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Legal Aspects of Electronic Mail in Public Organizations

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The increasing use of electronic mail in the workplace has generated important legal questions, especially for public organizations. The legal questions concerning e-mail in public institutions and agencies fall into two basic categories: (a) issues of employee privacy regarding e-mail messages; and (b) public access to e-mail under applicable freedom of information legislation. While employees might believe that their e-mail messages are private, the employer has broad legal grounds for reading workplace e-mail. In particular, when the employer owns the e-mail system, which almost always is the case, the employer has considerable latitude to access and read stored e-mail messages, at least if there is some legitimate business reason for doing so. Government organizations also must treat at least some of their e-mail as part of the public record, making it open to public access. State laws vary considerably in terms of how they define the types of e-mail messages that are part of the public record, some being far more inclusive than others. Given the uncertainty and confusion that frequently exists among employees regarding these legal questions, it is essential that public organizations develop and publicize an e-mail policy that both clarifies what privacy expectations employees should have regarding their e-mail and specifies what recording keeping requirements for e-mail should be followed to appropriately retain public records.

Electronic mail (e-mail) has become increasingly important in the

workplace. The growth of this new medium of communication has generated important legal questions, so much so that most experts strongly recommend that organizations adopt explicit policies about e-mail. Public organizations in particular must be concerned about the legal ramifications of e-mail. The legal questions concerning e-mail in public institutions and agencies fall into two basic categories: (a) issues of employee privacy regarding e-mail messages; and (b) public access to e-mail under applicable freedom of information legislation. We discuss both of these topics in this article, attempting not only to outline current legal thinking in the area, but also to raise questions that public managers and policy makers should consider.

It is worth noting at the start that many of the legal issues surrounding the use of e-mail are direct extensions of principles that apply to other forms of communications. Indeed, much of the law that governs e-mail is not legislation that was written explicitly to cover this particular form of communication. Issues of the privacy of employee e-mail messages, for example, are directly analogous to issues of the privacy of employee phone calls or written correspondence. Similarly, the right of the public to have access to governmental e-mail messages is a direct extension of the right to have access to written documents. To be sure, there are questions about exactly how legal principles that were established for older communication technologies should be applied to a new one, and perhaps not all of these questions are fully settled at this point in time. But our understanding of this topic is broadened if we appreciate the application of legal principles across communication media.

Privacy Issues

Many employees, whether in the public or private sector, probably believe that it would be highly inappropriate for supervisors to listen to their phone conversations at work--except perhaps for the monitoring of employees who primarily handle public phone calls, such as tax department workers responding to taxpayer questions. Most employees undoubtedly feel the same way about their employer opening and reading their personal correspondence. By extension, these employees may also feel that e-mail falls into the same category and that supervisors should not be reading their e-mail without permission, except in certain narrowly defined cases. Many employees undoubtedly use their work e-mail system to send personal messages, both internally and externally, or they may mix personal and professional items in the same message, in much the same way that both may be mixed together in a phone conversation with a colleague. Employees may believe that they are entitled to privacy in these matters, and the fact that a password is required to access their computer account, and thus their e-mail, may be considered confirmation of this belief (Greengard, 1996).

Regardless of what many employees might believe should be the case, their legal right to privacy is quite limited when it comes to e-mail messages. The possible basis for a right to privacy of e-mail messages from the scrutiny of the employer might come from several sources. First of all, the Fourth Amendment prohibits the government from unreasonable searches and seizures, and this restricts public (but not private) sector employers. Second, federal legislation, most notably the Federal Electronic Communications Privacy Act of 1986, provides some protection for communications. Third, many states may have their own constitutional and legisla-