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E-Mails and Text Messages on Personal Communication Devices Subject to FOIA

On June 12, 2012, a Circuit Court in Sangamon County, Illinois ordered the City of Champaign and its City Council members to produce emails and text messages sent on their personal cell phones during a City Council meeting. The lawsuit was brought by a newspaper which had previously submitted a request for the records pursuant to the Freedom of Information Act (FOIA) and was denied access to these records. The City's basis for the denial was that the records were not "public records" because the emails and text messages were not "in the possession of" or in the "control of" the public body but, rather, individual members of the public body. The Circuit Court determined that a record in the possession of the individual members of the public body in which public business was discussed was a public record as defined by FOIA and, therefore, subject to disclosure. While this decision is still subject to appeal, it brings to the forefront an important issue for school districts and other



governmental entities.

As you are aware, under FOIA public records are presumed to be open unless one of the exceptions to disclosure in Section 7 of the Act applies. 5 ILCS 140/1.2. A public record is defined as “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.” 5 ILCS 140/2(c). The FOIA also states that, “a public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under the Act, shall be considered a public record.” 5 ILCS 140/7(2).

The upshot of the Sangamon County ruling demonstrates that publicly elected local officials will likely not be permitted to

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perform an end run around the FOIA by conducting public business on personal communication devices. Furthermore, it is likely that a court would determine that any public records in the possession of a paid administrator would fall squarely within the language of Section 7(2) of the FOIA regardless of where the record is stored. These disclosure requirements pursuant to FOIA are separate and apart from the potential that the device could be procurable pursuant to subpoena or a discovery request should any litigation arise involving any individual who is conducting public business via personal electronic devices. In a court setting, there would be no question that any relevant communications would be discoverable regardless of the medium or device used to communicate. It should further be noted that permitting the use of personal electronics and/or e-mail servers for the discussion of public business creates issues when a district is required to preserve electronic evidence in litigation.

With these thoughts in mind, we are making the following recommendations to our clients:

- Ensure that all communications regarding public business and/or employees are conducted on district-owned

electronic devices and/or email accounts. This will help ensure that the information is properly maintained and that it can easily be controlled and preserved in the event of litigation.

- Ensure that any portable communication device where email is accessible uses a “pop-through” method where any email message sent and/or received is stored on the district’s server.
- If using a personal computer to send e-mail, access the district-owned email account and conduct business through that medium when discussing public business or employees.
- Ensure that all members of the board of education are issued and use a districtcontrolled email address to communicate about public business and/or employees.
- To the maximum extent possible, limit the amount of public business that you conduct via text message. To the extent that you believe you must conduct public business via text message, contact your service provider to determine how these messages are stored and how long each message is stored. If there is an ability to preserve text messages in the same fashion as email messages, your district should strongly consider exercising that option.

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- Encourage all administrators and board members to refrain from communicating about public business and/or employees on any non-district-controlled medium such as blogs, Facebook or other on-line communication sites.

If we can be of further assistance, please contact one of our attorneys in our Flossmoor office – (708) 799-6766 or in our Oak Brook office – (630) 928-1200.