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## **The Government in Your Facebook: An Examination of Social Networking Sites and Florida's Public Records Law**

**by Maggie D. Mooney-Portale and Kevin S. Hennessy**

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State agencies, local governments, government elected officials, and government employees are not immune from the desire to possess and disseminate the most up-to-date information to the public. Social networking sites like Facebook, Twitter, MySpace, YouTube, Flickr, and LinkedIn are being embraced by some agencies around the state of Florida as a new way in which many governments can reach a technologically savvy constituency, while other agencies are staying away from these sites because they could be a minefield of litigation under Florida's Public Records Law.

The state agencies and local governments embracing this new social networking technology have weighed the value of being cutting edge and communicating quickly with the "plugged in" constituency against the risk and uncertainty of how these social networking sites will integrate with an agency's required compliance with Florida's Public Records Law. In so doing, these agencies have, in many cases, adopted institutional controls to monitor and maintain the postings on the agency's sites as public records. However, time will tell as to whether institutional controls for agency sites are enough, especially when agency officials operate their own personal Facebook and Twitter accounts.

This article will review Florida's Public Records Law and how advancing social networking technology may create practical difficulties in an agency's obligation to produce this medium of public record when the agency, its employees, or its representatives are conducting "official business." It will discuss Florida's Public Records Law, the appeal and use of social networking sites by Florida's agencies and their representatives, whether adequate controls are in place as agencies use this technology, and whether outreach to constituents outweighs the risk of a potentially costly lawsuit for Florida agencies. The often related topic of the potential Sunshine Law violations using this technology is beyond the scope of this article.<sup>1</sup>

### **Florida's Public Records Law**

Access to public records is guaranteed by Fla. Const. art. I, §24 and F.S. Ch. 119. Specifically, Fla. Const. art. I, §24 states:

(a) Every person has the right to inspect or copy *any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.*<sup>2</sup>

The constitutional protection afforded public records is reinforced under the procedures set forth in Florida's Public Records Law, F.S. Ch. 119. The purpose of Florida's Public Records Law is to memorialize that, unless a record is exempt, "[p]roviding access to public records is a

duty of each agency.”<sup>3</sup>

### **To Whom Does It Apply?**

Florida’s Public Records Law applies to each “agency” of the state, which includes:

any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including. . . the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.<sup>4</sup>

The obligation to produce public records attaches to the agency and the agency’s employees and representatives, all of whom have an obligation under the Florida Public Records Law to produce public records in their possession. F.S. §119.07(1)(a) provides that “[e]very person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of public record or the custodian’s designee.”<sup>5</sup> The term “records custodian” under the Public Records Act means all agency personnel who have it within their power to release or communicate records.<sup>6</sup> In order to have custody, a person must have supervision and control over the record or have legal responsibility for its care, keeping, or guardianship.<sup>7</sup>

### **What Is a Public Record?**

The term “public record” is broadly defined 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.*”<sup>8</sup> The Florida Supreme Court has upheld an expansive interpretation of “public records” to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.<sup>9</sup> While the determination of what constitutes a public record is a question of law, the determining factor of whether a document is a public record subject to disclosure is the nature of the record, not its physical location or form.<sup>10</sup> A document that is used and made or received in connection with public business is a “public record.”<sup>11</sup>

Public records made or received by an agency are subject to retention requirements established by the Division of Library and Information Services of the Department of the State that governs the destruction and disposition of records. F.S. §119.021 sets forth maintenance, preservation, and retention requirements for public records. It provides that public officials must “systematically dispose” of records no longer needed in compliance with the record retention disposal provisions contained in F.S. §257.36.<sup>12</sup> The obligation to comply with the retention and disposal requirements applies irrespective of whether the public record is in a hard copy format or is electronically generated and maintained.<sup>13</sup> Retention requirements for agency electronic records are governed by rules promulgated by the Division of Library and Information Services, and the retention periods within the rule are based upon the content, nature, and purpose of the record, and the corresponding legal, fiscal, administrative, and historical value.<sup>14</sup>

### **Consequences for Failure to Produce**

A claim can be asserted under the Public Records Law against any person having custody of

the public record who fails to produce it following a public records request.<sup>15</sup> Public records requests can be made to an agency verbally or in writing, and an agency cannot condition its response to the public records request on the requesting party providing their name, signing for records, or providing a reason for the request for records.<sup>16</sup> Automatic and excessive delays by an agency in processing of public records requests are violations of the Public Records Law.<sup>17</sup> If a civil action is filed against an agency for Public Records Law violations and the agency is found to have unlawfully refused to permit the inspection or copying of a record, reasonable attorneys' fees and costs shall be awarded to the prevailing party.<sup>18</sup>

Failure of agencies to properly retain public records, including those records generated by public officials from their personal computers can result in costly lawsuits for the agency, and potential personal and criminal liability by the violating individual.<sup>19</sup> In *Lorenzo v. City of Venice*, Case No. 2008 CA 8108 SC (Fla. 12th Cir. Ct. Oct. 7, 2009), the city of Venice's clerk was unable to produce all of the email communications between the city council members in response to the public records request from Anthony Lorenzo and Citizens for Sunshine, Inc. (a nonprofit corporation devoted to promoting awareness and compliance with open government laws) because several city council members failed to copy the clerk on emails transmitted from their personal email accounts, and the city council members deleted their emails from their personal computers. After almost a year of litigation and an evidentiary hearing on the amount of the attorneys' fees and costs that would be assessed against the city, Judge Robert Bennett ordered the city to pay \$777,114.42 in attorneys' fees and costs, one of the highest and most costly judgments entered against a local government for violations of the Public Records and Sunshine laws.

In addition to civil penalties against the agency, depending on the nature of the violation, a public officer who violates Florida's Public Records Law may be subject to penalties that include a fine of \$500; public suspension, removal, or impeachment from office; and criminal misdemeanor or felony claims.<sup>20</sup>

### **Evolving Public Records**

In 1982, the question of application of Florida's Public Records Law to information stored on an agency's computer was first judicially decided when such information was determined to be public record if it concerned the business of an agency.<sup>21</sup> Emails made or received in connection with official business by agency employees and representatives have similarly been declared a public record.<sup>22</sup> The Florida Supreme Court has clarified, however, that only emails made or received pursuant to law or ordinance, or in connection with the transaction of official business qualify as a "public record," and private emails are not automatically a public record by virtue of their placement on a government-owned computer.<sup>23</sup>

The Public Records Law has also been extended to website blogs and message boards irrespective of whether the message is created on a publicly or privately owned computer when the record is in connection with official business of the agency.<sup>24</sup> In the context of websites and blogs, the Florida attorney general has opined that when public officials of a public agency create a public document by posting comments about official agency business, the individual is responsible for ensuring that the information is maintained in accordance with the Public Records Law and the policies and retention schedule adopted by the agency.<sup>25</sup>

In April 2009, the Florida attorney general responded to an inquiry from the City of Coral

Springs regarding whether the municipality could create and use a Facebook page in compliance with Florida's Sunshine and Public Records Laws.<sup>26</sup> The Florida attorney general's opinion suggests that a city has the authority to establish a Facebook page pursuant to its home rule authority for a valid public purpose, but stated that any information on the city's Facebook pages made or received in connection with the transaction of official business by the city would be subject to Florida's Public Records laws.<sup>27</sup> Florida's attorney general stated that to the extent the information on the city's Facebook account communicated information made or received in connection with the transaction of official business, such information would constitute a public record, and the city would be under an obligation to follow the public record retention schedules set forth in F.S. §257.26.<sup>28</sup>

Similarly, in October 2009, the First District Court of Appeal, in *National Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009), extended the Public Records Law to documents "received" by an agency's legal counsel from a secure, password-protected website that was operated from a remote computer since the agency's legal counsel's use of the information from the website was for a public purpose.<sup>29</sup>

### **Social Networking Sites – Can the Records Be Retained?**

The rise of social networking sites like Facebook and Twitter is staggering. Facebook has more than 100 million users.<sup>30</sup> Facebook allows each of its members to create a profile to share as much or as little information as they would like with their "friends" or "fans." The premise of Facebook is that information on a member's Facebook account will only be shared with the friends or fans that have been granted access by the Facebook member. Individuals with Facebook accounts share information and provide access to "friends." Businesses and organizations (including agencies and governments) with Facebook accounts share information and provide access to "fans."

Twitter is a combination of instant messaging and blogging, and is commonly referred to as "microblogging." Twitter permits text-based postings of no more than 140 characters. Twitter delivers instant messages from the sender's profile page, and the information posted is then delivered to the sender's "followers." The sender's messages are termed "tweets." Tweets can be sent or received from users' Blackberries, smart phones, or iPhones.

One of the benefits of Facebook and Twitter is that one can make and receive messages from a computer, a cellular phone, or other device, and thereby stay informed about the most current events and news. The appeal of these two social networking sites in particular is that they allow their members to link to other member's messages, and follow other messages and postings from related and connected users. The benefits of these sites include their ability to reach a broad audience; their free access; and their ability to provide people with instant feedback.<sup>31</sup>

Facebook and Twitter are yet two other ways for governments to disseminate information and engage their constituents. Many agencies are operating Facebook and Twitter sites as a way to publicize and disseminate the most up to date agency sponsored events, meeting agendas and public notices, and legislative information. Substantive information on issues like water nutrient criteria establishment, off shore oil drilling, census information, and economic development opportunities and grants are also prevalent topics on Florida's agencies' sites. We have seen the prominence of Twitter and Facebook during natural disasters (*i.e.*, recent

earthquakes in Haiti, Chile, and Japan) and the usefulness of these tools to disseminate time sensitive information during emergencies and crisis situations. It is easy to see the appeal of this source of technology and the benefits it could provide from a communication standpoint. The immediate dissemination of information through Facebook or Twitter relating to natural disasters, emergency services, and even child abductions could save lives. The Sunshine Technology Team's Feb. 22, 2010, presentation on "Social Networking and Cloud Computing" suggests that the use of Facebook and Twitter sites for the dissemination of news releases and media announcements for public awareness, education, and outreach constitute legitimate agency usage.<sup>32</sup> In this context, the value of social networking sites to assist an agency in protecting the health, safety, and welfare of its constituents would be invaluable.

Since the rendition of the Florida attorney general's opinion on a municipality's use of Facebook, several state and local governments have interpreted the opinion as authorization to proceed with the establishment of Facebook and Twitter accounts subject to compliance with Florida's Public Records and Sunshine Laws. The following is a list of some of the Florida government agencies with Twitter accounts: City of Sarasota, City of Port Orange, Palm Beach County, Pinellas County, Pinellas County Emergency Management, the South Florida Water Management District, the Southwest Florida Water Management District, St. John's River Water Management District, the Florida State Parks, and the Lake County Economic Growth and Redevelopment, to name a few. Agencies with Facebook accounts include the cities of Coral Springs, Tallahassee, and Jacksonville; the Clay County Supervisor of Elections; and the Florida League of Cities. Miami-Dade County, Nassau County, Collier County, the City of West Palm Beach, the Florida Association of Counties, the Department of Business and Professional Regulation, and Enterprise Florida maintain both Facebook and Twitter accounts.

#### **Retaining Records from Facebook and Twitter: Problems**

Twitter and Facebook postings made or received on a Florida agency's site would be subject to Florida's Public Records Law, since all forms of records that are sent or received in connection with official business are a public record. Although the social networking sites provide an opportunity to reach out to constituents using this technology, the practical problem with these sites from an agency's perspective is whether an agency can really maintain all of the contents qualifying as a public record that is made and received on an agency's social networking site like Facebook and Twitter to comply with Florida's Public Records Law.

Since Facebook and Twitter are web-based private companies, Florida's agencies may be able to control the content and message that the agency makes and posts on these sites; however, the agency cannot control the content that the agency receives from other people's posts on the agency's site. Similarly, Florida's agencies cannot control whether a message posted by a third party is subsequently deleted from the social networking site by the website operator (*i.e.*, Facebook and Twitter) or the posting third party, as both the person posting the message and the social networking site (Facebook and Twitter) have the ability to delete such postings.

A Florida agency maintaining one of these social networking mediums could lose public records because the posting is deleted by forces outside of the agency's control. Consequently, the agency could technically violate the Public Records Law and state retention and destruction policies by virtue of a third party's deletion of such information. Additional risks to agencies operating on these sites include inadequate record retention and data protection and significant agency exposure under Florida's Public Records and Sunshine Law.<sup>33</sup>

It appears that many agencies are addressing the retention of tweets and posts “made” on their own Twitter and Facebook accounts by either purchasing software that saves these postings onto the agency’s server, by making “hard copies” of their postings, or by simply only posting information that is duplicative of agency emails that are saved on the agency’s servers.

Agencies appear to be adopting institutional controls that include coordination between the agency’s records custodian, and policies within communication departments on who is permitted to “post” on social networking sites on behalf of the agency. These controls may be enough to satisfy the Public Records Law. The trickier issue is how the agency will maintain and store postings the agency receives by third parties on their sites. Will the agency operating the account retain each posting received by the agency as a new record, or can the records be saved cumulatively? Additionally, will the agencies retain the postings by printing out a hard copy, or will the agency invest in technology that enables it to archive and retrieve the postings? Will each posting the agency’s site receives be a separate record that will need to be stored? How will each agency handle negative postings it receives if and when a displeased constituent posts negative comments in connection with agency business on the agency’s site?

Even with all the above questions about the agency’s retention, the most difficult and liability filled issue will likely be how agencies will ensure that their individual employees and officials are complying with the Public Records Law when they make and receive postings or tweets on their own personal accounts in connection with official business. How will the agencies ensure the capture of all public records made and received relating to official business from each individual’s sites? How will the individual provide all public records to the agency’s records custodian?

### **Lots of Questions, Few Solutions**

At least one company, GovLive Vault, appears to be promoting itself as one possible solution to the Public Records Law compliance concerns faced by Florida agencies operating social networking sites.<sup>34</sup> For a fee, GovLive Vault acts as an offsite records custodian that takes digital images of all the information contained on an agency’s social networking site (Facebook, Twitter, and YouTube) and copies the information onto an offsite virtual server.<sup>35</sup> When a public records request is received from an agency, the agency contacts GovLive Vault, which then produces a PDF report responsive to the information requested for specific query dates. Although this product may provide a solution for a government entity that subscribes to this service, individual social networking accounts operated by agency officials or employees would not be captured by this service, unless those individuals separately subscribe to the service on their own.

While agencies operating these social networking sites have presumably consulted with their legal counsel prior to the establishment of these accounts, the agency staff maintaining these sites must be thoroughly trained on the Public Records and Sunshine Laws and must establish some type of coordination with the agency’s records custodian. Agencies operating these accounts should have adopted policies, in addition to email retention policies, that provide how these social networking public records will be retained, maintained, and produced in response to public records requests. Agencies should provide updated training to all officials, staff, and representatives on the risks and coordination needed when operating personal accounts.

Attention must be given to how agency officials and representatives retain, maintain, and reproduce postings from their sites that contain information made in connection with agency business.

To the extent that agencies are aware of personal accounts, the agency must take steps to inform these individuals that there is potential for agency and personal liability for communications in connection with agency business. Based upon the recent decisions in the *City of Venice* and *National Collegiate Athletic Association*, to the extent communications are posted on personal social networking sites in connection with public business, there is a great likelihood that the agencies will shoulder the primary financial exposure and liability for the failure of its representatives to properly provide this information to the agency's records custodian.

<sup>1</sup> Fla. Stat. §286.011(2009); Fla. Const. art. I, §24 (b).

<sup>2</sup> See Fla. Const. art. I, §24(a) (emphasis added).

<sup>3</sup> See Fla. Stat. §119.01(1).

<sup>4</sup> See Fla. Stat. §119.011(2).

<sup>5</sup> See Fla. Stat. §119.07(1)(a).

<sup>6</sup> *Mintus v. City of West Palm Beach*, 711 So. 2d 1359, 1361 (Fla. 4th D.C.A. 1998).

<sup>7</sup> *Id.*

<sup>8</sup> Fla. Stat. §119.011(12) (emphasis added).

<sup>9</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>10</sup> *State v. City of Clearwater*, 863 So. 2d 149, 151, 153 (Fla. 2003).

<sup>11</sup> *National Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1207 (Fla. 1st D.C.A. 2009).

<sup>12</sup> Fla. Stat. §119.021(2)(c).

<sup>13</sup> Op. Att'y Gen. Fla. 01-20 (2001); see *also* Informal Op. Att'y Gen. Fla. (June 8, 2007).

<sup>14</sup> Fla. Admin. Code R. 1B-26.003(6)(g); Florida Department of State's General Schedule for State and Local Government Agencies (GS1-SL).

<sup>15</sup> *Puls v. City of Port St. Lucie*, 678 So. 2d 514, 514 (Fla. 4th D.C.A. 1996); *National Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1210 (Fla. 1st D.C.A. 2009) (finding the Public Records Law can be enforced against any person who has custody of public records, whether that person is employed by the public agency creating or receiving the records or not).

<sup>16</sup> *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, 305 (Fla. 3d D.C.A. 2001).

<sup>17</sup> *Tribune Company v. Cannella*, 458 So. 2d 1075, 1079 (Fla. 1984); *Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th D.C.A. 1996).

<sup>18</sup> Fla. Stat. §119.12; *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th D.C.A. 1996).

<sup>19</sup> *Lorenzo v. City of Venice*, Case No. 2008 CA 8108 SC, (Fla. 12th Cir. Ct. Oct. 7, 2009); *Office of State Attorney for Thirteenth Judicial Circuit of Florida v. Gonzalez*, 953 So. 2d 759 (Fla. 2d D.C.A. 2007).

<sup>20</sup> Fla. Stat. §119.10; *State v. Webb*, 786 So. 2d 602 (Fla. 1st D.C.A. 2001).

<sup>21</sup> *Seigle v. Barry* 422 So. 2d 63, 65 (Fla. 4th D.C.A. 1982), *review denied*, 431 So. 2d 988 (Fla. 1983) (finding that information stored on an 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).

<sup>22</sup> Op. Att'y Gen. Fla. 96-34 (1996); Op. Att'y Gen. Fla. 01-20 (2001); Op. Att'y Gen. Fla. 07-14 (2007).

<sup>23</sup> See *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003) (stating "private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer").

<sup>24</sup> See Op. Att'y Gen. Fla. 08-07(2008) (finding that postings by a city council member on a private Internet website about official business would be subject to the requirements of the Public Records Law); *National Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d at 1207 (stating that the Public Records Law is not limited to paper documents, it applies to documents that exist only in digital form as well.)

<sup>25</sup> Op. Att'y Gen. Fla. 08-07(2008) (stating that an individual council member that is public posting comments relating to city business is responsible for ensuring that the information is maintained in accordance with the city's retention policy and the Public Records Law.)

<sup>26</sup> Op. Att'y Gen. Fla. 09-19(2009).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *National Collegiate Athletic Ass'n*, 18 So. 3d at 1207 (stating that the method of transmission of a public record to an agency is immaterial if the public record is examined by an agency's representative in connection with public business).

<sup>30</sup> Tina Trenker, *Is Social Media a Friend or Foe of Government*, *Governing* (Jan. 2010), available at <http://www.governing.com/article/social-media-friend-or-foe-government>.

<sup>31</sup> Sunshine Technology Team, *Social Networking and Cloud Computing* Presentation (Feb. 22, 2010), available at [http://myfloridalegal.com/webfiles.nsf/WF/JFAO-82YLBJ/\\$file/SocialNetworking.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JFAO-82YLBJ/$file/SocialNetworking.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> GovLive Vault, <http://www.govlive.com/vault>.

<sup>35</sup> *See id.*

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*This column is submitted on behalf of the City, County and Local Government Law Section, Vivien Jane Monaco, chair, and Jewel W. Cole, editor.*

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