

Institute for Local Government Lawyers

Public Records and Open Meetings - They're Watching Us

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Public Records

I. Public records law is generally a matter of state or provincial statutory law.

1. The federal "Freedom of Information Act" (FOIA – 5 U.S.C. § 552) does not apply to state or local government in the United States. *E.g.,* St. Michael's Convalescent Hosp. v. State of California, 643 F.2d 1369 (9th Cir. 1981).

2. Federal pre-emption is rare in the United States. (Social security account numbers are an important example of pre-emption. *See* 5 U.S.C. § 552a, footnote; and 42 U.S.C. § 405(c)(2)(C)(viii).)

3. Constitutional rights of privacy play little part in public records case law. *But see*, Statharos v. New York City Taxi and Limousine Comm'n, 198 F.3d 317 (2nd Cir. 1999) (personal financial statements) and Déjà vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tenn., 274 F.3d 377 (6th Cir. 2001) (personal information that a local government held about persons owning or working in sexually-oriented businesses)

4. In all but a few states or provinces, the common law no longer is relevant to these issues.

II. There are two basic types of public records statutes.

1. A minority of states have adopted public records statutes modeled after the federal "Freedom of Information Act" (FOIA – 5 U.S.C. § 552).

- These statutes attempt to be comprehensive treatments of access to records held by state and local governments, putting all the law in a single statute.

- The federal model leaves a good bit of discretion to courts in determining whether particular records are open or closed, and in these states, the courts rely very much on federal decisions interpreting the federal FOIA.

- Some of these states have created state-level Freedom of Information Commissions, which have power to review agency actions regarding record requests.

2. The more recent provincial statutes also are comprehensive treatments of access to records and typically treat privacy issues as well as public records.

3. A majority of states have a basic public records statute – usually defining "public record" very broadly – and then place exceptions to access throughout the codified statutes.

- In most such states, a record held by government is presumed to be open to the public, and if the custodial government wishes to deny access it must find a statute making an exception to the general rule of open access. (In a very few states, courts feel entitled to create their own exceptions on grounds of public policy.)

- In these states, courts are interpreting their own state statutes, which tend to be specific about types of records exempt from public access. Courts in these states look much more to decisions from other states than they do to federal decisions.

III. A government attorney must become familiar with the statutory exceptions to access established in his or her state or province. Again, these might be scattered in many sections of the codified statutes (and perhaps in the city or county charter). Common kinds of records that are exempt, in whole or part, from public access include:

1. Personnel records. (Some personnel records, such as salaries, are usually open to public access.)

2. Law enforcement records. (Some police records, such as incident reports and arrest records, are usually open to public access; in some states, police investigation records become open once a trial is held or an investigation closed. Juvenile records normally receive greater protection.)

3. Medical records associated with specific patients. Hospital credentialing and peer review information is also often closed to access. Furthermore, with increased competition among hospitals, more and more states exempt information that might be important to a hospital's competitive position. Some states also explicitly exempt emergency medical system records.

4. Student records. (Federal law requires that these records be confidential as a condition of federal education aid.)

5. Trade secrets submitted to governments by private companies.

6. Income and sales information found in tax records. (Property tax records are usually open.)

7. Matters within the attorney-client privilege. (This is not universal, and in some states attorney work product is also open to the public.)

8. Minutes of closed sessions of public bodies.

9. Records of economic development agencies regarding client contacts.

10. Records about social services clients, because of federal requirements.

11. Records involving public security, including drawings and plans for public buildings and for infrastructure.

IV. The right of access

1. Usually a government may not charge for locating and producing a public record.

2. The charge for providing a copy of a public record is usually nominal, covering only the marginal cost of making the copy. Sometimes statutes permit higher charges for specific types of records.

3. If a record is maintained in electronic form, in most states the requester is entitled to a copy in that form.

4. Records usually must be produced within a reasonable time, and what is reasonable depends on many variables: size of request, number of requests, location of record, etc. A custodian may not, however, automatically put the records request at the bottom of the list of things to do. In some states and provinces the statute sets a specific number of days within which a records request must be responded to.

5. The purpose for which someone seeks a record is irrelevant to that person's right of access.

6. Governments may adopt regulations governing access to public records, as long as those do not significantly deter the public's right of access.

7. Generally a government need not create a new record in response to a records request.

V. Electronic records: some emerging issues

1. Generally, email is recognized as a public record. Requests for copies of email can be extraordinarily onerous, but the costs of isolating email in response to a request may have to be met by the government.

2. Just because email is found on a public computer does not mean it's a public record. Courts have recognized private email as just that. *E.g.*, State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't, 693 N.E.2d 789 (Ohio 1998) and Times Publishing Co. v. City of Clearwater, 830 So.2d 844 (Fla. Ct. App. 2002).

3. The cookies on a public computer may be comparable to private email, unless the record of cookies is used in personnel decisions. *See* Tiberino v. Spokane County, 13 P.3d 1104 (Wash. Ct. App. 2000).

4. Most courts have held that a local government need not reprogram a computer in order to respond to a public records request:

E.g., Schulten, Ward & Turner, LLP v. Fulton-DeKalb Hosp. Auth., 535 S.E.2d 243 (Ga. 2000).

State ex rel. Kerner v. State Teachers Retirement Bd., 695 N.E.2d 256 (Ohio 1998).

Contra: The Tennessean v. Electric Power Bd. of Nashville, 979 S.W.2d 297 (Tenn. 1998).

Open Meetings

I. Each state and province has its own open meetings law, and there is enormous variety in their provisions. Therefore, the decisions of other courts are often not helpful in interpreting your jurisdiction's statute. A new attorney needs to read his or her state's or province's statute, any cases interpreting that statute, and any publications explaining the statute. (The provincial statutes seem, as a group, to be less elaborate than the state statutes in the U.S.) The new attorney should seek answers to the following questions:

II. What bodies are covered?

1. Elected governing boards are universally subject to open meetings laws.

2. Sometimes boards with advisory powers only are not covered.

3. Sometimes committees of larger boards are not covered.

4. Sometimes boards in formally private organizations are covered, if these organizations are subject to effective government control or are acting as agents for government. This kind of coverage is usually the result of case law rather than explicit statutory provision.

III. What meetings are covered?

1. In some states only meetings at which action is taken are subject to the law.

2. In some states only formal meetings are subject to the law. Informal gatherings of a board's members are not covered.

3. In many states, any gathering at which board members deliberate about board business is subject to the law.

4. A few courts have begun to hold that extended email interchanges among board members constitute meetings under open-meetings legislation.
See: Wood v. Battle Ground School District, 27 P.3d 1208 (Wash. Ct. App. 2001) (series of email transmissions might constitute a meeting)
Del Papa v. Board of Regents of the University and Community College System of Nevada, 956 P.2d 770 (Nev. 1998) (Sending of fax, with telephonic responses, constitutes meeting)
But see: Beck v. Shelton, 593 S.E.2nd 195 (Va. 2004) (A series of emails among council members was not a meeting)

IV. What notice is required of meetings?

1. In a few states the statute contains no requirement of notice.

2. In some states the statute requires “reasonable” notice, or a comparable formulation, and the courts will second-guess a board as to whether the notice given was in fact reasonable.

3. In some states the statute sets out very specific requirements for notice.

V. What can be talked about (or acted upon) in closed or executive session? Common topics include:

1. Personnel matters.

2. Litigation, administrative proceedings, and discussions of other claims.

3. Attorney-client discussions.

4. Property acquisition and/or disposition.

5. Deliberations in quasi-judicial matters.

6. Deliberations on economic development projects.

7. Matters involving patients or physicians in public hospitals and other health facilities.

8. Discussions on matters confidential under other statutes.

VI. What remedies are available when the statute has been violated?

1. Most commonly, litigants can seek declaratory or injunctive relief.

2. In many states, litigants can seek to invalidate actions taken after statutory violations.

3. In a few states, violations expose board members to civil penalties or criminal prosecution or to personal liability for plaintiffs’ attorney fees.

Bibliography

Public Records

For those states that operate under statutes modeled after the federal Freedom of Information Act, there are a number of reference books on the federal statute. One good case service is Prentice-Hall's Government Disclosure service.

There does not seem to be any good single source for cases or the law for states that operate under the public records law model. At the risk of appearing shameless, I'll mention:

David M. Lawrence
Public Records Law for North Carolina Local Governments
(Institute of Government, Chapel Hill, 1997)

Although this book focuses on North Carolina, it draws in cases from around the country and therefore might be a useful starting point for investigating the law and finding cases.

Open Meetings

In most states there will be some state-level source on that state's open meetings law. The most likely publishers are a state league or association of cities or counties, the state attorney general's office, or a university-based public service organization.

There is one comprehensive national source on open meetings laws and cases:

Ann Taylor Schwing and Constance Taylor
Open Meetings Laws
(Fathom Pub. Co., Anchorage, 2d ed. 2000)

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Questions for Discussion
(Answer each question based on your knowledge of the law of your state or province)

1. The reporter who covers your city for the local newspaper has submitted a letter to the city manager asking that she (the reporter) automatically receive a copy of all emails to or from the manager, the assistant manager, and the mayor and each member of the city council. How should the city respond to this request?

2. The public works director has received a request for all email he has received or sent in the last four months concerning a controversial construction project. There are about 15 emails in his "deleted items" folder that concern the project. Are these still public records that must be turned over to the requester?

3. The local television station has asked for copies, under the public records law, of all correspondence received by your council members from constituents, whether at home or at city hall. Are these letters subject to the public records law?

4. The city is in litigation and the other party has allowed the time for discovery to lapse. Therefore, the attorney's paralegal has shown up at city hall and demanded certain materials, no longer discoverable, pursuant to the public records law. Must the city produce the materials?

5. The city uses social security account numbers as water and sewer system account numbers. If someone requests a copy of a utility bill under the state's public records law, may or should the social security account numbers be blackened out?

6. You represent the recorder (or register) of deeds, who is planning to place deed records on the internet. Sometimes land records, such as deeds of trust, recorded in the office include the social security number of a party to the transaction. Should the social security numbers be blackened out before the document images are placed online?

7. A city council member has sent a message about an item on the upcoming agenda to each of the other council members. Two have replied, using the "Reply All" feature of the email program, and the original member has responded, also using that feature. Is this exchange a "meeting" subject to the open meetings law?

8. Your council is considering a moratorium on midget car race tracks until it can consider and possibly adopt a new noise control ordinance. You wish to discuss with them the proper procedures for adopting and terms of such a moratorium. (There is no litigation threatened with respect to this matter.) May you advise your council in closed session?

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Questions for Discussion – Resources

Question 1

Cases involving private email or other correspondence or comparable records:

State ex rel. Wilson-Simmons v. Lake County Sheriff's Department, 693 N.E.2d 789 (Ohio 1998). (Racist email on departmental computer not public record)

Times Pub. Co. v. City of Clearwater, 863 So.2d 149 (Fla. 2003) (Private email on government-owned computer not public record)

Office of the Governor v. Washington Post Co., 759 A.2d 249 (Md. 2000) (Records of telephone calls made at governor's residence, paid for by the state, are not public records)

Also, see the attached speculation about correspondence of elected officials.

Question 4

Some cases involving use of public records law in lieu of discovery:

Chief of Police, Hartford Police Dept. v. Freedom of Information Comm'n, 724 A.2d 554 (Conn. Ct. App. 1999). (Use of public records law allowed)

Kentucky Lottery Comm'n v. Stewart, 41 S.W.3d 860 (Ky. Ct. App. 2001). (Use of public records law allowed)

General Electric Co. v. Dep't of Environmental Protection, 711 N.E.2d 589 (Mass. 1999). (Use of public records law allowed)

Scott v. Smith, 728 S.W.2d 515 (Ark. 1985) (attorney work-product available under public records law).

General Electric Co. v. Dep't of Environmental Protection, 711 N.E.2d 589 (Mass. 1999) (attorney work-product available under public records law).

News and Observer Pub. Co., Inc. v. Poole, 412 S.E.2d 7 (N.C. 1992) (matters within attorney-client privilege available under public records law).

McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004) (attorney work-product available through public records law).

Questions 5 and 6

42 U.S.C. § 405(c)(2)(C)(viii) (1990):

"Social Security account numbers and related records that are obtained or maintained by authorized persons [defined to include state and local government officials] pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such Social Security account number or related record."

[Violation of this statute is a felony.]

Selected cases involving release of social security account numbers by local or state governments:

State ex rel. Beacon Journal Publishing Co. v. City of Akron, 640 N.E.2d 164 (Ohio 1994) (release of social security account numbers held by city would be unconstitutional invasion of privacy).

Arakawa v. Sakata, 133 F. Supp. 2d 1223 (D. Hawaii 2001) (release of social security account numbers held by state DMV would be unconstitutional invasion of privacy).

Yeager v. Hackensack Water Co., 615 F. Supp. 1087 (D. N.J. 1985) (court orders agency holding social security account numbers collected in violation of federal law not to release the numbers).

Question 7

Wood v. Battle Ground School District, 27 P.3d 1208 (Wash. Ct. App. 2001) (series of email transmissions might constitute a meeting)

Del Papa v. Board of Regents of the University and Community College System of Nevada, 956 P.2d 770 (Nev. 1998) (Sending of fax, with telephonic responses, constitutes meeting)

Beck v. Shelton, 593 S.E.2d 195 (Va. 2004) (A series of emails among council members was not a meeting)

Correspondence and Other Material Held by Elected Officials

Adapted from Lawrence, Public Records Law for North Carolina Local Governments, 1997-2003 Supplement

Local elected officials receive and send a variety of communications-to or from constituents, local government staff, other elected officials, state or national organizations, and so on. Sometimes they receive or send these communications through the facilities of the local government; at other times they do so at or from the official's home or private office. Increasingly, these kinds of communications are made by electronic mail and may be routed through the local government's server or stored on a computer provided by the local government. In addition, elected officials also sometimes generate materials in the process of preparing proposals for the board on which they serve. This new section discusses which of these kinds of communications and materials are public records. It should be noted that the state's public records statute does not address these issues directly, nor have the state's appellate courts considered them. Indeed, there is almost no case law on this point from any U.S. jurisdiction. As a result, the following discussion is inevitably somewhat speculative.

As a way of framing the discussion, it is important to recall that material that is personal in nature does not become a public record simply because it is found in a public facility or on a government-owned computer. Clearly, at least some of the communications to or from an elected official or some of the materials prepared by an elected official are personal in nature and therefore not public records. The difficulty lies in determining where to place the line between public and personal records. The following paragraphs delineate a variety of categories of communications or other materials and offer my suggestions on whether they are public records.

Communications with local government staff. E-mail and other communications between local government staff and an elected official are almost always public records. (An elected official could, of course, have a personal relationship with a staff member, and some of their communications could therefore be personal in nature; but that would be relatively unusual.) Presumably, communications in this category relate to county or city business and therefore are public records for both the official and the staff member.

Communications with state or national organizations. Some elected officials are active in state or national organizations representing local governments, such as a state League of Municipalities or the National Association of Counties. Although they become involved in such organizations because of their elected position, their activities within the organizations are personal to them and are not part of their official responsibilities. Therefore, any communications with or about these kinds of organizations presumably are personal rather than public records.

Communications with constituents. It is much more difficult to be categorical about this set of communications. At one end, many are clearly public in nature, seeking help with respect to a local government service, petitioning for some governing board action, and so on. Although probably not conclusive, the fact that such constituent communications are routed through a local government's mailroom or through an e-mail address belonging to the city or county presumably makes them public rather than personal records. But messages to or from constituents can also be political in nature, particularly if the constituent is personally acquainted with the elected official or the communication is sent to the official's home or private e-mail address. And if they are political, they are probably personal to the officeholder. It might be necessary to judge each such message individually to determine from its content whether it is public or personal.

Communications with other elected officials. Again, there may be distinctions among such messages based on such factors as the number of officials involved and whether they might be considered a caucus of the entire governing board. For example, if a city council member sends an e-mail message to each of the other members of the council making a proposal about an upcoming agenda item, the message is probably a public record. But if, for example, the communication is between two minority party members of a board of county commissioners, it might be more about the fortunes of their party than about county business and, therefore, a personal rather than a public record. Here again, categorical assertions are impossible.

Materials associated with a proposal still in the planning or draft stage. If an elected official is working with local government staff in preparing a proposal for eventual presentation to the governing board, materials associated with that effort are clearly public record. But if, instead, the elected official is working with a community group or a set of political advisers, any materials associated with that effort are probably personal in nature and therefore not a public record. In this latter case, the materials might be considered comparable to personal notes prepared by a public employee to assist in his or her job; or they might be considered political in nature. In either case, they would not be public records unless included in the official's eventual presentation of the proposal to the governing board.