Public Records--emails

Number: INFORMAL

Date: June 08, 2007

Subject:
Public Records--emails

The Honorable Alice Monyei
Chiefland City Commissioner
Post Office Box 1220
Chiefland, Florida 32644

Dear Commissioner Monyei:

Thank you for considering the Attorney General's Office as a source of assistance. Your letter regarding the applicability of the Public Records Law to e-mails has been forwarded to me for response.

You express your concern about an email which was sent to you by another commissioner. For purposes of the Government in the Sunshine Law, section 286.011, Florida Statutes, the use of a written report by one commissioner to inform other commissioners of a subject which will be discussed at a public meeting is not a violation of the Sunshine Law if prior to the meeting, there is no interaction related to the report among the commissioners. In such cases, the report, which is subject to disclosure under the Public Records Act, is not being used as a substitute for action at a public meeting as there is no response from or interaction among the commissioners prior to the meeting.[1] If, however, the report is circulated among board members for comments with such comments being provided to other members, there is interaction among the board members which is subject to section 286.011, Florida Statutes.[2]

Regarding the applicability of e-mails, this office has stated that "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.[3] Such messages are subject to the statutory restrictions on destruction of public records.[4] The fact that the information is electronically generated and transferred rather than contained on paper does not alter its character as a public record under the Public Records Act. Thus, this office stated in Attorney General Opinion 01-20 that 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.

The Florida Supreme Court, however, has ruled that private e-mail stored in government computers does not automatically become a public record by virtue of that storage. The Court in *State v. City of Clearwater*,[5] stated that "[j]ust 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." As the e-mail in question in your inquiry was from a commissioner providing information regarding an upcoming meeting, the e-mail was received in connection with your official duties and would therefore constitute a public record.

Section 119.07(1)(a), Florida Statutes, establishes a right of access to public records in plain and unequivocal terms:

"Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records."

In addition, I would note that section 1 of Chapter 07-39, Laws of Florida, effective July 1, 2007, creates a new subsection (1)(b) and (c) of section 119.07, Florida Statutes, with subsequent subsections renumbered. The new subsections provide:

"(b) A custodian of public records or a person having custody of public records may designate another officer or employee of the agency to permit the inspection and copying of public records, but must disclose the identity of the designee to the person requesting to inspect or copy public records.

(c) A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith. A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed."

You may access any of the opinions referred to herein on this office's website at: www.myfloridalegal.com. Click on "AG Opinions" to access a searchable database of Attorney General Opinions from 1974. In addition, an abridged version of the 2007 Government in the Sunshine Law is available on this office's website. Click on "Open Government" to access the manual.

I hope that the above informal comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/t

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[1] *See* Op. Att'y Gen. Fla. 89-23 (1989). *And see*, Op. Att'y Gen. Fla. 01-20 (2001) (e-mail communication of factual background information from one city council member to another is a public record and should be maintained by the records custodian for public inspection and

copying; however, such communication of information, when it does not result in the exchange of council members' comments or responses on subjects requiring council action, does not constitute a meeting subject to the Sunshine Law).

[2] *See* Op. Att'y Gen. Fla. 90-03 (1990). *See also* Op. Att'y Gen. Fla. 96-35 (1996), stating that a school board member may prepare and circulate an informational memorandum or position paper to other board members; however, the use of a memorandum to solicit comments from other board members or the circulation of responsive memoranda by other board members would violate the Sunshine Law.

[3] Attorney General Opinion 96-34.

[4] *See* s. 257.36(6), Fla. Stat., stating that a public record may be destroyed or otherwise disposed of only in accordance with retention schedules established by the division (Division of Library and Information Services of the Department of State); and s. 119.021(2)(b), Fla. Stat., 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 2.051 of the Rules of Judicial Administration, "includes information transmitted by an e-mail system").

[5] 863 So. 2d 149, 154 (Fla. 2003). 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 151 n.2.