

NO SURPRISE: ILLINOIS ATTORNEY GENERAL RULES PRIVATE EMAILS MAY BE CONSIDERED PUBLIC DOCUMENTS



Michael F. Zimmermann
Partner in the
Chicago Office
312.627.4020
mzimmermann@tresslerllp.com



Andrew S. Paine
Partner in the
Chicago Office
312.627.4154
apaine@tresslerllp.com



Luke Glisan
Senior Counsel in the
Chicago Office
312.627.4097
lglisan@tresslerllp.com

Should you have any questions, please contact Michael Zimmermann, Andrew Paine, Luke Glisan or any other member of our firm's Government Law Group.

In an opinion issued on August 9, 2016, the Illinois Attorney General's Office found that private emails may be considered public documents. While there was never a safe harbor for private emails in the past, some had viewed them beyond the reach of Illinois FOIA. The Attorney General's decision makes it crystal clear that emails sent or received on private accounts can fall within the scope of FOIA and be requested by the public.

Foreshadowing Began in 2013 with *City of Champaign v. Madigan*

In *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, the Appellate Court held that text messages sent or received by members of the city council during a city council meeting were public records and subject to request under FOIA. For a more in depth analysis of the case, better known as the "*Champaign Case*," please click on Tressler's previous Special Alert, July 24, 2013:

[Appellate Court Holds That Texts and Emails Sent During Public Meetings By Individual Members of a Public Body Using Personal Electronic Devices Are Subject to FOIA](#)

The AG Extends FOIA to Personal Email Accounts

The Attorney General – in Public Access Opinion 16-006 – has now extended FOIA to personal emails when it commented on CNN's request for the same from the Chicago Police Department (CPD) regarding the Laquan McDonald shooting.¹ Specifically, CNN requested "all emails related to Laquan McDonald from Police Department emails accounts and personal accounts where business was discussed." In response, CPD searched only the officers' city-issued email address and limited its search to any message containing the term "Laquan McDonald."

Applying the ruling in the *Champaign Case*, the Attorney General opined that to be subject to FOIA a record must

¹ On October 20th, 2014, 15-year-old Laquan McDonald was shot 16 times by Chicago Police Officer Jason Van Dyke. Police reports written by the 12 officers present described McDonald as "crazed" and lunging at officers with a knife. These reports were later called into question by several surveillance cameras which cast doubts on the officers' accounts.

pertain to the transaction of public business and must have been either: (1) prepared by a public body, (2) prepared for a public body, (3) used by a public body, (4) received by a public body, (5) possessed by a public body, or (6) controlled by a public body. CPD argued that emails were not "public records."

Because the communications sought . . . would have been prepared by or sent to individual officers and employees rather than the City, they are not communications "prepared by or for" a public body. And because the communications would not be stored on a City server or account, they cannot be "used by," were not "received by," and are not "in possession of, or under the control of," a public body.

The Attorney General disagreed, holding that when a CPD officer acts in their official capacity they are transacting public business for CPD, which is clearly a public body. Further, "CPD's interpretations would undercut the principal that public bodies act through their employees, by excluding . . . communications sent or received by employees on personal devices or accounts. Such an interpretation erroneously focuses not on the content of the communication but on the method by which it is transmitted."

The Attorney General went on to comment that the searching of private emails is essential in reflecting the purpose of FOIA to provide the public "full and complete information regarding the affairs of government" and although FOIA was enacted prior to the advent of the internet, email and text messaging, Illinois' General Assembly foresaw such technical advances and wished for FOIA to evolve with technology to fulfill its spirit of public disclosure. Nevertheless, the use of a personal email account to send or receive public records does not transform all communication in that email account into public record, "in particular those with no connection to the transaction of public business."

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Finally, the AG rejected CPD's search of only "Laquan McDonald" as insufficient under FOIA. Citing prior cases, FOIA requires a "reasonable search tailored to the nature of a particular request."² As a consequence, CPD was ordered to expand the scope of its search of email accounts to include other search terms, such as alternate name spellings, the name of the involved officers, the incident number, the location of the incident and a physical description of Laquan.

When it came to the concern of employee privacy in private email searches, the Attorney General suggested "depending on the circumstances," a public agency may satisfy FOIA if the employees search their emails themselves. The Attorney General failed to elaborate or set any rules about sufficient circumstances.³

² *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998)

³ The AG cited two cases for this proposition: *Nissen v. Pierce County*, 183 Wash. 2d 863, 886-87, 357 P.3d 45, 57 Wash. 2015 ("[A]gency employees are responsible for searching their files, devices, and accounts for records responsive to a relevant [public records] request. * * * When done in good faith, this procedure allows an agency to fulfill its responsibility to search for and disclose public records without unnecessarily treading on the constitutional rights of its employees."); and *Brophy v. United States Department of Defense*, No. CIV. A. 05-360 (RMC), 2006 WL 571901, at *8 (D.D.C. 2006) (absent evidence of a lack of good faith, a public employee's search of his personal e-mail account and confirmation that he did not locate responsive records satisfied the public body's obligation to conduct a reasonable search of that account).

As an Officer or Employee of a Public Body, What's Next?

As predicted in our previous update regarding the *Champaign Case*, private emails will not be sheltered from FOIA in some circumstances. In short, public entities should take the following actions, if they haven't already, to help mitigate the circumstances of this ruling:

1. Do not conduct public business on private emails.
2. Forward any email sent to your private account to your designated public account.
3. Update your personnel manual to restrict the use of public business on private emails.
 - a. Notify employees of this restriction.
 - b. Mandate that all emails conducting public business be forwarded to a public account.
 - c. Notify employees of their duty to search their emails when requested and provide a response to the FOIA officer.
4. Keep copies of the key words used in all searches conducted, any requests for searches made to employees and the responses from those employees.
5. Make sure that internal searches are not limited to just the terms in the FOIA request, but are broad enough to reasonably find all responsive records.

CHICAGO

233 South Wacker Drive
22nd Floor
Chicago, IL 60606
312.627.4000
Fax: 312.627.1717

BOLINGBROOK

305 West Briarcliff Road
Suite 201
Bolingbrook, IL 60440
630.759.0800
Fax: 630.759.8504

Should you have any questions, please contact Michael Zimmermann, Andrew Paine, Luke Glisan or any other member of our firm's Government Law Group.

Michael F. Zimmermann, Partner in the Chicago Office | 312.627.4020, mzimmermann@tresslerllp.com

Andrew S. Paine, Partner in the Chicago Office | 312.627.4154, apaine@tresslerllp.com

Luke Glisan, Senior Counsel in the Chicago Office | 312.627.4097, lglisan@tresslerllp.com



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