Sunshine should clarify use of private email

In September, this column looked at whether the Sunshine Law in Missouri applied to messaging between members of a public body that are routed through social media websites or apps, such as Facebook Messenger and Twitter.

This month, let's consider whether it's time for Missouri's legislature to address the basic issue of if the open records law should apply to private email addresses used by members of a public body. There's no doubt that emails that go through a ".gov" address are retained within the public body's computer server and therefore are public records under the Sunshine Law's definition of that term. But what about messages sent on a "gmail" account or other personal account of an elected official or other governmental employee?

> "Should the Missouri legislature pass a bill ... clarifying private email addresses used by members of public governmental bodies are subject to the Sunshine Law?"

We see how this has been the subject of much national news in the last year, ranging from Hillary Clinton's private email use to, more recently, private email addresses used by Jared Kushner and Ivanka Trump. But rather than deal with federal issues, let's keep this on the local level.

Should the Missouri legislature pass a bill next session clarifying private email addresses used by members of public governmental bodies are subject to the Sunshine Law's definition of public records when they are used by members of public bodies for the discussion of public business or public policy?

There are differing opinions among various states. For example, in Delaware, the Attorney General was recently asked to issue an opinion on this issue. A radio station had attempted to obtain emails between an elected official and county employees regarding county business. The emails were stored in a private email account and were not in a government computer server. The Attorney General's initial opinion was the emails were private and not subject to the state's open records law.

However, in mid-October, the Attorney General reversed its opinion and concluded that the denial of access was a violation of state law. It based its decision on a federal appellate opinion out of the District of Columbia requiring a federal agency to search for agency records that the agency director maintained in a private email account. The fact that the governmental official used a private email account was no different than if he had put paper copies of the correspondence "in a file at his daughter's house and then claim[ed] they are under her control," the court said. The AG's opinion concluded that emails don't lose their status as public records just because they reside in a private email account.

And it's not just AG opinions that have concluded this. Courts in California and Washington have held that emails residing in the private account of a governmental employee are public records if they are sent or received within the scope of that person's employment. And the State of Vermont has become the most recent to join the group that includes private digital records within the scope of a records request.

The Vermont Supreme Court concluded these digital documents are included, even if stored in public accounts, if they otherwise meet that state's definition of "public records." In analyzing that state's law, the court held that the definition of "public records" in Vermont didn't exclude otherwise qualifying records on the basis that they were located in private accounts.

How does that compare to Missouri's law? Missouri's definition of "public record" includes "any record, whether written or electronically stored, ... of any public governmental body ..." If the email was a record of the "body," then it clearly wouldn't matter where it was stored, based upon this definition. Similarly, records created by a private contractor under an agreement with a public body would be covered as a public record, no matter where they were stored.

But, the Missouri definition specifically excludes "internal memorandum or letter received or prepared by or on behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body, unless such records are retained by the public governmental body or presented at a public meeting." If these messages are held in a non-governmental email account, that might limit what would fall within a liberal interpretation of "public record" and therefore limit access to private emails not retained by the body.

There is, however, no doubt that the Missouri law was meant to have a liberal interpretation and that it was drafted with the intent to create a public policy of openness. Creation of a "functional" interpretation of this state law would seem to mandate that it is time for this definition of "public records" to be amended by the state legislature to ensure that public records cannot be hidden in private email accounts by public officials seeking to keep their activities out of the public's eyes.