

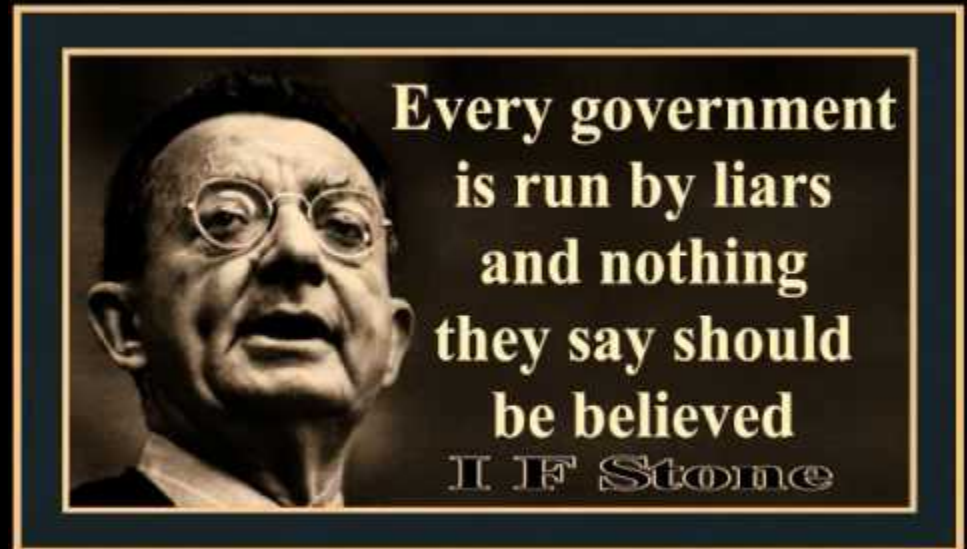
Transparency and Technology

Maintaining Public Trust and Effectively Managing Public
Correspondence on Emerging Platforms

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

PURPOSE:

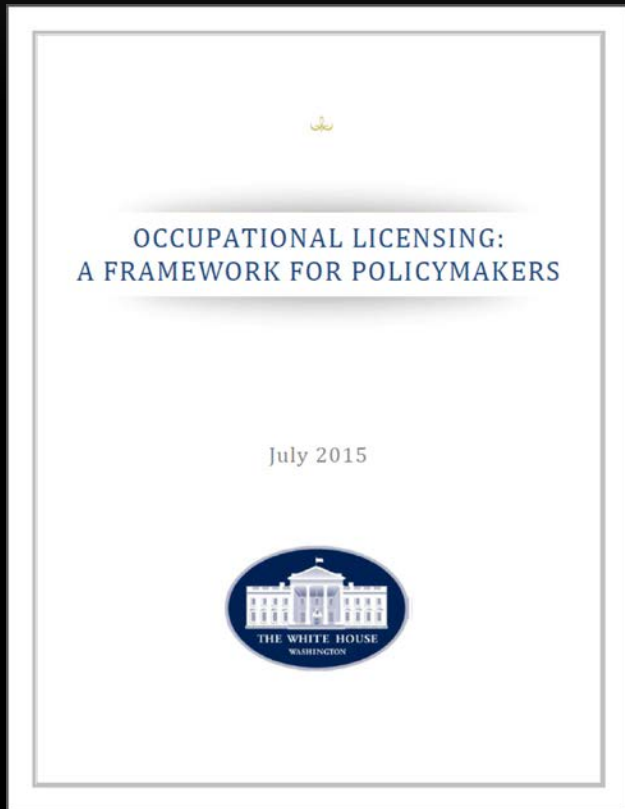
- Growing mistrust by the public against government:



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

[Home](#) > [Issues](#) > More Embarrassing Emails Reveal Abbotsford City Staff, APD At Their Worst

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 Dwanve 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

♀

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 -----

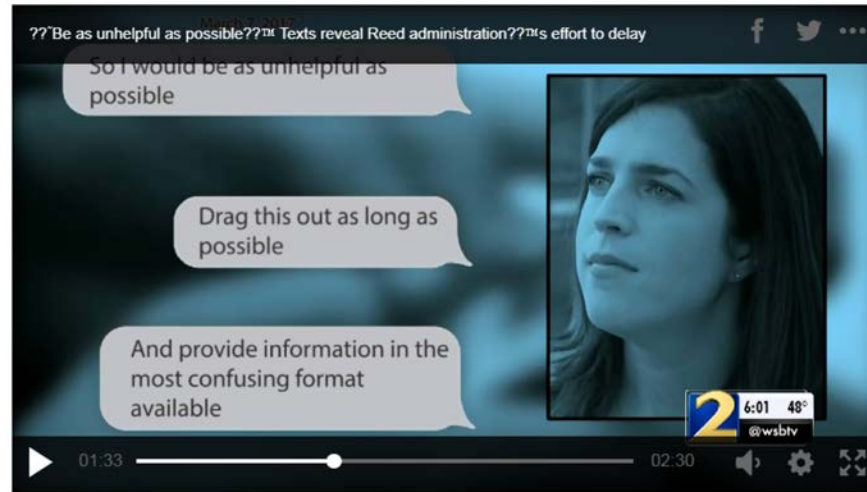
From: Ian MacDonald
Sent: Friday, July 05, 2013 11:16 AM Pacific Standard Time
To: Bob Rich; Rick Lucy; Len Goerke
Subject: Re: Chicken Manure class action lawsuit

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

Sent using BlackBerry

TRANSPARENCY

Georgia AG refers Atlanta text messages for criminal investigation



Text messages obtained by Channel 2 Action News and The Atlanta Journal-Constitution shed new light on efforts by Kasim Reed's administration to keep reporters from getting potentially embarrassing public records. Photo: John Spink /Atlanta Journal-Constitution

Updated March 13, 2018

By [Dan Klepal](#) and [Stephen Deere](#), The Atlanta Journal-Constitution

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TRANSPARENCY

L.A. NOW LOCAL LA TIMES

L.A. County has repeatedly violated state open records laws, L.A. Times lawsuit alleges



By JACK DOLAN MAR 21, 2018 | 3:55 PM



L.A. County Sheriff Jim McDonnell, front left, and L.A. County Dist. Atty. Jackie Lacey have refused to disclose records that are public under California law, according to a lawsuit filed this week by the Los Angeles Times. (Allen J. Schaben / Los Angeles Times)

The Los Angeles Times has sued L.A. County, accusing it of repeatedly and routinely flouting

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TRANSPARENCY

Editorials

State lawmakers are not above Public Records Act

Originally published November 21, 2017 at 3:38 pm | Updated November 21, 2017 at 3:48 pm



Washington State Capitol (Ellen M. Banner / The Seattle Times)

State lawmakers continue to claim they are not subject to the state Public Records Act, unlike nearly every other government official in Washington state. Their refusal is a disservice to the public they serve.

By [Seattle Times editorial board](#)

The Seattle Times

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Washington state lawmakers continue to think themselves above the public disclosure laws that apply to nearly every other government official in the state, demonstrating a remarkable commitment to shielding their activities from public view.

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DISCUSSING PUBLIC BUSINESS ON PRIVATE EMAIL SERVERS

Pence used personal email for state business — and was hacked

Tony Cook, tony.cook@indystar.com

Published 7:08 p.m. ET March 2, 2017 | Updated 8:38 p.m. ET March 3, 2017



Vice President Mike Pence reportedly used a private email account to conduct public business, including homeland security matters, while he was governor of Indiana. Records of the emails were obtained by IndyStar through a public records request. Dwight Adams/IndyStar



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[Vice President Mike Pence](#) routinely used a private email account to conduct public business as governor of Indiana, at times discussing sensitive matters and homeland security issues.

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For The Win

DISCUSSING PUBLIC BUSINESS ON PRIVATE EMAIL SERVERS



News / Local news / Clout Street

Emanuel admits using personal email for public business as city settles open records lawsuit



These are some of the emails in which Mayor Emanuel sounded off on a number of issues. Dec. 21, 2016. (CBS Chicago)

By **Bill Ruthhart, Hal Dardick and Jeff Coen** · Contact Reporters
Chicago Tribune



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TREND – ANY DISCUSSION OF PUBLIC BUSINESS IS SUBJECT TO TRANSPARENCY LAW

L.A. NOW

Public officials can't shield government business by using personal email, state Supreme Court rules



By MAURA DOLAN MAR 02, 2017 | 2:25 PM



Public employees' work-related email and text messages sent on their personal devices through their private accounts are public records, the California Supreme Court decided Thursday. (Justin Sullivan / Getty Images)



LATEST L.A. NOW

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1h



Officials' text messages and social media are public record, Arizona attorney general says

Ryan Santistevan, The Republic | azcentral.com Published 7:14 p.m. MT July 10, 2017



The Arizona Republic and azcentral.com have created the website azpublicinfo.com to make it as simple as possible for citizens to request public records from government agencies.

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(Photo: Getty Images)

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Arizona public officials' text messages and social-media activity are a public record if the information is related to their official roles, state Attorney General Mark Brnovich wrote in an opinion released last week.

FROM THE USA TODAY NETWORK



CRIMINAL JUSTICE

Vermont Supreme Court: Private emails of public officials subject to records requests

By Alan J. Keays and Anne Galloway Oct 20 2017

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Attorneys Robert Hemley, left, and Brady Toensing at a Vermont Supreme Court hearing Wednesday. Pool photo by April McCullum/Burlington Free Press

The Vermont Supreme Court has ruled that the private email and text message accounts of public officials are subject to the state's public records law, a decision hailed as a victory for advocates for government transparency.

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



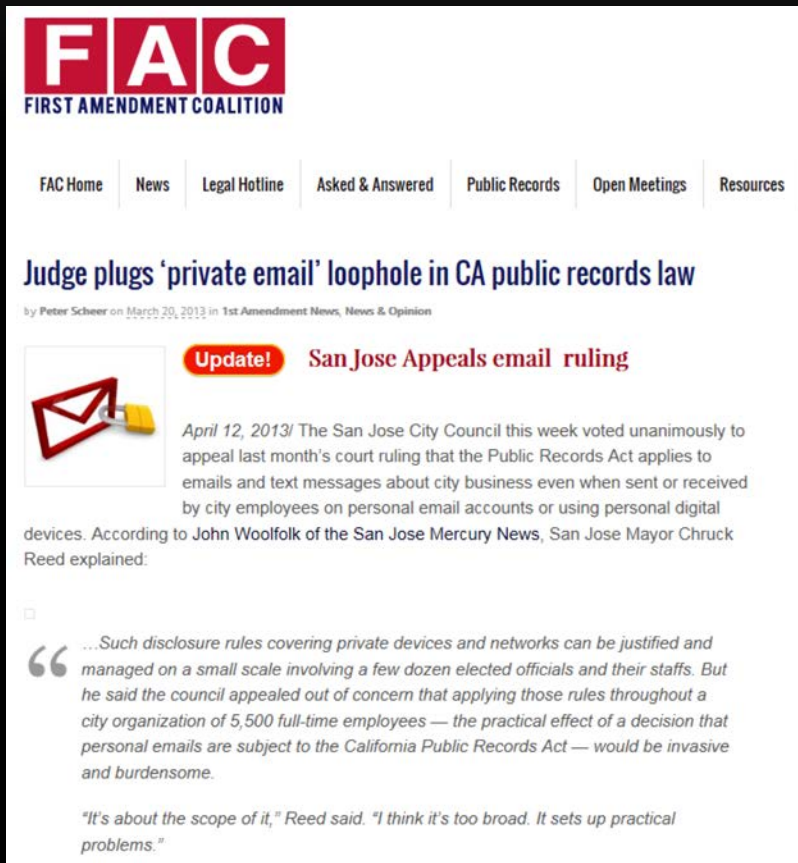
- Be conscious of what you put in email:
 - Don't discuss disciplinary matters that could suggest prejudice.
 - Refrain from jokes or offensive comments regarding fellow Board members, Board staff, or credential holders.
 - Advice: Don't put anything in an email you wouldn't want on the front page of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




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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** **FREE PHON**
WIRELESS CONNECTING AMERICA **FREE MINUT**
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Yes, That Text Message Is a Public Record

By Michael Grass | January 5, 2015 | 6 Comments



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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.

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Text messages enter public-records debate

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Those supposedly private messages that public officials dash off on their government cellphones to friends and colleagues aren't necessarily private after all.

f 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.

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"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?

