ADVISORY OPINION 2016-2

PUBLIC RECORDS REQUEST FOR TEXT MESSAGES

J. Mitchell for the Court

Pursuant to Article IV, Section 3(C)(5), of the Student Body Constitution, the Supreme Court shall have jurisdiction to "issue advisory opinions concerning student rights under the Student Body Constitution upon request of the Student Body President or any Senator."

On October 2, 2016, a Florida State University Senator petitioned this Court for an advisory opinion as to the applicability of Chapter 204 of the SGA Statutes, The Florida State University Student Government Association Public Records Act of 1988, to GroupMe[1] messages of the Student Senate Internal Affairs Committee and the Senator's personal text messages. The Senator inquires if the public records statute includes text messages via iMessage, GroupMe, SMS, personal emails, or any other form of interpersonal communication. We conclude that text messages, via GroupMe and any other form, are included under section 204.1(C) when made or received in connection with any Official University transaction or business.

REASONING

Chapter 204 of the SGA Statutes, The Florida State University Student Government Association Public Records Act of 1988 (Public Records Act), is applicable to "any Florida State University Student Government official, employee, organization, or any entity or any individual funded or regulated by Student Government Association." The Internal Affairs Committee is a Standing Committee of the Senate. See § 411.1, SGA Stat. The Senate is vested with the legislative powers of the Student Body and the governing entity of the Student Body is the Student Government Association. See Article I Section 1 and Article II, Section 1, SGA Const. Therefore, the public records act is applicable to Senators and to a committee composed of senators such as the Internal Affairs Committee.

Chapter 204 defines a public record as "all documents, papers, letters, maps, books, tapes, photographs, film, sound recordings, or other material, regardless of physical form or characteristics, made or received pursuant to the Constitution or Statutes or in connection with any transaction or business." 204.1(C), SGA Stat. "The determining factor [of whether material is a public record] is the nature of the record, not its physical location." State v. City of Clearwater, 863 So. 2d 149, 154 (Fla. 2003). Therefore, any written communication, no matter the form by which it is received, will be subject to the public records statute if it involves official University business.

The question of text messages as public records is not novel. A 2013 Continuing Legal Education presentation to the Florida Association of County Attorneys discusses electronic messaging as public records.

Furthermore, Florida's public record law has been interpreted to include all materials made or received by state personnel with official business which are used to perpetuate, communicate, or formalize knowledge. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633, 640 (Fla. 1980). Additionally, the particular form of the record is irrelevant when determining

[1] GroupMe is a group messaging application. Users can send and receive messages in the application or as a text message through their personal devices.

whether a communication counts as a public record. The test to determine whether something is a public record examines whether the communication involves transactions or business made or received by the state personnel in their official capacity. In other words, a communication that touches and concerns some sort of official business is a public record. Op. Att'y Gen. Fla. 04-33 (2004).

The Attorney General's office has advised that "the same rules that apply to email should be considered for electronic communications including Blackberry PINS, SMS communications (text messaging), MMS communications (multimedia content) and instant messaging conducted by government agencies." See Inf. Op. to Browning, March 17, 2010. As a result of our statutes, and Florida's statutes as construed by the attorney general and case law, communications through the use of emails, texts, social media, and other forms of electronic communication pertaining to official business are considered public records. Therefore, communications which fall under the umbrella of public records must be retained and produced when requested.

In 2003, the Florida Supreme Court said that the public records law was clear and the production of public records could not be defeated by conducting official business on one's private device. State v City of Clearwater, 863 So. 2d 149 (Fla. 2003). The Court reasoned exempting private devices from public records requests would swallow the public records rule and defeat the entire point behind a public records request.

However, the Courts holding does not mean that a public records request can reach any and all communications of a public official that took place on a private device. We are mindful of the private nature of cell phone use and the privacy interest a person has in their mobile device. To be clear, a public official does not automatically give up his or her right to privacy just by using a private device to conduct official affairs.

REDACTION AND RETENTION

The law's reach extends only to one's personal text messages to the extent that those text messages touch and concern official University business. As a result, if an SGA Member is faced with a public records request, the Member does not have to turn over their entire phone. The party seeking the requested communications is limited to messages that touch and concern official University business. For example, a message sent to schedule a committee meeting or a communication regarding a transaction within the SGA member's official capacity. The SGA Member faced with a public records request for communications on a private device is only required to send the communications that meet the "official business" test. In the instant case, the Member is required to turn over all communications from their private device relating to business or transactions sent while in their official university capacity. Additionally, the Member can redact portions of the personal communications and leave only the material parts of the communication, or the Member may simply turn over the relevant portions of the messages.

Furthermore, public records are subject to retention guidelines. For text messages in particular, the retention timeframe is a factor of the content, nature, and purpose of the message. For example, if a text message was created simply to communicate some information that would only be valuable in the short-term, that communication may be considered what's known as a transitory message. If the message is considered transitory, then it

must be retained until it is considered obsolete, superseded, or otherwise becomes irrelevant. See Section 119.021(2)(c), Fla. Stat. As such, SGA Members are required to retain digital communications until such messages are determined to be obsolete, superseded, or otherwise become irrelevant.

Finally, when an SGA Member is faced with a voluminous public records request, the Member may ask the requester to narrow the request, ask the requester to consent to a later deadline for responding to the request, or ask the requester to consent to a "rolling" basis production of communications rather than in one complete package. This Court highly recommends that both the requester and producer attempt to work cooperatively in order to streamline the production of communications while reducing the burdens on the producer complying with the request.

CONCLUSION

The Supreme Court advises that transcripts of the content of interpersonal communication, in the form of email, text message, or otherwise, may constitute as a public record if it is made or received pursuant to the Constitution or Statutes or in connection with any official transaction or business.