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Newsletters

# Informing Illinois Newsletter - February 2016

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**Personal Documents Stored on a Government Computer System — Disclosable Under Illinois' FOIA?**

Not all documents created or stored on a government computer system are subject to disclosure under Illinois' Freedom of Information Act (FOIA). Although there is a presumption that records in the custody or possession of a public body are "open to inspection or copying" (5 ILCS 140/1.2), that presumption may be rebutted under the "1 + 6 formula" contained in the definition of "public records." As the court observed in *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶¶31, 32, to qualify as a "public record" the document first must pertain to the public business of the public body, "as opposed to private affairs." If it does, then the document must have been: (1) prepared by, (2) prepared for, (3) used by, (4) received by, (5) possessed by, or (6) controlled by a public body. 5 ILCS 140/2(c). In *City of Champaign*, the court held that public records subject to FOIA may be stored on private cell phones or other private electronic devices, but the converse is equally true. Documents created or stored on government computer systems that do not pertain to the transaction of public business may not be public records.

Like their private sector counterparts, government employers often have a policy allowing the occasional, limited personal use of government computers. Even absent a policy, employers may "look the other way" when employees use the government systems for personal reasons — so long as there is no interference with the employees' work obligations. This practice may extend to personal use of government-maintained email accounts and private web viewing. "There are good reasons why employers allow this practice. E-mail can enhance a worker's productivity. It is often the fastest and least disruptive way to do a brief personal communication during the work day, and employees who are forbidden or discouraged from occasional personal use of e-mail may simply need to take more time out of the day to accomplish the same tasks by other means." *Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177, 182-83 (Wis. 2010).

It appears that neither the Illinois judiciary nor the public access counselor (PAC) has addressed whether these emails and other records reflecting employee use of government computers for personal reasons are subject to FOIA. Other states' courts have, in most cases concluding that because the documents did not concern the affairs of the public body, they were not public records. For example, in *Schill*, the Wisconsin Supreme Court held that personal communications created and saved on government computer networks are not public records in that they are not related to government

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business. *See also Howell Educ. Ass'n v. Howell Bd. of Educ.*, 789 N.W.2d 495 (Mich. Ct. App. 2010) (private emails on school system were not public records subject to disclosure); *Associated Press v. Canterbury*, 688 S.E.2d 317 (W. Va. 2009) (personal emails were not public records); *Griffis v. Pinal County*, 156 P.3d 418 (Ariz. 2007) (private emails not public records); *Florida v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003) (emails of personal nature between two city employees were not public records). Even emails manifesting alleged improper conduct of government officers or employees may not be public records in that they do not concern the exercise of government function. *See, e.g., Denver Publ'g Co. v. Bd. of Co. Comm'rs*, 121 P.3d 190 (Colo. 2005) (emails showing sexual harassment were not public records).

Furthermore, records showing employee internet activity may not be public records. *Brennan v. Giles Co. Bd. of Educ.*, 2005 WL 1996625 (Tenn. Ct. App. 2005) (internet history was not a public record); *but see Belenski v. Jefferson Co.*, 350 P.3d 689 (Wash. Ct. App. 2015) (absent a claim that internet activity logs were personal in nature, the logs were public records).

There is, of course, a contrary view. Those holding it contend that personal documents on government systems pertain to the public business because they show how government-paid employees use, misuse or abuse their time and other government resources. The majority of courts that have considered this issue, however, have not been persuaded by that argument.

No matter what the PAC or the Illinois courts may eventually decide, there are three caveats. First, while private emails and other documents on a government computer may not be public records under FOIA, the government employer has the right to monitor the use of its systems and the activities of its employees during work hours. Accordingly, the employer may have access to those types of documents, including personal emails and internet activity logs.

Second, even if emails and other documents of a personal nature are not initially public records, they may be converted to public records if used in furtherance of the public body's official functions. For example, if personal emails stored on a government system are used to discipline an employee, those records then pertain to the transaction of government business. At that point, an analysis would be required to determine if they would be exempt from disclosure under Section 7 of Illinois' FOIA, 5 ILCS 140/7.

Finally, if challenged, it may still be necessary to produce private emails and other documents of a personal nature to the court for in camera review. The court will be the final arbiter of whether those documents are private or whether they are public subject to the demands of FOIA.

For more information, please contact Charles R. Schmadeke.