

St. Johns County Office of the County Attorney



Government in the Sunshine and Public Records



St. Johns County
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2014 Ethics Training

Portions of this presentation were provided by Pat Gleason, Special Counsel for Open Government, Office of the Attorney General.

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Government in the Sunshine



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Government in the Sunshine

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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Government in the Sunshine

- § 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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Government in the Sunshine

- **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
 - One person acting on behalf of a public agency
 - Members and members-elect of a public agency



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Government in the Sunshine: 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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Government in the Sunshine: 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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Government in the Sunshine: Meetings

- Board members may not circumvent the Sunshine Law by using a non-member to circulate information to other members.
- If you are told another Board member's position on an issue, don't acknowledge it!



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Government in the Sunshine: 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.
- Fact-finding or information-gathering is okay.



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Government in the Sunshine: 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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Government in the Sunshine: 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 public.



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Government in the Sunshine: 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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Government in the Sunshine: 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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Government in the Sunshine: Public Participation

- § 286.0114, Florida Statutes, was passed this year as Senate Bill 50.
- 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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Government in the Sunshine: 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 Government in the Sunshine;
 - A meeting in which the Board is acting in a quasi-judicial capacity.



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Government in the Sunshine: 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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Government in the Sunshine: 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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Government in the Sunshine: 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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Government in the Sunshine: Exemptions

- Statutory 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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Government in the Sunshine: 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.



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Government in the Sunshine: 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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Government in the Sunshine: 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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Government in the Sunshine

*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 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 compliance with 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.



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Resources

- Office of Attorney General website:
<http://www.myfloridalegal.com>
- 2014 Government in the Sunshine Manual:
<http://www.myfloridalegal.com/sun.nsf/sunmanual>
- Florida First Amendment Foundation:
<http://www.floridafaf.org>