The DIGITAL Age:

Protocols for Communicating Electronically with Governmental Entities

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Technology has not stopped evolving and maturing, since the Internet boom of the 90s. Although most Americans have adapted to the use of newer technology like the Internet, cell phones and iPads, most do not know what the protocols are for use of these products in the business environment. This has never been more apparent than in today's society where electronic communication such as Facebook, email, instant messenger and twitter are allowing faster, more instant access to people, places and materials than ever before, sometimes with dire consequences.

With this new access come new rules, regulations and protocols that must be followed, especially when interacting with governmental agencies. Unfortunately, the idea that that emails and other electric communication are public records, just like paper files, and thus are to be protected and stored for public inspection is a concept most still have not gotten use to or are complying with.

As we delve deeper into this issue of how to properly maneuver through the digital age, we will first take a look at the definition of electronic communication and what it actually encompasses, then take a look at how Florida's public records law comes into play when utilizing electronic communication in the workplace.

Electronic Communication

Electronic communication is the electronic transfer of information from a sending party to one or more receiving parties by means of an intermediate telecommunications system. Electronic communications include email, instant messaging, text messaging (such as SMS, Blackberry PIN, etc.), multimedia messaging (such as MMS), chat messaging, social networking (such as Facebook, Twitter, etc.), or any other current or future electronic messaging technology or device.

The general rule is that electronic communications created or received in connection with the transaction of official business are public records subject to inspection and copying in accordance with The Public Records Act, Chapter 119, Florida Statutes, and subject to applicable state retention laws and regulations, unless expressly exempted by law.

Accordingly, electronic public records are governed by the same rule as written documents and other public records--the records are subject to public inspection unless a statutory exemption exists which removes the records from disclosure. Thus, email messages made or received by agency employees in connection with official business are public records and subject to disclosure in the absence of an exemption. Further, such messages are subject to the statutory restrictions on destruction of public records.

While electronic communications created or received for personal use are not generally considered public record and do not fall within the definition of public records simply by virtue of their placement on a government-owned computer system , the electronic messages may become public record as part of an investigation, especially if the personal messages are identified as being in violation of the agency's policy.

Likewise, text messages can also be subject to the public records act. In March 2010, the Florida Attorney General wrote a letter to the Department of State (which is statutorily charged with development of public records retention schedules) and said that the "same rules that apply to email should be considered for electronic communications including Blackberry PINS, SMS communications (text messaging, MMS communications (multimedia content), and instant messaging conducted by government agencies." In response, the Department revised its records retention schedule to note that text messages may be public records and that retention of text messages could be required depending upon the content of those texts.

Similarly, 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. 119.11, F.S. (AGO 09-19). Thus, 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 by law.

Florida Public Records Law

The State of Florida has a long history of providing public access to governmental records and Florida is recognized nationally for its leadership regarding public records and accessibility to public information. The Florida Legislature enacted the first public records law in 1892. Florida is one of the most liberal states in the country when it comes to open government, also known as "government in the sunshine." In fact, only the Legislature is authorized to create exemptions to open government requirements.

In fact, Senator Don Gaetz, (R-Niceville) has filed a measure for the 2012 legislative session that would make it clear all records, including emails sent and received by newly-elected officials, are public records even if the person hasn't been sworn into office yet. If the bill passes, it would take effect this July. "I believe that for once and for all we ought to clarify that the transition records of statewide elected officials are public records," Gaetz said. "Plans are made, key personnel decisions are decided, policies are decided during the transition and I think they ought to be open to the public and press."

Senate Bill 1464, Relating to Public Records/Public Meetings/Application to Officers-elect sponsored by Senator Gaetz, requires that officers-elect adopt and implement reasonable measures to ensure compliance with the public records requirements established by Chapter 119, F.S. The bill also requires that officers-elect maintain public records in accordance with the policies and procedures of the office to which they have been elected. The bill defines officers-elect as the Governor, Lieutenant Governor, Attorney General, Chief Financial Officer and Commissioner of Agriculture. In turn, the bill requires that transition records stored online or electronically be preserved to allow for public inspection.

Article I, s. 24 of the State Constitution, provides that "Every person has the right to inspect or copy 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 with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution."

Moreover, Chapter 119, Florida Statutes, Florida's Public Records Law, is one of the most open public records laws in the country and a model for other states. It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person and providing access to public records is a duty of each agency.

Chapter 119, Florida Statutes, defines public records as "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 determined that public records are all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge and are not limited to traditional written documents. Additionally, the courts have determined that 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. . ."

In fact, as soon as a document is received by a public agency, it becomes a public record, unless there is a legislatively created exemption which makes it confidential and not subject to disclosure. Section 119.01(2)(a), Florida Statutes, specifically states that "Automation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law." An electronic record includes such technology such as electronic mail, instant messages, and scanned images.

Undoubtedly, the complex characteristics of electronic records, the rapid changes in the software used to access them, and the massive quantities of electronic records make it even more difficult to manage them effectively as more traditional types of public records. For example, electronic storage media can easily become unreadable over time due to physical, chemical, or other deterioration. Special care and precautionary measures must be taken to avoid the loss of records stored on electronic media. Thus, agencies must back up electronic records on a regular basis to safeguard against loss of information due to equipment malfunctions, human error, or other disaster.

It is imperative that agencies establish policies and procedures to ensure that electronic records and their documentation are retained and accessible as long as needed. Agencies can manage their electronic records by incorporating electronic records into any general agency records management policies they may have in place.

Likewise, if the agency has an email policy, it should alert users that emails as well as other forms of electronic communication relating to agency business are public records and are subject to all public records access, duplication, retention, and legal discovery requirements. Agencies that allow the use of electronic communications on their networks, including email, instant messaging, text messaging (such as SMS, Blackberry PIN, etc), multimedia messaging (such as MMS), chat messaging, social networking (such as Facebook, Twitter, etc.), or any other current or future electronic messaging technology or device must recognize that such content may be a public record and must manage the records accordingly. Agencies developing a comprehensive policy need to also ensure that the electronic communications content is managed consistently across the agency in its component offices.

Rule 1B-26.003(12), Florida Administrative Code, specifies that agency policies and procedures include provisions for scheduling the retention and disposition of all electronic records; establishing procedures for regular recopying, reformatting, and other necessary maintenance to ensure the retention and usability of the electronic records throughout their authorized life cycle; transferring a copy of the electronic records and any related documentation and indexes to the State Archives of Florida at the time specified in the records retention schedule, if applicable; and destruction of electronic records. Note: Electronic records may be destroyed only in accordance with the provisions of Rule 1B-24, Florida Administrative Code.

Finally, no single retention period applies to all of any agency's electronic records, or all electronic records in a particular format such as email. Retention periods are determined by the content, nature, and purpose of records, and are set based on their legal, fiscal, administrative, and historical values, regardless of the format in which they reside. ■

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