



PERSSON, COHEN, MOONEY, FERNANDEZ & JACKSON, P.A.
ATTORNEYS AND COUNSELORS AT LAW

Ethics Course Public Records Law

Presented by:

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Public Records Law

- Florida Constitution, Article I, Section 24(a)
- Chapter 119, Florida Statutes



A Public Record is...

Any 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 an agency.



A Public Record is...

- Any material
- Prepared in connection with official agency business
- Intended to perpetuate, communicate, or formalize knowledge.



Tell Me More!

- A document can be a public record whether it is in final form or is designated by the agency as a “draft,” “working copy,” or “preliminary version.”
- Any record that is circulated for review or shared for comment or information is a public record.
- Notes prepared for personal use, not shared, may not be a public record if not intended to be final evidence of knowledge.
- Inter-office memos are public records as they are the final evidence of knowledge.



Location, Location is Relevant (NOT)

Records not made in connection with official business are not public records. Determining factor is not where records are housed, but the nature of the record. *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003)

Example: A public employee who sends a proposed budget to a supervisor for review is a public record regardless of whether sent from the employee's government computer or from his or her home computer using a personal e-mail account.



Who Can Request Public Records?

Art. I, Section 24, Florida Constitution --
“Every person has the right to inspect or copy
any public record...”

SO THE ANSWER IS ANYONE!



Why Do People Make Public Records Requests?

1. The Requestor legitimately needs the records.
2. Conducting “audit” either personally or on behalf of some open government association/group.
3. Seeking information to embarrass someone.



YOU SHOULDN'T CARE!



- A requester's motive for wanting the records is irrelevant.
- Annoying requesters who make public record requests for the sole purpose of harassment is irrelevant.
- Requesters who intend on using the records for commercial purposes are irrelevant.
- The number of records involved or the possible inconvenience to the agency is irrelevant.



Requests for Information

- Florida's public records law requires an agency to provide access to public records. The agency **IS NOT** required to provide information from those records.
- Florida's public records law also **DOES NOT** mandate that an agency create new records in order to accommodate a request for information from the agency.



Text Messages and Personal Email Accounts

- Are a public record when they relate to public business.
- Unless statutorily exempt, text messages that relate to public business are a public record that must be produced to requesting parties. *O'Boyle v. Town of Gulf Stream*, 257 So. 3rd 1036 (Fla. 4th DCA 2018); *City of Sunny Isles Beach v. Gatto*, 338 So. 3d DCA 2022).
- A public entity has a responsibility to conduct a reasonable search to locate text message including those located on private accounts or devices.



Social Media



- Potentially the next frontier of lawsuits!
- What could go wrong??
 - People can post on your page or in response to your post about public business without your knowledge or invitation.
 - Users can delete and edit their posts.
 - Unless the platform is supplied by your local government, the onus is on you to retain anything deemed a public record.
 - First Amendment issues that go beyond the scope of this presentation.



Electronic Records

- An agency must provide a copy of a public record in the format requested if the record is maintained in that format. If the record is not maintained in the format requested, an agency has the option of converting the record and charging a fee.
- An agency is not required to provide public records in an electronic format other than the standard format routinely maintained by the agency.



How soon must the agency respond to a request?

- The law and the courts require that a response be in a reasonable amount of time.
- The courts have made it clear that public records are to be given attention.
- “The only delay permitted by the Act is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.” *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984)



Does the public get access to all records that meet the public records definition?

No.

Some records are either:

- 1) confidential or;
- 2) exempt from access.





Confidential Records

- Generally CANNOT be released to the public and may be released only to those persons or entities designated in the statute.
- Agency must take reasonable steps to ensure they are not improperly released.



Confidential Record Example

§119.071(2)(h)1.b., F.S. - The following criminal intelligence information or criminal investigative information is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

Any information that may reveal the identity of a person who is a victim of any sexual offense, including a sexual offense proscribed in s. 787.06(3)(b), (d), (f), or (g), or chapter 794, chapter 796, chapter 800, chapter 827, or chapter 847.



Exempt Records

- An “exemption” makes a specified record not subject to access requirements.
- Generally, it is up to the discretion of the agency as to whether they want to release exempt records or not.
- Some exemptions apply to a record for a period of time.



Exemption Example

§119.071(2)(c)1., F.S. - "Active criminal intelligence information and active criminal investigative information are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution."



How are Exempt Records Handled?

- First, it is determined if the entire record is exempt or just a portion of the record.
- If entire record is exempt, the basis for exemption is stated and the record is not provided.
- If a portion is exempt, the exempt information is redacted and the basis for the exemption is stated.
- Access cannot be restricted to the part of the record that is not confidential or exempt.



Fees for Public Records – Special Service Charge

§119.07(4)(d), F.S. - An agency may charge a reasonable fee for the extensive use of agency resources personnel, information technology, or both in addition to the actual cost of duplication.

- Such fees must be reasonable and based on actual costs incurred.
- “Extensive” is not defined. Agencies should have policies in place to define what is extensive, i.e., more than 15 minutes, 30 minutes, 1 hour, etc.



Fees for Public Records – Advance Deposit

Section 119.07(4), F.S. - The custodian of public records must furnish a copy or a certified copy of the [requested] record upon payment of the fee prescribed by law.

NOTE: Custodial agencies are authorized to require the payment of an advance deposit before proceeding with the effort and cost of preparing copies of requested public records. *Malone v. City of Satellite Beach*, No. 94 10557 CA D (Fla. Cir. Ct. Brevard Co. December 15, 1995)



Record Retention Requirements

- Retention period of a record is the duration of time for which the information should be maintained by an agency.
- Based on federal and state laws and regulations, general administrative practices, and fiscal management principles.
- Generally there are *minimum* retention periods; public agencies may retain their records longer at their discretion.



If the agency has the record, it must be produced even if it could have been disposed of under your retention schedule.

Don't tolerate hoarders!



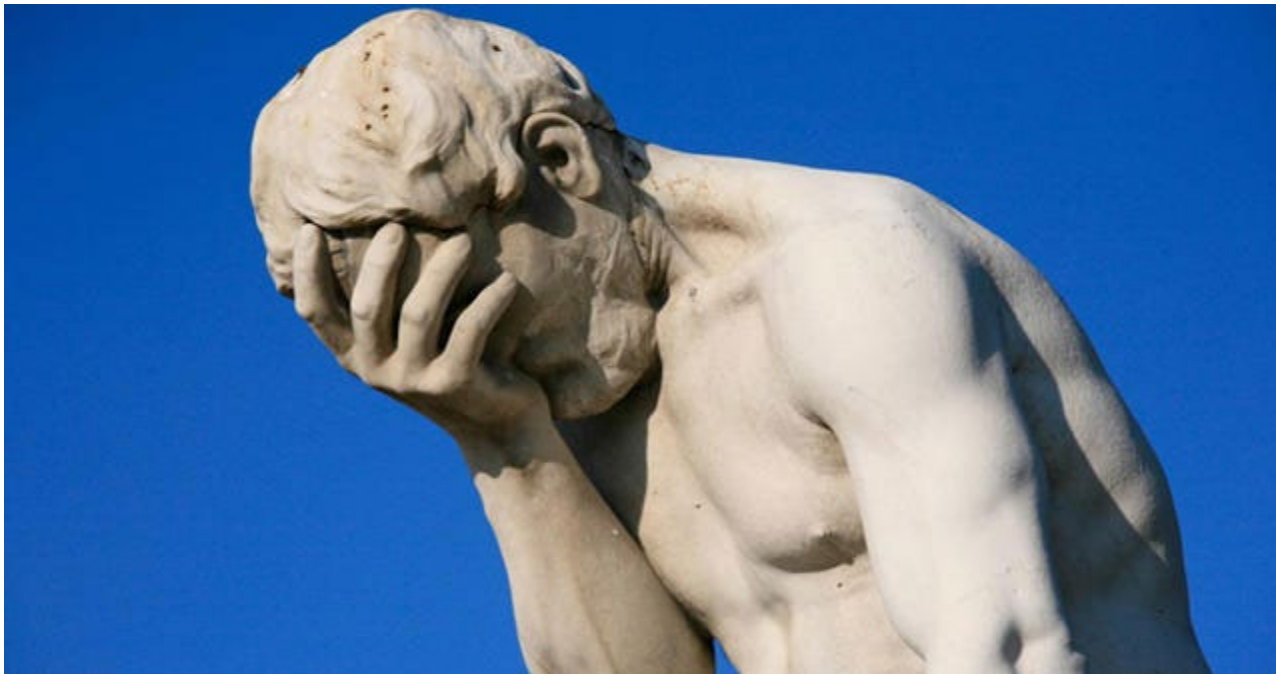


Penalties for Violation of Public Records:

- A knowing violation constitutes a: 1st degree misdemeanor (up to 1 year in jail), and/or \$1,000 fine, and/or potential suspension, removal or impeachment from office.
- Non-criminal infraction (committed without the requisite knowledge) is punishable by a not to exceed \$500 fine.
- The above may be pursued by the State Attorney's Office.
- Also, there is a civil action provided by statute that allows for the recovery of attorney's fees and costs for violations of this law.



Lessons to be learned...





Manatee County (2020)

- Michael Barfield sued three Manatee County Commissioners in December 2020 over a failure to timely respond to a public records request.
- Subsequent FDLE investigation found text message and phone communication between Commissioners, but *none of those records confirmed anyone broke the law.*
- County paid over \$100,000 for settlement, private attorney fees, and court costs.



Manatee County (2022)

- Lawsuit filed by Florida Center for Government Accountability (Director is Michael Barfield) alleging Manatee County violated Public Records Act by failing to provide text messages sent or received by public officials (County Administrators) in response to a records request.
- County admitted it did not capture the content of text messages sent or received on County-issued cell phones.
- "A phenomenal amount of public business is being carried out by text message by county commissioners, county administrators, and lobbyists behind the scenes that give a completely different explanation than the county's official meetings do, and we're not sure if we have all of them yet," FCGA Director for Public Access Michael Barfield said. "You look at these messages, and you then understand that the public meetings are merely perfunctory. That's a big problem that needs to be exposed."



City of Sarasota (2018)

- Michael Barfield sued then City Manager Tom Barwin alleging a failure to produce city-related discussions from his private Gmail account.
- Hundreds of emails were subsequently released from Barwin's personal email account.
- Case settled for \$30,000 with no admission of guilt. Barwin also agreed to never again respond to emails pertaining to city business from his personal Gmail account, and if he received any, to forward them to the city server for preservation. Barwin also agreed to set up an automatic response on his Gmail account alerting senders to correspond with him on his official city email account if the message is about city matters.



City of Tallahassee (2017)

- City of Tallahassee settled a lawsuit by the local newspaper alleging city officials violated the Florida Public Records Act.
- The suit alleged that City Manager Rick Fernandez, who was placed on a paid leave of absence pending the outcome of a state ethics investigation, deleted text messages that showed he asked a local lobbyist for four expensive sky box tickets to a Florida State football game in 2016.
- When a reporter asked the city to produce those text messages, the city said no such record existed. However, a subpoena to the lobbying firm disclosed the messages.
- “The city has admitted it broke the state’s public records law and is now putting into place innovative new policies and procedures to make sure it doesn’t happen again.”



City of Venice (2018)

- Denovo Law Services (associated with Michael Barfield) sued the City of Venice alleging the Public Records Act was violated due to the City's failure to adequately retain text messages related to City business on public and personal devices.
- City believed text messaging was not possible on City-issued devices.
- Lawsuit resulted in a third-party vendor retrieving all text messages on City phones AND private phones on which City business had occurred.
- Case was settled, resulting in the payment of approximately \$45,000, the implementation of retention software to allow text messaging on City-issued phones, a policy prohibiting the conduct of public business on personal devices, and an agreement to conduct an audit of the retention software every 2 years.



Lorenzo v. City of Venice (2009)

Judge Bennett ordered the City of Venice to pay \$777,114.42 in attorney's fees and costs to the Plaintiff's attorney. This judgment (for just the Plaintiff's attorneys' fees and costs) is one of the highest and most costly judgments entered against a local government for violations of the Public Records and Sunshine laws.



Question #1

If your friend posts a comment on your Facebook page encouraging you to vote yes on an agenda item at your next meeting, what should you do?

1. Nothing.
2. Post a responsive comment.
3. Delete it.
4. Take a screenshot and send it to your City Clerk for retention.



Question #2

If you send an e-mail to a fellow Council Member/Commissioner regarding an upcoming agenda item, but the Board Member doesn't reply, is the e-mail a public record?

- a. Yes
- b. No



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