

Computer Records and Email

Florida's 2008 *Government-In-The-Sunshine Manual*,

What kinds of agency records are subject to the Public Records Act?

1. Computer records
2.
 - a. Computer records are public records

In 1982, the Fourth District Court of Appeal stated 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 . . ." *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th DCA 1982), *review denied*, 431 So. 2d 988 (Fla. 1983).

Numerous Attorney General Opinions have cited *Seigle* for the principle that the Public Records Act includes computer records as well as paper documents, tape recordings, and other more tangible materials. See, e.g., 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 subject to Ch. 119); 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 they are not public records).

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(11), F.S. "Providing access to public records is a duty of each agency." Section 119.01(1), F.S. "Automation of public records must not erode the right of access to those records." Section 119.01(2)(a), F.S. "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." *Id.*

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. "E-Mail"

"E-mail" 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. AGO 96-34. Such 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; and s. 119.021(2)(b), F.S., providing that each agency shall comply with rules establishing retention schedules and disposal processes for public records which are adopted by the records and information management program of the division. *And see In re Amendments to Rule of Judicial Administration 2.051.—Public Access to Judicial Records*, 651 So. 2d 1185, 1186 (Fla. 1995) (definition of "judicial records" in Rule 2.420 of the Rules of Judicial Administration, "includes information transmitted by an e-mail system").

The nature of information—that is, that it is electronically generated and transferred—has been determined not to alter its character as a public record under the Public Records Act. AGO 01-20. Thus, the e-mail communication of factual background information and position papers from one official 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. *Id.* 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.

(1) Personal e-mail

The Florida Supreme Court has ruled that private e-mail stored in government computers does not automatically become a public record by virtue of that storage. *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003). "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." *Id.* at 154. The Court cautioned, however, that the case before it did not involve e-mails "that may have been isolated by a government employee whose job required him or her to locate employee misuse of government computers." *Id.* at 151n.2. *Cf. Grapski v. Machen*, Case 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).