Electronic signatures and electronic record retention

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Subject:
Electronic signatures and electronic record retention

Mr. Gustavo Ceballos
Assistant City Attorney
City of Coral Gables
Post Office Box 141549
Coral Gables, Florida 33114-1549

RE: ELECTRONIC SIGNATURES – ELECTRONIC RECORDS – PUBLIC RECORDS RETENTION – MUNICIPALITIES – municipality may accept electronic signatures for its business transactions, and is not required to retain an original or duplicate hard copy when there is a digital version of the record. §§ 668.004, 668.50, 119.01, Fla. Stat. (2017); rule 1B-24.003, Fla. Admin. Code.

Dear Mr. Ceballos:

We are in receipt of your letter on behalf of the City of Coral Gables, asking the following questions:

1. Whether the City of Coral Gables can use electronic signatures for its myriad business processes.

2. Whether the City of Coral Gables is required to preserve a hard copy of a document notwithstanding the fact that there is a digital version of the document in the City's digital storage.

In sum:

1. The City is authorized to use electronic signatures to sign a writing, pursuant to the requirements and exceptions of sections 668.004 and 668.50, Florida Statutes (2017).

2. There is no general requirement in chapters 119 or 257, Florida Statutes (2017), requiring the City to preserve a hard copy of documents being stored digitally. Section 668.50(12) provides that a statute that requires a record to be retained in its original form is satisfied if the record is retained electronically, with limited exceptions. Rule 1B-24.003, Florida Administrative Code, authorizes disposal of the paper original of a record when there is an electronic copy, unless there is a law, rule, or ordinance that specifically requires retention of the paper original.

Question 1: Chapter 668 of the Florida Statutes deals with electronic commerce. Part I, the Electronic Signature Act of 1996, provides, in section 668.004, Florida Statutes (2017), in full:

“Force and effect of electronic signature. — Unless otherwise provided by law, *an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature.*”

(Emphasis added.) Part II, the Uniform Electronic Transaction Act, provides in section 668.50(7)(d) that any statute requiring a signature is satisfied by providing an electronic signature.[1]

Pursuant to section 668.50(5), a party is not required to accept an electronic signature, and may refuse to do so.[2] The parties to a transaction with the City must agree, implicitly or explicitly, to conduct the transaction electronically. Whether there has been an agreement is determined from the circumstances of the transaction.[3]

It is therefore my opinion that under the plain language of these provisions, the City is authorized to use electronic signatures when conducting business in compliance with chapter 668.

Question 2: You also ask whether the City is required to preserve a hard copy of a document that is otherwise being stored digitally.

In section 119.01, Florida Statutes, entitled “General state policy on public records,” the Legislature recognized the prevalence of electronic record keeping, stating that agencies must facilitate access to public records as well as preserve confidentiality when required by law.[4] Subsection 119.01(2)(f) requires an agency to provide a copy of any public record that is being digitally stored “in the medium requested” by the person requesting such document, unless the record is exempt or confidential.

Under section 668.50(18), an agency is not required to use electronic records or signatures. Instead, each governmental agency is given the discretion to decide whether and how it will send and accept electronic records and signatures, consistent with policies developed by the Agency for State Technology. If the agency does choose to use electronic records and signatures, section 668.50(12)(a) expressly provides:

“(a) *If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record* of the information in the record which:
1. Accurately reflects the information set forth in the record after the record was first generated in final form as an electronic record or otherwise.
2. Remains accessible for later reference.”

(Emphasis added.) Under section 668.50(12)(d):

“(d) If a provision of law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, *that law is satisfied by an electronic record* retained in accordance with paragraph (a).”

(Emphasis added.) Notwithstanding the broad scope of paragraph (12)(d), paragraph (12)(f) provides an exception when a law specifically *prohibits* use of an electronic record for “evidentiary, audit, or similar purposes,” and such law was enacted after July 1, 2000.[5] In a

further exception, paragraph (12)(g) provides that a government agency may specify "additional requirements for the retention of a record subject to the agency's jurisdiction."[6]

Finally, the Legislature created a records and information management program within the Division of Library and Information Services of the Department of State to address the creation, management, security, retention, and disposal of public records.[7] The Division was directed to adopt rules to facilitate retention and destruction of records,[8] which it did in Florida Administrative Code chapter 1B. Under rule 1B-24.003, regarding records retention scheduling and disposition, paragraph (9)(a) addresses retention of a hard-copy original, providing:

"(9)(a) Public records may be destroyed or otherwise disposed of only in accordance with retention schedules established by the Division. Photographic reproductions or reproductions through electronic recordkeeping systems may substitute for the original or paper copy, per Section 92.29, F.S., Photographic or electronic copies. Minimum standards for image reproduction shall be in accordance with Rules 1B-26.0021 and 1B-26.003, F.A.C. An electronic or microfilmed copy serving as the record (master) copy[9] must be retained for the length indicated for the record (master) copy in the applicable retention schedule. *An agency that designates an electronic or microfilmed copy as the record (master) copy may then designate the paper original as a duplicate and dispose of it in accordance with the retention requirement for duplicates in the applicable retention schedule unless another law, rule, or ordinance specifically requires its retention.*"

(Emphasis added.)

It is therefore my opinion that retention of an electronic record alone is in most cases sufficient under the law, and that local government is not required to preserve either an original hard copy or a duplicate hard copy of electronic records. The City is obligated, however, to determine whether there is a statute, rule, or ordinance applicable to a specific electronic record that requires preservation of an original or a duplicate hard copy, or that prohibits use of the record in electronic form for "evidentiary, audit, or similar purposes."

Sincerely,

Pam Bondi
Attorney General

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[1] Section 668.50(7)(d) provides: "If a provision of law requires a signature, an electronic signature satisfies such provision."

[2] *See generally* Op. Att'y Gen. Fla. 2005-34 (reflecting that, although s. 668.50(5) does not require an agency to accept electronic records and signatures, the Manatee County property appraiser was permitted to under the statute).

[3] Section 668.50(5) provides:

“(a) This section does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.
(b) This section applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct.”

[4] Section 119.01(2) provides, in part:

“(2)(a) Automation of public records must not erode the right of access to those records. 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.

* * *

(e) Providing access to public records by remote electronic means is an additional method of access that agencies should strive to provide to the extent feasible. If an agency provides access to public records by remote electronic means, such access should be provided in the most cost-effective and efficient manner available to the agency providing the information.”

[5] Section 668.50(12)(f) provides: “A record retained as an electronic record in accordance with paragraph (a) satisfies a provision of law requiring a person to retain a record for evidentiary, audit, or similar purposes, unless a provision of law enacted after July 1, 2000, specifically prohibits the use of an electronic record for the specified purpose.”

[6] Section 668.50(12)(g) provides: “This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency’s jurisdiction.”

[7] *See* section 257.36, Fla. Stat. (2017).

[8] *See* sections 257.36(6) and 119.021(2)(a), Fla. Stat. (2017).

[9] A “record (master) copy” is defined in rule 1B-26.003(5)(j) as “public records specifically designated by the custodian as the official record.”