2015 Open Government Overview

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SUNSHINE LAW

A. Scope of the Sunshine Law

- Florida's Government in the Sunshine Law, commonly referred to as the Sunshine Law, provides a right of access to governmental proceedings at both the state and local levels. The law is equally applicable to elected and appointed boards and has been applied to any gathering of two or more members of the same board to discuss some matter which will foreseeably come before that board for action. Members-elect are subject to the Sunshine Law, even though they have not yet taken office.

- There are three basic requirements

    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, promptly recorded and open to public inspection.

- Advisory boards created pursuant to law or ordinance or otherwise established by public agencies may subject to the Sunshine Law, even though their recommendations are not binding upon the agencies that create them.

- Generally, the Sunshine Law does not apply to private organizations providing services to a state or local government, unless the private entity has been created by a public entity, there has been a delegation of the public entity's governmental functions, or the private organization plays an integral part in the decision-making process of the public entity.

- Meeting of staff are not ordinarily subject to the Sunshine Law. However, a staff committee can be subject to the Sunshine Law if the committee is delegated "decision-making authority" as opposed to mere information gathering or fact-finding. For example, a staff committee which was given the authority to screen applications for a university position and to reject some applicants from further consideration was found to be subject to the Sunshine Law.

- Only the Legislature can create an exemption to the Sunshine Law (by a 2/3 vote) and allow a board to close a meeting.

- Board members may not use the telephone, Facebook, email or text messages to conduct a private discussion about board business. Board members may send a "one-way" communication to a board member as long as the communication is kept as a public record and there is no response to the communication except at an open public meeting. Accordingly, any "one-way" communications (for example one board member wants to forward an article to the board members for

information) should be distributed by the board office so that they can be preserved as public records and ensure that any response to the communication is made only at a public meeting.

- While a board member is not prohibited from discussing board business with staff or a nonboard member, these individuals cannot be used as a liaison to communicate information between board members. For example, a board member cannot ask staff to poll the other board members to determine their views on a board issue.

B. Board meetings

- Board members are not prohibited from using written ballots to cast a vote as long as the votes are made openly at a public meeting, the name of the person who voted and his or her selection are written on the ballot, and the ballots are maintained and made available for public inspection in accordance with the Public Records Act.

- While boards may adopt reasonable rules and policies to ensure orderly conduct of meetings, the Sunshine Law does not allow boards to ban nondisruptive videotaping, tape recording, or photography at public meetings.

- Board meetings should be held in buildings that are open to the public. This means that meetings should not be held in private homes.

- The phrase “open to the public” means open to all who choose to attend. Boards are not authorized to exclude some members of the public (i.e. employees or vendors) from public meetings.

- Effective October 1, 2013, s. 286.0114, F.S., provides, subject to listed exceptions, that boards must allow an opportunity for the public to be heard before the board takes official action on a proposition. The statute does not prohibit boards from "maintaining orderly conduct or proper decorum in a public meeting." Boards are authorized to adopt specified rules or policies that govern the opportunity to be heard, such as time limits for speakers.

C. Penalties

- Any member of a board or commission or of any state agency or authority of a county, municipal corporation, or political subdivision who *knowingly* violates the Sunshine Law is guilty of a misdemeanor of the second degree. An unintentional violation may be prosecuted as a noncriminal infraction resulting in a civil penalty up to $500.

- The Sunshine Law provides that no resolution, rule, regulation or formal action shall be considered binding except as taken or made at an open meeting.

- Recognizing that the Sunshine Law should be construed so as to frustrate all evasive devices, the courts have held that action taken in violation of the law was void *ab initio*.

- Where, however, a public board or commission does not merely perfunctorily ratify or ceremoniously accept at a later open meeting those decisions which were made at an earlier secret meeting but rather takes "independent final action in the sunshine," the board's decision may stand.

PUBLIC RECORDS

A. Scope of Public Records Law

- 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.

- There is no "unfinished business" exception to the public inspection and copying requirements of the Public Records Act. If the purpose of a document prepared in connection with the official business of a public agency is to perpetuate, communicate, *or* formalize knowledge, then it is a public record regardless of whether it is in final form or the ultimate product of an agency.

- Although a right of access exists under the Constitution to all three branches of government, the Public Records Act, as a legislative enactment, does not apply to the Legislature or the judiciary.

- A "public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency" is also subject to the requirements of the Public Records Act.

- E-mail messages, text messages and other electronic communications 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 from public inspection. As with other public records, the retention period for these records is governed by schedules adopted by the Department of State which make it clear that it is the content of the communication---not its location or the type of technology used to send the message—that determines how long it must be retained.

B. Providing public records

- The Public Records Act requires no showing of purpose or "special interest" as a

condition of access to 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.

- A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith.

- 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.

- An agency is not authorized to establish an arbitrary time period during which records may or may not be inspected.

- 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. 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 fact that a particular record is also maintained by another agency does not relieve the custodian of the obligation to permit inspection and copying in the absence of an applicable statutory exemption.

- An agency may not refuse to allow public records made or received in the normal 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.

C. 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 of the applicable statutory fees 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.

D. 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.

Practical Tips for Agencies

Here are some examples of things that should be avoided when processing Ch. 119 requests:

1. A reporter makes a request for copies of several letters and is told, "It is 3 o' clock and we close at 5, and all requests must go through the general counsel."

2. We cannot process your request unless you put it in writing.

3. We cannot process your request until you fill out this form.

4. We cannot process your request unless you first show us your driver's license.

5. Why do you want these records?

6. You can look at the records, but we are not going to make copies.

7. You have asked for the email you requested to be placed on a disc, but we are not going to do that; you can only get a written transcript.

8. You cannot have these records because the document you have requested is a draft and has not yet been approved by management.

9. You cannot have these records because you filed a lawsuit against this agency, and you must use the discovery process to obtain any records from this agency.

10. You cannot have these records because the employee who drafted them has stored them in his locked office, and he won't be back for 6 months.

Additional Resources

1. Office of Attorney General Pam Bondi www.myfloridalegal.com
2. First Amendment Foundation www.floridafaf.org
3. Office of Governor Rick Scott Open Government Office www.flgov.com

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