

Managing Email and Electronic Records: A Transition Priority

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Electronic communications tools such as email 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 effect of Freedom of Information requirements regarding email and other electronic communications.

The following media headlines illustrate how email and other forms of electronic-based communication pose numerous opportunities for gubernatorial embarrassment.

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

Email 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 email. Because of the widespread use of email communications, the unique challenges of storing and managing email are becoming more significant for an administration.

It is important to know your state's open records laws because federal law and many state laws treat email as a record. This means email messages created and sent by the governor's office could be disclosed when a Freedom of Information Act (FOIA) request is received or in connection to impending litigation.

There are many examples of questionable actions (whether intentional or not) that have been perceived as circumventing the retention of email as a permanent public record.

Actions that have generated criticism include:

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- » Inadequate or outdated archival systems for electronic records management; and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

Furthermore, countless news stories show that negative media attention, protracted litigation and escalated conflicts have ensued because of the revelation of email records or the lack thereof involving federal, state and local government actions and specific public officials. Email 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 email 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 email and other electronic messages. Since statutory provisions and regulations vary considerably from state to state, each transition team will need to immediately determine the FOIA guidelines in the state and convey appropriate electronic record policies and email use guidelines to staff members.

It is important for governors' office staff to be aware of the type of email messages that constitute public record and the difference between messages with permanent retention value and those with short-term or transitory value. It also is crucial to explain how email retention systems will work on an office-wide basis. For example, an archived email 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 (updated in 2010), the National Governors Association (NGA) and the Council of State Archivists (CoSA) collaborated to publish *Managing Gubernatorial Records: A Guide for Governors*. The guide was developed to assist governors and their offices in better understanding and managing the various records and communications produced by their offices. Special attention is devoted to the issue of email.

As noted in the guide, the concept of public ownership of government records has received national attention since Watergate and continues today with widely publicized and sometimes controversial incidents in all levels of government. These issues are arguably more significant today given the prevalence of easy-to-use electronic communication tools such as smartphones, email, 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 administration.

4 KEY CONCEPTS

The following four concepts are specific to email use and records classification explained in greater detail in the previously mentioned NGA publication, which is available on the NGA website and referenced at the end of this brief:

» **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 nonofficial 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.

» **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 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.

» **Email as record.** Many state records laws and federal law treat email as a record, making email 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 individual state requirements for the management and appropriate preservation of email and ensure governor's office staff members are aware of the extent to which their email may be or become public records.

» **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, those records may be considered public because of 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 that must be addressed immediately. The checklist below provides governors-elect with useful points to consider on the issue of electronic records and email use and retention.

CHECKLIST FOR GOVERNORS-ELECT

- » Seek expert legal advice regarding your state laws relating to the retention and public access to email and text messages. This includes communications generated during the transition and communications using private email or cellphones 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 email and text messages.
- » Ensure that governor's office staff members are aware of the extent to which their email may be or become public.
- » Establish clear policies relating to the use of email and text messaging, including limits relating to personal communications and nongovernmental 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 email and text messages and be prepared to invest the staff resources needed to review large volumes of email 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 St., #189
Iowa City, Iowa 52240
Phone: 319-338-0248
Fax: 319-354-2526
Email: info@statearchivists.org
<http://www.statearchivists.org>

National Association of Government Archives and Records Administrators (NAGARA)

48 Howard St.
Albany, NY 12207
Phone: 518-463-8644
Email: nagara@caphill.com
<http://www.nagara.org>

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 the state 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 NGA management brief was written in conjunction with the Council of State Archivists and is available online at www.nga.org/consulting.



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