



Electronic Communication and Open Government *Big Brother Is Being Watched*

BY MARK C. GOULET

We have all witnessed this scenario: A teacher discovers two students passing notes and says, “Perhaps you would like to share that with the rest of the class.” What if, instead of two students, two elected trustees of the school board pass notes during a called meeting, and a reporter wants to discover the content?

Written communication has evolved from pen and paper to electronic methods including email, text messages, instant messaging, and social networking. These technological tools, while useful for government officials, must be viewed with two state statutes in mind: the Texas Open Meetings Act¹ (OMA) and the Texas Public Information Act² (PIA). These statutes advance the principle of the citizen’s right to be informed of the workings of government and are applicable to all state agencies and all political subdivisions, including school districts, cities, and counties. Criminal penalties exist for noncompliance with either law.

The prevalence and ease of electronic communication raises several unexpected compliance issues for elected and appointed officials. These include the compelled release of information from personal email and other accounts and potential issues with archiving electronic communications. Electronic communications also raise emerging issues under the OMA. First, how does the use of electronic communications between elected officials during a public meeting affect the public's right to observe the meeting of a governmental body. Second, can electronic communications between elected officials outside of a meeting constitute an illegal meeting or be construed as an attempt to circumvent the OMA?

Information transmitted on personal accounts can be available under the PIA.

The PIA is structured with a presumption that all records kept or maintained by a governmental entity are public unless a specific exception to disclosure applies. Anyone can request information under the PIA with the expectation that the request will be filled promptly.

Elected officials are aware that their government-issued computers and devices are subject to the PIA. Some are surprised, however, to find out that, to the extent that they transmit or discuss public business on their personal accounts or devices, this information is also available to the inquiring public. In an Open Records Determination, the attorney general held that correspondence sent to and from school board members' personal email accounts and maintained on the board members' personal computer at home is public information subject to the PIA if it relates to school district business.³ A school district received a request for all correspondence between school board members on a certain subject. The records at issue were communications between board members that related solely to district business. Specifically, the emails contain detailed references to the policies and procedures of the school district and information relating to district employees.

In another determination by the attorney general, a county received a request for correspondence between several named individuals. The county claimed that the emails maintained on a county commissioner's private email account were not public information subject to the Act because the county does not own or have any right of access to this information. The county further argued that, by searching for any responsive information, it would violate privacy rights granted by the Texas and U.S. Constitutions. The attorney general opined that a governmental body may not circumvent the applicability of the Act by conducting official public business in a private medium. The county commissioner, who maintains the information at issue, is required to release "public information" maintained in his personal email account.⁴

"Deleted" electronic communications are subject to retention and archiving regulations.

The attorney general has ruled that the PIA "[o]nly applies to public information in existence at the time of the request for

information."⁵ What about "deleted" emails and other electronic records? Those records are deemed to be available for public release. The attorney general has determined that:

[T]o the extent an email responsive to the instant request has only been placed in the "trash bin" or "recycle bin" of a program, the email is still being "maintained." ... However, to the extent an email responsive to the instant request has been deleted from the trash bin, and thus the location of the file on the hard drive has been deleted from the FAT [file allocation table], we believe the email is no longer being maintained by the city and therefore the email is no longer public information.⁶

The Texas State Library and Archives Commission (TSLAC) is charged with the oversight of the retention of government records, including email and other electronic communications. In the "Frequently Asked Questions" section for state and local records management, the question "How long should I keep email?" is asked. The TSLAC answers:

Email is the medium or the delivery mechanism. It is not a records series. You would not choose to keep everything the mailman brings for 30 days. The mailman might bring you payments, catalogs, invoices, complaint letters, and more. You would have to look at each item of mail and decide how long to keep each item. The same goes for email. You have to



Does Your Law Firm Need A Rainmaker?

Is Your Business In A Drought?

Let Houston Lawyer Referral Service
be your #1 source for new business!

Join our team and be part of the 2000 legal cases we refer to members each month. We spend marketing dollars to attract the clients with legal needs and we pass them directly on to you.

You don't pay us until you get paid!
Bi-lingual attorneys are in high demand with Houston's diverse community.

Call today and bring your business from drought to plentiful.

HOUSTON LAWYER REFERRAL SERVICE
(713) 237-9429 or sign up at hlrs.org



read each email and place it into a records series. For example, in the State Records Retention Schedule, a complaint record is kept for 2 years after the complaint is resolved. Whereas, an open records request is retained for 1 year after the request is filled.

As electronic storage of information has grown, the management of that information has become increasingly important when litigation is threatened or underway. Electronically Stored Information (ESI) is now recognized as a special category of information subject to specific federal court rules requiring its preservation and disclosure. When a district anticipates litigation or is in the midst of a lawsuit, preserving ESI and making the information readily retrievable is critical. Litigators often find that the most critical information divulged in the discovery process is electronic information that may have been stored, archived, or recorded automatically.

Electronic communications during a meeting subject to the OMA carry some risk.

House Bill 2977, introduced in the Texas Legislature during the 82nd regular session, sought to criminalize the transmission of an electronic communication during a public meeting. The bill was left pending in the State Affairs Committee, but it illustrates a growing awareness that electronic messaging by and between government officials during open meetings could undermine the goal of the OMA.

Recently, members of the Austin City Council released electronic messages that revealed that members were communicating privately during public meetings. The content of the messages suggest that the elected officials did not anticipate public release. One official sent a message disparaging a city employee, calling a certain action “[T]he biggest snow job I’ve seen in a long time. ...” and speculating that an employee organization had been “bought off.” Another official stated of the same employee, “[N]othing will change in that department with her in charge. ...” A third elected official referred to a local advocate for environmental issues as “crazy, two-faced, and not someone who I listen to.”⁷ The Travis County attorney began an investigation into possible legal violations regarding this communication during meetings.

There is scant legal guidance for the limits of electronic communications by officials during open meetings. Public officials should be aware of the concern that secret electronic communication by or between board members during a public meeting may be seen as thwarting the purpose of the OMA and could be viewed as an illegal “shadow” meeting occurring during the meeting. The attorney general has ruled that paper notes passed between school board members during a meeting are subject to public release.⁸

Officials who communicate via electronic message outside of a meeting risk an unintentional quorum.

The widespread use of email and other electronic messaging methods creates special dangers for governmental officials trying to comply with the open meetings laws. Questions have arisen as to whether electronic communications among elected officials (e.g., emails leading up to a meeting that concern public matters) constitute a “meeting” for purposes of open meetings laws. Any deliberation among a quorum of a governmental body without the required posted notice is a violation of the OMA. Courts would likely consider the following factors: (1) the number of participants involved in the communication; (2) the number of communications regarding the subject; (3) a time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.⁹ The attorney general has held that email communications can be included in the OMA definition of “deliberations.”¹⁰

The OMA and the PIA apply to all political subdivisions and to the state of Texas itself. Every city council, school board, and department and agency of the state operates for the benefit of the public. Their meetings and records are subject to public viewing. Elected and appointed officials should be reminded of this required transparency and use electronic communications with this transparency in mind.

Notes

1. Texas Government Code, Chapter 551.
2. Texas Government Code, Chapter 552.
3. Op. Tex. Att’y OR-0951 (2003).
4. Op. Tex. Att’y ORD-7537 (2010).
5. Op. Tex. Att’y ORD-3366 (2001).
6. Op. Tex. Att’y ORD-3366 (2001).
7. Tony Plohetski, “Council releases revealing e-mails: Communications show hard feelings, harsh words; raise questions on open meetings,” *Austin American-Statesman*, Feb. 25, 2011, located at <http://www.statesman.com/news/local/council-releases-revealing-e-mails-1282940.html> (last visited Aug. 15, 2011).
8. *Tex. Att’y Gen. OR* 2003-801 Feb. 6, 2003.
9. *See e.g.*, Op. Wisc. Att’y Gen’l No. 29, 2-4 (2005).
10. *Tex. Att’y Gen. JC*-307 (2000).

MARK C. GOULET

is a shareholder in Walsh, Anderson, Brown, Gallegos & Green, PC. in Austin. He represents the interests of Texas schools in local matters, as well as state and federal agencies. Goulet serves on the board of the Texas Council of School Attorneys.

EMPLOYMENT LAW

RACE, AGE, & SEX DISCRIMINATION
SEXUAL HARASSMENT
OVERTIME PAY

THE GBENJO LAW GROUP

8449 West Bellfort Ave., Ste. 100, Houston, TX 7707

713-771-4775

Don't Discard Your Employment Cases, Call
ANNE GBENJO

Practicing Law in MD, D.C., GA & TX