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County Public Schools

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DATE: January 11, 2023

TO: Joris M. Jabouin, CPA, Chief Auditor

FROM: Marylin C. Batista, Interim General Counsel, and
Robert Paul Vignola, Deputy General Counsel

SUBJECT: ***Public Records Retention Requirements - Digital Records***

This Office has received a request from the November 17, 2022, meeting of the Audit Committee seeking a summary of the Florida Public Records Act. Having reviewed the Audit Committee's discussion surrounding its request for a public records summary, it appears that the guidance requested primarily concerned public records that exist in digital form. Accordingly, this memorandum will focus primarily upon digital varieties of public records.

The Office of the Florida Attorney General has issued the 2022 Edition of the *Government-In-The-Sunshine Manual* which provides a reference for compliance with Florida's Public Records Laws. This memorandum is largely comprised of excerpts from that publication and excerpts from General Records Schedule GS1-SL which is maintained by the Florida Secretary of State to guide the retention of public records by state and local agencies (including district school boards). In general, Florida's Public Records Law, Chapter 119, Florida Statutes, provides a right of access to the records of the state and local governments as well as to private entities acting on their behalf. In the absence of a specific statutory exemption (and such exemptions are numerous), this right of access applies to all materials made or received by an agency in connection with the transaction of official business which are used to perpetuate, communicate, or formalize knowledge.

Section 119.011(12), Florida Statutes, defines "public records" to include: 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 interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge. The term "public record" is not limited to traditional written documents. As the statutory definition states, "tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission" can all constitute public records. 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, as well, to

documents that exist only in digital form"). Clearly, as technology changes the means by which agencies communicate, manage, and store information, public records will take on increasingly different forms. Yet, the comprehensive scope of the term "public records" will continue to make the information open to public inspection unless exempted by law.

During its November 17, 2022, meeting, an Audit Committee member expressed interest in what was contained in the public records training provided to School Board Members at the December 7, 2021 workshop. The printed agenda materials did not include any reference to text messages, although they may have been addressed by the speaker during her oral presentation. Since the speaker is the primary author of the *Government-in-the-Sunshine Manual*, this memorandum includes pertinent portions of the manual to provide a more comprehensive discussion of the requested issues rather than to recount the speaker's more concise oral presentation at the workshop. However, if any advisory committee member wishes to view that workshop presentation, it may be viewed at the following link:

https://browardschools.granicus.com/player/clip/141?view_id=1&redirect=true&h=71b3ca5333c59322b6830b09201b3e53

Electronic and computer records. 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). 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 Chapter 119, Florida Statutes, 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. In evaluating whether a public official's records were made or received in the course of official business for purposes of Chapter 119, the determining factor is the nature of the record, and not whether the record is located in a private or a government computer or communications device.

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. See *Rhea v. District Board of Trustees of Santa Fe College*, 109 So. 3d 851, 855 (Fla. 1st DCA 2013), noting that "electronic communications, such as e-mail, are covered [by the Public Records Act] just like communications on paper." The Attorney General has opined that 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. 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. Section 257.36(6), Florida Statutes, states 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.

Facebook. 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 Chapter 119, Florida Statutes, although in any given instance, the determination would have to be made based upon the definition of "public record" contained in Section 119.011(12), Florida Statutes. To the extent that the information on a city's Facebook page constitutes a public record, the city is under an obligation to follow the public records retention schedules established in accordance with Section 257.36(6), Florida Statutes. The Attorney General has also opined that city council members who post comments and emails relating to the transaction of city business on a privately owned and operated website "would be responsible for ensuring that the information is maintained in accordance with the Public Records Law".

Text messages. The retention periods for text messages and other electronic messages or 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." See General Records Schedule GS1-SL for State and Local Government Agencies, Electronic Communications. Stated another way, it is the content, nature and purpose of the electronic communication that determines how long it is retained, not the technology that is used to send the message. The Attorney General has opined that the same retention rules that apply to e-mail should be considered for electronic communications including SMS communications (text messaging), MMS communications (multimedia content), and instant messaging conducted by government agencies. A public official or employee's use of a private cell phone to conduct public business via text messaging "can create an electronic written public record subject to disclosure" if the text message is "prepared, owned, used, or retained . . . within the scope of his or her employment or agency." To comply with the requirements of the Public Records Act, "the governmental entity must proceed as it relates to text messaging no differently than it would when responding to a request for written documents and other public records in the entity's possession—such as emails—by reviewing each record, determining if some or all are exempted from production, and disclosing the unprotected records to the requester."

General Records Schedule GS1-SL has the following segment which governs the retention of electronic records and states as follows:

> VI. ELECTRONIC RECORDS. Records retention schedules apply to records regardless of the format in which they reside. Therefore, records created or maintained in electronic format must be retained in accordance with the minimum retention requirements presented in these schedules. Printouts of standard correspondence 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.

General Records Schedule GS1-SL has the following segment which governs the retention of electronic communications and states as follows:

> ELECTRONIC COMMUNICATIONS. There is no single retention period that applies to all electronic messages or communications, whether they are sent by 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.), voice mail/voice messaging (whether in audio, voiceover-internet protocol, or other format), or any other current or future electronic messaging technology or device. 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 or the method by which they are transmitted. 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.

The questions presented by the Audit Committee included one inquiring whether public record retention requirements cease upon the conclusion of a public employee's term of employment or a public official's term of office. Public records belong to the public agency and not to an individual public employee or official in whose custody the record was held. Any public records received or created during the term of employment or office of a public official or employee should be retained and maintained by the public agency. Upon the conclusion of the term of employment or office of a public official or employee, any public records in that employee or official's custody must be turned over to the public agency for retention.

Another question presented by the Audit Committee was about the applicable penalties for a violation of the requirements of Florida's Public Records laws. Section 119.10, Florida Statutes, states that any public officer who violates any provision of that chapter commits a noncriminal

infraction, punishable by fine not exceeding $500. It also states that any public officer who knowingly violates the provisions of Section 119.07(1), Florida Statutes, is subject to suspension and removal or impeachment and, in addition, commits a misdemeanor of the first degree, punishable by up to 1 year in prison, fines up to $1,000, and suspension or removal from office.

If the Audit Committee requires any additional guidance regarding the requirements of Florida's Public Records laws, please advise this Office at your earliest convenience.

MCB:rpv

C: Aston Henry, Director – Risk Mgmt.

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