

A vibrant clownfish with orange and white stripes and a yellow body is swimming in a blue oval frame. Below the fish is a green anemone with many tentacles. The background is a dark blue gradient.

# ***PUBLIC RECORDS***

**May 2016**

# ACCESS

Florida Law creates a right of access to inspect and/or have copies of public records.



# WHO?

This means ANYONE regardless of:

- Identity
- Reason





## YOU MAY NOT REQUIRE A REQUESTOR :

- To identify him or herself
- To tell you why they want access or copies
- To fill out a form or make a request in writing

# PUBLIC RECORDS

The right is a right to access public records, so what is a public record?





## DEFINITION

- A public record is something made or received pursuant to law or ordinance in connection with the transaction of official business by any agency.
- The form of the record is not important! If it meets the definition, it is a public record.



# PERPETUATE, COMMUNICATE, OR FORMALIZE

If something is meant to perpetuate, communicate or formalize knowledge it is a public record.





## EXAMPLES:

- Public records can be documents, electronic records such as emails or data files, maps, books, audio or video tapes or software.
- Any type of communication, not only email, that fits the definition is a public record.
- This includes voice mails, texts, and IMs as well as emails!





# OBLIGATION TO MAINTAIN RECORDS

A custodian of public records must maintain records so that they can be produced upon request.

Records may be destroyed in compliance with state retention requirements.

# FAILURE TO MAINTAIN = LIABILITY

## “Orange County’s ‘Textgate’ Scandal Shows Need for Texting Policies” (*Governing*, 2013)

“Mobile technology is creating new ways for officials to violate public records laws. Orange County, Fla., learned that the hard way.”

“Last September, a nasty little controversy over an undetermined number of deleted text messages erupted in Orange County, Fla. Commissioners there were accused of trading texts with opponents of a ballot referendum during public hearings on the measure. When local media outlets and supporters of the measure -- which would require businesses in the county to provide paid sick time to employees -- sought the texts, they discovered some had been erased.”



# REQUESTS- WHERE DO THEY COME FROM?

- There is no requirement that a request come in a certain form, use certain words, or be in writing.
- You may receive a request by:
  - Telephone
  - Email
  - Letter
  - Walk in





## WHO GETS REQUESTS?

- A requestor can make a request to any employee of an agency.
  - Best Practice: train all employees to recognize a request and know the basics and to coordinate the response through a designated and specially trained liaison employee.

Some requestors have tried to surprise or trip up front counter or reception area employees to purposefully cause a violation.



# WHO IS A CUSTODIAN?

- Anyone with custody and control of a public record
- Any employee of your agency
- Sometimes private entities



## EMAIL/SPAM EXAMPLE

- Recently many Pinellas County employees received an emailed public records request to their work email--- for their own personnel files. Many of yours may have also.
- This was a public records request.
- The custodian was required to acknowledge and respond.
- In Pinellas County most, if not all, of the hundreds of such requests received went into the spam filter.
  - This didn't change the fact that it was a public records request.
  - Or the fact that the custodian was required to acknowledge and response.





## SO, WHAT DID THE COUNTY DO?

We determined that even though the request was caught in the Spam filter, it had been received by the agency (the agency employee).

- The Spam filter was set up by the agency to manage emails.
- The email was actually delivered.
- Employees have an obligation to review their spam filter.
- We coordinated an acknowledgement through our specially trained public records liaisons.
- We calculated the estimated special service charge since, due to the volume and nature, the response would require extensive clerical or supervisory time.
- We provided an estimate to the requestor.

# PROVIDING ACCESS

- As a custodian, you must provide access in a reasonable time and manner
  - During regular office hours
  - Within a reasonable time
  - At your office location, generally
  - You also have a duty to preserve the records so:
    - You have to maintain their integrity and remain with records being inspected.
    - Make sure records are reviewed for exempt and or confidential information before granting access or providing copies!





## DENYING ACCESS

- Although in Florida the right to access public records is a broad right there are times when it is appropriate to deny (or limit access).
- You must have specific statutory authority to deny or limit access!
- A statutory exemption precluding access will be narrowly construed (against the custodian).
- You must tell the requestor the specific statutory cite pursuant to which you are denying or limiting access.
- And, if asked, explain why that is your position!

# “Gov. Rick Scott agrees to pay \$700,000 to end public records lawsuit”

*(Tampa Bay Times, 08/07/15)*



“Gov. Rick Scott has agreed to pay a Tallahassee lawyer \$700,000 in taxpayer money to settle seven public records lawsuits alleging he and several members of his staff violated state law when they created email accounts to shield their communications from state public records laws and then withheld the documents.”

<http://www.tampabay.com/news/politics/stateroundup/gov-rick-scott-agrees-to-pay-700000-to-end-public-records-lawsuit/2240461>



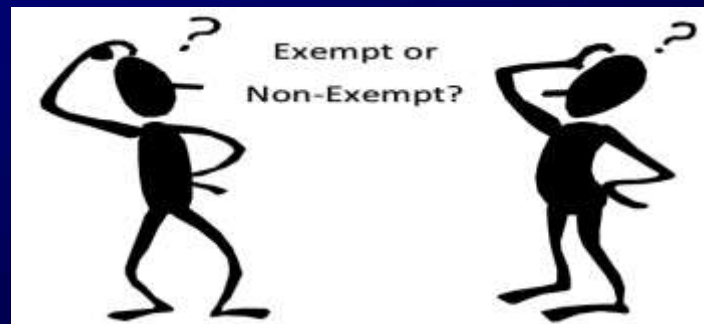
## EXEMPT OR CONFIDENTIAL?

- Some records, or parts thereof, are made exempt and or confidential and, therefore, do not have to be or at times must not be made available for inspection or copying.
- Exempt records may be disclosed, but need not be.
- Confidential records may not be disclosed.



# WHAT RECORDS ARE EXEMPT FROM DISCLOSURE?

- Take some time to get familiar with the records you maintain and the statutory provisions that relate to them making them exempt and/or confidential.







# COMMON EXEMPTIONS

- Information about request and delivery of absentee ballots
- Information entered into the Department of State electronic filing system to generate campaign finance reports
- The names, addresses and telephone numbers of stalking victims
- Election software filed with the Department of State
- Voter Registration signatures may be viewed but not copied



# COMMON EXEMPTIONS

The following are confidential and may only be used for voter registration purposes:

- Declinations to register to vote
- Information relating to the place a person registered to vote or updated a registration
- Social security #, DL # or Florida ID # or a voter registration applicant or voter

# COMMON EXEMPTIONS

- There is a limited protection for ballots which are open to access & viewing but not copying
- Only staff may handle them





## COMMON EXEMPTIONS

- Campaign finance and Elections violation complaints filed with the Commission
- Investigations of those complaints and related papers
- User IDs and passwords held by the Department of State
- Information entered into the electronic filing system to generate a report (temporarily)



# PROVIDING ACCESS - HOW IS IT DONE?

- Upon receipt of a request, you must acknowledge it:
  - In writing if possible
  - Within a reasonable time
  - Ask for clarification if needed



# PROVIDING ACCESS - HOW IS IT DONE?

- Good faith determination of what records, if any, you have that are responsive
  - No requirement to answer questions
  - No requirement to explain records
  - No requirement to create records that do not exist
  - No requirement to change the form of a record



# PROVIDING ACCESS - HOW IS IT DONE?

- Determine if a charge is allowable
- Advise requestor of cost
- Once you obtain payment, provide access or records
- Keep a copy of what you provide!





# PROVIDING ACCESS - HOW IS IT DONE?

- Take the time to review all responsive material for any exempt or confidential parts that must or may be redacted
- Make sure your redaction does not allow a recipient to “undo” it
  - Software issues
  - Incomplete manual blacking out

# CHARGES

- The public records law allows certain charges
- Only those charges specifically authorized by statute are allowable
- There are three types of charges allowable:
  - Copying
  - Special Service
  - Mailing costs

**COPY CAT**





## CHARGES - COPYING

- You may charge a copying cost of actual cost to copy (if less) or
- 15 cents per one sided page
- 20 cents for a two sided page
- Odd sizes may be charged at actual cost



## CHARGES - SPECIAL SERVICE CHARGE

In limited instances, the law allows a special service charge to be imposed.

- Only where fulfilling the public records request will take extensive supervisory or IT time.
- Extensive is a matter of policy.
- Best practice— Pinellas County SOE uses 30 minutes as the cutoff—
  - Under 30 minutes, no special service charge
  - Over 30 minutes, a special service charge is imposed

# CHARGES - SPECIAL SERVICE CHARGE

Charging a Special Service Charge is a way to balance the burden of complying with the law.







# CHARGES - SPECIAL SERVICE CHARGE

- If you have an instance where a special service charge is allowable---
  - Provide the requestor with a good faith estimate
  - Collect the estimate in advance
  - Track the actual time it takes
  - If you have underestimated, you may ask for and require additional money
  - If you have overestimated, you must provide a refund!



## CHARGES - MAILING COSTS

- If you send the records electronically you should not charge copying or mailing costs.
- Only if you had to make copies in order to send them electronically would a copy cost be allowable.
- If you mail the records, you may charge the actual cost of mailing.



## CHARGES - COMMON ISSUES

- What if the requestor refuses to pay for copies or the estimate for a special service charge?
  - You do not have to provide the records until you receive the payment.
  - You should not prepare the records until you receive the payment or you run the risk of wasted time, paper & effort.



## CHARGES - COMMON ISSUES

- What if a requestor challenges a special service charge or a copy charge?
  - You should be prepared to show how you arrived at the copy cost or special service charge estimate.
  - You may discuss whether the requestor wants to revise his or her request to lower the cost.
  - You do not have to waive the costs.



## CHARGES - COMMON ISSUES

- May you charge a flat rate for certain records?
  - No, only the specific charges that are provided for in the statute are allowable.



## CHARGES - COMMON ISSUES

May you charge for the additional time to create records?

- No.
- And, you do not have any obligation under the law to create records that do not exist.
- It is recommended that if you have no records responsive to a request you say so.



# BEST PRACTICES

- Have a system or protocol for handling public records requests.
- Train all employees in the basics.
- Identify and train a specific staff member or members to handle requests.
- Keep copies of requests and responses for easy access later.
- Make sure your charges are consistent with the statute.
- Be consistent!





# HAVE A SYSTEM OR PROTOCOL FOR HANDLING PUBLIC RECORDS REQUESTS

- Pinellas County and the Pinellas County Supervisor of Elections have designated public records liaisons who
  - Receive special training at least yearly on responding to public records requests
  - Coordinate responses for their agencies to ensure
    - Correctness
    - Consistency



# TRAIN EMPLOYEES

- As mentioned- the County and the Pinellas County Supervisor of Elections have designated public records liaisons to handle requests.
- However, a requestor may make the request of any employee--- so train all employees to
  - Understand the obligation of public records
  - Take requests (and possibly acknowledge)
  - Route them efficiently to the records liaison for handling unless simple enough to handle on the spot



## FAILURE TO COMPLY

- If you fail to provide access or copies or unreasonably deny access you can be liable.
- Declaratory judgements may be issued requiring compliance.
- Negative press can result.
- Attorneys fees may be due to the other side-
  - There is no reasonable mistake exemption from fees.
  - Costs can be high.

# FAILURE TO COMPLY

**“The JSO’s public records policies must be examined.”**

*(The Florida Times-Union Editorial, 12/18/15)*

**“It’s a scandal that the Jacksonville Sheriff’s Office has been breaking state record laws by failing to properly save email communications.”**



Sheriff Mike Williams says he was unaware of records violations until recently

<http://jacksonville.com/opinion/editorials/2015-12-18/story/jsos-public-records-policies-must-be-examined#>

# MORE INFORMATION

- [www.Myfloridalegal.com](http://www.Myfloridalegal.com)
- Florida Statutes Ch. 119
- The Government in the Sunshine Manual





Questions?

