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**From:** Tom <Tom@will-law.org>  
**Sent:** Wednesday, January 6, 2016 7:35 PM  
**To:** DOA Public Records Board Comments  
**Subject:** Comment on Transitory Record Retention  
**Attachments:** 2015-01-06 Public Records Board Letter.pdf

Attached, please find written comments for the Public Records Board's January 11, 2016 meeting.

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January 6, 2016

Wisconsin Public Records Board  
Matt Blessing, Chair  
PublicRecordsBoardComments@wisconsin.gov  
**VIA EMAIL**

Re: January 11 Meeting regarding the retention schedule for “transitory” records

Dear Mr. Blessing and Members of the Public Records Board:

I am Deputy Counsel for the Wisconsin Institute for Law & Liberty, a public interest law center dedicated to the rule of law, individual liberty, constitutional government, and a robust civil society. I am also WILL’s open government specialist, and I have extensive experience litigating, negotiating, and advising on both open meetings and open records issues. I am unable to attend your January 11, 2016 meeting in person, but write here to comment on Agenda items 2, 5, and 6 relating to the Public Record Board’s actions last August on so-called “Transitory Records.”

According to Board guidance, Transitory Records are allegedly of such “temporary usefulness” that they require no retention period at all, and may therefore be instantly deleted. At your August 24, 2015 meeting, you modified the General Records Schedule for “Administrative and Related Records,” including the “Record Disposal Authorization” for “Transitory Records.” Previously such records were defined as “correspondence and other related records of short-term interest which have no documentary or evidentiary value.” Now, the definition includes records that have documentary or evidentiary value so long as they are of only “temporary usefulness.”

When you revisit the issue on January 11, I urge you to return to the previous definition of Transitory Records. Furthermore, at a properly-noticed meeting in the near future, you should eliminate the category entirely. Allowing government officials to subjectively determine whether a particular government record can be destroyed is an invitation to abuse. There is no meaningful oversight of the destruction of records, and no enforcement mechanism like there is for the Open Records Law. Giving officials such discretion robs the sovereign people of their right to oversee government action.

Assembly Speaker Robin Vos has publicly stated that keeping text messages is somehow onerous (never mind that deleting them takes more effort than keeping them), and that he doesn’t think the public should be able to read emails from “months and months ago.”<sup>1</sup> But the public

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<sup>1</sup> <http://www.wrn.com/2016/01/vos-no-open-records-changes-this-session/>

often doesn't find out there is something worth investigating until "months and months" after it happens. If politicians are willing to openly make statements so callous of the public's right to oversee their activities, how much worse will their secret abuses be?

Having a "temporary" category of records that can instantly be destroyed also incentivizes government officials to move their government business to text messages and other electronic forms of communication. Government business should be done in a way that creates a permanent record, but the Board's retention schedule encourages officials to use methods of communication that can easily be described as transitory, with the result that important documents can and will be discarded.

The Board also lacks the legal authority to create a category of records that are exempt from any retention. State law on the topic begins with a statement that records "shall be and remain the property of the state." Wis. Stat. § 16.61(4)(a). Retention is the default rule, and destruction the exception. The law then contemplates that records will be in state agencies' possession for up to a year before the Board's schedules give them permission to destroy them. *See* § 16.61(4)(b).

If a "transitory" category is retained, it should be defined as narrowly as possible. The former language, while not ideal, is vastly superior. The specific language in the amended schedule ill serves the goals of the records laws. The category is described as "Records of temporary usefulness that have no ongoing value beyond an immediate and minor transaction or the preparation of a subsequent (final) record." That description has many problems:

- 1) Most records are of "temporary usefulness" to their creators and recipients. The purpose of records laws isn't focused on the usefulness of records to the government, but their usefulness to the public.
- 2) Whether a record has "ongoing value" should be judged from the point of view of the public, not the record holder.
- 3) The "ongoing value" of a record is often not apparent immediately upon its creation or receipt. Records should be kept for a longer period of time specifically so they can be reviewed in the future in unforeseen circumstances.
- 4) Whether a transaction is "minor," is, again, better judged by the public than the officials who may have different interests.
- 5) The record law already exempts "drafts . . . prepared for the originator's personal use." Wis. Stat. § 19.32(2). By permitting drafts that are circulated among multiple people to be destroyed immediately, the Board is essentially expanding the statutory exemption, which it lacks authority to do.

The description goes on to state that:

Transitory records and correspondence are of such short-term value that they are not required to meet legal or fiscal obligations, initiate, sustain, evaluate or provide evidence of decision-making, administrative or operational activities and are often maintained as informational by offices or individuals who do not have primary responsibility for them.

With respect, that is not the Board's call to make. That is the public's decision to make, or the Legislature's in its representative capacity.

The examples given as records that are transitory and can immediately be destroyed actually expand the category beyond its description. The examples are:

Routine agency communications or announcements; Information that does not direct action or require compliance; Records that don't relate to the recipients work or decision-making.

- Emails to schedule or confirm meetings or events
- Committee agendas and minutes received by members on a distribution list (other than the committee lead or person responsible for the meeting)
- Interim files; tracking and control files
- Recordings used for training purposes
- Ad hoc reports for individual use

Nearly all of these examples are more expansive than the definition:

- 1) Routine agency communications and announcements do not fit the description of transitory records. They have ongoing value and provide evidence of decision-making, administrative and/or operational activities. They can be required to meet legal obligations. Record requesters frequently want to see communications within an agency and announcements made publicly.
- 2) Information not directing action or requiring compliance may still provide direct evidence of the decision-making process. This would include discussions of what to do or what can or should be done.
- 3) Some records unrelated to the recipients' work or decision-making might be "purely personal" and thus not producible under the balancing test. *See Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86. But what if a communication relates to government functions that aren't the job of the sender or recipient? That could be evidence that a government official is acting outside his or her lawful authority. Or what if a government official is illegally using government resources to campaign for a political candidate? That communication would be a record that doesn't "relate to the recipient's work or decision-making," but would be evidence of unlawful activity.
- 4) Emails relating to scheduling and confirming meetings and events can provide evidence of the decision-making process, particularly if meetings are intentionally scheduled for somebody's convenience (or inconvenience). Should a request from someone interested in an issue to reschedule a meeting so he can attend be able to be deleted?
- 5) Duplicates of agendas sent out can show that a person did (or did not) in fact receive a copy.
- 6) Tracking and control files can provide useful summaries to record requesters in lieu of large amounts of individual records. Moreover, their purpose is specifically to provide an ongoing usefulness.
- 7) Training recordings seem particularly out of place. They will always have evidentiary value as a permanent record of events that occurred or of what training

government employees received (or are meant to receive). This seems nothing more than a naked attempt to reverse the effect of a recent court of appeals case requiring the production of DOJ training videos.

- 8) A report of any kind is a substantive document demonstrating the actions and sometimes thought process and decisions of government officials.

I urge this Board to return to the previous description of “Transitory Record” at your January 11 meeting and eliminate that category entirely in the near future.

Sincerely,

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