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Work Session IX: Open Meetings Act: Electronic Records

Virtual Rocks and Shoals

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1 Types of Electronic Communications Technology

1.1 Plain Old Telephone, Telegraph, Radio (old tech)

1.2 Discussion Group or Forum (on-line, electronic, Internet, etc.)

An online discussion group. Online services and bulletin board services (BBS's) provide a variety of forums, in which participants with common interests can exchange open messages. Forums are sometimes called newsgroups (in the Internet world) or conferences.

What is forum? - A Word Definition From the Webopedia Computer Dictionary, http://www.webopedia.com/TERM/F/forum.html (last visited June 16, 2013).

1.3 Electronic Bulletin Board

An electronic message center. Most bulletin boards serve specific interest groups. They allow you to dial in with a modem [sic!], review messages left by others, and leave your own message if you want. Bulletin boards are a particularly good place to find free or inexpensive software products. In the United States alone, there are tens of thousands of BBSs

What is bulletin board system? - A Word Definition From the Webopedia Computer Dictionary, http://www.webopedia.com/TERM/B/bulletin_board_system_BBS.html (last visited June 16, 2013).

1.4 ListServ

An automatic mailing list server developed by Eric Thomas for BITNET in 1986. When e-mail is addressed to a LISTSERV mailing list, it is automatically broadcast to everyone on the list. The result is similar to a newsgroup or forum, except that the messages are transmitted as e-mail and are therefore available only to individuals on the list.

LISTSERV is currently a commercial product marketed by L-Soft International. Although LISTSERV refers to a specific mailing list server, the term is sometimes used incorrectly to refer to any mailing list server. Another popular mailing list server is Majordomo, which is freeware.

What is LISTSERV? - A Word Definition From the Webopedia Computer Dictionary, http://www.webopedia.com/TERM/L/Listserv.html (last visited June 16, 2013).

1.5 Social Media

A term used to describe a variety of Web-based platforms, applications and technologies that enable people to socially interact with one another online. Some examples of social media sites and applications include Facebook, YouTube, Del.icio.us, Twitter, Digg, blogs and other sites that have content based on user participation and user-generated content (UGC).

What is social media? - A Word Definition From the Webopedia Computer Dictionary, http://www.webopedia.com/TERM/S/social_media.html (last visited June 16, 2013).

1.6 CHAT ROOM

A virtual room where a chat session takes place. Technically, a chat room is really a channel, but the term room is used to promote the chat metaphor.

What is chat room? - A Word Definition From the Webopedia Computer Dictionary, http://www.webopedia.com/TERM/C/chat_room.html (last visited June 16, 2013).

1.7 E-MAIL

Short for electronic mail, the transmission of messages over communications networks. The messages can be notes entered from the keyboard or electronic files stored on disk. Most mainframes, minicomputers, and computer networks have an e-mail system. Some electronic-mail systems are confined to a single computer system or network, but others have gateways to other computer systems, enabling users to send electronic mail anywhere in the world. Companies that are fully computerized make extensive use of e-mail because it is fast, flexible, and reliable.

What is e-mail? - A Word Definition From the Webopedia Computer Dictionary, http://www.webopedia.com/TERM/E/e_mail.html (last visited June 16, 2013).

1.8 INSTANT MESSAGING

Abbreviated IM, a type of communications service that enables you to create a kind of private chat room with another individual in order to communicate in real time over the Internet, analogous to a telephone conversation but using text-based, not voice-based, communication. Typically, the instant messaging system alerts you whenever somebody on your private list is online. You can then initiate a chat session with that particular individual.

What is instant messaging? - A Word Definition From the Webopedia Computer Dictionary, http://www.webopedia.com/TERM/I/instant_messaging.html (last visited June 16, 2013).

1.9 CLOUD STORAGE

Cloud computing is a type of computing that relies on *sharing computing resources* rather than having local servers or personal devices to handle applications.

In cloud computing, the word cloud (also phrased as "the cloud") is used as a metaphor for "*the Internet*," so the phrase *cloud computing* means "a type of Internet-based computing," where different services -- such as servers, storage and applications -- are delivered to an organization's computers and devices through the Internet.

Cloud computing is comparable to grid computing, a type of computing where unused processing cycles of all computers in a network are harnesses to solve problems too intensive for any stand-alone machine.

What is Cloud Computing? A Word Definition From the Webopedia Computer Dictionary, http://www.webopedia.com/TERM/C/cloud_computing.html (last visited June 16, 2013).

2 Risks Posed by Government Officials & Employees Using Electronic Media in Connection with Open Meetings (THERE ARE NON-TECH COUNTERPARTS TO EACH OF THESE RISKS, BUT THEY USUALLY INVOLVE LOWER PROBABILITY OF WIDE DISSEMINATION, DISCOVERY & RETENTION. ASSUME NOTHING IS FULLY DELETED ONCE IT IS ONLINE)

2.1 INADVERTENT QUORUM & WALKING QUORUM

2.1.1 If the online discussion or even one or two post relates to government business,

2.1.2 Could a quorum of governing body members be online for the discussion without knowledge of the others?

2.1.3 Could governing body members amounting to a quorum separately, even if innocently, access posts over time, yielding same result as walking quorum achieved by successive phone calls or in successive personal discussions?

2.2 INADVERTENT "LEGISLATIVE HISTORY" & STATEMENTS AGAINST GOVERNMENT UNIT'S INTERESTS

2.2.1 Statements of fact, belief, or opinion by governing body members substantially contemporaneous with official action

2.2.2 Statements of motive or rationale for official actions

2.2.3 Statements about risks or reasons not to do certain things

2.2.4 Acknowledgments that certain persons are "experts"

2.2.5 Acknowledgments of knowledge of existence of facts or beliefs

2.3 IMPROPER EX PARTE COMMUNICATIONS

2.3.1 For officials or employees engaged in quasi-judicial, procurement, or other functions for which the parties should not contact them off the record;

2.3.2 Are interested parties or their agents members of the on-line group?

- How do you determine affiliation;
- Can one include warning or disclaimer with one's post?

2.4 WAIVERS OF PRIVILEGES OR RIGHTS OF CONFIDENTIALITY

2.4.1 Confidential information & attorney litigation thought processes posted on sites available to non-clients & unaffiliated attorneys

- Particular danger among lawyers sharing a listserv or forum with others sharing similar practices
- Are such listservs or fora subject to state open records laws?
- Legal hold and discovery requirements applicable to listservs on which government officials participate? What if the official is a moderator or listserv "owner"?

2.4.2 NSA surveillance – information shared with DEA – is online privilege dead? Legal fiction to preserve it?

2.5 SIGNIFICANT CONTACTS WITH FOREIGN JURISDICTION SUPPORTING PERSONAL JURISDICTION TO BE SUED

2.5.1 Where are the servers storing your data?

2.6 ILLEGAL CAMPAIGN CONTRIBUTIONS OR CAMPAIGNING

2.6.1 Are statements of support for an elected official during a campaign construed as contributions?

2.6.2 Are such statements on an official online site considered to be illegal use of government resources for electioneering?

2.7 FIRST AMENDMENT VIOLATIONS FROM EMPLOYEE OR PUBLIC POSTS – PARTICULARLY IF TERMS OF USE NOT CLEARLY POSTED AND ENFORCED

2.7.1 Is the government impermissibly censoring protected speech by pulling down certain posts based on content?

2.7.2 Is a government employee being improperly disciplined for online comments?

2.8 DESTRUCTION OF RECORDS REQUIRED TO BE MAINTAINED

2.8.1 Was there deletion of online record that should have been retained due to:

- State law retention requirements;
- Legal hold or open records request;
- Election or other laws

2.8.2 Were non-conforming copies such as drafts or backups destroyed that should have been retained or produced?

2.9 INABILITY TO DESTROY RECORDS THAT SHOULD BE DESTROYED

2.9.1 After expiration of state law retention periods, are there backups, "originals" or other electronic versions of records residing online?

2.9.2 Can you locate them & account for them?

3 Special Bonus Section – Electronic Media Risks Related to Other Government Activities – EXPLAIN – MAYBE THESE CAN BE RELATED TO OPEN MEETINGS TOO?

3.1 INCOMPLETE RESPONSES TO DISCOVERY & OPEN RECORDS REQUESTS DUE TO INABILITY OR NEGLECT TO ACCOUNT FOR, SEARCH FOR, RETRIEVE, OR PRODUCE RECORDS

3.1.1 Does search for responsive records include tech communications sites?

3.1.2 Do you know where the host backs up government records or stores drafts? Can you access the backups & drafts?

3.2 STEALTH OPEN RECORDS REQUESTS

3.2.1 Receive online requests for document, perhaps as a "me too" on a listserv, but fail to realize that the request complies with state law open records request requirements;

3.2.2 Need to comply with strict deadlines;

3.2.3 If decline or fail to produce requested records, need to pursue administrative protocols in accordance with state law.

3.2.4 These requests could arrive during an open meeting or otherwise.

3.2.5 Such requests often are not recognized as constituting official FOIA-type requests under state law. Consequences:

- Waive privileges and exemptions from production?
- Lose ability to prevent disclosure to subsequent requesters or in litigation?
- Some jurisdictions might have civil or criminal penalties?

3.3 INADVERTENT OVERTIME PAYROLL OBLIGATIONS TO EMPLOYEES

3.3.1 Employees monitoring officials' online communications or responding on behalf of officials "on their own time" usually would be entitled to overtime after 40 hours per week.