Michigan
Law Revision Commission

TWENTY-NINTH ANNUAL REPORT
1994

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LAW REVISION COMMISSION

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MICHIGAN LAW REVISION COMMISSION
Twenty-Ninth Annual Report to the Legislature for Calendar Year 1994

To the Members of the Michigan Legislature:

The Michigan Law Revision Commission hereby presents its twenty-ninth annual report pursuant to section 403 of Act No. 268 of the Public Acts of 1986, MCL 4.1403.

The Commission, created by section 401 of Act No. 268 of the Public Acts of 1986, MCL 4.1401, consists of two members of the Senate, with one from the majority and one from the minority party, appointed by the Majority Leader of the Senate; two members of the House of Representatives, with one from the majority and one from the minority party, appointed by the Speaker of the House; the Director of the Legislative Service Bureau or his or her designee, who serves as an ex-officio member; and four members appointed by the Legislative Council. The terms of the members appointed by the Legislative Council are staggered. The Legislative Council designates the Chairman of the Commission. The Vice Chairman is elected by the Commission.

Membership

The legislative members of the Commission during 1994 were Senator David Honigman of West Bloomfield; Senator William Faust of Westland; Representative Ted Wallace of Detroit; and Representative Michael Nye of Litchfield. As Director of the Legislative Service Bureau, Elliott Smith was the ex-officio Commission member. The appointed members of the Commission were Richard McLellan, Anthony Derezinski, Maura Corrigan, and George Ward. Mr. McLellan served as Chairman. Mr. Derezinski served as Vice Chairman. Professor Kent Syverud of the University of Michigan Law School served as Executive Secretary. Gary Gulliver served as the liaison between the Legislative Service Bureau and the Commission. Brief biographies of the 1994 Commission members and staff are located at the end of this report.

The Commission's Work in 1994

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and to recommend needed reform.

2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association, and other learned bodies.

3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers, and the public generally as to defects and anachronisms in the law.

4. To recommend such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the civil and criminal law of this state into harmony with modern conditions.

5. To encourage the faculty and students of the law schools of this state to participate in the work of the Commission.

6. To cooperate with the law revision commissions of other states and Canadian provinces.

7. To issue an annual report.

The problems to which the Commission directs its studies are largely identified through an examination by the Commission members and the Executive Secretary of the statutes and case law of Michigan, the reports of learned bodies and commissions from other jurisdictions, and legal literature. Other subjects are brought to the attention of the Commission by various organizations and individuals, including members of the Legislature.

The Commission's efforts during the past year have been devoted primarily to three areas. First, Commission members provided information to legislative committees related to various proposals previously recommended by the Commission. Second, the Commission examined suggested legislation proposed by various groups involved in law revision activity. These proposals included legislation advanced by the Council of State Governments, the National

Conference of Commissioners on Uniform State Laws, and the law revision commissions of various jurisdictions within and without the United States (e.g., California, New York, and Ontario). Finally, the Commission considered various problems relating to special aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others.

As in previous years, the Commission studied various proposals that did not lead to legislative recommendations. In the case of certain uniform or model acts, the Commission sometimes found that the subjects treated had been considered by the Michigan Legislature in recent legislation and, therefore, did not recommend further action. In other instances, uniform or model acts were not pursued because similar legislation was currently pending before the Legislature upon the initiation of legislators having a special interest in the particular subject.

The Commission recommends immediate legislative action on three of the topics studied. On one additional topic, the Commission presents a study report.

The four topics are:

(1) Electronic Mail and Public Disclosure Laws (study report).

(2) Repeal of UCC Article 6: Bulk Transfers.

(3) The Uniform Putative and Unknown Fathers Act and Revisions to Michigan Laws Concerning Parental Rights of Unwed Fathers.

(4) Arson as a Predicate Felony of the Michigan Felony Murder Statute.

Proposals for Legislative Consideration in 1995

In addition to its new recommendations, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1994:

(1) Uniform Fraudulent Transfer Act, 1988 Annual Report, page 13.

(2) Consolidated Receivership Statute, 1988 Annual Report, page 72.

(3) Condemnation Provisions Inconsistent with the Uniform Condemnation Procedures Act, 1989 Annual Report, page 15.

(4) Proposed Administrative Procedures Act, 1989 Annual Report, page 27.

(5) Judicial Review of Administrative Action, 1990 Annual Report, page 19.

(6) Amendment of Uniform Statutory Rule Against Perpetuities, 1990 Annual Report, page 141.

(7) Amendment of the Uniform Contribution Among Tortfeasors Act, 1991 Annual Report, page 19.

(8) International Commercial Arbitration, 1991 Annual Report, page 31.

(9) Tortfeasor Contribution Under Michigan Compiled Laws §600.2925a(5), 1992 Annual Report, page 21.

(10) Amendments to Michigan's Estate Tax Apportionment Act, 1992 Annual Report, page 29.

(11) Uniform Trade Secrets Act, 1993 Annual Report, page 7.

(12) Amendments to Michigan's Anatomical Gift Act, 1993 Annual Report, page 53.

(13) Ownership of a Motorcycle for Purposes of Receiving No-Fault Insurance Benefits, 1993 Annual Report, page 131.

Current Study Agenda

Topics on the current study agenda of the Commission are:

(1) Declaratory Judgment in Libel Law/Uniform Correction or Clarification of Defamation Act.
(2) Medical Practice Privileges in Hospitals (Procedures for Granting and Withdrawal).
(3) Health Care Consent for Minors.
(4) Health Care Information, Access, and Privacy.
(5) Public Officials -- Conflict of Interest and Misuse of Office.
(6) Reproductive Technology.
(7) Uniform Statutory Power of Attorney.

(8) Uniform Custodial Trust Act.
(9) Statutory Definitions of Gross Negligence.
(10) Amendments to Michigan's "Lemon" Law.
(11) Legislation Concerning Teleconference Participation in Public Meetings.
(12) Michigan Legislation Concerning Native American Tribes.
(13) Revisions to Michigan's Administrative Procedures Act and to Procedures for Judicial Review of Agency Action.
(14) Government E-Mail.

The Commission continues to operate with its sole staff member, the part-time Executive Secretary. The Executive Secretary of the Commission was Professor Kent Syverud, who was responsible for the publication of this report. Professor Syverud has been named as Associate Dean for Academic Affairs at the University of Michigan Law School and has resigned as Executive Secretary for 1995. The Commission is in the process of securing a new Executive Secretary. By using faculty members at the several Michigan law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions. At the end of this report, the Commission provides a list of more than 70 Michigan statutes passed since 1967 upon the recommendation of the Commission.

The Legislative Service Bureau, through Mr. Gary Gulliver, its Director of Legal Research, has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Richard D. McLellan, Chairman
Anthony Derezinski, Vice Chairman
Maura Corrigan
George Ward
Senator David Honigman
Senator William Faust
Representative Ted Wallace
Representative Michael Nye
Elliott Smith

Electronic Mail and Public Disclosure Laws

A Study Report Submitted to the Michigan Law Revision Commission

Executive Summary

Employees at almost all major Michigan government agencies and public universities now use electronic mail to communicate with each other and, often, with the general public. This new technology allows its users to communicate faster, cheaper, and more effectively than ever before.

E-mail is a medium that has come to replace both telephone calls and documents for many purposes. Michigan public disclosure laws, which have historically differentiated between telephone conversations (which are private) and documents (which are often subject to disclosure), 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 electronic mail, like public access to government records, would help promote the goal of open government embodied in the disclosure laws. Yet public disclosure of electronic mail could also considerably dampen the candor, informality, and ease of communication that makes e-mail so popular and effective among many employees of public agencies, as well as among the administrators, faculty, and students at public universities and secondary schools in Michigan.

After a description of how e-mail works and a summary of its use by Michigan state employees, the report addresses how Michigan's public disclosure laws, as currently written and interpreted, are likely to be applied to electronic mail. It concludes 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 (FOIA) and Management and Budget Act. This would subject e-mail messages of public employees to the disclosure and preservation requirements of those acts. Thus, under most circumstances, the report concludes that 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.

The Commission has received numerous comments from state agencies and universities, which are attached as appendices, that urge revision of Michigan disclosure statutes so as to prevent their blanket application to e-mail. Rather than endorse the suggestion that electronic communications be removed entirely from the purview of disclosure statutes, the report recommends revision of one exemption to the FOIA to provide a safe harbor for that subset of electronic messages that most resemble the informal exchange of ideas and information that now occurs by telephone. In addition, the report encourages the Legislature to exempt classes of users at public institutions (such as college and high school students) from the threat of disclosure. Finally, the report encourages a process of refining the definition of "record" in the Management and Budget Act to more appropriately encompass e-mail.

The report concludes by urging the Commission to conduct a hearing on e-mail and public disclosure laws. Such a hearing should be the first step toward revising a wide range of Michigan statutes -- on disclosure, privacy, harassment, and eavesdropping -- to better reflect public policy toward new communications technologies that include not just e-mail, but also voice mail, facsimile transmission, and computer conferences.

I. Introduction: Electronic Mail and Public Disclosure Laws

Electronic mail is now used by almost all of Michigan's state agencies and universities. Some Michigan state public employees are connected to hundreds of other state employees by large mainframe computers; 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 size or scope, these electronic messages or "e-mail" represent the cutting edge of today's workplace technology. E-mail has many advantages 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 sectors.[1]

It is entirely unclear, however, what new responsibilities come with 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,[2] which requires that many government records be disclosed when requested

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1 Anne Wells Branscomb, Who Owns Information?, (New York: Basic Books, 1994), p 163.

2 MCL 15.231 et seq.

by the public. Moreover, the Management and Budget Act generally requires the government to permanently preserve those writings that record the activities of the government. These statutes raise an important issue: To what extent are electronic mail messages sent or received by state employees "records" that must be preserved and, when requested, disclosed to members of the public?

Several other legal issues are raised by electronic mail: Are electronic mail conversations and conferences ever "meetings" under the Michigan Open Meetings Act?[3] If an e-mail message contains financial information, must it be disclosed pursuant to Article IX of the Michigan Constitution, which mandates the disclosure of certain financial records to the public? Are e-mail messages subject to discovery requests[4] 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 was doing, where it was spending money, and of whom it was keeping records. However, these statutes were written when information traveled in basically two media: paper memoranda (or 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 is like a telephone conversation in that most messages are short, casual and can travel around the world in minutes. On the other hand, e-mail messages are like written memoranda because they can be copied, edited, filed and even printed onto paper. Like hanging up the phone, e-mail can be deleted with a keystroke; or, it can be printed out and treated like a standard memorandum.

The applicability of disclosure rules to electronic mail is crucial to how government employees and officials will communicate in the future. Public access to electronic mail, like public access to written memoranda, would help promote the goal of open government embodied in the disclosure statutes. Unfortunately, a policy of public disclosure of e-mail messages could dampen the current candor that makes this medium so popular. Moreover, there is a strong sentiment among many e-mail users that all electronic communications should remain private and that the laws of the state should reflect this desire.[5] There are significant uncertainties as to how courts will interpret Michigan's existing

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3 MCL 15.261 et seq.

4 MCR 2.302, 2.310; FR Civ P 26-37.

5 See Stephanie B. Lichtman, Computers and Privacy Rights: Minimum Standards Needed, The Computer Lawyer, December 1993, p 26.

disclosure laws when applying them to electronic mail.[6] This report will attempt to clarify, explain, and suggest ways to modernize the existing laws that could affect electronic mail use by public employees.

First, the report describes electronic mail and summarizes its current use by the State of Michigan and its agencies and universities. Second, the report explores the existing statutes, constitutional provisions, and court rules that are relevant to disclosure of public records. Third, the report summarizes the suggestions of several State agencies, universities, and the media in response to the issue of e-mail disclosure. Finally, the report poses some of the questions that should be answered to keep Michigan's laws ahead of the technology curve. It concludes by urging the Michigan Law Revision Commission to hold a hearing and to suggest specific legislation to address these important questions.

II. An Overview of Electronic Mail and its Use in Michigan's Public Agencies and Universities

A. A Description of E-Mail

"Faster than a speeding letter, cheaper than a phone call, electronic mail is the communication medium of the '90s."[7] E-mail is electronic mail automatically passed through computer networks and/or via modems over common carrier lines.[8] According to the Electronic Mail Association the number of e-mail users is growing at 25 percent per year and currently stands between 30-50 million.[9]

1. The Parts of An E-mail Message

Just as memoranda are composed of several parts, including a heading and a body, and telephone conversations have formal beginnings and endings ("Hello, Treasury Department" "Goodbye."), e-mail messages have several components. Figure 1, an actual e-mail message sent to the Chairman of the Michigan Law Revision Commission, illustrates the address, header, and body of a typical message.

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6 This report does not cover criminal computer activity including wire fraud and stalking. Michigan has such statutes, see MCL 750.411h.

7 David Angell & Brent Heslop, The Elements of E-mail Style, (Reading, Mass: Addison-Wesley, 1994), p 1.

8 Eric S. Raymond, ed., The New Hacker's Dictionary, (MIT Press, 1991).

9 In 1980 there were an estimated 430,000 electronic mailboxes. By 1992 that number had grown to approximately 19 million. See Computerworld, November 23, 1992.

Figure 1

SAMPLE E-MAIL MESSAGE WITH COMPLETE HEADER[1]

The "From" and "Received" lines give the real address that the mail is coming from, and what computer systems the mail went through to get there.

Over the Internet there is always at least one "Received" header and usually no more than four or five. These headers help in retrieving lost mail, but usually are not displayed on the recipient's screen. (indicate lines which are often not displayed to the general e-mail user)

The posted line contains the date and time the message was sent. The second "From" line contains the address important to normal users, and this is the address to which a receiver should reply.

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From [Kent.Syverud@um.cc.umich.edu) Tue Jul 26 1994
15:01:06
Received: from totalrecall.rs.itd.umich.edu by
us.itd.umich.edu with ESMTP id QAA17002;Tue Jul 26 1994
14:52:26
Message: 37262618, 11 lines
Posted: 11:44am EDT, Tue Jul 26/94
Subject: meeting date
To: mclella5@pilot.msu.edu
From: Kent.Syverud@um.cc.umich.edu

     Richard McClellan, Chair
     Michigan Law Revision Commission
          Dear Richard:
          I just wanted to confirm that the next meeting
of the Commission will be on September 30, 1994, and
that we will have a draft of the study on Electronic
Mail and Public Disclosure Laws on the agenda for that
meeting.
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The "To" line lists the e-mail address (or addresses) of the recipients of the message. There may also be a "CC" line which lists other recipients who will receive a copy of the message.

The "Message Id" is always unique, and it is important mainly for finding lost messages.

"Subject" is a line in which the sender gives a brief description of the message. The header is followed by the body of the message.

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[1]See Brendan P. Kehoe, Zen and the Art of the Internet, (Prentice Hall, 1994) p 11. The standard syntax for headers is described in, David Crocker, Standard for the Format of ARPA Internet Text Messages, August 12, 1982 (generally referred to as RFC-822). Every system displays the Header differently, but all of these lines are necessary to send e-mail messages.

Electronic mail comes in many forms, but they all have an "address." An e-mail address contains the information necessary to send a message from one computer to another anywhere in the world. It is important to note that an e-mail message need not be sent to just another person; it can be sent to a computer archive, a list of people, or even a pocket pager.[10] An e-mail address contains a local part and a host part. These parts are separated by an "@" sign, e.g., wallace@60-minutes.cbs.com. Once one knows the address of the person, a few keystrokes send the message to its destination. Multiple copies of messages can also be sent if the message is intended for multiple recipients.

In addition to the "address," each message must have a "header" in order to be transferred to other computer systems. A header contains useful information not only for the systems and the users but for the public as well because the header tells us much more than a phone call or a letter. For example, the header records precisely what time a message was received and viewed by the addressee.

2. Pathways of E-mail Messages

An e-mail message is rarely transmitted directly from one computer to another. Each message is sent to a "server", which is a central computer that provides a service to "client" computers. One common service provided by the server is the forwarding of electronic mail. 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. These gateways are computers that have connections to both networks and know how to translate the e-mail messages.[11]

What is the Internet?

> 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 that it has transcended the original mission. Today it's being used by all sorts of people . . . for a variety of purposes.[12]

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10 Brendan P. Kehoe, Zen and the Art of the Internet, (New Jersey: Prentice Hall, 1994), p 9.

11 Id., p 51.

12 Tracy LaQuey, The Internet Companion, (Reading, Mass: Editorial Inc, (1993)).

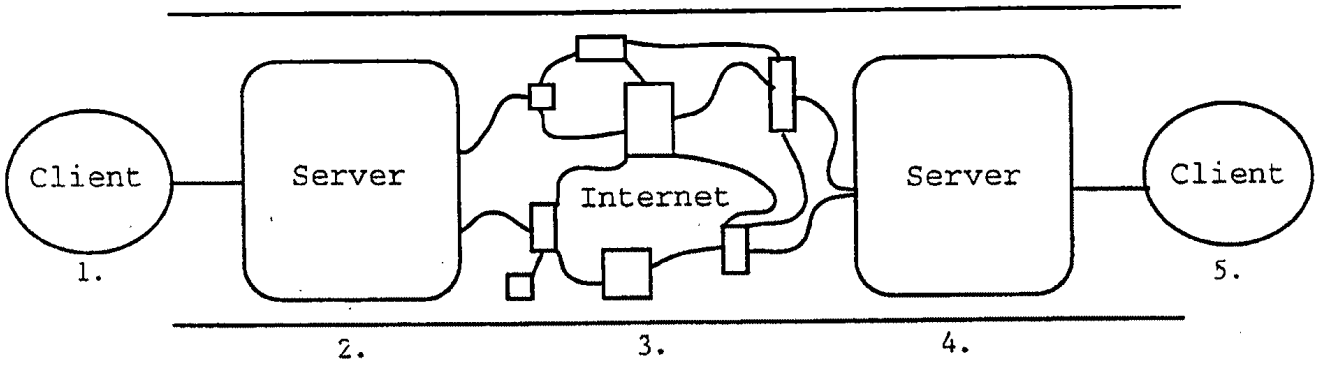
Once a gateway is obtained, and the proper address is found, e-mail can be sent anywhere in the world.

The language of the Internet is "TCP/IP," which stands for Transmission Control Protocol/Internet Protocol. This protocol was developed in the 1970s as part of an experiment in networking.[13] TCP/IP was developed using public funds and is an open, non-proprietary public protocol. The rules of the protocol are written in a document called RFC 822.[14]

13 Id., p 22.

14 See David Crocker, Standard for the Format of ARPA Internet Text Messages, August 1982 (generally referred to as RFC-822).

Figure 2



In this hypothetical a lawyer named Dave from a Michigan television broadcast company sends Public Employee a message suggesting how FOIA should apply to e-mail.

1. Dave drafts the message from his office with Word Perfect Office and edits the message before sending it via his modem to America On-line, a popular e-mail service, which charges him a monthly fee. The message may be saved on his hard drive if he desires.

2. America On-line routes Dave's message to the Internet which is a network of networks. America on-line may save the message in case of loss or inability to forward.

3. The Internet which is open to the public forwards the message according to the ITP protocol to the main frame at The University of Michigan. Any of the systems on the path of machines forwarding Dave's message could choose to save the message in case of problems. Also at this juncture any clever computer "hacker" could read Dave's message if he chose.

4. The Michigan Terminal System (MTS) receives Dave's message (usually within minutes) and tells Public Employee's e-mail account that a message has been received. The message is probably recorded on the main frame's tape drive system. These drives are regularly erased. See text.

5. Public Employee retrieves his message from his home late that night. He accesses his account from a modem at home (called "remote access"). Public Employee may then delete Dave's message, but it is more likely that he will print out one copy for his research assistant and save another copy in his computer. Public Employee may also "archive" Dave's message for later use by saving it under his name on the MTS drive.

3. How E-mail Differs From Telephone Calls and Paper Memoranda

The Elements of E-mail Style[15] points out some of the major advantages of e-mail communication.

First, e-mail is asynchronous. That is, the receiver need not be present to receive his or her message. Many phone calls are unsuccessful because the receiver is not present. E-mail eliminates this problem by posting the message where it can be retrieved and read at the receiver's leisure. Because the sender and the receiver communicate at different times, more reflection is permitted in the response because no one is waiting as they would be on the phone.

Second, e-mail can be sent 365 days a year, 24 hours a day; thus breaking barriers such as no mail delivery on Sundays and time zone problems.

Third, e-mail is often a shorter, cheaper, and more efficient form of communication. Certainly more mistakes (grammatical and spelling) are made in electronic messages, but the cycle of idea-response-idea is shortened greatly when compared with traditional paper-based communication.

Fourth, there may be sociological advantages gained by e-mail communication. Through e-mail, a supervisor can maintain direct daily contact with many employees working in widely dispersed facilities on different schedules; the result is often a more direct and less hierarchical form of communication. Flexibility is added to the workplace allowing employees to work off-site. Moreover, the interruptions characteristic of telephone calls are reduced because e-mail need not be answered until the receiver wishes.

In sum, electronic communication has the advantages of speed, cost, storage, and access.[16] The messages move at the speed of light rather than the speed of other means of communication. They cost less than a stamp or a facsimile (e-mail can send roughly 100 pages for the same cost as 1 cross country fax). Millions of pages of e-mail can be stored for less than the price of a single file cabinet. Last, electronic messages can be accessed on-screen quickly and conveniently.

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15 Angell & Heslop, supra, p 2.

16 See generally, Martin E. Hellman, Implications of Encryption Policy on the National Information Infrastructure, The Computer Lawyer, v. 11, no. 2, p 28.

4. E-mail Access and Disposal

The storage and disposal of electronic mail differs widely depending on what system controls the message. It would be a mistake to assume that just because a receiver deletes a message that it is gone permanently. The system used by the sender often has retained a copy of the message, and a duplicate of the message could also reside with another user. That user could then forward the message to thousands of other users. Senders should likewise not assume that their receiver has deleted the message. 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 keeping messages for later reading, but it is also a way for others to stumble across personal e-mail.

State government entities have a variety of written and unwritten policies concerning the retention and deletion of electronic mail. The University of Michigan, for example, has set forth 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 new policy of deleting messages at the end of every back-up cycle, which lasts 28 days. "The longest a deleted or expired message could be retrievable is 28 days; the shortest it could be retrievable is one hour."[17] 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."[18] The policy of Western Michigan University does not explicitly state when their files are deleted, however, 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."[19] The federal government may soon require federal electronic mail to be stored for several years.[20]

It would be unwise to assume that employers do not have access to employee e-mail (either public or private). Organizations have widely differing policies on e-mail privacy. The University of Michigan, at one extreme, encrypts the e-mail on campus systems so that it cannot be read even by the system administrator.[21] At the other extreme, Epson America (a private employer) has a

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17 The University of Michigan Information Technology Digest, Greater Security for Your Outdated E-Mail on MTS, v.1 n.3.

18 Id.

19 Letter from Diether Haenicke, President of Western Michigan University, Policy and Guidelines for Electronic Mail, April 1993.

20 See supra at III.B.

21 Conversation with Joseph Gelinas, postmaster of the Michigan Terminal System.

standard practice of printing and reviewing their employee e-mail; this activity occurred without notice and many employees even had password-protected accounts printed and reviewed. In 1990, Epson America dismissed their e-mail administrator after she complained about the practice of reading employee messages. She filed a class action suit shortly thereafter.[22] "Macworld", a magazine for the Apple computer industry, conducted a survey of employers and their eavesdropping practices. Of the 301 companies participating, 21.6 percent admitted searching employee files, and of those, 41 percent searched their employees' e-mail.[23]

B. Current Use of E-mail by Michigan State Agencies

Of the largest Michigan departments, approximately 90 percent have access to some kind of electronic messaging system. These systems vary from large main frames to LANs. Some of these systems are interconnected; most are not. However, at the time of this writing there is a project underway to link the State's computer systems. The Michigan Administration Network (or "MAIN-NET") project would link five departments first, and later link the rest of the departments that wanted to be interconnected.

There are several different types of electronic messaging systems running in Michigan agencies. Once up and running, MAINNET would let employees and officials at different state agencies in widely different locations communicate by e-mail. Currently members of the public rarely send messages to or receive messages from state departments by e-mail. With the proliferation of private use of e-mail, however, it seems quite possible that in the future such communications, particularly with elected officials, will become common.[24]

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22 See Branscomb, supra, pp 92-106. See also, Michael Maurer, Policy Needed to Avert Shock Caused by Electronic Mail, Crain's Detroit Business, July 4, 1994, p 10. A seemingly confidential e-mail message was sent by one manager to another criticizing a local supplier. "Within minutes the note was electronically copied up the chain of command, eventually winding up in the electronic mail of the company's president." The message eventually made it into the hands of the other supplier. Id.

23 Branscomb, supra, p 93.

24 For example, in the 1992 presidential race, each candidate supported an e-mail address. Today, the White House is paralyzed by e-mail: more than 300,000 messages arrive electronically each day. The Clinton Administration plans to put the entire federal government on e-mail and already has the White House documents released via electronic mail. Branscomb, supra, p 163.

Table 1

USE OF ELECTRONIC MAIL WITHIN MICHIGAN STATE GOVERNMENT[1]

DEPARTMENT OR AGENCY	NUMBER OF NETWORK STATIONS (approx.)	E-MAIL SOFTWARE[2]
Agriculture	300[3]	Banyan Vines Mail, CC:Mail
Civil Rights	175	*
Civil Service	337	Beyond Mail
Commerce	1100+	Vax E-mail, Beyond Mail
Corrections	1200	WordPerfect Office
Education	125	WordPerfect Office
Employment Securities	120 (soon 500)	*
Lottery	*	*
Management and Budget	1100	Wang Office
Mental Health	*	Banyan Vines(*)
Military	*	Federal System E-mail
Natural Resources	2300	Office Vision, Microsoft Mail
Public Health	400	Wordperfect Office
Social Services	3500	In progress CC:Mail, Wordperfect Office
State	1550	UNISYS E-mail, Wordperfect Office
Transportation	2119	Star Mail → Wordperfect Office 4.0a
Treasury	1000 (not all connected)	CC:Mail → Wordperfect Office

* = Data not available.

Information in this table was collected by survey in July, 1994.

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[1]See generally, Memorandum from Richard Reasner to Gerald Williams, Director of Information Technology, Draft of MAIN State Agency Connection Report. Department of Management and Budget, March 29, 1994. See also, Memorandum from Dennis Krypmalski of Deloitte & Touche for Jerry Williams, April 12, 1994, Subject: Network Operations Center Consolidation Project Status Report.

[2]The e-mail software market is growing rapidly. See Richard Shaffer, Beam Me A Letter, FORBES, June 20, 1994, p 118.

[3]By the fall of 1994 the Department of Agriculture will have extended its network to the Laboratory Division in East Lansing as well as the Office of the Racing Commissioner in Livonia. In the near future the Department plans to network the entire field staff at their homes. See letter from the Department of Agriculture to Richard McLellan, June 21, 1994.

The Governor is connected to the heads of several departments via the Executive Local Area Network (herein E-LAN). This network connects at least 15 department directors, as well as employees in the executive office of the Governor, to the Governor using Quick Mail and WordPerfect Office. The server for this network is located in the Executive Office of the Governor, thus largely exempting the system from the Michigan Freedom of Information Act, as discussed below. However, should employees outside the Governor's office keep copies of messages to or from the Executive Office—either in hard copy or in computer files—the current FOIA might apply.[25]

Michigan's public universities use electronic mail more extensively than most of the State's departments. The University of Michigan has approximately 30 different computer systems that exchange electronic mail regularly. One of these systems alone handles an estimated 1,000,000 messages per month.[26] One college at the University receives "2,000 messages per week and approximately 43,000 messages are kept on its machines by faculty, staff and students."[27] Another large e-mail user, the University of Michigan's Medical Campus, supports "approximately 100,000 messages per week between 2,500 - 3,400 employees."[28]

Research is the primary focus of these networks. For example, the University of Michigan maintains that its information resources (including e-mail) are intended "primarily for activities related to accessing, sharing, and creating information and collaborating with other members of this and other communities for *scholarly and work-related communications*."[29] However, e-mail is also used for social communication at these schools which has been shown to help aid the learning process:

> "The mission of a public body such as a university or college requires that there be unhampered free speech in all forms. Such open and free flowing communication is important in order to enable the creation of concepts and for the training of minds in the processing and synthesis of information. . . . Open communication in a variety of forms is also important in creating the sense of

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25 See infra text at III.A.3.e.

26 See Letter from Elsa Cole, General Counsel at the University of Michigan, to Kent Syverud, Executive Secretary of the Michigan Law Revision Commission, Public Access to Electronic Mail, July 28, 1994.

27 Id.

28 Id.

29 University of Michigan General Policies, Standard Practice Guide 601.11, Privacy of Electronic Mail and Computer Files at the University of Michigan, December 1993 (emphasis added).

community within universities and colleges, a condition that has been found to enhance learning, discovery, and teaching exchanges."[30]

Universities also differ from other state agencies because they use e-mail regularly to communicate with people outside of the government at other public and private universities and research institutions, as well as at private companies around the world. It is also likely that public schools of all levels will use e-mail for similar purposes in the near future.

III. Michigan Public Disclosure Laws

Currently there are numerous methods by which information about the state government is disclosed upon request by members of the public. This Report will focus on the Freedom of Information Act,[31] the Management and Budget Act,[32] and discovery procedures under the Michigan Court Rules.[33] Where it is analogous, reference will be made to federal law, including the federal Freedom of Information Act,[34] the Federal Records Act,[35] and federal case law. Federal law is particularly important when there is no applicable Michigan case:

> "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."[36]

A. FOIA and Electronic Mail

In applying the text of Michigan's Freedom of Information Act to e-mail the primary issues are whether e-mail is a "writing" under FOIA; whether e-mail is a "public record" under FOIA; and, whether any exemptions to FOIA apply generally to e-mail, most importantly the privacy exemption and the communications within a public body exemption. Before addressing those and

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30 Cole, supra, p 2.

31 MCL 15.231 et seq.

32 MCL 18.1101 et seq.

33 MCR 2.302, 2.310.

34 5 USC 552.

35 44 USC 29, 31, 33. Chapter 33 is sometimes referred to specifically as the Federal Records Disposal Act.

36 Hoffman v Bay City Sch Dist, 137 Mich App 333, 337; 357 NW2d 686 (1984).

other issues, it is important to review the purposes of FOIA and the text of the act.

1. Purposes of FOIA

The purpose of the Act must be considered when resolving ambiguities in the Act's definition, including its definition of the term "public record."[37] That purpose is contained in the preamble of the Act:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, 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 informed so that they may fully participate in the democratic process.[38]

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

> The Legislature in the enactment of the Michigan FOIA followed closely, but abbreviated, the Federal Freedom of Information Act, 5 USC 552. 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.[39]

To say that FOIA is a "disclosure statute" has been interpreted to mean that "FOIA does not require that information be recorded; it only gives a right of access to records in existence."[40] Generally speaking, then, 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."[41]

However, that same court concluded that the purpose of disclosure also implies a duty to "*preserve and maintain* [records requested through FOIA] until

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37 Walloon Water v Melrose Twp, 163 Mich App 726, 730; 415 NW2d 292 (1987).

38 MCL 15.231(2).

39 Schinzel v Wilkerson, 110 Mich App 600, 603-04; 313 NW2d 167 (1981) (citations omitted); see also, State Employees Ass'n v Dep't of Management & Budget, 428 Mich 104, 109; 404 NW2d 606 (1987).

40 Walloon, supra, p 731.

41 Id., p 732.

access has been provided or a court executes an order finding the records to be exempt from disclosure."[42] The court explained its reasoning as follows:

> it 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, a claimant's right to disclosure under the FOIA would not be adequately safeguarded.[43]

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

The federal Freedom of Information Act was also designed as a pro-disclosure statute. The Supreme Court emphasized this philosophy in Dep't of the Air Force v Rose: "the basic purpose [of FOIA] reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' To make crystal clear the congressional objective [was] . . . 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'"[44] The Court held that the nine exceptions to the federal FOIA were to be construed narrowly: "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."[45]

When the federal Freedom of Information Act 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."[46] President Nixon later 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

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42 Id.

43 Id.

44 Dep't of Air Force v Rose, 425 US 352, 360-61; 96 S Ct 1592; 48 L Ed 2d 11 (1976); see also EPA v Mink, 410 US 73; 93 S Ct 827; 35 L Ed 2d 119 (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.").

45 Rose, p 361.

46 1974 Journal of the Senate 854 (No. 93-854, Report on Amending the Freedom of Information Act, May 16, 1974).

their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies.[47]

Senator Kennedy introduced the 1974 revisions to the FOIA by emphasizing how democracy succeeds only in a system where information flows freely:

> We should keep in mind that it does not take marching armies to end republics. Superior firepower may preserve tyrannies, but it is not necessary to create them. 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.[48]

However, it has been contended that these lofty objectives are undermined in practice. Compliance with FOIA can be very expensive and burdensome for state agencies on tight budgets and with limited staff. The FOIA can be used to obtain sensitive information about individuals for invidious purposes. For example, the University of Michigan has commented 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 personal and personnel files of current employees, from citizens asking for the names of all individuals who participate in specific communication or social groups" and other requests which tax the resources of the school "unnecessarily and perhaps inappropriately."[49]

2. Relevant FOIA Provisions

The Michigan Freedom of Information Act functions by having the public 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

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47 Id.

48 Id.

49 Cole, supra, p 6. 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, Braverman & Chetwynd, Information Law, (New York City: Practicing Law Institute, 1985), p 426 (these suits are more often connected with confidential business information).

record of a public body, except as otherwise expressly provided by section 13.[50]

A "public record" is defined in MCL 15.232(c) 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."

The definition of a "public body" for the purposes of the Act includes "[a] state officer, employee, agency, department, 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 the employees thereof."[51]

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.[52]

Twenty categories of items may be exempt from disclosure under the act. The following exemptions should be noted: information of a personal nature where the disclosure would equal a "clearly unwarranted" intrusion into the individual's privacy; information related to law enforcement practices; information covered by the Family Educational Rights and Privacy Act; and communications between public bodies that are of "an advisory nature" and are "preliminary" to a final action.[53]

3. Issues in Applying FOIA to E-Mail

a. *Is e-mail a "writing" under MCL 15.232(e)?*

Writings are defined so broadly under FOIA that electronic mail is probably a writing for the purposes of this Act. Electronic messages are typed

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50 MCL 15.233(3).
51 MCL 15.232(b).
52 MCL 15.232(e).
53 MCL 14.243.

into a computer so the language specifying "typewriting"[54] may apply. E-mail is usually written to a computer disc or a hard drive tape and would fall within the scope of "magnetic or punched cards, discs."[55] E-mail may also be printed on a printer, which could qualify a message as "printing." It is possible, however, to create an electronic message and send it to another computer without ever printing it or saving it on disc. Yet, even this message must reside in "Read Only Memory" (RAM) for at least a short while. Such a message would probably fall under the statute's broad catch-all phrase "every other means of recording . . . or retaining meaningful content."[56]

Two authorities may imply that the current Michigan FOIA applies to e-mail messages. First, in the 1982 case of Kestenbaum v Michigan State University, the Michigan Supreme Court held that computer tapes containing the names, addresses, and other information about Michigan State students were a "writing" under FOIA because the statute "defines a writing to include 'magnetic or paper tapes * * * or other means of recording or retaining meaningful content.'"[57]

The force of Kestenbaum is somewhat diluted, since 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 e-mail, like computer tapes, would be construed under the FOIA to be a "writing". Thus, Chief Justice Fitzgerald's opinion for affirmance stated that information retained in a computer tape is a writing. There seems no obvious reason not to extend that analysis to information contained in a computer's memory. Justice Ryan's opinion for reversal 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.

Second, the Attorney General opined in 1979 that stenographers' notes and tape recording or dictaphone records of a municipal meeting were "records" under FOIA. The Attorney General commented:

> Since the definition of 'writing' . . . includes symbols, magnetic tapes, or 'other means of recording or retaining meaningful content,' stenographer's notes, tape recordings or

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54 MCL 15.232(e).

55 Id.

56 Id. There appears to be no definition of "meaningful content."

57 Kestenbaum v Michigan State University, 414 Mich 510, 538; 327 NW2d 783 (1982).

> dictaphone records of municipal meetings are public records under the Act and must be made available to the public.[58]

The Attorney General, however, decided that computer software owned by the State was *not* "writing" within the scope of FOIA. The dilemma was that software was both "a set of instructions for carrying out prearranged operations" but it was also "stored on paper cards in the form of decks and on reels of magnetic tape." The Attorney General reasoned:

> It may be seen that although the forms on which the software is recorded appear to meet the definition of a 'writing' as defined in 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.[59]

These cases and opinions lead one to conclude that electronic messages would probably be held to be "writings" within the definition of MCL 15.232(e). E-mail is not an "integral part of computer operation" -- it is much more like a form of writing used to "record information or ideas." Moreover, these cases and opinions suggest that many forms of electronic information would be held to be "writing" under FOIA.

Federal case law has also filled in the electronic gap in the definition of records. "Although 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."[60]

Congress implied that computerized documents were records when they explained that the term "search" would include both conventional searches and computer data base searches. The Senate Judiciary committee decided that it was "desirable to encourage agencies to process requests for computerized information even if doing so involves performing services which the agencies are not required to provide—for example, using its computer to identify records."[61]

This reasoning persuaded the United States Court of Appeals for the District of Columbia that "computer-stored records, whether stored in the central

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58 OAG No. 5500, p 255, 264 (July 23, 1979).

59 Id., p 265 (italics added).

60 Yeager v Drug Enforcement Admin, 678 F2d 315, 321; 220 US App DC 1 (1982).

61 Amending the Freedom of Information Act, S.Rep. No. 854, 93d Cong., 2d Sess. 1974, p 12.

processing unit, on magnetic tape or in some other form, are still 'records' for purposes of FOIA."[62] 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."[63]

Thus, under Federal law, electronic messages would most likely be considered "records," even though that Act does not define records very clearly. E-mail might not qualify as a "record" for other reasons, but, e-mail 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 MCL FOIA 15.232(c)?*

In order to qualify as a record, a writing must pass two tests. It must be 1) "prepared, owned, used, in the possession of, or retained by a public body" for the purpose of 2) "performance of an official function, from the time it is created."[64]

The first prong of this test seems broad. For example, three Justices of the Michigan Supreme Court have accepted (without deciding) that computer tapes containing the Michigan State University student directory passed this test: "the magnetic tape is indisputably 'prepared, owned, used, in the possession of, or retained by' the defendant public body."[65]

At first glance, e-mail too would seem to fit the definition of a "public record" because state agencies use it every day to perform a wide variety of tasks from sending messages, to scheduling meetings, to drafting reports. However, e-mail 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 their tape drive—for instance, any system connected to the Internet could receive messages prepared by anyone in the world; many e-mail messages are not meant to be "retained," many e-mail messages merely pass through the universities' large mainframes; many messages arrive at computers accidentally and thus are not intended to 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 (thus not

62 Yeager, supra, p 321.
63 Id.
64 MCL 15.232(c).
65 Kestenbaum, supra, p 538.

prepared by it), and were not intended to be used in any way by the agency (passing through), and if they were never saved by the agency's e-mail system.[66]

The second prong of this test, that a record be used "in the performance of an official function,"[67] is not defined in the statute. The equally divided Kestenbaum court affirmed a court of appeals ruling that this expression should be "construed according to its commonly accepted and generally understood meaning."[68] The court's affirmance also applied to a holding that Michigan State University's computer tapes passed this test. "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."[69] Yet because these holdings resulted from an affirmance 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 FOIA arises.

The Michigan Appeals Court has ruled that the "goldenrod-colored worksheet" used by the disciplinary credit committee of the Michigan Department of Corrections is a "public record" within the scope of FOIA because "it was prepared, owned, and used by the disciplinary credit committee in performing its official function of determining credits."[70] The court held that these worksheets were public records even though they normally were destroyed after the warden made his decision.[71]

Moreover, it is the policy of some Michigan agencies that no computer owned by the state shall be used for personal reasons.[72] This policy would lead

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66 It stands to reason the these "non-record" e-mail messages would involve the universities that are tightly woven into the structure of the Internet far more than they would other state agencies. However, connection to the Internet by all agencies is probably just a matter of time.

67 MCL 15.232 (c).

68 Kestenbaum, supra, p 538.

69 Id., p 539.

70 Favors v Corrections Dep't, 192 Mich App 131, 135; 480 NW2d 604 (1991).

71 Id., p 134. See also, Patterson v Allegan Cty Sheriff, 199 Mich App 638; 502 NW2d 368 (1993) (ruling that "mug shots" are public records under FOIA); Swickard v Wayne Cty Med Examiner, 438 Mich 536; 475 NW2d 304 (1991) (holding that an autopsy report and toxicology tests result prepared by the county coroner were prepared "in the performance of an official function" and were "public records"); Penokie v Michigan Technological University, 93 Mich App 650, 656; 287 NW2d 304 (1979) (salary records of Michigan Technological University teachers are "public records" within the meaning of FOIA); Detroit News v Detroit, 185 Mich App 296, 298; 460 NW2d 312 (1990) (minutes of a meeting by the Detroit City Council which was closed in violation of the Open Meetings Act, are public records subject to disclosure under FOIA).

72 Telephone conversation with Erik West, Dept. of Management and Budget, June 20, 1994.

one to conclude that electronic mail that is sent during working hours could only pertain to an "official function."[73]

The federal rules defining "records" are equally as vague as their Michigan counterparts. The DC Circuit Court commented: "As has often been remarked, the Freedom of Information Act, for all its attention to the treatment of 'agency records' never defines that crucial phrase."[74] Generally, the courts have followed the Supreme Court's decision in Forsham v Harris which held that:

> [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. .[75]

According to the treatise Information Law, "agency regulations and court decisions are in accord with this type of expansive, all encompassing definition of records."[76] As mentioned earlier, federal courts have located computer documents within this definition,[77] in addition to magazine photographs,[78] union

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73 Cf. Kestenbaum, supra, p 539 n6 ("The question whether a writing is a 'public document' or a private one not involved 'in the performance of an official function' is separate and distinct from the question whether the document falls within the so-called 'privacy exception.' Many writings prepared, owned, used, possessed, or retained by government in the performance of its functions may contain intimate and embarrassing facts of a personal nature. This does not prevent them from being classified as 'public documents.' Nondisclosure of such 'public documents' must be justified, if at all, under the enumerated exemptions of the FOIA.")

74 Bureau of Nat Affairs v U.S. Dep't of Justice, 742 F2d 1484, 1488; 239 US App DC 331 (1984) (quoting McGehee v Central Intelligence Agency, 697 F2d 1095, 1106; 225 US App DC 205(1983).

75 Forsham v Harris, 445 US 169, 183; 63 L Ed 2d 293; 100 S Ct 978 (1980) (citing 44 USCS 3301) (emphasis in the original).

76 Braverman, supra, p 129.

77 Yeager, supra, p 221.

78 Weisberg v Dep't of Justice, 631 F2d 824; 203 US App DC 242 (1980).

authorization cards,[79] x-rays,[80] computerized mailing lists,[81] tape recordings,[82] and films.[83]

The United States Court of Appeals for the District of Columbia Circuit has applied another test to determine whether a document is a record. This is the "nexus" test: "we looked to see if there was 'some nexus between the agency and the documents other than the mere incidence of location."[84] The DC Circuit relied upon an Illinois district court opinion that emphasized that mere possession of a record by an agency was not enough to make it a departmental record.[85] The court thought that "use of the documents by employees other than the author [was] an important consideration."[86] But the court was not persuaded that the way in which an agency treated a document for disposal purposes was a relevant consideration: "an agency should not be able to alter its disposal regulations to avoid the requirements of FOIA."[87] There appear to be four factors which help guide the federal courts in determining whether a document is a record: "whether the document was generated within the agency, has been placed into the agency's files, is in the agency's control, and has been used by the agency for an agency purpose."[88]

The court 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 "no substantive information" was contained in them.[89] The court also held, however, that "daily agendas" maintained by the secretary of the Assistant Attorney General for Anti-trust were agency records because "[t]hey were created with the express purpose of facilitating the daily activities of the Antitrust Division."[90] Finally the court concluded that the official's appointment calendars were not agency records

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79 Committee On Masonic Homes v NLRB, 556 F2d 217 (CA 3, 1977).

80 Nichols v United States, 460 F2d 671 (CA 10, 1972) cert den 409 US 966.

81 Disabled Officers Ass'n v Rumsfeld, 428 F Supp 45 (D DC, 1977).

82 Mobil Oil Corp v FTC, 406 F Supp 305 (SD NY, 1976).

83 Save the Dolphins v Dep't of Commerce, 404 F Supp 407 (ND Cal, 1975).

84 Bureau of National Affairs, p 1491 (quoting Wolfe v Dep't of Health and Human Services, 711 F2d 1077, 1080; 229 US App DC 149 (1983).

85 Bureau of Nat Affairs, p 1491 (citing Illinois Institute for Continuing Legal Education v U.S. Dep't of Labor, 545 F Supp 1229 (ND Ill, 1982)).

86 Id., p 1493.

87 Id.

88 Id.

89 Id., p 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 do not indicate why the call was made and, most importantly, whether the call was personal or related to official agency business." Id.

90 Id.

because they were not "*distributed* to other employees" and because the calendars were expressly for the official's personal convenience.[91]

Following the logic in Bureau of National Affairs, electronic mail would vary message by message in terms of its record status. Many messages are created solely for "personal convenience," while other messages contain calendars and appointment schedules that 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—in that almost all e-mail messages are created to communicate with someone else. But they can vary significantly from message to message.

In conclusion, the applicability of Michigan's FOIA to electronic mail remains uncertain, largely because of uncertainty whether all or some e-mail messages are used "in the performance of an official function."

c. *Do Any Exemptions to FOIA Apply to Electronic Mail?*

i. Information Of A Personal Nature

Section 13 of the Michigan FOIA, MCL 15.243, lists the only exemptions applicable to FOIA requests. This act separates public records into 2 classes: (i) those which may be exempt from disclosure under section 13, and (ii) all others, which shall be subject to disclosure.[92] The first exemption might apply to various electronic messages on a case by case basis:

> (1) 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.[93]

This exemption, like the twenty others, is "to be narrowly construed."[94] The Michigan courts have applied common law principles and constitutional language to aid them in this grey area of privacy law. In the words of Justice

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91 Id., p 1496 (emphasis in original).

92 Swickard, supra, p 545 (citing MCL 15.232(c)).

93 MCL 15.243(1)(a)

94 Swickard, supra, p 544.

Cavanagh, the author of the opinion in State Employees Ass'n v Dep't of Management & Budget, 428 Mich 104; 404 NW2d 606 (1987):

> 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.[95]

In an early 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.'"[96] 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."[97]

Generally, the Michigan courts have kept to a *narrow* interpretation of records that would qualify for the privacy exception. For example, in 1990, the Honorable Judge Quinn, Jr. was found to have committed suicide by a gunshot wound to his head. The Detroit Free Press suspected the judge had used drugs prior to the incident based on information learned from the police. The Free Press requested, under FOIA, the autopsy and toxicology test results of the deceased judge. The standard used by the court was "whether the invasion [of privacy] would be 'clearly unwarranted.'"[98] Indeed, the court 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."[99]

Applying the rigors of the privacy exception to the variety of electronic messages would be difficult. First, each electronic message would have to be defended from disclosure on a "case-by-case" basis, which could prove time

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95 Id., p 546 (quoting State Employees, supra, p 123).

96 Kestenbaum, supra, p 551.

97 Id., p 546.

98 Swickard, supra, p 547 (quoting MCL 15.243(a)).

99 Id., p 562. See also, Penokie, supra, p 653 (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.")

consuming.[100] 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 prohibitive. As for the content of electronic 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 contain "intimate details" of a "highly personal nature" and therefore fail the standard. Universities, however, have no such policy for using their systems although they 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. As noted in the public comments submitted to the Commission in connection with this report,[101] many people treat e-mail like a telephone and assume it is private to some degree regardless of departmental policy. In general, then, 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.

Federal exemption 6 is not identical to 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,"[102] is not exactly 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." The following issues have been identified as coming 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, reasons for employment termination.[103]

A key federal case, Dep't of Air Force v Rose, held that Air Force cadet discipline records were not protected from disclosure by exemption 6.[104] In the words of Justice Brennan: "we find 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."[105] Justice Brennan was worried that agencies would simply place sensitive records into files labeled "personnel" and render them exempt. The Court ruled that Congress

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100 See Penokie, p 659 ("the governmental agency bears the burden of establishing that denial of a request for disclosure is statutorily supported").

101 See infra text at Part IV.

102 5 USC 552(b)(6).

103 See Penokie, p 660 (citing Rural Housing Alliance v United States Dep't of Agriculture, 162 US App DC 122; 498 F2d 73 (1974), Cox v United States Dep't of Justice, 576 F2d 1302 (CA 8, 1978)).

104 Rose, supra, p 370.

105 Id., p 371.

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.'"[106] The Court concluded that information could be redacted if needed. The Senate Report quoted by the Court read: "[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."[107]

Again, the federal case law reaffirms the stance taken by the Michigan courts—any and all records are subject to disclosure, unless to do so would constitute a "clearly unwarranted invasion" of privacy. The Court has emphasized that when an agency attempts to exempt an entire group of records or files it violates the intent of Congress underlying FOIA. This would lead one to think that an agency or university decision to treat all electronic mail as "exempt" for privacy reasons would fail. One likely application of Rose to e-mail is that each message would be subject to inspection and any part of it which could be released to the public would be.

ii. Communications Within A Public Body

There is another exemption which could apply to e-mail messages on a case by case basis. MCL 15.234(1)(n) 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 public 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 officials and employees of public bodies clearly outweighs the public interest in disclosure.

This exemption has been interpreted by Michigan courts on at least two occasions. In DeMaria v Dep't of Management the court was presented with a

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106 Id., p 372.

107 Id., p 374 (quoting S Rep No. 93-854, p 32 (1974)).

case where an outside consultant's report to the Department of Management and Budget concerning cost overruns on a university construction site were sought under FOIA. The attorney general denied the request for the consultant's report citing the exemption in MCL 15.243(1)(n). 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 2(b) of FOIA. Thus, the exemption did not apply.[108] According to the judge there were "strong public policy arguments as to why the reports of independent consultants should be accorded the same status as reports generated within the public body itself."[109] However, the court "could not ignore" the Michigan Supreme Court's past decisions to "narrowly construe the exemption provisions of the act."[110]

In another Michigan case, Favors v Corrections Dep't, the court held that the goldenrod colored worksheets used by the Department of Correction to make disciplinary credit decisions were preliminary to a final agency determination of a policy because they covered only the committee's recommendations.[111] The warden made all of the final decision regarding changes in inmate incarceration. The court explained its decision:

> The 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 inmate's merit or lack thereof.[112]

Next the court balanced the public interest in encouraging frank communications weighed against the public interest in disclosure of the goldenrod colored worksheet. The court found that "[t]he public has a far greater interest in knowing that these evaluations are accurate than in knowing the reasons behind the evaluations."[113]

Electronic mail messages would qualify for the "n" exemption if (1) they were sent within or between two public agencies; and (2) they were preliminary to a final action or decision; and (3) the need for frank communication in the particular instance outweighed the public interest. As for the third prong, e-mail

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108 DeMaria v Dep't of Management, 159 Mich App 729, 733; 407 NW2d 72 (1987).

109 Id.

110 Id.

111 Favors v Corrections Dep't, 192 Mich App 128, 135; 480 NW2d 604 (1991).

112 Id.

113 Id., 136.

is popular primarily because it promotes frank discussion and the quick, efficient exchange of ideas in a relatively simple format. As for the second prong, e-mail could be used to convey a final decision or action but that is probably the rare instance. 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, e-mail is most like the goldenrod worksheet: much of what is said and done on e-mail is likely to be "candid" and impressionistic rather than "final" or formal. Finally, the first prong of the test would vary by message. E-mail messages that were not created by a public body would not be subject to this exemption following DeMaria. However, it is not clear how this might apply to e-mail in some situations. For example, a message is sent from a consultant to an agency, and then that agency forwards the same message to another agency. It would appear that the message has now become a communication "within or between" public bodies. The language of the statute says nothing about the public agency "creating" or "writing" the notes, although that reading is implied by the DeMaria decision.

d. *Are E-mail Messages Sent to or Received from a Private Party by a Public Agency subject to the FOIA?*

This question is related to the issue of what constitutes a "public record" under FOIA.[114] 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.[115]

The most relevant case interpreting this language as it applies to messages sent to or received from a private party is Walloon Water v Melrose Twp. In Walloon, an individual citizen sent a letter to a township. The letter related somehow to the water system provided by the citizen's company to the township. The letter was read aloud at a regularly scheduled town meeting, and recorded in the minutes of the meeting. When the plaintiff requested the letter from the defendant township pursuant to the FOIA, the township refused to release the letter. 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

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114 See supra II.A.(3)(b).

115 MCL 15.232(c).

> 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.'[116]

No other cases could be found that extended or clarified this ruling.[117] It remains unclear to what extent private communications that 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, there must be some "nexus" 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.[118] The Court in Kissinger was presented with the issue of when a document "in the possession" of an agency becomes an "agency record." The first string of FOIA cases dealt with this problem of when a record created elsewhere and that later were transferred to a FOIA agency became records.[119]

It is unclear what the answer is to the question, "Are e-mail messages sent by private citizens to public agencies covered by FOIA?" The federal law is not on point, and might not even control because the language the Michigan statutory definition of a "public record" is so broad. Parts of the Michigan FOIA definition are left undefined. For example, "from the time it was created" is not treated in any decision. One possible conclusion is that as long as the state agency or university does not "use" a private-party document but only receives it, it is not a record. In Kestenbaum, three Justices stated that Michigan State University's student list was a record because the school had to "use" the list officially. However, an e-mail messages from a private citizen to the Department of Management and Budget about how their tax dollars are spent may not be records. Moreover, even if all private correspondence are records under FOIA, they may be so unimportant in documenting agency activity that they probably do not need to be saved or retained under the Management and Budget Act.

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116 Walloon, supra, p 730.

117 It can be inferred from DeMaria v Dep't of Management that a consultant's report paid for and in the possession of the government is disclosable under FOIA. The record status of that report was not discussed nor was it disputed. The court granted disclosure. DeMaria, p 730. 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.

118 445 US 136, 100 S Ct 960, 63 L Ed 2d 267 (1980).

119 See e.g., Lykins v United States Dep't of Justice, 725 F2d 1455; 233 US App DC 25 (1984) (presentence reports that have been tuned over to the Parole Commission are "agency records" even though they originated in the courts, which are not FOIA agencies); Goland v Central Intelligence Agency, 607 F2d 339, 347; 197 US App DC 25 (1978), Cert den 445 US 997; 63 L Ed2d 759; 100 SCT 1312 (1980) (setting forth standard for determining "[w]hether a congressionally generated document has become an agency record").

e. *Are E-mail Messages Sent To or Received By the Governor covered under FOIA?*

Documents from an agency to the Governor and his advisors are probably exempt from disclosure if the Governor chooses to exercise his executive privilege not to release those documents. Michigan's Attorney General addressed this issue when a Senate hearing committee requested a newly appointed director to disclose all of his "outgoing correspondence sent out in [his name] as Director."[120] The Attorney General stated the question as follows: "[m]ay the Committee require over the objections of the Governor that an appointee who has been serving as director of a state department provide copies of communications from the appointee to: (a) the Governor, and (b) principal advisors to the Governor?"

The Attorney General's research turned up no source for the power of executive privilege: "the doctrine of executive privilege is found in no statute." Apparently it was formulated by George Washington's cabinet.[121] The Attorney General also learned that the privilege of executive confidentiality has been accepted as a "valid state constitutional law doctrine."[122] Applying these decisions to the case of a Governor withholding correspondence written to him by another department head, the attorney general opined:

> In essence, what the cases seem to say is that the Governor is not an absolute sovereign, nor is the Senate permitted to conduct an unfettered inquisition . . . [b]oth branches are, therefore, subject to restraint and must be responsible to the people. The third branch of government, the judiciary, may, if necessary, balance the competing interests through an *in camera* review of the documents in question. . . it is my opinion, that as a matter of Michigan constitutional law, the Michigan courts would hold that the doctrine of executive privilege applies to communications, from a department head to the Governor and his principal advisors.[123]

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120 OAG, No. 5994, p 389 (September 30, 1981).

121 The doctrine of executive privilege received attention in United States v Nixon, 418 US 683; 41 L Ed 2d 1039; 94 S Ct 3090 (1974). The Court held that "The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all of the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making." Nixon, p 708.

122 OAG No. 5994, p 389, 395 (citing Thomson v German R Co, 22 NJ Eq 111 (1871); Appeal of Hartranft, 85 Pa St 433 (1877); Hamilton v Verdow, 287 Md 544, 561; 414 A2d 914 (1980)).

123 Id., p. 395.

But what does this have to do with FOIA requests? Correspondence between the Governor and various agencies via e-mail may someday be requested by the public under FOIA. Knowing that the Governor is connected to agency heads by the "executive LAN" makes these requests even more likely. A message from the Governor to an agency that was then used by that agency to conduct official business or make decisions would seem to mean that it is a "public record" in the "possession of"[124] that agency. However, the Governor may be able to trump a FOIA request for a document he created. The Governor would have a plausible argument even if he no longer possesses an e-mail message that it is still his "correspondence." First, his system most likely contains a copy of the message. Second, otherwise excluding the Governor under FOIA would have little meaning if messages to other agencies were disclosable under FOIA. Assuming the purpose is to allow him frank discussion with his advisors, then why not frank discussion with agency heads whom he directs? Third, the Governor could argue that the executive privilege applies to both correspondence from agency heads to him and *from him to his agency heads*. This would appear to be a reasonable conclusion to draw from the reasons supporting executive privilege.

B. The Management and Budget Act

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.[125] These duties are contained in another statute. Section 285 of the Management and Budget Act, MCL 18.1285, requires:

> (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.

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124 See MCL 15.232(c) "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function."

125 See MCL 15.233(3).

Moreover, the Act, at MCL 18.1287(2)(c), 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 rights and privileges of its citizens, or both.

The Secretary of State has a duty to determine which records possess "archival value" and are not to be destroyed.[126] Records with "archival value" are defined in MCL 18.1284 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 about persons, things, problems or conditions dealt with by state agencies.

A "record" is defined here slightly differently than under FOIA. The Management and Budget Act definition includes:

> magnetic or paper tape, microform [sic], 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 combinations thereof, regardless or physical form or characteristics. MCL 18.1284(b).

Moreover, the Management and Budget Act defines a "state agency" differently than FOIA defines a "public body." Under the Management and Budget Act 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." MCL 18.1115(5).

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126 MCL 18.1289.

It is not clear how the Management and Budget Act and the Freedom of Information Act will apply to electronic mail. The Management and Budget Act seems to have a broader definition of "record." Electronic 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; but it is also a form of communicating electronically.

Further, all electronic mail is stored somewhere—whether on a main frame or a LAN—the message must be stored on the server computer in order to be sent. Thus, the record exists on a magnetic tape, either a tape drive or a hard drive. Because the users of e-mail are often blind to the intermediate computer systems it appears as though the message exists only in "cyberspace" between the sender and the receiver—much as a telephone call is not actually recorded anywhere. This simply is not the case with most electronic mail. An e-mail message can be erased by the receiver, but it has existed as an electronic message at least temporarily on the server in order to be transferred.

On the other hand, electronic mail is a very unique medium. That neither statute refers to this medium specifically could be problematic. Electronic 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 out the message, and much e-mail is never printed out. 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.

Even if electronic mail is considered a "record" by either definition, it is not clear that all e-mail is of "archival value." Some e-mail contains schedules and employee calendars that record their activity on a day to day basis. 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, it should be mentioned that many e-mail software packages are poor word processors and thus not very helpful for creating more than short, unformatted messages. E-mail has the potential to revolutionize how society thinks about documents and reports of significant length, but today its use suggests very brief memoranda or a "typed" telephone call.

The leading case regarding electronic mail and federal records is Armstrong v Executive Office of the President, 303 US App DC 107; 1 F3d 1274 (1993). The court ruled that "electronic communications systems can create, and

have created, documents that constitute federal records under the FRA [Federal Records Act]."[127] Armstrong began when a private historical organization requested the electronic mail of the Reagan administration under the federal Freedom of Information Act.[128] 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.[129] The court decided the issues presented under the Federal Records Act, rather than under FOIA. These two acts parallel Michigan's Freedom of Information Act and the Management and Budget Act.

For the purposes of the Federal Records Act, "records" are defined as: "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 and preserved or appropriate for preservation by that agency."[130] At oral argument, the Government agreed with the court the "this [e-mail] system has, in the past, created some things that qualify as federal records."[131]

Further, the court ruled that printing the 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."[132] Also, the Armstrong court decided that electronic directories and distribution lists which often accompany e-mail would be "appropriate for preservation" in these situations.[133]

While finding that agency heads had "some discretion" in determining what constitutes a "record," they do 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."[134]

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127 Armstrong v Executive Office of the President, 303 US App DC 107; 1 F3d 1274, 1282 (1993).

128 Id., p 1281.

129 See Order, Armstrong v Executive Office of the President, 821 F Supp 761 (DDC, 1993).

130 Armstrong, p 1278 (quoting 5 USC 3301).

131 Id., at 1282.

132 Id., at 1284.

133 Id., at 1285, n8.

134 Id., at 1283.

Armstrong resulted in a new appendix to the federal rule on Electronic Record Management, 36 CFR 1234. A draft of the standards written by the National Archives and Records Administration on how to identify, maintain, and dispose of Federal records created or received on an E-mail system is found at 59 FR 13907. This section will codify much of the Armstrong decision, including the record status of e-mail messages: "[b]ecause of the widespread use of E-mail for conducting agency business, many E-mail documents meet the definition of a 'record' under the Federal Records Act."[135]

The federal definition of "record" is very close to the two definitions found in Michigan law. For example, both the Federal Record Act and the Michigan Management and Budget Act define a "record" as material "regardless of physical form or characteristics."[136] This language persuaded the 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." The federal government has yet to test the Freedom of Information Act as it applies to e-mail.

C. 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. MCR 2.302(B)

Michigan Court Rule 2.310 further illustrates 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." 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." MCR 2.310

There are no published opinions on the subject of discovering electronic mail in non-criminal cases. However, Discovery Practice: A Guide for Michigan Lawyers recommends that lawyers clearly define the term "documents" in their

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135 59 FR 13907.

136 See Armstrong, supra, p 1280; see also MCL 18.1284(b).

interrogatories. The sample forms in this work 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."[137]

Electronic mail has already been admitted into evidence in several reported Michigan cases, but none of these have included an electronic message sent by a public employee.[138]

Currently, 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 entailed searching electronic mail messages.[139] The reporter 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.'"[140] One lawyer noted the increased popularity of e-mail in Silicon Valley: "they don't pick up the phone, they don't talk in the hallway . . . they send e-mail."[141] This trend has lead lawyers to craft their discovery requests much more specifically. Some of these requests even call for hidden and deleted e-mail files.[142] A cottage industry has formed to search e-mail files for law firms. One company searched 750,000 e-mail messages to find 7,000 "potentially relevant" messages.[143]

The language in the Michigan Rules of Court that defines "documents" includes "other data compilations from which information can be obtained."[144] This language seems broad enough to include e-mail. This means that the future will undoubtedly find the Michigan government faced with litigation that includes highly specific discovery requests asking for e-mail files, perhaps even deleted ones. Assuming that an electronic message is "relevant" to the litigation, it appears that lawyers will go to great lengths to obtain them.

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137 Bruce T. Wallace & Mary R. Minnet, Discovery Practice: A Guide for Michigan Lawyers, The Institute for Continuing Legal Education: Ann Arbor, 1988, p 256.

138 See e.g., Donley v Ameritech Serv, No. 92-72236 (ED Mich Nov. 16, 1992); 1992 U.S. Dist. Lexis 21281 (employee fired because of an electronic message sent to another employee about a client).

139 Vira Titunik, Collecting Evidence in the Age of E-mail, The American Lawyer, July-Aug 1994, p 119.

140 Id.

141 Id.

142 Id.

143 Id.

144 MCR 2.310.

D. The Governor

The Governor is exempt from the Freedom of Information Act because his office is excluded in the definition of "state agency." Under the Management and Budget Act, the Governor may make his own initial determination of which documents he wishes to archive and those he wants to destroy.[145] The Governor's actions are subject to judicial review, this action may be initiated by the Department of Management and Budget.[146]

E. Open Meetings Act

The Open Meetings Act, MCL §15.261 et seq., provides that all meetings of public bodies must be open to the public when there is a quorum for deliberation or a decision is made.

There is no language in the act that specifically mentions electronic mail. However, the court in Booth v University of Michigan Board of Regents held that telephone calls made "round-the-horn" violated the OMA because such calls achieved the same effect as meeting privately.[147] Electronic mail messages could be used in a similar fashion. Electronic conferencing also poses a problem in this area, but this paper does not address the issue of public disclosure of electronic conferences.

Decisions made, or votes taken by electronic mail would probably also fall under the scope of the OMA. Decisions include any vote or disposition on a motion or proposal that requires a vote by a public body.[148]

F. Michigan Constitution

Article IX of the Michigan Constitution mandates:

> "All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection."[149]

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145 OAG, No. 6170, p 156 (July 18, 1983).
146 OAG, No. 3590, p 581 (November 14, 1962).
147 Booth, supra, p 229.
148 MCL 15.262(d).
149 Const 1963, art IX, §23.

The purpose of this provision is to allow the public to "keep a finger on the pulse of government spending."[150] However, the government need not keep records of every receipt.[151] The article does not mention electronic mail nor do subsequent cases. It is not known to what extent Michigan state agencies transmit financial data via e-mail.

IV. How Should Michigan Disclosure Laws Be Revised to Reflect New Electronic Means of Communications? Responses to A Survey of Media, Agencies and Universities

As part of this study the Law Revision Commission sent a letter to Michigan universities, agencies and the press asking for their comments on how they use e-mail and whether they would favor or oppose public disclosure of e-mail. The responses, which are attached as appendices to this report, suggest problems with applying public disclosure laws to e-mail messages. Comments were returned from the following institutions: The University of Michigan, Ann Arbor, Western Michigan University, Northern Michigan University, Michigan State University, the Department of Education, and the Department of Agriculture, and Wood TV. The responses noted that e-mail was widely used in state departments. The overall tone of these suggestion was clear—electronic mail should remain private if it is to remain useful.

Here is a summary of the responses:

> • "First, e-mail is easily modified once sent, thus its integrity as an official record would be highly suspect at best. Second, because of re-sending capabilities (which also includes the ability for modification) verification of authenticity with any level of certainty would be difficult at best. Third, if e-mail is to be available for FOIA, then it would need to be retrievable. While such retrievability is no doubt possible, it would be analogous to tape-recording all phone calls. . ." --Richard A. Wright, Associate Vice President for Academic Affairs, Western Michigan University
>
> • "I am struck by the two quite distinct modes of e-mail use . . . I do not print a hard copy, and people with whom I deal know that

150 Booth v University of Michigan Bd of Regents, 444 Mich 211, 267 n 27; 507 NW2d 422 (1993)(quoting Grayson v Bd of Accountancy, 27 Mich App 26, 34; 183 NW2d 424 (1970)).

151 Booth, p 267.

to be my operating preference . . . Other users understand or expect that their messages will be converted to hard copy. . . I would find the prospect of an intrusion on the privacy of my e-mail communication as troubling as I would find a blanket wiretap authorization on my telephone.. . [However, a]n e-mail message that is converted to hard copy looks more like a memo than it does a telephone conversation. It is palpable and enduring. Other eyes can be expected to see it. There is not, in reason, a high expectation of privacy. . ."--Michael J. Kiley, Interim General Counsel, Michigan State University

- "The use of electronic mail on our campus is very widespread among our students, faculty, and staff. Electronic mail is more of an informal dialogue than a formal communication. . . Because of the informal nature of most electronic mail I would oppose complete public access to electronic mail. . ."--William Vandament, President, Northern Michigan University

- "It is our position that electronic mail should <u>not</u> be treated as subject to disclosure under the Freedom of Information Act. Electronic mail is a type of verbal communications; it does not hold the same permanency as a memorandum in office communications. In addition, trying to keep track of FOIA requests regarding electronic mail would be laborious."--Robert E. Schiller, Superintendent of Public Instruction, Department of Education

- "The Michigan Department of Agriculture uses the E-Mail system which is supplied with Banyan Vines. . . This department would support the proposed National Archives and Records Administration rules."--Gordon Guyer, Director, Department of Agriculture

Although the Commission received only one response from the media, it believes that response would command support among the press:

- "We believe E-mail should be subject to public disclosure laws. It is written (like a letter) and it is (or at least can be) retained like a letter. . . If that causes state officials to be less candid in E-mail transmissions, so be it. There is no excuse for secrecy when handling the people's business."--Rick Gevers, News Director, Wood

Two responses to the Commission's inquiries require more lengthy analysis. First, the University of Michigan prepared an in-depth analysis of the use of electronic mail at public universities and the problems posed to that use by Michigan's FOIA. This analysis concludes that the Michigan FOIA should be amended significantly:

> "1. Clarify the definition of public records. What makes a writing a public record should be whether it contains documentation as evidence of the organization, functions, or policies of the agency, and, further, whether it has been purposefully preserved.
>
> "2. Change the definition of a writing so that the decision about whether a document is appropriate for release is based on whether it was created or deliberately filed, stored or systematically maintained as evidence of the public body's policies, decisions or procedures.
>
> "3. Exclude telephone transmissions and other electronic communications from the definition of "writing". Such transmissions by their nature are intended to be ephemeral and are not intended to document an agency action."

The University of Michigan's submission also includes a draft of the Michigan FOIA as these recommendations would amend it. See Appendix 4a.

The State Archivist, who concludes that the current FOIA would apply to electronic mail unless it is amended, favors the appointment of a state government-wide committee to consider legislation on the subject of electronic mail. The archivist is anxious that electronic mail with evidentiary and informational value is preserved in an accessible and retrievable form, subject to regulations that may parallel those currently being proposed and implemented in the federal government by the National Archives and Records Administration. See Appendix 3.

V. Analysis and Conclusions

As the responses to the Commission's survey indicate, there are widely different attitudes in this state to the question of how public disclosure statutes should be applied to electronic mail. At one extreme, some advocate extending to electronic mail the same privacy protections and confidentiality that currently apply to telephone conversations—privacy protections that are currently enjoyed

not just by private citizens, but by employees of public agencies as well. At the other extreme, some advocate that Michigan's Freedom of Information Act and records preservation laws should be applied to electronic mail in the same way as they apply to written communications to and from public employees. This position would ensure widespread public access to electronic mail and would require preservation of electronic 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 different reactions are understandable. Before electronic mail, the law in Michigan as in the nation had crystallized a set of privacy expectations in our public employees: telephone conversations would be private, and written communications would, except in precisely limited circumstances, be public. There are significant advantages to enforcing 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; members of the public need to have access to information about what their government is doing. The law promoted both policies by encouraging public employees to use telephone communication for discussions they wish to keep private, and by requiring that their written communications be preserved and disclosed in most circumstances.

Electronic mail has now come to upset this traditional understanding of privacy. Electronic mail is not a telephone conversation and not a traditional memorandum; it is a new medium of communication that blends the attributes of both and, indeed, serves desirable communication purposes better than either telephone conversations or written memoranda have in the past. Moreover, it is a flexible medium that may well come to absorb most communication that previously occurred in both telephonic and written form. In the future, we may find that both the simple telephone call to say "thank you" and the memorandum to explain an agency's policy are transmitted in the first and often only instance by electronic mail. In this new medium, which may subsume both telephone conversations and written communications, how can Michigan protect both the privacy traditionally accorded telephone calls and the public's right to access to information that is embodied in our disclosure statutes?

Several threshhold questions must be addressed. First, is it desirable that electronic mail be used for the sorts of candid conversations among public employees, and between public employees and citizens, that have previously taken place as telephone conversations? The authors of this report believe that this is desirable. Few technological innovations have greater potential than electronic mail to make public officials 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 at best, can be expected to improve understanding and the quality of decisionmaking in public life.

Second, the authors of this report believe it to be irrefutable that the blanket disclosure of electronic messages to the public would discourage some desirable communications among public employees. The responses to the Commission's survey are fairly emphatic and persuasive in making this point. If electronic 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 analysis of Michigan statutes earlier in this report indicates that there are some significant ambiguities in applying both the Freedom of Information Act and the Management and Budget Act to electronic mail. Nevertheless, the text of the statutes and the decisions interpreting that text do suggest that, most likely, all electronic mail messages will be a "writing" within the meaning of FOIA, and that many (if not most) will be "public records" subject to disclosure under FOIA unless the agency or public employee can show a particular message was created for personal convenience. This will subject electronic messages of state agencies and universities (but not the Governor) to 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 "(n)", which excludes from disclosure:

> "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." MCL 15.243(1)(n)

This exemption, however, requires case by case adjudication concerning each communication: "This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure." Id. In practice, this exemption would do little to protect e-mail from disclosure, for it would be difficult and expensive to defend from disclosure each of thousands of messages on a case-by-case basis. More important, a public employee can never be very certain, at the

time of sending a message, that the exemption "(n)" balancing, when applied months or years later, will result in non-disclosure. This uncertainty will deter public employees from risking electronic communication in the first place.

The solution to these dilemmas suggested by the University of Michigan—removing electronic communications entirely from the FOIA—would most assuredly maximize the privacy of electronic mail and encourage its widespread use among public employees. It would also, however, permit significant erosion of the disclosure currently provided under the FOIA, since communications that were once communicated in writing may gradually shift to electronic forms. It may well be, as the University of Michigan argues, that the disclosure currently required under FOIA is so burdensome and intrusive that a broad reform of the "writings" subject to disclosure is in order. Such a wholesale revision of the FOIA, however, is beyond the scope of this study, and indeed may be unnecessary in order to resolve the problems involving electronic mail.

A more limited solution to the public disclosure of electronic mail under FOIA would be to amend exemption (n) so as to provide a safe harbor for that subset of electronic messages that 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" electronic 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 are whole classes of users of electronic mail at public institutions who should enjoy exemption from FOIA. Among these are students at educational institutions (including high schools and universities) who communicate with each other and with their teachers concerning matters related to their instruction.

The National Archives and Records Administration Regulations on Electronic Mail Systems suggest a starting point for Michigan's efforts to apply disclosure laws to electronic mail. As noted in the analysis above, it remains unclear to what extent electronic messages are "records" subject to preservation under Michigan's Management and Budget Act. Federal caselaw and statutes, which employ a slightly different definition of "record", have been extended to electronic mail, and have caused NARA to promulgate an electronic mail preservation regime. Those regulations identify categories of messages that

would satisfy the definition of record, and would require public employees to "tag" messages as "record" or "non-record" each time a message is generated. The categories of "record" messages include those:

> "Containing information developed in preparing position papers, reports, and studies;
> "Reflecting official actions taken in the course of conducting agency business;
> "Conveying information on agency programs, policies, decisions, and essential transactions;
> "Conveying statements of policy or the rationale for official decisions or actions; and
> "Documenting oral exchanges, such as meetings or telephone conversations, during which policy was discussed or formulated or other agency activities were planned, discussed, or transacted."
> 36 CFR 1234 (The entire proposed standard is attached as appendix 3).

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

As a first step, the Michigan Law Revision Commission should circulate this study report widely and encourage discussion of the various problems and approaches suggested in the report and in the responses of state agencies, universities, and the public. A public hearing on the issues addressed also would be desirable.

As a second step, the Commission may wish to study the ever widening set of legal issues posed by evolving electronic communications. Electronic mail and public disclosure laws are but one part of a broad array of technologies and laws that Michigan and other states must soon mesh. Voicemail, facsimile transmissions, and computer conferences all have implications, not just for public disclosure laws, but also for laws protecting against eavesdropping, for laws concerning harassment and stalking, and for the First Amendment of the United States Constitution. Many of these technologies and laws are beyond the scope of this report to the Commission. Nevertheless, the Commission should encourage suggestions from the Legislature, bench, bar, and public concerning which of these issues to address next.

Electronic Mail and Public Disclosure Laws

A Study Report Submitted to the Michigan Law Revision Commission

APPENDICES

APPENDIX 1

FREEDOM OF INFORMATION ACT
Act 442 of 1976

AN ACT to provide for public access to certain public records of public bodies; to permit certain fees; to prescribe the powers and duties of certain public officers and public bodies; to provide remedies and penalties; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

15.231 Short title; public policy.

Sec. 1. (1) This act shall be known and may be cited as the "freedom of information act".

(2) It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, 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 informed so that they may fully participate in the democratic process.

15.232 Definitions.

Sec. 2. As used in this act:

(a) "Person" means an individual, corporation, partnership, firm, organization, or association, except that person does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility.

(b) "Public body" means:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

(v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

(c) "Public record" means 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. This act 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 under this act.

(d) "Unusual circumstances" means any 1 or a combination of the following, but only to the extent necessary for the proper processing of a request:

(i) The need to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records pursuant to a single request.

(ii) The need to collect the requested public records from numerous field offices, facilities, or other establishments which are located apart from the particular office receiving or processing the request.

(e) "Writing" means 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.

15.233 Public records; right to inspect, copy, or receive; subscriptions; inspection and examination; memoranda or abstracts; rules; compilation, summary, or report of information; creation of new public record; certified copies.

Sec. 3. (1) 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, except as otherwise expressly provided by section 13. A person has a right to subscribe to future issuances of public records which are created, issued, or disseminated on a regular basis. A subscription shall be valid for up to 6 months, at the request of the subscriber, and shall be renewable.

(2) A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. A public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions.

(3) This act does not require a public body to make a compilation, summary, or report of information, except as required in section 11.

This act does not require a public body to create a new public record, except as required in sections 5 and 11, and to the extent required by this act for the furnishing of copies, or edited copies pursuant to section 14(1), of an already existing public record.

(5) The custodian of a public record shall, upon request, furnish a requesting person a certified copy of a public record.

15.234 Fees; waiver or reduction; affidavit; deposit; calculation of costs; provisions inapplicable to certain public records; review by bipartisan joint committee; appointment of members.

Sec. 4. (1) A public body may charge a fee for providing a copy of a public record. Subject to subsection (3), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. Copies of public records may be furnished without charge or at a reduced charge if the public body determines that a waiver or reduction of the fee is in the public interest because furnishing copies of the public record can be considered as primarily benefiting the general public. Except as provided in section 30(3) of Act No. 232 of the Public Acts of 1953, being section 791.230 of the Michigan Compiled Laws, a copy of a public record shall be furnished without charge for the first $20.00 of the fee for each request, to an individual who submits an affidavit stating that the individual is then receiving public assistance or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigency.

(2) At the time the request is made, a public body may request a good faith deposit from the person requesting the public record or series of public records, if the fee provided in subsection (1) exceeds $50.00. The deposit shall not exceed 1/2 of the total fee.

(3) In calculating the costs under subsection (1), a public body may not attribute more than the hourly wage of the lowest paid, full-time, permanent clerical employee of the employing public body to the cost of labor incurred in duplication and mailing and to the cost of examination, review, separation, and deletion. A public body shall utilize the most economical means available for providing copies of public records. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. A public body shall establish and publish procedures and guidelines to implement this subsection.

(4) This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or where the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.

(5) Three years after the effective date of this act a bipartisan joint committee of 3 members of each house shall review the operation of this section and recommend appropriate changes. The members of the house of representatives shall be appointed by the speaker of the house of representatives. The members of the senate shall be appointed by the majority leader of the senate.

15.235 Request to inspect or receive copy of public record; response to request; failure to respond; court order to disclose or provide copies; damages; contents of notice denying request; signing notice of denial; notice extending period of response; grounds for commencement of action.

Sec. 5. (1) A person desiring to inspect or receive a copy of a public record may make an oral or written request for the public record to the public body.

(2) When a public body receives a request for a public record it shall immediately, but not more than 5 business days after the day the request is received unless otherwise agreed to in writing by the person making the request, respond to the request by 1 of the following:

(a) Grant the request.

(b) Issue a written notice to the requesting person denying the request.

(c) Grant the request in part and issue a written notice to the requesting person denying the request in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.

(3) Failure to respond to a request as provided in subsection (2) constitutes a final decision by the public body to deny the request. If a circuit court, upon an action commenced pursuant to section 10, finds that a public body has failed to respond as provided in subsection (2), and if the court orders the public body to disclose or provide copies of the public record or a portion thereof, then the circuit court shall assess damages against the public body as provided in section 10(5).

(4) A written notice denying a request for a public record in whole or in part shall constitute a final determination by the public body to deny the request or portion thereof and shall contain:

(a) An explanation of the basis under this act or other statute for the determination that the public record, or the portion thereof, is exempt from disclosure, if that is the reason for denying the request or a portion thereof.

(b) A certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body, if that is the reason for denying the request or a portion thereof.

(c) A description of a public record or information on a public record which is separated or deleted as provided in section 14, if a separation or deletion is made.

(d) A full explanation of the requesting person's right to seek judicial review under section 10. Notification of the right to judicial review shall include notification of the right to receive attorneys' fees and damages as provided in section 10.

(5) The individual designated in section 6 as responsible for the denial of the request shall sign the written notice of denial.

(6) If a public body issues a notice extending the period for a response to the request, the notice shall set forth the reasons for the extension and the date by which the public body shall do 1 of the following:

(a) Grant the request.

(b) Issue a written notice to the requesting person denying the request.

(c) Grant the request in part and issue a written notice to the requesting person denying the request in part.

(7) If a public body makes a final determination to deny in whole or in part a request to inspect or receive a copy of a public record or portion thereof, the requesting person may commence an action in circuit court, as provided in section 10.

15.236 Persons responsible for approving denial of request for public record.

Sec. 6. (1) For a public body which is a city, village, township, county, or state department, or under the control thereof, the chief administrative officer of that city, village, township, county, or state department, or an individual designated in writing by that chief administrative officer, shall be responsible for approving a denial under section 5(4) and (5). In a county not having an executive form of government, the chairperson of the county board of commissioners shall be considered the chief administrative officer for purposes of this subsection.

(2) For all other public bodies, the chief administrative officer of the respective public body, or an individual designated in writing by that chief administrative officer, shall be responsible for approving a denial under section 5(4) and (5).

15.240 Action to compel disclosure of public records; commencement; orders; jurisdiction; de novo proceeding; burden of proof; private view of public record; contempt; assignment of action or appeal for hearing, trial, or argument; attorneys' fees, costs, and disbursements; assessment of award; damages.

Sec. 10. (1) If a public body makes a final determination to deny a request or a portion thereof, the requesting person may commence an action in the circuit court to compel disclosure of the public records. If the court determines that the public records are not exempt from disclosure, the court shall order the public body to cease withholding or to produce a public record or a portion thereof wrongfully withheld, regardless of the location of the public record. The circuit court for the county in which the complainant resides or has his principal place of business, or the circuit court for the county in which the public record or an office of the public body is located shall have jurisdiction to issue the order. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(2) An action under this section arising from the denial of an oral request may not be commenced unless the requesting person confirms the oral request in writing not less than 5 days before commencement of the action.

(3) An action commenced pursuant to this section and appeals therefrom shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(4) If a person asserting the right to inspect or to receive a copy of a public record or a portion thereof prevails in an action commenced pursuant to this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person prevails in part, the court may in its discretion award reasonable attorneys' fees, costs, and disbursements or an appropriate portion thereof. The award shall be assessed against the public body liable for damages under subsection (5).

(5) In an action commenced pursuant to this section, if the circuit court finds that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall, in addition to any actual or compensatory damages, award punitive damages in the amount of $500.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body, not an individual, pursuant to whose public function the public record was kept or maintained.

15.241 Matters required to be published and made available by state agencies; form of publications; effect on person of matter not published and made available; exception; action to compel compliance by state agency; order; attorneys' fees, costs, and disbursements; jurisdiction; definitions.

Sec. 11. (1) A state agency shall publish and make available to the public all of the following:

(a) Final orders or decisions in contested cases and the records on which they were made.

(b) Promulgated rules.

(c) Other written statements which implement or interpret laws, rules, or policy, including but not limited to guidelines, manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions.

(2) Publications may be in pamphlet, loose-leaf, or other appropriate form in printed, mimeographed, or other written matter.

(3) Except to the extent that a person has actual and timely notice of the terms thereof, a person shall not in any manner be required to resort to, or be adversely affected by, a matter required to be published and made available, if the matter is not so published and made available.

(4) This section does not apply to public records which are exempt from disclosure under section 13.

(5) A person may commence an action in the circuit court to compel a state agency to comply with this section. If the court determines that the state agency has failed to comply, the court shall order the state agency to comply and shall award reasonable attorneys' fees, costs, and disbursements to the person commencing the action. The circuit court for the county in which the state agency is located shall have jurisdiction to issue the order.

(6) As used in this section, "state agency", "contested case", and "rules" shall have the same meanings as ascribed to those terms in Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws.

15.243 Exemptions from disclosure; withholding of information required by law.

Sec. 13. (1) 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.

(b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:

(i) Interfere with law enforcement proceedings.

(ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.

(iii) Constitute an unwarranted invasion of personal privacy.

(iv) Disclose the identity of a confidential source, or if the record is compiled by a criminal law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.

(v) Disclose law enforcement investigative techniques or procedures.

(vi) Endanger the life or physical safety of law enforcement personnel.

(c) A public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

(d) Records or information specifically described and exempted from disclosure by statute.

(e) Information the release of which would prevent the public body from complying with section 438 of subpart 2 of part C of the general education provisions act, title IV of Public Law 90-247, 20 U.S.C. 1232g, commonly referred to as the family educational rights and privacy act of 1974.

(f) A public record or information described in this section that is furnished by the public body originally compiling, preparing, or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.

(g) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:

(i) The information is submitted upon a promise of confidentiality by the public body.

(ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.

(iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

(h) Information or records subject to the attorney-client privilege.

(i) Information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian science practitioner privilege, or other privilege recognized by statute or court rule.

(j) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the time for the receipt of bids or proposals has expired.

(k) Appraisals of real property to be acquired by the public body until (i) an agreement is entered into; or (ii) 3 years has elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.

(l) Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

(m) Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation.

(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 exemptiom 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. This exemption does not constitute an exemption under state law for purposes of section 8(h) of the open meetings act, Act No. 267 of the Public Acts of 1976, being section 15.268 of the Michigan Compiled Laws. As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under Act No. 336 of the Public Acts of 1947, as amended, being sections 423.201 to 423.216 of the Michigan Compiled Laws.

(o) Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, which if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular instance.

(p) Information which would reveal the exact location of archaeological sites. The secretary of state may promulgate rules pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws, to provide for the disclosure of the location of archaeological sites for purposes relating to the preservation or scientific examination of sites.

(q) Testing data developed by a public body in determining whether bidders' products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications. This subdivision does not apply after 1 year has elapsed from the time the public body completes the testing.

(r) Academic transcripts of an institution of higher education established under sections 5, 6, or 7 of article VIII of the state constitution of 1963, where the record pertains to a student who is delinquent in the payment of financial obligations to the institution.

(s) Records of any campaign committee including any committee that receives money from a state campaign fund.

(t) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a police or sheriff's agency or department, the release of which would do any of the following:

(i) Identify or provide a means of identifying an informer.

(ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent.

(iii) Disclose the personal address or telephone number of law enforcement officers or agents or any special skills that they may have.

(iv) Disclose the name, address, or telephone numbers of family members, relatives, children, or parents of law enforcement officers or agents.

(v) Disclose operational instructions for law enforcement officers or agents.

(vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.

(vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies.

(viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informer.

(ix) Disclose personnel records of law enforcement agencies.

(x) Identify or provide a means of identifying residences which law enforcement agencies are requested to check in the absence of their owners or tenants.

(u) Except as otherwise provided in this subdivision, records and information pertaining to an investigation or a compliance conference conducted by the department of commerce under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws, before a complaint is issued. This subdivision does not apply to records and information pertaining to any of the following:

(i) The fact that an allegation has been received and an investigation is being conducted, and the date the allegation was received.

(ii) The fact that an allegation was received by the department of commerce; the fact that the department of commerce did not issue a complaint for the allegation; and the fact that the allegation was dismissed.

(2) This act does not authorize the withholding of information otherwise required by law to be made available to the public or to a party in a contested case under Act No. 306 of the Public Acts of 1969, as amended.

15.243a Salary records of employee or other official of institution of higher education, school district, intermediate school district, or community college available to public on request.

Sec. 13a. Notwithstanding section 13, an institution of higher education established under section 5, 6, or 7 of article 8 of the state constitution of 1963; a school district as defined in section 6 of Act No. 451 of the Public Acts of 1976, being section 380.6 of the Michigan Compiled Laws; an intermediate school district as defined in section 4 of Act No. 451 of the Public Acts of 1976, being section 380.4 of the Michigan Compiled Laws; or a community college established under Act No. 331 of the Public Acts of 1966, as amended, being sections 389.1 to 389.195 of the Michigan Compiled Laws shall upon request make available to the public the salary records of an employee or other official of the institution of higher education, school district, intermediate school district, or community college.

15.244 Separation of exempt and nonexempt material; design of public record; description of material exempted.

Sec. 14. (1) If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.

(2) When designing a public record, a public body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information. If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.

15.245 Repeal of SS 24.221, 24.222, and 24.223.

Sec. 15. Sections 21, 22 and 23 of Act No. 306 of the Public Acts of 1969, as amended, being sections 24.221, 24.222 and 24.223 of the Michigan Compiled Laws, are repealed.

15.246 Effective date.

Sec. 16. This act shall take effect 90 days after being signed by the governor.

APPENDIX 2

THE MANAGEMENT AND BUDGET ACT
Act 431 of 1984
(selected excerpts)

AN ACT to prescribe the powers and duties of the department of management and budget; to define the authority and functions of its director and its organizational entities; to authorize the department to issue directives; to provide for the capital outlay program; to provide for the leasing, planning, constructing, maintaining, altering, renovating, demolishing, conveying of lands and facilities; to provide for centralized administrative services such as purchasing, payroll, record retention, data processing, and publishing and for access to certain services; to provide for a system of internal accounting and administrative control for certain principal departments; to provide for an internal auditor in certain principal departments; to provide for certain powers and duties of certain state officers and agencies; to codify, revise, consolidate, classify, and add to the powers, duties, and laws relative to budgeting, accounting, and the regulating of appropriations; to provide for the implementation of certain constitutional provisions; to create funds and accounts; to make appropriations; to prescribe remedies and penalties; to rescind certain executive reorganization orders; to prescribe penalties; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

18.1101 Short title.

Sec. 101. This act shall be known and may be cited as "the management and budget act".

18.1111 Meanings of words and phrases.

Sec. 111. For purposes of this act, the words and phrases defined in sections 112 to 115 have the meanings ascribed to them in those sections. These definitions, unless the context requires otherwise, apply to use of the defined terms in this act. Other definitions applicable to specific articles or sections of this act are found in those articles or sections.

18.1112 Definitions: A, B.

Sec. 112. (1) "Appropriation" means the legislative authorization for expenditure or obligation of money from a state operating fund.

(2) "Appropriations committees" means the appropriations committee of the senate and the appropriations committee of the house of representatives.

(3) "Board" means the state administrative board.

(4) "Budget act" means an act containing appropriations which form a portion of the state's annual budget.

18.1115 Definitions; I to U.

Sec. 115. (1) "Institution of higher education" means a state supported 4-year college or university.

(2) "JCOS" means the joint capital outlay subcommittee of the appropriations committees.

(3) "Project" means a facility which is being planned or constructed.

(4) Except as used in sections 284 to 292, "record" means a public record as defined in section 2 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.232 of the Michigan Compiled Laws.

(5) "State agency" means a department, board, commission, office, agency, authority, or other unit of state government. State agency does not include an institution of higher education or a community college or, for purposes of article 2 or 3, the legislative or judicial branches of government.

(6) "Unit of local government" means a political subdivision of this state, including school districts, community college districts, intermediate school districts, cities, villages, townships, counties, and authorities, if the political subdivision has as its primary purpose the providing of local governmental service for citizens in a geographically limited area of the state and has the power to act primarily on behalf of that area.

18.1284 Additional definitions.

Sec. 284. As used in this section and sections 285 to 292:

(a) "Archival value" means 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 about persons, things, problems, or conditions dealt with by state agencies.

(b) "Record" or "records" means a document, paper, letter, or writing, including documents, papers, books, letters, or writings prepared by handwriting, typewriting, printing, photostating, or photocopying; or a photograph, film, map, 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. Record may also include a record series, if applicable.

18.1285 Records; maintenance by head of state agency; listing on retention and disposal schedule; legal custody and physical possession.

Sec. 285. (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.

(3) Legal custody and physical possession of a record shall be vested in the state agency that created, received, or maintains the record until such time as it is transferred to the state archives or is destroyed.

18.1287 Records management program; purpose; duties of department; directives.

Sec. 287. (1) The department shall maintain a records management program to provide for the development, implementation, and coordination of standards, procedures, and techniques for forms management, and for the creation, retention, maintenance, preservation, and disposition of the records of this state. All records of this state are and shall remain the property of this state and shall be preserved, stored, transferred, destroyed, disposed of, and otherwise managed pursuant to this act and other applicable provisions of law.

(2) In managing the records of this state, the department shall do all of the following:

(a) Establish, implement, and maintain standards, procedures, and techniques of records management throughout state agencies.

(b) Provide education, training, and information programs to state agencies regarding each phase of records management.

(c) Promote 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. Preservation of designated vital records shall be accomplished by storing duplicate copies of the original records in a secure remote records center to assure retention of those records in the event of disaster and loss of original records.

(d) Operate a records center or centers for the purpose of providing maintenance, security, and preservation of state records.

(e) Provide centralized microfilming service and, after the effective date of rules promulgated under the records media act to govern optical storage, service for off-site storage of optical discs as an integral part of the records management program.

(f) Provide safeguards against unauthorized or unlawful disposal, removal, or loss of state records.

(g) Initiate action to recover a state record that may have been removed unlawfully or without authorization.

(h) Establish retention and disposal schedules for the official records of each state agency with consideration to their administrative, fiscal, legal, and archival value.

(3) The department shall issue directives that provide for all of the following:

(a) The security of records maintained by state agencies.

(b) The establishment of retention and disposal schedules for all records in view of their administrative, fiscal, legal, and archival value.

(c) The submission of proposed retention and disposal schedules to the secretary of state, the auditor general, the attorney general, and the board for review and approval.

(d) The transfer of records from a custodian state agency to a state records center or to the custody of the secretary of state.

(e) The disposal of records pursuant to retention and disposal schedules, or the transfer of records to the custody of the secretary of state.

(f) The establishment of a records management liaison officer in each department to assist in maintaining a records management program.

(g) The cooperation of other state departments in complying with this act.

(h) The storage of records in orderly filing systems designed to make records conveniently accessible for use.

18.1288 Inspection or inventory of records.

Sec. 288. A state agency shall permit the department or the secretary of state, upon request, to inspect or inventory records in the custody of the agency.

18.1289 Records of archival value; listings of records due for disposal; report; notice of destruction or transfer of record; action to recover records; temporary restraining order.

Sec. 289. (1) In reviewing a draft retention and disposal schedule, the secretary of state shall determine whether any records listed on the schedule possesses archival value and may disapprove or may require modification of a schedule which proposes the destruction of a record possessing archival value.

(2) In cooperation with the archives division of the bureau of history in the department of state, the department shall periodically provide the department of state with listings of all records in the custody of the records center that are due for disposal before releasing those records for

destruction. Within 30 days after receiving these lists, the department of state shall report in writing to the records center regarding each list submitted, and may disapprove the destruction of any or all of the records listed. Any record which is considered to potentially have archival value by the secretary of state shall not be destroyed or otherwise disposed of but shall be transferred to the department of state.

(3) The department shall notify the state agency that created a record before its destruction or transfer to the state archives.

(4) The secretary of state may initiate legal action in circuit court to recover records possessing archival value when there is reason to believe that records have been improperly or unlawfully removed from state custody. Upon initiation of any action, the court may issue a temporary restraining order preventing the sale, transfer, or destruction of a record pending the decision of the court.

18.1292 Responsibilities of secretary of state.

Sec. 292. This act shall not be construed to prevent the secretary of state from exercising his or her responsibilities to ensure that records possessing historical value are protected and preserved in the state archives.

APPENDIX 3

PROPOSED RULES

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Part 1234

RIN 3095-AA58

Electronic Mail Systems

Thursday, March 24, 1994

AGENCY: National Archives and Records Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: The National Archives and Records Administration (NARA) is developing standards for management of Federal records created or received on electronic mail (E-mail) systems. These standards will be published as an appendix to regulations on electronic records in 36 CFR part 1234 and will supplement the NARA instructional guide, Managing Electronic Records. The standards would affect all Federal agencies.

DATES: Comments must be submitted by June 22, 1994.

ADDRESSES: Submit comments to Director, Records Appraisal and Disposition Division, National Archives at College Park, 8601 Adelphi Road, College Park, MD 20740-6001. Comments may be faxed to (301) 713-6852 or (301) 713-6850. Comments also may be sent to the following Internet address: ooa(a)cu.nih.gov

FOR FURTHER INFORMATION CONTACT: James J. Hastings, Director, Records Appraisal and Disposition Division, (301) 713-7096.

SUPPLEMENTARY INFORMATION:

Background

NARA has been working with components of the Executive Office of the President to develop specific records management policies and procedures for their E-mail records, pursuant to court

rulings in Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993). Because nearly all Federal agencies now use -mail, NARA recognizes that there also is the need for Government-wide standards on managing E-mail records. Consequently, NARA has drafted the following standards for all Federal government agencies on the proper means of identifying, maintaining, and disposing of Federal records created or received on an E-mail system. These standards reflect the legal definition of records in the Federal Records Act (44 U.S.C. 3301) and supplement NARA records management guidance previously issued under the law (44 U.S.C. 2904 and 2905; 36 CFR Chapter XII Subchapter B).

When finalized, these general standards will be used by Federal agencies to develop specific recordkeeping policies, procedures, and requirements to fulfill their obligations under the statute and regulations. Agencies that already have specific E-mail recordkeeping policies, procedures, and requirements in place should review them to ensure that they are consistent with these general NARA standards. In addition, agencies are encouraged to submit their directives implementing these standards to NARA for review and comment.

NARA has already issued regulations on electronic recordkeeping (36 CFR part 1234), and an instructional guide, Managing Electronic Records. In addition, General Records Schedules 20, Electronic Records, and 23, "Records Common to Most Offices," provide disposition authority for some types of records created or received in electronic form. These proposed new E-mail standards will expand this general guidance on managing electronic records.

In developing these standards NARA has recognized that agency E-mail systems have different characteristics and agencies have differing recordkeeping requirements. Some agencies may find that currently it is only feasible to maintain E-mail records on paper. Other agencies may find that currently it is possible and desirable to maintain E-mail records electronically. While NARA recognizes the practical considerations that may preclude electronic maintenance of E-mail records at this time, agencies are encouraged to consider the benefits for future use of electronically maintaining those records that are likely to be permanently valuable. These benefits include the ease of searching and manipulating electronic records, the availability of electronic records to many users simultaneously, and efficient storage. Agencies that are not now technologically able to maintain E-mail records electronically should consider electronic maintenance when updating or designing systems. This is particularly important for E-mail records that are likely to be appraised as permanent by NARA, such as records of cabinet members or other high level officials. The recent decision of the Office of Administration of the Executive Office of the President to begin maintaining its E-mail records in an electronic recordkeeping system is an example of an agency updating a system that contains permanently valuable records. NARA encourages other agencies to consider the value of electronic maintenance of E- mail records, and it will assist agencies in evaluating the desirability of an electronic format.

Agencies must also determine how to manage under the Federal Records Act the transmission and receipt information in the E-mail system. The agency should decide how to maintain the transmission and receipt information either as part of the E-mail communication or as a separate record linked to the communication. Because printouts may not contain necessary transmission and receipt information, the Court of Appeals in Armstrong held that to comply with the Federal Records Act, certain transmission and receipt information must be preserved along with all E-mail messages that are Federal records.

NARA will work closely with the agencies in the implementation of the final standards and will review, upon request, agency directives concerning E-mail records. In addition, NARA records management evaluations of agencies will include review and analysis of the management of E-mail records.

Comments

In soliciting comments from Federal agencies and the public, NARA particularly requests that agencies address the practical effects of compliance with these standards. Specifically, NARA is interested in how agencies manage documents with transmission and receipt information and handle the other types of documents, such as calendars, that are frequently part of electronic communications systems. In addition, *13907 NARA would like to learn from agencies if they intend to maintain E-mail records electronically now or in the future, and how they would monitor the E-mail system for compliance with recordkeeping obligations. Agencies are also encouraged to comment on any other aspect of this guidance, or to request further information or clarification. NARA encourages those submitting comments to include examples of solutions to electronic recordkeeping problems that may be of assistance to other agencies in developing recordkeeping requirements and programs for these systems.

List of Subjects in 36 CFR Part 1234

Archives and records; Computer technology.

For the reasons set forth in the preamble, NARA proposes to amend part 1234 of chapter XII of the Code of Federal Regulations as follows:

PART 1234--ELECTRONIC RECORDS MANAGEMENT

1. The authority citation for part 1234 continues to read as follows:

Authority: 44 U.S.C. 2904, 3101, 3102, and 3105.

2. Appendix A is added to part 1234 as follows:

Appendix A to Part 1234--Managing Federal Records on Electronic Mail Systems

1. Introduction

These standards cover documentary materials created or received by electronic mail (E-mail) systems in Federal agencies. Because of the widespread use of E- mail for conducting agency business, many E-mail documents meet the definition of a "record" under the Federal Records Act (44 U.S.C. chapters 29, 31, and 33).

The definition of "record" in the Federal Records Act encompasses documentary materials in all media. The Act requires the National Archives and Records Administration (NARA) to issue records management standards for all Federal agencies (44 U.S.C. 2094 and 2905). NARA has issued records management regulations on electronic records (36 CFR part 1234), guidance on electronic recordkeeping entitled Managing Electronic Records (1992), and General Records Schedules 20, Electronic Records, and 23, Records Common to Most Offices. The standards being proposed here expand the existing issuances and apply established records management and archival principles and techniques to records created or received on E-mail systems. They provide instructions to program officials, information specialists, records managers, and other E-mail users on the proper means of identifying, maintaining, and disposing of E-mail records.

2. Definitions

The following definitions of terms used in these standards are included for clarity and convenience. We have provided citations to those that are based on definitions in the Federal Records Act or existing NARA guidance or regulations.

Electronic Mail System. A computer application used to create, receive, and transmit messages and other documents or create calendars that can be used by multiple staff members. Excluded from this definition are file transfer utilities (software that transmits files between users but does not retain any transmission data), data systems used to collect and process data that have been organized into data files or data bases on either personal computers or mainframe computers, and word processing documents not transmitted on an E-mail system.

Electronic Record. Numeric, graphic, text, and any other information recorded on any medium that can be read by using a computer and satisfies the definition of a Federal record in 44 U.S.C. 3301. This includes, but is not limited to, both on-line storage and off-line media such as tapes, disks, and optical disks. (36 CFR 1234.1)

Electronic Mail Message. A document created or received on an E-mail system including brief notes, more formal or substantive narrative documents, and any attachments, such as word processing documents, which may be transmitted with the message.

General Records Schedules. Schedules authorizing the disposal, after the lapse of specified periods of time, of records common to several or all agencies if such records will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their further preservation by the United States Government. (44 U.S.C. 3303a(d))

Nonrecord Material. Materials that do not meet the statutory definition of records (44 U.S.C. 3301), i.e., they were not created or received under Federal law or in connection with Government business, or they are not preserved or considered appropriate for preservation because they lack evidence of agency activities or information of value. In addition, the statute specifically excludes from coverage extra copies of documents kept only for convenience of reference, stocks of publications and processed documents, and library or museum materials intended solely for reference or exhibit. (36 CFR 1220.14, 1222.34(d)) Nonrecord materials also include personal papers and materials.

Permanent Record. Any Federal record that NARA has determined to have sufficient value to warrant its continued preservation by the National Archives and Records Administration. (36 CFR 1220.14)

Preserved Record. Documentary materials that have been deliberately filed, stored, or otherwise systematically maintained as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them. This applies to documentary materials in a file or other storage system, including electronic files and systems, and those temporarily removed from the files or other storage system.

Records. 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 under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other

activities of the Government or because of the informational value of data in them. (44 U.S.C. 3301)

Recordkeeping System. A system for collecting, organizing, and storing records in order to facilitate their preservation, retrieval, use, and disposition and to fulfill recordkeeping requirements.

Records Management. The planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations. (36 CFR 1220.14)

Records Schedule. A document describing, providing instructions for, and approving the disposition of specified Federal records. It consists of one of the following:
(a) An SF 115, Request for Records Disposition Authority, which NARA has approved to authorize the disposition of Federal records;
(b) A General Records Schedule (GRS) issued by NARA; or
(c) A printed agency manual or directive containing the records descriptions and disposition instructions approved by NARA on one or more SF 115s or issued by NARA in the GRS.

(36 CFR 1220.14)

Security Backup. Copy of a record in any medium created to provide a means of ensuring retention and access in the event the original record is destroyed, inaccessible, or corrupted.

System Backup. Copy on off-line storage media of software and data stored on direct access storage devices in a computer system used to recreate a system and its data in case of unintentional loss of data or software.

Temporary Record. Any Federal record that the Archivist of the United States has determined to have insufficient value to warrant its preservation by the National Archives and Records Administration. (36 CFR 1220.14)

Transmission and Receipt Data.
(a) Transmission Data. Information in E-mail systems regarding the identities of sender and addressee(s), and the date and time messages were sent.
(b) Receipt Data. Information in E-mail systems regarding date and time of receipt of a message, and/or acknowledgment of receipt or access by addressee(s).

3. Records Management Responsibilities

Under the Federal Records Act, agencies' records management responsibilities include *13908 creating and maintaining adequate and proper Federal records, regardless of the medium in which the records are created or received, and scheduling the disposition of records no longer needed for conduct of Government business (44 U.S.C. Chapters 31 and 33). Agencies are legally obligated to ensure creation and maintenance, for an appropriate period, of "records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency * * *." (44 U.S.C. 3101). Because E-mail is often used to conduct Government business, it is critical that agencies take steps to ensure that records created or received on E-mail systems are managed according to the law. Accordingly, agencies must develop and implement an agency-wide program for the management of all Federal records created or received on electronic communications systems (36 CFR 1234.10(a)). All features of E-mail systems

(including messages, calendars, directories, distribution lists, attachments such as word processing documents, messages sent or received over external communications systems) must be evaluated to identify documentary materials that satisfy the definition of Federal records. An agency's records management program should address all Federal records in the E-mail system. The agency should also incorporate procedures that ensure recordkeeping and disposition requirements are met before approving a new E-mail system or enhancements to an existing system (36 CFR 1234.10(d)).

4. What Are Federal Records?

The definition of "records" in the Federal Records Act specifies the criteria under which documentary materials are to be considered Federal records. The phrase "regardless of physical form or characteristics" means that the records may be paper, film, disk, or any other physical type or form; and that the method used to record information may be manual, mechanical, photographic, electronic, or any combination of these or other technologies.

Whatever the medium, the statute establishes two conditions that must be met for a document to be a record: (1) The document is made or received by agency personnel under Federal law or in connection with the transaction of public business, and (2) it is preserved or appropriate for preservation. Documentary materials, in any physical form, are Federal records when they meet both tests. The word "preserved" means the deliberate act of filing, storing, or otherwise systematically maintaining material as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in it. "Appropriate for preservation" means documentary materials made or received by an agency which in its judgment should be filed, stored, or otherwise systematically maintained by the agency because of the evidence of agency activities or information they contain, even though the materials may not be covered by its current filing or maintenance procedures (36 CFR 1222.12). Agencies must apply carefully reasoned judgment in deciding when E-mail documents are "appropriate for preservation" and in exercising this judgment, must consider their obligation to create and maintain records that adequately document their policies, programs, and activities under 44 U.S.C. 3101 (see previous section entitled Records Management Responsibilities).

5. Record Status of E-Mail Messages

It is critical that all E-mail users understand the concept of Federal records and that agencies provide sufficient information for users to distinguish Federal records from nonrecord materials. E-mail messages are Federal records when they meet the criteria specified in the statutory definition, i.e., they are made or received under Federal law or in the conduct of agency business, and they are preserved or are appropriate for preservation as evidence of the agency's organization, functions, policies, decisions, procedures, operations, or other activities, or contain information of value. Since E-mail systems transmit a variety of messages, not all E-mail documents will meet the statutory definition of records.

Some categories of E-mail messages or documents that would satisfy the definition of record are those:

1. Containing information developed in preparing position papers, reports, and studies;
2. Reflecting official actions taken in the course of conducting agency business;
3. Conveying information on agency programs, policies, decisions, and essential transactions;
4. Conveying statements of policy or the rationale for official decisions or actions;
5. Documenting oral exchanges, such as meetings or telephone conversations, during which policy was discussed or formulated or other agency activities were planned, discussed, or transacted.

E-mail messages are not considered nonrecord materials merely because the information they contain may also be available elsewhere on paper or in electronic files. Separate E-mail messages that contain the same information on Government activities may differ in important respects and, thus, are not automatically nonrecord materials. In addition, multiple copies of messages may all be records if they are used for different purposes in the conduct of official business or filed in different files. In other words, if more than one office takes action or otherwise uses copies of a message, copies would be records in each of those offices.

To assist in the process of determining record status, NARA recommends that agencies consider designing into their current or future E-mail systems a feature that helps users to identify records. For example, agencies may want their systems to allow users to tag messages as record or nonrecord or to automatically default to the determination that system-produced documents are records, requiring users to take additional steps to mark a document as nonrecord. Another option would be to develop a system that analyzes the contents of a message according to specified rules in order to prompt the user with a suggested categorization.

For further information on making these distinctions between records and nonrecord materials, see Personal Papers of Executive Branch Officials: A Management Guide, published by NARA in 1992.

6. Transmission and Receipt Data

Besides the text of messages, E-mail systems may provide transmission and receipt data. In some systems, transmission data is part of the message. In other systems some transmission data is in a separate message. Generally, receipt data is separate from the messages.

E-mail messages require some transmission data to be intelligible and to understand their context. It is essential that necessary transmission data is preserved with all E-mail records. Many E-mail systems automatically capture with an E-mail message the identity of the sender and the addressee(s) and the date the message was sent. Just as with a paper record, this transmission data is necessary for an E-mail record to be complete and understandable. Agencies should determine if any other E-mail transmission data is needed for purposes of adequacy of documentation. Both the message and the related transmission data are Federal records and must be maintained in recordkeeping systems for the same retention period. (See section entitled Maintenance of Federal Records Created by an E-mail System, below.)

E-mail systems may provide users with the ability to request acknowledgments or receipts showing that an E-mail message reached the mailbox or inbox of each addressee. E-mail systems may also provide, upon request, information about or acknowledgments of E-mail messages that were received or viewed by the addressee. Agency instructions to E-mail system users should specify when to request such receipts or acknowledgments. Users should request receipt data when it is needed for adequate and proper documentation of agency activities, especially when it is necessary to confirm when an addressee has received or viewed a message. Agencies should maintain such receipts and acknowledgments associated with Federal records for the same period as the electronic message to which they refer.

7. Draft Documents

Agency staff may use the E-mail system to circulate draft documents created on either the E-mail system or a separate word processing or other system. Preliminary drafts must be maintained for purposes of adequate and proper documentation if (1) they contain unique information, such as annotations or comments, that helps explain the formulation or execution of agency policies, decisions, actions, or responsibilities, and (2) they were circulated or made available to employees

other than the creator for the purpose of approval, comment, action, recommendation, follow-up, or to keep staff informed about agency business.

Because drafts in electronic form may be Federal records, the record status of *13909 electronically created drafts that are transmitted as part of, or as attachments to, E-mail messages must be evaluated as changes are made. Successive drafts containing substantive revisions may be Federal records; drafts containing only minor changes are less likely to qualify as records. If the draft qualifies as a record, the agency should save a copy before the draft is deleted or altered.

8. Directories and Distribution Lists

Some electronic communication systems identify users by codes or nicknames. Some identify the recipients of a communication only by the name of a distribution list. Directories or distribution lists linking such shorthand names or codes with the names of users must be retained to ensure identification of the sender and addressee(s) of messages that are records.

9. Calendars

An E-mail system may provide calendars and task lists for users. Agencies that have such features on their E-mail system should advise users that calendars, indexes of events, and task lists are Federal records if they meet the criteria specified by law. Calendars, whether individual or shared, despite the level of the individual to whom they relate, may be Federal records or they may be personal materials. The NARA publication Personal Papers of Executive Branch Officials: a Management Guide provides guidance on the record status of calendars. That publication notes that the Freedom of Information Act case law regarding "agency records" is the most pertinent guidance for deciding whether calendars are Federal records.

Most calendars and related documents that are Federal records are disposable under General Records Schedule 23, Item 5. Federal record calendars that relate to the activities of high-level officials, however, must be specifically scheduled for disposition to allow NARA to appraise their value for future use. GRS 23 provides guidance on identifying high-level officials. Users may delete calendars that are nonrecord materials at their discretion.

10. External Communications Systems

Some Government agencies use electronic communications systems external to the Government, such as the Internet or other commercial network services. These communications systems have established protocols that are not subject to agency modification. However, the use of external communications systems which are neither owned nor controlled by the agency does not alter in any way the agency's obligation under the Federal Records Act. Agencies must ensure that Federal records sent or received on these systems are preserved and that reasonable steps are taken to capture available transmission and receipt data needed by the agency. As is the case with any Federal record, those that are communicated to or received from persons outside the agency or Government should include the identity of the outside senders or addressees.

11. Maintenance of Federal Records Created by an E-Mail System

Agencies must ensure that all E-mail records are maintained in appropriate recordkeeping systems. Such recordkeeping systems must meet the following requirements: (1) Permit easy and timely retrieval; (2) facilitate the distinction between record and nonrecord materials (if such distinctions were not made previously); (3) retain the records in a usable format until their authorized disposition date; and (4) permit transfer of permanent records to the National Archives and Records Administration (see 36 CFR 1228.188, 36 CFR 1234.28(a)).

Agencies should consider the advantages of maintaining their records electronically. An electronic system may be more easily searched and manipulated than records in paper files. An electronic file may also be available for simultaneous use by multiple staff members and may provide a more efficient method to store records. In addition, future use of permanently valuable E-mail records for agencies and for historical research could be enhanced by storing them electronically.

System backup tapes normally are not suitable for recordkeeping purposes because they are merely mirrors of storage disks with data and documents scattered throughout as they are on the disks themselves. They are meant to provide only a means of recreating a system and its data in case of emergency. Agencies should have a separate system that is appropriate for recordkeeping. In all cases when records are maintained electronically, agencies should provide for regular backups to guard against system failures or loss through inadvertent erasures (36 CFR 1234.30).

A. Maintenance on the E-Mail System

E-mail systems are generally designed for convenient and efficient agency communications and not as a system for storing agency records for their entire life cycle. To maintain instantaneous communications capability without increasing hardware capacity, these systems often limit the number of messages that can accumulate on the system and may automatically delete messages after a short period. If an E-mail system is not designed for or adaptable to use as a recordkeeping system, E-mail records must be copied or moved to an appropriate recordkeeping system for maintenance and disposition.

B. Maintenance in an Electronic Recordkeeping System Other Than the E-Mail System

Some agencies store their E-mail records on an electronic system separate from the E-mail system. Agencies that maintain their records in this way must move or copy all E-mail records to the electronic recordkeeping system. The recordkeeping system must allow segregation of permanent and temporary records and have sufficient capacity to store records for their authorized retention periods (36 CFR 1234.10).

Agencies may retain records from E-mail systems in an off-line electronic storage format (such as optical disk or magnetic tape) that meets the requirements described above (36 CFR 1234.28(a)). Factors to be considered in selecting a storage medium or converting from one medium to another are identified in 36 CFR 1234.28(b)). Agencies may use optical disk systems for the storage and retrieval of permanent records while the records remain in the agency's legal custody, but NARA currently does not accession permanent records stored on optical disks. Permanent records stored on optical disk must be converted to a medium acceptable to NARA at the time of transfer to NARA's legal custody, as specified in 36 CFR 1228.188.

C. Maintenance in Paper Recordkeeping Systems

Agencies that do not have the technological capability to maintain E- mail records in an electronic recordkeeping system must print their E-mail records. In such instances, agencies must also print related transmission and receipt data and maintain it together with the printed communications according to the same procedures as other paper records.

Other agencies may have the technological capability to maintain E-mail records electronically but, nevertheless, determine that current agency use is best served by also printing them on to paper. While it is the agency's responsibility to determine whether its current needs are best served by one or both formats, an electronic format may be in the best interest of future use. Accordingly, agencies must schedule and NARA must appraise both formats before E-mail records are deleted

from the electronic recordkeeping system. This ensures the opportunity for NARA to determine the best format for the preservation of records of potential historical or other research value. (See the section below for instructions on the disposition of records.)

Any agencies that maintain E-mail records only on paper even though they have the technology to maintain them electronically are strongly encouraged to consider the benefits of an electronic format. NARA will assist such agencies in evaluating the advantages of maintaining E-mail records electronically.

Those agencies that have no plans for implementing an electronic recordkeeping system are also encouraged to consider this format when their current systems are redesigned or replaced.

12. Disposition of E-Mail Records

E-mail records may not be deleted or otherwise disposed of without prior disposition authority from NARA (44 U.S.C. 3303a). This applies to all versions of E-mail records, including the original record that is on the E-mail system and all copies that have been forwarded to a recordkeeping system. NARA authorizes records disposition through two mechanisms; issuance of the General Records Schedules developed by NARA for temporary records common to most or all Federal agencies, and approval of schedules developed by agencies for records unique to the agency. The authorization process employed by NARA involves appraisal, which is the determination of the historical or other value of the records including the most appropriate format for future use when the same information is *13910 captured in records on different physical formats.

Electronic records must be scheduled even if the same information is available in another medium, including paper printouts of electronically stored records. Information in electronic records may have greater research utility than similar information stored on another medium because it is easier to access and manipulate. Also, it may be more efficient to capture transmission and receipt data in electronic systems. Thus, the disposition of electronic records may differ from the disposition of paper records with the same information. The disposition of all records, regardless of medium (paper, magnetic, microform, etc.) must be in accordance with an approved schedule.

A. Records on the E-Mail System

If an agency has an E-mail system that is designed for or is adaptable for use as an agency recordkeeping system as well as a communications system, users must be instructed on the required steps to be taken to ensure that the record on the user's screen or in his or her mailbox is forwarded to the recordkeeping feature of the system. If, on the other hand, an agency has an E-mail system that cannot also serve as a recordkeeping system, users should be instructed to forward all records from the E-mail system to an appropriate recordkeeping system to ensure that the records are preserved and the E-mail system continues to operate efficiently. When the necessary steps have been taken to preserve the record by using the recordkeeping feature or by forwarding it to an appropriate recordkeeping system, the identical version that remains on the user's screen or in the user's mailbox has no continuing value to the agency or for future research. Therefore, NARA considers the version of the record on the "live" E-mail system appropriate for deletion after it has been preserved on a recordkeeping system along with all appropriate transmission data. NARA will revise General Records Schedule 23 to authorize deletion of the copy of the record on the "live" E-mail system after the necessary preservation steps have been taken. This general authorization will apply only to the E-mail record on the "live" E-mail system. There is no formal authorization at this time for agencies to delete E-mail records from the E-mail system if they are stored only on the system itself or if they have been transferred to an electronic

recordkeeping system. The revised General Records Schedule will extend the authorization to these categories of records.

B. Records in Recordkeeping Systems

Because E-mail records must be maintained for varying retention periods and, when appraised as permanent, transferred to NARA, it is not appropriate for NARA to issue a General Records Schedule that pertains to all E-mail records in recordkeeping systems. Consequently, those E-mail records that have been incorporated into a recordkeeping system that includes records from other sources or systems must be managed in accordance with the records schedule of the recordkeeping system in which they are filed. Alternatively, those E-mail records that are maintained as a separate system must be separately scheduled. Agencies must develop and submit to NARA schedules that identify the categories of E-mail records in their systems if they are maintained separately so that NARA can appraise the records and provide appropriate disposition authority.

As indicated previously, it is established NARA policy that agencies that maintain records in paper and electronic formats must receive the approval of NARA before disposing of either format. This will ensure that future use considerations enter into determinations of the most appropriate format for the preservation of permanent records.

13. Security of E-Mail Records

Agencies must take adequate measures to protect records in E-mail systems (36 CFR 1234.26). Security measures must protect E-mail records from unauthorized alterations or deletions. Agencies should regularly back up messages stored on-line to off-line media to guard against system failures or inadvertent erasures.

14. Training Employees

Agencies must ensure that all employees are familiar with the legal requirements for creation, maintenance, and disposition of records on E-mail systems. The agency's directives must provide sufficient guidance so that agency personnel are familiar with the agency's specific recordkeeping requirements and can distinguish between records and nonrecord materials on E- mail systems (36 CFR 1222.30). Because Federal records may be created using an E-mail system, each agency using an E-mail system should provide records management training and guidance for all employees which includes criteria for determining which E-mail messages are records. As indicated above, it may be useful for agencies to have designed into their E-mail systems a feature that helps users to identify Federal records.

15. Monitoring Implementation of Recordkeeping Guidance for the E-Mail System

Agencies are responsible for monitoring the implementation of records management guidance to ensure that E-mail users are accurately identifying records and properly maintaining them. Each agency must ensure that the implementation of directives concerning records on its E-mail system is carried out by reviewing the systems periodically for conformance to established agency procedures. These reviews should consist of auditing or reviewing representative samples of all electronic communications, conducting periodic staff interviews, and internal records management evaluations. The purpose of these reviews is to ensure that E-mail users properly determine record status and that record messages are being properly maintained. These reviews would determine whether permanent and temporary records are segregable and schedules are being implemented properly. Such reviews should be used to correct errors when they are found, and to evaluate, clarify, and update agency recordkeeping directives, disposition schedules, and training for agency staff (36 CFR 1234.10(l)). Reports concerning the results of the reviews should be made available

to NARA upon request and when it conducts evaluations of the agency's records management program.

16. Conclusion

E-mail systems provide unprecedented communications convenience. However, agencies must take the necessary measures to ensure that there is no diminution of their records resulting from the use of E-mail systems. E-mail systems have become important tools for the transmission of substantive information, and, therefore, they are used to create Federal records. Agencies must take special care that employees understand their responsibilities when using E-mail to ensure the adequate creation and proper maintenance and disposition of Federal records.

As specified in 44 U.S.C. 3102, NARA and the agencies shall cooperate in the implementation of NARA standards. Agencies should amend their recordkeeping policies and procedures where necessary to meet these standards. NARA will assist agencies in implementing these standards by reviewing agency directives concerning E-mail and by participating in agency considerations of maintaining permanent E-mail records electronically. NARA and the agencies will work together to ensure that recordkeeping policies and programs for E- mail records serve the needs of the agencies and the needs of future researchers.

Dated: March 18, 1994.

Trudy Huskamp Peterson,

Acting Archivist of the United States.

APPENDIX 4a

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July 28, 1994

Kent D. Syverud
Executive Secretary
Michigan Law Revision Commission
P.O. Box 30036
Lansing, MI 48909-7536

Re: Public Access to Electronic Mail

Dear Professor Syverud,

We are very pleased that the Commission is considering the need to revise and clarify the Michigan Freedom of Information Act and that it has requested the University's input in its review. Such a revision is needed and is of increasing importance to State entities trying to fulfill the intent of the law yet anxious to preserve the privacy of electronic communications.

In such a review it would be easy to focus solely on the technology, specifically electronic mail, and in doing so to make recommended changes in language or concepts based on that technology alone. To do this, however, would be an error with both negative short and long term implications. A focus just on the need not to disclose electronic mail would, in the short term, divert attention to only a part of the problem that universities and other institutions are experiencing in implementing the current Michigan FOIA. In the long term, we predict that such a narrow focus would result in yet other reviews when electronic technology advances further and inevitably introduces yet one more variation in the way people transport, store and manage information.

In the following paragraphs, therefore, we will focus not only on the importance of maintaining electronic communication in the modern university, unchilled by threats of disclosure, but also on general defects in the current Michigan FOIA. We will then recommend changes to the law.

The Importance of Open Communications at Universities and Colleges

The mission of a public body such as a university or college requires that there be unhampered free speech in all forms. Such open and free flowing communication is important in order to enable the creation of concepts and for the training of minds in the

processing and synthesis of information. Open communication is important for facilitating different forms of expression, for the exchange of ideas that are only partially formed as well as for those that are completed and clear in their expression. Open communication in a variety of forms is also important in creating the sense of community within universities and colleges, a condition that has been found to enhance learning, discovery, and teaching exchanges.

If a FOIA can be interpreted, due to unclear and overly broad language, to allow access to information about individuals and about the expressions, ideas and beliefs of faculty, staff and students, then achieving the balance between privacy and the public's right to know seems impossible. While it can be argued that the business of a university is the teaching and learning that goes on within that institution, the central intent of FOIA is not served by a disclosure of the informal communications between teachers and learners. Nor, for that matter, is it served by disclosure of the casual exchanges between administrators. It is served by disclosures that contain meaningful content as documentation of the actions and decisions of the institution in doing its business.

Electronic Communications: The Balance between First Amendment and FOIA

Electronic communications serve an important and critical function within universities and colleges. They connect students, faculty and staff to each other. They provide the channels for the expression of ideas and for the formation of concepts. They facilitate the flow of information of all types so that the community can do its work. Through connectedness to each other within a purposeful community, through freedom of speech and the exercise of reasoned discourse, students, faculty, and staff achieve the work of a university. Policies and practices that serve to diminish these processes serve also to undermine the institution's own mission.

Electronic communications are widely used within and between educational institutions as a sampling from the University of Michigan illustrates. Electronic mail and electronic conferencing, two of the major communication vehicles by which colleagues form and exchange ideas, share information, and interact socially, are used enormously at the University of Michigan. For example, on one of the existing major mail systems (approximately 30 different systems exist) approximately 1,000,000 messages are exchanged per month. One of the University's schools estimates it sends and receives 2,000 messages per week and approximately 43,000 messages are kept on its machines by faculty, staff and students. The mail

servers on the University's Medical Campus support approximately 100,000 messages per week between 2,500-3,400 employees. One of the University's colleges has approximately 7,500 users and delivers 14,000 to 16,000 messages per week day to local users and approximately 8,000 per day off the campus. The college estimates its per monthly message traffic to be between 330,000 and 350,000 messages.

This is an extensive exchange of information and is only a sampling from a community of 80,000 members that maintains this level of exchange over 8-10 months of each year. Technology has made this level of communication possible and has enabled universities to better achieve their missions.

But are these exchanges records of the agency? Electronic mail is not unlike a telephone call or the street corner on which face-to-face communications are exchanged. Electronic mail should therefore be afforded the privacy protections that are already afforded such other forms of communication.

Certainly, the central purpose of FOIA would not be served by categorizing such electronic transmissions as documentation of the agency's actions, or by identifying them as records. They clearly are not deliberately filed, stored, or otherwise systematically maintained as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the University.

To define electronic communication as a record of the agency simply because it passes over or sits on a computer system of the agency, and to consider it therefore potentially disclosable under FOIA, would be to violate seriously the First Amendment rights of the vast majority of individuals within that body. For an educational agency such as a university or college, such an over-sweeping judgment would diminish that agency's ability to achieve its mission.

Lack of Clarity and Overly Broad Language

The Michigan FOIA requires changes not only to protect electronic communications from disclosure, but also because the central purpose of its original intent is often missed when agencies and individuals strive to interpret it. The intent of the federal FOIA and the state FOIA's that followed was "to ensure that the Government's activities be opened to the sharp eye of public scrutiny...". Department of Justice v Reporters Comm'n for Freedom of the Press, 489 US 749, 774 (1989). It is this central purpose

that must be reinforced by whatever revisions are made and by the way in which the revisions guide agencies in their interpretations of the Act. With this goal in mind, "writing" and "public record" need to be defined more clearly in the Act.

"Writing"

In defining "writing", the authors of the Michigan FOIA foresaw the emergence of new technology. They therefore attempted to address the different forms that a writing could take, including magnetic tapes, microfilm, discs and "other means of recording or retaining meaningful content." They did not go far enough in defining a writing, however, because they failed to emphasize the most critical element: that a writing be intended to document the actions of the agency.

FOIA's authors appear to have been so intent on ensuring that agencies recognize that some writings could contain record information and therefore be candidates for disclosure under the Act, that they indirectly encouraged an overly broad interpretation of the Act. To be covered by the Act a writing ought to serve the central purpose of the Act by containing valuable information about the actions of the agency in the performance of an official function. An interpretation that ignores the Act's central purpose results in disclosure of information that is only peripheral or totally unrelated to an agency's actions and that may dangerously impinge on the privacy rights of individuals within the agency and those of private citizens.

"Public record"

The Act also fails to define "public record" with sufficient clarity to fulfill the purpose of the Act. The current language is so broad that it does not recognize that different agencies need to keep different records by virtue of their differing natures, not all of which should be disclosed to any member of the public. It also fails to recognize the differences between records that contain adequate and proper documentation of an organization's functions, policies, and decisions, and those that focus not at all on agency action but are simply retained by the agency.

The Michigan Court of Appeals recognized this shortcoming when it said: "It is evident that there is a tendency to interpret the FOIA as a freedom of public records act. When a statute is so broad that it makes all information available to anyone for any purpose, the court has an obligation to narrow its scope by judicial

interpretation. Kestenbaum v Michigan State University, 97 Mich App 5, 23 (1980).

The National Archives and Records Administration (NARA) provides a helpful way of looking at records. Its proposed regulations, which are directed in part to preserving records for public review, recognize that different agencies have different record keeping requirements. They define records as documents, regardless of physical form or characteristics, that 1) are made or received by agency personnel under federal law or in connection with the transaction of public business and 2) are deliberately filed, stored, or systematically maintained by the agency to evidence its function, policies, decisions, procedures, operations or other activities. See, 6 CFR Part 13234. They further distinguish between temporary and permanent records for management purposes.

NARA's proposed regulations establish when a record is significant. For example, a creator's specific act to preserve a document because of its importance as a documentary statement of an action, decision, or policy is critical to defining the document as a record.

The specificity of the NARA model provides a useful guide for revision of the Michigan FOIA where similar specificity is needed. A change that focuses on the central purpose of the Act is necessary or those trying to respond to Michigan FOIA requests will continue to drift from the central purpose for which the law was enacted. They will prepare and disclose material that is not a record of the agency. They will disclose information such as electronic communications between individuals that exists within the agency by virtue of flowing over agency machines, but which in fact have no documentary value regarding the agency's policies, functions or decisions.

The tightening of the definitions of "public record" and "writing" is needed because without such changes interpretations of the applicability of the Michigan FOIA will continue to be overly broad in scope. Because the definition of "public body" ("Any other body which is created by state or local authority or which is primarily funded by or through state or local authority," PA 1976, No. 442, Sec 2) includes bodies like the University that have only an indirect effect on the citizenry of the State, the Act can be used

to gain access to communications of students, faculty and staff that are none of the public's business.[1]

When the purpose of an agency such as the University is not to govern or regulate the public, the public's right to know is not the same. When an agency's mission is teaching, learning and research and its day-to-day operations are not proscribed or directed by the State, not all of those operations or the activities of its faculty, staff and students are relevant to and within the scope of the public's right to know.

Misuses of the Act by Those Seeking Information

The lack of emphasis in the Act of its central purpose encourages misuse of the Act by people seeking information unrelated to governmental agency action. When FOIA is used to gain access to information about individuals and not "to open agency action to the light of public scrutiny", the Act is being misused. See, Department of Air Force v Rose, 425 US 352, 372 (1976). Responses to such requests increasingly cloud the Act's central purpose because each sets a precedence or mind set for future responses by the agency, potentially leading the requester and the responding agency personnel further and further away from the Act's central purpose.

Universities have experienced FOIA requests from male prisoners asking for the names of all female students, from former employees asking for the contents of personal and personnel files of current employees, from citizens asking for the names of all individuals who participate in specific communication or social groups, from contractors seeking competitor information, and so on. Each of these requests cause time consuming deliberations and interpretations of the law, interpretations that balance on language that is overly broad and unclear. Responses to the requests become delayed because agencies need to seek additional opinions as to how to interpret such requests. Agency and institutional resources are unnecessarily and perhaps inappropriately used in trying to respond.

[1] Universities, colleges, and educational agencies, although created by the state or local authority, may not be primarily funded by the state or local authority and are not governed by the state to the same extent as other governmental agencies. Indeed, some universities receive very little state funding and are governed by independently elected boards. Their missions dictate the retention of different types of records than governmental agencies. Their operations require a level of openness and information exchange that could be seriously destroyed by an overly broad interpretation of FOIA.

Reflecting also on these misuses at the federal level, Cate, Fields and McBain write: "Today, a typical FOIA scenario is not, as (originally) envisioned by the Congress, the journalist who seeks information about the development of public policy which he will shortly publish for the edification of the electorate. Rather, it is the corporate lawyer seeking business secrets of a client's competitors; the felon attempting to learn who informed against him; the drug trafficker trying to evade the law.....the private litigant who, constrained by discovery limitations, turns to the FOIA to give him what a trial court will not." Fred H. Cate, D. Annette Fields, James K. McBain , *The Right to Privacy and the Public's Right to Know;* 46 Adm L Rev 41, 50 (1994).

While these misuses of the Act are not specifically tied to advances in technology, they will be exacerbated by those advances. Greater quantities of information are being stored electronically on public systems--information relating to private individuals as well as information that documents agency actions, policies and decisions. Confusions will increasing exist as requesters attempt to obtain both information that is deliberately created and/or stored as documentation of agency actions--("records"), as well as information that is simply retained on or passing through machines as means of transient communication or a function of system operations.

The potential speed of retrieval and the greater electronic search capabilities of computer systems will encourage wider and less targeted requests, known by some as fishing expeditions. They have already led to requests for specifically formatted or compiled records, requests that recognize the technological capabilities for handling information and that are not tied to the current existence of records or to their "record or non-record " status in terms of content. Such requests potentially escalate the cost of FOIA responses while a focus on the central purpose of the Act and its original intent is being diminished.

Recommendations

1. Clarify the definition of public records. What makes a writing in a public record should be whether it contains documentation as evidence of the organization, functions, or policies of the agency, and, further, whether it has been purposefully preserved.

2. Change the definition of a writing so that the decision about whether a document is appropriate for release is based on whether it was created or deliberately filed, stored or systematically maintained as evidence of the public body's policies, decisions or procedures

3. Exclude telephone transmissions and other electronic communications from the definition of "writing". Such transmissions by their nature are intended to be ephemeral and are not intended to document an agency action.

These recommendations are consistent with the principles articulated by the United States Supreme Court which said in regard to the federal FOIA: 1) whether disclosure of a private document is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny; 2) that a third party's request for information about a private citizen can reasonably be expected to invade that citizen's privacy; and 3) that when the request seeks no official information about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is unwarranted. United States Dept of Justice v Reporters Commn for Freedom of the Press, 489 US 749, 780 (1989).

Very truly yours,

Elsa Kircher Cole

Elsa Kircher Cole
General Counsel

EKC/lsb
cc: James J. Duderstadt, President

Proposed Amendment to the Freedom of Information Act, P.A. 1976, No. 442, §2

As used in this act:

(a) "Person" means an individual, corporation, partnership firm, organization, or association.

(b) "Public body" means:

(i) A State officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

(v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

(c) "Public record" means a writing ~~prepared, owned, used, in the possession of, or retained~~ **created or received** by a public body ~~in the performance of an official function, from the time it is created~~ **in connection with the transaction of public business and preserved by that public body as evidence of the organization, functions, policies, decisions, procedures, or operations of the public body.**

(d) "Non-public records" means materials that do not meet the definition of public records in subsection (c) above. In addition, it shall not include personal, informal communications, papers and materials.

(e) ~~(d)~~ "Unusual circumstances" means any 1 or a combination of the following, but only to the extent necessary for the proper processing of a request:

(i) The need to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records

pursuant to a single request.

(ii) The need to collect the requested public records from numerous field offices, facilities, or other establishments which are located apart from the particular office receiving or processing the request.

(f) ~~(e)~~ "Writing" means 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 **that have been created and deliberately filed, stored, or otherwise systematically maintained as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the public body. It shall not include telephone transmissions or any other kind of electronic communications.**

APPENDIX 4b

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

LANSING
MICHIGAN 48918

July 19, 1994

Kent D. Syverud, Executive Secretary
Michigan Law Revision Commission
Post Office Box 30036
Lansing, Michigan 48909-7536

Dear Mr. Syverud:

Your letter of June 1 has been transferred to this office for a response. I am very pleased that the Michigan Law Revision Commission is studying the issue of public access to electronic mail. The use of electronic recording technology, e.g. word processing, computer spread sheets, data bases, management systems, document imaging, computer based-modeling, geographical information systems, and particularly "E-mail" is growing rapidly in Michigan state government. The fact that "E-mail" is increasingly used as a means for inter-office communication on both administrative and policy matters highlights the importance of its management and preservation on a state government-wide basis. Also, the transient nature of electronic mail makes it a very difficult issue to deal with but also reinforces the need for action. If it is to be preserved, it must be addressed when systems are planned and implemented.

From an archives perspective, some state government and university electronic mail records will be worthy of permanent preservation while others may not. Appraisal for records of enduring value is essential. Probably the most widely known example of E-mail possessing long term value is its use by the National Security Council in the mid 1980's. It contributed significantly to a better understanding of the now commonly called "Iran-Contra Affair." In this instance, the electronic mail record system was of great importance for understanding current policy, oversight purposes, and investigative purposes. And, of course, these files will have value for historical research. However, even at a less dramatic level, it will be invaluable to future scholars who want to better understand the development of state government policies and their implementation. Furthermore, it should not be overlooked that E-mail documents a revolution in government structure. It is having a democratizing effect, e.g. promoting and encouraging collaboration by government staff in the decision making process. The organization of government is becoming more horizontal rather than vertical as in the past. As a result of E-mail, state government personnel and the citizens generally have an increased opportunity

to express their opinions and ideas. They have a more direct impact upon government actions and activities than ever before. This trend as reflected in state government electronic mail deserves permanent preservation in the State Archives.

Since the growing quantities of records with enduring value may be available only in electronic form in the future, methods need to be established for their identification and preservation. The simple physical preservation of electronic records is inadequate to meet archival needs. They need to be accessible and useable or they are not worth preserving. And if they are not preserved, tremendous gaps will exists in the documentation of state government. The gravity of the matter is illustrated by the fact that by the end of the century it is estimated that up to 98 percent of all new information will be created and stored in digital formats. Archives need to continue to identify records, regardless of physical form or characteristics, that provide evidence of the creation, organization, development, operation, functions, or effects of government agencies or that possess informational value.

The National Archives and Records Administration (NARA) is currently addressing this issue of electronic mail. In accordance with a Federal District Court ruling, NARA has recently prepared draft regulations for electronic mail systems in the federal government (Enclosure). These proposed federal government-wide standards on managing E-mail provide the authorized means of identifying, maintaining, and disposing of federal records created or received on an E-mail system. The standards, when approved, will be used by federal agencies to develop specific record keeping policies, procedures, and requirements to fulfill their obligations on federal law and regulations.

As for the state of Michigan, consideration may be given to establishing a state government-wide committee to consider legislation that would address the complex matter of electronic mail. From the archives perspective, as noted above, we are concerned that electronic mail with evidential and informational value is preserved. Our concern is with the contents of the record, not the recording technology. The committee may possibly include representatives of the legal community, press, Legislature, State Court Administrative Office, Department of the Attorney General, Office of the Auditor General, policy and program level staff from the Executive Branch, management information systems staff, state government records management program staff and the state archives staff. An outside consultant with an expertise in electronic mail may be considered as well. After legislation is enacted, the possibility of a committee for its implementation may be considered. Issues such as compatibility in hardware, software and operating systems; manuals; security; authenticity; auditability; confidentiality; accessibility; preservation; etc. would be among the issues addressed.

If electronic mail is defined as a record under Michigan's Freedom of Information Act (FOIA), the issue of public access would need to be addressed.

It seems access would be covered by FOIA unless it is amended. Generally speaking, archives encourage open access to records. If access restrictions are established, time frames for opening the information to researchers should be statutorily authorized. Implementation could then be accomplished through regulations.

I would be pleased to discuss this matter further. Thank you for this opportunity. It is not only an exceeding important issue for administrative, legal and audit purposes but also for the historical documentation of state government and for future scholars.

Sincerely,

David J. Johnson
State Archivist
State Archives

dle

Enclosure

APPENDIX 4c

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WESTERN MICHIGAN UNIVERSITY

July 1, 1994

Mr. Kent D. Syverud
Executive Director
Michigan Law Revision Commission
Hutchins Hall, U of M Law School
Ann Arbor, MI 48109-1215

Dear Mr. Syverud:

President Haenicke has asked me to respond to your letter concerning viewpoints on Public Access to Electronic mail. We are pleased to participate in discussion of this issue, and appreciate the opportunity you have made available to us.

Our position is that electronic mail is an informal means of communication, similar in nature to the use of the telephone, rather than the use of written correspondence. While e-mail is indeed text based, it is none-the-less primarily intended, and principally used, with a great deal of informality. In our view, the inclusion of e-mail in the Freedom of Information Act would then leave no logical reason for not also including telephone conversations. Conversely, because we can see no reason why telephone conversations should fall under the FOIA, so by extension there is no reason for e-mail to be so covered.

There are also several significant practical considerations for excluding e-mail from FOIA coverage. First, e-mail is easily modified once sent, thus its integrity as an official record would be highly suspect at best. Second, because of re-sending capabilities (which also includes the ability for modification) verification of authenticity with any level of certainty would be difficult at best. Third, if e-mail is to be available for FOIA, then it would need to be retrievable. While such retrievability is no doubt possible, it would be analogous to tape-recording all phone calls, then storing all the tapes for some specified period. Beyond the storage, there is the not insignificant task of indexing and programming for retrievability all the stored e-mail from all the agencies to whom the FOIA applies. Fourth, electronic media are notoriously non-standard. In the computer world particularly, there are multiple operating systems, each of which has literally hundreds of different e-mails programs, most of which are incompatible without elaborate inter-system translation capabilities which do not currently exist for most of the programs and systems. Additionally,

some means would have to be devised for translating the electronic storage to hard copy suitable for compliance with the FOIA requirements. This too presents technical problems which are not insignificant.

For your information, and utilization as appropriate, you may be interested in the Policy and Guidelines for Electronic Mail, issued by President Diether Haenicke on April 4, 1993. The text follows:

WMU Electronic Mail
Policy and Guidelines

The WMU Electronic Mail Policy and Guidelines apply to all electronic Mail systems operated for and by Western Michigan University faculty, staff, students and/or library patrons. Electronic mail is provided as a cost-effective method of informal communication for University-related matters. Bulletin Boards and voice mail are considered to be a form of electronic mail and are covered by this policy and guidelines. Please note that the Michigan Courts have not determined whether or not messages transmitted and stored via any electronic mail system are subject to disclosure under the Freedom of Information Act or other statutes. Accordingly, when making the decision to store an electronic message, you should consider the impact on the University if the message is ultimately disclosed or released to other parties.

It 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. The University reserves the right to purge messages older than one year after notice to the account holder. Unless you are notified otherwise, systems administrators will review electronic messages only with the written authority of the general counsel. Mail files will not be backed up on centrally operated and controlled computer systems. There will be no ability to reclaim individual messages, once deleted from those systems.

Passwords are required on all electronic mail systems and will be changed periodically. However, the user is responsible to exercise due care in the

use of an electronic mail system. Electronic mail systems possess the capability to forward a message, and the author of a message has no ability to control the actions of the recipient(s). Prudence and consideration for the feelings of others dictate that electronic mail be used in a mature and reasoned manner, and with the knowledge that others may have access to such messages.

I hope this information is helpful to you. Should you wish to discuss it further, or seek clarification on any item, please do not hesitate to contact me directly.

Please accept my best wishes for your work on this matter which is most important, but which will no doubt be difficult and controversial.

Sincerely,

Richard A. Wright
Associate Vice President
for Academic Affairs

cc: President Haenicke
Vice President Pretty
Dr. Harley Behm

APPENDIX 4d

)OD
TV

120 College SE
P.O. Box B
Grand Rapids, MI
49501
616 456-8888
616 456-9169 Fax

June 27, 1994

Kent D. Syverud
Executive Secretary
Michigan Law Revision Commission
P.O. Box 30036
Lansing, MI 48909-7536

Dear Mr. Syverud,

Thanks for writing to ask how E-mail should be treated under state disclosure laws.

We believe E-mail should be subject to public disclosure laws. It is written (like a letter) and it is (or at least can be) retained like a letter. Consequently, it is a public document.

If that causes state officials to be less candid in E-mail transmissions, so be it. There is no excuse for secrecy when handling the people's business.

(If the possibility of disclosure causes officials to keep to business, and eliminates non-business messages, the people would be better served anyway.)

I would suggest that phone conversations are more candid because there is no permanent record of the conversation, unlike written correspondence. If phone conversations were recorded, I am sure those conversations would be less candid, too.

Please keep us posted as to the progress of your commission's work. Thanks again for asking us how we view this important issue.

Sincerely,

Rick Gevers
News Director

RG:jr

APPENDIX 4e

MICHIGAN STATE
UNIVERSITY

June 7, 1994

Kent D. Syverud
University of Michigan Law School
Hutchins Hall
Ann Arbor, Michigan 48109

Dear Mr. Syverud:

I write to respond to your recent letter soliciting thoughts, in your capacity as Executive Secretary of the Michigan Law Revision Commission, on "public access to electronic mail." The Commission is studying how the legislature ought to "balance the need for open government with the desire of e-mail users for some non-telephonic method of candid (and private) communication." A semantic observation may be worth noting. I, personally, did not particularly "desire" a non-telephonic method of candid, private communication. The desire for privacy is a product of the availability of e-mail and the use I make of it.

As I think about this matter in practical terms--and there are no more commendable terms to serve as a base for legislative thinking--I am struck by the two quite distinct modes of e-mail use. Some people, use it solely for the purpose of private communication. When I send an e-mail message, I do not print a hard copy, and people with whom I deal know that to be my operating preference and understanding. Other users understand or expect that their messages will be converted to hard copy. Many people work in both modes.

The salient point is that one's mode of use relates, practically and directly, to one's expectation of privacy. For me, privacy is essential. If my e-mail communication were susceptible to disclosure to anyone other than person(s) to whom I transmit them, I simply could not use it. For me, the privacy is a defining characteristic of e-mail's utility. I do not believe that one could reasonably assign the same level of privacy expectation, generally, with respect to e-mail messages that are converted to hard copy.

I would find the prospect of an intrusion on the privacy of my e-mail communication as troubling as I

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would find a blanket wiretap authorization on my telephone. If e-mail were subject to disclosure, I could not use it. It happens that e-mail serves me, every day, in consultation with colleagues. Relegating this form of communication to the public domain would not likely open the windows of government. It would deny people, including me, access to a useful communication device.

An e-mail message that is converted to hard copy looks more like a memo than it does a telephone conversation. It is palpable and enduring. Other eyes can be expected to see it. There is not, in reason, a high expectation of privacy. If I were to transmit e-mail messages with the thought that my words would be memorialized outside of the computer screen, I would measure them, with appreciation that others may do the same.

My "desire" is ontologic. E-mail is available and useful. I was unaware of a need for another way of communicating that would be private, like telephone conversations. Now that technology has provided this capability, I like having it and do not want to lose it. These comments, incomplete as they may be, reflect my strongly felt sentiments. I trust that you and your colleagues will maintain a firm grounding in the pertinent practical implications presented. Thank you for your thoughtful consideration.

Very truly yours,

Michael J. Kiley
Interim General Counsel

Direct Dial: (517) 353-1798

MJK:lmc

APPENDIX 4f

Northern Michigan University

Office of the President
1401 Presque Isle
Marquette, MI 49855-5302
906 227-2242
FAX: 906 227-2249

June 21, 1994

Mr. Richard D. McLellan, Chairman
Michigan Law Revision Commission
P. O. Box 30036
Lansing, MI 48909-7536

Dear Mr. McLellan:

I am writing you in response to the Commission's request for comments on public access to electronic mail. The use of electronic mail on our campus is very widespread among our students, faculty, and staff. Electronic mail is more of an informal dialogue rather thana formal communication. I agree that electronic mail communications are more like a telephone conversation than a written memorandum. Because of the informal nature of most electronic mail I would oppose complete public access to electronic mail. I believes to do so would curtail the use of this very useful technology.

I hope my comments are helpful in your deliberation on this important issue.

Sincerely,

Wm. E. Vandament

William E. Vandament
President

WEV/jsl

APPENDIX 4g

STATE OF MICHIGAN

DEPARTMENT OF EDUCATION

P.O. Box 30008
Lansing, Michigan 48909

ROBERT E. SCHILLER
Superintendent
of Public Instruction

June 13, 1994

Mr. Kent D. Syverud
Executive Secretary
Michigan Law Revision Commission
P.O. Box 30036
Lansing, Michigan 48909-7536

Dear Mr. Syverud:

Thank you for your letter of June 1 regarding public access to electronic mail and its relationship to the Freedom of Information Act.

It is our position that electronic mail should not be treated as subject to disclosure under the Freedom of Information Act. Electronic mail is a type of verbal communications; it it does not hold the same permanency as a memorandum in office communications. In addition, trying to keep track of FOIA requests regarding electronic mail would be laborious.

Thank you for your consideration of our position on this issue as you conduct your study for the Legislature.

Sincerely,

Robert E. Schiller

APPENDIX 4h

STATE OF MICHIGAN

JOHN ENGLER, Governor

DEPARTMENT OF AGRICULTURE

P.O. BOX 30017, LANSING, MICHIGAN 48909

GORDON GUYER, Director

June 21, 1994

Richard D. McLellan, Chairman
Michigan Law Revision Commission
P.O. Box 30036
Lansing, MI 48909-7536

Dear Mr. McLellan:

This letter is in response to the Michigan Law Revision Commission's June 1, 1994, letter seeking comments on the issue of Public Access to Electronic Mail. Thank you for the opportunity to comment on this important issue.

The Michigan Department of Agriculture uses the E-Mail system which is supplied with Banyan Vines. The network locations include the Lansing central office and the six regional offices located throughout the state. By the fall of 1994, we expect the network to extend to the Laboratory Division in East Lansing as well as the Office of Racing Commissioner in Livonia. Within the next two to three years, the wide-area network will be enlarged to include the field staff with their home as their work station.

An article on page one of the April 4, 1994, issue of "Government Computer News" discusses E-Mail. In part it states that the National Archives and Records Administration is proposing rules for preserving electronic mail messages as public records. Their proposal, in part, would keep an E-mail message if it:

- Contains information developed in preparing position papers, reports or studies.
- Reflects official actions taken in the course of conducting agency business.
- Conveys information on agency programs, policies, decisions and actions.
- Conveys statements of policy or the rationale for official decisions or actions.

In addition, messages may be discarded if they lack evidence of agency activities, refer only to personal papers and materials, or are extra copies of documents kept elsewhere.

This department would support the proposed National Archives and Records Administration rules.

If you have any further questions, please contact Fred H. Heiner, Director, Automated Services Division, 373-9780.

Sincerely,

Dr. Gordon Guyer
Director

GG/FH/sj

cc: K. Syverud

REPEAL OF UCC ARTICLE 6: BULK TRANSFERS

The Michigan Law Revision Commission recommends that the Legislature repeal Article 6 of the Uniform Commercial Code. The Uniform Commercial Code was adopted in Michigan in 1962 and took effect in 1964.[1] UCC Article 6: Bulk Transfers,[2] has been amended three times since the UCC was adopted, in 1963,[3] 1964,[4] and 1979.[5]

Article 6 was revisited by the National Conference of Commissioners on Uniform State Laws and the American Law Institute (the Conference) in 1989. The Conference now "encourages those states that have enacted the [Sixth] Article to repeal it."[6] Since that decision was made, nine states have now repealed Article 6 or its equivalent,[7] and another four have adopted a revised version of the Article presented as an alternative to its repeal by the Conference.[8]

The Conference set out at some length the reasons why it felt that Article 6 was no longer necessary. They are reiterated below:

> Bulk sale legislation originally was enacted in response to a fraud perceived to be common around the turn of the century: a merchant would acquire his stock in trade on credit, then sell his entire inventory ("in bulk") and abscond with the proceeds, leaving creditors unpaid. The creditors had a right to sue the merchant on

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1 1962 PA 174, MCL 440.1101 et seq.

2 MCL 440.6101-6111.

3 1963 PA 223.

4 1964 PA 250.

5 1979 PA 215.

6 UCC Repealer of Article 6: Bulk Transfers and (Revised) Article 6: Bulk Sales; Prefatory Note (1990).

7 The following states have repealed prior Article 6 without adopting Revised Article 6, and adopted conforming amendments to other sections of the Code: Ark, Acts 1991, No 344, eff. July 15, 1991; Colo, L 1991, c 284, eff. July 1, 1992; Ill, L 1991, PA 87-308, eff. Jan. 1, 1992; Neb, L 1991, LB 162; Nev, Acts 1991, c 223, eff. Oct. 1, 1991; Or, L 1991, c 83; Minn, L 1991, c 171, approved May 24, 1991; Mont, L 1991, c 410; Wyo, L 1991, c 177, eff. July 1, 1991. But note, that although Arkansas Acts 1991, No 344 apparently was intended to repeal section 9-111, such repeal was not implemented by this act; and that Montana adopted a section analogous to section 6-109 of Revised Article 6 (MCA 30-6-112). Note also, that Louisiana never adopted Article 6 of the Code, but Louisiana has repealed its Bulk Sales Law (RS 9:2961 to 9:2968), and in conformity therewith has repealed its section 9-111, by L 1991, Act No. 377.

8 The following states have adopted Revised Article 6 [Alternative B] and amendments to other Articles of the Code conforming to Revised Article 6 [Alternative B]: Cal, L 1990, c 1191; Haw, L 1991, Act 119, eff. Jan. 1, 1992; Okla, L 1990, c 273, eff. Sept. 1, 1990; Utah, L 1990, c 294, eff. April 23, 1990. California and Utah did not adopt the Article 2 conforming amendment.

the unpaid debts, but that right often was of little practical value. Even if the merchant-debtor was found, in personam jurisdiction over him might not have been readily available. Those creditors who succeeded in obtaining a judgment often were unable to satisfy it because the defrauding seller had spent or hidden the sale proceeds. Nor did the creditors ordinarily have recourse to the merchandise sold. The transfer of the inventory to an innocent buyer effectively immunized the goods from the reach of the seller's creditors. The creditors of a bulk seller thus might be left without a means to satisfy their claims.

To a limited extent, the law of fraudulent conveyances ameliorated the creditors' plight. When the buyer in bulk was in league with the seller or paid less than full value for the inventory, fraudulent conveyance law enabled the defrauded creditors to avoid the sale and apply the transferred inventory toward the satisfaction of their claims against the seller. But fraudulent conveyance law provided no remedy against persons who bought in good faith, without reason to know of the seller's intention to pocket the proceeds and disappear, and for adequate value. In those cases, the only remedy for the seller's creditors was to attempt to recover from the absconding seller.

State legislatures responded to this perceived "bulk sale risk" with a variety of legislative enactments. Common to these statutes was the imposition of a duty on the buyer in bulk to notify the seller's creditors of the impending sale. The buyer's failure to comply with these and any other statutory duties generally afforded the seller's creditors a remedy analogous to the remedy for fraudulent conveyances: the creditors acquired the right to set aside the sale and reach the transferred inventory in the hands of the buyer.

Like its predecessors, Article 6 (1987 Official Text) is remarkable in that it obligates buyers in bulk to incur costs to protect the interests of the seller's creditors, with whom they usually have no relationship. Even more striking is that Article 6 affords creditors a remedy against a good faith purchaser for full value without notice of any wrongdoing on the part of the seller. The Article thereby impedes normal business transactions, many of which can be expected to benefit the seller's creditors. For this reason, Article 6 has been subjected to serious criticism. See, e.g., Rapson, UCC

Article 6: Should It Be Revised or "Deep-Sixed"? 38 Bus.Law 1753 (1983).

In the legal context in which Article 6 (1987 Official Text) and its nonuniform predecessors were enacted, the benefits to creditors appeared to justify the costs of interfering with good faith transactions. Today, however, creditors are better able than ever to make informed decisions about whether to extend credit. Changes in technology have enabled credit reporting services to provide fast, accurate, and more complete credit histories at relatively little cost. A search of the public real estate and personal property records will disclose most encumbrances on a debtor's property with little inconvenience.

In addition, changes in the law now afford creditors greater opportunities to collect their debts. The development of "minimum contacts" with the forum state as a basis for in personam jurisdiction and the universal promulgation of state long-arm statutes and rules have greatly improved the possibility of obtaining personal jurisdiction over a debtor who flees to another state. Widespread enactment of the Uniform Enforcement of Foreign Judgments Act has facilitated nationwide collection of judgments. And to the extent that a bulk sale is fraudulent and the buyer is a party to fraud, aggrieved creditors have remedy under the Uniform Fraudulent Transfer Act. Moreover, creditors of a merchant no longer face the choice of extending unsecured credit or no credit at all. Retaining an interest in inventory to secure its price has become relatively simple and inexpensive under Article 9.

Finally, there is no evidence that, in today's economy, fraudulent bulk sales are frequent enough, or engender credit losses significant enough, to require regulation of all bulk sales, including the vast majority that are conducted in good faith. Indeed, the experience of the Canadian Province of British Columbia, which repealed its Sale of Goods in Bulk Act in 1985, and of the United Kingdom, which never has enacted bulk sales legislation, suggests that regulation of bulk sales no longer is necessary.

Recommendation. The National Conference of Commissioners on Uniform State Laws and the American Law Institute believe that changes in the business and legal contexts in which sales are conducted have made regulation of bulk sales

unnecessary. The Conference and the Institute therefore withdraw their support for Article 6 of the Uniform Commercial Code and encourage those states that have enacted the Article to repeal it.[9]

The Conference also offers a revised Article 6 for those states that wish to disregard its recommendation and continue to maintain special regulations for bulk sales. The revised Article is designed to better address the problems associated with the original Article.

In addressing this matter the Conference stated that:

> The Conference and the Institute recognize that bulk sales may present a particular problem in some states and that some legislatures may wish to continue to regulate bulk sales. They believe that existing Article 6 has become inadequate for that purpose. For those states that are disinclined to repeal Article 6, they have promulgated a revised version of Article 6. The revised Article is designed to afford better protection to creditors while minimizing the impediments to good-faith transactions.
>
> The Official Comment to Section 6-101 explains the rationale underlying the revisions and highlights the major substantive changes reflected in them. Of particular interest is Section 6-103(l)(a), which limits the application of the revised Article to bulk sales by sellers whose principal business is the sale of inventory from stock. In approving this provision, the Conference and the Institute were mindful that some states have expanded the coverage of existing Article 6 to include bulk sales conducted by sellers whose principal business is the operation of a restaurant or tavern. Expansion of the scope of revised Article 6 is inconsistent with the recommendation with the recommendation that Article 6 be repealed. Nevertheless, the inclusion of restaurants and taverns within the scope of the revised Article as it is enacted in particular jurisdictions would not disturb the internal logic and structure of the revised Article.[10]

In light of the reasons set out by the Conference above, the Michigan Law Revision Commission recommends that Michigan repeal Article 6: Bulk Transfers by enacting the legislation set out as the Conference's Alternative A.

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9 UCC Repealer of Article 6: Bulk Transfers and (Revised) Article 6: Bulk Sales; Prefatory Note (1990).

10 Id.

The Michigan Law Revision Commission does not favor the adoption of the revised version of Article 6 (Conference's Alternative B). The Conference's Alternative A[11] reads as follows:

§1 Repeal.

MCL 440.6101-6111 and MCL 440.9111 are hereby repealed, effective _____.

§2 Amendment.

MCL 440.1105(2) is hereby amended to read as follows:

(2) Where 1 of the following provisions of this act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods.	Section 2402.
Applicability of the article on bank deposits and collections.	Section 4102.
Governing law in the article on funds transfers.	Section 4A502.
Applicability of the article on investment securities.	Section 8106.
Applicability of the article on leases.	Sections 2A105 and 2A106.
Perfection provisions of the article on secured transactions.	Section 9103.

§3 Amendment.

MCL 440.2403(4) is hereby amended to read as follows:

(4) The rights of other purchasers of goods and of lien creditors are governed by the articles on secured transactions (article 9), and documents of title (article 7).

§4 Savings Clause.

Rights and obligations that arose under MCL 440.6101-6111 and MCL 440.9111 before their repeal remain valid and may be enforced as though those statutory provisions had not been repealed.

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11 UCC Repealer of Article 6: Bulk Transfers and (Revised) Article 6: Bulk Sales (1990).

THE UNIFORM PUTATIVE AND UNKNOWN FATHERS ACT AND REVISIONS TO MICHIGAN LAWS CONCERNING PARENTAL RIGHTS OF UNWED FATHERS

Introduction

The National Conference of Commissioners on Uniform State Laws approved the Uniform Putative and Unknown Fathers Act (UPUFA) in 1988. (The text of UPUFA is attached to this report as Appendix 1.) The Act is intended to clarify the procedural requirements for notifying and determining the parental rights of unwed fathers, in response to the United States Supreme Court's recent decisions defining the due process rights of unwed fathers with respect to their children.[1]

With the protection of the child's best interest as its main objective, the UPUFA is an attempt to balance the frequently conflicting considerations of the unwed father's legitimate interests in a parental relationship with his child, the mother's freedom from harassment by the father, and the state's and child's interest in the efficiency and security of the adoption process. The UPUFA is also an effort to clarify the rights of putative fathers as addressed by the Supreme Court in recent years.

If adopted in Michigan, the Uniform Putative and Unknown Fathers Act would affect procedures involving notification of putative fathers, determination of paternity, termination of parental rights, and custody disputes, and would alter parts of the Michigan Adoption Code, the Paternity Act, the juvenile chapter of the Probate Code, the Child Custody Act of 1970, and the Michigan Court Rules. These current Michigan procedures are analyzed in this report and attached as appendices. In the opinion of the Michigan Law Revision Commission, Michigan's current procedures are consistent with the constitutional due process requirements established by the Supreme Court. While the UPUFA also meets the requirements of the Constitution, its underlying policy generally leans more heavily toward fathers' rights than Michigan law does.

The UPUFA is intended to be adopted as a supplement to the Uniform Parentage Act (UPA); its definitions and language are designed to be consistent

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1 Stanley v Illinois, 405 US 645; 92 S Ct 1208 (1972); Quilloin v Walcott, 434 US 246; 98 S Ct 549 (1978); Caban v Mohammed, 441 US 380; 99 S Ct 1760 (1979); Lehr v Robertson, 463 US 248; 103 S Ct 2985 (1983).

with the UPA. Only 16 states have adopted the UPA since its proposal in 1973.[2] As of this writing, no state has adopted the UPUFA, although several have considered it. One of the purposes of the UPUFA is to make state laws uniform and thereby to avoid protracted interstate custody battles and inconsistent laws. Because no states have adopted the UPUFA, however, it has not affected inconsistent state laws and is not likely to do so in the future.[3]

Michigan law already addresses most of the procedures covered by the UPUFA. The purpose of this report is to examine the differences between the UPUFA and current Michigan law and to consider the advisability of adopting the UPUFA in Michigan. Section I summarizes the line of United States Supreme Court cases that the UPUFA is intended to clarify and to codify. Section II compares provisions of the UPUFA with relevant provisions in Michigan law. This report concludes by recommending against adoption of the UPUFA in Michigan, but suggesting a few specific elements of the UPUFA that should be considered as modifications of Michigan law.

I. United States Supreme Court Cases

Stanley v Illinois

The first significant United States Supreme Court case dealing with the rights of putative fathers was Stanley v Illinois.[4] That case involved a father of three children who had lived intermittently with the children and their mother over an 18-year period, but had never married the mother. When she died, the state of Illinois declared the children wards of the state without considering the putative father's fitness as a parent. The Court held that the state's denial of a hearing as to an unwed father's fitness violated the Equal Protection Clause when such hearings were granted to other parents (such as married fathers and unwed mothers).[5] The Court also noted that "Stanley' s interest in retaining custody of his children [was] cognizable and substantial"[6] and that the state's interest would be de minimis if the father was shown to be fit. The convenience of presuming

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2 Michigan has not adopted the UPA. The Michigan Law Revision Commission did not issue a recommendation regarding the UPA.

3 Telephone Interview with Professor Joan H. Hollinger, Recording Secretary for the Uniform Adoption Act (June 15, 1994).

4 405 US 645; 92 S Ct 1208 (1972).

5 Stanley, supra, at 658.

6 Id. at 652.

rather than proving unwed fathers' unfitness was insufficient under the Due Process Clause to justify refusing a father a hearing.[7]

The Stanley court also commented in a footnote that extending an opportunity for fitness hearings to putative fathers who want and are able to care for their children "creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined."[8] This footnote suggested that the putative father's rights are related to his involvement or willingness to become involved, rather than the mere fact of his biological fatherhood.

Quilloin v Walcott

The Court returned to this idea six years later. In Quilloin v Walcott,[9] the Court tried to resolve a question that Stanley had left unanswered, that of "the degree of protection a State must afford to the rights of an unwed father in a situation in which the countervailing interests are more substantial." Quilloin was the natural father of a child who had been raised solely by his mother. The mother had married Walcott, who later decided to adopt the child. Quilloin, who had not supported the child on a regular basis, did not seek custody or object to the child's continuing to live with the mother and stepfather, but wanted to block the adoption and to obtain visitation rights. The state of Georgia did not require an unwed father's consent to an adoption unless he had legitimated the child by marriage or court order. Using a "best interests of the child" standard, the trial court rejected Quilloin's petition for legitimation, request for visitation rights, and objection to the adoption. The Supreme Court held that under the circumstances, in which the biological father had never sought custody and the proposed adoption would merely recognize an already existing family unit, the "best interests" standard did not violate the unwed father's due process rights.[10]

The Court also rejected the father's equal protection claim that he should have the same authority to veto an adoption that a separated or divorced father would have.[11]

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7 Id. at 657-58.

8 Id. at 657, n9.

9 434 US 246; 98 S Ct 549 (1978).

10 Quilloin, supra, at 255.

11 Id. at 256.

Caban v Mohammed

The Court again emphasized an unwed father's participation in child rearing in Caban v Mohammed.[12]

Caban lived with his children and their mother and contributed to their support for the first few years of the children's lives. After the mother and children moved away, the father continued to visit his children each week at their grandmother's apartment. After a dispute over custody, Caban and Mohammed, both married to other people, each sought to adopt the children and terminate the other parent's rights. Because New York law did not require an unwed father's consent to adoption but did require an unwed mother's consent, the trial court ruled that the Cabans could not adopt the children because the mother objected, and granted the Mohammeds the adoption. The Supreme Court reversed, holding that while the Equal Protection Clause would not prevent a state from withholding the privilege of vetoing an adoption from an unwed father who had not participated in rearing the child, the state's different treatment of unwed fathers and unwed mothers could not be justified in cases where unwed fathers had "established a substantial relationship with" or "manifested a significant paternal interest in" their children.[13]

Lehr v Robertson

The fourth major case concerning putative fathers' rights was Lehr v Robertson,[14] in which an unwed father who had never lived with or financially supported his child and her mother petitioned to vacate an adoption order because he had not received notice of the adoption proceedings. Lehr had filed a visitation and paternity petition in another county, but had not filed a notice of intent to claim paternity with New York's putative father registry. Affirming the denial of the petition to vacate the adoption, the Supreme Court stated that "the rights of the parents are a counterpart of the responsibilities they have assumed."[15]

According to the Lehr majority, unwed fathers do not have constitutionally protected rights as to their children merely because of the biological link; biology offers them the opportunity to develop a relationship with their children. Their interest in that relationship acquires due process protection when they demonstrate their commitment by participating in raising the child. Having put

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12 441 US 380; 99 S Ct 1760 (1979).

13 Caban, supra, at 393, 394.

14 463 US 248; 103 S Ct 2985 (1983).

15 Lehr, supra, at 257.

the responsibility for establishing their parental rights on unwed fathers themselves, the Court then held that New York's putative father registry was a sufficient means of protecting fathers' inchoate interest in parent-child relationships.[16]

Turning to an equal protection analysis, the Lehr Court again held that differentiating between parents who have establish a parental relationship with their children and those who have not is permissible.[17]

II. The UPUFA and Michigan Law

The provisions of the UPUFA would affect parts of the Michigan Adoption Code, the Child Custody Act of 1970, the Paternity Act, the juvenile chapter of the Probate Code, and the Michigan Court Rules regarding adoption and juvenile proceedings. Because the affected provisions are found in different Michigan laws, this discussion will be organized by sections of the UPUFA.

§ 1. Definitions.

Section 1 of the UPUFA defines the terms "man", "putative father", and "unknown father."[18]

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16 Lehr, supra, at 265.

17 Id. at 268.

18 In this [Act]:

(1) "Man" means a male individual of any age.

(2) "Putative father" means a man who claims to be, or is named as, the biological father or a possible biological father of a child, and whose paternity of the child has not been judicially determined, excluding:

(i) a man whose parental rights with respect to the child have been previously terminated or declared not to exist;

(ii) a donor of semen used in artificial insemination or in vitro fertilization whose identity is not known by the mother of the resulting child or whose semen was donated under circumstances indicating that the donor did not anticipate having an interest in the resulting child;

(iii) a man who is or was married to the mother of the child, and the child is born during the marriage [or within 300 days after the marriage was terminated by death, annulment, declaration of invalidity, divorce, or marital dissolution, or after a decree of separation was entered by a court];

(iv) a man who, before the birth of the child, attempted to marry the mother of the child in apparent compliance with law, although the attempted marriage is, or could be declared, invalid, and:

(A) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage [, or within 300 days after its termination by death, annulment, declaration of invalidity, divorce, or marital dissolution]; or

(B) if the attempted marriage is invalid without a court order declaring its invalidity, the child is born during, or within 300 days after the termination of, cohabitation; and

The definition of the term "man" as a male individual of any age -- is included to eliminate any doubt that males under the age of majority are subject to the Act. A putative father is a man "who claims to be, or is named as, the biological father or possible biological father of a child, whose paternity has not been judicially determined." The definition goes on to exclude a man whose parental rights as to the child have been previously judicially determined or declared nonexistent, an anonymous semen donor, and a man who was or is married to the mother if the child was born during the marriage or, if a state adopts the optional language of the provision, was born within 300 days after the end of the marriage. The definition also excludes a man whose marriage to the mother at the time of or before the birth is or could be invalid, or a man whose marriage to the mother after the birth is or could be invalid and who has legally acknowledged his paternity, is named with his consent on the birth certificate, or is obligated by court order or written promise to support the child. These exceptions merely incorporate the definitions of a presumed father under the Uniform Parentage Act.

Michigan's current definition of the term "putative father" is much less specific. The Court Rules define the term "father" in detail, MCR 5.903 (A)(4),[19] but "putative father" is not defined in the Court Rules or in any of the

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(v) a man who, after the birth of the child, married or attempted to marry the mother of the child in apparent compliance with law, although the attempted marriage is, or could be declared, invalid, and:

(A) has acknowledged his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau];

(B) with his consent, is named as the child' s biological father on the child's birth certificate; or

(C) is obligated to support the child under a written promise or by court order.

(3) "Unknown father" means a child' s biological father whose identity is unascertained. However, the term does not include a donor of semen used in artificial insemination or in vitro fertilization whose identity is not known to the mother of the resulting child or whose semen was donated under circumstances indicating that the donor did not anticipate having any interest in the resulting child.

19 "Father" means:

(a) a man married to the mother at any time from a minor's conception to the minor's birth unless the minor is determined to be a child born out of wedlock;

(b) a man who legally adopts the minor; or

(c) a man whose paternity is established in one of the following ways within time limits, when applicable, set by the court pursuant to this subchapter:

(i) the man and the mother of the minor acknowledge that he is the minor's father in a writing executed and acknowledged by them in the same manner provided by law for the execution and acknowledgment of deeds of property and filed in the probate court in the county in which the man, mother, or minor resides;

(ii) the man and the mother file a joint written request for a correction of the certificate of birth pertaining to the minor that results in issuance of a substituted certificate recording the birth;

(iii) the man acknowledges the minor, without the acknowledgment of the mother, with the approval of the court as provided in MCR 5.921(D)(2)(b).

(iv) a man who by order of filiation or by judgment of paternity is determined judicially to be the father of the minor.

relevant statutes. The most coherent definition of putative father is found in a Court of Appeals decision construing the Michigan Paternity Act: "A putative father is a man reputed, supposed, or alleged to be the biological father of a child."[20]

The UPUFA also defines the term "unknown father" separately, based on the Supreme Court's footnote 9 in Stanley v Illinois.[21] The Act defines unknown fathers separately from putative fathers,[22] as a child's biological father whose identity is unascertained, for the purposes of providing different procedures for protection of parental rights. Michigan does not have a separate definition of an unknown father, but the relevant procedural provisions do address fathers whose identity cannot be ascertained.

Unlike the UPUFA, Michigan law does not make clear that the status of a man as a putative father ends when his rights are judicially determined. Under the UPUFA, once a putative father's paternity or parental rights have been adjudicated against him, he is not entitled to notice of any subsequent proceedings involving the child. Michigan provisions regarding putative fathers do not make the temporary nature of the putative father's status as clear.

Although Michigan law does not define putative and unknown fathers as specifically as the UPUFA, the lack of a precise statutory definition does not seem to present major problems in practice.[23] Although Michigan might consider clarifying these definitions, section 1 of the UPUFA is not necessarily the proper definition to be adopted, given its purpose of matching the Uniform Parentage Act, which Michigan has not enacted.

§ 2. Right to Determination of Paternity.

This section of the UPUFA is optional. According to the Comment, states that have enacted the Uniform Parentage Act or comparable legislation should not

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20 Girard v Wagenmaker, 173 Mich App 735, 740, 434 NW2d 227 (1988), rev'd on other grounds 437 Mich 231 (1991).

21 405 US 645; 92 S Ct 1208 (1972). See supra, n8 and accompanying text.

22 See supra, n18.

23 A case search of Michigan law turned up no cases in which the definition of "putative father" was at issue. Questions are more likely to arise in suits brought by putative fathers of children born to married women, thus involving the marital presumption of legitimacy and the definition of "child born out of wedlock." Cases have focused on putative fathers' standing and the courts' subject-matter jurisdiction in such cases. See, e.g., Girard v Wagenmaker, 437 Mich 231, 470 NW2d 372 (1991); Svrkowski v Applevard, 420 Mich 367, 362 NW2d 211 (1985).

enact it.[24] Section 2 provides that a putative father whose paternity or parental rights have not already been determined and are not involved in pending litigation may bring an action to determine whether he is the biological father of a certain child. The action may be brought at any time.[25]

Current Michigan procedures are not significantly different than those created by section 2 of UPUFA. A putative father of a child born out of wedlock may file a complaint seeking an order of filiation at any time before the child reaches 18 years of age. MCL 722.714(3) and (7).[26] Unlike the UPUFA, the Michigan statute does include the "born out of wedlock" language, which expresses the rebuttable presumption of legitimacy of children born to married women. Whether this differs from the UPUFA, however, is unclear, since the Comment to section 2 of the UPUFA discusses the marital presumption and the Supreme Court's decision in Michael H. and Victoria D. v Gerald D.,[27] which upheld the constitutionality of a conclusive presumption of legitimacy. The UPUFA Comment does not indicate in any way that the Act would alter or undermine either conclusive or rebuttable presumptions in states that have them. Even if Michigan did choose to enact the UPUFA, section 2 would be superfluous, as Michigan law already provides putative fathers of children born out of wedlock an opportunity to establish their paternity.

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24 "This section is based on section 6 (a) and (d) of the Uniform Parentage Act. It is bracketed because states that have already enacted the UPA or comparable legislation on the judicial determination of paternity should not enact this section." UNIFORM PUTATIVE AND UNKNOWN FATHERS ACT § 2 comment (1988).

25 [(a) A putative father may bring an action to determine whether he is the biological father of a particular child [, in accordance with [applicable state law],] at any time, unless his paternity or possible parental rights have already been determined or are in issue in pending litigation.

(b) An agreement between a putative father and the mother or between him and the child does not bar an action under this section [, unless the agreement has been judicially approved [under applicable state law]].]

26 (3) An action under this act may be instituted during the pregnancy of the child's mother, at any time before the child reaches 18 years of age, or for a child who became 18 years of age after August 15, 1984 and before June 2, 1986, before March 1, 1993. This subsection applies regardless of whether the cause of action accrued before June 1, 1986 and regardless of whether the cause of action was barred under this subsection before June 1, 1986.

. . . .

(7) The father or putative father of a child born out of wedlock may file a complaint in the circuit court in the county in which the child or mother resides or is found, praying for the entry of the order of filiation as provided for in section 7. The mother of the child shall be made a party defendant and notified of the hearing on the complaint by summons, which shall be in the form the court determines and shall be served in the same manner as is provided by court rules for the service of process in civil actions. The court, following the hearing, may enter an order of filiation. An order of filiation entered under this subsection has the same effect, is subject to the same provisions, and is enforced in the same manner as an order of filiation entered on the complaint of the mother.

27 491 US 110; 109 S Ct 2333; 105 L Ed 2d 91 (1989).

§ 3. Notice of Judicial Proceedings for Adoption or Termination of Parental Rights.

This section, governing notice to putative fathers, is at the heart of the reform sought through the UPUFA. Subsection (a) of section 3 requires a person seeking judicial termination of any man's parental rights -- such as prospective adoptive parents or an unwed mother -- to give every putative father notice of the proceeding. By contrast, the Michigan Adoption Code currently requires the party seeking termination to give notice to only three categories of putative fathers: (1) putative fathers who have filed notice of intent to claim paternity;[28] (2) putative fathers who were not served with a notice of (the mother's) intent to release or consent at least 30 days before the expected date of confinement;[29] and (3) putative fathers who were not served with a notice of intent to release or consent and who the court has reason to believe may be the father. MCL 710.36 (3) (a) - (c).

Subsection (b) of section 3 of UPUFA discusses the form of the notice. It must be given in accordance with state rules regarding service of process in a civil action, or "at a time and place and in a manner as the court directs to provide actual notice." The Comment suggests that nontraditional methods of notice, allowed at the court's discretion, might include a telephone call, an informal note, etc. Under subsection (g) of section 3, when it appears to the court that there may be an unknown father, courts may employ publication or public posting of notice as the means to reach the putative father only if the court determines that it is likely to lead to actual notice to him.

Michigan Court Rules regarding adoption proceedings provide different standards of notice in different situations. When the identity or whereabouts of a father is unascertainable after "diligent inquiry," the petitioner must file proof of the attempt to identify or locate the father; "[n]o further service is necessary

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28 MCL 710.33. (1) Before the birth of a child born out of wedlock, a person claiming under oath to be the father of the child may file a verified notice of intent to claim paternity with the court in any county of this state. The form of the notice shall be prescribed by the director of the department of public health and provided to the court. The notice shall include the claimant' s address on the next business day after receipt of the notice the court shall transmit the notice to the vital records division of the department of public health. If the mother's address is stated on the notice, the vital records division shall send a copy to the mother of the child at the stated address. . . .

(3) A person who timely files a notice of intent to claim paternity shall be entitled to notice of any hearing involving that child to determine the identity of the father of the child and any hearing to determine or terminate his paternal rights to the child.

29 Unlike some states' putative fathers registries, Michigan law helps the putative father by allowing the unwed mother to notify him as early as possible of her intent to put the child up for adoption. The putative father is then on notice and can protect his rights by registering his intent to claim paternity. MCL 710.34. Under MCL 710.36(3) (b) and (c), the putative father who is not so notified is not deprived of his right to notice of a proceeding to terminate his rights.

before the hearing to identify the father and to determine or terminate his rights." MCR 5.752(B)(1). At the hearing, the court will determine whether a reasonable attempt was made. If the court finds that it was not, it must adjourn the hearing and order a further attempt or direct "any manner of substituted service of the notice ... except service of publication." MCR 5.752(B)(2).

The UPUFA and Michigan provisions are based on similar considerations. The Comment to section 3 of UPUFA discusses its goal of maximizing the court's available options and thereby protecting putative fathers' right to notice; the Comment also expresses a goal of "all reasonable efforts" having been undertaken to protect the biological father's right to notice. Similarly, the Michigan rules give the court broad discretion to direct nontraditional service and establish a "reasonable attempt" standard. The UPUFA and the Michigan Court Rules differ as to publication, but the difference is virtually insignificant. The Court Rules do not allow publication as a means of providing notice to a putative or unknown father[30]; the UPUFA allows publication only when the court determines that it is likely to lead to actual notice to an unknown father.[31] Publication, however, is usually ineffective, so courts would rarely if ever find a sufficiently strong probability to justify ordering publication.[32] The Comment to section 3 states that publication or public posting is "virtually ruled out" by the actual notice standard. As a result, the UPUFA and the Michigan Court Rules are not significantly different as to methods of notice.

Subsection (d) of section 3 requires that if at any time during the proceeding, it appears to the court that there is a putative father who has not been given notice, the court must require that he be given notice. A somewhat comparable provision is found in the Michigan Court Rules for the Juvenile Division. If at any time during the pendency of a juvenile proceeding, the court determines that the minor has no father, as defined in MCR 5.903(A)(4), the court has the discretion (but not the duty) to take testimony on the tentative identity and address of the biological father and to direct that the probable father be served in a manner that the court finds "reasonably calculated to provide notice." MCR 5.921(D)(1) and (2)(a).

Subsections (e) and (f) of section 3 require that if it appears to the court at any time during the proceeding, that an unknown father may not have been given notice, the court must try to determine whether he can be identified, including certain prescribed questions in the inquiry, and must then require notice under

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30 See MCR 5.752 (B) (2) (b).

31 See UPUFA § 3 (g).

32 See OAG, 1976, No 4,942, p 371, 373 (April 7, 1976).

subsection (b) of section 3 if his whereabouts are known or under subsections (b) and (g) of section 3 if they are not known. Similarly, Michigan Court Rules require a 'reasonable attempt' to identify and/or locate an unwed biological father. MCR 5.752(B). Unlike the UPUFA, however, the court here evaluates the reasonableness of the effort by the parties seeking to terminate the right of the putative or unknown father, but does not conduct the inquiry itself. This may protect mothers' privacy better than the UPUFA, since the court will only evaluate the reasonableness of her efforts rather than directly question her relatives and friends and conduct the inquiry itself.

The greatest difference between section 3 of the UPUFA and the Michigan Adoption Code is Michigan's limitations on the types of putative fathers who must be given notice of adoption proceedings.[33] Michigan does not yet employ a statewide putative fathers registry to restrict notice. The Comment to the UPUFA criticizes such registries, which exist in at least 17 states and are gaining popularity among legislators. Putative fathers registries provide a limitation on the types of putative fathers that must be given notice, relieve courts to some extent of the responsibility to seek out putative fathers, and aid in expediting adoption proceedings and ensuring the security and finality of adoptions. The Comment to the UPUFA argues that putative fathers registries are too harsh, since most fathers or potential fathers are not likely to be aware of the registry; state registries also do not protect responsible fathers in interstate situations, and their reliance on unsupported claims makes their accuracy doubtful and increases the potential for invasion of privacy and interference with adoption, custody, and visitation matters. They also may be used by putative fathers to blackmail mothers. The aim of state registries is to put the responsibility for protecting a putative father's rights and opportunity to participate in his child's rearing in his hands, to the greatest extent possible.

The Michigan Adoption Code avoids some of these criticisms by being somewhat more flexible than the laws of other states.[34] Unwed fathers are aided by a provision allowing an unwed pregnant woman who wishes to put her child up for adoption to expedite the process by arranging for notice to the putative father or fathers. MCL 710.34. The court then notifies the putative father of the mother's intent to release or consent, the expected date of birth, his right to file a notice of intent to claim paternity, and his forfeiture of his rights as to the child if he fails to file before the expected date of birth or the actual birth, whichever is later. The Michigan law is less harsh than some others because a putative father

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33 See supra, n30 and accompanying text.

34 For an example of a classic putative father registry, see 1993 Oregon Revised Statutes, ORS 109.096 and ORS 109.225.

who is not notified of the mother's intent to give up the child may still be afforded notice. MCL 710.36(3)(b) and (c).[35]

The UPUFA Comment's other arguments against putative fathers registries are less compelling. The interstate problems may exist regardless of the use of putative father registries because state laws vary widely. The Uniform Law Commissioners are right to advocate uniformity of laws on this subject, but the fact that no state has enacted the UPUFA demonstrates that this Act probably will not be that law. The potential for abuses may be unavoidable, but can be minimized. The usefulness of the registry may simply outweigh its problems; as the UPUFA Comment concedes, the registry can provide a simple solution for terminating nonparticipating putative fathers' rights and expediting adoptions.

The UPUFA clearly requires more notice to putative fathers than Michigan law. Michigan's notice requirements are consistent with the constitutional mandates of due process. The Supreme Court held in Lehr v Robertson[36] that a putative fathers registry is a constitutionally permissible means of protecting putative fathers' rights. The UPUFA, intended to clarify the constitutional standards, actually exceeds the requirements of due process by providing for notice of all putative fathers, regardless of whether they have sought to protect their own rights. The UPUFA, therefore, gives putative fathers more protection than the Constitution guarantees.

Aside from the categories of putative fathers who must be given notice, the UPUFA and comparable Michigan provisions are generally very similar; in addition, they are based on the same goal of balancing of protection of unwed fathers' rights against the ability of the court to function efficiently, and they share a standard of reasonableness to strike such a balance. These similarities demonstrate that Michigan does not need to adopt section 3 of the UPUFA.

§ 4. Notice of Judicial Proceedings Regarding Custody or Visitation.

The fourth section of the UPUFA establishes different guidelines for notice to putative fathers in custody and visitation situations. It requires that the petitioner in a custody or visitation rights proceeding shall give notice to every putative father. Notice must be given either according to state rules of civil procedure regarding service of process in a civil action or as the court determines "will likely provide actual notice." If, at any time during the

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35 See supra nn30-31 and accompanying text.

36 463 US 248; 103 S Ct 2985 (1983).

proceeding, it appears to the court that there is a putative father who has not been given notice, the court must require notice to be given to him. An unknown father is not necessarily given notice; the court may try to identify and require notice to be given to an unknown father only if it deems it in the best interests of the child to do so. The Comment to section 4 states that access to and contact with a biological father might be very important to a child even if that father does not have daily responsibility for the child. The Comment also recognizes that in some situations it may be beneficial to the child to find and bring in the putative father, particularly in proceedings regarding possible child abuse or neglect by the mother.

Michigan does not appear to have comparable provisions providing notice of hearings to change custody or visitation. The only sections of Michigan law that deal with putative fathers' right to be notified of proceedings regarding changes in the child's situation are those governing adoption and termination of parental rights.[37] The Michigan Adoption Code seems to embody an all-or-nothing approach for putative fathers; a putative father who denies his interest in seeking custody of the child, even if he appears at the hearing, may have his parental rights terminated on that ground. MCL 710.37(l)(a) and (d). If he does seek custody and is denied it because the court finds that it would not serve the child's best interests, his rights will then be terminated. MCL 710.39(l).

Michigan law seems to be intended to protect the participating unwed father's basic right to notice when his constitutionally protected relationship with the child is to be adjusted by a court (i.e., when his rights may be terminated), but not to afford him the additional right of having a say in the child's custody or visitation arrangements. This reflects a policy of limiting the extent of the rights given to putative fathers and minimizing the disruption of children's and mothers' lives. This policy would be abandoned if Michigan enacted section 4 of the UPUFA, and putative fathers would potentially be able to wield more influence over their children's lives than Michigan currently chooses to allow. The current balance between the ability of putative fathers to assert their rights as to their children and the stability of children's and mothers' situations would be shifted, resulting in more legal tangles.

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37 See MCL 710.36 et seq. In addition, a putative father may, at the court's discretion, receive notice of proceedings in the Juvenile Division, but such notice is not required. MCR 5.921(D).

§ 5. Factors in Determining Parental Rights of Father.

The UPUFA includes 14 factors that the court must take into consideration when deciding whether to terminate a putative father's rights under either section 3 or 4 of the Act. Most of the factors are concerned with the man's involvement, both emotional and financial, in the child's life; several factors also allow the court to consider the father's reasons for not being involved,[38] such as denial of access to the child. According to the Comment, the purpose underlying most of the factors is to determine whether there is "any meaningful psychological bond between father and child" and whether it is in the child's best interest that bond or the potential for establishing such a bond be protected.

Some of the UPUFA factors are similar to elements of Michigan's definitions of "best interests of the child," found in the Michigan Adoption Code, MCL 710.22(f) and the Child Custody Act of 1970, MCL 722.23. Adding or substituting the UPUFA factors to Michigan law would be unnecessary and probably confusing. The only significant difference between the UPUFA and current Michigan law in this respect is the UPUFA's greater sympathy for the putative father who has been denied an opportunity to support his child and to establish a parent-child relationship. The UPUFA mandates consideration of the putative father's reasons for the absence of a relationship; Michigan statutory law considers only the existence or nonexistence of a relationship. Some Michigan courts, however, do consider factors that, combined with prompt action by the putative father to assert parental rights, may excuse or mitigate the failure to establish a parent-child relationship.[39]

The UPUFA better protects a responsible father from being penalized for the actions of the mother (or other persons with custody of the child) in preventing the establishment of a father-child relationship. The Act better preserves the father's opportunity to have a parental relationship with his child, but it also encourages men who are strangers to their children suddenly to enter their children's lives and disrupt current custody arrangements. It may also interfere significantly with the adoption process, particularly where an unwed mother concealed the child from the putative father and the child has subsequently been raised by prospective adoptive parents. The problem of mothers denying unwed fathers access to their children and opportunities to act as fathers is a serious one that should be addressed by state law. The UPUFA may

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38 See subsections (3), (8), and (9) of section 5.

39 See, e.g., In re Baby Girl Clausen, 442 Mich 648, 684 n43; 502 NW2d 649, 665 n43 (1993) ; In re Baby Boy Barlow, 404 Mich 216, 237-238; 237 NW2d 35, 43-44 (1978); In re Robert P., 36 Mich App 497, 500; 194 NW2d 18, 19-20 (1971).

not be the appropriate avenue for this, however, given its harmful effect on adoptions.

§ 6. Court Determinations and Orders.

The UPUFA sets two distinct standards to be applied in proceedings under sections 3 and 4 of the Act. Subsection (d) of section 6 states that in proceedings under section 3 (regarding adoption or termination of rights), if the court, using the factors in section 5, finds an established familial bond between the putative father and the child, or finds that the failure to establish such a bond is justified and that the father wants and is able to establish the bond, it may terminate his rights "only if failure to do so would be detrimental to the child." Absent such a finding of an actual or potential bond, the court may terminate his rights if doing so is in the child's best interest. The court may apply subsection (d) with or without determining the putative father's actual paternity; the court must determine paternity in order to preserve the father's rights, but may terminate his rights without such a determination.[40]

Though the UPUFA standard here strongly favors preservation of the responsible father's rights, Michigan's standard is even less flexible. If the court finds that a putative father has established a custodial relationship or "has provided support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him," the court cannot terminate his rights except by proceedings under MCL 710.51(6)[41] or MCL 712A.2.[42] As a result, a putative father who has provided support or who has established a custodial relationship cannot have his rights terminated even if it would be detrimental to the child not to do so. The UPUFA strives to protect responsible fathers' rights, but allows courts a loophole for use in cases whose circumstances demand it; Michigan does not allow any such loophole. Because of the possible harm to children that might result in some cases from such a rigid rule, Michigan should consider allowing courts this discretion. As the law stands, a putative father who has provided any support within the requisite time period is automatically afforded parental rights that cannot be terminated; he is given an absolute right to block a potential adoption. Whereas the court may terminate the rights of a putative father who has not been

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40 See subsection (a) of section 6.

41 MCL 710.51(6) allows termination of the father's rights if the mother marries another man who wishes to adopt the child and if the putative father has failed to provide regular and substantial financial support for at least two years before the filing of the petition for adoption, and, having the ability to contact the child, has regularly and substantially failed to do so for at least two years.

42 MCL 712A.2 is a section of the Probate Code concerning juveniles and the juvenile division. It provides for termination of parental rights in juvenile cases; it is not related to this UPUFA discussion.

involved if it in the best interests of the child to do so, the court is powerless to terminate the rights of a putative father who has contributed any support, regardless of the consequences for the child.

Responsible putative fathers deserve a high level of protection of their basic parental rights, but that protection should not automatically trump their children's interests. Michigan law should be amended to allow the court to consider the effect on the child in all situations; the "only if failure to [terminate rights] would be detrimental" standard employed by the UPUFA would protect the rights of putative fathers who have been involved in some way in their children's lives while allowing courts to consider and protect the children's interests.

Subsection (g) of section 6 of the UPUFA applies to proceedings under section 4 of the Act (regarding custody or visitation). If a man appears seeking custody or visitation rights based on a paternity claim, the court must determine whether he is the biological father or deny him custody or visitation based on the factors in section 5. If he is found to be the biological father, the court shall determine, based on section 5, whether or not to grant him custody or visitation. The applicable standard here is the child's best interests.

As mentioned previously, Michigan does not currently require notice to putative fathers in proceedings regarding a change in a child's custody or visitation arrangements; therefore this UPUFA provision changes the notice required in Michigan. In any case, the best interests standard is already the relevant test under Michigan law.

Subsections (b), (e), and (f) of section 6 allow the court in a section 3 proceeding to terminate the parental rights of any man who received notice and failed to appear,[43] and to declare that no man has any parental rights with respect to the child. Courts are thereby able to ensure finality and security of the results of such proceedings, protecting the stability of the children's situations and foreclosing the possibility of future disruptions and legal messes.

Similarly, the Michigan Adoption Code allows (but does not require) the court to terminate a putative father's rights if he is given notice and fails to appear, or if his identity cannot be determined after a reasonable effort and he has not provided for the child and did not support the mother during pregnancy, or if his identity is known but his whereabouts cannot be determined after a

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43 The Comment notes that by giving the court discretion here (in subsection (e) (1)), the UPUFA allows the court to consider the excusable nonappearance of an identified putative father.

reasonable effort and he has not shown interest in the child and has not provided for the child for at least 90 days before the hearing. MCL 710.37(2)(a) and (b). Michigan does not have a specific provision allowing a court to declare that no man has any parental rights with respect to a given child, but Michigan courts do issue such declarations.

Overall, Michigan provisions are adequate for terminating the rights of disinterested or irresponsible putative fathers. Michigan should clarify what is already being done by adding a specific provision giving courts the power to declare that no man has parental rights as to a given child. Allowing the courts to issue such declarations would not violate due process rights, because Michigan law makes clear that putative fathers' rights are connected to the interest that they take in their children. Michigan provisions regarding notice to putative fathers and termination of their parental rights are consistent with Supreme Court decisions allowing states to link putative fathers' rights to their demonstrated interest and efforts to be involved in their children's lives. Allowing a court to eliminate all future claims of parental rights as to a given child would not violate due process if the court had already required notice of any putative father having a right to such notice under MCL 710.36[44] and had already terminated the rights of any putative father appearing and requesting custody under MCL 710.39.[45] Because the court would have met the constitutional requirements of due process for putative fathers, the court could permissibly declare that no further process would be necessary.

Michigan should enact a provision giving courts the explicit power to issue a declaration, as part of a proceeding that results in termination of a putative father's parental rights, that no man has any parental rights with respect to a particular child. Such a provision would allow courts to give their decisions regarding children the certainty and finality that those decisions require.

Subsection (i) of section 6 establishes a strict period of limitation[46] after which no person may directly or collaterally challenge on any ground[47] an order terminating parental rights or declaring that no man has parental rights.[48] Michigan does not have such a provision. Though strongly worded and perhaps

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44 See supra, p 12.

45 In other words, the court had found that the putative father had not provided support and that it would not be in the child' s best interest to grant custody to that putative father. See supra, pp 21-22.

46 The Uniform Commission recommends six months, but allows states to choose.

47 Including fraud, misrepresentation, failure to give required notice, or lack of either personal or subject matter jurisdiction.

48 According to the UPUFA Comment, several states have adopted a similar provision in the Uniform Parentage Act; Montana enacted the six-month limit, while Colorado shortened it to three months and Hawaii and North Dakota to 30 days.

seemingly harsh, this type of provision would be very effective and beneficial to children. It would preclude a very disruptive challenge to an existing family arrangement years after a court decision. The disadvantage with which this provision burdens some putative fathers who may (through little fault of their own fail to receive notice of an adoption years previously) is probably outweighed by the stability it lends to the adoption process and the necessary security it provides for children and their adoptive families. Michigan should therefore adopt a similar period of limitation.

Conclusion

Michigan should not enact the Uniform Putative and Unknown Fathers Act. No other state has passed it, and Michigan does not need to adopt it. Michigan law already addresses most of the issues covered by the UPUFA, usually in a similar or comparable manner. The constitutional concerns that the UPUFA was drafted to handle are adequately addressed by current Michigan law, which protects the parental rights of putative fathers who take hold of the opportunity to participate in their children's lives, and which also promotes the security of children and the effectiveness of adoption proceedings by providing straightforward means for terminating the rights of nonparticipating putative fathers.

Although the UPUFA is not necessary or appropriate for Michigan, the Legislature should consider incorporating some elements of the UPUFA into existing Michigan law.

Recommendations

1) Should Michigan adopt the Uniform Putative and Unknown Fathers Act?

No. Michigan law regarding putative fathers' rights already complies with the constitutional requirements of due process as recently interpreted by the Supreme Court. In addition, if the UPUFA were adopted, it would alter the current balance that Michigan has struck, as a matter of policy, between putative fathers' rights and the judicial system's ability to protect the security and stability of children's situations.

2) Should Michigan enact a specific definition of a putative father?

Yes. Michigan should add a definition of a putative father to MCR 5.903.[49] The definition should be "a male individual reputed, supposed, or alleged to be the biological father of a child." The definition should also emulate the UPUFA's emphasis on the temporary nature of putative father status, stating that "A prior judicial determination that a male individual has no rights with respect to a given child eliminates his status as a putative father and eliminates any right to future notice of or participation in proceedings regarding that child. A judicial declaration that no male individual has rights with respect to a given child shall operate as such a prior judicial determination of every male individual's rights."

3) Should courts be given limited discretion to terminate the rights of putative fathers who have provided support or care?

Yes, Michigan should amend MCL 710.39(2), which prohibits termination of a putative father's rights if he appears and requests custody and has established a custodial relationship with the child or has contributed support or care within 90 days prior to notice of the hearing.[50] As under the UPUFA, a court should be permitted to terminate such a putative father's rights under certain circumstances. The following language should be added at the end of MCL 710.39(2): "unless failure to terminate the putative father's rights would be detrimental to the child."

4) Should courts have the explicit dower to issue a declaration terminating all putative and unknown fathers' rights with respect to a given child?

Yes. Michigan should enact a provision specifically granting courts the authority, in adoption proceedings, to issue a declaration that no male individual has any parental rights with respect to a given child.

5) Should Michigan limit the time in which an order terminating parental rights or declaring that no male individual has parental rights may be challenged?

Yes. Michigan should enact a six-month or other period of limitation under the Michigan Adoption Code, between MCL 710.64 and 710.65, after which a court order terminating parental rights or declaring that no man has parental rights cannot be directly or collaterally challenged by any person upon any

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49 MCR 5.903 includes general definitions for the juvenile division, including the definition of the term "father."

50 See supra, pp 21-22.

ground, including fraud, misrepresentation, failure to give required notice, or lack of jurisdiction over the parties or the subject matter. Out of concern for finality, the period of limitation should not be permitted to be extended for any reason.

APPENDIX 1

UNIFORM PUTATIVE AND UNKNOWN FATHERS ACT

SECTION 1. DEFINITIONS. In this [Act]:

(1) "Man" means a male individual of any age.

(2) "Putative father" means a man who claims to be, or is named as, the biological father or a possible biological father of a child, and whose paternity of the child has not been judicially determined, excluding:

(i) a man whose parental rights with respect to the child have been previously judicially terminated or declared not to exist;

(ii) a donor of semen used in artificial insemination or in vitro fertilization whose identity is not known by the mother of the resulting child or whose semen was donated under circumstances indicating that the donor did not anticipate having an interest in the resulting child;

(iii) a man who is or was married to the mother of the child, and the child is born during the marriage [or within 300 days after the marriage was terminated by death, annulment, declaration of invalidity, divorce, or marital dissolution, or after a decree of separation was entered by a court];

(iv) a man who, before the birth of the child, attempted to marry the mother of the child in apparent

compliance with law, although the attempted marriage is, or could be declared, invalid, and:

(A) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage [, or within 300 days after its termination by death, annulment, declaration of invalidity, divorce, or marital dissolution]; or

(B) if the attempted marriage is invalid without a court order declaring its invalidity, the child is born during, or within 300 days after the termination of, cohabitation; and

(v) a man who, after the birth of the child, married or attempted to marry the mother of the child in apparent compliance with law, although the attempted marriage is, or could be declared, invalid, and:

(A) has acknowledged his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau];

(B) with his consent, is named as the child's biological father on the child's birth certificate; or

(C) is obligated to support the child under a written promise or by court order.

(3) "Unknown father" means a child's biological father whose identity is unascertained. However, the term does not include a donor of semen used in

artificial insemination or in vitro fertilization whose identity is not known to the mother of the resulting child or whose semen was donated under circumstances indicating that the donor did not anticipate having any interest in the resulting child.

COMMENT

Paragraph (1) defines "man" to include all male humans. The age element is the significant definitional feature. It has been suggested that use of the word "man" throughout this Act should be changed to "male individual" since "man" might connote adulthood and the Act should cover under-age progenitors as well as adults. (The UPA also uses "man.") Rather than change the wording throughout the Act, a definition of "man" has been added. Although objection to calling a 14-year-old father a "man" was raised at the August 7, 1986 floor session of the Conference, it would seem that for purposes of procreation and thus of this Act that individual is a man.

Paragraph (2) was originally taken from an early working draft (11/5/81) of the American Bar Association Family Law Section's Model State Adoption Act (which has not yet, as of the date of promulgation of this putative fathers Act, been adopted as a product of the ABA). It has been thoroughly revised for this putative fathers Act. To be consistent with the Uniform Parentage Act, and to use a term that the Drafting Committee felt is more commonly understood while still being more flexible in anticipation of the "new biology," the term "natural father" appeared in some earlier drafts of this Act as a substitute for the ABA's "father of genetic origin." Later, "biological" was substituted for "natural." It is believed that "biological" and "genetic" are essentially synonymous in this context, but that "biological" is more commonly understood.

The "putative father" definition includes a clause to make clear that a man cannot keep the status of "putative father," and thus is not entitled to notice of subsequent proceedings involving a particular child under Sections 3 and 4, once his parental rights have been judicially terminated or declared not to exist. Also, under this definition, a prior judicial determination of his parenthood, whether resulting from

some sort of paternity action or from an adoption, leaves a man outside the coverage of this Act.

The "putative father" definition includes the descriptive phrase "who claims to be or is named as." This allows for separate (and, we believe, clearer) treatment of the "unknown father," a person with whom this Act must, and does, also deal (primarily because of Footnote 9 in Stanley).

Part of paragraph (2) excludes from the definition donors of semen used in artificial insemination or in vitro fertilization whose identity is not known by the mother. This wording should provide latitude to apply the exclusion to the use of sperm from either a commercial sperm bank or a self-help network. Thus, it is left to other law, such as a "new biology" Act, to deal with the known donor of sperm used in artificial insemination. This exclusion covers donors who might be known to the attorney or doctor involved in arranging the insemination, but not known to the mother at the time of the insemination. It also covers the situation of mixing semen from more than one donor, where the mother might know who the donors are but not know whose semen produced the child. In other words, where there is an "anonymous" donation of semen without either the man or the woman anticipating that the man will have an interest in the child, this Act provides no rights to the donor nor does it impose any obligations on the court, the mother, or other interested parties with respect to the donor.

In contrast, the general pattern of 29 state statutes on artificial insemination seems to authorize such insemination for a married woman by a licensed physician upon the written consent of the woman and her husband. The resulting child is treated as the "natural and legitimate" child of the two spouses. See, for example, Alaska Statute 25.20.045. See also, UPA Section 5. Cf. Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. App. 1 Dist. 1986), holding that a sperm donor was the legal father of a child born to a single woman where insemination was not by a physician and the mother selected the donor. Although the mother was given custody, the father's paternity was determined and he was allowed visitation. In accord, C.M. v. C.C., 337 A.2d 821 (N.J. 1977).

Part of UPA Section 4, on presumed fathers, has been incorporated into the definition of "putative father," as an exclusion. This is part of the effort to sharpen this Act's focus on putatives. Thus, for the

purposes of this Act, a putative father is not one who has married the mother (whether or not the marriage was valid). This Act's definition does not, however, exclude all of the fathers whom the UPA's Section 4(a) describes as presumed. Still treated as "putative" are those who are described in the UPA's Section 4(a)(4) and (5). Thus Peter Stanley is a putative father under this definition, whereas, under the UPA, he is a presumed father. States that have not enacted the UPA but that have comparable law on presumed fathers should also be alert to this slight difference.

The phrases regarding a time period of 300 days are bracketed in Section 1(2)(iii) and (iv)(A) in response to comment and concern expressed from the floor during the Conference's first reading of this Act (1986) that, in states granting a divorce on grounds of living apart for six months or more, the date for triggering the running of the 300 days might need to be the date of separation as shown in the divorce papers.

In the lead-in lines of subsection (2)(iv) and (v), commas have been inserted around the phrase "or could be declared" to resolve the ambiguity of the UPA's unpunctuated version. A different meaning would be achieved by putting the commas around "or could be."

The definition of "unknown father," provides a handy reference to the biological father whose identity is not known to the petitioner or, in some instances, to the mother herself. In some cases, the petitioner who is not the mother might not know the identity of the father simply because the mother either does not know or, for whatever reason, will not tell. (See, In the Matter of Karen A.B., 513 A.2d 770 [Del. 1986], where the mother had refused to identify the unwed father and the Delaware Supreme Court held that a mere biological link did not merit Due Process protection, citing Lehr v. Robertson, 463 U.S. 248, 261, 103 S.Ct. 2985, 2993, 77 L.Ed.2d 614 [1983]. That father had not demonstrated a commitment to the responsibilities of parenthood, and, in fact, did not even know of the child's existence. The court placed great reliance on what it determined to be in the child's best interest.)

This Act does not define "parental rights." It is assumed that the term includes whatever rights existing state law accords it.

[SECTION 2. RIGHT TO DETERMINATION OF PATERNITY.

(a) A putative father may bring an action to determine whether he is the biological father of a particular child [, in accordance with [applicable state law],] at any time, unless his paternity or possible parental rights have already been determined or are in issue in pending litigation.

(b) An agreement between a putative father and the mother or between him and the child does not bar an action under this section [, unless the agreement has been judicially approved [under applicable state law]].]

COMMENT

This section is based on Section 6(a) and (d) of the Uniform Parentage Act. It is bracketed because states that have already enacted the UPA or comparable legislation on the judicial determination of paternity should not enact this section. They probably should substitute a provision that merely serves as a cross reference to that other law (an approach taken in earlier drafts of this Act). Research by the Drafting Committee's reporter indicates that no state absolutely bars a putative father from bringing some sort of action to establish his paternity, unless the bar is a statutory conclusive presumption of paternity in another man, as in California (see West's Ann. Cal. Evid. Code Sec. 621).

As noted above in the Prefatory Note, the U.S. Supreme Court, during its 1988-89 term, decided the California case, Michael H. and Victoria D. v. Gerald D., 491 U.S. 110, 105 L.Ed.2d 91, 109 S.Ct. 2333 (1989), issuing five separate opinions in the process. The key questions raised were whether either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution is violated by a state's creation of a conclusive presumption of paternity based on the marital status of the mother at the time of birth. Justice Antonin Scalia, writing for a plurality of the court (only three justices signed his lead opinion), declared that California's conclusive

presumption did not violate either the substantive or procedural due process (or equal protection) rights of the biological father, even though (1) there was clear and convincing scientific evidence of the putative father's paternity, (2) there was no full evidentiary hearing held on paternity or the best interest of the child, (3) the mother acknowledged the putative father's paternity, (4) the putative father had volunteered emotional and financial support of the child, and (5) the putative father had lived with the mother and child for a period of time.

While an opinion from such a divided court will be narrowly construed, nevertheless it sends a chilling message to those who may father a child of a married woman that, even if they "act like a father" and "develop a relationship with their offspring," the sanctity of the "unitary marital family" may be upheld. However, certain recent state court decisions, such as C.C. v. A.B., Mass. Sup. Jud. Ct., 406 Mass. 679 (2/19/90), 16 FLR 1328; Smith v. Cole, La. Sup. Ct. No. 89-C-1134 (12/11/89), 16 FLR 1087; and Michael K. T. v. Tina L. T., W.Va. Sup. Ct. App. No. 18989 (12/21/89), 16 FLR 1149, indicate that there may be some weakening of the conclusive presumptions based merely on the marital status of the mother at the time of birth.

It has been suggested that the right to a determination of paternity need only be referred to in the commentary because the UPA already provides for it. However, since the thrust of this Act is to clarify the rights of putative fathers, it is appropriate to state this right in the text of the Act. This statement of the right, however, does not suggest that bringing a paternity action is the only way that a putative father's rights may be protected.

This version of the UPA's Section 6, while including the UPA's timing element ("at any time"), does not include the provisions on a paternity action being brought by someone other than a father. Nor does it include that Act's provisions on declaring the nonexistence of a father and child relationship. A major difference from that Act is that, whereas in that Act these provisions apply to "presumed" fathers (a term not used in this Act), in this Act they apply to putative fathers since this Act focuses on the rights of putative fathers. This Act is not intended as another parentage Act.

The bracketed language in subsection (b) is intended to pick up reference to a state's statutory law

comparable to Section 13(a)(2) of the UPA, setting out certain protections with regard to such agreements.

In some states without specific provisions on actions to establish paternity, declaratory judgment is available. For example, citing cases from 13 states decided between 1974 and 1985, the court in White v. Mertens, 225 Neb. 241, 404 N.W.2d 410 (1987), held that, although the father of a child born out of wedlock need not be treated in all respects as a father of a child born in wedlock, the relationship between an unwed father and his child is not devoid of constitutional protection. Thus, absent any other statutory remedy, such a father has recourse to the declaratory judgment statutes to determine his status and rights. A provision such as in the UPA, or the abbreviated version here, removes any doubt.

SECTION 3. NOTICE OF JUDICIAL PROCEEDINGS FOR ADOPTION OR TERMINATION OF PARENTAL RIGHTS.

(a) In an adoption or other judicial proceeding that may result in termination of any man's parental rights with respect to a child, the person seeking termination shall give notice to every putative father of the child known to that person.

(b) The notice must be given (i) at a time and place and in a manner appropriate under the [rules of civil procedure for the service of process in a civil action in this State] or (ii) at a time and place and in a manner as the court directs and which provides actual notice.

(c) A putative father may participate as a party in a proceeding described in subsection (a).

(d) If, at any time in the proceeding, it appears to the court that there is a putative father of the child who has not been given notice, the court shall require notice of the proceeding to be given to him in accordance with subsection (b).

(e) If, at any time in the proceeding, it appears to the court that an unknown father may not have been given notice, the court shall determine whether he can be identified. The determination must be based on evidence that includes inquiry of appropriate persons in an effort to identify him for the purpose of providing notice. The inquiry must include:

(1) whether the mother was married at the probable time of conception of the child or at a later time;

(2) whether the mother was cohabiting with a man at the probable time of conception of the child;

(3) whether the mother has received support payments or promises of support, other than from a governmental agency, with respect to the child or because of her pregnancy;

(4) whether the mother has named any man as the biological father in connection with applying for or receiving public assistance; and

(5) whether any man has formally or informally acknowledged or claimed paternity of the child in a

jurisdiction in which the mother resided at the time of or since conception of the child or in which the child has resided or resides at the time of the inquiry.

(f) If the inquiry required by subsection (e) identifies any man as the unknown father, the court shall require notice of the proceeding to be given to him pursuant to subsection (b). If the inquiry so identifies a man, but his whereabouts are unknown, the court shall proceed in accordance with subsections (b) and (g).

(g) If, after the inquiry required by subsection (e), it appears to the court that there may be an unknown father of the child, the court shall consider whether publication or public posting of notice of the proceeding is likely to lead to actual notice to him. The court may order publication or public posting of the notice only if, on the basis of all information available, the court determines that the publication or posting is likely to lead to actual notice to him.

COMMENT

Section 3 is derived from Section 25 of the UPA, but deals with notice only to putative and unknown fathers. It does so only for adoption proceedings and various other child "care and protection" proceedings that could result in a dispositional order terminating parental rights (see subsection (a)). It is the intent of the Act that there be no undue intrusion into the law of marriage and divorce. This section deals neither with custody and visitation nor with presumed or judicially declared fathers. Custody and visitation are dealt with in Section 4.

Subsection (a) requires that notice be given to all putative fathers known to the person seeking termination. Subsection (b) provides for both traditional service of civil process and discretionary employment, by the court, of nontraditional methods of providing actual notice. Such nontraditional ways of providing actual notice could include a telephone call, a personal visit, an informal note, or any other way of providing actual notice. The reason for this is to allow the court to be sensitive to the various privacy interests of the persons involved which might be adversely affected by traditional means of serving civil process. For the purpose of appellate review, the record must include appropriate notation of notice having been given.

Subsection (b) is intended to maximize options available to the court and hence to protect a father's right to notice. This, in turn, protects the security of a child's future adoption. In determining whether to direct an alternative form of notice, the court may consider, and, when they conflict, balance such factors as the privacy interests of the parents, the societal interest in the permanency and stability of a final judicial disposition, and the father's procedural due process right to notice. Thus, a court's power to order publication or posting is limited to those situations described in subsection (g), when a determination is made that actual notice is likely to be effected. There will be some situations in which the father will not want to receive such a notice and will be more concerned about his own "right to privacy" than his right to notice (e.g., when he is married to another woman).

Subsection (b) also allows flexibility in the content of the notice that must be given when it is not possible to locate the identified putative father. For example, if notice is published in the newspaper, it need not name the mother. A notice such as the following should alert the putative father as to his need to assert his rights:

> To (name of putative father):
>
> You are named as a party in Case No. _____, and must act within _____ days by filing legal papers. You might need the assistance of an attorney. You can obtain further information by. . . .
>
> Your failure to respond can result in a judgment against you.

Subsections (c) and (d) are intended to pick up situations such as that in Lehr v. Robertson where, although the biological father did not avail himself of the putative fathers registry, he filed a "visitation and paternity" petition in another local court and the judge in the adoption proceeding knew who the biological father was and where he could be located (yet did not direct that he be notified of the adoption proceeding).

In subsection (e), in order to provide some protection to putative fathers who might not know of the proceeding or of their fatherhood, especially in those situations where the mother may be reluctant to reveal information, further inquiry is required whenever it becomes apparent that a possible father has not been notified. It is contemplated that various aspects of the inquiry will be conducted by the judge, court personnel, or the agency or person initiating the proceeding, as directed by the judge.

The list of investigative approaches in subsection (e) includes a reference to information the mother might have furnished when seeking or receiving public assistance. It is assumed that whatever confidentiality statutes might protect that information would not preclude its release to the court when attempting to provide for the best interest of the child. Also, although this investigative avenue has been criticized for subjecting poor women to an approach to which more well-to-do women would not be subject, there is no reason that a child born to a poor mother should not be afforded the protection of this rather obvious possible source of information.

The "and" at the end of subsection (e)(4) is intended to convey the idea that an inquiry covering fewer than all of those avenues is not adequate unless it has turned up the father.

Subsection (f) governs the giving of notice to any possible father identified by the inquiry required by subsection (e).

Subsection (g) addresses only the circumstance of an unidentified ("unknown") father. Publication or public posting is virtually ruled out, unless the court determines that that action is likely to lead to actual notice to the appropriate man. Although subsection (g) is based on the UPA's Section 25(e), there has been a change of emphasis and a relatively minor substantive

change. In addition, the UPA's brackets around that provision have been deleted.

Whereas the UPA's Section 25(e) provides that the judge shall determine whether publication is likely to lead to identification, and, if the judge determines that publication is likely to lead to identification he or she must order publication, prior drafts of this Act provided that the judge may not order publication unless he or she determines that it is likely to lead to ... . Draft No. 6 of this Act introduced another variation (still present): "... may order ... only if ... ." The substantive change is that, rather than speaking of publication "identifying" the father, as the UPA does, this subsection focuses on providing notice to the father.

Many people recognize that publishing and posting such notices to unnamed and unknown fathers are unlikely either to give actual notice or to ferret out facts relating to the father's identity, especially if the notice does not state the sort of information that would unnecessarily subject the mother and child to an invasion of privacy, embarrassment, and stigma. Given this Act's investigation requirement and the court's obligation to determine the likelihood of publication or posting accomplishing its purpose, it would seem that all reasonable efforts will have been undertaken in the protection of the biological father's right to notice. Going beyond the procedure set out here could merely subject the mother and child to that potential invasion of privacy, embarrassment, and stigma, and to the unnecessary expense and delay of performing a probably useless act. Notice by publication and posting should not be regarded as a security blanket for lawyers and their clients wanting to feel reassured that they have "done everything they could."

As indicated in the Prefatory Note, this Act seeks to protect and balance the interests of all of the parties, including the child; the scale should not be weighted in favor of an unknown or unidentified (and perhaps unidentifiable) father. Unless there is some reasonable likelihood that publication or posting will lead to actual notice, the mother's and child's interest in privacy and the public interest in an efficient and expeditious adoption process militate against publication and posting of notice. It would appear that this is all that is required by Footnote 9 in Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972), and its progeny.

If the inquiry under subsection (e) turns up enough information to identify a person, with name and address, then notice must conform to subsection (b). If inquiry only establishes that an unidentified person is the father, then the court must confront the issue of whether publication or public posting can successfully provide notice to the proper person. To maximize the chances of any notice reaching the proper person, it might have to include the names of the mother and the child, as well as other information that might sorely infringe upon the mother's privacy rights and subject her to embarrassment and ridicule within her community. Under subsection (g), however, the court has discretion to fashion a particularized notice that might be posted only where it would be most likely to provide actual notice to the father.

Subsection (g) is silent as to the time or manner of publication and posting, or the required proof of notice to be filed, because the committee believes that such language would be superfluous. Each state's rules of civil procedure should cover those points.

It has been suggested that this Act be more specific as to the content of notices, especially those published or posted under subsection (g). The Conference has decided not to include such a provision.

Relevant to notice procedures, it should be observed that this Act does not include provisions on a putative fathers registry. (Basically, under such a law, notice must be given to men who register as fathers of particular children.) At least 11 states have such registries: Idaho, Michigan, Montana, Nebraska, New York, North Carolina, Oklahoma, Tennessee, Texas, Utah, and Wisconsin. Nor does the Act include language like that in UPA Section 4(a)(5), regarding filing written acknowledgements of (or, as in Draft No. 6 of this Act, statements of intent to claim) paternity. The Act does not enable a man to interfere with or delay (or possibly discourage altogether) adoptions, custody proceedings, etc., by simply filing a notice of intent to claim paternity. The mother must be given an opportunity to dispute that claim, without the burden being on her to bring an action under UPA Section 4(b) and to disprove the claim only by "clear and convincing evidence."

The Act does not include a putative fathers registry requirement for, essentially, three reasons: (1) while "ignorance of the law is no excuse," most fathers or potential fathers -- even very responsible ones -- are not likely to know about the registry as a

means of protecting their rights, and the objective is providing some actual protection, not relying on a cliche more relevant to the criminal law; (2) individual state registries do not protect responsible fathers in interstate situations; and (3) since the registries rely on unsupported claims, their accuracy is in doubt and their potential for an invasion of privacy and for interference with matters of adoption, custody, and visitation is substantial. It has also been pointed out that such a registry could provide a means for blackmailing the mother. The registry can, however, provide a simple (albeit "hard-nosed" and potentially unjust) solution when a father fails to register, as in Lehr v. Robertson.

Paternity registration statutes were held unconstitutional as applied to two fathers in separate decisions in Nebraska and Utah. As is typical under such statutes, in both states a father's consent to the adoption of his out-of-wedlock child is dispensed with unless he files a notice of intent to claim paternity. The Nebraska statute requires filing within five days after the child's birth, but that state's supreme court (in Application of S.R.S., 408 N.W.2d 272 (Neb. 1987)) ruled the law inapplicable to a father who lived with the mother of his child before and after the child was born, and who never had occasion to formally claim his paternity until after the mother left him and placed the child for adoption. The Utah statute provides that the claim must be registered before the filing of a petition for adoption of the child. The Utah Court of Appeals (in Matter of K.B.E., 740 P.2d 292 (Utah App. 1987)) found that a father who filed his claim on the day his child was born failed to timely file under the statute where the mother and her grandfather had filed an adoption petition only hours before; however, the court said that to apply the statute in such circumstances would violate the father's constitutional rights.

SECTION 4. NOTICE OF JUDICIAL PROCEEDINGS REGARDING CUSTODY OR VISITATION.

(a) The petitioner in a judicial proceeding to change or establish legal or physical custody of or visitation rights with respect to a child shall give notice to every putative father of the child known to

the petitioner, except a proceeding for annulment, declaration of invalidity, divorce, marital dissolution, legal separation, modification of child custody, or determination of paternity.

(b) The notice must be given (i) at a time and place and in a manner appropriate under the [rules of civil procedure for the service of process in a civil action in this State] or (ii) as the court determines will likely provide actual notice.

(c) If, at any time in the proceeding, it appears to the court that there is a putative father of the child who has not been given notice of the proceeding, the court shall require notice of the proceeding to be given to him pursuant to subsection (b).

(d) If, at any time in the proceeding, it appears to the court that there may be an unknown father who has not been given notice of the proceeding, the court, in the best interest of the child, may attempt to identify him pursuant to Section 3(e) and require notice of the proceeding to be given to him pursuant to Section 3(f) and (g).

(e) A putative father may participate as a party in a proceeding described in subsection (a).

COMMENT

This section addresses notice of custody and visitation proceedings separately from the section on adoption and termination of parental rights. From the perspective of a child, access to and continuity of

contact with a male biological parent might be very important and necessary for healthy growth and development, even if that person is not able to have day-to-day responsibility for total physical care and custody.

Only known putative fathers need be given notice of a custody proceeding, because in a custody proceeding parental rights are not subject to termination. However, this section recognizes the importance, especially in the context of a state proceeding based on allegations of child mistreatment or neglect by the mother, of giving notice to a putative father who, if brought into the situation, might prove to be a positive resource and support for the child. In addition, subsections (c) and (d) provide for the court to order notice and, if necessary, inquiry like that specified in Section 3 so that the stability of a child's environment may more readily be secured. For example, the immediate effort might be to make a voluntary or involuntary temporary change in physical custody of the child, but with a recognition that, at a later point, termination of parental rights might be necessary. Early notice will, it is hoped, avoid delay and provide greater security to the child when that later point is reached.

As with Section 3, marriage-termination and subsequent child custody modification proceedings are not covered by this section.

Clark Domestic Relations, 2nd Ed., sec. 4.5, n. 16, cites a group of cases that have held that an unwed father has "a constitutional right to visitation upon the same terms as would the father of a legitimate child under Stanley v. Illinois." These include: La Grone by Bridger v. La Grone, 238 Kan. 630, 713 P.2d 474 (1986) (custody of one child to the mother, of the other to the father); Phillips v. Horlander, 535 S.W.2d 72 (Ky. 1974); R. v. F., 113 N.J.Super. 396, 273 A.2d 808 (1971); Pierce v. Yerkovich, 80 Misc.2d 613, 363 N.Y.S.3d 403 (Fam. Ct. 1974); J.M.S. v. H.A., 161 W.Va. 433, 242 S.E.2d 696 (1978).

A recent case on point is the 1987 Nebraska Supreme Court decision, White v. Mertens, discussed above under Section 2. The court, referring to dicta from the earlier Nebraska case of Carlson v. Bartels, 143 Neb. 680, 10 N.W.2d 671 (1943) stated that "paternity is a 'right,' 'status,' or 'legal relation' within the ambit of a declaratory judgment action." 404 N.W. 2d 410, 412. The court held that the relationship

is not devoid of constitutional protection (id. at 413), and ordered visitation for the father.

The current supplement to 15 ALR 3d 887-892, Annot. "Right of Putative Father to Visit Illegitimate Child," lists many cases recognizing that a putative father has a right to visit his illegitimate child, unless it has been shown that visitation would be detrimental to the best interest and welfare of the child. For example: Forestiere v. Doyle, 30 Conn. Supp. 284, 310 A.2d 607 (1973) (father entitled to be heard on visitation); Griffith v. Gibson, 73 Cal. App.3d 465, 142 Cal. Rptr. 176 (1977); Maxwell v. LeBlanc, 434 So.2d 375 (La. 1983); Normand v. Barkei, 385 Mass. 851, 434 N.E.2d 631 (1982); People ex rel. Vallera v. Rivera, 39 Ill. App.3d 775, 351, N.E.2d 391 (1976) (visitation allowed only if father has acknowledged paternity, and should be conditioned on father's contributing to child's support); Pi v. Delta, 400 A.2d 709 (Conn. 1978). But see, contra, Camacho v. Camacho, 173 Cal. App.3d 214, 218 Cal. Rptr. 810 (1985) (trial court erred in conditioning visitation on father's making timely payments and on father's undergoing regular psychotherapy for indefinite period; support and visitation are independent rights accruing to benefit of child, and visitation could not be made contingent upon proper exercise of some other duty or obligation of parent).

And for cases holding that determination of a putative father's right to visitation must be governed by what is held to be in the best interest of the child, see (to list just a few): Gardner v. Rothman, 370 Mass. 79, 345 N.E.2d 370 (1976); State ex rel. Wingard v. Sill, 223 Kan. 661, 576 P.2d 620 (1978); Pearson v. Clark, 382 So.2d 482 (Miss. 1980); and Alice v. Ronald, 683 S.W.2d 307 (Mo. 1984).

SECTION 5. FACTORS IN DETERMINING PARENTAL RIGHTS OF FATHER. In determining whether to preserve or terminate the parental rights of a putative father in a proceeding governed by Section 3 or 4, the court shall consider all of the following factors that are pertinent:

(1) the age of the child;

(2) the nature and quality of any relationship between the man and the child;

(3) the reasons for any lack of a relationship between the man and the child;

(4) whether a parent and child relationship has been established between the child and another man;

(5) whether the child has been abused or neglected;

(6) whether the man has a history of substance abuse or of abuse of the mother or the child;

(7) any proposed plan for the child;

(8) whether the man seeks custody and is able to provide the child with emotional or financial support and a home, whether or not he has had opportunity to establish a parent and child relationship with the child;

(9) whether the man visits the child, has shown any interest in visitation, or, desiring visitation, has been effectively denied an opportunity to visit the child;

(10) whether the man is providing financial support for the child according to his means;

(11) whether the man provided emotional or financial support for the mother during prenatal, natal, and postnatal care;

(12) the circumstances of the child's conception, including whether the child was conceived as a result of incest or forcible rape;

(13) whether the man has formally or informally acknowledged or declared his possible paternity of the child; and

(14) other factors the court considers relevant to the standards for making an order, as stated in Section 6(d) and (g).

COMMENT

This section includes factors to be considered by the court. The basic thrust of the factors is to require ascertainment by the court of (1) whether there is any meaningful psychological bond between father and child; and (2) whether that bond or the potential for establishing such a bond should, in the child's best interest, be protected. See Section 6(c) and (d).

With many changes, the list of factors in this section is based on Professor Harry Krause's points-to-be-kept-in-mind outline (originally prepared as notes for oral presentation at the Drafting Committee meeting, 5/31/85). As set out here, the list covers the various categories of fathers, from the "casual progenitor" to the one who lived with the mother in a stable relationship. It also covers various descriptions of conduct, such as paying support, exercising visitation rights, and trying to "grasp the opportunity" to act as a parent. And, finally, it covers various descriptions of factual circumstances, such as the age of the child (objective) and the existence of a parent and child relationship (subjective).

In considering some of the factors listed, a court might wish to take note of a father's written acknowledgment of paternity, filed with the appropriate agency under a statute similar to UPA Section 4(a)(5), or a state's putative fathers registry. While its probative value might be slight, such a filing could be some evidence of intent to assume responsibility for the child and of an interest in having a parental relationship with the child.

To take one state as an example to compare with this section, the Official Code of Georgia Annotated, section 19-8-7(b)(1) and (2) sets out the following factors:

1. Whether the putative father has lived with the child;

2. Whether the putative father has contributed to the child's support;

3. Whether the putative father has made any attempt to legitimate the child;

4. Whether the putative father provided support for the mother (including medical care) either during her pregnancy or during her hospitalization for the birth of the child.

Under the Georgia law, if the court finds that there is evidence of any of these factors, it is to determine from the evidence whether that conduct by the putative father was sufficient to establish a familial bond between the putative father and the child.

It is thought that careful application of this Act's 14 factors will allow solid decision-making on behalf of both parents and their children. For example, consideration of factor 4 might reveal a significant relationship with another man, either defacto or by court order, and that to disrupt it would be detrimental to the child.

For another example, under factor 12, a court might find, as did the Appellate Division of the New York Supreme Court in In the Matter of Craig "V" v. Mia "W", 500 N.Y.S.2d 568 (4/3/86), that although a father committed the felony of rape in the third degree by fathering a child with a 17-year-old mother, he did not forfeit his right to establish paternity and gain custody, since he was not seeking merely to benefit from his wrongdoing, but, more importantly, to assume duties and responsibilities of supporting the child. Yet, in other cases, such as when rape was in the first degree, involving force, or when conception was the product of incest, the court might determine that it would be detrimental to the child to accord any parental rights to such a father. See the discussion in the dissenting opinion in S.J. v. L.T., 727 P.2d 789 (Alaska 1986), dealing with a rather bizarre set of facts.

This Act does not speak specifically about what weight the court should give to each factor in each type of proceeding or about which factors are of primary significance in the various types of proceedings. The court is specifically granted discretion to consider other, unlisted factors.

SECTION 6. COURT DETERMINATIONS AND ORDERS.

(a) If a man appears in a proceeding described in Section 3, other than as a petitioner or prospective adoptive parent, the court may:

(1) [in accordance with [applicable state law],] determine whether the man is the biological father of the child and, if the court determines that he is, enter an order in accordance with subsection (d); or

(2) without determining paternity, and consistent with the standards in subsection (d), enter an order, after considering the factors in Section 5, terminating any parental rights he may have, or declaring that he has no parental rights, with respect to the child.

(b) If the court makes an order under subsection (a), the court may also make an order (i) terminating the parental rights of any other man given notice who does not appear, or (ii) declaring that no man has any parental rights with respect to the child.

(c) If a man who appears in a proceeding described in Section 3 is determined by the court to be the father, the court, after considering evidence of the

factors in Section 5, shall determine (i) whether a familial bond between the father and the child has been established; or (ii) whether the failure to establish a familial bond is justified, and the father has the desire and potential to establish the bond.

(d) If the court makes an affirmative determination under subsection (c), the court may terminate the parental rights of the father [, in accordance with [applicable state law],] only if failure to do so would be detrimental to the child. If the court does not make an affirmative determination, it may terminate the parental rights of the father if doing so is in the best interest of the child.

(e) If no man appears in a proceeding described in Section 3, the court may enter an order:

(1) terminating with respect to the child the parental rights of any man given notice; or

(2) declaring that no putative father or unknown father has any parental rights with respect to the child.

(f) If the court does not require notice under Section 3, it shall enter an order declaring that no putative father or unknown father has any parental rights with respect to the child.

(g) If a man appears in a proceeding described in Section 4 and requests custody or visitation based on a

claim of paternity, the court shall either determine [, in accordance with [applicable state law],] whether he is the biological father of the child or, after considering the factors in Section 5, deny him the custody of or visitation with the child. If the court determines that he is the biological father, the court shall determine, after considering evidence of the factors listed in Section 5, whether or not to grant him custody or visitation and shall make such other orders as are appropriate. All orders issued under this subsection must be in the child's best interest.

(h) A court order under subsection (a)(2), (b), (d), or (e) terminating the parental rights of a man, or declaring that no man has parental rights, with respect to the child, is not a determination that the man is or is not the biological father of the child.

(i) [Six months] after the date of issuance of an order under this section terminating parental rights or declaring that no man has parental rights, no person may directly or collaterally challenge the order upon any ground, including fraud, misrepresentation, failure to give a required notice, or lack of jurisdiction over the parties or of the subject matter. The running of this period of limitation may not be extended for any reason.

COMMENT

Subsections (a) through (g) provide for a variety of court orders, depending upon the appearance or

nonappearance of the father in the proceeding. If a man appears in the proceeding, subsection (a) authorizes but does not require the court to determine paternity. It also expressly provides for an order that no man has any parental rights with respect to the child. Under subsections (b)(i) and (e)(1), nonappearance after notice could result in a termination of parental rights. If there is no identified biological father, the court should terminate the unidentified biological father's parental rights so that crucial and timely planning for the child can proceed. The court has discretion to terminate the rights of a man who "does not appear." The court could decide not to enter either of the two kinds of order mentioned. This addresses the situation of an identified man who is unable to appear; an excusable nonappearance ought not require a termination.

Subsection (a) does not include references to claiming "custodial" rights. Under UPA Section 25(d), a father not only had to appear but had to claim custody of the child in order to avoid termination of his parental rights. The current opinion is that that should not be required.

In subsections (a)(1), (d), and (g), the phrase "in accordance with applicable state law" is in brackets to indicate that it is optional. States with law on the point should use the phrase (or a more specific citation); those without law on the point should not. See, Katz, Howe, and McGrath, Child Neglect Laws in America, Table X, on termination.

Subsections (c) and (d) attempt to take into account and distinguish between the two basic functions served by consideration of Section 5's factors: the determination of the existence of a familial bond, and the determination of the extent to which a father's parental rights should be judicially preserved.

The final version of this Act modifies earlier drafts' provision that no order may be "detrimental" to the child's best interest. That provision picked up a standard similar to the one in California Civil Code, Section 4600(c). That "not detrimental" standard, requiring a determination of whether an award of custody to the putative father would be detrimental to the child, is more protective of the father's rights than the mere "best interest of the child" standard, and is given only a very limited application in this Act. See In re Baby Girl M., 191 Cal. App. 3d 786, 236 Cal. Rptr. 660 (Cal. App. 4 Dist. 1987); In re Baby Girl M., 207 Cal. Rptr. 309, 688 P.2d 918 (Cal. 1984); and In re Baby

Girl M., 141 Cal. App.3d 432, 191 Cal. Rptr. 339 (App. 1983). But see also Michael U. v. Jamie B., 39 Cal.3d 789, 705 P.2d 363, 218 Cal. Rptr. 39 (1985). The final language, in Section 6(d), applies the "not detrimental" standard only in termination proceedings and only to situations in which there is a familial bond between the father and child, or in which its nonexistence is justified and there is the potential for establishing one. This is viewed as serving the child, not just the father. The "best interest" standard applies to all other situations.

Subsection (g), applicable to Section 4 proceedings, closely parallels the approach taken for Section 3 proceedings. Under this subsection, if a man seeks custody or visitation, based on a claim of paternity, the court may either first determine paternity and then apply the Section 5 factors to decide whether it would be in the child's best interest to grant custody or visitation, or the court may simply apply the factors and determine that no custody or visitation would be appropriate. In the last sentence of subsection (g), the Drafting Committee had in mind UPA Section 15(e), which provides for orders "concerning the duty of support, the custody and guardianship of the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child."

Subsection (i) provides a statute of limitations for challenging a termination order, based on part of the UPA's Section 25(d). "Six months" is in brackets to allow enacting states a choice. Of the 16 states that have enacted the UPA in whole or in part, it appears that the majority have no provision comparable to Section 25(d), relying instead upon other state law. Montana uses the UPA's six-month provision, Hawaii and North Dakota set the limit at 30 days, and Colorado at three months.

Judicial decision makers should be sensitive to social workers' concerns about avoiding delays in securing a stable situation for a child, something considered vital to a child's healthy development. However, the statutory cutoff date should not be so close to the finality of the termination order itself as to raise due process issues. Under this Act's wording, the time begins running from the date of issuance of the order (rather than from the date it becomes final) because any rehearing, reconsideration, or appeal deadline will fall within the six-month deadline. To assure that whatever time period is selected will not be

extended, an express prohibition on tolling the running of the limitation period is included. This reflects the overwhelming public policy favoring a stable environment for the child's development -- a policy benefiting the individual child, the child's family, and the society as a whole.

APPENDIX 2

Michigan Probate Code

Adoption Code
(selected excerpts)

THE PROBATE CODE
(Act 288 of 1939)

CHAPTER X. MICHIGAN ADOPTION CODE

710.22 Definitions.

Sec. 22. As used in this chapter:

(f) "Best interests of the adoptee" or "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:

(*i*) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under section 39 of this chapter, the putative father and the adoptee.

(*ii*) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.

(*iii*) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(*iv*) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(*v*) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39 of this chapter, the home of the putative father.

(*vi*) The moral fitness of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father.

(*vii*) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father, and of the adoptee.

(*viii*) The home, school, and community record of the adoptee.

(*ix*) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.

(*x*) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.

(*xi*) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody.

710.33 Notice of intent to claim paternity.

Sec. 33. (1) Before the birth of a child born out of wedlock, a person claiming under oath to be the father of the child may file a verified notice of intent to claim paternity with the court in any county of this state. The form of the notice shall be prescribed by the director of the department of public health and provided to the court. The notice shall include the claimant's address. On the next business day after receipt of the notice the court shall transmit the notice to the vital records division of the department of public health. If the mother's address is stated on the notice, the vital records division shall send a copy of the notice by first-class mail to the mother of the child at the stated address.

(2) A person filing a notice of intent to claim paternity shall be presumed to be the father of the child for purposes of this chapter unless the mother denies that the claimant is the father. Such a notice is admissible in a paternity proceeding under Act No. 205 of the Public Acts of 1956, as amended, being sections 722.711 to 722.730 of the Michigan Compiled Laws, and shall create a rebuttable presumption as to the paternity of that child for purposes of that act. Such a notice shall create a rebuttable presumption as to paternity of the child for purposes of dependency or neglect proceedings under chapter 12a.

(3) A person who timely files a notice of intent to claim paternity shall be entitled to notice of any hearing involving that child to determine the identity of the father of the child and any hearing to determine or terminate his paternal rights to the child.

710.34 Ex parte petition evidencing intent to release or consent; notice of intent to release or consent.

Sec. 34. (1) In order to provide due notice at the earliest possible time to a putative father who may have an interest in the custody of an expected child or in the mother's intended release of an expected child for adoption or consent to adoption of the expected child, and in order to facilitate early placement of a child for adoption, a woman pregnant out of wedlock may file with the probate court an ex parte petition which evidences her intent to release her expected child for adoption or to consent to the child's adoption, which indicates the approximate date and location of conception and the expected date of her confinement, which alleges that a particular person is the putative father of her expected child, and which requests the court to notify the putative father about his rights to file a notice of intent to claim paternity pursuant to section 33. The petition may allege more than 1 putative father where circumstances warrant. The petition shall be verified. Upon the filing of the petition, the court shall issue a notice of intent to release or consent, which notice shall be served upon the putative father by any officer or person authorized to serve process of the court. Proof of service shall be filed with the court.

(2) A notice of intent to release or consent shall:

(a) Indicate the approximate date and location of conception of the child and the expected date of confinement of the mother.

(b) Inform the putative father of his right under section 33(1) to file a notice of intent to claim paternity before the birth of the child.

(c) Inform the putative father of the rights to which his filing of a notice of intent to claim paternity will entitle him under section 33(3).

(d) Inform the putative father that his failure to file a notice of intent to claim paternity before the expected date of confinement or before the birth of the child, whichever is later, shall constitute a waiver of his right to receive the notice to which he would otherwise be entitled under section 33(3) and shall constitute a denial of his interest in custody of the child, which denial shall result in the court's termination of his rights to the child.

(3) The form of the notice of intent to release or consent shall be approved by the supreme court administrator and shall be consistent with this section.

710.36 Hearing to determine whether child born out of wedlock and to determine identity and rights of father; filing proof of service of notice of intent or acknowledgment; copy of notice of intent to claim paternity; notice of hearing; contents; filing proof of service of notice of hearing; waiver; evidence of identity; adjournment of proceedings.

Sec. 36. (1) If a child is claimed to be born out of wedlock and the mother executes or proposes to execute a release or consent relinquishing her rights to the child or joins in a petition for adoption filed by her husband, and the release or consent of the natural father cannot be obtained, the judge of probate shall hold a hearing as soon as practical to determine whether the child was born out of wedlock, to determine the identity of the father, and to determine or terminate the rights of the father as provided in this section and sections 37 and 39 of this chapter.

(2) Proof of service of a notice of intent to release or consent or the putative father's verified acknowledgment of notice of intent to release or consent shall be filed with the court, if the notice was given to the putative father. The court shall request the vital records division of the department of public health to send to the court a copy of any notice of intent to claim paternity of the particular child which the division has received.

(3) Notice of the hearing shall be served upon the following:

(a) A putative father who has timely filed a notice of intent to claim paternity as provided in section 33 or 34 of this chapter.

(b) A putative father who was not served a notice of intent to release or consent at least 30 days before the expected date of confinement specified in the notice of intent to release or consent.

(c) Any other male who was not served pursuant to section 34(1) of this chapter with a notice of intent to release or consent and who the court has reason to believe may be the father of the child.

(4) The notice of hearing shall inform the putative father that his failure to appear at the hearing shall constitute a denial of his interest in custody of the child, which denial shall result in the court's termination of his rights to the child.

(5) Proof of service of the notice of hearing required by subsection (3) shall be filed with the court. A verified acknowledgment of service by the party to be served is proof of personal service. Notice of the hearing shall not be required if the putative father is present at the hearing. A waiver of notice of hearing by a person entitled to receive it is sufficient.

(6) The court shall receive evidence as to the identity of the father of the child. Based upon the evidence received, the court shall enter a finding identifying the father or declaring that the identity of the father cannot be determined.

(7) If the court finds that the father of the child is a person who did not receive either a timely notice of intent to release or consent pursuant to section 34(1) of this chapter or a notice required pursuant to subsection (3), and who has neither waived his right to notice of hearing nor is present at the hearing, the court shall adjourn further proceedings until that person is served with a notice of hearing.

710.37 Termination of rights of putative father.

Sec. 37. (1) If the court has proof that the person whom it determines pursuant to section 36 to be the father of the child was timely served with a notice of intent to release or consent pursuant to section 34(1) or was served with or waived the notice of hearing required by section 36(3), the court may permanently terminate the rights of the putative father under any of the following circumstances:

(a) The putative father submits a verified affirmation of his paternity and a denial of his interest in custody of the child.

(b) The putative father files a disclaimer of paternity. For purposes of this section the filing of the disclaimer of paternity shall constitute a waiver of notice of hearing and shall constitute a denial of his interest in custody of the child.

(c) The putative father was served with a notice of intent to release or consent in accordance with section 34(1), at least 30 days before the expected date of confinement specified in that notice but failed to file an intent to claim paternity either before the expected date of confinement or before the birth of the child.

(d) The putative father is given proper notice of hearing in accordance with section 36(3) or 36(5) but either fails to appear at the hearing or appears and denies his interest in custody of the child.

(2) If the identity of the father cannot be determined, or if the identity of the father is known but his whereabouts cannot be determined, the court shall take evidence to determine the facts in the matter. The court may terminate the rights of the putative father if the court finds from the evidence that reasonable effort has been made to identify and locate the father and that any of the following circumstances exist:

(a) The putative father, whose identity is not known, has not made provision for the child's care and did not provide support for the mother during her pregnancy or during her confinement.

(b) The putative father, whose identity is known but whose whereabouts are unknown, has not provided support for the mother, has not shown any interest in the child, and has not made provision for the child's care, for at least 90 days preceding the hearing required under section 36.

710.39 Inquiry into fitness of putative father; determining best interests of child; termination of rights of putative father; order granting custody to putative father and legitimating child; recording legitimation.

Sec. 39. (1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA.

(3) If the parental rights of the mother are terminated pursuant to this chapter or other law and if the court awards custody of a child born out of wedlock to the putative father, the court shall enter an order granting custody to the putative father and legitimating the child for all purposes. The judge of probate shall duly record the legitimation in accordance with section 111 of the revised probate code, Act No. 642 of the Public Acts of 1978, as amended, being section 700.111 of the Michigan Compiled Laws.

APPENDIX 3

CHILD CUSTODY ACT OF 1970
Act 91 of 1970
(selected excerpt)

722.23 "Best interests of the child" defined.

Sec. 3. As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

APPENDIX 4

THE PATERNITY ACT
Act 205 of 1956
(selected excerpt)

722.714 Paternity proceeding;

Sec. 4. (1) An action under this act shall be brought by the mother, the father, a child who became 18 years of age after August 15, 1984 and before June 2, 1986, or the department of social services as provided in this act. Complaints shall be made in the county where the mother or child resides. If both the mother and child reside outside this state, then the complaint shall be made in the county where the putative father resides or is found. The fact that the child was conceived or born outside of this state is not a bar to entering a complaint against the putative father.

(3) An action under this act may be instituted during the pregnancy of the child's mother, at any time before the child reaches 18 years of age, or for a child who became 18 years of age after August 15, 1984 and before June 2, 1986, before March 1, 1993. This subsection applies regardless of whether the cause of action accrued before June 1, 1986 and regardless of whether the cause of action was barred under this subsection before June 1, 1986.

(7) The father or putative father of a child born out of wedlock may file a complaint in the circuit court in the county in which the child or mother resides or is found, praying for the entry of the order of filiation as provided for in section 7. The mother of the child shall be made a party defendant and notified of the hearing on the complaint by summons, which shall be in the form the court determines and shall be served in the same manner as is provided by court rules for the service of process in civil actions. The court, following the hearing, may enter an order of filiation. An order of filiation entered under this subsection has the same effect, is subject to the same provisions, and is enforced in the same manner as an order of filiation entered on complaint of the mother.

APPENDIX 5

MICHIGAN COURT RULES OF 1985
CHAPTER 5. PROBATE COURT
SUBCHAPTER 5.750 ADOPTION

RULE 5.752 MANNER AND METHOD OF SERVICE

(A) Service of Papers.

(1) A notice of intent to release or consent pursuant to MCL 710.34(1); MSA 27.3178(555.34)(1) may only be served by personal service.

(2) All other papers may be served by personal service or by mail under MCR 5.105.

(B) Service When Identity or Whereabouts of Father Is Unascertainable.

(1) If service cannot be made under subrule (A)(2) because the identity of the father of a child born out of wedlock or the whereabouts of the identified father has not been ascertained after diligent inquiry, the petitioner must file proof, by affidavit or by declaration under MCR 5.114(B)(1), of the attempt to identify or locate the father. No further service is necessary before the hearing to identify the father and to determine or terminate his rights.

(2) At the hearing, the court shall take evidence concerning the attempt to identify or locate the father. If the court finds that a reasonable attempt was made, the court shall proceed under MCL 710.37(2); MSA 27.3178(555.37)(2). If the court finds that a reasonable attempt was not made, the court shall adjourn the hearing under MCL 710.36(7); MSA 27.3178(555.36)(7) and shall

(a) order a further attempt to identify or locate the father so that service can be made under subrule (A)(2), or

(b) direct any manner of substituted service of the notice of hearing except service by publication.

(C) Service When Whereabouts of Noncustodial Parent Is Unascertainable. If service on a petition to terminate the parental rights of a noncustodial parent pursuant to MCL 710.51(6); MSA 27.3178(555.51)(6) cannot be made under subrule (A)(2) because the whereabouts of the noncustodial parent has not been ascertained after diligent inquiry, the petitioner must file proof, by affidavit or by declaration under MCR 5.114(B)(1), of the attempt to locate the noncustodial parent. If the court finds that a reasonable effort was made to locate the noncustodial parent, the court may direct any manner of substituted service of the notice of hearing, including service by publication.

APPENDIX 6

MICHIGAN COURT RULES OF 1985
CHAPTER 5. PROBATE COURT
SUBCHAPTER 5.900 PROCEEDINGS IN THE JUVENILE DIVISION
(selected excerpt)

RULE 5.903 DEFINITIONS

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1) "Child born out of wedlock" means a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage.
(2) "Child protective proceeding" means a proceeding concerning an offense against a child.
(3) "Delinquency proceeding" means a proceeding concerning an offense by a juvenile.
(4) "Father" means:
(a) a man married to the mother at any time from a minor's conception to the minor's birth unless the minor is determined to be a child born out of wedlock;
(b) a man who legally adopts the minor; or
(c) a man whose paternity is established in one of the following ways within time limits, when applicable, set by the court pursuant to this subchapter:
(i) the man and the mother of the minor acknowledge that he is the minor's father in a writing executed and acknowledged by them in the same manner provided by law for the execution and acknowledgment of deeds of property and filed in the probate court in the county in which the man, mother, or minor resides;
(ii) the man and the mother file a joint written request for a correction of the certificate of birth pertaining to the minor that results in issuance of a substituted certificate recording the birth;
(iii) the man acknowledges the minor, without the acknowledgment of the mother, with the approval of the court as provided in MCR 5.921(D)(2)(b); or
(iv) a man who by order of filiation or by judgment of paternity is determined judicially to be the father of the minor.

APPENDIX 7

MICHIGAN COURT RULES OF 1985
CHAPTER 5. PROBATE COURT
SUBCHAPTER 5.900 PROCEEDINGS IN THE JUVENILE DIVISION
(selected excerpt)

RULE 5.920 SERVICE OF PROCESS

(C) Notice of Hearing.

(1) General. Notice of a hearing must be given in writing or on the record at least 7 days prior to the hearing except as provided in subrules (C)(2) and (C)(3), or as otherwise provided in the rules.

(2) Preliminary Hearing; Emergency Removal Hearing.

(a) When a juvenile is detained, notice of the preliminary hearing shall be given to the juvenile and to the parent of the juvenile as soon as the hearing is scheduled, and the notice may be in person, in writing, on the record, or by telephone.

(b) When a child is placed, notice of the preliminary hearing or an emergency removal hearing under MCR 5.973(E)(3) shall be given to the parent of the child as soon as the hearing is scheduled, and the notice may be in person, in writing, on the record, or by telephone.

(3) Permanency Planning Hearing; Termination Proceedings.

(a) Notice of a permanency planning hearing must be given in writing or on the record at least 14 days before the hearing.

(b) Notice of a hearing on a petition requesting to terminate parental rights in a child protective proceeding must be given in writing or on the record at least 14 days before the hearing.

(4) When a party fails to appear in response to a notice of hearing, the court may order the party's appearance by summons or subpoena.

APPENDIX 8

MICHIGAN COURT RULES OF 1985
CHAPTER 5. PROBATE COURT
SUBCHAPTER 5.900 PROCEEDINGS IN THE JUVENILE DIVISION
(selected excerpt)

RULE 5.921 PERSONS ENTITLED TO NOTICE

(D) Putative Fathers. If, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 5.903(A)(4), the court may, in its discretion, take appropriate action as described in this subrule.

(1) The court may take initial testimony on the tentative identity and address of the natural father. If the court finds probable cause to believe that an identifiable person is the natural father of the minor, the court shall direct that notice be served on that person in the manner as provided in MCR 5.920. The notice shall include the following information:

(a) that a petition has been filed with the court;

(b) the time and place of hearing at which the natural father is to appear to express his interest, if any, in the minor; and

(c) a statement that failure to attend the hearing will constitute a denial of interest in the minor, a waiver of notice for all subsequent hearings, a waiver of a right to appointment of an attorney, and could result in termination of any parental rights.

(2) After notice to the putative father as provided in subrule (D)(1), the court may conduct a hearing and determine that:

(a) the putative father has been personally served or served in some other manner which the court finds to be reasonably calculated to provide notice to the putative father. If so, the court may proceed in the absence of the putative father.

(b) a preponderance of the evidence establishes that the putative father is the natural father of the minor and justice requires that he be allowed 14 days to establish his relationship according to MCR 5.903(A)(4); provided that if the court decides the interests of justice so require, it shall not be necessary for the mother of the minor to join in an acknowledgment. The court may extend the time for good cause shown.

(c) there is probable cause to believe that another identifiable person is the natural father of the minor. If so, the court shall proceed with respect to the other person in accord with subrule (D).

(d) after diligent inquiry, the identity of the natural father cannot be determined. If so, the court may proceed without further notice or court-appointed attorney for the unidentified person.

(3) The court may find that the natural father waives all rights to further notice, including the right to notice of termination of parental rights, and the right to legal counsel if:

(a) he fails to appear after proper notice, or

(b) he appears, but fails to establish paternity within the time set by the court.

(E) Failure to Appear; Notice by Publication. When persons whose whereabouts are unknown fail to appear in response to notice by publication or otherwise, the court need not give further notice by publication of subsequent hearings except a hearing on the termination of parental rights.

APPENDIX 9

1993 OREGON REVISED STATUTES
TITLE 11. DOMESTIC RELATIONS
CHAPTER 109. RIGHTS AND RELATIONSHIPS OF PARENT AND CHILD
PARENT AND CHILD RELATIONSHIP

109.096. Notice to putative father where paternity not established.

(1) When the paternity of a child has not been established under ORS 109.070, the putative father shall be entitled to reasonable notice in adoption, juvenile court, or other court proceedings concerning the custody of the child if the petitioner knows, or by the exercise of ordinary diligence should have known:

(a) That the child resided with the putative father at any time during the 60 days immediately preceding the initiation of the proceeding, or at any time since the child's birth if the child is less than 60 days old when the proceeding is initiated; or

(b) That the putative father repeatedly has contributed or tried to contribute to the support of the child during the year immediately preceding the initiation of the proceeding, or during the period since the child's birth if the child is less than one year old when the proceeding is initiated.

(2) Except as provided in subsection (3) or (4) of this section, a verified statement of the mother of the child or of the petitioner, or an affidavit of another person with knowledge of the facts, filed in the proceeding and asserting that the child has not resided with the putative father, as provided in subsection (1)(a) of this section, and that the putative father has not contributed or tried to contribute to the support of the child, as provided in subsection (1)(b) of this section, shall be sufficient proof to enable the court to grant the relief sought without notice to the putative father.

(3) The putative father shall be entitled to reasonable notice in a proceeding for the adoption of the child if notice of the initiation of filiation proceedings as required by ORS 109.225 was on file with the Vital Statistics Unit of the Health Division of the Department of Human Resources prior to the child's being placed by an authorized agency in the physical custody of a person or persons for the purpose of adoption by them. If the notice of the initiation of filiation proceedings was not on file at the time of the placement, the father shall be barred from contesting the adoption proceeding.

(4) The putative father shall be entitled to reasonable notice in juvenile court or other court proceedings if notice of the initiation of filiation proceedings as required by ORS 109.225 was on file with the Vital Statistics Unit prior to the initiation of the juvenile court or other court proceedings.

(5) Notice under this section shall not be required to be given to a putative father who was a party to filiation proceedings under ORS 109.125 which either were dismissed or resulted in a finding that he was not the father of the child.

(6) The notice required under this section shall be given in the manner provided in ORS 109.330.

(7) No notice given under this section need disclose the name of the mother of the child.

(8) A putative father has the primary responsibility to protect his rights, and nothing in this section shall be used to set aside an act of a permanent nature including, but not limited to, adoption or termination of parental rights, unless the father establishes within one year after the entry of the final decree or order fraud on the part of a petitioner in the proceeding with respect to matters specified in subsections (1) to (5) of this section.

APPENDIX 10

1993 OREGON REVISED STATUTES
TITLE 11. DOMESTIC RELATIONS
CHAPTER 109. RIGHTS AND RELATIONSHIPS OF PARENT AND CHILD FILIATION PROCEEDINGS

109.225. Notice to Vital Statistics Unit after petition filed; filing notice.

(1) After filing the petition, the petitioner shall cause the Vital Statistics Unit of the Health Division of the Department of Human Resources to be served by mail with a notice setting forth the court in which the petition was filed, the date of the filing therein, the case number, the full name and address of the child, the date and place of the child's birth, or if the child is not yet born, the date and place of the child's conception and the probable date of the child's birth, the full names and addresses of the child's alleged parents, and the names and addresses of the petitioner and of the respondents in the proceedings.

(2) The Vital Statistics Unit shall file immediately the notice, or a copy thereof, with the record of the birth of the child or in the same manner as its filing of records of birth if the unit does not have a record of the birth. The unit shall only provide the information contained in the notice to persons whose names appear in the notice or to persons or agencies showing a legitimate interest in the parent-child relationship including, but not limited to, parties to adoption, juvenile court or heirship proceedings.

ARSON AS A PREDICATE FELONY OF THE MICHIGAN FELONY MURDER STATUTE

In this report, the Michigan Law Revision Commission recommends that the Legislature consider revising the Michigan Penal Code to better define "arson" as a predicate felony under Michigan's statutory felony murder rule, MCL 750.316. This revision would correct a statutory anachronism highlighted by the decision of the Michigan Court of Appeals in People v Reeves, 202 Mich App 706 (1993), which was recently affirmed by the Michigan Supreme Court.[1] In particular, the Commission recommends consideration of several alternate revisions that would permit, under certain circumstances, the application of Michigan's felony murder rule to persons who cause the death of a firefighter or other person by setting fire to abandoned structures or to structures other than dwellings.

Introduction

Although one chapter of the Michigan Penal Code is entitled, "Arson and Burning,"[2] its sections detail only what factors constitute different types of "burning[s]" and make no reference whatsoever to arson. The term "arson" is defined nowhere in this chapter, nor anywhere else in the Michigan Penal Code. This apparent statutory oversight is for the most part inconsequential: for example, an act that in another state might be labeled "arson" is in Michigan instead punished as a "burning." Under certain unusual circumstances, however, the hazard of not using this term with precision becomes clear.

Michigan has statutorily enacted a variant on the felony murder rule,[3] and one of the predicate felonies it enumerates is "arson."[4] In the rare case of an unintended fatality resulting from what Michigan law terms a "burning," the

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1 People v Reeves, 448 Mich 1 (1995).

2 MCL 750.71-750.80.

3 MCL 750.316. Michigan's statutory version of the rule provides that "[m]urder committed in the perpetration of, or attempt to perpetrate, arson [and several other felonies]" is first degree murder, and shall be punished by imprisonment for life. In its traditional form, the felony murder rule instead mandates that any killing which is connected with a felony or its attempt is murder. Dispensing with differing categories of homicide, the rule obviates all inquiry into whether the killing occurs accidentally or non-negligently.

4 Id.

question arises whether the felony murder rule applies. Intuitively, it may seem that the intent of the Legislature is clear: "burning" and "arson" are synonymous, and one who sets a fire that results in human death should therefore be liable for felony murder. A decision of the Michigan Court of Appeals, however, has held that this is not so. In People v Reeves,[5] the court held that defendants who caused the death of a firefighter by torching an abandoned building could be charged with second degree murder but not first degree felony murder.

The Reeves decision is reasoned carefully, and the Michigan Supreme Court has now held it to be correct as a matter of statutory interpretation. The outcome therefore raises questions of whether the Michigan Legislature should correct the ambiguities Reeves exposes in the statutory references to arson, and if so, in what manner. To suggest answers to these questions, this report first summarizes the facts and procedural history of Reeves and discusses the problems raised by the outcome of the case. It then discusses various legal concepts that should be taken into account in deciding how Michigan should respond to the statutory elision the case highlights. It investigates to what extent other states have confronted situations analogous to that presented in Reeves and how they have resolved them, and it also examines how other jurisdictions statutorily define arson and felony murder. Finally, the report will propose alternate statutory definitions of predicate felonies and arson to be considered by the Michigan Legislature.

The *Reeves* Decision

People v Reeves[6] arose out of a fire set by several men in an abandoned Detroit building. The building's structure had been weakened due to the removal of bricks from the foundation, although no evidence linked the defendants with these actions. As it burned, the building collapsed upon and killed a trainee firefighter who arrived to combat the blaze.

The determination of how the defendants should be charged for this unintended homicide was a surprisingly complex problem under existing Michigan law. At trial, the defendants were bound over by the magistrate on a charge of first degree felony murder, but the court then reduced this charge to involuntary manslaughter. This ruling was appealed by the prosecutor, who argued that the proper charge was first degree murder. On appeal, the Michigan

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5 202 Mich App 706, 510 NW2d 198 (1993), aff'd, 448 Mich 1 (1995).

6 Id.

Court of Appeals concurred with the trial court judge that the defendants could not be charged with first degree felony murder.

The court first noted that a "conflict among panels of this Court concerning this issue"[7] existed. People v Foster[8] had held that burning an abandoned building did not constitute arson; People v Clemons[9] later held that it did. The court then began its analysis by observing that, although arson is one of the felonies enumerated in Michigan's felony murder statute, it is nowhere statutorily defined. Felonies pertaining to unlawful use of fire are categorized as "Arson and Burning,"[10] but Michigan law defines no specific crime of arson; rather, it details various classes of the crime of "burning." The Clemons court, making no reference to Foster, had relied "on the fact that, in 1929, the crime of burning real property was specifically designated as 'arson.'"[11] The Reeves court "decline[d] to follow Clemons because...the fact that...[n]either before or after this short period was 'arson' specifically defined in the statute, let alone defined to include the burning of real property."[12] Accordingly, the court referred to the common law definition of arson: "'burning of another's house or dwelling house' and appurtenances."[13] The court held that under this definition the defendants had not committed arson, as the burned property was both uninhabited and uninhabitable at the time of the fire and, thus, was not a dwelling house in the sense of the common law term. The court further reasoned that since the defendants had not committed arson, and, therefore, had not committed one of the felony murder statute's predicate felonies, they could not properly be charged with felony murder.

The court did hold, however, that the defendants could be charged with second degree murder. It held that abuse of discretion is the proper standard of review for the magistrate's decision concerning evidence of malice, and the court found that malice could well be inferred from "'evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm.'"[14] The court found that a trier of fact therefore had sufficient evidence to support a finding of malice.

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7 Id. at 708.

8 103 Mich App 311, 302 NW2d 862 (1982).

9 184 Mich App 726, 459 NW2d 40 (1990). The Clemons decision was expressly ejected by the Michigan Supreme Court in People v Reeves, 448 Mich 1 (1995).

10 MCL 750.71-750.80.

11 202 Mich App 706,709, 510 NW2d 198 (1993), quoting 184 Mich App 726, 729, 459 NW2d 40 (1990).

12 People v Reeves, 202 Mich App 706, 708, 510 NW2d 198 (1993).

13 Id.

14 Id. at 712, quoting People v Flowers, 191 Mich App 169, 177, 477 NW2d 473 (1991).

The Michigan Supreme Court has recently affirmed the holding and reasoning of the Court of Appeals in Reeves. Writing for a unanimous Court, Justice Mallett noted that, in the absence of a clear and explicit statutory definition of "arson", the Court had to look to the common law definition. The court held that definition to be the burning of the dwelling house of another:

> Since the Legislature is presumed to know that the courts will apply the common-law meaning to words in the statute having a common-law definition and crimes not clearly or explicitly defined, this Court infers from the circumstances that the Legislature intended to include only the common-law definition of arson in the 1931 felony murder statute.
>
> The arson and burning statute in the present case is virtually identical to the 1931 arson and burning statute. Similarly, the felony murder statute in the present case includes arson as a predicate offense without clearly and explicitly defining the criminal offense. Therefore, we conclude that the legislative intent would be furthered by ascribing the same construction of the word "arson" referred to in the 1931 felony murder statute, that is, the burning of the dwelling house of another.[15]

The *Reeves* Problem

The decision in People v Reeves[16] raised both conceptual and practical legal difficulties. First, one aspect of the holding--that the defendants could not be charged with felony murder--may seem to be an arbitrary outcome, one clearly resulting from a statutory oversight. After all, the defendants set fire to a structure intentionally, and their act led to a human death. Had they caused the identical outcome by burning an inhabited, though temporarily empty, structure, they would surely have been charged with first degree felony murder. Second, the state's inability to charge defendants in this situation with first degree felony murder may pose a significant public safety problem. The inapplicability of felony murder charges in such a situation eliminates a possible means of deterring a crime that may be especially likely, and therefore especially hazardous, in the specific context of abandoned or uninhabited structures in Michigan cities.

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15 People v Reeves, 448 Mich 1 (1995) (citations omitted).

16 202 Mich App 706, 711, 510 NW2d 198 (1993).

Arson is typically included in felony murder statutes because of the danger it presents to human life. The common law definition of arson as burning a dwelling house derives from the notion that, due to likely human presence in an inhabited structure, the risk of death is significant when it is burned. "At common law, arson was...an offense against the security of the habitation, and pertained to the possession rather than property. It was considered an aggravated felony of greater enormity than any other unlawful burning because it manifested in the perpetrator a greater recklessness and contempt of human life than the burning of a building in which no human being was presumed to be."[17] Reasoning along these lines, the Reeves court noted, concerning the Michigan felony murder statute, that, "[o]bviously, our Legislature must have thought that [the enumerated] felonies were especially reprehensible and/or involved a particularly high risk of death to the victim and therefore justified special treatment."[18]

Although the building burned in Reeves was not a dwelling house, the case nonetheless would seem to present exactly the situation contemplated by the inclusion of arson in the felony murder statute. If the felony murder statute is intended to deter and punish human death resulting from an illegally set fire, is it desirable that defendants such as those in Reeves be charged with a lesser crime?

An additional concern was noted by the Michigan Law Revision Commission during the course of this study. Michigan's housing inventory includes many uninhabited and uninhabitable structures. It seems perverse that a police officer or firefighter who dies in the intentional torching of an uninhabited commercial structure should be beyond the reach of the felony murder statute. There is also a vast quantity of abandoned housing in some areas of the state, and it has proven an attractive target to arsonists. The felony murder statute currently provides no additional measure of deterrence or punishment for this problem.

This is obviously a serious problem requiring the Legislature's attention. Whether and how to define predicate felonies and "arson" under the felony murder statute to include abandoned dwellings and other structures should turn in part on the operation of the felony murder rule in Michigan.

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17 44 ALR2d 1456, 1457.

18 People v Reeves, 202 Mich App 706, 711, 510 NW2d 198 (1993). Justice Mallett's opinion for the Supreme Court, affirming Reeves, contains similar reasoning. People v Reeves, 448 Mich 1 (1995).

The Felony Murder Rule in Michigan

The practical effect of reformulating the Michigan arson statute to expand the predicate offenses under the state felony murder statute is not enormous. Classical felony murder equates the intent to commit an underlying felony with the malice necessary for murder. Hence, the rule usually provides that any death whatsoever caused during the commission or attempted commission of a felony is a murder. In People v Aaron,[19] however, the Michigan Supreme Court held that Michigan had no felony murder rule in the traditional sense. The court observed that,

> Michigan does not have a statutory felony-murder doctrine which designates as murder any *death* occurring in the course of a felony without regard to whether it was the result of accident, negligence, recklessness or willfulness. Rather, Michigan has a statute which makes a *murder* occurring in the course of one of the enumerated felonies a first-degree murder.[20]

In order to reach this conclusion, the court examined the history of the statute, explaining that Michigan adopted Pennsylvania's corresponding statute in 1837. This statute did not attempt to create a felony murder rule, but rather sought to clarify different degrees of murder. The court also cited statutes from other jurisdictions that similarly provide that murder, rather than just death, in the commission of a felony entails a charge of first degree murder, and stated that courts in those states have followed an interpretation like that here adopted by the Michigan Supreme Court. The court therefore held that Michigan has not codified a felony murder rule, and it further held that, as Michigan's common law felony murder doctrine had become greatly limited over time by case law, it was now abolished. Because Michigan lacks either a statutory or a common law felony murder rule, the court held malice to be a ubiquitous requirement for murder, even for homicides occurring during commission of a felony.

The court took pains to indicate that this limitation is not a significant setback for law enforcement. It pointed out that in many prior cases the malice necessary for a murder conviction could have been found without the mechanical operation of the felony murder rule. A jury could, for example, infer malice from the fact that a defendant set dangerous forces into motion. Alternately, the commission of a felony could establish intent to kill, intent to cause great bodily

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19 People v Aaron, 409 Mich 672, 299 NW2d 304 (1980).

20 Id. at 717.

harm, or wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm.

The Aaron decision creates an interesting implication for the decision of whether to reformulate the arson statute. To begin with, the felony murder statute only operates to reclassify an act that is already murder, and cannot elevate a different type of homicide to the category of murder. It is thus a statute of quite limited application. Furthermore, the felony murder rule is not a prerequisite to a murder conviction in cases like People v Reeves.[21] As the Aaron court noted, "[a] jury can properly *infer* malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm."[22] Therefore, a broader definition of arson will have the primary effect of elevating what is otherwise second degree murder to first degree murder.

Cases From Other Jurisdictions

Assuming it is desirable for the felony murder statute to extend to broader categories of fire-related deaths, questions of application remain. Do just certain, highly foreseeable deaths, such as the death of a dwelling's occupant, warrant application of the rule? In People v Reeves,[23] the Michigan Court of Appeals appeared to indicate a conviction that application of the felony murder statute is limited by such foreseeability considerations. This concern can be seen in its analysis of the purpose of the arson laws.

The court stated that the rationale underlying the traditional conception that arson occurs only when a dwelling house is burned relates to the clear hazard to the occupants within. The court evidently felt that the chance that a firefighter might die while fighting a blaze in an abandoned building was, by contrast, too remote to be foreseeable. Explaining its reasoning as to why the defendants' act did not fall under the common law arson definition and thus could not invoke the felony murder rule, the court stated that, "death is, tragically, an ever present risk of a firefighter's courageous calling and one which may actually be lower in certain intentionally set fires than in other accidental fires. That risk is therefore not the risk which is addressed by the prohibition against arson."[24]

Several courts in sister states have addressed the issue of whether an arsonist commits felony murder when he or she sets a fire in which a firefighter

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21 202 Mich App 706, 711, 510 NW2d 198 (1993).

22 People v Aaron, 409 Mich 672, 729, 299 NW2d 304, 13 ALR4th 1180 (1980).

23 202 Mich App 706, 510 NW2d 198 (1993).

24 Id. at 711.

dies. In all the cases, courts have expanded the definition of arson to reach cases like that in Reeves. In McCoy v State,[25] the defendant burned an abandoned house near which a well was located, and the protective wooden covering over the well was consumed in the fire. His vision impaired by the smoke from the fire, a fireman fell into the well and died of smoke inhalation. Despite this convoluted causal chain, the court held that,

> [i]t being clear that appellant deliberately set the house afire, that the victim came to scene as a direct result of appellant having set the fire, that the protective cover over the well was burned away by the fire appellant set, and that the victim died as a result of breathing the concentrated smoke from the fire which appellant set, we hold that the evidence was sufficient to authorize a rational trier of fact to find appellant guilty beyond a reasonable doubt of felony murder with arson in the first degree as the underlying felony.[26]

In People v Lozano,[27] the New York Supreme Court upheld an even weaker causal link between an arsonist's act and a firefighter's death. There, the defendant moved to inspect the grand jury minutes, claiming that, inter alia, insufficient evidence existed to support his indictment for felony murder. In this matter, a fireman had died of a heart attack on a humid day while pulling a heavy fire hose into the burning building. An autopsy later revealed the death to have been caused partly by arteriosclerosis and partly by smoke inhalation.

The court noted that under the former penal law any felony or its attempt could trigger the felony murder rule. This was no longer the case in New York, however: the court explained that "[b]ecause of the harshness of strict interpretation, many states had either statutorily or judicially engrafted 'dangerousness' or 'foreseeability' requirements before authorizing the invocation of liability under the felony murder rule."[28] The court then discussed the resultant statutory requirement that the homicide be "in furtherance of such crime,"[29] and inquired as to how this could be said to apply to the death in the instant case. The court observed that this felony murder requirement is largely meaningless where arson is the predicate felony because arson involves little likelihood of a personal confrontation between the criminal and his victim. It then concluded, that since this requirement could rarely be met in the context of

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25 262 Ga 699, 425 SE2d 646 (1993).

26 Id. at 700.

27 107 Misc 2d 345, 434 NYS2d 588 (1980).

28 Id. at 347.

29 Id. at 348.

arson it was "meaningless and at best surplusage."[30] The court held that the fireman's heart disease did not exculpate the defendant, stating "that a heart should fail is manifestly foreseeable."[31] It then found that although the defendant's actions were not the sole cause of the death, a "spatiotemporal nexus"[32] existed between the fire and the death, and it held that this was sufficient evidence upon which to base the conviction.

In State v Leech,[33] a firefighter died of carbon monoxide poisoning in an arsonist-set fire. When his equipment was examined, the air gauge attached to his breathing apparatus read that it was at zero; evidently, it was not defective but was simply empty. Several safety procedures designed to prevent this occurrence had not been followed, and the defendant appealed his conviction for felony murder on the ground that, rather than having caused the fireman's death "'in the course of and in furtherance of first degree arson,'"[34] it was instead the result of negligence by the fireman and the fire department. Responding to the defendants' claim that this alleged negligence was not foreseeable, the Supreme Court of Washington noted that "experience teaches that one of the certainties attendant upon a hostile fire is that firemen will be called and will come. Danger inheres in fire fighting. In setting a hostile fire, the arsonist can anticipate that firemen will be endangered."[35] The court further stated that, "[t]he implication of defendant's argument is that an arsonist is entitled to have his fire fought in a perfect, risk-free manner by a fire department; this is not the law."[36] As to his claim that the death did not fulfill the statutory requirement of it being "'in furtherance of'"[37] the arson, the court held that "because the firefighter's death in this case occurred while the arson fire was still engaged, the death was sufficiently close in time and place to the arson to be part of the res gestae of that felony."[38]

Case law from other jurisdictions thus supports the notion that the felony murder doctrine may properly be applied to arson that results in the death of responding firefighters. All cases surveyed have concluded that felony murder was an appropriate charge in these circumstances. This outcome has been

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30 Id. at 349.
31 Id. at 351.
32 Id. at 351-2.
33 114 Wash 2d 700, 790 P2d 160 (1990).
34 Id. at 703.
35 Id. at 704-5, quoting State v Levage, 23 Wa App 33, 35, 594 P2d 949 (1979).
36 Id. at 705.
37 Id. at 706.
38 Id. at 709.

reached despite occasionally quite tenuous causal linkages between the arson fires and the deaths.[39]

Statutory Approaches in Other Jurisdictions

Other jurisdictions utilize a variety of differing approaches to deter and punish deaths caused by arson, and their relevant statutes defy ready categorization. One constant is that arson is a predicate felony of felony murder in all jurisdictions surveyed,[40] although states vary as to whether death resulting from arson is considered first or second degree murder.[41] Several state codes contain statutory provisions that exhibit awareness of the special hazard to human life posed by arson. This is seen in unique provisions for arson which treat the crime differently from other predicate felonies of that state's felony murder law.

The North Carolina arson/felony murder scheme is typical of the simpler approaches seen in the states surveyed. Its definition of arson and felony murder would permit felony murder conviction of the People v Reeves[42] defendants. The North Carolina murder statute[43] provides that "[a] murder...which shall be committed in the perpetration or attempted perpetration of any arson...shall be deemed to be murder in the first degree."[44] The state arson statute[45] adopts and expands slightly upon the traditional common law definition of arson:

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39 See also: People v Arzon, 92 Misc 2d 739, 401 NYS 156 (1978) (despite ambiguity as to which of two independently set fires actually caused death of firefighter, defendant's fire was held to have increased the risk of the firefighter's death, and his felony murder conviction was upheld); State v Thompson, 55 Ohio App 2d 17, 9 Ohio Op 3d 190, 379 NE2d 245 (1977) (firefighter killed by falling wall; felony murder conviction upheld because foreseeable that fire, set with clearly dangerous gasoline, would naturally and probably cause death of, or very serious injury to, responding firefighter); Bell v State, 249 Ga 644, 292 SE2d 402 (1982) (felony murder conviction for death of firefighter upheld on grounds that danger to human life was foreseeable because defendant knew abandoned building was inhabited at time of fire by vagrants); People v Zane, 152 AD2d 976, 543 NYS2d 777 (1989) (denial of motion to dismiss felony murder indictment count upheld because death need not occur at the time of the commission of the crime; rather, it need only be caused by the commission of the crime); United States v Ryan, 9 F3d 660 (1993) (firefighters' deaths held proximately caused by defendant's fire, despite additional factor of their evident panicking; deaths held foreseeable as well because intended result of act--powerful fire--achieved successfully, and ancillary consequences could have been expected).

40 In order to approach the issue of arson and felony murder statutes from the perspective of the problem addressed by the Reeves decision, this report primarily examines the relevant statutes of states which contain major cities. States surveyed include Arkansas, California, Connecticut, Colorado, Florida, Georgia, Illinois, Massachusetts, Minnesota, North Carolina, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Texas, and Washington.

41 Massachusetts, New York, and Pennsylvania provide that arson-related felony murders are second-degree murder. All other states surveyed provide that such deaths (or, in the case of California, murders) are either first degree murder or its equivalent (e.g., Ohio's crime of "aggravated" murder).

42 202 Mich App 706, 711, 510 NW2d 198 (1993).

43 NC Gen Stat § 14-17.

44 Id.

45 NC Gen Stat § 14-58.

> There shall be two degrees of arson as defined at the common law. If the dwelling burned was occupied at the time of the burning, the offense is arson in the first degree and is punishable as a Class C felony. If the dwelling burned was unoccupied at the time of the burning, the offense is arson in the second degree and is punishable as a Class D felony.[46]

Hence, any death occurring in connection with an act of arson that could be considered murder would be elevated to first degree status.

A number of states have directly addressed the problem of how to categorize deaths of firemen or other public safety officials resulting from arson. Colorado's general arson and felony murder statutes would probably apply to any such death: the arson statutes[47] delineate various degrees of the crime based on occupancy, non-occupancy, and property type, and the state murder statute[48] provides, inter alia, that the death of any non-participant that occurs in connection with arson is first-degree murder. While these provisions would appear to apply to the death of a responding firemen, Colorado has also enacted a crime entitled "First degree murder of a peace officer or fireman."[49] This statute provides that "[a] person who commits murder in the first degree as defined in [the first-degree murder statute] and the victim is a peace officer or fireman engaged in the performance of his duties, commits the felony crime of first degree murder of a peace officer or fireman."[50] The text of the statute contains a legislative declaration that

> protection of peace officers and firemen from crime is a major concern of our state because society depends on peace officers and firemen for protection against crime and other dangers and because peace officers and firemen are disproportionately damaged by crime because their duty to protect society often places them in dangerous circumstances. Society as a whole benefits from affording special protection to peace officers and firemen because such protection deters crimes against them and allows them to better serve and protect our state. The general assembly therefore finds that the penalties for first degree murder of a peace officer or fireman

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46 Id.
47 Colo Rev Stat § 18-4-102-105 (1994).
48 Colo Rev Stat § 18-3-102 (1994).
49 Colo Rev Stat § 18-3-107 (1994).
50 Id.

should be more severe than the penalty for first degree murder of other members of society.[51]

Ohio has likewise explicitly addressed this issue. The Ohio aggravated murder statute[52] includes both arson and aggravated arson as predicate felonies. The Ohio aggravated arson statute[53] states, inter alia, that "No person, by means of fire or explosion, shall knowingly...create a substantial risk of serious physical harm to any person"[54] To "create a substantial risk of serious physical harm to any person" is defined as including "the creation of a substantial risk of serious physical harm to any emergency personnel."[55] "Emergency personnel" is defined to include the following persons:

> A peace officer...[; a] member of a fire department or other firefighting agency of a municipal corporation, township, township fire district, joint fire district, other political subdivision, or combination of political subdivisions;...[a] member of a private fire company...or a volunteer firefighter;...[a] member of a joint ambulance district;...[a]n emergency medical technician-ambulance, advanced emergency medical technician-ambulance, emergency medical technician-paramedic, ambulance operator, or other member of an emergency medical service that is owned or operated by a political subdivision or a private entity;...[t]he state fire marshal, an assistant state marshal, or an arson investigator of the office of the state fire marshal;...[a] fire prevention officer of a political subdivision or an arson investigator or similar inspector of a political subdivision.[56]

Similarly, the relevant Pennsylvania statutes provide specific penalties in the case of injury to firefighters and other public safety officers. The offense of "Arson endangering persons"[57] is committed when one "intentionally starts a fire...and...thereby recklessly places another person in danger of death or bodily injury, including but not limited to a firefighter, police officer or other person actively engaged in fighting the fire...."[58] The arson statute further provides that

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51 Id.
52 Ohio Rev Code Ann § 2903.01.
53 Ohio Rev Code Ann § 2909.02.
54 Id.
55 Ohio Rev Code Ann § 2909.01.
56 Id.
57 Pa Cons Stat § 3301 (1993).
58 Id.

> A person who commits arson endangering persons is guilty of murder of the second degree if the fire or explosion causes the death of any person, including but not limited to a firefighter, police officer or other person actively engaged in fighting the fire....[59]

The Washington statutes arrive at a similar end through a different conjunction of arson and felony murder provisions. The first degree murder statute[60] lists first and second degree arson as predicate felonies of felony murder, and the first degree arson statute[61] provides that a person commits the crime if he:

> knowingly and maliciously...[c]auses a fire or explosion which is manifestly dangerous to any human life, including firemen; or...[c]auses a fire which damages a dwelling; or...[c]auses a fire or explosion in any building in which there shall be at the time a human being who is not a participant in the crime....[62]

While the Connecticut statutes make no specific reference to harm to firefighters or other public safety officers, the Connecticut legislature deleted arson from among the felony murder statute's enumerated felonies in 1979 and created a new crime of "Arson Murder."[63] This statute provides that:

> [a] person is guilty of murder when, acting either alone or with one or more persons, he commits arson and, in the course of such arson, causes the death of a person. Notwithstanding any other provision of the general statutes, any person convicted of murder under this section shall be punished for life imprisonment and shall not be eligible for parole.[64]

In at least one other jurisdiction, arson-related deaths are singled out statutorily as being especially reprehensible. An arson-related death in Arkansas requires a lower standard of culpability to invoke the felony murder rule than does a death in connection with other predicate felonies. Under the state's variant on the felony murder doctrine,[65] "capital murder"[66] occurs when a person

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59 Id.
60 Wash Rev Code Ann § 9A.32.030. (Mitchie 1994).
61 Wash Rev Code Ann § 9A.48. (Mitchie 1994).
62 Id.
63 Conn Gen Stat § 53a-54d (1992).
64 Id.
65 Ark Stat Ann § 5-10-101 (1987).
66 Id.

"commits or attempts to commit [various enumerated felonies other than arson] and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life...."[67] "[E]xtreme indifference to the value of human life" is not required to be shown in the case of a death occurring in connection with arson, however: capital murder is also committed when "[a]cting alone or with one or more other persons, he commits or attempts to commit arson, and in the course of and in furtherance of the felony or in immediate flight therefrom, he or an accomplice causes the death of any person...."[68] This harsher provision for arson-related deaths may reflect an awareness, like that seen in Lozano, supra, that using the indiscriminate weapon of fire inherently displays indifference to life and requires no showing of personal animus between criminal and victim.

Alternatives to Michigan's Current Arson Statutes

It is clear that in most states, felony murder rules could apply to the burning of an abandoned dwelling or other structure that caused the death of a firefighter. Should the Michigan Legislature wish to revise Michigan statutes to produce a similar result, thereby changing the result of People v Reeves, it can choose among four alternative revisions. Rather than radically reworking sections of the Michigan Penal Code, each of these alternatives are based largely on the wording of existing statutes.

1. The Legislature could most easily dissolve all statutory ambiguity regarding what fire-related crimes are referred to by the felony murder statute[69] by rewording it to refer to "unlawful burning of any kind" rather than "arson." This change would ensure that any homicide to which the Michigan felony murder rule could be applied in conformity with the People v Aaron[70] decision would become first degree, rather than second degree, murder.

2. An alternative revision with the identical effect would be to change all statutory references to "burning" to refer instead to "arson." To do so, the phrase "Burning dwelling house" in MCL 750.72 should be changed to "Arson of dwelling house." The phrase "Burning of other real property" in MCL 750.73 should be changed to "Arson of other real property." The phrase "Burning of personal property," in MCL 750.74 should become "Arson of personal

67 Ark Stat Ann § 5-10-101(a)(1) (1987).
68 Ark Stat Ann § 5-10-101(a)(2) (1987).
69 MCL 750.316.
70 People v Aaron, 409 Mich 672, 299 NW2d 304, 13 ALR4th 1180 (1980).

property." The phrase "Burning of insured property" in MCL 750.75 should be changed to "Arson of insured property." These changes, like the alternative proposed supra, would cause any murder committed in connection with an unlawful use of fire to become first degree murder. It would also bring Michigan's criminal statutory language in line with that employed by most jurisdictions, and would explicitly reject the common law definition of arson, which restricted the crime to dwellings.

3. Another option, which could be taken in conjunction with any of the others, would be to redraft the highest degree offense of the "arson" or "burning" statute to include the death of any rescue worker as an element. A good model for such a revision would be the Pennsylvania statute, "Arson endangering persons."[71] The Michigan statute, "Burning dwelling house,"[72] could be amended to read:

> Any person who wilfully or maliciously burns any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof, **or intentionally starts a fire and thereby recklessly places another person in danger of death or bodily injury, including, but not limited to a firefighter, police officer, or other person actively engaged in fighting the fire**, shall be guilty of a felony punishable by imprisonment in the state prison not more than 20 years.

This revision would clearly indicate a legislative intent that deaths of those other than the inhabitants of a dwelling house are contemplated by the felony murder statute.

4. Another alternative would be to merely retitle the highest degree, or the two highest degrees, of the offense of "burning" to fall within the felony murder statute. To do so, the phrase in MCL 750.72, "Burning dwelling house," should be changed to "Arson of dwelling house." The phrase in MCL 750.73, which is currently "Burning of other real property," could also be changed to "Arson of other real property." The remainder of crimes in this chapter could remain "burnings." This change would have several effects. First, it would ensure that the felony murder statute related to the arson statute in a clear manner. Second,

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71 Pa Cons Stat § 3301 (1993).

72 MCL 750.72.

making only a limited category of illegal "burnings" subject to the felony murder statute would reflect the observation of the Reeves court that,

> [a] review of the felonies enumerated in the [felony murder] statute shows that they tend to be the most serious in their class. For example, only first- and third-degree criminal sexual conduct is included; only breaking and entering into a dwelling house are included. Similarly, in the context of unlawfully set fires, the burning of a dwelling house is considered the most serious in its class, as evidenced by the penalty (twenty years), which is harsher than one imposed for the burning of real estate (ten years), the burning of personal property (misdemeanor), and the burning of insured property (ten years).[73]

Adoption of any of the alternative revisions listed above would resolve the ambiguity concerning what is meant by the Michigan Penal Code's references to both "arson" and "burning." Apart from that common effect, these options allow whatever severity of punishment is desired, in light of the materials presented in this report, for arson-related killings.

73 202 Mich App 706, 711-12, 510 NW2d 198 (1993).

Prior Enactments Pursuant to Michigan Law Revision Commission Recommendations

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some cases amendments thereto by the Legislature:

1967 Legislative Session

Subject	Commission Report	Act No.
Original Jurisdiction of Court of Appeals	1966, p. 43	65
Corporation Use of Assumed Names	1966, p. 36	138
Interstate and International Judicial Procedures	1966, p. 25	178
Stockholder Action Without Meetings	1966, p. 41	201
Powers of Appointment	1966, p. 11	224
Dead Man's Statute	1966, p. 29	263

1968 Legislative Session

Subject	Commission Report	Act No.
Possibilities of Reverter and Right of Entry	1966, p. 22	13
Stockholder Approval of Mortgage of Corporate Assets	1966, p. 39	287
Corporations as Partners	1966, p. 34	288
Guardians Ad Litem	1967, p. 53	292
Emancipation of Minors	1967, p. 50	293
Jury Selection	1967, p. 23	326

1969 Legislative Session

Subject	Commission Report	Act No.
Access to Adjoining Property	1968, p. 19	55
Recognition of Acknowledgments	1968, p. 64	57
Dead Man's Statute Amendment	1966, p. 29	63
Notice of Change in Tax Assessments	1968, p. 30	115
Antenuptial and Marital Agreements	1968, p. 27	139
Anatomical Gifts	1968, p. 39	189
Administrative Procedures Act	1967, p. 11	306
Venue for Civil Actions	1968, p. 17	333

1970 Legislative Session

Subject	Commission Report	Act No.
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships	1969, p. 41	90
Minor Students' Capacity to Borrow Act	1969, p. 46	107
Warranties in Sales of Art	1969, p. 43	121
Appeals from Probate Court	1968, p. 32	143
Circuit Court Commissioner Powers of Magistrates	1969, p. 57	238

1971 Legislative Session

Subject	Commission Report	Act No.
Revision of Grounds for Divorce	1970, p. 7	75
Civil Verdicts by 5 of 6		

Jurors In Retained Municipal Courts	1970, p. 40	158
Amendment of Uniform Anatomical Gift Act	1970, p. 45	186

1972 Legislative Session

Subject	Commission Report	Act No.
Summary Proceeding for Possession of Premises	1970, p. 16	120
Interest on Judgments	1969, p. 59	135
Business Corporations	1970, Supp.	284
Constitutional Amendment re Juries of 12	1969, p. 60	HJR "M"

1973 Legislative Session

Subject	Commission Report	Act No.
Execution and Levy in Proceedings Supplementary to Judgment	1970, p. 51	96
Technical Amendments to Business Corporation Act	1973, p. 8	98

1974 Legislative Session

Subject	Commission Report	Act No.
Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52
Choice of Forum	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic		

Relations Cases	1972, p. 53	90
Technical Amendments to the Michigan General Corporations Act	1973, p. 37	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
Technical Amendments to the Business Corporation Act	1974, p. 30	303
Amendment to Dead Man's Statute	1972, p. 70	305
Attachment and Collection Fees	1968, p. 22	306
Contribution Among Joint Tortfeasors	1967, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Due Process in Seizure of a Debtor's Property (Elimination of Pre-judgment Garnishment)	1972, p. 7	371

1975 Legislative Session

Subject	Commission Report	Act No.
Hit-Run Offenses	1973, p. 54	170
Equalization of Income Rights of Husband and Wife in Entirety Property	1974, p. 12	288
Disposition of Community Property Rights at Death	1973, p. 50	289
Insurance Policy in Lieu of Bond	1969, p. 54	290
Child Custody Jurisdiction	1969, p. 23	297

1976 Legislative Session

Subject	Commission Report	Act No.
Due Process in Seizure of a Debtor's Property (Replevin Actions)	1972, p. 7	79
Qualifications of Fiduciaries	1966, p. 32	262
Revision of Revised Judicature Act Venue Provisions	1975, p. 20	375
Durable Family Power of Attorney	1975, p. 18	376

1978 Legislative Session

Subject	Commission Report	Act No.
Juvenile Obscenity	1975, p. 133	33
Multiple Party Deposits	1966, p. 18	53
Amendment of Telephone and Messenger Service Company Act	1973, p. 48	63
Elimination of References to Abolished Courts:		
a. Township By-Laws	1976, p. 74	103
b. Public Recreation Hall Licenses	1976, p. 74	138
c. Village Ordinances	1976, p. 74	189
d. Home Rule Village Ordinances	1976, p. 74	190
e. Home Rule Cities	1976, p. 74	191
f. Preservation of Property Act	1976, p. 74	237
g. Bureau of Criminal Identification	1976, p. 74	538
h. Fourth Class Cities	1976, p. 74	539
i. Election Law Amendments	1976, p. 74	540
j. Charter Townships	1976, p. 74	553
Plats	1976, p. 58	367

Amendments to Article 9 of the Uniform Commercial Code	1975, Supp.	369

1980 Legislative Session

Subject	Commission Report	Act No.
Condemnation Procedures	1968, p. 8	87
Technical Revision of the Code of Criminal Procedure	1978, p. 37	506

1981 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to the Justice of the Peace:		
Sheriff's Service of Process	1976, p. 74	148
Court of Appeals Jurisdiction	1980, p. 34	206

1982 Legislative Session

Subject	Commission Report	Act No.
Limited Partnerships	1980, p. 40	213
Technical Amendments to the Business Corporation Act	1980, p. 8	407
Interest on Probate Code Judgments	1980, p. 37	412

1983 Legislative Session

Subject	Commission Report	Act No.
Elimination of References to Abolished Courts: Police Courts and County Board of Auditors	1979, p. 9	87
Federal Lien Registration	1979, p. 26	102

1984 Legislative Session

Subject	Commission Report	Act No.
Legislative Privilege:		
a. Immunity in Civil Actions	1983, p. 14	27
b. Limits of Immunity in Contested Cases	1983, p. 14	28
c. Amendments to R.J.A. for Legislative Immunity	1983, p. 14	29
Disclosure of Treatment Under the Psychologist/Psychiatrist-Patient Privilege	1978, p. 28	362

1986 Legislative Session

Subject	Commission Report	Act No.
Amendments to the Uniform Limited Partnership Act	1983, p. 9	100

1987 Legislative Session

Subject	Commission Report	Act No.
Amendments to Article 8 of the Uniform Commercial Code	1984, p. 97	16
Disclosure in the Sale of Visual Art Objects Produced in Multiples	1981, p. 57	40, 53, 54

1988 Legislative Session

Subject	Commission Report	Act No.
Repeal of M.C.L. §764.9	1982, p. 9	113
Statutory Rule Against Perpetuities	1986, p. 10	417, 418
Transboundary Pollution Reciprocal Access to Courts	1984, p. 71	517

1990 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to Abolished Courts:		
a. Procedures of Justice Courts and Municipal Courts	1985, p. 12; 1986, p. 125	217
b. Noxious Weeds	1986, p. 128; 1988, p. 154	218
c. Criminal Procedure	1975, p. 24	219
d. Presumption Concerning Married Women	1988, p. 157	220
e. Mackinac Island State Park	1986, p. 138; 1988, p. 154	221
f. Relief and Support of the Poor	1986, p. 139; 1988, p. 154	222
g. Legal Work Day	1988, p. 154	223

h. Damage to Property by Floating Lumber	1988, p. 155	224

1991 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to Abolished Courts:		
a. Land Contracts	1988, p. 157	140
b. Insurance	1988, p. 156	141
c. Animals	1988, p. 155	142
d. Trains	1986, pp. 153, 155; 1987, p. 80; 1988, p. 152	143
e. Appeals	1985, p. 12	144
f. Crimes	1988, p. 153	145
g. Library Corporations	1988, p. 155	146
h. Oaths	1988, p. 156	147
i. Agricultural Products	1986, p. 134; 1988, p. 151	148
j. Deeds	1988, p. 156	149
k. Corporations	1989, p. 4; 1990, p. 4	150
l. Summer Resort Corporations	1986, p. 154; 1988, p. 155	151
m. Association Land	1986, p. 154; 1988, p. 155	152
n. Burial Grounds	1988, p. 156	153
o. Posters, Signs, and Placecards	1988, p. 157	154
p. Railroad Construction	1988, p. 157; 1988, p. 156	155
q. Work Farms	1988, p. 157	156
r. Recording Duties	1988, p. 154	157
s. Liens	1986, pp. 141, 151, 158; 1988, p. 152	159

1992 Legislative Session

Subject	Commission Report	Act No.
Determination of Death Act	1987, p. 13	90

RICHARD D. McLELLAN

Mr. McLellan is Chairman of the Michigan Law Revision Commission, a position he has filled since 1986, the year following his appointment as a public member of the Commission.

Mr. McLellan is a partner in the law firm of Dykema Gossett, PLLC, which has offices in Michigan, Chicago, and Washington, D.C. He serves as the head of his firm's Government Policy and Practice Group.

He is a graduate of the Michigan State University Honors College and the University of Michigan Law School.

Prior to entering private practice, Mr. McLellan served as an Administrative Assistant to former Governor William G. Milliken. He is a former member of the National Advisory Food and Drug Committee in the United States Department of Health, Education and Welfare. Mr. McLellan served as the Transition Director for Governor John Engler following the 1990 election and as Chairman of the Michigan Corrections Commission. He is presently Secretary and a member of the Michigan International Trade Authority.

Mr. McLellan is also immediate past Chairman of the Michigan Chamber of Commerce and is the President of the Library of Michigan Foundation.

His legal practice includes primarily the representation of business interests in matters pertaining to state government.

Mr. McLellan is a member of the Board of Directors of the Mackinac Center for Public Policy and the Cornerstone Foundation and is a Governor of the Cranbrook Institute of Science.

ANTHONY DEREZINSKI

Mr. Derezinski is Vice Chairman of the Michigan Law Revision Commission, a position he has filled since May 1986 following his appointment as a public member of the Commission in January of that year.

Mr. Derezinski practices law with the firm of Cooper, Walinski & Cramer, in Ann Arbor, Michigan.

He is a graduate of Muskegon Catholic Central High School, Marquette University, the University of Michigan Law School (Juris Doctor degree), and Harvard Law School (Master of Laws degree). He is married and resides in Ann Arbor, Michigan.

Mr. Derezinski is a Democrat and served as State Senator from 1975 to 1978. He is a member of the Board of Regents of Eastern Michigan University, and also of the Board of the Michigan Theater Foundation.

He served as a Lieutenant in the Judge Advocate General's Corps in the United States Navy from 1968 to 1971 and as a military judge in the Republic of Vietnam. He is a member of the Veterans of Foreign Wars, Derezinski Post No. 7729, the International Association of Defense Counsel, the National Health Lawyers' Association, and the National Association of College and University Attorneys.

MAURA D. CORRIGAN

Judge Corrigan is a public member of the Michigan Law Revision Commission and has served since her appointment in November 1991.

Judge Corrigan is a judge on the Michigan Court of Appeals.

She is a graduate of St. Joseph Academy, Cleveland, Ohio; Marygrove College; and the University of Detroit Law School. She is married and has two children.

Prior to her appointment to the Court of Appeals, Judge Corrigan was a shareholder in the law firm of Plunkett & Cooney, P.C. She earlier served as First Assistant United States Attorney for the Eastern District of Michigan, Chief of Appeals in the United States Attorney's Office, Assistant Wayne County Prosecutor, and a law clerk on the Michigan Court of Appeals. She was selected Outstanding Practitioner of Criminal Law by the Federal Bar Association as well as awarded the Director's Award for superior performance as an Assistant United States Attorney by the United States Department of Justice. She has served on numerous professional committees and lectured extensively on law-related matters.

GEORGE E. WARD

Mr. Ward is a member of the Michigan Law Revision Commission and has served since his appointment in August 1994.

Mr. Ward has been the Chief Assistant Prosecuting Attorney in Wayne County since January 1986. Prior to this, he was a clerk to a justice of the Michigan Supreme Court and in private civil practice for twenty years in the City of Detroit.

He is a graduate of Sts. Peter and Paul High School, Saginaw, the University of Detroit, and the University of Michigan Law School. He is married and the father of five children.

Mr. Ward has been an Adjunct Professor of Contracts and State and Local Government at the Detroit College of Law since 1970, and is a member and past chair of the Board of Control of Saginaw Valley State University; an elected member from Wayne County to the Michigan State Bar Board of Commissioners; a director of Michigan Center for Charter Schools; former commissioner and president of the Wayne County Home Rule Charter Commission; former Executive Director of the City of Detroit Charter Revision

Commission; and a member of the President's Club of the University of Michigan and President's Cabinet of the University of Detroit.

WILLIAM FAUST

Mr. Faust is a legislative member of the Michigan Law Revision Commission and has served on the Commission since March 1993.

Mr. Faust, a Democrat, is serving his seventh term in the Michigan State Senate. Mr. Faust has represented a portion of western Wayne County for the past twenty-five years.

Former Majority Leader of the Senate, a position he held longer than anyone in Michigan history, Mr. Faust now serves on the Commerce; Energy and Technology; and Corporations and Economic Development Committees.

A former township supervisor, newspaper editor and publisher, Mr. Faust is a graduate of the University of Michigan.

A strong supporter of Michigan libraries, Mr. Faust is widely credited for his leadership in securing the funds necessary to build the Michigan Library and Historical Museum located west of the Capitol in Lansing.

DAVID M. HONIGMAN

Mr. Honigman is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 1987.

Mr. Honigman is a Republican State Senator representing the 17th Senatorial District. He was first elected to the Michigan House in November 1984 and served in that body until his election to the Senate in November 1990. He is currently Chairman of the Senate Committees on Labor and on Local Government and Urban Development, and Vice-Chairman of the Senate Education Committee.

He is a graduate of Yale University (with honors) and the University of Michigan Law School. He is married.

Mr. Honigman serves on the Board of Trustees of the Michigan Cancer Foundation and the Alumni Board of Detroit County Day School. He is a member of the Michigan Regional Advisory Board of the Anti-Defamation League of B'nai Brith. He was named one of the Outstanding Young Men in America in 1985 and 1988.

Mr. Honigman is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

MICHAEL E. NYE

Mr. Nye is a legislative member of the Michigan Law Revision Commission and has served on the Commission since March 1991.

Mr. Nye is a Republican State Representative representing the 58th House District. He was first elected to the Michigan House in November 1982. He is Chairman of the House Judiciary Committee and serves on the House Committees on Labor, Civil Rights and Women's Issues.

He is a graduate of Purdue University and University of Detroit Law School. He is married and has two children.

Mr. Nye was named the 1991 Legislator of the Year by the Michigan Association of Chiefs of Police and the 1990 Michigan Environmental Legislator of the Year by the Michigan Environmental Defense Association.

Mr. Nye has been a leader against Drunk Driving and has received the GLADD award (Government Leader Against Drunk Driving) from the Mothers Against Drunk Drivers.

Mr. Nye is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

TED WALLACE

Representative Ted Wallace is a legislative member of the Michigan Law Revision Commission and has served on the Commission since April 1993. Representative Wallace is a Democrat from Detroit and has represented the 5th House District since November 1988.

Representative Wallace served in the U.S. Navy during the Vietnam war and is an in-active member of the Michigan National Guard.

He holds a Bachelor of Science Degree in Accounting from Wright State University and a law degree from the University of Michigan Law School. He also took post-graduate classes at the University of Michigan Institute of Public Policy, and post-legal classes at Wayne State Law School.

Representative Wallace is a practicing attorney in the Detroit area and was previously an adjunct professor at Wayne State University and an assembler for the Chrysler Corporation. Representative Wallace has been a tax analyst for the General Motors Corporation and a tax accountant for Arthur Anderson and Company.

He is affiliated with the Michigan Democratic Party, Urban League, T.U.L.C., University of Michigan Alumni Association, and other various legal organizations. He is also a life member of the N.A.A.C.P. and a member of the issues committee of the Michigan State N.A.A.C.P. His past history has included tenure as President of the Democratic Voters League; Vice-President, Young Democrats; Member, Board of Governors Young Democrats; Chairman, Upper Neighborhood City Council; Delegate to the 1972 Black National Convention; and Vice-President, Government Affairs, Greater Dayton Jay-Cees.

Representative Wallace serves as Assistant Majority Floor Leader and is a member of the Appropriations Committee. He serves as Vice-Chair of the Appropriations subcommittee on Mental Health and is a member of the subcommittees on Agriculture, Public Health, Social Services, and State Police.

Wallace is married to the former Bernice Jones and has three children.

ELLIOTT SMITH

Mr. Smith is an ex officio member of the Michigan Law Revision Commission due to his position as the Director of the Legislative Service Bureau, a position he has filled since January 1980.

Mr. Smith has worked with Michigan legislators since 1972 in various capacities, including his work as a Research Analyst for Senator Stanley Rozycki, Administrative Assistant to Senator Anthony Derezinski, and Executive Assistant to Senate Majority Leader William Faust before being named to his current position.

He is a graduate of Michigan State University. He is married and has two children.

KENT D. SYVERUD

Mr. Syverud is Executive Secretary to the Michigan Law Revision Commission, a position he has filled since January, 1993.

Mr. Syverud joined the University of Michigan Law Faculty in 1987 and has taught courses in civil procedure, complex litigation, insurance law, negotiation, settlement, and products liability. He has published articles about liability insurance, settlement of civil litigation, and legal problems of automobile and highway technology.

Mr. Syverud is a graduate of the Georgetown University School of Foreign Service and the Michigan Law School. Following his graduation from Michigan, he served as a law clerk to Judge Louis Oberdorfer of the United States District Court for the District of Columbia and Justice Sandra Day O'Connor of the United States Supreme Court. He is married and has three children.

GARY GULLIVER

Mr. Gulliver acts as the liaison between the Michigan Law Revision Commission and the Legislative Service Bureau, a responsibility he has had since May 1984.

Mr. Gulliver is currently the Director of Legal Research with the Legislative Service Bureau. He is a graduate of Albion College (with honors) and Wayne State University Law School. He is married and has four children.

Mr. Gulliver is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

Electronic Mail and Public Disclosure Laws

A Special Report to the

Michigan Law Revision Commission

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Michigan
Law Revision Commission

1994

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This report is an excerpt taken from the 29th Annual Report of the Michigan Law Revision Commission (1994). A copy of the Annual Report may be secured by writing to:

Michigan Law Revision Commission
c/o Legislative Service Bureau
P.O. Box 30036
Lansing, Michigan 48909-7536

Electronic Mail and Public Disclosure Laws

A Study Report Submitted to the Michigan Law Revision Commission

Executive Summary

Employees at almost all major Michigan government agencies and public universities now use electronic mail to communicate with each other and, often, with the general public. This new technology allows its users to communicate faster, cheaper, and more effectively than ever before.

E-mail is a medium that has come to replace both telephone calls and documents for many purposes. Michigan public disclosure laws, which have historically differentiated between telephone conversations (which are private) and documents (which are often subject to disclosure), 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 electronic mail, like public access to government records, would help promote the goal of open government embodied in the disclosure laws. Yet public disclosure of electronic mail could also considerably dampen the candor, informality, and ease of communication that makes e-mail so popular and effective among many employees of public agencies, as well as among the administrators, faculty, and students at public universities and secondary schools in Michigan.

After a description of how e-mail works and a summary of its use by Michigan state employees, the report addresses how Michigan's public disclosure laws, as currently written and interpreted, are likely to be applied to electronic mail. It concludes 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 (FOIA) and Management and Budget Act. This would subject e-mail messages of public employees to the disclosure and preservation requirements of those acts. Thus, under most circumstances, the report concludes that 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.

The Commission has received numerous comments from state agencies and universities, which are attached as appendices, that urge revision of Michigan disclosure statutes so as to prevent their blanket application to e-mail. Rather than endorse the suggestion that electronic communications be removed entirely from the purview of disclosure statutes, the report recommends revision of one exemption to the FOIA to provide a safe harbor for that subset of electronic messages that most resemble the informal exchange of ideas and information that now occurs by telephone. In addition, the report encourages the Legislature to exempt classes of users at public institutions (such as college and high school students) from the threat of disclosure. Finally, the report encourages a process of refining the definition of "record" in the Management and Budget Act to more appropriately encompass e-mail.

The report concludes by urging the Commission to conduct a hearing on e-mail and public disclosure laws. Such a hearing should be the first step toward revising a wide range of Michigan statutes -- on disclosure, privacy, harassment, and eavesdropping -- to better reflect public policy toward new communications technologies that include not just e-mail, but also voice mail, facsimile transmission, and computer conferences.

I. Introduction: Electronic Mail and Public Disclosure Laws

Electronic mail is now used by almost all of Michigan's state agencies and universities. Some Michigan state public employees are connected to hundreds of other state employees by large mainframe computers; 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 size or scope, these electronic messages or "e-mail" represent the cutting edge of today's workplace technology. E-mail has many advantages 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 sectors.[1]

It is entirely unclear, however, what new responsibilities come with 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,[2] which requires that many government records be disclosed when requested

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1 Anne Wells Branscomb, Who Owns Information?, (New York: Basic Books, 1994), p 163.

2 MCL 15.231 et seq.

by the public. Moreover, the Management and Budget Act generally requires the government to permanently preserve those writings that record the activities of the government. These statutes raise an important issue: To what extent are electronic mail messages sent or received by state employees "records" that must be preserved and, when requested, disclosed to members of the public?

Several other legal issues are raised by electronic mail: Are electronic mail conversations and conferences ever "meetings" under the Michigan Open Meetings Act?[3] If an e-mail message contains financial information, must it be disclosed pursuant to Article IX of the Michigan Constitution, which mandates the disclosure of certain financial records to the public? Are e-mail messages subject to discovery requests[4] 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 was doing, where it was spending money, and of whom it was keeping records. However, these statutes were written when information traveled in basically two media: paper memoranda (or 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 is like a telephone conversation in that most messages are short, casual and can travel around the world in minutes. On the other hand, e-mail messages are like written memoranda because they can be copied, edited, filed and even printed onto paper. Like hanging up the phone, e-mail can be deleted with a keystroke; or, it can be printed out and treated like a standard memorandum.

The applicability of disclosure rules to electronic mail is crucial to how government employees and officials will communicate in the future. Public access to electronic mail, like public access to written memoranda, would help promote the goal of open government embodied in the disclosure statutes. Unfortunately, a policy of public disclosure of e-mail messages could dampen the current candor that makes this medium so popular. Moreover, there is a strong sentiment among many e-mail users that all electronic communications should remain private and that the laws of the state should reflect this desire.[5] There are significant uncertainties as to how courts will interpret Michigan's existing

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3 MCL 15.261 et seq.

4 MCR 2.302, 2.310; FR Civ P 26-37.

5 See Stephanie B. Lichtman, Computers and Privacy Rights: Minimum Standards Needed, The Computer Lawyer, December 1993, p 26.

disclosure laws when applying them to electronic mail.[6] This report will attempt to clarify, explain, and suggest ways to modernize the existing laws that could affect electronic mail use by public employees.

First, the report describes electronic mail and summarizes its current use by the State of Michigan and its agencies and universities. Second, the report explores the existing statutes, constitutional provisions, and court rules that are relevant to disclosure of public records. Third, the report summarizes the suggestions of several State agencies, universities, and the media in response to the issue of e-mail disclosure. Finally, the report poses some of the questions that should be answered to keep Michigan's laws ahead of the technology curve. It concludes by urging the Michigan Law Revision Commission to hold a hearing and to suggest specific legislation to address these important questions.

II. An Overview of Electronic Mail and its Use in Michigan's Public Agencies and Universities

A. A Description of E-Mail

"Faster than a speeding letter, cheaper than a phone call, electronic mail is the communication medium of the '90s."[7] E-mail is electronic mail automatically passed through computer networks and/or via modems over common carrier lines.[8] According to the Electronic Mail Association the number of e-mail users is growing at 25 percent per year and currently stands between 30-50 million.[9]

1. The Parts of An E-mail Message

Just as memoranda are composed of several parts, including a heading and a body, and telephone conversations have formal beginnings and endings ("Hello, Treasury Department" "Goodbye."), e-mail messages have several components. Figure 1, an actual e-mail message sent to the Chairman of the Michigan Law Revision Commission, illustrates the address, header, and body of a typical message.

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6 This report does not cover criminal computer activity including wire fraud and stalking. Michigan has such statutes, see MCL 750.411h.

7 David Angell & Brent Heslop, The Elements of E-mail Style, (Reading, Mass: Addison-Wesley, 1994), p 1.

8 Eric S. Raymond, ed., The New Hacker's Dictionary, (MIT Press, 1991).

9 In 1980 there were an estimated 430,000 electronic mailboxes. By 1992 that number had grown to approximately 19 million. See Computerworld, November 23, 1992.

Figure 1

SAMPLE E-MAIL MESSAGE WITH COMPLETE HEADER[1]

The "From" and "Received" lines give the real address that the mail is coming from, and what computer systems the mail went through to get there.

Over the Internet there is always at least one "Received" header and usually no more than four or five. These headers help in retrieving lost mail, but usually are not displayed on the recipient's screen. (indicate lines which are often not displayed to the general e-mail user)

The posted line contains the date and time the message was sent. The second "From" line contains the address important to normal users, and this is the address to which a receiver should reply.

```
From [Kent.Syverud@um.cc.umich.edu} Tue Jul 26 1994
15:01:06
Received: from totalrecall.rs.itd.umich.edu by
us.itd.umich.edu with ESMTP id QAA17002;Tue Jul 26 1994
14:52:26
Message: 37262618, 11 lines
Posted: 11:44am EDT, Tue Jul 26/94
Subject: meeting date
To: mclella5@pilot.msu.edu
From: Kent.Syverud@um.cc.umich.edu

     Richard McClellan, Chair
     Michigan Law Revision Commission
          Dear Richard:
          I just wanted to confirm that the next meeting
of the Commission will be on September 30, 1994, and
that we will have a draft of the study on Electronic
Mail and Public Disclosure Laws on the agenda for that
meeting.
```

The "To" line lists the e-mail address (or addresses) of the recipients of the message. There may also be a "CC" line which lists other recipients who will receive a copy of the message.

The "Message Id" is always unique, and it is important mainly for finding lost messages.

"Subject" is a line in which the sender gives a brief description of the message. The header is followed by the body of the message.

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[1]See Brendan P. Kehoe, Zen and the Art of the Internet, (Prentice Hall, 1994) p 11. The standard syntax for headers is described in, David Crocker, Standard for the Format of ARPA Internet Text Messages, August 12, 1982 (generally referred to as RFC-822). Every system displays the Header differently, but all of these lines are necessary to send e-mail messages.

Electronic mail comes in many forms, but they all have an "address." An e-mail address contains the information necessary to send a message from one computer to another anywhere in the world. It is important to note that an e-mail message need not be sent to just another person; it can be sent to a computer archive, a list of people, or even a pocket pager.[10] An e-mail address contains a local part and a host part. These parts are separated by an "@" sign, e.g., wallace@60-minutes.cbs.com. Once one knows the address of the person, a few keystrokes send the message to its destination. Multiple copies of messages can also be sent if the message is intended for multiple recipients.

In addition to the "address," each message must have a "header" in order to be transferred to other computer systems. A header contains useful information not only for the systems and the users but for the public as well because the header tells us much more than a phone call or a letter. For example, the header records precisely what time a message was received and viewed by the addressee.

2. Pathways of E-mail Messages

An e-mail message is rarely transmitted directly from one computer to another. Each message is sent to a "server", which is a central computer that provides a service to "client" computers. One common service provided by the server is the forwarding of electronic mail. 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. These gateways are computers that have connections to both networks and know how to translate the e-mail messages.[11]

What is the Internet?

> 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 that it has transcended the original mission. Today it's being used by all sorts of people . . . for a variety of purposes.[12]

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10 Brendan P. Kehoe, Zen and the Art of the Internet, (New Jersey: Prentice Hall, 1994), p 9.

11 Id., p 51.

12 Tracy LaQuey, The Internet Companion, (Reading, Mass: Editorial Inc, (1993)).

Once a gateway is obtained, and the proper address is found, e-mail can be sent anywhere in the world.

The language of the Internet is "TCP/IP," which stands for Transmission Control Protocol/Internet Protocol. This protocol was developed in the 1970s as part of an experiment in networking.[13] TCP/IP was developed using public funds and is an open, non-proprietary public protocol. The rules of the protocol are written in a document called RFC 822.[14]

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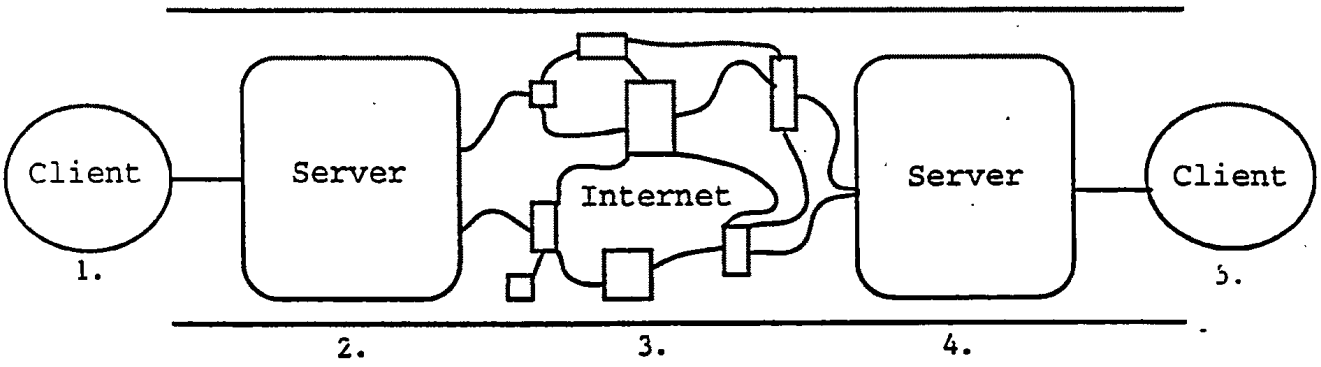
13 Id., p 22.

14 See David Crocker, Standard for the Format of ARPA Internet Text Messages, August 1982 (generally referred to as RFC-822).

Figure 2



In this hypothetical a lawyer named Dave from a Michigan television broadcast company sends Public Employee a message suggesting how FOIA should apply to e-mail.

1. Dave drafts the message from his office with Word Perfect Office and edits the message before sending it via his modem to America On-line, a popular e-mail service, which charges him a monthly fee. The message may be saved on his hard drive if he desires.

2. America On-line routes Dave's message to the Internet which is a network of networks. America on-line may save the message in case of loss or inability to forward.

3. The Internet which is open to the public forwards the message according to the ITP protocol to the main frame at The University of Michigan. Any of the systems on the path of machines forwarding Dave's message could choose to save the message in case of problems. Also at this juncture any clever computer "hacker" could read Dave's message if he chose.

4. The Michigan Terminal System (MTS) receives Dave's message (usually within minutes) and tells Public Employee's e-mail account that a message has been received. The message is probably recorded on the main frame's tape drive system. These drives are regularly erased. See text.

5. Public Employee retrieves his message from his home late that night. He accesses his account from a modem at home (called "remote access"). Public Employee may then delete Dave's message, but it is more likely that he will print out one copy for his research assistant and save another copy in his computer. Public Employee may also "archive" Dave's message for later use by saving it under his name on the MTS drive.

3. How E-mail Differs From Telephone Calls and Paper Memoranda

The Elements of E-mail Style[15] points out some of the major advantages of e-mail communication.

First, e-mail is asynchronous. That is, the receiver need not be present to receive his or her message. Many phone calls are unsuccessful because the receiver is not present. E-mail eliminates this problem by posting the message where it can be retrieved and read at the receiver's leisure. Because the sender and the receiver communicate at different times, more reflection is permitted in the response because no one is waiting as they would be on the phone.

Second, e-mail can be sent 365 days a year, 24 hours a day; thus breaking barriers such as no mail delivery on Sundays and time zone problems.

Third, e-mail is often a shorter, cheaper, and more efficient form of communication. Certainly more mistakes (grammatical and spelling) are made in electronic messages, but the cycle of idea-response-idea is shortened greatly when compared with traditional paper-based communication.

Fourth, there may be sociological advantages gained by e-mail communication. Through e-mail, a supervisor can maintain direct daily contact with many employees working in widely dispersed facilities on different schedules; the result is often a more direct and less hierarchical form of communication. Flexibility is added to the workplace allowing employees to work off-site. Moreover, the interruptions characteristic of telephone calls are reduced because e-mail need not be answered until the receiver wishes.

In sum, electronic communication has the advantages of speed, cost, storage, and access.[16] The messages move at the speed of light rather than the speed of other means of communication. They cost less than a stamp or a facsimile (e-mail can send roughly 100 pages for the same cost as 1 cross country fax). Millions of pages of e-mail can be stored for less than the price of a single file cabinet. Last, electronic messages can be accessed on-screen quickly and conveniently.

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15 Angell & Heslop, supra, p 2.

16 See generally, Martin E. Hellman, Implications of Encryption Policy on the National Information Infrastructure, The Computer Lawyer, v. 11, no. 2, p 28.

4. E-mail Access and Disposal

The storage and disposal of electronic mail differs widely depending on what system controls the message. It would be a mistake to assume that just because a receiver deletes a message that it is gone permanently. The system used by the sender often has retained a copy of the message, and a duplicate of the message could also reside with another user. That user could then forward the message to thousands of other users. Senders should likewise not assume that their receiver has deleted the message. 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 keeping messages for later reading, but it is also a way for others to stumble across personal e-mail.

State government entities have a variety of written and unwritten policies concerning the retention and deletion of electronic mail. The University of Michigan, for example, has set forth 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 new policy of deleting messages at the end of every back-up cycle, which lasts 28 days. "The longest a deleted or expired message could be retrievable is 28 days; the shortest it could be retrievable is one hour."[17] 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."[18] The policy of Western Michigan University does not explicitly state when their files are deleted, however, 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."[19] The federal government may soon require federal electronic mail to be stored for several years.[20]

It would be unwise to assume that employers do not have access to employee e-mail (either public or private). Organizations have widely differing policies on e-mail privacy. The University of Michigan, at one extreme, encrypts the e-mail on campus systems so that it cannot be read even by the system administrator.[21] At the other extreme, Epson America (a private employer) has a

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17 The University of Michigan Information Technology Digest, Greater Security for Your Outdated E-Mail on MTS, v.1 n.3.

18 Id.

19 Letter from Diether Haenicke, President of Western Michigan University, Policy and Guidelines for Electronic Mail, April 1993.

20 See supra at III.B.

21 Conversation with Joseph Gelinas, postmaster of the Michigan Terminal System.

standard practice of printing and reviewing their employee e-mail; this activity occurred without notice and many employees even had password-protected accounts printed and reviewed. In 1990, Epson America dismissed their e-mail administrator after she complained about the practice of reading employee messages. She filed a class action suit shortly thereafter.[22] "Macworld", a magazine for the Apple computer industry, conducted a survey of employers and their eavesdropping practices. Of the 301 companies participating, 21.6 percent admitted searching employee files, and of those, 41 percent searched their employees' e-mail.[23]

B. Current Use of E-mail by Michigan State Agencies

Of the largest Michigan departments, approximately 90 percent have access to some kind of electronic messaging system. These systems vary from large main frames to LANs. Some of these systems are interconnected; most are not. However, at the time of this writing there is a project underway to link the State's computer systems. The Michigan Administration Network (or "MAIN-NET") project would link five departments first, and later link the rest of the departments that wanted to be interconnected.

There are several different types of electronic messaging systems running in Michigan agencies. Once up and running, MAINNET would let employees and officials at different state agencies in widely different locations communicate by e-mail. Currently members of the public rarely send messages to or receive messages from state departments by e-mail. With the proliferation of private use of e-mail, however, it seems quite possible that in the future such communications, particularly with elected officials, will become common.[24]

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22 See Branscomb, supra, pp 92-106. See also, Michael Maurer, Policy Needed to Avert Shock Caused by Electronic Mail, Crain's Detroit Business, July 4, 1994, p 10. A seemingly confidential e-mail message was sent by one manager to another criticizing a local supplier. "Within minutes the note was electronically copied up the chain of command, eventually winding up in the electronic mail of the company's president." The message eventually made it into the hands of the other supplier. Id.

23 Branscomb, supra, p 93.

24 For example, in the 1992 presidential race, each candidate supported an e-mail address. Today, the White House is paralyzed by e-mail: more than 300,000 messages arrive electronically each day. The Clinton Administration plans to put the entire federal government on e-mail and already has the White House documents released via electronic mail. Branscomb, supra, p 163.

Table 1

USE OF ELECTRONIC MAIL WITHIN MICHIGAN STATE GOVERNMENT[1]

DEPARTMENT OR AGENCY	NUMBER OF NETWORK STATIONS (approx.)	E-MAIL SOFTWARE[2]
Agriculture	300[3]	Banyan Vines Mail, CC:Mail
Civil Rights	175	*
Civil Service	337	Beyond Mail
Commerce	1100+	Vax E-mail, Beyond Mail
Corrections	1200	WordPerfect Office
Education	125	WordPerfect Office
Employment Securities	120 (soon 500)	*
Lottery	*	*
Management and Budget	1100	Wang Office
Mental Health	*	Banyan Vines(*)
Military	*	Federal System E-mail
Natural Resources	2300	Office Vision, Microsoft Mail
Public Health	400	Wordperfect Office
Social Services	3500	In progress CC:Mail, Wordperfect Office
State	1550	UNISYS E-mail, Wordperfect Office
Transportation	2119	Star Mail - Wordperfect Office 4.0a
Treasury	1000 (not all connected)	CC:Mail - Wordperfect Office

* = Data not available.

Information in this table was collected by survey in July, 1994.

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[1]See generally, Memorandum from Richard Reasner to Gerald Williams, Director of Information Technology, Draft of MAIN State Agency Connection Report. Department of Management and Budget, March 29, 1994. See also, Memorandum from Dennis Krypmalski of Deloitte & Touche for Jerry Williams, April 12, 1994, Subject: Network Operations Center Consolidation Project Status Report.

[2]The e-mail software market is growing rapidly. See Richard Shaffer, Beam Me A Letter, FORBES, June 20, 1994, p 118.

[3]By the fall of 1994 the Department of Agriculture will have extended its network to the Laboratory Division in East Lansing as well as the Office of the Racing Commissioner in Livonia. In the near future the Department plans to network the entire field staff at their homes. See letter from the Department of Agriculture to Richard McLellan, June 21, 1994.

The Governor is connected to the heads of several departments via the Executive Local Area Network (herein E-LAN). This network connects at least 15 department directors, as well as employees in the executive office of the Governor, to the Governor using Quick Mail and WordPerfect Office. The server for this network is located in the Executive Office of the Governor, thus largely exempting the system from the Michigan Freedom of Information Act, as discussed below. However, should employees outside the Governor's office keep copies of messages to or from the Executive Office—either in hard copy or in computer files—the current FOIA might apply.[25]

Michigan's public universities use electronic mail more extensively than most of the State's departments. The University of Michigan has approximately 30 different computer systems that exchange electronic mail regularly. One of these systems alone handles an estimated 1,000,000 messages per month.[26] One college at the University receives "2,000 messages per week and approximately 43,000 messages are kept on its machines by faculty, staff and students."[27] Another large e-mail user, the University of Michigan's Medical Campus, supports "approximately 100,000 messages per week between 2,500 - 3,400 employees."[28]

Research is the primary focus of these networks. For example, the University of Michigan maintains that its information resources (including e-mail) are intended "primarily for activities related to accessing, sharing, and creating information and collaborating with other members of this and other communities for *scholarly and work-related communications*."[29] However, e-mail is also used for social communication at these schools which has been shown to help aid the learning process:

> "The mission of a public body such as a university or college requires that there be unhampered free speech in all forms. Such open and free flowing communication is important in order to enable the creation of concepts and for the training of minds in the processing and synthesis of information. . . . Open communication in a variety of forms is also important in creating the sense of

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25 See infra text at III.A.3.e.

26 See Letter from Elsa Cole, General Counsel at the University of Michigan, to Kent Syverud, Executive Secretary of the Michigan Law Revision Commission, Public Access to Electronic Mail, July 28, 1994.

27 Id.

28 Id.

29 University of Michigan General Policies, Standard Practice Guide 601.11, Privacy of Electronic Mail and Computer Files at the University of Michigan, December 1993 (emphasis added).

community within universities and colleges, a condition that has been found to enhance learning, discovery, and teaching exchanges."[30]

Universities also differ from other state agencies because they use e-mail regularly to communicate with people outside of the government at other public and private universities and research institutions, as well as at private companies around the world. It is also likely that public schools of all levels will use e-mail for similar purposes in the near future.

III. Michigan Public Disclosure Laws

Currently there are numerous methods by which information about the state government is disclosed upon request by members of the public. This Report will focus on the Freedom of Information Act,[31] the Management and Budget Act,[32] and discovery procedures under the Michigan Court Rules.[33] Where it is analogous, reference will be made to federal law, including the federal Freedom of Information Act,[34] the Federal Records Act,[35] and federal case law. Federal law is particularly important when there is no applicable Michigan case:

> "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."[36]

A. FOIA and Electronic Mail

In applying the text of Michigan's Freedom of Information Act to e-mail the primary issues are whether e-mail is a "writing" under FOIA; whether e-mail is a "public record" under FOIA; and, whether any exemptions to FOIA apply generally to e-mail, most importantly the privacy exemption and the communications within a public body exemption. Before addressing those and

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30 Cole, supra, p 2.

31 MCL 15.231 et seq.

32 MCL 18.1101 et seq.

33 MCR 2.302, 2.310.

34 5 USC 552.

35 44 USC 29, 31, 33. Chapter 33 is sometimes referred to specifically as the Federal Records Disposal Act.

36 Hoffman v Bay City Sch Dist, 137 Mich App 333, 337; 357 NW2d 686 (1984).

other issues, it is important to review the purposes of FOIA and the text of the act.

1. Purposes of FOIA

The purpose of the Act must be considered when resolving ambiguities in the Act's definition, including its definition of the term "public record."[37] That purpose is contained in the preamble of the Act:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, 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 informed so that they may fully participate in the democratic process.[38]

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

> The Legislature in the enactment of the Michigan FOIA followed closely, but abbreviated, the Federal Freedom of Information Act, 5 USC 552. 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.[39]

To say that FOIA is a "disclosure statute" has been interpreted to mean that "FOIA does not require that information be recorded; it only gives a right of access to records in existence."[40] Generally speaking, then, 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."[41]

However, that same court concluded that the purpose of disclosure also implies a duty to "*preserve and maintain* [records requested through FOIA] until

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37 Walloon Water v Melrose Twp, 163 Mich App 726, 730; 415 NW2d 292 (1987).

38 MCL 15.231(2).

39 Schinzel v Wilkerson, 110 Mich App 600, 603-04; 313 NW2d 167 (1981) (citations omitted); see also, State Employees Ass'n v Dep't of Management & Budget, 428 Mich 104, 109; 404 NW2d 606 (1987).

40 Walloon, supra, p 731.

41 Id., p 732.

access has been provided or a court executes an order finding the records to be exempt from disclosure."[42] The court explained its reasoning as follows:

> it 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, a claimant's right to disclosure under the FOIA would not be adequately safeguarded.[43]

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

The federal Freedom of Information Act was also designed as a pro-disclosure statute. The Supreme Court emphasized this philosophy in Dep't of the Air Force v Rose: "the basic purpose [of FOIA] reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' To make crystal clear the congressional objective [was] . . . 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'"[44] The Court held that the nine exceptions to the federal FOIA were to be construed narrowly: "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."[45]

When the federal Freedom of Information Act 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."[46] President Nixon later 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

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42 Id.

43 Id.

44 Dep't of Air Force v Rose, 425 US 352, 360-61; 96 S Ct 1592; 48 L Ed 2d 11 (1976); see also EPA v Mink, 410 US 73; 93 S Ct 827; 35 L Ed 2d 119 (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.").

45 Rose, p 361.

46 1974 Journal of the Senate 854 (No. 93-854, Report on Amending the Freedom of Information Act, May 16, 1974).

> their own affairs, distrustful of those who manage them, and—eventually—incapable of determining their own destinies.[47]

Senator Kennedy introduced the 1974 revisions to the FOIA by emphasizing how democracy succeeds only in a system where information flows freely:

> We should keep in mind that it does not take marching armies to end republics. Superior firepower may preserve tyrannies, but it is not necessary to create them. 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.[48]

However, it has been contended that these lofty objectives are undermined in practice. Compliance with FOIA can be very expensive and burdensome for state agencies on tight budgets and with limited staff. The FOIA can be used to obtain sensitive information about individuals for invidious purposes. For example, the University of Michigan has commented 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 personal and personnel files of current employees, from citizens asking for the names of all individuals who participate in specific communication or social groups" and other requests which tax the resources of the school "unnecessarily and perhaps inappropriately."[49]

2. Relevant FOIA Provisions

The Michigan Freedom of Information Act functions by having the public 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

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47 Id.

48 Id.

49 Cole, supra, p 6. 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, Braverman & Chetwynd, Information Law, (New York City: Practicing Law Institute, 1985), p 426 (these suits are more often connected with confidential business information).

record of a public body, except as otherwise expressly provided by section 13.[50]

A "public record" is defined in MCL 15.232(c) 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."

The definition of a "public body" for the purposes of the Act includes "[a] state officer, employee, agency, department, 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 the employees thereof."[51]

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.[52]

Twenty categories of items may be exempt from disclosure under the act. The following exemptions should be noted: information of a personal nature where the disclosure would equal a "clearly unwarranted" intrusion into the individual's privacy; information related to law enforcement practices; information covered by the Family Educational Rights and Privacy Act; and communications between public bodies that are of "an advisory nature" and are "preliminary" to a final action.[53]

3. Issues in Applying FOIA to E-Mail

a. *Is e-mail a "writing" under MCL 15.232(e)?*

Writings are defined so broadly under FOIA that electronic mail is probably a writing for the purposes of this Act. Electronic messages are typed

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50 MCL 15.233(3).
51 MCL 15.232(b).
52 MCL 15.232(e).
53 MCL 14.243.

into a computer so the language specifying "typewriting"[54] may apply. E-mail is usually written to a computer disc or a hard drive tape and would fall within the scope of "magnetic or punched cards, discs."[55] E-mail may also be printed on a printer, which could qualify a message as "printing." It is possible, however, to create an electronic message and send it to another computer without ever printing it or saving it on disc. Yet, even this message must reside in "Read Only Memory" (RAM) for at least a short while. Such a message would probably fall under the statute's broad catch-all phrase "every other means of recording . . . or retaining meaningful content."[56]

Two authorities may imply that the current Michigan FOIA applies to e-mail messages. First, in the 1982 case of Kestenbaum v Michigan State University, the Michigan Supreme Court held that computer tapes containing the names, addresses, and other information about Michigan State students were a "writing" under FOIA because the statute "defines a writing to include 'magnetic or paper tapes * * * or other means of recording or retaining meaningful content.'"[57]

The force of Kestenbaum is somewhat diluted, since 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 e-mail, like computer tapes, would be construed under the FOIA to be a "writing". Thus, Chief Justice Fitzgerald's opinion for affirmance stated that information retained in a computer tape is a writing. There seems no obvious reason not to extend that analysis to information contained in a computer's memory. Justice Ryan's opinion for reversal 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.

Second, the Attorney General opined in 1979 that stenographers' notes and tape recording or dictaphone records of a municipal meeting were "records" under FOIA. The Attorney General commented:

> Since the definition of 'writing' . . . includes symbols, magnetic tapes, or 'other means of recording or retaining meaningful content,' stenographer's notes, tape recordings or

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54 MCL 15.232(e).

55 Id.

56 Id. There appears to be no definition of "meaningful content."

57 Kestenbaum v Michigan State University, 414 Mich 510, 538; 327 NW2d 783 (1982).

dictaphone records of municipal meetings are public records under the Act and must be made available to the public.[58]

The Attorney General, however, decided that computer software owned by the State was *not* "writing" within the scope of FOIA. The dilemma was that software was both "a set of instructions for carrying out prearranged operations" but it was also "stored on paper cards in the form of decks and on reels of magnetic tape." The Attorney General reasoned:

> It may be seen that although the forms on which the software is recorded appear to meet the definition of a 'writing' as defined in 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.[59]

These cases and opinions lead one to conclude that electronic messages would probably be held to be "writings" within the definition of MCL 15.232(e). E-mail is not an "integral part of computer operation" -- it is much more like a form of writing used to "record information or ideas." Moreover, these cases and opinions suggest that many forms of electronic information would be held to be "writing" under FOIA.

Federal case law has also filled in the electronic gap in the definition of records. "Although 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."[60]

Congress implied that computerized documents were records when they explained that the term "search" would include both conventional searches and computer data base searches. The Senate Judiciary committee decided that it was "desirable to encourage agencies to process requests for computerized information even if doing so involves performing services which the agencies are not required to provide—for example, using its computer to identify records."[61]

This reasoning persuaded the United States Court of Appeals for the District of Columbia that "computer-stored records, whether stored in the central

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58 OAG No. 5500, p 255, 264 (July 23, 1979).

59 Id., p 265 (italics added).

60 Yeager v Drug Enforcement Admin, 678 F2d 315, 321; 220 US App DC 1 (1982).

61 Amending the Freedom of Information Act, S.Rep. No. 854, 93d Cong., 2d Sess. 1974, p 12.

processing unit, on magnetic tape or in some other form, are still 'records' for purposes of FOIA."[62] 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."[63]

Thus, under Federal law, electronic messages would most likely be considered "records," even though that Act does not define records very clearly. E-mail might not qualify as a "record" for other reasons, but, e-mail 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 MCL FOIA 15.232(c)?*

In order to qualify as a record, a writing must pass two tests. It must be 1) "prepared, owned, used, in the possession of, or retained by a public body" for the purpose of 2) "performance of an official function, from the time it is created."[64]

The first prong of this test seems broad. For example, three Justices of the Michigan Supreme Court have accepted (without deciding) that computer tapes containing the Michigan State University student directory passed this test: "the magnetic tape is indisputably 'prepared, owned, used, in the possession of, or retained by' the defendant public body."[65]

At first glance, e-mail too would seem to fit the definition of a "public record" because state agencies use it every day to perform a wide variety of tasks from sending messages, to scheduling meetings, to drafting reports. However, e-mail 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 their tape drive—for instance, any system connected to the Internet could receive messages prepared by anyone in the world; many e-mail messages are not meant to be "retained," many e-mail messages merely pass through the universities' large mainframes; many messages arrive at computers accidentally and thus are not intended to 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 (thus not

62 Yeager, supra, p 321.
63 Id.
64 MCL 15.232(c).
65 Kestenbaum, supra, p 538.

prepared by it), and were not intended to be used in any way by the agency (passing through), and if they were never saved by the agency's e-mail system.[66]

The second prong of this test, that a record be used "in the performance of an official function,"[67] is not defined in the statute. The equally divided Kestenbaum court affirmed a court of appeals ruling that this expression should be "construed according to its commonly accepted and generally understood meaning."[68] The court's affirmance also applied to a holding that Michigan State University's computer tapes passed this test. "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."[69] Yet because these holdings resulted from an affirmance 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 FOIA arises.

The Michigan Appeals Court has ruled that the "goldenrod-colored worksheet" used by the disciplinary credit committee of the Michigan Department of Corrections is a "public record" within the scope of FOIA because "it was prepared, owned, and used by the disciplinary credit committee in performing its official function of determining credits."[70] The court held that these worksheets were public records even though they normally were destroyed after the warden made his decision.[71]

Moreover, it is the policy of some Michigan agencies that no computer owned by the state shall be used for personal reasons.[72] This policy would lead

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66 It stands to reason the these "non-record" e-mail messages would involve the universities that are tightly woven into the structure of the Internet far more than they would other state agencies. However, connection to the Internet by all agencies is probably just a matter of time.

67 MCL 15.232 (c).

68 Kestenbaum, supra, p 538.

69 Id., p 539.

70 Favors v Corrections Dep't, 192 Mich App 131, 135; 480 NW2d 604 (1991).

71 Id., p 134. See also, Patterson v Allegan Cty Sheriff, 199 Mich App 638; 502 NW2d 368 (1993) (ruling that "mug shots" are public records under FOIA); Swickard v Wayne Cty Med Examiner, 438 Mich 536; 475 NW2d 304 (1991) (holding that an autopsy report and toxicology tests result prepared by the county coroner were prepared "in the performance of an official function" and were "public records"); Penokie v Michigan Technological University, 93 Mich App 650, 656; 287 NW2d 304 (1979) (salary records of Michigan Technological University teachers are "public records" within the meaning of FOIA); Detroit News v Detroit, 185 Mich App 296, 298; 460 NW2d 312 (1990) (minutes of a meeting by the Detroit City Council which was closed in violation of the Open Meetings Act, are public records subject to disclosure under FOIA).

72 Telephone conversation with Erik West, Dept. of Management and Budget, June 20, 1994.

one to conclude that electronic mail that is sent during working hours could only pertain to an "official function."[73]

The federal rules defining "records" are equally as vague as their Michigan counterparts. The DC Circuit Court commented: "As has often been remarked, the Freedom of Information Act, for all its attention to the treatment of 'agency records' never defines that crucial phrase."[74] Generally, the courts have followed the Supreme Court's decision in Forsham v Harris which held that:

> [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. .[75]

According to the treatise Information Law, "agency regulations and court decisions are in accord with this type of expansive, all encompassing definition of records."[76] As mentioned earlier, federal courts have located computer documents within this definition,[77] in addition to magazine photographs,[78] union

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73 Cf. Kestenbaum, supra, p 539 n6 ("The question whether a writing is a 'public document' or a private one not involved 'in the performance of an official function' is separate and distinct from the question whether the document falls within the so-called 'privacy exception.' Many writings prepared, owned, used, possessed, or retained by government in the performance of its functions may contain intimate and embarrassing facts of a personal nature. This does not prevent them from being classified as 'public documents.' Nondisclosure of such 'public documents' must be justified, if at all, under the enumerated exemptions of the FOIA.")

74 Bureau of Nat Affairs v U.S. Dep't of Justice, 742 F2d 1484, 1488; 239 US App DC 331 (1984) (quoting McGehee v Central Intelligence Agency, 697 F2d 1095, 1106; 225 US App DC 205(1983).

75 Forsham v Harris, 445 US 169, 183; 63 L Ed 2d 293; 100 S Ct 978 (1980) (citing 44 USCS 3301) (emphasis in the original).

76 Braverman, supra, p 129.

77 Yeager, supra, p 221.

78 Weisberg v Dep't of Justice, 631 F2d 824; 203 US App DC 242 (1980).

authorization cards,[79] x-rays,[80] computerized mailing lists,[81] tape recordings,[82] and films.[83]

The United States Court of Appeals for the District of Columbia Circuit has applied another test to determine whether a document is a record. This is the "nexus" test: "we looked to see if there was 'some nexus between the agency and the documents other than the mere incidence of location."[84] The DC Circuit relied upon an Illinois district court opinion that emphasized that mere possession of a record by an agency was not enough to make it a departmental record.[85] The court thought that "use of the documents by employees other than the author [was] an important consideration."[86] But the court was not persuaded that the way in which an agency treated a document for disposal purposes was a relevant consideration: "an agency should not be able to alter its disposal regulations to avoid the requirements of FOIA."[87] There appear to be four factors which help guide the federal courts in determining whether a document is a record: "whether the document was generated within the agency, has been placed into the agency's files, is in the agency's control, and has been used by the agency for an agency purpose."[88]

The court 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 "no substantive information" was contained in them.[89] The court also held, however, that "daily agendas" maintained by the secretary of the Assistant Attorney General for Anti-trust were agency records because "[t]hey were created with the express purpose of facilitating the daily activities of the Antitrust Division."[90] Finally the court concluded that the official's appointment calendars were not agency records

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79 Committee On Masonic Homes v NLRB, 556 F2d 217 (CA 3, 1977).

80 Nichols v United States, 460 F2d 671 (CA 10, 1972) cert den 409 US 966.

81 Disabled Officers Ass'n v Rumsfeld, 428 F Supp 45 (D DC, 1977).

82 Mobil Oil Corp v FTC, 406 F Supp 305 (SD NY, 1976).

83 Save the Dolphins v Dep't of Commerce, 404 F Supp 407 (ND Cal, 1975).

84 Bureau of National Affairs, p 1491 (quoting Wolfe v Dep't of Health and Human Services, 711 F2d 1077, 1080; 229 US App DC 149 (1983).

85 Bureau of Nat Affairs, p 1491 (citing Illinois Institute for Continuing Legal Education v U.S. Dep't of Labor, 545 F Supp 1229 (ND Ill, 1982)).

86 Id., p 1493.

87 Id.

88 Id.

89 Id., p 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 do not indicate why the call was made and, most importantly, whether the call was personal or related to official agency business." Id.

90 Id.

because they were not "*distributed* to other employees" and because the calendars were expressly for the official's personal convenience.[91]

Following the logic in Bureau of National Affairs, electronic mail would vary message by message in terms of its record status. Many messages are created solely for "personal convenience," while other messages contain calendars and appointment schedules that 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—in that almost all e-mail messages are created to communicate with someone else. But they can vary significantly from message to message.

In conclusion, the applicability of Michigan's FOIA to electronic mail remains uncertain, largely because of uncertainty whether all or some e-mail messages are used "in the performance of an official function."

c. *Do Any Exemptions to FOIA Apply to Electronic Mail?*

i. Information Of A Personal Nature

Section 13 of the Michigan FOIA, MCL 15.243, lists the only exemptions applicable to FOIA requests. This act separates public records into 2 classes: (i) those which may be exempt from disclosure under section 13, and (ii) all others, which shall be subject to disclosure.[92] The first exemption might apply to various electronic messages on a case by case basis:

> (1) 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.[93]

This exemption, like the twenty others, is "to be narrowly construed."[94] The Michigan courts have applied common law principles and constitutional language to aid them in this grey area of privacy law. In the words of Justice

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91 Id., p 1496 (emphasis in original).

92 Swickard, supra, p 545 (citing MCL 15.232(c)).

93 MCL 15.243(1)(a)

94 Swickard, supra, p 544.

Cavanagh, the author of the opinion in State Employees Ass'n v Dep't of Management & Budget, 428 Mich 104; 404 NW2d 606 (1987):

> 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.[95]

In an early 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.'"[96] 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."[97]

Generally, the Michigan courts have kept to a *narrow* interpretation of records that would qualify for the privacy exception. For example, in 1990, the Honorable Judge Quinn, Jr. was found to have committed suicide by a gunshot wound to his head. The Detroit Free Press suspected the judge had used drugs prior to the incident based on information learned from the police. The Free Press requested, under FOIA, the autopsy and toxicology test results of the deceased judge. The standard used by the court was "whether the invasion [of privacy] would be 'clearly unwarranted.'"[98] Indeed, the court 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."[99]

Applying the rigors of the privacy exception to the variety of electronic messages would be difficult. First, each electronic message would have to be defended from disclosure on a "case-by-case" basis, which could prove time

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95 Id., p 546 (quoting State Employees, supra, p 123).

96 Kestenbaum, supra, p 551.

97 Id., p 546.

98 Swickard, supra, p 547 (quoting MCL 15.243(a)).

99 Id., p 562. See also, Penokie, supra, p 653 (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.")

consuming.[100] 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 prohibitive. As for the content of electronic 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 contain "intimate details" of a "highly personal nature" and therefore fail the standard. Universities, however, have no such policy for using their systems although they 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. As noted in the public comments submitted to the Commission in connection with this report,[101] many people treat e-mail like a telephone and assume it is private to some degree regardless of departmental policy. In general, then, 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.

Federal exemption 6 is not identical to 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,"[102] is not exactly 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." The following issues have been identified as coming 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, reasons for employment termination.[103]

A key federal case, Dep't of Air Force v Rose, held that Air Force cadet discipline records were not protected from disclosure by exemption 6.[104] In the words of Justice Brennan: "we find 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."[105] Justice Brennan was worried that agencies would simply place sensitive records into files labeled "personnel" and render them exempt. The Court ruled that Congress

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100 See Penokie, p 659 ("the governmental agency bears the burden of establishing that denial of a request for disclosure is statutorily supported").

101 See infra text at Part IV.

102 5 USC 552(b)(6).

103 See Penokie, p 660 (citing Rural Housing Alliance v United States Dep't of Agriculture, 162 US App DC 122; 498 F2d 73 (1974), Cox v United States Dep't of Justice, 576 F2d 1302 (CA 8, 1978)).

104 Rose, supra, p 370.

105 Id., p 371.

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.'"[106] The Court concluded that information could be redacted if needed. The Senate Report quoted by the Court read: "[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."[107]

Again, the federal case law reaffirms the stance taken by the Michigan courts—any and all records are subject to disclosure, unless to do so would constitute a "clearly unwarranted invasion" of privacy. The Court has emphasized that when an agency attempts to exempt an entire group of records or files it violates the intent of Congress underlying FOIA. This would lead one to think that an agency or university decision to treat all electronic mail as "exempt" for privacy reasons would fail. One likely application of Rose to e-mail is that each message would be subject to inspection and any part of it which could be released to the public would be.

ii. Communications Within A Public Body

There is another exemption which could apply to e-mail messages on a case by case basis. MCL 15.234(1)(n) provides:

> (1) A public body may exempt from disclosure as a public record under this act:
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> (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 public 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 officials and employees of public bodies clearly outweighs the public interest in disclosure.

This exemption has been interpreted by Michigan courts on at least two occasions. In DeMaria v Dep't of Management the court was presented with a

106 Id., p 372.

107 Id., p 374 (quoting S Rep No. 93-854, p 32 (1974)).

case where an outside consultant's report to the Department of Management and Budget concerning cost overruns on a university construction site were sought under FOIA. The attorney general denied the request for the consultant's report citing the exemption in MCL 15.243(1)(n). 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 2(b) of FOIA. Thus, the exemption did not apply.[108] According to the judge there were "strong public policy arguments as to why the reports of independent consultants should be accorded the same status as reports generated within the public body itself."[109] However, the court "could not ignore" the Michigan Supreme Court's past decisions to "narrowly construe the exemption provisions of the act."[110]

In another Michigan case, Favors v Corrections Dep't, the court held that the goldenrod colored worksheets used by the Department of Correction to make disciplinary credit decisions were preliminary to a final agency determination of a policy because they covered only the committee's recommendations.[111] The warden made all of the final decision regarding changes in inmate incarceration. The court explained its decision:

> The 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 inmate's merit or lack thereof.[112]

Next the court balanced the public interest in encouraging frank communications weighed against the public interest in disclosure of the goldenrod colored worksheet. The court found that "[t]he public has a far greater interest in knowing that these evaluations are accurate than in knowing the reasons behind the evaluations."[113]

Electronic mail messages would qualify for the "n" exemption if (1) they were sent within or between two public agencies; and (2) they were preliminary to a final action or decision; and (3) the need for frank communication in the particular instance outweighed the public interest. As for the third prong, e-mail

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108 DeMaria v Dep't of Management, 159 Mich App 729, 733; 407 NW2d 72 (1987).

109 Id.

110 Id.

111 Favors v Corrections Dep't, 192 Mich App 128, 135; 480 NW2d 604 (1991).

112 Id.

113 Id., 136.

is popular primarily because it promotes frank discussion and the quick, efficient exchange of ideas in a relatively simple format. As for the second prong, e-mail could be used to convey a final decision or action but that is probably the rare instance. 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, e-mail is most like the goldenrod worksheet: much of what is said and done on e-mail is likely to be "candid" and impressionistic rather than "final" or formal. Finally, the first prong of the test would vary by message. E-mail messages that were not created by a public body would not be subject to this exemption following DeMaria. However, it is not clear how this might apply to e-mail in some situations. For example, a message is sent from a consultant to an agency, and then that agency forwards the same message to another agency. It would appear that the message has now become a communication "within or between" public bodies. The language of the statute says nothing about the public agency "creating" or "writing" the notes, although that reading is implied by the DeMaria decision.

d. *Are E-mail Messages Sent to or Received from a Private Party by a Public Agency subject to the FOIA?*

This question is related to the issue of what constitutes a "public record" under FOIA.[114] 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.[115]

The most relevant case interpreting this language as it applies to messages sent to or received from a private party is Walloon Water v Melrose Twp. In Walloon, an individual citizen sent a letter to a township. The letter related somehow to the water system provided by the citizen's company to the township. The letter was read aloud at a regularly scheduled town meeting, and recorded in the minutes of the meeting. When the plaintiff requested the letter from the defendant township pursuant to the FOIA, the township refused to release the letter. 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

114 See supra II.A.(3)(b).

115 MCL 15.232(c).

> 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.'[116]

No other cases could be found that extended or clarified this ruling.[117] It remains unclear to what extent private communications that 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, there must be some "nexus" 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.[118] The Court in Kissinger was presented with the issue of when a document "in the possession" of an agency becomes an "agency record." The first string of FOIA cases dealt with this problem of when a record created elsewhere and that later were transferred to a FOIA agency became records.[119]

It is unclear what the answer is to the question, "Are e-mail messages sent by private citizens to public agencies covered by FOIA?" The federal law is not on point, and might not even control because the language the Michigan statutory definition of a "public record" is so broad. Parts of the Michigan FOIA definition are left undefined. For example, "from the time it was created" is not treated in any decision. One possible conclusion is that as long as the state agency or university does not "use" a private-party document but only receives it, it is not a record. In Kestenbaum, three Justices stated that Michigan State University's student list was a record because the school had to "use" the list officially. However, an e-mail messages from a private citizen to the Department of Management and Budget about how their tax dollars are spent may not be records. Moreover, even if all private correspondence are records under FOIA, they may be so unimportant in documenting agency activity that they probably do not need to be saved or retained under the Management and Budget Act.

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116 Walloon, supra, p 730.

117 It can be inferred from DeMaria v Dep't of Management that a consultant's report paid for and in the possession of the government is disclosable under FOIA. The record status of that report was not discussed nor was it disputed. The court granted disclosure. DeMaria, p 730. 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.

118 445 US 136, 100 S Ct 960, 63 L Ed 2d 267 (1980).

119 See e.g., Lykins v United States Dep't of Justice, 725 F2d 1455; 233 US App DC 25 (1984) (presentence reports that have been tuned over to the Parole Commission are "agency records" even though they originated in the courts, which are not FOIA agencies); Goland v Central Intelligence Agency, 607 F2d 339, 347; 197 US App DC 25 (1978), Cert den 445 US 997; 63 L Ed2d 759; 100 SCT 1312 (1980) (setting forth standard for determining "[w]hether a congressionally generated document has become an agency record").

e. *Are E-mail Messages Sent To or Received By the Governor covered under FOIA?*

Documents from an agency to the Governor and his advisors are probably exempt from disclosure if the Governor chooses to exercise his executive privilege not to release those documents. Michigan's Attorney General addressed this issue when a Senate hearing committee requested a newly appointed director to disclose all of his "outgoing correspondence sent out in [his name] as Director."[120] The Attorney General stated the question as follows: "[m]ay the Committee require over the objections of the Governor that an appointee who has been serving as director of a state department provide copies of communications from the appointee to: (a) the Governor, and (b) principal advisors to the Governor?"

The Attorney General's research turned up no source for the power of executive privilege: "the doctrine of executive privilege is found in no statute." Apparently it was formulated by George Washington's cabinet.[121] The Attorney General also learned that the privilege of executive confidentiality has been accepted as a "valid state constitutional law doctrine."[122] Applying these decisions to the case of a Governor withholding correspondence written to him by another department head, the attorney general opined:

> In essence, what the cases seem to say is that the Governor is not an absolute sovereign, nor is the Senate permitted to conduct an unfettered inquisition . . . [b]oth branches are, therefore, subject to restraint and must be responsible to the people. The third branch of government, the judiciary, may, if necessary, balance the competing interests through an *in camera* review of the documents in question. . . it is my opinion, that as a matter of Michigan constitutional law, the Michigan courts would hold that the doctrine of executive privilege applies to communications, from a department head to the Governor and his principal advisors.[123]

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120 OAG, No. 5994, p 389 (September 30, 1981).

121 The doctrine of executive privilege received attention in United States v Nixon, 418 US 683; 41 L Ed 2d 1039; 94 S Ct 3090 (1974). The Court held that "The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all of the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making." Nixon, p 708.

122 OAG No. 5994, p 389, 395 (citing Thomson v German R Co, 22 NJ Eq 111 (1871); Appeal of Hartranft, 85 Pa St 433 (1877); Hamilton v Verdow, 287 Md 544, 561; 414 A2d 914 (1980)).

123 Id., p. 395.

But what does this have to do with FOIA requests? Correspondence between the Governor and various agencies via e-mail may someday be requested by the public under FOIA. Knowing that the Governor is connected to agency heads by the "executive LAN" makes these requests even more likely. A message from the Governor to an agency that was then used by that agency to conduct official business or make decisions would seem to mean that it is a "public record" in the "possession of"[124] that agency. However, the Governor may be able to trump a FOIA request for a document he created. The Governor would have a plausible argument even if he no longer possesses an e-mail message that it is still his "correspondence." First, his system most likely contains a copy of the message. Second, otherwise excluding the Governor under FOIA would have little meaning if messages to other agencies were disclosable under FOIA. Assuming the purpose is to allow him frank discussion with his advisors, then why not frank discussion with agency heads whom he directs? Third, the Governor could argue that the executive privilege applies to both correspondence from agency heads to him and *from him to his agency heads.* This would appear to be a reasonable conclusion to draw from the reasons supporting executive privilege.

B. The Management and Budget Act

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.[125] These duties are contained in another statute. Section 285 of the Management and Budget Act, MCL 18.1285, requires:

> (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.

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124 See MCL 15.232(c) "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function."

125 See MCL 15.233(3).

Moreover, the Act, at MCL 18.1287(2)(c), 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 rights and privileges of its citizens, or both.

The Secretary of State has a duty to determine which records possess "archival value" and are not to be destroyed.[126] Records with "archival value" are defined in MCL 18.1284 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 about persons, things, problems or conditions dealt with by state agencies.

A "record" is defined here slightly differently than under FOIA. The Management and Budget Act definition includes:

> magnetic or paper tape, microform [sic], 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 combinations thereof, regardless or physical form or characteristics. MCL 18.1284(b).

Moreover, the Management and Budget Act defines a "state agency" differently than FOIA defines a "public body." Under the Management and Budget Act 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." MCL 18.1115(5).

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126 MCL 18.1289.

It is not clear how the Management and Budget Act and the Freedom of Information Act will apply to electronic mail. The Management and Budget Act seems to have a broader definition of "record." Electronic 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; but it is also a form of communicating electronically.

Further, all electronic mail is stored somewhere—whether on a main frame or a LAN—the message must be stored on the server computer in order to be sent. Thus, the record exists on a magnetic tape, either a tape drive or a hard drive. Because the users of e-mail are often blind to the intermediate computer systems it appears as though the message exists only in "cyberspace" between the sender and the receiver—much as a telephone call is not actually recorded anywhere. This simply is not the case with most electronic mail. An e-mail message can be erased by the receiver, but it has existed as an electronic message at least temporarily on the server in order to be transferred.

On the other hand, electronic mail is a very unique medium. That neither statute refers to this medium specifically could be problematic. Electronic 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 out the message, and much e-mail is never printed out. 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.

Even if electronic mail is considered a "record" by either definition, it is not clear that all e-mail is of "archival value." Some e-mail contains schedules and employee calendars that record their activity on a day to day basis. 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, it should be mentioned that many e-mail software packages are poor word processors and thus not very helpful for creating more than short, unformatted messages. E-mail has the potential to revolutionize how society thinks about documents and reports of significant length, but today its use suggests very brief memoranda or a "typed" telephone call.

The leading case regarding electronic mail and federal records is Armstrong v Executive Office of the President, 303 US App DC 107; 1 F3d 1274 (1993). The court ruled that "electronic communications systems can create, and

have created, documents that constitute federal records under the FRA [Federal Records Act]."[127] Armstrong began when a private historical organization requested the electronic mail of the Reagan administration under the federal Freedom of Information Act.[128] 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.[129] The court decided the issues presented under the Federal Records Act, rather than under FOIA. These two acts parallel Michigan's Freedom of Information Act and the Management and Budget Act.

For the purposes of the Federal Records Act, "records" are defined as: "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 and preserved or appropriate for preservation by that agency."[130] At oral argument, the Government agreed with the court the "this [e-mail] system has, in the past, created some things that qualify as federal records."[131]

Further, the court ruled that printing the 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."[132] Also, the Armstrong court decided that electronic directories and distribution lists which often accompany e-mail would be "appropriate for preservation" in these situations.[133]

While finding that agency heads had "some discretion" in determining what constitutes a "record," they do 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."[134]

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127 Armstrong v Executive Office of the President, 303 US App DC 107; 1 F3d 1274, 1282 (1993).

128 Id., p 1281.

129 See Order, Armstrong v Executive Office of the President, 821 F Supp 761 (DDC, 1993).

130 Armstrong, p 1278 (quoting 5 USC 3301).

131 Id., at 1282.

132 Id., at 1284.

133 Id., at 1285, n8.

134 Id., at 1283.

Armstrong resulted in a new appendix to the federal rule on Electronic Record Management, 36 CFR 1234. A draft of the standards written by the National Archives and Records Administration on how to identify, maintain, and dispose of Federal records created or received on an E-mail system is found at 59 FR 13907. This section will codify much of the Armstrong decision, including the record status of e-mail messages: "[b]ecause of the widespread use of E-mail for conducting agency business, many E-mail documents meet the definition of a 'record' under the Federal Records Act."[135]

The federal definition of "record" is very close to the two definitions found in Michigan law. For example, both the Federal Record Act and the Michigan Management and Budget Act define a "record" as material "regardless of physical form or characteristics."[136] This language persuaded the 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." The federal government has yet to test the Freedom of Information Act as it applies to e-mail.

C. 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. MCR 2.302(B)

Michigan Court Rule 2.310 further illustrates 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." 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." MCR 2.310

There are no published opinions on the subject of discovering electronic mail in non-criminal cases. However, Discovery Practice: A Guide for Michigan Lawyers recommends that lawyers clearly define the term "documents" in their

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135 59 FR 13907.

136 See Armstrong, supra, p 1280; see also MCL 18.1284(b).

interrogatories. The sample forms in this work 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."[137]

Electronic mail has already been admitted into evidence in several reported Michigan cases, but none of these have included an electronic message sent by a public employee.[138]

Currently, 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 entailed searching electronic mail messages.[139] The reporter 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.'"[140] One lawyer noted the increased popularity of e-mail in Silicon Valley: "they don't pick up the phone, they don't talk in the hallway . . . they send e-mail."[141] This trend has lead lawyers to craft their discovery requests much more specifically. Some of these requests even call for hidden and deleted e-mail files.[142] A cottage industry has formed to search e-mail files for law firms. One company searched 750,000 e-mail messages to find 7,000 "potentially relevant" messages.[143]

The language in the Michigan Rules of Court that defines "documents" includes "other data compilations from which information can be obtained."[144] This language seems broad enough to include e-mail. This means that the future will undoubtedly find the Michigan government faced with litigation that includes highly specific discovery requests asking for e-mail files, perhaps even deleted ones. Assuming that an electronic message is "relevant" to the litigation, it appears that lawyers will go to great lengths to obtain them.

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137 Bruce T. Wallace & Mary R. Minnet, Discovery Practice: A Guide for Michigan Lawyers, The Institute for Continuing Legal Education: Ann Arbor, 1988, p 256.

138 See e.g., Donley v Ameritech Serv, No. 92-72236 (ED Mich Nov. 16, 1992); 1992 U.S. Dist. Lexis 21281 (employee fired because of an electronic message sent to another employee about a client).

139 Vira Titunik, Collecting Evidence in the Age of E-mail, The American Lawyer, July-Aug 1994, p 119.

140 Id.

141 Id.

142 Id.

143 Id.

144 MCR 2.310.

D. The Governor

The Governor is exempt from the Freedom of Information Act because his office is excluded in the definition of "state agency." Under the Management and Budget Act, the Governor may make his own initial determination of which documents he wishes to archive and those he wants to destroy.[145] The Governor's actions are subject to judicial review, this action may be initiated by the Department of Management and Budget.[146]

E. Open Meetings Act

The Open Meetings Act, MCL §15.261 et seq., provides that all meetings of public bodies must be open to the public when there is a quorum for deliberation or a decision is made.

There is no language in the act that specifically mentions electronic mail. However, the court in Booth v University of Michigan Board of Regents held that telephone calls made "round-the-horn" violated the OMA because such calls achieved the same effect as meeting privately.[147] Electronic mail messages could be used in a similar fashion. Electronic conferencing also poses a problem in this area, but this paper does not address the issue of public disclosure of electronic conferences.

Decisions made, or votes taken by electronic mail would probably also fall under the scope of the OMA. Decisions include any vote or disposition on a motion or proposal that requires a vote by a public body.[148]

F. Michigan Constitution

Article IX of the Michigan Constitution mandates:

> "All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection."[149]

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145 OAG, No. 6170, p 156 (July 18, 1983).
146 OAG, No. 3590, p 581 (November 14, 1962).
147 Booth, supra, p 229.
148 MCL 15.262(d).
149 Const 1963, art IX, §23.

The purpose of this provision is to allow the public to "keep a finger on the pulse of government spending."[150] However, the government need not keep records of every receipt.[151] The article does not mention electronic mail nor do subsequent cases. It is not known to what extent Michigan state agencies transmit financial data via e-mail.

IV. How Should Michigan Disclosure Laws Be Revised to Reflect New Electronic Means of Communications? Responses to A Survey of Media, Agencies and Universities

As part of this study the Law Revision Commission sent a letter to Michigan universities, agencies and the press asking for their comments on how they use e-mail and whether they would favor or oppose public disclosure of e-mail. The responses, which are attached as appendices to this report, suggest problems with applying public disclosure laws to e-mail messages. Comments were returned from the following institutions: The University of Michigan, Ann Arbor, Western Michigan University, Northern Michigan University, Michigan State University, the Department of Education, and the Department of Agriculture, and Wood TV. The responses noted that e-mail was widely used in state departments. The overall tone of these suggestion was clear—electronic mail should remain private if it is to remain useful.

Here is a summary of the responses:

> • "First, e-mail is easily modified once sent, thus its integrity as an official record would be highly suspect at best. Second, because of re-sending capabilities (which also includes the ability for modification) verification of authenticity with any level of certainty would be difficult at best. Third, if e-mail is to be available for FOIA, then it would need to be retrievable. While such retrievability is no doubt possible, it would be analogous to tape-recording all phone calls. . ." --Richard A. Wright, Associate Vice President for Academic Affairs, Western Michigan University
>
> • "I am struck by the two quite distinct modes of e-mail use . . . I do not print a hard copy, and people with whom I deal know that

150 Booth v University of Michigan Bd of Regents, 444 Mich 211, 267 n 27; 507 NW2d 422 (1993)(quoting Grayson v Bd of Accountancy, 27 Mich App 26, 34; 183 NW2d 424 (1970)).

151 Booth, p 267.

to be my operating preference . . . Other users understand or expect that their messages will be converted to hard copy. . . I would find the prospect of an intrusion on the privacy of my e-mail communication as troubling as I would find a blanket wiretap authorization on my telephone.. . [However, a]n e-mail message that is converted to hard copy looks more like a memo than it does a telephone conversation. It is palpable and enduring. Other eyes can be expected to see it. There is not, in reason, a high expectation of privacy. . ."--Michael J. Kiley, Interim General Counsel, Michigan State University

- "The use of electronic mail on our campus is very widespread among our students, faculty, and staff. Electronic mail is more of an informal dialogue than a formal communication. . . Because of the informal nature of most electronic mail I would oppose complete public access to electronic mail. . ."--William Vandament, President, Northern Michigan University

- "It is our position that electronic mail should not be treated as subject to disclosure under the Freedom of Information Act. Electronic mail is a type of verbal communications; it does not hold the same permanency as a memorandum in office communications. In addition, trying to keep track of FOIA requests regarding electronic mail would be laborious."--Robert E. Schiller, Superintendent of Public Instruction, Department of Education

- "The Michigan Department of Agriculture uses the E-Mail system which is supplied with Banyan Vines. . . This department would support the proposed National Archives and Records Administration rules."--Gordon Guyer, Director, Department of Agriculture

Although the Commission received only one response from the media, it believes that response would command support among the press:

- "We believe E-mail should be subject to public disclosure laws. It is written (like a letter) and it is (or at least can be) retained like a letter. . . If that causes state officials to be less candid in E-mail transmissions, so be it. There is no excuse for secrecy when handling the people's business."--Rick Gevers, News Director, Wood

Two responses to the Commission's inquiries require more lengthy analysis. First, the University of Michigan prepared an in-depth analysis of the use of electronic mail at public universities and the problems posed to that use by Michigan's FOIA. This analysis concludes that the Michigan FOIA should be amended significantly:

> "1. Clarify the definition of public records. What makes a writing a public record should be whether it contains documentation as evidence of the organization, functions, or policies of the agency, and, further, whether it has been purposefully preserved.
>
> "2. Change the definition of a writing so that the decision about whether a document is appropriate for release is based on whether it was created or deliberately filed, stored or systematically maintained as evidence of the public body's policies, decisions or procedures.
>
> "3. Exclude telephone transmissions and other electronic communications from the definition of "writing". Such transmissions by their nature are intended to be ephemeral and are not intended to document an agency action."

The University of Michigan's submission also includes a draft of the Michigan FOIA as these recommendations would amend it. See Appendix 4a.

The State Archivist, who concludes that the current FOIA would apply to electronic mail unless it is amended, favors the appointment of a state government-wide committee to consider legislation on the subject of electronic mail. The archivist is anxious that electronic mail with evidentiary and informational value is preserved in an accessible and retrievable form, subject to regulations that may parallel those currently being proposed and implemented in the federal government by the National Archives and Records Administration. See Appendix 3.

V. Analysis and Conclusions

As the responses to the Commission's survey indicate, there are widely different attitudes in this state to the question of how public disclosure statutes should be applied to electronic mail. At one extreme, some advocate extending to electronic mail the same privacy protections and confidentiality that currently apply to telephone conversations—privacy protections that are currently enjoyed

not just by private citizens, but by employees of public agencies as well. At the other extreme, some advocate that Michigan's Freedom of Information Act and records preservation laws should be applied to electronic mail in the same way as they apply to written communications to and from public employees. This position would ensure widespread public access to electronic mail and would require preservation of electronic 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 different reactions are understandable. Before electronic mail, the law in Michigan as in the nation had crystallized a set of privacy expectations in our public employees: telephone conversations would be private, and written communications would, except in precisely limited circumstances, be public. There are significant advantages to enforcing 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; members of the public need to have access to information about what their government is doing. The law promoted both policies by encouraging public employees to use telephone communication for discussions they wish to keep private, and by requiring that their written communications be preserved and disclosed in most circumstances.

Electronic mail has now come to upset this traditional understanding of privacy. Electronic mail is not a telephone conversation and not a traditional memorandum; it is a new medium of communication that blends the attributes of both and, indeed, serves desirable communication purposes better than either telephone conversations or written memoranda have in the past. Moreover, it is a flexible medium that may well come to absorb most communication that previously occurred in both telephonic and written form. In the future, we may find that both the simple telephone call to say "thank you" and the memorandum to explain an agency's policy are transmitted in the first and often only instance by electronic mail. In this new medium, which may subsume both telephone conversations and written communications, how can Michigan protect both the privacy traditionally accorded telephone calls and the public's right to access to information that is embodied in our disclosure statutes?

Several threshhold questions must be addressed. First, is it desirable that electronic mail be used for the sorts of candid conversations among public employees, and between public employees and citizens, that have previously taken place as telephone conversations? The authors of this report believe that this is desirable. Few technological innovations have greater potential than electronic mail to make public officials 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 at best, can be expected to improve understanding and the quality of decisionmaking in public life.

Second, the authors of this report believe it to be irrefutable that the blanket disclosure of electronic messages to the public would discourage some desirable communications among public employees. The responses to the Commission's survey are fairly emphatic and persuasive in making this point. If electronic 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 analysis of Michigan statutes earlier in this report indicates that there are some significant ambiguities in applying both the Freedom of Information Act and the Management and Budget Act to electronic mail. Nevertheless, the text of the statutes and the decisions interpreting that text do suggest that, most likely, all electronic mail messages will be a "writing" within the meaning of FOIA, and that many (if not most) will be "public records" subject to disclosure under FOIA unless the agency or public employee can show a particular message was created for personal convenience. This will subject electronic messages of state agencies and universities (but not the Governor) to 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 "(n)", which excludes from disclosure:

> "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." MCL 15.243(1)(n)

This exemption, however, requires case by case adjudication concerning each communication: "This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure." Id. In practice, this exemption would do little to protect e-mail from disclosure, for it would be difficult and expensive to defend from disclosure each of thousands of messages on a case-by-case basis. More important, a public employee can never be very certain, at the

time of sending a message, that the exemption "(n)" balancing, when applied months or years later, will result in non-disclosure. This uncertainty will deter public employees from risking electronic communication in the first place.

The solution to these dilemmas suggested by the University of Michigan—removing electronic communications entirely from the FOIA—would most assuredly maximize the privacy of electronic mail and encourage its widespread use among public employees. It would also, however, permit significant erosion of the disclosure currently provided under the FOIA, since communications that were once communicated in writing may gradually shift to electronic forms. It may well be, as the University of Michigan argues, that the disclosure currently required under FOIA is so burdensome and intrusive that a broad reform of the "writings" subject to disclosure is in order. Such a wholesale revision of the FOIA, however, is beyond the scope of this study, and indeed may be unnecessary in order to resolve the problems involving electronic mail.

A more limited solution to the public disclosure of electronic mail under FOIA would be to amend exemption (n) so as to provide a safe harbor for that subset of electronic messages that 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" electronic 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 are whole classes of users of electronic mail at public institutions who should enjoy exemption from FOIA. Among these are students at educational institutions (including high schools and universities) who communicate with each other and with their teachers concerning matters related to their instruction.

The National Archives and Records Administration Regulations on Electronic Mail Systems suggest a starting point for Michigan's efforts to apply disclosure laws to electronic mail. As noted in the analysis above, it remains unclear to what extent electronic messages are "records" subject to preservation under Michigan's Management and Budget Act. Federal caselaw and statutes, which employ a slightly different definition of "record", have been extended to electronic mail, and have caused NARA to promulgate an electronic mail preservation regime. Those regulations identify categories of messages that

would satisfy the definition of record, and would require public employees to "tag" messages as "record" or "non-record" each time a message is generated. The categories of "record" messages include those:

> "Containing information developed in preparing position papers, reports, and studies;
> "Reflecting official actions taken in the course of conducting agency business;
> "Conveying information on agency programs, policies, decisions, and essential transactions;
> "Conveying statements of policy or the rationale for official decisions or actions; and
> "Documenting oral exchanges, such as meetings or telephone conversations, during which policy was discussed or formulated or other agency activities were planned, discussed, or transacted."
> 36 CFR 1234 (The entire proposed standard is attached as appendix 3).

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

As a first step, the Michigan Law Revision Commission should circulate this study report widely and encourage discussion of the various problems and approaches suggested in the report and in the responses of state agencies, universities, and the public. A public hearing on the issues addressed also would be desirable.

As a second step, the Commission may wish to study the ever widening set of legal issues posed by evolving electronic communications. Electronic mail and public disclosure laws are but one part of a broad array of technologies and laws that Michigan and other states must soon mesh. Voicemail, facsimile transmissions, and computer conferences all have implications, not just for public disclosure laws, but also for laws protecting against eavesdropping, for laws concerning harassment and stalking, and for the First Amendment of the United States Constitution. Many of these technologies and laws are beyond the scope of this report to the Commission. Nevertheless, the Commission should encourage suggestions from the Legislature, bench, bar, and public concerning which of these issues to address next.

Electronic Mail and Public Disclosure Laws

A Study Report Submitted to the Michigan Law Revision Commission

APPENDICES

APPENDIX 1

FREEDOM OF INFORMATION ACT
Act 442 of 1976

AN ACT to provide for public access to certain public records of public bodies; to permit certain fees; to prescribe the powers and duties of certain public officers and public bodies; to provide remedies and penalties; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

15.231 Short title; public policy.

Sec. 1. (1) This act shall be known and may be cited as the "freedom of information act".

(2) It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, 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 informed so that they may fully participate in the democratic process.

15.232 Definitions.

Sec. 2. As used in this act:

(a) "Person" means an individual, corporation, partnership, firm, organization, or association, except that person does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility.

(b) "Public body" means:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

(v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

(c) "Public record" means 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. This act 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 under this act.

(d) "Unusual circumstances" means any 1 or a combination of the following, but only to the extent necessary for the proper processing of a request:

(i) The need to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records pursuant to a single request.

(ii) The need to collect the requested public records from numerous field offices, facilities, or other establishments which are located apart from the particular office receiving or processing the request.

(e) "Writing" means 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.

15.233 Public records; right to inspect, copy, or receive; subscriptions; inspection and examination; memoranda or abstracts; rules; compilation, summary, or report of information; creation of new public record; certified copies.

Sec. 3. (1) 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, except as otherwise expressly provided by section 13. A person has a right to subscribe to future issuances of public records which are created, issued, or disseminated on a regular basis. A subscription shall be valid for up to 6 months, at the request of the subscriber, and shall be renewable.

(2) A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. A public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions.

(3) This act does not require a public body to make a compilation, summary, or report of information, except as required in section 11.

This act does not require a public body to create a new public record, except as required in sections 5 and 11, and to the extent required by this act for the furnishing of copies, or edited copies pursuant to section 14(1), of an already existing public record.

(5) The custodian of a public record shall, upon request, furnish a requesting person a certified copy of a public record.

15.234 Fees; waiver or reduction; affidavit; deposit; calculation of costs; provisions inapplicable to certain public records; review by bipartisan joint committee; appointment of members.

Sec. 4. (1) A public body may charge a fee for providing a copy of a public record. Subject to subsection (3), the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14. Copies of public records may be furnished without charge or at a reduced charge if the public body determines that a waiver or reduction of the fee is in the public interest because furnishing copies of the public record can be considered as primarily benefiting the general public. Except as provided in section 30(3) of Act No. 232 of the Public Acts of 1953, being section 791.230 of the Michigan Compiled Laws, a copy of a public record shall be furnished without charge for the first $20.00 of the fee for each request, to an individual who submits an affidavit stating that the individual is then receiving public assistance or, if not receiving public assistance, stating facts showing inability to pay the cost because of indigency.

(2) At the time the request is made, a public body may request a good faith deposit from the person requesting the public record or series of public records, if the fee provided in subsection (1) exceeds $50.00. The deposit shall not exceed 1/2 of the total fee.

(3) In calculating the costs under subsection (1), a public body may not attribute more than the hourly wage of the lowest paid, full-time, permanent clerical employee of the employing public body to the cost of labor incurred in duplication and mailing and to the cost of examination, review, separation, and deletion. A public body shall utilize the most economical means available for providing copies of public records. A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs. A public body shall establish and publish procedures and guidelines to implement this subsection.

(4) This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or where the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.

(5) Three years after the effective date of this act a bipartisan joint committee of 3 members of each house shall review the operation of this section and recommend appropriate changes. The members of the house of representatives shall be appointed by the speaker of the house of representatives. The members of the senate shall be appointed by the majority leader of the senate.

15.235 Request to inspect or receive copy of public record; response to request; failure to respond; court order to disclose or provide copies; damages; contents of notice denying request; signing notice of denial; notice extending period of response; grounds for commencement of action.

Sec. 5. (1) A person desiring to inspect or receive a copy of a public record may make an oral or written request for the public record to the public body.

(2) When a public body receives a request for a public record it shall immediately, but not more than 5 business days after the day the request is received unless otherwise agreed to in writing by the person making the request, respond to the request by 1 of the following:

(a) Grant the request.

(b) Issue a written notice to the requesting person denying the request.

(c) Grant the request in part and issue a written notice to the requesting person denying the request in part.

(d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.

(3) Failure to respond to a request as provided in subsection (2) constitutes a final decision by the public body to deny the request. If a circuit court, upon an action commenced pursuant to section 10, finds that a public body has failed to respond as provided in subsection (2), and if the court orders the public body to disclose or provide copies of the public record or a portion thereof, then the circuit court shall assess damages against the public body as provided in section 10(5).

(4) A written notice denying a request for a public record in whole or in part shall constitute a final determination by the public body to deny the request or portion thereof and shall contain:

(a) An explanation of the basis under this act or other statute for the determination that the public record, or the portion thereof, is exempt from disclosure, if that is the reason for denying the request or a portion thereof.

(b) A certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body, if that is the reason for denying the request or a portion thereof.

(c) A description of a public record or information on a public record which is separated or deleted as provided in section 14, if a separation or deletion is made.

(d) A full explanation of the requesting person's right to seek judicial review under section 10. Notification of the right to judicial review shall include notification of the right to receive attorneys' fees and damages as provided in section 10.

(5) The individual designated in section 6 as responsible for the denial of the request shall sign the written notice of denial.

(6) If a public body issues a notice extending the period for a response to the request, the notice shall set forth the reasons for the extension and the date by which the public body shall do 1 of the following:

(a) Grant the request.

(b) Issue a written notice to the requesting person denying the request.

(c) Grant the request in part and issue a written notice to the requesting person denying the request in part.

(7) If a public body makes a final determination to deny in whole or in part a request to inspect or receive a copy of a public record or portion thereof, the requesting person may commence an action in circuit court, as provided in section 10.

15.236 Persons responsible for approving denial of request for public record.

Sec. 6. (1) For a public body which is a city, village, township, county, or state department, or under the control thereof, the chief administrative officer of that city, village, township, county, or state department, or an individual designated in writing by that chief administrative officer, shall be responsible for approving a denial under section 5(4) and (5). In a county not having an executive form of government, the chairperson of the county board of commissioners shall be considered the chief administrative officer for purposes of this subsection.

(2) For all other public bodies, the chief administrative officer of the respective public body, or an individual designated in writing by that chief administrative officer, shall be responsible for approving a denial under section 5(4) and (5).

15.240 Action to compel disclosure of public records; commencement; orders; jurisdiction; de novo proceeding; burden of proof; private view of public record; contempt; assignment of action or appeal for hearing, trial, or argument; attorneys' fees, costs, and disbursements; assessment of award; damages.

Sec. 10. (1) If a public body makes a final determination to deny a request or a portion thereof, the requesting person may commence an action in the circuit court to compel disclosure of the public records. If the court determines that the public records are not exempt from disclosure, the court shall order the public body to cease withholding or to produce a public record or a portion thereof wrongfully withheld, regardless of the location of the public record. The circuit court for the county in which the complainant resides or has his principal place of business, or the circuit court for the county in which the public record or an office of the public body is located shall have jurisdiction to issue the order. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

(2) An action under this section arising from the denial of an oral request may not be commenced unless the requesting person confirms the oral request in writing not less than 5 days before commencement of the action.

(3) An action commenced pursuant to this section and appeals therefrom shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(4) If a person asserting the right to inspect or to receive a copy of a public record or a portion thereof prevails in an action commenced pursuant to this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person prevails in part, the court may in its discretion award reasonable attorneys' fees, costs, and disbursements or an appropriate portion thereof. The award shall be assessed against the public body liable for damages under subsection (5).

(5) In an action commenced pursuant to this section, if the circuit court finds that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall, in addition to any actual or compensatory damages, award punitive damages in the amount of $500.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body, not an individual, pursuant to whose public function the public record was kept or maintained.

15.241 Matters required to be published and made available by state agencies; form of publications; effect on person of matter not published and made available; exception; action to compel compliance by state agency; order; attorneys' fees, costs, and disbursements; jurisdiction; definitions.

Sec. 11. (1) A state agency shall publish and make available to the public all of the following:

(a) Final orders or decisions in contested cases and the records on which they were made.

(b) Promulgated rules.

(c) Other written statements which implement or interpret laws, rules, or policy, including but not limited to guidelines, manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions.

(2) Publications may be in pamphlet, loose-leaf, or other appropriate form in printed, mimeographed, or other written matter.

(3) Except to the extent that a person has actual and timely notice of the terms thereof, a person shall not in any manner be required to resort to, or be adversely affected by, a matter required to be published and made available, if the matter is not so published and made available.

(4) This section does not apply to public records which are exempt from disclosure under section 13.

(5) A person may commence an action in the circuit court to compel a state agency to comply with this section. If the court determines that the state agency has failed to comply, the court shall order the state agency to comply and shall award reasonable attorneys' fees, costs, and disbursements to the person commencing the action. The circuit court for the county in which the state agency is located shall have jurisdiction to issue the order.

(6) As used in this section, "state agency", "contested case", and "rules" shall have the same meanings as ascribed to those terms in Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws.

15.243 Exemptions from disclosure; withholding of information required by law.

Sec. 13. (1) 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.

(b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:

(i) Interfere with law enforcement proceedings.

(ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.

(iii) Constitute an unwarranted invasion of personal privacy.

(iv) Disclose the identity of a confidential source, or if the record is compiled by a criminal law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.

(v) Disclose law enforcement investigative techniques or procedures.

(vi) Endanger the life or physical safety of law enforcement personnel.

(c) A public record that if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

(d) Records or information specifically described and exempted from disclosure by statute.

(e) Information the release of which would prevent the public body from complying with section 438 of subpart 2 of part C of the general education provisions act, title IV of Public Law 90-247, 20 U.S.C. 1232g, commonly referred to as the family educational rights and privacy act of 1974.

(f) A public record or information described in this section that is furnished by the public body originally compiling, preparing, or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the considerations originally giving rise to the exempt nature of the public record remain applicable.

(g) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:

(i) The information is submitted upon a promise of confidentiality by the public body.

(ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.

(iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit.

(h) Information or records subject to the attorney-client privilege.

(i) Information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian science practitioner privilege, or other privilege recognized by statute or court rule.

(j) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the time for the receipt of bids or proposals has expired.

(k) Appraisals of real property to be acquired by the public body until (i) an agreement is entered into; or (ii) 3 years has elapsed since the making of the appraisal, unless litigation relative to the acquisition has not yet terminated.

(l) Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

(m) Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation.

(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 exemptiom 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. This exemption does not constitute an exemption under state law for purposes of section 8(h) of the open meetings act, Act No. 267 of the Public Acts of 1976, being section 15.268 of the Michigan Compiled Laws. As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under Act No. 336 of the Public Acts of 1947, as amended, being sections 423.201 to 423.216 of the Michigan Compiled Laws.

(o) Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, which if disclosed would prejudice a public body's ability to protect the public safety unless the public interest in disclosure under this act outweighs the public interest in nondisclosure in the particular instance.

(p) Information which would reveal the exact location of archaeological sites. The secretary of state may promulgate rules pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws, to provide for the disclosure of the location of archaeological sites for purposes relating to the preservation or scientific examination of sites.

(q) Testing data developed by a public body in determining whether bidders' products meet the specifications for purchase of those products by the public body, if disclosure of the data would reveal that only 1 bidder has met the specifications. This subdivision does not apply after 1 year has elapsed from the time the public body completes the testing.

(r) Academic transcripts of an institution of higher education established under sections 5, 6, or 7 of article VIII of the state constitution of 1963, where the record pertains to a student who is delinquent in the payment of financial obligations to the institution.

(s) Records of any campaign committee including any committee that receives money from a state campaign fund.

(t) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a police or sheriff's agency or department, the release of which would do any of the following:

(i) Identify or provide a means of identifying an informer.

(ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent.

(iii) Disclose the personal address or telephone number of law enforcement officers or agents or any special skills that they may have.

(iv) Disclose the name, address, or telephone numbers of family members, relatives, children, or parents of law enforcement officers or agents.

(v) Disclose operational instructions for law enforcement officers or agents.

(vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.

(vii) Endanger the life or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies.

(viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informer.

(ix) Disclose personnel records of law enforcement agencies.

(x) Identify or provide a means of identifying residences which law enforcement agencies are requested to check in the absence of their owners or tenants.

(u) Except as otherwise provided in this subdivision, records and information pertaining to an investigation or a compliance conference conducted by the department of commerce under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws, before a complaint is issued. This subdivision does not apply to records and information pertaining to any of the following:

(i) The fact that an allegation has been received and an investigation is being conducted, and the date the allegation was received.

(ii) The fact that an allegation was received by the department of commerce; the fact that the department of commerce did not issue a complaint for the allegation; and the fact that the allegation was dismissed.

(2) This act does not authorize the withholding of information otherwise required by law to be made available to the public or to a party in a contested case under Act No. 306 of the Public Acts of 1969, as amended.

15.243a Salary records of employee or other official of institution of higher education, school district, intermediate school district, or community college available to public on request.

Sec. 13a. Notwithstanding section 13, an institution of higher education established under section 5, 6, or 7 of article 8 of the state constitution of 1963; a school district as defined in section 6 of Act No. 451 of the Public Acts of 1976, being section 380.6 of the Michigan Compiled Laws; an intermediate school district as defined in section 4 of Act No. 451 of the Public Acts of 1976, being section 380.4 of the Michigan Compiled Laws; or a community college established under Act No. 331 of the Public Acts of 1966, as amended, being sections 389.1 to 389.195 of the Michigan Compiled Laws shall upon request make available to the public the salary records of an employee or other official of the institution of higher education, school district, intermediate school district, or community college.

15.244 Separation of exempt and nonexempt material; design of public record; description of material exempted.

Sec. 14. (1) If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.

(2) When designing a public record, a public body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information. If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.

15.245 Repeal of SS 24.221, 24.222, and 24.223.

Sec. 15. Sections 21, 22 and 23 of Act No. 306 of the Public Acts of 1969, as amended, being sections 24.221, 24.222 and 24.223 of the Michigan Compiled Laws, are repealed.

15.246 Effective date.

Sec. 16. This act shall take effect 90 days after being signed by the governor.

APPENDIX 2

THE MANAGEMENT AND BUDGET ACT
Act 431 of 1984
(selected excerpts)

AN ACT to prescribe the powers and duties of the department of management and budget; to define the authority and functions of its director and its organizational entities; to authorize the department to issue directives; to provide for the capital outlay program; to provide for the leasing, planning, constructing, maintaining, altering, renovating, demolishing, conveying of lands and facilities; to provide for centralized administrative services such as purchasing, payroll, record retention, data processing, and publishing and for access to certain services; to provide for a system of internal accounting and administrative control for certain principal departments; to provide for an internal auditor in certain principal departments; to provide for certain powers and duties of certain state officers and agencies; to codify, revise, consolidate, classify, and add to the powers, duties, and laws relative to budgeting, accounting, and the regulating of appropriations; to provide for the implementation of certain constitutional provisions; to create funds and accounts; to make appropriations; to prescribe remedies and penalties; to rescind certain executive reorganization orders; to prescribe penalties; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

18.1101 Short title.

Sec. 101. This act shall be known and may be cited as "the management and budget act".

18.1111 Meanings of words and phrases.

Sec. 111. For purposes of this act, the words and phrases defined in sections 112 to 115 have the meanings ascribed to them in those sections. These definitions, unless the context requires otherwise, apply to use of the defined terms in this act. Other definitions applicable to specific articles or sections of this act are found in those articles or sections.

18.1112 Definitions: A, B.

Sec. 112. (1) "Appropriation" means the legislative authorization for expenditure or obligation of money from a state operating fund.

(2) "Appropriations committees" means the appropriations committee of the senate and the appropriations committee of the house of representatives.

(3) "Board" means the state administrative board.

(4) "Budget act" means an act containing appropriations which form a portion of the state's annual budget.

18.1115 Definitions; I to U.

Sec. 115. (1) "Institution of higher education" means a state supported 4-year college or university.

(2) "JCOS" means the joint capital outlay subcommittee of the appropriations committees.

(3) "Project" means a facility which is being planned or constructed.

(4) Except as used in sections 284 to 292, "record" means a public record as defined in section 2 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.232 of the Michigan Compiled Laws.

(5) "State agency" means a department, board, commission, office, agency, authority, or other unit of state government. State agency does not include an institution of higher education or a community college or, for purposes of article 2 or 3, the legislative or judicial branches of government.

(6) "Unit of local government" means a political subdivision of this state, including school districts, community college districts, intermediate school districts, cities, villages, townships, counties, and authorities, if the political subdivision has as its primary purpose the providing of local governmental service for citizens in a geographically limited area of the state and has the power to act primarily on behalf of that area.

18.1284 Additional definitions.

Sec. 284. As used in this section and sections 285 to 292:

(a) "Archival value" means 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 about persons, things, problems, or conditions dealt with by state agencies.

(b) "Record" or "records" means a document, paper, letter, or writing, including documents, papers, books, letters, or writings prepared by handwriting, typewriting, printing, photostating, or photocopying; or a photograph, film, map, 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. Record may also include a record series, if applicable.

18.1285 Records; maintenance by head of state agency; listing on retention and disposal schedule; legal custody and physical possession.

Sec. 285. (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.

(3) Legal custody and physical possession of a record shall be vested in the state agency that created, received, or maintains the record until such time as it is transferred to the state archives or is destroyed.

18.1287 Records management program; purpose; duties of department; directives.

Sec. 287. (1) The department shall maintain a records management program to provide for the development, implementation, and coordination of standards, procedures, and techniques for forms management, and for the creation, retention, maintenance, preservation, and disposition of the records of this state. All records of this state are and shall remain the property of this state and shall be preserved, stored, transferred, destroyed, disposed of, and otherwise managed pursuant to this act and other applicable provisions of law.

(2) In managing the records of this state, the department shall do all of the following:

(a) Establish, implement, and maintain standards, procedures, and techniques of records management throughout state agencies.

(b) Provide education, training, and information programs to state agencies regarding each phase of records management.

(c) Promote 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. Preservation of designated vital records shall be accomplished by storing duplicate copies of the original records in a secure remote records center to assure retention of those records in the event of disaster and loss of original records.

(d) Operate a records center or centers for the purpose of providing maintenance, security, and preservation of state records.

(e) Provide centralized microfilming service and, after the effective date of rules promulgated under the records media act to govern optical storage, service for off-site storage of optical discs as an integral part of the records management program.

(f) Provide safeguards against unauthorized or unlawful disposal, removal, or loss of state records.

(g) Initiate action to recover a state record that may have been removed unlawfully or without authorization.

(h) Establish retention and disposal schedules for the official records of each state agency with consideration to their administrative, fiscal, legal, and archival value.

(3) The department shall issue directives that provide for all of the following:

(a) The security of records maintained by state agencies.

(b) The establishment of retention and disposal schedules for all records in view of their administrative, fiscal, legal, and archival value.

(c) The submission of proposed retention and disposal schedules to the secretary of state, the auditor general, the attorney general, and the board for review and approval.

(d) The transfer of records from a custodian state agency to a state records center or to the custody of the secretary of state.

(e) The disposal of records pursuant to retention and disposal schedules, or the transfer of records to the custody of the secretary of state.

(f) The establishment of a records management liaison officer in each department to assist in maintaining a records management program.

(g) The cooperation of other state departments in complying with this act.

(h) The storage of records in orderly filing systems designed to make records conveniently accessible for use.

18.1288 Inspection or inventory of records.

Sec. 288. A state agency shall permit the department or the secretary of state, upon request, to inspect or inventory records in the custody of the agency.

18.1289 Records of archival value; listings of records due for disposal; report; notice of destruction or transfer of record; action to recover records; temporary restraining order.

Sec. 289. (1) In reviewing a draft retention and disposal schedule, the secretary of state shall determine whether any records listed on the schedule possesses archival value and may disapprove or may require modification of a schedule which proposes the destruction of a record possessing archival value.

(2) In cooperation with the archives division of the bureau of history in the department of state, the department shall periodically provide the department of state with listings of all records in the custody of the records center that are due for disposal before releasing those records for

destruction. Within 30 days after receiving these lists, the department of state shall report in writing to the records center regarding each list submitted, and may disapprove the destruction of any or all of the records listed. Any record which is considered to potentially have archival value by the secretary of state shall not be destroyed or otherwise disposed of but shall be transferred to the department of state.

(3) The department shall notify the state agency that created a record before its destruction or transfer to the state archives.

(4) The secretary of state may initiate legal action in circuit court to recover records possessing archival value when there is reason to believe that records have been improperly or unlawfully removed from state custody. Upon initiation of any action, the court may issue a temporary restraining order preventing the sale, transfer, or destruction of a record pending the decision of the court.

18.1292 Responsibilities of secretary of state.

Sec. 292. This act shall not be construed to prevent the secretary of state from exercising his or her responsibilities to ensure that records possessing historical value are protected and preserved in the state archives.

APPENDIX 3

PROPOSED RULES

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Part 1234

RIN 3095-AA58

Electronic Mail Systems

Thursday, March 24, 1994

AGENCY: National Archives and Records Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: The National Archives and Records Administration (NARA) is developing standards for management of Federal records created or received on electronic mail (E-mail) systems. These standards will be published as an appendix to regulations on electronic records in 36 CFR part 1234 and will supplement the NARA instructional guide, Managing Electronic Records. The standards would affect all Federal agencies.

DATES: Comments must be submitted by June 22, 1994.

ADDRESSES: Submit comments to Director, Records Appraisal and Disposition Division, National Archives at College Park, 8601 Adelphi Road, College Park, MD 20740-6001. Comments may be faxed to (301) 713-6852 or (301) 713-6850. Comments also may be sent to the following Internet address: ooa(a)cu.nih.gov

FOR FURTHER INFORMATION CONTACT: James J. Hastings, Director, Records Appraisal and Disposition Division, (301) 713-7096.

SUPPLEMENTARY INFORMATION:

Background

NARA has been working with components of the Executive Office of the President to develop specific records management policies and procedures for their E-mail records, pursuant to court

rulings in Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993). Because nearly all Federal agencies now use E-mail, NARA recognizes that there also is the need for Government-wide standards on managing E-mail records. Consequently, NARA has drafted the following standards for all Federal government agencies on the proper means of identifying, maintaining, and disposing of Federal records created or received on an E-mail system. These standards reflect the legal definition of records in the Federal Records Act (44 U.S.C. 3301) and supplement NARA records management guidance previously issued under the law (44 U.S.C. 2904 and 2905; 36 CFR Chapter XII Subchapter B).

When finalized, these general standards will be used by Federal agencies to develop specific recordkeeping policies, procedures, and requirements to fulfill their obligations under the statute and regulations. Agencies that already have specific E-mail recordkeeping policies, procedures, and requirements in place should review them to ensure that they are consistent with these general NARA standards. In addition, agencies are encouraged to submit their directives implementing these standards to NARA for review and comment.

NARA has already issued regulations on electronic recordkeeping (36 CFR part 1234), and an instructional guide, Managing Electronic Records. In addition, General Records Schedules 20, Electronic Records, and 23, "Records Common to Most Offices," provide disposition authority for some types of records created or received in electronic form. These proposed new E-mail standards will expand this general guidance on managing electronic records.

In developing these standards NARA has recognized that agency E-mail systems have different characteristics and agencies have differing recordkeeping requirements. Some agencies may find that currently it is only feasible to maintain E-mail records on paper. Other agencies may find that currently it is possible and desirable to maintain E-mail records electronically. While NARA recognizes the practical considerations that may preclude electronic maintenance of E-mail records at this time, agencies are encouraged to consider the benefits for future use of electronically maintaining those records that are likely to be permanently valuable. These benefits include the ease of searching and manipulating electronic records, the availability of electronic records to many users simultaneously, and efficient storage. Agencies that are not now technologically able to maintain E-mail records electronically should consider electronic maintenance when updating or designing systems. This is particularly important for E-mail records that are likely to be appraised as permanent by NARA, such as records of cabinet members or other high level officials. The recent decision of the Office of Administration of the Executive Office of the President to begin maintaining its E-mail records in an electronic recordkeeping system is an example of an agency updating a system that contains permanently valuable records. NARA encourages other agencies to consider the value of electronic maintenance of E- mail records, and it will assist agencies in evaluating the desirability of an electronic format.

Agencies must also determine how to manage under the Federal Records Act the transmission and receipt information in the E-mail system. The agency should decide how to maintain the transmission and receipt information either as part of the E-mail communication or as a separate record linked to the communication. Because printouts may not contain necessary transmission and receipt information, the Court of Appeals in Armstrong held that to comply with the Federal Records Act, certain transmission and receipt information must be preserved along with all E-mail messages that are Federal records.

NARA will work closely with the agencies in the implementation of the final standards and will review, upon request, agency directives concerning E-mail records. In addition, NARA records management evaluations of agencies will include review and analysis of the management of E-mail records.

Comments

In soliciting comments from Federal agencies and the public, NARA particularly requests that agencies address the practical effects of compliance with these standards. Specifically, NARA is interested in how agencies manage documents with transmission and receipt information and handle the other types of documents, such as calendars, that are frequently part of electronic communications systems. In addition, *13907 NARA would like to learn from agencies if they intend to maintain E-mail records electronically now or in the future, and how they would monitor the E-mail system for compliance with recordkeeping obligations. Agencies are also encouraged to comment on any other aspect of this guidance, or to request further information or clarification. NARA encourages those submitting comments to include examples of solutions to electronic recordkeeping problems that may be of assistance to other agencies in developing recordkeeping requirements and programs for these systems.

List of Subjects in 36 CFR Part 1234

Archives and records; Computer technology.

For the reasons set forth in the preamble, NARA proposes to amend part 1234 of chapter XII of the Code of Federal Regulations as follows:

PART 1234--ELECTRONIC RECORDS MANAGEMENT

1. The authority citation for part 1234 continues to read as follows:

Authority: 44 U.S.C. 2904, 3101, 3102, and 3105.

2. Appendix A is added to part 1234 as follows:

Appendix A to Part 1234--Managing Federal Records on Electronic Mail Systems

1. Introduction

These standards cover documentary materials created or received by electronic mail (E-mail) systems in Federal agencies. Because of the widespread use of E- mail for conducting agency business, many E-mail documents meet the definition of a "record" under the Federal Records Act (44 U.S.C. chapters 29, 31, and 33).

The definition of "record" in the Federal Records Act encompasses documentary materials in all media. The Act requires the National Archives and Records Administration (NARA) to issue records management standards for all Federal agencies (44 U.S.C. 2094 and 2905). NARA has issued records management regulations on electronic records (36 CFR part 1234), guidance on electronic recordkeeping entitled Managing Electronic Records (1992), and General Records Schedules 20, Electronic Records, and 23, Records Common to Most Offices. The standards being proposed here expand the existing issuances and apply established records management and archival principles and techniques to records created or received on E-mail systems. They provide instructions to program officials, information specialists, records managers, and other E-mail users on the proper means of identifying, maintaining, and disposing of E-mail records.

2. Definitions

The following definitions of terms used in these standards are included for clarity and convenience. We have provided citations to those that are based on definitions in the Federal Records Act or existing NARA guidance or regulations.

Electronic Mail System. A computer application used to create, receive, and transmit messages and other documents or create calendars that can be used by multiple staff members. Excluded from this definition are file transfer utilities (software that transmits files between users but does not retain any transmission data), data systems used to collect and process data that have been organized into data files or data bases on either personal computers or mainframe computers, and word processing documents not transmitted on an E-mail system.

Electronic Record. Numeric, graphic, text, and any other information recorded on any medium that can be read by using a computer and satisfies the definition of a Federal record in 44 U.S.C. 3301. This includes, but is not limited to, both on-line storage and off-line media such as tapes, disks, and optical disks. (36 CFR 1234.1)

Electronic Mail Message. A document created or received on an E-mail system including brief notes, more formal or substantive narrative documents, and any attachments, such as word processing documents, which may be transmitted with the message.

General Records Schedules. Schedules authorizing the disposal, after the lapse of specified periods of time, of records common to several or all agencies if such records will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their further preservation by the United States Government. (44 U.S.C. 3303a(d))

Nonrecord Material. Materials that do not meet the statutory definition of records (44 U.S.C. 3301), i.e., they were not created or received under Federal law or in connection with Government business, or they are not preserved or considered appropriate for preservation because they lack evidence of agency activities or information of value. In addition, the statute specifically excludes from coverage extra copies of documents kept only for convenience of reference, stocks of publications and processed documents, and library or museum materials intended solely for reference or exhibit. (36 CFR 1220.14, 1222.34(d)) Nonrecord materials also include personal papers and materials.

Permanent Record. Any Federal record that NARA has determined to have sufficient value to warrant its continued preservation by the National Archives and Records Administration. (36 CFR 1220.14)

Preserved Record. Documentary materials that have been deliberately filed, stored, or otherwise systematically maintained as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them. This applies to documentary materials in a file or other storage system, including electronic files and systems, and those temporarily removed from the files or other storage system.

Records. 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 under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other

activities of the Government or because of the informational value of data in them. (44 U.S.C. 3301)

Recordkeeping System. A system for collecting, organizing, and storing records in order to facilitate their preservation, retrieval, use, and disposition and to fulfill recordkeeping requirements.

Records Management. The planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations. (36 CFR 1220.14)

Records Schedule. A document describing, providing instructions for, and approving the disposition of specified Federal records. It consists of one of the following:
(a) An SF 115, Request for Records Disposition Authority, which NARA has approved to authorize the disposition of Federal records;
(b) A General Records Schedule (GRS) issued by NARA; or
(c) A printed agency manual or directive containing the records descriptions and disposition instructions approved by NARA on one or more SF 115s or issued by NARA in the GRS.

(36 CFR 1220.14)

Security Backup. Copy of a record in any medium created to provide a means of ensuring retention and access in the event the original record is destroyed, inaccessible, or corrupted.

System Backup. Copy on off-line storage media of software and data stored on direct access storage devices in a computer system used to recreate a system and its data in case of unintentional loss of data or software.

Temporary Record. Any Federal record that the Archivist of the United States has determined to have insufficient value to warrant its preservation by the National Archives and Records Administration. (36 CFR 1220.14)

Transmission and Receipt Data.
(a) Transmission Data. Information in E-mail systems regarding the identities of sender and addressee(s), and the date and time messages were sent.
(b) Receipt Data. Information in E-mail systems regarding date and time of receipt of a message, and/or acknowledgment of receipt or access by addressee(s).

3. Records Management Responsibilities

Under the Federal Records Act, agencies' records management responsibilities include *13908 creating and maintaining adequate and proper Federal records, regardless of the medium in which the records are created or received, and scheduling the disposition of records no longer needed for conduct of Government business (44 U.S.C. Chapters 31 and 33). Agencies are legally obligated to ensure creation and maintenance, for an appropriate period, of "records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency * * *." (44 U.S.C. 3101). Because E-mail is often used to conduct Government business, it is critical that agencies take steps to ensure that records created or received on E-mail systems are managed according to the law. Accordingly, agencies must develop and implement an agency-wide program for the management of all Federal records created or received on electronic communications systems (36 CFR 1234.10(a)). All features of E-mail systems

(including messages, calendars, directories, distribution lists, attachments such as word processing documents, messages sent or received over external communications systems) must be evaluated to identify documentary materials that satisfy the definition of Federal records. An agency's records management program should address all Federal records in the E-mail system. The agency should also incorporate procedures that ensure recordkeeping and disposition requirements are met before approving a new E-mail system or enhancements to an existing system (36 CFR 1234.10(d)).

4. What Are Federal Records?

The definition of "records" in the Federal Records Act specifies the criteria under which documentary materials are to be considered Federal records. The phrase "regardless of physical form or characteristics" means that the records may be paper, film, disk, or any other physical type or form; and that the method used to record information may be manual, mechanical, photographic, electronic, or any combination of these or other technologies.

Whatever the medium, the statute establishes two conditions that must be met for a document to be a record: (1) The document is made or received by agency personnel under Federal law or in connection with the transaction of public business, and (2) it is preserved or appropriate for preservation. Documentary materials, in any physical form, are Federal records when they meet both tests. The word "preserved" means the deliberate act of filing, storing, or otherwise systematically maintaining material as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in it. "Appropriate for preservation" means documentary materials made or received by an agency which in its judgment should be filed, stored, or otherwise systematically maintained by the agency because of the evidence of agency activities or information they contain, even though the materials may not be covered by its current filing or maintenance procedures (36 CFR 1222.12). Agencies must apply carefully reasoned judgment in deciding when E-mail documents are "appropriate for preservation" and in exercising this judgment, must consider their obligation to create and maintain records that adequately document their policies, programs, and activities under 44 U.S.C. 3101 (see previous section entitled Records Management Responsibilities).

5. Record Status of E-Mail Messages

It is critical that all E-mail users understand the concept of Federal records and that agencies provide sufficient information for users to distinguish Federal records from nonrecord materials. E-mail messages are Federal records when they meet the criteria specified in the statutory definition, i.e., they are made or received under Federal law or in the conduct of agency business, and they are preserved or are appropriate for preservation as evidence of the agency's organization, functions, policies, decisions, procedures, operations, or other activities, or contain information of value. Since E-mail systems transmit a variety of messages, not all E-mail documents will meet the statutory definition of records.

Some categories of E-mail messages or documents that would satisfy the definition of record are those:

1. Containing information developed in preparing position papers, reports, and studies;
2. Reflecting official actions taken in the course of conducting agency business;
3. Conveying information on agency programs, policies, decisions, and essential transactions;
4. Conveying statements of policy or the rationale for official decisions or actions;
5. Documenting oral exchanges, such as meetings or telephone conversations, during which policy was discussed or formulated or other agency activities were planned, discussed, or transacted.

E-mail messages are not considered nonrecord materials merely because the information they contain may also be available elsewhere on paper or in electronic files. Separate E-mail messages that contain the same information on Government activities may differ in important respects and, thus, are not automatically nonrecord materials. In addition, multiple copies of messages may all be records if they are used for different purposes in the conduct of official business or filed in different files. In other words, if more than one office takes action or otherwise uses copies of a message, copies would be records in each of those offices.

To assist in the process of determining record status, NARA recommends that agencies consider designing into their current or future E-mail systems a feature that helps users to identify records. For example, agencies may want their systems to allow users to tag messages as record or nonrecord or to automatically default to the determination that system-produced documents are records, requiring users to take additional steps to mark a document as nonrecord. Another option would be to develop a system that analyzes the contents of a message according to specified rules in order to prompt the user with a suggested categorization.

For further information on making these distinctions between records and nonrecord materials, see Personal Papers of Executive Branch Officials: A Management Guide, published by NARA in 1992.

6. Transmission and Receipt Data

Besides the text of messages, E-mail systems may provide transmission and receipt data. In some systems, transmission data is part of the message. In other systems some transmission data is in a separate message. Generally, receipt data is separate from the messages.

E-mail messages require some transmission data to be intelligible and to understand their context. It is essential that necessary transmission data is preserved with all E-mail records. Many E-mail systems automatically capture with an E-mail message the identity of the sender and the addressee(s) and the date the message was sent. Just as with a paper record, this transmission data is necessary for an E-mail record to be complete and understandable. Agencies should determine if any other E-mail transmission data is needed for purposes of adequacy of documentation. Both the message and the related transmission data are Federal records and must be maintained in recordkeeping systems for the same retention period. (See section entitled Maintenance of Federal Records Created by an E-mail System, below.)

E-mail systems may provide users with the ability to request acknowledgments or receipts showing that an E-mail message reached the mailbox or inbox of each addressee. E-mail systems may also provide, upon request, information about or acknowledgments of E-mail messages that were received or viewed by the addressee. Agency instructions to E-mail system users should specify when to request such receipts or acknowledgments. Users should request receipt data when it is needed for adequate and proper documentation of agency activities, especially when it is necessary to confirm when an addressee has received or viewed a message. Agencies should maintain such receipts and acknowledgments associated with Federal records for the same period as the electronic message to which they refer.

7. Draft Documents

Agency staff may use the E-mail system to circulate draft documents created on either the E-mail system or a separate word processing or other system. Preliminary drafts must be maintained for purposes of adequate and proper documentation if (1) they contain unique information, such as annotations or comments, that helps explain the formulation or execution of agency policies, decisions, actions, or responsibilities, and (2) they were circulated or made available to employees

other than the creator for the purpose of approval, comment, action, recommendation, follow-up, or to keep staff informed about agency business.

Because drafts in electronic form may be Federal records, the record status of *13909 electronically created drafts that are transmitted as part of, or as attachments to, E-mail messages must be evaluated as changes are made. Successive drafts containing substantive revisions may be Federal records; drafts containing only minor changes are less likely to qualify as records. If the draft qualifies as a record, the agency should save a copy before the draft is deleted or altered.

8. Directories and Distribution Lists

Some electronic communication systems identify users by codes or nicknames. Some identify the recipients of a communication only by the name of a distribution list. Directories or distribution lists linking such shorthand names or codes with the names of users must be retained to ensure identification of the sender and addressee(s) of messages that are records.

9. Calendars

An E-mail system may provide calendars and task lists for users. Agencies that have such features on their E-mail system should advise users that calendars, indexes of events, and task lists are Federal records if they meet the criteria specified by law. Calendars, whether individual or shared, despite the level of the individual to whom they relate, may be Federal records or they may be personal materials. The NARA publication Personal Papers of Executive Branch Officials: a Management Guide provides guidance on the record status of calendars. That publication notes that the Freedom of Information Act case law regarding "agency records" is the most pertinent guidance for deciding whether calendars are Federal records.

Most calendars and related documents that are Federal records are disposable under General Records Schedule 23, Item 5. Federal record calendars that relate to the activities of high-level officials, however, must be specifically scheduled for disposition to allow NARA to appraise their value for future use. GRS 23 provides guidance on identifying high-level officials. Users may delete calendars that are nonrecord materials at their discretion.

10. External Communications Systems

Some Government agencies use electronic communications systems external to the Government, such as the Internet or other commercial network services. These communications systems have established protocols that are not subject to agency modification. However, the use of external communications systems which are neither owned nor controlled by the agency does not alter in any way the agency's obligation under the Federal Records Act. Agencies must ensure that Federal records sent or received on these systems are preserved and that reasonable steps are taken to capture available transmission and receipt data needed by the agency. As is the case with any Federal record, those that are communicated to or received from persons outside the agency or Government should include the identity of the outside senders or addressees.

11. Maintenance of Federal Records Created by an E-Mail System

Agencies must ensure that all E-mail records are maintained in appropriate recordkeeping systems. Such recordkeeping systems must meet the following requirements: (1) Permit easy and timely retrieval; (2) facilitate the distinction between record and nonrecord materials (if such distinctions were not made previously); (3) retain the records in a usable format until their authorized disposition date; and (4) permit transfer of permanent records to the National Archives and Records Administration (see 36 CFR 1228.188, 36 CFR 1234.28(a)).

Agencies should consider the advantages of maintaining their records electronically. An electronic system may be more easily searched and manipulated than records in paper files. An electronic file may also be available for simultaneous use by multiple staff members and may provide a more efficient method to store records. In addition, future use of permanently valuable E-mail records for agencies and for historical research could be enhanced by storing them electronically.

System backup tapes normally are not suitable for recordkeeping purposes because they are merely mirrors of storage disks with data and documents scattered throughout as they are on the disks themselves. They are meant to provide only a means of recreating a system and its data in case of emergency. Agencies should have a separate system that is appropriate for recordkeeping. In all cases when records are maintained electronically, agencies should provide for regular backups to guard against system failures or loss through inadvertent erasures (36 CFR 1234.30).

A. Maintenance on the E-Mail System

E-mail systems are generally designed for convenient and efficient agency communications and not as a system for storing agency records for their entire life cycle. To maintain instantaneous communications capability without increasing hardware capacity, these systems often limit the number of messages that can accumulate on the system and may automatically delete messages after a short period. If an E-mail system is not designed for or adaptable to use as a recordkeeping system, E-mail records must be copied or moved to an appropriate recordkeeping system for maintenance and disposition.

B. Maintenance in an Electronic Recordkeeping System Other Than the E-Mail System

Some agencies store their E-mail records on an electronic system separate from the E-mail system. Agencies that maintain their records in this way must move or copy all E-mail records to the electronic recordkeeping system. The recordkeeping system must allow segregation of permanent and temporary records and have sufficient capacity to store records for their authorized retention periods (36 CFR 1234.10).

Agencies may retain records from E-mail systems in an off-line electronic storage format (such as optical disk or magnetic tape) that meets the requirements described above (36 CFR 1234.28(a)). Factors to be considered in selecting a storage medium or converting from one medium to another are identified in 36 CFR 1234.28(b)). Agencies may use optical disk systems for the storage and retrieval of permanent records while the records remain in the agency's legal custody, but NARA currently does not accession permanent records stored on optical disks. Permanent records stored on optical disk must be converted to a medium acceptable to NARA at the time of transfer to NARA's legal custody, as specified in 36 CFR 1228.188.

C. Maintenance in Paper Recordkeeping Systems

Agencies that do not have the technological capability to maintain E- mail records in an electronic recordkeeping system must print their E-mail records. In such instances, agencies must also print related transmission and receipt data and maintain it together with the printed communications according to the same procedures as other paper records.

Other agencies may have the technological capability to maintain E-mail records electronically but, nevertheless, determine that current agency use is best served by also printing them on to paper. While it is the agency's responsibility to determine whether its current needs are best served by one or both formats, an electronic format may be in the best interest of future use. Accordingly, agencies must schedule and NARA must appraise both formats before E-mail records are deleted

from the electronic recordkeeping system. This ensures the opportunity for NARA to determine the best format for the preservation of records of potential historical or other research value. (See the section below for instructions on the disposition of records.)

Any agencies that maintain E-mail records only on paper even though they have the technology to maintain them electronically are strongly encouraged to consider the benefits of an electronic format. NARA will assist such agencies in evaluating the advantages of maintaining E-mail records electronically.

Those agencies that have no plans for implementing an electronic recordkeeping system are also encouraged to consider this format when their current systems are redesigned or replaced.

12. Disposition of E-Mail Records

E-mail records may not be deleted or otherwise disposed of without prior disposition authority from NARA (44 U.S.C. 3303a). This applies to all versions of E-mail records, including the original record that is on the E-mail system and all copies that have been forwarded to a recordkeeping system. NARA authorizes records disposition through two mechanisms; issuance of the General Records Schedules developed by NARA for temporary records common to most or all Federal agencies, and approval of schedules developed by agencies for records unique to the agency. The authorization process employed by NARA involves appraisal, which is the determination of the historical or other value of the records including the most appropriate format for future use when the same information is *13910 captured in records on different physical formats.

Electronic records must be scheduled even if the same information is available in another medium, including paper printouts of electronically stored records. Information in electronic records may have greater research utility than similar information stored on another medium because it is easier to access and manipulate. Also, it may be more efficient to capture transmission and receipt data in electronic systems. Thus, the disposition of electronic records may differ from the disposition of paper records with the same information. The disposition of all records, regardless of medium (paper, magnetic, microform, etc.) must be in accordance with an approved schedule.

A. Records on the E-Mail System

If an agency has an E-mail system that is designed for or is adaptable for use as an agency recordkeeping system as well as a communications system, users must be instructed on the required steps to be taken to ensure that the record on the user's screen or in his or her mailbox is forwarded to the recordkeeping feature of the system. If, on the other hand, an agency has an E-mail system that cannot also serve as a recordkeeping system, users should be instructed to forward all records from the E-mail system to an appropriate recordkeeping system to ensure that the records are preserved and the E-mail system continues to operate efficiently. When the necessary steps have been taken to preserve the record by using the recordkeeping feature or by forwarding it to an appropriate recordkeeping system, the identical version that remains on the user's screen or in the user's mailbox has no continuing value to the agency or for future research. Therefore, NARA considers the version of the record on the "live" E-mail system appropriate for deletion after it has been preserved on a recordkeeping system along with all appropriate transmission data. NARA will revise General Records Schedule 23 to authorize deletion of the copy of the record on the "live" E-mail system after the necessary preservation steps have been taken. This general authorization will apply only to the E-mail record on the "live" E-mail system. There is no formal authorization at this time for agencies to delete E-mail records from the E-mail system if they are stored only on the system itself or if they have been transferred to an electronic

recordkeeping system. The revised General Records Schedule will extend the authorization to these categories of records.

B. Records in Recordkeeping Systems

Because E-mail records must be maintained for varying retention periods and, when appraised as permanent, transferred to NARA, it is not appropriate for NARA to issue a General Records Schedule that pertains to all E-mail records in recordkeeping systems. Consequently, those E-mail records that have been incorporated into a recordkeeping system that includes records from other sources or systems must be managed in accordance with the records schedule of the recordkeeping system in which they are filed. Alternatively, those E-mail records that are maintained as a separate system must be separately scheduled. Agencies must develop and submit to NARA schedules that identify the categories of E-mail records in their systems if they are maintained separately so that NARA can appraise the records and provide appropriate disposition authority.

As indicated previously, it is established NARA policy that agencies that maintain records in paper and electronic formats must receive the approval of NARA before disposing of either format. This will ensure that future use considerations enter into determinations of the most appropriate format for the preservation of permanent records.

13. Security of E-Mail Records

Agencies must take adequate measures to protect records in E-mail systems (36 CFR 1234.26). Security measures must protect E-mail records from unauthorized alterations or deletions. Agencies should regularly back up messages stored on-line to off-line media to guard against system failures or inadvertent erasures.

14. Training Employees

Agencies must ensure that all employees are familiar with the legal requirements for creation, maintenance, and disposition of records on E-mail systems. The agency's directives must provide sufficient guidance so that agency personnel are familiar with the agency's specific recordkeeping requirements and can distinguish between records and nonrecord materials on E- mail systems (36 CFR 1222.30). Because Federal records may be created using an E-mail system, each agency using an E-mail system should provide records management training and guidance for all employees which includes criteria for determining which E-mail messages are records. As indicated above, it may be useful for agencies to have designed into their E-mail systems a feature that helps users to identify Federal records.

15. Monitoring Implementation of Recordkeeping Guidance for the E-Mail System

Agencies are responsible for monitoring the implementation of records management guidance to ensure that E-mail users are accurately identifying records and properly maintaining them. Each agency must ensure that the implementation of directives concerning records on its E-mail system is carried out by reviewing the systems periodically for conformance to established agency procedures. These reviews should consist of auditing or reviewing representative samples of all electronic communications, conducting periodic staff interviews, and internal records management evaluations. The purpose of these reviews is to ensure that E-mail users properly determine record status and that record messages are being properly maintained. These reviews would determine whether permanent and temporary records are segregable and schedules are being implemented properly. Such reviews should be used to correct errors when they are found, and to evaluate, clarify, and update agency recordkeeping directives, disposition schedules, and training for agency staff (36 CFR 1234.10(l)). Reports concerning the results of the reviews should be made available

to NARA upon request and when it conducts evaluations of the agency's records management program.

16. Conclusion

E-mail systems provide unprecedented communications convenience. However, agencies must take the necessary measures to ensure that there is no diminution of their records resulting from the use of E-mail systems. E-mail systems have become important tools for the transmission of substantive information, and, therefore, they are used to create Federal records. Agencies must take special care that employees understand their responsibilities when using E-mail to ensure the adequate creation and proper maintenance and disposition of Federal records.

As specified in 44 U.S.C. 3102, NARA and the agencies shall cooperate in the implementation of NARA standards. Agencies should amend their recordkeeping policies and procedures where necessary to meet these standards. NARA will assist agencies in implementing these standards by reviewing agency directives concerning E-mail and by participating in agency considerations of maintaining permanent E-mail records electronically. NARA and the agencies will work together to ensure that recordkeeping policies and programs for E- mail records serve the needs of the agencies and the needs of future researchers.

Dated: March 18, 1994.

Trudy Huskamp Peterson,

Acting Archivist of the United States.

APPENDIX 4a

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July 28, 1994

Kent D. Syverud
Executive Secretary
Michigan Law Revision Commission
P.O. Box 30036
Lansing, MI 48909-7536

Re: Public Access to Electronic Mail

Dear Professor Syverud,

We are very pleased that the Commission is considering the need to revise and clarify the Michigan Freedom of Information Act and that it has requested the University's input in its review. Such a revision is needed and is of increasing importance to State entities trying to fulfill the intent of the law yet anxious to preserve the privacy of electronic communications.

In such a review it would be easy to focus solely on the technology, specifically electronic mail, and in doing so to make recommended changes in language or concepts based on that technology alone. To do this, however, would be an error with both negative short and long term implications. A focus just on the need not to disclose electronic mail would, in the short term, divert attention to only a part of the problem that universities and other institutions are experiencing in implementing the current Michigan FOIA. In the long term, we predict that such a narrow focus would result in yet other reviews when electronic technology advances further and inevitably introduces yet one more variation in the way people transport, store and manage information.

In the following paragraphs, therefore, we will focus not only on the importance of maintaining electronic communication in the modern university, unchilled by threats of disclosure, but also on general defects in the current Michigan FOIA. We will then recommend changes to the law.

The Importance of Open Communications at Universities and Colleges

The mission of a public body such as a university or college requires that there be unhampered free speech in all forms. Such open and free flowing communication is important in order to enable the creation of concepts and for the training of minds in the

processing and synthesis of information. Open communication is important for facilitating different forms of expression, for the exchange of ideas that are only partially formed as well as for those that are completed and clear in their expression. Open communication in a variety of forms is also important in creating the sense of community within universities and colleges, a condition that has been found to enhance learning, discovery, and teaching exchanges.

If a FOIA can be interpreted, due to unclear and overly broad language, to allow access to information about individuals and about the expressions, ideas and beliefs of faculty, staff and students, then achieving the balance between privacy and the public's right to know seems impossible. While it can be argued that the business of a university is the teaching and learning that goes on within that institution, the central intent of FOIA is not served by a disclosure of the informal communications between teachers and learners. Nor, for that matter, is it served by disclosure of the casual exchanges between administrators. It is served by disclosures that contain meaningful content as documentation of the actions and decisions of the institution in doing its business.

Electronic Communications: The Balance between First Amendment and FOIA

Electronic communications serve an important and critical function within universities and colleges. They connect students, faculty and staff to each other. They provide the channels for the expression of ideas and for the formation of concepts. They facilitate the flow of information of all types so that the community can do its work. Through connectedness to each other within a purposeful community, through freedom of speech and the exercise of reasoned discourse, students, faculty, and staff achieve the work of a university. Policies and practices that serve to diminish these processes serve also to undermine the institution's own mission.

Electronic communications are widely used within and between educational institutions as a sampling from the University of Michigan illustrates. Electronic mail and electronic conferencing, two of the major communication vehicles by which colleagues form and exchange ideas, share information, and interact socially, are used enormously at the University of Michigan. For example, on one of the existing major mail systems (approximately 30 different systems exist) approximately 1,000,000 messages are exchanged per month. One of the University's schools estimates it sends and receives 2,000 messages per week and approximately 43,000 messages are kept on its machines by faculty, staff and students. The mail

servers on the University's Medical Campus support approximately 100,000 messages per week between 2,500-3,400 employees. One of the University's colleges has approximately 7,500 users and delivers 14,000 to 16,000 messages per week day to local users and approximately 8,000 per day off the campus. The college estimates its per monthly message traffic to be between 330,000 and 350,000 messages.

This is an extensive exchange of information and is only a sampling from a community of 80,000 members that maintains this level of exchange over 8-10 months of each year. Technology has made this level of communication possible and has enabled universities to better achieve their missions.

But are these exchanges records of the agency? Electronic mail is not unlike a telephone call or the street corner on which face-to-face communications are exchanged. Electronic mail should therefore be afforded the privacy protections that are already afforded such other forms of communication.

Certainly, the central purpose of FOIA would not be served by categorizing such electronic transmissions as documentation of the agency's actions, or by identifying them as records. They clearly are not deliberately filed, stored, or otherwise systematically maintained as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the University.

To define electronic communication as a record of the agency simply because it passes over or sits on a computer system of the agency, and to consider it therefore potentially disclosable under FOIA, would be to violate seriously the First Amendment rights of the vast majority of individuals within that body. For an educational agency such as a university or college, such an over-sweeping judgment would diminish that agency's ability to achieve its mission.

Lack of Clarity and Overly Broad Language

The Michigan FOIA requires changes not only to protect electronic communications from disclosure, but also because the central purpose of its original intent is often missed when agencies and individuals strive to interpret it. The intent of the federal FOIA and the state FOIA's that followed was "to ensure that the Government's activities be opened to the sharp eye of public scrutiny...". Department of Justice v Reporters Comm'n for Freedom of the Press, 489 US 749, 774 (1989). It is this central purpose

that must be reinforced by whatever revisions are made and by the way in which the revisions guide agencies in their interpretations of the Act. With this goal in mind, "writing" and "public record" need to be defined more clearly in the Act.

"Writing"

In defining "writing", the authors of the Michigan FOIA foresaw the emergence of new technology. They therefore attempted to address the different forms that a writing could take, including magnetic tapes, microfilm, discs and "other means of recording or retaining meaningful content." They did not go far enough in defining a writing, however, because they failed to emphasize the most critical element: that a writing be intended to document the actions of the agency.

FOIA's authors appear to have been so intent on ensuring that agencies recognize that some writings could contain record information and therefore be candidates for disclosure under the Act, that they indirectly encouraged an overly broad interpretation of the Act. To be covered by the Act a writing ought to serve the central purpose of the Act by containing valuable information about the actions of the agency in the performance of an official function. An interpretation that ignores the Act's central purpose results in disclosure of information that is only peripheral or totally unrelated to an agency's actions and that may dangerously impinge on the privacy rights of individuals within the agency and those of private citizens.

"Public record"

The Act also fails to define "public record" with sufficient clarity to fulfill the purpose of the Act. The current language is so broad that it does not recognize that different agencies need to keep different records by virtue of their differing natures, not all of which should be disclosed to any member of the public. It also fails to recognize the differences between records that contain adequate and proper documentation of an organization's functions, policies, and decisions, and those that focus not at all on agency action but are simply retained by the agency.

The Michigan Court of Appeals recognized this shortcoming when it said: "It is evident that there is a tendency to interpret the FOIA as a freedom of public records act. When a statute is so broad that it makes all information available to anyone for any purpose, the court has an obligation to narrow its scope by judicial

interpretation. Kestenbaum v Michigan State University, 97 Mich App 5, 23 (1980).

The National Archives and Records Administration (NARA) provides a helpful way of looking at records. Its proposed regulations, which are directed in part to preserving records for public review, recognize that different agencies have different record keeping requirements. They define records as documents, regardless of physical form or characteristics, that 1) are made or received by agency personnel under federal law or in connection with the transaction of public business and 2) are deliberately filed, stored, or systematically maintained by the agency to evidence its function, policies, decisions, procedures, operations or other activities. See, 6 CFR Part 13234. They further distinguish between temporary and permanent records for management purposes.

NARA's proposed regulations establish when a record is significant. For example, a creator's specific act to preserve a document because of its importance as a documentary statement of an action, decision, or policy is critical to defining the document as a record.

The specificity of the NARA model provides a useful guide for revision of the Michigan FOIA where similar specificity is needed. A change that focuses on the central purpose of the Act is necessary or those trying to respond to Michigan FOIA requests will continue to drift from the central purpose for which the law was enacted. They will prepare and disclose material that is not a record of the agency. They will disclose information such as electronic communications between individuals that exists within the agency by virtue of flowing over agency machines, but which in fact have no documentary value regarding the agency's policies, functions or decisions.

The tightening of the definitions of "public record" and "writing" is needed because without such changes interpretations of the applicability of the Michigan FOIA will continue to be overly broad in scope. Because the definition of "public body" ("Any other body which is created by state or local authority or which is primarily funded by or through state or local authority," PA 1976, No. 442, Sec 2) includes bodies like the University that have only an indirect effect on the citizenry of the State, the Act can be used

to gain access to communications of students, faculty and staff that are none of the public's business.[1]

When the purpose of an agency such as the University is not to govern or regulate the public, the public's right to know is not the same. When an agency's mission is teaching, learning and research and its day-to-day operations are not proscribed or directed by the State, not all of those operations or the activities of its faculty, staff and students are relevant to and within the scope of the public's right to know.

Misuses of the Act by Those Seeking Information

The lack of emphasis in the Act of its central purpose encourages misuse of the Act by people seeking information unrelated to governmental agency action. When FOIA is used to gain access to information about individuals and not "to open agency action to the light of public scrutiny", the Act is being misused. See, Department of Air Force v Rose, 425 US 352, 372 (1976). Responses to such requests increasingly cloud the Act's central purpose because each sets a precedence or mind set for future responses by the agency, potentially leading the requester and the responding agency personnel further and further away from the Act's central purpose.

Universities have experienced FOIA requests from male prisoners asking for the names of all female students, from former employees asking for the contents of personal and personnel files of current employees, from citizens asking for the names of all individuals who participate in specific communication or social groups, from contractors seeking competitor information, and so on. Each of these requests cause time consuming deliberations and interpretations of the law, interpretations that balance on language that is overly broad and unclear. Responses to the requests become delayed because agencies need to seek additional opinions as to how to interpret such requests. Agency and institutional resources are unnecessarily and perhaps inappropriately used in trying to respond.

[1] Universities, colleges, and educational agencies, although created by the state or local authority, may not be primarily funded by the state or local authority and are not governed by the state to the same extent as other governmental agencies. Indeed, some universities receive very little state funding and are governed by independently elected boards. Their missions dictate the retention of different types of records than governmental agencies. Their operations require a level of openness and information exchange that could be seriously destroyed by an overly broad interpretation of FOIA.

Reflecting also on these misuses at the federal level, Cate, Fields and McBain write: "Today, a typical FOIA scenario is not, as (originally) envisioned by the Congress, the journalist who seeks information about the development of public policy which he will shortly publish for the edification of the electorate. Rather, it is the corporate lawyer seeking business secrets of a client's competitors; the felon attempting to learn who informed against him; the drug trafficker trying to evade the law.....the private litigant who, constrained by discovery limitations, turns to the FOIA to give him what a trial court will not." Fred H. Cate, D. Annette Fields, James K. McBain , *The Right to Privacy and the Public's Right to Know;* 46 Adm L Rev 41, 50 (1994).

While these misuses of the Act are not specifically tied to advances in technology, they will be exacerbated by those advances. Greater quantities of information are being stored electronically on public systems--information relating to private individuals as well as information that documents agency actions, policies and decisions. Confusions will increasing exist as requesters attempt to obtain both information that is deliberately created and/or stored as documentation of agency actions--("records"), as well as information that is simply retained on or passing through machines as means of transient communication or a function of system operations.

The potential speed of retrieval and the greater electronic search capabilities of computer systems will encourage wider and less targeted requests, known by some as fishing expeditions. They have already led to requests for specifically formatted or compiled records, requests that recognize the technological capabilities for handling information and that are not tied to the current existence of records or to their "record or non-record " status in terms of content. Such requests potentially escalate the cost of FOIA responses while a focus on the central purpose of the Act and its original intent is being diminished.

Recommendations

1. Clarify the definition of public records. What makes a writing in a public record should be whether it contains documentation as evidence of the organization, functions, or policies of the agency, and, further, whether it has been purposefully preserved.

2. Change the definition of a writing so that the decision about whether a document is appropriate for release is based on whether it was created or deliberately filed, stored or systematically maintained as evidence of the public body's policies, decisions or procedures

3. Exclude telephone transmissions and other electronic communications from the definition of "writing". Such transmissions by their nature are intended to be ephemeral and are not intended to document an agency action.

These recommendations are consistent with the principles articulated by the United States Supreme Court which said in regard to the federal FOIA: 1) whether disclosure of a private document is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny; 2) that a third party's request for information about a private citizen can reasonably be expected to invade that citizen's privacy; and 3) that when the request seeks no official information about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is unwarranted. United States Dept of Justice v Reporters Commn for Freedom of the Press, 489 US 749, 780 (1989).

Very truly yours,

Elsa Kircher Cole

Elsa Kircher Cole
General Counsel

EKC/lsb
cc: James J. Duderstadt, President

Proposed Amendment to the Freedom of Information Act, P.A. 1976, No. 442, §2

As used in this act:

(a) "Person" means an individual, corporation, partnership firm, organization, or association.

(b) "Public body" means:

(i) A State officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.

(v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

(c) "Public record" means a writing ~~prepared, owned, used, in the possession of, or retained~~ **created or received** by a public body ~~in the performance of an official function, from the time it is created~~ **in connection with the transaction of public business and preserved by that public body as evidence of the organization, functions, policies, decisions, procedures, or operations of the public body.**

(d) "Non-public records" means materials that do not meet the definition of public records in subsection (c) above. In addition, it shall not include personal, informal communications, papers and materials.

(e) ~~(d)~~ "Unusual circumstances" means any 1 or a combination of the following, but only to the extent necessary for the proper processing of a request:

(i) The need to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records

pursuant to a single request.

(ii) The need to collect the requested public records from numerous field offices, facilities, or other establishments which are located apart from the particular office receiving or processing the request.

(f) ~~(e)~~ "Writing" means 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 **that have been created and deliberately filed, stored, or otherwise systematically maintained as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the public body. It shall not include telephone transmissions or any other kind of electronic communications.**

APPENDIX 4b

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

LANSING
MICHIGAN 48918

July 19, 1994

Kent D. Syverud, Executive Secretary
Michigan Law Revision Commission
Post Office Box 30036
Lansing, Michigan 48909-7536

Dear Mr. Syverud:

Your letter of June 1 has been transferred to this office for a response. I am very pleased that the Michigan Law Revision Commission is studying the issue of public access to electronic mail. The use of electronic recording technology, e.g. word processing, computer spread sheets, data bases, management systems, document imaging, computer based-modeling, geographical information systems, and particularly "E-mail" is growing rapidly in Michigan state government. The fact that "E-mail" is increasingly used as a means for inter-office communication on both administrative and policy matters highlights the importance of its management and preservation on a state government-wide basis. Also, the transient nature of electronic mail makes it a very difficult issue to deal with but also reinforces the need for action. If it is to be preserved, it must be addressed when systems are planned and implemented.

From an archives perspective, some state government and university electronic mail records will be worthy of permanent preservation while others may not. Appraisal for records of enduring value is essential. Probably the most widely known example of E-mail possessing long term value is its use by the National Security Council in the mid 1980's. It contributed significantly to a better understanding of the now commonly called "Iran-Contra Affair." In this instance, the electronic mail record system was of great importance for understanding current policy, oversight purposes, and investigative purposes. And, of course, these files will have value for historical research. However, even at a less dramatic level, it will be invaluable to future scholars who want to better understand the development of state government policies and their implementation. Furthermore, it should not be overlooked that E-mail documents a revolution in government structure. It is having a democratizing effect, e.g. promoting and encouraging collaboration by government staff in the decision making process. The organization of government is becoming more horizontal rather than vertical as in the past. As a result of E-mail, state government personnel and the citizens generally have an increased opportunity

to express their opinions and ideas. They have a more direct impact upon government actions and activities than ever before. This trend as reflected in state government electronic mail deserves permanent preservation in the State Archives.

Since the growing quantities of records with enduring value may be available only in electronic form in the future, methods need to be established for their identification and preservation. The simple physical preservation of electronic records is inadequate to meet archival needs. They need to be accessible and useable or they are not worth preserving. And if they are not preserved, tremendous gaps will exists in the documentation of state government. The gravity of the matter is illustrated by the fact that by the end of the century it is estimated that up to 98 percent of all new information will be created and stored in digital formats. Archives need to continue to identify records, regardless of physical form or characteristics, that provide evidence of the creation, organization, development, operation, functions, or effects of government agencies or that possess informational value.

The National Archives and Records Administration (NARA) is currently addressing this issue of electronic mail. In accordance with a Federal District Court ruling, NARA has recently prepared draft regulations for electronic mail systems in the federal government (Enclosure). These proposed federal government-wide standards on managing E-mail provide the authorized means of identifying, maintaining, and disposing of federal records created or received on an E-mail system. The standards, when approved, will be used by federal agencies to develop specific record keeping policies, procedures, and requirements to fulfill their obligations on federal law and regulations.

As for the state of Michigan, consideration may be given to establishing a state government-wide committee to consider legislation that would address the complex matter of electronic mail. From the archives perspective, as noted above, we are concerned that electronic mail with evidential and informational value is preserved. Our concern is with the contents of the record, not the recording technology. The committee may possibly include representatives of the legal community, press, Legislature, State Court Administrative Office, Department of the Attorney General, Office of the Auditor General, policy and program level staff from the Executive Branch, management information systems staff, state government records management program staff and the state archives staff. An outside consultant with an expertise in electronic mail may be considered as well. After legislation is enacted, the possibility of a committee for its implementation may be considered. Issues such as compatibility in hardware, software and operating systems; manuals; security; authenticity; auditability; confidentiality; accessibility; preservation; etc. would be among the issues addressed.

If electronic mail is defined as a record under Michigan's Freedom of Information Act (FOIA), the issue of public access would need to be addressed.

It seems access would be covered by FOIA unless it is amended. Generally speaking, archives encourage open access to records. If access restrictions are established, time frames for opening the information to researchers should be statutorily authorized. Implementation could then be accomplished through regulations.

I would be pleased to discuss this matter further. Thank you for this opportunity. It is not only an exceeding important issue for administrative, legal and audit purposes but also for the historical documentation of state government and for future scholars.

Sincerely,

David J. Johnson
State Archivist
State Archives

dle

Enclosure

APPENDIX 4c

Provost and Vice President for Academic Affairs

WESTERN MICHIGAN UNIVERSITY

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July 1, 1994

Mr. Kent D. Syverud
Executive Director
Michigan Law Revision Commission
Hutchins Hall, U of M Law School
Ann Arbor, MI 48109-1215

Dear Mr. Syverud:

President Haenicke has asked me to respond to your letter concerning viewpoints on Public Access to Electronic mail. We are pleased to participate in discussion of this issue, and appreciate the opportunity you have made available to us.

Our position is that electronic mail is an informal means of communication, similar in nature to the use of the telephone, rather than the use of written correspondence. While e-mail is indeed text based, it is none-the-less primarily intended, and principally used, with a great deal of informality. In our view, the inclusion of e-mail in the Freedom of Information Act would then leave no logical reason for not also including telephone conversations. Conversely, because we can see no reason why telephone conversations should fall under the FOIA, so by extension there is no reason for e-mail to be so covered.

There are also several significant practical considerations for excluding e-mail from FOIA coverage. First, e-mail is easily modified once sent, thus its integrity as an official record would be highly suspect at best. Second, because of re-sending capabilities (which also includes the ability for modification) verification of authenticity with any level of certainty would be difficult at best. Third, if e-mail is to be available for FOIA, then it would need to be retrievable. While such retrievability is no doubt possible, it would be analogous to tape-recording all phone calls, then storing all the tapes for some specified period. Beyond the storage, there is the not insignificant task of indexing and programming for retrievability all the stored e-mail from all the agencies to whom the FOIA applies. Fourth, electronic media are notoriously non-standard. In the computer world particularly, there are multiple operating systems, each of which has literally hundreds of different e-mails programs, most of which are incompatible without elaborate inter-system translation capabilities which do not currently exist for most of the programs and systems. Additionally,

some means would have to be devised for translating the electronic storage to hard copy suitable for compliance with the FOIA requirements. This too presents technical problems which are not insignificant.

For your information, and utilization as appropriate, you may be interested in the Policy and Guidelines for Electronic Mail, issued by President Diether Haenicke on April 4, 1993. The text follows:

WMU Electronic Mail
Policy and Guidelines

The WMU Electronic Mail Policy and Guidelines apply to all electronic Mail systems operated for and by Western Michigan University faculty, staff, students and/or library patrons. Electronic mail is provided as a cost-effective method of informal communication for University-related matters. Bulletin Boards and voice mail are considered to be a form of electronic mail and are covered by this policy and guidelines. Please note that the Michigan Courts have not determined whether or not messages transmitted and stored via any electronic mail system are subject to disclosure under the Freedom of Information Act or other statutes. Accordingly, when making the decision to store an electronic message, you should consider the impact on the University if the message is ultimately disclosed or released to other parties.

It 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. The University reserves the right to purge messages older than one year after notice to the account holder. Unless you are notified otherwise, systems administrators will review electronic messages only with the written authority of the general counsel. Mail files will not be backed up on centrally operated and controlled computer systems. There will be no ability to reclaim individual messages, once deleted from those systems.

Passwords are required on all electronic mail systems and will be changed periodically. However, the user is responsible to exercise due care in the

use of an electronic mail system. Electronic mail systems possess the capability to forward a message, and the author of a message has no ability to control the actions of the recipient(s). Prudence and consideration for the feelings of others dictate that electronic mail be used in a mature and reasoned manner, and with the knowledge that others may have access to such messages.

I hope this information is helpful to you. Should you wish to discuss it further, or seek clarification on any item, please do not hesitate to contact me directly.

Please accept my best wishes for your work on this matter which is most important, but which will no doubt be difficult and controversial.

Sincerely,

Richard A. Wright
Associate Vice President
for Academic Affairs

cc: President Haenicke
Vice President Pretty
Dr. Harley Behm

WOOD TV

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June 27, 1994

Kent D. Syverud
Executive Secretary
Michigan Law Revision Commission
P.O. Box 30036
Lansing, MI 48909-7536

Dear Mr. Syverud,

Thanks for writing to ask how E-mail should be treated under state disclosure laws.

We believe E-mail should be subject to public disclosure laws. It is written (like a letter) and it is (or at least can be) retained like a letter. Consequently, it is a public document.

If that causes state officials to be less candid in E-mail transmissions, so be it. There is no excuse for secrecy when handling the people's business.

(If the possibility of disclosure causes officials to keep to business, and eliminates non-business messages, the people would be better served anyway.)

I would suggest that phone conversations are more candid because there is no permanent record of the conversation, unlike written correspondence. If phone conversations were recorded, I am sure those conversations would be less candid, too.

Please keep us posted as to the progress of your commission's work. Thanks again for asking us how we view this important issue.

Sincerely,

Rick Gevers
News Director

RG:jr

APPENDIX 4e

MICHIGAN STATE
UNIVERSITY

June 7, 1994

Kent D. Syverud
University of Michigan Law School
Hutchins Hall
Ann Arbor, Michigan 48109

Dear Mr. Syverud:

I write to respond to your recent letter soliciting thoughts, in your capacity as Executive Secretary of the Michigan Law Revision Commission, on "public access to electronic mail." The Commission is studying how the legislature ought to "balance the need for open government with the desire of e-mail users for some non-telephonic method of candid (and private) communication." A semantic observation may be worth noting. I, personally, did not particularly "desire" a non-telephonic method of candid, private communication. The desire for privacy is a product of the availability of e-mail and the use I make of it.

As I think about this matter in practical terms--and there are no more commendable terms to serve as a base for legislative thinking--I am struck by the two quite distinct modes of e-mail use. Some people, use it solely for the purpose of private communication. When I send an e-mail message, I do not print a hard copy, and people with whom I deal know that to be my operating preference and understanding. Other users understand or expect that their messages will be converted to hard copy. Many people work in both modes.

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The salient point is that one's mode of use relates, practically and directly, to one's expectation of privacy. For me, privacy is essential. If my e-mail communication were susceptible to disclosure to anyone other than person(s) to whom I transmit them, I simply could not use it. For me, the privacy is a defining characteristic of e-mail's utility. I do not believe that one could reasonably assign the same level of privacy expectation, generally, with respect to e-mail messages that are converted to hard copy.

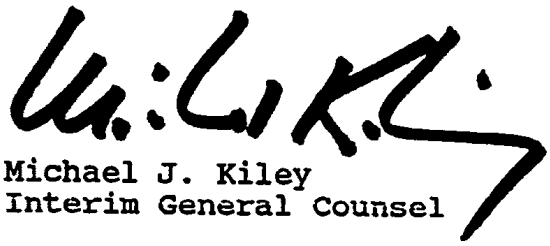
I would find the prospect of an intrusion on the privacy of my e-mail communication as troubling as I

would find a blanket wiretap authorization on my telephone. If e-mail were subject to disclosure, I could not use it. It happens that e-mail serves me, every day, in consultation with colleagues. Relegating this form of communication to the public domain would not likely open the windows of government. It would deny people, including me, access to a useful communication device.

An e-mail message that is converted to hard copy looks more like a memo than it does a telephone conversation. It is palpable and enduring. Other eyes can be expected to see it. There is not, in reason, a high expectation of privacy. If I were to transmit e-mail messages with the thought that my words would be memorialized outside of the computer screen, I would measure them, with appreciation that others may do the same.

My "desire" is ontologic. E-mail is available and useful. I was unaware of a need for another way of communicating that would be private, like telephone conversations. Now that technology has provided this capability, I like having it and do not want to lose it. These comments, incomplete as they may be, reflect my strongly felt sentiments. I trust that you and your colleagues will maintain a firm grounding in the pertinent practical implications presented. Thank you for your thoughtful consideration.

Very truly yours,



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MJK:lmc

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June 21, 1994

Mr. Richard D. McLellan, Chairman
Michigan Law Revision Commission
P. O. Box 30036
Lansing, MI 48909-7536

Dear Mr. McLellan:

I am writing you in response to the Commission's request for comments on public access to electronic mail. The use of electronic mail on our campus is very widespread among our students, faculty, and staff. Electronic mail is more of an informal dialogue rather thana formal communication. I agree that electronic mail communications are more like a telephone conversation than a written memorandum. Because of the informal nature of most electronic mail I would oppose complete public access to electronic mail. I believes to do so would curtail the use of this very useful technology.

I hope my comments are helpful in your deliberation on this important issue.

Sincerely,

Wm. E. Vandament

William E. Vandament
President

WEV/jsl

APPENDIX 4g

STATE OF MICHIGAN

DEPARTMENT OF EDUCATION

P.O. Box 30008
Lansing, Michigan 48909

ROBERT E. SCHILLER
Superintendent
of Public Instruction

June 13, 1994

Mr. Kent D. Syverud
Executive Secretary
Michigan Law Revision Commission
P.O. Box 30036
Lansing, Michigan 48909-7536

Dear Mr. Syverud:

Thank you for your letter of June 1 regarding public access to electronic mail and its relationship to the Freedom of Information Act.

It is our position that electronic mail should not be treated as subject to disclosure under the Freedom of Information Act. Electronic mail is a type of verbal communications; it it does not hold the same permanency as a memorandum in office communications. In addition, trying to keep track of FOIA requests regarding electronic mail would be laborious.

Thank you for your consideration of our position on this issue as you conduct your study for the Legislature.

Sincerely,

Robert E. Schiller

APPENDIX 4h

STATE OF MICHIGAN

JOHN ENGLER, Governor

DEPARTMENT OF AGRICULTURE

P.O. BOX 30017, LANSING, MICHIGAN 48909

GORDON GUYER, Director

June 21, 1994

Richard D. McLellan, Chairman
Michigan Law Revision Commission
P.O. Box 30036
Lansing, MI 48909-7536

Dear Mr. McLellan:

This letter is in response to the Michigan Law Revision Commission's June 1, 1994, letter seeking comments on the issue of Public Access to Electronic Mail. Thank you for the opportunity to comment on this important issue.

The Michigan Department of Agriculture uses the E-Mail system which is supplied with Banyan Vines. The network locations include the Lansing central office and the six regional offices located throughout the state. By the fall of 1994, we expect the network to extend to the Laboratory Division in East Lansing as well as the Office of Racing Commissioner in Livonia. Within the next two to three years, the wide-area network will be enlarged to include the field staff with their home as their work station.

An article on page one of the April 4, 1994, issue of "Government Computer News" discusses E-Mail. In part it states that the National Archives and Records Administration is proposing rules for preserving electronic mail messages as public records. Their proposal, in part, would keep an E-mail message if it:

- Contains information developed in preparing position papers, reports or studies.
- Reflects official actions taken in the course of conducting agency business.
- Conveys information on agency programs, policies, decisions and actions.
- Conveys statements of policy or the rationale for official decisions or actions.

In addition, messages may be discarded if they lack evidence of agency activities, refer only to personal papers and materials, or are extra copies of documents kept elsewhere.

This department would support the proposed National Archives and Records Administration rules.

If you have any further questions, please contact Fred H. Heiner, Director, Automated Services Division, 373-9780.

Sincerely,

Dr. Gordon Guyer
Director

GG/FH/sj

cc: K. Syverud