

UNIVERSITY OF ILLINOIS
URBANA-CHAMPAIGN SENATE
Committee on Information Technology
(Final; Action)

IT.16.02 Report on University Access of Employee Electronic Communications

BACKGROUND

On August 7, 2015, the University of Illinois issued a news release¹ describing the results of an official ethics inquiry, launched to investigate whether or not Urbana-Champaign campus employees used personal e-mail accounts for University-related communications and did not make those e-mail messages available to the University to respond to a Freedom of Information Act (FOIA) request. This ethics inquiry led to the bulk publication of the e-mails collected by the inquiry. Prompted by these events, many faculty and staff have been concerned and confused about the policies regarding proper use of electronic communications for official University business, as well as the proper procedures and privacy rights involved in fulfilling a FOIA request.

FINDINGS

The University has treated any electronic communications regarding University business as potentially subject to FOIA², even if they are made through a non-university resource, such as a personal Google gmail account. As stated in the 8/7/15 news release, “[t]he Illinois FOIA statute does not specify whether emails in personal email accounts are necessarily subject to FOIA, and Illinois case law is likewise not settled on this issue.” Regardless, if the University is in possession of electronic mail from a personal e-mail account that relates to University business, then the University will include such e-mail in determining its response to a FOIA request.

The University of Illinois maintains a FOIA website³ that includes the FOIA Log that lists all of the recent FOIA requests to the University. As the University FOIA website explains, “requests filed under the Freedom of Information Act, response letters, and responsive documents are themselves public records and subject to FOIA requests.” The 8/7/15 news release reports that “[t]he University receives, on average, about 90 FOIA requests each month.”

The University’s practice for fulfilling a request is to ask the individual subject of the request to provide his or her own records. However, in extraordinary circumstances, the University *can* (under current University policy) access these records without the individual’s permission. The Campus Administrative Manual (CAM) Part VIII-1.1, Section VI-C: “Process for Requesting Disclosure of Contents of Messages and Files” describes this procedure. . In ¶11, it states:

“Requests for disclosure are made to the campus Chief Information Officer (CIO), who ... carries out these responsibilities in consultation with Legal Counsel and other appropriate offices. The CIO may designate an individual to act on his or her behalf in fulfilling these responsibilities. All authorizations by the CIO or designee will include specifications for the form and timing of notification to the person whose information is accessed or disclosed.”

¹ <http://uofi.uillinois.edu/emailer/newsletter/77321.html>

² “What all Employees Should Know About Electronic Communications and Email Use.” Ethics Matters, Issue #7, May 2012, <https://www.ethics.uillinois.edu/cms/One.aspx?portalId=1216&pageId=9274>. See also: Records and Information Management Services. <https://www.uillinois.edu/cio/services/rims>.

³ <http://www.uillinois.edu/FOIA>

In ¶3 “Notification of Affected Individual(s),” it states:

“When the CIO ... provides access to, and disclosure of, email messages and/or file content under provisions of external laws, regulations or applications of this University policy, the requesting administrator will **normally** notify in advance the individual(s) whose information is to be released, indicating the information to be released and the law, regulation or policy that governs the release. If individuals are not notified in advance, the CIO will be responsible for determining when notification is appropriate and for ensuring that such notification is carried out. Circumstances in which notification may be delayed include, but are not limited to, (1) the presentation by legal bodies of subpoenas or other instruments prohibiting advance notification, (2) situations where the safety of individuals is involved, or (3) **investigations or inquiries conducted under published University policies.**” [Emphasis added.]

The term “normally” highlighted in this excerpt is particularly troubling. Some examples are given where e-mail could be disclosed with notification occurring after the fact, and one of these examples is “(3) investigations or inquiries conducted under published University policies.” Such inquiries would include the aforementioned ethics inquiry, and could possibly include the response to a FOIA request.

The Illinois Attorney General’s website provides an authoritative FAQ⁴ on FOIA. It indicates that a public body has 5 business days to respond to a FOIA request, but this time period may be extended by an additional 5 business days if the request “requires the collection of a substantial number of documents,” “an extensive search,” “additional efforts to find,” or “further review to determine if they are exempt from FOIA.” Furthermore, additional time can be granted if a statutory reason and deadline for response can be provided within five business days. If an employee’s e-mail is the target of a FOIA request, and the employee cannot be notified in time to respond within five days, an additional five days would be available since the employee would be needed to determine if the e-mail was exempt from FOIA.

If an employee uses University e-mail resources for university business, then the University could (in non-“normal” circumstances) access the e-mail without notifying the employee in advance. If an employee uses non-University e-mail resources for university business, then the University would be required to notify the employee in advance before the e-mail could be accessed. This creates a situation that could encourage University employees to use non-University e-mail accounts for University-related business. Hence we recommend that the CAM be revised to better balance the privacy rights of an employee with the property rights of the University and the right to know of the public.

Part VIII-1.1, Section IV-D-2 of the CAM allows university employees to use their e-mail accounts, internet connections and computers for “limited” personal use so long as it does not “interfere in any way with University functions or the Employee’s duties.” This use of any university resources, including these, must follow the Ethics Act which precludes political or commercial uses. ***The Senate IT Committee is aware of no such policy that requires that all University-related e-mail occur through a University e-mail account.***

University Counsel, the University FOIA Officer and the University Ethics Office are charged with ensuring the timely response to FOIA requests. Hence, University Counsel and these others represent the interests of the University of Illinois, and not the interests of any one of its employees when those interests are in conflict or are inconsistent with the interest of the University. As the 8/7/15 press release indicates:

“Today the University is publicly releasing emails from personal email accounts related to James Kilgore, Steven Salaita, and the proposed Carle Illinois College of Medicine, whether they were subject

⁴ “Illinois Freedom of Information Act - Frequently Asked Questions By Public Bodies”
http://foia.ilattorneygeneral.net/pdf/FAQ_FOIA_Government.pdf

to FOIA or not. This should fulfill the specific incomplete FOIA requests, and the additional emails around those three subjects are being released in the interest of transparency and disclosure.”

The University’s public release of e-mails demonstrates that it acts in the interest of the University, and does not act in the interest of any individual employee involved. It released these e-mails publicly without adequately notifying all of the employees involved, as reported to the Senate IT Committee at its 17 February 2016 meeting. In that case, employees were notified only minutes before the publication of e-mails, the notification did not indicate which e-mails were published, and the notification did not provide adequate opportunity for the employees to ensure the e-mail content was appropriate in whole for the intended disclosure. As a result, the published e-mails included extraneous elements that, for example, the Freedom of Information Act would have clearly and convincingly omitted as not an appropriate “public record” under its “personal information” exclusion.

RECOMMENDATIONS

Based on these findings, the Senate IT Committee recommends that the Campus Administrative Manual Part VIII-1.1, Section VI-C, ¶13 be revised as follows:

- 1 **3. Notification of Affected Individual(s):** When the CIO or a designated authorized unit administrator
2 provides access to, and disclosure of, email messages and/or file content under provisions of external
3 laws, regulations or applications of this University policy, the requesting administrator will ~~normally~~
4 notify at least 24 hours in advance the individual(s) whose information is to be released, indicating the
5 particular information to be released external to the university, and the law, regulation or policy that
6 governs the release. If individuals are not notified in advance, the CIO will be responsible for
7 determining when notification is appropriate and for ensuring that such notification is carried out.
8 Circumstances in which notification may be delayed ~~include, but are not limited to,~~ (1) the presentation
9 by legal bodies of subpoenas or other instruments prohibiting advance notification, or (2) situations
10 where the safety of individuals is involved, ~~or (3) investigations or inquiries conducted under published~~
11 ~~University policies.~~

The Senate IT Committee seeks further to advise the faculty and staff of the University of Illinois of their privacy rights to properly respond to a FOIA request.

Personal Counsel. University Counsel, the University FOIA Office, AITS and Tech Services can and do provide very helpful and very useful assistance to satisfy a FOIA request, but do, as they should, act primarily in the interest of the University. They must also oversee a time-sensitive task within a fixed budget, and when faced with limited resources, will ensure that sufficient information is disclosed to satisfy the FOIA request, but may also disclose information that the Act allows to be excluded. An employee may seek additional, independent counsel to determine what portion of e-mails and other electronic communication can be properly and lawfully excluded from FOIA disclosure.

Scope. The Freedom of Information Act (5 ILCS 140) applies to “Public Records” which it defines in Sec. 2(c) as “all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials ***pertaining to the transaction of public business***, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.” [Emphasis added]

Exemptions. The Freedom of Information Act⁵ (5 ILCS 140) includes a section (7) listing exemptions. The following exemptions should be considered when seeking to fulfill a FOIA request.

⁵ <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=85>

1. Private Information 7(1)(b). Sec. 2 defines this as unique identifiers, and includes social security numbers, driver's license numbers, license plate numbers, UIN's (employee identification numbers), personal financial information, passwords, medical records, home address, personal phone numbers and e-mail addresses.
2. Personal information contained within public records 7(1)(c). The test for such information is that (1) it would be considered highly personal and its disclosure considered highly objectionable by a reasonable person, (2) the subject's right to privacy outweighs the public's right to know regarding the public information in question, and (3) is not information that bears on the public duties of public employees.
3. Preliminary drafts, notes, recommendations and memoranda 7(1)(f). "... and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body."
4. Trade secrets 7(1)(g). Or any such information provided through a non-disclosure agreement.
5. Research 7(1)(i). If the disclosure "could reasonably be expected to produce private gain or public loss."
6. Educational and research material 7(1)(j). Exams, answer keys, "course materials" and "research materials" are all specifically identified and excluded. Also specifically excluded are evaluations of faculty by "their academic peers."
7. Records relating to collective bargaining 7(1)(p). Except for any final contracts.
8. Information about students 7(1)(z). The full specification, as listed in Sec. 25 of the Illinois Credit Card Marketing Act of 2014⁶, is a subset of the private information already excluded by 7(1)(b).

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And with the additional consideration and endorsement of the Committee on General University Policy.

⁶ <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3124>