

LOCAL COMMENT

State e-mails are public record, shouldn't be clicked into oblivion

By ARTHUR SIEGAL



Although technology is stimulating, empowering and economically productive, it often tends to run ahead of our laws.

The downloading of copyrighted music from the Internet, stem cell research and cloning are well-publicized examples. But in Michigan, a very real and practical threat is the inability to access — or the outright loss of — state government proceedings conducted through e-mail.

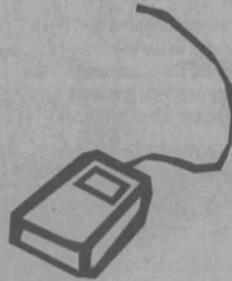
E-mail has become so indispensable to our daily lives and so easily written. And while e-mail is capable of being erased with just a mouse click, we tend to overlook the vital information it often carries.

In the state government, like elsewhere, e-mail is used for communications previously conducted by letter, memo or written note. These items fall into the category of public records, access to which is essential to the public's understanding and oversight of government. And they are needed in many regulatory matters, criminal proceedings and litigation. But the "paper" trail is disappearing.

Our state government has yet to establish satisfactory requirements or procedures for the storage of, and access to, its e-mail communications. Every day, many e-mail communications supporting governmental actions are lost. As a result, the public has less chance to understand, comment on or challenge what its government is doing.

Freedom of Information Act to the rescue?

For the time being, some safeguard can likely be found in the existing FOIA, an important tool, along with the Open Meetings



Act, that allows the state's public, taxpayers and businesses to determine what their government is doing. However, as a significant amount of state business is now transacted by e-mail, rather than on paper, even when FOIA requests are made, the public often does not get all of the information to which it is entitled. By lacking consistent or established e-mail policies, state agencies have created for themselves a de facto exemption to the FOIA. Part of the reason: the current version does not even specifically address electronic mail.

Still, because of the magnitude of the governmental dialogue occurring in cyberspace, there is great value in state e-mail information accessed through the FOIA. So the questions stand: Has the state kept relevant e-mails? And, if it has, will they be provided?

Based on some related cases, the courts should agree that e-mails are writings subject to FOIA requests. However, not every writing generated by the state government must be kept as a public record. Some state agencies, without regard to state law, have established e-mail "cleanup" or purging programs that obliterate all e-mails beyond a certain age, regardless of content. This is a violation of state law, and, more important, an insult to the policy of openness that underlies our

state Constitution and FOIA.

Our state government should establish a formal e-mail policy in law. This policy should preserve and make recallable anything conducted by e-mail that would otherwise be considered public records, as traditionally required by the FOIA. This is an urgent issue.

Even though our state Management and Budget Act and protocols set by the Michigan Department of Management and Budget in 1998 require each state agency to maintain electronic records, implementation has been woefully slow or nonexistent. Even the agency responsible for supervising the implementation of this requirement has not adopted a retention policy.

In August 2000, the state told local governments that "responsibilities for managing e-mail messages are the same as those for other records." This direction shows that the state realizes the importance of public-record e-mails. It should practice what it preaches. The ongoing Enron-/Arthur Andersen debacle is proof that e-mail dialogues should be preserved and not obliterated.

What is the solution? First, we need cooperation, not combat. State leadership must recognize the seriousness of this issue and address it promptly and responsibly in law. Second, and this is not easy, we all must respect the seriousness of e-mail in our transactions in business and in government. Finally, when pursuing FOIA action, be sure to specifically request e-mails, even those that may have been deleted.

This way, our legal rights won't get lost in electronic noise or, worse, disappear altogether.

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