



Managing Electronic Records and E-mail: A Transition Priority

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Electronic communications tools such as e-mail and text messaging present new challenges to the governor-elect and the transition team in defining and managing access to public records. **It is critical that the governor-elect and the transition team understand the impact of freedom of information requirements regarding e-mail and other electronic communications during the transition into office and when governing.**

The following media excerpts illustrate how e-mail and other forms of electronic-based communication pose numerous opportunities for gubernatorial embarrassment:

- “Governor’s Angry Moods Pour Forth in E-mail”
- “Group Posts E-mail from Governor’s Account”
- “Governors Chief of Staff a Key Player in Spat Concerning E-mail Retention”
- “Governor’s E-mail Scandal Still Ongoing”

E-mail is used extensively as a convenient, quick and direct communications tool in everyday government business. Documents and work processes such as decision memos, draft reports, and external correspondence are routinely circulated via e-mail. **Because of the widespread use of e-mail communications, the unique challenges of storing and managing e-mail are becoming more significant for a governor’s administration.**

It is important to know your state’s open records laws as federal law and the law in many states treat e-mail as a record. This means e-mail messages created and sent by the governor’s office could be disclosed when a freedom of information request is received or in connection to impending litigation.

There are all too many examples of questionable actions (whether intentional or in error) that have been perceived as circumventing the retention of e-mail as a permanent public record.

Actions that have generated criticism include:

- Routine and systematic deletion of office e-mail
- An undefined records retention schedule
- Inadequate or outdated archival systems for electronic records management
- Use of private e-mail accounts to distribute information in the conduct of government business

Furthermore, countless news stories can be cited where negative media attention, protracted litigation and escalated conflicts have ensued due to the revelation of e-mail records or the lack thereof involving federal, state and local government actions and specific public officials.

E-mail messages have been cited pertaining to such varied subjects as appointments to boards and commissions, hiring and firing decisions, instructions given to and reports from cabinet and

agency officials, contract negotiations, legal and policy decisions, and political activity by public officials and public employees.

When e-mail disclosure has been circumvented, government offices have had to address charges of violating public records laws. In other cases, public officials have even been charged with crimes and as a result, improper conduct whether of a business or personal nature has often been revealed as a tangent to the forced disclosure of e-mail and other electronic messages.

Since statutory provisions and regulations vary considerably from state to state, each transition team will need to immediately determine the Freedom of Information Act (FOIA) guidelines in their individual state and convey the appropriate electronic record policies and e-mail use guidelines to their staff members.

It is important for governor's office staff to be aware of the type of e-mail messages which constitute a public record and the difference between messages with permanent retention value and those with short-term and transitory value. It is also crucial to explain how e-mail retention systems will work on an office-wide basis. For example, an archived e-mail message typically must include the transmission information (known as metadata) in order to authenticate the record. A governor-elect can consult with the state's archival or records management agency to obtain specific guidelines and learn the correct format and storage requirements used to preserve electronic records in their state.

In 2006, the National Governors Association (NGA) and the Council of State Archivists (CoSA) collaborated to publish a management note titled "Managing Gubernatorial Records: A Guide for Governors." This guide was developed to assist governors and their offices to better understand and manage the various records and communications produced by their offices. Special attention is devoted in this guide to the issue of e-mail.

As noted in the NGA management note, the concept of public ownership of government records has received national attention since Watergate in the 1970s, and continues today with widely publicized and sometimes controversial incidents in all levels of government. Arguably, these issues are even more noteworthy today given the prevalence and ease of use of electronic communication tools such as cell phones, e-mail, text messaging, Web-based records and digital media. **Access to public records and the conflicting concerns of executive privilege, privacy, and the accountability of public officials are important considerations for any gubernatorial administration.**

The following paragraphs highlight four key concepts specific to e-mail use and records classification which are explained in greater detail in the 2006 NGA management note. The full publication is available online on the NGA Web site and is referenced at the end of this brief.

Key Concepts on Records Classification and Use of E-mail

- 1) **Official Records versus Private Papers**: "There is no universal legal standard applicable to all states on what constitutes an official document and what alternatively may be a non-official or private document. In the archival and records management professions, "official records" are documents and other forms of records created or received by the governor, the governor's staff, and other units and individuals in the governor's office in the conduct of government business. Official records are evidence of the constitutional, administrative, and ceremonial functions of the office.

“Personal papers” contain personal or private material that does not relate to the carrying out of official duties and is not created or maintained by state employees with state equipment on state time.”

- 2) **The Consequences of Mixing Records**: “The consequences of mixing official public records and private papers can be serious. Public relations problems can arise from a conflict over access to, or the management of, records. There are important legal considerations as well. The governor’s legal counsel should review all appropriate legal authorities and citations concerning records to determine a clear and legally defensible delineation of public versus private records. If personal papers are in electronic form and are inserted into the electronic files and databases of a governor’s office, such storage could threaten their “personal” classification. **It is important to note the trend in many, if not most, states to broaden the definition of public records and to restrict the authority of the executive to classify records as personal.**”
- 3) **E-mail as a Record**: “Many states’ records laws and federal law treat e-mail as a record, making e-mail messages disclosable under open records statutes. **The governor’s legal counsel and office manager should ensure from the outset that the governor’s office is complying with their individual state requirements for the management and appropriate preservation of e-mail** and ensure governor’s office staff members are aware of the extent to which their e-mail may be or become public records.”
- 4) **Campaign and Transition Documents**: “Essential executive records are generated almost from the point of election. Gubernatorial transition offices may find that if they accept state resources (office space, personnel and equipment) to create, maintain, and file transition documents, these records may be considered “public” due to the investment of public resources. Furthermore, any records an outgoing administration sends to the transition office also could be classified as public since they were created while that administration was incumbent. Campaign records present another concern. If an incoming administration mixed its campaign documents with transition documents it is likely the campaign documents would be newly classified as official government records. **The governor-elect must be prepared to deal with the assumption that new documents created or accepted during the transition period may become official documents, possibly pre-inauguration.** Knowing how to deal with such documents is essential to manage records properly and alleviate risk.”

In summary, **developing and communicating records management policies, with special attention to electronic records in particular, is an important office policy decision which must be addressed right away.** The following checklist provides governors-elect with some useful points to consider on the issue of electronic records and e-mail use and retention.

CHECKLIST FOR GOVERNORS-ELECT

- Seek expert legal advice regarding your state laws relating to the retention and public access to e-mail and text messages. This includes communications generated during the transition and communications using private e-mail or cell phones which relate to public business.

- Develop and seek guidance from your state's archives or records management agency regarding the appropriate records retention policy and disposition schedule to be used for e-mail and text messages.
- Ensure that governor's office staff members are aware of the extent to which their e-mail may be or become public.
- Establish clear policies relating to the use of e-mail and text messaging, including limits relating to personal communications and non-governmental business transactions.
- Remember that few electronic media are 100 percent secure and that many records may be retained separately even after being deleted on individual computers and telephones.
- Be prepared for periodic requests for access to copies of e-mail and text messages and be prepared to invest the staff resources needed to review large volumes of e-mail to determine whether it is protected or subject to public disclosure.

ADDITIONAL RESOURCES

Two organizations, CoSA and NAGARA, offer detailed information and resources pertaining to records management and archives.

Council of State Archivists (CoSA)

308 East Burlington Street, #189

Iowa City, Iowa 52240

Phone: 319/338-0248

Fax: 319/354-2526

E-mail: info@statearchivists.org

<http://www.statearchivists.org>

National Association of Government Archives and Records Administrators (NAGARA)

48 Howard Street

Albany, NY 12207

Phone: 518/463-8644

E-mail: nagara@caphill.com

<http://www.nagara.com>

Contact information for each state's archival and records management agency can be found at:

<http://www.statearchivists.org/statearchivists.htm>

The governor-elect's transition staff may contact their state's records management or archival agency for immediate assistance with issues relating to the management of official records. In most states, a variety of direct services are available at little or no cost.

Online Resource Materials

NGA Management Note: “Managing Gubernatorial Records: A Guide for Governors”

This 2006 NGA management note written in conjunction with the Council of State Archivists.

This publication can be found at:

<http://www.nga.org/Files/pdf/06OMCTGOVRECORDS.PDF>

State Email Preservation Project by Kentucky, North Carolina and Pennsylvania

(A Collaborative Initiative Funded by NHPRC for the Preservation of Electronic Mail)

In March 2007, the National Historic Publications Records Commission (NHPRC) awarded a multi-state collaboration grant to the state archives of North Carolina, Kentucky, and Pennsylvania to pursue their goal of developing and testing an email collection and preservation prototype tool that will be able to collect mail from any client software program and transform the message from its native format into an XML file. The tool:

- captures only the e-mail that each user chooses to archive, arranged into folders that the user designates,
- uses open formats,
- has an easy migration path to other content repositories,
- utilizes existing standards and protocols.

Both the original message and the XML copy will be saved and an XML wrapper will be placed around the attachment.

The three states will work with participating agencies to test the user experience and reaction to the tool as a viable option to collect and preserve electronic mail of administrative, legal, or historical significance. They have identified high level offices that produce archival correspondence and have high public interest within each participating state (e.g., a constitutional office such as the governor or the secretary of state). This partnership involves working with content producers, information technology support staff, records analysts, and employees in the agencies.

For more information, contact names, and progress reports, please see:

<http://www.records.ncdcr.gov/EmailPreservation/>

Additional Information

The NGA Office of Management Consulting & Training (OMCT) provides governors, chiefs of staff and governors’ staff members with valuable resources and management services on the leadership and management of state government and organizing and operating the governor’s office. Many OMCT publications are accessible online at www.nga.org/omct.

For more information on OMCT services and publications, please contact Nikki Guilford, Director of OMCT (202/624-5422; nguilford@nga.org). For more information on this management brief and other research requests, please contact Christie Amberman, Senior Management Analyst with OMCT (202/624-5370; camberman@nga.org).