

State of Florida



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** May 23, 2016

**TO:** Carlotta S. Stauffer, Commission Clerk, Office of Commission Clerk

**FROM:** Adria E. Harper, Senior Attorney, Office of the General Counsel

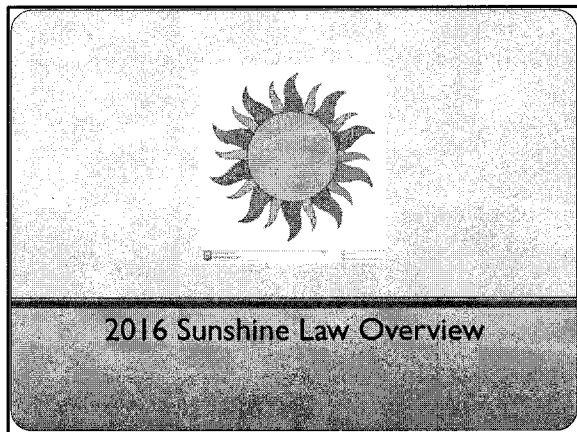
**RE:** Ethics Training Material

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Please find attached ethics training materials to be placed in undocketed file (Docket No. 160000).

Thank you,  
Adria Harper

RECEIVED-FPSC  
2016 MAY 23 AM 9:08  
COMMISSION  
CLERK



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**Scope of Sunshine Law—Section 286.011, F.S.**

- The Government-in-the-Sunshine Law or "Sunshine Law" applies to "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or political subdivision." Thus, it applies to public collegial bodies within the state at both the local as well as state level. It applies equally to elected or appointed boards or commissions.
- The Florida Public Service Commission, as a state collegial body, is subject to the Sunshine Law.

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**Requirements of the Sunshine Law**

- 1) Meetings must be open to the public
- 2) Reasonable public notice of such meetings must be given; and
- 3) Minutes of the meetings must be promptly prepared and open to public inspection

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**What Qualifies as a Meeting that should be Open to the Public?**

The Sunshine Law applies to all discussions or deliberations as well as the formal action taken by a board or commission. The law is applicable to any gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which foreseeable action will be taken by the public board or commission. There is no requirement that a quorum be present for a meeting to be covered under the law.

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**Communications outside of a public meeting**

Two or more members of board using telephone, e-mails, or text messages to communicate on government business are conducting a meeting subject to the Sunshine Law's notice and public access requirements.

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**Can two members of a public board attend social functions together?**

- Members of a public board are not prohibited under the Sunshine Law from meeting together socially, provided that matters which may come before the board are not discussed at such gatherings.
- Consider article "Jax general counsel smacks down City Council for budget night "Text-Ghazi"

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**Staff & Sunshine Law**

- Staff is generally not subject to the Sunshine Law.
- However, staff cannot act a conduit between board members.
- In certain instances, staff committees can be subject to the Sunshine Law if they have been delegated some "decision-making" authority as opposed to mere fact-finding or information-gathering.

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**Ex Parte Issues**

- The Commissioners' ex parte statute, Section 350.042, F.S., prohibits a Commissioner from initiating or considering ex parte communications with parties.
- Communications between Commissioners and staff are not considered ex parte.
- Staff cannot act as conduits between Commissioners.

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**What is "Reasonable" Public Notice?**

- A key element of the Sunshine Law is the requirement that boards subject to the law provide "reasonable notice" of all meetings. See, section 286.011(1), Florida Statutes.
- Although section 286.011, F.S., did not contain an express notice requirement until 1995, many court decisions had stated prior to the statutory amendment that in order for a public meeting to be in essence "public," reasonable notice of the meeting must be given. *Hough v. Stembbridge*, 278 So. 2d 288, 291 (Fla. 3d DCA 1973). Accord, *Yarbrough v. Young*, 462 So. 2d 515, 517 (Fla. 1st DCA 1985). Notice is required even though meetings of the board are "of general knowledge" and are not conducted in a closed door manner. *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309 (Fla. 1st DCA 1991). And see, *Baynard v. City of Chieftand*, No. 38-2002-CA-00078 (Fla. 6th Cir. Ct. July 8, 2003) (reasonable notice required even if subject of meeting is "relatively unimportant").

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**Reasonable Notice Continued...**

- The type of notice that must be given is variable depending on the facts of the situation and the board involved. In some instances, posting of the notice in an area set aside for that purpose may be sufficient; in others, publication in a local newspaper may be necessary. For agencies, a more "specific" notice requirement is provided by Section 120.525, F.S.
- In each case, an agency must give notice at such time and in such a manner as will enable interested members of the public to attend the meeting. Ops. Att'y Gen. Fla. 34-44 (1954) and 80-73 (1980). Cf. Lynn v. Lake County, 741 So. 2d 782 (Fla. 3d DCA 1999). In Lynn, county attorney provided citizens with "constructive notice" of a committee meeting and its location, it would be "impossible to require" the citizens by concluding that a meeting lacked adequate notice because the newspaper advertisement failed to correctly name the committee and *Laurin v. City of Miami Beach*, No. 80228CA-077881 (Fla. 3d DCA Ct. December 8, 2015), per curiam affirmed, 79 So. 3d 38 (Fla. 4th DCA 2015), so violation of Section 120.525 is not a basis of agency meeting held in violation of Section 120.525. See also *City of Miami Beach v. Florida Department of Transportation*, 2015 WL 10000000 (11th Cir. 2015), cert. denied, 136 S.Ct. 1000 (2015).

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**Chapter 120, F.S. and FAR notice**

- Section 120.525, F.S., requires an agency give notice of all public meetings, hearings and workshops by publishing it in the Florida Administrative Register and on the agency's website at least 7 days before the event.
- This rule is not applicable in case of emergency meetings. An agency can call for an emergency meeting if it finds that there is imminent danger to public health, safety and welfare. In such a situation, the agency can give notice by any reasonable procedure which is necessary to protect public interest. This procedure must comport with state statute, the state constitution or the U.S. constitution. Under the emergency procedure, the agency is permitted to take only that action which is necessary to protect public interest.

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**Requirement for Public Participation**

Section 286.0114, F.S., requires, subject to limited exceptions, that public boards provide an opportunity for public comment prior to taking official action on a proposition. Boards are authorized to adopt rules or policies that provide time limits for speakers; procedures for allowing a representative of a group to speak, as opposed to all members of a large group; and procedures or forms for an individual to use to inform the board of a desire to be heard, to indicate his/her position and a representative and designate a specified period of time for public comment.

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**Public Participation Continued**

In an April 25, 2014 Informal AGO, the Attorney General's Office stated: "It should also be noted that section 286.0114, Florida Statutes, recognizes public participation need not occur at the meeting at which the official action on a proposition takes place as long as the public is allowed to speak before official action is taken and that a board or commission may adopt rules or policies regulating such public participation. In light of the purpose of the statute to allow public participation during the decision-making process on a proposition, it should be liberally construed to facilitate that purpose. This office would suggest, therefore, that when in doubt as to whether the public participation is required, a board or commission should err on the side of allowing the public to do so."

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**Public Participation Continued**

The Commission affords public participation at most meetings and workshops. However, because the Commission has quasi-judicial functions, the Commission's quasi-judicial hearings allow for party participation only. Limited Exceptions: Need Determinations, Service Hearings.

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**Livestreaming Meetings**

- Section 350.01, F.S., requires each meeting, including each internal affairs meeting, workshop, hearing, or other proceeding attended by two or more commissioners, and each such meeting, Workshop, hearing, or other proceeding where a decision that concerns the rights or obligations of any person is made, shall be streamed live on the Internet, and a recorded copy of the meeting, workshop, hearing, or proceeding shall be made available on the commission's website
- The PSC uses the Granicus system to provide live and archived meetings and meeting records. See PSC's website at: <http://www.floridapsc.com/Conferences/AudioVideoEventCoverage>

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**Minutes Promptly Prepared and Made Available to Public**

- At the Commission, we provide full transcripts of all internal affairs meetings, agendas, workshops, and any meetings open to the public.
- The meetings are also archived and available to watch on our website.

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**Can a public board hold closed meetings?**

- Not generally. There are a very limited number of exemptions which would allow a public agency to close a meeting. These include, but are not limited to, certain discussions with the board's attorney over *pending litigation* and portions of *collective bargaining sessions*.
- At the Commission, we do not close the hearing when confidential information is at issue. Rather, the hearing remains open and the confidential information is referenced generally without disclosing the specific confidential material.

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**Litigation Exemption**

There is a very narrow and specific exemption that makes litigation strategy or settlement meetings private when they are held between a board and its attorney and the board is a party before a court or administrative agency. The statute limits the persons who may attend such a meeting, the subject of any such meeting, and the length of time the record of the meeting may be kept closed.

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**Litigation Exemption Continued...**

Section 286.011(8), Florida Statutes, provides that any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:

- (a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.
- (b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.
- (c) The entire session shall be recorded by a certified court reporter. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.
- (d) The entity shall give reasonable public notice of the time and date of the attorney client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney client session and the names of the persons attending. At the conclusion of the attorney client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.
- (e) The transcript shall be made part of the public record upon conclusion of the litigation.

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**Penalties for Sunshine Law Violation**

- Knowing violation is a 2<sup>nd</sup> degree misdemeanor punishable by up to 60 days imprisonment and or fine up to \$500
- Removal from office
- Noncriminal infractions, fine up to \$500
- Attorneys fees
- Civil actions such as injunction

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**Validity of Action Taken in Violation of Sunshine Law**

- Section 286.011, F.S., provides that no action shall be considered binding except as taken or made at an open meeting.
- Recognizing that the Sunshine Law should be construed to frustrate all evasive devices, the courts have held that action taken in violation of the Sunshine Law is void ab initio.
- Only a full open meeting will cure the defect so long as it's not merely an "perfunctory ratification." This full open meeting cures the action only, not the violation itself.

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**Sunshine Law Case Update**

• **What is the liability for a conduit that shares information between board members?:** *State v. Dorworth*, No. 14-MM-5841 (Fla. Orange Co. Ct. October 21, 2014), *affirmed*, No. 14-AP-48 (Fla. 9th Cir. Ct. August 19, 2015): Court dismissed a misdemeanor charge filed against a lobbyist who was accused of violating the Sunshine Law by relaying information between board members and thereby aiding the members to meet without complying with the Sunshine Law. The judge said that by charging the lobbyist, the state attorney "expanded the reach of the Sunshine Law to private citizens; and the Legislature did not intend for the statute to apply to private citizens."

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**Sunshine Law AGOs**

**AGO 15-03, to State Attorney Bruce Colton, issued January 28, 2015**

• **Conclusion:** A dismissal with prejudice pursuant to a settlement agreement that confers continuing jurisdiction on the court to enforce the terms of the settlement agreement would operate as a conclusion of the litigation for purposes of s. 286.011(8), F.S., making the transcript of a settlement or litigation strategy session which was closed to the public while the litigation was ongoing, open for inspection and copying.

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**Sunshine Law AGOs**

**Informal Opinion to Lynn Barrett, General Counsel North Broward Hospital District February 17, 2016**

**Issue:** May a board hold a "shade meeting" (i.e., closed meeting) to discuss an investigation and subpoena?

**Conclusion:** The material submitted by the District "reflects the existence of an investigation and subpoena." However, the exemption in s. 286.011(8), F.S., does not apply in the absence of an on-going judicial or administrative proceeding.

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**Sunshine Law AGOs**

**Informal Opinion to Robert Sugarman, Attorney for Board of Trustees for City of Boca Raton Police and Firefighters Retirement System, dated August 5, 2015**

- **Issue:** May four members of the board travel out of state to conduct interviews of investment consultants and their teams without violating the Sunshine Law if they provide notice of the trip, set up live interactive audio/visual feeds and refrain from expressing impressions, taking votes or other formal action?
- **Conclusion:** No

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# Florida Public Records Law

## **Article I, Section 24(a), Fla. Constitution**

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. This section specifically includes the legislative, executive, and judicial branches of government, counties, municipalities, and districts, and each constitutional officer, board, and commission.

**§ 119.01(1), F.S.:** It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.

# Definition of Public Record

- “Public records” means 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. § 119.011(12), F.S.
- A public record is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type. Shevin v. Byron, Harless, Schaffer, Reid and Assoc., 379 So. 2d 633, 640 (Fla. 1980).

# **Working with Public Records**

In order to comply with public records, you need to be able to identify (1) what is a public record, (2) who's responsible for maintaining it, (3) how long the record has to be maintained, and (4) how to dispose of the record once the retention period has run.

The Commission Retention Schedules describe the various categories of public records, as well as their applicable retention period and disposition method.

# Common Types of Public Records

– Convenience Copies

– Correspondence

– Transitory Messages

- Are public records created primarily for the communication of information rather than the perpetuation of knowledge;
- Do not set policy, establish guidelines or procedures, certify a transaction, or become a receipt;
- Are similar to the communication that might take place during a telephone call or conversation in an office hallway;
- Include documents with short-lived or no administrative value.

# Public Record Y/N?

- **Drafts** – Any agency document, however prepared, if circulated for review, comment, or information is a public record.
- **Notes** – “Personal” notes can constitute public records if they are intended to communicate, perpetuate, or formalize knowledge of some type. However, under Chapter 119, F.S., public employee’s notes to themselves which are designed for their own personal use in remembering certain things do not fall within the definition of “public record.”

# Record Maintenance

- Need to determine who has the official record copy of the document.
  - If it's filed in CMS, the filed copy is the official record copy and the Clerk maintains it as a permanent record.
  - Otherwise, the author or primary recipient of that document should serve as the custodian.



# **Retention Requirements for Common Public Records**

**Transitory Messages** – OSA retention period (keep the record until it's obsolete, superseded, or administrative value is lost).

**Convenience copies** – OSA.

**Drafts** – OSA.

**Correspondence** – 3 fiscal years.

# **Disposition Requirements for Common Public Records**

**Transitory Messages** – discard (throw away) when OSA (when the record is obsolete, superseded, or administrative value is lost)

**Convenience copies** – discard when OSA.

**Drafts** – discard when OSA.

**Correspondence** – after 3 fiscal years, have the RMC complete an RDD and submit it to the RMLO for approval before disposition.

# **Email *may or may not* be a public record.**

Email that is prepared or received in connection with official agency business and is intended to perpetuate, communicate, or formalize knowledge *is* a public record.

Spam email is not a public record.

Personal email is not a public record.

## Public Record Email

- Public record email is subject to the same public access, retention, and disposition requirements as other documents containing similar information.
- If email is a public record, the “record copy” must be retained (saved) for the applicable retention period.

# **What is the record copy and who is responsible for retaining it?**

If the public record email originated in the Commission, the “Sent Item” copy of the employee who originated the email is the official record copy.

The originating employee is responsible for retaining the email. The email is retained by simply not deleting it from the email system.

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- For public record emails received from persons outside the Commission, the “Inbox” copy of the primary Commission recipient of the email is the official record copy.
- The primary Commission recipient is responsible for retaining the email. The email is retained by simply not deleting it from the email system.

## Retention Period for Emails

- The retention period for a particular public record depends on its content, not the method by which it is sent or stored.
- Common types of public record email:
  - Transitory messages (OSA)
  - Drafts (OSA)
  - General Correspondence (3 fiscal years)
  - Convenience copies (OSA)

## Disposition of Email

- *How you dispose of a record depends on what kind of record it is (Is it a transitory message? Correspondence? A draft?).*
- Disposition requirements are set out in the PSC Records Management Handbook and Retention Schedules.



- §119.07(1)(a), F.S.: 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.
- Only limited, statutory exemptions are recognized – confidential information, social security numbers, bank account numbers, etc. Florida law does not recognize a general right to privacy. The statutory basis for redaction or exemption must be identified to the requestor.

# Commission Public Records Request Process

- If the request asks for “any and all” records or records that can be obtained from multiple divisions/offices (such as emails), it should be treated as a Chapter 119, F.S., public records request and routed to the Clerk’s Office.
- The Clerk will log the request and broadcast it to the appropriate attorney supervisor, who will coordinate with the appropriate offices or staff, and gather and review responsive documents.
- The Clerk is responsible for invoicing for documents and services, acceptance of money for services rendered, and subsequent transmittal of documents.

# Requests for Information, New Records, Continuing Requests

- Florida's public records law requires an agency to provide access to public records. An agency is *not* required to provide information from those records.
- Florida's public records law provides a right of access to inspect and copy an agency's *existing* public records; it does not mandate that an agency create new records in order to accommodate a request for information from the agency. Wooten v. Cook, 590 So. 2d 1039 (Fla. 1st DCA 1991)
- Florida's public records law does not recognize continuing records requests.

# Agency-Imposed Restrictions

- An agency can't impose a rule or condition on the right of access that operates to restrict or circumvent that right. AGO 75-50
- Absent specific statutory authority, an agency cannot require:
  - that requests for records be made in writing, Dade Aviation Consultants v. Knight Ridder, Inc., 800 So. 2d 302 (Fla. 3d DCA 2002); or
  - that a requestor provide identity or the reason for the request. AGO 92-38 and 91-76

# Response Time

- Prompt Response: Acknowledgment of a request to inspect or copy a public record must be made *promptly* and *in good faith*. Section 119.07(1)(c), F.S.
- Reasonable Right of Access: The time it takes to locate a record, review it for exempt information, and provide a copy to the requestor. Section 119.07(1)(a), F.S., and Tribune Company v. Cannella, 458 So. 2d 1075, 1078 (Fla. 1984), appeal dismissed sub nom., DePerte v. Tribune Company, 105 S.Ct. 2315 (1985)

# Redaction

- If a record contains both exempt and non-exempt information, the agency must redact that which is exempt and provide access to the remainder. Section 119.07(1)(d), F.S.
- An agency may not ordinarily charge for the cost to review records for exempt information. AG0 84-81
- However, an extensive use fee may be imposed *if* review and redaction require an extensive use of agency resources. Florida Institutional Legal Services v. Florida Dept. of Corrections, 579 So. 2d 267, 269 (Fla. 1st DCA), rev. den., 592 So. 2d 680 (Fla. 1991)

# Failure to Comply with Public Records Law May Result in Sanctions

- A *knowing* violation of §119.07(1), F.S., is a 1st degree misdemeanor, punishable by a fine of up to \$1,000 and a jail term not exceeding one year. § 119.10(1)(b), F.S.
- A violation of *any* provision of Chapter 119, F.S.:
  - Unintentional: non-criminal and punishable by a fine not exceeding \$500. § 119.10(1)(a), F.S.
  - Intentional: 1st degree misdemeanor, punishable by a fine of up to \$1,000 and a jail term not exceeding one year. § 119.10(2)(a), F.S.
- Suspension or removal from office. § 112.52(1), F.S.
- Attorney's fees and court costs. § 119.12, F.S.

# Where to go for more information

- PSC Records Retention Schedules
- Administrative Procedures Manual
  - Section 11.03 – Public Records Access, Copying and Associated Costs
  - Section 11.04 – Handling of Confidential Information
  - Section 11.05 – Use, Retention, and Disposal of Electronic Mail
- Government in the Sunshine Manual and Webpage (<http://www.myflsunshine.com>)