

2014 Open Government Overview

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2014 Legislative Highlights

- A summary of open government bills passed in the 2014 legislative session that may impact local governments and constitutional officers.

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.

SCOPE OF THE SUNSHINE LAW

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
- 3) Minutes of the meetings must be taken, promptly recorded and open to public inspection

SCOPE OF THE SUNSHINE LAW

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

SCOPE OF THE SUNSHINE LAW

- Neither the Legislature nor the courts are subject to the Sunshine Law. There is a constitutional provision that provides access to legislative meetings but it is not as strict as the Sunshine Law. However, if legislators are appointed to serve on a board subject to the Sunshine Law, the legislator members are subject to the same Sunshine Law requirements as the other board members.

SCOPE OF THE SUNSHINE LAW

- Staff meetings are not normally subject to the Sunshine Law.
- However, staff committees may be subject to the Sunshine Law if they are deemed to be part of the “decision making process” (e.g. the committee is given the authority to screen and reject applicants from further consideration) as opposed to traditional staff functions like fact finding or information gathering.

SCOPE OF 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. *Exemptions are narrowly construed.*

SCOPE OF THE SUNSHINE LAW

- Board members may not use electronic communications (i.e. e-mail, text messages, Facebook or the telephone) to conduct a private discussion about board business. Board members may send a “one-way” communication to each other 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.

SCOPE OF THE SUNSHINE LAW

- While a board member is not prohibited from discussing board business with staff or a non-board 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.

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.

BOARD MEETINGS

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

BOARD 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.

BOARD MEETINGS

- 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.

BOARD MEETINGS

- A 2013 law requires, subject to listed exceptions, that boards provide a reasonable opportunity to be heard before the board takes official action on on a proposition.
- This statute, section 286.0114, F.S., took effect on October 1, 2013.

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.

PENALTIES

- 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.

PENALTIES

- 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*.

PENALTIES

- 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.

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.

SCOPE OF THE PUBLIC RECORDS ACT

- 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.

SCOPE OF THE 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.

SCOPE OF THE PUBLIC RECORDS ACT

Only the Legislature (by a 2/3 vote) may create an exemption from the public access requirements in the Public Records Act. There are over 1000 exemptions.

ELECTRONIC RECORDS

- Email messages and texts 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 public records or the custodian’s designee.”

PROVIDING 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.

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. A request cannot be denied because it is “overbroad.”

PROVIDING PUBLIC RECORDS

- 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.

PROVIDING PUBLIC RECORDS

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

PROVIDING PUBLIC RECORDS

- 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.

PROVIDING PUBLIC RECORDS

- 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.

PROVIDING PUBLIC RECORDS

- 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.

PROVIDING PUBLIC RECORDS

- 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.

PROVIDING PUBLIC RECORDS

- 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.

RETENTION

- All public records must be retained in accordance with retention schedules approved by the Department of State.
- Even exempt records must be retained in accordance with an approved retention schedule.

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.

FEES

- 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.

FEES

- 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 1/2 inches or less. An agency may charge no more than an additional 5 cents for each two-sided duplicated copy.

FEES

- 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.

PENALTIES

- 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.

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>