

This side of town . . .

A place of my own, to say what I want, in my own words, without the filter of the biased media and using as long of run on sentences as I feel like.

TUESDAY, FEBRUARY 19, 2008

Text Messages and Chats/IM not open records?

I gotta be missing something. Last week, the Badger Herald reported that the Mayor and Alder Zach Brandon want to make it so that text messages and instant messages/chats are not subject to open records laws. Their justification seems to be that the records are not "permanent" and not easy to capture. I haven't seen the proposal yet and I hesitate to put too much trust in the student paper to get the facts correct, so I talked to Bill Lueders to find out what was going on. And what I heard was more than a little disturbing. It sounds like a HUGE loophole is being blown in to the open records law based on FORM not SUBSTANCE. Why would we do that?

Now, I might be a little more anal about this than other elected officials, but I have text messages saved on my phone that are over a year old. I save them because I consider them a record about substance that could be subject to open records laws. And, my chats on gmail are all saved. How are these not "permanent records" and why should they be exempt from open records since they seem to be the same as emails to me?

I didn't save all my text messages, only the ones that seemed like they were relevant to being an elected official, so the "i'm here, where are you?" and "i'm running late" and "what's for dinner?" type text messages are deleted. However, I saved the following, the first one was from 2006:

Zach Brandon (10/5 10:59 am): The lack of city Economic Development is my fault? That's precious. I guess the truce is over. Fine with me, but don't go running to the Mayor is time.
Me (10/5 12:18 pm): Always the victim aren't you . . . I didn't even mention your name . . . geeesh . . .

Me (2/7 10:09 am): Would you have voted to put housing in with ecd and make it its own dept?
Zach Brandon (2/7 6:08 pm): Probably... Devil is in the detail.
Me (2/7 6:09 pm): always

Zach Brandon (10/24 7:51 am): Have you talked to verveer and

Aldersperson Brenda Konkel

Brenda Konkel
Madison, Wisconsin,
United States
I'm serving my 4th term on the City of Madison (WI) City Council. Yes, I am a member of two political parties, Progressive Dane (a local independent, one-and-only in the country, local political third party) and the Green Party, but these posting are my opinion and my opinion only. I'm the Executive Director of the Tenant Resource Center. I'm on the Board of Directors of the Social Justice Center and Community Shares of Wisconsin. I'm an active member in the Affordable Housing Action Alliance and several other community organizations. However, nothing I say here should be taken to reflect the position of any of the aforementioned organizations. Got that?! Oh, turning 40, but still get carded. A B.A. in Criminal Justice from UW-Platteville (1990), 1993 graduate of UW-Madison Law School. There's much more, but I'm sure I'll give you plenty to read to learn more about me and my opinions if the local media circus isn't enough.

[View my complete profile](#)

Contact Me

If you want to contact me about my blog, please feel free to email me at brendakonkel@gmail.com.

satya RE: splitting the econ dev/comm dev position?

Me (11/9 10:36 am): I have to cuts to the budget without seconds . . . Interested? Please call.
Zach Brandon (11/9 11:16 am): Stuck in a meeting... What's up?
Me (11/9 11:18 am): never mind . . . Got it covered . . . Was going to ask you to sponsor some cuts that I didn't have a second for . . . But I got em.
Zach Brandon (11/9 11:30 am): Ok. Sorry. Let me know what they are.

Me (11/27 5:01 pm): So who wants to be on this committee?
Zach Brandon (11/27 5:02 pm): Me and you.. LOL
Me (11/27 5:02 pm): :) and who else?
Zach Brandon (11/27 5:10 pm): Don't really know... Guessing: me, you, ms, src, mc, mv(???)...

Shouldn't most/all of these be subject to open records laws? You can do alot by chat and text messages that should be open to the public and exempting these types of communications seems to be leaving a big gaping hole in the law. If this ordinance passed, why bother with email if you can text or chat? Seems to me, that is not something we should be encouraging. I'm even more concerned after re-reading the Attorney General's guidance (page 35 & 36) on these issues, and confirming that it is the CONTENT that makes something a record, not the FORM:

X. Electronic Records

A. Introduction: General principles apply to records in electronic format, but unique or unresolved problems relating to storage, retention, and access abound.

1. The public records law defines the term "record" broadly to include "any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority." Wis. Stat. § 19.32(2). See Section IV.A., above.

2. Because the **content or substance of information contained in a document determines whether it is a "record" or not**, id., information concerning public access set forth in the remainder of this outline generally applies. However, many questions unique to electronic records have not yet been addressed by the public records statute itself, by published court decisions, or by opinions of the Attorney General.

B. Is electronically stored information a "record" within the meaning of the public records law?

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kept in connection with official business, Youmans, 28 Wis. 2d at 679, the substance, not the format, controls whether it is a record or not.

a. Examples of electronic records within the Wis. Stat. § 19.32(2) definition can include word processing documents, database files, e-mail correspondence, web-based information, PowerPoint presentations, and audio and video recordings, although access may be restricted pursuant to statutory or court-recognized exceptions, see Section VIII., above.

b. Wisconsin Stat. § 16.61, which governs retention, preservation, and disposition of state public records, includes "electronically formatted documents" in its definition of public records.

Like I said, what am I missing? If a record can be kept, why not keep it? Just because it can be deleted, should we? Or shouldn't we be encouraging people to keep those records instead of destroying them?

Don't get me wrong, we need to discuss these issues and address what I see a many problems with open records, but to me the bigger issue is, shouldn't the City be providing us a way to store these records and back up the records on our laptops?

Posted by Brenda Konkel at 7:03 AM

Links to this post

Open records links; Tuesday round-up

It's time for an open records blog round-up. This is always fun because we get to read bloggers who are touching on open records because of how it impacts their regular concerns. The Coast Guard Blog is disappointed but not surprised at ...

Posted by Leslie Graves at 4:29 PM

Surprising agreement...

I found myself nodding along in agreement with a blog posting this morning from an unexpected quarter. Most of the time, I find myself on the other side of the aisle of Brenda Konkel, but her post today about Mayor Dave and Ald. ...

Posted by Elizabeth at 10:53 AM

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THE BADGER HERALD

NEWS

Madison's council to clarify open records law

by Cara Harshman

Friday, February 15, 2008

On the heels of an open records requests in Michigan that publicized an extramarital affair of Detroit Mayor Kwame Kilpatrick, Madison city officials are looking to set standards for changing technologies in the city.

After a year of detailed study and work, Mayor Dave Cieslewicz and Ald. Zach Brandon, District 7, will introduce an ordinance to the City Council later this month clarifying the forms of electronic communication city employees use that are open to the public.

Rapidly changing electronic communication technology, like text messages, instant messages and Facebook prompted Brandon to ask, "What is an open record and what is not an open record?"

Currently, the Wisconsin public record law says electronic communications are open records, but does not specify which types of electronic communication are included, Brandon said.

"[The city] has gone the extra step to define what that means," Brandon said.

Bill Lueders, president of the Wisconsin Freedom of Information Council said the city essentially used the state's record law as a model to update its own open records law.

Cieslewicz and Brandon worked with Assistant City Attorney Roger Allen to identify issues the city's open record law would include and also to draft the ordinance, which only applies to elected city officials and employees.

The city officials concluded e-mail is the only form of electronic communication fit to be open to public at this point in time.

"The argument the city attorney makes is that text messages and instant messages are not things you can easily capture," Brandon said. "There is no easy way to get a text message out of a phone."

He said it is the same for instant messages, adding they are not something easily recorded or saved.

"[The ordinance] does explicitly say e-mails are public records and prescribes a required protocol for archiving e-mails and other kinds of records, including video records," said Lueders, who is also the news editor of The Isthmus.

Robert Drechsel, University of Wisconsin journalism professor, specializes in media law and says he questions the motivation behind the city's ordinance.

"To me it looks like a way of restricting what constitutes a record rather than anything else," he said.

"It brings the city's law into the 21st century," said George Twigg, spokesperson for Cieslewicz. "Our old public record law didn't really take anything into account like text messages and instant messages

and all the changes that have occurred in recent years.”

The public record law enables someone to request to see any public record.

“That is how the media gets a lot of information when the city does not want to release it,” Brandon said, adding it is a very good law.

Drechsel said rather than crafting a city-specific ordinance, the city should ask the attorney general to create an open record law that works at the state level.

“I think the city has done a good job and that this public record ordinance could serve as a model for other municipalities,” Lueders said. “Racine and Sheboygan don’t need to reinvent the wheel. ... They can just take the work Madison has done.”

Although Brandon and Cieslewicz have been working on the open record law for a year, Brandon said. “The job has just really begun because we are going to have to stay on top of new technology.”

But even a good open records ordinance does not guarantee the public will comply with the rules.

“There still will be battles over records the public can obtain,” Lueders added, saying the Wisconsin State Journal is in the middle of a lawsuit against the Madison Police Department for refusing to release records about an officer who resigned.

“The problem with open records compliance is rarely the law — the law is pretty good,” Lueders said. “The problem is with the compliance.”

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