

SUNSCREEN:

Increasing transparency (and defensibility)
through technology

Keith W. Rizzardi

St. Thomas University School of Law

This presentation contains my views and opinions.
I am not a public employee, an agent of the government,
nor performing a delegated duty. I am a Florida citizen,
employed by a private educational institution.

About me

South Florida Water Management District

U.S. Department of Justice

Government Lawyer Section

Attorney for municipalities

Law Professor

**Sunburned: How Public Records Laws Create An Overburdened,
More Expensive and Less Transparent Government,**

44 Stetson L. Rev. 425 (2015)

How many times has your entity been sued for alleged public records violations?

- A. Never
- B. 3 times or less
- C. 4-10 times
- D. More than 10 times

In one word, WHY?

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In one word, WHY?

Distrust, errors, money, harassment, leverage...

“It’s done undercover.”

Rebecca O’Hara, discussing the Home Rule
preemption movement in the prior session

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Trust in government is at stake

transparency is part of the solution.

Public records law and the risks of litigation

Article I, Section 24, Fla. Constitution

(a) 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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.

Chapter 119, Florida Statutes

119.01 General state policy on public records.—

(1) ... Providing access to public records is a duty of each agency.

(2)(a) Automation of public records must not erode the right of access to those records.

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Comply or else...

119.11 Accelerated hearing; immediate compliance.—(1) Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases.

Times Pub. Co., Inc. v. City of St. Petersburg,
558 So. 2d 487 (Fla. 2d DCA 1990).

“An open government is crucial to the citizens’ ability to adequately evaluate the decisions of elected and appointed officials.”

...

“[T]he right to access public documents is virtually unfettered, save only the statutory exemptions...”

Limited confidentiality for lawyers

Sec. 119.071(1)(d)1., F.S.: A public record that was

- mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency...
- prepared for or in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings,

is exempt [from disclosure]

- until the conclusion of the litigation or adversarial administrative proceedings.

Respond or be sued...

A demanding process

- Intake
- Acknowledge
- Estimate production/costs
- Initial letter
- Manage deposits & time
- Review exemptions
- Produce

Unwelcome alternatives

- Staff detour
- Costs of defense
- Risk of attorney's fees
- Settlement?

Data suggests abuses of the law

FLORIDA LEAGUE OF CITIES UNIVERSITY 2016 "SUNBURNED" SUMMIT: RESPONSES TO SURVEY

	Regional participants	Survey responses				#
		Never	Rarely	Sometimes	Frequently	
Has your governmental organization experienced public records requests that appear to be frivolous or otherwise designed to harass, cause unnecessary delay, or increase costs?	CRESTVIEW	1	2	2	0	5
	SANFORD	0	5	6	3	14
	PLANTATION	0	8	7	2	17
	JACKSONVILLE BEACH	1	3	2	3	9
	CLEARWATER	1	3	8	2	14
	TOTAL	3	21	25	10	59
	PERCENTAGES	5%	36%	42%	17%	
OBSERVATION	<i>Nearly all communities experienced abuses of public records laws, more than half reported abuses to occur "sometimes" or "frequently"</i>					

Florida Tax Watch, PREDATORY PUBLIC RECORDS REQUESTS (January 2016)

“Public agencies, and businesses under contract with public agencies, are falling victim to the predatory practice of individuals filing numerous and vague public records requests and then suing for non-compliance, ostensibly to obtain cash settlements or to prevent government from functioning effectively.”

SB 80 / HB 163 (2017)

Changing the risks and rewards
in public records litigation

Fee shifting: SHALL award attorney fees...

119.12 Attorney fees.—

(1) If a civil action is filed against an agency to enforce the provisions of this chapter, the court *shall* assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency if the court determines that:

(a) The agency unlawfully refused to permit a public record to be inspected or copied; **and**

Written notice of request needed

119.12(b), Fla. Stat.

The **complainant provided written notice** identifying the public record request to the agency's custodian of public records at least 5 business days before filing the civil action, except as provided under subsection (2).

The notice period begins on the day the written notice of the request is received by the custodian of public records, **excluding Saturday, Sunday, and legal holidays**, and runs until **5 business days** have elapsed.

Limits on nature of fees

119.12(4), Fla. Stat.

Payments by the responsible agency may include only the reasonable costs of enforcement, including reasonable attorney fees, *directly attributable to a civil action* brought to enforce the provisions of this chapter.

Agency duty to identify custodian

(2) The complainant is not required to provide written notice of the public record request to the agency's custodian of public records as provided in paragraph (1)(b) if the agency does not ***prominently post the contact information for the agency's custodian of public records in the agency's primary administrative building*** in which public records are routinely created, sent, received, maintained, and requested ***and on the agency's website***, if the agency has a website.

Reciprocal fee shifting

(3) The court shall determine whether the complainant requested to inspect or copy a public record or participated in the civil action for an improper purpose. *If the court determines there was an improper purpose*, the court may not assess and award the reasonable costs of enforcement, including reasonable attorney fees, to the complainant, and **shall assess and award against the complainant and to the agency** the reasonable costs, including reasonable attorney fees, incurred by the agency in responding to the civil action.

Improper purpose?

“improper purpose” means a request to inspect or copy a public record or to participate in the civil action primarily to cause a violation of this chapter or for a frivolous purpose.

Tangent: lawyer professionalism

A lawyer must not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or to unnecessarily prolong litigation or increase litigation expenses.

Florida Guidelines for Professional Conduct, A.7.

No private cause of action

(4) This section does not create a private right of action authorizing the award of monetary damages for a person who brings an action to enforce the provisions of this chapter.

Not retroactive

This act applies only to public records requests made on or after the effective date of this act. Chapter 2017-21, Laws of Florida, Sec. 2.

Transparency as self-defense

Strategies and technologies

The benefits of transparency

Trust

Branding

Knowledge

Success

The benefits of transparency

Trust

- Less lawsuits
- Better relationships
- Informed public

Knowledge

- Information portal
- Solicit & share new ideas
- Fix errors

Branding

- Greater visibility
- Showcase accomplishment

Success

- Higher quality products
- Increased accountability

Do it yesterday

The custodian

- Contact information posted in main building and on website
- Dedicated personnel for management of public records
 - Lead custodian
 - Backups
 - Subdivisions of agency

Train your team

- The Florida Attorney General Government in the Sunshine Manual
- The Florida League of Cities conferences and shared materials
- *Develop internal policies*
 - manage requests
 - seek deposits
 - apply exemptions

Transparency ain't free: collect fees

“taxpayers should not shoulder the entire expense of responding to an extensive request for public records.”

County Commissioners of Highlands County v. Colby,
976 So.2d 31 (Fla. 2d DCA 2008).

Delay is permissible under limited circumstances...

1. to determine whether records exist,
2. if some or all of the record is exempt,
3. if the requesting party fails to forward the appropriate fees,

Promenade D'Iberville, LLC, v. Sundy,
145 So. 3d 980 (Fla. 1st DCA 2014)

Excel Spreadsheet

Do it today

Track information

- The requests:
 - who, what, when
- The responses:
 - When, how big
 - Time spent, fees charged?

Coming soon:

The benefit of evidence...

Be proactive

- Post material online:
 - meeting agendas
 - backup materials
 - budget documents
 - completed responses to public records requests
 - controversial documents of public interest
 - Commonly requested records

Do it soon

Document retention

- Social media backup?
- Transitory record
destruction policies?
(e-discovery benefits, too)

Do it soon

Document retention

- Social media backup?
- Transitory record destruction policies?

(e-discovery benefits, too)



Intersect Systems Inc.

Software Systems for Records Management



Laserfiche

O'Hare v. Town of Gulf Stream Florida 15th Judicial Circuit

CASE NO. 502014CA008142XXXXMB

EXCERPT OF NON-JURY TRIAL BEFORE
THE HONORABLE THOMAS H. BARKDULL, III

Thursday, January 12, 2017

10:00 a.m. - 11:30 a.m.

“The first [issue is] whether the delay in this case was reasonable.”

- I find that, given the entirety of the surrounding circumstances at the time of the request and the response thereto, that the *delay was reasonable*.
- There had been a *deluge of requests* both by this Plaintiff and numerous other parties seeking hundreds and hundreds of public records requests, oftentimes, in large bursts that were [compiled over time and then sent in a burst] so that the requests were received first thing when someone would walk into the office on Monday morning.
- *The logs are in the record. There are literally hundreds and hundreds of requests... Therefore, the pattern of the Village, as shown by the log, was to respond in good faith, if they had the ability to do so...*

“The second issue is the issue of the affirmative defense of bad faith raised.”

- The conduct, in this case, was clearly an attempt to generate, *inappropriately generate, litigation*, and inappropriately generate attorney's fees...
- There had been no pickup of the documents requested. There had been *no payments of the estimates* for prior documents. And in this case, there was absolutely no follow-up to the request prior to the initiation of litigation...
- And additionally, it was clearly *intended to harass and intimidate* the employees of the Town... This was clearly in a bad faith attempt and gotcha requests, and an attempt to generate litigation and fees...
- I enter judgment in favor of the Defense and will reserve jurisdiction to entertain any requests for fees and/or costs by the Defense in this case, including any fees that are available under the Court's inherent authority for bad faith litigation.

The Coastal Star

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Gulf Stream: O'Hare settles with town; could O'Boyle be next?

Posted by [The Coastal Star](#) on June 28, 2017 at 1:00pm

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Jeremy Bentham (1748-1832)

“In the darkness of secrecy, sinister interest and evil in every shape, have full swing. Where there is no publicity there is no justice.”

Coming up next: Gwen Keough-Johns