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E-Mail Retention Policies and the Local Records Act

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Recent interpretations of the Local Records Act,[1] broadly construing the meaning of "public records" for purposes of formalizing retention policies, beg for the imposition of Supreme Court Justice John Roberts' three rules of statutory construction: "Read the Statute, Read the Statute, Read the Statute." The Illinois Attorney General's Office, numerous municipal clerks and the press are interpreting the Local Records Act to require preservation and retention of all documents of whatever import (or lack of import). This problem is exacerbated by the proliferation of e-mail, and the issues of preservation this presents. However, a close reading of the Local Records Act reflects this is unnecessary and unduly burdensome.

The Local Records Act defines a public record as "any book, paper, map, photograph, digitized electronic material or other official documentary material, regardless of physical form or characteristics, made, produced, executed or received by any agency or officer *pursuant to law or in connection with the transaction of public business and preserved or appropriate for preservation* by such agency or officer, or any successor *thereof as evidence of the organization, function, policies, decisions, procedures, or other activities thereof, or because of the informational data contained therein.*"[2] (Emphasis supplied).

While many have leapt to the conclusion that this requires preservation of anything and everything dealing with public business that happens to enter or leave a municipally owned computer, reading the statute three times, as Justice Roberts suggests, reveals a quite different intent.

For a public record to exist as defined under the Local Records Act, one of two tests must be met: (1) the item must be made, produced, executed or received by the Municipality "pursuant to law," or (2) the item must be made, produced, executed or received in connection with the transaction of public business and preserved or be "appropriate for preservation."[3] Under the first test, documents such as annexation agreements, resolutions and ordinances, which are documents created "pursuant to law," are public records and must be kept in accordance with the requirements of the Local Records Act. Under the second test, the documents must be created in connection with the transaction of public business and be "appropriate for preservation." The question then becomes—what is "appropriate for preservation" and who makes that determination?

The legislative declaration of the Local Records Act passed in 1961 states: the purpose of the Act is to provide a program "for the *efficient* and *economical* management of local records" which will "facilitate and expedite governmental operations."[4] (Emphasis supplied). It is important to remember that when the legislature passed the Local Records Act, we did not have the luxury or convenience of readily available copy machines—most, if not all, copies were made by using carbon paper. When the Local Records Act was passed, copies were difficult to make. Consequently, the legislature must have intended only to preserve those records important for the efficient operation of government. Moreover, the legislature did not, as it could have, give local government officials a bright line test to determine which records should be retained. Instead, it deferred to each local government to determine what is "appropriate for preservation."

Because the Local Records Act does not define what is "appropriate for preservation," it is clear that the legislature intended for the municipal clerk to have discretion to make a determination as to what is "appropriate for preservation." Not every e-mail is "appropriate for preservation." The Local Records Act was not intended for each unit of local government to create the local and functional equivalent of a Presidential library, where every memo and doodle is preserved for posterity. Rather, the intent was to provide for "the efficient and economical management of local records" and to "facilitate and expedite governmental operations." Most e-mails, for example, are temporary communications which are non-vital and may be discarded routinely. Their preservation does not promote "the efficient and economical management of local records" nor "facilitate and expedite governmental operations." Indeed, preservation of most e-mail would do the exact opposite.

When municipal clerks or employees examine records to determine whether they must be preserved, factors to consider are:

1. Is the document connected with the transaction of public business (this eliminates all documents which do not relate to public business, i.e., personal notes, etc.)?
2. Is it official documentary material (a draft of a letter vs. the letter itself)?
3. Is the document an original created for the municipality or simply copies of documents created for some other purpose? This includes all non-original source material such as newspaper and magazine articles.
4. Is the document subject to FOIA? For example, "[p]reliminary drafts, notes, recommendations, memoranda and other re-

cords in which opinions are expressed, or policies or actions are formulated" need not be produced under FOIA, except when a specific record or relevant portion of a record is publicly cited and identified by the head of the public body.[5] Therefore, unless staff wishes to keep their preliminary drafts, notes, etc., there is no point in keeping these documents and presumably they may be destroyed if paper or deleted if e-mail.

5. Is the material "appropriate for preservation by such agency or officer, or any successor thereof, as evidence of the organization, function, policies, decisions, procedures, or other activities thereof, or because of the informational data contained therein"? This would eliminate the necessity of keeping documents which do not reflect the official actions of the municipality, but rather the comments or actions of individuals which reflect not the policy of the municipality but the thought of an individual.
6. Does the document have any historical significance? What is the importance of the document? Does keeping or discarding the document further the goal of the Act - the "efficient and economical management of local records?"
7. Is this a final document? For instance, many e-mail documents rapidly become stale and do not reflect "function, policies, decisions, procedures, etc." when a matter is finalized. Therefore, the municipality can simply keep the final document.
8. Are the records duplicative? Only one copy need be retained.
9. Internal documents created by employees on work-related topics which do not facilitate action (i.e., transmittal notes, notifications, announcements, etc.) may be discarded.
10. Documents containing drafts, notes or inter-office memoranda that are not retained by the municipality in the ordinary course of business may be discarded.

Municipal clerks and employees should also be aware of Rule 37(f) of the Federal Rules of Civil Procedure which provides that absent exceptional circumstances, courts may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.[6] Comments to the rule reflect that data may be deemed as not having been lost in "good faith" if the loss follows an event that "triggers" the duty to preserve data, and sanctions, although not available under this rule, can be ordered under other authority to enforce the collection of discovery in a pending case. An example if a triggering event might be the discipline of an employee. It is a good practice to save all documents related to the discipline of an employee as this could be a triggering event.

The new rule has caused concern with various levels and departments of local government because it is somewhat vague. Does this require the municipality to retain all e-mails if it receives a preservation request or a complaint? Is a municipality required to preserve all e-mails before it receives a preservation request or a complaint even though the Local Records Act allows for destruction of such documents? A municipality may consider having a team monitor triggering events in order to comply with the new rule.

As a reading, rereading and third reading of the Local Records Act reveals, the intent of the Act is not to accumulate a mountain of useless documents. Rather, the purpose is to "efficiently and economically" preserve for future review and retrieval, documents which are genuinely necessary and appropriate for understanding actions of the public body. Any other interpretation ignores Justice John Roberts' sound advice as to statutory construction and creates needless and burdensome retention requirements. ■

1. 50 ILCS 205/1 et seq.
2. 50 ILCS 205/3.
3. Id.
4. 50 ILCS 205/2.
5. 5 ILCS 140/7(f).
6. Fed. R. Civ. P. 37(f)