



## Deleted E-Mails Must Be Considered in Responding to Public Records Requests

by Janet E. Hales

Public entities recognize that e-mails are subject to public records requests under Ohio law. Records requests for e-mails, however, now must be considered more carefully under a new Ohio Supreme Court opinion. On December 9, 2008, the Court granted a writ of mandamus compelling the Seneca County Board of Commissioners (the Board) to make reasonable efforts to recover and make available for review deleted e-mails requested by *The Toledo Blade* in a public records request. Several sub-parts of the Court's opinion suggest immediate attention and action.

First, the Supreme Court ordered the Board to pay for recovering the deleted e-mails. The Court took into account several factors, including:

- Ohio Revised Code 149.43(B)(1), which states the public's right of inspection is not conditioned upon the payment of any fee. The Board failed to maintain the requested records in accordance with its own schedule for records retention. One of its Commissioners admitted deleting e-mails that should have been preserved under Seneca County's records retention policy after *The Blade* noted e-mails missing from his account that other commissioners produced in their e-mails.
- The Board's failure to counter *The Blade's* argument that the e-mails had "significant administrative, fiscal, legal, or historic value."

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Based upon this holding, public entities may be saddled with expensive forensic searches and analyses of its computers and the personal computers of its board members. Records retention policies should be reviewed to determine whether they address the scope and time period for retaining all required electronically stored information (ESI), including e-mails. If policies do not address ESI appropriately, they should be updated as soon as possible. If the policies address ESI, all employees and board members should be reminded of their duties under the retention policy. If all involved follow the established policies, costly searches may be avoided.

Second, the Court required a reasonable recovery effort “consistent with a public office’s general duties under the Public Records Act.” The Court noted that it was not ordering “Herculean” efforts -- but as long as responsive deleted e-mails remained on the hard drives of commissioners’ computers they did not “lose their status as public records.” Public entities should review public records requests with their counsel to determine actions constituting reasonable efforts to recover responsive ESI.

Third, the Court noted there is no legal duty as to records that no longer exist, in other words, e-mails no longer on computer hard drives. This emphasizes not only the necessity of an updated records retention policy-- it emphasizes the need to communicate preservation and disposition obligations to employees and board members.

Following are several points to take away from the Supreme Court’s decision:

- review records retention policies to determine they address preservation and disposition of ESI;
- adopt and/or enforce an ESI preservation and disposition schedule;
- consider archiving all records subject to the Public Records Act for the required preservation period to avoid the expense of forensic recovery if the records become subject to a public records request;
- document all actions taken to comply with the Public Records Act.

*For more information on how this court decision may affect you or your organization, Ms. Hales can be reached at our Toledo office at 419- 247-1650.*



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