

**FINAL REPORT: AGO INQUIRY INTO USE OF CONFIDE
BY STAFF OF THE GOVERNOR'S OFFICE**

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BACKGROUND

Confide is a messaging application or “app” for smart phones. While messaging over Confide is substantially similar in many ways to ordinary text messaging, Confide has three principal features that distinguish it from ordinary texting. *See generally* <https://getconfide.com/#features>. First, Confide immediately and automatically deletes messages once the recipient has read them, and those messages cannot be recovered. Second, the recipient of a Confide message cannot view the entire message at once but instead can view only several words at a time by scrolling his or her finger over the text. This feature is intended to prevent the retention of Confide messages by taking screen shots of the messages. Third, Confide advertises that it uses powerful encryption methods to preserve the security of messages.

In late 2017, news media outlets reported that several senior members of the Governor’s Office (“GO”) had downloaded Confide to their personal phones. These reports resulted in speculation that the GO may have used Confide to transact public business. The Attorney General’s Office (“AGO”) received a number of requests from the public and government officials to review the GO’s use of Confide. After concluding that such a review would not raise any ethical concerns, the AGO opened an inquiry into the matter.

INQUIRY AND FACTUAL FINDINGS

The AGO has conducted an inquiry into the complaints relating to the use of Confide by certain GO staff. As requested by the AGO, the GO did provide certain documents and information relevant to the inquiry and also provided the AGO with the opportunity to conduct in-person factual interviews with eight high-level members of the GO. The GO asserted a blanket objection to all questions regarding communications between interviewees and the Governor based on the doctrine of executive privilege. *See generally, e.g., In re Sealed Case*, 121 F.3d 729, 736-62 (D.C. Cir. 1997); *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 483-87 (Ohio 2006). The GO further voluntarily turned over additional documents not requested by the AGO. The AGO also met with the GO’s in-house legal team regarding GO policies and practices.

The GO’s stated policies require the retention of all materials as provided by the State Records Commission’s retention schedules. The GO’s record-retention policies affirm that whether Chapter 109 requires a given communication to be retained depends on the content and context of the communication, *not* on whether the communication was transmitted or received via a personal account or device. As one document accurately notes, “[u]sing a personal account, messaging applications, personal device, or personal equipment does not nullify the requirement to retain records that pertain to official business.” Under GO policies, if a staff member were to receive or send a communication on her personal device that was required to be retained under

Chapter 109, the staffer must transmit a copy of that communication to the GO for formal retention. The GO views violations of these policies as grounds for employee discipline.

The GO represents that it has taken several steps to promote compliance with GO policies and with Chapter 109 and the Sunshine Law. Upon joining the Office, all GO staff receive thorough training regarding the Sunshine Law and record-retention laws. In addition, members of the Governor-elect's transition team received training regarding the Sunshine Law, records-retention laws, and government-ethics issues during the transition. For that reason, several of the individuals interviewed by the AGO had received multiple in-depth trainings regarding compliance with public-records laws. The GO has also implemented extensive training efforts for agency leadership and staff, including monthly Sunshine Law "update" meetings for agency in-house counsel.

The GO has also hired an experienced attorney, Sarah Madden, to work full-time on Sunshine Law and records-retention compliance. Among other things, Ms. Madden provides ongoing training regarding these matters and serves as a resource for GO staff. During interviews with the AGO, GO staff stated that they regularly consult Ms. Madden when they have questions or doubts regarding a public-records issue. In the words of one individual, the GO has promoted a culture of "when in doubt [about public-records issues], ask Sarah."

As noted above, the AGO conducted individual factual interviews with eight high-level members of the GO. Of these individuals, three stated that they had never used Confide to discuss matters relating to their government employment but instead had used Confide only to conduct private conversations. Five individuals stated that they had used Confide to discuss matters relating to their government employment. These individuals described the nature of their Confide communications as consisting entirely of non-substantive matters such as logistics and scheduling. For example, several interviewees stated that they had used Confide to discuss the scheduling of meetings or phone calls. Four individuals indicated that they had begun using Confide before joining the GO. These accounts appear credible, though the nature of Confide necessarily means that no documentary evidence exists to corroborate (or contradict) this testimony.

Seven of the eight individuals interviewed stated that they had not downloaded Confide on their State-issued phones. One individual stated that he had downloaded Confide onto both his personal phone and his State-issued phone. However, that individual maintained that he did not send Confide messages from his State-issued phone to anyone other than to his own personal phone. He stated that he sent these messages to himself in order to understand how Confide works and how messages would appear to recipients. He stated that none of these messages related to public business. After the use of Confide by GO staff was first publicized, the GO's in-house legal team requested that the Office of Administration ("OA") search all GO-issued phones to determine whether Confide was installed on the devices. That search did not identify any State-issued phones having Confide. The GO's in-house legal team did not discover until later that one GO staffer had, in fact, downloaded Confide to his State phone but deleted the app before OA ran its search.

Each individual interviewed was familiar with the GO's record-retention and Sunshine Law policies, and each individual had received one or more thorough trainings regarding those policies and the public-records laws. Each individual interviewed understood that communicating over private devices or private accounts did not affect whether Chapter 109 required the retention of those communications. Each individual interviewed stated that he or she was unaware of any violations of the GO's policies or any public-records laws.

During the AGO's inquiry, the GO disclosed that in certain limited circumstances, select GO staff have also used an app other than Confide that provides full end-to-end encryption for

secure phone calls and text messaging. The GO represented that this was done on the recommendation of the Department of Public Safety. In a meeting with AGO staff, the Director of Public Safety, Drew Juden, reiterated this account and explained that he had instructed certain GO staff to use this app to communicate in circumstances that Director Juden judged to present particularly acute risks of cybersecurity threats. The GO has taken the position that all materials related to this app are closed pursuant to § 610.021(18) and 610.021(21), RSMo.

After the AGO launched its inquiry, the GO revised its Sunshine Law and Records Retention Policy to prohibit the use of Confide for any communications relating to public business. That new policy provides that “[i]t is the policy of the Office of the Governor that employees may not use any self-destructing messaging application, for the use of conducting public business, whether it be on a state-issued or personal device. This policy applies to all public business-related communications: (1) whether transmitted by state-issued or personal devices; and (2) regardless of whether the communications are required to be maintained as ‘official business’ records pursuant to Chapter 109 and any applicable retention schedules.”

LEGAL CONCLUSIONS

Based on the records and materials available, the AGO has not identified any basis for concluding that the GO has violated Missouri law through the use of Confide by GO personnel. Chapter 109 of the Missouri Revised Statutes governs the records-retention obligations of Missouri governmental entities. Pursuant to Chapter 109, the State Records Commission issues records-retention schedules that prescribe what records governmental entities must retain and for how long the entities must retain those records. *See* § 109.260, RSMo. Each records-retention schedule is composed of records “series,” which identify specific categories of documents and the retention rules applicable to each category.

Three records series in the General Retention Schedule are directly relevant to this inquiry.¹ Record Series 21530—titled “General Correspondence – Elected Officials and Department Directors”—applies to:

Documents of a general nature that were created or received pursuant to law or in connection with the transaction of official business, which are not included in another records series. Examples are: interoffice or interdepartmental communications which do not subsequently result in the formulation of policy; files) for agency staff; calendars, appointment books, schedules, logs, diaries, and other records documenting meetings, appointments, telephone calls, trips, visits, and other daily activities of employees; and unpublished calendars of events and activities.

Records within Records Series 21530 must be retained until the completion of an elected official’s or department director’s term of office, at which time the records must be transferred to the State Archives for permanent retention.

Records Series 21531—titled “General Correspondence – Agency Personnel”—similarly applies to:

¹ The General Retention Schedule is available on the website of the Secretary of State at <https://www.sos.mo.gov/CMSImages/RecordsManagement/schedules/GRS/Admin.pdf>.

Documents of a general nature that were created or received pursuant to law, or in connection with the transaction of official business, which are not included in another records series. Examples are: interoffice or interdepartmental communications which do not subsequently result in the formulation of policy; daily, weekly or monthly activity reports that are summarized in annual reports or that relate to routine activities (including work progress or statistical reports prepared in the agency and forwarded to higher levels within the agency); documents relating to the creation or editing of forms, daily, weekly, or monthly work assignments (including duty roster files) for agency staff; calendars, appointment books, schedules, logs, diaries, and other records documenting meetings, appointments, telephone calls, trips, visits, and other daily activities of employees; and unpublished calendars of events and activities.

Records within Records Series 21531 must be retained for three years following the end of the fiscal year in which the record was created, at which time the records may be destroyed.

Records Series 21532—titled “General Correspondence – Transitory”—applies to:

Drafts or other documents having short-term value and which are not an integral part of administrative or operational records file; not required to sustain administrative or operational functions; not regularly filed under a standard records classification system; not required to meet statutory obligations; and recorded only for the time required for completion of actions.

Such “transitory” communications may be destroyed when no longer needed by the governmental entity.

According to the testimony of senior GO staff, all communications transmitted over Confide relating to public business constituted purely “transitory” communications within the scope of Records Series 21532.² The testimony from GO staff indicates that the Confide communications were exclusively non-substantive and generally involved logistical and scheduling matters. Because these communications fell within the scope of Records Series 21532, the GO had no obligation under Chapter 109 to retain the communications, and the GO did not violate Chapter 109 by failing to retain the communications through the use of Confide.

As we noted in our February 1, 2018 report regarding the State Auditor’s Office, the descriptions of Series 21530, 21531, and 21532 are all written in broad terms, and some

² The Governor’s Office also contends that certain communications transmitted over Confide relating to public business did not constitute “records” under Chapter 109 at all. As noted in our February 1 report regarding the State Auditor’s Office, this position finds support in longstanding governmental practice and interpretation of Chapter 109. *See, e.g.,* Missouri Secretary of State, *What Is a Record? A Guide to Missouri’s State Records Management Program*, <https://www.sos.mo.gov/records/recmgmt/whatisarecord> (indicating that “non-record materials” include “Materials that do not contribute to an understanding of the agency’s operations or decision-making process” and “Materials that have no substantial administrative or operational value”). Longstanding governmental practice ordinarily informs the interpretation of a legal text. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014); *Mistretta v. United States*, 488 U.S. 361, 401 (1989).

communications might seem to fall within the scope of more than one of these series. Importantly, however, by their own terms, Series 21530 and 21531 include only those communications that “are not included in another records series.” Thus, if a communication falls within the scope of Series 21532, by definition it cannot fall within the scope of Series 21530 or 21531. Here, the testimony of GO staff indicates that any communications relating to public business transmitted over Confide fell within the scope of Series 21532, and thus those messages did not fall within the scope of Series 21530 or 21531.

While the use of Confide by GO staff does not appear to have violated Chapter 109 or the Sunshine Law, the AGO considers it a best practice not to use Confide to communicate regarding public business. Most importantly, because Confide automatically deletes messages after they are read, the app prevents public employees from exercising reasoned judgment as to whether a communication must be retained under Chapter 109. While the available evidence in this case indicates that messages transmitted over Confide constituted “transitory” communications that need not be retained, it is conceivable that some text messages do fall within record series that require retention. If a public employee were to receive such a communication via Confide, she would be unable to retain that communication as required by Missouri law. In addition, under certain circumstances, laws other than Chapter 109 and the Sunshine Law or record-management best practices may require the retention of communications that constitute transitory communications under Chapter 109. While there is no evidence of such communications in this case, the use of Confide to transact public business introduces the risk of inadvertent violations of those principles. Finally, experts have raised concerns regarding the security of Confide.³ To be sure, all electronic communications face some risk of unauthorized access. However, these security concerns undermine the most concrete justifications for using such an app. The AGO supports the GO’s revision of its record-retention policies to prohibit the use of Confide for any communications relating to public business, regardless of whether those communications must be retained under Chapter 109.

³ See, e.g., Lily Hay Newman, *That Encrypted Chat App the White House Liked? Full of Holes*, WIRED MAGAZINE (Mar. 9, 2017), at <https://www.wired.com/2017/03/confide-security-holes>; Kate Conger, *Researchers critique security in messaging app Confide*, TECH CRUNCH (Mar. 8, 2017), at <https://techcrunch.com/2017/03/08/researchers-critique-security-in-messaging-app-confide>.