

# community watch

MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

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## Court Rules That FOIA Does Not Require Public Disclosure Of Personal Email

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The issue of whether personal email are subject to Michigan's Freedom of Information Act (FOIA) has been a longstanding and unresolved issue among public officials and attorneys. On January 26, 2010, the Michigan Court of Appeals published an opinion in the case of *Howell Education Association MEA/NEA, et al v Howell Board of Education, et al*, that addresses this issue.

In the *Howell Education Association* case, an individual submitted a series of FOIA requests seeking all email sent to and from three Howell public school teachers. In addition to being teachers and employees of the school district, the three were officers of the Howell Education Association, MEA/NEA, and some of their email apparently related to union negotiations. The Court noted that the FOIA requests appear to have been submitted in the context of heated negotiations for a new collective bargaining agreement. The Howell Education Association (HEA) objected to release of the union communications, arguing that they were personal email and therefore not "public records" as defined under the FOIA. In response, counsel for the Howell Board of Education indicated that there was no reported case law addressing this issue and suggested a "friendly lawsuit" to determine the applicability of the FOIA to the email requests. Accordingly, the HEA and the three teachers commenced the lawsuit seeking a declaratory ruling from the court and a restraining order. The trial court found that any email generated through the school's email system and stored by the school district are indeed public records subject to the FOIA.

### SECRET WARDLE NOTES:

In the recent case of *Howell Education Association v Howell Board of Education*, the Michigan Court of Appeals ruled that the personal email of three teachers using their school district computers were not "public records" under the Freedom of Information. The fact that the email were possessed by the school district in its public email system's digital memory and that the use of the school computer system for personal email violated the school's computer use policy did not render the personal email public records subject to the FOIA. This case appears to resolve a long-standing open question regarding whether the use of publicly-owned computers by public employees and officials for personal communications with friends and relatives would subject such communications to public disclosure under the FOIA.

The trial court's ruling was appealed, and the Michigan Court of Appeals began its opinion in an interesting way. First, the Court noted that "[t]he issue before us requires us to consider the application of the FOIA statute, adopted in 1977 and last amended in 1997, in the context of today's ubiquitous email technology. . . . We find ourselves in the situation akin to that of a court being asked to apply the laws governing transportation adopted in a horse and buggy world to the world of automobiles and air transport." Then, the Court of Appeals urged the state legislature to revise the FOIA statute to address the proliferation of electronic communications in today's society, and explained that it is left to rule in this case

## CONTINUED...

based on its best attempt to discern what the intent of the legislature would have been had the legislature known of this technology at the time it enacted the FOIA in 1977.

The Court then embarked on rendering its decision in the case. It initially identified the FOIA's definition of a "public record" as "*a writing prepared, owned, used, in the possession of or retained by a public body in the performance of an official function.*" In this case, the email in question were, in fact, stored and retained by the school district, i.e., they were in the school district's possession. The Court noted, however, that the only reason the email were retained by the school district was because it is "simply easier technologically to capture *all* the email on the system rather than have some mechanism to distinguish them." Given these circumstances, the Court found that the school district was in possession of the personal email of its teachers as a matter of convenience and not in the performance of some specific official function. As a result, the Court concluded that, in general, the personal email of public employees and officials are not "public records" as defined under the FOIA.

The Court then turned to examine whether the teachers' email involving "internal union communications" constituted personal email. The Court concluded that they are, because "[s]uch communications do not involve teachers acting in their official capacity as public employees, but in their personal capacity as HEA members or leadership. Thus, any email sent in that capacity are personal."

Of further import to public officials, the school district's computer use policy in this case indicated that "users should not expect that their communications on the system are private" and that "members are prohibited from . . . using technology for personal or private business." The Defendants argued that this use policy notified users that personal email were subject to FOIA. The Court of Appeals disagreed, finding that the use policy in no way indicates that users' email may be viewed by any member of the public who asks for them under a FOIA request or otherwise. The Court also concluded that, although using the school's computer system for personal email may constitute a violation of the use policy, it does not transform personal communications into public records.

We have learned that an application has been filed to appeal this decision to the Michigan Supreme Court. *Secret Wardle* will continue to monitor this matter and report in a future issue of the *Community Watch* if the law is further clarified or changed regarding this matter.

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