SENDING THE WRONG MESSAGE: TECHNOLOGY, SUNSHINE LAW, AND THE PUBLIC RECORD IN FLORIDA

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> *Since the general civilization of mankind, I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations.*[1]

I. INTRODUCTION

There is nothing like a sex scandal to grab people's attention. In January 2008, the *Detroit Free Press* published sexually graphic text messages exchanged by Detroit Mayor Kwame Kilpatrick and his then chief of staff Christine Beatty, both of whom had vehemently denied that they were having an extra-marital affair.[2] The published messages revealed that Kilpatrick and Beatty lied under oath in a whistleblowers' lawsuit[3] and that Kilpatrick agreed to settle the suit for $8.4 million to keep the affair quiet.[4] These revelations led to criminal charges that forced

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1. James Madison, Speech, *Virginia Convention on the Ratification of the Constitution* (Richmond, Va., June 6, 1788) (available at http://www.constitution.org/rc/rat_va_05.htm).

2. Jim Schaefer & M. L. Erick, *Freep.com*, *Kilpatrick, Chief of Staff Lied under Oath, Text Messages Show*, http://www.freep.com/article/20080124/NEWS05/801240414/Kilpatrick++chief+of+staff+lied+under+oath++text+messages+show (Jan. 24, 2008).

3. Detroit Free Press, *Freep.com*, *Time Line of Events*, http://www.freep.com/article/20080905/NEWS01/809050341/Time+line+of+events (Sept. 5, 2008). Detroit Deputy Chief of Police Gary Brown and Officer Harold Nelthrope filed the suit, alleging they were fired in retaliation for their investigation of Kilpatrick's security detail. Pl.'s 1st Amend. Compl. at ¶¶ 102, 137, *Brown v. Oliver*, 2003 WL 25717752 (Mich. Cir. June 2, 2003).

4. *Timeline of Events*, *supra* n. 3.

Kilpatrick to resign as mayor, give up his law license, pay restitution, and ultimately serve jail and probation time.[5]

After being denied two Freedom of Information Act (FOIA)[6] requests for the text messages, which were sent via city-issued SkyTel pagers, the *Detroit Free Press* ultimately obtained 14,000 of them through an unidentified source.[7] Naturally, the public's attention was riveted on the salacious nature of the text messages exchanged between Kilpatrick and Beatty.[8] However, the fact that the mayor also used his pager to discuss official business with city employees and his inner circle has greater legal significance.[9]

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5. P.J. Huffstutter, *Los Angeles Times*, *Detroit Mayor Kwame Kilpatrick Pleads Guilty to Felonies, Resigns*, http://articles.latimes.com/2008/sep/05/nation/na-kilpatrick5 (Sept. 5, 2008); Kate Linebaugh, *Detroit Mayor Kilpatrick to Resign in Plea Agreement*, Wall St. J. A4 (Sept. 5, 2008) (available at http://online.wsj.com/article/SB122053339750899459.html).

6. Michigan's FOIA requires the disclosure of non-exempt public records. Mich. Comp. Laws Ann. § 15.233(1) (West 2009). For a discussion of Michigan's FOIA, see *infra* note 11.

7. Melanie Bengston, *First Amend. Ctr.*, *Officials' Text Messages Can Pose FOI Dilemma*, http://www.firstamendmentcenter.org/news.aspx?id=19958 (Apr. 24, 2008). Kilpatrick has filed suit against SkyTel, alleging violations of the Federal Stored Communications Act, found at 18 U.S.C. § 2702 (2008). Pl's Compl. at ¶ 32, *Kilpatrick v. SkyTel, Inc.*, 2009 WL 689744 (Miss. Cir. Mar. 10, 2009). He claims that SkyTel improperly released the messages to police attorney Michael Stefani and the *Detroit Free Press* after receiving a second subpoena in the whistleblowers' lawsuit. Suzette Hackney, *Freep.com*, *Kilpatrick Sues SkyTel over Text Messages*, http://www.freep.com/article/20090311/NEWS01/903110395/0/NEWS01/Kilpatrick-sues-SkyTel-over-text-messages (Mar. 11, 2009). He also alleges that SkyTel did not inform him of the second subpoena, giving him no opportunity to object to the messages' release. *Id*. He claims that federal law gives him a reasonable expectation of privacy because the SkyTel pagers were for personal use as well as public business. *Id*.

8. The Kilpatrick scandal will be referenced throughout this Article. Although Michigan law applies to the Kilpatrick case, the story provides a useful backdrop illustrating the potential abuses of text messaging by public officials. For a brief discussion of Michigan's open government laws, see *infra* note 11.

9. *See* M. L. Elrick & Jim Schaefer, *Freep.com*, *Texts Show Highs, Lows of Kilpatrick's Time in Office*, http://www.freep.com/article/20090310/NEWS01/903100349/Texts+show+the+highs++lows+of+Kilpatrick+s+time+in+office (Mar. 10, 2009) (revealing the topics of nearly 6,000 previously unreleased text messages) [hereinafter Elrick & Shaefer, *Highs, Lows*]. In particular, the text messages show lengthy exchanges regarding the firing of Brown and Nelthrope and the recommended $2.25 million settlement of their whistleblowers' lawsuit. *Id*.; *see generally* Mot. Limine Admit Evid. and Br. in Support of Mot. Limine Admit Evid., *People v. Kilpatrick* (July 7, 2008) (available at http://www.freep.com/uploads/pdfs/2008/10/texts1023.pdf) (disclosing the content of many of the text messages).

Most states have statutes—known variously as Sunshine Laws, Open Meetings Acts, Public Records Acts, and Freedom of Information Acts—prohibiting public officials from discussing official business privately and failing to disclose information regarding the operations of government.[10] When the Kilpatrick story broke, it pointed to gaps in such laws, few of which mention newer technologies such as text messaging.[11]

Florida's open government laws have slowly evolved over the past forty years through judicial interpretation and Attorney General Opinions—influences that have helped to maintain the strength of the law in the face of rapid technological change.[12] But the statutes lack clarity and continuity with regard to technology. To remedy this problem, the Florida Commission on Open Government Reform recently spent two years reviewing these laws and recommending areas ripe for legislative review and amendment.[13]

Remarkably, the Commission found that while e-mail communications between public officials become part of the public record, text or instant messages "most likely" do not.[14] The Commission's reasoning is wrongheaded because it focuses the public record determination on the particular technology used for communication rather than on the content of the messages.[15] In sug-

10. *See* Sunshine Review, *Sunshine Review*, http://sunshinereview.org/index.php/United_States (last updated Aug. 31, 2009) (providing links to descriptions and reviews of each state's Sunshine Laws).

11. Michigan's Open Meetings Act states that "[a]ll meetings of a public body shall be open to the public." Mich. Comp. Laws Ann. § 15.263(1) (West 2009). However, Michigan limits the scope of the law to deliberations involving a quorum of a public body's members. *Id.* § 15.263(3). Michigan's FOIA exempts from disclosure "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." *Id.* at § 15.243(1)(a). Thus, Kilpatrick's use of his pager, and the city's failure to disclose the text messages, may not have violated Michigan law; however, that analysis is beyond the scope of this Article. Florida law does not provide officials with a general right of privacy. *See infra* n. 155 and accompanying text (explaining that the right to access public records includes a number of exemptions, excluding the right of privacy).

12. Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 Fla. St. U. L. Rev. 245, 260 (2008).

13. Fla. Commn. Open Govt. Reform, *Reforming Florida's Open Government Laws in the 21st Century* 1, 1–2 (Final Rpt. Jan. 27, 2009) (available at http://www.flgov.com/pdfs/og_2009finalreport.pdf) [hereinafter *Reform in the 21st Century*].

14. *Id.* at 124.

15. Although no Florida official has been embroiled in a sex scandal involving text

gesting that text messages cannot be made part of the public record, the Commission would effectively contravene decades of Florida case law, defy new rules regarding e-discovery, and potentially open the door for federal privacy claims. Furthermore, the Commission creates a gigantic loophole in Florida's public records law.

This Article will illustrate why the Commission's recommendations regarding text messaging are unsound, encourage Florida's legislature to reject those recommendations, and offer practical suggestions for crafting legislation that better controls and supports the role of electronic communications in open government. Section II provides a brief examination of the history of Florida's open government laws and how they have been shaped over the past four decades, while Section III delves into the impact of technology on the law. Section IV discusses how other areas of the law are shaping electronic record retention, and Section V looks at the impact of privacy concerns and government record retention policy. Section VI recommends that Florida's legislature reject the Commission's recommendations regarding text messaging and enact legislation making all communications between public officials part of the public record regardless of the underlying technology. If public officials are allowed to pick and choose which communications are to be made public based upon the underlying technology, both the letter and spirit of Florida's public records law will be undermined.

II. HISTORICAL BACKGROUND

The history and evolution of Florida's open government laws provide a backdrop at odds with the Commission's analysis re-

messages, the use of handhelds by public officials is hardly unique to Detroit. Ft. Lauderdale City Manager George Gretsas, for example, allegedly uses text messaging purposely to thwart Florida's open meetings law when conducting city business. Brittany Wallman, *SunSentinel.com*, *Will Attorney General Make Text Messages Public Record?* http://weblogs.sun-sentinel.com/news/politics/broward/blog/2008/05/will_attorney_general_make_tex.html (May 21, 2008). The Ft. Lauderdale Fraternal Order of Police has filed suit against Gretsas and Assistant City Manager David Herbert demanding the release of years' worth of text messages exchanged between the two. Brittany Wallman, *SunSentinel.com*, *Cops 2 Ft L: C U in Court!* http://weblogs.sun-sentinel.com/news/politics/broward/blog/2008/09/police_union_wants_politicians.html (Sept. 9, 2008). The City of Ft. Lauderdale claims that the text messages are not subject to the State's public records law. *Id.*

garding text messaging and the public record. Enacted in 1967 by legislators weary of politics as usual, the Sunshine Law was strengthened by courts that interpreted it expansively from the outset.[16] The courts have consistently refused to allow the kinds of categorical exceptions to the open government laws that the Commission's recommendations condone.

A. Spirit of Reform: The Policy behind Florida's Sunshine Law as Enacted by the Legislature and Interpreted by the Courts

Open meetings legislation, commonly known as Sunshine Laws, establishes that the business of government must be conducted in full view of the public so that the People can ensure that elected officials operate within the limits of their powers.[17] Florida's Sunshine Law has long been lauded as one of the best in the nation.[18] The law's purpose is not only oversight but participation; input from the citizenry improves government and, in turn, instills public confidence.[19] As a result, the State extends the reach of its Sunshine Law to any meeting of state or local officials,[20] with the goal of thwarting any attempt to circumvent open meeting mandates.[21] Research has shown that Florida's Sunshine Law has fewer exemptions than most other states' open meetings statutes,[22] and Florida courts have been reluctant to allow exceptions.[23]

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16. Jon Kaney, *Courts Key to Strength of Florida's Sunshine Law*, The Masthead (Summer 2002) (available at http://findarticles.com/p/articles/mi_m2737/is_2_54/ai_n25050988/).

17. Stephen Schaeffer, *Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws*, 48 St. Louis U. L.J. 755, 755 (2004). Some argue that the Sunshine State lent its name to open meetings legislation. *Id*. at 757 n. 12. Florida applies the term only to open meetings law, not public records law. Chance & Locke, *supra* n. 12, at 245 n. 1.

18. Chance & Locke, *supra* n. 12, at 245.

19. Schaeffer, *supra* n. 17, at 758–759.

20. *Id*. at 757.

21. *Id*. at 759. The law states simply that "[a]ll meetings of any board or commission . . . at which official acts are to be taken are declared to be public meetings open to the public at all times." Fla. Stat. § 286.011(1) (2008).

22. Chance & Locke, *supra* n. 12, at 258; *see infra* n. 155 and accompanying text (discussing the types of public records exempt from disclosure).

23. Jon Kaney, *Cobb Cole*, *Florida's Sunshine Law: Notes on a Law and an Ideal* 2, http://www.cobbcole.com/news/news-archives.html (May 29, 2002).

It has not always been this way. In 1905, Florida passed a law requiring city and town councils and boards of aldermen to hold open meetings.[24] However, that law was narrowly interpreted by the Florida Supreme Court when it held that the term "meetings" meant "formal assemblages."[25]

For many years, reform-minded legislators diligently introduced new legislation aimed at strengthening Florida's open meetings requirements,[26] but their efforts were frustrated by a secretive group of conservative state senators known as the Pork Chop Gang.[27] Notorious for closed-door politics and its relentless assault on its enemies,[28] the Pork Chop Gang was finally ousted by a series of federal court rulings mandating legislative reapportionment.[29]

The 1966 elections gave Florida a Republican governor and a number of liberal Democrats who moved quickly to put an end to government behind closed doors.[30] Governor Claude Kirk signed Senate Bill 9 on July 12, 1967, which finally codified Florida's Sunshine Law under Section 286.011 of the Florida Statutes.[31]

The new Sunshine Law was soon challenged by officials who were unaccustomed to such public scrutiny, but the Florida Supreme Court refused to allow evasion.[32] In *Board of Public Instruction of Broward County v. Doran*,[33] the Court declared that

24. Fla. Stat. § 165.22 (repealed 1974).

25. *Turk v. Richard*, 47 So. 2d 543, 544 (Fla. 1950). For the text of the less-restrictive current statute, review *supra* note 21.

26. Kaney, *supra* n. 23, at 1.

27. *Id*. The Pork Chop Gang was a group of North Florida Democrats who dominated the Florida State Senate due to a late-nineteenth century apportionment rule that gave disproportionate voting power to rural districts. Seth A. Weitz, *Bourbon, Pork Chops and Red Peppers: Political Immorality in Florida, 1945–1968*, at 4 (unpublished Ph.D. dissertation, Fla. St. U.) (available at http://etd.lib.fsu.edu/theses_1/available/etd-04052007-183052/unrestricted/sawdissertation.pdf). Inspired by McCarthyism, the Pork Chop Gang used its clout to perpetuate Old South agrarian values and white supremacy amid the rapid growth of urban, industrial South Florida. *Id*. at 6.

28. Weitz, *supra* n. 27, at 6.

29. Kaney, *supra* n. 23, at 1.

30. Chance & Locke, *supra* n. 12, at 249.

31. *Id*. at 250.

32. Kaney, *supra* n. 23, at 2–4.

33. 224 So. 2d 693 (Fla. 1969). In *Doran*, the trial court found that the Broward County School Board had violated the open meetings law by holding private "conferences" before and during public meetings. *Id*. at 696. On appeal, the Board argued that the new Sunshine Law was unconstitutionally vague. *Id*. at 697. The Court held that the "obvious intent [of the law] was to cover any gathering of the members where the members deal

closed meetings had "become synonymous with 'hanky panky'" and that "[r]egardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made."[34]

The Court reiterated its position in *Canney v. Board of Public Instruction of Alachua County*,[35] stating that Florida's Sunshine Law, "having been enacted for the public benefit, should be interpreted most favorably to the public."[36] In *Town of Palm Beach v. Gradison*,[37] the Court held that the law "should be construed so as to frustrate all evasive devices."[38] In *Wood v. Marston*,[39] the Court stated that "the Sunshine Law was enacted in the public interest to protect the public from 'closed door' politics and, as such, the law must be broadly construed to effect its remedial and protective purpose."[40]

In 1992, the Sunshine Law became a fundamental right of Floridians in the Declaration of Rights of the Florida Constitution.[41] The Constitution was further amended in 2002 to require a two-thirds majority of the legislature to pass or renew exemptions to the open meetings and public records requirements.[42] In addition, the Florida Attorney General's office prepares the "Government in the Sunshine Manual" each year, incorporating legisla-

with some matter on which foreseeable action will be taken by the board." *Id*. at 698.

34. *Id*. at 699.

35. 278 So. 2d 260 (Fla. 1973). In *Canney*, the Alachua County School Board argued that it was acting in a "quasi-judicial" capacity when it recessed a meeting to determine privately if a student should be suspended. *Id*. at 262. The Court held that the Board was nonetheless a legislative agency and the Sunshine Law applied. *Id*. The Court noted that "[v]arious boards and agencies have obviously attempted to read exceptions into the Government in the Sunshine Law which do not exist. Even though their intentions may be sincere, such boards and agencies should not be allowed to circumvent the plain provisions of the statute." *Id*. at 264.

36. *Id*. at 263.

37. 296 So. 2d 473 (Fla. 1974).

38. *Id*. at 477.

39. 442 So. 2d 934 (Fla. 1983). The University of Florida argued that a faculty committee formed to find and evaluate candidates for dean of the College of Law did not have to deliberate in public. *Id*. at 937. The Court held that because the committee had been delegated decisionmaking authority it was obligated to comply with the Sunshine Law. *Id*. at 938.

40. *Id*. (citing *Canney*, 278 So. 2d at 260; *Doran*, 224 So. 2d at 693).

41. Fla. Const. art. I, § 24.

42. Chance & Locke, *supra* n. 12, at 257.

tion, court decisions, and Attorney General Opinions.[43] The manual clearly illustrates the breadth of Florida's Sunshine Law.[44] That breadth has been firmly established by Florida courts, which have been unwilling to restrict the law's reach.

B. Open to the Public: Defining the Boundaries of Open Meetings and Public Records

The Florida Constitution requires that all meetings at which public officials discuss or conduct public business are to be open to the public unless otherwise exempted.[45] This language is reiterated in the Florida Statutes, which also provide that "no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting."[46] The Florida Supreme Court has ruled that the constitutional amendment left this older statute intact.[47]

In interpreting this legislation, Florida courts have consistently focused on the *purpose* of the law: "to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance."[48] The Florida Supreme Court has held that these rules apply to all discussions by officials regarding foreseeable public business over which they have authority, not just "official" meetings.[49] Furthermore, every step in the deliberative process, not just the ultimate decision, falls within the purview of the Sunshine Law.[50]

If officials want to discuss public matters, they must schedule a proper, open meeting, and "minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public

43. Off. Atty. Gen., *Government-in-the-Sunshine Manual* Vol. 31 (2009 Electronic Edition) (available at http://myfloridalegal.com/webfiles.nsf/WF/MRAY-6Y8SEM/$file/Sunshine.pdf) [hereinafter *Manual*]. The Government-in-the-Sunshine Manual is designed to "serve as a guide to those seeking to become familiar with the requirements of the open government laws." *Id.* at Introduction.

44. *Id.*

45. Fla. Const. art. I, § 24(b).

46. Fla. Stat. § 286.011(1) (2008).

47. *See Frankenmuth Mut. Ins. Co. v. Magaha*, 769 So. 2d 1012, 1021 (Fla. 2000) (stating that Florida's Sunshine Law has "both constitutional and statutory dimension[s]").

48. *Gradison*, 296 So. 2d at 477.

49. *Doran*, 224 So. 2d at 698.

50. *Times Publg. Co. v. Williams*, 222 So. 2d 470, 473 (Fla. 2d Dist. App. 1969).

inspection."[51] All forms of communication are included in the definition of "discussion," including mail, telephone, e-mail, and even sharing the same computer.[52]

The public record law works hand in glove with the open meetings law by requiring the public disclosure of information related to official business. In the past, Florida law limited the scope of the "public record" to a statutorily defined set of documents.[53] Today, however, the Florida Statutes define the term broadly:

> "Public record" means 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.[54]

In *Shevin v. Byron, Harless, Schaffer, Reid & Associates*,[55] the Florida Supreme Court described public records more succinctly as "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."[56] Any record an agency decides to keep, even if only for internal purposes, becomes part of the public record,[57] and the definition of "document" pertains to data stored on a computer system as well as paper-based files.[58]

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51. Fla. Stat. § 286.011(2) (2008).

52. *Manual*, *supra* n. 43, at 16–17. Unilateral communications of facts are not prohibited, but if officials distribute documents stating their position on an issue or a memorandum or e-mail requesting a response from other decision-makers, such communications could constitute a meeting as contemplated by the law. *Id*. The Commission notes that a discussion of public business via e-mail or text messaging would violate the open meetings law. For a more complete discussion of the open meetings law and the use of e-mail or text messaging, consult *infra* Section III(c).

53. *Amos v. Gunn*, 94 So. 615, 634 (Fla. 1922).

54. Fla. Stat. § 119.011(12) (2008).

55. 379 So. 2d 633 (Fla. 1980).

56. *Id*. at 640.

57. Penelope Thurmon Bryan & Thomas E. Reynolds, *Agency E-mail and the Public Records* Laws—*Is the Fox Now Guarding the Henhouse?*, 33 Stetson L. Rev. 649, 658 (2004).

58. *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th Dist. App. 1982).

Any person may ask to inspect public records for any reason.[59] An agency must respond to a public records request promptly and in good faith, which includes making a reasonable effort to determine if and where a record exists.[60] The only permissible delay is the time necessary to gather the records and redact any portions that are exempt.[61] Failure to respond to a public records request in a timely fashion can constitute a violation of the public records law.[62]

The Florida Supreme Court has held that only an agency's designated records custodian, not an individual employee, may claim that a record is exempt from disclosure.[63] The custodian must state in writing why the record is deemed exempt,[64] and if portions of a record are exempt, the custodian must redact those portions and produce the rest without delay.[65]

Florida's Public Records Act defines the public record broadly and strictly limits an agency's authority to deny a public records request. Courts have consistently affirmed the public's right to inspect public records unless the agency can document a clear and specific exemption from disclosure, and have imposed penalties when agencies have failed to produce public records in a timely manner.[66]

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59. *Curry v. State*, 811 So. 2d 736, 741–742 (Fla. 4th Dist. App. 2002).

60. Fla. Stat. § 119.07(1)(c) (2008).

61. *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984); *see infra* n. 155 (describing the types of records that are exempt from disclosure).

62. *Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th Dist. App. 1996); *see infra* nn. 70–71 and accompanying text (describing penalties for failure to disclose public records).

63. *Cannella*, 458 So. 2d at 1079. In *Cannella*, the City of Tampa wanted an automatic delay in the release of police personnel records so that the officers could have an opportunity to challenge the disclosure of the information. *Id*. at 1076. The Florida Supreme Court held that the public records law gave the officers no such right and that if the officers wished to raise a constitutional challenge "the time when the record is requested is not the time" to do so. *Id*. at 1078–1079. In *A.J. v. Times Publg. Co*., however, the Court distinguished situations in which a records custodian refuses to assert a statutory exemption. 605 So. 2d 160, 162 (Fla. 2d Dist. App. 1992). Statutory exemptions are designed to protect the privacy rights of covered individuals and a "custodian's refusal to assert the exemption deprives them of their statutory protection." *Id*.

64. Fla. Stat. § 119.07(1)(f) (2008). If the exemption is challenged, the court may review the public record in camera at its discretion. *Id*. at (1)(g).

65. *Cannella*, 458 So. 2d at 1078. An agency may not refuse a public records request on grounds that redaction would be too difficult. Fla. Atty. Gen. Op. 99-52 (Sept. 1, 1999) (available at http://www.myfloridalegal.com/ago.nsf/Opinions/04E6FED295114161852567E0004B45A9).

66. *See e.g. Town of Manalapan*, 674 So. 2d at 790 (holding that mandamus was an

C. The Price of Darkness: Penalties for Violation of the Sunshine Law

The Florida Statutes provide that any citizen may seek enforcement of the State's Sunshine Law in Florida circuit courts, and individual officials face civil and criminal penalties for Sunshine Law violations.[67] If a plaintiff seeking enforcement prevails, he or she is entitled to attorney's fees and court costs, which the court may assess against the individual officials found to be in violation of the law.[68]

Official action is voided *ab initio* if it is found that officials violated the Sunshine Law at any step.[69] Genuine reconsideration of the matter in a proper, open meeting may cure the Sunshine Law violation, in which case the final action will not be voided.[70] However, it does not absolve officials of responsibility.

An official who violates any provision of Florida's Sunshine Law—including the mandate to keep and make available public records—may be found guilty of a noncriminal infraction punishable by fine of up to $500.[71] In addition, the Florida Statutes re-

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appropriate remedy to compel the timely production of public records); *see also infra* nn. 70–71 and accompanying text (describing penalties for failure to disclose public records).

67. Fla. Stat. § 286.011(3)(a)–(c). An official who knowingly attends a meeting that is held in violation of the Sunshine Law commits a second-degree misdemeanor punishable by up to sixty days in jail. *Id*. at § 286.011(3)(b); *id*. at § 775.082(4)(b) (2008).

68. *Id*. at § 286.011(4) (2008).

69. *Gradison*, 296 So. 2d at 477 (citations omitted).

70. *Tolar v. Sch. Bd. of Liberty Co.*, 398 So. 2d 427, 429 (Fla. 1981). The Florida Supreme Court in *Tolar* distinguished *Gradison*, in which the Court voided an ordinance adopted by the zoning board and town council during a public meeting because officials merely rubberstamped decisions made in secret by the citizens planning committee. *Id*. at 428. Although the school board in *Tolar* had private discussions about eliminating the plaintiff's job, it ultimately held an open meeting and permitted discussion on the issue. *Id*. In his dissent, Justice Adkins argued that eventually holding an open meeting was not sufficient: "The important question is not whether a formal meeting was held, but whether the members of the Board had a nonpublic meeting dealing with any matters on which foreseeable actions might be taken." *Id*. at 432 (Adkins, J., dissenting).

71. Fla. Stat. § 286.011(3)(a) (2008). In February 2008, Marco Island City Councilman Chuck Kiester was fined $500 for deleting e-mails involving official business from his home computer—an "unprecedented" decision. Leslie Williams Hale, *Naplesnews.com*, *Collier Judge Finds Marco Council Member Guilty of Records Violation*, http://www.naplesnews.com/news/2008/feb/07/collier-judge-finds-marco-councilor-guilty-sunshin/ (Feb. 7, 2008). Councilman Kiester admitted that he regularly deleted the e-mails but claimed a computer technician told him that the computer's recycle bin would archive the messages. *Id*. He also testified that he did not know that his wife had installed software

quire an agency to pay a successful plaintiff's attorney's fees when a court finds that the agency has "unlawfully refused" to grant access to public records.[72]

Florida courts have used attorney's fees as leverage in public records cases. In *New York Times Co. v. PHH Mental Health Services, Inc.*,[73] for example, the Florida Supreme Court reasoned that "[i]f public agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents."[74] Thus, citizens seeking access to public records "are more likely to pursue their right to access beyond an initial refusal by a reluctant public agency."[75]

The aforementioned penalties, coupled with the courts' expansive interpretation of the public records law, have helped keep the law strong over time. However, conflicts regarding the scope of the public records law continue to emerge, particularly with regard to technology. A primary goal of the Commission was to help establish policy that would minimize these conflicts.

III. PUBLIC RECORDS LAW MEETS TECHNOLOGY

There is no question that technological advances have tested the limits of Florida's public records law. As new technologies have become available, government agencies and public officials have challenged the applicability of the public records law to

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that regularly emptied the recycle bin. *Id.* After a constituent filed a public records request, a computer forensics specialist was able to retrieve 1,000 deleted e-mails from the computer's hard drive, prompting Kiester's attorney to claim that his client had done nothing wrong because the messages were recoverable. *Id.* Rejecting that argument, District Judge Mike Carr invoked the maximum penalty for a public records violation, stating that Kiester "made a mockery of the law" by using his home computer for public business and failing to properly archive the messages. *Id.*

72. Fla. Stat. § 119.12 (2008). In September 2009, Circuit Judge Robert Bennett ordered the City of Venice to pay plaintiff Anthony Lorenzo $750,000 in attorney's fees. Kim Hackett, *HeraldTribune.com*, *Judge Issues Ruling on Legal Fees in Venice Sunshine Case*, http://www.heraldtribune.com/article/20090925/BREAKING/909259971/2055/NEWS?Title=Judge-issues-ruling-on-legal-fees-in-Venice-Sunshine-case (Sept. 25, 2009). The City had already spent more than $600,000 defending city council members. For additional details regarding the Venice case, see *infra* notes 102–104.

73. 616 So. 2d 27 (Fla. 1993).

74. *Id.* at 29.

75. *Id.*

those tools, despite the statute's broad language.[76] Even in situations where the law clearly applies, the ease with which electronic communications can be deleted and the lack of systematic electronic archival systems in agencies have threatened to undermine government transparency.

Florida courts are becoming increasingly frustrated with officials who attempt to use technology to flaunt the State's public records law. In contrast, the Commission's recommendations would effectively encourage officials to use text messaging to circumvent public records requirements by excluding them from the reach of the law.

A. Text Messaging and the Public Record: From Public Outcry to Quiet Denial

Text messaging among officials briefly made headlines when the Kilpatrick scandal came to light, with the hue and cry for classifying text messages as public documents.[77] The furor has since died down, but journalists and other open government advocates continue to fight for access to communications among officials who vehemently deny that text messages are subject to public disclosure.[78]

Many states, including Florida, have determined that e-mails between public officials become part of the public record, and are therefore subject to FOIA requests.[79] However, the applicability of the public records law to newer technologies, such as text messaging, remains murkier. Because text messages can involve both personal and state-issued devices, and include a mix of personal and professional communications, some legal experts are hesitant to say that these messages should become part of the public record.[80] Still others argue that text messages cannot be made part

76. For further discussion regarding challenges to the application of Florida's public records law to text messages, consult the text accompanying *infra* nn. 78–80.

77. Ledyard King, *USA Today*, *Text Messages Enter Public Records Debate*, http://www.usatoday.com/tech/wireless/2008-03-15-textmsgs_N.htm (Mar. 15, 2008).

78. *See* David Plazas, *Florida Society of News Editors*, *Sunshine Week: Public Gains from More Access, Information*, http://www.fsne.org/sunshine/2009/columns/plazas/ (Mar. 15, 2009) (stating that "the Legislature ought to make public records as expansive as possible, from the paper records in a file cabinet to the digital files in an iPhone").

79. King, *supra* n. 77.

80. Cristina Silva, *tampabay.com*, *Technology Leaps Beyond Florida Public Records*

of the public record because they are not routinely stored by service providers.[81]

Because the law is unclear, many officials have presumed that text messages do not qualify as public records. In April 2008, the City of Ft. Lauderdale refused the Ft. Lauderdale police union's request for text messages exchanged by City Manager George Gretsas and assistant David Herbert, stating that "text messages are considered transitory and therefore not stored."[82] In June 2009, Assistant Attorney General Lagran Saunders declined to comment on the applicability of Florida's public records law to text messages, citing the pending litigation between the Ft. Lauderdale Fraternal Order of Police and the city.[83]

In September 2009, Attorney General Bill McCollum announced that he had set a new policy requiring the retention of text messages within his agency and would establish a "Sunshine Team" to analyze the impact of newer technologies on the public records law.[84] However, McCollum stated that he was not issuing a legal opinion regarding text messaging but only setting a policy that he hoped other agencies would follow.[85]

In Florida, technology-related challenges to the Sunshine Law have been dealt with on a case-by-case basis, leading Governor Charlie Crist to form the Florida Commission on Open Government Reform in 2007.[86] On January 27, 2009, the Commission

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Laws, http://www.tampabay.com/news/politics/stateroundup/article976484.ece (Feb. 17, 2009).

81. *Id*.

82. Ltr. from Diansjhan Williams-Persad, Asst. City Atty., to George H. Tucker, P.A., Atty. for FOP Lodge 31, *Public Records Request No.08-034 from Jack Lokeinsky, Text Messages for George Gretsas & David Hebert* (Apr. 15, 2008) (available at http://weblogs.sun-sentinel.com/news/politics/broward/blog/refusalletter.pdf). Interestingly, the letter does not say that the text messages cannot be stored. *Id*.

83. Fla. Atty. Gen. Informal Advisory Leg. Op. (June 2, 2009) (available at http://www.myflsunshine.com/ago.nsf/sunopinions/22F05701139F9E5B852575C90072B4C9). For details of the Gretsas case, consult *supra* note 15.

84. Catherine Whittenburg, *TBO.com*, *McCollum: Text Messages on AG's Blackberries Will Be Public Records*, http://www2.tbo.com/content/2009/sep/15/mccollum-text-messages-ags-blackberries-will-be-pu/ (Sept. 15, 2009). McCollum stated that the move came in response to allegations that the Public Service Commission (PSC) had engaged in "pinning" with a lobbyist. *Id*. For a discussion of "pinning" and the PSC case, consult *infra* note 119.

85. Whittenburg, *supra* n. 84. McCollum's statement suggests that retaining the text messages is simple from a technology standpoint: "We began to ask the questions and found out, sure enough, you could flip a switch on a server and begin to retain these." *Id*.

86. *Reform in the 21st Century*, *supra* n. 13, at 1.

issued its Final Report on Reforming Florida's Open Government Laws in the 21st Century.[87] However, the Commission offered little meaningful input with regard to text and instant messaging.[88] In language remarkably similar to that used by the Ft. Lauderdale assistant city attorney, the Commission theorized that text and instant messages cannot be made part of the public record because they are not routinely archived by service providers.[89]

By the time the Commission issued its report, many agencies had already thrown up their hands on this matter, choosing to disable text messaging features on government-issued devices because service providers vary widely in how long they retain messages.[90] Agencies say they cannot police employees' personal handheld devices and telecommunications accounts, and employees are allowed to "self-select" which records are personal and which are public.[91] Yet Florida courts have ordered officials to produce e-mails sent via private computers and personal e-mail accounts or turn over their computers for forensic examination.[92] Officials' text messages can and should be subject to the same scrutiny.

B. How Florida's Public Records Law Treats E-mail

Although text messaging is relatively new, the State's treatment of e-mail public records is instructive in analyzing how text messaging might be handled. In 1995, the Florida legislature modified the definition of public records to include all material "regardless of the physical form, characteristics, *or means of transmission*," ensuring that electronic communications between officials would be included.[93] The House of Representatives'

87. *Id*.

88. *Id*. at 124.

89. *Id*.

90. Silva, *supra* n. 80. Ironically, however, the city of St. Petersburg recently declined to release the text messages of a lobbyist because they were deemed private, not because they were irretrievable. *Id*.

91. *Id*. In other words, each employee decides which of his or her own messages are private in nature and therefore not subject to disclosure.

92. *See infra* nn. 102–103 and accompanying text (discussing case in which forensic examination of officials' computers was ordered).

93. Fla. Stat. § 119.011(12) (emphasis added); Bryan & Reynolds, *supra* n. 57, at 659

Committee on Government Operations noted that Florida court decisions had already made it clear that e-mails between public officials would become part of the public record, but sought to clarify the official definition to allay any confusion surrounding the law's applicability to electronic communications.[94]

However, Agency compliance still varies.[95] In November 2008, reporters tested the ability of agencies in fifty-six counties to handle public records requests involving e-mail.[96] Almost 43% failed.[97] E-mail remains problematic due to inconsistencies in how agencies archive and manage e-mail records.[98] Sensitive to this issue, the Commission recommended that "[a]ll agencies create systems or establish processes to provide enhanced public access to all public record e-mail."[99]

Another pervasive problem is officials' use of private computers and personal accounts to send and receive e-mail pertaining to public business.[100] Marco Island City Council member Chuck Kiester's February 2008 conviction for a noncriminal pub-

n. 71.

94. Bryan & Reynolds, *supra* n. 57, at 659 n. 71 (quoting the H.R. Comm. on Govt. Operations' Analysis of Fla. Comm. Substitute/H. Bill 1149, 14th Leg., 1st Reg. Sess. (June 15, 1995)). The legislature could simply have inserted the word "e-mail" into the list of documents included in the public record. Instead, the legislature chose to modify the section of the statute describing the characteristics of these documents, broadly including all types of electronic communication.

95. Walton County was sued in April 2009 for failure to properly retain e-mail records when it destroyed e-mails deleted by county commissioners in its district offices. Kimberly White, *theDestinlog.com*, *Lawsuit Targeting Walton County Claims Public Records Law Violation*, http://www.thedestinlog.com/news/video-9513-lawsuit-beach.html (June 5, 2009). The County's IT specialist testified that e-mail is purged every six weeks, and hard drives are routinely wiped clean without preserving the data. Tom McLaughlin, *theDestinlog.com*, *Counties Consider Updating Public Records Rules*, http://www.thedestinlog.com/news/rosa-10043-consider-rules.html (July 13, 2009).

96. Sunshine Review, *Public Records Requests Meet with Confusion in Central Florida*, http://sunshinereview.org/index.php/Public_record_requests_meet_with_confusion_in_central_Florida#cite_note-BH-4 (Nov. 22, 2008).

97. *Id*. A number of agencies were unable to produce the requested e-mails in a reasonable amount of time, while some claimed that no e-mails existed that met the request criteria. *Id*. Many failed the audit by demanding to know the identity of the requestor or the reason for the request, or requiring a written request. *Id*.

98. *Id*.

99. *Reform in the 21st Century*, *supra* n. 13, at 29. The Commission notes that many agencies effectively block access to public records by assessing large fees for retrieving e-mails and redacting exempt information. *Id*. at 117–118. Commercially available redaction software could eliminate the problem. *Id*. at 119–120.

100. *Id*. at 125.

lic records violation involved the deletion of e-mails containing information about city business from his personal computer.[101]

In June 2008, Sarasota County Circuit Judge Robert Bennett ordered three members of the Venice City Council to turn over their personal computers for inspection by a digital forensics expert.[102] The order stemmed from a lawsuit alleging that the officials violated Florida's Sunshine Law by discussing city business via e-mail.[103] Open government advocates say this case is the first of its kind.[104]

In drafting its recommendations regarding the overhaul of Florida's public records law, the Commission on Open Government Reform acknowledged these practices, specifically noting the Venice case.[105] The Commission's Final Report states that "[e]-mail relating to public business clearly falls within the statutory definition of 'public record' and is subject to the same retention and access requirements as all other public records."[106] The Report also states that "[t]he use of private computers and personal e-mail accounts to conduct public business does not alter the public's right of access to the public records maintained on those computers or transmitted by such accounts."[107] The Commission recommended that "all agencies adopt policies and procedures for ensuring that public records maintained on personal computers or transmitted via personal [I]nternet accounts are

101. Williams, *supra* n. 71.

102. Kim Hackett, *HeraldTribune.com*, *Nation Watches Open-Records Case*, http://www.heraldtribune.com/article/20080614/NEWS/806140373/1661 (June 14, 2008) [hereinafter Hackett, *Nation Watches*].

103. Pl.'s Corrected 4th Amend. Compl., *Citizens for Sunshine, Inc. v. City of Venice*, 2008 WL 6744964 (Fla. 12th Cir. Oct. 8, 2008). According to the complaint, the council members admitted that they "routinely deleted" e-mail from their private computers. *Id*. at ¶¶ 69–74. The complaint further alleges that the e-mail discussions between the council members constituted an electronic meeting subject to public notice. *Id*. at ¶ 1. Memoranda circulated to obtain officials' positions on a matter have been found to constitute a meeting. Fla. Atty. Gen. Informal Advisory Leg. Op. (May 29, 1973) (available at http://www.myfloridalegal.com/ago.nsf/Opinions/E3B7B3490561AD9485256CBE00731B3D). This same reasoning has been extended to e-mail. Fla. Atty. Gen. Op. 2001-20 (Mar. 20, 2001) (available at http://www.myfloridalegal.com/ago.nsf/Opinions/8012415EF5C0208F85256A1500794781).

104. Hackett, *Nation Watches*, *supra* n. 102.

105. *Reform in the 21st Century*, *supra* n. 13, at 125.

106. *Id*. at 124.

107. *Id*. at 14.

disclosed and retained according to law."[108] However, the Commission declined to treat text messaging similarly, arguing that agencies cannot control communications sent via personal handheld devices.[109]

C. Text Messaging Is Different . . . and the Same

The Commission's recommendations are included under a heading titled "Increased Use of Communications Technology Including Personal Computers and Portable Handheld Devices," but the Commission quickly draws a line between laptops and handheld devices.[110] The Commission argues that while an e-mail sent via an official's laptop computer is a public record, a text message sent via a handheld device is not, even if the content were the same:

> [I]f a city commissioner uses a laptop computer to discuss via e-mail with another commissioner an item on the commission's agenda, those e-mails are public record and must be retained by law. . . . The issue is less clear if the two city commissioners were using their portable handheld devices to send text or instant messages to each other about the same agenda item. Such messages, which are transitory in nature, aren't generally captured or stored, and thus are analogous to the spoken word and the public records law most likely does not apply.[111]

The Commission does note that if either communication involved a discussion of public business, it would violate the open meetings law.[112] However, the Commission merely recommends that "[a]ll agencies adopt policies that prohibit the use of text and instant messaging technologies during public meetings and/or hearings."[113] Why the distinction? Officials simply point to wide varia-

108. *Id*. at 165. The report acknowledges that such a policy depends upon officials' diligence in archiving e-mails as required by law. *Id*. at 124–125.

109. *Id*. at 124.

110. *Id*. at 123–124.

111. *Id*.

112. *Id*.

113. *Id*. at 166 (emphasis removed). It is not clear how the prohibition would prevent officials from using text messaging to conduct electronic meetings in other settings.

tions in the length of time that telecommunications providers keep copies of text messages.[114]

It is true that some telecommunications providers delete text messages as soon as they are delivered to the recipient, leaving nothing to trace.[115] However, others maintain stored archives of text messages, and a skilled computer forensic examiner often can retrieve message data from a handheld device even if the messages have been deleted by the user.[116] In addition, public entities can contract with service providers to archive messages indefinitely, as the Kilpatrick case makes clear, and officials could be required to archive their text messages from a handheld device onto permanent storage.[117]

Officials say the real problem arises with the use of private (not government-issued) communications devices and public instant messaging services, but the Commission's report acknowledges that similar challenges arise with e-mail.[118] The Report also notes that officials can use a variety of techniques to keep e-mail and other electronic records off of government systems and networks.[119] Yet the Commission does not dismiss e-mail as transitory.

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114. Silva, *supra* n. 80.

115. *Id*.

116. Jacob Leibenluft, *Slate*, *Do Text Messages Live Forever?* http://www.slate.com/id/2190382 (May 1, 2008).

117. A number of commercial software products are available that allow end-users to archive text messages from a variety of cell phones and handhelds onto their PCs. *See e.g.* Sound Feelings, *How to Save Text Messages to Your Computer*, http://www.soundfeelings.com/free/save_text_messages.htm (last updated Oct. 6, 2009). Again, such a policy would depend upon officials' diligence in archiving messages as required by law; however, defining the policy broadly provides recourse when unlawful use of electronic communications is discovered.

118. *Reform in the 21st Century*, *supra* n. 13, at 125. Commercial providers may only store e-mail for a short length of time. *Id*.

119. *Id*. at 125 n. 349. In particular, the report mentions a technique called "pinning" in which a user sends an e-mail to another handheld device using that device's PIN, which the telecommunications provider uses to direct e-mail, rather than the e-mail address associated with the PIN. *Id*. Because no government e-mail address is used, the message never passes through government servers. *Id*.; *see* Indiana University, *University Information Technology Services*, *Knowledge Base*, *With a BlackBerry, What Is the PIN and How Do I Find It?* http://kb.iu.edu/data/alnw.html (May 13, 2009) (explaining how pinning works). Florida's Public Service Commission (PSC) is under investigation for allegedly exchanging PINs with a Florida Power & Light attorney. Mary Ellen Klas, *tampabay.com*, *PSC Staffers, FPL Executive Had BlackBerry Connection*, http://www.tampabay.com/news/business/energy/psc-staffers-fpl-executive-had-blackberry-connection/1034153 (Sept. 6, 2009). PSC commissioners and staff are prohibited from engaging in private communica-

Furthermore, the Florida Department of State has defined "transitory" in terms of a message's content, not its delivery mechanism. In the *General Records Schedule GS1-SL for State and Local Government Agencies*, the State Library and Archives of Florida states that transitory messages are those "created primarily to communicate information of short-term value" and that are "not intended to formalize or perpetuate knowledge and do not set policy, establish guidelines or procedures, certify a transaction, or become a receipt."[120] As examples, the guidelines list interoffice communications such as meeting reminders, announcements of office events, and copies of formal agency announcements.[121]

Florida courts and agencies charged with establishing record retention policies have not permitted dilution of the public record. On the contrary, case law and record retention schedules mandate the preservation of all but the most ephemeral electronic communications. These policies serve not only to strengthen Florida's Sunshine Law but to acknowledge the growing legal importance of electronic records and the resulting changes in evidentiary and e-discovery rules.

IV. CHANGING NOTIONS OF ELECTRONIC RECORD RETENTION IN THE INTERNET AGE

Electronic communications are hardly a novelty. Indeed, electronically stored information is vital to the transaction of both public and private business. As a result, the courts have rewritten the rules regarding electronic evidence, forcing organizations to seek improved methods for retaining digital records—including electronic communications. These rules play into the public re-

tions with entities subject to PSC regulation. *Id*. Failure to retain the messages may also have violated the public records law. *Id*.

120. St. of Fla., *General Records Schedule GS1-SL for State and Local Government Agencies* 43 (revised Apr. 1, 2010) (available at http://dlis.dos.state.fl.us/barm/genschedules/GS1-SL.doc). Even transitory messages must be retained "until obsolete, superseded, or administrative value is lost." *Id*.

121. *Id*. Although the guidelines do not refer specifically to text messaging, they state that transitory messages "include, *but are not limited to*, e-mail . . . [and] telephone messages (whether in paper, voice mail, or other electronic form) . . . ." *Id*. (emphasis added). This further emphasizes that content, not medium, determines whether or not a message is transitory.

cords debate, both legally and practically: If agencies must maintain electronic communications in anticipation of litigation, then those communications can and should be subject to public records disclosure.

The definition of electronic evidence is broad, encompassing text messaging and related technologies. As a result, the Commission's argument that text messages cannot be retained belies current trends and could subject Florida agencies to increased risk of litigation.

A. The Rules Have Changed: The Growing Importance of Electronic Communications Have Altered Their Role in Litigation

Former Detroit Mayor Kilpatrick and other city employees took maximum advantage of their city-issued SkyTel pagers. In the course of her criminal investigation into Kilpatrick's misconduct, Wayne County Prosecutor Kym Worthy obtained 625,000 messages sent or received by Kilpatrick and members of his administration over forty months.[122]

Those numbers point to the growing prevalence of text messaging in the United States. According to the Pew Internet and American Life Project, 62% of Americans now use handheld devices for non-voice data applications such as text messaging.[123] According to CTIA-The Wireless Association, subscribers were sending an average of 135.2 billion text messages per month as of June 2009.[124]

Text messages, like e-mail and other electronic data, have entered the mainstream—in fact, as little as 3% of information is stored in paper form.[125] As a result, courts now generally treat electronically stored information the same as documents in litigation production, and are increasingly wary of claims that elec-

122. Elrick & Schaefer, *Highs, Lows*, *supra* n. 9.

123. John B. Horrigan, *Seeding the Cloud: What Mobile Access Means for Usage Patterns and Online Content* 1 (Pew Internet and American Life Project 2008) (available at http://www.pewinternet.org/~/media/Files/Reports/2008/PIP_Users.and.Cloud.pdf.pdf).

124. CTIA, *Wireless Quick Facts*, http://www.ctia.org/media/industry_info/index.cfm/AID/10323 (accessed Dec. 17, 2009).

125. NASCIO, *Seek and Ye Shall Find? State CIOs Must Prepare Now for E-Discovery!* 3, http://www.nascio.org/publications/documents/nascio-ediscovery.pdf (2007) [hereinafter NASCIO, *Prepare Now*].

tronic information cannot be produced due to technological challenges.[126]

Recent amendments to the Federal Rules of Civil Procedure (FRCP) that specifically address e-discovery reflect the major role of electronic documents in litigation.[127] FRCP Rule 34(a)(1)(A) states that information "stored in any medium" may be subject to e-discovery requests, which would clearly include text messages and data stored on handheld devices.[128] The National Association of State Chief Information Officers (NASCIO) warns that discoverable data could be located anywhere from a central data center or server to "*an employee's personal PDA that contains both personal and work-related information*."[129]

While FRCP Rule 26 states that a party to a lawsuit does not have to provide electronic information from sources that are "not reasonably accessible because of undue burden or cost," a court may still require such information if the requesting party shows "good cause" for its discovery or challenges the inaccessibility claim.[130] The determination of whether data is inaccessible depends not upon the underlying technology "but upon the balancing of need, technology, importance, spoliation, relevance, alternative sources and potential benefit against overbreadth, burden and cost."[131] Courts are increasingly willing to issue sanctions to parties who fail to establish electronic record retention policies and procedures in anticipation of future litigation.[132] Similarly, courts are unlikely to be sympathetic to agencies that routinely delete electronic communications without preserving them.[133]

126. *Id*. at 4.

127. *Id*. at 3.

128. Fed. R. Civ. P. 34(a)(1)(A). The NASCIO has listed instant messages among the "digital object types" that should be preserved in anticipation of e-discovery. NASCIO, *The Search Is On: State CIO Starting Points for E-Discovery* 5, http://www.nascio.org/publications/documents/NASCIO-TheSearchIsOn.pdf (2007) [hereinafter NASCIO, *Starting Points*].

129. NASCIO, *Prepare Now*, *supra* n. 125, at 3 (emphasis added).

130. Fed. R. Civ. P. 26(b)(2)(B).

131. Dean Gonsowski, *e-discovery 2.0*, *Five Electronic Discovery Questions Regarding Inaccessibility with David Isom*, http://www.clearwellsystems.com/e-discovery-blog/2009/04/30/five-electronic-discovery-questions-regarding-inaccessibility-with-david-isom/ (Apr. 30, 2009).

132. Kroll Ontrack, *News Center, News Releases, Year in Review: Courts Unsympathetic to Electronic Discovery Ignorance or Misconduct*, http://www.krollontrack.com/news-releases/?getPressRelease=61208 (Dec. 2, 2008).

133. *See infra* n. 137 (discussing a case in which a court sanctioned an agency for its

B. Applicability of E-Discovery Rules to Electronic Information Stored by Government Agencies

What does e-discovery have to do with the public record? When an entity reasonably anticipates litigation, it must immediately take steps to preserve any information—including electronically stored information—that may be relevant to the case, a process known as "legal hold."[134] Given the significant odds that an organization will become a party to litigation at some point, technology experts recommend that organizations develop ongoing data retention and management strategies to reduce the time and cost associated with e-discovery requests.[135] Because the FRCP apply to public as well as private litigants, experts recommend that government agencies take similar steps.[136] Agencies should also inform employees of their role in ensuring that records are properly maintained.[137]

In *Flagg v. City of Detroit*,[138] a case with ties to former Detroit Mayor Kilpatrick,[139] the U.S. District Court for the Eastern District of Michigan compelled the City of Detroit to produce text

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failure to take steps to retain electronic communications).

134. NASCIO, *Starting Points*, *supra* n. 128, at 3–4.

135. *Id*. at 2.

136. NASCIO, *Prepare Now*, *supra* n. 125, at 3. The report notes that state courts are likely to adopt similar rules. *Id*.

137. NASCIO, *Starting Points*, *supra* n. 128, at 7. Failure to properly retain records can be costly. In December 2007, the U.S. District Court for the Eastern District of New York sanctioned Suffolk County for failure to put data on legal hold in anticipation of litigation. *Toussie v. Co. of Suffolk*, 2007 WL 4565160 at *7 (E.D.N.Y. Dec. 21, 2007). The County argued that employees had taken steps to retain e-mails and other data on their individual computers, but the court held that there was no way to know whether all relevant documents had been retained because the County never formally suspended its usual document retention procedures and employees remained free to delete potentially relevant data. *Id*. The County was required to pay the plaintiff's costs in litigating the e-discovery dispute. *Id*. at *10. Ironically, the e-mails in question were more helpful to the County than to the plaintiff. *Id*. at *9. E-discovery experts say that this is often the case, thus it generally makes more sense to retain data than to delete it. Benjamin Wright, *Electronic Data Records Law: How to Win E-Discovery*, *E-Discovery Legal Hold: County Underestimates Value of Its Own E-Mail Records*, http://legal-beagle.typepad.com/wrights_legal_beagle/2008/12/local-government-botches-e-discovery-and-legal-hold.html (Dec. 19, 2008).

138. 252 F.R.D. 346 (E.D. Mich. 2008).

139. The case is related to a $150 million wrongful death lawsuit filed against the City of Detroit by the family of an exotic dancer who claimed she attended a party at Kilpatrick's mansion. Click on Detroit, *$150 Million Lawsuit Over Rumored Mansion Party*, http://www.clickondetroit.com/news/14884764/detail.html (Dec. 18, 2007). The family alleged she was later shot and killed as part of a cover-up. *Id*.

messages sent by city employees on government-issued handhelds because the text messages were under the city's control and thus discoverable under FRCP Rule 34(a).[140] The court found that this control stemmed not only from the City's right to grant its consent to the disclosure of the messages but also from the fact that at least some of the messages were public records.[141] The City has an obligation to preserve and disclose such records, putting it in the same position as a corporation required to produce electronic information under FRCP Rule 34(a).[142]

Flagg establishes a clear link between text messages, the public record, and e-discovery requirements. At the same time, the NASCIO makes a key distinction between the public record and discoverable electronic data: because electronically stored information subject to e-discovery procedures is broader than the public record, processes designed to maintain data in anticipation of litigation would discourage employee-driven record retention decisions and nullify arguments that certain types of records cannot be maintained.[143] In an era when public and private entities are required by the courts to produce any electronic communications related to pending litigation, agencies no longer have the luxury of deleting text messages.

140. 252 F.R.D. at 353. The City argued that the release of the messages violated the Federal Stored Communications Act (SCA), 18 U.S.C. § 2702, which prevents service providers from disclosing the content of electronic communications to civil litigants with limited exceptions. *Id.* at 359. Disagreeing with the Ninth Circuit's ruling in *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892 (9th Cir. 2008), the *Flagg* court found that the archived text messages constituted computer storage; therefore, their contents could be divulged with the consent of the subscriber, in this case the city. 252 F.R.D. at 363. For a detailed discussion of *Quon* and the implications of the SCA, see *infra* notes 166–174 and accompanying text.

141. 252 F.R.D. at 355. The court noted that the city's electronic communications policy, issued by Mayor Kilpatrick, warns employees that electronic communications "may be deemed under the law to be public records" and "may be subject to court-ordered disclosure." *Id.* at 356 n. 20 (quoting Memo. from Info. Tech. Servs., to Dept. Dir., Agency Heads, Members of Bds. and Commns., City Council Members, The City Clerk, Parking Dept. and All On Site Vendors, *Directive for the Use of the City of Detroit's Electronic Communications System* 2, http://info.detnews.com/pix/2008/pdf/citydirective.pdf (Apr. 15, 2008)).

142. *Id.* at 356.

143. NASCIO, *Starting Points*, *supra* n. 128, at 3.

C. E-Discovery Concepts Are Coming into Play in FOIA and Public Records Requests

The Sarasota County Circuit Court ruling demanding that Venice City Council members turn over their personal computers for forensic examination may have been a first, but it reflects a growing trend in litigation involving public records. In an increasing number of cases, courts are ordering officials to produce e-mails that are subject to an FOIA request even if agency policy allows their deletion.[144]

In December 2008, the Ohio Supreme Court ordered the Seneca County Board of Commissioners to use computer forensics to attempt to recover e-mails subject to a newspaper's public records request.[145] The County asserted that the e-mails had been deleted in accordance with its record retention policy, which permitted individual officials to determine which e-mails had "significant administrative, fiscal, legal, or historic value" and thus must be retained in accordance with the state's public records law.[146] However, the Court held that evidence of significant gaps of time between e-mails produced by the County was enough to establish the inference that the commissioners had violated the County's record retention policy.[147] The Court noted that deleted information is subject to e-discovery[148] and further ruled that the County had to bear the cost of the forensic examination.[149]

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144. Benjamin Wright, *Electronic Data Records Law: How to Win E-Discovery*, *FOIA Requires Recovery of Deleted E-mails*, http://legal-beagle.typepad.com/wrights_legal_beagle/2009/01/foia-requires-recovery-of-deleted-e-mails.html (Jan. 24, 2009). Wright notes that these cases cast serious doubt on the logic of self-selection policies:

> If a government agency is required under a FOIA to incur great expense to recover deleted e-mails after officials had determined—under a formally-adopted policy—that the e-mails were of 'no significant value,' then it makes no sense to let officials delete e-mails in the first place. Such a make-a-decision style of policy is unworkable because it will cause the government regularly to employ expensive forensics to recover deleted records.

Id.

145. *State ex rel. Toledo Blade Co. v. Seneca Co. Bd. of Commrs.*, 899 N.E.2d 961, 964 (Ohio 2008).

146. *Id.* at 970.

147. *Id.*

148. *Id.* at 969.

149. *Id.* at 972. The County argued that the Ohio public records law allowed it to charge a reasonable fee for records requests, but the court held that the fees applied to requests for copies of records, not the right to inspect the records. *Id.* The court did note that while

In *Griffis v. Pinal County*,[150] the Supreme Court of Arizona held that the courts, not public officials, ultimately decide what constitutes a public record even if a government agency's record retention policy allows officials to decide whether records are personal and therefore not subject to disclosure.[151] The Idaho Supreme Court has held that the personal communications of a public official are public records if they suggest the basis for official action or the administration of agency business.[152] Thus, in a growing number of jurisdictions, an agency's decision not to retain certain types of records is unlikely to prevent courts from demanding disclosure.

With most information now stored electronically, courts are prohibiting litigants from picking and choosing which records they will produce. E-discovery demands that all organizations retain electronic communications in anticipation of litigation, and government agencies have the additional mandate of public records policy. No one wants his or her private communications revealed in a court of law. However, officials face an increasingly uphill battle in their efforts to maintain control over record retention.

V. WHAT IS PUBLIC? PRIVACY AND SELF-SELECTION THREATEN GOVERNMENT TRANSPARENCY

Privacy and technology converge in twenty-first-century struggles over public records policy. Florida's legislature and courts have taken steps to ensure that privacy rights do not swal-

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the significant cost of recovering deleted electronic data is sometimes shifted to the party making the e-discovery request, the policy behind the public records law demanded that the county be required to pay. *Id.*

150. 156 P.3d 418 (Ariz. 2007).

151. *Id.* at 422. A plaintiff need only show that an official refused to produce e-mail or other electronic documents stored on a government computer to establish a prima facie case that the data constitutes a public record. *Id.* at 423. The burden then shifts to the agency to produce the records in order to prove that they are not public. *Id.*

152. *Cowles Publg. Co. v. Kootenai Co. Bd. of Co. Commrs.*, 159 P.3d 896, 902 (Idaho 2007). The case involved e-mails exchanged by Kootenai County Prosecutor William Douglas and his employee Marina Kalani suggesting that the two had an "inappropriate" relationship. *Id.* at 898. Questions regarding their relationship arose when Douglas publicly defended Kalani against allegations of misconduct. *Id.* The court held that the e-mails were public records because the public had a right to know the motivations behind his defense of her. *Id.* at 902.

low up the Sunshine Law. However, federal privacy laws and the realities of the modern, electronic workplace could undercut these efforts. Furthermore, policies allowing public employees to self-select which records become public create an unacceptable loophole in Florida's public records mandate. The Commission's Final Report does not effectively address either problem.

A. The Privacy Debate

The City of Detroit fought a long and costly battle to keep the text messages of Kilpatrick and Beatty out of the limelight. After the nature of the text messages became public knowledge, Kilpatrick and Beatty struggled to minimize the legal fallout the messages would cause by asserting a right of privacy.[153] In *Flagg*, the U.S. District Court for the Eastern District of Michigan noted the irony of this claim: the City of Detroit had an electronic communications policy, signed by Kilpatrick himself, advising city employees that any messages sent, received, or stored on a city-owned system became the property of the city and were very likely subject to disclosure under the public records law.[154]

The Florida Constitution grants to everyone a general right of privacy with one caveat: the right to privacy may not limit access to public records.[155] The Florida Constitution also guarantees the right to access public records, unless such records are exempted by a two-thirds vote of each house of the Florida legislature or defined by the Constitution as confidential.[156] All exemptions "shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."[157] The legislature has enacted a fairly

153. *See supra* n. 7 (discussing Kilpatrick's lawsuit against SkyTel alleging that the telecommunications provider violated his privacy by releasing the text messages).

154. 252 F.R.D. at 364–365. For additional discussion of the City of Detroit's electronic communications policy, see *supra* note 141.

155. Fla. Const. art. I, § 23. Federal law may preempt Florida's constitutional guarantee of access to public records. *See e.g. Rios v. Direct Mail Express, Inc.*, 435 F. Supp. 2d 1199, 1206 (S.D. Fla. 2006) (holding that the Driver Privacy Protection Act of 1994 prevented the use of Florida motor vehicle data for marketing purposes).

156. Fla. Const. art. I, § 24(c). All exemptions that were on the books at the time the amendment was enacted remained on the books until repealed. Fla. Const. art. I, § 24(d).

157. *Id*. at § 24(c).

limited number of exemptions, none of which provides officials with a general right of privacy.[158]

Florida courts have been hesitant to constrain public records policy based upon privacy concerns. In *Forsberg v. Housing Authority of Miami Beach*,[159] the Florida Supreme Court held that the files of public housing tenants, which contained financial, medical, and other personal information, were public records irrespective of any constitutional right of privacy.[160] In *Michel v. Douglas*,[161] the Court held that a tax-funded hospital's personnel files were part of the public record despite the privacy concerns of employees.[162] Many types of private data have since been exempted from public disclosure, but Florida courts have made it clear that they will not play the role of the legislature in extending such exemptions.[163]

However, there is a risk that federal law could come into play. In his concurring opinion in *Forsberg*, Justice Adkins agreed with the result but advocated a clearer application of the federal balancing test weighing privacy rights against government interests.[164] He asserted that a failure to do so "could have a devastating effect on our public meeting and public records law because it opens the door to a more restrictive federal court interpretation of the proper application of the balancing test, and thereby permits those courts to construe our laws contrary to the views of this Court."[165] A recent Ninth Circuit decision gives weight to his concerns.

158. Fla. Stat. § 119.071 (2008). The exemptions generally apply to attorney-client privilege and attorney work product, criminal investigations, security-related matters and personally identifiable information that might result in identity theft or threaten an individual's safety. *See generally id.* at § 119.071(2)–(5) (describing the exemptions from inspection or copying of public records). Many other exceptions are contained in other Florida statutes. *See Forsberg v. Hous. Auth. of Miami Beach*, 455 So. 2d 373, 378 n. 3 (Fla. 1984) (per curium) (listing statutes with public records exceptions).

159. 455 So. 2d 373 (Fla. 1984).

160. *Id.*

161. 464 So. 2d 545 (Fla. 1985).

162. *Id.* at 546.

163. *Hous. Auth. of City of Daytona Beach v. Gomillion*, 639 So. 2d 117, 121 (Fla. 5th Dist. App. 1994).

164. 455 So. 2d at 379 (Adkins, J., specially concurring in result).

165. *Id.*

B. *Quon*-tifying Privacy: The Impact of the Federal Stored Communications Act on Text Messaging and the Public Record

The Ninth Circuit's 2008 decision in *Quon v. Arch Wireless Operating Co., Inc.*[166] created a new challenge for public records laws. Sgt. Jeff Quon of the City of Ontario, Calif., Police Department sued the City for violating the Fourth Amendment and California's constitutional privacy protection. He also sued the City's telecommunications provider, Arch Wireless, for giving his supervisor transcripts of his text messages without his consent.[167] The City had an e-mail policy stating that all communications sent using City resources were property of the City that could be monitored at any time, and when the City began issuing pagers, Lt. Steve Duke informed Sgt. Quon and others that the e-mail policy extended to text messaging.[168] However, Lt. Duke did not enforce that policy.[169]

Lt. Duke did enforce a policy requiring officers to pay overage fees for exceeding their allotted 25,000 characters per month, but informally promised not to monitor messages if officers paid the fees when requested. Sgt. Quon regularly exceeded the limit and paid the fees.[170] However, Lt. Duke requested a transcript of Sgt. Quon's text messages when Police Chief Lloyd Scharf asked him to "audit" the messages to determine if they were work-related, warranting an increase in the character-count allotment, or personal.[171]

The court held that Sgt. Quon had a reasonable expectation of privacy because of Lt. Duke's informal policy and that the search of the text messages was unreasonable given the objective of the audit.[172] The court also found that the Federal Stored Communi-

166. 529 F.3d 892 (9th Cir. 2008).

167. *Id.* at 895. Quon exchanged sexually explicit text messages with his wife and mistress, who both joined him in the lawsuit. *Id.*

168. *Id.* at 896.

169. *Id.* at 897.

170. *Id.*

171. *Id.* at 897–898.

172. *Id.* at 906, 909. In December 2009, the U.S. Supreme Court agreed to review the Ninth Circuit's decision. Philip L. Gordon, *Workplace Privacy Counsel*, *Supreme Court Review of Quon May Provide Important Guidance for Private Employers*, http://privacyblog.littler.com/2009/12/articles/electronic-monitoring/supreme-court-review

cations Act (SCA) prevented Arch Wireless from disclosing stored messages to the city even though the city subscribed to the service; messages could be disclosed only to the sender or intended recipient.[173] Most notably, the court held that even if text messages were part of the public record in California, government employees have a reasonable expectation of privacy.[174]

Legal analysts have advised employers that they may safely monitor employee text messages by avoiding statements or practices that could establish a reasonable expectation of privacy.[175] Effective electronic communications policies have also successfully protected the public record. The *Flagg* court leveraged the City of Detroit's electronic communications policy to overcome an SCA claim,[176] and the Idaho Supreme Court has held that public records are not protected by a constitutional right to privacy if the agency has established a computer-use policy eliminating any expectation of privacy.[177]

However, the Commission's presumption that text messages are not part of the public record could create an expectation of privacy and thus potentially place employee text messages off limits to public disclosure even if they are retained by a telecommunications provider. Furthermore, the Commission would continue to allow officials to decide for themselves which records must be retained, further weakening Florida's public records policy.

C. Who Decides? The Problem of Self-Selection

In Florida, no general right to privacy can prevent disclosure of a public record absent a specific exemption.[178] However, Florida officials routinely control access to "personal" communications by

-of-quon-may-provide-important-guidance-for-private-employers/ (Dec. 14, 2009).

173. *Quon*, 529 F.3d at 900. The Supreme Court declined to review this ruling. Gordon, *supra* n. 172.

174. *Quon*, 529 F.3d at 908.

175. Philip L. Gordon & Justine A. Morello, *Employee Text Messages Are Not Inviolate: Understanding and Navigating the Ninth Circuit's Decision in* Quon v. Arch Wireless Operating Company, A.S.A.P. (newsltr. of Littler Mendelson) 2 (July 2008) (available at http://www.littler.com/PressPublications/Documents/2008_07_ASAP_EmployeeTextMessages_QuonArchWireless.pdf).

176. For a discussion of *Flagg*, consult *supra* notes 140–141 and accompanying text.

177. *Cowles Publg. Co.*, 159 P.3d at 902.

178. For a discussion of this constitutional guarantee, review *supra* note 155 and accompanying text.

self-selecting which records become public—a practice sanctioned by a 2003 Florida Supreme Court decision.[179]

The *St. Petersburg Times* sued the City of Clearwater in December 2000, demanding e-mails sent over the City's computer network that two employees had designated as "personal" correspondence not subject to disclosure under the public records law.[180] The City allowed the employees to make their own determination as to the private nature of the e-mails; no independent review of the content was conducted despite the fact that the City's computer-use policy stipulated that e-mails sent over the City's network were not private and could be accessed to fulfill public records requests.[181] The trial court held that if the content of the e-mails was personal, the messages were not public records because they did not involve city business.[182]

The Second District Court of Appeals affirmed the trial court's decision, but asked the Florida Supreme Court to address the question of "whether all e-mails transmitted or received by public employees of a government agency are public records . . . by virtue of their placement on a government-owned computer system."[183] The Court held that although the employees had no expectation of privacy when using city computer systems, their personal e-mails were not subject to disclosure under the public records law.[184] If the e-mails did not involve public business, they did not become public records simply because they were sent using city equipment.[185]

Many officials continue to defy the simple logic of Florida's Sunshine Law by giving themselves the authority to decide which e-mails are "transitory" or "personal" and thus outside the domain of the public record.[186] The U.S. District Court for the Middle District of Florida questioned this practice in *Wells v. Orange County School Board*,[187] concluding that permitting individual employees

179. *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003).
180. Bryan & Reynolds, *supra* n. 57, at 650, 652.
181. *Id*.
182. *Id*. at 653.
183. *City of Clearwater*, 863 So. 2d at 150 (all capital letters omitted).
184. *Id*. at 154.
185. *Id*. at 155.
186. Silva, *supra* n. 80.
187. 2006 WL 4824479 (M.D. Fla. Nov. 7, 2006).

to determine if an e-mail were transitory in nature and not of "public importance" created a loophole that would enable employees to pick and choose which e-mails were subject to public disclosure.[188] The court noted that "wide variation in employees' personal definitions of 'transitory,' not 'official business,' or not of 'public importance'" could serve as a "cloak under which some employees might try to obscure access to e[-]mails unflattering or unsupportive of their perspective on an issue."[189]

However, the Commission's Final Report does not effectively deal with the problem of "self-selection" of the public record, particularly with regard to communications transmitted via a personal account.[190] The report notes that an official or employee "'must self-select to copy' the correspondence to the government server," providing no guarantee that all communications are properly archived.[191] Some jurisdictions are addressing this question by changing their approach to electronic records management. The State of Washington has updated its computer-use policy stating that any e-mail generated on government computers may be monitored and retained for the public record.[192] In response to criticism regarding the routine deletion of e-mail by his staff, Missouri Governor Matt Blunt established a permanent e-mail retention policy that prohibited self-selection.[193] While these policies focus on e-mail, the same approach can be extended to text messages.

States that maintain traditional record retention schedules are being criticized for enabling systematic evasion of public re-

188. *Id*. at *2. In its defense, the school board cited the definition of "transitory" in the Florida record retention schedule. *Id*. For a discussion of "transitory" messages, see *supra* notes 120–121 and accompanying text.

189. *Wells*, 2006 WL 4824479 at *2. The court imposed costs of $750 on the school board for its lack of diligence in searching for e-mails relevant to the case, which had resulted in a one-year delay in production. *Id*. The court did not sanction the school board for spoliation of evidence, however, because the plaintiff had not identified any documents that were spoliated. *Id*. at *3. The court did not address the fact that the one-year delay would make it more difficult to recover deleted files because the likelihood that those files would be overwritten increases with time. *Id*.

190. *Reform in the 21st Century*, *supra* n. 13, at 124.

191. *Id*.

192. Ellen Perlman, *Governing*, *Delete at Your Own Risk*, http://www.governing.com/article/delete-your-own-risk (Jan. 1, 2008).

193. *Id*.

cords statutes.[194] Even if officials are not using electronic communications to circumvent Sunshine Laws, as many clearly are, critics argue that the importance of a message may only become clear over time.[195]

VI. UPDATING FLORIDA'S PUBLIC RECORDS LAW FOR THE TWENTY-FIRST CENTURY

The Florida Commission on Open Government Reform made a number of noteworthy recommendations in its Final Report. With regard to text messaging, however, the entity tasked with bringing Florida's Sunshine Law up-to-date took a technology-specific approach that does not comport with Florida's public records policy. The Florida legislature should therefore reject the Commission's recommendations regarding text messaging and adopt open government legislation that will prepare Florida for the future.

A. The Fallacy of the Commission's Argument: Why We Need a Better Approach

If the *Detroit Free Press* had not obtained copies of the Kilpatrick text messages, would the scandal have come to light? There is no way to know, of course. However, similar political shenanigans might never see the light of day in the Sunshine State if the legislature adopts the recommendations of the Commission regarding text messaging.

By focusing on distinct aspects of a particular technology in analyzing whether communications become part of the public record, the Commission would create an unacceptably large loophole in Florida's public records law.[196] Excluding text messages from the public record because they are "transitory"[197] and allow-

194. *Id*.

195. *Id*.

196. Arguably, the broad exemption of text messages from the public record would be unconstitutional. The Florida constitution requires that such exemptions be narrowly tailored to meet a "public necessity." *See* text accompanying *supra* n. 157 (stating the Florida constitutional requirement).

197. "Transitory," as defined by the Florida Department of State, is a content-based analysis, not a technology-based analysis. *See supra* nn. 120–121 and accompanying text (noting the definition of "transitory" stated in Florida's General Records Schedule).

ing officials to simply delete all text messages regardless of content undoubtedly would encourage some officials to use text messaging specifically to skirt the public records law.[198]

Instead, the Commission should have focused on Florida's longstanding public records policy[199] and let the technology take care of itself. If the State requires archival text messaging, the market will provide it.[200] Although agencies will argue that taxpayers would be unwilling to fund such services, a comprehensive, market-based approach to message archival could help minimize protracted litigation and substantial awards of attorney's fees.[201]

Even if commercial text messaging services did present insurmountable obstacles to public record preservation, agencies can use various techniques to effectively deal with the technology. The NASCIO issued a report in 2005 addressing the use of text and instant messaging (IM) in government, warning that "[g]iven the potential for IM communications to constitute official communications if used for state business purposes, states should consider ways to manage and archive such communications."[202]

In particular, the NASCIO recommended that government entities deploy enterprise-class IM solutions and disallow the use of commercial text messaging services for public business.[203] In the past, such solutions were expensive, difficult to use, and pre-

198. The Sunshine Law attorney for the Attorney General's Office has stated that it would be impossible to convict an official of violating the public records law using text messaging because service providers do not archive the messages. Silva, *supra* n. 80. However, stricter retention policies and court-ordered forensic examination of handheld devices could provide the evidence needed.

199. *See supra* nn. 56–58 (discussing broad interpretations of Florida's public records law).

200. Officials' concerns regarding the variability of record retention can be overcome through market forces; if the State were to allow agencies to contract only with those service providers that archive text messages, text messages would be archived.

201. *See supra* nn. 72–75 (discussing courts' use of attorney's fees as leverage in public records cases).

202. NASCIO, *TLK2UL8R: The Privacy Implications of Instant & Text Messaging in the States* 7, http://www.nascio.org/publications/documents/NASCIO-instantMessagingBrief.pdf (2005) (emphasis removed).

203. *Id*. at 11. An enterprise-class messaging system uses software licensed and controlled by the agency. *Id*. at 3. The NASCIO report notes that the Florida State Technology Office uses an enterprise-class messaging system. *Id*. at 8. Although not specifically addressed in the report, there are technologies that allow such systems to be delivered to mobile handhelds. *E.g.* Rhombus Technologies, *Rhombus IM Mobile Technology*, http://www.rhombusim.com/mobile/ (accessed Dec. 17, 2009) (example of a mobility-enabled enterprise IM solution).

cluded communications using commercial IM services, but newer products have overcome these limitations.[204]

Agencies could also subscribe to services that provide long-term storage of text messages, provide employees with software that can be used to download text messages to personal computers, or utilize low- or no-cost archival techniques such as forwarding text messages to government e-mail accounts.[205] Gaps of time in archived text messages could be used to establish an inference of public records law violations.[206]

This is far from revolutionary. The private sector is finding ways to preserve records, regardless of the underlying technology, in order to meet e-discovery and regulatory compliance mandates.[207] Public records should be approached similarly: the Commission should take its cue from the FRCP, which acknowledges that technology changes rapidly and rejects technology-specific arguments that data is inaccessible.[208] Indeed, courts are likely to consider the Commission's argument regarding text messages specious should a Florida agency become embroiled in litigation.

Some officials have suggested that text messages sent using private devices are presumptively private and should not be monitored.[209] Many text messages are private in nature, and such messages are not public records; only those messages "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency" must be preserved.[210] However, there must be some mechanism—other than

204. *E.g.* Barracuda Networks, *Barracuda IM Firewall*, http://www.barracudanetworks.com/ns/products/im_features.php (accessed Dec. 17, 2009) (example of a product allowing management and logging of public and private messaging).

205. *See* Ask MetaFilter, *How Can I Archive My Phone's Text Messages for Future Reference, Without Paying a Lot in Money or Effort?* http://ask.metafilter.com/77112/How-can-I-archive-my-phones-text-messages-for-future-reference-without-paying-a-lot-in-money-or-effort (Nov. 26, 2007) (discussing a variety of low-cost solutions and commonsense strategies for text message archival).

206. *See* text accompanying *supra* n. 147 (explaining an Ohio court ruling creating such an inference with regard to e-mail).

207. Robert Mullins, Suite101.com, *Web 2.0 Conflicts with E-discovery*, http://office-software.suite101.com/article.cfm/web_20_conflicts_with_ediscovery (Jan. 28, 2009).

208. *See* Gonsowski, *supra* n. 131 (describing the balancing test federal courts use to determine whether electronic information is accessible and therefore discoverable).

209. Silva, *supra* n. 80.

210. Fla. Stat. § 119.011(12). Of course, privacy issues are not unique to text messaging; officials may send private communications using e-mail and other media, and such

self-selection—for determining which messages are public and which are private. The courts should determine which communications must be retained when challenges arise.[211]

Privacy issues can be addressed with an up-to-date electronic usage policy that is applied consistently throughout the State.[212] Agencies should avoid statements or practices that dilute the electronic usage policy in order to prevent privacy challenges.[213]

Very real problems will result from a failure to adequately address the role of technology in the operations of government. Indeed, Florida's Sunshine Law risks ultimate extinction as technology continues to advance. If the approach is to continue to ascertain the applicability of the Sunshine Law to every technology that comes down the pike, the law will remain many steps behind. Technology advances much more rapidly than the law; Twitter, social networking, and other Web 2.0 technologies promise to further revolutionize government.[214] Since the law changes slowly, Florida should take this opportunity to overhaul its public records statute with an eye toward the future.

B. Ending the Controversy: Proposed Legislation

The Florida Legislature should amend the public records law to establish a presumption that all communications between public officials—including communications some officials might consider "personal" or "transitory"—are part of the public record, regardless of the underlying technology.[215] This legislation should

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messages are public records only if they reference public business. *See supra* n. 178 and accompanying text (discussing the problem of self-selection).

211. *A.J.*, 605 So. 2d at 162 (noting that "judicial enforcement of the public records law is implicitly authorized by sections 119.11(1) and (3), Florida Statutes") (citation omitted).

212. *See supra* nn. 176–177 and accompanying text (discussing the importance of consistent electronic communications policies in government agencies).

213. Brian Kane, *It's Not Your Blackberry: The Courts Remind Employers to Update Their Workplace Electronic Policies*, 51 Advoc. 21, 22 (Oct. 2008) (available at http://isb.idaho.gov/pdf/advocate/adv08oct.pdf).

214. At the federal level, groups such as the Sunlight Foundation are using Web 2.0 technologies to improve access to information through such projects as OpenCongress.org, PublicMarkup.org, and Watchdog.net. Jeff Erlichman, *Federal Computer Week*, *Spreading Sunlight*, http://fcw.com/microsites/solutions-for-transparent-gov/spreading-sunlight.aspx (accessed Dec. 17, 2009).

215. Arguably, the legislature made this clear in 1995 when it modified the statute to include the words "means of transmission," as discussed *supra* note 93 and accompanying text. Because technology-based challenges to the law continue, however, the words "under-

address electronic information broadly in order to eliminate any suggestion that the type of device or software used has any bearing on public records. It should also prohibit officials from deleting records they have decided not to retain until the character of those records can be assessed.[216] The law should acknowledge that the People may have a right to know the content of these communications, even if they are personal, if they offer insight into motivations behind official decisionmaking.[217]

If an official uses a technology to create, store, or transmit information that constitutes a public record, then the law should presume that the official has the means to properly retain that record. Failure to do so would constitute a violation of the public records law.

The law should clearly outline the State's expectations regarding officials' use of electronic communications to create consistency across agencies and overcome privacy challenges. Officials should be put on notice that privately owned computers and handheld devices may be subject to digital forensic examination to retrieve deleted messages.

The law should eliminate the practice of allowing officials to self-select which communications are transitory by providing for third-party review of such communications and regular audits of records flagged for deletion.[218] "Transitory" should be defined in the law as it is in the record retention schedules to include a very limited range of communications.[219]

The law should require that agencies invest in technologies that archive and manage all electronic communications—including text messages and e-mail sent via private computers—

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lying technology" should be added.

216. Currently, the statute requires thirty-day retention of disputed records only after a public records request has been made. Fla. Stat. § 119.07(h) (2008).

217. *See supra* n. 152 and accompanying text (noting Idaho Supreme Court decision making an official's personal communications part of the public record because they suggested the basis for official decisions).

218. Interestingly, the City of Venice "completely revised its policies regarding public record and compliance with open government" after being sued for public records violations. *Citizens for Sunshine, Inc. v. City of Venice*, No. 2008 CA 8108 SC, slip op. at 3 n. 1 (Fla. 12th Cir. Sept. 25, 2009) (available at http://www.heraldtribune.com/assets/pdf/SH18289925.PDF). The City no longer allows "each city official [to] be custodian of his or her own records." *Id.* at 3. Review *supra* notes 102–104 and accompanying text for a discussion of the Venice case.

219. *See supra* n. 120 and accompanying text (stating the definition of "transitory").

for both the public record and e-discovery.[220] Agencies should not be allowed to purge records from devices or hard drives unless these records are properly archived. Significant gaps of time in record archives should be sufficient to establish a prima facie case for violation of the public records law, as should an agency's refusal to produce requested records.

If commercial text messaging services are used, the messages should be archived by the service provider or end-user for retrieval upon request.[221] The law should avoid application of the SCA by stipulating that third-party archival services are for storage, not communication.[222]

By embracing all forms of electronic communications in the public records analysis, Florida can effectively end technology-based public records debates and strengthen data security and confidentiality through acceptable use rather than avoidance. More importantly, Florida's public records law will maintain its dynamic nature by anticipating that technology will change.

220. Although agencies will argue that they have no budget for such investments, these tools will reduce the potential for costly and time-consuming e-discovery as well as digital forensics in public records challenges.

221. The Federal Wiretap Act is not implicated here. 18 U.S.C. § 2511 (2006). "The federal courts have consistently held that electronic communications, in order to be intercepted, must be acquired contemporaneously with transmission and that electronic communications are not intercepted within the meaning of the Federal Wiretap Act if they are retrieved from storage." *O'Brien v. O'Brien*, 899 So. 2d 1133, 1136 (Fla. 5th Dist. App. 2005) (citations omitted). Florida has a comparable act that was based upon the federal act but has slightly different provisions. Fla. Stat. § 934.03 (2008). "[It] does not include a provision for retrieval from storage and, therefore, it is not clear whether the same rationale would be applied." *O'Brien*, 899 So. 2d at 1136. Nonetheless, the Florida statute specifically prohibits an electronic communication service from divulging the contents of a communication "while in transmission"—with no reference to archived messages. Fla. Stat. 934.03(3)(a) (2008). Furthermore, the statute specifically allows the disclosure of the fact that an electronic communication "was initiated or completed." Fla. Stat. 934.03(2)(i)(2). Of course, the contents of any communication may be divulged "[w]ith the lawful consent of the originator." Fla. Stat. 934.03(3)(b)(2).

222. The *Flagg* decision provides a basis for this reasoning. *See supra* n. 137 (discussing the *Flagg* court decision and reasoning).

PROPOSED LEGISLATION AMENDING FLORIDA'S PUBLIC RECORDS ACT

119.01. General state policy on public records

(4) All agency electronic communications referencing public business are deemed part of the public record, regardless of the underlying technology, unless specifically exempted by law. Agencies must provide evidence to rebut the presumption that electronic communications are public records. Communications deemed "personal," "private," or "transitory" must be retained until the character of those communications can be independently assessed. Such messages may be deemed public records if they offer insight into motivations behind agency decisionmaking.

(5) Agencies shall establish policies and procedures for comprehensive and efficient electronic record retention across all devices and technologies used. If an agency uses a technology to create, store, or transmit information that constitutes a public record, the agency is presumed to have the means to properly retain that record. Failure to do so constitutes a violation of the public records law.

(a) Agencies may not delete records unless those records are properly archived. Significant gaps of time in record archives or an agency's refusal to produce requested records are sufficient to establish a prima facie case for violation of the public records law.

(b) This policy extends to privately owned devices and commercial services used by agencies to transmit or store public records. Privately owned devices may be subject to digital forensic examination to retrieve deleted records at the agency's expense.

(c) Commercial or third-party services may not be used in violation of this policy.

119.011. Definitions

(12) "Public record" means all documents, papers, letters, maps, books, tapes, photographs, films, sound records, data processing software, or other material, regardless of physical form, characteristics, means of transmission, **or underlying technology**, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

(15) "Transitory" records are those created primarily to communicate information of short-term value and do not formalize or perpetuate knowledge, set policy, establish guidelines or procedures, certify a transaction, or become a receipt.

VII. CONCLUSION

The Kilpatrick scandal illustrates all too vividly how power and a sense of entitlement can sometimes cause officials to lose sight of their responsibility to the People. Open government laws exist as a guard against such breaches of the public trust.

No Sunshine Law can fully prevent government secrecy. Whispered conversations and furtive phone calls will always take place. However, explicitly placing text messages and other electronic communications outside the scrutiny of the public record unnecessarily weakens Florida's open government laws. Furthermore, as technology continues to advance, officials will find ever-wider loopholes in open meetings and public record requirements. A better solution is needed.

Florida's open government laws have long been lauded as among the best in the nation. However, if Florida determines that text messages are not part of the public record, and feebly attempts to cope with the onslaught of handheld devices by banning their use, it will soon fall behind states that take a more proactive approach to the impact of technology. Worse, Florida will be sending the wrong message to its public officials.