

A stylized sun with a large yellow circle in the center and numerous yellow rays of varying lengths radiating outwards. The background is a solid light blue color. The entire graphic is enclosed within a thin yellow border.

# **The First Amendment Foundation**

**2012**

**Sunshine Seminar**



# FLORIDA'S CONSTITUTION

## Access to Government 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 . . . “



# FLORIDA'S CONSTITUTION

## Access to Government Meetings

### Article I, section 24(b)

“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 . . .”



# FLORIDA LEGISLATURE

Note that the Florida Legislature is not subject to the meetings provision in Article I, section 24(b), of Florida's Constitution.

However, the Legislature *is* bound by the requirements of Article III, s. 4(e), Fla. Con., which says that meetings between more than 2 members of the Legislature must be “reasonably open” to the public.



# FLORIDA COURTS

Florida courts are not bound by the meetings requirements in Article I, section 24(b), Fla. Con. However, Amendments I and VI of the U.S. Constitution guarantee open judicial proceedings, and although a court has the inherent power to control its proceedings, there is a “strong presumption of openness” in both criminal and civil proceedings. In each case a court must balance the interests of the parties against those of the public.



# FLORIDA'S SUNSHINE LAW

## Section 286.011, F.S.

### Three simple 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.



## WHAT IS A “MEETING”?

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)]

# question

Two members of the school board are annoyed by Mr. Smith, a self-appointed watch dog, who is extremely critical, it seems, of everything the school board does. The two members arrange a conference call with the school superintendent to discuss what action the board might take to address the “Smith problem”. Is this a violation of the Sunshine Law?





# EVASIVE DEVICES

- The Sunshine Law applies, generally, to deliberations and discussions between two or more members of the board on any issue on which foreseeable action might be taken, and the use of a telephone to conduct such discussion does not remove the conversation from the requirements of the law. [*State v. Childers*, No. 02-21939-MMC; 02-21940-MMB (Escambia Co. Ct. June 5, 2003, *per curiam aff'd.*, 886 So.2d 229 (1<sup>st</sup> DCA 2004))
- Similarly, members of a public board can't use computers or personal communication devices to conduct private discussions among themselves about board business. [AGO 89-39]

# question

Mr. Smith and Reporter X want to attend a meeting of an advisory committee formed by the school board to make recommendations about the location of a new school. The committee is comprised of the school superintendent and five parents active in the PTA. Can Mr. Smith and the reporter attend the meeting?



# WHO IS COVERED?

- All public agencies in the state: state agencies, local governments, school boards, and special districts.
- Private companies doing business on behalf of a government agency.
- Advisory boards and committees.
- One person acting on behalf of a board or commission.

# question

After the high school basketball game, Mr. Smith decides to go to his favorite bar to savor the home team's win. When he gets there, he sees three members of the school board sitting at a table talking. Are the school board members violating the Sunshine Law?



# When does the Sunshine Law *not* apply?

- Fact-finding meetings;
- Social events; and
- When there is a *specific* statutory exemption.

# question

The school board is holding a special meeting and has notified the reporter who covers education for the local newspaper about the board's upcoming meeting. Is notice to the local newspaper public notice under the sunshine law?



# PROCEDURAL REQUIREMENTS

## 1. NOTICE

- Must be *sufficient so as to inform*; and
- Must be *reasonable* in terms of
  - Content
  - Timing
  - Placement

# question

Mr. Smith wants to speak at the school board meeting, but the school board has a policy prohibiting public participation. Does Mr. Smith have a right to speak?





# PROCEDURAL REQUIREMENTS

## 2. PUBLIC PARTICIPATION

Florida's Supreme Court has stated that the public has an "inalienable right to be present and to be heard" at public meetings.

*[Board of Public Instruction of Broward County v. Doran, 224 So. 2d 693, 699 (Fla. 1969)]*



# PROCEDURAL REQUIREMENTS

## 2. PUBLIC PARTICIPATION, cont'd

However, there's recent case law that may mean the right to participate is not as absolute as we once thought.

*[Keesler v. Comm. Maritime Park Assoc., Inc., No. 1D09-1659, 35 Fla. L. Weekly D538 (March 10, 2010) (2010 WL 786216)]*

# question

Mr. Smith starts criticizing a member of the school board during the time set aside for public testimony, but the school board has a policy that says everyone gets to speak so long as the speaker doesn't criticize the members of the board. Does Mr. Smith have a right to criticize the board member?



# REASONABLE RULES

## 2. PUBLIC PARTICIPATION, cont'd

A government agency can adopt *reasonable rules* which require orderly behavior and allow for the orderly progression of public meetings.

[2010 *Government-in-the-Sunshine Manual*, p. 56]

# question

The committee formed to make a recommendation to the school board about the location of the new school is meeting in Mrs. Smith's kitchen. Is that okay? Does the education reporter have a right to attend? The public?



# PROCEDURAL REQUIREMENTS

## 3. LOCATION

A government agency -

- Cannot hold a meeting at any facility which discriminates based on age, race, etc.;
- Cannot unreasonably restrict public access;  
*and*
- Must hold meetings in a facility of sufficient size so as to accommodate the anticipated turnout.

# question

The school board is meeting to discuss the possible firing of a high school principal. Mr. Smith sees the members of the school board sitting in the conference room and opens the door. The school superintendent says Mr. Smith can't attend the meeting because of the "sensitive" nature of the discussion. Can they keep Mr. Smith out?



# EXEMPTIONS

- *Presumption of Openness*: All meetings between two or more members of the same board or commission are open to the public unless there is a *specific* statutory exemption.
- Only the Legislature can create an exemption to our constitutional right of access.
- If denied access to a meeting, the person denied may demand the statutory citation authorizing closure.





## Security Exemption Section 286.0113, F.S.

Allows closure of portions of government meetings which would reveal a security system plan.

A “security system plan” includes “all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations . . . relating to the physical security of the facility or revealing security systems . . . ”[Section 119.071(2), F.S.]



# Litigation Exemption

## Section 286.011(8) , F.S.

1. Applies to *pending* litigation to which the public agency is *presently* a party;
2. Agency attorney must notify the agency at a public meeting;
3. Attendance is strictly limited;
4. Subject matter is limited to discussion of settlement negotiations or strategy sessions related to litigation expenditures;
5. Action is prohibited;
6. The meeting must be recorded by a court reporter; *and*
7. A transcript of the meeting becomes a public record at the conclusion of the litigation.



# SANCTIONS

- An unintentional violation: non-criminal infraction punishable by a fine up to \$500  
Section 286.011(3)(a), F.S.
- A knowing violation: 2d degree misdemeanor punishable by a fine of not more than \$500 and/or a jail term of not more than 60 days  
Section 286.011(3)(b), F.S.
- Suspension or removal from office  
Section 112.52(1), F.S.
- Attorney's fees and court costs  
Sections 286.011(4) and (5), F.S.

# question

The school board attorney informs the school board that it may have been a violation of the Sunshine Law to refuse Mr. Smith the right to attend the meeting held to discuss firing the principal. Mr. Smith has said he's going to sue to overturn the school board's decision to fire the principal (Mr. Smith's daughter-in-law). What can the school board do?



# Cure Meetings

- No resolution, rule, regulation, or formal action shall be considered binding except as taken at an open meeting. [Section 286.011, F.S.]
- Action taken in violation of the Sunshine Law is void *ab initio*. [*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)]



# FLORIDA'S PUBLIC RECORDS LAW

State Agencies & Local Government –  
Chapter 119, Florida Statutes

The Florida Legislature –  
Section 11.0431, Florida Statutes

Florida Courts –  
Rule 2.420, Florida Rules of Judicial  
Administration



# KEY DEFINITIONS

- Person: Includes “individuals, firms, associations, joint [ ]ventures, partnerships, estates, trusts, . . . corporations, and all other groups or combinations. “ [Section 1.01(3), F.S.]
- Agency: “[M]eans 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.]

# question

A staff member recorded yesterday's staff meeting which, incidentally, was not subject to the sunshine law. This morning, Ms. Doe made a public record request for a copy of the tape recording. Can she have a copy?





## KEY DEFINITIONS, continued

- Public Records: “[M]eans 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.]
  - *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)]

# question

Reporter X calls the agency's personnel office and wants to know how many agency employees make over \$35,000/year. Does the personnel director have to provide the reporter with the information requested?



## REQUESTS FOR INFORMATION

Florida's public records law requires an agency to provide access to public records. But an agency is *not* required to provide information from those records.

[AGO 92-38]

# question

When the personnel director refuses to provide Reporter X with the information requested, the reporter says look, I'm on deadline and I need a list of all your employees making over \$35,000/year within the hour. Does the personnel director have to comply with the reporter's request?



## CREATING A NEW RECORD

Florida's public records law provides a right of access to inspect and copy an agency's *existing* public records; it does not mandate that an agency create new records in order to accommodate a request for information from the agency.

[*Wooten v. Cook*, 590 So.2d 1039 (Fla. 1<sup>st</sup> DCA 1991)]

# question

Ms. Doe is very interested in the history of the city's parks and makes a public record request for all records related to park projects approved between 1960 and 1965. She's told the records have been destroyed. Very annoyed, she threatens to sue the city. Can she prevail?



# RECORDS RETENTION

Call the  
Bureau of Archives and Records  
Management  
at  
850/245-6750

Or e-mail questions to:  
[RecMgt@dos.state.fl.us](mailto:RecMgt@dos.state.fl.us)

<http://dlis.dos.state.fl.us/RecordsManagers>

# question

Ms. Doe requests a copy of a personnel file over the telephone and says she'll be in later that week to pick up the records requested. When Ms. Doe arrives at the personnel office, she's told she has to make the request to the city clerk. Does Ms. Doe have to make her request for a personnel record at the city clerk's office?





# WHO'S RESPONSIBLE?

- Section 119.07(1)(a): “*Every 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 119.011(5): Defines “custodian of public records” as the person who is responsible for “maintaining the office having public records . . . “
- Section 119.07(1)(b): Authorizes the custodian to designate another to permit inspection and copying; requires disclosure of designee’s identity.

# question

After being sent back to the personnel office, Ms. Doe is told that she has to fill out a form in order to obtain the record requested. Can her request be denied if Ms. Doe refuses to fill out the form?



## AGENCY IMPOSED RESTRICTIONS

- 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;  
Or [*Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So.2d 302 (Fla. 3d DCA 2002)]
  - that a requestor provide identity or the reason for the request. [AGOs 92-38 and 91-76]

# question

After getting it straight about the required form, Ms. Doe is told that office policy requires that she wait 72 hours before obtaining copies of the records requested. Can the agency impose a time restriction on the right of access?



# RESPONSE TIME

- Reasonable Right of Access: The time it takes to locate a record, review it for exempt information, and provide a copy to the requestor. [Section 119.07(1)(a), F.S., and *Tribune Company v. Cannella*, 458 So.2d 1075, 1078 (Fla. 1984), *appeal dismissed sub nom., DePerte v. Tribune Company*, 105 S.Ct. 2315 (1985)]
- Prompt Response: Acknowledgement of a request to inspect or copy a public record must be made *promptly* and *in good faith*. [Section 119.07(1)(c), F.S.]

# question

Ms. Doe makes a public records request that the agency determines will take 4 hours of staff time and estimates will cost approximately \$250. The agency asks Ms. Doe to pay the estimated fees before staff starts making copies.

Does Ms. Doe have to pay the estimated cost?



## RIGHT OF ACCESS – FEES

### Section 119.07(4), F.S.:

An agency must “furnish a copy . . . of the (requested) record *upon payment* of the fee prescribed by law.”

If there is no statutorily-prescribed fee, the requestor can be required to pay those fees authorized by the general fee provision in chapter 119.

# question

Ms. Doe requests a breakdown in the charges and the agency tells her it's going to cost \$50.00 for making approximately 200 copies. Okay?





# FEES – ACTUAL COST

## Section 119.07(4)(a)., F.S.:

- 15 cents a page for paper copies + an additional 5 cents for a two-sided copy [s. 119.07(4)(a)1. and 2.]

*Or*

- The *actual cost of duplication* for large size or non-paper copies [s. 119.07(4)(a)3.]

- Actual cost of duplication: the cost of materials and supplies used to duplicate the record; does NOT include labor or overhead [s. 119.011(1)]

*Or*

- Statutorily prescribed fees [s. 119.07(4)]

# question

According to the breakdown of fees provided Ms. Doe, the agency has also included a charge of \$50/hour for 4 hours of staff time needed to find the records Ms. Doe has requested, to review those records for exempt information, and to make copies.

Okay?



## FEES – EXTENSIVE USE

Section 119.07(4)(d), F.S.: a reasonable fee for the *extensive use* of agency resources — personnel, information technology, or both.

- Fee must be
  - Reasonable; and
  - Based on actual costs incurred.
- Automatic application is prohibited.
- Agencies should have
  - a definition of “extensive use”; and
  - a justification for the definition.

# question

Ms. Doe changes her mind and says she simply wants to inspect the records requested. The agency determines the records have been archived and are stored in an off-site facility. A staffer meets Ms. Doe at the facility and supervises her for the four hours it takes to inspect the records. The agency then asks Ms. Doe to pay \$200 for supervisory time -- \$50/hour for 4 hours of staff time. Okay?



# FEES FOR INSPECTION

- Generally, an agency can't charge for the mere inspection of public records. [AGO 75-50]
- However, an agency may charge a reasonable fee based on actual labor costs for clerical personnel who are required, due to the nature or volume of a request, to safeguard such records from loss or destruction during the inspection. [AGO 00-11]

# question

Ms. Doe decides she doesn't want photocopies and she doesn't want to inspect, she wants the records in an electronic format. Does the agency have to give Ms. Doe the requested records in an electronic format?



# FORMAT

- An agency must provide a copy of a public record in the format requested *if* the record is maintained in that form. [Section 119.01(f)]
- If the record is not in the format requested, an agency has the *option* of converting the record and charging a fee pursuant to § 119.07(4).
- Everyone has a right to public records in “some *meaningful* form.” [Seigle v. Barry, 422 So. 2d 63, 66 (Fla. 4<sup>th</sup> DCA 1982), *review denied*, 421 So. 2d 988 (Fla. 1983)]

# question

Ms. Doe is getting testy and when the agency denies her request, she demands to know why. Does the agency have to tell her? What if Ms. Doe demands that the agency put the denial in writing – does the agency have to comply with Testy Doe's demand?





# EXEMPTIONS

- *Presumption of Openness*: All records are presumed open unless there is a *specific* statutory exemption.
- Only the Legislature can create an exemption to our constitutional right of access.
- If request for access is denied, the requestor can demand (1) that the denial be made in writing and (2) the exact statutory citation authorizing the denial. [Section 119.07(1)(f), F.S.]

# question

Testy Doe is told that she can't have one of the records she's requested because it contains both exempt and non-exempt information. Can the agency deny Ms. Doe's request because the record requested contains information that is exempt from public disclosure?



# REDACTION

- 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.]
- An agency may not ordinarily charge for the cost to review records for exempt information. [AG0 84-81]
- However, an extensive use fee may be imposed IF review and redaction require an extensive use of agency resources. [*Florida Institutional Legal Services v. Florida Department of Corrections*, 579 So. 2d 267, 269 (Fla. 1<sup>st</sup> DCA), *review denied*, 592 So. 2d 680 (Fla. 1991)]



# SANCTIONS

- A *knowing* violation of section 119.07(1), F.S., is a 1<sup>st</sup> degree misdemeanor punishable by a fine of up to \$1,000 and a jail term not exceeding one year [Section 119.10(1)(b), F.S.]
- A violation of *any* provision of chapter 119 -
  - Unintentional: non-criminal and punishable by a fine not exceeding \$500 [Section 119.10(1)(a), F.S.]
  - Intentional: 1<sup>st</sup> degree misdemeanor, punishable by a fine of up to \$1,000 and a jail term not exceeding one year [Section 119.10(2), F.S.]
- Suspension or removal from office [Section 112.52(1), F.S.]
- Attorney's fees and court costs [Section 119.12, F.S.]



# Need Help?

- First Amendment Foundation
  - Call (800) 337-3518 or (850) 222-3518
  - E-mail [sunshine@floridafaf.org](mailto:sunshine@floridafaf.org)
- Office of Open Government
  - Call (850) 921-6099
- Open Government Mediation Program
  - Call (850) 245-0157