

## COMMUNICATIONS LAW

### Use of Personal Email Accounts

The question has been raised if personal email may be used to conduct Air Force business. The general rule is that personal e-mail may not be used to conduct official Air Force business; however there is a limited exception.

There are two issues with using personal e-mail to conduct Air Force business: placing controlled unclassified information (CUI) outside of the AF network and the storage of official records outside of the AF filing system. Both contain distinct risks to the information and the personal e-mail account when data is transmitted over commercial networks.

CUI is defined in DoD Manual 5200.01, Volume 4 (February 24, 2012) as information not released under the Freedom of Information Act (FOIA), 5 USC§552. Under FOIA's release to one, release to all rule (*see* NARA v Favish, 541 U.S. 157 (2004)) any information that is released by an authorized official to one party cannot be withheld to another party.

When e-mail is transmitted via a commercial network a copy of the e-mail sits on the commercial server; sometimes forever and can and in many cases is scanned by the commercial e-mail provider to ascertain information to sell advertising to the commercial e-mail user. Therefore, when an e-mail is sent over a commercial network the content of that e-mail is "released" under the FOIA test.

In addition, several DoD and AF policies prohibit the use of personal e-mails for CUI data. DoDI 1035.01 and AFMAN33-282\_AFGM2013-02, both prohibit storage of CUI data on non-government furnished equipment. AFI 33-332 also specifically prohibits sending personally identifiable information (PII) over commercial e-mail.

The second issue involving using personal e-mail for official Air Force business involves creating records outside of an Air Force records system. Under the Federal Records Act, e-mail is not considered a category of records, but a tool to create and transmit records<sup>1</sup>. E-mails may be considered a temporary or permanent record depending on the content of the e-mail. E-mail is subject to both FOIA and e-discovery requests.

E-mail created and transmitted on personal accounts can subject a personal account and computer to a search pursuant to FOIA and/or e-discovery. In the case of *Landmark Legal v EPA* (D.D.C. 2014), the EPA was required to search the personal e-mail accounts of several high level EPA employees who had conducted government business over their personal e-mail accounts to avoid subjecting the content of the e-mail to FOIA. In addition, Rule 34 of the Federal Rules of Civil Procedure would require the Agency to search personal computers if the government knew the personal computer had relevant information subject to a litigation hold or discovery request.

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<sup>1</sup> See OMB Memo 12-18.

To ensure that e-mail that is a government record is retained in the government records retention system. NARA has put forth guidance on this subject in NARA Bulletin 13-03, which in regards to personal e-mail states:

While agency employees should not generally use personal email accounts to conduct official agency business, there may be times when agencies authorize the use of personal email accounts, such as in emergency situations when Federal accounts are not accessible or when an employee is initially contacted through a personal account. In these situations, agency employees must ensure that all Federal records sent or received on personal email systems are captured and managed in accordance with agency recordkeeping practices. Agency policies and procedures must also ensure compliance with other statutes and obligations, such as FOIA and discovery.

The easiest way to comply with NARA's guidance is to copy a government e-mail account so that the e-mail is also recorded in the government e-mail system.

Personal e-mail may be used for non-CUI data, however the user is at risk of subjecting his personal account and computer to a search pursuant to FOIA and e-discovery and the user must ensure that the e-mail will be incorporated into the Air Force records system.

OpJAGAF 2014/16 17 September 2014