

Detroit Free Press

MICHIGAN

Top Michigan State Police officials using encryption messaging apps that can evade FOIA



Paul Egan

Detroit Free Press

Published 6:02 a.m. ET Jan. 22, 2021 | Updated 6:00 p.m. ET Jan. 23, 2021

LANSING — Top officials at the Michigan State Police have been using text messaging encryption devices that can put their internal communications out of the reach of the Freedom of Information Act and legal discovery, according to admissions the MSP made in a civil lawsuit.

Among those who have downloaded the "end-to-end" encryption applications onto their state-issued phones are a lieutenant-colonel, two majors and two first lieutenants, according to court records obtained by the Free Press.

The use by top MSP officials of the encryption devices — under which text messages, once deleted, can leave no record on either the phone or the state of Michigan server — was disclosed recently in a federal lawsuit brought against Gov. Gretchen Whitmer, Col. Joseph Gasper, who is the director of the department, and the MSP.

Earlier, the department also admitted that both Gasper, and the manager of the MSP records section, Lori Hinkley, who oversees FOIA requests, had also installed and used the technology on their state phones. But late on Thursday, after the Free Press made inquiries about the encryption apps, the MSP sent the plaintiffs a corrected filing, through the state Attorney General's Office, which denied that Gasper and Hinkley had used the encryption app on their state phones, contrary to the earlier admission.

The use of such applications by government employees — not necessarily with official authorization — is a growing concern among advocates for government transparency. It appears to fly in the face of Michigan's Freedom of Information Act, which says records of communications between public officials, outside of specific exceptions, are public record. It

also appears to violate the spirit of a 2019 Whitmer executive directive, which related to emails, rather than text messages, but said emails "may not be disposed of by a state department or autonomous agency except in compliance with an applicable record retention schedule."

Government use of the end-to-end encryption application Signal emerged as an issue in 2017 when Politico reported that a group of U.S. Environmental Protection Agency officials were using the app to discuss what to do if then-President Donald Trump's political appointees sought to undermine their agency's various missions.

Signal is the same app that has been in use by top officials at the MSP, said R. Michael Hahn, a former MSP inspector. Hahn was fired in March 2020. The department said it fired Hahn for violating departmental policy related to how he handled the promotion of a subordinate. Hahn alleges he was fired in retaliation for speaking out against what he says are unlawful racial and gender hiring and promotion preferences the department has adopted as it seeks to increase its diversity.

James Fett, a Pinckney attorney representing Hahn, said he was suspicious when he requested copies of text messages exchanged among the top brass related to the firing of Hahn and the demotion to inspector of a second client, former Capt. Michael Caldwell, who was Hahn's supervisor.

Hahn's firing and the simultaneous demotion of Caldwell, "I can assure you did generate ... a lot of electronic discussion," Fett told the Free Press on Wednesday. The firing and demotion followed "a four-month-long investigation," but the "texts that we got back were extremely sparse."

Fett, through the court, sent the MSP formal requests to admit that top officers and even the MSP civilian who oversees FOIA requests, were using the encryption software.

Fett asked the MSP to admit that Gasper, Hinkley, Lt. Col. Kyle Bowman, Maj. Emmitt McGowan, Maj. Beth Clark, 1st Lt. Brody Boucher, and 1st Lt. Jason Nemecek had each downloaded and used an instant messaging application with end-to-end encryption on their state-issued cellphones.

Assistant Attorney General Mark Donnelly, who is representing the state defendants in the lawsuit, admitted in an Oct. 29 response, obtained by the Free Press, that was true for each of the officials named. But in a corrected filing Thursday, Donnelly said use of the encryption app on state phones was not true for Gasper or Hinkley, though it was true for the others. The

questions from Fett and the responses from Donnelly did not identify a specific end-to-end encryption application. But Hahn, who was also a high-ranking MSP official until his dismissal, said he knows senior officers there have been using Signal, including several who were not included in the request because they were not directly relevant to the lawsuit. Several senior MSP officials dropped off of Signal in the last 24 hours, after the Free Press made inquiries, Hahn said Thursday.

More: State halts work on \$12.2M Michigan State Police citizens database, saying it doesn't work

More: Michigan man faces terrorism charges over fake bomb call, threat to lawmaker

Asked whether Signal was the encryption application senior MSP officials had been using, MSP spokeswoman Shanon Banner refused to say, citing "pending litigation."

Signal, which is a free-to-the-user app funded by grants and donations, says on its website: "We can't read your messages or listen to your calls, and no one else can either."

Hahn said the Michigan Department of Technology, Management and Budget should explicitly ban the use of end-to-end encryption applications by state employees, if it has not already.

"Every member of the Michigan State Police has had multiple training sessions on the importance of preserving government-related texts on devices owned by the people, and to not conduct government business on privately owned devices," Hahn said.

"Col. Gasper and his executive level commanders have had this training many times and know better, yet here we are. What a fine example they're setting for junior officers and the troopers. Is that transparency?"

Asked whether state employees are permitted to install end-to-end encryption applications on their state-issued phones, Caleb Buhs, a spokesman for DTMB, said that would be allowed only "if the application is for legitimate state business."

Buhs was then asked to give examples of what the Whitmer administration would consider "legitimate state business" that would leave no record of official communications between state employees. He did not respond. Buhs also did not respond when asked whether the DTMB had specifically authorized the use of Signal by any state employees.

Lisa McGraw, public affairs manager for the Michigan Press Association, said the revelations are disturbing.

“Any attempt to avoid transparency by those the taxpayers employ is unacceptable — even more so for police employees in an era where accountability and transparency has never been more important in gaining the public trust,” McGraw said.

Further, “law enforcement is already afforded a level of coverage that prevents access through the public's inability to obtain body camera footage, personnel information and other records exempt from FOIA,” she said.

Contact Paul Egan: 517-372-8660 or pegan@freepress.com. Follow him on Twitter @paulegan4. Read more on Michigan politics and sign up for our elections newsletter.

Become a subscriber.