

Public Records in an Electronic World

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This provides information relating to public records laws and treatment of E-mail and other electronic documents.

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PUBLIC RECORDS IN AN ELECTRONIC WORLD

Applicability of Public Records Laws to E-mail

As technology has evolved and use of e-mail has become more widespread, questions arise about a public agency's obligations to retain e-mail correspondence. Do e-mails constitute public records? If so, how long must e-mail be retained? What are sufficient means of complying with record retention requirements?

Despite the fact that electronic communications may seem less permanent and substantial than paper documents, they are nonetheless subject to Washington laws pertaining to public records. Any record that is created or received in the transaction of public business and is not otherwise exempted is a public record — regardless of its medium. Thus, any e-mail that falls within this definition is subject to the record retention and disclosure requirements codified under RCW Title 42, Chapter 17.

Below, we have summarized guidance provided by the Washington Secretary of State's Office regarding which types of information typically constitute public records and which have no retention value.¹ It is important that retention systems be designed with both categories in mind. While destroying public records violates the state's record retention laws, failing to follow a retention policy and delete documents that do not constitute public records also has consequences. Whether in litigation or responding to public record requests, public agencies without proper retention policies are often faced with huge volumes of documents to be reviewed, and high costs associated with that review, particularly with e-mail. Adequate document retention policies can help by ensuring that only those documents that are required for retention are retained. Should litigation be anticipated or is pending, all documents relating to issues in the case must be retained, often for long periods of time. The more data that is saved by failure to follow a retention policy before this occurs, the more burdensome responding to discovery requests will be.

Principal categories of e-mail messages likely to be public records:

- Correspondence or memoranda related to official public business
- Original reports
- Policy and procedure directives
- Agenda and minutes of meetings
- Documents related to legal or audit issues
- Messages documenting agency actions, decisions, operations and responsibilities
- Documents that initiate, authorize or complete a transaction

¹ See *Local Government Records Retention Schedule*, "Electronic Information — Electronic Mail," GS50-20C.

Examples of e-mail messages that are not likely to be public records:

- Appointment calendar messages
- Information down-loaded from bulletin boards or web sites
- Information-only copies of documents that do not related directly to the functional responsibility of the agency or office that receives them
- Personal messages and announcements not related to official business
- Phone message slips that do not contain public record information

In addition, just as is the case with paper records, agencies need not disclose information that might compromise vital government interests if disclosed, nor information about individuals that may be considered private and confidential.

Setting up an E-mail System to Comply with Public Disclosure Laws²

E-mail back-up tapes are not an appropriate surrogate for a filing system. The Archives and Records Management Division of the Secretary of State's Office (Archives Division) advises that government entities may choose whether to retain electronic records in paper or electronic format. However, e-mail back-up tapes are not an appropriate surrogate for a structured filing system. Because e-mail systems are not typically designed to categorize and retain information, it is nearly impossible to retrieve specific records from them. Thus, public records should be retained in e-mail format only as long as they are being worked on or distributed. For retention purposes, public record e-mails should be transferred either to paper or to a disk or hard drive.

A paper-filing system is preferable. The Archives Division strongly recommends that state agencies print out e-mails that are public records so they can be integrated into the agency's paper filing system. E-mails should be filed based on their content and function, rather than filing all e-mail messages together. Also, e-mails that are retained as printed documents must include full transmittal information, including the complete names of the sender, recipient, the date the message was sent, the distribution list and any attachments.

Some records must be retained in paper format. Records that must be retained for more than three years and those types of records designated as "Archival" on the Secretary of State's records retention schedule have continuing historical value and must be retained in paper format.

² The recommendations that follow were drawn primarily from *Electronic Mail: Guidelines for Developing E-mail Policies and Establishing Procedures*, by the Archives and Records Management Division of the Office of the Secretary of State.

An electronic filing system may be acceptable. If an agency adopts a electronic filing system for public record e-mail, it must take steps to ensure that records are easily retrievable. The Archives Division suggests the following guidelines:

- Group related documents using a directory and subdirectory file management structure.
- Develop and apply file-naming standards.
- Ensure that public record material remains in an accessible format for the entire retention period.
- Ensure that public record material is accessible to all authorized staff without requiring use of a personal password.
- Develop security precautions to protect against unauthorized access to public record material.
- Ensure that the relevant transmittal data of electronic public records is preserved.
- Develop a process for scheduled deletions of public record e-mail messages that no longer require retention (based on either the General Retention Schedule provided by the Archives Division or an agency-specific approved schedule).
- Delete non-public record e-mails as soon as their purpose has been served.

Also, the Secretary of State's office is currently in the process of drafting a section of the Washington Administrative Code that would set certain standards for public records stored on electronic media.

*Practical tips for developing an e-mail policy*³. The Archives Division recommends that government entities develop policies to guide staff on using, managing and retaining e-mail. Generally, e-mail policies should define the roles and responsibilities of managers, technical staff, records management staff and end-users to avoid gaps in documentation, inconsistencies and unnecessary duplication. E-mail policies should:

- **Advise staff regarding appropriate use of e-mail.** Because government entities provide e-mail to facilitate the conducting of official business, they may set limitations on e-mail use similar to those that exist for telephone, fax and postal mail.
- **Ensure that any e-mail policy complies with laws regulating privacy protection.** An Executive Order issued by Gary Locke affirms the need for agencies to identify and protect any system of records that contains personal information, retaining such information only as long as necessary to carry out the purpose for which it was originally collected or for the minimum period required by law.⁴
- **Inform employees of employer's rights to access e-mail.** Ensure that employees are aware of the terms and conditions under which requestors may have access to e-mail, as well as the

³ See generally *Electronic Mail: Guidelines for Developing EMail Policy & Establishing Procedures, A component of an agency records management program*, Archives and Records Management Division, Records Management Section, Office of the Secretary of State.

⁴ See Executive Order 00-03 *Public Records Privacy Protections Preamble to All State Agencies*, April 25, 2000.

responsibilities of end users to protect the personal privacy of individuals who may be subjects of e-mail messages.

- **Educate staff regarding retention requirements.** Educate staff regarding what constitutes a public record and who is responsible for its retention. Because e-mails are often distributed to numerous recipients, email policies should establish who is responsible for maintaining the primary record copy. Otherwise, no one may keep the message or everyone may retain a copy of it. (Generally, the person who sends an e-mail message should retain its record copy; however, the varied ways in which e-mail is used may necessitate exceptions.)
- **Use subject headings.** Regardless of whether e-mails are retained in an electronic or paper format, staff should be instructed to use descriptive subject headings in order to facilitate record retrieval. (For example, "June, 2000 State Records Committee Minutes" is preferable to "Minutes.")

Outstanding Questions Regarding Compliance with Requests for Electronic Records

Electronic records raise some novel, as yet unanswered issues with respect to what is required of governmental entities in order to comply with a request.

What is an identifiable record? Records requests must be for "identifiable records." Government entities are not required to "create" records in order to comply with a public disclosure request. Does the fact that electronic records are more easily searchable than file cabinets mean that governments are obliged to run reports they would not otherwise run in order to comply with a request? While the answer is not clear, a possible approach to dealing with such a request is to consider the level of difficulty involved in complying with the request. If any employee could easily extract the requested information, it may not constitute creation of a new record. However, if a computer expert must write a special program to generate the requested record, it seems clear that the public entity is being asked to create something new.

Must public agencies comply with format requests? The law is unclear as to whether public agencies must comply with requests that records be provided in a particular format. While the Public Disclosure Act would probably not require public agencies to purchase new computer programs in order to comply with a format request, they should probably provide records in the requested format if current systems make doing so relatively easy.

Some question also exists as to how an agency should respond if the requested electronic record is only decipherable with the use of software that was designed by and for the agency. Until the legislature or courts address this issue, state government entities should probably develop a policy that states how far they are able to go in responding to requests that raise this issue.

Using Web Sites to Comply with SEC Securities Offering Disclosure Rules

A web site may provide an efficient means for municipalities to comply with the Securities and Exchange Commission's ("SEC") primary and secondary market disclosure requirements. For example, web sites can be used to post bond offering documents and subsequent investor relations materials. However, municipalities should exercise caution in using the Internet for such purposes. Because SEC rules were developed in a paper-based world, their application to online activities can be uncertain, potentially exposing municipalities to liability.

In April 2000, the SEC issued a series of releases providing interpretive guidance as to how the federal securities statutes should be applied in an online world. These releases, Nos. 33-7856, 34-42728, and IC-24426, affirmed and updated the SEC's previous guidance on the subject (offered in Release No. 33-7233 of October 1995). While encouraging electronic delivery of required information, the SEC believes that paper-based delivery must continue to be available until electronic media become more universally accessible. Thus, for the time being, required information may be disclosed in electronic form only if such distribution results in the intended recipients receiving substantially equivalent information as they would have had the information been delivered in paper form.

To comply with SEC rules, electronic disclosure must be "substantially equivalent" to the paper format alternative in terms of notice, access and evidence of delivery.

Notice: Ensuring equivalent notice may sometimes require using regular mail in addition to electronic media. For example, an issuer could not presume that investors would have adequate notice of a bond offering document that was typically mailed to investors simply because it had been posted to a web site. In order to provide intended recipients with adequate notice of such a document, a separate mailed notice might be necessary to alert recipients to the posting of the document on the web site.

Access: To provide equivalent access, electronic versions of a document must be available for as long as the delivery requirement applies. The April 2000 release clarifies that issuers may deliver documents in portable document format (PDF), as long as they take appropriate measures to assure that investors can easily access the documents. Also, paper versions of documents delivered electronically must be made available.

Evidence of Delivery: Issuers who deliver information electronically have reason to believe that delivery requirements have been satisfied if:

- An investor gives informed consent to receive information through a particular electronic medium and the issuer assures appropriate notice and access as discussed above.
- The issuer obtains evidence that an investor actually received the information, for example, by electronic mail return-receipt or confirmation that the investor has accessed, downloaded, or printed the document.
- An investor accesses a document that is hyperlinked to a required document.
- An investor uses forms or other material available only by accessing the required information.

Even if the above guidelines are followed, use of electronic media to comply with federal securities laws exposes municipalities to certain risks. Just as issuers are liable for misstatements in required paper filings and disclosures, they may incur liability as a result of any misleading statements that appear on their web site. Thus, a municipality may be liable for providing out-dated information and for mistakes made by information technology consultants who help format information for electronic posting or transmission. Also, a municipality that embeds a hyperlink to a third-party's website in any document required to be filed or delivered under federal securities laws may incur liability for inaccurate statements made by the other party. The SEC has cautioned that when an issuer embeds a hyperlink in a document, the issuer will be deemed to have adopted the hyperlinked information. To minimize risk of liability for misleading statements, the following precautions should be taken:

- Separate the disclosure documents from the municipality's general information by, for example, establishing separate sites. Make clear that the general web site is not part of, nor incorporated into, the disclosure site.
- Establish procedures for regularly updating the web sites on which disclosure documents are posted, to avoid providing out-of-date information.
- Include a disclaimer stating that all information provided on the site is only current as of a specified date and require that users take affirmative action to acknowledge the disclaimer (such as requiring them to click on an "I agree" button after reading the disclaimer).
- Post investment materials in a format that is not subject to manipulation by users.
- Proceed with extreme caution when embedding hyperlinks to third-party web sites.
- Proceed with caution when making historical information available on a web site. Identify archival information clearly and include appropriate disclaimers.

Even as the SEC provides guidance regarding how issuers may use electronic media to comply with federal securities laws, it recognizes that its recommendations are likely to evolve as technology changes. The 2000 releases conclude with requests for comments on such questions as whether access to the Internet is so prevalent that posting on the World Wide Web should be sufficient evidence that delivery requirements have been met. While these guidelines hold for the time being, significant changes may be just around the corner.

E-Sign

The Electronic Signatures in Global and National Commerce Act ("E-sign") became effective on October 1, 2000. The Act aims to "facilitate the use of electronic records and signatures in interstate or foreign commerce." With important exceptions, E-sign gives electronic signatures and contracts the same legal effect as hand-written signatures. While the law may have enormous and far-reaching consequences, as with most new legislation, the extent of its impact is still unclear.

By its terms, E-sign supersedes most state laws requiring that documents and signatures be provided in written form. This means that E-sign may have eliminated state requirements that bond purchase agreements and bids have paper signatures, as well as state laws specifying that a document must be notarized on paper. E-sign does not supersede state law if a state has adopted the Uniform Electronic Transactions Act in the exact form issued by the National Conference of Commissioners on Uniform State Laws; no state has yet adopted UETA in that form. Washington has not adopted UETA, and the Business Section of the Washington State Bar Association has approved a report recommending against adoption of it for various substantive reasons; that report is available at: <http://www.wsba.org/sections/biz/lccc/report/1999.htm>.

The extent to which E-sign applies to transactions involving municipalities is uncertain. Several provisions of the law limit the scope of its impact. E-sign only applies to transactions in or affecting interstate or foreign commerce. Thus, certain municipal transactions that are inherently local could be outside its reach, although it is possible that almost any transaction on a computer utilizing the Internet may qualify as affecting interstate commerce. Also, State Regulatory Agencies are not mandated to follow E-sign when they are actually party to a contract. E-sign does not explicitly define "State Regulatory Agency," so it is unclear exactly which state and local government entities come under this exception.

Because the exception for State Regulatory Agencies applies only when an agency is a party to a contract, E-sign may nonetheless supersede state laws requiring that certain contracts between private parties be submitted in paper form. For example, county recorders may be required to accept filings of deeds and mortgages in electronic form. While this issue is not yet settled, state government entities may continue to require paper documents when there is a compelling government interest in doing so and certain other requirements are met. The unofficial legislative history notes, however, that there is an expectation that states will use this power sparingly and E-sign itself prohibits State Regulatory Agencies from re-imposing paper requirements in many circumstances.

Whether or not state agencies and other local government entities are obliged to follow E-sign, they may nonetheless elect to take advantage of the law, using or accepting electronic records in reliance on the new law's provisions. However, if an existing law requires that information relating to a transaction affecting interstate commerce be made available to a consumer in writing, E-sign mandates that certain disclosures be made to the consumer before such information is provided electronically and that the affirmative consent of the consumer be obtained in order to provide the information electronically. These include, among other requirements, informing the consumer of:

- His or her right to have the record made available in nonelectronic form.
- His or her right to withdraw consent and any fees or other consequences that result from such a withdrawal.
- Whether the consent will apply only to a specific transaction or to other records that may be provided during the course of the parties' relationship.
- Procedures the consumer must use to withdraw consent and to update information needed to contact the consumer electronically.
- How the consumer may request a paper copy of an electronic record and whether a fee will be charged for such a copy.

In conclusion, the development of electronic documents challenges traditional systems of record-keeping, document delivery and document signature. The new laws and other efforts summarized above provide some guidance in using and storing electronic documents in a manner that complies with public records requirements, securities law disclosure rules and the E-sign law. Please contact any of the attorneys listed on the cover sheet at 206-623-7580 for more information about the treatment of electronic documents under these laws.

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