

From: osingalawoffice@aol.com
Sent: Wednesday, January 6, 2016 9:59 PM
To: DOA Public Records Board Comments
Subject: Electronic Records

Members of the State Record Board:

The following is a comment in regards to possible unintended consequences of considering short e-mails, text messages and other "transitory records" as not worthy of the protection afforded, for example, to more typical hard copy records. Such hard copy records may be those usually envisioned when the words "public records" are verbalized. Future generations, however, will likely have something very different in mind.

The following is a real life situation pertaining to a series of open records requests that were followed by a subsequent mandamus proceeding brought in court against a local governmental entity.

The record custodian in this case had indicated an absence of certain requested records. The record custodian also cited a lack of knowledge of conduct that violated existing policies adopted by that governmental entity and which would have necessarily generated internal investigative reports and other documents. Fortunately, the record requester was aware of and actually had copies of several documents furnished to the governmental entity's administrators by either employees or third parties. In addition, these administrators had briefly acknowledged receipt of several of these documents in short e-mail responses that were made long before and contemporaneous with the receipt of the documents. These short e-mails had been furnished in the process of the open records requests but the documents they referred to had not.

These short e-mails essentially prevented the administrators in later depositions from alleging ignorance of the documents or questioning whether the copy of the document the record requester had been furnished by the employee or third party was a true and accurate copy of the original. This proved extremely important in trying to establish evidence in the mandamus action.

The reality is that in isolation these short e-mail responses of the administrators would have looked to an uninformed observer as innocuous, routine and unimportant. I would, therefore, urge the board to carefully weigh the advisability of weakening or narrowing the protection afforded to various forms of electronic

messaging. Their true significance may not be immediately apparent.

Attorney John Osinga