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## 2016
## Sunshine Seminar
## FRMA

# 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.

# Constitutional Right of Access/Meetings

## The Florida Legislature

Article III, s. 4(e), Fla. Con.

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 *pre-arranged* meetings between more than 2 members of the Legislature at which legislative business is discussed must be "reasonably" open to the public. http://www.flsenate.gov/Laws/Constitution#A3S04

# Constitutional Right of Access/Meetings

## Florida's Courts

Amendments I and VI, U.S. Con.

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.

http://www.usconstitution.net/xconst_Am1.html

http://www.usconstitution.net/xconst_Am6.html

# 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.

http://www.flsenate.gov/Laws/Statutes/2014/286.011

# 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. **2015 Government-in-the-Sunshine Manual, p. 37**

**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

Shortly after passage of the Sunshine Law, Florida Supreme Court stated that government boards and commissions should not be allowed to deprive the public of the "inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made." ***Board of Public Instruction of Broward County v. Doran,* 224 So. 2d 693, 699 (Fla. 1969)**

Later court decisions, however, said that because the Sunshine Law didn't specifically require the public be given an opportunity to speak, local policies prohibiting public participation didn't violate the law. ***Keesler v. Community Maritime Park Associates, Inc.,* 32 So. 3d 659 (Fla. 1st DCA 2010); *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010)**

# Procedural Requirements

## Public Participation

In 2013, the Florida Legislature approved a law, s. 286.0114, F.S., requiring 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.

http://www.flsenate.gov/Laws/Statutes/2014/286.0114

# Procedural Requirements

## Public Participation

A government agency may adopt *reasonable rules* which require orderly behavior and allow for the orderly progression of public meetings. **Section 286.0114, F.S.**

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

## Location

### Accommodating the Public

Section 286.011(6) prohibits holding meetings at facilities which discriminate based on age, race, etc.

Boards and commissions should avoid holding meetings that effectively exclude the public and the press or unreasonably restrict public access. **AGO 71-295**

In addition, boards and commissions must hold meetings in a facilities of sufficient size so as to accommodate the anticipated turnout, and if a large turnout is expected, reasonable steps must be taken to accommodate those who wish to attend. **Inf. Op. to Galloway, August 21, 2008**

# Procedural Requirements

## Location

### Out-of-Town Meetings

The fact that a meeting is held in a public room does not make it public within the meaning of the Sunshine Law; for a meeting to be "public," the public must be given advance notice and provided with a reasonable opportunity to attend. ***Bigelow v. Howze*, 291 So. 2d 645 (Fla. 2d DCA 1974)**

Some statutes limit where board meetings may be held – s. 125.011 (county commissions) and s. 1001.372 (school boards) – and the Attorney General has opined that city commissions should hold meetings within city boundaries. **AGOs 08-01 and 03-03**

# Procedural Requirements

## Voting

No member of any state, county, or municipal board who is present at a meeting can abstain from voting unless there is, or appears to be, a possible conflict of interest under the Code of Ethics for Public Officers and Employees. **Section 286.012, F.S.**

Secret ballots violate the Sunshine Law. **AGOs 73-264; 72-326; and 71-32**

Board members may use written ballots to cast a vote *if* the votes are made openly at a public meeting, the name of the person who voted and his or her selection are written on ballot, and the ballots are maintained and made available for public inspection. **AGO 73-344**

# 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?"

## Two or More Members

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 discussions does not remove the conversations 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 (1st DCA 2004)**

The Sunshine Law requires boards to meet in public; boards may not take action or engage in private discussions of public business via written correspondence, emails, text messages, or other electronic communications. **AGO 89-39**

# What is a "meeting?"

## Video Conferencing

State agencies are authorized by law to conduct public meetings via electronic means. **Section 120.54(5)(b)2., F.S.**

Local boards however, do not have such authority, and remote participation by an absent board member is allowed *if*:

- A quorum of the board is physically present;
- The audience and the board members can hear the member on the phone; *and*
- The board member's absence is due to extraordinary circumstances such as illness.

Whether an absence due to a scheduling conflict constitutes an "extraordinary" circumstance "must be made in the good judgment of the board." **AGOs 98-28; 09-56; *and* 03-41**

# 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 Board and Committees

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?

### Non-Board Members

The Sunshine Law applies to meetings between a board member and an individual who is *not* a board member when that individual is being used as a liaison between, or to conduct a *de facto* meeting of, board members. **AGOs 74-47; 89-39**

According to the Florida Supreme Court, 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?"

## 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)**

# What is a "meeting?"

## Who is Covered by the Sunshine Law?

### Members-Elect and Transition Teams

Members-elect of boards or commissions are subject to the Sunshine Law at the point election results are certified.

***Hough v. Stembridge*, 287 So.2d 288 (Fla. 3d DCA 1973)** *and* **Section 286.011, F.S.**

The Sunshine Law applies to transition teams appointed by a member- or officer-elect for the purpose of making recommendations. **Inf. Op to Lamar, August 2, 1993**

# What is a "meeting?"

## When does the Sunshine Law *not* apply?

### Community Forums

Community or political forums sponsored by a *private organization* are *not* subject to the Sunshine Law even though two or more members of the same board or commission are in attendance and discussing issues that may come before them in their official capacity. **AGO 92-05**

The Sunshine Law *will* apply, however, if the members of the board or commission discuss such issues among themselves. **AGO 94-62**

# What is a "meeting?"

## When does the Sunshine Law *not* apply?

### Social Events

The Sunshine Law does *not* apply to social gatherings attended by two or more members of the same board or commission provided that public business is not discussed. **AGO 92-79**

However, "[p]ublic bodies should avoid secret meetings" held in connection with a public meeting "even though such secret meetings are held ostensibly for purely social purposes . . . ." **AGO 71-295**

# 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. **Art. I, s. 24(c), Fla. Con.**
http://www.flsenate.gov/Laws/Constitution#A1S24

# Exemptions

## Statutory Citations

If denied access to a meeting, the person denied should demand the statutory citation authorizing closure.

To determine the application of the exemption, it is very important to review the exact statutory language.

For example:

- If a statute exempts meetings from the requirements of s. 286.011, F.S., the meetings are also exempt from the notice provisions that would otherwise apply. **AGOs 93-86 and 07-28.**
- And in some cases, a statutory exemption may limit who is permitted to attend a closed meeting. **AGO 01-10**

# Exemptions

## Litigation Meetings

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.

http://www.flsenate.gov/Laws/Statutes/2014/286.011

# Exemptions

## Security System Plan Meetings

### Section 286.0113(1), F.S.

Section 286.0113(1), F.S., allows closure of *portions* of government meetings which would reveal exempt security system plans.

http://www.flsenate.gov/Laws/Statutes/2014/286.0113

A "security system plan" is defined in s. 119.071(3)(a)1., F.S., of the Public Records Law and 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 . . . "

http://www.flsenate.gov/Laws/Statutes/2014/119.071

# Exemptions

## Competitive Solicitation Meetings

### Section 286.0113(2), F.S.

Section 286.0113 allows closure of those *portions* of a meeting at which a (1) negotiation with a vendor is conducted pursuant to a *competitive* solicitation; (2) a vendor makes an oral presentation as part of a *competitive* solicitation; or (3) a vendor answers questions a part of a *competitive* solicitation are exempt, as are portions of team meetings at which negotiation strategies are discussed are exempt.

Also exempt are portions of team meetings at which negotiation strategies are discussed.

"Competitive solicitation" means the process of requesting and receiving sealed bids, proposals or replies in accordance with the terms of a competitive process, regardless of the method of procurement.

http://www.flsenate.gov/Laws/Statutes/2014/286.0113

# 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.

http://www.flsenate.gov/Laws/Statutes/2014/286.011

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.**

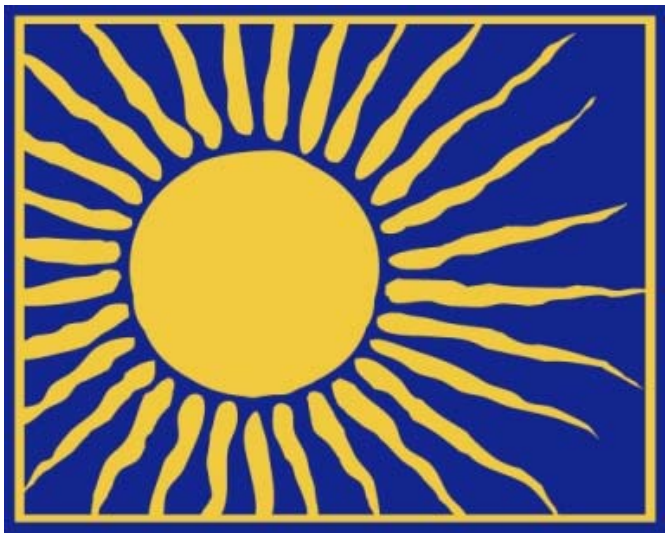
# Sunshine Law Violations

## 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.**



# 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 . . . ."

# Access to Government Records

The constitutional right of access applies to all three branches of state government – the executive, the legislative, and the judiciary. However, each branch has different laws or rules that regulate access to its records.

State Agencies and Local Governments are subject to Florida's Public Records Act, chapter 119, Florida Statutes.

http://www.flsenate.gov/Laws/Statutes/2014/Chapter119

The Florida Legislature is subject to s. 11.0431, F.S., and to the rules of each chamber, the House and Senate.

http://www.flsenate.gov/Laws/Statutes/2014/11.0431

Florida Courts are subject to Rule 2.420, Florida Rules of Judicial Administration

http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F854D695BA7136B085257316005E7DE7/$FILE/Judicial.pdf

# 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?

## Drafts

There is no "unfinished business" exception to the Public Records Act, and Florida's Supreme Court has stated that the term "public record" means "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." Such material is a "public record" regardless of whether it is in final form or the ultimate product of an agency. ***Shevin v. Byron, Harless, Schaffer, Reid and Assoc.*, 379 So. 2d 633, 640 (Fla. 1980)**

The fact that a record is still in draft form does not remove it from the definition of "public record." When material falls within the statutory definition of "public record" and has been prepared to "perpetuate, communicate, or formalize knowledge," the record is subject to disclosure even if the agency believes release of the draft document could be detrimental. **Gannett Corporation, Inc. v. Goldtrap, 302 So. 2d 174 (Fla 2d DCA 1974)**

# What is a Public Record?

## Notes

Public employees' *notes to themselves* "which are *designed for their own personal use* in remembering certain things do not fall within the definition of 'public record'" and are thus not subject to disclosure under the Public Records Act. ***Justice Coalition v. The First District Court of Appeal Judicial Nominating Commission*, 823 So. 2d 185 (Fla. 1st DCA 2002)**

But if those notes are shared, circulated for review and comment, or are used to generate portions of other documents, the notes are then public records subject to disclosure. ***Florida Sugar Cane League, Inc. v. Florida Department of Environmental Regulation*, No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992); AGO 05-23**

# 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?

## 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)**

# What is a public record?

## 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**

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. 1st DCA 1991)**

# What is a Public Record?

## Record Retention Requirements

Section 119.021(2)(a), F.S., requires the Division of Library and Information Services (DOS) to adopt rules establishing retention schedules and a disposal process for public records.

Section 257.36(6), F.S., says that public records can be destroyed or otherwise disposed of "only in accordance with retention schedules established by the division."

For questions regarding record retention schedules and requirements, contact the Division of Library & Information Services.

**State Records Center**
850/245-6750
RecMgt@dos.state.fl.us
http://dlis.dos.state.fl.us/RecordsManagers

# 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?

## Custodian of Public Records

Although s. 119.011(5), F.S., defines "custodian of public records" as the person who is responsible for "maintaining the office having public records," the Florida courts have concluded that the statutory reference to *the records custodian* does not alter the "duty of disclosure" imposed by s. 119.07(1) upon "*every person* "who has custody of a public record." ***Puls v. City of Port St. Lucie*, 678 So.2d 514 (Fla. 4th DCA 1996)**

But "the mere fact that an employee of a public agency *temporarily* possesses a document does not necessarily mean that the person has custody as defined by section 119.07."
***Mintus v. City of West Palm Beach*, 711 So. 2d 1359 (Fla. 4th DCA 1998)**

# 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?

## Private Organizations
## Contracting with Public Agencies

The fact that a private organization has contracted with a public agency doesn't automatically trigger application of the Public Records Act. ***News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992)**

While the mere act of contracting with a public agency is not sufficient to bring a private entity within the scope of the Public Records Act, there is a difference between a party contracting with a public agency to provide services to the agency and a contracting party which provides services *in place of* the public agency. ***News-Journal Corporation v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418 (Fla. 5th DCA)**

# 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.

Changes to this provision were made to this section during the 2016 legislative session, and now 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's Responsible?

## Statutory Requirements - Contracts

If a court finds that a contractor failed to comply with the law, the court must award attorney fees *if* (1) a court determines the contractor unlawfully refused to comply with the public record request within a reasonable period of time; *and* (2) the requestor provides written notice of the request, including a statement that the contractor has failed to comply with the request, to the public agency and to the contractor at least 8 days prior to filing the action. A contractor who complies with a public record request within 8 days of the notice being sent will not be liable for attorney fees and costs. **Section 119.0701(4), F.S.**

State agency procurement agreements must contain a provision allowing unilateral cancellation by the agency if the contractor refuses to provide access to its public records pursuant to the Public Records Act. **Section 287.058(1)(c), 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 public employee is a person within the meaning of the Public Records Act and thus has the same right of access as any other person. **AGO 75-175**

Likewise, a government agency is a person for the purposes of the Act and is allowed to request public records. ***Hillsborough County, Florida v. Buccaneers Stadium Limited Partnership*, No. 99-0321 (Fla. 13th Cir. Ct February 5, 1999)**

# Who Can Request Public Records?

## Requestor's Motivation

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)***

"The fact that a person seeking access to public records wishes to use them in a commercial enterprise does not alter his or her rights under Florida's public records law." ***Microdecisions, Inc. v. Skinner, 889 So.2d 871, 875 (Fla. 2nd DCA 2004)***

# 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**

A policy that dictates additional conditions or restrictions on the right of access to public records is of "dubious validity" and the Public Records Act preempts agency regulations. ***Tribune Company v. Can*nella, 458 So. 2d 1075 (Fla. 1984)**

# Procedural Requirements

## Reasonable Conditions

An agency cannot refuse to allow access to public records it made or received in connection with the transaction of official business on the grounds that the documents are in the actual possession of an agency or official other than the record custodian. ***Wallace v. Guzman*, 687 So 2d 1351 (Fla. 3d DCA 1997)**

Records viewed and used by an agency in carrying out its official duties are public records even if the agency does not take physical possession of the records. ***National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009)**

The fact that a particular public record is also maintained by another agency does not relieve the custodial agency of its obligation to permit inspection and copying of the record in the absence of an applicable statutory exemption. **AGO 86-69**

# Procedural Requirements

## Reasonable Conditions

The right of access to public records "is virtually unfettered, save for statutory exemptions . . ." Thus, in the absence of a statutory exemption, the custodial agency must produce the requested records regardless of the number of records involved or the possible inconvenience to the agency. ***Lorei v. Smith*, 464 So. 2d 1330 (Fla. 2d DCA 1985)**

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)**

# 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

## Right to Inspect *or* Copy

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

The Florida Supreme Court has held that the right to inspect public records carries with it the right to make copies of those records. ***Fuller v. State ex rel. O'Donnell*, 17 So 2d 607 (Fla. 1944)**

The Public Records Act requires a custodial agency to furnish copies of public records. ***Schwartzman v. Merritt Island Volunteer Fire Department*, 352 So. 2d 1230 (Fla. 4th DCA 1977)**

# Procedural Requirements

## 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.**

An agency is not required to provide public records in an electronic format other than the standard format routinely maintained by the agency. **AGO 97-39**

# Procedural Requirements

## .PDF v. Requested Electronic Format

A .pdf, portable document format, is a file format that provides an *electronic image* of text or text and graphics that looks like a printed document and can be viewed, printed, and electronically transmitted across various operating systems. A .pdf is the electronic equivalent of a photocopy of a paper document

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.*

# Fees & Costs

## Advance Deposits

The custodian of public records must furnish a copy or a certified copy of the [requested] record *upon payment of the fee* prescribed by law. **Section 119.07(4), F.S.**

Custodial agencies are authorized to require the payment of an advance deposit before proceeding with the effort and cost of preparing copies of requested public records. ***Malone v. City of Satellite Beach*, No. 94-10557-CA-D (Fla. Cir. Ct. Brevard Co. December 15, 1995)**

If an agency requires an advance deposit, the agency must provide the requestor with a written estimate of the total costs associated with the request. ***Wootton v. Cook*, 590 So. 2d 1039 (Fla. 1st DCA 1991)**

# 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. **2015 Sunshine Manual, pp. 156 - 157**

# Fees & Costs

## Fees for Those Who Make Their Own Copies

If a requestor makes his own copies or provides the materials and supplies necessary to duplicate the record, the custodian can't charge copy fees but *may* charge a supervisory service charge *if* supervision requires an extensive use of agency resources. **AGO 82-23**

It is difficult, however, to justify the imposition of a fee for supervisory time if the personnel providing such supervision is simultaneously performing regular duties. **AGO 00-11**

# Fees & Costs

## Inspection of Public Records

Generally, an agency can't charge for the mere inspection of public records. **AGO 75-50**

Public records must be open for inspection without charge unless otherwise expressly provided by law. ***State ex rel. Davis v. McMillan*, 38 So. 2d 666 (Fla. 1905)**

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**

But again, if the employee supervising continues to perform regular duties, the person inspecting shouldn't be charged for supervisory time. **AGO 00-11**

# 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.**

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. 1st DCA 1991), *review denied*, 592 So. 2d 680 (Fla. 1991)**

# Exemptions

## Confidential and Exempt v. Exempt

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. **Section 119.12, F.S.**

Attorney fees ay also be awarded for a successful appeal of a denial of access, provided that at the time of the appeal a motion is filed in accordance with the appellate rules. ***Downs v. Austin*, 559 So. 2d 246 (Fla. 1st DCA 1990)**

An "unjustified failure to respond to a public records request until after an action has been commenced to compel compliance amounts to an unlawful refusal" for purposes of Section 119.12, F.S. ***Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000)**

# Need Help?

- First Amendment Foundation
  - Call (800) 337-3518 or (850) 222-3518
  - E-mail sunshine@floridafaf.org

- Open Government Mediation Program
  - Call (850) 245-0179
  - E-mail pat.gleason@myfloridalegal.com