

Chapter 8

ACCESS TO ELECTRONIC MAIL AND OTHER ELECTRONIC DATA OF GOVERNMENTAL BODIES

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Today, governmental bodies, like private business, keep many records in electronic form. In particular, electronic mail (“e-mail”) communication in government, like elsewhere, is ubiquitous. Because of the potentially ephemeral nature of e-mail, confusion abounds regarding when it must be kept and produced. Accordingly, a discussion of the legal requirements for retaining and producing electronic records, especially e-mail, warrants a separate chapter in this handbook.

I. GENERAL PRINCIPLES

As a cardinal rule, government records that exist in an electronic medium are subject to inspection and copying in Missouri under principles identical to data in non-electronic format. *See* Mo. Rev. Stat. § 109.210(5) (record is defined “regardless of physical form or characteristic”); §610.010(6) (“whether written or electronically stored”); *see also Deaton v. Kidd*, 932 S.W.2d 804, 806 (Mo.App.W.D. 1996) (state statutes maintained on computer constitute a “public record” subject to the Sunshine Law).

The statutory requirements for retaining e-mail, indeed all government records, are found principally within Missouri’s State and Local Records Law, Mo. Rev. Stat. §§109.200-109.310 (“Records Law”). The statutory mandate for providing public access to such materials is found primarily within Mo. Rev. Stat. §§610.010 *et seq.*, commonly known as the “Sunshine Law.”¹ While the Records Law deals primarily with retention, and the Sunshine Law with access, each statute to some extent deals with both retention *and* access.

The general rules applicable to e-mail and electronic records of governmental bodies can be stated as follows: E-mail and electronic data which pertains to public policy or public business must be retained according to the Records Law and must be produced to requesting members of the public in accordance with the precepts of the Sunshine Law. Further, e-mail and electronic data – which (i) fits within a Sunshine Law request; (ii) exists at the time of the request; and (iii) is not exempt under the Sunshine Law – must be produced in response to a Sunshine Law request, even though such material normally would have been purged or deleted and is not otherwise required to be retained under the Records Law. *Hemeyer v. KRCC-TV*, 6 S.W.3d 880 (Mo. 1999). Furthermore, if existing at the time of a request, it would be improper to destroy the records. *Id.*

Figure 1 on the next page provides a flow chart or decision tree giving guidance as to when e-mails should be retained or produced.

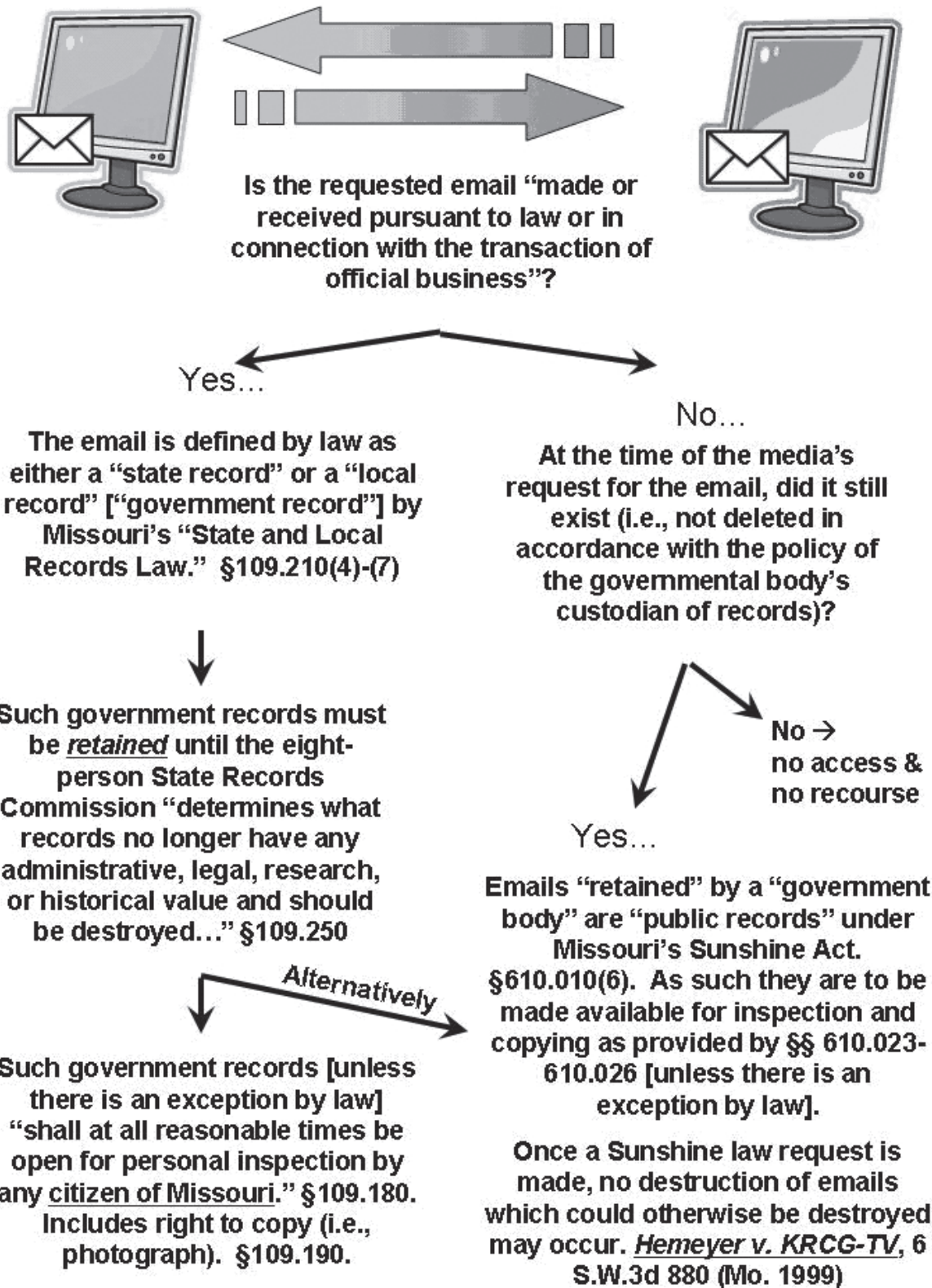


FIGURE 1: Retention and Production of E-Mail

II. THE RECORDS LAW (MO. REV. STAT. §§109.200 – 109.310)

The Records Law defines records held by governmental agencies as either a “state record” or a “local record” (“any record not a state record”). Mo. Rev. Stat. §109.210(4)-(7). While the term “government record” is not used in the statute, this chapter uses this classification to mean either.

Any record, including any e-mail, “made or received pursuant to law or in connection with the transaction of official business” is a government record which must be retained until the eight-person State Records Commission “determines what records no longer have any administrative, legal, research, or historical value and should be destroyed....” Mo. Rev. Stat. §109.250. The State Records Commission has established guidelines for preserving and retaining government records, which are located at <http://www.sos.mo.gov/archives/localrecs/schedules/>. Further, the Secretary of State has prepared specific guidelines for retaining and producing e-mail records in an on-line publication, “Managing E-mail Records,” found at <http://www.sos.mo.gov/records/recmgmt/E-MailGuidelines.pdf>.

The specific requirements and timeframes for retaining e-mail are beyond the scope of this chapter, but in general terms, e-mail (and attachments) dealing with the following matters should be retained for at least 3 years:

- E-mail that documents or memorializes decisions, policies, procedures, resource expenditures, finances, operations, or delivery of services;
- E-mail consisting of general correspondence regarding management, financial matters, operating procedures, or public policy matters;
- Interoffice e-mail regarding management, financial, operating procedures, or policy matters;
- E-mail regarding policy or the policy process;
- E-mail regarding public information;
- E-mail transmitting any News Releases;
- E-mail concerning Agendas and Minutes of Public Meetings;
- Listserv messages posted in an official capacity (job announcements, etc.); and
- Listserv messages that are relied upon in the development of management, financial, operating procedures, or policy matters.

On the other hand, the following types of e-mail need not generally be retained:

- General departmental e-mail regarding routine business activities (for example, transmittal messages and responses to routine questions);
- Interoffice e-mail regarding employee activities (holiday parties, etc.), telephone calls, invitations and responses to work related events, meetings, etc.;
- Listserv messages other than those posted in an official capacity - unless the messages are relied upon in the development of management, financial, operating procedures or policy matters;

Importantly, however, upon receipt of a Sunshine Law request that would cover a particular e-mail that is not required to be retained, but which exists at the time of the request, such e-mail must be produced if subject to the request and not the subject of any exemption under the Sunshine Law. *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 882 (Mo. 1999) (records held by a public governmental body at the time of a Sunshine Law request are considered “retained” by that public governmental body and subject to a Sunshine Law request even though only temporarily held by the public governmental body).

As mentioned earlier, the Records Law is not limited to setting standards for retention. If classified as a government record, the Records Law requires that email “shall at all reasonable times be open for personal inspection by any citizen of Missouri.” Mo. Rev. Stat. §109.180. This includes the right to copy the record. Mo. Rev. Stat. §109.190. The failure to allow inspection of government records which are not subject to any exception, subjects the violator to “removal or impeachment,” as well as “a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or both the fine and the confinement.” Mo. Rev. Stat. §190.180.

Curiously, the Records Statute is seldom relied upon by persons seeking access to government records, and there seems to be a common misperception that access under this statute is not an unconditional right as it is under the Sunshine Law.

III. THE SUNSHINE LAW (MO. REV. STAT. §610.010, ET. SEQ.)

As discussed in Chapters 4 and 5 of this Handbook, the Sunshine Law mandates liberal public access to public records subject to narrowly tailored exceptions. This right of access applies to e-mails and other electronic data the same as any other record.

Thus, any e-mail required to be retained under the Records Law, must be produced in response to a Sunshine Law request if it is not subject to an exemption as set forth in section 610.021 of the statute. Further, because the definitions of “public record” and “retained” under the Sunshine Law are construed in a broader sense under the Sunshine Law than under the Records Law, *any* e-mail existing at the time of a Sunshine Law request is subject to the request, even though the Records Law may not have required retention of such a record. *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 882 (Mo. 1999). Upon receipt of the request, the requested e-mail must be preserved; it would be improper to destroy or permit destruction of the e-mail.

Id.; see also MISSOURI SUNSHINE LAW HANDBOOK, Office of the Missouri Attorney General, located at <http://ago.mo.gov/sunshinelaw/topten.htm> (“The Sunshine Law deals with whether a public body’s records must be open to the public, but it generally does not state what records the body must keep or for how long. *A body cannot, however, avoid a records request by destroying records after it receives a request for those records.*”) (emphasis added).

As the Secretary of State’s Guidelines on “Managing Email Records” note, “Any e-mail message that is neither created nor received in the course of routine or official state business may be disposed of immediately.” <http://www.sos.mo.gov/records/recmgmt/E-MailGuidelines.pdf>. However, if not deleted, those personal emails would be subject to a Sunshine Law request because they would be “retained” and therefore a “public record.” *Hemeyer v. KRCG-TV*, 6 S.W.3d at 882. While some might argue that this strict interpretation of the Sunshine Law could lead to potential invasion of privacy, the rule is justified by both the state’s public policy of open access and the inadvisability of, if not prohibition against, using government e-mail for private or personal business. See, e.g. “Managing Email Records” at <http://www.sos.mo.gov/records/recmgmt/E-MailGuidelines.pdf> (“Agencies are encouraged to define within their policies how much, if any, personal e-mail is acceptable.”). Just as private business should not be conducted using government letterhead or resources, persons wanting to avoid public scrutiny of their private e-mails should not be using a government e-mail account.

Personal e-mails sent or received using government e-mail accounts are only one side of the equation. What about emails dealing with public business which are sent on a personal or political e-mail account or device?

Section 610.025 of the Sunshine Law addresses this question. It states that “[a]ny member of a public governmental body who transmits any message relating to public business by electronic means shall also concurrently transmit that message to either the member’s public office computer or the custodian of records in the same format.” This section is limited, however, to only those “messages sent to two or more members of that body so that, when counting the sender, a majority of the body’s members are copied.” *Id.* The language of the statute suggests applicability to only multi-membered public governmental bodies (to say nothing of the compliance issues of getting individuals to “concurrently transmit [emails] to either the member’s public office computer or the custodian of records”). In fact, despite statutory reference to emails “sent to two or more members,” courts in other contexts under the Sunshine Law have held that single-member government agencies, such as a county executive, mayor or city coordinator, are public governmental bodies and subject to the Sunshine Law. See e.g., *MacLachlan v. McNary*, 684 S.W.2d 534, 537 (Mo.App.E.D. 1984) and *Tipton v. Barton*, 747 S.W.2d 325, 329 (Mo.App.E.D. 1988). Therefore, emails to or from an executive officer, such as the governor or member of his or her staff, “relating to public business,” should be covered by this section.

The Sunshine Law also includes a provision requiring production of electronic data in its electronic format when possible and if requested in that format. This would include e-mail and other electronically maintained records. See Mo. Rev. Stat. §610.029. The significance of this, of course, from the requesting party’s standpoint, is that it permits more ready access to bulk records, such as property tax payment rolls, and facilitates content searches and organization of the records.

Section 610.029 also prohibits governmental bodies from entering into any contract for the creation or maintenance of public records in electronic format if that contract would in any way impair public access. Presumably, this would include any contract that would seek to foist upon the requester the added cost of such privatization.

The Sunshine Law states that “each public governmental body shall provide a reasonable written policy in compliance with [the Sunshine Law], open to public inspection, regarding the release of information...” Mo. Rev. Stat. §610.028.2. While the statute does not state what this policy should include, it seems logical that it would include an e-mail back-up and archival policy, including the time between backups and the frequency that tapes are over-written. Therefore, requests for electronic data or e-mails should also include a request for any applicable policy regarding such matters.

As is the case with paper records, the fees to be charged for electronic data and e-mail may not exceed the actual cost to the governmental body. Section 610.026.1(2) provides that fees for access to records maintained on computer facilities cannot exceed the cost of the copies (whether on paper or electronic medium) and staff time, at the average hourly rate, for making copies and programming if necessary.

Finally, while retention of records, including emails, is primarily addressed in the Records Statute, the Sunshine Law also seemingly includes retention requirements by providing that each public governmental body is to appoint a custodian “who is to be responsible for the maintenance of that body’s records.” Mo. Rev. Stat. §610.023.1. The statute also provides that “[n]o person shall remove original public records from the office of the public governmental body or its custodian without written permission of the designated custodian.” Mo. Rev. Stat. §610.023.2. Arguably, this section of the Sunshine Law would require retention of e-mails as “original public records” until such time as the custodian consents in writing to the deletion (the “removal”) thereof.

Footnotes

¹ Chapters 4 and 5 of this Handbook discusses the Sunshine Law in greater detail