



**Date:** February 2, 2021

**To:** **Members of the Law & Public Safety Committee**

**Copies to:** Paula Boggs Muething, City Manager  
Melissa Autry, Clerk of Court

**From:** Andrew W. Garth, City Solicitor  
Emily Smart Woerner, Deputy City Solicitor

**Subject:** **Report re Motion #202100060 (text messages)**

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202100545

This report is in response to Council Motion #202100060, submitted by Vice Mayor Smitherman, which states as follows:

*We move that the city administration release to the public the additional 2000 plus text messages associated with the "Gang of 5," excluding any text messages related to personal matters.*

**Introduction and Summary**

Based on Council discussion, the City Administration understands the above motion as a Council request to the administration to identify and disclose all text message public records on the five cloned councilmember phones in the possession of the City administration, excluding personal messages or content that is protected from disclosure by law (e.g., excluding medical records, attorney-client privilege, or personal financial information). This report outlines a process by which the City Administration could identify such records and release them to the public. The process necessarily involves safeguards to comply with public records laws as well as with an ongoing federal court order which restricts the release of text messages that do not concern city business. Relevant background and legal context is provided in the analysis, below. A summary of the actions required is as follows:

1. If the motion is approved by Council, the City Administration will petition the Federal Court to appoint a special master to provide court assistance in identifying to the extent feasible all the public records contained in the phone data beginning on January 2,

2018. Engaging the court provides a forum for applying the existing court order to this search and production process.
2. The Law Department would assist the committee in identifying search terms as a starting point to extract messages from phone data that may relate to official business and would therefore potentially be public records. It is anticipated that the search would be overinclusive at the outset but the final search would be subject to input and review by the special master charged with identifying and excluding private and protected messages.
  3. Once the final search terms have been approved by the special master, the Law Department would engage the City's third-party data processing vendor to perform the search and deliver the results to the special master for final review and release to the public. Initial conversations with the City's vendor suggest that the search itself would take approximately four weeks due to the complexity and the amount of data required to be sorted, indexed, and produced. The administration does not have software and computer processing capabilities required to do anything but simple, targeted public records searches from the phones.
  4. The City Law department has identified a potential existing budget source to be used for the costs of the searching and the indexing (approximately \$25,000), but the court will likely order the City to pay the fees associated with the review by the special master which would be paid from the judgment fund.

### **Background: Litigation and Court Order**

In April 2018, a person named Mark Miller filed two lawsuits against five members of Council alleging violations of the Ohio Open Meetings Act and the Ohio Public Records Act. At issue in the lawsuit was whether a quorum of Council communicating via a text message thread became a virtual "meeting" that was not open to the public. For a time, the five members of council were represented by outside counsel due to a professional legal conflict. While the members were being represented by outside counsel, in late October and early November 2018, outside counsel used a contractor to create a digital copy of the phones, often referred to as an "image" or "clone" of your phone. Because of the way that smart phones operate, the cloned data included the entire content of council members' phones. Thus, the phone clones include personal communications such as, for example, any texts sent to family members or friends – regardless of whether it had anything to do with city business.

The purpose of outside counsel in creating the phone clones was so that the five members of council could respond to discovery requests in the litigation

matter. Eventually, the cases brought by Mr. Miller were resolved. Part of the resolution was an agreed order, along with a production of texts exchanged between and among the five Councilmembers named in the lawsuit. While the City's normal practice under public records law would be to segregate "City" and "non-City" texts from any production, there was an exception made for this lawsuit. Therefore, all of the texts sent between the five Councilmembers (or any combination of them) were produced, even if they had nothing to do with roles as Councilmembers. Those texts were released to the public and are a part of the minutes of Council.

Separately, two additional lawsuits were filed in the Ohio Court of Claims regarding whether text messages on personal, privately-paid-for cell phones are subject to the Ohio Public Records Act. This was an open question under Ohio law – there were no court decisions directly on this issue. The City Solicitor's Office argued that the City did not have possession of these texts and so the public records act did not apply. However, the Court of Claims found that text messages located on private phones are subject to the Public Records Act. As a result, the City produced and released another batch of council text messages in that court case. The City has also updated its policies and retention schedules to reflect that text messages can constitute public records.

In the wake of the various lawsuits about text message communication among Council, the media and other citizens made dozens of public records requests. The City has required that all such public records requests comply with the requirements for a request under law; namely, they must be for a limited time period and include a subject which relates to City business.

However, after there were additional texts released in response to public records requests, a group of concerned people filed a lawsuit in federal court that argued their non-City communications with Councilmembers are entitled to protection. The result of that lawsuit is a permanent federal court order that prohibits the City from releasing non-City business text messages contained on the images of the phones without councilmember consent. The City has adhered to this order as required by law.

There have been at least two instances where people have requested the entire copy of the five cell phones in a public records request. The City has denied those requests because they are not proper under the Ohio Public Records Act and implicate a whole host of constitutional and privacy concerns. We explained to those requesters the following:

In 2014, the Supreme Court of the United States held that warrantless searches of an arrested person's cell phone are unconstitutional under the Fourth Amendment. *Riley v. California*, 573 U.S. 373, 403 (2014).

In reaching that holding, the Court discussed the immense storage capacity of modern cellular phones, noting, “The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone.” *Riley*, 573 U.S. at 393. Here, the requester asked for a complete duplication of the “minicomputers” carried by the five councilmembers. Because the request is for a complete duplication of voluminous records, the request is denied. *State ex rel. Glasgow v. Jones*, 119 Ohio St. 3d 391, ¶ 17 (2008).

More significantly, the *Riley* court concluded, “Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life,” [citation omitted]. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.” *Id.* Here, your request for a copy of each cell phone encompasses information subject to a host of concerns, including statutory and common law privileges as well as privacy concerns of a constitutional dimension. Therefore, the request is denied under Ohio Revised Code 149.43(A)(1)(v). Similarly, given how people use personal cell phones, most of the information contained on the cell phones would involve private concerns and would not involve City business.

When presented with a proper public records request for text messages, the City has assisted requesters with narrowing their searches to comply with the law. To our knowledge the administration has produced all texts that should have been produced in response to either a lawsuit or proper public records request. It is also the case, however, that our software search capabilities are relatively unsophisticated (allowing only simple key word searches, date ranges, and recipients). Moreover, as the City’s attorneys, we cannot review texts that contain personal legal advice and for which attorney-client privilege has been asserted. And, lastly, the City administration simply lacks context and background for text message communications to be able to say — in many cases — whether it was sent in connection with city business, campaign activity, a personal exchange, or something altogether different.

There are those that may have found the City’s approach to the court order and careful application of public records laws to be frustrating. The Administration strives to be transparent — in this and other matters — and any suspicions to the contrary are misplaced. The City Administration has no objection to acting on recommendation of a majority of Council to take additional steps to release any remaining public records in its possession in a manner consistent with applicable law. But to do so without third-party (*e.g.*, the Court) involvement is not feasible.

## **Identifying and Releasing Any Remaining Public Records**

If Council adopts the motion, the Administration will treat the motion as a valid public records request. Due to legal limits and other practical constraints identified above, we will engage the federal court to ensure that records are properly released without subjecting the municipal corporation and its employees to public records or privacy-related liability or being found in contempt of court.

As a first step, the Administration will strive to draft a complex and broad data search to capture as many potential public records as possible. We will solicit input from members of council for search terms that potentially pertain to city business. We anticipate that the proposed search will also include parameters intended to exclude privileged attorney communications and personal communications with family and friends.

Simultaneously, the City will petition the federal court to appoint a special master to oversee the process and to advise as to the appropriate means for the owners of the five phones to participate as needed to protect privacy and privilege concerns. The Administration will present the proposed search to the special master for review and confirmation prior to conducting the search. The City would be a party to this process but anticipates that the Court would have final authority as relates to release the requested public records.

In coordination with the Federal Court, the Law Department will work to engage the City's third-party data processing vendor to perform the search. Neither the Court nor the City has the hardware and software capability to independently run anything but the simplest of term-based searches of the phone data. Law anticipates being able to absorb this cost into its existing legal services budget for FY21 absent unforeseen resource needs. The City will request the special master to confirm that, upon completion, the phone copies may be returned to the members of council or disposed of consistent with the City's record retention policy.

## **Search Architecture**

As discussed above, the administration will assist the special master in crafting the final search based on the topics identified by City Council. In order to give an idea of how the search must be structured to extract data from the cloned phones, we offer the following example of potential search terms. We invite councilmembers to propose additional terms to the Law Department to be added. The structure of the search will be based on four basic categories:

1. **INCLUDE:** texts between identified persons (phone numbers) reasonably likely to relate to Council business. Texts in this category would include, for example, texts between one or more city public officials or texts between public officials and persons having business before the City.
2. **INCLUDE:** texts containing one or more keywords potentially relating to public business during the time in question:
  - a. [list of legislative/council keywords] Vote, voted, votes, council, city, Cincinnati, mayor, manager, department, dept, ordinance, ord, resolution, reso, motion, clerk, introduce, pass, enact, appropriate, appropriation, approve, approved, failed, fails, appropriation, committee, law, public, policy, veto, override, refer, member, meeting, amend, amendment, budget, project, administration, neighborhoods, agenda, item, rules, constituent [add], by-leave, hold, chair, majority, speaker, report, present, presentation, powerpoint, support, oppose, communication, FYI memo ... (final list with input from Council)
  - b. [list of subjects pertaining to city business in the public interest – to be developed with input from Council] resign, replace, remove, terminate, charter, municipal code, budget, retaliation, retaliate, settlement, resignation, settle, development, construct, abatement, incentive, terms, threat, threaten, zoning, neighborhood, citywide, negotiate, developer ... (final list with input from Council)
  - c. Names of departments, relevant committees, city officials, persons engaged in city business... ... (final list with input from Council)
3. **EXCLUDE:** texts with persons identified as family members, personal non-city texts (e.g., friends or relations not reasonably related to city business), private attorney communications subject to privilege under state law, communications with private health care practitioners—all to be determined by special master with input from the owners of the source phones.

4. **EXCLUDE:** Privileged communications with City attorneys to prevent inadvertent disclosure of privileged communications.

The search terms presented to the special master would include the above categories with additional input from Council. The final terms would, however, be left to the discretion of the Court.

Please let me or Deputy City Solicitor Emily Smart Woerner know if you have questions.