



## Email and the Freedom of Information Act

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With public officials, such as Hillary Clinton, making headlines recently regarding e-mail use and retention, we wanted to provide municipalities with a reminder about the rules of e-mail use in Michigan:

- E-mails drafted by public employees, board or council members and officials may be subject to the FOIA regardless of whether the e-mails are sent from the public computer or a home computer. Pursuant to the FOIA, a "public record" is defined as: "A writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function from the time it is created." MCL 15.232(c). The Michigan Court of Appeals concluded that an individual employee's personal e-mails did not become public records solely because they were captured in the e-mail system of the public body. See *Howell Educ Ass'n MEA/NEA v Howell Bd of Educ*, 287 Mich App 228; 789 NW2d 495 (2010). Mere possession of the public record, such as retaining all e-mails on the school's backup system, was not sufficient. Based on this reasoning, sending an e-mail from a "private" phone or computer will also not automatically make the e-mail private. The courts will review whether the e-mail was used in the performance of an official function. If so, it will be a public record regardless of where it was drafted – the issue will be whether it was prepared, owned, used, in the possession of or retained in the performance of an official function.
- Because e-mails are "public records" that may be subject to FOIA requests, officials should be careful not to put any information or comments in an e-mail that they would not put in "formal" correspondence.

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### **PRACTICE AREAS**

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- Public bodies should consider having e-mail addresses for board members and employees that are to be used only for the business of the public body. Then, the public employees, board members and officers can use that address, rather than a “personal” one. This will prevent the time-consuming task of having to sort through e-mails to separate the personal from the private and ask an official to search through a personal computer.
- In addition to the FOIA issue, the public body should consider its obligation to maintain public documents. According to Michigan law, certain documents must be retained by the public body in accordance with a properly-approved retention and disposal schedule. (Examples of approved record retention and disposal schedules for townships are available from the Department of Technology, Management and Budget’s State of Michigan website) Further, the public body may also have additional retention requirements if the document is subject to a FOIA request or litigation.
- As a result, e-mails should be routinely reviewed and filed in accordance with the record retention schedule. The public body does not want to be in a situation where it must review thousands of e-mails over an extensive period of time to respond to a FOIA request or discovery in litigation.

To that end, the public body should have a policy and practice that applies to all its board members, officers and employees that reminds officials that their e-mail may not be “private” and governs how documents are copied and maintained properly in accordance with the record retention schedule. This may save the public body the cost of potential litigation or the requirement of releasing e-mails that may contain commentary that the sender may now regret putting in writing.