FLORIDA STATUTES (2013)

Section 668.6076 Public records status of e-mail addresses; agency website notice.—Any agency, as defined in s. 119.011, or legislative entity that operates a website and uses electronic mail shall post the following statement in a conspicuous location on its 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.

History.—s. 1, ch. 2006-232.

2010), *review denied,* 47 So. 3d 1288 (Fla. 2010) (canvassing board minutes constitute "final work product of the [b]oard, not a preliminary draft or note"); *City of Pinellas Park, Florida v. Times Publishing Company,* No. 00-008234CI-19 (Fla. 6th Cir. Ct. January 3, 2001) (rejecting city's argument that employee responses to survey are "notes" which are not subject to disclosure because "as to each of the employees, their responses were prepared in connection with their official agency business and they were 'intended to perpetuate, communicate, or formalize knowledge' that they had about their department"); and *Florida Sugar Cane League, Inc. v. Florida Department of Environmental Regulation,* No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992) (handwritten notes of agency staff "utilized to communicate and formulate knowledge within [the agency] are public records subject to no exemption").

Similarly, in AGO 05-23, the Attorney General's Office was asked whether handwritten notes taken by an assistant city labor attorney during her interviews with city personnel were public records. The notes were reviewed by the city's labor attorney, used to prepare a disciplinary action form, and then filed. The opinion concluded that the notes "are public records when those notes are made to perpetuate and formalize knowledge and to communicate that information to the labor attorney." The notes represented the "end product of her interviews and were the formalized knowledge that was used to prepare a separate and distinct public record: the disciplinary action form."

3. 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) (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 inspection 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.

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." *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).

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.

The importance of ensuring public access to computer records is recognized by statute and in the electronic recordkeeping rules of the Division of Library and Information Services of the Department of State. Rule 1B-26.003(6)(g), F.A.C., provides that each agency shall "[e]nsure that agency electronic recordkeeping systems meet state requirements for public access to records in accordance with Chapter 119, F.S."

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,* 37 F.L.W. D1722, 1724 (Fla. 1st DCA 2012), 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.