

## **Is Your E-mail Company Property?**

*By: David Morrison, Principal*

Everyday, millions of workers send and receive e-mails on the job, but how often do those workers stop and think about to whom the e-mails belong? Some employees might believe that if the e-mail is not about company business then their employer cannot or will not monitor those messages, or that their e-mail is not considered property of their employer. Indeed, by the revealing nature of everyday e-mails, it would seem that employees still view the e-mail they send and receive on their company's network as private and sacrosanct. That is, however, not the case. In fact, it is a company's very right to monitor e-mail and Internet traffic that preserves the professional atmosphere in the work place and ensures that a company's policies are actually adhered to by its employees.

Companies should make sure they have a clear policy in their handbook that employees sending and receiving e-mail on the company's network should not consider the e-mail private. It is considered company property, and may be monitored. Without any expectation of privacy in e-mail traffic on the company's network, employees should consider all e-mails sent or received on company e-mail addresses to be accessible to a company's IT department and subject to monitoring. Monitoring may arise for several reasons.

- For example, the biggest threat to a harassment-free office environment these days is not a pin-up calendar, but e-mails with inappropriate jokes and pictures circulating throughout an office. Companies should be sure to advise their employees not to send inappropriate e-mails, and if they do receive them to delete them immediately and not to forward them in or outside of the office. According to the 2004 Workplace E-Mail and Instant Messaging Survey from American Management Association and The ePolicy Institute, 79% of organizations have established written e-mail policies prohibiting romantic and racy messages.
- In addition, companies regularly monitor the websites that employees visit through the network to ensure that they are not surfing inappropriate sites while at work. Monitoring Internet traffic and e-mail content ensure that anti-harassment and equal employment policies are strictly adhered to. According to the 2004 Workplace E-Mail and Instant Messaging Survey from American Management Association and The ePolicy Institute, 13% of organizations have battled lawsuits triggered by inappropriate e-mail.
- An employer's need to access and review an employee's e-mail also comes up when companies are seeking to protect their confidential and trade secret information, or to enforce post-employment restrictive covenants. Companies have learned through monitoring that their employees are planning on competing with their current employer and that they are sending confidential material to their personal e-mail accounts in days, weeks or months leading up to their departure, or they send those e-mails to their new employer. Careful monitoring of e-mail

accounts and laptops for departing employees takes place to determine if there was any breach of fiduciary duty, or violations of trade secret laws, confidentiality agreements or non-compete agreements.

- Finally, the hottest topic in courtroom battles these days is "electronic discovery". The rules of litigation have long required parties to produce responsive documents in litigation, even if they are stored electronically (such as e-mail). It has only been in the last few years, and even in the last few months, that courts have made clear that they will strictly enforce a company's obligation to turn over all information that may respond to another party's request. This includes e-mails that employees may have sent or received under the mistaken impression that e-mails would not be preserved by the company, or that the company could not or would not monitor the e-mail at some time in the future. While this new reality requires the forward-thinking company to create defensible document retention and destruction policies to handle potential litigation down the road, employees should be aware that potentially embarrassing e-mails sent or received behind a closed office door may some day be read in an open courtroom. If employees thought of e-mail in this way, e-mail content would be drastically different.

In today's Internet-reliant workplace, e-mail has proven to be an effective communications tool. In order to protect companies and employees alike, however, employers have a responsibility to monitor their networks, address any potentially harmful issues in a prompt and professional manner, and be prepared to produce even the most embarrassing e-mail if litigation cannot be avoided.