

The Private Life of E-Mail

The digital age has complicated the definition of what's a public document.

BY PAM GREENBERG

What's public some of the time, private some of the time, and potentially confusing almost all of the time?

If you're a state legislator, it's probably your e-mail.

Consider this scenario. You're at your desk on the House floor, thumbing through e-mail messages on your personal BlackBerry. One message is from your wife, asking if you will be at parent teacher conferences. Another message is a BlackBerry "PIN" message from a lobbyist, explaining her position on a bill coming up for a vote. On the desk in front of you is your state-owned laptop, which displays messages from constituents in your state e-mail account. Another window on the laptop is opened to your private Yahoo e-mail account. In yet another browser window, your Facebook page is open, showing the messages you've sent to your friends, constituents and legislative colleagues.

Which of these communications is a public record? Which messages will you save, and which will you delete? The answer can depend on the state you live in, the content of the messages, court rulings and how your state's constitution is written.

Openness and transparency in government

Author credit: Pam Greenberg follows public records and technology issues for NCSL.

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DELAWARE HOUSE MAJORITY LEADER
PETER C. SCHWARTZKOPF

are essential democratic principles that foster accountability, promote the public trust and prevent abuses by those in power. But there are important privacy interests and fundamental constitutional doctrines that require a careful balancing act when considering public records laws. E-mail and new technologies create added complexities and challenges to the debate.

WHAT'S PRIVATE?

In six states—Colorado, Delaware, Montana, New Jersey, Rhode Island, Texas—statutes specifically address whether legislators' e-mails are considered public records. In most of these states, the laws are the result of a balancing act between the public's right to know and an individual's right to privacy.

In Delaware, the balancing act surfaced earlier this year when the General Assembly considered amending the state's Freedom of Information Act. The bill brought the legislature under the same public records and open

meetings provisions that applied to other government officials and agencies. The bill was at risk of failing because some lawmakers felt legislators' e-mails should be kept private.

"One of their biggest concerns was that we have so many e-mails from constituents talking about sensitive problems, problems with health care, and some are very descriptive," says Delaware House Majority Leader Peter C. Schwartzkopf. "We support open government and the public's right to know, but quite frankly, constituents bare their souls to us sometimes. When it comes to private conversations, there's a difference between need to know and want to know."

That does not mean, however, that the e-mails are protected in criminal proceedings or investigations of wrongdoing, he says.

In a blog posting about the Legislature's public records law, former Utah Senator David L. Thomas described another reason why some legislators want to keep their e-mail correspondence private. "Citizens have a right of privacy in personal and confi-



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ARE IMS A MEETING?

Courts have consistently found e-mails are more like a memo than a conversation. But what about instant messages, text messages and chat rooms?

In Virginia, the state Supreme Court ruled e-mails among three or more members of a public body are not subject to open meeting requirements because they do not constitute “immediate comment and response.” The court noted, however, that “some electronic communication may constitute a ‘meeting,’ and some may not.”

It specifically noted that in Internet chat rooms or instant messaging, the communication is virtually simultaneous and could be considered a public meeting.

The Missouri General Assembly confirmed this view in legislation passed in 2006. Meetings conducted through conference call, videoconference, Internet chat or Internet message board can be public meetings if any public business is discussed or decided, or if public policy is formulated. The law also requires a notice of these types of meetings to be posted in advance on a public website.

dential correspondence, without which their constitutional right to petition their government would be negatively affected,” he says. “No right to privacy means no whistle-blowers. Citizens want to feel secure in contacting their elected representatives without the fear that someone is spying on them.”

But open government groups don’t see it that way.

“It’s not very often I talk to citizens who want their e-mail private,” says Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press. “Citizens generally want help, and unless their message falls into the category of sensitive medical or financial information, it should be public. If the message is that sensitive, you should be able to make some of the exemptions in your regular state public records law apply to that communication.”

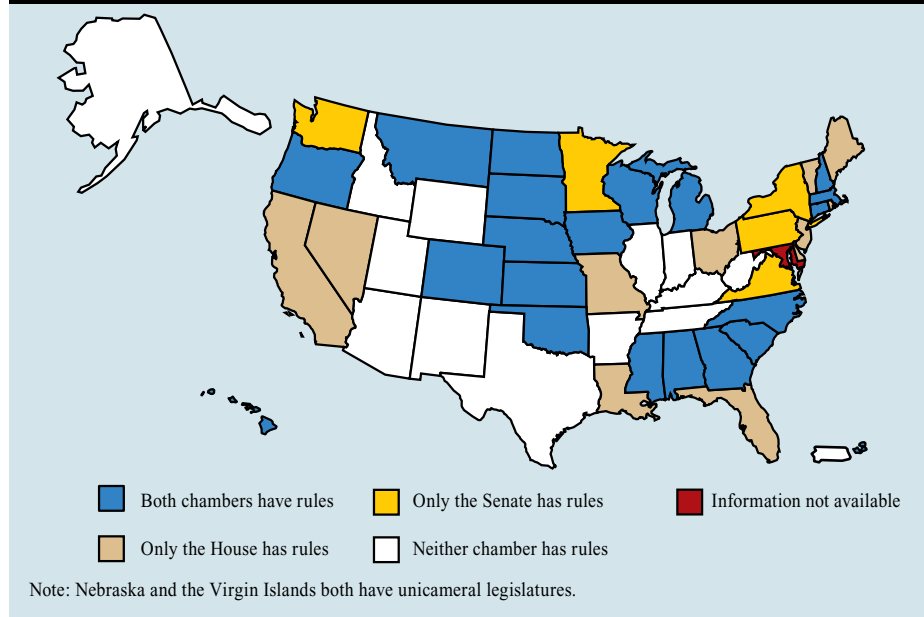
CONSTITUTIONAL QUESTION

Legislators are often criticized for exempting themselves from public records laws that apply to other public officials. In some states, however, the exemptions are the result of long-standing state constitutional provisions similar to the U.S. Constitution’s Speech or Debate Clause. Speech and debate provisions grant legislators a “legislative privilege” in connection with legislative work, freeing them to deliberate candidly without intimidation from the judicial or executive branch.

Steven Huefner, a law professor at the Michael E. Moritz College of Law at Ohio State University, says without these protections, the legislative process could be harmed, “diminishing legislators’ willingness to think creatively, solicit diverse opinions and advice, or explore what in hindsight turn out to be blind alleys.”

This legislative privilege has been cited in a variety of court rulings, attorney general opinions and other disputes that have resulted in conflicting decisions about the privacy of

LEGISLATIVE RULES GOVERNING ELECTRONIC DEVICES



MANAGING “SMOKING” E-MAIL

Advances in technology and the growth of electronic communications have elevated the importance of electronic evidence. In fact, information stored in computers and on electronic devices frequently is the “smoking gun” in litigation.

In 2006, the Federal Rules of Civil Procedures were amended to require federal courts to treat electronic documents the same as paper documents in litigation discovery requests. Almost half the states have adopted specific rules to manage electronic discovery, often referred to as e-discovery.

“Most states require that, when there is ‘reasonable anticipation of litigation,’ records—paper and electronic—must be preserved in case they must eventually be disclosed,” says Robert Joyce, a professor of public law and government at the University of North Carolina.

The changes in discovery requirements have created significant challenges for government.

More than 95 percent of a typical state agency’s documents are in electronic form, according to Gary Robinson, the former chief information officer in Washington state who chaired an e-discovery working group for the National Association of State Chief Information Officers.

E-discovery requests can include extremely volatile information such as e-mail, voice mail, instant messages, wikis and blogs, and other communications delivered through or stored via the Internet. Because of the difficulty of identifying where information is located and how it can be retrieved, e-discovery obligations can be very expensive. If a party in litigation is unable to locate and retrieve discoverable information, he may be penalized for his failure, and that could hurt his chances of winning the lawsuit.

E-discovery is proving to be a strong motivator for states to strengthen records management and digital preservation efforts.

Jo Anne Bourquard, NCSL

legislative records and communications.

Other kinds of state constitutional provisions also come into play.

In Delaware, for example, legislators heard conflicting legal opinions about whether their proposed legislation was constitutional.

“The state’s constitution says one General Assembly cannot bind the hands of the next,” says Schwartzkopf, “so there was discussion about putting the FOIA provisions in legislative rules instead of statute. But the bottom line is that we expect other political divisions to operate under FOIA, so there’s no reason we shouldn’t hold ourselves to that standard.”

CONTENT IS KEY

In some states, including Alaska and Florida, the content of a message—regardless of format or physical characteristics—determines if it’s a public record.

“The mere fact that an e-mail message is received on a government computer issued to a public official for the conduct of the public’s business does not of itself make the e-mail message a public record,” says Robert Joyce, a professor of public law and government at the University of North Carolina. “The invitation to go bowling does not become a public record just because it was received on a government computer.”

And just because an e-mail message is received on a personal home computer or BlackBerry does not, in itself, mean the e-mail is not a public record.

In Alaska, former Governor Sarah Palin regularly used her private Yahoo e-mail account instead of the state e-mail system to communicate with aides and to conduct state business. An Alaska Superior Court judge in August ruled just because the records related in some way to state business didn’t mean they were necessarily public record.

A 2003 Florida Supreme Court decision also illustrates the content versus format ques-

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tion. A Florida newspaper had requested all the e-mails of two city employees, arguing that it was entitled to them since they were made on publicly owned computers. The employees sorted the e-mails, and supplied only those that related to official business. Deciding in favor of the employees, the court held that the determining factor of whether a document is a public record lies in the nature of the record, not its physical location. Personal e-mails, the court said, do not fall within the scope of the transaction of official business and therefore are not public records.

TECHNOLOGY OUTSTRIPS THE LAW

BlackBerries, iPhones and other devices are becoming essential tools for many state lawmakers, but their text messaging capabilities in particular are raising new questions.

“They might make it easier to communicate with constituents and other legislators, but there’s really no functional difference in writing a message and a letter,” says Dalglish. “Many public officials think that using a BlackBerry is like a telephone conversation, but it’s not a phone call, it’s a memo. If you don’t want something to be part of the permanent record, pick up the phone. Courts have consistently found that e-mails are more like a memo than a conversation.”

FEW STATES DEAL DIRECTLY WITH E-MAIL

Six states specifically address in statute whether legislators' e-mail communications are public record.

◆ Colorado law classifies e-mail messages sent or received by legislators as public records, but exempts communications that a constituent "would have reason to expect to remain confidential."

◆ New Jersey law treats e-mail as a public record, but excludes information legislators receive from a constituent or concerning a constituent.

◆ In Rhode Island, e-mail messages between legislators and constituents or other elected officials are exempt from the public records law.

◆ Delaware excludes from public disclosure any e-mails received or sent by members of the Delaware General Assembly.

◆ Texas law prohibits public disclosure of electronic communications between citizens and members of the Legislature and the lieutenant governor unless the citizen authorizes disclosure.

◆ In Montana, all electronic messages used for transaction of official business are deemed public records, including constituent communications, "unless constitutionally protected by individual privacy interests."

Handheld devices also come with new features that can create more questions. In Florida, staff and commissioners of the Public Service Commission used PIN numbers to exchange messages BlackBerry-to-BlackBerry with Florida Power & Light lobbyists. PIN messages usually do not pass through an e-mail server and are easily deleted, raising suspicion that the PINs were being used to circumvent public records laws. The local controversy also prompted some media outlets to question similar types of exchanges between lawmakers and lobbyists during legislative hearings.

NEW SITES, NEW CONCERNS

Social networking sites also are raising questions for public officials who use them. The city of Coral Springs, Fla., sought an attorney general opinion about whether a city Facebook page, and any communications and other information about the city's Facebook "friends" (including the friends' respective Facebook pages), would be subject to the state's public records laws. The attorney general said a determination would depend on whether the information was made or received as part of official business by or on behalf of a public agency. Commissioners' communications on the city's Facebook page could also be subject to Florida's Sunshine Law and its retention schedules. Some social media users might not be aware that even on sites that allow them to keep postings private, the information could be made available to anyone if required by public records laws, by the site's terms of use contract, or even by other "friends" or users.

Discussions about the open records implications of public officials' use of social media are also coming up in other states. A recent online article by Megan Crowley of the Utah Center for Public Policy and Administration suggests that public officials should analyze the content of their social media postings to

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determine if they fall under the state's Government Records Management Act. Questions Crowley suggests considering include: "Does the information exist in another or original format? Is the information meaningful in conducting government business and for how long? Is the social media page being presented by a person in an official government role, or is it presented as their own personal page?"

In Washington, the State Archives website offers similar guidance to state and local government about the retention of posts on blogs, wikis and social networking sites such as Facebook and Twitter.

SAVE OR DELETE?

The proprietary nature of social media sites and the sheer volume of e-mail and text messaging may tend to discourage elected officials from saving messages that might otherwise be retained as part of the public record.


"The nature of e-mail works in some ways to make retention harder and in other ways to make it," says the University of North Carolina's Joyce.

"Retention is harder, on the one hand, because deleting is so easy and so tempting. It's easier, on the other hand, because long-term storage of data is technically quite possible."

Dalglish of the reporters group says the drive for open records has been underway for

a long time and is a factor in this debate.

"We started passing public records laws decades ago. For citizens to be actively engaged in their communities, they need information," she says. "They need to know how decisions are being made and how their tax dollars are being spent, and they should have a presumptive access to that information. New technologies are a blessing and a curse."

 **CHECK OUT** video of Washington state lawmakers debating an open records law at www.ncsl.org/magazine.