

2011 Public Records Overview

Patricia R. Gleason

**Special Counsel for Open
Government**

Attorney General Pam Bondi

Scope of the Public Records Act

- Florida's Public Records Act provides a right of access to records of state and local governments as well as to private entities acting on their behalf.
- A right of access is also recognized in Article I, section 24 of the Florida Constitution, which applies to virtually all state and governmental entities including the legislative, executive, and judicial branches of government. The only exceptions are those established by law or by the Constitution.

Section 119.011(12), Florida Statutes, defines "public records" to include:

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 are used to perpetuate, communicate or formalize knowledge.

- All such materials, regardless of whether they are in final form, are open for public inspection unless the Legislature has exempted them from disclosure.
- Only the Legislature and not the judiciary may exempt attorney-client communications from disclosure.
- Section 119.071(1)(d), F.S., establishes a statutory exemption for certain litigation work product of agency attorneys.

Attorney work product exemption

- Section 119.071(1)(d), provides that a public record prepared by an agency attorney or prepared at the attorney's express direction that reflects a mental impression, conclusion, litigation, strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for litigation or adversarial administrative proceedings, or in anticipation of imminent litigation or imminent adversarial administrative proceedings is exempt until the conclusion of the litigation or proceedings.

- Only those records which reflect a “mental impression, conclusion, litigation strategy or legal theory” are included within the parameters of the work product exemption.
- In order to qualify for the exemption, the records must have been prepared “exclusively” for, or in anticipation of imminent, litigation or imminent adversarial administrative proceedings.

- The exemption from disclosure is temporary and limited in duration.
- The exemption exists only until the “conclusion of the litigation or adversarial administrative proceedings” even if other issues remain.

Electronic Records

- Email messages made or received by public officers or employees in connection with official business are public records and subject to disclosure in the absence of a statutory exemption.
- The Attorney General has advised that materials placed on an agency's Facebook page presumably would be in connection with official business and thus subject to Chapter 119, Florida Statutes.

Providing Public Records

- Section 119.07(1)(a), Florida Statutes, provides that “[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.”

- The Public Records Act requires no showing of purpose or "special interest" as a condition of access to public records. Unless authorized by law, an agency may not ask the requestor to produce identification as a condition to providing public records.

- The custodian is not authorized to deny a request to inspect and/or copy public records because of a lack of specifics in the request.

- The Public Records Act does not contain a specific time limit (such as 24 hours or 10 days) for compliance with public records requests. The Florida Supreme Court has stated that the only delay in producing records permitted under Chapter 119, Florida Statutes, is the reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.

- Nothing in Chapter 119, Florida Statutes, requires that a requesting party make a demand for public records in person or in writing.

- A custodian is not required to give out *information* from the records of his or her office. For example, the Public Records Act does not require a town to produce an employee, such as the financial officer, to answer questions regarding the financial records of the town.
- The Public Records Act requires that an agency produce nonexempt existing records. An agency is not required to create a new record.

- In the absence of express legislative authority, an agency may not refuse to allow public records made or received in the official course of business to be inspected or copied if requested to do so by the maker or sender of the document.

- A custodian of a public record who contends that a record or part of a record is exempt from inspection must state the basis for the exemption, including the statutory citation to the exemption. Additionally, upon request, the custodian must state in writing and with particularity the reasons for the conclusion that the record is exempt from inspection.

- There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Act and confidential. If information is made confidential in the statutes, the information is not subject to inspection by the public and may be released only to those persons and entities designated in the statute. On the other hand, if the records are not made confidential but are simply exempt from the mandatory disclosure requirements in section 119.07(1)(a), Florida Statutes, the agency is not prohibited from disclosing the documents in all circumstances.

- The general rule is that records which 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 particular records to be closed and the state is clearly subject to the provisions of such statute, then pursuant to the Supremacy Clause of the United States Constitution, Article VI, section 2, United States Constitution, the state must keep the records confidential.

Fees

- 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.

- Section 119.07(4)(d), Florida Statutes, authorizes the imposition of a special service charge to inspect or copy public records when the nature or volume of public 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 or computer costs actually incurred by the agency.

- If no fee is prescribed elsewhere in the statutes, section 119.07(4)(a)1., Florida Statutes, authorizes the custodian to charge a fee of up to 15 cents per one-sided copy for copies that are 14 inches by 8 ½ inches or less. An agency may charge no more than an additional 5 cents for each two-sided duplicated copy.

The courts have upheld an agency's requirement of a reasonable deposit or advance payment in cases where a large number of records have been requested. In such cases, the fee should be communicated to the requestor before the work is undertaken.

Penalties

- A person who has been denied the right to inspect and/or copy public records under the Public Records Act may bring a civil action against the agency to enforce the terms of Ch. 119.

- In addition to judicial remedies, section 119.10(1)(b), Florida Statutes, provides that a public officer who knowingly violates the provisions of section 119.07(1), Florida Statutes, is subject to suspension and removal or impeachment and is guilty of a misdemeanor of the first degree, punishable by possible criminal penalties of one year in prison, or \$1,000 fine, or both.

Attorney's Fees

- Section 119.12, Florida Statutes, provides that if a civil action is filed against an agency to enforce 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 shall assess and award against the agency responsible the reasonable costs of enforcement, including attorney's fees.

E. Additional Resources

- Office of Attorney General Pam Bondi website:
<http://www.myfloridalegal.com>
- Governor Rick Scott website.
<http://www.flgov.com>
- First Amendment Foundation website:
<http://www.floridafaf.org>

Question 1

An agency employee is working on a performance evaluation. The agency receives a public records request for “all records relating to the performance evaluation.” Which of the following constitutes a public record?

- A. An early draft of the evaluation that was never communicated to anyone within or outside the agency.
- B. A draft evaluation that was sent to the employee’s supervisor and was returned with a note “need to make changes.”
- C. A draft evaluation that was emailed to the supervisor but the supervisor has not read the email yet.
- D. Answers B and C are correct.

Question 2

A city clerk has received over 150 public records requests over the past year from John Jones. Each of the public records requests asks for records prepared by Jones' ex-wife who is the city building official. Jones is very rude and obnoxious when he comes to city hall to make his requests. Which of the following options is available to the clerk?

- A. Because Jones is so rude, the clerk may ban him from city hall and require him to make his requests in writing or over the telephone.
- B. Because Jones has asked an extraordinary number of records, the clerk may require him to specify the particular records he wants.
- C. Because Jones has made numerous public records requests relating to records prepared by his ex-wife, Jones could be charged with stalking.
- D. None of the above.

Question 3

A city police department receives a public records request for photographs obtained from a member of the public during the investigation of a robbery case that is now closed. There is no statutory exemption from the public records law that applies to the photographs. Which statement is correct?

- A. The department may refuse to release the photographs because the public records law does not apply to photographs.
- B. The department must release the photographs.
- C. Unless release of the photographs would violate accepted police standards and procedures, the department must release them.
- D. Unless the person taking the photographs has asked the department not to release them, the department must release them.