

E-discovery under State Open Records or Sunshine Laws

Compliance brief by Benjamin Wright, JD

Increasingly, public agencies are required to search for and turn over e-mail records in response to freedom of information and open records requests. An example of a Florida open records lawsuit seeking municipal government e-mail is described at Eric Ernst, "High cost to having a strong records law," August 27, 2008. See <http://www.heraldtribune.com/article/20080827/COLUMNIST/808270351/-1/newssitemap>

Generally speaking, under either state or federal law, a freedom of information act link to http://en.wikipedia.org/wiki/Freedom_of_information_act - requires government to disclose requested records to citizens. Sometimes a FOIA might be known as (or associated with) an open records act or a sunshine act.

The federal FOIA applies to US federal agencies. Each state (as well as the District of Columbia and some territories) has its own similar law, which applies to both state agencies and local governments such as counties, municipalities and school districts.

The philosophy of these laws is that democracy works best if citizens have access to virtually all the records of government. As e-mail has become popular, these laws have been interpreted to cover e-mail records.

One example of a decided case: A Kentucky judge required state government to give a man copies of e-mails between his wife, a state employee, and another state employee whom the man suspected was having an affair with his wife. (Associated Press, "Judge: Ky. Man Can See His Wife's E-Mail," Nov. 20, 2007.)

Another example:

A newspaper requested under Arizona's open records law access to records of e-mail by a county official on county computers. The official fought the request, claiming the records were personal and therefore not subject to disclosure. The Arizona Supreme Court held that the records must be shown to a trial judge. The judge should then decide whether they are personal records, which are to be withheld, or public records. (The Reporters Committee for Freedom of the Press, "Judge must decide whether e-mail is private," April 27, 2007. See <http://www.rcfp.org/news/2007/0427-foi-judgem.html>)

Third example: A West Virginia judge held the state's FOIA required the state to release e-mails of the state's Supreme Court Chief Justice. The justice had sent the e-mails from his government account to the head of a private coal company. (The Reporters Committee for Freedom of the Press, "Even high court subject to FOIA in West Virginia," September 18, 2008. See <http://www.rcfp.org/newsitems/index.php?i=7013>). Although the released e-mails did not pertain directly to the court's internal administration or cases pending before the justice, they touched on more than merely personal matters. They at least mentioned upcoming supreme court elections. See <http://www.legalnewslines.com/news/215832-some-of-w.va.-chief-justices-e-mail-subject-to-disclosure-judge-rules>

To respond to these requests takes time and resources on the part of agency IT staff. Haphazard records management makes the job more difficult. Agencies therefore have incentive to keep organized, searchable e-mail records. And they are wise to insist that all employees (including governors and supreme court justices) route all official messages to or through centrally-controlled archives. See <http://hack-igations.blogspot.com/2008/04/reducing-volume-of-e-mail-archives.html>



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