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Colorado Court Holds That Public Officials' Text Messages on Cell Phones are Public Records

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On October 30, 2023, a Colorado state court judge determined that two Denver city officials had improperly withheld public records from a TV reporter when they refused to disclose text messages stored on their personal cell phones in which they discussed the city's public business.

Judge Stephanie Scoville's ruling joined numerous other state courts in finding that text messages of public employees housed on personal cell phones are not outside the statutory definition of "public records" merely because they were never transferred to any government entity's servers for storage and retrieval. Accordingly, the court ordered the city of Denver to provide a copy of those text messages to the reporter and to pay the TV station's reasonable attorney's fees and costs.

Facts Giving Rise to the Records Request

On the evening of June 21, 2023 (the longest day of the year), nearly 6,000 people arrived at the celebrated Red Rocks Amphitheater, an outdoor performance venue in the foothills just West of Denver, to attend a concert by Louis Tomlinson (former member of the band One Direction). Just after the sun had set, a severe hailstorm arrived quickly and pummeled the concertgoers, who were given only ten minutes warning to seek shelter. (To witness what a scary experience this was for those in attendance, see here). In the ensuing melee, approximately 100 members of the public sustained physical injuries (seven of them requiring hospitalization). The tragedy attracted widespread local and national press coverage.

That evening, and the next day, two officials employed by the City and County of Denver (which owns and operates the Red Rocks Amphitheater) – the Director of the City's Arts and Venues Department and the Red Rocks Venue Manager – used their cellphones to send and receive text messages about that event and its aftermath.

Records Requests and the City's Denials

As many news outlets covered the June 21 debacle at Red Rocks, Steve Staeger, a reporter at TEGNA-owned NBC affiliate KUSA-TV in Denver, filed requests under Colorado's Open Records Act ("CORA") to the City and County of Denver seeking the text messages described above, and he expressly limited his request only to those "regarding city business." The City and County of Denver refused to produce those text messages, asserting that they were exchanged and resided exclusively on the two City officials' personal cellphones, and "therefore" they were not the City's public records.

Staeger and KUSA-TV filed suit naming as defendants only the two City officials who, by law, are the "custodians" of the public records that had been requested and denied. The Complaint cited case law from 14 other states that had previously held electronic communication that discuss public business and reside exclusively on personal cellphones or "private" email accounts of government employees are public records under similarly worded FOI statutes, as well as federal court rulings applying the federal FOIA.

The Bench Trial

After the trial court judge, Stephanie Scoville, issued an Order to Show Cause why the text messages should not be provided to Staeger, a hearing was held in which the City put on two witnesses: the Red Rocks Venue Manager and the head of the City's Data Technology Department. The parties had previously stipulated that there were text messages discussing the City's public business on the two City officials' cell phones that were responsive to Staeger's requests, and that those messages had never been transferred to any City data storage system or server. The Department head had purchased her own cell phone but received a monthly reimbursement from the City for its official usage; the Venue Manager's cell phone had been provided to him by the City and the City paid for his usage of that phone. It was also stipulated that a formal City policy declares that all electronic writings made by city employees in the course of their employment are "City and County Records" which the policy declares to be the physical property of the City, and not of any individual employee.

The Venue Manager testified that he was not on scene at Red Rocks the night of the storm but he had exchanged "a handful" of text messages with other city employees about it that evening and the following day. On cross-examination, he acknowledged that assuring visitor safety at Red Rocks was among his job duties, and that the decision to cancel that evening's concert had financial repercussions to the City.

The IT Director testified that the City does not require all its employees to transfer text messages from their cellphones to a City server, and her department has neither the software nor "the technical capability" to collect all such messages from the City's thousands of employees. On cross-examination, she admitted that it would pose no technical difficulty for the City to retain copies of "a handful" or perhaps a couple dozen text messages that the two City officials had exchanged on June 21 and 22, and to produce them to the TV station.

In closing arguments, counsel for the City argued that because the City never took physical custody over the text messages at issue (on any centralized storage media), they were not the City's public records, and, in fact, they were not "public records" at all. The City also made policy arguments suggesting that a ruling that text messages on cellphones are public records would present insurmountable logistic hurdles on government entities and would invade the personal privacy of city employees.

Counsel for the Plaintiffs argued that all "writings" generated and held by City officials in the course of their employment were, by definition, "City records" and because the content of those messages, by stipulation, discussed official City business, those two "custodians" of the City's public record (the named Defendants) were required to provide them to Plaintiffs in response to his CORA request. Because the requested records were expressly limited to the discussion of official city business, counsel argued, the two City officials had no reasonable expectation of personal privacy in them.

The Court's Ruling

After taking a brief recess, the Court issued its ruling from the bench. Judge Scoville stated that she was duty-bound to apply the plain text of CORA, which defines "public records" as any "writing" that is "made, maintained or kept by . . . any. . . political subdivision of the state . . . for use in the exercise of functions required or authorized by law or administrative rule." *See* § 24-72-202(6)(a)(I), C.R.S. (emphasis added). "Writings" are defined as "mean[ing] and includ[ing] all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, *regardless of physical form or characteristics*. '*Writings' includes digitally stored data, including without limitation electronic mail messages*, but does not include computer software." § 24-72-202(7), C.R.S. (emphasis added) ."

Judge Scoville made further reference to the statute's definitions of "correspondence" and "electronic mail," which also arguably encompass the text messages at issue. Judge Scoville noted that Colorado's appellate courts, including the state Supreme Court, had held that text messages (exchanged on government-provided pagers) that discussed official public business were public records. Accordingly, the text messages at issue in this case are public records. And, because the City had not asserted that any statutory exemption in CORA applied to them, the City is ordered to provide Mr. Staeger with copies of those public records. The Court also ordered the City to pay the Plaintiffs' reasonable attorney's fees and costs, as CORA mandates must be awarded to prevailing "applicants."

Court Ruling Consistent with Many Other Jurisdictions

As noted above, the Complaint cites 14 state courts' rulings holding that electronic communication that discuss public business and reside exclusively on personal cellphones or "private" email accounts of government employees are public records. If you've read this far into this piece, and you're interested in other such authorities (including some that were not included in the Complaint), you're in luck: I've posted highlighted copies of them here. These decisions provide ample support for the

argument over "whose records are they?" that Judge Scoville's bench ruling did not address. *See also* S. Zansberg, *Cloud-Based Public Records Pose New Challenges for Access*, 31:1 Comm. L. 12 (ABA Winter 2015).

Here are some of the best articulations of this reasoning: *State v. City of Clearwater*, 863 So. 2d 149, 152 (Fla. 2003) ("[W]henever a written record of the transactions of a public officer is [prepared or generated], it is not only his right, but his duty, to keep that written memorial, . . . and, when kept, it becomes a public document – a public record – belonging to the office, and not to the officer."); *Sinclair Media III,* Inc. *v. City of Cincinnati*, 2019 Ohio Misc. LEXIS 216 at **9 (Ohio Ct. Cl.) ("[I]t is individual human beings in an office who create, receive, and maintain the office's records of its official actions. . . .[I]t is well recognized that a political subdivision acts through its employees."), *modified in part, adopted in part,* 2019 Ohio Misc. LEXIS 218 (Ohio Ct. Cl. 2019); *City of San Jose v. Superior Ct.,* 389 P.3d 848, 855 (Cal. 2017) ("the term 'local agency' logically includes not just the discrete governmental entities listed in section 6252, subdivision (a) but also the individual officials and staff members who conduct the agencies' affairs. It is well established that a governmental entity, like a corporation, can act only through its individual officers and employees. . . . A disembodied governmental agency cannot prepare, own, use, or retain any record. Only the human beings who serve in agencies can do these things. When employees are conducting agency business, they are working for the agency and on its behalf.") (emphasis added); *Nissen v. Pierce Cty.,* 357 P.3d 45, 52-54 (Wash. 2015) (concluding that records on private cell phones are subject to the Public Records Act because agencies "act only through their employee-agents" and therefore "a record that an agency employee prepares, owns, uses, or retains in the scope of employment is necessarily a record prepared, owned, used, or retained by" the agency (quotation omitted)).

As more and more government employees and public officials utilize privately owned cellphones to create and house electronic communications in which they conduct official public business, it is of the utmost importance that courts continue the trend of not exempting such public records from the ambit of states' and federal freedom of information acts.

Multimedia Holdings, L.L.C. (owner/operator of Denver TV station KUSA-TV/9 News) and its reporter Steven Staeger were represented by Steve Zansberg of Law Office of Steven D. Zansberg, L.L.C. in Denver. Ginger White Brunetti and Tad Bowman were represented by Assistant City Attorneys Mitch Baer and Ed Gorman in Denver.