Document Destru
Violate

Government agencies routinely delete

that should be accessible under the Freedom of I

FOIA

By Arthur H. Siegal

THE FREEDOM OF INFORMATION ACT[1] (FOIA) IS A TOOL THAT, ALONG with the Open Meetings Act,[2] allows Michigan's public, taxpayers, and businesses to determine what their government is doing. The opportunity to transact business by electronic mail has complicated matters, and there has been no legislative change to account for the advent of the government's use of the "information superhighway."

It is likely that a significant amount of state business is now being transacted via e-mail, rather than on paper. Due to legislative silence and the lack of a case bringing this to the courts' attention, agencies have been creating an unofficial exemption to the FOIA that no one could have anticipated, even as recently as the act's last amendment in 1996.

While some might discount an inability to access an agency's e-mails under the FOIA, this is critical for significant reasons, including the requirement of exhausting administrative remedies before resorting to the courts; the variety of administrative procedures available or required before one can get to court; and the limited discovery available in administrative proceedings. Further, a valid request that an agency produce e-mails pursuant to the FOIA, even if denied, may require the preservation of those e-mails for later discovery during litigation—e-mails that almost certainly would otherwise be purged beyond recovery.

The Policy Behind the FOIA

The FOIA states:

It is the public policy of this state that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees . . . . The people shall be informed so that they may fully participate in the democratic process.

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Michigan courts have interpreted the FOIA as being broadly pro-disclosure:

> *The Legislature in the enactment of the Michigan FOIA followed closely . . . the Federal Freedom of Information Act. The intent of both acts is to establish a philosophy of full disclosure by public agencies and to deter efforts of agency officials to prevent disclosure of mistakes and irregularities committed by them or the agency and to prevent needless denials of information.*[3]

While there are a number of specific exemptions from disclosure,[4] these are to be narrowly construed and the burden of proof is on the agency or public body asserting the exemption.[5]

The Public Record Subject to the FOIA Disclosure

The FOIA provides for the disclosure of "public records," which includes writings prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, after their creation. E-mail is not specifically addressed, even in the 1996 amendment, which was passed when e-mail was just beginning to reach the national consciousness.

E-mails as Part of the Public Record

A "writing" is broadly defined in the FOIA as including every "means of recording, and includes letters, words . . . or symbols, or combinations thereof, and . . . magnetic or paper tapes, . . . magnetic or punched cards, . . . or other means of recording or retaining meaningful content." E-mails should fall within this definition. This is particularly true in light of the legislature's exemption of "software" to prevent the use of the FOIA to avoid copyright protections. The act defines exempted "software" *not* to include "computer-stored information or data, or a field name if disclosure of that field name does not violate a software license," making field names disclosable. Clearly, even in 1996, the legislature recognized that computerized information might be the subject of the FOIA inquiry.

Relevant cases are *Kestenbaum v Michigan State University*[6] holding that computer tapes containing information about Michigan State University students were "writings" under the act; *Farrell v City of Detroit*[7] holding that computer records are public records subject to production under the act and that the requester may receive the records in the form of computer tapes if that is what they request; *Yeager v Drug Enforcement Administration;*[8] and *Armstrong v Executive Office of the President.*[9]

Regular Destruction of E-mails

Every writing generated by an agency is not required to be kept as a public record. If a writing is kept, then there is a strong argument that it is subject to disclosure under the FOIA. The FOIA requires state agencies to publish and make available final orders or decisions in contested cases and the records of those cases, promulgated rules, and "other written statements which implement or interpret laws, rules or policy." Beyond that, the retention of documents is the province of the Management and Budget Act.[10]

The Management and Budget Act requires each state agency to maintain records necessary to the agency's continued operation and to maintain an adequate record of the agency's actions. In the act, the Michigan Department of Management and Budget (DMB) is charged with maintaining records of state agencies by establishing standards and procedures for agency records management, guarding against improper disposal of state records, and setting up retention and disposal schedules for all agency records.

In response, the DMB promulgated Procedure 0910.02[11] requiring all state agencies to develop and adhere to schedules specifying how long documents are to be retained and in what cases, and when, documents may be disposed of. There are also similar records retention schedules for local government entities, some of which include statutorily-mandated retention periods.[12]

On June 26, 1998, the DMB promulgated Procedure 0920.04, supplementing its earlier procedure, which extends the requirement to "electronic records," requiring them to be listed on each agency's retention and disposal schedule. The term "electronic records" is never defined. The procedure does recognize that "[r]ecords in electronic formats are increasingly created and used in place of traditional paper records."

Despite this mandate, many agencies, including the DMB itself, have apparently not enacted such schedules. Instead, ignoring the requirement of the Management and Budget Act and the DMB's procedure, these agencies have left the issue of maintaining a governmental record to their information systems/technology departments. Agency personnel receive no training on how to retain e-mails of import and often do not. These agencies, without regard to state law or procedure, have established e-mail purging programs that obliterate all e-mails beyond a certain age, regardless of content.

This failure is a violation of state law. Ironically, the state agrees. In August, 2000, the Department of State published a guidance, co-authored by the DMB, directed to local governments, which states that "[g]overnment employees' responsibilities for managing e-mail messages are the same as those for other records." This raises the question of

Fast Facts:

- E-mail should fall under the FOIA's broad description of "public records" that are subject to disclosure, although it is not specifically mentioned.
- The retention of documents is the province of the Management and Budget Act. In the act, the Michigan Department of Management and Budget is charged with establishing standards and setting up disposal schedules for agency records management.
- Despite this mandate, many agencies, including the DMB itself, ignore e-mails, allowing them to be deleted "automatically" at the end of an arbitrarily-set time period.
- There is a heavy burden on the government to prove why these records should not be disclosed if requested. If they are destroyed, the requestor is entitled to compensation provided for in the FOIA.

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If Kept, Are E-mails Exempt?

If an agency has not purged its e-mail, the question becomes whether they can be accessed. Michigan courts likely would deem a government or agency e-mail to be a writing and a public record subject to disclosure. Of all the exemptions in the act, only one seems potentially applicable:

> *Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.*

The body of case law applying this exemption is relatively modest but makes it clear that government agencies seeking to exempt documents have a monumental burden to overcome. The public interest in disclosure is very strong, and the public interest in encouraging frank communications between officials rarely outweighs it. For example, locations under consideration for development must be disclosed even though disclosure would result in land value swings.[13] In another case, the public interest in an employment file of a convicted teacher was not outweighed by the public interest in frank governmental communications.[14]

Michigan courts have held the public interest in disclosure to be outweighed in the very narrow cases of a request for a tentative collective bargaining agreement while negotiations were ongoing[15] and when documentation was sought regarding an issue of public safety.[16] In that case, an inmate requested prison system documents used to make recommendations regarding the length of a prisoner's incarceration. Given the public safety nature of the information, the court held that the public interest in encouraging the members of disciplinary credit committees to communicate frankly to the warden outweighed the public interest in disclosure, holding that "the public has a far greater interest in ensuring that these evaluations are accurate than knowing the reasons behind the evaluations."

Therefore, even if an agency e-mail covers other than purely factual materials and is both advisory and preliminary to a final agency determination or action, a heavy burden remains on the government to show why it should not be disclosed. While it could be argued that many e-mails are of a preliminary advisory nature, that alone is not enough to exempt them from disclosure.

A tool exists to preserve the possibility of access to such documents. In *Walloon Lake Water Sys, Inc v Melrose Twp*,[17] the court held that the FOIA implies a duty to "preserve and maintain [records requested through the act] until access has been provided or a court executes an order finding the record to be exempt from disclosure." This ruling imposes a duty not to destroy records once a request has been made under the FOIA. It does not require that any record be kept if there is no pending request.

While it is not likely that an administrative agency information systems technician will take notice and reprogram the agency's systems to account for a request under *Walloon Lake*, the destruction of e-mails in light of such a request when a matter does arrive at litigation should result in the agency's being penalized under the FOIA. Any burden of proof regarding an agency's motives being shifted should be weighted heavily against the agency that has failed to account for its improperly deleted e-mails.

Conclusion

With an ever-growing amount of business being transacted via e-mail in the private sector, it is logical to assume that our government is likewise taking advantage of this tool. Rather than treating e-mails as the "public records" they undoubtedly are, many public agencies ignore them, allowing them to be deleted "automatically" at the end of some arbitrarily set period of time. This practice deprives the public of significant access to information regarding the operation of its government, in direct violation of the FOIA.

A person interested in a particular governmental action should request all e-mails as well as other documents when making a FOIA request. However, when e-mails are not produced in response to a request, it is likely that by the time the matter goes to court, the e-mails will have been destroyed, possibly beyond restoration and a litigant may simply be forced to do without them. As a result, the requestor could argue that he or she is entitled to compensation pursuant to the FOIA's own provisions and that any burden of proof regarding the government's actions at issue should be shifted to the government in light of its failure to abide by law and applicable administrative requirements. ✦

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Footnotes

1. MCL 15.231.
2. MCL 15.251 et seq.
3. *Schinzel v Wilkerson*, 110 Mich App 600, 603–604; 313 NW2d 167, 169 (1981) (citations omitted).
4. MCL 15.243.
5. *Shellum v Michigan Employment Sec Comm'n*, 94 Mich App 474; 487 NW2d 490 (1992), lv den 442 Mich 912 (1993).
6. 414 Mich 510; 327 NW2d 783 (1982).
7. 209 Mich App 7; 530 NW2d 105 (1995).
8. 678 F2d 315, 321 (DC Cir 1982).
9. 1 F3d 1274 (DC Cir 1993).
10. MCL 18.1101.
11. *Getting the Job Done: The Administrative Guide to State Government*, published by the DMB.
12. See, for example, MCL 41.185, MCL 15.267(2), MCL 399.5, MCL 168.81.
13. *Milford v Gilb*, 148 Mich App 778; 384 NW2d 786 (1985).
14. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 274–275; 568 NW2d 411 (1997).
15. *Traverse City Record Eagle v Traverse City Area Public Schools*, 184 Mich App 609; 459 NW2d 28 (1990), lv den 437 Mich 880 (1990).
16. *Favors v Department of Corrections*, 192 Mich App 131; 480 NW2d 604 (1991), lv den 440 Mich 898 (1992).
17. 163 Mich App 726; 415 NW2d 292 (1987).