



Public Records Act: Social media retention issues

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Scope of Public Records Act

- Florida's Public Records Act, Chapter 119, Florida Statutes, provides a right of access to records of state and local governments as well as to private entities acting on their behalf.
- If material falls within the definition of "public record" it must be disclosed to the public unless there is a statutory exemption. A public record must also be retained in accordance with the applicable Department of State retention schedule.

The term “public records” means:

- a) 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” **(includes electronic communications like Facebook postings, text messages, emails, blog comments, tweets)**.
- b) Made or received pursuant to law or ordinance or in connection with the transaction of official business
- c) By any agency [including a private entity acting ‘on behalf of’ a public agency]
- d) Which are used to perpetuate, communicate, or formalize knowledge

Challenge:

- Public records stored on private computers and cell phones
- Suggested policies
 - a. Discouraging use of private accounts to send or receive public records
 - b. Transmittal of public records sent or received on private accounts to government accounts.



Retention

All public records must be retained in accordance with retention schedules approved by the Department of State

Even exempt records must be retained.

Retention of public records made or received on social media

- Section 257.36 vests authority in the Department of State to establish retention schedules and records management procedures for public records. There is nothing in Ch. 119, F.S., which excludes social media postings from these schedules.

Social media retention

- The retention periods for electronic 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.”** General Records Schedule GSI-SL for State and Local Government Agencies **“Electronic communications.”**

Social media retention

“Electronic communications, as with records in other formats, can have a variety of purposes and relate to a variety of program functions and activities. The retention of any particular electronic message will generally be the same as the retention for records in any other format that document the same program function or activity. For instance, electronic communications might fall under a correspondence series, a budget records series, or one of numerous other series, depending on the content, nature and purpose of each message. Electronic communications that are created primarily to communicate information of short-term value, such as messages reminding employees about scheduled meetings or appointments, or most voice mail messages, might fall under the “Transitory Messages” series.”

Social media retention

- Transitory messages: This schedule consist of records that are created primarily to communicate information of short-term value. **“Transitory” refers to short-term value based upon the content and purpose of the message, not the format or technology used to transmit it.** Examples of transitory messages include, but are not limited to, reminders to employees about scheduled meetings or appointments; most telephone messages (whether in paper, voicemail, or other electronic form), announcements of office events such as holiday parties or group lunches; recipient copies of announcements of agency sponsored events such as exhibits, lectures or workshops.....

Social Media Retention

- **Transitory messages schedule:** Retain until obsolete, superseded, or administrative value is lost.
- By contrast, the “**Correspondence-Administrative**” category calls for a retention of 3 fiscal years. The content here is “routine correspondence and memoranda of a general nature that are associated with administrative practices but that do not create policy or procedure, document the business of a particular program, or act as a receipt.
- The “**Correspondence: Program and Policy Development**” has a 5 fiscal year retention. This is for public records “documenting policy development, decision-making or substantive programmatic issues, procedures or activities.

Problem scenarios

- I. ***SDE Media v. City of Doral and Daniel Espino*** (May 5, 2017). City violated public records law by failing to conduct timely, good-faith search for responsive records located on private devices. Also by “failing to maintain electronic communications in a manner that prevents their accidental destruction or deletion by individual city officials.”

Problem scenarios continued

- Also, “by failing to produce public records responsive to the request until after threatened with litigation, being sued and being ordered by the Court to conduct a proper search.”
- The trial judge ordered that “all City Officials or employees who use electronic devices to communicate regarding matters of official business to conduct those communications only on devices that record those communications onto servers directly accessible by the City’s Public Records Custodian.”

Problem scenarios

- 2. State Attorney Jeff Ashton 2013 Report concerning violations of the Public Records Act by commissioners who failed to retain public records in accordance with the applicable Department of State records retention schedule.

Problem scenarios

- Findings:
 - 1. Retention of text messages determined by purpose and content, not format.
 - 2. Lack of knowledge that text messages are subject to retention is not an excuse
 - 3. Belief that cell phone service provider would retain text messages, not an excuse.

Penalties for noncompliance

- a) Criminal penalties
- b) Civil action
- c) Attorney's fees

Additional Resources

Office of Attorney General Pam Bondi

website: <http://www.myfloridalegal.com>

Governor Rick Scott website:

<http://www.flgov.com>

First Amendment Foundation website:

<http://www.floridafaf.org>