

St. Johns County
2015 Sunshine Law, Public Records
and Ethics Seminar



Presented by
Patrick F. McCormack, Esq.
County Attorney



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The Sunshine Law



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Information contained in this portion of the presentation was provided in part by Pat Gleason, Special Counsel for Open Government, Office of the Attorney General.

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The Sunshine Law

Provides a right of access to governmental proceedings at the state and local level. The Sunshine Law applies equally to elected and appointed boards.



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The Sunshine Law

- § 286.011, Florida Statutes
- Key elements:
 - Meetings of public boards and commissions must be open to the public;
 - Reasonable notice of meetings must be given; and
 - Minutes of meetings must be taken.



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The Sunshine Law

Who is covered by the Sunshine Law?

- All public agencies in the state
- Advisory boards and committees
- Private companies doing business on behalf of a public agency
- Public agency member delegated to act on behalf of a public agency
- Members and members-elect of a public agency



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The Sunshine Law: Meetings

- Not formally defined in the statute.
- Any gathering 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.



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The Sunshine Law: Meetings

- Does not have to be a formal meeting.
- Members do not have to be physically present in the same place.
 - Written correspondence
 - Telephone or electronic communication
 - Use of intermediaries



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The Sunshine Law: Meetings

- Board members may not circumvent the Sunshine Law by using a non-member to circulate information to other members.



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The Sunshine Law: Meetings

- The Board may not circumvent the Sunshine Law by delegating the authority to act on its behalf to a single member or to a staff person. If single person already vested with that authority - OK
- Fact-finding or information-gathering by board member or appointed boards making recommendations is okay.



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The Sunshine Law: Meetings

Inaudible discussion or passing notes between Board members may be a violation of the Sunshine Law even if it occurs at a public meeting.



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The Sunshine Law: Notice

- The public must be given reasonable notice of meetings that are subject to the Sunshine Law.
 - Consider content, timing, and placement of notice.
 - Be consistent!
- Notice must be sufficient to inform the public.



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The Sunshine Law: Notice

“The purpose of the notice requirement is to apprise the public of the pendency of matters that might affect their rights, afford them the opportunity to appear and present their views, and afford them a reasonable time to make an appearance if they wish.” *Rhea v. City of Gainesville*, 574 So.2d 221 (Fla. 1st DCA 1991).



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The Sunshine Law: Public Participation

- The public has the right to be present and be heard at meetings where decisions affecting the public are being made.
- The right to speak is not absolute; government can adopt reasonable rules which require orderly behavior and allow for the orderly progression of public meetings.



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The Sunshine Law: Public Participation

- § 286.0114, Florida Statutes requires members of the public to be given a reasonable opportunity to be heard on a proposition before a board of commission.
- Boards may adopt policies governing public comment.



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The Sunshine Law: Public Participation

- The right to public comment does not apply to:
 - Emergency situations where compliance would cause reasonable delay;
 - Ministerial acts;
 - A meeting that is exempt from The Sunshine Law;
 - A meeting in which the Board is acting in a quasi-judicial capacity.



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The Sunshine Law: Public Participation

- The Board may adopt rules and policies governing the public's opportunity to be heard that:
 - Provide guidelines as to the amount of time an individual has to address the board or commission;
 - Prescribe procedures for allowing representatives of groups or factions to address the board or commission at meetings in which a large number of individuals wish to be heard;
 - Prescribe procedures or forms for an individual to use in connection with public comment; or
 - Designate a specified period for public comment



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The Sunshine Law: Public Participation

If the Board adopts rules or policies in compliance with the statute, and follows those policies when providing members of the public the opportunity to be heard, the Board is deemed to be acting in compliance with the statute.



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The Sunshine Law: Exemptions

- The Legislature has the ability to create statutory exemptions to the requirements of the Sunshine Law.
 - Must be passed by a 2/3 majority.
 - Exemption cannot be any broader than necessary to accomplish the stated purpose of the law.
 - 5-year sunset provision.



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The Sunshine Law: Exemptions

- Statutory alterations or exemptions to the requirements of the Sunshine Law include:
 - Discussions between a public agency and its attorney concerning pending litigation.
 - Meetings relating solely to the evaluation of tort claims or offers to compromise such claims.
 - Meetings to discuss actual or impending collective bargaining negotiations.
 - Certain competitive solicitation meetings.
 - Meetings relating to security systems for property owned or leased by a public agency.
- All exemptions should be narrowly construed.



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The Sunshine Law: Violations

- What happens if the Board takes action at a meeting that violates the Sunshine Law?
- Action is void *ab initio*.
 - In other words, it has no legal validity from the time of its inception.
 - Exception: A violation of the public participation statute will not void Board action.
- The action can be cured by the Board taking independent, final action in the sunshine. Still may face civil or criminal penalties.



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The Sunshine Law: Violation

- Penalties for violation of the Sunshine Law include:
 - For an unintentional violation: Fine of up to \$500
 - For a knowing violation: Second-degree misdemeanor punishable by a fine of up to \$500 and/or up to 60 days in jail
 - Suspension or removal from office
 - Payment of attorney's fees and court costs



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The Sunshine Law: Conclusion

- The Sunshine Law should be liberally construed so as to frustrate all evasive devices.
- Don't get creative. If you are asking yourself how you can get around the Sunshine Law, you are already going down the wrong path.
- If you have to ask, assume the Sunshine Law applies.



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The Sunshine Law

The purpose of the Sunshine Law is to make the entire decision-making process open to the public.



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Public Records



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Public Records Act

Provides the public a right of access to records of state and local governments as well as access to records of private entities acting on the behalf of government.



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Public Records Act

- The public's right to inspect records is a constitutional right.
- Article I, Section 24(a) of the Florida Constitution states:
 - “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...”
 - County governments are specifically included within the scope of this provision.



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Public Records Act

§ 119.011(2), Florida Statutes, defines a public record 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 in connection with the transaction of official business by any agency.



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Public Records Act

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.



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Public Records Act

- The State Legislature may create an exemption from the public access requirements in the Public Records Act.
- Requires a 2/3 vote.
- There are over 1000 exemptions.



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Public Records Act

- Any person who desires to inspect or copy a public record has the right to do so.
- Any person who has custody of a public record has a duty to disclose the record upon request.
- Agency may impose reasonable conditions.
 - May require supervision of the records custodian.
 - May charge a reasonable fee for copying



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Public Records Act

- A fee for a public records request should be limited to the cost associated with the labor and technology required to produce the record.
- A fee is appropriate where compliance with a request will require extensive use of information technology resources or extensive clerical or supervisory assistance.
- A fee can only be based on extensive use of agency resources.
- The fee must be reasonable and limited to costs actually incurred.
- An advance payment may be required where a large number of records have been requested.
- Production of the records may be made contingent upon payment of the fee.



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Public Records Act

- A public agency may not require a showing of purpose or special interest as a condition of access to public records.
 - A person's motivation for requesting a record is irrelevant with respect to whether they have a right to the record.
- Unless authorized by law, a public agency may not ask the requestor to produce identification as a condition of providing public records.
- A request for public records may not be denied on the grounds that it is not sufficiently specific or is overbroad.
- A request for public records does not have to be made in person or in writing.



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Public Records Act

- There is no specific time limit in the Public Records Act for responding to a public records request.
- The only permissible delay is the reasonable time needed to retrieve the record and redact any portion that is exempt from disclosure. *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).



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Public Records Act

- The Public Records Act simply requires the production of records.
 - A records custodian is not required to give out information from records or answer questions with respect to the records.
 - An agency is not required to create a new record if the record does not already exist at the time of the request.
 - An agency is not required to convert an existing record into a new format.



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Public Records Act

- Exempt records vs. confidential records
 - Both require statutory authorization.
 - An exempt record is one that the agency is neither required nor prohibited to disclose.
 - A confidential record is one that is not subject to inspection and that may not be released except to a person authorized by statute.



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Public Records Act

- If a requested record is exempt from disclosure, the records custodian must state the basis for the exemption, including the statutory citation.
- Upon request, the records custodian must state in writing and with particularity the reasons for the conclusion that the record is exempt from inspection.
- The public agency bears the burden of proving the right to an exemption.



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Public Records Act

- Exemptions to the requirements of the Public Records Act include:
 - Sealed bids, proposals, or replies received pursuant to a competitive solicitation (becomes public when the agency provides notice of an intended decision or 30 days after the opening of bids)
 - Work products developed in preparation for collective bargaining negotiations
 - Information relating to a private entity's interest in locating or expanding its business activities in connection with an economic incentive agreement (only upon request and only for 12 months)
 - Bank account and credit/debit card numbers held by a public agency
 - Law enforcement resource inventories and emergency response plans
 - Certain litigation work product of agency attorneys (only while litigation is pending)



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Public Records Act

- Records that are confidential under Florida law include:
 - Photographs or video/audio recordings of an autopsy
 - 911 records that identify personal information about a person requesting emergency services or reporting an emergency
 - EMS records that contain patient examination or treatment information
 - Work papers and notes related to the internal audit of a unit of local government (becomes public when the audit becomes final)
 - Trade secrets or proprietary confidential business information held by an economic development agency
 - Identity of a whistle-blower
 - Personal identifying information related to a public employee's participation in an Employer Assistance Program
 - Social Security numbers held by a public agency



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Public Records Act

- If a requested record contains both exempt and non-exempt information, the public agency must redact out the exempt information and produce the remainder of the record.
- The agency may charge a fee if review and redaction will require an extensive use of agency resources.



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Public Records Act

Public records, whether exempt or non-exempt, must be retained in accordance with retention schedules approved by the Department of State.



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Public Records Act

- Denial of a person's right to inspect or copy public records creates a civil cause of action against the agency.
 - A prevailing party may receive reasonable costs of enforcement, including attorney's fees.
- A public officer who knowingly violates the provisions of the Public Records Act is subject to suspension, removal, or impeachment and is guilty of a misdemeanor of the first degree, punishable by up to one year in prison and/or a fine of up to \$1,000.



Public Records Act

St. Johns County Examples

Statement Acknowledging a Public Records Request

Dear _____:

I am writing to acknowledge receipt of your public records request. St. Johns County will determine if it has any records that are responsive to your request. If any such records are located, we will compile them and redact any exempt material prior to providing them to you. Should it be determined that the nature or volume of the public records requested requires the extensive use of information technology resources, or extensive clerical or supervisory assistance, or both, then we will first respond with an estimate of the additional charges for the actual costs incurred, and whether a deposit will be required. In such instance, the records will be compiled only after you approve the charges and the County receives any required deposit. Payment for the total or remaining costs can be made when the records are available. If the actual cost is less than your deposit, you will be refunded the balance.



Public Records Act

St. Johns County Examples

Response When No Responsive Records Are Found

Dear _____:

After a reasonable review, the County has found no records responsive to your request.

St. Johns County Public Records Tracking System

Applications - Windows Internet Explorer provided by St Johns County Mis Department

http://appserver.intranet.co.st-johns.fl.us/Applications/SbmtMgmt/AppPicklist.aspx

File Edit View Favorites Tools Help

St Johns County IntraNet Ho... Applications

Application Maintenance To Do List Administrative General Reports Administrative Reports Standards Project Search Fee Calculator NAL Lookup

Public Records Request * 2014

Close

Appl Code	Project Name	Created	Updated	Completed
2014000763	1204 Fort Peyton Drive (PRIDE 1404466)	12/23/2014	12/23/2014	12/23/2014
2014000762	1232 Woodchurch Lane (SUBCON 2001-08, BP 10306430/CS 2003-3951)	12/22/2014	12/22/2014	12/22/2014
2014000761	Ocean Grand/ PUD Res 98-57, PUD Res 79-39 *Atty	12/22/2014	12/22/2014	12/22/2014
2014000760	1715 W. Kayla Court (BP 10400999)	12/22/2014	1/20/2015	12/22/2014
2014000759	River Crest Planned Unit Development (PUD 2014-13)	12/19/2014	1/30/2015	12/19/2014
2014000758	3444 Kings Road S (BP 1050884, 10801246)	12/18/2014	12/18/2014	12/18/2014
2014000757	Silver Creek (COMM 2012-10)	12/18/2014	12/18/2014	12/18/2014
2014000756	Nocatee DRI DO *Atty	12/18/2014	12/23/2014	12/23/2014
2014000755	10712 Quail Ridge Drive (BP 11002076,11002961,11004739) *Atty	12/18/2014	12/18/2014	12/18/2014
2014000754	1650 CR 210 W/ Popeye's Sign (BP 11406851)	12/17/2014	12/18/2014	12/18/2014
2014000753	556 St. Claude Place (BP 10409100)	12/17/2014	12/18/2014	12/18/2014

Done Local intranet 100%

start Memo to BCC re Elect... Windows Media Player http://www.stjccc.us... Applications - Windo... Microsoft PowerPoint ... 5:21 PM



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Public Records Resources

- Office of Attorney General website:
<http://www.myfloridalegal.com>
- 2015 The Sunshine Law Manual:
<http://www.myfloridalegal.com/sun.nsf/sunmanual>
- Florida First Amendment Foundation:
<http://www.floridafaf.org>



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Misuse of Office, Use of Inside Information and Nepotism



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The information contained in this portion of the presentation was provided by Betsy Daley, Senior Attorney, Florida Commission of Ethics and Kerri J. Stillman, Director of Operations and Communications, Florida Commission on Ethics.

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Misuse of Public Position

(§ 112.313(6), F.S.)

No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others.



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Bad Behavior

Misuse is NOT merely:

- Using poor judgment;
- Being dishonest, incompetent or negligent;
- Wasting resources; or
- Engaging in rude or unprofessional behavior



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Key Words

- Corruptly use or attempt to use
- Public position or resources
- To secure a special benefit or privilege
- For oneself or others



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Corruptly means...

- Engaging in conduct that is inconsistent with proper performance of duties;
- Knowing that the conduct is wrong; AND
- Intending to gain a personal privilege, benefit or exemption

See Blackburn v. State Commission on Ethics, 589 So. 2d 431 (Fla. 1st DCA 1991)



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Examples

- Port Authority employees were fined for using office equipment to make BBQ grills and repairs to friends' cars.
- A State employee was fined for selling a state manual to a town in the Midwest after “borrowing” the contents and deleting references to Florida Statutes.



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Inside Information

(§ 112.313(8), F.S.)

Disclosure or Use of Certain Information.— A current or former public officer, employee of an agency or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.



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Key words...

- The provision applies to both *current* and *former* officers and employees
- Personal gain or benefit
- Information not available to the public



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Exemptions

- Information relating exclusively to governmental practices
- Use of general expertise or skill



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Helpful tips for avoiding complaints

- Keep business endeavors separate from public responsibilities
- Never assert a public position for a special benefit
- When in doubt, seek guidance from the Florida Commission on Ethics



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Nepotism

Restriction on Employment of Relatives

(§ 112.3135(2)(a), F.S.)

A public official may not appoint, employ, promote, or advance, or advocate for appointment, employment, promotion, or advancement, in or to a position in the agency in which the official is serving or over which the official exercises jurisdiction or control any individual who is a relative of the public official.



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Key Words

A public official may not:

- appoint, employ, promote or advance a relative
- recommend a relative for appointment, employment, promotion or advancement



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Meet the Relatives

Father, Mother

Brother, Sister

Son, Daughter

Aunt, Uncle, 1st Cousin

Half Brother, Half Sister

Stepson, Stepdaughter

Father-in-law, Mother-in-law

Brother-in-law, Sister-in-law

Nephew, Niece

Stepfather, Stepmother

Stepsister, Stepbrother



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Non-Relatives

- A man who is your mother's sister's husband (your aunt's husband) is not your relative for purposes of § 112.3135(2)(a), F.S.
See CEO 99-5.
- “Relatives” do not include “significant others” or paramours.
See CEO 02-3.



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Interesting Notes

- The provision does not prohibit relatives from working in the same office.
- The provision does not prohibit relatives from supervising one another (although that not might not be a good idea for countless reasons)
- The Commission has *grandfathered* certain nepotism situations.



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Exemptions

- District school boards (*but see* §1012.23, F.S.-a board member cannot supervise a relative)
- Community college districts
- Individuals serving in a volunteer capacity, providing emergency medical, fire or police services
- Appointments to boards other than land planning or zoning agencies, in municipalities with populations of less than 35,000
- Legislators' relatives who serve as messengers during session



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Important Note

If you serve on a collegial body, your relative *cannot be hired or appointed* to a position or board, *even if you abstain from the vote.*



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Contact the Florida Commission on Ethics

Florida Commission on Ethics
325 John Knox Road, Suite 200
Tallahassee, Florida 32303
(850) 488-7864
www.ethics.state.fl.us



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Voting Conflicts and Gift Laws for County Officials



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Definitions

(Per §112.3143, Fla. Stat.).

- “Public Officer” includes any person elected or appointed to hold office in any agency, including any person serving on an advisory body.
- “Relative” means any father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law.



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Special Private Gain or Loss

“Special private gain or loss” means an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:

1. The size of the class affected by the vote.
2. The nature of the interests involved.
3. The degree to which the interests of all members of the class are affected by the vote.
4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.



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Special Private Gain or Loss, cont'd

This definition is a fairly new definition which was included in Senate Bill 2, which was passed by the Florida Legislature, and became effective on May 1, 2013.



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Voting Conflict Rules

- No elected county officer may vote upon any measure which would inure to the special private gain or loss of:
 - i. The County Officer
 - ii. The Officer's Employer
 - iii. A parent's organization or subsidiary of the officer's corporate employer
 - iv. The officer's relative, or
 - v. Business associate of the county officer



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Voting Conflict Rules cont'd

- If a voting conflict exists, such elected officer shall, prior to the vote being taken, publicly state to the assembly the nature of the conflict of interest and shall within 15 days after the vote occurs disclose the notice of his or her interest in a public record memorandum filed with the clerk of the body (Form 8B).



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Voting Conflict Rules cont'd

- No appointed county officer shall participate without first disclosing the nature of his or her interest in any matter which would inure to the special private gain or loss of:
 - i. The appointed county officer
 - ii. A principal of the officer's employer
 - iii. The parent organization or subsidiary of a corporate principal whom the officer is retained
 - iv. The officer's relative, or
 - v. Business associate of the county officer



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Voting Conflict Rules cont'd

- Such disclosure shall be made by memorandum filed as public record with the Clerk which shall be immediately provided to the other members and which shall be read at the next official meeting of the body. (See §112.3143 (4), Fla. Stat).
- Whenever a public officer or former public officer is considered for appointment or reappointment, the number and matter of such memoranda shall be considered. §112.3143 (6), Fla. Stat.



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Gifts

- Public officers are subject to state laws regarding the solicitation and acceptance of certain gifts.
- In some instances, gift acceptance or solicitation is completely prohibited. In other instances, gifts may be accepted, but must be reported to the Commission on Ethics.



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- Public officers are prohibited from soliciting or accepting anything of value to the recipient based on any understanding that the vote, official action, or judgment of the official would be influenced thereby.
 - Examples include loans, promises of future employment, services, favors, etc.
 - Such a situation essentially amounts to bribery and requires a quid pro quo.



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- Public officers and their spouses and minor children are prohibited from accepting any compensation, payment, or thing of value when the official knows, or with the exercise of reasonable care, should know that it is given to influence a vote or other action in which the official was expected to participate in his/her official capacity.
- Public officers are also prohibited from knowingly accepting a gift which he or she knows or reasonably believes has a value exceeding \$100 from a lobbyist who lobbies the official's agency.
- Public officers are prohibited from soliciting any gift from a lobbyist.



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- Other gifts are acceptable, however, any gift worth over \$100 must be reported quarterly to the Commission on Ethics.
- Alternatively, a public official can pay back the value of the gift (or partially pay back so the net value received does not exceed \$100) within 90 days of acceptance of the gift. If such action is taken, the gift does not have to be reported.
- Any gift from a lobbyist that exceeds \$25 must also be reported by the lobbyist on a quarterly basis.
 - Remember that no gift worth more than \$100 can be accepted from a lobbyist
- These provisions only apply to gifts that are not otherwise prohibited under the previously discussed prohibitions.



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Form 9 – Quarterly Gift Disclosure

- Florida Commission on Ethics Form 9 must be submitted for any calendar quarter in which a Public Official accepted a reportable gift.
- Any permissible gift with a value in excess of \$100 must be reported on this form.
- The form must be filed with the Commission no later than the last day of the calendar quarter that follows the calendar quarter for which the form is filed.



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References

- Anderson III, C. Christopher, *Conflicts of Interest, Financial Disclosure, Gift Laws, Postemployment Restrictions, Voting Conflicts, and More, Under Part III, Chapter 112, Florida Statutes (Code of Ethics for Public Officers and Employees)*, August 2012
- Florida Statutes, 2014, and Chapter 2013-36, Laws of Florida

