PUBLIC RECORDS

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SCOPE OF THE PUBLIC RECORDS ACT

Florida's Public Records Law, Ch. 119, F.S., provides a right of access to the records of the state and local governments as well as to private entities acting on their behalf. In the absence of a statutory exemption, this right of access applies to all materials made or received by an agency in connection with the transaction of official business which are used to perpetuate, communicate or formalize knowledge. Access to public records has been described as a "cornerstone of our political culture." *In re Report & Recommendations of Judicial Mgmt. Council of Fla. on Privacy & Elec. Access to Court Records,* 832 So. 2d 712, 713 (Fla. 2002).

Section 119.011(2), F.S., defines "agency" to include: any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

A right of access to records is also recognized in Art. I, s. 24, Fla. Const., which applies to virtually all state and local governmental entities, including the legislative, executive and judicial branches of government. The only exceptions are those established by law or by the Constitution.

Section 119.011(12), F.S., defines "public records" to include: all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980). All such materials, regardless of whether they are in final form, are open for public inspection unless the Legislature has exempted them from disclosure. *Wait v. Florida Power & Light Company,* 372 So. 2d 420 (Fla. 1979). Exemption summaries are found in Appendix D.

The term "public record" is not limited to traditional written documents. As the statutory definition states, "tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission" can all constitute public records. *And see National Collegiate Athletic Association v. Associated Press,* 18 So. 3d 1201 (Fla. 1st DCA 2009), *review denied,* 37 So. 3d 848 (Fla. 2010) ("public records law is not limited to paper documents but applies, as well, to documents that exist only in digital form"). *Cf. Church of Scientology Flag Service Org., Inc. v. Wood,* No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997), available online in the Cases database at the open government site at myfloridalegal.com (physical specimens relating to an autopsy are not public records because in order to constitute a "public record" for purposes of Ch. 119, "the record itself must be susceptible of some form of copying").

Clearly, as technology changes the means by which agencies communicate, manage, and store information, public records will take on increasingly different forms. Yet, the comprehensive scope of the term "public records" will continue to make the information open to public inspection unless

exempted by law.

Article I, s. 24, Fla. Const., establishes a constitutional right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted pursuant to Art. I, s. 24, Fla. Const., or specifically made confidential by the Constitution. *See State ex rel. Clayton v. Board of Regents,* 635 So. 2d 937 (Fla. 1994) ("[O]ur Constitution requires that public officials must conduct public business in the open and that public records must be made available to all members of the public."); and *Rhea v. District Board of Trustees of Santa Fe College,* 109 So. 3d 851, 855 (Fla. 1st DCA 2013) ("A citizen's access to public records is a fundamental constitutional right in Florida").

WHAT RECORDS ARE INCLUDED

EMAIL

E-mail messages made or received by agency officers and employees in connection with official business are public records and subject to disclosure in the absence of an exemption. AGOs 96-34 and 01-20. *See Rhea v. District Board of Trustees of Santa Fe College,* 109 So. 3d 851, 855 (Fla. 1st DCA 2013), noting that "electronic communications, such as e-mail, are covered [by the Public Records Act] just like communications on paper." *Cf.* s. 668.6076, F.S., requiring agencies that operate a website and use electronic mail to post the following statement in a conspicuous location on the agency website: "Under Florida law, e-mail addresses are public records. If you do not want your e-mail address released in response to a public records request, do not send electronic mail to this entity. Instead, contact this office by phone or in writing."

Similarly, e-mails sent by city commissioners in connection with the transaction of official business are public records subject to disclosure even though the e-mails contain undisclosed or "blind" recipients and their e-mail addresses. AGO 07-14. *Cf. Butler v. City of Hallandale Beach,* 68 So. 3d 278 (Fla. 4th DCA 2011) (affirming a trial court order finding that a list of recipients of a *personal* e-mail sent by mayor from her personal computer was not a public record).

The Legislature has enacted exemptions for certain email addresses. *See e.g.*, ss. 655.057(5) (exemption for "personal identifying information" of certain officers and directors which are received by the Office of Financial Regulation pursuant to an application for authority to organize a new state bank or trust company); 197.3225, F.S. (taxpayer's email address held by a tax collector for the purpose of sending certain tax notices); 215.5587(1)(b) (email address submitted by applicant to Department of Financial Services as part of the My Safe Florida Home Program); and 28.47(5)(b), F.S. (email addresses submitted to clerk of court or property appraiser for the purpose of registering for a recording or notification service).

Like other public records, e-mail messages are subject to the statutory restrictions on destruction of public records. *See* s. 257.36(6), F.S., stating that a public record may be destroyed or otherwise disposed of only in accordance with retention schedules established by the Division of Library and Information Services (division) of the Department of State. Thus, an e-mail communication of "factual background information" from one city council member to another is a public record and should be retained in accordance with the retention schedule for other records relating to performance of the agency's functions and formulation of policy. AGO 01-20.

SOCIAL MEDIA POSTINGS

The Attorney General's Office has stated that the placement of material on a city's Facebook page presumably would be in connection with the transaction of official business and thus subject to Ch. 119, F.S., although in any given instance, the determination would have to be made based upon the definition of "public record" contained in s. 119.011(12), F.S. AGO 09-19. To the extent that the information on the city's Facebook page constitutes a public record, the city is under an obligation to follow the public records retention schedules established in accordance with s. 257.36(6), F.S. *Id. And see* AGO 08-07 (city council members who post comments and emails relating to the transaction of city business on a privately owned and operated website "would be responsible for ensuring that the information is maintained in accordance with the Public Records Law"); and *Bear v. Escambia County Board of County Commissioners,* 2022 WL 602266 (N.D. March 01, 2022) (messages on a county commissioner's privately owned and maintained social media accounts which involved his interactions with the public on matters of county concern and which involved his duties as a commissioner were public records).

The determination as to whether a list or record of accounts which have been blocked from posting to or accessing an elected official's personal Twitter feed is a public record involves mixed questions of law and fact which cannot be resolved by the Attorney General's Office. Inf. Op. to Shalley, June 1, 2016. However, "if the tweets the public official is sending are public records [because they were sent in connection with the transaction of official business] then a list of blocked accounts, prepared in connection with those public records 'tweets,' could well be determined by a court to be a public record." *Id.*

TEXT MESSAGES

A public official or employee's use of a private cell phone to conduct public business via text messaging "can create an electronic written public record subject to disclosure" if the text message is "prepared, owned, used, or retained . . . within the scope of his or her employment or agency." *O'Boyle v. Town of Gulf Stream*, 257 So. 3d 1036, 1040-1041 (Fla. 4th DCA 2018). *Accord City of Sunny Isles Beach v. Gatto*, 338 So. 3d 1045 (Fla. 3d DCA 2022), noting that a "city commissioner's text messages may be a public record," although a private communication by a municipal official "falls outside the definition of public record." For more information on personal records created or received by public officials on government or private devices, please see the discussion of that topic on pages 133-135.

In order to comply with the requirements of the Public Records Act, "the governmental entity must proceed as it relates to text messaging no differently than it would when responding to a request for written documents and other public records in the entity's possession—such as emails—by reviewing each record, determining if some or all are exempted from production, and disclosing the unprotected records to the requester." *O'Boyle v. Town of Gulf Stream,* at 1041. *And see* the discussion on pages 166-167 regarding the entity's responsibility to conduct a reasonable search to locate text messages that have been requested from the governmental entity, including those located on private accounts or devices.

The retention periods for text messages and other electronic messages or communications "are determined by the content, nature, and purpose of the records, and are set based on their legal, fiscal, administrative, and historical values, regardless of the format in which they reside or the method by which they are transmitted." *See* General Records Schedule GS1-SL available online at dos.myflorida.com/library-archives. Stated another way, it is the content, nature and purpose of the

electronic communication that determines how long it is retained, not the technology that is used to send the message. *See also* Inf. Op. to Browning, March 17, 2010, advising that the same rules that apply to e-mail should apply to electronic communications including SMS communications (text messaging), MMS communications (multimedia content), and instant messaging conducted by government agencies.