

TO: LANCASTER COUNTY OFFICES AND DEPARTMENTS

FROM: LANCASTER COUNTY ATTORNEY'S OFFICE

DATE:

RE: CONDUCTING COUNTY BUSINESS BY ELECTRONIC COMMUNICATIONS
PROCESSED THROUGH OR STORED IN PRIVATE ACCOUNTS

Several courts in other state and federal jurisdictions recently have held that the public records laws in their respective jurisdictions are broad enough to cover electronic communications from public employees engaged in public business even when those electronic communications are processed through or stored in private accounts.

For example, with respect to text messages and emails on private electronic devices of certain city employees, the California Supreme Court held: "a city employee's writings [including emails, text messages, and other electronic platforms] about public business are not excluded from [the California Public Records Act] simply because they have been sent, received, or stored in a personal account."¹ The Washington Supreme Court reached a similar conclusion regarding text messages on a personal phone, to the extent they were "work-related."² Likewise, with respect to a public employee's work-related emails on an email account through a private organization, the United States Court of Appeals for the District of Columbia Circuit explained: "If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served. It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming that they are under her control."³

So far, neither the Nebraska Supreme Court nor the Nebraska Court of Appeals has weighed in on this topic. However, as with the laws at issue in the above cases, the Nebraska public records statutes, Neb. Rev. Stat. § 84-712 et seq., broadly define "public records."⁴ Furthermore, when reviewing a public records request for work-related emails that may have been sent through private accounts, the State of Nebraska Office of the Attorney General, which enforces the public records statutes, requested that public employees search their private email accounts for relevant records.⁵ More recently, the Attorney General issued a disposition letter to the City of Omaha and the City's Mayor, Jean Stotert, concluding that text messages made in the course of public business by government officials were public records subject to disclosure pursuant to the public records statutes.⁶ Therefore, results in Nebraska courts similar to those in other jurisdictions appear increasingly likely.

Given the precedent in other jurisdictions, Nebraska's public records statutes, and the Attorney General's enforcement history, our Office advises Lancaster County Offices and Departments to carefully consider the implications of using personal electronic devices and personal email accounts to conduct public business.

¹ City of San Jose v. Superior Court, 2 Cal. 5th 608, 629, 389 P.3d 848, 861 (2017).

² Nissen v. Pierce Cty., 183 Wash. 2d 863, 882-83, 357 P.3d 45, 55-56 (2015).

³ Competitive Enter. Inst. v. Office of Sci. & Tech. Policy, 827 F.3d 145, 150 (D.C. Cir. 2016).

⁴ See Neb. Rev. Stat. § 84-712.01(1).

⁵ Att'y Gen. Disposition Letter 06-R-133, November 13, 2006.

⁶ Att'y Gen. Disposition Letter 15-R-118, May 14, 2015.