

# Sunshine Law still applies as tech changes

Missouri's Sunshine Law was officially adopted in 1973 – 44 years ago. You can imagine there have been many changes to the law since that time – originally it was very short. At that time, computer use wasn't prolific, public bodies met only in person and never in cyberspace, and law enforcement didn't wear cameras on their bodies.

The law has changed many times since then to address these changes. And in the last year or so, it has become clear that there's another issue that may soon need to be looked at in the law. Back in 2004, a specific provision was added to the law addressing emails from members of public bodies (Section 610.025). The question today is whether that language is sufficient to address what we see happening today.

Rather than using email, more and more public officials are sending messages via their phone's text messaging capability, or using applications such as WhatsApp, Facebook Messenger, and Google Voice/Hangouts, among dozens of others. I imagine every single public body member who uses these apps sends them out without a second thought to the language in Section 610.025.

But I think there is a very strong argument that this statute covers such communications under certain circumstances. Let's

look at that language: "Any member of a public governmental body who transmits any message relating to public business by electronic means shall also concurrently transmit that message to either the member's public office computer or the custodian of records in the same format. The provisions of this section shall only apply to messages sent to two or more members of that body so that, when counting the sender, a majority of the body's members are copied...."

Of course, when that section was written, it meant "by email." But this language certainly is broad enough to cover text messages, I would argue! Granted, this only applies to text messages sent to a quorum of the public body (and the sender counts as one). But the smaller the public body, the more likely this is to be an issue!

And this even becomes a bigger issue when you consider what happens if the public governmental body is supplying the telephone to the member for "official" use. Clearly, emails that go through a ".gov" email account are retained within the server as public records, just like any other record retained by that public body. But what happens to these text messages within the telephone?

The Sunshine Law doesn't address this issue at all, primarily because record retention issues are not a Sunshine Law issue but

are within the scope of the Secretary of State's office in its Record Retention area, which are contained in the State Regulations that can be found on the Secretary of State's website under Title 15-Elected Officials, Division 30-Secretary of State, chapter 45, section 15 CSR 30-45.020. Basically, that regulation tells us that there are massive amounts of rules relating to records retention for state and local government. There are links to find them, but reading them would take forever.

I did take a few minutes to glance at them and I cannot easily find information relating to local government record retention periods and/or whether the rules as they are written even encompass obtaining and/or retaining records relating to telephone text messages.

But if I were to guess, based on what I know about telephone text messages and the bills I get each month, I suspect most public bodies simply get a bill mailed to them for the service and I doubt, unless they go into a website and print out detail, they even have a record "retained" in their offices as to text messages sent and received. I don't even know if it is possible to obtain a printed copy from my cell phone service provider as to what messages were sent or received without making a special request of the provider.

So unless members of the public body are somehow sending those text messages to the custodian who is technically storing them in some fashion, I imagine there is no "transmitting" of those messages to the custodian and also no storing of those messages for records purposes under the Sunshine Law taking place today. And that strikes me as a major problem with the Sunshine Law in 2017!

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