



# EMAIL: USE, ACCESS & RETENTION

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The use of email in the workplace has become routine and is frequently the preferred mode of communication. For state and local government officials and employees, the application of the Virginia Freedom of Information Act (FOIA), relating to access to records, and the Virginia Public Records Act (the PRA), relating to the retention of records, comes into play.

Government officials and employees frequently ask two key questions about the use of e-mail—"Can the public and media access my email under FOIA?" and "Do I have to save my email?"

This document will address these questions and provide guidance concerning the use and management of email by state and local government officials and employees.

## **The nature of email**

Email generally refers to any communication that requires an electronic device for storage and/or transmission.<sup>1</sup> Email is a medium for correspondence—essentially, email is the *envelope* for the communication. For purposes of FOIA and the PRA, email provides a medium for communication, much like a telephone or the U.S. Postal Service provides a means of communication. The fact that a communication is sent via email is not in itself conclusive as to whether that email is required to be accessible to the public under FOIA or retained pursuant to the PRA; one must look at the text and substance of the communication to determine whether it is indeed a public record.

## **The Virginia Freedom of Information Act**

FOIA addresses access by the general public and media representatives to public records. Section 2.2-3701 of the Code of Virginia defines public records for purposes of FOIA to include:

all writings and recordings that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording, or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business.

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<sup>1</sup> Library of Virginia, Electronic Records Guidelines (effective September 29, 2023; original June 10, 2002).



Email falls under this broad definition of a public record, because the definition applies to "all writings and recordings . . . set down by . . . mechanical or electronic recording . . . , however stored, and regardless of physical form or characteristics." As noted above, email is just the medium, or the envelope, used to convey the communication. Just as a letter sent via the U.S. Postal Service from one public official to another concerning public business is a public record under FOIA, so is that same communication sent via email.

FOIA provides that unless subject to a statutory exemption, all public records must be open to inspection and copying. Therefore, an email relating to the transaction of public business must be accessible just like any other public record and may be withheld from public disclosure only if a particular exemption applies to the content of the email.

### **The Virginia Public Records Act**

While FOIA governs access to records held by public bodies in state and local government, the PRA governs how long a government agency must retain certain records. The PRA defines a public record for purposes of records retention. Like FOIA, the definition is fairly broad and includes messages, depending on their content, that are communicated by email as a public record. Section 42.1-77 defines a public record to include:

recorded information that documents a transaction or activity by or with any public officer, agency, or employee of an agency.<sup>2</sup> Regardless of physical form or characteristic, the recorded information is a "public record" if it is produced, collected, received, or retained in pursuance of law or in connection with the transaction of public business. The medium upon which such information is recorded has no bearing on the determination of whether the recording is a "public record."

The PRA sets forth different retention schedules for different types of records. Several factors shape how long a record needs to be held. Many records are only kept for as long as business requires them to be kept, although if a record has historical significance or is created by an agency head or director, it may need to be kept longer. For example, certain records are required to be maintained permanently, such as records from standing committees of the General Assembly, annual reports of state agencies, and correspondence of agency directors. Other records must be kept only as long as they are administratively necessary, such as reminders of events like blood drives or fundraisers, courtesy copies of correspondence, or messages received from a listserv. Along the continuum, other records may be required to be retained for 30 days to 10 years, depending on their content. After the retention time has expired for a particular document, the record may be destroyed pursuant to the guidelines set forth by the Library of Virginia.<sup>3</sup>

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<sup>2</sup> Per § 42.1-77, an agency includes "all boards, commissions, departments, divisions, institutions, and authorities, and parts thereof, of the Commonwealth or its political subdivisions and includes the offices of constitutional officers."

<sup>3</sup> The PRA is administered by the Library of Virginia. For more details on retention schedules for particular types of records or for a particular agency or for information regarding the proper disposal of records, please contact the Library of Virginia. Records retention information and contact information is also available on the Library's website at <https://www.lva.virginia.gov/agencies/records/>.



In providing guidance for adhering to the PRA, the Library of Virginia notes that email messages should be treated the same as paper correspondence. Again, email is only the medium, or the envelope, by which the correspondence is sent; the retention schedule for a particular email depends on its content, and the email should be preserved in the same manner as its paper equivalent. Both incoming and outgoing email should be retained when an email message is determined to be a public record, along with any attachments sent via email.

### **Tips for using and managing email**

All emails related to public business are subject to the provisions of FOIA and the PRA and should be managed in the same manner as all other public records. Official emails that need to be retained should be maintained with other public records that relate to the same content.

There is a tendency with email to hit the delete button as soon as you are finished with a particular message. In the process of managing emails, consideration must be given as to whether a particular email must be retained for purposes of the PRA—a public official or state or local government employee cannot automatically delete an email, just as such official or employee can't automatically throw away paper correspondence and records.

FOIA governs access to records and the PRA dictates how long certain records must be retained. If a government entity keeps an email (or any other record) for longer than its retention schedule requires, that email is still subject to FOIA if requested. Conversely, if a government entity properly disposes of a record pursuant to a retention schedule, and a subsequent FOIA request is made for that record, FOIA does not require the government entity to re-create the record.

Email is often used as a substitute for a telephone call and can be informal. However, communicating via email creates a record that, depending on its content, must be retained pursuant to the PRA and must be made available upon request to the public under FOIA. Consider the consequences of these public record laws when determining whether to use email instead of the telephone for an informal communication—it may not be in the best interest of an agency for a public official or state or local government employee to communicate an informal message via email that might be more appropriate via telephone.

Public officials and employees should not commingle personal and official emails. Personal emails do not need to be retained; emails relating to the transaction of public business do. From an email management perspective, it is not advisable to mix personal and official business in the same email.

Prepared by the Virginia Freedom of Information Council  
804-698-1810 || Toll-free 866-448-4100  
Updated November 2023

