



## Private Emails Sent on Public Systems are not Automatically Subject to Disclosure Under FOIA

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On January 26, 2010, the Michigan Court of Appeals issued an important decision regarding the definition of "public records" under the Michigan Freedom of Information Act ("FOIA"). MCL 15.231 *et seq.* For the first time in Michigan, the Court addressed whether e-mails sent by public employees on the public body's e-mail systems were automatically considered "public records" under the FOIA. The Court concluded that an individual employee's personal e-mails did not become public records solely because they were captured in the e-mail system of the public body.

In *Howell Educ Ass'n MEA/NEA v Howell Bd of Educ*, \_\_\_\_ NW2d \_\_\_\_ (2010), FOIA requests were submitted to the school district requesting e-mails sent to and from certain teachers. During the relevant time period, these teachers were also members and officials for the Howell Education Association ("Association"). The Association objected to the release of the communications because the e-mails involved internal union communications. The Association filed a "friendly lawsuit," taking the position that these were not "public records" but were private correspondence. The trial court concluded that any e-mails generated through the school's e-mail system were retained and stored by the school district and were, therefore, public records under the FOIA. The Court of Appeals disagreed and reversed the trial court's decision.

The Court of Appeals noted that the FOIA was adopted in 1977 and has not been amended since 1997. As a result, the current technological advances were not contemplated at the time of adoption: "We find ourselves in the situation akin to that of a court being asked to apply the laws governing transportation in a horse and buggy world to the world of automobiles and air transport." In evaluating what the intent of the Legislature would have been if this technology would have been foreseen, the Court analyzed the definition of "public record" in the FOIA. A public record is "prepared, owned, used in the possession of or retained by a public body *in the performance of an official function.*" MCL 15.232(e) (emphasis added). Absent specific legislative directive

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to do so, the Court would not "judicially convert" every e-mail ever sent or received by a public employee into a public record subject to disclosure under FOIA. Mere possession of the public record, such as retaining all e-mails on the school's backup system, was not sufficient; the document must also have been in the performance of an official function. Here, the e-mails did not involve teachers acting in their official capacity as public employees, but in their personal capacity as Association members and leadership. Since the e-mails in this case involved union business and not school district business, they were not "public records."

Notably, the Court refused to find the e-mails at issue to be private even though the school district had an acceptable use policy that specifically stated that users should not expect their communications on the system to remain private. The policy further stated that the technology was only to be used for educational purposes. In the Court's view, although personal e-mails may be an inappropriate use of the school's e-mail system, such violations did not automatically make those documents public records.

The Court was also careful to note that the ruling should not be used to conclude that personal e-mails can never become public records. For example, if a teacher was disciplined for violations of the acceptable use policy and the personal e-mails were used to support that discipline, the e-mails may become "public records" subject to the FOIA.

Increasingly, FOIA requests have been asking for e-mail correspondence. A public body should carefully review any e-mail correspondence to determine whether it meets the definition of "public record" in light of the above court decision.

If you have any questions regarding the FOIA, please contact **Anne Seuryneck** at **616.726.2240** or [aseuryneck@fosterswift.com](mailto:aseuryneck@fosterswift.com).