

The curious case of the disappearing texts

By the time this column reaches print, the New Year will have begun and that means the Missouri General Assembly has convened. This is going to be an interesting year, and at this point, there are suggestions it will be a year that may bring a lot of attention to Missouri's Sunshine Law.

In the last month of 2017, much attention was focused on Gov. Eric Greitens, his aides and their use of the disappearing text application called "Confide". Apparently the Governor and members of his senior staff are using this app on their cell phones. News reports said those using the app include his chief of staff and deputy chief of staff, legislative director, press secretary, policy advisor, director of cabinet affairs and other senior staff members. The Governor's staff say they are not using the app on state-issued cell phones but only on personal phones.

This, of course, raises questions about whether there is discussion of public business happening among these individuals and whether records that should be retained under the state Sunshine Law are being deleted with no opportunity for public review or retention.

You've read all these stories, including the follow-up at the end of the month that Attorney General Josh Hawley has appointed special investigators to look into the issue and see if further action is required. And state legislators have begun speaking about the need to look at Sunshine Law language to see if changes are needed to address such issues.

It's been some time since there was a significant change to the law. Major changes were made in 2004. Additional significant changes were made in 2016 when language governing the use of video from mobile video recorders ("body-cams") was added to the law. Perhaps the time is right to consider this subject.

The Missouri Press Association is interested in working with legislators to consider what changes in the law are needed. More and more govern-

ment officials use their telephones to search the Internet and to handle both emails and text messages. The use of text messages, in and of themselves, has skyrocketed. According to the Pew Research Center, in 2016, 81 percent of Americans texted regularly. One research group noted that over 6 billion texts were sent every day in 2016.

Years ago, everyone received in their monthly telephone bill a list of all numbers called made during the month. Now that's gone. And no doubt it requires special effort by local government officials to capture and retain the text messages sent on government-issued phones in order to meet state Sunshine Law requirements, because those don't come automatically with your bill. But clearly there needs to be access to this information because it's the way we all communicate today.

And if a government official chooses to not use a government-issued phone, but chooses instead to discuss matters with a personal phone, that means they have made a mental decision that what they are discussing is not something they can justify using the government-issued phone to use. It's a purposeful decision to choose which phone to use. So if Sunshine Law requesters discover that government business is being discussed on personal phones, persons who are doing this should not be allowed to avoid maximum penalties and fines by claiming it's not a "purposeful" violation of the law.

Plus, another issue involves when the person doing the texting is a

governmental body of one. Case law in the state has made it clear that a county sheriff is a public governmental body of one. Based upon that holding, it would seem clear that a Governor, too, is a public governmental body of one. Such a figure cannot have "public meetings" but clearly does have "public records." Therefore, every record created by the Governor is arguably a "public record" unless it is exempted by present language in the state regulations which govern what records must be maintained by any governmental entity. Every record the Governor creates is about his job as Governor, unless it's personal. It needs to be retained, subject to the requirements

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imposed in state regulations by the State Records Commission.

Does the present Sunshine Law, and these state regulations, cover all these situations? It looks like it's time for a closer look at that issue. The Association looks forward to working with legislators and the state Attorney General's office, to find language that will clarify these issues. Every state official supports transparency in government when they are running for office. Missouri Press looks forward to seeing these advocates put action behind their words as we work to address these issues.

