

Florida's Government in the Sunshine and Public Records Laws Presentation

1. Article I, § 24(b), Florida Constitution.

“All meetings of . . . any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public . . . , except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.”

2. The 3 Basic Requirements of § 286.011, Florida Statutes:

- 1) Meetings of public boards or commissions must be open to the public;
- 2) Reasonable notice of such meetings must be given; and
- 3) Minutes of the meetings must be taken and promptly recorded.

3. Meetings

- A “meeting” occurs when there is ANY gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which foreseeable action will be taken by the board or commission.
- A “gathering” may include meetings of board or commission members via telephone or other electronic means.

4. Why?

Because every thought, as well as every affirmative act of a public official as it relates to and is within the scope of his/her official duties is a matter of public concern, and the public should, to the extent possible, have access to the entire decision making process, from start to finish, including initial inquiries and deliberation.

5. What Kinds of Discussions Are Covered?

Any of the following types of discussions of any matter that may foreseeably come before the board.

- Email discussions between any two or more board members.
- Telephone conversations between any two or more board members.
- Internet discussions between any two or more board members (*e.g.*, chat rooms, blogs, comments, etc.).
- **Text messages!**
- Inaudible discussions (discussions that occur between board members in an open meeting that cannot be heard by others violate the Sunshine Law).
- Discussions during recess or after adjournment (when the public meeting is not in session, board members must refrain from discussing board matters until the next meeting or until the current meeting is recommenced).

6. Liaison Rule

- Generally, individual board members may call upon staff members for factual information and advice without being subject to the Sunshine Law. Staff members are not members of a collegial board.

- However, the Sunshine Law applies if a board member begins to use one or more staff members as an intermediary or “go between” such that the board members are essentially discussing matters that may foreseeably come before the board via third parties.

7. Exceptions

- The following limited-purpose exceptions to the Sunshine Law exist. This list is not intended to be comprehensive, nor will all of the exemptions necessarily be applicable to your board:
 - Closed attorney-client meetings for the purpose of discussing pending litigation.
 - Internal collective bargaining discussions between the chief executive officer and the governing board.
 - Fact finding committees established solely for the purpose of gathering facts (no decision making or screening functions).
 - Portions of meetings that reveal a security system plan.
 - Some solicitation processes (See § 286.0113(2), Fla. Stat.).

8. Notice of Meetings

- Notice must be “reasonable,” but is not otherwise defined (though your agency may have adopted specific notice requirements).
- The Florida Attorney General has recommended the following guidelines:
 - **Time, Place, and Subject Matter.** Notice should provide time and place of meeting and, if available, an agenda, or if no agenda is available, a statement of the general subject matter to be considered.
 - **Prominently Displayed.** Notice should be prominently displayed in an area of the agency’s offices set aside for that purpose (e.g., main office and website).
 - **Notice Provided at Least 7 Days Prior to the Meeting.** Except that emergency meetings should be noticed in the most appropriate and effective manner under the circumstances.
 - **Notice for Special Meetings.** Should be provided no less than 24 and preferably at least 72 hours prior to the meeting.
 - **Notice by Other Means.** The use of press releases, email, and faxes to spread notice of a meeting is encouraged.

9. Minutes of Meetings

- All meetings require recorded minutes, including workshops.
- Minutes are intended as a brief summary of notes or memoranda reflecting the events of the meeting; a verbatim transcript is not required.
- Minutes must be in written format (audio recordings are optional).

10. Right of Public Participation (Added 2013)

- Members of the public must be given a reasonable opportunity to be heard on a proposition before a board or commission.
- The opportunity to be heard need not occur at the same meeting at which the board takes official action if the opportunity occurs at a meeting that is during the decision making process and occurs within reasonable proximity in time before the meeting at which the board takes official action.
- The statute does not prohibit the board from maintaining standards of conduct and decorum.

11. Penalties and Sanctions

- **Unintentional Violations** – are non-criminal infractions punishable by a fine up to \$500.00.

- **Knowing Violations** – are second-degree misdemeanors punishable by a fine of not more than \$500.00 and a jail term of not more than 60 days.
- **Suspension or removal from office** – a board member may be suspended or removed from office under the general provisions of § 112.52 (for commission of a felony or misdemeanor).
- **Attorneys Fees and Court Costs** – fees and costs may be awarded at both the trial and appellate level if a violation is found.

12. A Constitutional Right

- “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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.” Article I, § 24(a), Fla. Const.

13. Legislative Mandate

- “It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.” - § 119.01(1), Fla. Stat.

14. What is a Public Record?

- 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.
- The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which materials are used to perpetuate, communicate, or formalize knowledge.
- **Location is Irrelevant.** Public records are identified based upon whether they are made or received in the transaction of county business or pursuant to law.
- Records pertaining to County business do not lose their public records status merely because they are not stored in or on County property.

15. Drafts and other non-final materials.

- There is no “unfinished business” exception to the Public Records law. Thus, “rough draft” correspondence, reports, and memoranda are generally subject to disclosure under the public records law.
- **HOWEVER**, personal notes taken in the course of conducting official business by a public employee, are not public records, if the notes have not been transcribed or shown to others and are not intended to perpetuate, communicate, or formalize knowledge. Such records may become public records if shared with others or filed or stored for future reference by others.
- Generally, any communications pertaining to County business that are reduced to a recorded medium in the course of County business, whether it be on paper, tape, compact disc, or other format, regardless of location, are public records.
- Though most recorded or written communications will be public records, not all will qualify.
- Examples of recorded or written items that are not public records:
 - My personal grocery list;
 - My county computer password;

- A ballot that has not been voted.
- **WHY?**

16. Items that are Not Public Records

- **Personal Grocery List.** This item is personal and was not otherwise created or maintained in connection with county business.
- **County Computer Password.** Passwords, though used in connection with county business, are not intended to communicate, perpetuate, or formalize knowledge. Passwords are better compared to building keys.
- **An Unvoted Ballot.** Though maintained in the course of county business, an unvoted ballot does not perpetuate, communicate, or formalize knowledge until it is marked by a voter (and becomes a public record).

17. Exemptions.

- Some items clearly qualify as public records but do not have to be produced, because the legislature has deemed them to be exempt or confidential from disclosure.
- Statutory exemptions are narrowly interpreted and construed in the manner most favorable to the requestor.

18. Common Exemptions:

- **Social Security Numbers.** § 119.071(5)(a), Florida Statutes.
- **Bank Account, Debit, and Credit Card Numbers.** § 119.071(5)(b), Florida Statutes.
- **Certain personnel information** (*e.g.*, law enforcement, corrections, firefighters, judges, code enforcement, etc.). § 119.071(4), Florida Statutes.

19. Handling Public Records Requests:

- Requests can be:
 - Verbal or written
 - Made by any person (the person need not identify him/herself if she does not wish to do so).

20. Handling Public Records Requests

- A requestor needs no special purpose or motive to be entitled to the receipt of public records. However, if a court determines that records were requested for an “improper purpose,” then the agency may seek its attorney’s fees in a civil action.
- The records custodian has an obligation to ensure the preservation of records to be produced.
- A request cannot be denied because it lacks specificity; however, the custodian should make an effort to confirm the identity of the records sought if the request is not clear.
- **Prompt Response.** § 119.07(1)(c), Florida Statutes, states that **records requests must be acknowledged promptly and responded to in good faith.** The Florida Supreme Court has stated that the only delay allowed in responding to a records request is the reasonable time it takes for staff to retrieve the record and redact or otherwise remove those portions of the record the custodian asserts are exempt.
- **BUT - 5-Day Waiting Period.** Regardless, revisions to § 119.12, Florida Statutes, in 2017 mandate that a requestor may not receive attorney’s fees in a civil suit for public records unless he has provided the agency with written notice of the request and waits a period of 5 business days before filing suit. This requirement does not apply if the agency has not prominently posted its records custodian contact information in its primary administrative building and on its website.

- **Redaction.** If portions of the records requested contain confidential or exempt information, the custodian should redact that information from the record prior to producing the record to the requestor. The requestor is entitled to review and copy the remainder of the record.
- **Basis for Redaction.** If staff believes that all or a portion of a record is subject to a valid exemption or is confidential, staff must state the basis for the redaction, including the statutory citation supporting such basis.
- **Requests are for Records, NOT Information.** Staff is required only to produce records in the ordinary form in which they are kept. Staff is not required to provide “information” from such records or to generate new reports or records in response to a request. This, however, would not preclude staff from responding to requests for information in a different manner if agreed to between staff and the requestor.
- **Format of Records Produced.** An agency must provide a copy of a public record in the format requested IF the record is maintained in that form.
- **Not Available in Requested Format.** If the record is not kept in the format requested, the agency has the option to convert the record. The county often allows records to be produced electronically to reduce costs to the requestor and the county.
- **Exempt vs. Confidential.** There is a difference between records that are exempt versus records that are confidential. Confidential records cannot be released regardless and staff must protect such records from disclosure. Release of exempt records is discretionary, but custodians are cautioned to understand and appreciate the legislature’s reasons for exempting that information when choosing to disclose the records regardless. Typically, local governments will not release exempt records unless there is good reason to do so.
- **Federal vs. State.** Generally, records that would otherwise be public under state law are unavailable for public inspection only when there is an absolute conflict between federal and state law relating to confidentiality of records. If a federal statute requires certain records to be closed, and the state is clearly subject to the provisions of the federal statute, then the state must keep the records confidential.

21. Fees and Charges

- **Not a Profit Center.** Providing access to public records is a statutory duty imposed by the Legislature upon all record custodians and should not be considered a profit-making or revenue-generating operation. Thus, public information must be open for inspection without charge unless otherwise expressly provided by law.
- **Inspection Charges.** Generally, an agency cannot charge for the mere inspection of public records. *See* AGO 1975-50.
- **Supervisory Charges.** However, an agency may charge a reasonable fee based upon 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 inspection. *See* AGO 2000-11.
- **Copying.** If no fee is prescribed elsewhere in the statutes, § 119.07(4)(a)1., Florida Statutes, authorizes the records custodian to charge a fee of up to 15 cents per one-sided copy for copies that are 14 inches by 8.5 inches or less.
- **Special Service Charges.** Staff may charge special service charges to inspect or copy public records when the nature or volume of the records to be inspected is such as to require extensive use of information technology resources, or extensive clerical or supervisory assistance or both. The charge must be reasonable and based on the labor and computer costs actually incurred by the agency.
- **Volusia County Service Charge.** The county presently charges a special service charge for requests where more than 15 minutes of staff time is incurred in responding to the request. The

charge is calculated based on the salary and benefits of staff employed to respond to the request and is intended to compensate the county and taxpayers for the actual cost of responding to the request.

- *See Bd. Of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31, 37 (Fla. 2d DCA 2008); *Florida Institutional Legal Services, Inc. v. Florida Dept. of Corrections*, 579 So. 2d 267 (Fla. 1st DCA 1991), *rev denied*, 592 So. 2d 680 (Fla. 1991).
- **Advance Deposits.** Payment of an advance deposit for production of public records is contemplated by the Public Records Act. An agency may refuse to produce additional records if the fees for a previous public records request have not been paid by the requestor. A records custodian may bill a requestor for any shortfall between a deposit and the actual cost of copying the public records when the copies have been made and the requesting party subsequently refuses receipt of the records. *See* AGO 2005-28.

22. Penalties and Sanctions

- **Failure to Produce.** Failure to timely produce or allow inspection and copying of records as required by Chapter 119, Florida Statutes, may result in the following penalties:
 - A knowing violation of § 119.07(1) is a first degree misdemeanor punishable by a fine of up to \$1,000.00 and a jail term not exceeding one year. § 119.10(1)(b).
- Any violation of Chapter 119, Florida Statutes, may result in the following:
 - Unintentional. Is a non-criminal violation and is punishable by a fine not exceeding \$500.00;
 - Intentional. Is a first degree misdemeanor, punishable by a fine of up to \$1,000.00 and a jail term not exceeding one year.
 - Suspension or removal from office (pursuant to the general authority for suspension allowed for misdemeanor and felony convictions under § 112.52(1), Florida Statutes).
 - Attorney's fees and court costs may be awarded against the agency in lawsuits seeking the production of public records. Production after-the-fact does not preclude an award of attorney's fees and costs.

23. Conclusions

- Remember NOT to talk to, email, text, or correspond with fellow board or commission members about any matters that may foreseeably come before the board for discussion or decision outside the confines of a duly noticed and open public meeting.
- Promptly respond in good faith to all requests for public records and ensure that confidential and exempt records are not produced in a manner contrary to statutory requirements.
- When in doubt, please contact your board or commission's county legal representative at (386) 736-5950, or at his/her appropriate email address.