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Public's business is public

Ask to see officials' e-mails even if they were produced on personal machines

News that Alaska Gov. Sarah Palin and some of her aides had routinely used their private Yahoo! e-mail accounts to conduct state business renewed concerns that government officials are transacting public matters through private communication channels to skirt open records laws and avoid public scrutiny.

Earlier in 2008, San Francisco's mayor refused to release text messages sent and received on his personal iPhone regarding an oil spill in the city's bay, and Oklahoma state officials defended a policy of keeping secret all university business transacted on the school president's private BlackBerry. In 2007, the Bush administration acknowledged that White House aides had conducted government business through e-mail servers owned by the GOP.

Regardless of motive, officials are contending that their text messages, e-mails and other records conducting public business are not subject to sunshine laws if communicated on private accounts, computers, BlackBerrys or cell phones. They argue that ownership of the device, not the substance of the message, should be the deciding factor when determining whether records are open.

That notion poses a serious threat to open government because it contains no limiting principle. If a record is secret because it's on the mayor's iPhone, then so are documents on the mayor's own laptop. It matters only that the mayor paid for the yellow notepad, not that he's conducting the public's business on it.

Fortunately for the public, state courts and attorneys general have rejected this idea.

"It is the nature of the record created rather than the means by which it is created which determines whether it is a public record," Florida's attorney general wrote in an opinion in February.

In Texas, the personal cellular records and e-mail messages of officials have been deemed subject to disclosure if related to the transaction of public business. Likewise, an opinion issued by Alaska's attorney general in August said documents related to state business are public records even if "generated on a personal cell phone or PDA."

In each of those states, the statutory definition of a public record includes any document made or received "in connection with the transaction of official business." Reporters should look for similar phrasing in their state FOI laws if confronted by "private ownership of the device" as a reason for withholding records.

Another ownership-related justification for secrecy is that the government agency does not have custody of or access to records maintained in private e-mail accounts or on private BlackBerrys. That argument failed in Texas when the attorney general said the state's statute applied to information "maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person."

"If a governmental body could withhold records relating to official business simply because they are held by an individual member of the governmental body, it could easily and with impunity circumvent the [Public Information Act] merely by placing all records relating to official business in the custody of an individual member," the Texas attorney general said in 1995. "The legislature could not have intended to permit governmental bodies to escape the requirements of the act so easily."

Of course, the simplest solution would be to require officials to forward business-related records to their government accounts. The Ohio attorney general's office, for example, requires its employees to "copy their e-mails that relate to public business to their business e-mail accounts and retain them in accordance ... records retention schedules."

Officials also have argued that disclosure would invade their privacy because personal e-mails or text messages would be made public along with those related to government business. However, attorneys general have agreed that truly private information would be redacted prior to any record's release to the public. The opinion issued in Alaska, for example, emphasized that personal calls and e-mails would not be disclosed but instead would be culled by a state official or court from those related to government business.

Challenges to the "ownership, not substance," argument find support in decisions protecting privacy. In several states, personal e-mails on government computers are not subject to disclosure because of their content, not because of who owns the computer. It seems unlikely these states would allow officials to protect their personal e-mails on publicly owned computers but at the same time shield from disclosure government-related communications on privately owned devices.

A legislative solution would be to rewrite state FOI statutes to articulate that records of public business are subject to disclosure even if the government official owns the device or account on which the record was created. ♦