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Blurring the Line Between Personal and Professional for Public Employees

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The New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA), established a broad requirement for the disclosure of government records, which are defined as any records made, maintained, kept on file, or received in the course of official business. The legislative intent behind OPRA is to protect the public interest by increasing government transparency, but the expansive definition of a "government record" is in tension with the privacy interests of government workers. As technology advances and people increasingly use their private electronic devices to manage all aspects of their life, the line between personal and official conduct becomes blurred, and government workers can unintentionally subject their personal lives to public scrutiny.

Custodians of records struggle with OPRA requests that threaten to upset the balance between the public's interest in disclosure and the privacy interests of government workers, such as requests for records from private cell phones. Although the law arguably favors nondisclosure of such records at this time, public agents should be advised not to conduct official business on their private electronic devices. The balance of interests is delicate and depends on the specific facts of each case, so the best practice is to avoid all discussions of official matters on private electronic devices. Likewise, municipalities should create retention policies for government records for which there is no controlling retention schedule, such as text messages from official cell phones. These policies would establish a clean procedure for OPRA compliance while the retention schedules catch up with the expanding definition of a "government record."

The Government Records Council (GRC), which is the agency charged with adjudicating OPRA controversies, has provided some guidance regarding disclosure of records from private electronic devices. Notably, in *Verry v. Borough of South Bound Brook (Somerset),* GRC Complaint No. 2011-280 (June 2015), the GRC decided that billing records of a public employee's private cell phone were not government records, reasoning that the employee's privacy interests


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in his private cell phone records outweighed the public's interest in disclosure of same. The GRC and the Office of Administrative Law (OAL) maintained this position even though the public employee in *Verry*, who was a part-time municipal clerk and therefore the custodian of government records, admitted he "sometimes" used his private cell phone to conduct public business, and even though a law firm engaged by the municipality listed him as a reference using his private cell phone number.

The GRC initially referred the *Verry* complaint to the OAL so an Administrative Law Judge (ALJ) could conduct a hearing to gather evidence, resolve

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the facts, and make a recommendation regarding the classification of the custodian's private cell phone bills as government records. Subsequently, the GRC adopted the ALJ's decision in its entirety and denied the complainant's request for remand to OAL for a plenary hearing. The complainant had requested a plenary hearing to determine the extent of the custodian's use of his private cell phone to conduct public business. Notably, neither the GRC nor the ALJ thought a plenary hearing was necessary, despite the admissions on the record regarding the custodian's occasional use of his private cell phone to conduct public business.

The ALJ left open the possibility that, under the right set of facts, private cell phone bills might be considered government records under OPRA. However, the ALJ and the GRC maintained their position that a plenary hearing was unnecessary by reasoning that, even if the private cell phone bills were government records, they would not be disclosable because the criteria for disclosure set forth in *Burnett v. Cty. of Bergen*, 198 N.J. 408 (2009), militate against disclosure of work-related calls made from private cell phones. The ALJ considered whether the requester had a compelling reason to seek the records, which is an application of the common law right of access, and indicated that the requester's apparent position that "even one public call on a private cell phone opens the entire record to scrutiny" was unreasonable. The ALJ's consideration of these issues is a warning that private cell phone records may be disclosable if there is evidence of repeated use for official business, or if the requester has a "fairly compelling" need for the records. *See, Robert A. Verry, Petitioner, 2011*, 2015 WL 4410100, at *2 (EFPS June 2, 2015).

The application of *Burnett* in the *Verry* case is instructive for custodians who receive OPRA requests that present similar privacy concerns, but for which there is no authority on point, such as requests for private text messages. The Supreme Court in *Burnett* affirmed that there is no unqualified right of access to government records, and held that courts and agencies must consider the following factors in order to balance the countervailing interests of privacy and access: (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

The balancing test adopted by the Supreme Court in *Burnett* is an application of N.J.S.A. 47:1A-1, which provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy[.]" In *Verry*, the agencies applied the *Burnett* criteria and decided that disclosure of private cell phone bills would violate the custodian's reasonable expectation of privacy as a citizen. However, the ALJ highlighted the fact that the custodian received no reimbursement from the municipality for his cell phone, and opined that the distinction between a public employee who receives reimbursement and one who does not is "fundamental." Therefore, we may reasonably expect the records of publicly-subsidized cell phones to be treated as government records under OPRA.

The best practice for public employees and other public agents is to avoid all discussions of official business on their private electronic devices, and municipalities should create retention policies for official text messages.

In another case initiated by Mr. Verry, the GRC determined that text messages are government records subject to disclosure so long as they have been made, maintained, kept on file or received in the course of official business. *Verry v. Franklin Fire District No. 1 (Somerset),* GRC

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Complaint No. 2014-387 (July 2015). However, this case and its progeny concern cell phones provided by the government, and there is no authority concerning text messages from entirely private cell phones. Applying the *Burnett* criteria and the first *Verry* case, custodians may reasonably argue that text messages from private cell phones are not government records, especially when there is limited evidence of their official use. But it is only a matter of time before a complainant presents a compelling set of facts that establishes authority requiring disclosure of private text messages once some threshold level of official use has been met. For example, a municipal official may own two private cell phones and use one exclusively to conduct official business, or there may be evidence that a municipal official uses a private cell phone in order to circumvent the disclosure requirements of OPRA. In cases such as those, we should expect a court or agency to order the disclosure of the private cell phone records, including text messages, even if the municipality provides no reimbursements for the cell phones.

The best practice for public employees and other public agents is to avoid all discussions of official business on their private electronic devices, and municipalities should create retention policies for official text messages in order to establish a clean procedure for OPRA compliance. There is currently no retention schedule for text messages, but the GRC considers text messages to be fundamentally similar to emails, so retention policies for official text messages should track the existing retention schedule for emails, which must be retained for seven years before they may be destroyed. *See, Verry v. Franklin Fire District No. 1 (Somerset),* GRC Complaint No. 2014-387 (July 2015). Implementing retention policies at the municipal level while the state-promulgated retention schedules catch up with the expanding definition of a "government record" will be helpful to records custodians and protect against protracted legal battles.

Although the GRC has no authority over retention schedules, its opinion is the closest authority on point regarding the classification of text messages for records retention purposes. Still, caution is advisable, so municipalities might consider retaining official text messages indefinitely rather than holding them for seven years and then destroying them, at least until a controlling retention schedule is created. Additionally, municipalities must be advised of the privacy concerns presented by current interpretations of OPRA and the possibility that future interpretations may present even greater privacy concerns. Municipalities should take preemptive measures to protect themselves from OPRA complaints by prohibiting the use of private cell phones for official business and establishing appropriate retention policies for official text messages. ■