Open Government Overview

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Sunshine Law

Florida's Government in the Sunshine Law provides a right of access to governmental proceedings at both the state and local levels. In the absence of statutory exemption, it applies to any gathering (formal or informal) of two or more members of the same board to discuss some matter which will foreseeably come before that board for action.

Sunshine Law – Judge Ciklin's Comments

Or, as an appellate judge stated in an opinion issued April 12, 2023:

"Meetings of two or more fellow government officials who are subject to the Sunshine Law are not allowed if any words of any type pertaining to any possible foreseeable issue will be communicated in any way unless they are open to the public to whom reasonable notice has been provided."

Parris v. State, 359 So. 3d 1178 (Fla. 4th DCA 2023) (J. Ciklin, concurring).

Sunshine Law – Judge Ciklin's Comments Cont'd

"There is rarely any purpose for a private meeting or communication between two or more government officials who are both subject to the Sunshine Law. Those who engage in such activity widely open themselves to allegations that some aspect of the governmental decisional process has unlawfully occurred behind closed doors.

Any aspect of the decisional process—ranging from whether to conduct a meeting in the first instance to the concept of terminating administrative staff to the seeming inane decision as to which government officials will even make a motion to begin open public discussion—is part of the official decisional process and must be wide-open and advertised in advance to the public."

Boards Subject to the Sunshine Law

- Elected or appointed boards at the state and local level (except the Legislature and judiciary)
- Advisory boards appointed by a governmental board or a single governmental official
- Staff gatherings are typically not subject to the Sunshine Law but can be if the work they do is part of a "decision making process" as opposed to traditional staff functions like "information gathering" or "fact finding." Examples include search committees and purchasing committees.

Prohibited Communications

Members of boards subject to the Sunshine Law may not engage in private discussions with each other about board business, either in person or by telephoning, emailing, texting or any other type of electronic communication (i.e. social media, blogs).

*See Gilliams v. St*ate, 359 So. 3d 784 (Fla. 3d DCA 2023)

LIAISONS

While an individual board member is not prohibited from discussing board business with staff or a nonboard member, these individuals may not be used as a liaison to communicate information between board members. For example, a board member cannot ask staff to poll the other board members to determine their views on a board issue.

See also AGO 23-04

Sunshine Law Requirements

There are three basic requirements:

1) Meetings of public boards or commissions must be open to the public
2) Reasonable notice of such meetings must be provided; and
3) Minutes of the meetings must be prepared and open to public inspection.

Exemptions

Only the Legislature may create an exemption from the Sunshine Law (by a two-thirds vote).

An exemption from the Public Records Law does not allow a board to close a meeting. Instead, a specific exemption from the Sunshine Law is required.

Penalties

- Civil action
- Criminal penalties
- Suspension or removal from office

Judge Ciklin's Comments Cont'd

"When in any doubt as to whether a meeting or communication, either directly or indirectly between two or more government officials may be illegal under the Sunshine Law, the easy answer is "**LEAVE**." The judge goes on to quote from a 1971 Florida Supreme Court decision stating "If a public official is unable to know whether by any convening of two or more officials, he is violating the law, he should leave the meeting forthwith."

Public Participation

Section 286.0114, F.S., provides, subject to listed exceptions, that boards must allow an opportunity for the public to be heard before the board takes official action on a proposition. The statute does not prohibit boards from "maintaining orderly conduct or proper decorum in a public meeting."

Public Records Law

- Florida's Public Records Act, Chapter 119, Florida Statutes, provides a right of access to records of state and local governments as well as to private entities acting on their behalf.
- If material falls within the definition of "public record" it must be disclosed to the public unless there is a statutory exemption. The material must also be retained in accordance with the Department of State retention schedule.

The Term "Public Records" Means:

a) 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" **(includes electronic communications like text messages, and emails, whether on government or private devices or accounts)**.

b) Made or received pursuant to law or ordinance or in connection with the transaction of official business

c) By any agency [including a private entity acting 'on behalf of' a public agency] The term "agency" includes public officials and employees.;

d) Which are used to perpetuate, communicate, or formalize knowledge.

See NCAA v. Associated Press, 18 So. 3d 1201 (Fla. 1st DCA 2009).

Public Records Disclosure And Retention

Once a record meets all four of the preceding criteria and qualifies as a "public record" it is subject to public disclosure, unless there is an exemption. *See Wait v. Florida Power and Light*, 372 So. 2d 420 (Fla. 1979).

All public records (including those on private devices) must be retained in accordance with the retention schedules approved by the Department of State. Section 119.021, F.S.

Providing Public Records

- Public records cannot be withheld at the request of the sender
- A requestor is not required to show a “legitimate” or “noncommercial interest” as a condition of access
- A request cannot be denied because it is “overbroad”
- Unless authorized by another statute, an agency may not require that public records requests be in writing or require the requester to identify himself or herself

Providing Public Records

- The Public Records Act does not contain a specific time limit (such as 24 hours or 10 days).
- The Florida Supreme Court has stated that the only delay in producing records permitted under the statute is the reasonable time allowed the custodian to retrieve the record and redact those portions of the record the custodian asserts are exempt.

Providing Public Records

- An agency is not required to comply with a “standing” request for records that may be created in the future.
- An agency is not required to answer questions about the public records (other than information on how to obtain them, like the cost)
- An agency is not required to create a new record

Providing Public Records

Chapter 119 authorizes the custodian to charge a fee of up to 15 cents per one-sided copy for copies that are 14 inches by $8^{1/2}$ inches or less. An additional 5 cents may be charged for two-sided copies. For other copies, the charge is the actual cost of duplication of the record. Actual cost of duplication means the cost of the material and supplies used to duplicate the record but does not include labor or overhead cost.

Fees

In addition to the actual cost of duplication, an agency may impose a reasonable service charge for the actual cost of extensive labor and information technology required due to the large volume of a request.

Retention

All public records must be retained in accordance with retention schedules approved by the Department of State

Even exempt records must be retained.

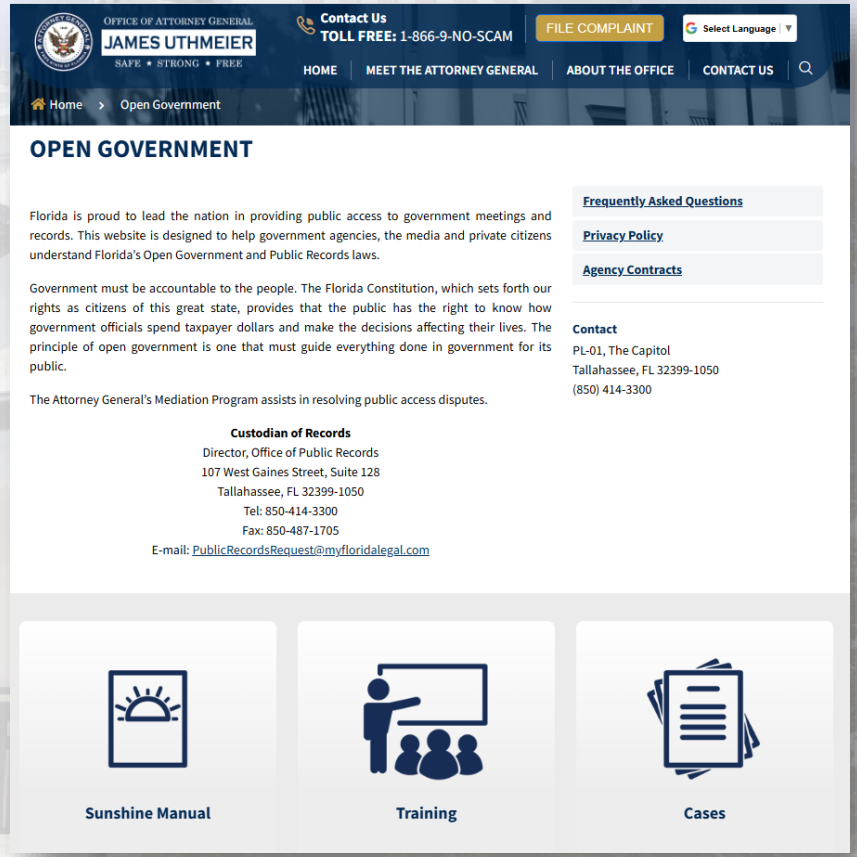
Penalties

- Criminal penalties
- Civil action
- Attorney's fees

Contact Information

The Sunshine Manual is updated annually and may be accessed via the main Office of the Attorney General website.

Office of the Attorney General Website:
myfloridalegal.com



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