

REQUEST FOR COUNCIL ACTION

Date: 8/10/09
Item No.: 12.b

Department Approval

Acting City Manager Approval

W. J. Malinen

Christopher K. Miller

Item Description: Approve Electronic Communication Policy

BACKGROUND

The City Council has discussed an Electronic Communications Policy. The first draft of the policy was presented by City Attorney Scott Anderson and discussed at the 2/23/09 Council meeting. Based on the suggestions and discussion of Council Members, the Electronic Communications Policy has been revised.

STAFF RECOMMENDATION

Approve the Electronic Communications Policy.

REQUESTED COUNCIL ACTION

Approve the Electronic Communications Policy.

Prepared by: William J. Malinen
Attachments: A: July 8, 2009 Memo from Scott Anderson and Eric Quiring
B: Revised Electronic Communications Policy
C: Excerpt - 2/23/09 City Council Minutes

MEMORANDUM

TO: Bill Malinen

FROM: Scott T. Anderson
Eric J. Quiring

DATE: July 8, 2009

SUBJECT: Retainer/Electronic Communications Policy
File No. 4002(1)-0341

Based on the suggestions and discussion of Council Members, the Electronic Communications Policy has been revised in the following manner.

1. The e-mail disclaimer provision found on page 3, lines 32-41, of the Policy has been removed. Such a "Confidentiality Statement" is not legally required. Based on the feedback from Council Members, we removed the provision as unnecessary and a slight deterrent to public communications with Council Members.
2. The listserv provision found on page 4, lines 12-16, was revised to clarify that Council Members may participate in listservs and electronic forums so long as they are not doing so for impermissible reasons under the Open Meeting Law. As requested, the revised provision addresses listservs in a positive statement, rather than solely as a limitation.
3. Lastly, questions remain as to which electronic communications must be retained by Council Members in order to comply with the record retention requirements found on pages 4 and 5 of the Policy. As our April 8, 2009 memo explained, only electronic communications that become part of an official City transaction need to be provided to the City Manager for retention. Government records are defined to expressly exclude data and information that does not become part of an official transaction. Minn. Stat. § 138.17, subd. 1(b)(4). Minnesota law does not define what constitutes an official transaction of public business. However, an analysis of the phrase leads us to the conclusion that an official transaction occurs only when the Council takes action on an agenda item, such as entering into a contract or approving the expenditure of public funds.

The obligation to retain the record is further limited in that records must be retained only if they become part of the official transaction. In other words, even when a Council Member communicates electronically about an official transaction, that

communication will not always become part of the official transaction. In fact, the communication will likely rarely become part of the official transaction. As a result, electronic communications of Council Members will need to be retained very infrequently. The vast majority of electronic communications would not concern an official City transaction of public business. Of those limited number of electronic communications that do, only a limited number would actually become part of the official transaction. Electronic communications between Council Members and constituents would not constitute government records under the record retention laws because they would not become part of the official transaction of public business.

RRM: 131014

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CITY OF ROSEVILLE

Policy on Council Members' Electronic Communications

This Policy applies to all members of the Roseville City Council. For purposes of this Policy, reference to Council Members includes members of all other City committees and groups subject to the Open Meeting Law. Reference to the Council shall include all such groups and meetings.

This Policy applies to all electronic communications containing government data, as defined by the Minnesota Government Data Practices Act, Minn. Chapter 13, regardless of whether the Council Member is using a City-provided email address and account, his/her personal email address or account, or one provided by his/her employer.

I. Purpose

This Policy is adopted to increase awareness of the risks associated with Council Members using electronic communications and to set forth the appropriate restrictions on the use of electronic communications in accordance with the Minnesota Open Meeting Law and Minnesota Government Data Practices Act.

Electronic communications may be classified as public data, and thus, may be subject to public disclosure. ~~Members of the public cannot expect confidentiality when electronically communicating with Council Members on matters of City business.~~

II. Definitions

"Electronic communications" include email, texting, instant messaging, chatrooms, and related electronic means of communicating with others.

"City Manager" means the City Manager or his/her designee.

III. Communications with members of the public

Members of the public cannot expect confidentiality when electronically communicating with Council Members on matters of City business.
Correspondence between individuals and elected officials is private data on individuals, but may be made public by either the sender or the recipient as provided by Minnesota Statutes Section 13.601, subd. 2.

IV. Meeting materials

Electronic communication of meeting materials should generally be conducted in a one-way communication from the City Manager to the Council Members.

- Council Members may receive agenda materials, background information, and other materials via email attachment or other electronic means (such as file sharing) from the City Manager.
- If a Council Member has questions or comments about materials received, s/he should inquire via electronic means directly back to the City Manager. A Council Member should not copy other Council Members on his/her inquiry.
- If the clarification is one of value to other Council Members, the City Manager may send follow-up materials or information to the Council Members.

Electronic communications relating to agenda items of a meeting prepared or distributed by or at the direction of a Council Member or City employees and (1) distributed at the meeting to all members of the Council; (2) distributed before the meeting to all Council members; or (3) available in the meeting room to all Council members must also be made available to the public at the meeting pursuant to Minnesota Statutes Section 13D.01, subd. 6, unless the materials are classified as nonpublic under the Minnesota Government Data Practices Act.

IV. Communication during Council meetings

- Council Members should not communicate with one another via electronic means during a public meeting.
- Council Members should not communicate with any member of city staff via electronic means during a public meeting.
- Council Members should not communicate with the public via electronic means during a public meeting.

VI. Communications outside of Council meetings

- Council Members should act ~~with caution~~ in accordance with the Minnesota Open Meeting Law when using electronic means to communicate with one another; ~~being mindful of the Minnesota Open Meeting Law~~. Council Members shall not communicate with each other outside of Council meetings for the purpose of avoiding public discussion, to forge a majority in advance of

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public meetings, or to hide improper influences such as personal or pecuniary interests of the Council Member.

- ~~If a Council Member wishes to share information with other Council Members, s/he should do so through the City Manager. The Council Member may request the City Manager distribute materials to others. The communication should not invite response to or discussion between any Council Members, including replies to the person making the distribution request. This should be considered a method for providing one-way information to other Council Members.~~
- ~~If a Council Member wishes to address only one other Council Member through electronic means on any topic related to City business, s/he can do so directly, but should be mindful of the following:~~
 - ~~One to one communication is preferable.~~
 - ~~The recipient of an electronic message or inquiry should reply only to the sender, should not copy others on the reply and should not forward the original email to other Council Members.~~
 - ~~The sender of an electronic message should not forward or copy the recipient's reply to any other Council Member.~~
 - ~~If a Council Member receives an electronic communication from any source related to City business and distributed to multiple Council Members (i.e. an email sent to the entire council from a member of the public; or an email sent to three Council Members from a local business), s/he should reply only to the sender. The reply should not be copied to all on the original distribution or forwarded to any other Council Member.~~
- ~~When communicating via e-mail on City matters, Council Members should include the following disclaimer: "Confidentiality Statement: The information contained in this electronic message and any documents accompanying this transmission may contain information that is private or nonpublic confidential and/or legally privileged. This information is intended only for the use of the individuals or entities listed above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or action taken in reliance on the contents of these documents is strictly prohibited. If you have received this information in error, please notify the sender immediately and arrange for the return or destruction of these documents."~~

- ~~Council Members and City employees should discourage members of the public from replying or forwarding electronic communications with a Council Member about matters presently pending before the Council for official action to all Council Members. When communicating with members of the public via e-mail, Council Members and City employees should include the following disclaimer: "Open Meeting Law Notice: Please note that electronic communications about matters pending before Council for official action which directly or serially include at least three Council Members, including forwarding of e-mails or use of 'reply to all,' may be found to violate the Minnesota Open Meeting Law, and should be avoided."~~
- ~~A quorum of Council Members shall not participate in any electronic discussion forums Council Members may participate in listservs and other electronic forums that serve to exchange information and opinions about City issues, so long as that participation is not for the purpose of avoiding public discussion or to forge a majority in advance of public meetings. deliberating on any matters presently pending before the Council that would foreseeably result in the taking of official Council action. If a Council Member receives listserv distributions, electronic newsletters, or participates in electronic discussion forums where other Council Members are also likely to participate (such as chat rooms), the Council Member should not reply to any distribution or comment that could be considered deliberation on a matter presently pending before the Council that would foreseeably result in the taking of official Council action when that reply is copied to the entire distribution group, or any part of the group that might include other Council Members. In those situations, the Council Member should instead respond only to the sender of any message or inquiry.~~

VII. Classification and Retention of Electronic Communications

- ~~Regardless of whether electronic communication by a Council Member is taking place on a City provided computer, home computer or other computer system, classification of information as public, private or other is governed by the Minnesota Government Data Practices Act (Minn. Stat. Chapt. 13) and should be treated accordingly.~~
- ~~Council Members should retain electronic communications in keeping with City policies and procedures, whether such communication takes place on a City provided computer, home computer or other computer system.~~
- Council Members should provide the City Manager with a copy of any electronic communication not already maintained by the City that was made or

received by the Council Member and becomes part of an official City transaction pursuant to the following retention classifications:

Complaints – General: General city services, maintenance, repair, citizen complaints. [Retention period: 1 year after action completed.]

Correspondence – Historical: Correspondence to/from mayor, city manager, city administrator. Official correspondence that documents important events or major functions of the office. Usually deals with a specific topic, issue, organization or individual. [Retention period: Permanent.]

Correspondence – General. [Retention period: 3 years.]

- Council Members do not need to retain or provide the City Manager with electronic communications that do not become part of an official transaction or electronic communications that fall within the following retention classification:

Correspondence – Messages: Transitory messages, e-mail or phone messages of short-term interest which are considered incidental and non-vital correspondence. [Retention period: Until read.]

RRM: #131013

Excerpt – 2/23/09 Roseville City Council Meeting

Discuss City Council Electronic Communications Policy

City Manager Malinen provided a first draft of a proposed policy on Councilmember Electronic Communications; along with a review of previous topics discussed at the City Council level. Mr. Malinen advised that this proposed policy language was based on a model from the League of Minnesota Cities (LMC) with suggestions for outlines and content; and that it was provided as a framework for further discussion. Mr. Malinen provided, as a bench handout, additional information related to such a policy.

City Manager Malinen noted that, in discussions with City Attorney Jay Squires, there was some question as to the benefit and/or consistency of a disclaimer for staff e-mails, as addressed on Page 3, line 21; and whether it should be included as a part of that policy.

Discussion included individual Councilmember comments to the proposed policy, as indicated in red, in the draft.

Mayor Klausing expressed concern that City Councilmembers be prohibited from participating in list serves, if items were not being deliberated or pending before the City Council; and, allowing for more public discussion for elected officials with their constituents; and considerations of First Amendment Speech rights and Open Meeting laws.

City Attorney Anderson noted that the draft was prepared from language in the League of Minnesota Cities Insurance Trust (LMCIT) with a concentration on risk analysis and concerns; and that his office been asked to draft language based on previous City Council discussion they would do so with fewer restrictions. Mr. Anderson opined that his office did not necessarily think the draft policy was appropriate as presented, but that it was in keeping with the direction given to them to draft a policy based on LMCIT policy language to initiate discussions and to serve as a talking point. Mr. Anderson advised that his office would take into consideration case law to-date, as identified in his previous April 2, 2009 letter.

Councilmember Pust opined that the City Council needed to seek recommendations of their City Attorney, not just consider what was the best version of LMCIT proposals.

Councilmember Pust requested additional information based on language addressing retention issues for individual home computers, addressed on Page 4, Section VI, and data retention consistent with law, but not in perpetuity.

Councilmember Johnson concurred with Mayor Klausing, asking that more information be provided on First Amendment Rights; expressing concern that freedom of speech rights were being squelched, in addition to not encouraging public discussion. Councilmember Johnson questioned whether, by his serving as part of a governing body, he had given up some of those rights.

Mayor Klausing responded that Councilmember Johnson's concerns were valid from a public policy standpoint, when elected officials should be encouraged to participate through public venues in expressing their viewpoints to their constituency; but opined that any policy should be consistent with state statute and the spirit of public discussions.

City Attorney Anderson noted that this draft was a working draft, and encouraged Councilmember comment and input.

Mayor Klausing concurred with Councilmember Pust's concerns for retention of items on home computers; whether retention was necessary if items had gone through staff at City Hall where they would naturally fall into record retention categories; and whether communication of advisory boards to the City fell within this framework and policy as well.

City Manager Malinen advised that he needed to further consult with the City's Information Technology staff on record retention practices; and referenced comment received from Planning Commissioner Daniel Boerigter related to this matter and advisory commissions.

Councilmember Pust opined that she didn't appreciate the tone or focus of the proposed policy, and the comment about trying not to put things on paper so they could be construed as public data; when it was the intent and interest of the City Council to transparently comply with the Open Meeting Law and Minnesota Data Practice Act.

Further discussion included individual City Councilmember correspondence with citizens, and when it became public information; removal of liability issues for the City once a document was legally obtained from a government entity and came into the public domain; and interpretation of uses of such data or using citizens as surrogates in forging decisions privately and not in the public venue.

Councilmember Ihlan addressed the purpose statement on Page 1, second paragraph; and suggested that the language mirror that of the Data Practices Act related to correspondence between elected officials and individuals.

City Attorney Anderson so noted.

Councilmember Ihlan opined that the disclaimer as addressed by City Manager Malinen, seemed confusing and unnecessary.

Mayor Klausing concurred; and questioned if it actually served a good public policy purpose, and may actually make citizens less willing to correspond with their elected officials if they thought the information was going to be shared.

City Attorney Anderson advised that his firm would work on the confidentiality concerns as discussed; noting that the most common privacy issue was personnel and/or discipline issues; and those would be the only practical things requiring a standard disclaimer.

Councilmember Roe concurred that this statement was overused. Councilmember Roe referred to a recent presentation at Roseville University related to City Policy development on Data Practices and Record Retention that may serve to help clarify the questions and concerns expressed by Councilmember Pust.

Councilmember Roe noted the need to clarify language on Page 2, lines 8 – 13, related to distribution to all City Councilmembers or only a quorum.

City Attorney Anderson noted that this language was word for word from the Open Meeting Law.

Mayor Klausing noted that this policy was designed to distinguish communication, not pending City Council action, going to all Councilmembers.

City Attorney Anderson clarified the need to remind staff that anything specific to an agenda item needed to be included in the agenda packet and provided to the public, unless falling within City Attorney/client privilege. City Attorney Anderson further clarified that, if a member of the public sent each Councilmember communication, there was no requirement in law to provide a public copy of those member materials; only those items prepared and/or distributed at the direction of the governing body or its employees; but that something coming to the City Council from a citizen was not within the provision of law needing to be included in the packet materials.

Mayor Klausing noted that, beyond the statute, but from a policy standpoint to provide for transparency in government and in the spirit of the law, it may be prudent to include that information.

City Attorney Anderson noted that there was nothing prohibiting the City Council from going further than the law required if they so chose that as their policy.

City Attorney Anderson advised that he would take tonight's comments and discussion into consideration for changing this first draft, as well as further researching First Amendment laws.