

2-C-17 | PERSONAL RECORDS NOT MADE OR RECEIVED IN THE COURSE OF OFFICIAL BUSINESS

As noted in AGO 04-33, the broad definition of "public record" makes it clear that the "form of the record is irrelevant; the material issue is whether the record is made or received by the public agency in connection with the transaction of official business." See s. 119.011(12), F.S., defining the term "public records" to mean materials "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." See also *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980), stating that in order to constitute "public records" for purposes of Ch. 119 disclosure requirements, the records must have been prepared "in connection with official agency business" and be intended to "perpetuate, communicate, or formalize knowledge of some type."

Accordingly, records which are not made or received in connection with the transaction of official business do not constitute public records for purposes of Ch. 119 disclosure requirements. See e.g. *Butler v. City of Hallandale Beach*, 68 So. 3d 278 (Fla. 4th DCA 2011) (e-mail sent by mayor from her personal account using her personal computer and blind copied to friends and supporters did not constitute a public record because the e-mail was not made pursuant to law or ordinance or in connection with the transaction of official business). Similarly, text messages from a city commissioner to her husband during a city commission meeting which were 'uniformly personal and private' and were not made in connection with any business transacted by the city, "did not possess the attributes of official business and, therefore, did not become subject to public records inspection." *City of Sunny Isles Beach v. Gatto*, 338 So. 3d 1045 (Fla. 3d DCA 2022). The court noted that the commissioner was not acting in her official capacity when she texted with her husband; "[n]or did her husband step out of his role as husband and adopt the role of a citizen either seeking to enter a City process or to transact City business." *Id.*

In evaluating whether a record is made or received in connection with the official business of an agency, "the determining factor is the nature of the record, not its physical location." *State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003). In *Clearwater*, the Court held that personal e-mails between government employees on government-owned computers which were not made or received in the course of official business did not constitute public records.



See also *Bent v. State*, 46 So. 3d 1047, 1050 (Fla. 4th DCA 2010) (recordings made by sheriff's office of personal telephone calls between minors in jail awaiting trial and third parties are not public records when contents of the phone calls do not involve criminal activity or a security breach); and *Media General Operations, Inc. v. Feeney*, 849 So. 2d 3 (Fla. 1st DCA 2003) (records of personal or private calls of legislative employees using cellular phone service provided by a political party do not constitute official business of the Legislature and are not subject to public disclosure).

However, in concluding that the location of e-mails on a government computer does not control the application of Public Records Act, the Clearwater court also cautioned 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." *State v. City of Clearwater*, at 151n.2. And see *Miami-Dade County v. Professional Law Enforcement Association*, 997 So. 2d 1289 (Fla. 3d DCA 2009) (personal flight log of pilots paid by county which are required as part of pilots' administrative duties are distinguishable from personal e-mails in *City of Clearwater* case and are subject to disclosure). See also AGO 09-19 (because the creation of a city Facebook page must be for a municipal, not private purpose, the "placement of material on the city's page would presumably be in furtherance of such purpose and in connection with the transaction of official business and thus subject to the provisions of Chapter 119, Florida Statutes"),

Thus, in *Bill of Rights, Inc. v. City of New Smyrna Beach*, No. 2009-20218-CINS (Fla. 7th Cir. Ct. April 8, 2010), available online in the Cases database at the open government site at myfloridalegal.com, the court concluded that billing documents regarding personal calls made and received by city employees on city-owned or city-leased cellular telephones are public records, when those documents are received and maintained in connection with the transaction of official business; "and, the 'official business' of a city includes paying for telephone service and obtaining reimbursement from employees for personal calls." See also AGO 77-141 (copies of letters or other documents received by the mayor in his official capacity constitute records received "in connection with the transaction of official business" and therefore are public records). Compare Inf. Op. to Burke, April 14, 2010 (while the licensing board, and not Attorney General's Office, must determine whether a letter, allegedly sent to the



board by mistake, had been received by the board in connection with the transaction of official business, the board "may wish to consider whether circumstances characterize how the document was received, such as does the letter relate to a past, existing, or potential investigation by the board").

Similarly, the mere fact that an e-mail is sent from a private e-mail account using a personal computer is not the determining factor as to whether it is a public record; it is whether the e-mail was prepared or received in connection with official agency business. See *Butler v. City of Hallandale Beach*, supra. For example, if a public employee sends a proposed agency budget to his or her supervisor for review, the report is a public record, regardless of whether the report was sent from the employee's agency e-mail account using a government computer, or from his or her home computer using a personal e-mail account. And see AGO 08-07 (individual council members who post comments and emails relating to 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").

"An elected official's use of a private cell phone to conduct public business via text messaging can create an electronic written public record subject to disclosure." *O'Boyle v. Town of Gulf Stream*, 257 So. 3d 1036, 1040 (Fla. 4th DCA 2018). However, in order for the communication to constitute a public record, "an official or employee must have prepared, owned, used, or retained it within the scope of his or her employment or agency." *Id.* at 1040-1041. According to the *O'Boyle* court, an official or employee's communication "falls 'within the scope of employment or agency' only when their job requires it, the employer or principal directs it, or it furthers the employer's or principal's interests." *Id.* at 1041. Cf. AGO 16-16 (hospital district not authorized to reimburse a board member for attorney fees incurred in responding to a public records request for records relating to her board service which were stored in her private computer and telephone when no suit, claim, charge, or action was instituted against the commissioner when the fees were incurred).

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