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Memorandum

TO: NREA Managers, Troy Bredenkamp, Bob Cooper

FROM: Dave Jarecke

DATE: May 7, 2015

RE: **Electronic Devices & Board Use**

There are a multitude of reasons why moving to an electronic board room may be wise. However, there are a few legal concerns associated with this transition. The question of who should buy the device and pay the associated monthly costs must to be analyzed in light of the potential risks these devices pose. While these devices make transacting and carrying out business easier, they also bring unintended consequences. But risk is not a reason to reject the technology. The risk is manageable.

A few examples of scenarios that pose problems are:

1. Director Jones e-mails Director Smith during a public meeting to discuss a certain agenda item.

2. Director Jones sends a private email to Director Smith regarding a PPD topic and expects such e-mail to remain private.

3. Director Jones creates a document utilizing the device, but wants to shield it from a public records request from the local newspaper.

4. Director Jones sends an e-mail from the District owed iPad from either a private email account or the District account to his fellow coffee shop friends stating he is running for re-election on the board and requests contributions to his campaign.

5. Director Jones deletes all emails sent through a District account in the week leading up to a board meeting, including all e-mails related to an agenda item.

These scenarios are all possible situations each and every Director could find themselves. The potential problems with each are outlined below. Ultimately, the District must determine the best method in which to reduce the potential risks, including the development of a cost-share program or strictly setting forth rules that the device may only be used only for District business and no personal use. Based upon this decision, Management should take it upon themselves to ensure that all Directors understand the potential risks and how to use the device in an appropriate manner.

Potential Concerns

A. Public Records:

Because Public Power Districts are political subdivisions of the State of Nebraska, its business is subject to the public records laws. The Nebraska legislature has determined it is the policy of the state that ALL records of public entities be available for inspection by members of the public, regardless of the motive in viewing the records.

So what exactly constitutes a "public record"? Pursuant to NEB. REV. STAT. § 84-712.01 "Public records are all records and documents, regardless of physical form, of or belonging to the state and its various political subdivisions." Case law has interpreted this language to mean a public record is anything the political subdivision "owns" or is entitled to possess, including the data logged by the electronic devices. Op. Att'y Gen. No. 97033 (June 8, 1997). "Record" is not limited to finalized or discernible documents. Instead, it can include drafts of documents and

other incidental information logged by an electronic device. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009); Op. Att'y Gen. No. 91054 (1991).

Additionally, the public's right of access does not depend on where the record is physically located. The key question is whether those records are records "of" or "belonging" to the agency in question. Op. Att'y Gen. No. 97033 (June 8, 1997). This means that in the case of iPad use, it does not matter that the Director iPads are frequently not located within the District's physical building. The records created and stored on those iPads in carrying out public business are still public records subject to public inspection.

Why is public records law cause for concern?

In the instance of Director Jones sending a private e-mail to Director Smith regarding a PPD topic and expecting such e-mail to remain private, when Director Jones created a document utilizing a Publicly Owned device, it became a public record and could be subject to a public records request.

Ownership Alone Not Determinative.

Requests for public records can be either narrow or broad in scope, meaning a request can be very specific set of information or can be very expansive, for example, "please provide ALL e-mails, texts, documents." A few highly publicized, broad requests to the Omaha mayor's office provides insight into how newspapers and members of the public view Nebraska's public records laws. Requests were made for ALL e-mails, text messages, and call logs for state owned cell phones. And then subsequently for all text messages from a privately owned cell phone. The public, and the Nebraska Attorney General's opinions in both instances found that who owned the device was not the determining factor, the key is the content of text, e-mail, or call log. Those

text messages located on the private device pertaining to public business are still public records subject to public inspection. These real-life instances demonstrate that private emails and documents regarding public business are clearly public records regardless of whether the District owns the device or if the cost is shared by the directors.

B. Right to Privacy.

Directors who expect to be able to conduct both personal and public business from their iPad inherently expect private conduct to remain private and not become publically available. If these iPads are solely owned by the District, this expectation cannot legally exist, as these devices should only be used for public business. Some may believe that a private electronic device cannot be searched by a District by virtue of it being a private device. There is case law supporting the notion that an employer's search of these private devices is considered a "search" within the parameters of the United States' Constitution. However, the protections only exist for *unreasonable* searches and seizures. The Court has previously held that a public agency can read an employee's private e-mails and text messages so long as the search is "reasonably related" to a business purpose.

It is quite possible that the District will need to conduct searches of these Director electronic devises from time to time in order to respond to a public records request. Furthermore, the Nebraska statutes create a presumption that records are subject to public inspection, and places the burden on the document custodian to demonstrate otherwise. To state it plainly, if a text, e-mail, document, data, etc., appears to relate to public business, there is a presumption that it is a public record open for inspection and the District will then have to prove that it is not a public record in order to withhold the document. This would necessarily require a search and

inspection of those devices. Essentially, if the activity conducted on these electronic devices relates to District business, which is the very reason these devices are issued, then Directors cannot expect any Right to Privacy.

C. Duty to Preserve.

The Nebraska Legislature, through the Records Management Act, has declared it to be the policy of this State that essential governmental records be maintained and protected from destruction. The Attorney General's Office has explicitly declared Public Power District subject to the Records Management Act. The Districts have a duty to preserve records, which is defined by NEB. REV. STAT. § 84-1202(4) as:

> any book, document, paper, photograph, microfilm, sound recording, magnetic storage medium, optical storage medium, or other material regardless of physical form or characteristics created or received pursuant to law, charter, or ordinance or in connection with any other activity relating to or having an effect upon the transaction of public business.

The Secretary of State's Office is charged with advising and governing the retention policies of local entities such as public power districts. These rules and regulations provide further guidance that "electronic records" must be retained: Electronic Record: A record created, generated, sent, communicated, received, or stored by electronic means. These retention policies are designed to be compatible with electronic devices. However, the policy implementation is the responsibility of each individual district. This necessarily requires a method in accessing and acquiring records from each iPad that must be preserved pursuant to the Records Management Act. The example above in which Director Jones deletes all e-mails sent through a District account in the week leading up to a board meeting, specifically, those related to an agenda item, is an example of improperly deleting public records.

D. Electioneering.

All public power district elections are subject to Nebraska's Electioneering laws, NEB. REV. STAT. §§ 32-101-32-1551 and the specific prohibitions regarding the expenditure of public resources or funds. Should these electronic devices be entirely owned by the District, they will be considered a "public resource." State law provides, "a public official or public employee shall not use or authorize the use of public resources for the purpose of campaigning for or against the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question." While the parameters of what constitutes "for the purpose of campaigning" is at issue in current litigation, certain activities are unquestionably prohibited. For example, soliciting votes from a District owned iPad would clearly be a violation. As would using the iPad to design and create campaign posters and other distributive materials.

Should these electronic devices be wholly owned by the District, incidental personal use would only be permissible under certain circumstances. NEB. REV. STAT. § 49-14,101.03 provides:

> a resource of government, including a vehicle, shall not be considered a public resource and personal use shall not be prohibited if (a) the use of the resource for personal purposes is part of the public official's or public employee's compensation provided in an employment contract or a written policy approved by a government body and (b) the personal use of the resource as compensation is reported in accordance with the Internal Revenue Code of 1986, as amended, and taxes, if any, are paid. If authorized by the contract or policy, the resource may be used whether or not the public official or public employee is engaged in the duties of his or her public office or public employment.

E. Open Meetings Act.

An additional risk associated with Director iPad use is the possibility of Open Meetings Act violations. NEB. REV. STAT. § 84-1410(4) provides that no closed session, informal meeting,

chance meeting, social gathering, e-mail, fax, or other electronic communication shall be used for the purpose of circumventing the requirements of the Open Meetings Act. Considering the very purpose of the Open Meetings Act is to ensure briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body occurs within the proper public forum, it can easily be violated. A simple example would be the seemingly innocent exchange of e-mails between Directors during the meeting regarding an agenda item or other District business. Case law indicates this would be a violation, as a public body's decision was challenged after e-mails discussing a public issue were discovered. The public body's decision was only upheld by the District Court because the plans were substantially revised from the original course of action discussed in the e-mails and the revision was publically discussed. *Johnston v. Metro. Gov't of Nashville & Davidson County*, 320 S.W.3d 299 (2009).

As has been publicized by the Omaha World Herald, the Omaha mayor has been criticized for texting members of the council during the meeting instead of directing her comments verbally for the public to hear. While no legal action or complaints have yet to be formally filed, it is my opinion that this could be an Open Meetings Act violation.

It is important to note, Public Power Districts have a statutory duty to maintain records of the business conducted at each board meeting. NEB. REV. STAT. § 70-622 provides:

> The board of directors shall cause to be kept accurate minutes of their meetings and accurate records and books of account, conforming to approved methods of bookkeeping, clearly setting out and reflecting the entire operation, management and business of the district. Said books and records shall be kept at the principal place of business of the district or at such other regularly maintained place or places of business of the district as shall be designated by the board of directors, with due regard to the convenience of the district and its customers in the several localities or divisions served or from which the information is thus gathered or

> obtained. Said books and records shall at reasonable business hours be open to public inspection.

In the example of Director Jones e-mailing another Board member about an agenda item, not only is there a threat of an Open Meetings Act violation, but also the subsequent omission of important information required to be maintained pursuant to NEB. REV. STAT. § 70-622, the obligation to maintain public records.

How to Avoid Potential Problems?

The key to avoiding the potential problems identified is to determine whether the District will own the device or if the Directors themselves will need to purchase and maintain, but receive a partial reimbursement for related expenses. A third option would be to require Directors to supply their own electronic device at their sole expense. This option has been the subject of recent litigation outside the State of Nebraska. A California Court held that employees required to supply their own device must be compensated for their business use. *Cochran v. Schwan's Home Serv., Inc.*, Ca. Ct. App. No. B247160.

In practice, because Director iPads would be used only a portion of the month, the cost could be prorated to account for the actual time used for District business. All three of these options are permissible under Nebraska law and I view it as a business decision for the District. By implementing a cost-share type program, personal use would not need to be strictly monitored. However, some monitoring would still be inherently required, as certain public records must be maintained from those devices. If the District solely owns and maintains the device, there is a greater risk of violating the electioneering and misuse of public resources

statutes. Regardless of the District's decision as to who is going to pay for and own the device, a Board Policy should be implemented that sets forth the appropriate use of the device.

In my opinion, it would be wise for a cost share basis to avoid the trap of violating public records and election laws.

However, understand that even if the device is solely owned by the director, the communication may still be considered a public record and subject to a request for public records.