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Municipal Law News

Foster Swift Administrative & Municipal Group

What's Inside:

We have a new look!

Recently, Foster Swift has undergone a re-brand. Through the first quarter of 2010, we are rolling out our new logo, colors and Web site. Our old copper and teal colors have been replaced with a fresh blue and gray.

Private E-Mails Sent on Public Systems are Not Automatically Subject to Disclosure Under FOIA

On January 26, 2010, the Michigan Court of Appeals issued an important decision regarding the definition of "public records" under the Michigan Freedom of Information Act ("FOIA"). MCL 15.231 *et seq*. For the first time in Michigan, the Court addressed whether e-mails sent by public employees on the public body's e-mail systems were automatically considered "public records" under the FOIA. The Court concluded that an individual employee's personal e-mails did not become public records solely because they were captured in the e-mail system of the public body.

In *Howell Educ Ass'n MEA/NEA v Howell Bd of Educ*, ___ NW2d ___ (2010), FOIA requests were submitted to the school district requesting e-mails sent to and from certain teachers. During the relevant time period, these teachers were also members and officials for the Howell Education Association ("Association"). The Association objected to the release of the communications because the e-mails involved internal union communications. The Association filed a "friendly lawsuit," taking the position that these were not "public records" but were private correspondence. The trial court concluded that any e-mails generated through the school's e-mail system were retained and stored by the school district and were, therefore, public records under the FOIA. The Court of Appeals disagreed and reversed the trial court's decision.

The Court of Appeals noted that the FOIA was adopted in 1977 and has not been amended since 1997. As a result, the current technological advances were not contemplated at the time of adoption: "We find ourselves in the situation akin to that of a court being asked to apply the laws governing transportation in a horse and buggy world to the world of automobiles and air transport." In evaluating what the intent of the Legislature would have been if this technology would have been foreseen, the Court analyzed the definition of "public record" in the FOIA. A public record is "prepared, owned, used in the possession of or retained by a public body *in the performance of an official function*." MCL 15.232(e) (emphasis added). Absent specific legislative directive to do so, the Court would not "judicially convert" every e-mail ever sent or received

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by a public employee into a public record subject to disclosure under FOIA. Mere possession of the public record, such as retaining all e-mails on the school's backup system, was not sufficient; the document must also have been in the performance of an official function. Here, the e-mails did not involve teachers acting in their official capacity as public employees, but in their personal capacity as Association members and leadership. Since the e-mails in this case involved union business and not school district business, they were not "public records."

Notably, the Court refused to find the e-mails at issue to be private even though the school district had an acceptable use policy that specifically stated that users should not expect their communications on the system to remain private. The policy further stated that the technology was only to be used for educational purposes. In the Court's view, although personal e-mails may be an inappropriate use of the school's e-mail system, such violations did not automatically make those documents public records.

The Court was also careful to note that the ruling should not be used to conclude that personal e-mails can never become public records. For example, if a teacher was disciplined for violations of the acceptable use policy and the personal e-mails were used to support that discipline, the e-mails may become "public records" subject to the FOIA.

Increasingly, FOIA requests have been asking for e-mail correspondence. A public body should carefully review any e-mail correspondence to determine whether it meets the definition of "public record" in light of the above court decision.

If you have any questions regarding the FOIA, please contact **Anne Seurynck** at **616.726.2240** or **aseurynck@fosterswift.com.**

Court of Appeals Interprets "Common Area" Under Michigan's Condominium Act

In a recent published opinion, the Michigan Court of Appeals held that a condominium project developer's convertible property (property that the developer retained the right to convert, contract, or otherwise develop for a six year period) could not be separately valued and assessed for taxation purposes.

In *Paris Meadows, LLC v City of Kentwood*, __ Mich App __ ; __ NW2d __; 2010 WL No. 286978 (January 12, 2010), Paris Meadows's developer sued the City of Kentwood when the City sent him a notice of assessment regarding the development's "convertible area." Paris Meadows's Master Deed defined this "convertible area" as part of the "general common elements" of the condominium project. Further, Paris Meadows's developer reserved the right to contract or expand this land by an amendment or series of amendments to the Master deed within six years. Paris Meadows argued that the "convertible area" was not subject to separate taxation under Michigan's Condominium Act (MCA), MCL 559.231, because it consisted solely of the general common element area of the condominium project. The Tax Tribunal granted the City's motion for summary disposition and upheld the assessment. It explained that because the Master Deed provided Paris Meadows with the right to contract, convert, or expand the condominium project for six years after

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the Master Deed was filed, the disputed property was not a "true" common element until the six year period ran out.

The Court of Appeals characterized the central issue as whether the City could separately value and assess the convertible property for taxation purposes where the condominium project developer retained the right to convert, contract, or otherwise develop the convertible property for six years. Answering this question in the negative, the Court recognized that the Tax Tribunal implemented its own definition of "common element" rather than applying the MCA's definition of that term. The Court of Appeals declared that the Tax Tribunal's conclusion that a "common element" could only include land over which all co-owners had equal control was "clearly contrary to the plain language of the MCA." The Court emphasized that under the MCA's definitions, "every part of a project that is not part of a unit is a 'common element.'" Furthermore, "[a]lthough a developer may retain rights to withdraw or develop land within the project, until it records an amended master deed the land remains part of the project and, under MCL 559.231, no part of the project is taxed separately from the units." For these reasons, the City could only tax the convertible property via the individual condominium units.

If you have any questions regarding this case, please contact **Steven Lasher** at **517.371.8118** or **slasher@fosterswift.com.**

Protecting Your Reputation While Using Social Media

"It takes many good deeds to build a good reputation, and only one bad one to lose it." - Ben Franklin

Social media platforms such as Facebook and Twitter can be great ways to promote a public body's activities, inform about services offered, connect with the community and share information. These online tools help a public body build its reputation in a progressive and cost effective way.

However, social media use can lead to liability. **Be aware that prosecutors, employers, probation officers, and state workers will review social media posts**. One could be disciplined or fired by his or her employer based on his or her use of social media. For example, a posting on Facebook stating that a person is off to another "boring meeting" could lead to a reprimand at work. Criminal consequences can also occur. For example, a person found sharing photos of himself using drugs or posting "drunk in Florida" while that person is under a court order to abstain from drugs or alcohol could lead to criminal penalties.

Also, entities and individuals should not share information about ongoing legal matters through social media outlets. Statements on social media sites may be admissible in Court. It is imperative to keep confidential information out of the hands of the Internet-viewing public.

If you have a personal account, adjust the privacy settings and closely manage who your "friends" are. Think about what image you want to portray to your friends, employer, and community. It only takes one post or photo to soil a reputation.

If you have any questions regarding the liability of social media, please contact **Nichole Derks** at **517.371.8245** or **nderks@fosterswift.com.**

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Michigan Employers Must Ban Smoking In Indoor Work Places

Effective May 1, 2010, smoking will be banned in all public places, including places of employment. A place of employment includes any enclosed indoor area where one or more employees perform work, but excludes the Detroit casinos, cigar bars and tobacco retail stores, home offices, and motor vehicles.

The new law prohibits smoking anywhere in an employer's indoor facilities, including private, enclosed rooms or offices occupied exclusively by a smoker. "Smoking" under the new law means the burning of a lighted cigar, cigarette, pipe, or any other matter or substance that contains a tobacco product, but does not include chewing tobacco.

Any person who smokes in violation of the law is subject to a $100 fine for the first violation, and fines of up to $500 for any subsequent violations. Employers are not required to report smoking violations to any police or government authority, but are required to do at least the following:

- Have clearly posted "no smoking" signs (or the internationally recognized "no smoking symbol") at the entrances to and in every building or work area covered by the smoking ban.
- Remove all ash trays and other smoking paraphernalia from any work area covered by the smoking ban.
- Inform any employee or other individual (such as a customer or vendor visiting the workplace) who is smoking in violation of the law that he or she is violating state law and is subject to penalties for doing so.
- If applicable, refuse to serve an individual smoking in violation of the law.

While there is no direct obligation for employers to adopt a written no smoking policy, it would be prudent for employers to do so. However, unionized employers may be required to bargain with the union concerning no-smoking restrictions.

Finally, employers may not take retaliatory or adverse personnel action against any employee or applicant who seeks to enforce his or her rights under the law. Though not clearly defined, presumably this means that employees are protected for bringing complaints to the employer's attention about co-workers smoking in violation of the law.

If you have any questions regarding the Michigan smoking ban, please contact **Michael Blum** at **248.785.4722** or **mblum@fosterswift.com.**