

From: [Stout, Eric](#)
To: [Broome, Anna](#)
Cc: [Reinsch, Margaret](#); [McCarthyReid, Colleen](#)
Subject: RE: RTKAC Technology subcommittee questions
Date: Sunday, October 31, 2021 2:36:38 PM
Attachments: [image003.jpg](#)
[Email-use-policies.docx](#)

This message originates from outside the Maine Legislature.

Anna, Peggy, Colleen:

On the topic below, see my suggested resources to share with the subcommittee on technology, and potentially with the full Committee:

As the Commission starts to work on the issue of maintaining public records that are digital in nature, I was wondering if you would be able to help me with some basic information. **What policies does the state have already in terms of retaining public records for email, text messages, chats etc? I've found a few things on line but I'm not really sure what is official or the latest guidance.** Can you help please? I'm hoping to gather this before the subcommittee meetings (we're working on that too!).

I hope all of this is helpful. I composed this in a way that could be shared as-is with the subcommittee on technology and eventually with the full Committee if they decide that would be good. Or, you can select certain portions that you think are best. Let me know if you have any questions or need anything else...

I think the best place to start is the Maine State Archives, specifically these links.

Highlighted in red are the portions related to email specifically:

- Policies & Guidance for State Government (top-level site for Records Management):
<https://www.maine.gov/sos/arc/records/state/index.html>
 - State of Maine Policy on Preservation of State Government Records (issued annually for employee acknowledgement):
<https://www.maine.gov/sos/arc/records/state/policy.html>
 - See this excerpt about email specifically:

Actions by Employees: Every State employee shall comply with this policy by taking the following actions:

1. Properly manage all of their State government records, including (but not limited to) correspondence, email and electronic documents.

a. Employees should save (retain accordingly) their paper and electronic correspondence including other documents so that it is **preserved for time required by the records schedules**. It is the responsibility of Agency managers and supervisors to secure and manage/archive records of former employees. For steps on how to archive email, see the instructions on the [State internal website](#).

- State Agency Records Training and Resources (top-level site for training and guidance): <https://www.maine.gov/sos/arc/records/state/statetraining.html>

- Records Management Basic Principles for State Employees (see especially slides 46-60 on email management):
<https://www.maine.gov/sos/arc/records/state/trainingstandard2018.pdf>
- Managing Electronic Records (see especially slides 14-27 on email):
<https://www.maine.gov/sos/arc/records/managing%20electronic%20records.jan2021.pdf>
- State records retention schedules:
 - General schedules:
<https://www.maine.gov/sos/arc/records/state/generalschedules.html>
 - General schedule 13, State Agency Correspondence (which includes email as a type of correspondence; in principle, this would also include text messages and chats if conducting government business):
<https://www.maine.gov/sos/arc/records/state/GS13.pdf>
 - Agency-specific schedules (records unique to the agency; common records follow general schedules):
<https://www.maine.gov/sos/arc/records/state/agencyschedules.html>

So, that's a lot to share from the Maine State Archives, but I think it's important that the Committee has a common foundation of the existing State Archives records management policies and guidance, which includes email which is a government record if conducting government business.

Now, as far as HR and OIT policies related to email, they are sprinkled into various guidelines for employee expectations and other IT-related policies. Attached is a summary I put together of key excerpts. On the use of personal email for Government business, both the HR Work Rule and OIT policy say prohibit that. See the attached and the links below for important details.

- **STATE OF MAINE POLICY AND WORK RULES CONCERNING THE USE OF STATE INFORMATION AND TECHNOLOGY (I.T.) EQUIPMENT AND RESOURCES (2015):**
https://www.maine.gov/bhr/sites/maine.gov.bhr/files/inline-files/DAFSITPolicy_0.pdf
 - 3. State employees shall not conduct state business through personal email accounts (e.g., Yahoo, Hotmail, and G-mail)
- **User Device and Commodity Application Policy:**
<https://www.maine.gov/oit/sites/maine.gov.oit/files/inline-files/user-device-commodity-app-policy.pdf> (2020)
 - 5.7. No State business may be conducted through personal email accounts. This prohibition applies irrespective of whether the device is State-issued, or otherwise.

The Federal Government adopted guidelines in 2014 that says that any official government business received on an official's personal email account must be forwarded to a government account within 20 days so that it is discoverable.

- See: <https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html>

4. Can electronic messages created in personal accounts be Federal records?

Employees create Federal records when they conduct agency business using personal electronic messaging accounts or devices. This is the case whether or not agencies allow employees to use personal accounts or devices to conduct agency business. This is true for all Federal employees regardless of status. This is also true for contractors, volunteers, and external experts.

Personal accounts should only be used in exceptional circumstances. Agencies must provide clear instructions to all employees on their responsibility to capture electronic messages created or received in personal accounts to meet the requirements in the amended Federal Records Act.

The Federal Records Act (44 U.S.C. 2911 as amended by Pub. L. 113-187) states:

(a) IN GENERAL.—An officer or employee of an executive agency may not create or send a record using a non-official electronic messaging account unless such officer or employee—

(1) copies an official electronic messaging account of the officer or employee in the original creation or transmission of the record; or

(2) forwards a complete copy of the record to an official electronic messaging account of the officer or employee not later than 20 days after the original creation or transmission of the record.

Electronic messages created or received in a personal account meeting the definition of a Federal record must be forwarded to an official electronic messaging account within 20 days. The statutory definition of electronic messages includes email.

- National Archives and Records Administration (NARA) guidance on email management (extensive resources that might be referred to for adapting to State guidance): <https://www.archives.gov/records-mgmt/email-management/email-guidance-and-resources.html>

Next is the challenge of actually being able to “discover” phone-to-phone text messages (which are on those mobile devices only, but not capturable in a State IT system like our email is). See below. This is meant to help educate people about the challenges, rather than give definitive or legal advice.

Here’s some background I’ve shared with others (AG lawyers and agency people) about phone-to-phone text messages:

TO: _____

When it comes to phone text messages, the question would be are they discoverable/recoverable, practically speaking? If the text message is still preserved on the device, then they could be turned over as any other record. Just like a piece of paper – if it still exists, then turn it over. But if the piece of paper has been destroyed (thrown in the trash, ripped up, burned, etc.), then it no longer exists, and you can’t produce it. An email on the State’s system is recoverable if it’s deleted, from the Microsoft e-

discovery center, in the cloud. But not so with phone text messages. Those are not in the State's system or control – but rather the data exists within the phone provider's system, but only long enough to be delivered (and verified delivery) to the user's device (phone to phone). So, practically speaking, if the text message is still on the user's phone, you can ask for it to be produced. But if it's been deleted, then there is essentially no way to recover it. Like a piece of paper that has been destroyed – it's gone.

See below for a definitive article about this topic, written from a legal perspective. Want to discuss further?

Here's an excerpt from a Fordham University article (written for lawyers about tech questions). It's from 2016 but I think it's still the case. The data on the phone is recoverable if it hasn't been deleted from the device, or the phone turned in and wiped. As far as what the phone carriers have, they keep "call log" data, but not the content. See below.

<https://news.law.fordham.edu/jcfl/2016/06/02/cell-phone-forensics-powerful-tools-wielded-by-federal-investigators/>

A. The Text of Texts Are Often Only Available On The Device Itself

Cellular service providers retain records of the parties to a text message and the date and time it was sent. **They do not, however, retain the content of text messages for very long, if at all.**

In 2010, the American Civil Liberties Union ("ACLU") served a Freedom of Information Act ("FOIA") request to the Department of Justice seeking an internal memorandum regarding the data retention plan of major cellular service providers. The memorandum contained information from the six largest cell phone carriers in the United States: Verizon, T-Mobile, AT&T/Cingular, Sprint, Nextel and Virgin Mobile. **All of the providers retained records of the date and time of the text message and the parties to the message for time periods ranging from sixty days to seven years.**

However, the majority of cellular service providers do not save the content of text messages at all. As of 2010, Verizon Wireless saved text message content for three to five days while Virgin Mobile retained text message content for ninety days but stated that it would only disclose that content if law enforcement had a search warrant containing a "text of text" request. As recently as November 25, 2015, T-Mobile's privacy policy indicated that it retained "calls and text messages you send and receive (but we do not retain the content of those calls or messages after delivery)." Nathan Freitas, a fellow at the Berkman Center for Internet and Society at Harvard University explained that **the carrier may have "details of whom [was]texted and when" but "the actual text is what is really hard to get, if not impossible" from the carrier.** The Boston Globe reported that carriers, including the four biggest in the country - **AT&T, Verizon, T-Mobile and Sprint - have publicly confirmed that they delete their copies of messages after delivering them.**

I hope all of this is helpful. I composed this in a way that could be shared as-is with the subcommittee on technology and eventually with the full Committee if they decide that would be good. Or, you can select certain portions that you think are best.

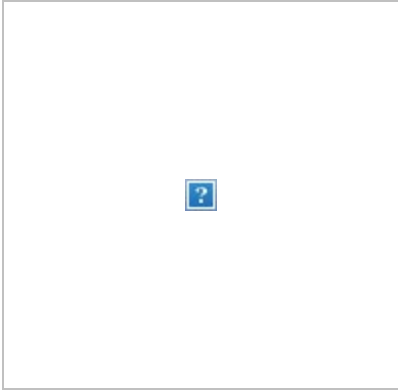
Let me know if you have any questions or need anything else...

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Member (2021-): Maine State Archives Advisory Board:
<https://www.maine.gov/sos/arc/about/advisory.html>



From: Broome, Anna <Anna.Broome@legislature.maine.gov>

Sent: Friday, October 29, 2021 1:25 PM

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Subject: RTKAC Technology subcommittee questions

Hi Eric,

I think we've met before during my State and Local Government Committee days but I'm new to the RTKAC whereas Peggy and Colleen are old hands at it. Anyway, I'm the third wheel! I'm co-staffing the technology subcommittee and that's why I'm emailing you.

As the Commission starts to work on the issue of maintaining public records that are digital in nature, I was wondering if you would be able to help me with some basic information. What policies does the state have already in terms of retaining public records for email, text messages, chats etc? I've found a few things on line but I'm not really sure what is official or the latest guidance. Can you help please? I'm hoping to gather this before the subcommittee meetings (we're working on that too!).

Thank you! Have a good weekend!

Anna

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