PIERCE DAVIS & PERRITANO LLP

CLEAR DIRECTION IN COMPLEX CASES

Attorneys

John J. Cloherty III

Governmental Employee Email As Public Records

Governmental Employee Email As Public Records

Recent publicity scrutinizing a city official's habit of deleting emails, which precluded the city from promptly responding to a newspaper's public records request, offers a lesson to public officials in Massachusetts. Many public employees are unaware of the obligations and risks when using electronic mail to communicate. This article briefly describes the status of governmental employee email as a public record in Massachusetts, and the duties incumbent upon employees to safeguard and preserve such public records.

The Massachusetts Public Records Act, M.G.L. c. 66, sec.sec. 1, et. seq., broadly defines "public records" to include "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee" of any Massachusetts governmental entity. M.G.L. c. 66, sec. 10(a). There is a presumption that all governmental records are public records. M.G.L. 66, sec. 10(c); 950 C.M.R. 32.08(4). There are 18 strictly and narrowly construed exemptions to this broad definition of public records. See M.G.L. c. 4, sec.sec. 7(26)(a-s); see also Attorney General v. Assistant Comm'r, 380 Mass. 623, 625 (1980) (stating statutory exemptions are to be strictly and narrowly construed). Of course, the "primary purpose of [the public records law] is to give the public broad access to governmental records." Worcester Telegram & Gazette Corp. v. Chief of Police, 436 Mass. 378, 382-383 (2002). The statute expresses the Legislature's considered judgment that "[t]he public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner." Attorney General v. Collector of Lynn, 377 Mass. 151, 158 (1979). "Greater access to information about the actions of public officers and institutions is increasingly . . . an essential ingredient of public confidence in government." New Bedford Standard-Times Publ. Co. v. Clerk of Court, 377 Mass. 404, 417 (1979).

With this background, one should expect that emails of public officials and employees are considered public records under the Public Records Act. Lest there be any doubt, the Massachusetts Secretary of State's Public Records Division has issued guidelines expressly stating that "[a]ll email created or received by an employee of a government unit is a public record." Seewww.sec.state.ma.us/arc/arcrmu/rmubul/bul199.htm. The guidelines explain that email is subject to the same records management principles as all other public records. Government offices are required to establish and implement records management procedures to ensure public records are preserved for the proscribed period. Every governmental department is required to have a "records custodian" having routine access to, or control of, public records. 950 C.M.R. 32.03. Further guidance regarding public records retention and management from the Public Records Division and the Supervisor of Records can be found at the following websites:

1. www.sec.state.ma.us/arc/arcrmu/rmindex.htm; and

© 2017 Pierce Davis & Perritano LLP | 617.350.0950 | www.piercedavis.com

2. www.sec.state.ma.us/pre/preerecords/erecords.pdf.

For example, the Supervisor of Records suggests that, while an email scheduling a meeting can be disposed of after use, an email relating to a contract should be retained for six years after final payment.

It is apparent that the content of each email must be screened and evaluated to determine the need for, and duration of, retention. As for the form of the retention, the Public Records Division recommends that the user print out the email message and file it in accordance with the entity's paper-filing system, unless it cannot be printed accurately or is too voluminous, in which case it should be stored electronically. Given the volume of email correspondence today, and the potential relevance of electronic metadata discussed below, it is advisable that governmental entities establish electronic record-keeping systems in lieu of the burden of printing physical copies.

Public employees should be aware that some of the exceptions contained in the Public Records Act may apply to the content of emails, and the emails may be subject to other state statutory or common law privileges from disclosure. Thus, legal counsel should be consulted prior to producing emails in response to a public records request. Furthermore, the burdens of producing email as part of a lawsuit may be equally onerous. The obligation of a governmental entity to respond to discovery requests in the context of litigation is beyond the scope of this article. Governmental officials should be aware, however, that courts routinely allow electronic discovery, including production of electronic data. Court cases and rules recognize that electronic documents contain metadata, hidden contextual data that may reveal the author of electronic documents, the date of creation, and any alterations to the documents. Metadata may be relevant and discoverable. If a governmental department is involved in litigation, counsel or the court may seek a "litigation hold" requiring the department to preserve intact all electronic data as of a certain date, effectively overriding other applicable retention policies. Although these record-keeping obligations may seem burdensome, numerous resources now exist for email storage and searching. Prudent governmental departments should consult with information technology specialists to determine the necessary electronic archiving solutions to meet their obligations with respect to governmental employee email.

- John J. Cloherty III

© 2017 Pierce Davis & Perritano LLP | 617.350.0950 | www.piercedavis.com