FOIA'S REACH EXTENDS TO CERTAIN RECORDS ON PERSONAL DEVICES OF OFFICIALS AND EMPLOYEES

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On August 5, 2020, the Appellate Court in *Better Government Association v. City of Chicago Office of Mayor*, 2020 IL App (1st) 190038, held that text messages and emails that pertain to public business on personal devices or accounts of public officials may subject to the Freedom of Information Act (FOIA). The Appellate Court further held that defendants' refusal to inquire with their respective officials as to whether their personal accounts contained responsive records was not reasonable. 2020 IL App (1st) 190038.

In 2016, the Better Government Association (BGA) submitted FOIA requests to the City of Chicago Mayor's Office (Mayor's Office) and the City of Chicago Department of Public Health (CDPH) seeking "any and all communication" between the Public Health Commissioner and officials at the Mayor's Office (including the Mayor and other personnel), and communications between the Commissioner and officials at Chicago Public Schools (CPS), related to the discovery of lead in the drinking water at CPS. BGA was not satisfied with the response and filed a lawsuit which alleged in part that the search was not adequate because the Mayor's Office was aware that its officials used personal phones and email accounts to discuss public business, but did not ask its officials whether their personal devices and accounts contained records responsive to the FOIA request. The Mayor's Office maintained that it had no obligation to search personal accounts or devices for responsive records because those records were not "public records"[1] subject to FOIA.

The trial court determined that the Mayor's Office and CDPH did not perform a reasonable search for responsive records because it failed to include the personal text messages and e-mails of the relevant officials in the search. Both were ordered to make inquiries with the relevant officials to determine if additional responsive records exist and provide affidavits accordingly. The Mayor's Office and the CDPH appealed the trial court's ruling. The order of the trial court was affirmed on appeal.

In reaching its decision, the Appellate Court looked to the Fourth District's decision in *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, which held that communications on the personal account of a member of a public body come into the possession of that body

[1] Public records include "all…electronic communications…pertaining to the transaction of public business, having been prepared by or for, or having been or being used by, received by, in possession of, or under the control of any public body." 5 ILCS 140/2(c).

when the communications are sent or received at a time when the body is conducting public business. There, the records at issue were those of city council members and the court concluded that the city council was capable of conducting public business only when a quorum of council members was involved.

By contrast, in this case, the defendants, through their individual officials, can function as public bodies without any official meeting being convened. For example, the Appellate Court noted that the mayor and the director of CDPH can make unilateral decisions that are binding on their respective public bodies. *See Dumke v. City of Chicago*, 2013 IL App (1st) 121668, ¶ 10 n.2 (the mayor of Chicago is the city's chief executive officer responsible for, inter alia, directing city departments and appointing department heads). Thus, under *City of Champaign*, the e-mails and text messages from those officials' personal accounts are "in the possession of" a public body within the meaning of FOIA. Also, many such communications are prepared for or eventually used by the public body. The Appellate Court further reasoned that if such records were not considered "public records" for FOIA purposes, public officials would be able to completely circumvent FOIA simply by conducting public business on private accounts.

After determining that the e-mails and text messages in question were generally subject to FOIA, the Appellate Court held that the search for responsive records was not adequate because there was no inquiry as to whether records existed on the private devices and accounts. Notably, the Appellate Court said that a public body is not required to actually conduct a search of personal devices and accounts. Rather, to satisfy its obligation to conduct an adequate search for FOIA purposes, a public body must ask its officials whether they are in possession of records that pertain to public business on a personal device or account. If not, there are no responsive records. If so, those records should be identified for purposes of the FOIA response, including whether the records contain content exempt from disclosure under FOIA. Such inquiries should be answered truthfully as any legal challenge will likely result in sworn testimony or an affidavit from the respective officials.

In view of this decision, we remind public bodies that best practice is to only conduct public business on accounts and devices issued and accessible by the public body. If private accounts and devices are used for public business, such may be records of the public body and subject to the reach of FOIA.

Should you have any questions about this decision or its implications, please contact a Robbins Schwartz attorney with any questions.