

Government in the Sunshine

Florida's Open Meeting and Public Records Laws

Introduction

Florida's Sunshine Law provides a right of access to governmental proceedings of public boards and advisory councils established by those boards. It requires:

- Meetings of public boards must be open to the public
- Reasonable notice must be given, and
- Minutes of the meetings must be taken and promptly recorded.

Applicability

Public Agencies: The Florida Constitution and laws require full openness of meetings and records unless a specific statutory exemption has been enacted. Even if an exemption has been enacted, there is no prohibition against disclosure unless the law has also determined the information is confidential. Efforts should always be made to provide as much information to the public as is possible, not just the minimum required. Before denying any request for records or participation in agency business, staff, board members, and committee members should consult with the agency's attorney.

Members: Current Board members are subject to Sunshine. Further, members-elect lose their status as a private individual upon appointment to the Board even if they haven't yet been installed or attended their first board meeting. If a board member is unable to determine whether a meeting is subject to the Sunshine Law, he/she should either leave the meeting or ensure that the meeting complies with the law. When in doubt, the members of the board should follow the open-meeting policy of the state.

Staff: Meetings of staff are not ordinarily subject to open meeting requirements unless the staff has been delegated decision-making functions outside of normal staff functions, are acting as liaisons between board members, or are acting in place of the board members at their direction.

Private Organizations: Private organizations are also often subject to the Sunshine Law. If these private organizations are created by law or by a public agency or the public agency has delegated any of its functions to that private organization, the organization is subject to Sunshine.

Public Meetings Defined

A **public meeting** applies to any gathering, whether formal or casual, of two or more members of the same board where any discussion occurs on a matter on which foreseeable action will be taken, even if a quorum isn't present. It is the thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his/her official duties, is a matter of public concern and it is the entire decision-making process, not merely the final decision that governs the actions.

Written correspondence between board members can constitute a meeting. While a written report by one member to inform other members of a subject that will be discussed at a public meeting is not a violation if prior to the meeting there is no interaction related to the report among the members. The report, which is subject to disclosure under the Public Records Act, is not being used as a substitute for action at a public meeting if there is no response from or interaction among the members prior to the meeting. If such a memorandum reflecting the views of one board member on a pending issue is circulated among the board members with each indicating his/her approval or disapproval, the memorandum has the effect of becoming the official action of the board and a violation would have occurred. Board members should refrain from using the "reply to all" computer command to a communication from another board member or staff member.

Telephone communication or use of electronic media technology among two or more board members is subject to Sunshine. A one-way e-mail communication from one board member to another, when it doesn't result in the exchange of members' comments or responses on subjects requiring board action doesn't constitute a meeting, but the communications are public records and must be maintained by the agency for public inspection and copying.

Local boards aren't permitted to conduct workshops or official meetings through **electronic means** – only state agencies are permitted to do so. Local boards must hold their meetings at a public place in the county and a quorum of the board must be physically present at the meeting. If a quorum of a local board is physically present, the participation of an absent member by telephone or other interactive electronic technology is permissible when such absence is due to extraordinary circumstances such as illness. If the absence of a member is due to a scheduling conflict, the board must use its good judgment to determine if participation of the member is an extraordinary circumstance. At a public workshop where no formal action will be taken, the physical presence of a quorum is not required.

Social events involving members of a public board are not prohibited, provided that matters which may come before the board are not discussed at such events.

Reasonable Notice Required

Reasonable public notice is required for all meetings subject to Sunshine even if the meetings are of general knowledge and are not conducted in a closed door manner. This also includes any meetings between members even though a quorum isn't present.

Each agency is required to give notice of public meetings, hearings, and workshops on the agency's **website** and to publish agendas and certain other nonexempt materials on the website (s.120.525, FS). Otherwise, the type of notice that must be given is variable, but must be done in such a manner as to enable the media and general public to attend the meeting. If a noticed meeting is adjourned and rescheduled to a later date, the second meeting must also be noticed.

The notice should follow the following guidelines:

- The time/place of the meeting and, if available, an agenda (or if no agenda is available, the subject matter summation);
- Prominently displayed in the area of the agency's office set aside for that purpose;
- Emergency sessions afforded the most appropriate and effective notice under the circumstances and special meeting have at least 24 hours reasonable notice to the public; and
- Use of press releases and/or phone calls to wire services and other media, but on matters of critical public concern, advertising in the local newspapers of general circulation would be appropriate.

The courts have ruled that notice of each item to be discussed in a published agenda is not required in order to allow members of the general public to bring issues before the Board. However, the Florida Attorney General recommends publication of an agenda, if available, in the notice of the meeting. If an agenda isn't available, subject matter summations might be used.

Place of Meetings

Inspection trips and fact-finding trips by boards with ultimate decision-making authority should be avoided. Even Advisory Board members must be careful not to discuss matters which may come before the board for official action.

Luncheon meetings should be avoided if held at places that aren't easily accessible to the public. Such meetings have a chilling effect upon the public's willingness to attend or participate in the meetings. Out-of town meetings, even if noticed, don't provide a reasonable opportunity for the public to attend and participate.

Any facility that discriminates on the basis of age, race, creed, color, origin, or economic status or which operates in such a manner as to unreasonably restrict public access to such a facility would violate the Sunshine law, including those which do not fully accommodate the needs of persons with disabilities.

Conduct of Meetings

Meeting facilities must be large enough to accommodate the expected number of people wishing to attend. If more people attend than were expected and the venue cannot accommodate all wishing to attend, use of video technology may be appropriate.

Communication between members that are audible only to those sitting at the table may violate the openness requirement.

If board members discuss issues during a recess of a public meeting in a manner not generally audible to the public, a violation of Sunshine may occur.

Public Participation

"Open to the public" means all persons who choose to attend. Agency staff can't be excluded from meetings. Bidders can't be excluded from other bidder's presentations. Singling out a particular news organization or other interested party is not acceptable.

Public comment must be allowed before a Board makes its decision on any matter. The public should be afforded a meaningful opportunity to participate at each stage of the decision-making process.

Reasonable rules and policies which ensure the orderly conduct of a public meeting and which require orderly behavior on the part of those persons attending the meeting may be adopted by the Board. A rule can limit the amount of time an individual may address the Board, provided the time limit doesn't unreasonably limit the public's right of access.

The public has a right to silently record public meetings. A rule or policy which prohibits the use of non-disruptive or silent tape recording devices, however, is unreasonable and arbitrary and is, therefore, invalid.

A meeting is either fully open or fully closed there are no intermediate categories. Conditioning attendance at a meeting on agreement to respect the confidentiality of certain matters is not permitted.

Voting

No member present at a meeting may abstain from voting. A vote shall be recorded for each member present except when there is or appears to be a possible conflict of interest as defined by law. A conflict of interest means a measure which inures to the member's special private gain or loss; to the special private gain or loss of any other organization than a public agency by whom he/she is retained; or which would inure to the special private gain or loss of a relative or business associate. When a member of a local board is required to abstain, the member is disqualified from voting and may not be counted for the purposes of determining a quorum.

Minutes

Written minutes of all public meetings, whether formal meetings or workshops, must be promptly recorded and open to public inspection. While tape recorders may also be used to record the proceedings, written minutes of the meeting must be taken and promptly recorded

Draft minutes may be circulated to individual board members for corrections and studying prior to approval by the board, so long as any changes, corrections, or deletions are discussed and adopted during the public meeting when the board adopts the minutes. The minutes are public records when the person responsible for preparing the minutes has performed his/her duty even though they haven't yet been sent to the board members or officially approved by the board.

Public Records

Public Records 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 in connection with the transaction of official business by any agency.

This means that all materials made or received by a public agency in connection with official business which are used to **perpetuate, communicate or formalize knowledge** are public records regardless of whether they are in final form or the ultimate product of an agency must be open for public inspection unless the Legislature has specifically exempted them from disclosure.

Any agency document, however prepared, if circulated for review, comment or information, is a public record regardless of whether it is an official expression of policy or marked "preliminary" or "working draft" or similar label. The fact that the records are part of a preliminary process doesn't detract from their essential character as public records. Even personal notes can constitute public records if they are intended to communicate, perpetuate or formalize knowledge of some type. However, notes to oneself by a public employee which are designed for his/her own personal use in remembering certain things don't fall within the definition of public record.

Other Organizations and Public Records

Advisory Boards: Records of committees established to make recommendations to the Board are subject to Florida's Public Records law.

Private Organizations: A public agency can't avoid disclosure by contractually delegating to a private entity that which would otherwise be an agency expenditure. However, mere receipt of public funds for professional services by a private organization doesn't make it subject to Sunshine. A "totality of factors" test must be applied as a guide for evaluating whether a private entity is subject to the Public Records law, including:

1. The level of public funding;

2. Commingling of funds;
3. Whether the activity was conducted on publicly-owned property;
4. Whether services contracted for are an integral part of the public agency's chosen decision-making process;
5. Whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
6. The extent of the public agency's involvement with regulation of, or control over the private entity;
7. Whether the private entity was created by the public agency;
8. Whether the public agency has a substantial financial interest in the private entity;
9. For whose benefit the private entity is functioning.

The fact that a private entity is incorporated as a nonprofit corporation is not dispositive as to its status under the Public Records Act. The issue is whether the entity is "acting on behalf of" a public agency. However, there is a difference between a party contracting with a public agency to provide a service to the agency and a contracting party which provides services in place of the public body. The public records law can be enforced against any person who has custody of public records whether that person is employed by the public agency creating or receiving the records or not. It makes no difference that the records in question are in the hands of a private party.

Electronic Records

Computer records and e-mail messages made or received by a public agency in connection with official business are public records and subject to disclosure in the absence of an exception. However, private e-mail stored in government computers doesn't automatically become a public record by virtue of that storage. Florida law requires that all public agencies that operate a website and use electronic mail must post the following statement in a conspicuous location on the website:

Under Florida law, e-mail addresses are public records. If you do not want your e-mail address released in response to a public records request, do not send electronic mail to this entity. Instead, contact this office by phone or in writing.

Each agency that maintains a public record in an electronic recordkeeping system shall provide to any person a copy of any public record in that system which is not exempted by law from public disclosure. Any agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium, and the agency may charge a fee in accordance with the law. However, an agency is not generally required to reformat its records to meet a requestor's particular needs.

Financial Records

Any financial reports prepared or received by a public agency as part of its official duties and responsibilities are subject to the Public Records law. However, internal audit reports of a public agency generally become a public record when it is finalized at the time it is presented to the Board. Until the audit becomes final, the audit workpapers and notes related to such audit report are confidential.

Personnel Records

A single file must be maintained for each employee and a public agency cannot remove certain items to a private file unless there is a specific statutory exemption such as for medical information. An agency is not authorized to unilaterally impose special conditions for the inspection of personnel records. An automatic delay in the production of such records is invalid and can't be delayed in order to allow the employee to be notified or present during the inspection of the public records relating to that employee.

Inspection and Copying of Public Records

Florida law establishes a right of access to public records. It states that every 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 the public records.

A custodian of public records can't impose a rule or condition of inspection which operates to restrict or circumvent a person's right of access. A person doesn't have to show a special or legitimate interest in the public records before being allowed to inspect those records. The motivation of the person doesn't impact the person's right to see them. A person doesn't need to make a written request to examine or copy public records, nor does the requestor need to furnish background information

The Public Records law doesn't include a specific time limit within which the agency must respond to a request. However, the Florida Supreme Court has stated that the only permissible delay in producing records is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt. Any refusal to release an exempt record must be accompanied by the agency's written statement including the basis for the exemption and the statutory citation to the exemption. Even if the record includes some confidential information, the custodian must redact the confidential information and produce the rest for 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. If records are not made confidential but are simply exempt from the mandatory disclosure requirements, the agency is not prohibited from disclosing the documents in all circumstances.

Public records must be open for inspection without charge. However, the law authorizes the imposition of a special service charge 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.

Records must be available for inspection and copying. If no fee is prescribed elsewhere in the law, the custodian can charge a fee of up to 15 cents per one-sided copy and no more than an additional 5 cents for each two-sided copy. Unless a specific request for copies requires extensive clerical or supervisory assistance or extensive use of information technology resources so as to trigger a special service charge, an agency may charge only the actual cost of duplication for copies of public records.

Maintenance and Disposal of Public Records

All public records should be kept in the building in which they are ordinarily used and easily accessible for convenient use. Disposal of public records must comply with rules established by the Department of State, Division of Library and Information Services. Prior consent of the Division must be obtained to dispose of records no longer needed.

Legal Advice on Sunshine

The information included in this summary only addresses specific issues and isn't intended to be a comprehensive report on all ways in which the Sunshine laws apply. It doesn't substitute for legal advice; any questions about compliance with public meeting or public records should be directed to the General Counsel.