

Electronic Information and FOI Requests

The Freedom of Information Act requires that governmental agencies provide copies of certain “records” in response to proper requests by citizens. How does the obligation to respond apply to electronic information maintained by government agencies? In the last year, spurred by the 2006 amendments to the Federal Rules of Civil Procedure, courts and lawyers have focused a lot of attention on the obligation to respond to requests for electronic information in litigated cases. To our knowledge, no one has addressed the extent to which a governmental agency is required to disclose the electronic information in its possession in response to an FOI request.

The Federal and State Acts

Most lawyers know that there are several "Freedom of Information" Acts. There is a Federal FOI Act, 5 U.S.C. §552, which applies to Federal agencies under the Executive branch. It does not apply to Congress or to the Federal courts. It also does not apply to any state agency. Most states, however, have adopted their own similar acts, governing access to their agencies' records and information.

In 1996, the Federal government adopted a new Electronic Freedom of Information Act (E-FOIA). Loosely stated, this Act amended the FOI sections of the U.S. Code to add new requirements that Federal agencies make much of their information available online.

The Federal FOI Act, in its current form, requires that covered agencies provide certain "information" online, and it otherwise declares an obligation to provide "records" to people who request them. Unlike many other statutes, the FOI Act does not define the term "records", and the term is thus open to judicial interpretation. The Federal FOI Act does, however, directly address form of production issues in its section 552(a)(3)(B), newly added with the 1996 amendment:

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

Thus, it is clear that agencies which are required to respond to requests under the Federal FOI are required to provide the record in electronic format when requested in that format, if it is feasible to do so.

The Michigan FOI Act, MCL §15.231 et seq., does not include a similar express requirement. It does, however, provide a broad definition, under section 2(e), of the term "public record":

(e) “Public record” means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. . .

This last sentence does not exempt electronic documents from disclosure requirements. Instead, what it does is provide that the FOI requirements will not jeopardize the proprietary interests of software vendors. The very next subsection defines "computer software":

(f) “Software” means a set of statements or instructions that when incorporated in a machine usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result. **Software does not include**

computer-stored information or data, or a field name if disclosure of that field name does not violate a software license.

This language makes it clear that the reference in subsection (e) to "computer software" does not encompass electronic information or data that otherwise fits the definition of "public record". The software which is used to create and store data is proprietary in nature and usually has to be purchased and licensed; requiring that it be provided in response to an FOI request would improperly infringe on the rights of the software publisher. Think of "software" as a container, and "data" as the information that it contains. The container is not public property; the information it contains is.

Under these provisions, electronic information and data that is generated by or in the possession of a public agency is included in the general definition of "public record" under subsection (e).

The Michigan FOI in action

It is our experience with FOI requests that our law firm has submitted to various agencies in Michigan that most state and local agencies, when responding, will provide only paper documents, and will not include electronic information as part of their response. Our experience suggests that they do not even check for electronic documents when doing their surveys for responsive "records". If an employee has printed certain e-mail messages to paper, only those messages will be provided. If no messages have been printed out, none will be provided.

We believe that this approach is inconsistent with the requirements of the state FOI Act. In our opinion, if an agency has information or data which is available in electronic format, it is obliged to provide that information in response to a request. As a corollary, we also believe that it is obliged to look for electronic information as part of its survey in response to the request.

Form of production

What about the form of production? Is the agency required to provide its electronic information in electronic form? The Michigan FOI Act is silent on this point. Thus we would counsel a "rule of reason" approach.

If the request does not mention electronic documents, we believe that the following principles should be followed. If an agency has information in both electronic and paper form, it may elect to provide copies of the paper documents in response to a request. (It should, however, verify that each electronic record has a paper counterpart.) If it has information which exists only in electronic form, the agency may elect to print that information to paper and provide it on paper, or it may choose to provide it in electronic form. The latter choice may well be much less expensive and less time-consuming.

If the requesting party specifically requests that the information be provided in electronic form, however, it is our opinion that the agency is obligated to comply with that request.

There are several advantages to information provided in electronic form, advantages which are lost when the information is reduced to paper. E-mail messages (which have now become the primary means of communication for many agencies) can be submitted to text search procedures when provided in electronic form, and they can be imported to database programs which will help to organize them to permit searching, sorting, and filtering. Spreadsheets can be inspected to determine the formulas which have been used to do calculations, and the ranges of entries covered by those calculations. Spreadsheets can also be modified to filter out unwanted or irrelevant information, to focus on particular items, or to

compare the agency's information with similar information generated by another agency or by a private party.

The general principle underlying the FOI Acts is that citizens should be entitled to full access to the information that their government has, subject to the statute's defined exclusions, exceptions, and restrictions. Applying that principle, it is our opinion that the agency which has information in electronic form must provide the information in that form if requested to do so. In this fashion, the practice under the FOI Acts will be quite similar to that used in the new Federal Rules as it pertains to discovery in litigation – the requesting party has a right to specify a form of production, and the responding party must comply that request unless it can provide a good reason not to do so.

M. Sean Fosmire is a shareholder in the firm's Marquette office. He may be reached at (906) 226-2524 or at sfosmire@garanlucow.com