

Ethics and Sunshine Laws for Local Government Officers and Employees

Presented by:

Martin Shelby
Tampa City Council Attorney

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

*FLC Legislative Conference
Orlando, Florida
November 15, 2019*

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).

Section 112.3142, Florida Statutes:

Ethics training for specified constitutional officers and elected municipal officers.

Compliance will be reported on Form 1, “Statement of Financial Interest”, which must be completed and returned by July 1 of each year.

PART G — TRAINING

For **elected municipal officers** required to complete annual ethics training pursuant to section 112.3142, F.S.

I CERTIFY THAT I HAVE COMPLETED THE REQUIRED TRAINING.

Order of Discussion

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

Florida Code of Ethics for Public Officers

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.”

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*.”

Basic Principles of Ethics in Florida

Statutory Subjects...Chapter 112 F.S.

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

Other Applicable Laws

- City Charter & Code of Ordinances
- Chapter 838 F.S. – Bribery, Unlawful Compensation
 - Second degree felonies (Up to 15 years and \$10,000 fine).
- Chapter 839 F.S. – Official Misconduct
 - Third degree felony (Up to 5 years and \$5,000 fine).
- Section 839.26 F.S. - Misuse of Confidential Information
 - First degree misdemeanor (Up to 1 year and \$1,000 fine.)
- 18 USC sec. 1346 - Honest Services Fraud
- Florida Common Law

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”

“Reporting Individuals” (and state procurement employees)

“Reporting individual” means any individual, including a candidate upon qualifying, who is required by law, pursuant to s. 8, Art. II of the State Constitution or s. 112.3145 (**“Local Officer”**), to file full or limited public disclosure of his or her financial interests or any individual who has been elected to, but has yet to officially assume the responsibilities of, public office. For purposes of implementing this section, the “agency” of a reporting individual who is not an officer or employee in public service is the agency to which the candidate seeks election, or in the case of an individual elected to but yet to formally take office, the agency in which the individual has been elected to serve.

Prohibited Conflict

vs.

Voting Conflict

Conflict of Interest

Sec. 112.312(8) “Conflict” or “conflict of interest” means a situation in which regard for a private interest tends to lead to disregard of a public duty or interest.

A situation that “tempts dishonor”.

Interferes with the full and faithful discharge of duties.

Agenda Review

Pre-Vote Checklist

Prohibited Conflicts: **Abstaining** does not prevent an ethics violation!

ASK:

- Doing business with one's agency?
- Conflicting employment or contractual relationship?
- Employment of relative?

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...

-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 among all qualified suppliers
- 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 full disclosure

Conflicting Employment or Contractual Relationship...*continued*

General Exemptions...*continued*

- Transactions don't exceed \$500 per calendar year
- Bank as depository of funds so long as without favor
- Private purchase from supplier at terms available to public
- Blind trusts
- 501(c)3 exemption (doing business only)
 - Not compensated as a result of contract or relationship
 - No participation
 - Abstain from voting

Restriction on Employment of Relatives (Anti-Nepotism)

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

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

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

WHO ARE RELATIVES?

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

RELATIVES

Generally under Chapter 112, Florida Statutes,
including GIFTS [Sec. 112.312(21) F.S.]

- “Relative,” unless otherwise specified in this part, means an individual who is related to a public officer or employee as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, grandparent, great grandparent, grandchild, great grandchild, step grandparent, step great grandparent, step grandchild, step great grandchild, person who is engaged to be married to the public officer or employee or who otherwise holds himself or herself out as or is generally known as the person whom the public officer or employee intends to marry or with whom the public officer or employee intends to form a household, or any other natural person having the same legal residence as the public officer or employee.

RELATIVES

Restriction on Employment of Relatives (Anti-Nepotism) [Sec. 112.3135 F.S.]

- “Relative,” for purposes of this section only, with respect to a public official, means an individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

RELATIVES

Voting Conflicts [Sec. 112.3143 F.S.]

- “Relative” means any father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law.

RELATIVES

...continued

City of Tampa [Sec. 2-502 Code of Ordinances]

- “Immediate Family” means spouse, parents and children of the person involved.
- “Close personal relationship” means dating, cohabitation, and/or having an intimate sexual relationship. Dating includes but is not limited to casual dating, serious dating, or casual sexual involvement where the parties have no intention of carrying on a long-term relationship, cohabitation, and any other conduct or behavior normally associated with romantic or sexual relationships. This definition applies regardless of the sexual orientation of the employees involved. Persons involved in a close personal relationship shall be referred to as a "close personal relation."

RELATIVES

City of Tampa [Sec. 2-502 Code of Ordinances]

- “Relative” means an individual who is related to the subject official or employee as father, mother, son, daughter, grandfather, grandmother, grandchild, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, anyone who is engaged to be married to the subject official or employee, or anyone who is a domestic partner pursuant to Sec. 12-120, City of Tampa Code.

Section 286.012 F.S.

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.*”

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*

Announce...disclose...abstain...file Form 8b within 15 days of the vote.

Exception: Does not apply votes by a community redevelopment agency.

Though no legal requirement to leave the room, best practice: **Get off dais – don't participate**

Voting Conflicts...*continued*

Voting Conflict Tests

Special private gain or loss (**Economic benefit or harm**)

- ✓ What is the size of the affected class?
- ✓ Is the result remote and speculative?
- ✓ Is this merely a preliminary or procedural matter?

Voting Conflicts...*continued*

- Size of the Affected Class
 - “Special private gain or loss” will depend on the size of the class of persons who are similarly affected by the vote.
 - The LARGER the class size, the LESS likely the gain or loss is “special”.
 - The SMALLER the class size, the MORE likely the gain or loss is “special”.

Voting Conflicts...*continued*

- Remote or Speculative

- “The degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit or harm must also be considered.” [Sec. 112.3143(d) F.S]
- CEO 12-1: “[I]f there is uncertainty at the time of the vote as to whether the measure will directly affect the officer or any of the listed others and, if so, what the nature or magnitude of the gain or loss might be...”

Voting Conflicts...*continued*

- Preliminary or Procedural

- Does not necessarily create a voting conflict.
- Some measures, while procedural in nature are **substantive in effect** and **will** result in actual gain or loss.
- **Later** actions which would result in **actual** economic gain or loss.

Florida Gift Law

- 1) Is it a gift?
- 2) Why are you getting this gift?
- 3) Who is it from?
- 4) What is its value?

Gifts

“Gift,” for purposes of ethics in government and financial disclosure required by law, means that which is accepted by a donee **or by another on the donee’s behalf**, or that which is **paid or given to another for or on behalf of a donee**, directly, **indirectly**, or in trust for the donee’s benefit **or by any other means**, for which equal or greater consideration is not given within 90 days, including:

Gifts...continued

1. Real property.
2. The use of real property.
3. Tangible or intangible personal property.
4. The use of tangible or intangible personal property.
5. A preferential rate or terms on a debt, loan, goods, or services, which rate is below the customary rate and is not either a government rate available to all other similarly situated government employees or officials or a rate which is available to similarly situated members of the public by virtue of occupation, affiliation, age, religion, sex, or national origin.
6. Forgiveness of an indebtedness.
7. Transportation, other than that provided to a public officer or employee by an agency in relation to officially approved governmental business, lodging, or parking.
8. Food or beverage.
9. Membership dues.
10. Entrance fees, admission fees, or tickets to events, performances, or facilities.
11. Plants, flowers, or floral arrangements.
12. Services provided by persons pursuant to a professional license or certificate.
13. Other personal services for which a fee is normally charged by the person providing the services.
14. Any other similar service or thing having an attributable value not already provided for in this section.

Gifts

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

Indirect Gift:

Rule 34-13.310:

“...where the gift or the benefit of the gift ultimately is received by the reporting individual...and where the gift is provided with the intent to benefit the reporting individual...”

Prohibited Gifts vs. Legal and Reportable Gifts

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

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*.

Prohibited Gifts to Reporting Individuals

Florida Administrative Code

Rule 34-13.310 Prohibitions Against Accepting and Giving Gifts

A gift solicited by a reporting individual *or any person on his or her behalf* **in any amount** from:

- 1) a political committee*
- 2) a vendor doing business with your city*
- 3) a lobbyist or a principal*

Prohibited Gifts to Reporting Individuals

A gift *knowingly accepted* by a reporting individual or *any person on his or her behalf, directly or indirectly* from:

- 1) A political committee *in any amount.*
- 2) a vendor doing business with your city, with a value in excess of \$100.
- 3) a lobbyist or a principal, with a value in excess of \$100.

“Political committee” is defined in Sec. 106.011(16)(a) F.S. Gift prohibitions apply to the reporting individual and “immediate family”, defined as his or her parent, spouse, child or sibling. Campaign contributions and expenditures authorized by statute are **not gifts**.

“Vendor” means a business entity doing business directly with an agency, such as renting, leasing, or selling any realty, goods, or services.

“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.

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!*

Legal and Reportable Gifts

Reporting requirement:

Form 9 – Quarterly Gift Disclosure

“a gift having a value in excess of \$100”

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

Form 9

QUARTERLY GIFT DISCLOSURE (GIFTS OVER \$100)

LAST NAME -- FIRST NAME -- MIDDLE NAME:			NAME OF AGENCY:	
MAILING ADDRESS:			OFFICE OR POSITION HELD:	
CITY:	ZIP:	COUNTY:	FOR QUARTER ENDING (CHECK ONE):	YEAR
			<input type="checkbox"/> MARCH <input type="checkbox"/> JUNE <input type="checkbox"/> SEPTEMBER <input type="checkbox"/> DECEMBER	20__

PART A — STATEMENT OF GIFTS

Please list below each gift, the value of which you believe to exceed \$100, accepted by you during the calendar quarter for which this statement is being filed. You are required to describe the gift and state the monetary value of the gift, the name and address of the person making the gift, and the date(s) the gift was received. If any of these facts, other than the gift description, are unknown or not applicable, you should so state on the form. As explained more fully in the instructions on the reverse side of the form, you are not required to disclose gifts from relatives or certain other gifts. **You are not required to file this statement for any calendar quarter during which you did not receive a reportable gift.**

DATE RECEIVED	DESCRIPTION OF GIFT	MONETARY VALUE	NAME OF PERSON MAKING THE GIFT	ADDRESS OF PERSON MAKING THE GIFT

CHECK HERE IF CONTINUED ON SEPARATE SHEET

PART B — RECEIPT PROVIDED BY PERSON MAKING THE GIFT

If any receipt for a gift listed above was provided to you by the person making the gift, you are required to attach a copy of that receipt to this form. You may attach an explanation of any differences between the information disclosed on this form and the information on the receipt.

CHECK HERE IF A RECEIPT IS ATTACHED TO THIS FORM

Commission on Ethics CEO 16-1

- A **reporting individual** is **dating** a lawyer who is a partner in a law firm that is both a **lobbyist** and a **vendor**.
- They exchange gifts on special occasions, incur expenses attending recreational and entertainment events together, they dine together, travel together, perhaps even on a business trip for the lawyer's firm at the firm's expense.

QUESTION: What are the legal obligations (if any) created for each of them under the Code of Ethics?

Honoraria and Honorarium Event Related Expenses

Honorarium:

- A payment, directly or indirectly, as consideration for an oral presentation or writing.
- Prohibited from **soliciting** anyone for an honorarium which is related to your public office or duties.
- Prohibited from **knowingly accepting** an honorarium from a political committee, a lobbyist or its principal (who lobbied your city within past 12 months) or a vendor doing business.

Honoraria and Honorarium Event Related Expenses

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. *You* have reporting requirements if expenses paid by a lobbyist. (Annual disclosure for the calendar year, Form 10.)

FORM 10

ANNUAL DISCLOSURE OF GIFTS FROM GOVERNMENTAL ENTITIES AND DIRECT SUPPORT ORGANIZATIONS AND HONORARIUM EVENT RELATED EXPENSES

LAST NAME -- FIRST NAME -- MIDDLE NAME:

THIS STATEMENT REFLECTS GIFTS AND HONORARIUM EVENT RELATED EXPENSES RECEIVED DURING CALENDAR YEAR 20____.

DO NOT FILE THIS FORM IF YOU HAVE NOTHING TO REPORT ON IT.

MAILING ADDRESS:

NAME OF AGENCY:

CITY:

ZIP:

COUNTY:

OFFICE OR POSITION HELD:

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 (ballot preparation).

Misuse of Public Position

Corruptly =

- 1) Conduct inconsistent with proper performance of duties...
- 2) knowing conduct is wrong...
- 3) And intending to gain personal privilege, benefit, exemption.

Additional Considerations

Prohibitions:

Dual Office-Holding

- Article II, Section 5(a), Florida Constitution
- Sec. 112.3135 F.S.

Dual Public Employment - Sec. 112.313(10) F.S.

- No employee of a state agency or of a county, municipality, special taxing district, or other political subdivision of the state shall hold office as a member of the governing board, council, commission, or authority, by whatever name known, which is his or her employer while, at the same time, continuing as an employee of such employer.

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*.

Former Elected Officials

Current Law

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.

Florida Constitution Amendment 12, Lobbying Restrictions Amendment (2018)

- Effective December 31, 2020: Bars public officer from abusing his or her public position in order to obtain a “disproportionate benefit” for himself or herself, his or her spouse, children, or employer, or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest.
- Effective December 31, 2022: Creates prohibition on lobbying for compensation by serving public officers on “issues of policy, appropriations, or procurement before the federal government, the legislature, any state government body or agency, or any political subdivision of this state, during his or her term in office.”
- Effective December 31, 2022: Expands current restrictions on lobbying (personally represent another person or entity for compensation) by former public officers before the government body or agency of which the person was an officer from the current 2 years to a period of 6 years after vacating that office.

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.]

Remedy for Frivolous Complaint

In any case in which the commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee by filing the complaint with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part, the complainant shall be liable for costs plus reasonable attorney fees incurred in the defense of the person complained against, including the costs and reasonable attorney fees incurred in proving entitlement to and the amount of costs and fees. If the complainant fails to pay such costs and fees voluntarily within 30 days following such finding by the commission, the commission shall forward such information to the Department of Legal Affairs, which shall bring a civil action in a court of competent jurisdiction to recover the amount of such costs and fees awarded by the commission. (Section 112.317(7), Florida Statutes)

*It Is Better To Ask Permission
Than Forgiveness*

Public Records Law

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

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).

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

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.

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.

Delegation Test

- When a public entity delegates a statutorily authorized function to a private entity, the records generated by the private entity's performance of that duty become public records.

“Totality of Factors” Test

- 1) The level of public funding.
- 2) Commingling of funds.
- 3) Whether on publicly owned property.
- 4) Are contracted services part of the public agency’s decision-making process.
- 5) Whether performing a governmental function.
- 6) Extent of public agency control.
- 7) Was the private entity was publicly created.
- 8) Public financial interest in private entity.
- 9) For whose benefit does private entity function.

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.

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!

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
- Trade secrets

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)

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.

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

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

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

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

State of Florida

**GENERAL RECORDS SCHEDULE GS1-SL
FOR STATE AND LOCAL GOVERNMENT
AGENCIES**



EFFECTIVE: August 2017

Rule 1B-24.003(1)(a), *Florida Administrative Code*

Florida Department of State
Division of Library and Information Services
Tallahassee, Florida

850.245.6750

recmgt@dos.myflorida.com

info.florida.gov/records-management

Electronic copy of original

AGO 18-04, June 1, 2018

Section 668.50(12)(a), Florida Statutes, expressly provides:

“(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

1. Accurately reflects the information set forth in the record after the record was first generated in final form as an electronic record or otherwise.
2. Remains accessible for later reference.”

Under Section 668.50(12)(d):

“(d) If a provision of law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with paragraph (a).”

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*.

Text messages on private phones

O'Boyle v. Town of Gulf Stream, 257 So. 3d 1036 (Fla. 4th DCA 2018)

- A public employee or official's use of a private cell phone to conduct public business via text messaging can create a public record subject to disclosure if the individual has "prepared, owned, used, or retained it within the scope of his or her employment or agency." The communication falls 'within the scope of employment or agency' only when their job requires it, the employer or principal directs it, or it furthers the employer or principal's interests."

O'Boyle, continued (text messages)

Ch. 119, F.S., requires that the governmental entity must proceed as it relates to text messaging no differently than it would when responding to a request for written documents and other public records in the entity's possession—such as emails—by reviewing each record, determining if some or all are exempted from production, and disclosing the unprotected records to the requester. The obligation applies regardless of whether the records are located on public or private accounts or devices. The entity must conduct a reasonable search that includes asking these individual employees or officials to provide any public records stored on their private accounts that are responsive to a proper request.

O'Boyle:

Elements of public records lawsuit

A public records plaintiff must prove that they made a specific request for public records, the City received it, the requested public records exist, and the City improperly refused to produce them in a timely manner. If all four of these elements are pled, the judge holds an in camera review unless the city could show “some controlling authority that the Public Records Act did not apply, or otherwise prohibited, the submission of the text messages to the court for an in-camera review.” **The case was remanded for in camera review to determine whether disputed text messages qualified as public records.**

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

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.

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.
- Submit your records to the Legal Department or City Council Attorney for review to determine if records contain confidential or exempt material.

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

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.

Penalties for Failure to Comply with Public Records Law

119.10 Violation of chapter; penalties.—

- (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

Sec. 119.12 Florida Statutes

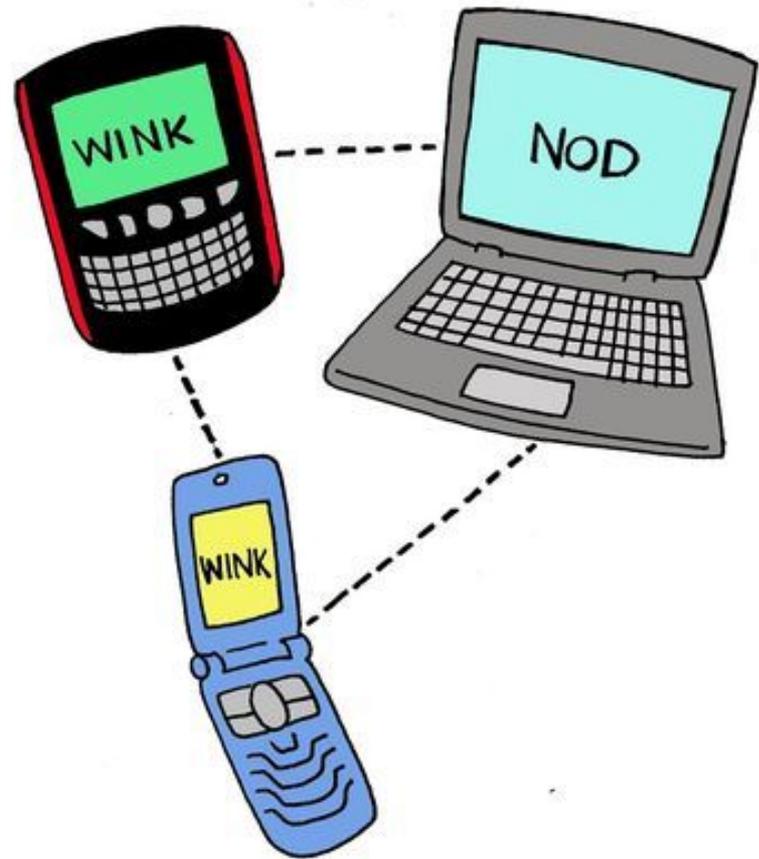
- Creates criteria for awarding attorney’s fees:
 1. If court finds that the agency refused to permit the record to be inspected or copied.
 2. If written notice was received at least five days before filing civil action. *Requirement waived if records custodian’s contact info not prominently posted.*
 3. If court finds request NOT for an “improper purpose”.

Public Meetings Law

PUBLIC MEETINGS (BEHIND CLOSED DOORS)



THEN



NOW



“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.”

“[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)

...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.*”

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

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 “from the beginning”*).
- 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.

Key Concept

PUBLIC MEETING REQUIREMENTS =

- NOTICE
- LOCATION
- MINUTES
- *PUBLIC PARTICIPATION*
(for official action)

Notice

Attorney General's Office suggested notice guidelines:

- Should contain the time and place of the meeting and agenda or a summary of the subject matter to be considered.
- Should be prominently displayed in an area in the agency's office set aside for such purposes, and on the agency's website.
- If an emergency meeting, 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

- An exception allows 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.

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 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.

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.



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 e-mails a position paper to all 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.

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*

- 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.

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

- Does not apply to quasi-judicial matters, or ministerial or ceremonial matters.

Legislative Matters vs.

Quasi-Judicial Proceedings:

Legislative = Setting policy

Quasi-Judicial = Applying the policy (at a public hearing).

Social Media

Facebook, Twitter, LinkedIn, YouTube

- Always remember your legal obligations.
- 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.

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.

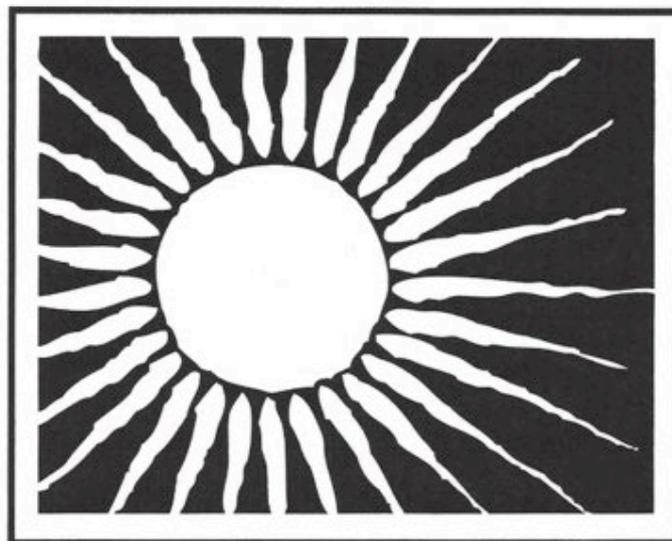
FLORIDA COMMISSION ON
ETHICS



GUIDE
to the
SUNSHINE AMENDMENT
and
CODE of ETHICS
for Public Officers and Employees

2019

**GOVERNMENT-IN-
THE-SUNSHINE
MANUAL**



2019 Edition

*A Reference For Compliance
with Florida's Public Records
and Open Meetings Laws*

Volume 41

The Florida Municipal Officials' Manual



the John Scott Dailey

FLORIDA
INSTITUTE OF
GOVERNMENT

A publication of the Florida League of Cities with the assistance of the John Scott Dailey Florida Institute of Government.

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