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Government Management of E-mail – What’s in Your Municipalities In-box?

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E-mails “created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function” are governmental records. RSA 91-A:1-a, III. The managers and legal counsel for School Districts and Municipalities should know what is in their government operated e-mail systems. They should ensure policy, procedure, training, and compliance are in place for proper record preservation and destruction.

Municipal and school district systems contain e-mails which, like the paper records on the same subject, must be retained permanently or for specified periods under federal or state law. RSA 33-A:3-a provides municipalities with 156 categories of records with preservation periods ranging from permanent to “as needed for reference.” RSA 189:29-a assigns School Boards responsibility for setting a record retention schedule. The New Hampshire School Boards Association sample retention schedule has over 115 categories. There are a large number of federal and state statutes and regulations that impose specific retention requirements and a few specific destruction requirements. All categories of records are subject to potentially longer retention when there is a litigation hold or a Right-to-Know request.

Government e-mail systems also contain transitory e-mails, such as scheduling, news aggregations, professional and non-profit organization messages, etc. that fall within the broad scope of being “in furtherance of its official function,” but provide *de minimums* information about what government is up to. For municipalities, such transitory correspondence needs to be retained only “as needed for reference.” RSA 33-A:3-a, XXVII.

Finally, government e-mail systems will contain messages between public officials/employees and their family members/friends about personal schedules, grocery lists from spouses, a child’s after school schedule, spam, etc. that facially may not be governmental records. These personal e-mails are not created or received in furtherance of the individual’s official function. “The legitimacy of the public’s interest in disclosure, however, is tied to the Right-to-Know Law’s purpose, which is ‘to provide the utmost information to the public about what its government is up to.’” *Reid v. New Hampshire Attorney General*, slip op. at 19 (Dec. 23, 2016) (quoting *N.H. Right to Life*, 169 N.H. 95, 111(2016)). If these “personal” e-mails constitute evidence of public official or employee misconduct, they provide information on “what government is up to.” If there is a policy forbidding personal use of the government e-mail, each personal e-mail sent may be evidence of a policy violation. If the volume of personal e-mails document that the employee is spending excessive work time on personal business, show the employee is conducting personal for-profit business at work, or is unlawfully electioneering, the e-mails may be evidence of misconduct, thereby potentially a governmental record subject to disclosure. At the least, the personal e-mails in the system at the time of a Right-to-Know request or litigation hold will need to be reviewed to determine if they are responsive governmental records or potentially relevant to the litigation. At most, they may need to be disclosed.

Preserve it all or file and cull? The federal government requires its e-mail system users to cull federal e-mail systems of transitory and non-governmental record e-mails. Culling typically includes destroying spam, e-mail blasts (agency-wide communications), and personal materials (such as e-mails to family members not related to agency business). Culling may be manual, automated, or a hybrid of both.

<https://www.archives.gov/files/records-mgmt/grs/grs06-1.pdf>, last visited 5/15/2017.

Agencies may require that e-mails, just like paper records, must be sorted and filed. For agencies not equipped to convert e-mails to PDF/A and maintain them in archival storage, it may be prudent to print to paper and file limited categories of governmental records, such as those that must be retained permanently. RSA 33-A:5-a.

While the cost of electronic storage makes permanently preserving all e-mails possible, the benefit versus the cost of filing and culling should be carefully analyzed. If either a Right-to-Know request or a litigation hold compels a thorough review of a voluminous archive of e-mails which could have been legally destroyed and that are not systematically filed, the human resource costs, technology costs, and legal fees may quickly wipe out any cost savings from choosing preserving all over a system of culling or filing.

The United States Military has adopted a “Bottom Line Up Front (BLUF)” strategy, starting e-mails with a succinct statement of the subject and the action needed from the recipient. Using BLUF provides detail only after the recipient has been told what he or she needs to do with that information. *How to Write Email with Military Precision*, Harvard Business Review, <https://hbr.org/2016/11/how-to-write-email-with-military-precision>, last visited 5/15/2017. Leading with a clear statement of the subject and limiting e-mails to one subject simplifies the process of filing, culling, or reviewing e-mails to determine if they are subject to a litigation hold or responsive to a Right-to-Know request. When e-mails address multiple subjects they are more expensive to file, cull, or disclose, particularly if redaction is required.

The broad availability of free e-mail accounts, smart phones, and e-mail web portals makes it practical to have a policy discouraging personal use of the government e-mail system. Educating employees regarding the risk of public disclosure of personal e-mails on the government system may help motivate the use of personal accounts for personal business. Particularly for elected public officials and agency leadership, policies and training should provide for moving e-mails which are received on personal accounts and that need to be treated as governmental records into either the agency paper system or a government e-mail account, for response and retention.

Policies and training should instruct e-mail users how to distinguish between permanent, temporary, transitory, and non-record e-mails. Establish how to appropriately handle e-mail messages in personal accounts that constitute governmental records. *National Archives Criteria for Managing Email Records*, April 6, 2016.

<https://www.archives.gov/files/records-mgmt/email-management/2016-email-mgmt-success-criteria.pdf>, last visited 5/15/2017. Prudent management of government e-mail systems can help ensure compliance with retention laws, litigation holds, and Right-to-Know disclosure requests, as well as control costs and improve performance.

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