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To: Faye Matthews
From: David Durfee **DRD**
Subject: E-mail policies
Date: November 10, 2010

Chief Judge Bell asked me to research the question of whether there are any statutory requirements to archive or journal e-mail. He also asked me determine what, if any, policies the other branches of government may have in place to address this issue. JIS is asserting that the files need to be retained in case there is an investigation or some other matter requiring old e-mail files.

The short answer to his question is that e-mails are included within newly adopted State Archives regulations concerning records that an agency must maintain. The regulations are based on general statutory language that requires the State Archives to adopt regulations governing the retention of State records. Md. State Government Code Ann. §§ 9-1007, 10-632 (2010). The Archives has for some time interpreted that authority to extend to e-mails, and this year it promulgated new regulations that explicitly state that e-mails (rather than just electronic records generally) indeed are among the records that must be included in an agency's retention schedule. *See* 37-9 Md. Reg. 689 (April 23, 2010); 37-14 Md. Reg. 940 (July 2, 2010).¹

The new regulations define a "Record" to include "Written materials, *email*, books, photographs, photocopies, publications, forms, microfilms, tapes, computerized records, maps, drawings, and other materials in any format . . ." COMAR 14.18.02.02B(9)(i)

¹ The Office of the Attorney General has expressed a more guarded opinion. In 81 *Opinions of the Attorney General* 140, 145 (1996) the Attorney General noted that the "Archives ha[d] adopted regulations requiring all State and local agencies to "ensure that all electronic records created by that agency ... are covered by an official [records retention] schedule" COMAR 14.18.04.04A(3) . . . [but he was] unable to say . . . whether these schedules adequately address the phenomenon of e-mail messages that are commonly retained only for a short time in a computer's storage." He also noted that "most e-mail messages presumably do not meet the standards of 'archival value' that would justify their preservation . . . However, some might have potential historical or legal value." *Id.* at 145 n.4.

(emphasis added). While under the former regulations, the term “agency” was defined to be “any unit of State, county, or local government,” see COMAR 14.18.02.01B(1), under the revised regulations there no longer is any doubt that the Archives intends that its authority extends to all three branches of government. COMAR 14.18.02.02B(1) defines an “Agency” to “mean[] any office, department, board, commission or other separate unit of Maryland government, including the executive, legislative, and judicial branches of government, and all political subdivisions.”

Under the governing statute, an agency must develop a records retention schedule and submit it to the Archives for approval. SG Art. §10-639. Under the implementing regulation, COMAR 14.18.02.04, an agency shall:

- A. Develop schedules;
- B. Review and update their schedules at least once every 2 years^[2];
- C. Establish and maintain a records management program;
- D. Provide copies of publications to Archives as soon after release to the public as is practicable;
- E. Initiate appropriate action to recover records removed unlawfully or without authorization; and
- F. Transfer to Archives permanent record material not needed for the current operation of the agency in accordance with procedures outlined in this regulation.

The Archives’ regulations also provide that “No officer, employee, or contractor of any agency shall destroy, sell, or otherwise dispose of any record in such person’s care or custody or under such person’s control without first having followed the procedures under Regulation .07 of this chapter.” See COMAR 14.18.02.05B. On its website, the Archives informs officers and employees that the “willful, unauthorized destruction or alienation of a public record is a misdemeanor subject to criminal penalties set forth in [Criminal Law Article §8-606].”

The most recent records retention schedule submitted by the Administrative

² It formerly was every 5 years. COMAR 14.18.02.03B. A “schedule” is defined as “a records retention and disposition schedule . . . listing and describing all records of an agency . . .” COMAR 14.18.02.02B(13).

Office of the Courts and approved by the Archives dates back to 1979. I am unaware of any efforts by the Archives since then to seek a new retention schedule from the AOC. The Archives did approve a records retention schedule for the Circuit Courts in October, 2005 (approved for the Judiciary by Chief Judge Bell) and a schedule for the District Court in 2002. The Circuit Court schedule does not mention e-mails expressly, but contains the following general language about "ADMINISTRATIVE OPERATION RECORDS AND FILES":

Records and files containing correspondence, reports and miscellaneous administrative papers relating to the operation of the Circuit Court including but not limited to:

- a) Attorney General opinions;
- b) reports, correspondence, and miscellaneous papers;
- c) material relating to policy, administrative orders or history of the court;
- d) supervisory and management reports that require data sampling and verification.

Retain permanently material having continuing legal or administrative value to the operation of the office; transfer periodically to State Archives.

Retain all other material three (3) years and until all audit requirements have been fulfilled, then destroy.³

The *Records Retention and Disposal Schedule for the District Court*, schedule 2219, also does not mention e-mails specifically, and states concerning "Administrative Operation Records and Files" :

Records and files containing correspondence, reports and miscellaneous administrative papers relating to the operation of the District Court including:

- a. Attorney General opinions.
- b. Reports, correspondence, and miscellaneous papers.

³ The Records Retention and Disposal Schedule for the Circuit Courts stated that "The retention period for a court record applies to the record regardless of the medium in which it is maintained (e.g.: paper, film, electronic). Some court records listed in this schedule are maintained only in electronic format. For more information on retention of electronically stored court records, see Exhibit A." Page 1. Exhibit A does not, however, discuss e-mails specifically."

- c. Material relating to policy, administrative orders or history of the court.
- d. Supervisory and Management reports that require data sampling and verification.

Retain permanently material having *continuing legal or administrative value* to the operation of the office; transfer periodically to State Archives.

Retain all other materials three (3) years and until all audit requirements have been fulfilled, then destroy.

The Archives has published "*Email Retention Guidance and Policies*" for the assistance of covered agencies, which I am attaching. The *Guidance* makes some basic points, the most important of which are: (1) E-mail should not be treated differently from other records because "it is just like any other form of written correspondence"; and (2) "The criteria for determining the retention and disposition of email are whether the record is non-permanent or permanent. Email messages that have significant administrative, legal, fiscal, and/or historical value should be designated as permanent records."

The management of e-mail records also has to be considered in the broader context of records management in general. In its publication *What is Records Management?*, the Archives states:

Some records are **archival** in nature; that is, they have permanent value. Accordingly, decisions of the records manager in regard to the retention and/or disposition of records are subject to review by the State Archivist. Such review is meant to ensure that records of a permanent nature are retained in perpetuity. The State Archivist, after approving records retention and disposition schedules, passes the responsibility back to the individual agency records manager to ensure that archival materials are properly transferred to the State Archives for permanent preservation.

Under COMAR 14.18.02.04B, agencies must "review and update their schedules at least once every 2 years." As already stated, the Archives' regulations provide that "No officer, employee, or contractor of any agency shall destroy, sell, or otherwise dispose of any record in such person's care or custody or under such person's control without first having followed the procedures under Regulation .07 of this chapter." See COMAR 14.18.02.05B. Finally, "Until it has been approved in writing by the State Archivist, a schedule does not constitute legal authorization for the destruction of records." COMAR 14.18.02.07C(7).

Among other things, a records inventory must include a description of the types of information or data or documents and include "[a]ccess restrictions, if any,

based on laws or regulations, with citations.” COMAR 14.18.02.07A(2)(d)(vi). Similarly, a schedule must “Define any access restrictions that apply, give legal or regulatory citation for access restrictions, and note when or under what circumstances those restrictions will be lifted.”

The Judiciary has taken the position in its Rules that the Archivist makes *recommendations* on the schedules for disposition of circuit court and District Court records, and that a proposed schedule and the recommendations must be submitted to the Chief Judge of the District Court and the County Administrative Judge, respectively, who may approve or disapprove of the schedule and recommendations in whole or in part. See Rules 16-505c and 16-818c. Courts and Judicial Proceedings Article §2-205 similarly leaves to the Chief Judge of the District Court or County Administrative Judge the question of which records to retain or dispose, as guided by Court Rules.⁴ Rules 16-505d. and 16-818d. also categorize the types of records that must be kept permanently by the clerk, records which must be kept permanently by the Hall of Records or the clerk and “other records” whose disposition occurs according to times designated on a schedule. If the Hall of Records has been offered custody of records and declines it, disposition shall take place according to the schedule as approved. If the records are to be destroyed, the clerk must obtain the approval of the Board of Public Works and file a certificate of destruction with the Hall of Records. Rules 16-505c.6 and 16-818c.6.⁵

Conclusion

While it would have been possible for an agency to argue that the Archives’ former regulations did not require that e-mails be part of a record retention policy, the Archives’ new regulations remove any doubt: e-mails are among the included records. Moreover, under COMAR 14.18.02.04B, as revised this summer, agencies

⁴ Which provides:

(a) The clerk of a circuit court or the chief clerk of the District Court, under rules and regulations promulgated by the Court of Appeals, may authorize the destruction of pleadings, papers, and files in his custody which, because of their character, serve no useful purpose in being retained.

(b) Before any pleadings, papers, or files are destroyed, the proposed destruction shall be approved in writing by the judge exercising the functions of administrative judge in the county in the case of circuit court records or the Chief Judge of the District Court in the case of District Court records, and the records shall be disposed of in accordance with Title 10, Subtitle 6, Part V of the State Government Article.

⁵The Administrative Office of the Courts and the appellate courts are not covered by statute or court rule, however. We may want to request that the Rules Committee adopt a new rule that would make the Archivist’s views on the schedule of records of the AOC and the appellate courts *recommendations* rather than definitive.

must "review and update their schedules at least once every 2 years." Therefore, in order for an agency of the Judiciary (e.g., a circuit court, the District Court, the AOC) to be in compliance, the next time its reviews and update its schedule, it should to include e-mails within its inventory of records and develop procedures for the differentiation of permanent and non-permanent e-mails and transmission of those permanent records to the Archives..

Because the AOC has not revised its record retention schedule in over 30 years, I was reluctant to contact any officials with the State Archives for advice on how an agency realistically can be expected to cull through the thousands of e-mail messages, separate them into permanent and non-permanent categories, and then transfer the permanent records to the Archives. The attached "Email Retention Guidance and Policies" provide a good starting point. Of most concern to me is the requirement that an agency, (1) conduct a records inventory and describe the information contained within the inventory, including "[a]ccess restrictions, if any, based on laws and regulations (with citations), *see* COMAR 14.18.02.07A.(2)(d)(iv); and (2) prepare a records schedule that "define[s] any access restrictions that apply, give[s] legal or regulatory citations for access restrictions, and note when or under what circumstances those restrictions will be lifted."⁶

Attachment

cc: Frank Broccolina
Veronica Jones
Ann MacNeille

⁶COMAR requires "[e]ach agency [to] designate at least one records officer to serve as liaison with Division and with Archives for the purpose of implementing and overseeing a records management program, and coordinating legal disposition, including destruction or obsolete records."

Email Retention Guidance and Policies

Definitions

Email systems store and deliver text messages and attachments from one computer user to another.

Email messages are electronic documents created and sent or received by a computer system. Email messages are similar to other forms of communicated messages, such as correspondence, memoranda, and circular letters. An email message is a record created or received by an agency. Whether the email serves to document the organization, functions, policies, decisions, procedures, operations or other activities of an agency is the deciding factor as to its status as a record.

What email should be kept and how long?

Email should not be given any special treatment because in essence it is just like any other form of written correspondence. The only differentiating quality between email and paper correspondence is the medium or mode of delivery. Email itself is not considered a record series or category. It is a means of transmission of messages or information. Like paper or microfilm, email is the medium by which this type of record is transmitted.

The criteria for determining the retention and disposition of email are whether the record is non-permanent or permanent. Email messages that have significant administrative, legal, fiscal, and/or historical value should be designated as permanent records.

Records with permanent value include but are not limited to the following:

1. documentation of State policy (*eg. laws, rules, and court decisions*)
2. documentation of the policy process (*eg. policy directives, minutes of meetings, transcripts of selected hearings*)
3. protection of vital public information (*eg. births, deaths, marriages and reports*).

Recommendations re: email retention periods

- Personal email: Delete immediately
- Non-record email: Delete immediately
- Non-permanent email: Delete after a certain period of time, per approved records retention schedule
- Permanent email: Transfer to Archives in accordance with Archives' rules and regulations in COMAR 14.18.02

Non-permanent emails serve to convey information of temporary importance in lieu of oral communication. They include but are not limited to: routine correspondence, activity reports, and weekly fiscal reports. Permanent documents are records that are deemed to have lasting administrative, legal, fiscal and/or historical value beyond the life of the creator. These may include but are not limited to: meeting minutes, policy statements, and end of year reports.

Who should save email and how?

Some feel the individual who sends an email message should maintain a record copy of the message. However, the varied use and wide distribution of email may result in many exceptions to this rule that will have to be dealt with internally. There are clearly instances when the recipient should maintain the record.

After a specified periods of time in the employees inboxes, messages of permanent value should be transferred to other boxes or designated files on the agency's server, in accordance with retention requirements. Email that is designated as permanent should be saved to an online storage folder or permanent near-line storage periphery. Permanent emails must be periodically transferred to the archives in accordance with Archives' rules and

regulations in [COMAR 14.18.02](#).

In order to aid in the managing of the email system, the creator should provide descriptive subject lines. This not only enhances the email but also makes retention much easier.

The system should be maintained in a format that preserves contextual information and that facilitates retrieval and access. The system should allow for periodic deletion of non-permanent messages as well as transfer of permanent messages to a central repository. Both permanent and non-permanent records should be stored in a logical filing system.

The system administrator and records management officer of the agency should manage the email system and transfer to the Archives, per retention schedule, file folders containing saved permanent email in accordance with Archives' rules and regulations in [COMAR 14.18.02](#)

This web site is provided as a courtesy of the Maryland State Archives. As you develop your records management program, you should consult with the Records Management Division of the Department of General Services and your staff counsel.

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Laws, Rules, and Regulations

The purpose of this site is to guide Maryland State, county, and local government agencies in the management of public records. The [Annotated Code of Maryland State Government Article 10, sections 631-634](#) and [COMAR 14.18.02](#) require every State, county or local government agency to develop a program to efficiently manage its records. This includes the establishment and/or regular revision of records retention and disposition schedules. The head of each agency or office is responsible for ensuring that all records created or received by that agency are on an approved records retention and disposition schedule.

The willful, unauthorized destruction or alienation of any public record is a misdemeanor subject to criminal penalties set forth in the [Annotated Code of Maryland \(Criminal Law Article 8, section 606\)](#). A public record may not be disposed of without authorization from the State Archivist. This authorization must be obtained by means of filing a records retention and disposition schedule with the State of Maryland. The [Schedule Preparation](#) section of this web site provides guidance on the development and approval of records retention schedules.

If you are a State agency with an approved records retention schedule and would like to transfer **non-permanent** records to the State Records Center, please contact the Records Management Division at 410-799-1379. Agencies must complete and submit a [Records Transmittal and Receipt Form \(DGS 550-5\)](#) prior to transfer.

If you already have an approved records retention schedule and would like to arrange for the transfer of **permanent** records to the Archives, please visit the transfer.mdsa.net site. Forms, instructions and contact information for the transfer of permanent records to the Archives are available [online](#).

This web site is provided as a courtesy of the Maryland State Archives. As you develop your records management program, you should consult with the Records Management Division of the Department of General Services and your staff counsel.

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