

New Year, New Governor, New E-Mail Policies?

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January 2009 marks the start of a new year, with a new President in the White House and new Governors in a number of states, including North Carolina and Missouri. Two outgoing governors, North Carolina Governor Michael Easley and Missouri Governor Matt Blunt, faced intense conflict with the media during 2008 over the issue of retention of and public access to government e-mail messages under relevant public records laws. The conflicts were often heated but were ultimately resolved in anti-climatic fashion in the final days of their respective administrations.

In North Carolina, Governor Easley had a public clash with local media organizations when it was reported that the Governor's staff may have directed state agencies to routinely delete e-mails received in the course of government business. The allegations were made following the termination of the state Department of Health and Human Services' public information officer for, reportedly, failure to comply with public records requests. As the story unfolded, the news media reported that the Governor had established a policy that allowed state employees to delete messages that had only "short-term" value or no "reference" value.

Like many states, North Carolina has a public records statute that plainly provides a right of public access to e-mail. Section 132-1(a) provides, in relevant part:

"Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

The public records statute further provides that "public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people" and that "the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law."

Given the clear statutory language and the absence in the public records statute of any blanket e-mail exemption, media advocates disagreed with the Governor's policy that permitted e-mail messages received in the course of transacting agency business to be deleted. In March 2008, the

Governor appointed a panel to review executive office policies concerning the retention of e-mail under the state's public records law. Then, in April 2008 several news organizations filed a lawsuit to enforce the public records law with respect to the Governor's e-mail policy. The committee made its recommendations in May 2008.

On January 9, 2009—his last day in office—Governor Easley signed an Executive Order adopting a new e-mail policy making clear that “e-mail messages sent and received in connection with state business are public records.” Of course, this finding is consistent with and, in fact, compelled by the public records statute. The full text of the order, which requires 13 points of action, is provided [here](#).

One significant aspect of the order is that it requires state executive branch employees to retain e-mail messages sent or received in the course of conducting state business for at least 24 hours. Relatedly, the order requires e-mail messages to be backed up at least once daily and for backup tapes to be kept for at least 10 years; this means that all e-mails should theoretically be available in some electronic form for at least 10 years, although obtaining access to e-mail messages available only on backup tapes may be problematic from a practical standpoint.

The order also requires employees who conduct public business using personal e-mail accounts or personal devices (e.g., Blackberrys) to ensure that all public records are properly retained and archived—obviously, this requires employees to take initiative to retain these e-mails and make them accessible to the agency for archiving and to the public for inspection. The order further directs executive branch employees to treat e-mails they send or receive via government e-mail accounts as public records and to handle those e-mails in accordance with the public records statute; however, the order also appears to leave the determination whether or not to delete e-mail messages (after the 24-hour holding period) to employees.

It is unclear whether newly inaugurated Governor Beverly Perdue will let the Executive Order stand as it is or issue a new or different one.

Beginning in 2007 and lasting through 2008, Missouri Governor Blunt had a similar experience regarding retention of government e-mail. In late 2007, media organizations reported that members of the Governor's staff may have deleted government-related e-mail messages in violation of Missouri's public records law. As in North Carolina, a lawsuit was filed concerning the Governor's e-mail retention policies. Then, on January 5, 2009, only days before Governor Blunt's term expired and the day trial was scheduled to begin, the court hearing the case approved a settlement agreement that requires a review and report of the Governor's e-mail retention policies. According to press reports, allegations that the Governor's office had “‘knowingly and purposely’” violated the state public records statute were dismissed.