

2-C-9 | ELECTRONIC AND COMPUTER RECORDS**a. Electronic Databases and Files**

Information stored in a public agency's computer "is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet...." *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th DCA 1982), review denied, 431 So. 2d 988 (Fla. 1983). 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 to documents that exist only in digital form); AGO 98-54 (application and disciplinary reports maintained in a computer system operated by a national securities dealers association which are received electronically by state agency for use in licensing and regulating securities dealers doing business in Florida are public records); AGO 91-61 (agency must provide copy of computer disk in response to Ch. 119 request); and AGO 85-03 (computer tape subject to disclosure).

Thus, information such as electronic calendars, databases, and word processing files stored in agency computers, can all constitute public records because records made or received in the Course of official business and intended to perpetuate, communicate or formalize knowledge of some type, fall within the scope of Ch. 119, F.S. AGO 89-39. Compare AGO 85-87 (to the extent that "machine-readable intermediate files" may be intended to "communicate" knowledge, any such communication takes place completely within the data processing equipment and in such form as to render any inspection pursuant to Ch. 119, F.S., unintelligible and, except perhaps to the computer itself, meaningless; therefore, these files are analogous to notes used to prepare some other documentary material, and are not public records). And see *Grapski v. Machen*, No. 01-2005-CA-4005 J (Fla. 8th Cir. Ct. May 9, 2006), affirmed per curiam, 949 So. 2d 202 (Fla. 1st DCA 2007), available online in the Cases database at the open government site at myfloridalegal.com (spam or bulk mail received by a public agency does not necessarily constitute a public record).

Moreover, the definition of "public records" specifically includes "data processing software" and establishes that a record made or received in connection with official business is a public record, regardless of physical form,



characteristics, "or means of transmission." See s. 119.011(12), F.S. "Automation of public records must not erode the right of access to [public records]." Section 119.01(2)(a), F.S.

Accordingly, electronic public records are governed by the same rule as written documents and other public records--the records are subject to public disclosure unless a statutory exemption exists which removes the records from disclosure. Cf. AGO 90-04, stating that a county official is not authorized to assign the county's right to a public record (a computer program developed by a former employee while he was working for the county) as part of a settlement compromising a lawsuit against the county. And see the discussion on pages 132-134 noting that in evaluating whether a public official's records were made or received in the course of official business for purposes of Ch. 119, the determining factor is the nature of the record, and not whether the record is located in a private or a government computer or communications device.

b. Consideration of Public Access in Design of Electronic Recordkeeping System

When an agency is designing or acquiring an electronic recordkeeping system, the agency must consider whether the proposed system is capable of providing data in some common format such as, but not limited to, the American Standard Code for Information Interchange. Section 119.01(2)(b), F.S. Cf. Inf. Op. to Moore, October 19, 1993, noting that an agency considering the acquisition of computer software should be responsive to the need for preserving public access to the information through use of the computer's software and that "[t]he design and development of the software, therefore, should ensure that the system has the capability of redacting confidential or exempt information when a public records request is made."

Similarly, an agency may not enter into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of that agency, including public records that are online or stored in an electronic recordkeeping system used by the agency. Section 119.01(2)(c), F.S. And see s. 287.042(3)(h), F.S. (Department of Management Services responsible for development of procedures to be used by state

agencies when procuring information technology commodities and contractual services that ensure compliance with public records and records retention requirements). Cf. Rule 1B-26.003, F.A.C., adopted by the Department of State and providing standards for electronic recordkeeping.

Providing access to public records "is a duty of each agency." Section 119.01(1), F.S. Section 119.01(2)(a), F.S., states that "[a]utomation of public records must not erode the right of access to those records." A circuit judge found that an agency violated both policies when it established an automated anti-SPAM system that quarantined the requester's "entirely legitimate public records request" and allowed it to be deleted and purged a week later, because the agency "altogether failed to establish any procedural safeguards to ensure that legitimate public records requests were not inadvertently sent to SPAM." *Bracci v. School Board of Lee County*, No. 20-CA-5205 (Fla. 20th Cir. Ct. January 12, 2021), available online in the Cases database at the open government site at myfloridalegal.com.

c. E-Mail

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).

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.

d. 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").

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. Cf. Knight First Amendment Institute v. Trump, No. 18-1691 (2d Cir. July 9, 2019) (public



official engaged in unconstitutional viewpoint discrimination by blocking certain users from access to his Twitter account, which is otherwise open to the public at large and "used for all manner of official duties," because he disagreed with their speech)

e. 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 and or received by public officials on government or private devices, please see the discussion of that topic on page 134.

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 page 164 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 for State and Local Government Agencies, Electronic Communications, 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[retention] rules that apply to e-mail should be considered for electronic communications including SMS communications (text messaging), MMS communications (multimedia content), and instant messaging conducted by government agencies.

f. Cybersecurity

Please see the discussion on that topic on pages 156-157.

(Florida Office of the Attorney General // © March 9, 2023)

