

FACA 2013 Continuing Legal Education Program

PUBLIC RECORDS: TEXTING, TWEETING AND FACEBOOK

June 26-27, 2013

Presentation by:

ROBERT D. GUTHRIE

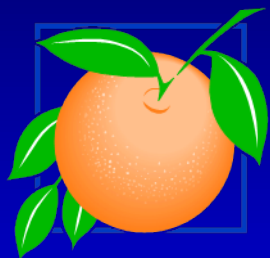
Orange County

GREG OSINOFF

Navigant

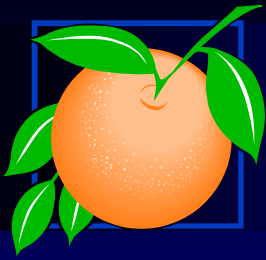
GREGORY T. STEWART

Nabors, Giblin & Nickerson, P.A.



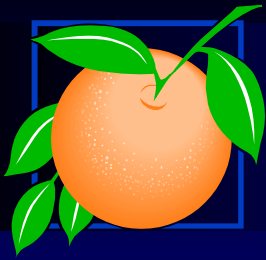
THE ORANGE COUNTY EXPERIENCE

**Robert D. Guthrie
Senior Assistant County Attorney
Orange County, Florida**



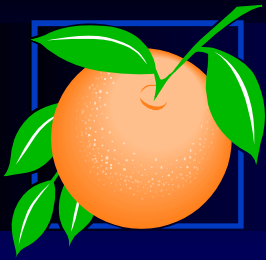
Florida Public Records

This session will focus on the duty of custodians of public records and public agency officials to store and maintain public records created on public and private electronic devices and websites. The experience of Orange County as a defendant in a lawsuit alleging violation of the public records law and violation of the Sunshine Law in 2012 will frame the discussion of these issues.



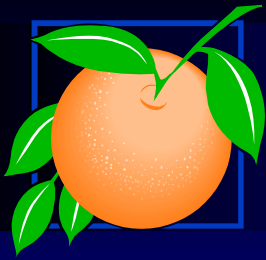
Public Records on Electronic Devices

- Public Records on Electronic Media
- Public Electronic Devices and Media
- Private Electronic Devices and Media
- Who controls public records on private devices?



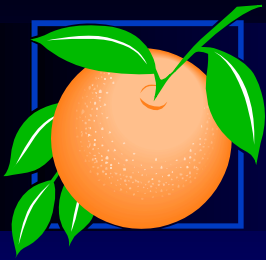
Florida Public Records

Compliance with the Florida public records law has been mandated for forty years by Chapter 119, Florida Statutes, and in 1992, access to public records (and public meetings) was added to the Florida Constitution at Article I, Section 24. The requirements were enacted when public records were essentially on paper and created in an office setting.



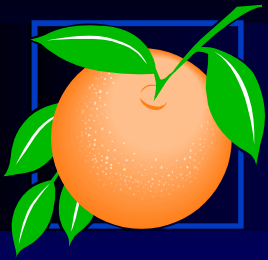
Florida Public Records (Cont)

In recent years, public records have been created, stored and produced in electronic form. Creation and sharing public records can be instantaneous. Public records can be created and distributed on portable electronic devices anywhere and anytime. Managing public records in electronic form is an evolving challenge.



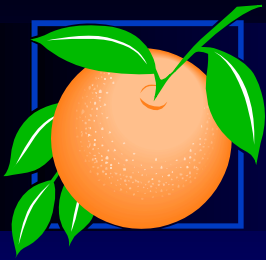
Florida Public Records (Cont)

Public records may be created and distributed on personal as well as public electronic devices. Orange County has been sued for failure to comply with public records law based on allegations that public records created on cell phones (personal and public) were deleted in violation of state law.



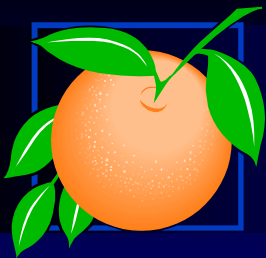
Orange County Experience and Litigation

- Background and Citizen Initiative Under County Charter
- 50,000 signatures secured/certified on a petition dealing with paid sick leave for private employees
- Opposition from business community
- Board action scheduled for 9-11-12



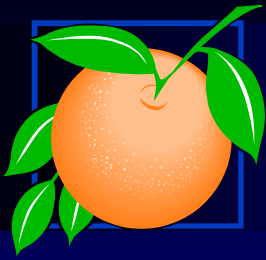
Litigation

- Law suits filed
 - Chamber of Commerce, et al vs. Citizens Group
 - Citizen Group vs. Orange County
- Protracted debate on 9-11-12
- County Attorney's advice to Board
- Defects in ballot title/language in Petition



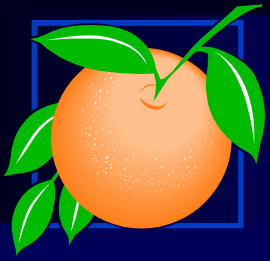
Board Action on Underlying Issue

- Board votes 4 – 3 not to put language on November ballot
- Think gnashing of teeth; fur and stuff flying; a fan, etc.
- A number of text messages sent to/by BCC Members
- Many during the Board meeting



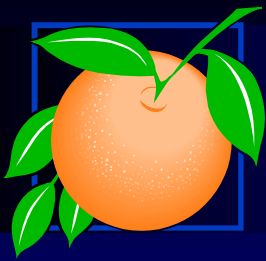
Cell Phones/Texts

- Several elected officials use only their private electronic devices (cell phones, primarily)
- Same with Commission staffs and County employees
- County manages texts, IMS, etc. on County devices or sites
- Not on private devices or sites



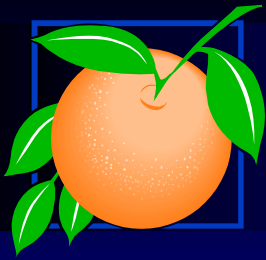
Public Records Requests/Lawsuit Against Orange County

- Two members of public file public records requests
- Lawsuit: *Citizens for a Greater Orange County vs. Orange County* filed in Circuit Court on October 5, 2012
- Initially two counts; violation of Public Records Law and violation of Sunshine Law for sending and/or receiving text messages
- Alleged deletion of text messages
- No individuals sued in initial complaint



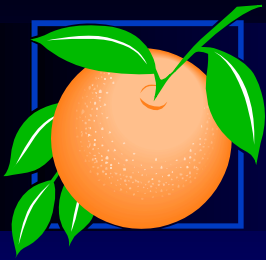
Seize the Phones

- Plaintiff's counsel demands County Attorney's Office seize all public and private phones
- Sought phones from County officials and twelve citizens alleged to have texted Commissioners
- Meek, mild-mannered Assistant County Attorney declined request to seize private devices



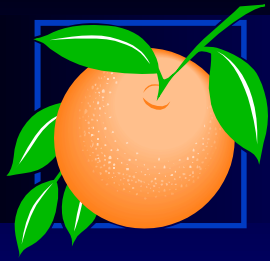
Records Produced/ Records Lost

- Broad public records request filed
- Thousands of pages; numerous discs, etc.
- Amended Complaint filed joining some Commissioners and employees



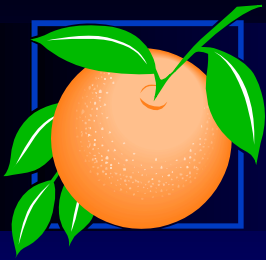
Lobbyists Texts

- Lobbyists declared they were exercising their 1st Amendment Rights
- Refused to turn over their devices or records
- Litigants told County to get Lobbyists private devices and records



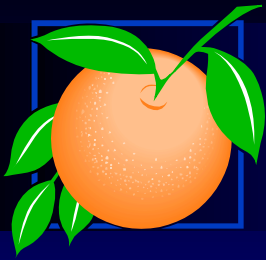
Plaintiff's Efforts to Get Lobbyists Texts

- Discovery – Notice of taking Lobbyists deposition
- Lobbyists opposed
- Plaintiff never forced issue



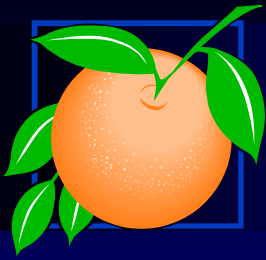
More Public Records Requests

- Public records requests
- Mayor and six Commissioners
- County Attorney
- Mayor's chief of staff



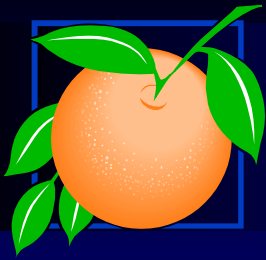
Broader Records Request

- All paper, voicemails, IMS, other electronic and records from:
 - Everyone in Mayor's office
 - Everyone in each of six Commissioners' offices
 - Everyone in County Attorney's office
- Response took awhile so request was added as Count III to lawsuit



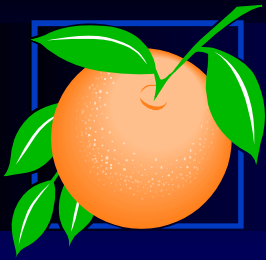
Were Text Messages Deleted?

- Several elected and appointed officials admitted deleting texts
- Several admitted deletions then said they did not do so
- Some denied using private devices for public business
- Every time a reporter puts a microphone in front of several of them they said something



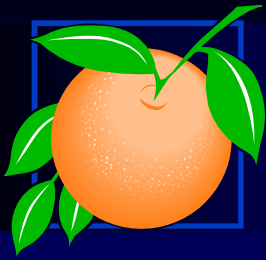
Status of Deleted Texts

- Recovery efforts for lost texts
- Deleted texts cannot be recovered for very long after deletion
- Lost forever
- If not deleted they are recoverable



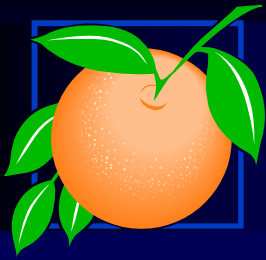
Texts Recovery Efforts

- County information services staff tried recovery from County devices and some private phones
- Personal info and public records
- Redaction of personal information
- Plaintiffs want to see it all



Data Recovery Firm Retained

- County retains a forensic electronics recovery service
- Results not dramatically different from recovery efforts by County
- Deleted texts essentially lost and not recoverable
- Who pays for private firm?



Myriad of Issues

- Who controls public records on private devices?
 - ❖ Set up a public system to help elected officials manage records on private devices
 - ❖ Provide apps to preserve records
 - ❖ Ban use of private devices for conduct of public business

THE TECHNOLOGY OF ELECTRONIC MEDIA

Greg Osinoff, J.D.

NAVIGANT

ELECTRONIC MEDIA LEGAL ISSUES

Gregory T. Stewart



PUBLIC RECORDS

“Public records” 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.

§ 119.011(12), Fla. Stat.

PUBLIC RECORDS

- Definition encompasses all materials made or received by an agency in connection with official business used to communicate or formalize knowledge
- Form of record is irrelevant

PUBLIC RECORDS

- Computer records
- Facebook
- Text messages

RIGHT TO PRIVACY AS TO PUBLIC RECORDS

- Public records must be produced unless they are exempt and/or confidential
- May not refuse on basis that public records will cause embarrassment or humiliation
- Courts have refused to recognize right to privacy as to public records

PRIVATE MESSAGES ON PUBLIC DEVICES

- Private use of public devices for electronic messaging
- Records not transformed into public records merely because on public device
- State v. City of Clearwater case

PUBLIC RECORDS ON PRIVATE DEVICES

- Public records on private devices still subject to disclosure
- Cannot defeat public records disclosure by conducting business on private devices

USE OF PRIVATE DEVICES TO CONDUCT PUBLIC BUSINESS RAISES SEVERAL LEGAL ISSUES

- Duty to retain
- Duty to produce
- Liability for violation
- Loss of privacy rights?

PUBLIC RECORDS ON PRIVATE DEVICES

Officials and employees still have the right to privacy on their private devices even if used to conduct public business

- Smallwood v. State - expectation of privacy to material on cell phone
- Officials don't give up right to privacy because the use is public business

CUSTODIAN OF RECORDS

Who has the duty to produce and what is the responsibility of the Custodian

- Custodian of Records
- Persons with custody of document
- Persons who illegally possess records

REMEDY

What are the remedies as to an official or employee who fails to produce records

- In camera view
- Required to join individual?

RETENTION

Retention issues for electronic messages

- Electronic messages must be maintained and disposed of in accordance with Division of Library and Information Services
- Transitory message

FORMATTING RECORD

Other special issues

- Native format
- Specially designed format

TEMPORARY CUSTODY

- Private vendor subject to public records request

HOW DOES A COUNTY PROTECT ITSELF

- Set up a public system to help elected officials manage records on private devices
- Provide applications to preserve records
- Ban use of private devices for conduct of public business