

University of Michigan Journal of Law Reform

Volume 28

1995

Electronic Mail and Michigan's Public Disclosure Laws: The Argument for Public Access to Governmental Electronic Mail

Daniel F. Hunter
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Internet Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Daniel F. Hunter, *Electronic Mail and Michigan's Public Disclosure Laws: The Argument for Public Access to Governmental Electronic Mail*, 28 U. MICH. J. L. REFORM 977 (1995).

Available at: <https://repository.law.umich.edu/mjlr/vol28/iss4/6>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

ELECTRONIC MAIL AND MICHIGAN'S PUBLIC DISCLOSURE LAWS: THE ARGUMENT FOR PUBLIC ACCESS TO GOVERNMENTAL ELECTRONIC MAIL

Daniel F. Hunter*

This Note explores the potential for citizens to request electronic mail (e-mail) records from government agencies using public disclosure laws, with emphasis on the Michigan Freedom of Information Act (FOIA). E-mail is a medium that has come to replace both telephone calls and paper documents for many purposes. The applicability of public disclosure laws to e-mail, however, is less than clear. Telephone conversations by public employees for most purposes are confidential, while paper records created by those same employees can be requested under the FOIA. Thus, should public e-mail remain private and confidential or should it be subject to FOIA requests?

Public access to e-mail, like public access to government records, would help promote the goal embodied in the disclosure laws of open government. Yet public disclosure of e-mail also could considerably dampen the candor, informality, and ease of communication, which makes e-mail so popular and effective with employees of public agencies. This Note argues that an attempt to request e-mail messages most likely would succeed under the provisions of Michigan's public disclosure laws. More importantly, this Note maintains that, with certain exceptions for faculty of public schools and for highly informal messages, e-mail created by public agencies should remain open to public scrutiny given the policies underlying the Freedom of Information Act.

INTRODUCTION

Electronic mail (e-mail) is now used by almost all of Michigan's state agencies and universities to allow employees to communicate with each other and, often, with the general public. Some Michigan state employees are connected to

* Article Editor, *University of Michigan Journal of Law Reform*, Volume 29, 1995. B.A. 1991, University of Michigan; J.D. 1996, University of Michigan Law School. An early draft of this Note, which has been substantially revised, was written in collaboration with Professor Kent Syverud under the auspices of the Michigan Law Revision Commission, an agency of the Michigan state legislature, and was published in 29 MICH. LAW REVISION COMM'N ANN. REP. 7 (1994). The opinions expressed in this Note, however, are solely those of the author.

hundreds of other state employees by large mainframe computers, while others can send messages to only five or ten people on a Local Area Network (LAN). Still others can communicate through networks with millions of users of personal computers worldwide. Regardless of their size or scope, these electronic messages represent the cutting edge of today's workplace technology. E-mail has many advantages compared to traditional means of communication, including speed, ease of access, and the ability to save and retrieve messages at the user's convenience. These advantages have led to an enormous increase in the use of e-mail by both the private and public sector.¹

It is entirely unclear, however, what responsibilities accompany the advent of this new technology. Certain Michigan statutes and the Michigan Constitution require the government to conduct its business in the open. The most significant statute in this regard is the Michigan Freedom of Information Act (FOIA or Act) which requires that many government records be disclosed when requested by the public.² Moreover, the Management and Budget Act requires that the government permanently preserve all writings which record the activities of the government.³ These statutes raise an important issue: To what extent are e-mail messages that are sent or received by state employees "records" which must be preserved and, if requested, disclosed to members of the public? Are e-mail messages subject to discovery requests submitted to state agencies and universities when they are parties to civil lawsuits?

Public disclosure statutes like the FOIA and the Management and Budget Act were written to protect the public's right to know what the government is doing, where it is spending money, and about whom it is keeping records.⁴ These statutes were written, however, when information traveled in basically two media: paper memoranda (letters) and telephone calls. In general, paper memoranda were considered public records, and telephone calls were considered private conversations. Today, e-mail has bridged those media. E-mail correspondence is like

-
1. ANNE W. BRANSCHOMB, WHO OWNS INFORMATION 163 (1994).
 2. MICH. COMP. LAWS ANN. §§ 15.231-.246 (West 1994 & Supp. 1995).
 3. *Id.* §§ 18.1284-.1292 (West 1994).
 4. *See infra* Part II.A.1.

a telephone conversation in that most messages are short, casual, and can travel around the world in minutes. At the same time, e-mail messages are like written memoranda because they can be copied, edited, filed, and printed onto paper.

E-mail is a medium that has come to replace both telephone calls and documents for many purposes. Michigan public disclosure laws, which historically have differentiated between telephone conversations and documents are problematic when applied to a medium that straddles this line. Nevertheless, the applicability of public disclosure laws to electronic mail may determine how public employees communicate in the future.

Public access to e-mail, like public access to government records, would help to promote the goal of open government embodied in disclosure laws. Yet public disclosure of e-mail also could considerably dampen the candor, informality, and ease of communication which makes e-mail so popular and effective among employees of public agencies, as well as among administrators, faculty, and students at public universities and secondary schools in Michigan.

Part I of this Note describes e-mail and summarizes its unique characteristics that pose challenges to any program of public disclosure. Part II analyzes the existing statutes, constitutional provisions, and court rules that are relevant to disclosure of public records. Part III argues that under current law, e-mail messages are likely to be considered both a "writing" and a "public record" within the scope of Michigan's Freedom of Information Act and its Management and Budget Act. This Note concludes that, in most circumstances, e-mail messages would be subject to disclosure upon request of a citizen unless a court excuses a particular message from disclosure under narrow and cumbersome exemptions.

This Note recommends revision of one exemption to the FOIA to provide a safe harbor for the subset of electronic messages that most closely resemble the informal exchange of ideas and information that has traditionally occurred by telephone. In addition, an exception for university-centered e-mail may be needed so that students and researchers, individuals whose activities the state never intended to cover under the FOIA, do not have their e-mail opened to the public. In general, e-mail should be subject to public scrutiny in furtherance of the goals of FOIA, but these rules must be tempered to allow for the technical difficulties of storing and retrieving massive amounts of e-mail data and to allow for certain e-mail to remain private

until it crosses the threshold between a set of ideas and a public record.

I. AN OVERVIEW OF ELECTRONIC MAIL AND ITS USE IN MICHIGAN'S PUBLIC AGENCIES AND UNIVERSITIES

"Faster than a speeding letter, cheaper than a phone call, electronic mail is the communication medium of the '90s."⁵ E-mail is electronic mail automatically passed through computer networks, via modems over common carrier lines, or a combination of both.⁶ According to the Electronic Mail Association, the number of e-mail users is growing at twenty-five percent per year and currently stands between thirty to fifty million.⁷

A. The Parts of an E-mail Message

Just as memoranda are composed of several parts, including a heading and a body, and just as telephone conversations include greetings, discussions, and closings, e-mail messages also have several components. Every electronic message must have an "address" which contains the information necessary to send a message from one computer to another anywhere in the world.⁸ An e-mail message need not be sent just to another person; it can be sent to a computer archive, a list of people, or even a pocket pager.⁹ An e-mail address contains a local part and a host part; these parts are separated by an "@" sign,¹⁰ for example, danielhunter@umich.edu. Once one knows the address of a person, typing a few keystrokes will send the message to its intended recipient and even to multiple recipients. Because e-mail can be sent in many ways to many places and people, the legal challenge of opening e-mail to public scrutiny

5. DAVID ANGELL & BRENT HESLOP, *THE ELEMENTS OF E-MAIL STYLE* 1 (1994).

6. *THE NEW HACKER'S DICTIONARY* 142 (Eric S. Raymond ed., 1991).

7. ANGELL & HESLOP, *supra* note 5, at 1. In 1980 there were an estimated 430,000 electronic mailboxes, and by 1992 that number had grown to approximately 19 million. Ernest A. Kallman & Sanford Sherizen, *Private Matters*, *COMPUTERWORLD*, Nov. 23, 1992, at 85, 85.

8. BRENDAN P. KEHOE, *ZEN AND THE ART OF THE INTERNET* 9 (1994).

9. *Id.*

10. *Id.* at 10.

is significantly greater than it may appear at first glance. For example, there may be only one written record of a university's position on a topic, yet there could exist thousands of e-mail messages on that same topic sent back and forth among university administrators.

In addition to the "address," each message must have a "header" in order to be transferred to other computer systems.¹¹ A header contains useful information not only for the systems and the users but also for the public, because the header reveals much more than a phone call record or a letter. For example, the header records precisely what time a message was received and viewed by the addressee. Thus, even though a message may be sent to many recipients, the header provides a crucial link to the record because it traces the route of every message. The header must remain attached to the memorandum because an e-mail message without a header tells the public very little.

B. Pathways of E-mail Messages

To appreciate the technical difficulties associated with public access to e-mail records, it is necessary to understand the length of the path which every message must travel before it reaches the recipient. An e-mail message rarely is transmitted directly from one computer to another; instead, each message is sent to a "server" which is a central computer that provides a service to "client" computers.¹² Servers are generally operated by private companies, such as Compuserve, Inc., or by non-profit entities, such as the University of Michigan. In order to send e-mail to other networks, a system needs a gateway to the Internet.¹³ These gateways are computers that

11. *See id.* at 10-12.

12. TRACY LAQUEY, *THE INTERNET COMPANION* 102 (1993).

13. *Id.* at 51. LaQuey writes:

The Internet is a loose amalgam of thousands of computer networks reaching millions of people all over the world. Although its original purpose was to provide researchers with access to expensive hardware resources, the Internet has demonstrated such speed and effectiveness as a communications medium

have connections to networks and know how to translate the e-mail messages.¹⁴ Once a gateway is obtained and the proper address is found, e-mail can be sent anywhere in the world.

C. E-mail Access and Disposal

The last technical problem that bears on the public's access to e-mail is the disposal process. Disposal of e-mail is a double-edged sword. On the one hand, e-mail may exist long after a government official believes it has been deleted. This happens when someone else, or another server which handles the e-mail, saves the message. On the other hand, e-mail can be deleted with the touch of a button. This may not have the same psychological impact on the disposer that the shredding of a document has on the person. Taken together, these two qualities may balance out. Members of the public looking for government e-mail may find an important message hidden away on another hard drive as often as they find that a crucial message was simply deleted.

The storage and disposal of e-mail differs widely depending on what system controls the message. Just because a receiver deletes a message does not mean that it is destroyed. The system used by the sender often retains a copy of the message, and a duplicate of the message could also reside with another user.¹⁵ That user could then forward the message to thousands of other users. A sender therefore should not assume that the receiver has deleted the message. Additionally, it is simple for the receiver to archive, print, or forward any message or part of any message. Printing e-mail to a local printer is a common and convenient way of saving messages for later reading, but it is also a way for others to stumble across personal e-mail.

Universities often have different retention and disposal regulations. The University of Michigan, for example, has

that it has transcended the original mission. Today it's being used by all sorts of people . . . for a variety of purposes

Id. at 1.

14. *Id.* at 51.

15. See ANGELL & HESLOP, *supra* note 5, at 6-7. Usually e-mail networks save messages simply for administrative purposes, such as the need to return a message if a person has sent it to an incorrect address. KEHOE, *supra* note 8, at 12-15.

established a procedure for the disposal of its electronic mail. In an article entitled *Greater Security for Your Outdated E-Mail on MTS*, the university announced its policy of deleting messages at the end of every back-up cycle, which lasts twenty-eight days.¹⁶ The university warns that “[u]sers should keep in mind that history-chain and forwarded messages may be retrievable long after the original message has expired or been deleted.”¹⁷ The policy of Western Michigan University, on the other hand, does not state explicitly when their files are deleted. Nevertheless, the official guidelines caution that “[i]t is generally not intended that electronic mail serve as a repository for records of permanence or lasting value and account holders are responsible for purging electronic mail messages older than one year.”¹⁸

II. MICHIGAN PUBLIC DISCLOSURE LAWS

Currently there are numerous methods by which information about the Michigan State government is disclosed upon request by members of the public. This Note will focus on Michigan's Freedom of Information Act,¹⁹ relevant sections of its Management and Budget Act,²⁰ and certain discovery procedures under the Michigan Court Rules.²¹ Where it is analogous, reference will be made to federal law, including the Federal Freedom of Information Act,²² the Federal Records Act,²³ and federal case law. The Michigan Supreme Court has held that federal law is particularly important when no Michigan case applies:

16. *Greater Security for Your Outdated E-Mail on MTS*, INFO. TECH. DIG. NEWSLETTER (University of Michigan Information Technology Division, Ann Arbor, Mich.), Aug. 8, 1992, at 1 (stating that a deleted or expired message is retrievable after one hour and for up to 28 days).

17. *Id.*

18. Letter from Richard A. Wright, Associate Vice President for Academic Affairs, Western Michigan University, to Kent D. Syverud, Executive Secretary, Michigan Law Revision Commission (July 1, 1994), reprinted in 29 MICH. LAW REVISION COMM'N ANN. REP. 97 app. 4c (1994).

19. MICH. COMP. LAWS ANN. §§ 15.231-246 (West 1994 & Supp. 1995).

20. *Id.* §§ 18.1284-1292.

21. MICH. CT. R. PRAC. 2.302, 2.310.

22. 5 U.S.C. § 552(a) (1994).

23. 44 U.S.C. §§ 2901-2909, 3101-3107, 3301-3324 (1988). Chapter 33 is sometimes referred to specifically as the Federal Records Disposal Act.

Because there are no Michigan cases dealing with this issue, we look to the federal courts for guidance in deciphering the various sections and attendant judicial interpretations, since the Federal FOIA is so similar to the Michigan FOIA.²⁴

*Armstrong v. Executive Office of the President*²⁵ is particularly important because the federal government appears to have taken the lead in this decision and found that e-mail in certain circumstances may constitute a public record under federal law.

A. The FOIA and Electronic Mail

In applying the text of Michigan's FOIA to e-mail, the primary issues are whether e-mail is a "writing"²⁶ under the FOIA; whether e-mail is a "public record"²⁷ under the FOIA; and whether any exemptions to the FOIA apply generally to e-mail, most importantly the privacy exemption²⁸ and the communications within a public body exemption.²⁹ Before addressing these and other issues, it is important to review both the purposes and the text of the FOIA.

1. *Purposes of the FOIA*—The purpose of the Act must be considered when resolving ambiguities in the Act's definitions, including its definition of a public record.³⁰ The Act's preamble states that

[i]t is the public policy of [the State of Michigan] that all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be

24. *Hoffman v. Bay City Sch. Dist.*, 357 N.W.2d 686, 688 (Mich. Ct. App. 1984) (citation omitted).

25. 1 F.3d 1274 (D.C. Cir. 1993).

26. See MICH. COMP. LAWS ANN. § 15.232(e) (West 1994 & Supp. 1995).

27. See *id.* § 15.232(c).

28. See *id.* § 15.243(1)(a) (West 1994).

29. See *id.* § 15.243(1)(n).

30. *Walloon Lake Water Sys., Inc. v. Melrose Township*, 415 N.W.2d 292, 294 (Mich. Ct. App. 1987).

informed so that they may fully participate in the democratic process.³¹

In addition to this policy statement, Michigan courts have interpreted the purpose of the FOIA as being primarily a pro-disclosure statute:

The Legislature in the enactment of the Michigan FOIA followed closely, but abbreviated, the Federal Freedom of Information Act. The intent of both acts is to establish a philosophy of full disclosure by public agencies and to deter efforts of agency officials to prevent disclosure of mistakes and irregularities committed by them or the agency and to prevent needless denials of information.³²

The Michigan Court of Appeals in *Walloon Lake Water Systems, Inc. v. Melrose Township* interpreted the FOIA's status as a disclosure statute as meaning that "the FOIA does not require that information be recorded; it only gives a right of access to records in existence."³³ In general, then, the FOIA "does not impose a duty upon a governmental official to prepare or maintain a public record or writing independent from requirements imposed by other statutes."³⁴ However, the court concluded that the purpose of disclosure also implies a duty to "*preserve and maintain* [a record requested through the FOIA] until access has been provided or a court executes an order finding the record to be exempt from disclosure."³⁵ The *Walloon Lake* court explained its reasoning as follows:

[I]t cannot be seriously maintained that the Legislature did not contemplate the continued existence of the record subsequent to the request for disclosure and during the pendency of a suit filed under the FOIA. If public bodies were free to dispose of requested records during this time,

31. MICH. COMP. LAWS ANN. § 15.231(2) (West 1994 & Supp. 1995).

32. *Schinzel v. Wilkerson*, 313 N.W.2d 167, 169 (Mich. Ct. App. 1981) (citations omitted); see also *State Employees Ass'n v. Department of Management & Budget*, 404 N.W.2d 606, 608 (Mich. 1987) (noting that the Michigan Supreme Court has "consistently recognized that the FOIA . . . is a disclosure statute").

33. *Walloon Lake*, 415 N.W.2d at 295.

34. *Id.*

35. *Id.* (emphasis added).

a claimant's right to disclosure under the FOIA would not be adequately safeguarded.³⁶

This ruling thus spells out a duty not to destroy records once they have been requested under the FOIA. It does not, however, require that a record be preserved if there is no pending FOIA request.

The Federal FOIA also was designed as a pro-disclosure statute. The United States Supreme Court has emphasized that the "basic purpose [of the Federal FOIA] reflect[s] 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'"³⁷ The Court held that the nine exceptions to the Federal FOIA "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."³⁸

When the Federal FOIA was signed into law in 1966, President Johnson said, "I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."³⁹ When issuing a new Executive Order governing classification and declassification of government information, President Nixon commented:

Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies.⁴⁰

When Senator Kennedy introduced the 1974 revisions to the Federal FOIA, he emphasized that democracy succeeds only in a system where information flows freely:

36. *Id.*

37. *Department of the Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965)); see also *EPA v. Mink*, 410 U.S. 73, 80 (1973) ("Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.")

38. *Rose*, 425 U.S. at 361.

39. S. REP. NO. 854, 93d Cong., 2d Sess. 5 (1974).

40. *Id.*

If the people of a democratic nation do not know what decisions their government is making, do not know the basis on which those decisions are being made, then their rights as a free people may gradually slip away, silently stolen when decisions which affect their lives are made under the cover of secrecy.⁴¹

However, there are those who contend that these lofty objectives are undermined in practice.⁴² Compliance with the Michigan FOIA can be very expensive and burdensome for state agencies on tight budgets and with limited staff.⁴³ Furthermore, the FOIA can be used to obtain sensitive information about individuals for invidious purposes. For example, the University of Michigan has noted that “[u]niversities have experienced FOIA requests from male prisoners asking for the names of all female students, from former employees asking for the contents of . . . files of current employees, from citizens asking for the names of all individuals who participate in specific communication [sic] or social groups” and from others whose requests tax the resources of the school “unnecessarily and perhaps inappropriately.”⁴⁴

2. *Relevant FOIA Provisions*—The Michigan FOIA places the burden upon the public to request public records from the government. “Upon an oral or written request which describes the public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of a public record of a public body”⁴⁵ 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.”⁴⁶

The definition of a “public body” for the purposes of the FOIA includes “[a] state officer, employee, agency, department,

41. *Id.*

42. *See, e.g.,* Letter from Elsa K. Cole, General Counsel, The University of Michigan, to Kent D. Syverud, Executive Secretary, Michigan Law Revision Commission (July 28, 1994), reprinted in 29 MICH. LAW REVISION COMM’N ANN. REP. 83 app. 4a (1994) [hereinafter Cole Letter].

43. *Id.* at 88.

44. *Id.* In order to protect their privacy, individuals and organizations have sued the government to prevent disclosure in what are called “reverse FOIA suits.” *See generally* 2 BURT A. BRAVERMAN & FRANCES J. CHETWYND, INFORMATION LAW 659 (1985). These suits more often are connected with confidential business information. *Id.* at 660.

45. MICH. COMP. LAWS ANN. § 15.233(1) (West 1994).

46. *Id.* § 15.232(c) (West 1994 & Supp. 1995).

division, bureau, board, commission, council, authority, or other [executive] body," but it does not include "the governor or lieutenant governor, the executive office of the governor . . . or employees thereof."⁴⁷ The FOIA defines a "writing" as

handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.⁴⁸

Twenty-one items may be exempt from disclosure under the Act.⁴⁹ These exemptions include: information of a personal nature where the disclosure would equal a "clearly unwarranted" intrusion into the individual's privacy;⁵⁰ information compiled for law enforcement purposes;⁵¹ information covered by the Family Educational Rights and Privacy Act;⁵² and communications between public bodies which are of "an advisory nature" and are "preliminary" to a final action.⁵³

3. *Issues in Applying the FOIA to E-mail*—a. *Is E-mail a "Writing" Under Section 15.232(e)?*—Writings are defined so broadly under the FOIA that electronic mail would probably fit under the definition given in the Act.⁵⁴ Because electronic messages are typed into a computer, the language specifying "typewriting"⁵⁵ may apply. E-mail is usually written to a computer disk or a hard drive tape and, thus, may fall within the scope of "magnetic or punched cards, discs."⁵⁶ E-mail also may be printed on a printer, qualifying a message as a "printing."⁵⁷ It is possible to create an electronic message and to send

47. *Id.* § 15.232(b).

48. *Id.* § 15.232(e).

49. *See id.* § 15.243(1).

50. *Id.* § 15.243(1)(a).

51. *Id.* § 15.243(1)(b).

52. *Id.* § 15.243(1)(e). The Family Educational Rights and Privacy Act of 1974 relates to funding for educational institutions based on their education records review policies.

53. *Id.* § 15.243(1)(n).

54. *See id.* § 15.232(e).

55. *See id.*

56. *See id.*

57. *See id.*

it to another computer without ever printing it or saving it on disk, but even this message must reside in Random Access Memory (RAM) for at least a short while. Thus, such a message could fall under the statute's broad catch-all phrase, "other means of recording or retaining meaningful content."⁵⁸

Two authorities imply that the current Michigan FOIA applies to e-mail messages. First, in the 1982 case of *Kestenbaum v. Michigan State University*,⁵⁹ the Michigan Supreme Court held that computer tapes containing the names, addresses, and other information about Michigan State University students were a "writing" under the FOIA. Chief Justice Fitzgerald's opinion stated that "the term 'writing' specifically includes a magnetic tape."⁶⁰ There is no obvious reason not to extend that analysis to information contained in a computer's memory. Justice Ryan's opinion emphasized that the computer tape is a means of retaining meaningful content and, thus, a writing under the Act, an argument that applies with equal force to computer memory as well.⁶¹

Second, the Office of the Attorney General opined in 1979 that stenographers' notes and tape recording or dictaphone records of a municipal meeting were "records" under the FOIA.⁶² "Since the definition of 'writing' . . . includes symbols, magnetic tapes, or 'other means of recording or retaining meaningful content,' stenographer's notes, tape recordings or dictaphone records of municipal meetings are public records under the Act and must be made available to the public."⁶³ The Attorney General decided, however, that computer software owned by the State was not "writing" within the scope of the FOIA.⁶⁴ The dilemma was that software was both "a set of instructions for carrying out prearranged operations" and also "stored on paper cards in the form of decks and on reels of magnetic tape."⁶⁵ The Attorney General reasoned that

58. See *id.* The FOIA does not define "meaningful content."

59. 327 N.W.2d 783 (Mich. 1982).

60. *Id.* at 785. The force of *Kestenbaum* is somewhat diluted, because it affirmed a lower court opinion by an equally divided vote. Nevertheless, the text of *both* of the Michigan Supreme Court opinions in *Kestenbaum* implies that a "writing" should be construed under the FOIA to include e-mail because the statute "defines a writing to include 'magnetic or paper tapes . . . or other means of recording or retaining meaningful content.'" *Id.* at 792 (Ryan, J., opinion for reversal).

61. *Id.* at 801.

62. 1979-1980 MICH. ATT'Y GEN. BIENNIAL REP. 264.

63. *Id.*

64. *Id.* at 265.

65. *Id.*

although the forms on which the software is recorded appear to meet the definition of a 'writing' as defined by section 2(e) of the Act, a distinction must be made between writing used to record information or ideas and an instructional form which is but an integral part of computer operation.⁶⁶

These authorities suggest that electronic messages would probably be held to be "writings" within the definition of section 232(e). E-mail is not an "integral part of computer operation" but more like a form of writing used to "record information or ideas." Moreover, these decisions show that many different forms of electronic information have been held to be "writing" under the FOIA.

The Federal FOIA does not hinge on the term "writing" but rather on the definition of a "record." Nevertheless, the federal authorities suggest that electronic communications have value as records, and even if the information is not a traditional writing, it should be saved for at least two reasons. First, federal case law has filled in the gap in the definition of records. The court in *Yeager v. Drug Enforcement Administration*⁶⁷ noted that "[a]lthough it is clear that Congress was aware of problems that could arise in the application of the FOIA to computer-stored records, the Act itself makes no distinction between records maintained in manual and computer storage systems."⁶⁸ Second, in drafting revisions to the FOIA, Congress implied that computerized documents were records when it explained that the term "search" would include both conventional searches and computer data base searches.⁶⁹ This reasoning persuaded the United States Court of Appeals for the District of Columbia that "computer-stored records, whether stored in the central processing unit, on magnetic tape or in some other form, are still 'records' for purposes of FOIA."⁷⁰ The court added that "[t]he type of storage system in which the agency has chosen to maintain its records cannot diminish the duties imposed by the FOIA."⁷¹

66. *Id.*

67. 678 F.2d 315 (D.C. Cir. 1982).

68. *Id.* at 321.

69. See S. REP. NO. 854, *supra* note 39, at 12. These revisions concerned retrieval problems the government was encountering, among other difficulties.

70. *Yeager*, 678 F.2d at 321.

71. *Id.*

Thus, under federal law, e-mail might not qualify as a "record" for some reasons, but it would not be excluded as a record because it is written, stored, or managed by a computer.

b. Is E-mail a "Public Record" Under Michigan FOIA Section 15.232(c)?—In order to qualify as a record under the Michigan FOIA, a writing must pass a two-pronged test. It must be (1) "prepared, owned, used, in the possession of, or retained by a public body" (2) for the purpose of "performance of an official function, from the time it is created."⁷² In other words, even if e-mail is considered a writing for the purposes of the FOIA, not all e-mail will qualify as public record. For example, e-mail discussing lunch plans might not pass the test, whereas e-mail discussing budget revisions for the state probably would.

The first prong of this test is broad. All six justices in *Kestenbaum* agreed that computer tapes containing the Michigan State University student directory passed the first prong of the test.⁷³ At first glance, e-mail also would seem to satisfy the first prong because state agencies may use it every day to perform a wide variety of tasks. E-mail, however, is rather ephemeral: E-mail is a two-way communication, and it need not be "prepared" by a public agency to find its way onto the agency's tape drive. Any system connected to the Internet could receive messages prepared by anyone in the world. Although many e-mail messages are not meant to be "retained," messages may pass through a university's large mainframe and arrive at computers accidentally. Most likely, the sender did not intend that the message be "used" by the recipient public body. Thus, it is by no means clear that all e-mail messages would qualify as "public records" if they were sent to the agency, were not intended to be used in any way by the agency, and if they were never saved by the agency's e-mail system.

The second prong of this test, that a record be used "in the performance of an official function,"⁷⁴ is not defined in the

72. MICH. COMP. LAWS ANN. § 15.232(c) (West 1994 & Supp. 1995).

73. *Kestenbaum v. Michigan State Univ.*, 327 N.W.2d 783, 784, 792 (Mich. 1982) (noting that "[t]he magnetic tape is undisputably 'prepared, owned, used, in the possession of, or retained by' the defendant public body") (Ryan, J., opinion for reversal). The three justices who voted to affirm the Michigan Court of Appeals ruling did not address each prong of the public record test separately. Rather, they decided only that "[a] list of students appears to be a public record, i.e., '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.'" *Id.* at 785 (Fitzgerald, J., opinion for affirmance).

74. MICH. COMP. LAWS ANN. § 15.232(c).

statute. In their opinion for reversal, three justices in *Kestenbaum* maintained that this expression should be "construed according to its commonly accepted and generally understood meaning."⁷⁵ The court as a whole affirmed the holding that Michigan State University's computer tapes passed this part of the test.⁷⁶ Yet, because these holdings resulted from an affirmation by an equally divided court, it is difficult to predict how a full seven-member court would rule when the issue of e-mail and the FOIA arises.

When the Michigan Supreme Court turns its attention to this matter in the future, it will probably review the broad array of Michigan court decisions which have considered the definition of a "public record." For example, the Michigan Court of Appeals has held that mug shots,⁷⁷ disciplinary worksheets for prisoners,⁷⁸ salary records of university teachers,⁷⁹ and closed meetings held by the Detroit City Council⁸⁰ all fall within the spectrum of public records under the FOIA. Moreover, the Michigan Supreme Court may consider its decision to label autopsy reports prepared by the county coroner as "public records."⁸¹

c. Federal Application of the FOIA—The federal rules defining "records" are as equally vague as their Michigan counterparts. The Court of Appeals for the District of Columbia Circuit has commented that, "[a]s has often been remarked, the Freedom of Information Act, for all its attention to the treatment of 'agency records,' never defines that crucial phrase."⁸² The Supreme Court has held generally that

75. *Kestenbaum*, 327 N.W.2d at 792.

76. *Id.* ("Facilitating communications among students, preventing a great deal of havoc, and simply operating the university in an efficient manner are all 'official functions' of Michigan State University.")

77. *Patterson v. Allegan County Sheriff*, 502 N.W.2d 368, 369 (Mich. Ct. App. 1993).

78. *Favors v. Department of Corrections*, 480 N.W.2d 604, 606 (Mich. Ct. App. 1991). Note that the court held that these worksheets were public records even though they normally were destroyed after the warden made his decision. *Id.* This suggests that the court may not find persuasive the argument that some e-mail which is quickly disposed should not be considered public record.

79. *Penokie v. Michigan Technological Univ.*, 287 N.W.2d 304, 309 (Mich. Ct. App. 1979).

80. *Detroit News, Inc. v. City of Detroit*, 460 N.W.2d 312, 316 (Mich. Ct. App. 1990).

81. *Swickard v. Wayne County Medical Examiner*, 475 N.W.2d 304, 308 (Mich. 1991).

82. *McGehee v. CIA*, 697 F.2d 1095, 1106 (D.C. Cir. 1983).

[a]lthough Congress has supplied no definition of agency records in the FOIA, it has formulated a definition in other Acts. The Records Disposal Act [herein the Federal Records Act], in effect at the time Congress enacted the Freedom of Information Act, provides the following threshold requirement for agency records: "records' includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics *made or received* by an agency of the United States Government under Federal law or in connection with the transaction of public business" ⁸³

According to one treatise, "[a]gency regulations and court decisions are in accord with this type of expansive, all encompassing definition of records."⁸⁴ As mentioned earlier, federal courts have placed computer documents within this definition,⁸⁵ in addition to magazine photographs,⁸⁶ union authorization cards,⁸⁷ x-rays,⁸⁸ computerized mailing lists,⁸⁹ tape recordings,⁹⁰ and films.⁹¹

The Court of Appeals for the District of Columbia Circuit applied the nexus test in *Bureau of National Affairs, Inc. v. United States Department of Justice*⁹² to determine whether a document is a record. "[W]e looked to see if there was 'some "nexus" between the agency and the documents other than the mere incidence of location.'"⁹³ The court relied upon an Illinois district court opinion which emphasized that the mere possession of a record by an agency was not enough to make it a departmental record.⁹⁴ The court noted that the "use of the documents by employees other than the author [was] an

83. Forsham v. Harris, 445 U.S. 169, 183 (1980) (citing 44 U.S.C. § 3301).

84. See 1 BRAVERMAN & CHETWYND, *supra* note 44, at 129.

85. Yeager v. Drug Enforcement Admin., 678 F.2d 315, 321 (D.C. Cir. 1982).

86. Weisberg v. United States Dep't of Justice, 631 F.2d 824, 828 (D.C. Cir. 1980).

87. Committee on Masonic Homes v. NLRB, 556 F.2d 214, 218 (3d Cir. 1977).

88. Nichols v. United States, 460 F.2d 671, 673 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972).

89. Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 456 (D.D.C. 1977).

90. Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 308 (S.D.N.Y. 1976).

91. Save the Dolphins v. United States Dep't of Commerce, 404 F. Supp. 407, 411 (N.D. Cal. 1975).

92. 742 F.2d 1484, 1493 (D.C. Cir. 1984).

93. *Id.* at 1491 (quoting Wolfe v. United States Dep't of Health and Human Servs., 711 F.2d 1077, 1080 (D.C. Cir. 1983)).

94. *Id.* (citing Illinois Inst. for Continuing Legal Educ. v. United States Dep't of Labor, 545 F. Supp. 1229, 1233-34 (N.D. Ill. 1982)).

important consideration.”⁹⁵ But the court was not persuaded that how an agency treated a document for disposal purposes was a relevant consideration, maintaining instead that “an agency should not be able to alter its disposal regulations to avoid the requirements of FOIA.”⁹⁶

In determining whether a document is a record, the federal courts have considered whether the document (1) was generated within the agency; (2) has been placed into the agency’s files; (3) is in the agency’s control; and (4) has been used by the agency for an agency purpose.⁹⁷ Applying these factors, the court in *Bureau of National Affairs* held that “yellow telephone message slips” kept for short periods of time by an Office of Management and Budget official were “not ‘agency records’ within the meaning of FOIA” because “[n]o substantive information [was] contained in them.”⁹⁸ The court also held, however, that “daily agendas” maintained by the secretary for the Assistant Attorney General for Antitrust were agency records because “[t]hey were created for the express purpose of facilitating the daily activities of the Antitrust Division.”⁹⁹ Finally, the court concluded that the official’s appointment calendars were not agency records because “they were not *distributed* to other employees” but were expressly for the official’s personal convenience.¹⁰⁰

Following the logic in *Bureau of National Affairs*, the record status of e-mail would vary message-by-message. Many messages are created solely for “personal convenience,” while other messages contain calendars and appointment schedules which allow department heads to schedule meetings via the computer. Some e-mail messages are circulated throughout an entire department, while others are meant for only one other person. It is clear, however, that e-mail is more than just a scratch pad for personal use, because almost all e-mail messages are created in order to communicate with someone else. The applicability of Michigan’s FOIA to electronic mail remains uncertain largely because of uncertainty regarding whether all

95. *Id.* at 1493.

96. *Id.*

97. *See id.* at 1494–95.

98. *Id.* at 1495. These slips of paper contained “the name of the caller, the date and time of the call and, possibly, a telephone number. . . . The slips d[id] not indicate why the call was made and, most importantly, whether the call was personal or related to official agency business.” *Id.*

99. *Id.*

100. *Id.* at 1496.

or some e-mail messages are used "in the performance of an official function."¹⁰¹ Moreover, it would be technically difficult to have a person or program sort through every government e-mail message to decide which messages equalled a public record and which messages simply were too informal to have an official function.

d. Do Any Exemptions to the FOIA Apply to E-mail?—
i. Section 243(a): Information of a Personal Nature—The Michigan FOIA "separates public records into 2 classes: (i) those which are exempt from disclosure under section 13, and (ii) all others, which are subject to disclosure."¹⁰² Section 13 of the Michigan FOIA¹⁰³ lists the only exemptions applicable to FOIA requests. The first exemption might apply to various electronic messages on a case-by-case basis: "A public body may exempt from disclosure as a public record under this act: (a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."¹⁰⁴ This exemption, like the twenty others, is "to be narrowly construed."¹⁰⁵ The Michigan courts have applied common law principles and constitutional language to aid them in this grey area of privacy law. Justice Cavanagh has reasoned:

The Legislature made no attempt to define the right of privacy. We are left to apply the principles of privacy developed under the common law and our constitution. The contours and limits are thus to be determined by the court, as the trier of fact, on a case-by-case basis in the tradition of the common law. Such an approach permits, and indeed requires, scrutiny of the particular facts of each case, to identify those in which ordinarily impersonal information takes on 'an intensely personal character' justifying nondisclosure under the privacy exemption.¹⁰⁶

101. MICH. COMP. LAWS ANN. § 15.232(c) (West 1994 & Supp. 1995).

102. *Id.*

103. *Id.* § 15.243 (West 1994).

104. *Id.* § 243(1)(a).

105. *Swickard v. Wayne County Medical Examiner*, 475 N.W.2d 304, 307 (Mich. 1991).

106. *State Employees Ass'n v. Department of Management & Budget*, 404 N.W.2d 606, 614-15 (Mich. 1987) (footnotes omitted).

In an earlier case, three justices of the Michigan Supreme Court stated that "names and addresses of students enrolled at Michigan State University are not 'information of a personal nature.'"¹⁰⁷ Justice Ryan's opinion reasoned that "[m]ost citizens voluntarily divulge their names and addresses on such a widespread basis that any alleged privacy interest in the information is either absent or waived."¹⁰⁸

Generally, Michigan courts have kept to a narrow interpretation of records which would qualify for the privacy exception. *Swickard v. Wayne County Medical Examiner*¹⁰⁹ provides a good example. The case involved the suicide death of the Honorable Judge Quinn, Jr.¹¹⁰ Based on information learned from the police, the newspaper suspected that the judge had used drugs prior to the incident.¹¹¹ The newspaper requested the deceased judge's autopsy and toxicology test results under the FOIA.¹¹² The standard used by the court was "whether the invasion [of privacy] would be 'clearly unwarranted.'"¹¹³ The court, following a federal court's rule that held that privacy rights belong to an individual and perish with that individual,¹¹⁴ held that disclosure of the autopsy results and the toxicology tests "would not amount to a 'clearly unwarranted invasion of privacy' of the late Judge Quinn or his family."¹¹⁵

Applying the rigors of the privacy exception to the variety of electronic messages will be difficult. First, each electronic message would have to be defended from disclosure on a case-by-case basis, which could prove to be time consuming.¹¹⁶ There is the option of *in camera* review, but again, the number of messages sent per day by an agency would probably make this option prohibitively time consuming. As for the content of

107. *Kestenbaum v. Michigan State Univ.*, 327 N.W.2d 783, 798 (Mich. 1982) (Ryan, J., opinion for reversal).

108. *Id.* at 795.

109. 475 N.W.2d 304 (Mich. 1991).

110. *Id.* at 306.

111. *Id.*

112. *Id.*

113. *Id.* at 309 (quoting MICH. COMP. LAWS ANN. § 15.243(1)(a) (West 1994)).

114. *Id.* at 313 (citing *Diamond v. FBI*, 532 F. Supp. 216, 227 (S.D.N.Y. 1981)).

115. *Id.* at 315; see also *Penokie v. Michigan Technological Univ.*, 287 N.W.2d 304, 310 (Mich. Ct. App. 1979) (holding that disclosure of university employee salary information might occasion a "minor invasion" of privacy but that it was "outweighed by the public's right to know precisely how its tax dollars are spent").

116. See *Penokie*, 287 N.W.2d at 308 (requiring that "the government agency bear[] the burden of establishing that denial of a request for disclosure is statutorily supported").

e-mail, the state agencies have a policy of using their computers only for official business. This suggests that most e-mail used by an agency would not qualify for the exception for records containing "intimate details" of a "highly personal nature." Universities, however, have no such policy for using their systems, although they do ask that their systems be used to further research. The reality of both situations is that personal information probably is transmitted every day by public employees. Many people treat e-mail like a telephone and assume that it is private to some degree, regardless of departmental policy. Some messages probably would pass the "clearly unwarranted" invasion of privacy test, but the task of reviewing all such messages and defending them in court could prove expensive.

The comparable federal exemption (Exemption (6)) is not identical to section 243(a) of the Michigan statute. The language, "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,"¹¹⁷ is not the same as "[i]nformation of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."¹¹⁸ The following issues have been identified as falling within the federal privacy exemption: "marital status, legitimacy of children, identity of children's fathers, medical condition, welfare status, alcohol consumption, family fights, reputation, personal job preferences and goals, job evaluations, job promotion prospects, [and] reasons for employment termination."¹¹⁹

A key federal case, *Department of the Air Force v. Rose*,¹²⁰ held that Air Force cadet discipline records were not protected from disclosure by Exemption (6).¹²¹ The United States Supreme Court found "nothing in the wording of Exemption 6 or its legislative history to support the Agency's claim that Congress created a blanket exemption for personnel files. . . . [N]o reason would exist for nondisclosure in the absence of a showing of a clearly unwarranted invasion of privacy."¹²² In *Rose*, the Court was worried that agencies simply would place

117. 5 U.S.C. § 552(b)(6) (1994).

118. MICH. COMP. LAWS ANN. § 15.243(1)(a) (West 1994) (emphasis added).

119. *Penokie*, 287 N.W.2d at 308.

120. 425 U.S. 352 (1976).

121. *Id.* at 370.

122. *Id.* at 371.

sensitive records into files labeled "personnel" and render them exempt. The Court ruled that Congress intended to "construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'"¹²³ The Court concluded that information could be redacted if necessary. The Court quoted the Senate Report: "[W]here files are involved [courts will] have to examine the records themselves and require disclosure of portions to which the purposes of the exemption under which they are withheld does not apply."¹²⁴

Again, federal case law reaffirms the stance taken by Michigan courts that any and all records are subject to disclosure, unless disclosure would constitute a "clearly unwarranted invasion" of privacy. The United States Supreme Court has emphasized that when an agency attempts to exempt an entire group of records or files, it violates the intent of Congress underlying the FOIA.¹²⁵ This suggests that an agency or university decision to treat *all* electronic mail as exempt for privacy reasons would fail. A Michigan court interpreting *Rose* likely would find that each e-mail message should be subject to inspection to determine whether it should be released or protected as private.¹²⁶

ii. Section 243(1)(n): Communications Within a Public Body—There is another exemption which could apply to e-mail messages on a case-by-case basis. The Michigan FOIA provides:

(1) A public body may exempt from disclosure as a public record under this act:

....

(n) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between

123. *Id.* at 372.

124. *Id.* at 374 (quoting S. REP. NO. 854, *supra* note 39, at 32).

125. *Id.* at 370-77.

126. *See id.* at 374.

officials and employees of public bodies clearly outweighs the public interest in disclosure. . . .¹²⁷

This exemption, Exemption (n), has been interpreted by Michigan courts on at least two occasions. In *DeMaria Building Co. v. Department of Management and Budget*,¹²⁸ the Michigan Court of Appeals was presented with a case in which the plaintiff sought an outside consultant's report to the Department of Management and Budget concerning cost overruns on a university construction site.¹²⁹ The Michigan Attorney General denied the request for the consultant's report, citing exemption 243(1)(n).¹³⁰ In a brief opinion, the court focused on the language "between public bodies" and ruled that an outside consultant was not a public body within the meaning of section 15.232(b).¹³¹ Thus the exemption did not apply.¹³² According to the court, there were "strong public policy arguments as to why the reports of independent consultants to a public body should be accorded the same status as reports generated within the public body itself."¹³³ However, the court could not ignore the Michigan Supreme Court's past decisions to "narrowly construe the exemption provisions of the act."¹³⁴

In another Michigan case, *Favors v. Department of Corrections*,¹³⁵ the appellate court held that worksheets used by the Department of Corrections to make disciplinary credit decisions were preliminary to a final agency determination of policy because they covered only the committee's recommendations.¹³⁶ The warden made all of the final decisions regarding changes in inmate incarceration.¹³⁷ The court explained that "[t]he comment sheet is designed to allow the committee members to state their candid impressions regarding the inmate's eligibility for disciplinary credits. Release of this information conceivably could discourage frank appraisals by the committee and, thus, inhibit accurate assessment of an

127. MICH. COMP. LAWS ANN. § 5.243(1)(n) (West 1994).

128. 407 N.W.2d 72 (Mich. Ct. App. 1987).

129. *Id.* at 72.

130. *Id.*

131. *Id.* at 73-74.

132. *Id.*

133. *Id.* at 73.

134. *Id.*

135. 480 N.W.2d 604 (Mich. Ct. App. 1991).

136. *Id.* at 606.

137. *Id.*

inmate's merit or lack thereof."¹³⁸ Next the court weighed the public interest in encouraging frank communications against the public interest in disclosure of the worksheet, concluding that "[t]he public has a far greater interest in insuring that these evaluations are accurate than in knowing the reasons behind the evaluations."¹³⁹

Electronic mail messages may qualify for exemption 243(1)(n) if (1) they were sent within or between two public agencies; (2) they were preliminary to a final action or decision; and (3) the need for frank communication in the particular instance outweighs the public interest.¹⁴⁰ The third prong applies most directly to e-mail. If one were to try to exempt e-mail as a whole, this code section would be the place to start. One advantage of e-mail is that it promotes frank discussion and the quick, efficient exchange of ideas in a relatively simple format. Whether this need for frank discussion outweighs the public interest remains unclear.

As for the second prong, e-mail can be used to convey a final decision or action, but this is probably rare. It would be unusual, for example, to have the warden write his final decision on e-mail, but it would not be unusual to have the board members make their personal recommendations via e-mail. In this regard, e-mail is most like the worksheet because much of what is communicated on e-mail is likely to be candid and impressionistic rather than final or formal.

Finally, the applicability of the first prong of the test would vary by message. Following *DeMaria Building*, e-mail messages which were not created by a public body would not be subject to this exemption. It is not clear, however, how this might apply to e-mail in some situations. For example, consider the case in which a message is sent from a consultant to an agency, and then that agency forwards the same message to another agency. The message probably has now become a communication "within or between" public bodies. The language of the statute says nothing about the notes originating with the public agency, but the Michigan Court of Appeals did interpret the exemption in this way in *DeMaria Building*.¹⁴¹

138. *Id.*

139. *Id.* at 607.

140. MICH. COMP. LAWS ANN. § 15.243(1)(n) (West 1994).

141. See *DeMaria Bldg. Co. v. Department of Management and Budget*, 407 N.W.2d 72, 73 (Mich. Ct. App. 1987).

e. Are E-mail Messages Sent to or Received from a Private Party by a Public Agency Subject to the FOIA?—Whether e-mail messages to or from a public agency are subject to the FOIA depends on the definition of “public record” under the FOIA.¹⁴² The Act defines a public record 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.”¹⁴³

The most relevant case interpreting this language as it applies to messages sent to or received from a private party is *Walloon Lake Water Systems, Inc. v. Melrose Township*.¹⁴⁴ In that case, an individual citizen sent a letter to a township regarding the water system provided by plaintiff’s company.¹⁴⁵ The letter was read aloud at a regularly scheduled town meeting and recorded in the minutes of the meeting.¹⁴⁶ When the plaintiff requested the letter from the defendant-township, pursuant to the FOIA, the township supervisor refused to release the letter.¹⁴⁷ The court was cautious in its ruling:

Without opining as to what extent an outside communication to an agency constitutes a public record, we believe that here, once the letter was read aloud and incorporated into the minutes of the meeting where the township conducted its business, it became a public record “used . . . in the performance of an official function.”¹⁴⁸

No other cases extend or clarify this ruling.¹⁴⁹

Thus, it remains unclear to what extent private communications, which are not “used” in a formal manner by the government, can be disclosed under the FOIA. The federal law on this point, as discussed above, is very confusing. Apparently,

142. See *supra* Part II.A.3.b.

143. MICH. COMP. LAWS ANN. § 15.232(c) (West 1994 & Supp. 1995).

144. 415 N.W.2d 292 (Mich. Ct. App. 1987).

145. *Id.* at 294.

146. *Id.*

147. *Id.*

148. *Id.*

149. *DeMaria Building Co. v. Department of Management*, 407 N.W.2d 72 (Mich. Ct. App. 1987) suggests that a consultant’s report, paid for and in the possession of the government, is disclosable under the FOIA. The record status of the report in *DeMaria Building* was neither discussed nor disputed and the court granted disclosure. *Id.* at 72–73. A consultant’s report, however, is a far cry from an *unrequested* e-mail message sent by a citizen to a public agency which is then filed by the agency server.

some nexus must exist between a document and its use by an agency before it becomes a public record belonging to that department. The key case in this area is *Kissinger v. Reporters Committee for Freedom of the Press*.¹⁵⁰ The United States Supreme Court in *Reporters Committee* was presented with the issue of when a document "in the possession" of a party not an agency becomes an "agency record,"¹⁵¹ where earlier FOIA cases had dealt with the problem of when a record created elsewhere but later transferred to a FOIA agency becomes a record.¹⁵² The Court held that possession or control by the agency is a prerequisite to FOIA disclosure.¹⁵³

It is unclear whether e-mail messages sent by private citizens to public agencies are covered by the FOIA. Federal law is not on point and might not even control because the language of the Michigan statute regarding a "public record" is so broad. Parts of the Michigan FOIA definition are left undefined. For example, the phrase, "from the time it is created,"¹⁵⁴ is not addressed in any decision. One possible conclusion is that a private-party document is not a record as long as the state agency or university only receives it and does not "use" it. In *Kestenbaum v. Michigan State University*, three justices stated that Michigan State University's student list was a record because the school had to "use" the list officially.¹⁵⁵ However, an e-mail message from a private citizen to the Department of Management and Budget regarding how tax dollars are spent may not be a record. Moreover, even if all private correspondence are records under the FOIA, they may be so unimportant in documenting agency activity that they do not need to be saved or retained under the Management and Budget Act.¹⁵⁶

150. 445 U.S. 136 (1980).

151. *Id.* at 139.

152. *See, e.g., Lykins v. United States Dep't of Justice*, 725 F.2d 1455 (D.C. Cir. 1984) (holding that pre-sentence reports which have been turned over to the Parole Commission are "agency records" even though they originated in the courts, which are not FOIA agencies); *Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978) (setting forth standard for determining "[w]hether a congressionally generated document has become an agency record"), *cert. denied*, 445 U.S. 927 (1980).

153. *Reporters Committee*, 445 U.S. at 155.

154. MICH. COMP. LAWS ANN. § 15.232(c) (West 1994 & Supp. 1995).

155. *Kestenbaum v. Michigan State Univ.*, 327 N.W.2d 783, 792 (Mich. 1982) (Ryan, J., opinion for reversal).

156. *See* MICH. COMP. LAWS ANN. §§ 18.1284–1292 (West 1994).

B. The Management and Budget Act

The FOIA describes which records must be disclosed to the public upon proper request. It does not, however, require the State to create or maintain any records.¹⁵⁷ These duties are contained in the Management and Budget Act (MBA), which provides:

- (1) The head of each state agency shall maintain records which are necessary for all of the following:
 - (a) The continued effective operation of the state agency.
 - (b) An adequate and proper recording of the activities of the state agency.
 - (c) The protection of the legal rights of the state.
- (2) The head of a state agency maintaining any record shall cause the records to be listed on a retention and disposal schedule.¹⁵⁸

Moreover, the MBA mandates that the Department of Management and Budget “[p]romote the establishment of a vital records program in each state agency by assisting in identifying and preserving records considered to be critically essential to the continued operation of state government or necessary to the protection of the rights and privileges of its citizens, or both.”¹⁵⁹

The Michigan Secretary of State has a duty to determine which records possess “archival value” and should not be destroyed.¹⁶⁰ Records with “archival value” are defined as

records which have been selected by the archives section of the bureau of history in the department of state as having enduring worth because they document the growth and development of this state from earlier times, including the territorial period; they evidence the creation, organization, development, operation, functions, or effects of state agencies; or because they contain significant information

157. *See id.* § 15.233(3).

158. *Id.* § 18.1285(1)–(2).

159. *Id.* § 18.1287(c).

160. *Id.* § 18.1289.

about persons, things, problems, or conditions dealt with by state agencies.¹⁶¹

The definition of a "record" in the MBA is slightly different than under the FOIA.¹⁶² The MBA definition includes "magnetic or paper tape, microform, magnetic or punch card, disc, drum, sound or video recording, electronic data processing material, or other recording medium, and includes individual letters, words, pictures, sounds, impulses, or symbols, or combination thereof, regardless of physical form or characteristics."¹⁶³

Moreover, the MBA defines a "state agency" differently than the FOIA defines a "public body."¹⁶⁴ Under the MBA a "state agency" means "a department, board, commission, office, agency, authority, or other unit of state government." However, it does not include "an institution of higher education or a community college."¹⁶⁵

It is not clear how the MBA and the FOIA apply to electronic mail. The MBA seems to have a broader definition of "record." E-mail, in some sense, is "electronic data processing material" because it is the manipulation of electronic data, and much e-mail can be created with an ordinary data processing program such as Microsoft Word or WordPerfect. E-mail, however, is broader than mere data processing; it is also a form of communication.¹⁶⁶

That neither the FOIA nor the MBA refers to e-mail explicitly could be problematic because it is such a unique medium. E-mail is something less than a traditional writing. A message can take the shape of a "letter" only if the receiver or sender chooses to print the message, and much e-mail is never printed. Moreover, because a high volume of messages are sent daily, they resemble phone calls rather than documents. Interestingly, telephone calls are not mentioned in either act. It can only be assumed that phone calls are not records.

161. *Id.* § 18.1284(a).

162. *Compare id.* § 18.1284(b) (West 1994) *with id.* § 15.232(c) (West 1994 & Supp. 1995).

163. *Id.* § 18.1284(b).

164. *Compare id.* § 18.1115(5) (West 1994) *with id.* § 15.232(b) (West 1994 & Supp. 1995).

165. *Id.* § 18.1115(5).

166. Moreover, all e-mail is likely to be stored either on a magnetic tape or hard drive, unlike a phone call, which often is not stored at all.

Even if e-mail is considered a record by either definition, it is not clear that all e-mail is of "archival value."¹⁶⁷ Some e-mail contains schedules and employee calendars which record day-to-day activity. E-mail is also a popular means of exchanging ideas, but e-mail rarely consists of "final drafts" of documents. The government is far from seeing the day of the paperless office. Also, many e-mail software packages are poor word processors and thus not very helpful for creating anything more than short, unformatted messages. E-mail has the potential to revolutionize the way in which society works with documents and reports of significant length, although its current use is for only very brief memoranda or "typed" telephone calls.

*C. Federal Court Interpretation of the Federal Records Act:
Armstrong v. Executive Office of the President*

A federal court has recently interpreted the Federal Records Act, which is comparable to Michigan's Management and Budget Act. In *Armstrong v. Executive Office of the President*,¹⁶⁸ the court ruled that "electronic communications systems can create, and have created, documents that constitute federal records under the [Federal Records Act]."¹⁶⁹ *Armstrong* began when a private organization made a FOIA request for certain e-mail created during the Reagan administration.¹⁷⁰ When the National Archive failed to provide the requested computer tapes, a lower court found the National Archive to be in contempt of court and fined it \$50,000 per day.¹⁷¹ The lower court decided the issues presented under the Federal Records Act (FRA), rather than under the Federal FOIA.¹⁷²

167. See MICH. COMP. LAWS ANN. § 18.1289(1). The Secretary of State determines whether a record possesses archival value. *Id.*

168. 1 F.3d 1274 (D.C. Cir. 1993).

169. *Id.* at 1282.

170. *Id.* at 1280.

171. *Armstrong v. Executive Office of the President*, 821 F. Supp. 761, 764 (D.D.C. 1993).

172. *Id.* at 763. It is unclear why the court sidestepped an interpretation of the federal FOIA and instead chose to interpret the case under the Federal Records Act.

For the purposes of the Federal Records Act, "records" are defined as

all books, papers, maps, photographs, machine readable [i.e., electronic] materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency.¹⁷³

At oral argument, the government agreed with the court of appeals that "this [e-mail] system has, in the past, created some things that qualify as federal records."¹⁷⁴

The *Armstrong* court ruled that printing messages onto paper and storing only the "papered version" was not the equivalent of saving e-mail in its electronic form because "important information present in the e-mail system, such as who sent a document, who received it, and when that person received it, will not always appear on the computer screen and so will not be preserved on the paper print-out."¹⁷⁵ The *Armstrong* court also decided that electronic directories and distribution lists which often accompany e-mail would be "appropriate for preservation" in these situations.¹⁷⁶ The court found that although the agency heads had "some discretion" in determining what constitutes a record, they did not have the power to declare "inappropriate for preservation" an entire set of substantive e-mail documents generated by two [Presidential] administrations over a seven-year period."¹⁷⁷ As a result of *Armstrong*, the National Archives and Records Administration revised the federal rule on electronic records management to incorporate the standards for e-mail, with the goal of placing e-mail in context with the management of records in all media.¹⁷⁸

The Federal Records Act definition of "record" is very close to the two definitions found in the Michigan Code. For

173. *Armstrong*, 1 F.3d at 1278 (quoting 5 U.S.C. § 3301).

174. *Id.* at 1283 n.6.

175. *Id.* at 1284.

176. *Id.* at 1284 n.8.

177. *Id.* at 1283.

178. See 60 Fed. Reg. 44,634 (1995) (to be codified at 36 C.F.R. §§ 1220, 1222, 1228, 1234).

example, both the Federal Records Act and the Michigan Management and Budget Act define a "record" as material "regardless of physical form or characteristics."¹⁷⁹ This language persuaded the *Armstrong* court that "substantive communications otherwise meeting the definition of federal 'records' that had been saved on the electronic mail came within the FRA's purview."¹⁸⁰ The federal government has yet to test the Federal Freedom of Information Act as it applies to e-mail.¹⁸¹

D. Michigan Rules of Discovery

Michigan Court Rules permit the discovery of

any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things.¹⁸²

The Michigan Court Rules further illustrate how this rule works. "A party may serve on another person a request . . . to inspect and copy designated documents or to inspect and copy, test, or sample tangible things."¹⁸³ This rule defines "documents" as "writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."¹⁸⁴

There are no published opinions on the subject of discovering e-mail in non-criminal cases; however, one practice guide recommends that lawyers clearly define the term "documents"

179. See *Armstrong*, 1 F.3d at 1280; see also MICH. COMP. LAWS ANN. § 18.1284(b).

180. *Armstrong*, 1 F.3d at 1280-81.

181. A bill was introduced last year in the United States Congress to amend the Federal Freedom of Information Act to require agencies, when requested, to make information, including electronic formats, available to the public "in any form or format in which such records are maintained by that agency." See H.R. 4917, 103d Cong., 2d Sess. (1994). This bill was never passed.

182. MICH. CT. R. PRAC. 2.302(B).

183. MICH. CT. R. PRAC. 2.310.

184. *Id.*

in their interrogatories.¹⁸⁵ The sample forms in this guide define "documents" as "all tangible material, of whatever nature, including, but not limited to, all written material such as graphs, charts, maps, drawings, correspondence, memoranda, records, notes, manuals, books, photographs, X rays, and all information stored on computer and/or archived software capable of reduction to a written document."¹⁸⁶ E-mail already has been admitted into evidence in several reported Michigan cases, but none of these have included an electronic message sent by a public employee.¹⁸⁷

California attorneys regularly seek discovery of e-mail records. A recently published article in *The American Lawyer* describes the increasing number of civil cases that entail searching e-mail messages.¹⁸⁸ According to the article, the author learned that "[d]iscovery requests for e-mail and other computer-stored information are becoming more routine . . . given the 'ton of information out there that doesn't exist on paper.'"¹⁸⁹ One lawyer noted the increased popularity of e-mail in Silicon Valley: "[T]hey don't pick up the phone, they don't talk in the hallway . . . They send e-mail."¹⁹⁰ This trend has led lawyers to craft their discovery requests much more specifically; some requests even call for hidden and deleted e-mail files.¹⁹¹ In fact, a cottage industry has formed in California to search e-mail files for law firms.¹⁹² One of these new high-tech discovery firms searched 750,000 e-mail messages to find 7000 "potentially relevant" messages in one company's database.¹⁹³

The provision in the *Michigan Court Rules Practice* that defines "documents" includes "other data compilations from which information can be obtained."¹⁹⁴ This language seems broad enough to include e-mail, and the future undoubtedly will find the Michigan government faced with litigation that includes

185. BRUCE T. WALLACE & MARY R. MINNET, *DISCOVERY PRACTICE: A GUIDE FOR MICHIGAN LAWYERS* 256 (1986).

186. *Id.* at 264-78.

187. *See, e.g.,* *Donley v. Ameritech Servs.*, No. 92-72236, 1992 U.S. Dist. LEXIS 21281 (E.D. Mich. Nov. 16, 1992) (concerning an employee fired after sending an electronic message to another employee concerning a client).

188. Vera Titunik, *Collecting Evidence in the Age of E-mail*, *AM. LAW.*, July-Aug. 1994, at 119, 119.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *MICH. CT. R. PRAC.* 2.310(A).

highly specific discovery requests asking for e-mail files, perhaps even deleted ones. If an electronic message is "relevant" to the litigation, it appears that lawyers will go to great lengths to obtain it.

IV. ANALYSIS

At one extreme, one could advocate extending to e-mail the same privacy protections and confidentiality that currently apply to telephone conversations, protections which are currently enjoyed not only by private citizens but also by employees of public agencies.¹⁹⁵ At the other extreme, one could advocate that the FOIA and records preservation laws should apply to e-mail in the same way they apply to traditional written communications to and from public employees.¹⁹⁶ The latter position would ensure widespread public access to e-mail and would require preservation of e-mail under limited circumstances.

Given that electronic mail is a communications medium that has come to serve many of the functions of both telephone conversations and written communications, these two different positions are reasonable. Before e-mail, the law in Michigan, as in the nation, had crystallized around a set of expectations that public employees' telephone conversations would be private and that written communications would be public, except in precisely limited circumstances. There are significant advantages to meeting these expectations. Public employees, like private individuals, need a sphere in which they can talk, deliberate, and formulate their ideas without fear of constant surveillance; yet at the same time, members of the public need to have access to information about what their government is doing. The law has promoted both policies by encouraging public employees to use telephone communication for discussions which they wish to keep private and requiring that their written communications be preserved and disclosed in most circumstances.

195. See, e.g., 18 U.S.C. § 2511 (1994) (federal wiretap statute); MICH. COMP. LAWS ANN. § 750.539 (West 1994) (Michigan's wiretap statute).

196. See *supra* notes 25-27 and accompanying text.

E-mail has upset the traditional understanding of privacy. It is a flexible medium which may well absorb most communication which previously occurred in both telephonic and written form. In this new medium, how can society protect both the privacy traditionally accorded telephone calls and the public's right of access to information as embodied in our disclosure statutes?

A threshold question must be addressed: Should e-mail be used for the sorts of candid conversations which have previously taken place as telephone conversations among public employees and between public employees and citizens? I believe that this is desirable. Few technological innovations have greater potential than e-mail to make public officials more accessible to each other and to the general public. The rapid and easy exchange of information among individuals who are widely dispersed in the hierarchy of government and in geographic location and whose schedules make telephone communication difficult can be expected to improve understanding and the quality of decision making in public life. The blanket disclosure of electronic messages to the public would discourage some desirable communications among public employees. If e-mail is to be regulated and disclosed under the same terms as public pronouncements of state agencies, a significant fraction of the communication now occurring electronically will shift back to the telephone or, more troubling, simply not occur.

So what should be done? The prior analysis of Michigan statutes indicates that there are some significant ambiguities both in applying the FOIA and in applying the Management and Budget Act to e-mail. Nevertheless, the text of the statutes and the decisions interpreting the text do suggest that all e-mail messages most likely will be "writings" within the meaning of the FOIA and that many, if not most, will be "public records" subject to disclosure under the FOIA unless the agency or public employee can show that a particular message was created for personal convenience. This will subject the electronic messages of state agencies and universities to the requirements of disclosure unless they can meet the heavy burden of showing that one of the FOIA exemptions applies.

Arguably, the most relevant exemption is Exemption (n), which excludes from disclosure "[c]ommunications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual

materials and are preliminary to a final agency determination of policy or action."¹⁹⁷ This exemption, however, requires case-by-case adjudication concerning each communication.¹⁹⁸ In practice, this exemption does little to protect e-mail from disclosure, because it would be difficult and expensive to defend from disclosure each of the thousands of messages on a case-by-case basis. More important, a public employee can never be certain when sending a message that Exemption (n) will protect the message from future disclosure. This uncertainty could deter public employees from risking electronic communication in the first place.

Removing electronic communications entirely from the FOIA most assuredly would maximize the privacy of e-mail and encourage its widespread use among public employees. It also would permit, however, significant erosion of the disclosure currently provided under the FOIA, as communications that were once written may gradually shift to electronic forms. The disclosure currently required under the FOIA may be so burdensome and intrusive that a broad reform of the definition of the "writings" subject to disclosure is in order.¹⁹⁹

A more limited solution to the public disclosure of e-mail under the FOIA would be to amend Exemption (n) so as to provide a safe harbor for that subset of electronic messages which most closely resembles the informal exchange of ideas and information that occurs on the telephone. The current exemption requires a case-by-case balancing of public interest in disclosure against the need for frank communication; a revision could confer a blanket exemption on "consultative" e-mail conferences among public employees. Such an exemption would require a careful definition of the types of messages that would be permitted on the consultative conference, as well as an enforcement mechanism to ensure that employees do not use the conference as a way to shield unqualified messages from public scrutiny.

It also seems clear that there exist whole classes of e-mail users at public institutions who should enjoy exemption from the FOIA. Among these are students at educational

197. MICH. COMP. LAWS ANN. § 15.243(1)(n) (West 1994 & Supp. 1995).

198. *See id.* ("This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.")

199. *See* Cole Letter, *supra* note 42, at 85-89.

institutions, both high schools and universities, who communicate with each other and with their teachers concerning matters related to their instruction.

Federal case law and statutes, which employ a slightly different definition of "record," have been extended to e-mail, and have caused the National Archives and Records Administration to promulgate an e-mail preservation regime.²⁰⁰ The National Archives and Records Administration recently has revised the regulations relating to records management to include e-mail in the general requirements for records in all media.²⁰¹ The standards for recordkeeping requirements now indicate that e-mail messages may be considered records.²⁰² The regulations relating specifically to electronic records management define an electronic mail message as any "document created or received on an electronic mail system including brief notes, more formal or substantive narrative documents, and any attachments, such as word processing and other electronic documents, which may be transmitted with the message."²⁰³

Michigan may wish to refine its definition of e-mail "records" which are to be preserved and, by tying this definition to the FOIA, which are to be disclosed. It may wish to require the State Archivist or some other appropriate state agency to develop guidelines more tailored to conditions in Michigan for how messages are designated as records and how messages can be generated with relative confidence that they will not be disclosed.

CONCLUSION

Society is now faced with the ever-widening set of legal issues posed by evolving electronic communications. Electronic mail is but one of a broad array of technologies which Michigan and other states must soon mesh with their public disclosure laws. Voicemail, facsimile transmissions, and computer conferences each have implications, not just for public disclosure laws

200. 36 C.F.R. § 1234 (1994).

201. See 60 Fed. Reg. 44,634 (1995) (to be codified at 36 C.F.R. §§ 1220, 1222, 1228, 1234).

202. *Id.* at 44,640 (to be codified at 36 C.F.R. § 1222.34(e)).

203. *Id.* at 44,641 (to be codified at 36 C.F.R. § 1234.2).

but also for laws protecting against eavesdropping, for laws concerning harassment and stalking, and for the First Amendment of the United States Constitution. This Note suggests balancing the needs of the public to be informed of governmental activities and decisions with the feasibility of providing a technically workable solution given the amount of e-mail which will soon exist. Given that achieving a perfect balance is not possible, lawmakers should err on the side of disclosure, because both the Michigan FOIA and the Federal FOIA were drafted for the purpose of maintaining the public's trust in its government. For this trust to endure, the government must remain open to its constituents.

