

Practical Issues with Laws Governing Electronic Records of State and Local Governments

by J. T. Tokarz



Like all modern businesses, state and local governments create a variety of electronic records. And like those businesses, their electronic records are subject to discovery, subpoena, and requests for production by regulatory agencies.

However, public agencies also are subject to statutory and regulatory requirements to facilitate citizen access to their records. Recent changes in the Federal Rules of Civil Procedure (the Rules)¹ have triggered hard thinking about these requirements as well as the maintenance and production of electronic information by other entities.

Virginia Freedom of Information Act

The Virginia Freedom of Information Act (FOIA)² expressly provides for access to electronic records of public bodies, and it addresses several questions unique to them. Nonetheless, difficult issues affecting them, as well as other entities, remain.

One is the burden of handling open-ended requests, e.g., “all documents and files of any agency employee regarding Joe Smith.” In a large agency or local government, such a request could paralyze the organization while each employee searches his computer and collects relevant files for review by counsel for exempt or privileged information.

FOIA provides mechanisms to limit such paralysis. Agencies may charge actual costs for access and search time and may require advance payment of costs likely to exceed \$200.³ FOIA also allows the public body

Electronic Record Keeping for State and Local Governments*

Correspondence (including e-mails) must be kept:

Chairpersons of local boards and councils	permanently
Board members and department heads	three years
Other officials	two years
Lower-level employees may destroy routine, administrative correspondence when it is no longer administratively necessary.	

*According to the Library of Virginia’s E-mail Management Guidelines

to seek additional time from the appropriate court “when the request is for an extraordinary volume of records” and a response within FOIA’s time limits “will prevent the public body from meeting its operational responsibilities.”⁴

Parties in litigation, including state and local governments, are not so lucky. Although they are entitled to seek protective orders against overbroad discovery,⁵ parties may not recover search and production costs for most of their own records. This can be a major problem given the enormous volume of electronic records in large organizations. For example, in ongoing products liability litigation about its painkiller Vioxx, Merck has produced over two million documents and privilege logs for over thirty-thousand documents totaling over five hundred thousand pages.⁶

Another difficult issue involves deleted files or e-mails. Most users are unaware that files and e-mails they deleted days or even years earlier may still reside on

their computers, agency servers, or centralized backup tapes. Is an extraordinary search for deleted e-mails in personal computers, in servers, and on backup tapes required? FOIA is silent on this issue, but it is unlikely to become a major issue under the act because of the agency’s ability to demand reimbursement for search costs. On the other hand, some courts have required parties in litigation to pay for the restoration of backup tapes to find deleted files.⁷ The test under the Rules is whether the electronic information is “reasonably accessible because of undue burden and cost.”⁸ A major concern is e-mail—a phenomenon virtually unknown a little more than a decade ago. E-mail makes it easy to send messages and attachments to multiple persons with a single mouse click, and the volumes are staggering. A 2005 Microsoft study found that the average employee receives fifty-six emails a day.⁹ Using Henrico County’s various departments as an example yields an estimate of one million e-mails to county employees each year. It is critical to determine which e-

mails must be retained and which may be permanently deleted.

Virginia Public Records Act

The Virginia Public Records Act (the Act)¹⁰ specifies which records public bodies must keep. The State Library Board implements the Act through regulations for record retention and destruction.¹¹ In addition to other schedules of general applicability, the Library of Virginia (the Library) has issued guidelines for e-mails and general schedules for administrative and electronic records.¹²

The Act broadly defines a public record as "recorded information that documents a transaction or activity by or with any public officer, agency or employee of the state government or its political subdivisions."¹³ The scope of this definition sometimes leads to retention of electronic files that are no longer necessary to carry out public business.

For example, the Library's *Q & A about E-Mail Retention* requires retention of e-mails that contain "policies and directives; correspondence or memos pertaining to the organization's business; work schedules and assignments; documents circulated for approval or comment; and any message that initiates, authorizes, or completes a business transaction, final report, or recommendation."¹⁴ Taken literally, this formula encompasses most e-mails of every employee because they pertain to the organization's business. Although the Library's *E-mail Management Guidelines* advise employees to periodically clean up their e-mail, their examples of e-mails that may be legally deleted are relatively limited: copies of e-mails to primary recipients, non-final e-mails in a e-mail thread, announcements of social events, Listserv chats, etc.¹⁵

In the absence of legal requirements, basic efficiency would lead employees to print out or save e-mails they or their employer know are important or they

need for their work, and to delete the rest of them. Unless there is a litigation hold for documents that might be needed in a lawsuit, this is preferable to keeping nonessential e-mails and records that clutter computers and make the task of reviewing and producing old e-mails for FOIA or discovery requests a nightmare.

The Library's guidelines classify most e-mails as correspondence and permit lower-level employees to destroy routine, administrative correspondence when it is no longer administratively necessary.¹⁶ However, chairs of local boards and councils must keep their correspondence and e-mails permanently, even if routine or administrative, other board members and department heads must keep them for three years, and other officials must retain them for two years.¹⁷ Equally important is the obligation to destroy records as provided in the Library's retention schedules.

These are not just issues for government agencies. Many corporations formerly limited retention of much of their data to six to nine months. However, the federal Sarbanes-Oxley Act¹⁸ enacted after the massive Enron and WorldCom scandals has triggered greater retention of e-mails and other electronic files. Ironically, some analysts charge that simply storing more records actually makes fraud easier to conceal because the higher volume helps hide irregular transactions.¹⁹ These critics think it is more important to decide what is necessary to keep and to get rid of the rest.

The increasing volume of electronic records, particularly trivial and routine e-mails, creates the need for hard choices about efficiency in electronic record keeping. Although the Virginia Public Records Act and FOIA (as well as Sarbanes-Oxley) have noble purposes, those purposes must be weighed against the costs of keeping thousands or millions of e-mails and electronic files unless the maker or

recipient sees a particular need to do so.

Endnotes:

- 1 Extensive new e-discovery provisions in the Rules went into effect December 1, 2006. The Supreme Court of Virginia is considering similar provisions for state litigation.
- 2 VA CODE ANN. § 2.2-3700 et seq. (2007)
- 3 VA CODE ANN. § 2.2-3704 (H) (2007)
- 4 VA CODE ANN. § 2.2-3704 (C) (2007)
- 5 FED. R. CIV. P. 26 (b)(2)(C)
- 6 *In re: Vioxx Prods. Liab. Litig.*, No. 1657, Section L(3) at *1, 2007 U.S. Dist. LEXIS 60299, *1, *3 (E.D. La. August 14, 2007)
- 7 *See Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004)
- 8 FED. R. CIV. P. 26 (b)(2)(B)
- 9 <http://www.microsoft.com/presspass/press/2005/mar05/03-15ThreeProductiveDaysPr.msp>.
- 10 VA CODE ANN. § 42.1-76 et seq. (2007)
- 11 VA CODE ANN. § 42.1-82. (2007)
- 12 The Library of Virginia Web site has a number of resources for electronic records at <http://www.lva.lib.va.us/whatwedo/records/electronic/index.htm>.
- 13 VA CODE ANN. § 42.1-77 (2007)
- 14 Library of Virginia *Q & A about E-Mail Retention* (October 2006), #2
- 15 Library of Virginia *E-Mail Management Guidelines* (October 2006), #1
- 16 Records Retention and Disposition Schedule General Schedule No. 19 Administrative Records (February 1, 2001)
- 17 *Id.*
- 18 15 U.S.C. § 7262 (2007)
- 19 *Hidden fraud risk in Sarbanes-Oxley?* ZDNet News (March 7, 2007) found at <http://www.news.zdnet.com/2100-1009-5602776.html>.

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