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Florida, The *Sunshine* State

Florida is one of only a handful of states that has both a constitutional and statutory right of access to the records and meetings of its government.

Our public records law was first enacted in 1909. Before that, state courts recognized a common law right of access to government records.

Today's Sunshine Law was enacted in 1968. However, Florida's first open meetings law was passed in 1905.

In 1992, Florida voters overwhelming approved a constitutional right of access to the records of all three branches of state government, and the meetings of state agencies and local governments.

Florida's
Public Records Law
Article I, s. 24(a), Fla. Con.
Chapter 119, F.S.

Constitutional Right of Access: Records

Article I, section 24(a)

"Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf . . .This section specifically includes the legislative, executive, and judicial branches of government; . . . counties, municipalities, and districts; and each constitutional officer, board, and commission . . . ."

What is a Public Record?

The term "public record" is broadly defined in law as "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." **Section 119.011(11), F.S.**

The Florida Supreme Court has said a public record is "*any material* prepared in connection with official agency business which is *intended to perpetuate, communicate, or formalize knowledge of some type*." ***Shevin v. Byron, Harless, Schaffer, Reid and Assoc.*, 379 So. 2d 633, 640 (Fla. 1980)**

What is a Public Record?

Electronic Data and Records

Information stored in a public agency's computer "is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet . . ." ***Seigle v. Barry*, 422 So. 2d 63 (Fla. 4th DCA 1982)**

The Public Records Act is not limited to paper documents; it applies to documents that exist only in digital form. ***National Collegiate Athletic Association v. Associated Press*, 18 So. 2d 1201 (Fla. 1st DCA 2009)**

Information such as electronic calendars, databases, and word processing files stored in an agency computers are all public records if made or received in connection with official business and intended to perpetuate, communicate, or formalize knowledge of some type. **AGO 89-39**

What is a Public Record?

Electronic Format

Everyone has a right to public records in "*some meaningful form*."
***Seigle v. Barry*, 422 So. 2d 63, 66 (Fla. 4th DCA 1982)**

An agency must provide a copy of a public record in the format requested *if* the record is maintained in that format. If the record is not maintained in the format requested, an agency has the *option* of converting the record and charging a fee pursuant to s 119.07(4). F.S. **Section 119.01(2) (f), F.S.**

Although neither the Attorney General nor the courts have directly addressed the issue of providing a .pdf in lieu of the requested format, there is an Attorney General Opinion, AGO 91-61, which is analogous.

In this opinion, the Attorney General opined that if an agency is asked for a copy of an electronic record, the agency must provide a copy of the record in its original format – *a typed transcript does not satisfy the requirements of s. 119.07(1), F.S.*

What is a Public Record?

Communications

E-Mail

E-mail messages made or received by agency officers and employees in connection with agency business are public records and subject to disclosure [and retention requirements] absent a specific statutory exemption. **AGOs 96-34 and 01-20**

Text Messages

The Attorney General has said that the "same rules that apply to e-mail should be considered for electronic communications" including text messages and instant messaging. **Inf. Op. to Browning, March 17, 2010**

What is a Public Record?

Social Media

Facebook Posts

The Attorney General has also said placement of material on an agency's Facebook page presumably would be in connection with the transaction of official business and thus subject to the public records law, and that the agency is under an obligation to follow retention schedules established by law. **AGO 09-19**

Tweets

And although neither the AGO nor the courts have directly addressed the issue of tweets as a public record, we can safely assume that such records, if "*intended to perpetuate, communicate, or formalize knowledge*" related to official agency business are subject to the requirements of the Public Records Act.

What is a Public Record?

Use of personal communication devices

In determining whether a record is made or received in connection with the official business of an agency, "the determining factor is the nature of the record, not its physical location. ***State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003)**

The fact that an email is sent from a private email account using a personal computer is not the determining factor as to whether that email is a public record – was the email prepared or received in connection with official agency business? If yes, the email is a public record subject to the requirements of the Public Records Act. ***Butler v. City of Hallandale Beach*, 68 So. 3d 278 (Fla. 4th DCA 2011)**

Who's Responsible?

Every Person Who Has Custody

Section 119.07(1)(a), F.S., stipulates that *"[e]very person* who has custody of a public record shall permit the record to be inspected and copied by any person . . . at any reasonable time, under reasonable conditions, and under supervision by the *custodian of the public records*." **Section 119.07(1)(a), F.S.**

The phrase "custodian of public records" is defined in law as "the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records. **Section 119.011(5), F.S.**

The custodian of public records is authorized to designate another to permit inspection and copying of public records, but must disclose the identity of the designee to those who are requesting to inspect or copy public records. **Section 119.07(1)(b), F.S.**

Who's Responsible?

What is an "Agency?"

The word "agency" is broadly defined in the Public Records Act as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, . . . and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of* any public agency." **Section 119.011(2), F.S.**

Whereas the Sunshine Law generally applies to elected and appointed government officials, the Public Records Act applies to *all* government officials and employees, as well as any private entity or person *acting on behalf of* a government agency. **Article I, s. 24(a), Fla. Con.**

Advisory boards created for the purposes of making recommendation to an agency are subject to the requirements of the Public Records Act. **AGO 96-32**

Who's Responsible?

Statutory Requirements - Contracts

Section 119.0701, F.S., requires that all public agency contracts for services must contain a provision requiring the contractor to comply with the public records law and to provide the public with access to public records under the same terms and conditions – and at the same cost – as the public agency.

The law requires that requests for records relating to a contract for services be made directly to the contracting agency, not the contractor. If the agency doesn't have possession of the requested records, the agency must immediately notify the contractor who must then produce the records within a reasonable period of time. **Section 119.0701(3), F.S.**

Who Can Request Public Records?

Any Person

"It is the policy of this state that all state, county, and municipal records are open for inspection and copying by *any person*." **Section 119.01(1), F.S.**

The word "person" is defined to include "individuals, firms, associations, joint []ventures, partnerships, estates, trusts, . . . corporations, and all other groups or combinations." **Section 1.01(3), F.S.**

A "person's motive in seeking public records is irrelevant." ***Timoney v. City of Miami Civilian Investigative Panel*, 917 So.2d 885, 886n.3 (Fla. 3rd DCA 2005)**

"Even though a public agency may believe" that a requestor is annoying and making public record requests for the sole purpose of harassment, "the public records are available to all . . . " **Salvadore v. City of Stuart, No. 91-812 (Fla. 19th Cir. Ct. December 17, 1991)**

The "law provides any member of the public access to public records, whether he or she be the most outstanding civic citizen or the most heinous criminal." ***Church of Scientology Flag Service Org., Inc v. Wood, No. 97-688CI-07 (Fla. 6th Cir. Ct. Feb. 27, 1997)***

Procedural Requirements

Prompt Response v. Reasonable Production

Requests to inspect or copy public records be acknowledged *promptly* and in *good faith*. **Section 119.07(1)(c), F.S.**

The custodial agency must then produce the requested records within a "reasonable" period of time. **Section 119.07(1)(a), F.S.**

The Florida Supreme Court has said that "reasonable" means the time it takes to locate a record, review it for exempt information, and provide a copy to the requestor. ***Tribune Company v. Cannella,* 458 So.2d 1075, 1078 (Fla. 1984)**

Policies which provide for automatic delays in producing public records are impermissible. **Id.**

An unjustified delay in producing public records can be a violation of the Public Records Act. ***Hewlings v. Orange County*, 87 So. 3d 839 (Fla. 5th DCA 2012)**

Procedural Requirements

Reasonable Conditions

The term "reasonable conditions" in s. 119.07(1)(a), F.S., "refers not to conditions which must be fulfilled before review is permitted but to reasonable regulations that would permit the custodian of records to protect them from alteration, damage, or destruction and also to ensure the person reviewing the records is not subjected to physical constraints designed to preclude review." ***Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979)**

An agency may not impose a rule or condition on the right of access that operates to restrict or circumvent that right. **AGO 75-50**

Absent specific statutory authority, an agency *cannot* require that:

- Requests for records be made in writing. *Dade Aviation Consultants v. Knight Ridder, Inc.,* 800 So.2d 302 (Fla. 3d DCA 2002)
- A requestor disclose his/her name, address, or telephone number. **AGOs 92-38 and 91-76**
- The reason for the request. ***Timoney v. City of Miami Civilian Investigative Panel*, 917 So.2d 885, 886n.3 (Fla. 3rd DCA 2005)**

Fees & Costs

Copying Fees

Providing access to public records is a statutory duty imposed by the Legislature upon all custodial agencies and should not be considered a profit-making or revenue generating operation. **AGO 85-03**

The general fee provision in the Public Records Act that allows a charge of no more than

- 15¢ a page for paper copies up to 8½ x 14 inches, plus an additional 5¢ for two-sided copies; or
- The *actual cost of duplication* for large size paper or non-paper copies. **Section 119.07(4)(a), F.S.**

"Actual cost of duplication" means the cost of the material and supplies actually used to duplicate the public record. Labor and overhead costs are *specifically excluded* and such costs can't be passed on to the requestor. **Section 119.011(1), F.S.**

Fees & Costs

Extensive Use

An agency may charge a *reasonable* fee for the *extensive use* of agency resources – personnel, information technology, or both – in addition to the actual cost of duplication. **Section 119.07(4)(d), F.S.**

Such fees must be reasonable and based on actual costs incurred. **Section 119.07(4)(d), F.S.**

Automatic application of the extensive use provision is prohibited. **AGO 90-07**

Agencies should have

- a definition of "extensive use" and
- a justification for the definition. **2019 Sunshine Manual p. 174**

Presumption of Openness

All records are presumed open and subject to disclosure unless there is a *specific* statutory exemption. **Art. I, s. 24(a), Fla. Con**

Only the Legislature can create an exemption to our constitutional right of access. **Art. I, s. 24(c), Fla. Con.**

Florida's "courts cannot judicially create any exceptions, or exclusions to Florida's Public Records Act." ***Board of County Commissioners of Palm Beach County v. D.B.*, 784 So. 2d 585, 591 (Fla. 4th DCA 2001)**

Courts cannot "imply" from open records requirements – "an exemption from public records access is available only after the legislature has followed the express procedure provided in Article I, section 24(c) of the Florida Constitution." ***Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373 (Fla. 1999)**

Exemptions

Burden of Proof

The public records law is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose. ***Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996)**

An agency claiming an exemption bears the burden of proving the right to an exemption. ***Woolling v. Lamar*, 764 So.2d 765, 768 (Fla. 5th DCA 2000)**

If an agency denies a request public records in whole or in part, the agency must put the denial in writing, provide the exact statutory citation authorizing the denial, and explain "with particularity" the conclusion that the record is exempt if asked to do so by the requestor. **Section 119.07(1)(f), F.S.**

Exemptions

Redacting Exempt Information

If a record contains both exempt and non-exempt information, the keeper of the record must redact (delete) that which is exempt and provide access to the remainder. **Section 119.07(1)(d), F.S.**

There is a difference between records the Legislature has determined to be exempt from public disclosure, and those which have been determined to be confidential and exempt. ***WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48 (Fla. 5th DCA 2004)**

Information that is confidential and exempt *cannot be released* except as specified by the exemption. **Id. *And* AGOs 08-24;04-09;**

If information is exempt from public disclosure, the custodial agency *may allow* access to such information. ***Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991)**

Public Records Act Violations

Sanctions – Penalties

A public officer who *unintentionally* violates the Public Record Act is guilty of a non-criminal infraction punishable by a fine of up to $500. **Section 119.0(1)(a), F.S.**

An *intentional* violation of the Public Records Act is a 1st degree misdemeanor. **Sections 119.10(1)(b) and 119.10(2), F.S.**

First degree misdemeanors are punishable by a fine of not more than $1,000 and/or a jail term not exceeding one year. **Sections 775.082(4)(a) and 775.083(1)(d), F.S.**

Public officers who intentionally violate the Public Records Act are subject to suspension and removal or impeachment from office. **Section 112.52, F.S.**

Sanctions

Fees and Costs

If a civil action is filed against an agency to enforce rights provisions of the Public Records Act, and the court determines that the agency unlawfully refused to permit a public record to be inspected or copied, the court *must* award, against the agency responsible, the reasonable costs of enforcement including attorney fees, *if:*

1. The court determines the agency unlawfully refused to allow the record to be inspected or copied; and
2. The requestor provided written notice of the request to the record custodian at least 5 days before filing the lawsuit to compel compliance. **Section 119.12(1), F.S**

However, if the court determines the request was made for an improper purpose, the court *cannot* award attorney fees to the requestor. A requestor who makes a public record request for an improper purpose will be required to pay attorneys fees and costs to the agency.

An "improper purpose" is defined as a request that is made primarily to cause a violation of the public records law or was frivolous. **Section 119.12(3), F.S**

Florida's
Open Meetings Law
Article I, s. 24(b), Fla. Con.
Section 286.011, F.S.

Constitutional Right of Access/Meetings

State Agencies and Local Governments

Article I, section 24(b), Fla. Con.

"*All meetings of any collegial 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*, shall be open and noticed to the public . . . ."
http://www.flsenate.gov/Laws/Constitution#A1S24

The term "collegial body" is generally defined as a board, a commission, a committee, a council, a task force, etc.

Florida's Sunshine Law

Section 286.011, Florida Statutes

The Sunshine Law contains three basic requirements:

1. Meetings of public agencies must be open to the public;
2. Reasonable notice of such meetings must be given; and
3. Minutes must be taken.

Procedural Requirements

Reasonable Notice

A vital element of the Sunshine Law is the requirement that boards subject to the law must provide "reasonable notice" of all meetings. **Section 286.011(1), F.S.**

In order for a meeting to be "public," reasonable notice of the meeting must be given. ***Hough v. Stembridge,* 278 So. 2d 288 (Fla. 3d DCA 1973); *Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985)**

Florida's Attorney General recommends that a meeting notice contain the time and place of the meeting and, if available, an agenda; if an agenda is not available, the notice should include a statement of the general subject matter(s) to be considered. **2019 Government-in-the-Sunshine Manual p. 38**

NOTE: Other statutes, codes or ordinances may impose different – and more stringent notice requirements – than those required by s. 286.011. For example, state agencies are subject to the notice requirements under ch. 120, the Administrative Procedures Act.

Procedural Requirements

Public Participation

Section 286.0114, F.S., requires boards and commissions to provide the public with a "reasonable opportunity to be heard" on propositions before the board or commission.

The right to speak doesn't have to be at the same meeting at which the proposition is considered, but must occur within *reasonable proximity* to the meeting at which official action will be taken.

The law allows for the adoption of reasonable rules requiring orderly conduct and the orderly progression of a meeting, subject to a few minor exceptions.

To remove a speaker who has become disruptive during a meeting does not violate the speaker's First Amendment Rights. ***Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989)**

However, the use of non-disruptive recording devices, whether cameras or tape recorders, cannot be banned. ***Pinellas County School Board v. Suncam, Inc.* 829 So. 2d 989 (Fla. 2d DCA 2002)**

Procedural Requirements

Minutes

Section 286.011(2) requires that minutes of public meetings, including workshops, be promptly recorded and open to public inspection. **AGOs 08-65 and 74-62**

The minutes are public records subject to disclosure when the person responsible for preparing the minutes has performed his or her duty even though the minutes haven't yet been sent to the board members or officially approved by the board. **AGO 91-26**

The Sunshine Law does not require that meetings be recorded, but other statutes, including some exemptions, require that meetings be recorded. **AGOs 86-21 and 10-42.**

Tape recordings of meetings are public records. **AGO 86-21**

What is a "meeting?"

Two or More Members

Generally, the Sunshine Law applies to *any* gathering, whether formal or informal, of two or more members of the same board or commission to discuss some issue on which foreseeable action will be taken by the board or commission.
***Hough v. Stembridge*, 278 So.2d 288 (Fla. 3d DCA 1973)**

The Florida Supreme Court has said the Sunshine Law is to be construed "so as to *frustrate all evasive devices*." ***Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974)**

What is a "meeting?"

Written Reports

A board member may send a written report or email to one or all members of the board on a subject that will be discussed at a future public meeting without violating the Sunshine Law *if*:

- there is no interaction among the commissioners related to the report or correspondence except at a public meeting;
- the sender of the document does not solicit a response; *and*
- the report or correspondence is not used as a substitute for action by the board at a public meeting.

All such reports, communications, and documents are public record.

AGOs 89-23 and 01-20

It is a violation of the law, however, to circulate a document among board members for comments and then share those comments with other members of the board. **AGO 90-03**

What is a "meeting?"

Who is Covered by the Sunshine Law?

State Agencies and Local Governments

The Government in the Sunshine Law applies to public collegial bodies throughout Florida, at the local as well as state level, including "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision." **City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971)**

"All governmental entities in Florida are subject to the requirements of the Sunshine Law unless specifically exempted. ***Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755 (Fla. 2010)**

The Sunshine Law is equally applicable to:

- Elected and appointed boards **AGO 73-223**
- Special district boards **AGO 74-169**
- Boards created by interlocal agreement **AGO 84-16**

What is a "meeting?"

Who is Covered by the Sunshine Law?

Advisory boards or committees created pursuant to law or ordinance or otherwise established by public agencies for the purpose of making recommendations are subject to the Sunshine Law even if those recommendations are not binding. ***Sarasota Citizens for Responsible Government v. City of Sarasota,* 48 So. 3d 755 (Fla. 2010)**

It is the *function* of the advisory board or committee and not its *composition* that triggers sunshine. ***Town of Palm Beach v. Gradison,* 296 So.2d 473 (Fla. 1974)**

What is a "meeting?"

Who is Covered by the Sunshine Law?

Administrative Staff

Staff meetings are not generally subject to the Sunshine Law.

***School Board of Duval County v. Florida Publishing Company,* 670 So.2d 99, 101 (Fla. 1st DCA 1996)**

As a general rule, a board member may call upon a staff member for factual information and advice on a given issue. ***Sarasota Citizens for Responsible Government v. City of Sarasota,* 48 So. 3d 755 (Fla. 2010)**

But staff should refrain from polling board members on specific issues which will come before the board for consideration.

AGOs 89-23; 75-59

What is a "meeting?"

Who is Covered by the Sunshine Law?

One Member of the Board

A single member of a board or commission will be subject to the Sunshine Law *if* that one person has been delegated the authority to act on behalf of the entire board or commission. **AGOs 74-294; 75-41; and 10-15**

"The Sunshine Law does not provide for any 'government by delegation' exception; a public body cannot escape the application of the Sunshine Law by undertaking to delegate the conduct of public business through an alter ego." ***IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353, 359 (Fla. 4th DCA 1973)**

Exemptions

Presumption of Openness

The Sunshine Law is to be liberally construed in favor of openness, and any exceptions to the right of access are to be narrowly construed. ***Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969); *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983)**

Article I, s. 24(b), Fla. Con., requires that all meetings of any collegial body at which public business is to be transacted or discussed be open and noticed to the public.

Only the Legislature can create an exemption to our constitutional right of access to the meetings of our government. **Art. I, s. 24(c), Fla. Con.**

Sunshine Law Violations

Cure Meetings

Section 286.011(1), F.S., states that no resolution, rule, regulation, or formal action shall be considered binding except as taken at an open meeting.

Action taken in violation of the Sunshine Law is void *ab initio* – as if it never happened. ***Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974)**

Action – but *not* violations - can be cured when the offending agency takes "independent final action in the sunshine." ***Tolar v. School Board of Liberty County*, 398 So. 2d 427, 429 (Fla. 1981)**

Sunshine Law Violations

Sanctions - Penalties

A public officer who *unintentionally* violates the Sunshine Law is guilty of a non-criminal infraction punishable by a fine of up to $500. **Section 286.011(3)(a), F.S.**

An *intentiona*l violation of the Sunshine Law is a second degree misdemeanor, and includes activities occurring out of state. **Sections 286.011(3)(b) - (c), F.S.**

Second degree misdemeanors are punishable by a fine of not more than $500 and/or a jail term not exceeding 60 days.

Sections 775.082(4)(b) and 775.083(1)(e), F.S.

Public officers who intentionally violate the Sunshine Law are subject to suspension or removal from office. **Section 112.52, F.S.**

Sunshine Law Violations

Sanctions – Fees and Costs

If a court determines that a board or commission violated the Sunshine Law, the court *must* award reasonable attorney fees and court costs against the agency, including fees and costs incurred in an appeal. **Sections 286.011(4) – (5), F.S.**

Attorney fees and court costs can be assessed against an individual member of a board or commission. **Sections 286.011(4) – (5), F.S.**

A board member who seeks the advice of the board's attorney and follows that advice, will not have to pay such fees and costs. **Sections 286.011(4) – (5), F.S.**

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