

Is email correspondence a public record under the Public Records Act?

It can be. The Vermont Public Records Act attempts to balance the constitutional requirement for government accountability with the competing goal of shielding certain private and confidential information in the custody of state and local government from public disclosure. In order to achieve this balance, the Act sets a broad definition of a municipal public record: “any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of [municipal] business.” 1 V.S.A. § 317(b). Generally, any person has the right to inspect a municipal public record during customary office hours. 1 V.S.A. § 316(a). If a request for a public record is made, the custodian must promptly produce the record for inspection unless it falls within one of the Act’s 39 exemption categories. 1 V.S.A. § 317(c).

All electronic mail software programs record information both at the time the information is created and at the time it is received. The information may also be recorded at intermediate points in the delivery system. As a consequence, all email messages clearly fit the first part of the definition of a public record under the Act. As to any specific piece of email, however, the question must also be answered whether it was “produced or acquired in the course of” municipal business. If this second part of the definition is not met, the email message is not a public record.

There are very few reported Vermont court decisions addressing whether recorded information was “produced or acquired in the course of” public agency business. In the leading case, *Herald Association v. Dean*, 174 Vt. 350 (2002), several newspapers requested copies of former Governor Howard Dean’s daily schedule under the Public Records Act. Governor Dean refused the request, arguing that portions of his schedule not directly related to duties as governor – in particular, information related to his developing presidential campaign – was not covered by the definition of a public record.

In rejecting this argument, the Vermont Supreme Court noted the circumstances surrounding the creation of the Governor’s calendar and the role it played in the functioning of the Governor’s office led to the conclusion that it was produced or acquired in the course of the Governor’s business. According to the Court, nothing in the Public Records Act “intimates that records of official acts alone are subject to public inspection.” The Court also emphasized that “the Legislature did not limit the statutory right of access to public documents to those reflecting official governmental acts only.” This being the case, the Governor’s entire calendar, including those portions of the calendar related to his presidential aspirations, was held to be a public record.

Significantly, under the Public Records Act an individual does not have to intend to record information, nor does an individual have to know he or she is recording information, in order for the recorded information to be a public record. Many computer applications – including email programs, Internet message boards and social media programs – automatically record information the user enters or receives. They also may record data *about* the recorded information. This metadata may often fit the statutory definition of a public record and could be a public record, even though the user of the application had no intention of recording the information or knew that it was being recorded.

It is also noteworthy that there is no location limitation in the definition of a public record. Email messages may still be public records even though they are recorded outside of a municipal office on

a computer not owned or controlled by the municipality. Depending on an email message's content and context, the message may be a public record even if it is sent or received by a local official or employee at his or her home or place of business. The same would apply to information recorded by computer applications such as word processing programs, databases and spreadsheets, Internet message boards, list-serves and social media applications.

While the facts in *Herald Association* may not readily transfer to the much more mundane information that municipal governments typically records, there are nevertheless some important insights and principles to be derived from the decision – namely that public records are not limited to the official actions of government, and that whether a particular item of recorded information is a public record depends upon its content and the context in which it was produced or acquired. Thus in most instances, the determination whether a particular document or email message is a public record must be made on a case-by-case basis. An email message may be a public record regardless of the creator or recipient's knowledge or intent and regardless of the location in which it is produce or acquired.

Do any Public Records Act exemptions apply to email correspondence?

Some may. As stated above, if a request for a public record is made, the custodian must promptly produce the record for inspection unless it falls within one of the Act's 39 exemption categories. According to the *Legislative Council Staff Report on Public Records Requirements in Vermont*, one of the exemption categories– records that by law are designated confidential – effectively encompasses 169 other exemptions found elsewhere in Vermont law, bringing to 208 the total number of possible state law exemptions to which a public record may be subject.

Through these exemption categories, the Vermont Legislature has identified the types of private and confidential information to be shielded from public disclosure. Generally, the Vermont Supreme Court has recognized that the Public Records Act favors a policy of access to public records, and to this end Vermont courts construe the Act “liberally in favor of disclosure.” They also construe exemptions narrowly against the custodians of records and resolve any doubts in favor of disclosure.

While any Public Record Act exemption may be applicable to any particular public record, given that email is most often used as a method of correspondence, a number of exemptions may specifically apply to email correspondence between municipal officials or municipal board members. These include:

- Records of interdepartmental and intradepartmental communications in any county, city, town, village, town school district, incorporated school district, union school district, consolidated water district, fire district, or any other political subdivision of the state to the extent that they cover other than primarily factual materials and are preliminary to any determination of policy or action or precede the presentation of the budget at a meeting held in accordance with section 312 of Title 1. 1 V.S.A. § 317(c)(17).
- Records that would cause the custodian to violate the common law deliberative process privilege which protects information of an advisory or deliberative nature that relates to the governmental decision or policy-making process and allows government officials freedom to debate alternative approaches in private. *Bethel v. Bennington School District and Mount Anthony School District*, 403-10-07 Bncv; *Munson Earth Moving Corp v. City of South Burlington*, So 805-08 Cnc.

- Records concerning formulations of policy, where such would constitute a clearly unwarranted invasion of personal privacy if disclosed. 1 V.S.A. § 317(c)(12).
- Records of, or internal materials prepared for, the deliberations of any public agency acting in a judicial or quasi-judicial capacity.

While some of the record exemption categories are fairly clear on their face, others have been the source of repeated litigation. In interpreting one of the Act's more ambiguous exemption categories – personal documents relating to an individual – the Court has developed a balancing test to determine whether public interest in disclosure is outweighed by potential invasion of an individual's privacy interests. The Court has described the privacy interest as the “intimate details of a person's life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends.” *Trombley v. Bellows Falls Union High School Dist. No. 27*, 160 Vt. 101 (1993). Even when this privacy concern is implicated, a public record may still be subject to disclosure if the public's interest in disclosure outweighs these privacy concerns. In balancing these interests, the significance of the public interest asserted, the nature, gravity, and potential consequences of the invasion of privacy occasioned by the disclosure and the availability of alternative sources for the requested information must all be considered. *Kade v. Smith*, 180 Vt. 554 (2006).

As with the determination of whether a particular document or email message is a public record, determining whether such document or email message is subject to one or more of these exemptions must be made on a case-by-case basis. This principle is especially important when the exemption being considered is “for personal documents relating to an individual” described above.

Who is the custodian of email messages under the Public Records Act?

According to the Public Records Act, “Upon request the custodian of a public record shall promptly produce the record for inspection.” It also provides, “A custodian of public records shall not destroy, give away, sell, discard, or damage any record or records in his or her charge, unless specifically authorized by law or under a record schedule approved by the state archivist pursuant to subdivision 117(a)(5) of Title 3.” However, the Public Records Act does not itself designate who the immediate or permanent custodian of a particular public record is. Different municipalities are likely to have different practices and, in many cases, no formal designation of a permanent custodian may be made.

As with the definition of a public record and the determination of whether it may be subject to an exemption, identifying the immediate custodian of a particular record must be made on a case-by-case basis. In some instances, the immediate custodian of an email message may be the message's sender or recipient. The custodian could change as the record is transmitted to recipients or archived for retention. Along these lines, the Vermont State Archives and Records Administration (VSARA) recommends that when email messages and attachments are sent to multiple people, the sender should be responsible for maintaining the record, including subsequent responses, until the retention requirement specific to that document is met. *Electronic Messages Best Practices for All Public Agencies*, April 1, 2009. vermont-archives.org/records/standards/pdf/ElectronicMessagesBestPractice_Eff.20090401.pdf

In 1893, the Vermont Supreme Court stated “The town clerk is the custodian of the permanent files and records of the town, either by express law making him such custodian, or by the immemorial usage in this state.” *State v. Buchanan*, 65 Vt. 445 (1893). In 1893, the volume of municipal public records was certainly much smaller than it is now and most of the information recording formats used today did not exist. To the extent that the modern law is not clear regarding who the permanent custodian of a particular public record should be, the selectboard is responsible for performing “all duties required of towns and town school districts not committed by law to the care of any particular officer.” 24 V.S.A. § 872.

In municipalities utilizing the town manager form of government, the manager is charged with “caus[ing] duties required of towns ... not committed to the care of any particular officer, to be duly performed and executed.” 24 V.S.A. § 1236(1). Given this default status, for records other than those expressly in the custody of a particular officer or board, the selectboard or legislative body of a municipality and/or the municipal manager would likely be legally responsible for safe keeping of municipal records and ensuring Public Records Act compliance.

How should email correspondence be managed?

The proper retention and management of all public records is vitally important to the operation of government. Vermont state agencies are required by law to establish and maintain a public record management program. Each agency program for public record management must be approved by VSARA and must meet certain statutory requirements. 3 V.S.A. § 218(b),(c).

While there is presently no legal requirement for a municipal government to have an approved public record management system, as noted above, it is unlawful to destroy, give away, sell, discard, or damage any public record unless specifically authorized by law or under a record schedule approved by the state archivist. 1 V.S.A. § 317a. A person who willfully destroys, gives away, sells, discards, or damages a public record without legal authority to do so may be fined up to \$1,000 for each offense. 1 V.S.A. § 320(c). Beyond these penalties, some effective system of municipal records management is certainly necessary, given the important role that records play in the administration of local government.

To guide the retention and management of emails messages, VSARA has published *Electronic Messages Best Practice for All Public Agencies*, the purpose of which is to “establish a set of statewide recommendations for the retention and disposition of electronic messages created with electronic communication systems (such as electronic mail systems).” It applies to “all electronic messages created or received by public agencies.” A municipality is a “public agency” for purposes of the document. 1 V.S.A. § 317(a).

Among the recommendations the *Electronic Messages Best Practice* document makes are “records created through electronic communication systems should be fully retrievable and available until retention requirements specified in their respective disposition orders or record schedules have been met,” and “[a]gencies should have policies and procedures that address how their agency will transfer records from their electronic communications systems to existing electronic recordkeeping systems or paper-based recordkeeping systems.” The document contemplates that all agencies, including municipal governments, have or will develop a system for retaining and managing email messages either in electronic or paper format.

Regardless of the statutory penalties for destroying a public record or failing to respond to a public records request, every municipality should be taking steps to manage electronic public records effectively, given their importance to the operation of municipal government and to citizens as a means of evaluating the performance of public officials. Municipal officials should review their electronic communication systems to determine what information being recorded could be a public record, keeping in mind that the definition of a public record is very broad and not limited to official government acts.

Municipal officials should also be conscious of the consequences and legal obligations arising from the use of the municipality's electronic communications systems and the importance of choosing a communication method appropriate to the message being conveyed. All users of municipal electronic communications systems (both senders and recipients) should be advised that their email communication may be a public record and of their responsibility to retain and manage electronic communications in accordance with the Public Records Act. In other states, municipal officials routinely include statements in their email correspondence reminding recipients that any correspondence – whether by traditional method or email with municipal officials – with certain limited exceptions is public record and is available for review by any requesting party.

To summarize, municipal governments should adopt specific policies for the management of email messages as public records. These policies should identify the immediate and permanent custodians of email messages and outline procedures for transfer of email messages from immediate custodians (e.g., senders or recipients) to electronic recordkeeping systems or paper-based recordkeeping systems overseen by permanent custodians. Messages retained in the recordkeeping system should be retrievable and available until retention requirements specified in the applicable VSARA disposition order or record schedule have been met.

Given that the determination of whether a particular email message is a public record or potentially subject to an exemption is determined by the content and context of the message, *all* email messages produced or acquired by a municipal electronic message system should be retained and managed as public records. Ultimately, the determination of whether an email message is a public record or might be subject to an exemption must be made on a case-by-case basis, based on both the content and the context of the information. The determination of whether a particular email message is a public record and/or is subject to an exemption should be made by the permanent custodian at the time a request for production of a public record is made. This approach will help ensure consistency in the treatment of email messages as public records.

**Jim Barlow, Senior Staff Attorney
Municipal Assistance Center**