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## Struggling with Sunshine: Analyzing the Impact of Technology on Compliance with Open Government Laws Using Florida as a Case Study

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# Struggling with Sunshine: Analyzing the Impact of Technology on Compliance with Open Government Laws Using Florida as a Case Study

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# Struggling with Sunshine: Analyzing the Impact of Technology on Compliance with Open Government Laws Using Florida as a Case Study

Sandra F. Chance\*  
Christina M. Locke\*\*

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## INTRODUCTION

Public records and government meetings are the stock and trade of journalists. From federal agency records to city council meetings, they provide invaluable insights into how elected officials deliberate and how tax dollars are spent. Lawsuits brought by media organizations to gain access to records and meetings illustrate the importance of government information to the press in performing its function as a “government watchdog.”<sup>1</sup> The *Detroit Free Press*, for example, used a public records lawsuit and confidential sources to expose the corruption in the Detroit mayor’s office and the wasteful spending of millions of taxpayer dollars.<sup>2</sup> As a result of the *Detroit Free Press*’s reporting, the mayor stepped down from office, spent time in jail for perjury and paid restitution to the city under a court order.<sup>3</sup> This is a classic example of how open government laws and good investigative reporting can promote better government.

The purpose of public records and open meetings is rooted in the concept of democracy. Effective self-governance requires that the citizenry be well informed. In addition to self-governance, open government laws contribute to a less corrupt, more efficient government and encourage more accurate news reporting.<sup>4</sup> While a common law right of access does exist for public records, no

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<sup>1</sup> See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 541–42.

<sup>2</sup> See *Kilpatrick Pleads Guilty, Resigns*, DETROIT FREE PRESS, <http://www.freep.com/kilpatrick> (last visited Sept. 10, 2010) (displaying stories, photos, and videos from the incident). The *Detroit Free Press* won the 2009 Pulitzer Prize in local reporting and the 2009 Joseph L. Brechner Freedom of Information Award for its coverage. See Press Release, The Brechner Ctr., Detroit Free Press Named 24th Annual Brechner Award Winner (March 24, 2010), available at [http://brechner.org/press\\_release\\_2009.asp](http://brechner.org/press_release_2009.asp); see also *The 2009 Pulitzer Prize Winners Local Reporting*, PULITZER PRIZES, <http://www.pulitzer.org/citation/2009-Local-Reporting> (last visited Oct. 6, 2010).

<sup>3</sup> See *Kilpatrick Pleads Guilty, Resigns*, *supra* note 2. The *Detroit Free Press* obtained more than 14,000 text messages from its investigation, which revealed that former Detroit Mayor Kwame Kilpatrick and his chief of staff were having an affair and lied about their relationship while under oath during a trial brought by police officers alleging that Kilpatrick fired them after an incident at the mayor’s mansion. *Id.*

<sup>4</sup> See Blasi, *supra* note 1, at 649; see also Joseph W. Little & Thomas Tompkins, *Open Government Laws: An Insider’s View*, 53 N.C. L. REV. 451, 451 (1975); Note, *Open Meeting Statutes: The Press Fights for the “Right to Know,”* 75 HARV. L. REV. 1199, 1201 (1962).

such common law right has been recognized for access to government meetings.<sup>5</sup> Both public records and open meetings laws are typically governed by federal and state statutes. The federal Freedom of Information Act (“FOIA”), passed in 1966, governs access to federal records.<sup>6</sup> The federal government is also subject to the Sunshine Act, passed in 1976, which provides for open meetings of federal agencies.<sup>7</sup> States have their own freedom of information laws, which vary greatly in the amount and ease of access afforded to the public.<sup>8</sup> Court interpretation of open government laws, as well as administrative rules, attorney general opinions and organizational policies, affect access to government information and meetings.<sup>9</sup>

Despite the nuances of open government laws in each of the fifty states and the federal government, government entities all share a similar problem: how to apply old laws to new technologies. Technologies such as the Internet, cell phones and laptop computers were not contemplated when many government entities formulated their laws governing access to records and meetings.<sup>10</sup> As these new technologies pervade the everyday activities of government officials and citizens alike, new policies (and sometimes laws) must be developed to ensure transparency. The closed doors that might have aided public officials in holding secret meetings in the past have now been replaced by electronic communications.

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<sup>5</sup> See *Tenby Corp. v. Mason*, [1908] 1 Ch. 457 at 468 (noting that “[n]o person had, simply as a member of the public, the right to say, ‘Open that door: I will come in.’”). At issue in *Tenby Corp.* was whether the proprietor of a local newspaper, as a member of the press, public, or as a taxpayer, had the right to attend the meetings of a borough council. *Id.* at 457–58; see also HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW* 179–80 (1953); Ira Bloom, *Freedom of Information Laws in the Digital Age: The Death Knell of Informational Privacy*, 12 RICH. J.L. & TECH. 3, 9 (2006); Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 545–46 (1993); Little & Tompkins, *supra* note 4, at 453.

<sup>6</sup> The Freedom of Information Act, 5 U.S.C. § 552 (2006).

<sup>7</sup> Government in the Sunshine Act, 5 U.S.C. § 552(b).

<sup>8</sup> See OPEN GOVERNMENT GUIDE (Dan Paul & Frank Burt eds., The Reporters Committee for Freedom of the Press 5th ed. 2006), available at <http://www.rcfp.org/ogg>.

<sup>9</sup> See Little & Tompkins, *supra* note 4, at 461.

<sup>10</sup> See Bunker et al., *supra* note 5, at 544.

As applications for these technologies have proliferated, even more opportunities for increased self-governance (but also increased secrecy) abound. Facebook, for example, is used by more than five hundred million active users<sup>11</sup> and is the second most-visited website on the Internet.<sup>12</sup> Social networking sites like Facebook can be a double-edged sword. While constituents might be able to participate more actively in their government by, for example, writing on a city's Facebook "Wall," city council members could use the site to circumvent open government laws by sending secret messages that are not archived.<sup>13</sup>

Due to variations among laws, fast-paced changes in technologies and a myriad of software solutions, there is a sense of discontinuity in the policy discussions about open government laws and technology. Thus, the relationship between technology and transparency is a confusing one. The purpose of this Article is to use one state, Florida, to provide a snapshot of how a state that is considered a leader in open government is dealing with the challenges of technology and transparency. Part I provides background on Florida's open government laws and its national reputation. Florida's legal and policy developments related to open government are presented in Part II with contemporaneous messaging, e-mail, social networking and cloud computing each receiving a separate analysis. Part III analyzes the strengths and weaknesses of Florida's approach and presents best practices that other jurisdictions could adapt to their own laws.

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<sup>11</sup> *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Oct. 7, 2010).

<sup>12</sup> *Alexa Top 500 Global Websites*, ALEXA, <http://www.alexa.com/topsites> (last visited Mar. 29, 2010) (noting that approximately over 30% of global Internet users visit facebook.com on any given day). Google.com is the most visited website, followed by facebook.com, youtube.com and yahoo.com. *Id.*

<sup>13</sup> *Cf.* Alan J. Bojorquez & Damien Shores, *Open Government and the Net: Bringing Social Media into the Light*, 11 TEX. TECH ADMIN. L.J. 45, 61 (2009) (illustrating how Internet postings and messages on websites like Facebook can violate Texas Open Meetings Act).

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## I. FLORIDA'S OPEN GOVERNMENT LAWS

The state of Florida has a reputation as a leader in the area of open government laws. The Reporters Committee for Freedom of the Press's *Open Government Guide* calls Florida's open government laws "the most expansive . . . in the country."<sup>14</sup> *The New York Times* has stated that Florida's open government laws "set the pace" for the rest of the nation.<sup>15</sup> The Commission on Open Government Reform, formed in Florida to conduct a comprehensive review of the state's open government laws and to make recommendations for change, succinctly summarized Florida's status in its nearly two hundred page report issued in 2009:

Generally considered a leader in the area of open government, Florida has a long history of providing public access to the meetings and records of its government. This rich tradition of open government culminated in the 1992 general election when Florida voters overwhelmingly approved a constitutional amendment guaranteeing access to the records of all three branches of state government and to "[a]ll meetings of the collegial public body of the executive branch of state government or of any . . . county, municipality, school district, or special district, at which official acts are to be taken or at which public business . . . is to be transacted or discussed."<sup>16</sup>

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<sup>14</sup> *Forward to Florida*, in OPEN GOVERNMENT GUIDE, *supra* note 8.

<sup>15</sup> Lawrence Fellows, *Connecticut Right-to-Know Bill Gets Final Legislative Approval*, N.Y. TIMES, May 22, 1975, at 45.

<sup>16</sup> COMMISSION ON OPEN GOVERNMENT REFORM, REFORMING FLORIDA'S OPEN GOVERNMENT LAWS IN THE 21ST CENTURY: FINAL REPORT 36-37 (2009) [hereinafter COMM'N ON OPEN GOV'T REFORM FINAL REPORT], *available at* [http://www.flgov.com/pdfs/og\\_2009finalreport.pdf](http://www.flgov.com/pdfs/og_2009finalreport.pdf) (quoting FLA. CONST. art. I, § 24). The Commission on Open Government Reform was created by Executive Order of Florida Governor Charlie Crist "for the express purpose of reviewing, evaluating, and issuing recommendations regarding Florida's public records and public meetings laws." COMM'N ON OPEN GOV'T REFORM FINAL REPORT, *supra*, at 1.

Prior to passage of the constitutional amendment in 1992,<sup>17</sup> Florida lawmakers passed a public records law in 1909<sup>18</sup> and an open meetings law in 1967.<sup>19</sup> Florida has also made open government a priority, with the Attorney General's Office administering a mediation program and dedicating resources and personnel to open government issues.<sup>20</sup> Governor Charlie Crist's first official action when he took office in 2007 was to establish an Office of Open Government.<sup>21</sup> Governor Crist directed the new office: "(1) to assure full and expeditious compliance with Florida's open government and public records laws, and (2) to provide training to all executive agencies . . . on transparency and accountability."<sup>22</sup>

#### A. *Public Records*

Florida's public records law, located in Chapter 119 of the Florida Statutes, applies to materials "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."<sup>23</sup> In addition to traditional paper records, electronic records, films, sound recordings and photographs all fall within the public records law.<sup>24</sup> Records are presumed open unless a specific statutory exemption applies.<sup>25</sup> There are nearly 1,000 exemptions to the public records law scattered throughout the Florida Statutes.<sup>26</sup> Inspection and copying of public records must

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<sup>17</sup> FLA. CONST. art. I, § 24.

<sup>18</sup> See FLA. STAT. § 119.01(1) (West 2010).

<sup>19</sup> See *Id.* § 286.011.

<sup>20</sup> *The "Sunshine" Law, Government in the Sunshine*, MY FLA. SUNSHINE, OFFICE ATT'Y GEN. FLA., <http://www.myflsunshine.com/sun.nsf/pages/Law> (last visited Oct. 6, 2010).

<sup>21</sup> *Office of Open Government*, FLA. GOV. CHARLIE CRIST, [http://www.flgov.com/og\\_home](http://www.flgov.com/og_home) (last visited Mar. 31, 2010).

<sup>22</sup> Fla. Exec. Order No. 07-01 (Jan. 3, 2007), available at <http://www.flgov.com/pdfs/orders/07-01-outline.pdf>.

<sup>23</sup> FLA. STAT. § 119.011(12).

<sup>24</sup> *Id.*

<sup>25</sup> See FLA. CONST. art. I, § 24(a)–(c).

<sup>26</sup> COMM'N ON OPEN GOV'T REFORM FINAL REPORT, *supra* note 16, at 5. Records custodians who deny a request based on an exemption must provide a citation to the specific exemption. *Id.*; see also *Exemptions to Florida's Open Government Laws—The Public Records Law and Sunshine Law*, FIRST AMENDMENT FOUND., <http://www>.

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be permitted at reasonable times and under reasonable conditions.<sup>27</sup> Fees are not generally permitted for inspection and there is a statutory schedule for copying fees, which is capped at 15 cents per page in most cases.<sup>28</sup> Requesters are not required to make the request in writing and generally are not required to identify themselves.<sup>29</sup> There is no specific time limit within which agencies must comply with a public records request; the standard is a “reasonable” amount of time.<sup>30</sup>

Intentional violation of the public records law is a first-degree misdemeanor punishable by up to a year in jail and a \$1,000 fine.<sup>31</sup> Public officials might also be subject to suspension, removal or impeachment.<sup>32</sup> Unintentional violations by public officials are treated as non-criminal infractions punishable by a maximum fine of \$500.<sup>33</sup> Florida has no statutory appeal process for denial of a public records request. Instead, the requester can take advantage of a free, voluntary mediation program administered by the Florida Attorney General’s Office or can file a civil action to enforce the public records law.<sup>34</sup>

The policy preamble to Florida’s public records law addresses electronic recordkeeping, noting that “[a]utomation of public records must not erode the right of access to those records.”<sup>35</sup> Agencies are required to “consider” compatibility issues when designing or acquiring electronic recordkeeping systems.<sup>36</sup> They

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floridafaf.org/index.php?option=com\_wrapper&view=wrapper&Itemid=129 (last visited Mar. 29, 2010).

<sup>27</sup> FLA. STAT. § 119.07(3)(b).

<sup>28</sup> See *id.* § 119.07(4)(a); OFFICE OF THE ATT’Y GEN. OF FLA., 31 GOV’T IN THE SUNSHINE MANUAL 127 (2009) [hereinafter SUNSHINE MANUAL], available at [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-6Y8SEM/\\$file/Sunshine.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-6Y8SEM/$file/Sunshine.pdf).

<sup>29</sup> See SUNSHINE MANUAL, *supra* note 28, at 86–87.

<sup>30</sup> FLA. STAT. § 119(1)(a).

<sup>31</sup> *Id.* § 119.10.

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

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

<sup>34</sup> *Id.*; see also Daxton R. Stewart, *Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems*, 1 J. MEDIA L. & ETHICS 49, 76 (2009) (applying conflict theory and dispute systems design in a look at open government law dispute resolution programs for fifty states).

<sup>35</sup> FLA. STAT. § 119.01(2)(a).

<sup>36</sup> *Id.* § 119.01 (2)(b).

are prohibited from contracting to create a records database that would inhibit public access.<sup>37</sup> Accordingly, proprietary software used by government agencies must not pose a barrier to public access.<sup>38</sup> Remote electronic access to public records is explicitly encouraged,<sup>39</sup> and if the agency maintains a record in a particular medium (e.g., electronically) it must provide the record in that medium.<sup>40</sup>

The lack of “teeth” in the policy statement of the public records law was criticized by the Commission on Open Government Reform, which noted that “[t]here are persistent impediments to obtaining access to public information stored in agency databases.”<sup>41</sup> The Commission suggested that state lawmakers create new standards for agency databases, and that these new legal standards include provisions for cost-effective and timely redaction of exempt information in electronic records.<sup>42</sup> Florida’s Agency for Enterprise Information Technology was suggested as a partner in developing these standards.<sup>43</sup> Other recommendations by the Commission regarding public records and technology include implementation of agency policies on enhanced public access to e-mail and access to public records transmitted or retained using personal accounts or computers.<sup>44</sup>

Regardless of the medium, Florida courts have construed the public records law broadly. The Florida Supreme Court has stated that the law “is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose.”<sup>45</sup> The Court also determined

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<sup>37</sup> *Id.* § 119.01 (2)(c).

<sup>38</sup> *Id.* § 119.01 (2)(d).

<sup>39</sup> *Id.* § 119.01 (2)(e).

<sup>40</sup> *Id.* § 119.01 (2)(f).

<sup>41</sup> COMM’N ON OPEN GOV’T REFORM FINAL REPORT, *supra* note 16, at 164.

<sup>42</sup> *Id.* at 164–65.

<sup>43</sup> *Id.* at 165; *see also* AGENCY ENTERPRISE INFO. TECH., <http://www.myflorida.com/myflorida/cabinet/aeit> (last visited Oct. 6, 2010).

<sup>44</sup> COMM’N ON OPEN GOV’T REFORM FINAL REPORT, *supra* note 16, at 165.

<sup>45</sup> *Lightbourne v. McCollum*, 969 So. 2d 326, 332–33 (Fla. 2007) (quoting *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. Dist. Ct. App. 1994)) (rejecting contention by the state that the exemption for records prepared in anticipation of litigation should be applied after primary litigation is concluded); *see, e.g.*, *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. Dist. Ct. App. 1994) (balancing

that public records include all “materials that have been prepared with the intent of perpetuating or formalizing knowledge.”<sup>46</sup> Electronic records were specifically addressed by the Florida Supreme Court in the 2003 case *State v. City of Clearwater*.<sup>47</sup> In that case, the media requested e-mails from the City of Clearwater.<sup>48</sup> In response, the city provided e-mails that it deemed public but not e-mails it deemed were of a personal nature.<sup>49</sup> The media argued that all of the e-mails, regardless of their nature, if stored on a public computer, were public records.<sup>50</sup> The court ruled that personal e-mails, even if sent using official e-mail accounts, were not public records because they were not created pursuant to official business.<sup>51</sup> “The determining factor is the nature of the record, not its physical location,” the court held.<sup>52</sup>

### B. Open Meetings

Also known as the “Sunshine Law,” Florida’s open meetings law is governed by section 286.011 of the Florida Statutes.<sup>53</sup> The Sunshine Law requires meetings to be properly noticed and open to the public.<sup>54</sup> Minutes must be taken at open meetings.<sup>55</sup> The Sunshine Law applies to state and local boards and commissions.<sup>56</sup> A quorum is not required to trigger the law’s application, and the law applies to meetings of two or more members of a collegial

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Florida’s “strong public policy in favor of open government” with the need to keep active criminal investigations confidential); *Wolfson v. State*, 344 So. 2d 611, 613 (Fla. Dist. Ct. App. 1977) (applying the principal of broadly applying statutes conducted for public benefit to Florida’s open meetings law); *Tribune Co. v. In re Public Records*, 493 So. 2d 480, 483 (Fla. Dist. Ct. App. 1986) (construing criminal investigation exemption of the Florida public records law narrowly, in favor of access).

<sup>46</sup> *Shevin v. Byron, Harless, Schaffer, Reid & Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>47</sup> 863 So. 2d. 149 (Fla. 2003).

<sup>48</sup> *Id.* at 150.

<sup>49</sup> *Id.* at 150–51.

<sup>50</sup> *Id.* at 151.

<sup>51</sup> *Id.* at 153 (quoting *Times Publ’g Co. v. City of Clearwater*, 830 So. 2d 844, 847 (Fla. Dist. Ct. App. 2002)).

<sup>52</sup> *Id.* at 154.

<sup>53</sup> FLA. STAT. § 286.011 (West 2010).

<sup>54</sup> *See id.* § 286.011(1).

<sup>55</sup> *Id.* § 286.011(2).

<sup>56</sup> *Id.* § 286.011(1).

body.<sup>57</sup> The broad language of Florida's statute also means that a violation of the Sunshine Law can occur when two or more members of a public body communicate via e-mail or other electronic means. Intentional violation of the open meetings law is a second-degree misdemeanor, punishable by up to sixty days in jail and a \$500 fine.<sup>58</sup> Non-intentional violations are considered civil infractions and carry a maximum fine of \$500.<sup>59</sup> There are close to a hundred exemptions to the Sunshine Law.<sup>60</sup>

Due to the broad sweep of the statute, court interpretations of the Sunshine Law have been key in its application. The Florida Supreme Court decided its first case interpreting the Sunshine Law in *Board of Public Instruction v. Doran*.<sup>61</sup> The court held that the Sunshine Law applies if members of a public body gather to "deal with some matter on which foreseeable action will be taken by the board."<sup>62</sup> The court emphasized the need for broad interpretation of the open meetings law because it was enacted to benefit the public,<sup>63</sup> noting one benefit would be less "hanky panky" between government officials.<sup>64</sup>

## II. TACKLING TECHNOLOGY AND TRANSPARENCY: FLORIDA'S EXPERIENCE

Seventy-four percent of adults in the U.S. use the Internet on a given day, accessing it through computers or handheld devices.<sup>65</sup> Social networking sites such as Facebook and Twitter have drawn 35% of adult Internet users to create a profile, with more adults on

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<sup>57</sup> See *City of Miami Beach v. Berns*, 245 So. 2d 38, 41 (Fla. 1971).

<sup>58</sup> FLA. STAT. § 286.011(3)(b).

<sup>59</sup> *Id.* § 286.011(3)(a).

<sup>60</sup> COMM'N ON OPEN GOV'T REFORM FINAL REPORT, *supra* note 16, at 3.

<sup>61</sup> 224 So. 2d 693 (Fla. 1969).

<sup>62</sup> *Doran*, 224 So. 2d at 698.

<sup>63</sup> *Id.* at 699.

<sup>64</sup> *Id.*

<sup>65</sup> Lee Rainie, *Internet, Broadband, and Cell Phone Statistics*, PEW INTERNET & AM. LIFE PROJECT, 16 (Jan. 5, 2010), [http://www.pewinternet.org/~media/Files/Reports/2010/PIP\\_December09\\_update.pdf](http://www.pewinternet.org/~media/Files/Reports/2010/PIP_December09_update.pdf).

these sites than children or teens.<sup>66</sup> A desktop or laptop computer is no longer necessary to communicate electronically, and 62% of adults in the U.S. have conducted non-voice data activities (e.g., sending e-mail or texts, or taking photos) using wireless connections away from home or work or using a cell phone or personal digital assistant (“PDA”).<sup>67</sup> At least 88% of elected local officials in one study used the Internet and e-mail in connection with their official duties.<sup>68</sup> These statistics illustrate just how saturated American life is with the Internet and information. From citizens who look online for government information to public officials who post it there, technology is changing the way we monitor and conduct government business.

Many public records are now created and maintained in digital form as government offices move toward becoming “paperless” in order to reduce costs and become more environmentally friendly.<sup>69</sup> These electronic records can be more easily accessed by the public if they are posted online. However, the more problematic aspect of technology and open government is the use of a variety of third-party applications such as Facebook as well as cell phones and PDAs. These types of communications are not as readily archived as say, e-mails sent from an official account through a government server. This can result in public records that are never made public.

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<sup>66</sup> Amanda Lenhart, *Adults and Social Network Websites*, PEW INTERNET & AM. LIFE PROJECT, 1 (Jan. 14, 2009), [http://www.pewinternet.org/~media/Files/Reports/2009/PIP\\_Adult\\_social\\_networking\\_data\\_memo\\_FINAL.pdf](http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Adult_social_networking_data_memo_FINAL.pdf).

<sup>67</sup> John Horrigan, *Mobile Access to Data and Information*, PEW INTERNET & AM. LIFE PROJECT, 1 (Mar. 5, 2008), [http://www.pewinternet.org/~media/Files/Reports/2008/PIP\\_Mobile.Data.Access.pdf](http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Mobile.Data.Access.pdf).

<sup>68</sup> Elena Larsen & Lee Rainie, *Digital Town Hall: How Local Officials Use the Internet and the Civic Benefits They Cite from Dealing with Constituents Online*, PEW INTERNET & AM. LIFE PROJECT, 2, 7 (Oct. 2, 2002), [http://www.pewinternet.org/~media/Files/Reports/2002/PIP\\_Digital\\_Town\\_Hall.pdf](http://www.pewinternet.org/~media/Files/Reports/2002/PIP_Digital_Town_Hall.pdf).

<sup>69</sup> See, e.g., *Evolution of a Paperless Government*, MASS. EXEC. OFFICE ADMIN. & FIN. (Sept. 24, 2004), <http://www.mass.gov/?pageID=afhomepage&L=1&L0=Home&sid=Eoaf> (follow “Research & Technology” hyperlink; then follow “IT Policies, Standards & Guidance” hyperlink; then follow “Legal Guidance” hyperlink; then follow “Electronic Signatures, Contracts & Records” hyperlink; then follow “Electronic Public Records” hyperlink).

Conducting government meetings via e-mail, webcasting, video conferencing, or online discussion boards allows for remote participation by officials, staff, and the public. The obvious advantages to conducting meetings in these ways are the potential for increased public participation and the ability of officials to participate in such meetings even if they cannot physically attend the meeting. However, concerns raised by electronic meetings include the potential for officials to be evasive and a resistance or disinterest by the public to participate remotely.<sup>70</sup> Additional issues raised by electronic meetings are the limited access to the Internet by members of the public, the accessibility of these meetings for disabled persons, and the quality of the technology.<sup>71</sup> It should also be noted that in Florida, “there are instances where the physical presence of two or more members [of a public board] is not necessary in order to find the Sunshine Law applicable . . . members of a public board may not use computers to conduct a private discussion among themselves about board business.”<sup>72</sup>

In this section, Florida’s responses to the challenges posed by instant messaging, e-mail, social networking and cloud computing are discussed.

#### A. *Text Messaging, Instant Messaging and PIN’ing*

Instant messaging allows two people to communicate typed messages simultaneously to one other.<sup>73</sup> Computer users at work or home can easily access free commercial software, such as AOL Instant Messenger, to send instant messages to each other. Some organizations also utilize enterprise level instant messaging systems to facilitate communication among members.<sup>74</sup> However,

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<sup>70</sup> See Suzanne J. Piotrowski & Erin Borry, *An Analytic Framework for Open Meetings and Transparency*, 15 PUB. ADMIN. & MGMT. 138, 141–143, 147 (2007).

<sup>71</sup> See *id.* at 147.

<sup>72</sup> 2009 Op. Att’y Gen. Fla. 19, 2009 WL 1106315 (Apr. 23, 2009).

<sup>73</sup> See *TLK2UL8R: The Privacy Implications of Instant and Text Messaging Technologies in State Government*, NAT’L ASS’N OF STATE CHIEF INFO. OFFICERS, 7 (May 2005), <http://www.nascio.org/publications/documents/NASCIO-instantMessagingBrief.pdf> [hereinafter *TLK2UL8R*].

<sup>74</sup> Enterprise devices are high-end equipment designed for a large organization. ENCYCLOPEDIA, PC.MAG.COM, <http://www.pcmag.com/encyclopedia> (search “enterprise”; then follow “Search Encyclopedia” hyperlink) (last visited Dec. 17, 2010).

a personal computer or laptop is not necessary to send and receive instant messages. Mobile devices, such as cell phones, smartphones and PDAs offer similar methods of communication by allowing users to send text messages and visual images to each other.<sup>75</sup> Use of mobile devices to send or access information is widespread, with 58% of adults in a recent Pew survey reporting that they have used a cell phone or smart phone to perform tasks other than talking on the phone.<sup>76</sup>

In fact, it was a cell phone messaging scandal that prompted policy changes at many levels in Florida. The controversy stemmed from Blackberry PIN messages sent between staffers of Florida's Public Service Commission ("PSC") and a utility company seeking a rate increase.<sup>77</sup> PIN messages involve correspondence using private BlackBerry messaging codes.<sup>78</sup> When the media requested the messages, the agency said the messages were not captured.<sup>79</sup> The messages were eventually found and released to the media, and the PSC was hit with resignations and ethics investigations.<sup>80</sup> In response, Florida Attorney General Bill McCollum launched a "Sunshine Technology Team" to address compliance with open government laws in light of new technologies.<sup>81</sup> Joe Jaquot, McCollum's chief of staff, told reporters:

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*See also* Eulynn Shiu & Amanda Lenhart, *How Americans Use Instant Messaging*, PEW INTERNET & AM. LIFE PROJECT, 2 (Sept. 1, 2004), [http://www.pewinternet.org/~media/Files/Reports/2004/PIP\\_Instantmessage\\_Report.pdf.pdf](http://www.pewinternet.org/~media/Files/Reports/2004/PIP_Instantmessage_Report.pdf.pdf).

<sup>75</sup> *TLK2UL8R*, *supra* note 73, at 1; *see also* Trimmel Gomes, *Do Smart Phones Thwart Public Records Laws?*, NAT'L PUB. RADIO (Feb. 14, 2010), <http://www.npr.org/templates/story/story.php?storyId=123573568>.

<sup>76</sup> Horrigan, *Mobile Access to Data and Information*, *supra* note 67.

<sup>77</sup> Mary Ellen Klas, *Boss: FPL's Image Has Suffered*, MIAMI HERALD, Dec. 4, 2009, <http://www.miamiherald.com/2009/12/04/1364830/boss-fpls-image-has-suffered.html> [hereinafter Klas, *Boss*].

<sup>78</sup> Mary Ellen Klas, *McCollum Seeking to 'Bust the Myth' that New Technologies Skirt Sunshine Law*, MIAMI HERALD, Oct. 13, 2009, <http://www.miamiherald.com/2009/10/13/1279483/mccollum-seeking-to-bust-the-myth.html>.

<sup>79</sup> *Id.*

<sup>80</sup> *See, e.g.*, Klas, *Boss*, *supra* note 77.

<sup>81</sup> Bill Cotterell, *AG: Text Messages Public Record*, TALLAHASSEE DEMOCRAT, at 1A, Sept. 16, 2009.

The common misconception is that PINs travel device to device. They don't. . . . They go through a BlackBerry server. We didn't know this, as legal staff, until the controversy at the PSC and we began to ask the question and found out, sure enough, you can flip a switch on the server and begin to retain this—and today we're flipping the switch.<sup>82</sup>

McCollum announced that his office would retain all BlackBerry PIN and text messages on the agency server.<sup>83</sup> By contrast, Governor Charlie Crist directed his staff to halt the use of Blackberry PIN messages.<sup>84</sup> Either way, the question was not whether text messages about official business are public records—they are<sup>85</sup>—but the question was how to ensure compliance with the public records law, either by retaining the messages (McCollum's approach) or eschewing the communication method (Crist's approach).

The first meeting of the Sunshine Technology Team occurred October 14, 2009, and addressed PIN'ing and other smart phone capabilities.<sup>86</sup> Representatives from Research in Motion Limited, the company that designs and manufactures BlackBerry devices, discussed the technology with government officials and open

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Michael C. Bender, *State Offices Curb Use of Electronic Messages*, PALM BEACH POST, Sept. 19, 2009, <http://www.allbusiness.com/government/elections-politics-political-parties/13009356-1.html>.

<sup>85</sup> The Attorney General has expressly reserved issuing a formal opinion regarding whether text messages are public records (although given the broad nature of Florida's public records law, there is little controversy that text messages related to public businesses would indeed be public records) due to a circuit court case involving that issue pending in Broward County. *See* Fort Lauderdale Fraternal Order of Police Lodge No. 31, Inc. v. Gretsas, No. 08-32515(18), 47286 Official Records 1894 (Fla. Broward County Ct. Jul. 14, 2010); Letter from Fla. Ass. Att'y Gen. Lagran Saunders for City Att'y George Trovato (June 2, 2009), <http://www.myflsunshine.com/ago.nsf/sunopinions/22F05701139F9E5B852575C90072B4C9>; *see also* Patricia Mazzei, *Feds Tapped Phones of Beverly Gallagher*, MIAMI HERALD, Jan. 6, 2010, <http://www.miamiherald.com/2010/01/05/1411291/feds-tapped-phones-of-beverly.html>.

<sup>86</sup> *Sunshine Technology Team Meeting Minutes*, OFFICE ATT'Y GEN. FLA. (Oct. 14, 2009), [http://myfloridalegal.com/webfiles.nsf/WF/KGRG-7X2N9M/\\$file/SunshineTechMinutes101409.pdf](http://myfloridalegal.com/webfiles.nsf/WF/KGRG-7X2N9M/$file/SunshineTechMinutes101409.pdf) [hereinafter *Sunshine Team Minutes Oct.*].

government advocates.<sup>87</sup> Smart phones like the BlackBerry offer multiple methods of communication using one device: e-mail, phone, PIN messaging, short message service (“SMS”), social networking and instant messaging.<sup>88</sup> PIN, SMS and e-mail messaging all flow through both the wireless carrier and the BlackBerry infrastructure.<sup>89</sup> While BlackBerry does not capture PIN traffic unless requested by law enforcement, wireless carriers can capture and maintain PIN messages.<sup>90</sup>

However, the length of time wireless carriers retain text messages, whether sent on a BlackBerry or other device, might pose a problem. Most text messages are only kept by wireless carriers for three to five days.<sup>91</sup> This is appealing to the average consumer who does not want his or her text messages stored indefinitely on a network. But for the purposes of open government, text messages that disappear after a few days equal vanishing public records.<sup>92</sup> Government agencies must, then, develop internal methods for retaining “transitory” messaging or work with their wireless vendors to ensure retention. One suggestion posed at the first task force meeting was that agencies

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<sup>87</sup> *Id.* David Coley, Jack Plating and Mark Zentz represented Research in Motion. *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See Jeff Karoub, *Most Text Messages Are Saved Only Briefly*, FOXNEWS.COM, Jan. 26, 2008, <http://www.foxnews.com/story/0,2933,325805,00.html>. “I think people can feel comfortable we’re not storing information that can later be used against them,” said Verizon Wireless spokesperson Erica Sevilla. “Unless you have something stored on your phone or on a recipient’s phone, it does not stay on our network for a long period,” she added. AT&T, Inc.’s spokesperson, Howard Riefs, said messages are kept for up to 72 hours. *Id.* See also Tom Staik, *County Not Keeping Texting Records*, LAKE WALES NEWS, Jan. 13, 2010 (quoting Polk County, Florida, Information Technology Director Ed Wolfe describing the time limits text messages are retained by the county’s wireless server).

<sup>92</sup> The Detroit text messaging scandal where 14,000 text messages over a period of several years were retrieved and revealed misconduct in the mayor’s office, as reported by the *Detroit Free Press*, involved a different type of technology than the SMS text messaging used by most consumers. See Karoub, *supra* note 91. The city used a text messaging service that employed Narrowband PCS technology, which “is more akin to e-mail than to text messaging, and messages are stored.” *Id.* Wireless analyst David Chamberlain of In-Stat stated, “There’s absolutely no expectation of privacy with phones, e-mails, text messages or computers.” *Id.*

collaborate for an enterprise solution rather than each attempting different ways to solve the same problem.<sup>93</sup>

Enterprise solutions were the focus on the Technology Team's second meeting on November 20, 2009, which featured Microsoft National Technology Officer Stuart McKee.<sup>94</sup> McKee noted that enterprise solutions are able to store instant messages (those sent back and forth using a particular program over the Internet or an intranet) in much the same way e-mails are stored.<sup>95</sup> It is up to government agencies, however, to seek out and utilize such retention resources.<sup>96</sup>

In the aftermath of the PSC messaging incident and the subsequent formation of the Sunshine Technology Team, many counties and cities began to craft messaging policies of their own.<sup>97</sup> The city of Orlando explicitly directed employees to save business-related text messages to their phones.<sup>98</sup> In the city of Deltona, text messaging was banned during public meetings.<sup>99</sup> St. Cloud and Kissimmee, cities just south of Orlando, advised their employees to limit the use of text messaging.<sup>100</sup> Osceola County disabled outgoing text capabilities on all county-issued cell phones, though employees were still able to receive text messages.<sup>101</sup> Alachua County, in north-central Florida, prohibited employees from sending texts related to official business on either county-issued or personal cell phones because of the inability to

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<sup>93</sup> *Sunshine Team Minutes Oct.*, *supra* note 86.

<sup>94</sup> *Sunshine Technology Team Meeting Minutes*, OFFICE ATT'Y GEN. FLA. (Nov. 20, 2009), [http://myfloridalegal.com/webfiles.nsf/WF/KGRG-7Y4RAN/\\$file/SunshineTechMinutes112009.pdf](http://myfloridalegal.com/webfiles.nsf/WF/KGRG-7Y4RAN/$file/SunshineTechMinutes112009.pdf).

<sup>95</sup> *Id.*

<sup>96</sup> OFFICE OF SEC'Y OF STATE OF GA., STATE AGENCIES' LEGAL DUTIES AND LIABILITIES UNDER GEORGIA LAW (2010), *available at* [http://sos.georgia.gov/archives/who\\_are\\_werims/publications/legal\\_duties\\_and\\_liabilities.htm](http://sos.georgia.gov/archives/who_are_werims/publications/legal_duties_and_liabilities.htm).

<sup>97</sup> Jeannette Rivera-Lyles, *Do U Think Txt Msgs R Public Records?*, ORLANDO SENTINEL, Jan. 18, 2010, at B1.

<sup>98</sup> *Do You Think Text Messages Are Public Records?*, TMCNET.COM, Jan. 17, 2010, *available at* <http://www.tmcnet.com/submit/2010/01/17/4576151.htm> (citing Rivera-Lyles, *supra* note 97).

<sup>99</sup> Rivera-Lyles, *supra* note 97; *see also* Nicole Service, *No More Texting During Deltona Meetings*, DAYTONA BEACH NEWS J., Apr. 7, 2009, at 01C.

<sup>100</sup> *See Do You Think Text Messages Are Public Records?*, *supra* note 98.

<sup>101</sup> Rivera-Lyles, *supra* note 97.

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track or save the messages.<sup>102</sup> Employees were required to forward any text messages related to county business to their county e-mail accounts.<sup>103</sup> In the Panhandle county of Escambia, it has been proposed that cell phones and laptops be banned during meetings or workshops.<sup>104</sup> Escambia's new policy follows the noncriminal violation of the public records law by a county commission member related to sending public e-mails through a private account.<sup>105</sup> The policy also prohibits county commissioners from blogging, texting, instant messaging or using social networking sites for county business.<sup>106</sup>

The major action on the part of Attorney General McCollum as a result of the inquiry into instant messaging, text messaging and PIN'ing was a letter to Secretary of State Kurt Browning requesting that administrative rulemaking procedures be initiated to address electronic communications.<sup>107</sup> McCollum wrote:

The Department of State currently maintains administrative rules defining the retention schedule for government agency email. There are no required retention guidelines, however, for other types of electronic communication because the administrative rules describe them as transitory. This is no longer accurate in today's world where business is conducted on a variety of communication platforms. The same rules that apply to email should be considered for electronic communication including Blackberry PINs, SMS communication (text messaging), MMS

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<sup>102</sup> Christopher Curry, *County Puts Ban on Staff Texting*, GAINESVILLE SUN, Nov. 6, 2009. "My position is, if you want to do text messages, we need to have a way to save all the messages and sort through them to see which ones are public records and which ones are not," said Alachua County Attorney Dave Wagner. *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Jamie Page, *County Attorney Proposes Tech Rules*, PENSACOLA NEWS J., Aug. 13, 2009.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Letter from Bill McCollum, Florida Attorney General, to Kurt Browning, Florida Secretary of State (Mar. 17, 2010), available at [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-83MJ8D/\\$file/BrowningLetter.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-83MJ8D/$file/BrowningLetter.pdf).

communications (multimedia content), and instant messaging conducted by government agencies.<sup>108</sup>

While clearer rules regarding texting and similar communications are important, other information practices of public officials (and citizens) are also relevant to the discussion of how open government laws can fall behind technology.

### *B. E-mail*

As evidenced by Attorney General McCollum's previously mentioned letter to the Florida Secretary of State, retention procedures are generally well-established for e-mail communications. Unlike text messages, there is clear case law precedent that e-mails are public records in Florida.<sup>109</sup> Therefore, the issue in Florida with e-mail is not if e-mails are public records or how to archive them. Instead, another problem has persisted: public officials using private e-mail accounts to discuss public business.

The magnitude of this problem is perhaps best illustrated by the case of the City of Venice, which in 2009 was ordered to pay approximately \$780,000 in attorney's fees stemming from an open government lawsuit that centered on public e-mails stored on private computers.<sup>110</sup> The nonprofit group Citizens for Sunshine and citizen-activist Anthony Lorenzo sued the city, alleging that Venice City Council members violated the open meetings and public records laws by discussing city business via e-mail and failing to preserve electronic communications.<sup>111</sup> The personal computers of some city council members were seized in order to retrieve missing e-mails sent and received from personal accounts.<sup>112</sup> When the lawsuit settled several months later, the issue of attorney's fees remained unresolved.<sup>113</sup> Attorneys for

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<sup>108</sup> *Id.*

<sup>109</sup> Kim Hackett, *Venice's Records Lawsuit Wraps Up*, SARASOTA HERALD TRIB., Oct. 22, 2009, at BN1.

<sup>110</sup> *Id.*; see also 1996 Op. Att'y Gen. Fla. 96-34, 1996 WL 267352 (May 15, 1996).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Kim Hackett, *Sunshine Suit Ends, But Legal Fees Still Unresolved*, SARASOTA HERALD TRIB., Apr. 2, 2009, at BS3.

plaintiffs sought a multiplier, bringing their requested total attorney's fees to \$2.2 million.<sup>114</sup> While the judge did not grant the multiplier, he did order the city to pay almost \$780,000 in attorney's fees, a record-setting attorney fee award in a Florida open government case.<sup>115</sup> As a result of the suit, the city changed its rules to require officials to use government accounts for city-related e-mails and to save e-mails received at private accounts on government computers.<sup>116</sup>

Elsewhere in the state, the Bonita Springs City Council changed its e-mail rules to require city employees and volunteers to forward city-related e-mails from private accounts to official accounts after an investigation of a council member related to e-mails maintained on her personal account.<sup>117</sup> In the Daytona Beach area, a mayor's use of an AOL account to send and receive official e-mails caused problems when his e-mails were requested; AOL retained the e-mails for only 30 days.<sup>118</sup>

As a result of the problems encountered when public officials use personal accounts for public business—whether to purposely circumvent the law or simply out of convenience—access to public records can be placed at risk. In January 2009 Florida's Commission on Open Government recommended that government entities “adopt policies and procedures for ensuring that public records maintained on personal computers or transmitted via personal internet accounts are disclosed and retained according to law.”<sup>119</sup>

### C. Social Media

Just as the lines between personal and public can be blurred when public officials use private accounts for e-mail, social

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<sup>114</sup> Kim Hackett, *Venice's Records Lawsuit Wraps Up*, *supra* note 109.

<sup>115</sup> *Id.*

<sup>116</sup> Ahnalese Rushmann, *City Council Settles Sunshine Lawsuit Over E-mail Use*, REPORTERS COMM. FREEDOM PRESS (Mar. 16, 2009, 5:41 PM), <http://www.rcfp.org/newsitems/index.php?i=10008>.

<sup>117</sup> *New E-mail Rules in Bonita*, 33 BRECHNER REP. (The Brechner Ctr., Gainesville, FL), no. 9, Sept. 2009, available at <http://www.brechner.org/reports/2009/09Sep2009.pdf>.

<sup>118</sup> See, e.g., COMM'N ON OPEN GOV'T REFORM FINAL REPORT, *supra* note 16, at 124–25.

<sup>119</sup> *Id.* at 165.

networking sites are another minefield for potential violations of open government laws if officials use these tools to conduct secret conversations. Online platforms like Facebook, Twitter, LinkedIn and YouTube also pose major problems of archiving posts and site information, which are public records in Florida. The benefits of government presence on a social networking site include reaching a wider audience, getting instant feedback on issues and encouraging civic participation.<sup>120</sup> The services are generally free to use and are therefore a cost-effective method of engaging citizens and spreading information.<sup>121</sup> However, social media also presents problems of record retention, data protection and legal exposure for government agencies.<sup>122</sup>

A growing trend among government agencies is to create a Facebook profile or fan page.<sup>123</sup> Facebook is a web-based service that allows users to interact online by e-mailing, instant messaging (“chat” function), posting messages on a “Wall” viewable by other users and sharing multimedia content such as photos, links or videos. Facebook has even created a “Government on Facebook” page dedicated to “information about how Government can best use Facebook.”<sup>124</sup> However, Facebook does not offer any special agreements for state or local governments.<sup>125</sup> Comments cannot be disabled for particular posts, but site administrators have discretion

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<sup>120</sup> Conference Presentation, Social Networking & Cloud Computing, Sunshine Technology Meeting (Feb. 22, 2010), [http://myfloridalegal.com/webfiles.nsf/WF/JFAO-82YLBj/\\$file/SocialNetworking.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JFAO-82YLBj/$file/SocialNetworking.pdf) [hereinafter Social Networking & Cloud Computing].

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Kaitlynn Riely, *Facebook Is the Latest Form of Town Forum*, PITTSBURGH POST-GAZETTE, Mar. 18, 2010, <http://www.post-gazette.com/pg/10077/1043449-55.stm>; see also Steven Overly, *Social Networking Sites: 10 Mistakes Organizations Make*, WASH. POST, June 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/25/AR2010062504382.html>.

<sup>124</sup> *Government on Facebook*, FACEBOOK, <http://www.facebook.com/government> (last visited Oct. 6, 2010). The Facebook page links to government Facebook sites. See *id.* For example, as of March 31, 2010, the White House had more than 500,000 fans; the U.S. Navy had 135 fans. See Joab Jackson & Michael Hardy, *Facebook Launches Government Page*, FED. COMPUTER WK., Sept. 11, 2009, <http://fcw.com/articles/2009/09/14/week-facebook-launches-government-page.aspx>.

<sup>125</sup> *Government on Facebook*, *supra* note 124 (follow “Resources” hyperlink).

to remove a comment or fan from the page.<sup>126</sup> The resources section for government agencies interested in setting up a Facebook page makes no mention of records retention capabilities, and in light of Facebook's lack of special agreements with entities, it appears that the burden of capturing and maintaining page contents would lie with the government.<sup>127</sup> Third-party tools might be a starting point for archiving social media sites, according to Florida Fish and Wildlife Conservation Commission technology analyst April Edmonds.<sup>128</sup> Examples of such software include the Microsoft Outlook plug-in TwInbox,<sup>129</sup> which archives Twitter postings; TweetTake,<sup>130</sup> another free tool for archiving Tweets; ArchiveFacebook,<sup>131</sup> a plug-in for the Firefox browser that maintains Facebook information; and SocialSafe, another application for saving Facebook content.<sup>132</sup>

Legal guidance for Florida officials interested in Facebook does not include case law at the present time, but the Attorney General has issued one opinion directly addressing social media.<sup>133</sup> The opinion, issued April 23, 2009, responded to an inquiry by the Coral Springs City Commission regarding: 1) whether a city can have a Facebook page; 2) whether the city would then be obligated to follow the public records retention schedule; 3) whether Florida's constitutional right of privacy would be implicated by including the city's "friends" in public records; and, 4) whether communications via Facebook would be subject to the open

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Andy Opsahl, *Backing Up Twitter and Facebook Posts Challenges Governments*, DIGITAL CMTYS. (Jan. 20, 2010), <http://www.digitalcommunities.com/articles/Backing-Up-Twitter-and-Facebook-Posts.html>.

<sup>129</sup> *TwInbox*, TECH HIT, [http://www.techhit.com/TwInbox/twitter\\_plugin\\_outlook.html](http://www.techhit.com/TwInbox/twitter_plugin_outlook.html) (last visited Mar. 31, 2010).

<sup>130</sup> *What is Tweetake?*, TWEETAKE, <http://tweetake.com/about> (last visited Mar. 31, 2010).

<sup>131</sup> Carlton Northern et al., *ArchiveFacebook 1.1*, MOZILLA, <https://addons.mozilla.org/en-US/firefox/addon/13993> (last visited Mar. 31, 2010).

<sup>132</sup> Opsahl, *supra* note 128; *see also* SOCIAL SAFE, <http://www.socialsafe.net> (last visited Mar. 31, 2010). Twitter donated its own archive of public tweets to the Library of Congress in 2010. *Twitter Donates Entire Tweet Archive to Library of Congress*, LIBRARY OF CONGRESS (Apr. 15, 2010), <http://www.loc.gov/today/pr/2010/10-081.html>.

<sup>133</sup> 2009 Op. Att'y Gen. Fla. 19, 2009 WL 1106315 (Apr. 23, 2009).

meetings law.<sup>134</sup> The Attorney General responded in the affirmative to all of the questions except for the privacy question.<sup>135</sup> Cities are permitted to create a Facebook page so long as it is for a municipal purpose.<sup>136</sup> The contents of the page would be public records if related to official business.<sup>137</sup> The Attorney General emphasized that “[i]t is the nature of the record created rather than the means by which it is created which determines whether it is a public record.”<sup>138</sup> Thus, the public retention schedule would have to be followed.<sup>139</sup> The open meetings law would also apply, since “the physical presence of two or more members is not necessary in order to find the Sunshine Law applicable.”<sup>140</sup> As to the privacy issue, the Attorney General noted that Florida’s constitutional right to privacy provision, Article I, section 23, explicitly states that it “shall not be construed to limit the public’s right of access to public records and meetings” and therefore would not be implicated by a city Facebook page.<sup>141</sup> The Attorney General suggested that the city consider posting a notice on its Facebook page related to the applicability of the public records law, presumably to assuage any privacy concerns.<sup>142</sup>

#### D. Cloud Computing

Once upon a time, when someone called you, the caller would leave a message on your answering machine, the message would be recorded on your machine and the only way someone could listen to that message would be if she were standing in your living room. Along came voicemail, and that message was stored not in

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (citing 2008 Op. Att’y Gen. Fla. 07, 2008 WL 546165 (Feb. 26, 2008) (stating that “an email created by a public official in connection with the transaction of official business is a public record whether it is created on a publicly or privately owned computer” and concluding that the posting of comments relating to city business by a city commissioner on a web page which he maintains would be subject to the Public Records Law)).

<sup>139</sup> *See* 2009 Op. Att’y Gen. Fla. 19, 2009 WL 1106315 (Apr. 23, 2009).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; *see* Fla. Const. art. I, § 23.

<sup>142</sup> *Id.*

your house but somewhere “out there” and accessible with a phone call. This scenario is analogous to the “cloud computing” trend that Harvard Law Professor Jonathan Zittrain describes as “mov[ing] us further away from running code and storing our information on our own PCs toward doing everything online—also known as ‘in the cloud’—using whatever device is at hand.”<sup>143</sup> Other definitions of cloud computing include “the dynamic provisioning of IT capabilities (hardware, software, or services) from third parties over a network”<sup>144</sup> and “virtual servers available over the Internet.”<sup>145</sup>

Google’s web-based e-mail service, Gmail, is an example of cloud computing, as are Facebook and YouTube. These software applications are accessible online and do not require users to download the software onto a computer. Cloud computing not only comes in the form of software as a service (often shorted to “SaaS”), but also infrastructure as a service (servers, networks, and storage in the cloud rather than the corporate basement) and platform as a service (i.e., virtualized servers that allow users to develop their own applications; Microsoft Azure is an example).

Cloud computing lowers costs by enabling users to pay for services as needed, permitting a lower investment in infrastructure<sup>146</sup> and freeing up physical space on a company’s servers.<sup>147</sup> On the other hand, the cloud computing model raises concerns of loss of control over data, privacy protections, security and interoperability with existing programs.<sup>148</sup> Of particular concern for government entities is accessibility of data. Governments should consider negotiating service-level agreements

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<sup>143</sup> Jonathan Zittrain, Op-Ed., *Lost in the Cloud*, N.Y. TIMES, July 19, 2009, at A19, available at <http://www.nytimes.com/2009/07/20/opinion/20zittrain.html>.

<sup>144</sup> Kevin Fogarty, *Cloud Computing Definitions and Solutions*, CIO (Sept. 10, 2009), [http://www.cio.com/article/501814/Cloud\\_Computing\\_Definitions\\_and\\_Solutions](http://www.cio.com/article/501814/Cloud_Computing_Definitions_and_Solutions).

<sup>145</sup> Eric Knorr & Galen Gruman, *What Cloud Computing Really Means*, INFOWORLD (Apr. 7, 2008), <http://www.infoworld.com/d/cloud-computing/what-cloud-computing-really-means-031?page=0,1>.

<sup>146</sup> Fogarty, *supra* note 144.

<sup>147</sup> Matt Williams, *In the Spotlight: All Eyes Are on Los Angeles CTO Randi Levin As City Deploys Cloud-Based E-Mail*, PUBLIC CIO, Feb.–Mar. 2010, at 10–12, available at [http://digitalmag.govtech.com/PCIO/PCIO\\_Mag\\_Feb10.pdf](http://digitalmag.govtech.com/PCIO/PCIO_Mag_Feb10.pdf).

<sup>148</sup> Fogarty, *supra* note 144.

for access from the outset, according to intellectual property attorney Daren Orzechowski, addressing issues of how archived data can be accessed; how the cloud computing vendor will pull data if needed; and if so, how much it will cost for the vendor to fulfill a public records request.<sup>149</sup>

The City of Los Angeles is one of the first government entities of its size to use Gmail, a web-based enterprise e-mail service, to replace its on-site e-mail system.<sup>150</sup> The \$17 million, five-year deal is expected to save the city approximately \$25.5 million in the long run due to decreased costs and other factors, such as increased productivity.<sup>151</sup> In its contract with Google, the city negotiated that the data will belong to Los Angeles in perpetuity, which helps ensure archived data can be moved to another vendor if needed.<sup>152</sup> If the project succeeds, it “could open the floodgates for other governments that are awaiting a successful test case before entering the cloud computing environment.”<sup>153</sup>

Public officials are already utilizing cloud computing models, whether an official Facebook page or public e-mails sent on a private, web-based account. Thus, the issues of security, portability, access and retention are relevant now to all government entities. If governments make widespread conversions to cloud-based systems, the scope of public records “in the cloud” will increase dramatically. This will result in public records being controlled to some degree by third parties, which can be a benefit if access is more efficient but could also result in reduced transparency if information is controlled in proprietary software or mishandled. Preemptive consideration of the open government

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<sup>149</sup> Steve Towns, *Cloud Computing: Four Questions to Ask Your Vendor*, PUBLIC CIO (Jan. 18, 2010), <http://www.govtech.com/pcio/Cloud-Computing-Four-Questions-to-Ask.html>. Intellectual Property Attorney Daren Orzechowski suggests four questions for governments considering cloud computing contracts: Where is my data? How do I access my data? How secure is my data and how portable is my data? Orzechowski pointed out that U.S. government entities should require that data be kept within the United States; ensure both physical and logical security of data; and discuss how easily data can be transferred to another vendor. *Id.*

<sup>150</sup> Williams, *supra* note 147, at 12.

<sup>151</sup> *Id.* at 12–13.

<sup>152</sup> *Id.* at 14.

<sup>153</sup> *Id.* at 12.

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issues raised by cloud computing is therefore key to maintaining transparency.

In Florida, cloud computing has had an impact in the Facebook and personal e-mail scenarios described above. But there has been little public dialogue about the open government aspects of cloud computing, although the Attorney General's Sunshine Technology Team did discuss the topic at its third and final meeting in February 2010.<sup>154</sup> Cloud computing stands to become more and more relevant to open government/technology discussions as the technology grows, and Florida is in the very early stages of responding to this issue.

### III. BEST PRACTICES FOR TECHNOLOGY AND OPEN GOVERNMENT

While Florida might be unique in its position as a national leader in open government laws, it is far from alone in its struggle to mesh new technologies with longstanding open government laws. Instant messaging, e-mailing from personal accounts, social networking and cloud computing are major issues that government entities in Florida and beyond must confront. With strong open government laws comes a greater burden to ensure that those laws remain powerful, even in the face of technological advances.

What Florida has done right is to dedicate personnel and resources to the issue of open government. Florida officials have often made open government a priority. Governor Crist's establishment of an Office of Open Government and later a Commission on Open Government Reform demonstrated that open government was a priority. The Commission worked for nearly two years to conduct a comprehensive evaluation of the public records and open meetings laws, resulting in a variety of legislative and policy recommendations.<sup>155</sup> In addition, the Attorney General's Office has long had an attorney dedicated to open government issues, a well-regarded resource for citizens, the media and government officials.<sup>156</sup> Florida also has a strong contingent

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<sup>154</sup> Social Networking & Cloud Computing, *supra* note 120.

<sup>155</sup> See COMM'N ON OPEN GOV'T REFORM FINAL REPORT, *supra* note 16.

<sup>156</sup> The "Sunshine" Law, *Government in the Sunshine*, *supra* note 20.

of open government advocates who help monitor compliance and legislation; for example, a legislative proposal to exempt 911 recordings from the public records law was quickly abandoned by its sponsor due to the “backlash” from the public, which included several scathing editorials in the Florida press.<sup>157</sup>

But despite all of these measures, it was a worst-case scenario—the PIN exchanges involving the Public Service Commission that captured headlines statewide—that prompted action regarding the impact of technology on compliance with open government laws. BlackBerry smart phones have been on the market since 1999,<sup>158</sup> so their potential to aid in circumvention of open government laws is not a new phenomenon. Personal e-mail accounts, text messaging and social media have all been available for several years as well. The result of a lack of attention to the issues has been years of public records that may be lost and secret meetings the public will never know about.

In response to the Public Service Commission scandal, Florida sought advice from the private sector, going straight to the source of technology—such as the creators of BlackBerry and executives at Microsoft.<sup>159</sup> Collaboration with those who develop and maintain technologies helps explain the complexities of communication methods, but it can also spur market competition that will result in newer, better technologies that help governments work more effectively and comply with freedom of information laws. Private industry has already spurred advances in software and hardware in an effort to reduce travel costs,<sup>160</sup> increase communication<sup>161</sup> and comply with new regulatory and procedural

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<sup>157</sup> *Florida: Once Again, Leading the March for Open Government*, SUNSHINE WEEK, Mar. 12, 2010, <http://www.sunshineweek.org/ManageArticles/ArticleView/tabid/68/ArticleId/68/Florida-Once-Again-Leading-the-March-for-Open-Government-68.aspx>.

<sup>158</sup> *Company*, BLACKBERRY, <http://na.blackberry.com/eng/company.jsp> (last visited Mar. 31, 2010).

<sup>159</sup> *See supra* notes 86, 94.

<sup>160</sup> *See, e.g., Global Crossing Cuts Costs, Unifies Communications with Integrated Solution*, MICROSOFT CASE STUDIES (Jan. 28, 2009), [http://www.microsoft.com/casestudies/Case\\_Study\\_Detail.aspx?CaseStudyID=4000003561](http://www.microsoft.com/casestudies/Case_Study_Detail.aspx?CaseStudyID=4000003561).

<sup>161</sup> *Id.*

requirements, such as the federal e-discovery rules.<sup>162</sup> Governments can apply these advanced technologies to open government laws to ensure effective public participation, documentation of meetings, access to records, retention of public records and compliance with existing open government laws.

Another important step that (at least some) Florida government officials took at the state, county and city levels was to reflect on instant messaging's impact on open government compliance and develop policies.<sup>163</sup> Responses ranged from a complete ban on mobile messaging, to allowing continued use but finding a way to capture messages and urging employees to limit use.<sup>164</sup> While the adoption of messaging policies is not yet widespread among local governments, many localities have paved the way for others.

The serious implications of using personal e-mail accounts to communicate about public business were highlighted in the case of the Venice City Council, whose alleged attempts to circumvent open government laws resulted in a lengthy lawsuit and a \$780,000 attorney fee award. While the Commission on Open Government Reform recommended that agencies develop policies for personal e-mail use, the policies that are being utilized vary from organization to organization.

Social media has been addressed by one Attorney General Opinion in 2008, and the Sunshine Technology Team explored the issues associated with social networking as well as cloud computing at its final meetings.<sup>165</sup> But the solution to the retention and accessibility problems raised by these forms of technology is not clear; in fact there may not be an efficient solution yet. While third-party software, such as TwInbox or ArchiveFacebook, might be the answer for now, remote data storage could later become a component of these applications.

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<sup>162</sup> See, e.g., Sharon Fisher, *E-Discovery Product Adds Ability To Find And Collect Data*, NETWORK COMPUTING, FOR IT BY IT (Sept. 17, 2010), <http://www.networkcomputing.com/data-protection/e-discovery-product-adds-new-ability-to-find-and-collect-data.php>.

<sup>163</sup> See *supra* note 97 and accompanying text.

<sup>164</sup> See *supra* notes 97–106 and accompanying text.

<sup>165</sup> *Id.*; Social Networking & Cloud Computing, *supra* note 120.

As government entities nationwide work to keep up with technology while maintaining transparency, some type of unified standards could be helpful. The following best practices are based on the experiences in Florida and the research presented in Part II regarding the technologies that can both enhance and confound open government laws:

*Be proactive in providing solutions to problems posed by new technology.* Public officials must acknowledge the challenges that new technologies place on their responsibilities under their states' open government laws. For example, many officials in Florida do not understand that when they send an instant message or a text during a public meeting about a public issue being discussed, they potentially violate the state's open meetings law and create a public record, which must be retained according to the state's retention policy.<sup>166</sup> Identifying and working with public officials regarding their use of new technology and the governmental entity's ability to capture and record information required by the law should help avoid unintentional violations and costly legal battles.

*Develop clear, concise policies for technology use.* Following a rash of public records lawsuits over the failure to retain public records made via new technology, a number of local government agencies and municipalities in Florida are establishing written guidelines regarding their use for public officials and government employees. These new policies restrict public officials' use of text messages during public meetings, the use of home computers to conduct government business and ban the use of private e-mails to answer constituents' correspondence.<sup>167</sup>

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<sup>166</sup> See *supra* text accompanying notes 97–106.

<sup>167</sup> See *supra* notes 97–106, 116–18 and accompanying text.

*Educate public officials and government employees on open government laws.* Public officials and employees must understand and remember it is the message, not the medium that triggers open government laws. Regardless of the medium, if it is a public record, the record must be kept and made accessible to the public. For example, in Florida, if the record is made or received in connection with public business, it is a public record.<sup>168</sup> That includes text messages, instant messages or PIN messages. While the myriad of new technologies greatly facilitates communication between government employees and between government and the public, they may render compliance with the public records laws much more difficult, if not impossible. As a result, public officials must understand the limitations of the technology they are using before they inadvertently violate the law.

*Establish a technology/open government czar.* Elected public officials need to depend on knowledgeable Information Technology (“IT”) people who are also well trained and committed to open government and public records laws. This position and a partnership with public officials will be critical to successfully navigating the technology challenges of the future.

*Do not jump on the technology bandwagon without a backup plan.* When new technology trends, such as Facebook or cloud computing, come on the scene, it can be tempting to adopt the technology without addressing open government concerns. Before adopting new technology for government use, safeguards for issues such as retention and retrieval must be addressed.

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<sup>168</sup> See *supra* Part I.A.

*Facilitate collaboration between open government compliance departments and IT professionals.* Legal staff and lawmakers may not have the technical understanding necessary to fully understand the implications of technology on open government laws. In turn, government IT staff might not have enough awareness of open government laws to understand the impact of certain technologies. When the two groups collaborate, the result can be a more informed discussion of open government/technology policies and processes, which can lead to better technology choices and enhances both access and compliance with open government laws. Private industry should be consulted for possible partnerships in developing cost-effective methods of achieving transparency in the digital age. Government agencies must use caution, though, to ensure the maximum amount of public access in the creation and maintenance of computer systems.

*Keep open government laws in mind when negotiating contracts with communication and IT vendors.* Price, service and data security are not the only factors to consider when contracting with wireless carriers, software providers and other vendors. Unfortunately, local and state IT staff and those bound by the public records law rarely discuss the need to set up computer systems and purchase new technology that will allow public officials to comply with open government laws. These two entities must work closely together in order to make cost-effective and compliant purchases.

*Eschewing technology is a stop-gap solution; long-term integration of technology and transparency is key.* Technology is everywhere and it is essential in

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our daily lives. Public officials must learn how to use and adapt technology so they can communicate more effectively and efficiently with constituents and colleagues without violating the public records laws.

These best practices can be helpful to government entities large and small in maintaining transparency and taking advantage of technology. For citizens, the ultimate best practice will be to elect officials who make open government a priority and hold them accountable after taking office. The media, too, plays a key role in safeguarding transparency by continuing to make public records requests and seeking access to government proceedings. It takes the combined efforts of government, citizens and the media to keep government open.

#### CONCLUSION

Government transparency is essential to a strong democracy; without access to information, citizens cannot fully participate in their self-governance. The public and press have long struggled to gain access to government information and meetings, but new technologies have further complicated the process. Reflective of a larger societal trend, government officials are turning to social media and mobile technology to communicate while carrying out their official duties. As a result, public records and government meetings are increasingly kept from public view. Florida, a national leader in open government, has not been immune from the tension between technology and transparency despite a persistent culture of transparency cultivated through decades of often favorable laws, judicial decisions, attorney general opinions and public advocacy. In response to a high-profile case involving secret BlackBerry messages, the Florida Attorney General's Office convened a "Sunshine Technology Team" to look at freedom of information problems created by technology. While the Florida Attorney General's fact-finding endeavor did not result in any long-term solutions to the open government issues it considered, the study did shed light on the technological aspects of this developing area of the law.

E-mail, instant messaging, social media and cloud computing all raise issues related to the capture, retention and security of public records. The law has yet to directly address many of these problems, and until it does, government agencies should implement best practices for technology and transparency such as developing policies prior to use, encouraging collaboration between records custodians and IT departments, and increasing education for employees and officials. These best practices will be key to preserving the public's right to know.