

## NYS Government Should Match Federal Transparency and Save Emails for at Least Seven Years

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Starting in early 2015, federal agencies will be required to save employee emails for at least seven years, and to save the emails of executive staff permanently. In sharp contrast, New York State is automatically destroying the emails of government employees after just 90 days, using a centralized computer system, unless they are saved by the employee who received them. Experts on archiving public records, in academia and government, believe New York's policy of automatically destroying emails will inevitably result in the destruction of some emails which are public records subject to disclosure under the state Freedom of Information Law.

New York's current email auto-destruction policy was implemented<sup>1</sup> by the Cuomo administration in June 2013, without public notice or comment, and completely reverses previous state practice. In their 2010 guidance to state agencies,<sup>2</sup> records retention experts at the NY State Archives called any policy which automatically destroys emails "unacceptable." Record retention experts in academia and government agree, and we spoke to several who expressed universal concern that New York's policy of automatically destroying emails after 90 days will inevitably result in public records being destroyed, thus reducing the transparency and accountability of New York State government.

For example, while the New York State Freedom of Information Law (FOIL)<sup>3</sup> requires agencies to provide public records in its possession upon request, it does not require agencies keep any records. Agencies which have destroyed those records face no sanctions under FOIL; they actually save the time and expense of responding to requests for records. Likewise, whistleblower lawsuits brought under the New York False Claims Act<sup>4</sup> will be hamstrung if agencies allow for the automatic destruction of employee emails.

Based on our conversations with academic experts and officials at the National Archives and Records Administration and New York State Archives, we strongly recommend that New York State matches the federal government's email retention guidelines, known as "Capstone," which requires the emails of federal employees to be saved for at least seven years.

## Flawed premises for mass deletion of government emails

In June 2013, the Cuomo administration quietly adopted a policy of automatically deleting the emails of state employees which were left in email inboxes for more than 90 days.<sup>5</sup> The state's policy was adopted without any public discussion or apparent study.

Employees at state agencies were informed of the change by memorandum, shortly after the state consolidated its two dozen email systems into one centrally administered Microsoft *Office 365* system controlled by the state Office for Information and Technology Services (ITS.) The centralized system is programmed to automatically delete emails which are not manually saved by state employees. That memo was leaked to the news media by an agency employee, and was never discussed with civil society groups concerned with Freedom of Information and public records retention.

The destroy by default email policy is accompanied by three rationales for deleting agency employees' emails after just 90 days. First, the memo claims that federal agencies and corporations have implemented 30, 60, or 90 day email retention policies. Second, it noted retaining enormous amounts of email is difficult to manage. Third, the memo claims that the mass deletion of email will improve agency operations.

## Federal email retention: a seven year minimum in 2015

While in June 2013, there may have been a handful of federal agencies with email retention policies similar to New York's current policy, this is no longer the case. Capstone will be formally adopted in early 2015 after a long period of public review,<sup>6</sup> as well as an assessment of best practices by the National Archives and Records Administration (NARA) and the Office of Management and Budget. Under the Capstone approach, the emails of agency executive staff, including White House emails, will be retained permanently, while the emails of non-executive staff will be retained for at least seven years.<sup>7</sup>

The National Archives settled on seven years in part "based on the standard period for bringing forth legal claims (such as those related to financial matters)." The Archives's Capstone standard is a minimum – it allows agencies to designate "a longer retention period for other levels of staff, such as middle management, as business need requires."<sup>8</sup> Again, the emails of executive staff will be retained permanently.

The Capstone uniform email retention policy is possible because of the very low cost of modern email storage and archiving. Today, nearly all federal

agencies use cloud-based email such as Microsoft *Office 365* or Google *Gmail*, which can store and retrieve decades of email at a fraction of the cost of older systems. (New York State agencies also use Microsoft *Office 365*.)

## **NY should not use the worst federal agencies as a model**

The administrative memo announcing New York's 90-day automatic email destruction policy cites unnamed federal agencies, which retain emails for a few months. But as noted above, beginning in 2015, federal government agencies (including the White House) are going to save employees' emails for a minimum of seven years. Officials from the National Archives told Reinvent Albany that any agency deleting its email after only a few months is badly lagging behind its peers, and has an obsolete email retention policy.

For example, the Central Intelligence Agency recently proposed an email retention policy of retaining all employees' emails for three years after the employee leaves the CIA's service.<sup>9</sup> The Senate Judiciary Committee's Chairman Patrick Leahy and Senator John Cornyn, strongly opposed this plan,<sup>10</sup> saying:

“In an era when critically important government activities and decisions are conducted via email, a plan to delete the majority of emails at any agency should raise great concern.”

The CIA drew criticism from Senators for “only” retaining emails for three years after its employees quit. The National Archives says that agencies with even more out-of-date email retention policies and practices are the reason that NARA and the Office of Management and Budget developed the uniform Capstone seven year minimum retention policy.<sup>11</sup> In other words, the Cuomo administration chose the federal agencies with the oldest and worst email retention policies as the state's model for its 2013 email destruction policy. In reality, federal agencies are retaining emails for close to a decade, not 90 days.

## **Big corporations are not a model for NY government transparency**

It is unfortunate that the Cuomo administration cited corporate email retention policies as a model for its 90 day automatic deletion policy.

Unlike government agencies, businesses are not part of a democratic government responsible for managing public records for the public interest; they are not subject to FOIL or the Open Meetings Law, and they are not expected to be transparent and accountable to voters and tax payers. FOIL presumes that records held by agencies are public records, subject to disclosure, unless they meet certain limited exceptions. An automated “destroy by default” policy

turns this presumption on its head; records can't be disclosed if they've already been deleted. This reduces transparency and accountability.

For businesses, this is precisely the point. Businesses are urged to destroy emails as quickly as possible with the goal of reducing the risk of unfavorable evidence for litigation. This is the opposite of what public agencies should be doing. Here is a quote from *Inside Counsel Magazine*<sup>12</sup> which is representative of the legal advice given to businesses on the topic of email retention:

“Businesses can dramatically cut cost and risk in litigation by adopting, and more importantly enforcing, appropriate document retention policies that ensure the routine destruction of all [email] that need not be maintained for legal or business purposes. Short time periods (e.g., 30 days) and small size limitations (e.g., megabytes, not gigabytes) are key.”

Reducing accountability appears to most experts to be the main reason government agencies adopt corporate style email destruction policies. According to Mark Diamond, chief executive of the records management consulting firm Contoural, governments adopt email destruction policies from the business world in order to “protect themselves from potential lawsuits and Freedom of Information requests.”<sup>13</sup> Journalists agree, and the Reporters Committee for Freedom of the Press says that New York's automatic deletion policy is “inconsistent with the goals of Freedom of Information Laws.”<sup>14</sup>

Essentially, businesses are told to reduce the public's ability to hold them accountable and responsible for their actions. That may be sound business advice, but reducing transparency and accountability by destroying potentially vexing public records should not be the goal of the Cuomo administration or New York State government.

### **NY's email system comes with 30 years of free email storage**

The Cuomo administration's memo explaining New York's 90-day email destruction policy says the state's “enormous amount of email data” is “difficult to manage and is interfering with operations.” This is not a credible claim. New York State's new *Office 365*-powered email system provides 50 gigabytes of email storage per user;<sup>15</sup> that's about 30 years of email storage for the average state employee. Thanks to modern search

*Office 365* also offers the unlimited archiving of emails at no extra cost, for those users who run out of space in their inbox.<sup>16</sup> With nearly endless storage

space for emails, a sophisticated search feature, and instant retrieval of archived emails, managing decades of email is relatively easy and straightforward. Indeed, it is common practice within businesses and organizations for employees to keep many months, if not years, of emails in their inboxes, and use those emails as an everyday reference for ongoing projects.

Taxpayers should wonder why state agencies are paying Microsoft for enough cloud-based storage to keep emails for several decades, while automatically destroying emails after 90 days, claiming it will save money. Ironically, automatically destroying emails this quickly may actually cost money in lost productivity, as state employees waste time sorting and saving emails and may accidentally delete important emails.

### **Public records experts reject automatic deletion as a waste of time and inherently error-prone**

Federal and state best practices, records management experts, and transparency advocates all agree that a 90-day destroy by default policy is a mistake. It unrealistically assumes that every state employee will unerringly classify, sort, and manage their own email records every time they get an email.

The National Archives and Records Administration explains<sup>17</sup> that:

“[P]lacing the responsibility on employees to make decisions on an email-by-email basis can create a tremendous burden. As a result, NARA recommends that agencies immediately begin to adopt automated or rules-based records management policies for email management...”

New York State’s current policy is the worst of both worlds for state employees. It puts the burden on employees to make decisions on an email-by-email basis by automatically deleting everything after 90 days unless the user has saved it to a designated folder.

Purging emails after just 90 days makes records management officers’ jobs difficult; if a state employee fails to manually save an email, it is extremely unlikely that an archivist or record retention officer will somehow know, and be able to tell that employee the email should be saved. More likely is that no one will ever know what public records have been destroyed, as large quantities of emails will be automatically deleted when users fail to maintain constant vigilance over their inboxes. Agencies will not even know what gaps they have created in institutional knowledge until months later, if ever.

*Information Management*, a leading records management industry publication,<sup>18</sup> bluntly describes the problem with forcing users to classify each email on a case-by-case basis, instead of using email tools which automatically sort and save relevant emails:

“Unless a schedule-based retention decision is made immediately after a message is sent or read, it may not be made at all. Pressured by a heavy workload, a well-intentioned but busy employee is unlikely to set time aside for daily, weekly, or monthly mailbox cleanup. Mailbox owners need retention rules that are easily implemented with a minimum of labor-intensive decision-making.”

The federal government and records retention experts agree, and so did New York until recently. In 2010, several years before New York’s current 90-day “delete by default” policy, the New York State Archives cautioned agencies against automatically deleting emails in a policy guidance titled *Developing a Policy for Managing Email*.<sup>19</sup>

In the guidance’s section on email retention, the State Archives wrote:

“Purging all emails after a defined time period is not an acceptable retention and disposition strategy. [...] It is highly unlikely, if not impossible, that a government or agency would [delete] only emails that are non-records.”

Put another way, automatic deletion of emails is virtually certain to delete emails which constitute records, according to the State Archives. The unnecessary automatic email destruction policy puts public records at risk, undermines the Freedom of Information Law, and requires state employees to laboriously go through their inboxes to sort and save emails they need for their work or to comply with archiving rules. Automatically destroying emails has these high costs while simultaneously reducing the transparency and accountability of the state government.

The reality is that email storage is cheap and getting cheaper, and modern search algorithms make large volumes of emails easy to retrieve.<sup>20</sup> In other words, it is far more cost effective to save every email and retrieve it using key words or phrases than it is to have employees categorize each email.

### **Save emails for at least seven years, like the Federal Government**

Because email storage is very inexpensive, and the risk of destroying public records is high when emails are destroyed automatically, we recommend that

New York State retain each employee email for at least 7 years. This would match the well-thought-out federal “Capstone” policy, and is actually shorter than some other state email retention policies, like North Carolina, where all state employee emails are archived for at least 10 years.<sup>21</sup>

The Capstone approach calls for all agency emails to be retained for seven years, and for executive staff emails to be retained permanently. The National Archives and Records Administration provides examples of agency managers whose emails should be saved permanently, including: agency and department heads, deputies and assistants, and the heads of program offices, regional offices, and their assistants. Capstone’s goal is to preserve the email of “high level policy/decision makers ... and those authorized to communicate on their behalf in the development of agency policy or important decision-making.”<sup>22</sup>

National Archives officials told us that Capstone mandates all emails be saved for at least seven years, in part because the Federal statute of limitations on employment-related lawsuits is six years. (New York State has an identical statute of limitations.) Leading experts in email retention from academia and the private sector concurred with the new federal requirement, and told us that “considering the technology in place and the various requirements for email retention, 7 years is reasonable.”<sup>23</sup> Another expert said that a minimum “retention period shorter than three years is not recommended,”<sup>24</sup> and agreed that 7 years is the practical minimum.

## Conclusion

The current 90-day delete by default email policy is a mistake. Government is not a business and should not adopt retention schedules designed with commercial interests, instead of the public interest, in mind. With New York’s new *Office 365*-powered email system, the State is paying for decades of email storage but only using a fraction of it. Federal agencies are on the cusp of adopting a seven-year minimum retention for all email. We strongly recommend New York follow the Federal best practices for email retention.

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