

PRIVACY RIGHTS, EMAILS AND PUBLIC RECORDS ISSUES FOR VSEA MEMBERS

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On 10/20/17, the Vermont Supreme Court decided *Toensing v. Attorney General of Vermont*, 2017 VT 99, ruling that a public employee's personal emails may qualify as a public records under certain circumstances. In addition, in other litigation currently before the Superior Court, a plaintiff is claiming the right to sue individual state workers directly under the public records laws. The following summary answers some of the questions surrounding these issues.

1. Can the State or another employer read my emails on the employer's own email system?

Almost certainly: yes. The employer's email system is its property, and you should assume they can read anything that you send or received on their system. There are some cases that suggest that an employee may in some situations have some privacy rights over materials on the employer's system, but don't count on it.

2. Can my employer compel me to hand over personal electronic communications or other private materials that I store in my home, on my own computer, or in my own email account?

Generally: No. You have a constitutionally protected privacy right to personal papers, records and communications in whatever form. That means that the government, whether as employer or law enforcement, cannot simply order you to turn over your computer or to let them search through your electronic communications. On the other hand, if they have a legitimate reason and some cause to believe the records show some form of misconduct or criminal activity, they will likely be able to compel disclosure. Consult with your lawyer or the union before you respond to any request for personal records or other personal matters. Unless the police are at your door with a warrant, you always have that right.

3. Are my personal email account communications open to the public?

It depends on whether they are public records. This is the central issue in the *Toensing* case. The Vermont Supreme Court answered that public records are open to the public no matter where they are stored. It's not a public record, however, unless it was "produced or acquired in the course of public agency business." 1 V.S.A. § 317(b). The public agency acts through you as its employee. The question is whether you wrote or received that message as part of your job. Is that email or record in your personal account part of the work you are paid to perform? If not, it is not a public record.

Your employer always has the right to insist that you give it your work product, regardless of the form or location. It also has the right to insist (as the State does) that official business be done on state email, or regulate whether you take work home. If you take a file home, it can insist that you bring it back. If you refuse, it can discipline you. It follows that it can ask you to produce such work product if responsive to a public record request.

Conversely, not every personal communication relating to work is a public record. Communications relating to union activity, criticizing management, or planning a co-worker's baby shower all may relate to work in some way, but they are not what you are paid for and are not public records. In addition, some matters are exempted from the public records laws. These include some personnel records, medical records, and other similar matters.

4. If a member of the public requests access to my personal emails, what will happen?

The Supreme Court made clear that the law doesn't give anyone the authority to paw through your personal electronic records looking for public records. The decision contemplates that the request from the member of the public should go to the agency, which then in turn asks employees to make a search of their own files and produce anything that is responsive. The matter ends there, unless the requestor can show that you are withholding records.

5. Can I be sued directly to produce records in my personal email account?

We read the statute and the decision to say that only the agency can be sued, and that they then need to get records from any individuals. We also believe that the Attorney General or the employer needs to provide legal representation if you are sued or otherwise implicated in a request. Those questions are not yet settled, however, since there is a case in Superior Court that was brought against the William Sorrell asking for his personal emails. The Attorney General is arguing that these claims can only be brought against the agency, and we are planning to file an amicus brief in support of that position.

6. How can I best protect my privacy?

Get a private account. If you don't have one, you can set up a gmail or yahoo account for free. Then use your work account for work and your personal account for everything else.