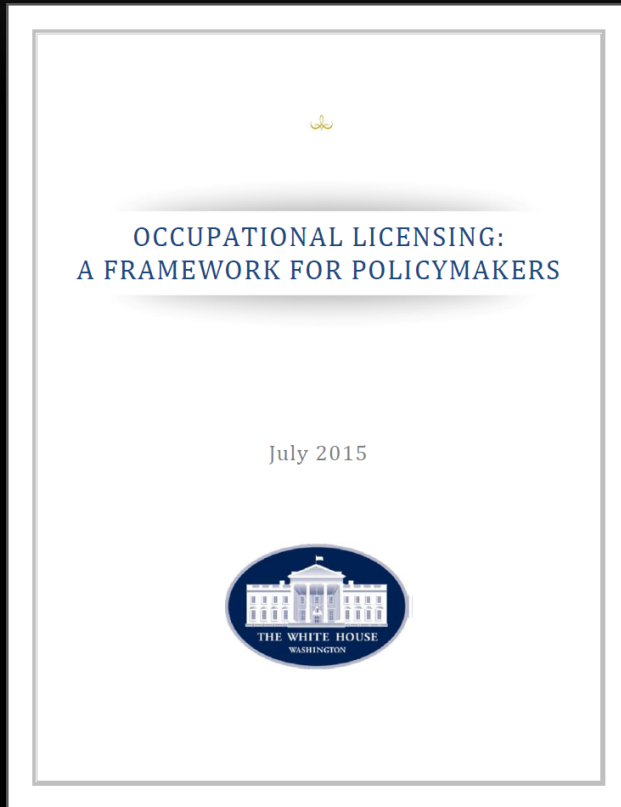
- Growing mistrust by the public against government:



PURPOSE:

- This extends to regulatory boards:
- *Patel v. Texas Dept. of Licensing and Regulation*, (Concurring opinion discussing the *NC Dental* case):
 - “The decision brought a smile to licensure critics who had long argued that self-regulation invites self-dealing and that state licensing boards prone to regulatory capture deserved no immunity for Sherman Act abuses. Ever since *Parker v. Brown* 80-plus years ago, such boards were deemed outside the Act's ban on cartels because, unlike traditional cartels, they were sanctioned by the state. No more. *Parker* no longer insulates regulated regulators regulating to anticompetitive effect. Licensing boards comprised of private competitors will face Sherman Act liability if they flex power to smother aspiring entrepreneurs.”

PURPOSE:



“...the current licensing regime in the United States also creates substantial costs, and often the requirements for obtaining a license are not in sync with the skills needed for the job. There is evidence that licensing requirements raise the price of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills across state lines.”

PURPOSE:

- In light of the current political climate surrounding governmental agencies and regulatory boards, there needs to be greater emphasis on maintaining public trust.
 - An easy way to lose public trust is to violate open records laws which are designed to promote transparency and accountability.
 - The following will examine the nature of open records laws, the potential to violate such laws using electronic communications, and some potential solutions.
-

WHY DO WE HAVE OPEN RECORDS LAWS?

- Kentucky:
 - “...free and open examination of public records is in the public interest...”
 - KRS 61.871
- Washington
 - “The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.”
 - RCW 42.56.030

DO OPEN RECORDS LAWS APPLY TO ME?

- In general, Open Records Laws apply to all public agencies, including regulatory boards such as a board of Physical Therapy.
- Utah
 - Act applies to “every office, agency, board, bureau, committee, department, advisory board, or commission...established by the government to carry out the public’s business.”
 - 63G-2-103
- Missouri
 - Act applies to “any legislative, administrative or governmental entity created by the constitution or statutes of this state....”
 - MRS 610.010.1

ARE EMAILS SUBJECT TO OPEN RECORDS LAWS?

- Most, if not all, open records laws have broad definitions of “public records” that would include emails or other electronic communication:
- Louisiana
 - Defines “public records” to include, “books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers...regardless of physical form or characteristics, including information contained in electronic data processing equipment....”
 - La. R.S. 44:1(2)(a)
- California
 - Defines “public records” as “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”
 - Gov. Code Sec. 6252(e)

PITFALLS OF USING EMAIL FOR BOARD BUSINESS

- Two main problems can arise from using email to discuss board business:
 - Disclosing emails that put board members and staff in a bad public light; and
 - Accusations of attempting to avoid disclosure by using private emails to communicate.
-

BAD LIGHT

WT WacoTrib.com
CENTRAL TEXAS NEWS, ALL DAY

Local

HOME LOCAL BUSINESS OPINION OBITS SPORTS PHOTOS VIDEO ENTERTAINMENT

Today's Ads! BEARS EXTRA CONTESTS DEALS NEWSLETTERS SHOPBRAZOS SPECIAL SECTIONS

Baylor emails revealed in lawsuit show concerted campaign to snuff BAA

Story Comments

Print Font Size: - +

Recommend 715 Tweet 21 G+ 0 Pin it 0 Share 64

Posted: Wednesday, June 24, 2015 5:01 pm

By REGINA DENNIS
rdennis@wacotrib.com

New emails revealed in a trademark infringement lawsuit Baylor University filed against the Baylor Alumni Association indicate a concerted effort led by a faction of the school's board of regents to snuff out the alumni group's on-campus presence and ability to operate.



Staff photo— Rod Aydelotte, file

“Can’t wait to tear that building DOWN!!!! If it is tied to the stadium, few will complain! :-)
How sweet it will be!” Baylor Vice President for Constituent Engagement Tommye Lou Davis wrote in an April 4, 2012, email to then-Regent Chairman Buddy Jones. It was part of a longer chain of exchanges disparaging the BAA.

In the exchange leading up to that email from Davis, Jones wrote, “I hate them,” to which Davis replied, “That makes two of us. Irrelevant twurps (sic).”

Four minutes later, Jones responded, “They are in my sight.”

During a Feb. 28, 2011, email exchange between Davis and Jones anticipating that the BAA eventually would have to fold into the university-run Baylor Alumni Network, Davis wrote “I am measuring for curtains every time I go into the building! ;-),” referring to the Hughes-Dillard Alumni Center.

More Embarrassing Emails Reveal Abbotsford City Staff, APD At Their Worst

By *The Editor* on February 4, 2015

By Mike Archer. For the first time, as a result of two Freedom of Information (FOI) requests, we have a detailed look at the how **staff at the City of Abbotsford, planned and executed the dumping of chicken feces on the homeless** across from the Salvation Army in June of 2013.

They did so with the knowledge and support of the Salvation Army and worked with the APD to contain the growing crisis which emerged when the story was **first reported** and then spread **around the world**.

For the first time we know who at the City was involved and knew about the plan and we have a clearer picture of how they reacted once their plan became known and then **shared around the world**.



From: Eric Fong
Sent: Monday, June 03, 2013 3:59 PM
To: James Arden
Subject: Spreading chicken manure by the "Honey" tree near the Savlation Army Bldg.

Hi James:

After a meeting with Bylaws (Gord Ferguson and Dwanye Fitzgerald), and Roads (Tony Schmidbauer), the agreement is to spread the chicken manure around the tree to deter homeless encampments being set up under it. We just need your approval to go ahead and spread the manure.

Bylaws and Roads will be on site with the police, so we will time the manure dump around 10:30 AM.

Thanks,

FOI 0580-20 2014 49 PRC Staff Emails

2

Jane Meachin

From: Len Goerke
Sent: Friday, July 05, 2013 12:46 PM
To: Rick Lucy; Ian MacDonald; Bob Rich
Subject: Re: Chicken Manure class action lawsuit

Chickens come home to roost.

Len Goerke
Deputy Chief Constable - Administration Abbotsford Police Department
604-864-4822

----- Original Message -----

From: Rick Lucy
Sent: Friday, July 05, 2013 12:25 PM
To: Ian MacDonald; Bob Rich; Len Goerke
Subject: Re: Chicken Manure class action lawsuit

Can't make this sh#* up.

----- Original Message -----

From: Ian MacDonald
Sent: Friday, July 05, 2013 11:16 AM Pacific Standard Time
To: Bob Rich; Rick Lucy; Len Goerke
Subject: Re: Chicken Manure class action lawsuit

Attention over substance for sure. Lawyer looking to boost his/her profile. Very John Grisham novel - say The Litigators.

Sent using BlackBerry

TRANSPARENCY

Keep up with changes in digital media.

DIGITAL MARKETING SUMMIT *October 16, 2015*

REGISTER NOW!

Register for the DU College of Business Marketing Summit Today.

 **DANIELS**
COLLEGE OF BUSINESS
UNIVERSITY OF DENVER

Lawmakers use private emails for state business



Lawmakers use private emails for state business. 9NEWS at 10 p.m. 05/11/15.

-  142
-  45
-  1
- 
-  14

TRANSPARENCY



The screenshot shows the top portion of a news article on the website 'The Wichita Eagle'. The header includes a weather icon for 88 degrees, a 'Sign In | Subscribe' link, and the newspaper's logo. A navigation bar contains links for 'FULL MENU', 'OBITUARIES', 'SPORTS', 'BUSINESS', and 'BUY&SELL', along with a search box. The article is categorized under 'Politics & Government' and dated 'JANUARY 27, 2015'. The main headline reads 'Budget director sent e-mail from private account to lobbyists on proposed budget'. Below the headline, a 'HIGHLIGHTS' section contains a short summary: 'Gov. Sam Brownback's budget director used a private e-mail account to share a working version of the governor's proposed budget with two lobbyists three weeks before it was unveiled to lawmakers.' At the bottom, there are two images: a photograph of the Kansas State Capitol dome and a promotional advertisement for a Ford F-Series truck celebrating 38 years as 'America's Best Selling Truck'.

88°
Sign In | Subscribe

The Wichita Eagle

FULL MENU OBITUARIES SPORTS BUSINESS BUY&SELL

Politics & Government JANUARY 27, 2015

Budget director sent e-mail from private account to lobbyists on proposed budget

HIGHLIGHTS

Gov. Sam Brownback's budget director used a private e-mail account to share a working version of the governor's proposed budget with two lobbyists three weeks before it was unveiled to lawmakers.



TRANSPARENCY

MSD use of private email, texting questioned

 James Bruggers, @jbruggers 6:13 a.m. EST February 4, 2015



(Photo: File photo)

 20 CONNECT  21 TWEET  LINKEDIN  2 COMMENT  EMAIL  MORE

At the Metropolitan Sewer District, board members and the executive director routinely use private accounts or personal smartphones to do agency business, sending emails or text messages to each other, the former chairman asserts.

But when James Craig, who led the MSD board for more than two years before stepping aside last November, sought to get access to some of those MSD communications to defend himself against an ethics charge, MSD lawyers put up a roadblock.

They had no way of getting access to their board member's private accounts, they said. And Executive Director Greg Heitzman had already deleted any work-related text messages on the personal cellphone he uses for work — a phone whose bill is partially reimbursed by MSD.

Craig appealed the denials to Kentucky Attorney General Jack Conway, whose office has jurisdiction over enforcement of the Kentucky Open Records

Law. And while that appeal focused on MSD, its resolution could have broad implications for how local boards, commissions or councils operate across the state.

 20

 21





 2



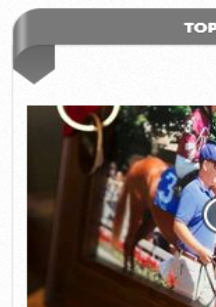
STORY HIGHLIGHTS

- Former MSD chairman's defense of ethics complaint sheds new light on the internal operations of MSD.
- MSD leadership's use of private email, texting should not shield it from open records law, attorneys say.
- MSD says it strives to follow the open records and open meetings laws and will defend itself.

Managing client expectations
That's Vanguard

 Start Vanguarding

Vanguard Marketing Corporation,
Distributor
[Obtain prospectus](#)



TRANSPARENCY

- In addition to public scrutiny, using private email for board business presents other issues:
 - It may subject your personal email to disclosure or, at a minimum, to inspection by a judge or attorney.
 - If a board member uses his/her work email, it may subject proprietary or confidential emails to disclosure or, at a minimum, inspection by a judge or attorney.
-

SOLUTIONS

Stop and think before you hit your email 'send' button



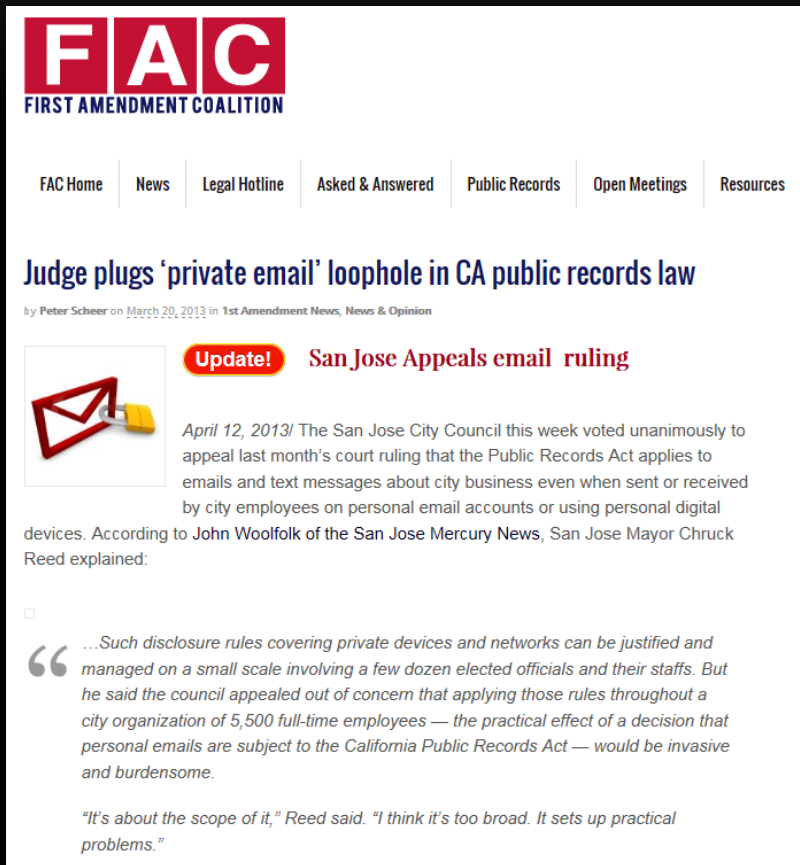
- Be conscious of what you put in email:
 - Don't discuss disciplinary matters that could suggest prejudice.
 - Refrain from jokes or offensive comments regarding fellow Board members, Board staff, or credential holders.
 - Advice: Don't put anything in an email you wouldn't want on the front page of the newspaper.

SOLUTIONS



- Be wary of communicating to board members via group emails:
 - Group discussions could inadvertently violate “open meetings” laws.
 - Group emails increase the risk of disclosing confidential information to a party not otherwise entitled to obtain it.
 - If you need to communicate information to the entire board, use the BCC option which precludes group replies.

SOLUTIONS




FAC
FIRST AMENDMENT COALITION

[FAC Home](#) | [News](#) | [Legal Hotline](#) | [Asked & Answered](#) | [Public Records](#) | [Open Meetings](#) | [Resources](#)

Judge plugs 'private email' loophole in CA public records law

by Peter Scheer on March 20, 2013 in 1st Amendment News, News & Opinion

Update! [San Jose Appeals email ruling](#)



April 12, 2013/ The San Jose City Council this week voted unanimously to appeal last month's court ruling that the Public Records Act applies to emails and text messages about city business even when sent or received by city employees on personal email accounts or using personal digital devices. According to John Woolfolk of the San Jose Mercury News, San Jose Mayor Chuck Reed explained:

“...Such disclosure rules covering private devices and networks can be justified and managed on a small scale involving a few dozen elected officials and their staffs. But he said the council appealed out of concern that applying those rules throughout a city organization of 5,500 full-time employees — the practical effect of a decision that personal emails are subject to the California Public Records Act — would be invasive and burdensome.

“It's about the scope of it,” Reed said. “I think it's too broad. It sets up practical problems.”

- Consider obtaining an official email account so that private emails are not subject to review or disclosure;
- If official emails are not feasible, consider creating an email specifically for board issues or business (Ex., gmail or yahoo);
- Use identifying subject lines to clearly identify those emails in your personal account that involve board business.


EMERGING ISSUE: TEXT MESSAGES

Government Executive **QLINK** WIRELESS CONNECTING AMERICA **FREE PHONE** **FREE MINUTE** Government Benefits P

NEWS **MANAGEMENT** **OVERSIGHT** **DEFENSE** **TECH** **CONTRACTING**

Yes, That Text Message Is a Public Record

By Michael Grass | January 5, 2015 | 6 Comments



RELATED

Young Public Servants Want to Be Leaders in Local Government
June 9, 2015 | 4 Comments

Could the South Carolina Police Shooting Be the Last Push for Body Cameras?
April 9, 2015 | 1 Comment

Local Officials Struggle Over Regulations for Bikini Baristas
April 7, 2015 | 2 Comments

Nonprofits Offer Help with Agency Records Management
January 27, 2015 | Leave a comment

igor.stevanovic / Shutterstock.com

Share 26 **Tweet** 48 **Share** 1 **Share** 74


Print this article Email this article AA Increase size

When you think of open records laws at the local government level, items like budget reports or email exchanges among public officials probably first come to mind on the list of things that need to be archived.

But what about text messages? Sending messages between phones is an increasingly important way for public employees and leaders to communicate official business and in most cases, those are considered public records that need to be preserved, too.

It's a challenge facing local governments across the nation, especially in states and localities with strong open government statutes.

abc NEWS U.S. World Politics Entertainment Health Tech ...



Text messages enter public-records debate

Share with Facebook Share with Twitter

1 SHARE

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.

NISSEN V. PIERCE COUNTY, ET AL

- Suit filed by Sheriff's Detective to Pierce County who filed open records request for text messages from County prosecutor's personal phone.
 - County provided a log indicating dates and times of text messages relating to work but did not provide the actual messages.
 - Detective brought suit claiming that denial of actual messages violated Washington's Public Records Act.
 - Trial Court held that records of a private cell phone could never be a public record under the PRA.
 - Court of Appeals reversed and Supreme Court affirmed.
-

NISSEN V. PIERCE COUNTY, ET AL.

- Supreme Court held that Public Records Act applies to employee-owned cell phones when used for agency business.
 - “...the PRA subjects ‘virtually any record related to the conduct of government’ to public discourse.”
 - “We hold that records an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can be a public record....”
- Court did not allow for third-party search of private phone. Instead found that a “good-faith search” by the employee of his/her phone was all that was required.

Questions?