A column by Sue Jeffers

Are Personal Emails Captured on a Public Body's Computer System Subject to FOIA?

Facts:

In March 2007, Chetly Zarko submitted a series of FOIA requests to the Howell Public Schools, including requests for all email to and from three Howell teachers, all of whom were also officials of the Howell Education Association. The requests were made in the context of heated negotiations for a new collective bargaining agreement between the school district and union. All of the emails in question were captured on the school district's computer system. It was undisputed that Howell Public Schools is a public body subject to FOIA.

The teacher's union objected to the release of emails that addressed union matters on the basis that those emails were personal and not "public records" as defined under Michigan's Freedom of Information Act. Howell schools responded that there was no case law over this issue. The Howell Education Association then filed a complaint requesting a declaratory judgment, in part, that personal emails and emails pertaining to union business are not "public records" as defined by FOIA.

A "public record" is defined as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created" under Michigan's FOIA statute. MCL 15.232(e).

The teachers were also subject to the acceptable use policy of Howell Public Schools which states that employees may only use the school's computer system for "appropriate educational purposes." The policy further provides that email is not considered private communication and that any use outside of the "instructional goals" may constitute misuse of the system.

Question #1:

Are personal emails that are generated through a public body's email system that are retained or stored by a public body "public records" and subject to disclosure under FOIA?

Answer according to the trial court:

YES. The trial court determined that emails generated through the schools' email system that are retained or stored by the district are public records because they are "in the possession of, or retained by" Howell Public Schools.

Answer according to the court of appeals:

NO. The court of appeals held that "mere possession of a record by a public body" does not render the record a public document. Rather, the use or retention of the document must be "in the performance of an official function." The court stated that for the emails at issue to be public records, they must have been stored or retained by the school district in the performance of an official function.

The court further reasoned that there was nothing about the personal emails, given that by their very definition they have nothing to do with the operation of the schools, which indicates that they are required for the operation of an educational institution.

Question #2:

Does misuse by an employee of a public employer's acceptable use policy, to which the employee has agreed, render personal emails subject to FOIA?

Answer according to the court of appeals:

NO. A public employee's misuse of the technology resources provided by a public employer, by sending private emails, does not render those emails public record. (Note: It is unclear if the trial court ruled on this issue.)

Question #3:

Were the emails that involved "internal union communications" personal emails?

Answer according to the court of appeals:

YES. To the extent that such communications do not involve teachers acting in their official capacity as public employees, but rather in their personal capacity as Howell Education Association members, such communications are personal and not subject to FOIA.

Howell Education Association v Howell Board of Education and Howell Public Schools, No. 288977, January 26, 2010

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