



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 15, 2011

**Public Access Opinion No. 11-006
(Request for Review – 2011 PAC 15916)**

FREEDOM OF INFORMATION ACT:

Public Records -- Electronic records relating to the transaction of public business are "public records" subject to disclosure under section 2(c) of FOIA notwithstanding that they are generated on public officials' private equipment and/or maintained on personal electronic accounts.

Via Electronic Mail

Ms. Trisha Crowley
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City of Champaign
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Dear Ms. Crowley:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2010), as amended by Public Act 97-579, effective August 26, 2011).

BACKGROUND

On July 15, 2011, Mr. Patrick Wade, staff reporter for *The News Gazette*, submitted a FOIA request to the City of Champaign seeking "[a]ll electronic communications, including cellphone text messages, sent and received by members of the city council and the mayor during city council meetings and study sessions since (and including) May 3." Mr. Wade

also noted that "this request applies to both city-issued and personal cellphones, city-issued or personal email addresses and Twitter accounts."¹

The City responded to Mr. Wade's request on July 22, 2011, advising that it was providing the public records held by itself or subsidiary public bodies of the City. The City stated that "Private citizen's communications to the Council member's or the Mayor's privately owned electronic devices is not within the scope of the Freedom of Information Act."² The City sent Mr. Wade 24 pages of responsive documents, and noted that it had redacted personal email addresses and telephone numbers pursuant to section 7(1)(b) of FOIA. 5 ILCS 140/7(1)(b) (West 2010).

The City also supplied Mr. Wade with a July 21, 2011, memorandum from Ms. Trisha Crowley, Deputy City Attorney, City of Champaign, to the Champaign City Council. In that memorandum, the City explained its basis for withholding records generated on private electronic devices. Specifically, the City stated that *Quinn v. Stone*, 211 Ill. App. 3d 809, 812 (1st Dist. 1991), supported its contention that emails and text messages generated on private computers are not public records subject to disclosure under FOIA. The City stated that "communications of the Mayor and City Council members on privately owned equipment to private parties are not public records of public bodies and will not be provided."³ The City confirmed that communications which pass through and are available on the City's electronic equipment are in the City's possession and control, and would be provided if not exempt.

Mr. Wade sought review of the City's partial denial on August 1, 2011. Mr. Wade's Request for Review suggests that "[i]t is very possible and likely that city council members received communications that aid in the elected officials' formulation of opinions and that consequently affect their votes." Mr. Wade further suggested that "[r]egardless of their form, communications pertaining to the transaction of public business – being received and used by individual members of an official body in their role as a member of that public body during an ongoing public meeting – should be public records."⁴

¹Letter from Patrick Wade, Reporter, *The News Gazette*, to Marilyn Banks, City of Champaign (July 15, 2011).

²Letter from Marilyn Banks, FOIO, City of Champaign, to Patrick Wade, *The News Gazette* (July 22, 2011).

³Report regarding the Patrick Wade FOIA Request of 7-15-2011 from Trisha Crowley, Deputy City Attorney, City of Champaign, to the Champaign City Council (July 21, 2011).

⁴Letter from Patrick Wade, *The News Gazette*, to Sarah Pratt, Acting Public Access Counselor, Office of the Attorney General (August 1, 2011).

This office initiated further inquiry of Mr. Wade's Request for Review on August 8, 2011.⁵ The City responded to this office on August 15, 2011, affirming its position that the communications requested are not public records and furnishing us with a representative sample of those communications, including both emails and text messages sent from and received by the private email accounts and private cellular phones of two of the City's elected officials.⁶ In that letter, the City informed us that it denied Mr. Wade records that related to "arranging personal business meetings or family matters." The City asserted that emails and text messages that did relate to the transaction of public business are not "public records" because they are not in the possession of a public body. *For purposes of this appeal, the City would concede that there were electronic communications which would be responsive to this request if they were required to be produced.*⁷ (Emphasis added.)

On September 13, 2011, this office forwarded a copy of the City's response letter to Mr. Wade.⁸ Mr. Wade did not reply to the City's response. On September 27, 2011, pursuant to section 9.5(f) of FOIA, this office extended the time to issue a binding opinion by 30 business days.⁹

ANALYSIS

This Request for Review concerns perhaps the most fundamental issue in interpreting the Freedom of Information Act – What is a public record? Specifically, are electronic communications pertaining to public business which are sent from or received by an

⁵Letter from Matthew C. Rogina, Assistant Attorney General, Office of the Attorney General, to Trisha Crowley, City Attorney, City of Champaign (August 8, 2011).

⁶It appears that an initial request was sent by Ms. Crowley to the city council members for text messages and emails potentially responsive to Mr. Wade's FOIA request. Two city council members promptly provided potentially responsive records. Upon review of those submissions, Ms. Crowley informed "all the council members that they did not need to send records of that type to me." See Letter from Trisha Crowley, Deputy City Attorney, City of Champaign, to Matthew C. Rogina, Assistant Public Access Counselor, Office of the Attorney General (August 15, 2011). The records of the two council members were submitted to the Attorney General's office as a representative sample of the communications.

⁷Letter from Trisha Crowley, Deputy City Attorney, City of Champaign, to Matthew C. Rogina, Assistant Public Access Counselor, Office of the Attorney General (August 15, 2011).

⁸Letter from Matthew C. Rogina, Assistant Attorney General, Office of the Attorney General, to Patrick Wade, *News Gazette* (September 13, 2011).

⁹Letter from Matthew C. Rogina, Assistant Attorney General, Office of the Attorney General, to Trisha Crowley, Deputy City Attorney, City of Champaign and Patrick Wade, *The News Gazette* (September 27, 2011).

electronic device¹⁰ owned by a member of a public body, rather than the public body itself, "public records" which are subject to disclosure under FOIA? The City's position is a simple one: because the City does not have possession of the communications, they are not "public records" of the City and the City is under no obligation to furnish them under FOIA.

As an initial matter, we strongly agree with the City that records that do not pertain to the business of the City, such as messages regarding "personal business meetings or family matters" do not fall within the definition of "public records" and the City need not produce those records. The City concludes, however, that it has no responsibility for maintaining or furnishing records pertaining to public business which are sent from or received on personal electronic devices. The City concedes that City officials have generated records pertaining to the transaction of City business via personal electronic devices and/or accounts, and that these records would be subject to disclosure under FOIA if the records were in the possession of the City. Having conceded that these are records that pertain to the transaction of public business of the City can the City then conclude that these records fall outside the scope of FOIA simply because it does not physically possess them?

To resolve this issue, we look to FOIA's definition of "public records." Section 2(c) of FOIA (5 ILCS 140/2(c) (West 2010)) provides that "public records" are:

[a]ll records * * * 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.

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Illinois Department of Healthcare and Family Services v. Warner*, 227 Ill. 2d 223, 229 (2008). Legislative intent is best evidenced by the language used in the statute; if statutory language is clear and unambiguous, it must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

Under the plain and unambiguous language of section 2(c), the term "public records" include "all * * * documentary materials pertaining to the transaction of public business, regardless of physical form * * *, having been or being used by * * * any public body." The City's position focuses entirely on the issue of possession, and ignores the plain language of the statute. Records in the control or possession of public bodies are only one class of records

¹⁰For purposes of this opinion, the term "electronic device" includes cell phones, iphones, ipads, blackberries, computers, or any other device used to send and receive communications by means of email, voice and/or text messages.

defined in FOIA. Whether information is a "public record" is not determined by where, how, or on what device that record was created; rather, the question is whether that record was prepared by or used by one or more members of a public body in conducting the affairs of government. The focus is on the creation of the record itself, and how it was used. If the mayor and/or a city council member sent or received communications on personal electronic devices during city council meetings or study sessions, as specified in Mr. Wade's request, and those communications pertain to the transaction of public business, then those communications are "public records" subject to the requirements of FOIA.

Further, the City's argument that text messages and emails pertaining to public business which are generated from private equipment are not public records is clearly inconsistent with the General Assembly's intention, as stated in section 1 of FOIA (5 ILCS 140/1 (West 2010)), that the public have "*full disclosure* of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity":

Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.

The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.

* * *

Restraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people. *The*

provisions of this Act shall be construed in accordance with this principle. (Emphasis added.)

The City's interpretation of which public records it may elect not to produce would frustrate the purpose of FOIA – to fully disclose information that affects the conduct of the government. Indeed, accepting the City's argument that it is not required to produce these records under FOIA simply because they are not in the City's actual physical custody or possession would allow any public body or public official to completely circumvent the requirements of FOIA by conducting their public business on personal equipment.

The City's argument that, under *Quinn v. Stone*, the records generated on individual officers' private electronic devices are not public records is undermined by the facts of that case. Citing *Quinn*, the City argues that the Mayor and council members are not public bodies under FOIA and that electronic communications received from private citizens on their private electronic devices are therefore not subject to FOIA. Applying the facts in *Quinn* to these circumstances leads to the opposite conclusion.

In *Quinn*, the plaintiff filed suit under FOIA against an individual Chicago alderman to obtain records of the alderman's expenditures of monthly travel allowance funds. The appellate court rejected the appeal, stating:

Plaintiff here failed to pursue her request for these records to the right person. Instead of suing defendant individually, she must pursue her remedy against the head of the public body, pursuant to the Act. The Act defines "head of the public body" as the "president, mayor, chairman, presiding officer, director, superintendent, manager, supervisor or individual otherwise holding primary executive and administrative authority for the public body." *Quinn*, 211 Ill. App. 3d at 812.

In essence, the court concluded that the records that the plaintiff was seeking were records of the city, not of the individual alderman; therefore, the records must be obtained from the city council. This decision is completely consistent with the conclusion that the records of the City officials in question pertaining to the transaction of public business are not records of the individual officials but records of the City.

Finally, we note the City's argument that disclosure of private communications would have "First Amendment implications well beyond this statute."¹¹ The City's statement is

¹¹Letter from Trisha Crowley, Deputy City Attorney, City of Champaign, to Matthew C. Rogina, Assistant Public Access Counselor, Office of the Attorney General (August 15, 2011).

conclusory and lacking in concrete examples as to how disclosure of the records of elected officials discussing matters that clearly relate to the transaction of public business would lead to such a result. The City's argument that political "opponents could FOIA an incumbent for every reference to public business in their private computer or phone for an indefinite period of time" is purely speculative and ignores the requirement that to be considered "public records," the communications must relate to the transaction of public business. A public body that receives a FOIA request for records generated on private equipment could clearly distinguish between communications that are either political in nature or simply mention public business in passing or in a non-substantive way, and those that relate to the transaction of public business. Only those communications on private equipment that pertain to public business are subject to disclosure under the requirements of FOIA, and any applicable FOIA exemptions can be asserted with respect to those records.

FINDINGS AND CONCLUSIONS

After full review and giving due consideration to the arguments of the parties, the Public Access Counselor's findings, and the applicable law, the Attorney General finds that:

- 1) On July 15, 2011, Mr. Patrick Wade, staff reporter with *The News Gazette*, submitted a FOIA request to the City of Champaign seeking "[a]ll electronic communications, including cellphone text messages, sent and received by members of the city council and the mayor during city council meetings and study sessions since (and including) May 3." Mr. Wade also noted that "this request applies to both city-issued and personal cellphones, city-issued or personal email addresses and Twitter accounts."
- 2) On July 22, 2011, the City responded to Mr. Wade's request and furnished him with public records held by itself or subsidiary public bodies of the City, which consisted of communications which passed through and were available on the City's electronic equipment. The City denied the request in part, refusing to provide copies of communications that were generated on privately owned electronic devices.
- 3) The City, as a matter of law, denied Mr. Wade's FOIA request by not providing him with communications pertaining to public business that were generated on privately owned electronic devices.
- 4) On August 1, 2011, Mr. Wade submitted to the Public Access Counselor a Request for Review of the City's July 22, 2011, response. Mr. Wade's Request for Review was timely filed and otherwise complies with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2010)). Therefore, the Attorney General may issue a binding opinion with respect to the disclosure of the records at issue.

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5) The Attorney General properly extended the time frame to issue a binding opinion pursuant to section 9.5(f) of FOIA, until November 15, 2011.

For the reasons addressed in detail above, it is the opinion of the Attorney General that the City has, in violation of the requirements of the Freedom of Information Act, improperly denied Mr. Wade's request for access to the public records of the City of Champaign specified in his request. Accordingly, the City is directed to take immediate and appropriate action to comply with this opinion by furnishing copies of the records to Mr. Wade.

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2010). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois, Mr. Patrick Wade, and *The News Gazette* as defendants. See 5 ILCS 140/11.5 (West 2010).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
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cc: *Via Electronic Mail*
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