

# Elected Official Ethics Training

*Part One*

*Sunshine Law - Open Meetings*

*Presented by:*

Martin Shelby

Florida Bar Board Certified in  
City, County & Local Government Law

*Florida League of Cities  
56<sup>th</sup> Annual Legislative Conference  
December 9, 2016*

# Section 112.3142, Florida Statutes:

*Ethics training for specified constitutional officers and elected municipal officers.*

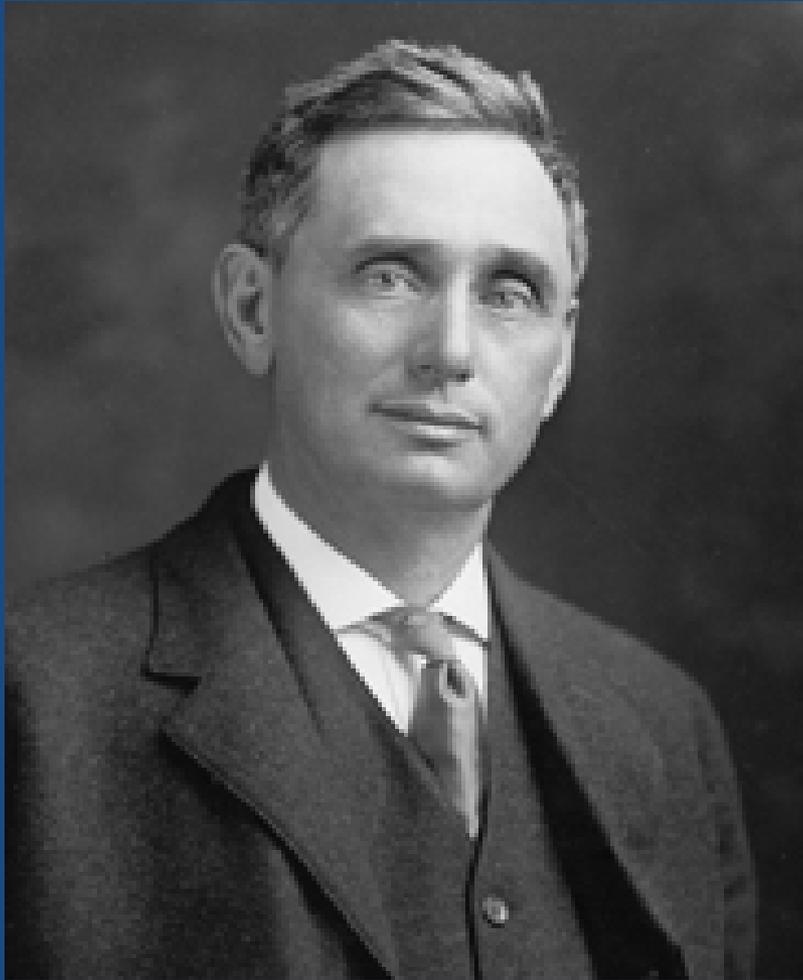
- Beginning January 1, 2015, all elected municipal officers must complete *four hours* of ethics training *each calendar year* which addresses, at a minimum:
  - Article II, section 8 of the Florida Constitution (“Ethics in Government”),
  - Code of Ethics for Public Officers and Employees (chapter 112, part III, Florida Statutes),
  - Public records and public meetings laws of this state (chapter 119 and chapter 286, Florida Statutes).
- Compliance will be reported on “Statement of Financial Interest” Form 1, which must be completed and returned by July 1 of each year.



# Order of Business

- Florida Statutes, Chapter 286 - Public Meetings
- Florida Statutes, Chapter 119 - Public Records
- Florida Statutes, Chapter 112 - Code of Ethics for Public Officers and Employees





*“Sunlight is said to be the best of disinfectants...”*

- Louis D. Brandeis (1914)

# Article I, Section 24 (b) Florida Constitution

“All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.”

# Section 286.011(1) F.S.

*“All meetings* of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, *including meetings with or attended by any person elected to such board or commission, but who has not yet taken office,* at which *official acts* are to be taken are declared to be public meetings *open to the public* at *all times*, and *no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.* The board or commission must provide reasonable notice of all such meetings.”

“Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the *entire decision-making process* that the legislature intended to affect by the enactment of the statute before us. This act is a declaration of public policy, the frustration of which constitutes irreparable injury to the public interest.”

*-Times Publishing Company, etc. v. Williams, 222 So. 2d 470 (2d DCA 1969)*

“One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. *Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors.* The statute should be *construed so as to frustrate all evasive devices.* This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and *relates to any matter on which foreseeable action will be taken.*”

-Justice Adkins in *Town of Palm Beach v. Gradison*, 296 So 2d 473 (Fla. 1974)

“[A] statute enacted for the public benefit should be *construed liberally in favor of the public* even though it contains a penal provision. In this posture, a reasonable construction should be applied giving full measure to *every effort to effectuate the legislative intent.*”

-*City of Miami Beach v. Berns*, 245 So 2d 38, 40  
(Fla. 1971)

“In order for there to be a violation of F.S. 286.011, F.S.A., a meeting between *two or more* public officials must take place which violates the spirit, intent, and purpose. The obvious intent of the Government in the Sunshine Law...was to cover any gathering of some of the members of a public board where members discuss some matters on which *foreseeable action* may be taken by the board.”

*-Hough v. Stembridge, 278 So.2d 288 (Fla. 3d DCA 1973).*

# Key Concept

PUBLIC MEETING REQUIREMENTS =

- NOTICE
- LOCATION
- MINUTES

# Notice

## *Attorney General's Office suggested notice guidelines:*

- Notice should contain the time and place of the meeting and agenda or a summary of the subject matter to be considered.
- Notice should be prominently displayed in an area in the agency's office set aside for such purposes, and on the agency's website.
- If it is an emergency meeting, the most appropriate and effective notice under the circumstances should have no less than 24 hours and preferably 72 hours reasonable notice to the public
- Use of press releases, faxes, e-mails and/or phone calls to the media is effective.

# Location

- Section 286.011(6) F.S. expressly prohibits the holding of any meeting subject to the Sunshine law at any facility “which discriminates on the basis of sex, age, race, creed, color, origin or economic status or which operates in such a manner as to unreasonably restrict public access to a facility.”
- Public access is most important.
- Can't be at location that discriminates on basis of sex, age, race, creed, color, origin, or economic status.
- Can't be at location that operates in a manner as to unreasonably restrict public access; e.g., restaurants, private clubs, private homes, small rooms.

# Location

Section 166.0213 F.S.

Governing body meetings.—Municipalities

- 1) The governing body of a municipality having a population of 500 or fewer residents may hold meetings within 5 miles of the exterior jurisdictional boundary of the municipality at such time and place as may be prescribed by ordinance or resolution.
- 2) The governing body of a municipality may hold joint meetings to receive, discuss, and act upon matters of mutual interest with the governing body of the county within which the municipality is located or the governing body of another municipality at such time and place as shall be prescribed by ordinance or resolution.

# Location

- New exception allowing joint meetings with the governing body or bodies of one or more adjacent municipalities or counties to discuss matters regarding land development or other multi-jurisdictional issues at any appropriate public place within the jurisdiction of any participating municipality or county. [Ch. 2016-148, Laws of Fla., effective July 1, 2016]

# Minutes

## Section 286.011(2)

“The minutes of a meeting of any such board or commission of any such state agency or authority shall be *promptly recorded*, and such records shall be *open to public inspection*. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.”

- Audio and video recordings are *not* minutes.

# Minutes

The Open Meetings Law requires notice of *meetings*, not individual *items* which may be considered at that meeting. Other statutes, codes, ordinances or procedural rules may impose such a requirement.

- Two-way communications outside noticed, public meetings between any two or more members of a public board about board business are *always* prohibited.
- This includes *all* communications: oral, written and *electronic* communications. In person, phone, letters, e-mail, Twitter, Facebook, LinkedIn, instant messenger and text messages.

- The following meetings have been deemed subject to the Open Meetings Law:
  - Investigative meetings;
  - Personnel matter meetings;
  - Collective bargaining negotiations;
  - Disciplinary, proceedings, grievances and appeals;
  - Appointed employee advisory and evaluation boards;
  - Selection and screening committees;
  - Purchasing or bid evaluation committees;
  - Quasi-judicial proceedings;
  - Real property negotiations;
  - Members-elect with members of the board.

# Exemptions

- **ALL STATUTORY:** Exemptions are created by a 2/3 vote of the Legislature and are generally subject to review and automatic repeal every five years unless renewed.
- The Sunshine law is to be liberally construed to accomplish its public purpose – exemptions shall be narrowly construed.
  - *See Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969)

# Specific Exemptions

- Collective Bargaining Sessions
  - The chief administrative officer, a duly appointed negotiating committee and the agency may meet in closed sessions to discuss ongoing negotiations with a collective bargaining unit.
- Security systems
  - Meetings to discuss a security plan, in general, or a security system related to any publicly owned or leased building are exempt.

# Specific Exemptions ...*continued*

- Attorney-Client Exemption: Pending Litigation Closed Session:
  - Legal counsel for the agency must advise the agency at a regularly scheduled public meeting of the need to hold such a meeting;
  - The subject matter of the meeting is limited to settlement negotiations and/or strategy session related to the litigation expenditures;
  - The entire session is recorded by a certified court reporter, fully transcribed and the transcript filed with the clerk of the agency.

# Specific Exemptions ...*continued*

- Attorney-Client Exemption: Pending Litigation Closed Session:
  - The agency shall give reasonable public notice of the session, the names and person attending and the session shall commence during a public meeting at which the presiding officer of that meeting shall announce that the agency will commence a closed session. The board returns immediately to the public meeting to announce the end of the closed session.

# Specific Exemptions ...*continued*

- Attorney-Client Exemption: Pending Litigation Closed Session:
  - The transcript shall become part of the public record upon conclusion of the litigation.
  - Only the agency, its legal counsel, its chief administrative officer and the court reporter may attend the meeting.
  - Although settlement discussion is permissible in these sessions, final action on a settlement is required to be voted upon at a public meeting.



# One Way Traps

- Oral statements made by a member of a public board at a *private meeting* where another board member is present *violate* the Open Meetings Law *regardless of whether the other official responds to the statements.*
- Community forums sponsored by private organizations. *Best practice:* either have the gathering noticed as a public meeting or *leave the room while the other board member is speaking.*
- Political forums for incumbents.
- Social and charity events. The Sunshine Law does *not* apply as long as there is no discussion on matters on which foreseeable action may be taken.

# Trick Question

Commissioner A sends an e-mail to fellow commissioners relating to an item on an upcoming agenda. Commissioner B replies to the issue and copies the City Clerk.

Was the law violated?

(If so, by whom? And which law?)



A one-way electronic or written communication by a board member is permissible if it is kept as a public record and there is *no response* to it from another board member except at a public meeting.

# Conduits



- It is not permissible to intentionally communicate to another board member outside a public meeting on an issue reasonably foreseeable to come before the board through a third party.
- It is inevitable that some unintentional communication through third parties will occur; e.g., media, constituents.
- *Do not solicit a third party to act as a liaison or conduit.*

# Trick Question

Can the public meetings law apply to a *single* member of a collegial board?

# Delegation

- When a public board delegates any portion of its decision-making authority to another group, individual or entity, that other group, individual or entity becomes subject to the Sunshine Law.
- Delegating authority creates a “sunshine board”.

# Advisory Boards

Advisory boards created by government which make recommendations to decision makers but themselves lack decision-making authority may be subject to the Sunshine Law because they are deemed part of the decision-making process.

# Fact-finding Committees

- Limited exception for advisory committees established for fact-finding or information gathering.
- Fact-finding exception does not apply to boards that have “ultimate decision-making authority”

*-Finch v. Seminole County School Board, 995 So. 2d 1068 (Fla. 5th DCA 2008)*

# Staff Meetings

Generally *not* subject to the Sunshine Law

*But*

“When a member of the staff ceases to function in his capacity as a member of the staff and is appointed to a committee which is *delegated authority* normally within the government body, he loses his identity as staff while operating on that committee and is accordingly included within the Sunshine Law.”

*-News-Press Publishing Co. v. Carlson, 410 So 2D 546, 548 (Fla. 2d DCA 1982)*

# Beware the De Facto Meeting

- It is not improper for non-board members to meet with individual board members; e.g., city manager, municipal attorney, lobbyists.
- *But* beware of creating a *de facto* meeting where a non-board member meets with every board member on an important issue just prior to a meeting and the issue is then decided with minimal or no discussion at the meeting.

- See *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979)

# Public Participation Law

## **Section 286.0114, F.S. (adopted 2013)**

Members of the public shall be provided an opportunity to address any appointed or elected body during the decision making process and prior to the body taking official action.

- It need not occur at the same meeting at which the board or commission takes official action on the proposition if the opportunity occurs at a meeting that is during the decision making process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action.

# Public Participation Law

**Section 286.0114, F.S.** (adopted 2013)... *continued*

Limits rules or policies of a board or commission which govern the opportunity to be heard to:

1. Provide guidelines regarding the amount of time an individual has to address the board or commission;
2. Prescribe procedures for allowing representatives of groups or factions on a proposition to address the board or commission, rather than all members of such groups or factions, at meetings in which a large number of individuals wish to be heard;
3. Prescribe procedures or forms for an individual to use in order to inform the board or commission of a desire to be heard; to indicate his or her support, opposition, or neutrality on a proposition; and to indicate his or her designation of a representative to speak for him or her or his or her group on a proposition if he or she so chooses;
4. Designate a specified period of time for public comment.

# Public Participation Law

**Section 286.0114, F.S.** (adopted 2013)... *continued*

- A circuit court has jurisdiction to issue an injunction for the purpose of enforcing this section upon the filing of an application for such injunction by a citizen of this state. Failure to comply could result in an award of attorney fees against the local government. Reasonable attorney fees against the individual filing such an action may be assessed if the court finds that the action was filed in bad faith or was frivolous.
- An action taken by a board or commission which is found to be in violation of this section is not void as a result of that violation.

# Legislative Matters vs. Quasi-Judicial Proceedings

**Legislative** = Setting policy

- “**Fairly debatable**”: A reasonable basis exists to support the decision of the board.

**Quasi-Judicial** = Applying the policy

- “**Competent substantial evidence**”: “...sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” *DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957)

# Quasi-Judicial Proceedings... *continued*

*Ex parte communications are presumed to be prejudicial* to one side or the other in the quasi-judicial decision making process.

- In 1995 the Florida Legislature adopted Sec. 286.0115 F.S. as a means to promote open communication between local elected officials and citizens and applicants.
  - Conduct their own inspection related to a quasi-judicial matter.
  - Talk to individuals about a quasi-judicial matter which may come before the body, provided that the *ex parte* communication is fully disclosed at the public hearing prior to the vote.
  - This removes only the *presumption* of prejudice.

# Quasi-Judicial Hearings: Legal Requirements

1. Was due process afforded? (Notice and opportunity to be heard.)
2. Was the decision based on competent, substantial evidence in the record?
3. Were the essential requirements of law met? (The correct law properly applied.)

*An Ounce of  
Procedure  
is Worth a Pound of  
Litigation*

# Other Considerations

- Public has the right to hear all comments made to or by members of the body. Private conversations and sidebars should be avoided.
- Receipt of messages, private notes or emails during meeting must be avoided.
- Time limits are permissible as long as they do not unreasonably restrict access.
- The presiding officer can regulate comment to avoid repetitive, irrelevant or disruptive comments or behavior.
- A member of the public can videotape or record any meeting.

# Section 286.012

## *Voting requirement at meetings of governmental bodies*

“A member of a state, county, or municipal governmental board, commission, or agency who is present at a meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted *may not abstain* from voting in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, *unless*, with respect to any such member, there is, or appears to be, *a possible conflict of interest*...If the official decision, ruling, or act occurs in the context of a *quasi-judicial proceeding*, a member *may abstain* from voting on such matter *if* the abstention is *to assure a fair proceeding free from potential bias or prejudice.*”

# Violations

## Impact on Action Taken

- Action taken at a meeting that was not open to the public, *whether intentional or not*, by operation of Section 286.011(1), F.S. is void ab initio (*legally nullified*).
- Curative measures can be taken if the board does not perfunctorily ratify or ceremoniously accept a tainted decision, but takes independent final action in the sunshine following a public discussion of any matters taken up privately. It is *not enough* to simply re-notice the action and seek public comment on the matter at a subsequent public meeting.  
*-See Tolar v. School Board of Liberty County, 398 So. 2d 427 (Fla. 1981)*

# Violations

## Impact on City

- Injunctive Relief. *Section 286.011(2)* expressly provides that any citizen of the state may apply to the court for injunctive relief to enforce the provisions of the Sunshine Law. The mere showing that the Sunshine Law has been violated is enough to demonstrate irreparable harm to warrant an injunction.
- Law provides for an award of reasonable attorney fees against a board or commission found to have violated the Sunshine Law.

# Violations

## Impact on Individuals Involved

- Noncriminal violations
  - *Section 286.011(3)(a) F.S.* provides that any violation of the act is punishable by a noncriminal infraction and fine up to \$500.
- Criminal Penalties
  - *Section 286.011(3)(b) F.S.* provides that it is a second-degree misdemeanor for a member to knowingly violate the Sunshine Law. Possible penalty and/or sentence: up to \$500 and/or 60 days in jail plus costs. Also possible suspension and removal from office by the Governor.
- Attorney fees may be awarded *against the individual members* involved except in those cases when the board followed advice of legal counsel.

If you find yourself in a situation where you are not sure the requirements of the Sunshine Law are being met: **EXTRICATE YOURSELF!**

ex·tri·cate

'ekstrə,kāt/

*verb*

*Free (someone or something), disentangle, get out, remove, withdraw, disengage, get someone/oneself off the hook.*

Questions?

# Elected Official Ethics Training

*Part Two*

*Public Records*

*Presented by:*

Martin Shelby

Florida Bar Board Certified in  
City, County & Local Government Law

*Florida League of Cities  
56<sup>th</sup> Annual Legislative Conference  
December 9, 2016*

# ACCESS TO PUBLIC RECORDS IS A CONSTITUTIONAL RIGHT

## Article I, Section 24 of the Florida 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*, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

# Florida's Sunshine Law

## Public Records

Section 119.01(1), Florida Statutes:

General state policy on public records.—

“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.*”

# Agencies Subject to Public Records Law

- Government body, to include, its elected officials, employees and agents
- Advisory boards
- Private entities created by a public entity:
  - Community Development Districts
  - Community Redevelopment Agency
  - Dependent Districts
  - Utility and other authorities
- Private entities doing business with the entity (receiving public funds)
  - Contracts require compliance with public records law.
  - Does not apply to all private entity's records, essentially only those related to the public business.

# Agencies Subject to Public Records Law

Private entity providing services in place of local government:

- Private jail
- Fire protection
- Employment search firm
- Salvation Army providing probation services

Key: Delegation of a governmental function

# Failure to Comply with Public Records Law

If a person requesting a public record believes that the City has failed to comply with the Law, they have the following options:

1. Participate in voluntary mediation through the Attorney General's Office.
2. File suit against the City alleging failure to comply with an immediate hearing per statute.
3. Seek an injunction against the City prohibiting future violations (usually applicable when the records have been provided after filing of an initial lawsuit).

# Penalties for Failure to Comply with Public Records Law

119.10 Violation of chapter; penalties.—

(1) Any public officer who:

(a) Violates any provision of this chapter commits a noncriminal infraction, punishable by fine not exceeding \$500.

(b) Knowingly violates the provisions of s. 119.07(1) is subject to suspension and removal or impeachment and, in addition, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) Any person who willfully and knowingly violates:

(a) Any of the provisions of this chapter commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) Section 119.105 (exempt or confidential information contained in police reports) commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

# Public Records Violations – Attorneys' Fees

## New Florida Supreme Court Decision:

*Board of Trustees of Jacksonville Police & Fire Pension Fund v. Lee*, No. SC13-1315 (Fla. Apr. 14, 2016).

- “In accordance with case law liberally construing the Public Records Act in favor of open access to public records, the reasonable statutory construction of the attorney’s fee provision, and the letter and spirit of the constitutional right to inspect or copy public records, we hold that a prevailing party is entitled to statutory attorney’s fees under the Public Records Act when the trial court finds that the public agency violated a provision of the Public Records Act in failing to permit a public record to be inspected or copied. *There is no additional requirement, before awarding attorney’s fees under the Public Records Act, that the trial court find that the public agency did not act in good faith, acted in bad faith, or acted unreasonably.*”

# Florida Public Records Law

What is a “public record”?

Section 119.011(12):

“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.*

# Florida Public Records Law

Who is responsible?

**Section 119.07(1)(a)**

*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.

# Florida Law Defines Public Records to Include:

- All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material
- regardless of 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

**-Fla. Stat. § 119.011(12)**

# Florida Public Records Law

## What is a “public record”?

Florida Supreme Court has interpreted the term “public records” to encompass:

- All materials made or received by an agency,
- In connection with official business,
- Which are used to perpetuate, communicate or formalize knowledge.

*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

# Key Concept

PUBLIC RECORD CREATED TO

- PERPETUATE
- COMMUNUCIATE
- FORMALIZE

# What Records are Public Records?

- Florida's Public Records Law is broad in scope.
- All records are presumed open unless the Florida *Legislature* has created a specific statutory *exemption*.
- What you name or call the record does not determine whether it is a public record.
- The *content of the record is what matters*.
- Documents marked with words such as Confidential, Exempt, Work Product, etc. *may still be subject* to inspection.

# Drafts and Notes

There is *no* “unfinished business” exception

- Interoffice or intra-office memorandum between government employees and/or officials are public records.
- Working drafts, if they are circulated for review or comment, are public records.
- Notes intended solely for personal use have been determined to *not* be public records.
  - But, if the notes were taken to confirm or summarize what was discussed at a meeting or discussion regarding city business, then they are likely a public record, because the notes *formalize* knowledge.

# Florida's Sunshine Law

## Public Records

**What about all of the work I do on my computer?**

**Is that public too?**

- Purely personal e-mails are not public records, but be warned there is no “expectation of privacy” for the communications you make on a government-owned computer
- City related e-mails, Facebook entries, Tweets and Instant Messages are public records
- Includes metadata

# Public Records

- Document distributed for review or comment by others is a public record
- “Preliminary” or “working drafts” which are circulated to others are public records
- E-mails and text messages
- Website blogs and message boards
- Communications on social networking sites
- Does not matter what device (public or private) is used to create the record. *State v. City of Clearwater*, 863 So.2d 149 (Fla. 2003)

# Records which are not Public Records

- Personal notes which are not distributed to others nor filed as a permanent record
- Personal notes kept solely to refresh your memory
- Draft documents which are not circulated
- Private e-mails – Remember your city policy may prohibit use of city issued equipment for private activities

# Duty to Acknowledge and Respond Promptly

## Section 119.07(c)

A custodian of public records and his or her designee must *acknowledge requests* to inspect or copy records *promptly* and *respond* to such requests in *good faith*. A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed.

# Public Records Request

Requests may be:

- Verbal
- Written
- E-mailed
- By any person
- For any or no reason

# Public Records Request

- Requester *does not* have to provide his/her name or means of contact
- Requester *does not* have to indicate why he/she requests the records
- Requester *has the right to inspect and copy* (and photograph) any public record which is not exempt from disclosure

# Public Records Request

- Access to Public Records *may not be denied* even if excessive or overbroad.
- Must provide a copy of a public record in format requested if the City maintains the record in that format.

# Florida's Sunshine Law

## Public Records

### Exemptions:

- Exemptions must be *explicitly provided by statute*
- Exemptions must be *narrowly applied*
- Claims to exemptions must be *stated in writing to requestor*

# Some Common Exemptions

- Social Security Numbers
- Personal Medical Information
- Bank account numbers and charge, debit and credit card numbers
- Home addresses, telephone numbers, social security numbers, dates of birth and photographs of certain individuals- sworn law enforcement, firefighters, etc. and their spouses and children
- Security system plans
- Trade secrets

# Some Common Exemptions

## *continued*

- Building plans, blueprints, schematic drawings which depict the internal layout and structural elements of government buildings, utilities and certain non-government developments
- Audit work papers and notes until the audit is complete
- Information that provides the identities or locations of a child (or his/her parent or guardian) that participates in a government-sponsored recreation program

This year the Legislature created eleven new exemptions and renewed seven.

# Exempt or Confidential

*Exempt:* May be redacted before disclosure.

If the request seeks documents that are subject to an exemption, then the custodian is obligated to state the basis for the exemption including the applicable statute that establishes the claimed exemption. If the record contains information that is exempt from disclosure and other information that is not, the custodian must redact the exempt information and provide the redacted record to the requestor.

*Confidential:* Must be redacted.

Disclosure of some statutorily defined records if done willfully and knowingly is a *criminal* offense!

# Retention of Public Records

- Public Records must be maintained in accordance with rules adopted by the Division of Library and Information Services of the Department of State for the retention and disposal process for public records.
- “Litigation holds” on records based on the “reasonable anticipation of litigation”. Destroying evidence may create an inference that the party had “consciousness of guilt”.

Record must be disclosed and made available for inspection unless, the document, material or item:

- Is not a public record
- Is subject to an exemption
- Does not exist:
  - Never existed
  - Existed but has met retention guidelines and been destroyed under an established retention management policy

# Florida Public Records Law

## Fees

- Fee for duplication authorized by statute.
- Extensive use of IT resources, staff, or supervisory, may require a “special service charge”.
- Special service charge *must be reasonable* and *based on actual cost incurred*.

# Florida Public Records Law

What do I do if I receive a public records request?

- Duty to acknowledge request
- Duty to respond (provide responsive records or claim statutory exemption)
- Contact records custodian
- Consult entity's attorney

# Time to Respond

- The Public Records Law does not establish a specific timeframe for responding to requests.
- According to the Florida Supreme Court the time to respond “is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian exerts are exempt.”
- The reasonable time to respond is ultimately determined based on the nature of the request and the volume of documents involved.
- An unjustified or arbitrary delay in producing documents has been deemed an unlawful refusal to provide public records. (45 day delay in responding)

# What to do When a Public Records Request is Made

- Ensure that it is clear what the requester wants.
- Provide the requester with a prompt acknowledgement of the request and respond in good faith.
- If the requested public records are readily available for inspection and contain no exempt information, allow immediate access (e.g. visitor logs, City Council agenda).
- If the requester would like copies, provide them immediately if possible.

# What to do When a Public Records Request is Made

*continued*

- If the requested public records require your review for exemptions prior to disclosure, inform the requester that the records need to be reviewed prior to disclosure, but will be readily available thereafter.
- If you are not sure if a public record contains any exempt information, contact your City Attorney or your department's legal representative.

# Additional Considerations

- Requests should be fulfilled within a reasonable time by law. Do not delay in fulfilling requests.
- Remember that a request may include records not within your department.
- Notify requester of estimated costs of producing public records for permission prior to proceeding.
- Requester may photograph a public record after any exempt information is deleted.
- Inspections only of public records must be supervised.

# What a Public Records Request Response Does Not Require

- Do *not* have to create a document
- Do *not* have to provide a record in the format requested unless maintained in that format
- Do *not* have to explain the records provided or provide additional information
- Do *not* have to meet the timetable requested for a response
- Do *not* have to honor standing or continuing requests

# Social Media

## Facebook, Twitter, LinkedIn, YouTube

- Think twice about posting.
- Be careful what you “Like”!
- Deleting is not a cure and may make things worse!
- Remember the phone? It may be your best option.

Questions?

# Elected Official Ethics Training

*Part Three*

*The Code of Ethics for Public Officers and Employees*

*Presented by:*

Martin Shelby

Florida Bar Board Certified in  
City, County & Local Government Law

*Florida League of Cities*  
*56<sup>th</sup> Annual Legislative Conference*  
*December 9, 2016*

# Article II, Section 8, Florida Constitution

Ethics in government -

“A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse.”

# Article II, Section 8, Florida Constitution

- (a) Disclosure of Financial Interests
- (b) Disclosure of Campaign Finances
- (c) Liability for Breach of Public Trust for Private Gain
- (d) Felony for Breach of Public Trust = forfeiture of retirement
- (e) Allowing for restrictions against representing individuals before your governing body (Revolving Door)
- (f) Providing for independent commission to conduct investigations and make public reports (Florida Commission on Ethics)
- (g) Requiring a code of ethics for all state employees and non-judicial officers prohibiting conflict between public duty and private interests (Code of Ethics – chapter 112, part III)
- (h) No limitation on disclosures or prohibitions otherwise established by law to preserve public trust and avoid conflicts between public duties and private interests.

# Basic Principles of Ethics in Florida

## *Chapter 112, Part III*

“It is essential to the proper conduct and operation of government that *public officials* be *independent* and *impartial* and that *public office not be used for private gain* other than the remuneration provided by law. The public interest, therefore, requires that the *law protect against any conflict of interest* and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.”

# Basic Principles of Ethics in Florida

## *Chapter 112, Part III (Legislative Intent)*

“It is declared to be the *policy of the state that public officers and employees*, state and *local*, are agents of the people and hold their positions *for the benefit of the public*.

...promoting the *public interest* and maintaining the *respect of the people* in their government must be of *foremost concern*.”

# Persons Governed By the Ethics Laws

“Public Officer” – defined to include persons elected or appointed to hold office in any agency, including any persons serving on an advisory body. [Sec. 112.313(1) F.S.]

“Employees of Agencies”

“Local Government Attorneys”

# Basic Principles of Ethics in Florida

## *Other applicable laws*

- Charters, local ordinances or ethics codes
- Chapter 838 F.S. – Bribery, Misuse of Public Office
  - Second degree felonies (Up to 15 years and \$10,000 fine).
  - “Corrupt intent” (acting knowingly and dishonestly for a wrongful purpose) becomes “knowingly and willingly”.  
Effective October 1, 2016 [Ch. 2016-151, Laws of Florida].
- Section 839.26 F.S. - Misuse of Confidential Information
- 18 USC sec. 1346 - Honest Services Fraud
- Florida Common Law

# Basic Principles of Ethics in Florida

## *Statutory Subjects...Chapter 112.313*

- Solicitation or acceptance of gifts (bribes)
- Unauthorized compensation (gift for influence)
- Misuse of public position
- Disclosure or use of certain information
- Doing business with one's agency
- Conflicting employment or contractual relationship
- Voting conflicts
- Restriction on employment of relatives (nepotism)
- Financial Disclosures (Form 6)

# Solicitation or Acceptance of Gifts

Sec. 112.313(2) F.S. -

*No public officer*, employee of an agency, local government attorney, or candidate for nomination or election shall *solicit or accept anything of value* to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, *based upon any understanding* that the *vote*, official *action*, or *judgment* of the public officer, employee, local government attorney, or candidate *would be influenced thereby*.

# Unauthorized Compensation

Sec. 112.313(4) F.S. –

No *public officer*, employee of an agency, or local government attorney or his or her *spouse* or *minor child* shall, at any time, accept any compensation, payment, or *thing of value when such public officer*, employee, or local government attorney *knows*, or, with the exercise of reasonable care, *should know*, that it was *given to influence* a *vote or other action* in which the officer, employee, or local government attorney was expected to participate in his or her *official capacity*.

# Gifts

A gift is *anything* of value you don't pay for within 90 days.

*Prohibited gifts vs. legal and reportable gifts:*

If a gift is prohibited, reporting it won't cure the violation!

# Legal and Reportable Gifts

It is not intended to influence you.

It doesn't influence you.

It is reported if over \$100.

*Cannot accept a gift from a:*

*1.) political committee (2013 statute)*

*2.) a vendor (see: chapter 112.3148 FS)*

# Legal and Reportable Gifts

Can be accepted in any amount, except from lobbyists.

*Maximum* permissible value of gift from lobbyist = \$100

“**Lobbyist**” means any natural person who, for compensation, seeks, or sought during the preceding 12 months, to influence the governmental decision-making of a reporting individual or procurement employee or his or her agency or seeks, or sought during the preceding 12 months, to encourage the passage, defeat, or modification of any proposal or recommendation by the reporting individual or procurement employee or his or her agency.

- Exercise caution when soliciting *anyone* for charity or your governmental entity.

# Legal and Reportable Gifts

## Valuation – What is the gift's value?

Compensation provided by the donee to the donor, if provided *within 90 days after receipt of the gift*, shall be deducted from the value of the gift in determining the value of the gift.

Florida Administrative Code  
Rule 34-13.500 Gift Valuation

*Gifts from relatives* may be of *any* value and *are not reported!*

# WHO ARE RELATIVES?

- Generally under Chapter 112, Florida Statutes, including GIFTS [Sec. 112.312(21) F.S.]
- Voting Conflicts [Sec. 112.3143 F.S.]
- Restriction on Employment of Relatives (Anti-Nepotism) [Sec. 112.3135 F.S.]

# Legal and Reportable Gifts

## Reporting requirement:

Form 9 – Quarterly Gift Disclosure

Must be filed by the end of the calendar quarter following the quarter within which you received the gift.

# Honoraria and Honorarium Event Related Expenses

## *Honorarium:*

- A payment, directly or indirectly, as consideration for an oral presentation or writing.
- Prohibited from soliciting an honorarium which is related to your public office or duties.
- Prohibited from knowingly accepting an honorarium from a political committee, lobbyist or its principal.

## *Honorarium event:*

- A meeting, function or convention where you've been invited to make your speech or presentation.

May accept actual and reasonable expenses related to an honorarium event. Reporting requirements if expenses paid by a lobbyist.

# Misuse of Public Position

Sec. 112.313(6) F.S. -

*No public officer*, employee of an agency, or local government attorney shall *corruptly use or attempt to use* his or her official *position* or any *property* or *resource* which may be within his or her trust, or perform his or her official duties, to secure a *special privilege, benefit*, or *exemption* for *himself, herself*, or *others*. This section shall not be construed to conflict with s. 104.31.

# Disclosure or Use of Certain Information

Sec. 112.313(8) F.S. -

A *current* or *former* public officer, employee of an agency, or local government attorney may *not disclose or use information not available to members of the general public* and *gained* by reason of his or her official *position*, except for information relating exclusively to governmental practices, for his or her *personal gain or benefit* or for the personal gain or benefit of any *other person* or *business entity*.

# Doing Business With One's Agency

Sec. 112.313(3) F.S. -

No employee of an agency acting in his or her official capacity as a purchasing agent, or *public officer* acting in his or her *official capacity*, shall either directly or indirectly *purchase, rent, or lease* any *realty, goods, or services for his or her own agency from any business entity* of which the *officer* or employee or the officer's or employee's *spouse or child is an officer, partner, director, or proprietor* or in which such officer or employee or the officer's or employee's spouse or child, or any *combination* of them, has a *material interest*.

# Doing Business With One's Agency...continued

Nor shall a public *officer* or employee, acting in a *private capacity*, rent, lease, or sell any realty, goods, or services *to the officer's* or employee's own *agency*, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator's place of business or when such offices are on property wholly or partially owned by the legislator.

-Exception for contracts entered into prior to office – but not changes to such contracts.

# Conflicting Employment or Contractual Relationship

Sec. 112.313(7)(a) F.S. -

No *public officer* or employee of an agency shall have or *hold any employment or contractual relationship* with any business *entity* or any agency which is subject to the *regulation* of, or is *doing business with*, an *agency* of which *he or she is an officer or employee*, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a *collective bargaining contract* with the state or any municipality, county, or other political subdivision of the state;

# Conflicting Employment or Contractual Relationship...continued

...nor shall an officer or employee of an agency *have* or hold any *employment or contractual relationship that will create a continuing or frequently recurring conflict between* his or her *private interests* and the *performance* of his or her *public duties* or that would *impede* the *full and faithful discharge* of his or her *public duties*.

Tests:

- a. Frequently recurring conflict
- b. Impede full and faithful discharge of public duties

*May yield harsh result...choice between public office and private employment.*

# Conflicting Employment or Contractual Relationship...*continued*

## Exceptions

Advisory board members after full disclosure conflict may be waived by 2/3 vote of appointing body

## General Exemptions

- Rotation system
- Competitive bidding (must meet certain criteria and filings)
- Legal advertising, utilities service, passage on a common carrier
- Emergency purchase or contract
- Sole source within city after disclosure

# Conflicting Employment or Contractual Relationship...*continued*

## General Exemptions...*continued*

- Not exceed \$500 per calendar year
- Banks...without favor
- Private purchase at terms available to public
- Blind trusts
- 501(c)3 exemption (doing business only)

# Voting Conflicts

Sec. 112.3143(3)(a) F.S. -

No county, *municipal*, or other local public officer shall *vote* in an official capacity upon any measure which *would inure to his or her special private gain or loss*; which he or she knows would inure to the special private gain or loss of any *principal* by whom he or she is retained or to the parent organization or subsidiary of a *corporate principal* by which he or she is retained, other than an agency as defined in s.112.312(2); or which he or she knows would inure to the *special private gain or loss of a relative or business associate* of the public officer.

# Voting Conflicts...continued

*Test: Special Gain or Loss*

*Announce...abstain....disclose....file...*

*Exception for CRA*

ADVICE: GET OFF DAIS – DON'T PARTICIPATE

## *Voting Conflict Tests*

Standard:

- Special private gain or loss (must be special and private)
- Size of the class test...1%
- Remote and speculative test

# Voting Conflicts...*continued*

## *2013 Statutory Changes*

- Change to “special private gain or loss” if applied to a class
- If measures affect a “class” that includes the officer, relatives, business associates or principals then the following factors must be considered:
  - Size of the class test
  - Nature of Interests
  - Degree to which interests affected
  - Greater when compared to members of class

# Voting Requirement

*You must vote unless you have a legal conflict*

*Sec. 286.012 - Voting requirement at meetings of governmental bodies.*

*No member* of any state, county, or *municipal governmental board*, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted *may abstain* from voting in regard to any such decision, ruling, or act; and a *vote shall be recorded* or counted for each such member present, *except* when, with respect to any such member, there *is, or appears to be, a possible conflict* of interest under the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases, said member shall comply with the disclosure requirements of s. 112.3143.

# Restriction on Employment of Relatives

Sec. 112.3135 F.S. - A *public official* may *not appoint, employ, promote, or advance, or advocate* for appointment, employment, promotion, or advancement, in or to a position in the agency in which the official is serving or over which the official exercises jurisdiction or control any individual who is a *relative of the public official*. *An individual may not be appointed, employed, promoted, or advanced* in or to a position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual or if such appointment, employment, promotion, or advancement is made by a *collegial body* of which a relative of the individual is a member.

# Restriction on Employment of Relatives

## *...continued*

However, this subsection *shall not apply to appointments to boards other than those with land-planning or zoning responsibilities* in those municipalities with *less than 35,000* population.

(a) Population under 35,000

(b) No Land Planning function

*Note that limitation is on both the public official and the employee – applies to paid and unpaid positions*

*Does not prohibit two relatives from being employed within the same agency, or independent contractors*

# Additional Considerations

## Other Employment Restrictions (Dual Public Employment)

- Cannot be both employee and commissioner of same entity.

## Dual Office-Holding

- Article II, Section 5(a), Florida Constitution

## Former Elected Officials

- Cannot lobby (personally represent another person or entity for compensation) before the government body or agency of which the person was an officer for a period of 2 years after vacating that office.

# Financial Disclosure

## Limited Disclosure (Form 1)

- No disclosure of dollar amounts – but sources
- Real property (does not include residence/vacation homes)
- Intangible property over 10%
- Interest in specified businesses
- Liabilities, with exceptions

## Full Disclosure (Form 6)

- Income
- Net worth
- Each asset/liability worth more than \$1,000
- Interest in specified businesses

# Financial Disclosure

## *...continued*

- Due annually on July 1. (Newly appointed or newly employed Form 1 filers must file within 30 days.)
- Grace period in effect until September 1
  - If amended prior to September 1, the amendment is treated as being the original filing.
  - After September 1, automatic fines of \$25 per day late up to a maximum of \$1,500.
  - 30 days to appeal after notice of assessment.
  - 20 year statute of limitations on collection of fines.
  - Collections can be through salary deduction. If no longer receiving public salary, wages may be garnished.

# Financial Disclosure

## *...continued*

- An ethics complaint could be filed against the filer.
  - Penalties include removal or suspension from office, dismissal from employment, public censure and reprimand, disqualification from being on the ballot.
  - If a complaint is filed and it “alleges an immaterial, inconsequential, or de minimus error or omission” (“if the original filing provided sufficient information for the public to identify potential conflicts of interest’), the filer is given 30 days to correct. Forgiven if corrected.

### Final Statement of Financial Interest

- To be filed within 60 days of leaving public office or employment.

# Commission on Ethics

## *Nine Non Partisan Members\**

Governor 5

Senate President 2

Speaker of the House 2

*\*2 year terms/may be reappointed once*

## *Duties*

- Advisory opinions
- Investigate complaints
- Recommend penalties

# Commission on Ethics...*continued*

## *Penalties for Public Officers*

- Removal from office
- Suspension from office
- Public censure and reprimand
- Forfeiture of 1/3 of salary for a year
- Civil penalty up to \$10,000
- Restitution of benefits received

# Commission on Ethics...*continued*

## *Penalties for Employees*

- Dismissal from employment
- Suspension without pay for up to 90 days
- Demotion or reduction in salary
- Forfeiture of 1/3 of salary for a year
- Civil penalty up to \$10,000
- Restitution of benefits received

# Commission on Ethics...*continued*

## *Civil Remedy for Contracts Executed in Violation of the Code of Ethics*

- Contract is **voidable** in any circuit court by action of the Commission on Ethics, the Attorney General, or any citizen materially affected by the contract and residing in the jurisdiction represented by the officer or agency entering into such contract. [Sec. 112.3175 F.S.]

# Resources

- YOUR CITY ATTORNEY
- Florida League of Cities [www.floridaleagueofcities.com](http://www.floridaleagueofcities.com)
- Florida Commission on Ethics <http://www.ethics.state.fl.us/>
- Florida Institute of Government and Affiliates <http://iog.fsu.edu/>
- Florida Statutes <http://www.leg.state.fl.us>
- Florida Attorney General <http://myfloridalegal.com/>
- 2016 GUIDE to the SUNSHINE AMENDMENT and CODE of ETHICS for Public Officers and Employees:  
<http://ethics.state.fl.us/Documents/Publications/GuideBookletInternet.pdf>

*It Is Better To Ask Permission  
Than Forgiveness*

Questions?