

To: BTS Board Members
Cc: Martin Rose, Pinellas County BTS CIO
From: Donald S. Crowell, Managing Assistant County Attorney
Date: April 20, 2016
Re: Text Messages on Private Cell Phones and the Florida Public Records Law

Pursuant to your request, I have prepared this brief memorandum explaining the state of the public records law as it applies to text messages on private devices. It is intended to provide context for discussions on text messaging in the furtherance of public business. It is not a comprehensive treatise on Florida Public Records Law, nor even a complete discussion of all issues that potentially surround texts or other electronic transmissions that are public records. This memo does not address items that may be specifically exempt from public records or both confidential and exempt. These exemptions are construed narrowly and, unless a specific exemption applies, public records must be made available for inspection or copying as described below. This memo does not address the current or possible technological alternatives, nor technological solutions to, the legal obligation to preserve public records, as these are beyond my realm of professional competency. If more legal information or analysis is desired by the Board, please let me know and I will seek further direction and clarity as to the scope desired.

Issue:

Are text messages, e-mails and other electronic communications sent via personal mobile device subject to Florida Public Records Law?

Short Answer:

Yes. It is the law and policy of Florida, that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency regardless of the location of the record or its physical or electronic form.

Analysis:

Twenty years before the first Florida public records law, the Florida Supreme Court made clear that, "whenever a written record of the transactions of a public officer is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty, to keep that written memorial, . . . and, when kept, it becomes a public document - a public record - belonging to the office, and not to the officer." Bell v. Kendrick, 25 Fla. 778, 6 So. 868, 869 (Fla. 1889).

Access to public records is currently granted by Fla. Const. Art. I, § 24 and Fla. Stat. Ann. §§ 119.01, et seq.

Fla. Const. art. I, § 24:

- (a) 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....

Fla. Stat. Ann. § 119.01 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."

Thus, both Fla. Const. Art. I, § 24 and Fla. Stat. § 119.01, specify that public records are those records that are in some way connected to "official business."

E-mail, text-messages, instant messaging communications or social media posts created or received by government agencies in connection with official business which perpetuate, communicate, or formalize knowledge are subject to the public records law and **open for inspection regardless of the platform by which such information is conveyed.**

In State v. City of Clearwater, 863 So. 2d 149 (Fla. 2003), the Florida Supreme Court held that private materials on a public computer are not public records; that it is the nature of the record created and not its location on a public computer that makes it a public record. The court also noted specifically that, "Just as an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of documents that fall within the definition of "public records," ...private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer. **The determining factor is the nature of the record, not its physical location.**" Clearwater at 154, (referencing the decision in Wisner v. City of Tampa Police Dep't, 601 So.2d 296, 298 (Fla. 2d DCA 1992)).

The Florida Department of State Division of Library and Information Services General Records Schedule GS1-SL for State and Local Government Agencies, which is adopted by Rule in the Florida Administrative Code implementing the Florida Public Records Law provides:

V. ELECTRONIC RECORDS

Records retention schedules apply to records regardless of their physical format. Therefore, records created or maintained in electronic format must be retained in accordance with the minimum retention requirements presented in these schedules, whether the electronic records are the record copy or duplicates. Printouts of standard correspondence in text or word processing files are acceptable in place of the electronic files. Printouts of electronic communications (email, instant messaging, **text messaging**, multimedia messaging, chat messaging, social networking, or any other current or future electronic messaging technology or device) are acceptable in place of the electronic files, provided that the printed version contains all date/time stamps and routing information. However, in the event that an agency is involved in, or can reasonably anticipate litigation on, a particular issue, the agency must maintain in native format any and all related and legally discoverable electronic files.

F.A.C. 1B-24.003(1)(a); General Records Schedule GS1-SL, P. vi, **emphasis added.**

Conclusion:

The determining factor of whether a document is a public record is subject to disclosure is the nature of the record, not its physical location or form. If it is a public record, and not specifically made exempt or both exempt and confidential by law, the record must be maintained, and made available for inspection and copying in accordance with the provisions of law. Depending on the substance of a public record, the retention time may be brief or it may be permanent. The General Records Schedule GS1-SL applicable to Local Government is 40 pages of categories of records and their respective retention periods. It can be found at <http://dos.myflorida.com/media/693574/general-records-schedulegs01-sl.pdf>.

Because of the difficulties inherent in retaining these messages if they are public records, as well as the difficulty in proving the content of records that are not retained, it remains my strong recommendation that text messaging not be used for public business.