



**NICOLE GALLOWAY, CPA**  
**Missouri State Auditor**

October 2, 2019

To Whom It May Concern:

As Missouri's independent watchdog, my office encourages local and county political subdivisions to adopt best practices relating to management, operations and fiscal responsibility. During our audits, we examine the operations of local governments to ensure they are accountable to taxpayers, and we identify potential waste and opportunities for fraud.

My comprehensive audits are successfully completed when entities have a meaningful retention policy for public documents and records. A public record is any "document, book, paper, photograph, map, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business."<sup>1</sup> These records must be capable of being preserved.

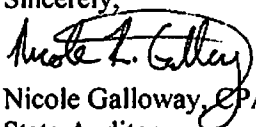
This is among the reasons why I am writing to encourage you and all local and county government officials to prohibit the use of self-deleting applications while conducting public business. Specifically, political subdivision officials and employees should not use applications or programs that automatically destroy, delete, or otherwise render unreadable public business communications. These applications allow for public business to be conducted in secret and prevent taxpayers from holding government accountable.

The scope of retention policies related to electronic communications is outlined in the attached guidelines, approved by the State Records Commission on May 14, 2019.<sup>2</sup> As a member of the Records Commission, I voted for these guidelines and was encouraged that other statewide officials joined me. These policies previously were adopted by the Local Records Board on August 21, 2018.

If a message references public business or official duties, then it is a record and falls under the appropriate retention schedule.<sup>3</sup> As described in the guidelines, an application that automatically deletes communications prevents retention of a record.

Missourians expect government to be open and honest when conducting public business. Banning self-destructing text messaging by public entities, officials and employees is another step to ensuring transparency, and is the best antidote to any perceived or actual government impropriety.

Do not hesitate to contact my office if you need additional information.

Sincerely,  
  
Nicole Galloway, CPA  
State Auditor

Enc.

<sup>1</sup> The State and Local Records Law, Section 109.210(5), RSMo.

<sup>2</sup> Missouri Secretary of State Records Service Division, *Electronic Communications Records Guidelines for Missouri Government, for State and Local Government*, May 14, 2019.

<sup>3</sup> Sections 109.200 to 109.310, RSMo.

Missouri Secretary of State  
Records Services Division  
Electronic Communications  
Records Guidelines for Missouri  
Government

FOR STATE AND LOCAL GOVERNMENT

**Approved by:**

**Local Records Board**

**August 21, 2018**

**State Records Commission**

**May 13, 2019**

## **Purpose and Overview**

These guidelines will assist state and local government agencies in developing policies to manage communications, regardless of format (memos, text messages, emails, or any format devised in the future). These communications, or messages, have always been records. The retention period of a given record is based on its content and function. For hard copy communications, such as written memoranda and letters, the agency of origin maintains these through filing. With files maintained only electronically (for instance, email) the agency manages the server storage of these records. For non-government controlled formats (examples include: text messages and social media) the service provider is not responsible for maintaining the records; it is the responsibility of the agency that owns the phone, device or account, to maintain that record for its retention period. Private phones, email accounts and computers, that are used to send, receive, or otherwise handle public, or official, business are also subject to records retention requirements. It is the responsibility of the account owner to preserve and maintain these records.

## **Scope**

The following guidelines are designed to provide assistance to state and local government agencies when creating electronic messaging policies for their offices and are intended to address records as defined by 109 RSMo. Employee personal records and information, which do not fall under the definition of a record per 109.210(5) RSMo, are outside the scope of these guidelines. Throughout these guidelines, reference may be made to personal or work cell phone and e-mail accounts. The same concerns apply whether the message originates from a personal or work account, or device. Content is key. If the message references public business or official duties, then it is a record and falls under the appropriate retention schedule. Please note that public records in Missouri are governed under two distinct statutes 109 RSMo, which deals with records management and retention, and 610 RSMo, the "Sunshine Law" which governs access to public records. These guidelines address the development of a total records policy, which will incorporate both statutes, however the primary discussion is directed to issues under 109 RSMo.

## **Official Records per Missouri Statutes**

As referenced above, a public record is any "document, book, paper, photograph, map, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included within the definition of records as used in sections 109.200 to 109.310 RSMo, and are hereinafter designated as "nonrecord" materials."

An email is an example of a format or "physical form" per 109.210 RSMo, the same as a punch card, paper letter, microfilm, etc. The physical form of the record is irrelevant, rather, it is the content of the email, or any other record, that determines how long it must be retained. The length of time a state record is to be retained can be found on the Missouri State Agency General Retention Schedule or an Agency Records Disposition Schedule that has been approved by the State Records Commission per 109.250(2). The length of time a local government record is to be retained can be found on Records Retention Schedules that have been approved by the Local Records Board per 109.255 RSMo.

The location of the record does not matter. Records stored within an agency, in a warehouse, on a personal device or on a third-party server must be maintained for their full retention period. If an agency is unsure if information qualifies as a record, they should review *What Is A Record?* at: <http://www.sos.mo.gov/records/recmgmt/whatisarecord.asp>.

#### Further Assistance

- The Division of Records Management assists agencies within state government with the continual process of renewing and revising their records management practices. State agencies can contact Records Management at 573-751-3319 or [recman@sos.mo.gov](mailto:recman@sos.mo.gov).
- The Local Records Division advises, educates and encourages custodians of local government records in the use of sound records management and archival practices. Local agencies can contact the Local Records Program at 573-751-9047 or [local.records@sos.mo.gov](mailto:local.records@sos.mo.gov).
- The Missouri Sunshine Law portion of the Attorney General's website, available at <https://ago.mo.gov/missouri-law/sunshine-law> is a resource to help government officials understand Missouri Sunshine Law and its implications for Missouri's public and quasi-public governmental bodies, members of those bodies, those that conduct business with a public governmental body and private citizens. The Attorney General's Office can be contacted at 573-751- 3321 or [sunshinelaw@ago.mo.gov](mailto:sunshinelaw@ago.mo.gov).

#### Are All Communications Considered Records?

All communications are records, the function and content of the message will determine its retention period. Electronic messages do not have a different retention period than hard copy records. A "record" is defined as any "document, book, paper, photograph, map, sound recording or other material, **regardless of physical form or characteristics**, made or received pursuant to law or in connection with the transaction of official business" (109.210(5) RSMo). Transitory messages have a short retention, but messages that set, or form the basis for, policy have a longer retention period. In order to determine the retention, the function and content of the message must be determined by asking two questions:

- What is the message about (content)?
- Why was it sent and for what purpose (function)?

Once the type of record has been identified [See Appendix A for an example of how to identify records], use the appropriate retention schedule to determine the retention period. It should also be noted that during litigation, text messages, email and other communications are a standard part of discovery for court cases and must be maintained under a temporary hold until litigation is concluded, regardless of having met minimum retention.

To determine the retention of a record, state agencies should consult the appropriate retention schedule, located at: <https://www.sos.mo.gov/records/recmgmt/introduction>, or through the SMART System. Local government entities may find their retention schedules at: <https://www.sos.mo.gov/archives/localrecs/schedules/>.

## **Creating a Policy**

The Office of the Secretary of State, Records Management and Local Records Divisions encourage government agencies to create internal policies to govern how their electronic messages are managed, what type of content may be communicated electronically, and their responsibilities for retaining electronic messages. When drafting a policy, an agency should consider the following:

- What agency business is appropriate to conduct via electronic message?
- Who is allowed to conduct agency business via electronic message? (every employee, specific employees, etc.)
- Will only messages relating to agency business be allowed on agency owned devices?
- Can personal devices be used for agency business?
- Who will decide what type of record it is? (i.e., who evaluates the record content and function?)
- How will the agency collect and store the messages?
- How will the retention policy be applied?
- What will happen to messages that have met retention?
- How will the policy be communicated to employees?
- How will compliance be monitored?

## **Drafting a Policy for Text Messages and other Third Party platforms**

An agency cannot abrogate its responsibility for maintaining records. Social media and text messaging are just two examples of services in use by government where official records may be found, but not under the control of the government entity. It is incumbent on the entity to ensure that any records created on these third-party services are preserved; it is not the responsibility of the service provider. Therefore, policies for the use of these services are vital to meet recordkeeping obligations. Take, for example, text messaging.

Text messaging has become part of everyday communication. Sometimes texting is used by government employees to conduct official business, therefore it is the responsibility of the agency to create policies and procedures concerning the use of text messages for official business. The policy will also need to address what will happen with the text message once it has been identified as a record, and how to keep identifying information (phone numbers/names) and the order of the messages if multiple messages are part of the record.

## **Retention of Text Messages**

Part of the policy for text messages should address how the text messages will be saved until they meet retention. There are multiple ways an agency can ensure it is meeting the requirements of record retention for text messages.

Policy may require a user to save/forward text messages through their phones' operating system to their official email. Alternatively, some other application/software solution may be sought to capture messages. If all else fails, contracting with a third party (i.e., service provider) to store and manage text messages may be a solution—note that this is the least satisfactory in terms of providing adequate response for records requests.

Once an agency determines the preferred method for capturing messages, it will need to decide how to store the messages and ensure the retention schedule is being applied.

### **Drafting a Policy for E-Mail**

E-mail is routinely used to conduct official business and each agency needs to create policies and procedures to ensure records created via e-mail are being handled properly.

Effective management of e-mail records requires the participation of everyone within the agency to ensure that the policies and procedures outlined by the agency and the retention schedules are being followed. Review Policies and procedures regularly to ensure continued compliance with regulatory or legal requirements.

### **Retention of E-mails**

Preserve e-mail that fulfills the definition of a record within a recordkeeping system. If the record is an open public record, maintain it in a format that makes it available to the public. Agencies must ensure their records are accurate and complete regardless of physical form or characteristics throughout the retention period. Several areas must be addressed to ensure e-mail messages are accurate and complete. The recordkeeping system must be able to capture the appropriate information, to ensure the records are easily accessible throughout their retention period, and to ensure the timely disposition of records once their retention period is met.

See Appendix B for more information regarding electronic message retention concerns.

### **Training and Compliance**

Once a policy is established, it is important to ensure all agency personnel are familiar with, and understand their responsibilities when complying with the policy. The agency will need to be able to demonstrate compliance with the policies and procedures through a process of monitoring and auditing.

### **Records Retention**

Agencies may use, but should not rely on, third party providers to retain records, as that responsibility lies solely with the agency creating or receiving the records. All communication is a record of some classification. No communication should be automatically destroyed under any circumstances. The use of auto delete applications and programs should be prohibited by policy, as they do not allow a determination as to the appropriate retention period for a message. Even transitory messages, which may be destroyed immediately, should be evaluated before deletion. Agencies should ensure employees know their responsibility regarding the forwarding/saving of communications. Agencies should have a plan established for the easy retrieval of requested messages that have not yet met retention.

Retention periods for communications vary from transitory to permanent. The retention time will depend on the content and function of the record. If an agency is unsure how long a record needs to be retained state agencies should refer to the Missouri General Retention Schedule, their Agency Records Disposition Schedule or contact the Division of Records Management. Local agencies should refer to their Records Retention Schedules or contact the Local Records Division.

**Sunshine Requests**

Communications are subject to 610 RSMo, more commonly known as the Sunshine Law. Government records on cell phones (business and personal phones) are subject to Sunshine requests, and legal discovery. Cell phone providers are not obligated to respond to agency requests - unless it is specified in the Terms of Use or Terms of Service. For this reason, an agency policy should be established if government business is conducted via cell phone. E-mail accounts (business and personal) can be subject to a Sunshine request and legal discovery. An agency should ensure that electronic communications are stored in a manner that retains all of the necessary information.

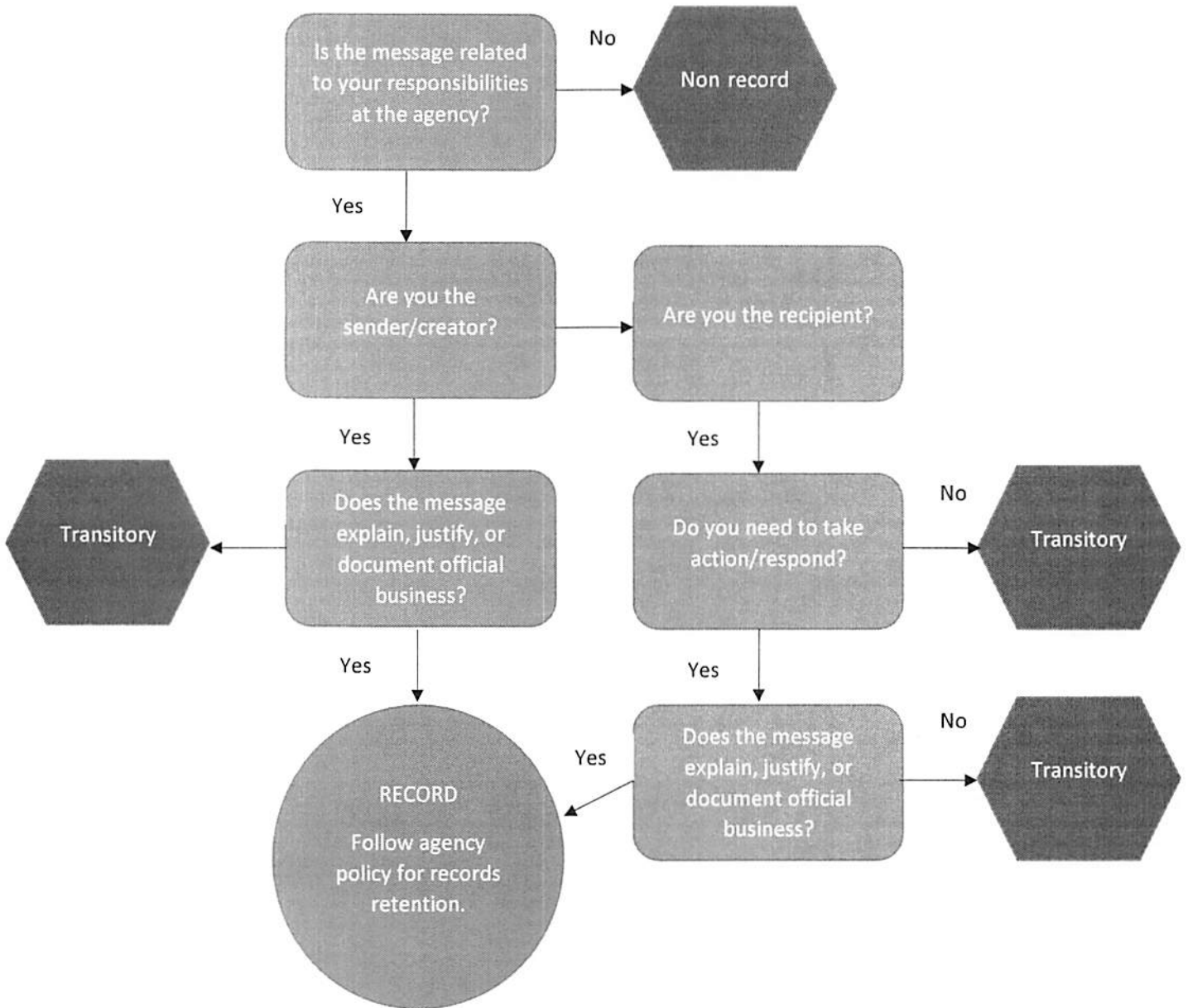
If the cell phone is lost, broken, or the cell phone provider changes the Terms of Service, records stored solely on a device could be at risk. Policy should dictate that messages are captured as they are created. Agencies must have a plan and process in place for how records will be saved because without adequate preparation, there is nothing the agency can do to protect itself.

State Government Agencies should access their retention schedules through the SMART System. Or, they may be found at: <https://www.sos.mo.gov/records/recmgmt/introduction>

Local Governments may find their retentions schedules at:  
<https://www.sos.mo.gov/archives/localrecs/schedules/>



Appendix A: Flowchart to determine if an electronic message is a record and its disposition<sup>1</sup>



<sup>1</sup> This is a generic representation for determining whether a communication is a record. Some Elected and Executive positions have different retention requirements—consult your record schedule.

## Appendix B: Areas to Address for Electronic Record Retention

<b>Transmission Data</b>	<p>Agencies should attempt to ensure that as much transmission data as possible is kept within the recordkeeping system. At a minimum the recordkeeping system must include the name of the sender(s), the recipient(s), and the date received. Text messages should include the phone number(s), and be maintained in order. Additionally, if receipt acknowledgements are a part of the e-mail system, users should include those as a part of the record when appropriate. (For example, it may be appropriate to request a receipt acknowledgement when distributing a new policy to staff.) It is important to note that many e-mail systems use aliases to identify users. Therefore, a means of deciphering who the alias belongs to must be maintained. The same is true for distribution lists. There must be a method to identify to whom the individual e-mail address or phone number belongs. However, when the e-mail is received from an e-mail system outside an agency's control, this may be an impossible task. Nonetheless, agencies must make a reasonable attempt to do so.</p>
<b>Authenticity</b>	<p>The system must ensure that once the record is a part of it, it cannot be altered.</p>
<b>Attachments</b>	<p>If an electronic message includes an attachment that meets the definition of a record, it must be maintained.</p>
<b>Calendars and Task Lists</b>	<p>Some e-mail systems include calendars and task lists for each user. If the information contained in the calendar or task list documents decisions, policies, procedures, resource expenditures, operations, or delivery of services, it may meet the definition of a record. Therefore, agencies must develop a method of retaining those records within the recordkeeping system.</p>
<b>Disposition</b>	<p>Materials' final destruction or transfer as determined by their retention period.</p>
<b>Temporary Hold</b>	<p>Once a record series and time period have been identified as part of litigation or audit, a temporary hold order must be placed on the covered records. Agencies must establish procedures to ensure that electronic records are included within the temporary hold order.</p>