



***2014-2015
ALAMEDA COUNTY GRAND JURY
FINAL REPORT***

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CITY OF FREMONT

EMAIL RETENTION POLICY

Executive Summary

The Grand Jury initiated an investigation based on a citizen's complaint that the city of Fremont systematically destroys all city emails after a 30-day period, alleging a violation of California law. The complaint also alleged that the city's administrative regulations define all emails as "preliminary drafts," thus excluding them from disclosure under the California Public Records Act. The Grand Jury examined California state statutes and Fremont policies governing the retention and purging of public documents, and spoke to advocates on both sides of the issue concerning the retention of emails. The Grand Jury is deeply concerned with Fremont's loose interpretation of California government transparency and retention statutes and the city's apparent intentional efforts to exclude the public from accessing city emails.

Background

In January 1956, Fremont was incorporated as a result of a merger of the five smaller communities of Centerville, Niles, Irvington, Mission San Jose, and Warm Springs. The city's government is headed by an elected mayor who also chairs a city council consisting of four members elected by the citizens of Fremont. The council appoints a city manager and a city attorney, adopts the city's budget, and decides all major policy issues. Various advisory bodies comprised of volunteers who serve without compensation are consulted by elected officials in the governance of Fremont. The city has approximately 832 employees organized into 22 departments to provide and maintain citizen services with an annual budget of \$157 million.

As communications technologies have advanced, public agencies like Fremont have relied heavily on the use of email to transact governmental business. Users **of the city’s email system, for example, include city** employees and volunteers. Fremont email users receive approximately 3,000 emails per day, which are **distributed to about 1,300 individual mailboxes within the city’s email system.**

Investigation

The Grand Jury’s investigation focused on a citizen’s allegations about Fremont’s administrative regulations that define all unsaved email communications as preliminary drafts that are purged and unavailable after 30 days. The Grand **Jury’s investigation included interviews of city employees and a representative** of a nonprofit organization dedicated to First Amendment disputes. Examinations of documents such as the California Public Records Act (PRA), California Government Code Section 34090, other state and jurisdictional documents, and **the city of Fremont’s** Administrative Regulations (AR 1.14) on the Use of Electronic Communications were also made. (Note: for the purposes of this report, the term “retention/purge policy” refers to the city’s AR 1.14.)

The California Public Records Act

The Public Records Act is a cornerstone of the state’s efforts to ensure open government by giving citizens access to information, thereby providing opportunities for public oversight of governmental operations. The law provides the public with the capacity to request documents and records from government agencies, including emails, which helps to explain how and why such agencies have made important decisions.

Built into the Public Records Act are, however, certain exceptions that prevent governmental agencies from disclosing some forms of information. These **exceptions focus on protecting an individual’s right to privacy (for example,** medical and personnel records) while other exceptions are intended to help

ensure efficient and effective administration of government functions, such as keeping some investigative reports and information about pending litigation secret.

The Public Records Act specifically exempts public access to preliminary drafts, notes and inter-and intra-governmental agency memos. This exception allows agencies to protect deliberative processes to ensure that agency employees can have frank discussions without the fear of information becoming public. Nevertheless, before withholding such information, the agency must determine that **disclosure would undermine the agency's ability to perform its functions**. In addition, the agency must find that the public interest in withholding records clearly outweighs the public interest in disclosing them.

Government Code Section 34090: The California Retention Statute

While the Public Records Act requires the disclosure of public records, it does not contain any provisions regarding how long a public record must be retained by governmental agencies. Government Code section 34090, however, addresses **this issue and is referred to as the state's records retention statute**. The statute does require that nearly all city records be retained for at least two years. **Unfortunately, it does not define the term "records" and some public agencies have taken the position that their organization's emails are not records even though the Public Records Act clearly defines records to include email communications**. The Grand Jury noted that the city of Fremont takes the same position by defining its unsaved emails as preliminary drafts that are not kept in the course of business, thereby making emails exceptions to retention codes and statutes.

Fremont Administrative Regulation:
Use of Electronic Communications and Internet

The city of Fremont's treatment of email communications is contained within its Administrative Regulation 1.14 on the Use of Electronic Communications. This retention/purge policy provides that all city emails shall be retained for 30 days, at which time they are automatically purged unless an individual employee or volunteer determines that the email is a record that needs to be retained. **The city's policy states in part:**

Interface with the Public Records Act. All “public records” (which generally means any writing, whether electronic or paper, that contains **information relating to the conduct of the public's business**) are governed by the mandatory public disclosure requirements of the Public Records Act and its exceptions (Gov. Code 6250 et seq.). Because information on the E-Mail System is automatically purged, the city considers every E-Mail to be a preliminary draft (not retained in the ordinary course of business). Accordingly, users are required to determine whether information transmitted or received through the E-Mail system is a record that needs to be retained.

Rather than defining a public record as the Public Records Act does, the Grand Jury learned that the city of Fremont relies on a 24-year-old Attorney General **Opinion which describes a public record as “... a thing which constitutes an objective lasting indication of a writing event or other information which is [retained]... because it is necessary or convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference.” (64 Ops.Cal.Atty.Gen. 317, 324 (1981)).** It is the position of the city that its unsaved emails do not fit within the Attorney General Opinion; therefore, they are **not** public records as understood by the **state's record retention statute.**

As a result, Fremont maintains it is not required to retain all emails for two years like other public records in its possession. Because city emails are purged after 30 days (meaning the documents are not kept in the regular course of business), the city maintains they amount to preliminary drafts that are exempt from **disclosure under the Public Records Act. From the Grand Jury's perspective, Fremont's questionable logic appears to exempt all emails (unless separately saved) from disclosure, even though the Public Records Act specifically includes emails.**

The users of Fremont's email system are city employees and advisory volunteers. The city's retention/purge policy is distributed to email users, requiring them to determine on their own whether or not emails should be retained. If individual users decide an email communication should be retained, they are directed to transfer the information to an appropriate records storage medium such as printing hard copies for filing. If email users cannot decide whether an email should be retained beyond 30 days, they are required to consult their supervisors. However, the Grand Jury heard testimony that there are instances of little or no training for employees or volunteers on how to determine whether an email is **one that needs to be retained as a public record in the normal course of the city's business.** The Grand Jury is concerned that individual city employees and volunteers, who may not be qualified, are required to make decisions as to which emails must be retained.

The Grand Jury learned that when originally implementing its retention/purge policy, the city justified it by stating that the cost of retaining and storing an estimated one million emails per year, with the additional capacity to search and retrieve them, is cost prohibitive. The Grand Jury heard testimony from all sides of this issue that the cost of storage and retrieval of emails is no longer excessive; that the city is considering lengthening its period of retention from 30 days to **90 days. Other testimony corroborated that Fremont's email system (taking into account storage, search, and retrieval capabilities) could be greatly expanded at a minimal cost.** For example, one in-house option the city has investigated would

necessitate an estimated start-up cost of \$55,000 for setting up an email retention-retrieval system with an annual maintenance cost of \$6,500. By contrast, cloud storage would cost the city about \$40,000-\$50,000 per year. Either option **is just over one percent of Fremont's current annual information technology budget** of approximately \$5.5 million.

Conclusion

Government agencies rely heavily on the use of email communications to transact **the public's business. The Grand Jury believes all government agencies should be open and transparent.** Emails must therefore be retained as public records and must be accessible for public review when warranted.

The city of Fremont purges most email records after 30 days, depriving citizens access to vital information about how and why public policy, regulations, and laws are formulated.

Given the growth and evolution of the internet and computer technology in the past 20 years, rules and regulations classifying emails as preliminary drafts are both antiquated and inadequate. The city of Fremont must overhaul its email retention/purge policy, thereby responding to the need for public transparency. The Grand Jury also believes the state of California could resolve this matter by integrating its retention statute into the Public Records Act. The absence of uniform guidelines means government emails will continue to be treated inconsistently across jurisdictions.

Destroying emails prematurely not only prevents public access to vital information, but also impedes investigations of wrongdoing. For example, the PG&E pipeline explosion in San Bruno was mired in scandal as a result of emails being uncovered between PG&E staff and the state Public Utilities Commission. The inappropriate conduct of public officials involved in this case would not have become known had it not been for the retention of emails that enabled the public to uncover wrongdoing and demand accountability.

Two other examples are found within this 2014-2015 Grand Jury report. These examples, like the PG&E case, further illustrate that access to email communications is essential to ensure that government business is conducted in an ethical manner. Emails were often key to determining whether there was misconduct by government agencies.

The Grand Jury concludes that the city of Fremont's interpretation of California statutes cited in this report is contrary to the spirit of open and transparent government and must be changed.

FINDINGS

Finding 15-22: **The city of Fremont’s classification of emails as preliminary drafts deprives the public of key opportunities to oversee government operations.**

Finding 15-23: **The city of Fremont’s classification of emails as records not kept in the regular course of business, unless specifically saved, deprives the public of important opportunities to monitor government.**

RECOMMENDATIONS

Recommendation 15-18:

The city of Fremont must change its email retention policy to require that emails are stored and retained for at least two years.

Recommendation 15-19:

The city of Fremont must change its email retention policy so that no emails are classified as preliminary drafts, but rather that all such emails are retained in the regular course of business and subject to the Public Records Act.

RESPONSES REQUIRED

Responding Agencies - Please see page 125 for instructions

Fremont City Council

Findings 15-22 and 15-23
Recommendations 15-18 and 15-19

One Grand Juror did not participate in this investigation due to a conflict of interest.