

Preservation of E-Mail.

E-mail is increasingly an integral part of the daily operations of individuals and offices within the University. The ease and speed with which information can be exchanged via e-mail makes it easy to overlook the fact that the same general considerations that pertain to the use of written correspondence apply as well to the use of e-mail. Ultimately, it is the content of e-mail that is crucial.

For instance, official matters that are dealt with through the use of e-mail deserve the same attention and forethought that would be given to preparation of a formal written communication. This is true, in part, because such e-mail may be subject to release to members of the media or the general public under provisions of Alabama's Public Records Act.

Speaking to this issue, the Alabama Department of Archives and History (ADAH) has advised that "e-mail is a public record when it is created by a government employee in the course of conducting public business, and when it documents the activities and business of public officials." The ADAH has also observed that,

[E]-mail that is a public record is guided by the same retention requirements as the same type of record in another format or medium. Retention periods for e-mail records will vary according to their content and function.

The ADAH has further stated that

[I]f e-mail records are to be preserved electronically, they should not be stored in the e-mail system itself (unless record keeping functionality is built into it), but should be moved to a separate electronic record keeping system. In some cases, the best preservation solution may be to print these e-mail messages onto paper. However, in *Armstrong v. Executive Office of the President*, the court ruled that a paper printout of an e-mail message, lacking accompanying transmission and reception data to provide its context, does not constitute a record.

See "Developing E-Mail Policy for Government Agencies." Government Records News. Vol. 1, No. 3 (December 1996)(www.archives.state.al.us/ol_pubs/govrec13.html). See also "Guidelines for Managing E-Mail." Technical Leaflet. State and Local Records Commission (April 2001) (www.archives.state.al.us/ol_pubs/E-mail01.html). While the University is not subject to ADAH regulations, the conclusions reached by the ADAH provide sound guidance.

In the area of litigation discovery, though the law is far from fully developed, there is no doubt that e-mail is subject here to potentially much broader obligations of retention and disclosure than would be required by the Alabama Public Records Act. This is a consideration of utmost importance, because increasingly e-mail is providing the "smoking gun" in employment discrimination cases. Use of an employer's e-mail system to distribute, for example, sexually oriented "jokes" and pictures can provide the basis for a claim of hostile environment. An e-mail characterizing certain named employees as "relics" will buttress an age-discrimination claim

when those individuals are terminated, regardless of whether or not legitimate reasons for termination exist.

As recognized by recent court rulings, parties to litigation have an affirmative duty to find and preserve e-mail that may be relevant to a lawsuit. That duty arises when a party becomes aware or should be aware that litigation is underway or is imminent, though the mere possibility of litigation does not create the duty. The duty falls first on legal counsel, who is obligated to advise the client about the type of e-mailed information relevant to the lawsuit and the necessity of finding and preserving it. Once it receives this advice, management then becomes responsible for properly and completely informing appropriate employees of what must be done.

The failure of a party to find, preserve, and produce relevant e-mail can in some cases result in the court's imposing sanctions on that party for "spoliation of evidence." Possible sanctions include awarding attorney fees, instructing the jury to draw adverse inferences based upon the absence of the missing e-mail, dismissal of affected claims or defenses, and/or entry of a default judgment against the offending party. Typically, some evidence of intentional or willful bad faith destruction of e-mail is required to support imposing the more severe sanctions. Innocent deletion of e-mail according to a long-standing policy of automatic deletion after the passage of a period of time that is reasonable in the industry concerned would not likely support imposition of any sanction. On the other hand, deletion of e-mail earlier than called for by such a policy would likely support a finding of bad faith.

In order for the University to meet its responsibility to find and preserve potentially relevant e-mail prior to the filing of a lawsuit, the Office of Counsel must be informed of any situation where circumstances suggest the potential for litigation.