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TEXT MESSAGES ON PRIVATE CELL PHONES ARE LIKELY SUBJECT TO RIGHT TO KNOW REQUESTS

In July 2014, the FCC issued an e-rate modernization order that reduced or eliminated e-rate funds for data plans and mobile phones through the federal e-rate program. Since then, there has been substantial discussion among school district and IU administrators about switching from employer-provided mobile phones to a Bring Your Own Device (BYOD) model, with a phone stipend to cover part of the cost of the device or the data plan. This switch to BYOD for employees calls attention to the issue of recovery of data from employee mobile devices in response to Right to Know (RTK) requests or to litigation.

In February 2015, in *Paint Township v. Clark*, 2015 WL 469434 (Feb 5, 2015), the Commonwealth Court issued a ruling clarifying whether data stored on an employee's personal device is subject to a RTK request. The township argued that a township supervisor's private cell phone was not subject to a RTK request because it was purchased by him and because it was his personal cell phone. The supervisor was, however, receiving a reimbursement stipend for the cell phone. The court concluded that phone records between the man and other township supervisors relating to township business on the a private phone are public records, and are therefore subject to disclosure under RTK. Although the court made note of the reimbursement stipend received by the supervisor, that payment did not appear to be dispositive of whether or not the records were public records. The court noted that if personal accounts could be used to evade the RTK law, all public officials would then do so and the RTK law would become meaningless.

School districts and IUs should use caution when utilizing personal devices for public use without adequate safeguards and plans in place to respond to RTK requests and litigation holds involving personal devices. The court's ruling in *Paint Township v. Clark* potentially opens text messages and other mobile-only communications to the RTK law in a way that few school districts and IUs have had to address to date. Wherever possible, e-mail and cloud-based resources should be utilized to conduct school district or IU business. E-mail is often maintained by school districts and IUs systematically, regardless of whether an e-mail message exists on a mobile device at any particular time. Similarly, data stored in cloud-based resources remains accessible from anywhere, without the need to obtain or forensically examine the mobile device itself. Conducting business through e-mail and cloud-based resources on personal devices may significantly simplify a school district or IU's response to a RTK request or to a litigation hold.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.



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