Coates' Canons Blog: Email Subscriber Lists: A New Exception to the Public Records Law

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In this blog post about citizen information, I noted that some local governments had obtained local legislation to protect email subscriber lists from some kinds of public access. Effective April 21, 2011, that law now applies to all local governments. This post summarizes its provisions.

S.L. 2011-54(S 182) creates a new section in the public records law as follows:

§ 132?1.13. Electronic lists of subscribers open for inspection but not available for copying.

(a) Notwithstanding this chapter, when a unit of local government maintains an electronic mail list of individual subscribers, this chapter does not require that unit of local government to provide a copy of the list. The list shall be available for public inspection in either printed or electronic format or both as the unit of local government elects.

(b) If a unit of local government maintains an electronic mail list of individual subscribers, the unit of local government and its employees and officers may use that list only: (i) for the purpose for which it was subscribed to; (ii) to notify subscribers of an emergency to the public health or public safety; or (iii) in case of deletion of that list, to notify subscribers of the existence of any similar lists to subscribe to.

Although the language of the act is pretty straight forward, there are a few observations that I think are worth mentioning, and there are a few issues of interpretation that have already arisen.

Observations

First, it's important to note that the law applies only to local governments. Lists maintained by state agencies are not covered.

Second, under this exception, a local government *is not required* to provide a copy of an email list, but it is not prohibited from doing so. Individuals who subscribe to local government email lists should be aware that the government may legally release copies (electronic or paper) of their email addresses. It is possible, however, that the release of the list would be considered a "use" that must be consistent with the purpose of the list under subsection (b) of the new law.

Third, the protection in the law applies only to email addresses. Other private information a local government may receive or maintain, including names, street addresses, and phone numbers, are subject to the full rights of access under the public records law, unless another exception applies. In addition, the new law protects only email addresses that are maintained in a subscriber list. Email addresses received or maintained for other purposes are subject to the full rights of access under the public records law, unless another exception applies.

Finally, it should be understood that local governments have no authority to charge any fee for the inspection of public records.

Interpretations

What types of lists does this law cover? For example, what if a local government itself creates a list of email addresses that it will use to communicate with individuals who serve on various volunteer boards? Will it be possible to protect this information by calling it a subscription list? Probably not. I read the language as requiring some action by a person to

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subscribe to the list. The local government could ask or require volunteers to subscribe to the list, and that would bring it within the scope of the statute. In order to trigger the protection under the law, it appears that a list 1) must have a stated purpose (which the unit can create, and which can be as broad or narrow as the unit desires); and 2) must be subscribed to by individuals with email addresses. It's probably a good practice to provide notice to individuals when they subscribe as to the purpose of the list and its intended and authorized uses as allowed under the new statute.

What is the scope of the right of inspection? May a person who inspects a subscriber list manually copy down the email addresses or take a digital picture of them? The statute doesn't specifically address this issue. One possible reading of the act is that it eliminates the local government's obligation to provide a copy, but doesn't prevent a person inspecting the record from creating his or her own. That interpretation, in my view, seems too narrow. A more logical reading is that the right of access is limited to viewing, and that the public has no right to a copy, even one they create themselves. Perhaps a way to analyze this is to make a distinction between the dual rights under the existing law – the right of inspection and the right to a copy – and to interpret this new provision as eliminating the right to a copy for this type of record.

On the other hand, the law eliminates the right to a copy of the list. The intent may have been to protect email list subscribers from being marketed or spammed by third parties who could obtain electronic copies of these lists under the public records law. Whatever the intent, it's possible that a person who inspects a list might have a right to copy one or more individual emails addresses (short of the whole list).

I'm interested in hearing how others interpret the law and how it is being used, especially in those local governments in Wake County that were already operating under the exception.

Links

- www.ncga.state.nc.us/EnactedLegislation/SessionLaws/HTML/2011-2012/SL2011-54.html

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