



# E-mail Communication and the Public's Right to Know

by Anonymous

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Have you ever sent an e-mail and then immediately wished you could take it back? Have you ever said anything in an e-mail that was misread or misinterpreted?

This article is a brief discussion on some of the unique characteristics of e-mail, its emergence as one of the most important methods of communication in the business/professional world, and its relationship to the responsibility to keep the tax process open and transparent as part of a democratic system of government.

## E-mail is not an Electronic Business Letter

To begin with, e-mail is quite different from the traditional business letter, long the standard method of business communication. E-mail by virtue of its speed and ease of use has decentralized office communications, and yet in many ways, professionals may not be aware of some of the subtle differences between e-mail and other more traditional forms of communication.

In the last ten years, the volume of e-mail messages in government and the private sector has grown dramatically, outpacing the use of the traditional formal business letter for many types of communication. E-mail has challenged the traditional postal service, faxes, FEDEX, and UPS, and its use is rapidly closing in on telephone calls as the most prevalent mode of professional communications.

The reasons for its popularity are obvious. Nothing is

quicker, more convenient, or efficient. You don't have to wade through layers of receptionists and administrative assistants or be banished to voice mail for a mumbling inarticulate chat with a telephonic beep signal.

What may not be as obvious is that communication by e-mail is a fundamentally different method of communication. This new form of communication works differently on several levels. John Suler in his book "The Psychology of Cyberspace" calls some of the attempt to come to grips with this new form of communication "e-mail stress." It is, as he points out, a wonderful tool for communication, but it extracts a price that many professionals don't fully understand.

The first thing that is fundamentally different is that e-mail is an "asynchronous interaction." Two people communicating by e-mail don't have to synchronize their schedules to be present at the same time in front of their computer terminals. You can send an e-mail at 3 a.m. in the middle of a dark, soulless night clad in your pajamas or you can communicate in the middle of the day. No one has to track Mr. Jones down to receive an e-mail from Mr. Smith. There are no frustrating "call-backs" or missed connections. An e-mail is not like a telephone call. This is one of the obvious strengths of e-mail. It is liberating.

This asynchronous dimension is also helpful in terms of a reply. The person on the receiving end of the e-mail doesn't have to reply immediately. They have an opportunity to review the message, check with other office staff, refer to reference in-

formation or statutes, and craft a well-developed response. Unfortunately, Suler's research indicates that most people reply very quickly to an e-mail without the level of consideration given to their response if they were replying to a formal business letter. (One writer on the subject calls this a "zone of reflection" and recommends the "24-hour rule" before responding. He prepares a reply, but waits 24 hours before sending the reply. He says that many times he is less emotionally involved and has a more reasoned and balanced reply.)

The other characteristic of e-mail radically different from traditional modes of communication is the overwhelming volume of messages. Every person in the assessment profession that I've talked with universally complains about being besieged, even saturated with a torrent of incoming messages. Most of us are literally bombarded by hundreds of e-mail messages each day. At our agency, e-mail messages from taxpayers requesting information or answers to questions have exploded over the last three years. We are receiving thousands of e-mail messages agency wide. The job of sorting that e-mail and getting the inquiry to the right person is extremely time consuming.

This stream of messages is even more stressful since e-mail is the only source of professional communication that mixes professional and personal messages. Messages from co-workers, supervisors, bosses, and other professionals are lumped in with messages from your kids, friends, taxpayers, junk mail advertisements, spam masters, enemies, or other IAAO members. All these messages, with radically different levels of importance and urgency, are stacked next to each other in the inbox. "Defending Your In-box" has become another daily task and it may take several hours to sort this information into some rough order.

One of our staff asked me "How can network security manage to tag legitimate e-mail from a county assessor as spam and fail to block the daily onslaught of fake Rolexes, sons of Nigerian officials who desperately need my help to recover a gold treasure, and the ubiquitous ads for chemicals that will enhance romance in my life?"

This blurred boundary between work and private communication is exacerbated by those millions of people who are "Blackberry" or home computer e-mail addicted and read their e-mail at home and at work. This difference adds to the e-mail stress by making it impossible to escape from the tyranny of instant messages that is so detrimental to an individual's personal space and relaxation.

## **Expectation of Privacy**

Another significant difference between e-mail and traditional forms of communication is the false expectation that e-mail is private. Somewhere in the social contract, e-mail when it first was introduced seemed to imply that the communication was conducted in anonymity. Many people, despite evidence to the contrary, assume that since they can use a pseudonym and the return address doesn't have much information about the source that somehow the sender is anonymous.

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The expectation of privacy in e-mail communication is naïve, if not foolish. E-mail messages are recorded and are often accessible to a third party even if sent from a re-mailing program. Messages are often unintentionally sent to a third party through the "carbon copy" feature on all e-mail programs.

The false assumption of privacy is even more a concern since there is no established protocol for sharing and forwarding communications. I recently sent a message to a county officer simply telling him of a program change at our agency's annual educational conference and found that it had been forwarded to several hundred people. There was nothing private in my message, but what was remarkable was that I received several copies of my own message forwarded by people who didn't apparently realize

I was the original author. Many embarrassed people have learned this lesson by unthinkingly hitting "reply to all" and sending their candid comments on strategic planning processes directly to the administrator in charge.

## **The "Disinhibiting Effect"**

John Suler argues that the ease of use and informal nature of e-mail communication leads to a "disinhibiting effect." Writers of e-mail often say things they wouldn't ordinarily say in a traditional business letter. An e-mail often resembles a conversation rather than a formal business communication. This effect cuts both ways. Some writers are more open or candid; others might be more aggressive as in "flaming" someone in a message.

This uninhibited informality sometimes leads to miscommunication. The receiver can't track some of the subtle clues of face-to-face conversation. Voice inflection, humorous comments, facial expressions, or body language aren't included in the message, and as a result some nuances of a complex discussion are not communicated. Humor and irony in particular seem to be poorly communicated in an e-mail.

Instinctively, the e-mail culture has evolved supplemental methods of communications particularly among younger users comfortable with instant messaging and telephone text messages. All these shorthand messages (LOL "laughing out loud," BTW, "by the way," IMHO "in my humble opinion") are means to clarify the writer's meaning. If there is any doubt that e-mail is essentially different than traditional communications, can you imagine a professional assessing officer communicating with the Chairman of the Department of Revenue and including a FOTFL (Falling on the Floor Laughing) in the text of his message?

## **What is the Public's Right to Know?**

All states, by application to local governments have some type of statutory provision for open records, open meetings, freedom of information, or so-called "sunshine" laws that provide the public and media with access to government records, proceedings, meetings, and

records of public action.

Open records laws in the United States date to before the Civil War with Wisconsin's statute adopted in 1848. Florida passed an open meetings law in 1967, and nearly all states have some requirement for advance notice of public meetings, minutes, and the requirement that voting take place during an open meeting.

The federal government adopted the more well-known Freedom of Information Act in 1966, and updated it in the wake of the Watergate scandal. The Electronic Freedom of Information Act Amendments enacted in 1996 specifically applied to electronic digital resources. (Canada has a similar "Access to Information" statute and a complementary Privacy Act.)

It is important to note, however, the terminology "the public's right to know" is somewhat nebulous. It is not defined in the United States Constitution, the Bill of Rights, or any of the amendments to the constitution. Article I of the Bill of Rights provides for the guarantee of free speech, but it is clear from a legal standpoint that the "public's right to know" doesn't have a clear definition. There are numerous categories of information that are held confidential and not subject to open records of any kind. Information related to a criminal investigation has traditionally been a closed record. The federal Freedom of Information Act itself specifies several areas where the "public" does not have a right to know, such as national security information, certain personnel and health records, trivial internal agency matters, confidential business information, details of litigation, personal privacy, certain law enforcement records, financial information, and even geological information. In addition, the statute directs that freedom of information requests cannot be made for commercial purposes.

In the area of taxation, states almost always have statutes that hold personal tax information as private. State governments that link their state income tax with the federal system come under certain federal restrictions on confidentiality. These statutes provide criminal prosecution

and termination of employment for any official or employee who violates its provisions. Other specific federal statutes make certain educational and health records confidential, as well as our state's statutes that impose privacy requirements on law enforcement records, drivers' license data, and health records.

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Tax information has long been protected since the first establishment of certain taxes in this country. This has been a long standing policy, dating back before the famous political battle in the 1930s when Franklin Roosevelt wanted the IRS to check the federal income tax returns of some political opponents. He did not even come close to winning that struggle. His inquiries were refused and the right of privacy was upheld.

### **How do you Balance Public's Right to Know and Privacy?**

Our State Attorney General's office, in some guidance material on public records for public officials, referred to one of Winston Churchill's visits to the White House during World War II. President Roosevelt wheeled himself into the Prime Minister's room to talk with him and found Winston Churchill emerging from his shower completely nude. Roosevelt apologized in embarrassment, but Churchill said, "The Prime Minister of Great Britain has nothing to hide from the President of the United States."

The Attorney General's material appropriately noted that unlike the ever confident Winston Churchill, our state's Open Record Act may "make many a public servant who must apply the law feel truly naked and uncertain."

Our state agency, like many other jurisdictions, serves several conflicting public policy mandates. We have statutes that provide for Open Records and Open Public meetings, but at the same time, there are statutory provisions for the protection of the privacy of certain tax records. State income tax records, as well as certain information provided on personal property tax returns at the county assessor's level, are also held confidential.

The most complex portion of the issues center on the two conflicting statutes: the law protecting confidentiality of taxpayers and the public's right to know. It represents a balancing act between the protection of private business information in a competitive market and the general right of the public to be informed of decisions made by their public officials. This area of law can become complicated. It is often difficult to make sure that the public's right to know is consistent with statutes protecting privacy. This is particularly complex in the area of taxation where the release of information on a property tax or income tax return could be harmful to the firm's competitive advantage.

### **What's the Practical Solution?**

To prevent some of these potential problems, it is sometimes helpful to create guidelines or simple directives for government employees that specify general "rules of thumb" on balancing the requirements of the Open Records act and statutes protecting the confidentiality of tax returns.

The first point in the guideline is a direct statement: "Yes, your e-mail may be subject to disclosure." The guideline also states that an employee's individual e-mail or portions of it may be viewed by the public or published by the media due to an Open Record request. E-mail may also be subject to discovery during litigation or made public as a result of a taxpayer record request.

The guideline also reminds our employees that any document created or received by a state public body that is connected with official business, expenditure of public funds, or administration of public property is a record subject to the Open Records Act. This includes all e-mail, as well as traditional documents associated with professional communications: letters, faxes, reports, spreadsheets, and other such products.

The general presumption of the statute favors disclosure of records. Based upon several court cases, it is clear from a legal standpoint that if there is any doubt as to the application of the Open Record's Act, then the record should be released.

Other examples of open public records may include: all public contracts, rules and rulemaking history, and minutes from meetings (excluding executive sessions). The Open Record's Act also applies to e-mail and any records not specifically excluded by law as potentially subject to open records inquiries.

Finally, in regard to the interaction between the Open Records Act and statutes that specifically make tax records confidential, records and files of a Tax Commission concerning the administration of the Uniform Tax Procedure Code are confidential and privileged except as otherwise provided by law. Material not provided by the taxpayer that doesn't reveal privileged tax information is a public record. This means that the usual tax records, tax returns, and renditions continue to be protected, but it is very clear that most public documents will be open to scrutiny for the public's right to know.

## Conclusion

So as a practical matter, what should the assessing officer do to carry out the sometimes conflicting responsibilities to protect the public's right to know as well as the privacy requirement?

- 1) Assume that every e-mail you write will be re-printed on the front page of the local newspaper.
- 2) Assume that every e-mail you write will be subpoenaed.
- 3) Review any records request with your in-house counsel to help straighten out conflicting statutes.

- 4) Never use the "Reply All" button.
- 5) Subscribe to the twenty-four hour rule. Be aware that e-mail's convenience should not prevent you from preparing a clearly thought out response.
- 6) Be polite in your e-mail and as helpful as possible, but limit your comments to the business at hand.
- 7) Write clearly and succinctly without offering opinions and certainly not any "pontifications" on the state of the universe.
- 8) It is not always possible, but make an effort not to mix personal and business e-mail. (An e-mail about lost car keys or canceled soccer practice will probably always make it in the in-box, but it should be brief and limited.)

The job of the assessing officer is difficult. We find ourselves on the front line when interpreting the many conflicts and ambiguities of our society. It is our responsibility and opportunity to lead by example and insure that the public's right to know is effectively balanced with the individual's long held presumption of privacy. ■

Editor's Note: The author of this article on e-mail privacy has chosen to remain anonymous. In today's workplace, the administration and interpretation of public information policies can sometimes become controversial. To write about privacy issues might be construed by some policy administrators and policy creators as an invitation to further controversy.

Any similarities to situations in other jurisdictions/agencies is unintended and specific examples of e-mail policies and situations have been avoided.

IAAO will consider all submitted comments about this and other published articles in its Letters to the Editor department.

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