

DEVELOPMENT OF ELECTRONIC MAIL AND RECORDS MANAGEMENT POLICY FOR GOVERNMENTAL ENTITIES - BACKGROUND MEMORANDUM

Senate Concurrent Resolution No. 4024 (attached as an appendix) directs the Legislative Council to study the development of an electronic mail and records management policy for governmental entities.

INTRODUCTION

With advances in technology, additional questions are raised regarding access to electronic mail, privacy of electronic mail, and storage and management of electronic mail. Although most states' open records laws were drafted before the use of electronic mail, many states have revised open records laws to clarify that the laws provide access to records of any form, including electronically produced and stored records. Nonetheless, because of the unique nature of electronic mail, questions remain regarding the accessibility and storage of electronic mail.

NORTH DAKOTA LAW Open Records

The 1997 Legislative Assembly adopted Senate Bill No. 2228, which substantially revised the state open records and open meetings laws. Before the enactment of Senate Bill No. 2228, the term "record" was not defined with respect to the open records law. Senate Bill No. 2228 created North Dakota Century Code (NDCC) Section 44-04-17.5 which defines "record" as "recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business." In addition, with respect to electronic records, the bill amended Section 44-04-18 to provide that a public entity is not required under that section to create or compile a record that does not exist. However, access to an electronically stored record or a copy of such a record must be provided at the requester's option in either a printed document or through any other available medium. The section provides that a computer file is not an available medium if no means exist to separate or prevent the disclosure of any closed or confidential information contained in that file.

Because the definition of "record" appears to include electronically produced and stored information, electronic mail is subject to the constitutional

and statutory provisions that require that all records of public or governmental entities of the state or a political subdivision are public records that must be open and accessible for inspection. However, there are exceptions to the open records requirements. Exceptions that may be relevant include:

1. Public employee personnel, medical, and employee assistance records (NDCC Section 44-04-18.1).
2. Records of law enforcement and correctional employees and records relating to confidential informants (NDCC Section 44-04-18.3).
3. Trade secret, proprietary, commercial, and financial information and information relating to economic development records (NDCC Section 44-04-18.4).
4. Records relating to the Legislative Council, the Legislative Assembly, the House of Representatives, the Senate, or a member of the Legislative Assembly if the records are of a purely personal or private nature, a record that is attorney work product or is attorney-client communication, a record that reveals the content of private communications between a member of the Legislative Assembly and any person, and a record of telephone usage which identifies the parties or lists the telephone numbers of the parties involved (NDCC Section 44-04-18.6).
5. Active criminal intelligence information and criminal investigative information (NDCC Section 44-04-18.7).
6. Attorney work product (NDCC Section 44-04-19.1).

Records Management

North Dakota Century Code Chapter 54-46 addresses management of state records. Section 54-46-03 provides that the director of the Office of Management and Budget or an individual designated by the director shall serve as a state records administrator. The state records administrator is required to establish and administer in the executive branch of state government a records management program that will apply efficient and economical management methods to the creation, utilization, maintenance, retention, and final disposition of state records.

North Dakota Century Code Section 54-46-05 requires the head of each executive branch agency to

establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. That section also requires agency heads to submit to the administrator schedules proposing the length of time each state record series warrants retention for administrative, legal, or fiscal purposes. Section 54-46-08 requires the administrator, after consultation with the official or department head concerned, the Attorney General, the State Auditor, and the state archivist, to determine that the type or class of record has no further administrative, legal, or fiscal value before the final disposition of any type or class of record.

The state records administrator has compiled and published a *State Records Management Systems Manual* to guide state agencies with respect to the retention and disposition of state records. In determining whether a record should be retained or how long each record should be retained, the administrator has established values to be considered during the appraisal of the records. The values to be considered include administrative value, legal value, fiscal value, and historical value.

FEDERAL LAW

The federal Electronic Communications Privacy Act (18 U.S.C. 2510, et seq.) prohibits the interception of wire and oral communications under most circumstances. Although the federal law does not specifically include electronic mail, the definition of "wire communications" appears to be broad enough to include electronic mail. Although the Act makes it a federal crime to intercept wire and oral communications, there are exceptions under 18 U.S.C. 2511 which may permit an employer to monitor electronic mail of its employees. Those exceptions include allowing the provider of the electronic communication service to monitor the service when the monitoring is incidental to the rendition of the service or to protect the rights or property of the provider and when a person who is a party to the communication has given prior consent to the monitoring.

OTHER STATES' LAWS

With respect to open records requirements, many states have amended open records laws to provide that the open records requirements apply to records regardless of the format or characteristic. Other states, such as Colorado, have amended open records laws to specifically address electronic mail.

Under Colorado law, government electronic mail is considered a public record. Colorado Revised Statute Section 24-72-202 defines "electronic mail" as "an electronic message that is transmitted between two or more computers or electronic terminals, whether or not the message is converted to hard copy format after receipt and whether or not the message is viewed upon transmission or stored for later retrieval. The definition also includes electronic messages transmitted through a local, regional, or global computer network.

Pursuant to Oregon law, the state Information Resources Management Division has adopted a policy that provides that the state's electronic mail systems or electronic bulletin boards may not be used for personal gain, junk mail, or unsolicited announcements. The policy also informs users that electronic mail may be accessed or read by other persons and reminds the users to not "send or keep anything that you would not mind seeing on evening news." The Oregon acceptable use policy also states that all systems and information are the property of the state agency and that the systems may only be used for the business of the agency. The policy makes it clear that the state agency may intercept or screen information at any time without notice.

POSSIBLE STUDY APPROACH

It appears that a logical approach for pursuit of this study may be to obtain information from various state agencies and entities regarding electronic mail policies to determine if a uniform policy for all state entities is feasible. In addition, the committee may receive information from the state records management administrator regarding policies for the retention of records such as electronic mail.

ATTACH:1

Fifty-fifth Legislative Assembly, State of North Dakota, begun in the Capitol in the City of Bismarck, on Monday, the sixth day of January, one thousand nine hundred and ninety-seven

**SENATE CONCURRENT RESOLUTION NO. 4024
(Senators Mathern, DeMers, Lee, G. Nelson)
(Representatives Boucher, Dorso)**

A concurrent resolution directing the Legislative Council to study the development of an electronic mail and records management policy for governmental entities.

WHEREAS, various state agencies and institutions and numerous political subdivisions operate or maintain electronic mail systems through which government officials and employees and others are able to communicate and transmit information; and

WHEREAS, state law does not address the impact of open records laws with respect to the use of electronic mail, nor does it address the privacy issues surrounding monitoring of electronic mail; and

WHEREAS, before the state adopts an electronic mail policy, comprehensive study of privacy issues such as monitoring of electronic communications and what types of electronic communications are subject to open records laws is needed; and

WHEREAS, official business may be conducted electronically using digital signatures; and

WHEREAS, standards and procedures need to be reviewed for the effective management of the electronic records;

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF NORTH DAKOTA, THE HOUSE OF REPRESENTATIVES CONCURRING THEREIN:

That the Legislative Council study the development of an electronic mail and records management policy for governmental entities; and

BE IT FURTHER RESOLVED, that the Legislative Council report its findings and recommendations, together with any legislation required to implement the recommendations, to the Fifty-sixth Legislative Assembly.

Filed March 25, 1997