



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20416

OFFICE OF GENERAL COUNSEL

January 24, 2008

The Honorable John F. Kerry  
Chairman  
Committee on Small Business & Entrepreneurship  
Washington, DC 10510-6350

Re: Monitoring of Employee E-mails by SBA Managers

Dear Chairman Kerry:

Thank you for your recent inquiry to Administrator Steven Preston regarding the Small Business Administration's (Agency) Office of Inspector General (OIG) Report No. 08-02, which addresses monitoring of employee e-mails and the Agency's response to the OIG's findings. The Administrator has asked that I respond directly to your inquiry. While we share your concerns regarding unauthorized access to employee e-mail, senior Agency supervisory personnel may at times have a legitimate need to have access to material contained in Agency files including an employee's e-mails. If an employee uses his/her governmental computer to communicate with Congress, these e-mails are maintained within the government's information systems. Employees are made aware of this through FOIA/Privacy Act training and computer awareness training that employees are required to take on at least a yearly basis. Presently, protections are in place to protect individual employees e-mail communications with Congress. This includes recently adopted measures to limit the circumstances under which a senior manager may access employees' e-mail. These protections, in addition to limiting who may access an employee's e-mail, further limit when that can occur and for what purpose. We feel that these guidelines appropriately protect employees' rights and hopefully address your concerns.

While it is established Agency policy in SOP 90 49 that employees do not have a right to or an expectation of privacy when using SBA's computer systems, including e-mail, SBA determined that it was necessary to establish written procedures governing the Agency's rights and accountabilities and to insure compliance with those policies.

Examples of when access to an employee's e-mail might be necessary include: (1) an employee's unexpected and/or prolonged absence from work; (2) conducting a fact finding or investigation; (3) preserving e-mails due to an employee's departure from the Agency; (4) normal management of litigation matters and (5) other legitimate management reasons.

These policies seek to balance the need to protect sensitive and confidential communications of employees with the legitimate Agency need for access to information in appropriate situations. As a result, on December 21, 2007 the Agency issued SBA Procedural Notice 9000-1720 which specifies the procedures necessary for obtaining authorization to access and/or monitor an employee's e-mails. Access can only be granted with the specific approval of a manager, senior official, OCIO Chief Information Security Officer, the General Counsel and the Chief Human Capital Officer. Chief Human Capital Officer approval is not necessary for litigation matters. These procedures will ensure that a senior manager has a legitimate need for reviewing an employee's e-mail and that access is provided in a very limited and appropriate manner.

As your letter correctly and appropriately points out, the Civil Service Reform Act recognizes an employee's right to furnish information to a Congressional committee and that right "may not be interfered with or denied." 5 U.S.C. 7211. This provides a measure of protection to an employee who feels that his/her right to communicate has been denied or compromised. To further protect employee rights, the Agency has now set limits on who may access an employee's e-mail and under what circumstances.

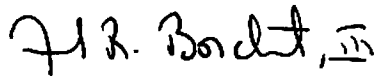
Similarly, whistleblower statutes support the Agency's position that employees have adequate legal remedies available to them should managers act in an illegal manner. We support the rights of employees and desire to protect those who report waste, fraud and abuse. As such, SBA's Policy Notice provides guidance and direction to all managers and employees on when, where and how employee e-mails may legally be accessed and explaining what actions must be taken prior to any such review.

With respect to Senate bill S. 274, Federal Employee Protection for Disclosures Act, cited in your letter, the Department of Justice has set forth the Administration's position regarding the specifics of the bill in its December 17, 2007 letter. The Department stated that the remedies set forth in the Bill are unnecessary and legally problematic. In particular, they note that the expanded definition of what would be considered a "protected disclosure" would greatly upset the balance of whistleblower protection and the ability of federal managers to manage the workplace.

Finally, pursuant to your request, we are herewith providing a copy of SBA Procedural Notice 9000-1720, which was effective December 21, 2007. As described above, we feel that this Notice properly strikes a balance between employee rights, whistleblower protections and the legitimate business needs of the Agency. While we appreciate your suggestion to have appropriate members of your committee staff participate in the revision of the new operating procedures, since the policy has already been adopted (prior to receipt of your letter) we are unable to accommodate your request to include them in revision discussions. In this regard, it should be noted that we did have discussions with Mr. Coutsos of your staff prior to the implementation of the present policy.

Thank you for your continued support of small business. Should you wish to discuss this further, I may be reached at (202) 205-6634.

Sincerely,

A handwritten signature in black ink that reads "Frank R. Borchert III". The signature is written in a cursive style with a small "III" at the end.

Frank R. Borchert III  
General Counsel