

Access to Electronic Communications

As technology brings electronic communications such as e-mail, text messaging and instant messaging into the mainstream of workday activity, governments from the federal down to the local levels are charged with evaluating how to treat those communications. Are they public records, subject to release just as any other record? Can the activity that occurs in those exchanges constitute a “meeting”? While new cases and legislation may specifically address these and related issues, many governments are still figuring out how to treat their electronic communications.



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An overview of access to electronic communications

As the United States government steadily progresses in its shift from paper to electronic records, transparency law has unfortunately struggled to keep up. It is a common obstacle in emerging bodies of law: the practical conflicts have developed ahead of a firm legal solution.

Reports that the Bush administration may have deleted millions of official White House e-mail messages and that it conducted official business through private Republican Party e-mail accounts have thrust this issue to the forefront of the national stage. The administration blamed technological failure for the loss of the e-mail. But whatever the cause, the gaping hole in the nation's presidential archives sparked reintroduction of the Electronic Message Preservation Act, H.R. 1387, in Congress in March 2009. The measure, if passed, would strengthen federal legal requirements for the retention of such messages.

The notion that official government e-mail should be stored and open to the public is not a new one. The Clinton administration — the first in which electronic communication became widespread — archived e-mail using its Automated Records Management System (ARMS), which the Bush administration dismantled in favor of a new system called Electronic Communications Records Management System (ECRMS). Many of the missing messages were lost between 2003 and 2005, roughly the time period in which the switch was taking place. The ARMS program wasn't foolproof — some e-mail messages went missing in the 1990s, too — but Clinton's policy stipulated that the Presidential Records Act required maintenance of all records, including e-mail. It is unclear what the Bush administration's policy on electronic records was.

In January 2009, as the Bush administration prepared to close up shop, Magistrate Judge John Facciola issued an order in *National Security Archive v. Executive Office of the President* that all White House e-mail records had to be protected during the transition. Facciola took the opportunity in his order to underscore the broader value of electronic records in the public arena: “[T]he emails that are said to be missing are the very heart of this lawsuit and there is a profound societal interest in their preservation. They are, after all, the most fundamental and useful contemporary records of the recent history of the President's office.”

The watchdog groups Citizens for Responsibility and Ethics in Washington and the National Security Archive, which filed the suit, agreed with the government to stay the case in April 2009 as they worked on an agreement with the new Obama administration.

The federal government is not the only government body that appears to be making the small, but necessary, jump in logic that that these types of electronic communications are in fact official records — just as crucial as paper records — to which the public should have access.

State Law — Developing, But Far From Settled

On a smaller scale, the body of law on government electronic communications across the states has been growing slowly over the past few years as e-mail use and mobile device communication have become more prevalent in government offices. The appropriateness of releasing the content of these communications is especially crucial, as the release of text messages exposed serious corruption in the form of perjury in a case that cost Detroit taxpayers more than \$8 million. That 2008 case led to the ouster and prosecution of former Detroit Mayor Kwame Kilpatrick, and a Pulitzer Prize for the *Detroit Free Press*.

A majority of states now recognizes that public officials' electronic communications should be processed and released in the same way as hard copies of official communications. Of course, states differ on the range of electronic communications they say should be exempt from records requests. A few states exclude governors or other public officials from such requests altogether, though most do not. Public officials increasingly conduct government business with their personal e-mail accounts and cell phones or, conversely, use government accounts for personal communication. That has presented its own dilemma: Should personal electronic communications be exempt because of their private nature? Most states that have addressed the issue of electronic communication retention have determined that job-related communications must be saved. How long they should be kept, however, is an unsettled matter. There is ongoing or recently settled litigation on this issue in several states, including Missouri and North Carolina.

Electronic Communications Under Sunshine Laws

Government officials are more frequently conducting business through e-mail, cellphone calls, text messages and other forms of electronic communication. Accordingly, states including Colorado, Tennessee and Florida have moved to include records of these electronic communications as items subject to request under local Sunshine laws.

Courts have developed more precedent on e-mail than any other form of electronic communication. Many state courts have considered the classification of a series of e-mail exchanges as an open record or meeting. Some have also heard cases regarding the overlap of official and private communication in both government-provided and personal accounts. That point is at issue in one Alaska citizen's lawsuit to compel disclosure of official e-mail Gov. Sarah Palin transmitted through a private Yahoo! address. On the other side of that coin, Iowa Gov. Chet Culver recently announced that he will release e-mail sent in his first two years of office using private computers and non-government servers that were used to conduct state business.

Requests to access public officials' text messages and cell phone records have also generated litigation in recent years. The *Detroit*

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Free Press and *The Detroit News* won a lawsuit to compel disclosure of text messages that eventually revealed that Kilpatrick and one of his aides lied under oath. That led to 99 days in jail for Kilpatrick, who pleaded guilty to obstruction of justice in the matter.

Computer-based instant messages in government offices are not immune from open records requests, either. Although the messages usually have to involve discussion of public business to be considered public records, in cases of potential corruption or improper behavior, even private instant messages have been released. In 2008, for instance, Ohio Attorney General Marc Dann was impeached and eventually resigned after the *Columbus Dispatch* requested records pursuant to a sexual harassment case

silence on the issue does not indicate a specific attempt by state officials to exempt e-mail and other electronic communications from sunshine laws. Finally, on the other end of the spectrum, a few states have taken steps to shield from records requests the e-mail communications between public officials and their staff members. Rhode Island, Arkansas, California, Louisiana, Massachusetts, Michigan and South Dakota exempt their governors from having to disclose e-mails under state sunshine laws.

Electronic Communications as Public Meetings

States have split on whether multiple e-mail messages between public officials qualify as a public meeting. The designation of an e-mail chain as a public meeting relies on the theory that e-mail and other similar communications can be so instantaneous that they might allow officials to conduct government business in place of convening at a live, in-person meeting.

Arizona law says that, for purposes of its public meetings laws, meetings can take place “in person or through technological devices.” A Delaware attorney general opinion, responding to a complaint about a local nominating committee’s practices, found that “serial e-mails” allowed committee members to “receive and comment on other members’ opinions and thoughts, and reach a consensus on action to take. ... [The office] believe[s] that under FOIA this can amount to a meeting of the public body, and that the open meeting law does not only apply to a physical gathering in a single place and time.”

Missouri’s access laws were expanded in 2004 to define a public meeting as any meeting at which any piece of public business is discussed, formulated or decided, and which is attended by a majority of the body’s

members. The new laws specifically mention online chat rooms and message boards as locations where public meetings may take place.

Virginia, however, has taken the opposite position in saying that, under its open meetings law, a meeting cannot be held by e-mail, because there is no physical “assemblage” of people.

The split among states on this issue seems to stem from differing constructions of sunshine laws’ gathering and assemblage requirements. Electronic communications like e-mail present public officials the chance to do substantial government business like that which occurs in meetings without ever really “meeting;” but on the other hand, most public-meetings statutes require that there be some kind of physical “gathering” or “assemblage.”

Public E-mail, Cell Phone Accounts Used for Private Communications

Perhaps the most contentious issue in deciding whether certain communications are subject to state sunshine laws is whether they were transmitted or received as part of an official’s job. “‘Private’ or ‘personal’ e-mail messages ‘simply fall outside the current definition of public records,’” according to the Supreme Court of Florida. Just as public officials cannot escape open records requirements by having a private entity maintain physical custody of the records, private records do not become subject to open records laws simply by being in the custody of a public official. A Tennessee court in 2005 incorporated the same line of reasoning into its case law, relying heavily on the Florida decision.



AP PHOTO/MANUEL BALCE CENETA

Archivist of the U.S. Allen Weinstein, center, testified in 2008 at a House oversight committee hearing on electronic records preservation at the White House.

and inadvertently uncovered instant messages and e-mail that revealed an affair between Dann and his scheduler.

E-mail Records as Public Records

While not all states have explicitly addressed whether e-mail records are public, notably, no state has wholly excluded e-mail from the range of records subject to its open government law. A few states, such as Colorado and Tennessee, have enacted laws that expressly state that public officials’ e-mail is subject to open records laws and may be subject to public inspection.

Attorneys general from some states, including Florida, have issued advisory opinions that e-mail involving official business is a public record. Others, including North Carolina, South Carolina and most recently South Dakota, necessarily include e-mail in state sunshine laws because the language specifies that it covers government records “regardless of physical form.”

Still other states have gone the judicial route to incorporate e-mail into the domain of public records, as citizens and journalists have brought lawsuits to compel disclosure. Ohio, for example, now defines e-mail under “electronic records” in its law. Its courts have said: “E-mail messages and correspondence are ‘documents, devices, or items’ under the first prong of the definition of ‘records.’” In Virginia, one court put it bluntly: “There is no question that e-mails fall within the definition of public records.”

Several states, such as Alabama, do not address e-mail in either their statutes or case law related to open records. But these states’

Other reasons that a public official's e-mail might be excluded from open records disclosure include lack of relevancy to the official's job; exposure of intimate details about the person's personal and private life; and limitations on the disclosure of some personnel records.

One Arizona opinion demonstrates a common approach to the threshold determination of when officials' e-mail becomes an open record: The Arizona Supreme Court held that the state's inclusion of e-mail in its open records law "does not encompass documents of a purely private or personal nature. Instead, only those documents having a 'substantial nexus' with a government agency's activities qualify as public records."

A Colorado court decided a case brought by *The Denver Post* with the finding that private cell phone records are not subject to requests under the state Open Records Act even if an official admits to using the phone for official public business. The newspaper sought more than 19 months of cell phone records that were thought to contain the phone numbers of people with whom Gov. Bill Ritter had discussed state business.

Another dispute occurred in New Jersey: Gov. Jon Corzine was initially ordered in May 2008 to turn over more than 700 pages of e-mail messages he exchanged with his former girlfriend Carla Katz, a labor union leader. Eventually, New Jersey's intermediate appellate court held that executive privilege shields the communications from the public. On March 19, New Jersey's highest court declined to hear an appeal from the plaintiff, a Republican state politician, ensuring that the e-mail messages would not be forcibly released.

Text Messages

The resignation and prosecution of former Detroit Mayor Kwame Kilpatrick highlighted Michigan courts' willingness to include text messages in the list of accessible open records, as well as the conflicts that can arise when the electronic communications in question are transmitted and maintained by private companies. The Michigan Court of Appeals in February 2008 ruled that text messages between Kilpatrick and a top aide were public records. The two had maintained an extramarital affair, lied about it under oath in a prior case, and were investigated for using city funds to pay off a fired police officer who had knowledge of the affair.

However, it remains an open question whether government agencies are required to maintain in-house records of officials' text messages, as well as if state sunshine laws extend to the text-message records maintained by the private data carriers in such cases.

E-mail Retention Policies

Whether states conclude that electronic communications constitute open records, public meetings or both, the sheer volume of such records raises essential issues regarding their maintenance.

A recent Ohio opinion stated that a state law that would give government employees the authority to delete work-related e-mail was unreasonable because it would "authorize the unfettered destruction of public records," and that if such messages are deleted in violation of statutory obligation, it would constitute a violation



AP PHOTO

The controversy surrounding former Detroit Mayor Kwame Kilpatrick led state courts to include text messages in the list of accessible open records.

of Ohio open records laws.

Confusion arises where courts — and government officials themselves — have to decide what must be kept and what may be deleted without always having clear guidelines or parameters. Even in cases where e-mail messages are considered public records, laws are frequently silent on whether *any* messages may be deleted, and if so, after how long. In the Ohio case, officials were not wrong to have disposed of items that were "no longer of administrative value" and "not otherwise required to be kept, in accordance with the office's properly adopted policy for records retention and disposal."

Several high-profile records requests and lawsuits have been filed in recent years to challenge the frequency with which officials are allowed to delete job-related e-mail. Missouri

Gov. Matt Blunt in December settled a lawsuit that arose from a whistleblower's outing of Blunt's plan to regularly delete office e-mail messages he wanted to keep away from news outlets and constituents — an open records violation. A settlement in the case called for the governor's office to turn over thousands of e-mail messages to a special investigator.

Texas Gov. Rick Perry's office has a policy of deleting office e-mail once a week — a policy that has been in place since George W. Bush held the office in the late '90s. John Washburn, a blogger from Wisconsin, took issue with this short time period for e-mail retention and set up a computer-generated process to repeatedly request the governor's e-mail. Though the governor's office ultimately was willing to comply with the request, it presented Washburn with a \$568 bill for its efforts in compiling the first four days' worth of requested e-mail messages. Washburn eventually paid the office's fees with the help of donors and posted the e-mails online.

And in North Carolina, after a controversy erupted over reports that the governor's press office ordered the state Department of Health and Human Services to delete e-mail addressed to Gov. Mike Easley, the governor himself commissioned a study in which journalists and administrative law specialists developed recommendations for how his office should manage its e-mail communications. But the recommendations, which included treating electronic records the same as paper records and mandating policies including training and archiving messages, are not legally binding.

E-mail retention policies likely will generate increasing amounts of litigation — and deservedly so. In states where the issue has not been settled by statute or case law, there are effectively no bright-line legal mandates requiring officials to retain e-mail records for a given period of time. This presents the risk of officials doing what Blunt and Easley were accused of — deleting e-mail to duck state sunshine law requirements. ♦

A state-by-state guide

Alabama

The Alabama Open Records Law provides access to “public writings,” without much elaboration. But recent statutes, case law and attorney general opinions have recognized that the term includes electronic records (and presumably electronic messages). Ala. Code § 22-9A-21(f) (1997).

A 2007 court decision denied a request for about 350,000 county employee e-mail messages, citing that the defendants — only county commissioners — were not the legal custodians of many of the messages. Accordingly, the court said, they did not have “legal authority or responsibility” to release them; also, screening the messages to determine if they were subject to disclosure under the open records law was deemed an “enormous task” that created “unreasonable and undue interference” with the work the government should be doing. *George v. Glasscock*, No. CV-07-40 (Cir. Ct. of Morgan County, Ala., June 12, 2007).

Alaska

The public records law does not specifically identify or address e-mail, but there is no evident argument that would exempt e-mail from disclosure under the public records law. E-mail was treated the same as non-electronic documents in a 2000 case, in which a court held that the government need not disclose to the public communications that would affect the quality of governmental decision making. Documents that are both “predecisional” and “deliberative” are presumed privileged; to gain disclosure, a requester must establish that the public’s interest outweighs the assertion of privilege. *Gwich’in Steering Committee v. State, Office of the Governor*, 10 P.3d 572 (Alaska 2000).

As to current issues in Alaska concerning access to electronic messages, in October 2008 Andree McLeod filed suit against the Office of the Governor seeking disclosure of 1,100 e-mail messages from Gov. Sarah Palin that concerned public business, but were sent via private e-mail accounts. There are two main issues before the court in the case. The first is whether any e-mail messages sent or received by public officials concerning state business are part of the public record as a matter of law, even if the communications were sent or received via private e-mail accounts and not through the state server. The second issue is whether the e-mail messages are

part of the public record and whether the public is entitled to an injunction stopping the official use of private e-mail accounts because this practice obstructs the public’s access to the public record. The case is fully briefed, and argument is expected in June 2009.

Under the law, each government agency should have regulations or policies regarding its retention of records. AS § 09.80.140.

Arizona

Under Arizona law, records subject to public disclosure include items produced or reproduced on “electronic media.” A.R.S. § 41-1350. E-mail communications, including those stored on backup tapes, are required to be disclosed as public records. *Star Publishing Co. v. Pima County Attorney’s Office*, 891 P.2d 899 (Ariz. Ct. App. 1995). However, e-mail of a personal nature, such as grocery lists or e-mail messages between family members regarding dinner plans, is not subject to disclosure under the public records law. *Griffis v. Pinal County*, 156 P.3d 418, 421 (Ariz. 2007).

Arkansas

A public record includes “electronic or computer-based information,” Ark. Code Ann. § 25-19-103(5)(A), so the state open records law encompasses e-mail. Ark. Op. Att’y Gen. No. 2001-305. This opinion was issued by the attorney general prior to a 2001 legislative amendment revising the statutory definition to include this information, since the act was meant to include “data compilations in any form.” Ark. Op. Att’y Gen. Nos. 2000-096, 99-018 (electronically stored e-mail is public record).

Additionally, it is the content of a record, not its medium of storage (paper or electronic,) that dictates its retention disposition under the Arkansas Freedom of Information Act. Chapter 3, § 3.05[f], and Chapter 7, § 7.02.

California

The California Public Records Act requires that the government grant prompt access to all non-exempt e-mail written to or by government officials. Government Code Section 6252 (defining “writing” covered by the PRA as including electronic mail) and 6253.9 (requiring the government to make the requested information available in any electronic format in which it holds the information). These two provisions, considered together, give meaning to

the “broad” right of access to government records, which are increasingly maintained in electronic form. 88 Ops. Atty. Gen. 153.

Courts construing the PRA have made clear that e-mail messages sent to or by government officials become part of the government record, and that neither the officials nor their constituents have reasonable expectations of privacy in such communications. *Holman v. Superior Court*, 31 Media L. Rep. 1993 (2003).

On the other hand, in a decision not favorable to access to government e-mail messages, the First Appellate District held that the Public Records Act did not preclude a government agency from recovering more than \$26,000 in costs associated with retrieving e-mail messages that a school had sought for use in litigation against the City of San Rafael. *St. Vincent School for Boys v. City of San Rafael*, 160 Cal. App. 4th 1426, 1437-39 (2008).

There are no published court decisions determining whether city council members may shield e-mail communications by using their private e-mail accounts. Such a holding would create a large loophole in the Public Records Act. However, in *Tracy Press v. Superior Court*, 164 Cal. App. 4th 1290, 1294-1295, 1300 (2008), the court refused to allow discovery of a city councilwoman’s e-mail communications with a laboratory because she had sent them from a private account.

Finally, in *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Unified School Dist.*, 139 Cal. App. 4th 1356, 1411 (2006), the court stated that the school superintendent’s testimony that she had neglected to produce e-mail messages in response to a Public Records Act request, although she later produced them at deposition, was insufficient evidence of failure to produce available documents in a timely fashion under the CPRA. The court thus credited the superintendent’s testimony that her practice was to delete e-mail, and so she did not know that her laptop computer was actually saving some of them.

Colorado

“Electronic mail” includes electronic messages that are transmitted through a local, regional, or global computer network. Colo. Rev. Stat. § 24-72-202(1.2). However, content of electronic mail that does not bear a demonstrable connection to discharge of public functions or to the

receipt or expenditure of public funds is not a public record. *Denver Pub'g Co. v. Board of Cty. Commrs. for Arapahoe Cty.*, 121 P.3d 190, 2005 WL 2203157 (Colo. Sept. 12, 2005).

In recent years, government entities have sought to dissuade open records requests by erecting significant financial barriers because of the Colorado Open Records Act's ambiguous fee provisions. For example, when the *Rocky Mountain News* requested e-mail messages and correspondence between employees of the Jefferson County Sheriff's Department and Jefferson County School District following the Columbine High School massacre, the county responded that it would cost a minimum of \$1.07 million for county attorneys to retrieve and review the electronically stored communications and determine which were required to be made public. The newspaper dropped the request after the county refused to waive the fees. The cities of Centennial and Denver have also both responded to targeted requests to inspect public officials' electronic communications by requiring that the requester pay an approximately \$2,000 fee.

For retention of records, including electronic records, agencies must maintain a records management program with documented policies and procedures. C.R.S. § 24-80-102.7.

Connecticut

Connecticut's Freedom of Information Commission has held that an exchange of e-mail correspondence among a quorum of members of a board or agency can constitute a "meeting" for the purposes of the state's Freedom of Information Act. *Emerick v. Ethics Comm'n, Town of Glastonbury*, No. FIC 2004-406

Agencies are permitted to delete e-mail messages at will if they are "transitory" in nature, meaning "non-record material such as junk mail, publications, notices, reviews, announcements, employee activities, routine business activities, casual and routine communications similar to telephone conversations." E-mail communications that are not transitory but are "less than permanent" are treated the same as their paper equivalent for retention purposes. "Permanent or archival" e-mail messages, such as those documenting state policies or processes, may be deleted only after transfer to paper or microfilm.

District of Columbia

Although e-mail is not specifically addressed by the statute, it should fall within the definition of a "public record," which "includes all books, papers, maps,

photographs, cards, tapes, recordings or other documentary materials, regardless of physical form or characteristics prepared, owned, used in the possession of, or retained by a public body" and expressly includes "information stored in an electronic format." D.C. Code Ann. § 2-502(18).

Delaware

The attorney general has evaluated several instances of whether electronic communications constituted "meetings" under the Delaware FOIA.

When two county council members, who did not constitute a quorum of the council, exchanged messages, it was not considered to be a meeting subject to FOIA. However, a phone call between six members did constitute a meeting under the law. In that opinion, the attorney general said, "We caution all public bodies to be careful not to discuss matters of public business by electronic means in such a way as could violate the open meeting requirements of FOIA." Del. Op. Atty. Gen., 04-IB17, 2004 WL 2639714 (Del. A.G. Oct. 18, 2004).

Electronic communications need not occur in "real time," such as instant messaging, chat or communications similar to a telephone conference call, to constitute a meeting. Three members of a nominating committee (constituting a quorum) who exchanged a series of e-mail messages over two days, resulting in a consensus of names to submit to the city council, were deemed to have held a meeting under FOIA. Del. Op. Atty. Gen. 03-IB11, 2003 WL 21431171 (Del. A.G. May 19, 2003).

Because electronic messages meet the criteria for "public records" set forth in 29 Del. C. § 502(7), they, like other records, may be subject to all provisions of Delaware's Public Records Law, 29 Del. C. § 501-526. Accordingly, for purposes of retention and back-up, e-mail is treated the same as paper records under 29 Del. C. § 501(c).

However, a 2006 attorney general opinion suggested there was no duty to retain e-mail that may have qualified as a public record. Because the requested e-mail messages had been deleted, the attorney general said the open records law was not violated when the agency was unable to produce the e-mail. Del. Op. Atty. Gen., 06-ID23, 2006 WL 3663142 (Del. A.G. Nov. 27, 2006).

Florida

According to Fla. Stat. § 119.011(12) (2008), "public records" include "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data

processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

In a 2008 Florida Attorney General Advisory Legal Opinion, it was reaffirmed that "e-mail messages made or received by agency employees or officials in connection with official business are public records and are subject to disclosure in the absence of an exemption." Op. Atty Gen. 08-07 (2008). However, personal e-mail messages are not public records, even if placed on a government-owned computer system. *State v. City of Clearwater*, 863 So. 2d 149, 150 (Fla. 2003).

A January 2009 report by the Commission on Open Government Reform found that "the increased use of communications technology including personal computers and handheld devices has changed the nature of communication but it has not diminished the value of Florida's open government laws or the need for public officials to consistently follow the law." Commission on Open Government Reform, Final Report (Jan. 2009).

"E-mail communications between members of a commission are public record and must be retained by law. Such discussions may violate the open meetings law, which applies to any discussion of public business between two or more members of the same board or commission." Also, "the use of private computers and personal e-mail accounts to conduct public business does not alter the public's right of access to the public records maintained on those computers or transmitted by such accounts."

The commission noted, however, that retention issues were "less clear" when public officials or employees used portable handheld devices to send text or instant messages to each other. It said the public records law most likely did not apply to such messages because they are "transitory in nature" and "analogous to the spoken word." However, a "discussion of public business between two members of the same collegial body using text or instant messaging technology is a clear violation of the open meetings law."

Georgia

E-mail documents are not treated any differently than written correspondence. Because the Open Records Act applies to both "computer based or generated information" and to "letters," e-mail correspondence is subject to it. O.C.G.A. § 50-18-70 (a).

A case was pending as of May 2009 to determine whether the Open Records Act was violated when the Department of Agriculture charged \$4.3 million for the recovery of archived e-mail. E-mail is to be kept for five years under the state's retention schedule, but the department was not following the requirements at that time. *Griffin Ind. v. Georgia Dep't of Agriculture*, No. 2005-CV-97935. In practice, however, several agencies claim ignorance of the existence of retention schedules and do not follow them.

Hawaii

Under state law, there is no distinction between the treatment of electronic messages and paper documents in terms of storage and retention. Both types of documents are grouped together within the general definition of a "government record" as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3. Any case or opinion that references the treatment and retention of "government records" applies equally to electronic messages and paper documents.

Hawaii's legislature deferred two bills in 2009 that would have amended the definition of "government record" to expressly include electronic records. HI S.B. 678 and 1652 were to be discussed further in committee. Several bills were also introduced in 2009 to address retention — primarily to incorporate the term "maintain" into the law and to require agencies to create a plan for record retention. These bills, too, were deferred for further committee discussion.

The state's Office of Information Practices issued an opinion that intra-agency e-mail must be disclosed in a matter related to an alleged criminal violation. OIP Op. Ltr. No. 04-12 (July 9, 2004).

Idaho

E-mail messages that are "informal communications between an employee and her supervisor, unrelated to personnel administration" are not public records under the open records law. "Rather, it is their relation to legitimate public interest that makes them a public record." *Cowles Publishing Corp. v. Kootenai Co. Board of County Commissioners*, 144 Idaho 259, 159 P.3d 896 (2007).

Electronic messages are legally treated the same as other records (paper documents, etc) in terms of retention and back-up.

Illinois

Public records are defined as all records, reports, forms, writings, letters, memo-

randa, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed or under the control of any public body. 5 ILCS 140/2(c). E-mail is treated as any other public record.

Conference calls, whether by video, audio, telephone or any kind of electronic means or "contemporaneous interactive communication" may be considered meetings under the Open Meetings Act. 5 ILCS 120. E-mail constitutes an electronic mean of communication and is covered by the Act's definition of "meeting." 5 ILCS 120/1.02.

Indiana

Electronic mail is a public record and must be available for inspection and copying unless an exception to disclosure in the Access to Public Records Act ("APRA") applies.

Whether e-mail messages of a personal nature are public records can be a difficult, fact-intensive question for the courts. The public access counselor generalized: "considering the APRA's broad definition of 'public record,' an e-mail that is sent, received, or stored on the public agency's computer server may well be 'maintained or retained' by the public agency that provides the server, even if the message of a personal nature is 'created' by an individual public employee rather than the public agency." (Feb. 1, 2006 Informal Opinion: Guidance Regarding Whether Personal Electronic Mail is a Public Record; see also Feb. 1 2006 Informal Opinion: Alleged Violation (finding that personal e-mail is able to be disclosed)).

The retention of electronic messages is governed by Indiana Code 5-15; electronic messages should be retained in the same manner as paper documents. Whether e-mail is to be retained depends on the *content* of the e-mail. (See April 4, 2007 Opinion, 07-FC-58.) Not all e-mail messages need be retained or transferred to the state archives; for example, personal or spam e-mail is not subject to retention and may be deleted.

Iowa

Iowa's General Assembly has not yet passed its much-discussed open records reform legislation. Thus, the boundaries of electronic records access will continue to be determined by Iowa Code Chapter 22. Meaningful access to such records, however, is practically beyond the reach of

most requestors because state government is increasingly imposing heavily restrictive "review" charges.

The statute permits government to charge for the actual costs of document copying. Retrieval charges have been added as a cost that agencies can recover from requestors, but now agencies are requiring a requestor to pay search fees based on the number of data fields and electronic records searched.

Beyond that, agencies are following the lead of the governor's office by stating that e-mail messages will not be produced until the requester agrees to reimburse the government for time taken by staff lawyers to review whether records that match search terms are otherwise exempt or privileged. These attorney review charges shift the cost of access from government to the requester and, in many cases, make the cost of access unaffordable.

However, the governor's office in May 2009 released e-mail messages sent using private computers and non-government servers in response to a request from The Associated Press. The content of the e-mail dealt with the conduct of state business, which the governor's office said led to the release.

Kansas

Electronic messages are treated as public records. (Attorney General opinion 2002-1.) However, e-mail written by public officials and sent on, to or from personal-use computers but that does not go through public agency servers are not public records.

Topeka city commissioners' use of text messaging during a public meeting in 2007 led the city attorney to issue a recommendation to discontinue the practice.

Kentucky

Personal e-mail between two state government employees using state e-mail accounts on state computers must be disclosed under Kentucky's Open Records Act. *Justice & Public Safety Cabinet v. Malmer, et al*, Franklin Cir. Court No. 06-CI-1373.

The Open Records Act and related public access and retention requirements apply equally to electronic and paper records. KRS 171.410(1) (defining "public record" for purposes of Kentucky's public agency retention statutes to include paper and electronic records).

However, each state and local agency is required by KRS 171.680 to establish its own records retention protocols, subject to the administrative regulation and oversight of the Kentucky Department

for Libraries and Archives. Most record retention schedules adopted by Kentucky's state and local government agencies differentiate among various types of electronic and paper records. These vary widely from agency to agency.

Louisiana

E-mail messages are treated the same as other paper records under the open records law. La. Rev. Stat. Ann. § 44:1; *City of Pineville v. Aymond*, 982 So.2d 292 (La. App. 2008).

Requesters in Louisiana are able to request electronic copies of records under an April 2009 ruling from the state Court of Appeals. In *Johnson v. City of Pineville*, 2009 WL 929841 (La. App. 2009) the court held that a requester should be accommodated when seeking the reproduction of records on a CD, DVD or flash drive. The court explained, "We are dealing with a developing area of law and we are quick to emphasize that this opinion does not stand for the proposition that every member of the public should always be allowed to reproduce the public records in any way he chooses. . . . Given that this information technology is readily available and is easily used and understood, we find no reason why the public should not be allowed the convenience of having electronic copies provided to it at the legally allowed cost."

According to the Louisiana State Archives policy, e-mail of all government bodies should be subject to the same records retention schedule as if it were a paper record.

Maine

The definition of "public records" in the Freedom of Access Act has for some time included electronic messages. The FOAA includes within the definition of "public records" any "mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension." 1 M.R.S.A. § 402(3). Additionally, "any document created or stored on a State Government computer must be made available" under the law. It is well settled in Maine that electronic communications, such as e-mail, are public records.

Records retention schedules, including those for electronic messages, are approved by the State Archivist and the Archives Advisory Board, per the Archives and Records Management Law in Title 5. E-mail messages that qualify as official state records must be categorized according to their content, just like paper records, so they can be deleted or retained to the

same extent as paper records. The specific retention period depends on the subject matter of the records.

Maryland

E-mail can constitute a public record, whether printed or stored electronically. 81 Op. Att'y Gen. Md. 140, 144 (1996). Access to such records depends on their content, not their form. Md. State Gov't Code Ann. §§10-611 *et. seq.* (Maryland Public Information Act). Maryland's State Archivist and the Records Management Division of the State's Department of General Services create regulations setting standards for record retention for each state entity, including with respect to electronic records. Md. State Gov't Code Ann. §§9-1007 and 10-632.

Massachusetts

Because Massachusetts public records laws consider public "all . . . documentary materials or data, regardless of physical form or characteristics," G.L. c. 4, § 7, cl. 26; 950 CMR 32:03, it includes all government records generated, received or maintained electronically, including computer records, electronic mail, and computerized records. All e-mail created or received by an employee of a government unit is a public record. SPR Bulletin No. 1-99 (Feb. 16, 1999; revised and reissued May 21, 2003). The Massachusetts Public Records Division requires all government offices to establish written policies regarding electronic communication.

A reporter's public records request for e-mail in March 2009 revealed that Gov. Deval Patrick's aides guided a state senator into a new position at a supposedly independent state authority, with a \$175,000 salary and a job description tailored so as not to require the technical expertise she lacked. The reporter received e-mail correspondence contradicting the officials' public statements insisting the senator's hiring was not related to her political support. Also in 2009, a Massachusetts resident filed a public records request seeking printed copies of electronic communication between Worcester city officials after he saw city councilors text-messaging each other during an open meeting. The city informed him that his request was overly broad. A council committee later said that although councilors could keep their devices on during meetings, they should not communicate electronically during a meeting with five or more colleagues at the same time, leaving the broader texting question somewhat open.

According to the Massachusetts Public Records Division, the state has not yet

adopted formal standards for the storage, retrieval and maintenance of long-term electronic records, but many municipalities and governments have voluntarily adopted individual policies for retention of electronic messages.

Michigan

Though the state FOIA does not expressly define electronic messages as public records, two cases holding that tape recordings and computer records were subject to the law strongly suggest that most electronic messages would fall under the law. *Payne v. Grand Rapids Police Chief*, 178 Mich. App. 193, 443 N.W.2d 481 (1989); *Farrell v. City of Detroit*, 209 Mich. App. 7, 530 N.W.2d 105 (1995).

Specifically, government text messages were found to be public in recent cases, *Flagg v. City of Detroit*, 252 FRD 345, 356, 360 (E.D. Mich. 2008), and the high-profile cases *People v. Kilpatrick*, No. 08-10496, and *Detroit Free Press v. City of Detroit*, No. 08-100214-cz, in which hundreds of text messages of the former mayor of the city of Detroit were considered public records.

Minnesota

The Data Practices Act does not deal with "records" but rather with "data," — more specifically, "government data," which is defined as information "collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media or conditions of use." Minn. Stat. § 13.02, subd. 7. All government data is subject to the act "regardless of its physical form." Thus, data in electronic formats is covered by the act.

Mississippi

Electronic messages are not specifically addressed by the Mississippi Public Records Act. However, it is generally accepted that such messages fall within the definition of public record contained in Miss. Code Ann. § 26-61-3(b) (public records include "books, records, papers . . . and any other documentary materials, regardless of physical form or characteristics . . .").

In terms of retention, the Mississippi Department of Archives and History advises that electronic messages and records are subject to the same retention guidelines as those applicable to paper records.

Missouri

The Sunshine Law applies to all public records, "whether written or electronically stored." Mo.Rev.Stat. § 610.010(6). Any member of a public governmental body who transmits any message relating to

public business must concurrently transmit the message either to the member's public office computer or to the custodian of records in the same format, to formalize it as a public record (subject to the enumerated exceptions). Mo.Rev.Stat. § 610.026.1(1).

In a lawsuit over access to e-mail messages from the office of Gov. Matt Blunt, the parties settled, agreeing that the records were subject to the Sunshine Law and required to be released unless exemptions applied.

Electronic records must be retained in the same way as all other records.

Montana

Information "in electronic format or other nonprint media" is open to the public, subject to the same restrictions that apply to information in printed form. Mont. Code Ann. § 2-6-110. While there has not been litigation over whether electronic records are to be legally treated the same as all other public records, they are generally regarded as such. *Barr v. Great Falls Intern. Airport Authority*, 326 Mont. 93, 107 P.3d 471 (2005) (although the specific issue of whether an electronic record constitutes a public record was not raised, the court held that an arrest record from Alaska contained in national computer database was public criminal justice information).

However, the server for the e-mail of officers and employees of state government is not maintained in a manner that permits easy access. The only way to access these e-mail messages is to request the agency that maintains the state server (the Department of Administration) to retrieve computer storage tapes and essentially recreate the information. The department charges for its time and effort in recreating these e-mail messages, and it is often exorbitant. This issue will likely lead to litigation.

Electronic messages are legally treated in the same way as other records in terms of retention and back-up.

Nebraska

The Nebraska public records law has for many years included electronic records in its definition of public records. Neb. Rev.Stat. § 84-712.01(1) (Reissue 2008) ("Public records shall include all records of documents regardless of physical form. . . . Data which is a public record in its original form shall remain a public record when maintained in computer files.").

The Nebraska Records Management Act requires each agency to submit a records retention and disposition schedule to the secretary of state; the agency may then dispose of record only in accordance with such approved schedule.

Neb.Rev.Stat §84-1201, *et seq.*

Nevada

The content of e-mail or other electronic records determines whether they are subject to release as public records. Personal records are not subject to release. Transitory messages, those that do not set policy, establish guidelines or procedures, document agency business, certify a transaction, or become a receipt, are considered non-records and may be deleted when no longer administratively useful.

For e-mail messages that are public records, the appropriate records retention schedule must be applied. These guidelines were set forth in the "Policy on Defining Information Transmitted via E-mail as a Public Record."

Two recent cases required e-mail to be released under the open records law. Gov. Jim Gibbons was ordered to turn over e-mail messages requested by the *Reno Gazette-Journal*. Of the 104 messages requested, the judge determined 98 fell within the transitory or privileged categories that did not require release.

Also, e-mail of the trustees of the Clark County School Board was held to be a public record. *Gray v. Clark County School District*, No. 53391, Nev. Sup. Ct.

New Hampshire

New Hampshire updated its records law in 2008 to include as "governmental records" any written communication or other information, "whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body." RSA 91-A:1-a, III.

Litigation prompted the legislative update. In *Hawkins v. New Hampshire Department of Health and Human Services*, 147 N.H. 376 (2001), a party requested information contained in databases of a state agency. Because the requested information did not take the form of an existing record, the court ruled it was not a public record and denied the plaintiff's request.

However, the court concluded its decision by stating: "The issues in this case foreshadow the serious problems that requests for public records will engender in the future as a result of computer technology. Unless the legislature addresses the nature of computerized information and the extent to which the public will be provided access to stored data, we will be called upon to establish accessibility on a case-by-case basis. It is our hope that the legislature will promptly examine the Right to Know Law in the context of advancing

computer technology."

In a case that arose since the new law took effect, a court held e-mail messages of "individual legislators" were not subject to release and that the law only applied to public bodies and agencies. *KingCast.net v. Martha McLeod, et al.*, No. 08-E-192.

Retention was also addressed in the update to the law. It states: "Governmental records created or maintained in electronic form shall remain accessible for the same retention or archival periods as their paper counterparts." RSA 91-A:4,III-a.

New Jersey

The Open Public Records Act includes in its definition of a "government record" any information "stored or maintained electronically." N.J.S.A. 47:1A-1.1.

E-mail exchanged between Gov. Jon Corzine and his former union-leader girlfriend is protected by the executive privilege, and the New Jersey Supreme Court upheld the order protecting it from release. *Wilson v. Brown*, 404 N.J. Super. 557 (2009).

For the purpose of retention and back up, electronic messages are treated in the same way as other records. The New Jersey Administrative Code (N.J.A.C. 15:3 *et seq.*) sets forth retention schedules for various records, including electronic records. The retention schedules vary based on the contents of the records.

New Mexico

The definition of public records broadly includes "all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained." § 14-2-6(E), NMSA 1978. E-mail is subject to disclosure under the law.

New York

The definition of an agency record covered by the Freedom of Information Law is sufficiently broad to include electronic messages maintained by government agencies. FOIL § 86(4). Whether a particular electronic communication is exempt from disclosure under FOIL will be determined by its content, rather than by the nature of the medium or format in which it is maintained by the agency. *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 849 N.Y.S.2d 489 (2007) ("FOIL does not differentiate between records stored in paper form or those stored in electronic format"); *Babigian v. Evans*, 104 Misc.2d

140, 427 N.Y.S.2d 688 (Sup. Ct., N.Y. Co. 1980) (“information is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form”), *aff’d*, 97 A.D.2d 992 (1st Dep’t 1983).

Two FOIL amendments made in 2008 — which seemingly apply to all types of electronic communications — require an agency to take public access considerations into account when it contracts with outside vendors and designs electronic information systems. New language added to FOIL in the form of § 87(5)(b) prohibits an agency from entering into or renewing a contract for the creation or maintenance of records where it would impair the public’s right of inspection or copying.

Section 89(8) of FOIL, which provides that any person who, with intent to prevent public inspection of an agency record, “willfully conceals or destroys any such record shall be guilty of a violation.” Although distinct from a specific retention policy governing electronic information files, this provision would seem to apply with full force and effect to any situation where agency personnel have intentionally failed to preserve or have purged electronic communications to avoid disclosure under FOIL.

North Carolina

The state’s definition of public records specifically includes “electronic data-processing records” and says the “physical form or characteristics” of a document have no bearing on whether it is a public record.

A lawsuit was pending in May 2009 involving access to e-mail messages of former Gov. Mike Easley. A whistleblower had disclosed that the governor’s press office discouraged the use of e-mail because of the paper trail it left and directed that when e-mail on a controversial subject was unavoidable, agency public affairs directors were to “double delete” e-mails from computer systems. Easley established the E-Mail Records Review Panel that issued recommendations on retention, most of which were signed on the governor’s last day in office.

There is no legal distinction in the law on access and retention between electronic and paper documents.

North Dakota

The open records laws apply per the statute to all forms of records, including electronic messages. NDCC 44-04-18.

Access to electronically stored records is free if the records are recoverable without the use of a computer backup. If a request

is made for access to a record on a backup or for a copy of an electronically stored record, the public entity may charge a reasonable fee for providing the copies, including costs attributable to the use of information technology resources. NDCC 44-04-18. Electronic records are legally treated the same way as other records in terms of retention and back-up.

Ohio

E-mail communications are treated in the same fashion as other paper records under the open records law. Ohio Rev. Code § 149.011(A) and § 149.43(A); *State ex rel. Wilson-Simmons v. Lake County Sheriff’s Department*, 82 Ohio St. 3d 37, 693 N.E.2d 789 (1998). This is true regardless of whether the e-mail is on a government or private account. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391 (2008) citing *Wilson-Simmons*, 82 Ohio St. 3d 37.

In *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391 (2008), the court held a requester was not entitled to access to text messages sent by a state representative because they did “not document work-related matters” and thus were not public records. The requester, however, did receive access to e-mail messages.

In *State ex rel. Toledo Blade Co. v. Seneca County Board of Commissioners*, 120 Ohio St.3d 372 (2008) the Ohio Supreme Court required a county board to retrieve e-mail messages that were deleted from its system in violation of its records retention policy. The board had to pay for the cost of retrieval.

E-mail messages are subject to the same retention schedules as paper records based on their content.

Oklahoma

All documents regardless of physical form are records available for public inspection under the open records law. 51 Okla. Stat. Supp. 2005 § 24A.3.1. E-mail in either electronic or paper form is subject to the Act. 2001 Okla. Op. Att’y Gen. 7.

A recent attorney general opinion addressed various issues related to electronic communications. Communications among legislators, whether written or electronic, are not subject to disclosure because, except for financial records, the legislature and legislators are not a “public body” covered under the Oklahoma Open Records Act.

However, an e-mail created by a third-party public body or official and sent to a legislator would be a record and thus subject to the Oklahoma Open Records Act. An e-mail sent by a legislator to a third-party public body or official would become

a record upon receipt and would thereby be subject to disclosure under the Oklahoma Open Records Act. Also, an e-mail from an employee of the legislature would become a record upon being received by a third-party public body or official, and so would be subject to the Oklahoma Open Records Act. 2008 OK AG 19.

Additionally, records of government business belong to the public even if they are created, received or stored on an official’s private smart phone or laptop, according to an Oklahoma AG opinion. 2009 OK AG 12.

Electronic messages are treated the same as paper documents in terms of retention and back-up. However, an agency may convert the e-mail to a hard copy when it does not have the capability to maintain records in the original format, provided that other records exist from which an interested party could ascertain all significant material contained in the electronic record. 2001 OK AG 46.

Public officials and employees are prohibited from altering or destroying public records on their private communication devices unless allowed to do under the state Records Management Act. 2009 OK AG 12.

Oregon

Electronic messages and files are treated the same as paper files and documents under Oregon’s Public Records law. ORS 192.410(4)(a). Whether the message is a public record or exempt from disclosure depends on its content.

Electronic communications are also treated the same as paper records in terms of retention. State guidelines require routine back-up and periodic copying or migration to new hardware or software systems to appropriately retain such records. Attorney General’s Manual, I, C, (1).

Pennsylvania

A record includes any information or document “regardless of physical form or characteristics” and includes information “stored or maintained electronically.” So long as an e-mail satisfies the Open Records Law’s definition, the law requires access.

However, local governments are interpreting the changes to the law that went into effect in 2009 as applying only to e-mail messages that are stored on government computer servers. Some local governments do not maintain e-mail messages for any length of time on servers, or only have forwarding services that send e-mail automatically to an official’s private

account. In such cases, those e-mail messages have not been accessible in response to open records requests.

Rhode Island

The state's Open Records Law treats electronic mail messages as a public record, except for messages sent by or to elected officials with or relating to their constituents or to elected officials in their official capacities. R.I. Gen. Laws § 38-2-2(4)(i).

Three 2006 Attorney General Opinions discuss the possibility that e-mail exchanges between and among the members of a public body may, under certain conditions, constitute a violation of the Open Meetings Act. To be unlawful that way, the e-mail messages must involve a majority of the members of the public body and discussion or action relating to a matter over which that public body has supervision, control, jurisdiction or advisory power. R.I. Gen. Laws §§ 42-46-2 and 42-46-5; *In re Loparto v. Lincoln Town Council*, 2006 WL 4563862 (R.I. Attorney General Opinion, May 19, 2006); *In re McFadden v. Exeter/West Greenwich Regional School Committee*, 2006 WL 4573866 (R.I. Attorney General Opinion, June 6, 2006); *In re Cerullo v. West Warwick Town Council*, 2006 WL 4573895 (R.I. Attorney General Opinion, Oct. 27, 2006).

Electronic messages are legally treated in the same way as other records in terms of retention and back-up by statute under R.I. Gen. Laws § 38-3-1 *et seq.* and regulation under R.I. Administrative Code 35-000-015.

South Carolina

Public records, as defined by the South Carolina Freedom of Information Act and the Public Records Act include "all . . . documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." Therefore, records created and stored electronically must be managed according to the law. S.C. Code Ann. § 30-4-20(c); S.C. Code Ann. § 30-1-10. The Public Records Act does not differentiate between types of media; records created or formatted electronically are covered. The South Carolina Department of Archives and History develops and issues records retention schedules to authorize the legal disposition of public records.

In 2007, e-mail messages released pursuant to an open government request seeking information about a deadly fire revealed a close relationship between the city of Charleston and a supposedly independent investigatory panel. The e-mail messages showed that a member of the

panel advised the city on how to respond to state workplace safety violations and how to hand-pick firefighters to speak publicly about their experiences in order to fight criticism of the department's handling of the fire.

A "meeting" under the open meetings laws includes the convening of a quorum of the constituent membership of a public body, whether in person or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, or jurisdiction. S.C. Code Ann. § 30-4-20(d). No chance meeting, social meeting or electronic communication may be used in circumvention of the spirit of the requirements.

South Dakota

A 2009 revision to the state's open records law shifted the legal standard for all state records — including electronic records — to presume they are public records unless an exception to the law would allow them to remain private. Electronic records are not specifically addressed in the new law; however, the state records management program statutes pertain to records in any physical form and make them state property. S.D.C.L. § 1-27-9 and S.D.C.L. § 1-27-10.

Tennessee

The state in 2008 made its most sweeping reforms to the state's Open Records Law in the past 20 years. With regard to electronic messages, the portion of the law that revises Tennessee Code Annotated §10-7-503 (a)(1) provides that public records include "all documents . . . regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency."

The new law also includes the creation of a state ombudsman, called the Office of Open Records Counsel. Along with an advisory committee, the office is charged with issuing guidance on electronic records issues.

According to state statutes, paper and electronic copies should be treated the same with regard to retention.

Texas

The Public Information Act covers virtually all information possessed by governmental bodies; "the form in which a governmental body stores information does not affect its availability." Tex. Att'y Gen. ORD-461 (1987). Electronic mail generated or received by a public entity may be but is not automatically subject

to public disclosure. Op. Tex. Att'y Gen. No. JC-3828 (2001). There is no firm state policy for retention of e-mail; for example, open-government advocates urged reform when it was discovered that Gov. Rick Perry's aides were instructed to routinely delete office e-mail after seven days.

In April 2009 a Texas appellate court reversed a trial court's decision that a Dallas mayor's Blackberry e-mail messages were public information, leaving the question open for further judicial interpretation. The trial court had held that because the messages were made in connection with the transaction of official business, they were public under the Texas Public Information Act, as information "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by . . . or for a governmental body." The city argued against release because the messages were not "collected, assembled, or maintained by or for the city, and the city [did] not own or have the right of access to them" since they were sent from the Blackberry device and not through the office server. *City of Dallas v. Dallas Morning News, LP*, 2009 WL 944395 (Tex. App 2009).

A case pending in the Fifth Circuit arose out of e-mail messages exchanged between city councilors in Alpine, Tex., discussing the time and content of a council meeting in violation of the Texas Open Meetings Act. The U.S. Court of Appeals held that the First Amendment protected the councilors' rights to communicate with one another and ordered that the open meetings law be subject to a heightened standard of constitutional review or else it would be considered invalid. *Rangra v. Brown*, No. 06-51587 (Apr. 27, 2009). The parties have asked the full appeals court to rehear the case. That request was pending as of publication.

Utah

The Government Records and Management Act defines "public record" to include "electronic data," "documents" and "other documentary material regardless of physical form or characteristics." Utah Code Ann. § 63G-2-103(22)(a). Public records, however, do not include personal communications sent from or to a government officer or employee who is acting in his or her private capacity.

All governmental entities (except those that are permitted to maintain their own retention schedules) "shall file with the State Records Committee a proposed schedule for the retention and disposition of each type of material that is defined as

a record under this chapter.” Utah Code Ann. § 63G-2-604(1)(a). Although section 63G-2-604 does not distinguish between paper and electronic records, it also does not preclude government entities from submitting proposed retention schedules that make such distinctions; indeed, the law appears to expect it in requiring proposed schedules for *each* type of material that qualifies as a record. § 63G-2-604(1)(a).

Vermont

E-mail and other electronic messages are included in the definition of “public record.” 1 V.S.A. § 317(b) (Cum. Supp. 2008) (a public record is “any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business”).

In 2008, the Vermont Superior Courts issued decisions in two cases under the Access to Public Records Act involving e-mail messages.

Personal e-mail communications between the Burlington city attorney and two women working for the city with whom he was allegedly romantically involved were exempt from disclosure as “personal documents” under 1 V.S.A. § 317(c)(7). *Gannett Vermont Publ'g, Inc. v. City of Burlington*, No. 628-9-07 Wncv at 1-3 (Wash. County Super. Ct. Oct. 6, 2008).

E-mail messages sent between school board members regarding a vote to move sixth graders to a new school were exempt under the deliberative process and inter-departmental communications privileges under the law. 1 V.S.A. § 317(c)(4) and (17). *Bethel v. Bennington Sch. Dist.*, No. 403-10-07 (Ben. County Super. Ct. Jul. 24, 2008).

Each public agency must establish and maintain a records management program to ensure the records are available to the public. 3 V.S.A. § 218 (Cum. Supp. 2008). Further, a custodian of public records may not destroy or dispose of a public record without approval from the state archives division. The General Record Schedule issued by the Vermont State Archives and Records Administration requires that substantive correspondence be maintained for at least three years. However, the Vermont legislature apparently has only a 90-day retention policy for all e-mail on its server.

Virginia

“Public records” subject to the Freedom of Information Act include electronic records. The Virginia Supreme Court considered the circumstances in which an exchange of e-mail messages between

elected officials constitutes a “meeting” subject to the FOIA provisions. In evaluating the issue, the court specifically noted that “there is no question that e-mails fall within the definition of public records under [FOIA].” *Beck v. Shelton*, 593 S.E.2d 195, 199 (Va. 2004).

Retention of electronic records is governed by the Virginia Public Records Act, Va. Code § 42.1-76, *et seq.* (the “VPRA”). Whether an electronic communication falls within the VPRA’s retention mandates depends on the content of the communication, not its form. Va. Code § 42.1-77. Accordingly, the VPRA pertains to all types of electronic communications so long as the information contained within “documents a transaction or activity by or with any public officer, agency or employee of an agency.”

Washington

Although practices vary by agency, requests for electronic communications are generally not controversial in Washington and are treated the same as any other records request.

In June 2007, the attorney general adopted Model Rules for Electronic Records. The rules are non-binding “best practices” for state and local agencies to follow in fulfilling requests for electronic documents. Among other things, the rules recognize that requests for electronic public records should be addressed in the same manner as requests for print records.

Washington’s Public Records Act makes no distinction between electronic public records and traditional paper records. One recent case held that an e-mail sent by a private citizen to the home computer of a public official was a public record — at least, once it became the subject of public comments at a city council meeting. *O’Neill v. City of Shoreline*, 145 Wash. App. 913, 187 P.3d 822 (2008).

State law requires agencies to develop appropriate record retention policies, including for electronic records. RCW 40.14.020. An electronic or e-mail version of a public record must be retained for the same period of time as if it were in paper form. Agency practices vary widely and compliance with these guidelines is not universal, particularly at the local level.

West Virginia

E-mail messages are treated the same as any other records under the West Virginia Freedom of Information Act; that is, if they are public records, they should generally be released.

A case pending before the West Virginia Supreme Court will determine whether e-mail exchanged between a supreme court justice and a party in a case before the court are public records under the FOIA. The judiciary is subject to West Virginia’s FOIA.

Electronic messages are legally treated in the same way as other records in terms of retention and back-up. However, there have been no cases in which the meaning of the retention section of West Virginia law has been judicially defined, so it is not certain that a “record” would include electronic messages. W.V. Code § 5A-8-3. If electronic messages are included within the definition of “record”, then they are subject to the same preservation requirements as paper documents. W.V. Code § 5A-8-4, and W.V. Code § 5A-8-17.

Wisconsin

E-mail messages can be obtained under the open records law just as any other record would be. *McCullough Plumbing, Inc. v. McFarland*, 288 Wis. 2d 657 (2005). They are subject to the same exemptions and privileges, such as the attorney-client privilege.

E-mail messages are also subject to the state’s records retention policies, but a failure to comply with the policies cannot be “attacked” under the open records law. *State ex rel. Gebl and DSG Evergreen F.L.P., v. Connors, et al.*, 306 Wis.2d 247 (Wis. 2007).

The Wisconsin Supreme Court was considering in 2009 whether “employees’ personal e-mails are public records and, if they are, whether public policy reasons outweigh the public’s interest in disclosure.” The case, *Schill v. Wis. Rapids School Dist.*, No. 2008AP000967-AC, involves school employees who sought an order from the court determining whether the e-mail messages are public. The state’s Court of Appeals has asked the Supreme Court to consider the question, because there is no opinion yet addressing the issue and it is of significant importance to the public.

Wyoming

“Private communications” between a legislator and a constituent, including e-mail, are not public records. Communications, including e-mail messages, between a legislature and legislative staff, as well as contractors and consultants, are also confidential.

The law does not distinguish the treatment of electronic messages from any other public record and should be retained and disposed of as set forth in W.S. 9-2-411.