

PUBLIC RECORDS

What Materials Are Public Records?

- Section 119.011(12), Florida Statutes, defines "public records" to include:
- All documents, papers, or other material, regardless of the physical form, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

When Are Notes or Nonfinal Drafts of Agency Proposals Subject to Chapter 119, Florida Statutes?

- There is no "unfinished business" exception to the public inspection and copying requirements of Chapter 119, Florida Statutes. If the purpose of a document prepared in connection with the official business of a public agency is to perpetuate, communicate, *or* formalize knowledge, then it is a public record regardless of whether it is in final form or the ultimate product of an agency.

- Accordingly, any agency document, however prepared, if circulated for review, comment or information, is a public record regardless of whether it is an official expression of policy or marked "preliminary" or "working draft" or similar label.

What About Personal Notes?

- Handwritten personal notes taken by a city employee in the course of conducting his official duties and made for the purpose of assisting him in remembering matters discussed, are not public records “if the notes have not been transcribed or shown to others and were not intended to perpetuate, communicate, or formalize knowledge.”

When Are Records Made or Received “In Connection with Transaction of Official Business?”

- The Florida Supreme Court has ruled that private e-mail stored in government computers does not automatically become a public record by virtue of that storage.

- Just as an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of documents that fall within the definition of “public records,” ... private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer.

When Does the Public Records Law Apply to Private Entities?

- The case law has established “two general sets of circumstances” when records belonging to a private entity must be produced as public records.
- First, when a public entity delegates a statutorily authorized function to a private entity.

- The mere fact that a private entity is under contract with, or receiving funds from, a public agency is not sufficient, standing alone, to bring that agency within the scope of the Public Records Act.
- However, there is a difference between a party contracting with a public agency to provide services *to* the agency and a contracting party which provides services *in place of* the public body.

- Example: A court ruled that the Salvation Army was subject to the Public Records Act when it completely assumed the responsibility to provide misdemeanor probation services pursuant to a contract with Marion County.
- Second, when a public entity contracts with a private entity to provide goods or services to facilitate the agency's performance of its duties and the "totality of factors" indicates a significant level of involvement by the public agency.

The “Totality of Factors” Test

- If a private entity has merely contracted with the agency to provide services to facilitate the performance of its duties, the private entity’s records in that regard may be public if the “totality of the factors” indicates a significant level of involvement by the public entity.
- There are nine factors to look at to see if this applies.

What Kinds of Agency Records Are Subject to the Public Records Law?

- E-mail messages made or received by agency employees in connection with official business are public records and subject to disclosure in the absence of a statutory exemption from public inspection.
- Like other public records, e-mail messages are subject to the statutory restrictions on *destruction* of public records, which require agencies to adopt a schedule for the disposal of records no longer needed.

- The Attorney General's Office has stated that the placement of material on a city's Facebook page presumably would be in connection with the transaction of official business and thus subject to Ch. 119, F.S.
- To the extent that the information on a city's Facebook page constitutes a public record, the city is under an obligation to follow the public records retention schedules established by law.

- Text messages: the same rules that apply to e-mail should be considered for electronic communications and instant messaging conducted by government agencies.
- In response, the Department of State revised its records retention schedule to note that text messages may be public records and that retention of text messages could be required depending upon the content of those texts.

Formatting Issues

- An agency that maintains a public record in an electronic recordkeeping system must provide a copy of the record in the medium requested by the person, if the agency maintains the record in that medium, and the fee charged shall be in accordance with Chapter 119, Florida Statutes.
- However, an agency is not generally required to reformat its records to meet a requestor's particular needs.

Attorney-Client Privilege

- In order to qualify for the work product exemption, the records must have been prepared *exclusively for or in anticipation of litigation or adversarial administrative proceedings*.
- Records prepared for other purposes may not be converted into exempt material simply because they are also used in or related to the litigation.

What Individuals Are Authorized to Inspect and Receive Copies of Public Records?

- Section 119.01, Florida Statutes, provides that "[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by *any person*."

Must An Individual Show a “Special Interest” or “Legitimate Interest” in Public Records Before Being Allowed to Inspect or Copy Same?

- No. Chapter 119, Florida Statutes, requires no showing of purpose or "special interest" as a condition of access to public records.
- Example: An abstract company may copy documents from the clerk's office for their own use and sell copies to the public for a profit.

- Note, however, that Florida law provides criminal penalties for unauthorized use of personal identification information for fraudulent or harassment purposes.
- Also, Florida law provides penalties for criminal use of a public record or public records information.

May an Agency Refuse to Allow Inspection or Copying of Public Records on the Grounds that the Request for Such Records is “Overbroad” or Lacks Particularity?

- No. The custodian is not authorized to deny a request to inspect and/or copy public records because of a lack of specifics in the request.
- A records custodian must furnish copies of records when the person requesting them identifies the portions of the record with sufficient specificity to permit the custodian to identify the record and forwards the statutory fee.
- A very broad request may allow for the imposition of an extra charge.

When Must an Agency Respond to a Public Records Request?

- 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.

- The Public Records Act does not contain a specific time limit (such as 24 hours or 10 days) for compliance with public records requests.
- The Florida Supreme Court has stated that the only delay in producing records permitted under Chapter 119, Florida Statutes, is the reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.

- Example: A municipal policy which provides for an automatic delay in the production of public records is impermissible. Thus, an agency is not authorized to delay inspection of personnel records in order to allow the employee to be present during the inspection of his records.
- Nor may a city delay public access to board meeting minutes until after the city commission has approved them. Nor can a board of trustees of a police pension fund delay release of its records until such time as the request is submitted to the board for a vote.

- An agency's unreasonable and excessive delays in producing public records can constitute an unlawful refusal to provide access to public records.
- An agency is not authorized to establish an arbitrary time period during which records may or may not be inspected.

May an Agency Require That a Request to Examine or Copy Public Records Be Made in Writing or Require That the Requestor Furnish Background Information to the Custodian?

- No. Nothing in Chapter 119, Florida Statutes, requires that a requesting party make a demand for public records in person or in writing.
- An agency may not require public records requestor to provide physical address for mailing copies or to be physically present in order to inspect records.

- If a public agency believes that it is necessary to provide written documentation of a request for public records, the agency may require that the *custodian* complete an appropriate form or document;
- However, the person requesting the records **cannot** be required to provide such documentation as a precondition to the granting of the request to inspect or copy public records.

Is An Agency Required to Give Out Information From Public Records or to Otherwise Produce Records in a Particular Form as Demanded By the Requestor?

- A custodian is not required to give out *information* from the records of his or her office. The Public Records Act does not require a town to produce an employee, such as the financial officer, to answer questions regarding the financial records of the town.

- However, an agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium.
- Thus, upon receipt of a public records request, the agency must comply by producing all non-exempt records in the custody of the agency that are responsive to the request, upon payment of the charges authorized in Chapter 119, Florida Statutes.

- However, this mandate applies only to those records in the custody of the agency at the time for request; nothing in the Public Records Act appears to require that an agency respond to a so-called “standing” request for production of public records that it may receive in the future.

May an Agency Refuse to Comply with a Request to Inspect or Copy the Agency's Public Records on the Grounds that the Records Are Not in the Physical Possession of the Custodian?

- No. An agency can't refuse a request on the grounds that the documents have been placed in the actual possession of an agency or official other than the records custodian.

May An Agency Refuse to Allow Access to Public Records on the Grounds that the Records are Also Maintained by Another Agency?

- No. The fact that a particular record is also maintained by another agency does not relieve the custodian of the obligation to permit inspection and copying in the absence of an applicable statutory exemption.
- Further an agency "cannot bargain away its Public Records Act duties with promises of confidentiality in settlement agreements."

Must An Agency State the Basis for its Refusal to Release an Exempt Record?

- Yes. A custodian of a public record must state the basis for the exemption, including the statutory citation to the exemption.
- Additionally, upon request, the custodian must state in writing and with particularity the reasons for the conclusion that the record is exempt from inspection.

May an Agency Refuse to Allow Inspection and Copying of an Entire Public Record on the Grounds that a Portion of the Record Contains Information Which is Exempt from Disclosure?

- No. Where a public record contains some exempt information, the custodian must redact only that portion of the record for which a valid exemption is asserted and to provide the remainder of the record for inspection and copying.

WHAT IS THE LEGAL EFFECT OF STATUTORY EXEMPTIONS FROM DISCLOSURE?

- Creation of exemptions – the Courts cannot judicially create any exceptions, or exclusions to Florida's Public Records Act.
- The Florida Constitution only authorizes the *Legislature* to enact general laws creating exemptions provided that such laws "shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law.”

- Exemptions are strictly construed - the Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.
- Release or transfer of confidential or exempt records - there is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Act and confidential.

- If information is made confidential in the statutes, the information is not subject to inspection by the public and may be released only to those persons and entities designated in the statute.
- On the other hand, if the records are not made confidential but are simply exempt, the agency is not prohibited from disclosing the documents in all circumstances.

What Are Some Examples of Exempt and Confidential Information?

Election Records

- Election records are generally open to public inspection. An individual or group is entitled to inspect the ballots and may take notes regarding the number of votes cast.
- Section 119.07(5), F.S., prohibits any person other than the supervisor of elections or the supervisor's employees from touching the ballots.

- *And see* s. 101.572, F.S. (no persons other than the supervisor, supervisor's employees, or the county canvassing board shall handle any official ballot or ballot card).
- However, this restriction does not prohibit the supervisor from producing copies of optically scanned ballots which were cast in an election in response to a public records request.

- Information regarding requests for absentee ballots that is recorded by the supervisor of elections pursuant to s. 101.62(3), F.S., is confidential and exempt and shall be made available to or reproduced only for the individuals and entities set forth in the exemption, for political purposes only. Section 101.62(3), F.S.

Voter Registration and Voter Records

- Each supervisor of elections shall maintain for at least two years and make available for public inspection and copying, all records concerning implementation of registration list maintenance programs and activities conducted pursuant to ss. 98.065 and 98.075, F.S. Section 98.045(3), F.S.
- The records must include lists of the name and address of each person to whom a notice was sent and information as to whether each such person responded to the mailing, but may not include any information that is confidential or exempt from public records requirements under the Election Code.

Section 97.0585, F.S., states the following information is confidential and exempt from public disclosure requirements and may be used only for purposes of voter registration:

- declinations to register to vote;
- information relating to the place where a person is registered to vote or updated a voter registration;
- the social security number, driver's license number, and the Florida identification number of a voter registration applicant or voter;
- The signature of a voter registration applicant or a voter is exempt from copying requirements.

- Names, addresses, and telephone numbers of stalking victims, provided that the stalking victim has filed a sworn statement of stalking with the Attorney General's Office and otherwise complies with the procedures in ss. 741.401-741.409, F.S. are exempt);
- Also, identifying information concerning participants in the Address Confidentiality Program for Victims of Domestic Violence contained in voter registration and voting records is exempt.

- Verified petition cards submitted by a *candidate* qualifying by the alternative method, however, are not registration records subject to restrictions on inspection and copying under the Florida Election Code.
- The supervisor of elections must maintain the exempt status of specified personal information for certain officers and employees which appears in petitions or campaign papers if the affected employee or officer or his or her employing agency has filed a written request for exemption with the supervisor as authorized by s. 119.071(4)(d)3., F.S.

Bids and Financial Statements

- Section 119.071(1)(b)2., F.S., provides an exemption for “sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation” until such time as the agency provides notice of an intended decision or until 30 days after opening “the bids, proposals, or final replies,” whichever is earlier.

Bank Account, Debit and Credit Card Numbers

- Bank account numbers, and debit, charge, and credit card numbers held by an agency are exempt from public disclosure.

Discrimination Investigations

- Complaints and other records in the custody of any agency which relate to a complaint of discrimination based on race, color, etc. in connection with hiring practices, salary, benefits, or related activities are exempt until a probable cause finding is made, the investigation becomes inactive, or the complaint or other record is made part of the record of a hearing or court proceeding.

Personnel Records

- The general rule with regard to personnel records is the same as for other public records; unless the Legislature has expressly exempted certain personnel records from disclosure or authorized the agency to adopt rules limiting access to such records, personnel records are subject to public inspection and copying.
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- Therefore, an agency is not authorized to “seal” disciplinary notices and thereby remove such notices from disclosure under the Public Records Act.

What Fees May Lawfully Be Imposed for Inspecting and Copying Public Records?

- Providing access to public records is a statutory duty imposed by the Legislature upon all record custodians and should not be considered a profit-making or revenue-generating operation.
- Special Service Charge – can be imposed when the nature or volume of public records to be inspected is such as to require extensive use of information technology resources, or extensive clerical or supervisory assistance, or both.
- The charge must be reasonable and based on the labor or computer costs actually incurred by the agency.

- Thus, an agency may adopt a policy imposing a reasonable special service charge based on the actual labor cost for personnel who are required, due to the nature or volume of a public records request, to safeguard such records from loss or destruction during their inspection.
- In doing so, however, the agency's policy should reflect no more than the actual cost of the personnel's time.

- If no fee is prescribed elsewhere in the statutes, a custodian may charge a fee of up to 15 cents per one-sided copy for copies that are 14 inches by 8 ½ inches or less. An agency may charge no more than an additional 5 cents for each two-sided duplicated copy.
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- For other copies, the charge is limited to the actual cost of duplication of the record. The phrase "actual cost of duplication" is defined to mean "the cost of the material and supplies used to duplicate the public record, but does not include the labor cost and overhead cost associated with such duplication."

May an Agency Charge for Travel Costs, Search Fees, Development Costs and Other Incidental Costs?

- The Public Records Act does not authorize the addition of overhead costs such as utilities or other office expenses to the charge for public records. Thus, an agency may not charge for travel time and retrieval costs for public records stored off-premises.

When May an Agency Charge a Special Service Charge for Extensive Use of Clerical or Supervisory Labor or Extensive Information Technology Resources?

- If the nature or volume of public records to be inspected or copied requires the extensive use of information technology resources or extensive clerical or supervisory assistance, or both, the agency may charge a special service charge.
- This charge must be reasonable and shall be based on the actual cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency.

- The special service charge applies to requests for both inspection and copies of public records when extensive clerical assistance is required.
- The term “labor cost” for purposes of the special service charge may include both salary and benefits.
- Example: An agency's decision to "archive" older e-mail messages on tapes so that they could not be retrieved or printed without a systems programmer was analogous to an agency's decision to store records off-premises in that the agency rather than the requestor must bear the costs for retrieving the records.

- A court concluded that an agency could charge only a clerical rate for the time spent making copies, even if due to staff shortages, a more highly paid person did the work.
- An agency is not ordinarily authorized to charge for the cost to review records for statutorily exempt material, but can impose the extra charge if the volume of records and the number of potential exemptions make review and redaction of the records a time-consuming task.

May an Agency Require an Advance Deposit?

- A policy to require an advance deposit has held to be “prudent given the legislature’s determination that taxpayers should not shoulder the entire expense of responding to an extensive request for public records.”
- Similarly, an agency may require that a public records requestor pay past due fees for records compiled for a previous request before complying with the requestor’s subsequent request.

IS AN AGENCY REQUIRED TO RESPOND TO REQUESTS FOR INFORMATION REGARDING COSTS TO OBTAIN PUBLIC RECORDS?

- In order to comply with the statutory directive that an agency provide copies of public records upon payment of the statutory fee, an agency must respond to requests for information as to copying costs
- If an agency is asked for a large number of records, the fee should be communicated to the requestor before the work is undertaken.

WHAT ARE THE OPTIONS IF AN AGENCY REFUSES TO PRODUCE PUBLIC RECORDS FOR INSPECTION AND COPYING?

- **Voluntary mediation program**
- Section 16.60, F.S., establishes an informal mediation program within the Office of the Attorney General as an alternative for resolution of open government disputes.

- **Civil action**
- A person denied the right to inspect and/or copy public records under the Public Records Act may bring a civil action against the agency to enforce the terms of Ch. 119, F.S.
- Section 119.11(1), F.S., mandates that actions brought under Ch. 119 are entitled to an immediate hearing and take priority over other pending cases.

- **Attorney's fees and costs**
- Section 119.12, F.S., provides that if a civil action is filed against an agency to enforce the provisions of this chapter and the court determines that the agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award against the agency responsible the reasonable costs of enforcement including reasonable attorney's fees.

- **Criminal and noncriminal infraction penalties**
- Section 119.10(1)(b), F.S., states that a public officer who *knowingly* violates the provisions of s. 119.07(1), F.S., is subject to suspension and removal or impeachment and commits a misdemeanor of the first degree, punishable by possible criminal penalties of one year in prison, or \$1,000 fine, or both.

- **Retention and disposal of records**
- Section 119.021(2)(a), F.S. requires the Division of Library and Information Services (division) of the Department of State to adopt rules establishing retention schedules and a disposal process for public records. Each agency must comply with these rules.

- Website where you can find the retention schedule:
- http://info.florida.gov/index_researchers.cfm