

Private messaging apps increasingly used for public business

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In this May 14, 2018 file photo, Gov. Eric Greitens leaves the civil courts building in St. Louis, Mo., after speaking with reporters after a felony invasion-of-privacy case against him was dismissed. In Missouri, Democratic lawmakers introduced a bill that would make clear that personal social media pages and messages sent through digital platforms such as Confide and Signal are public records as long as they relate to official business. The legislation arose because of a controversy involving use of the Confide app by Greitens, who resigned in June amid a series of scandals. Credit: Robert Cohen/St. Louis Post-Dispatch via AP

One app promotes itself as a way to discuss sensitive negotiations and human resources problems without leaving a digital record.

Another boasts that disappearing messages "keep your message history tidy." And a popular email service recently launched a "confidential mode" allowing the content of messages to disappear after a set time.

The proliferation of digital tools that make text and email messages vanish may be welcome to Americans seeking to guard their privacy. But open government advocates fear they are being misused by public officials to conduct business in secret and evade transparency laws.

Whether communications on those platforms should be part of the public record is a growing but unsettled debate in states across the country. Updates to transparency laws lag behind rapid technological advances, and the public and private personas of state officials overlap on private smartphones and social media accounts.

"Those kind of technologies literally undermine, through the technology itself, state open government laws and policies," said Daniel Bevarly, executive director of the National Freedom of Information Coalition. "And they come on top of the misuse of other technologies, like people using their own private email and cellphones to conduct business."

Some government officials have argued that public employees should be free to communicate on private, non-governmental cellphones and social media platforms without triggering open records requirements.

Lawmakers in Kentucky and Arizona this year unsuccessfully proposed exempting all communications on personal phones from state open records laws, alarming open government advocates. A Virginia lawmaker introduced a bill to exempt all personal social media records of state lawmakers from disclosure.

New Kansas Gov. Jeff Colyer went the opposite direction in February with an executive order that requires his staff to use official email accounts for all government business. He also banned private accounts for any communications related to "the functions, activities, programs, or operations" of the office.

In neighboring Missouri, Democratic lawmakers introduced a bill that would make clear that personal social media pages and messages sent through digital platforms such as Confide and Signal are public records as long as they relate to official business. The legislation arose because of a controversy involving use of the Confide app by former Gov. Eric Greitens, who resigned in June amid a series of scandals.

"We need to clarify the expectations, because we should not be allowed to conduct state business using invisible ink," said state Rep. Ingrid Burnett, who said she's disappointed the bill didn't advance.

The proposals were captured by a new Associated Press application called SunshineHub, a digital tool that tracks bills related to government transparency in all 50 states. They point to the mushrooming challenge of defining and maintaining government records in the smartphone era.

The issue exploded into public view last year amid reports that several employees in the office of Greitens, then Missouri's governor, had accounts on Confide. The app makes messages disappear immediately after they are read and doesn't allow them to be saved, forwarded, printed or captured by screenshot.

The news prompted an inquiry from the state attorney general, an ongoing lawsuit alleging the practice violated the state's sunshine law and the bill that would declare all such communications relating to government business to be public records.



In this Jan. 31, 2018 file photo, Republican Jeff Colyer is sworn in as the 47th governor of Kansas during a ceremony at the Statehouse in Topeka, Kan. In February, Colyer announced an executive order that requires his staff to use official email accounts for all government business. He also banned private accounts for any communications related to "the functions, activities, programs, or operations" of the office. Credit: AP Photo/Orlin Wagner

Greitens and aides have said they used Confide only to discuss logistics such as scheduling matters that were insignificant, "transitory" and therefore not required to be maintained as public records. An inquiry by Attorney General Josh Hawley found no evidence the practice as described was illegal, but investigators didn't recover the disappeared messages.

Greitens' explanation for using the app has drawn skepticism from

critics, who question why mundane messages would be sent on a platform that promotes "honest, unfiltered confidential conversations" on sensitive topics.

"That's absurd. Nobody switches out to a secret burner app to do that," said Missouri attorney Mark Pedroli, who is suing Greitens on behalf of an open government group and using the case to investigate whether the former governor used the app to communicate with donors and political aides.

"One of the motivating factors of this lawsuit is to find out—what could be the worst-case scenario of a governor or elected official using a secretive app like this?"

He said government agencies should move to ban or severely restrict the use of such applications before they become commonplace. He already has obtained during the litigation a training slide that repeatedly instructed members of Greitens' staff to never send text messages on government cellphones, an apparent suggestion to do such business only on personal phones.

In Kentucky, language added to an unrelated bill in March would have exempted all electronic communications related to public business—including calls, text messages and emails—from the state open records law. Those messages would be exempt from disclosure as long as the phone or computer was paid for with private money and used non-governmental accounts.

Open government advocates protested the legislation, which would have been the first of its kind in the nation. Lawmakers modified it so it would exempt only "communications of a purely personal nature unrelated to any governmental function." Media and open government advocates called the language unnecessary, saying personal

communications already aren't subject to disclosure.

A similar bill introduced in Arizona to shield all communications created, stored or received on electronic devices paid for with private money died without a hearing.

The measures in Kentucky and Arizona were introduced after the states' attorneys general issued legal opinions concluding that government agencies were not responsible for managing their employees' personal phones, and because of that such communications are not subject to open records laws.

Similar concerns arose after Gmail introduced its confidential mode, which allows senders to control who can access, forward, print or copy sensitive data and to set a time for messages to "expire."

National Freedom of Information Coalition board president Mal Leary recently wrote a letter to Google arguing that those features, which were recently launched as part of a redesign, could promote the illegal destruction of public records. Leary noted that Google's suite of services is commonly used by state and local governments and urged the company to disable that feature from accounts and emails linked to public agencies.

"Technology that allows the self-destruction of official, electronic public communications is not promoting transparency, and under most state open government laws, is illegal," Leary wrote.

Google responded that those features are similar to other tools in the marketplace, and that government administrators will be able to choose to disable them on their networks.

The company noted that even after a message in "confidential mode"

expires and its content is no longer available, a history of the message remains available in the sent folder and the headers and subject line remain visible in the recipient's inbox.

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