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Privacy v. Transparency: Managing Email as a Public Figure

This article is based on a presentation by Louis D. Kelly, Esq., General Counsel, Kentucky Board of Physical Therapy, at the 2015 FSBPT Annual Meeting.

Every state has "open records" laws that require public agencies to make certain documents subject to public disclosure. Whether board member or staff, there is a growing trend that any emails discussing official public business, whether originating from a public or private email account, is subject to public inspection. This presentation discussed what board members and staff need to know about using their private and public email accounts to avoid negative media attention or legal liability.

Board members are public figures and a lot of their communications are public record that people have a right to see and may demand to see.

There is a growing mistrust by the public against government, which includes regulatory boards. Even judges question regulatory board motives. In a concurring opinion on a Texas case discussing the North Carolina Board of Dental Examiners v. Federal Trade Commission U.S. Supreme Court decision, a Texas Supreme Court justice wrote:

"The decision brought a smile to licensure critics who had long argued that self-regulation brings self-dealing and that state licensing boards prone to regulatory capture deserved no immunity from *Sherman Act* abuses. Ever since *Parker v. Brown* 80-plus years ago, such boards were deemed outside the Act's ban on cartels, because, unlike traditional cartels, they were sanctioned by the state. No more. *Parker* no longer insulates regulated regulators regulating to anticompetitive effect. Licensing boards comprised of private competitors will face *Sherman Act* liability if they flex power to smother aspiring entrepreneurs."

Likewise, the White House's report, *Occupational Licensing: A Framework for Policymakers*, contained these words:

"… the current licensing regime in the United States also creates substantial costs, and often the requirements for obtaining a license are not in sync with the skills needed for the job. There is evidence licensing requirements raise the costs of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills across state lines."

In light of the current political climate surrounding governmental agencies and regulatory boards, there needs to be greater emphasis on maintaining public trust. An easy way to lose

public trust is to violate open records laws that are designed to promote transparency and accountability. There's an old adage that the cover-up is often worse than the crime.

Two examples from state laws were presented to show why open records laws exist. Kentucky's statute simply states it's because a "… free and open examination of public records is in the public interest."

Washington state's is more extensive:

"The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created."

In general, open records laws apply to all public agencies, including regulatory boards such as a board of physical therapy. Utah's act states that it applies to "every office, agency, board, bureau, committee, department, advisory board, or commission … established by the government to carry out the public's business." Missouri's is more vague, declaring its law applies to "any legislative, administrative, or governmental entity created by the constitution or statutes of this state …." But even if the statutes don't specifically mention boards, as in Missouri, they will be interpreted to do so, so board members and staff should assume they are covered under open records laws.

Most, if not all, open records laws have a broad definition of public records that would include emails or other electronic communication. For example, Louisiana defines public records as including "books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers … regardless of physical form or characteristics, including information contained in electronic data processing equipment."

California defines public records as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency, regardless of physical form or characteristics."

The key words used in both acts are "regardless of physical form or characteristics."

Two main problems can arise from using email to discuss board business — disclosure of emails that put board members and staff in a bad public light and accusations of attempting to avoid disclosure by using private emails to communicate.

A June 24, 2015, *Waco Tribune* article titled, "Baylor emails revealed in lawsuit show concerted campaign to snuff BAA," exemplifies how email exchanges can put officials in a bad light. The BAA is the Baylor Alumni Association, a private association the university wanted closed and folded into the Baylor-run association. The BAA had its own building on campus, which the university claimed needed to be torn down because it interfered with a new plaza and pedestrian bridge for the university's stadium. The emails were turned over to the BAA in the discovery phase of a lawsuit it had filed against the university. In one exchange, Baylor Vice President for Constituent Engagement Tommye Lou Davis wrote to then-Regent Chairman

Buddy Jones: “Can’t wait to tear that building DOWN!!!! If it is tied to the stadium, few will complain! :-) How sweet it will be!”

In an email prior to that note, Jones wrote to Davis, “I hate them,” to which Davis replied, “That makes two of us. Irrelevant twurps.”

Emails are an international problem, as a Feb. 4, 2015, *Langley Today* article shows about Abbotsford, British Columbia. The story, titled, “More Embarrassing Emails Reveal Abbotsford City Staff, APD At Their Worst,” revealed city staff decided to dump chicken feces on homeless people camped out across from a Salvation Army with the Salvation Army’s knowledge. The police department conspired in the cover-up.

Another news story broadcast on 9 News in Denver was headlined, “Lawmakers use private emails for state business.” The story detailed how Colorado lawmakers were having emails that were sent to their official accounts automatically routed to private accounts to circumvent open records laws. Other stories on government officials using private email accounts to discuss government business were also highlighted.

In addition to accusations of trying to hide questionable decisions from the public, using private emails may subject personal email to disclosure or, at a minimum, to inspection by a judge or attorney. A board member using work email for board business could subject the business to the disclosure of proprietary or confidential emails unrelated to board functions.

The primary solution to using email at all for board business is to stop and think — perhaps count to 10 — before hitting the “send” button. Be conscious of what you put in an email. Do not discuss disciplinary matters that could suggest prejudgment. Refrain from jokes or offensive comments regarding fellow board members, board staff, or credential holders. In short, do not put anything in an email you wouldn’t want to see on the front page of a newspaper or the top of a website.

Be wary of group emails. Group discussions could inadvertently violate “open meeting” laws. Group emails increase the risk of disclosing confidential information to a party not otherwise entitled to it. If you need to communicate information to the entire board, use the BCC — blind carbon copy — function so board members can only reply to you.

Consider obtaining an official email account so private emails are not subject to review or disclosure. If official emails are not feasible, consider creating a Gmail or Yahoo email specifically for board business or issues. Using identifying subject lines to clearly delineate what emails are board business in your inbox is another option.

Text messages are the next battleground in the public record debate.

A sheriff’s detective who filed suit against Pierce County, Washington, filed an open records request in that case for text messages from the county prosecutor’s private phone. The county provided a log indicating dates and times of text messages related to work but did not provide the actual messages. The detective sued, claiming that denying access to the actual messages violated the state’s Public Records Act. While the trial court ruled text messages on private

phones are not subject to the act, it was overturned on appeal and upheld by the state Supreme Court.

Social media probably also is not exempt from public records laws. Sending a Facebook message to a colleague about board business could be public record. Laws are only moving one way — toward more openness.

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