

FLORIDA'S PUBLIC RECORD ACT

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The background features a white central area with blue geometric shapes on the right and bottom edges. These shapes include overlapping triangles and polygons in various shades of blue, from light to dark. A thin white line runs diagonally across the bottom right corner.

WHAT IS FLORIDA'S PUBLIC RECORDS LAW AND WHAT DOES IT APPLY TO?

IT IS A GUARANTEED CONSTITUTIONAL RIGHT

- ▶ Art I, Section 24 of the Florida Constitution set forth Florida's Public Records law and states:
- ▶ **Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.**
- ▶ Requests DO NOT have to be made in writing.
- ▶ Requests DO NOT have to be for a special or legitimate interest/reason.
- ▶ Requestors DO NOT have to give their name.

IT IS EXTREMELY BROAD IN SCOPE

- ▶ Florida Statutes §119.011(12) defines “public records” as:
- ▶ 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.**
- ▶ The nature of the record (not the physical location or physical form) dictates whether it is a public record and what applicable retention schedule should apply.
- ▶ The Records Custodian is legally responsible for supervision, care, maintenance, control or guardianship of the record.

ITEMS THAT FALL WITHIN THE DEFINITION OF A “PUBLIC RECORD”

- ▶ Records contained and stored on a computer
- ▶ District financial records including budgets and working papers
- ▶ Draft documents
- ▶ All documents exchanged between the District, its representatives and attorneys, including attorney bills, unless the District is involved in pending litigation.
- ▶ E-mail messages
- ▶ Website blogs and message boards
- ▶ Documents contained on a password protected website link can be a public record if they are placed there to communicate official business of the agency
- ▶ Communications on social networking sites.

ITEMS THAT HAVE BEEN FOUND NOT TO BE PUBLIC RECORDS

- ▶ Personal notes when they are solely for the persons own use in remembering things are not a public record. *The Justice Coalition v. The First District Court of Appeals Judicial Nominating Commission*, 823 SO. 2nd 185 (Fla. 1st DCA 2002).
- ▶ Private E-mails stored in government computers does not automatically become a public record by virtue of that storage. *State v. City of Clearwater*, 863 SO 2d 149 (Fla. 2003).

ITEMS THAT COULD BE A PUBLIC RECORD

- ▶ Notes when they are intended to communicate, perpetuate or formalize knowledge. *Miami Herald Media Co. v. Sarnoff*, 971 SO 2d 915 (Fla 3rd DCA 2007).
- ▶ Text messaging and Blackberry “pinning” - Maybe?!?!?!?! . *Inf. Op. Att’y Gen. Fla. June 2, 2009*

WHAT IS EXEMPT FROM PUBLIC RECORDS

- ▶ The Legislature has carved out limited exemptions from the Public Records law all of which are narrowly construed
- ▶ If an exemption is applicable, it must be stated in writing and must contain the statutory citation to the exemption. Fla. Stat. §119.071(1)(e).

WHAT IS THE AGENCY RESPONSIBILITY REGARDING EXEMPT RECORDS?

- ▶ Maintain the confidentiality and exempt status of your agency public records and those of any other agency document or information that you may have received through the course of official business
- ▶ Before release or disclosure, REVIEW and REDACT all confidential and/or exempt information/document/material.
 - ▶ Redact only that part that is exempt unless the whole document or material is exempt
 - ▶ Do not alter/mark original document/material. Make a copy and then redact on the copy
- ▶ Identify the specific statutory exemption you rely upon to redact the information/document/material.

LIST OF EXEMPT RECORDS:

- ▶ Address/identification confidentially of certain classes of high-risk professionals places of employment, and schools of their spouses and children.
 - ▶ Active and former state or federal judicial or quasi-judicial or administrative law judges, local, statewide, or federal prosecutors, public defenders and other criminal or civil regional counsel, human resource/labor relations officers, law enforcement officers, corrections officers, probation officers, code enforcement officers, guardians ad litem, child abuse investigators, certain Department of Juvenile Justice personnel, certified firefighters, social services counselors request may extend to their children and spouses--- active or former profession--- exemption lasts forever even if divorce or child is an adult (See section 119.071(4)(d)1., 110.071(5)(i), Florida Statutes.
- ▶ Home address, telephone number, photo, social security number.

LIST OF EXEMPT RECORDS:

- ▶ Driver's licensees' information
- ▶ Domestic violence victims - name, address, phone number-victims must be registered with ACP for confidentiality.
- ▶ Stalking victims - name, address, phone number - victims must file "statement of stalking" with the Attorney General ACP.
 - ▶ Registration information for these AG program participants are processed entirely manually and outside of the Florida Voter Registration System.
- ▶ Victims of certain violent crimes - only addresses and other identifying information exempt - written request for exemption must include official verification of crime (this is not an ACP participant; person is still registered on rolls).

LIST OF EXEMPT RECORDS:

- ▶ Absentee ballot request information that is collected or received to process an absentee ballot request. The fact that you voted absentee IS NOT exempt from disclosure after election.
 - ▶ Exceptions to exemption: canvassing board, an election official, a political party or official thereof, a candidate who has filed qualification papers and is opposed in an upcoming election, a registered political committee, a registered committee of continuous existence, and a voter (only his or her own information).
- ▶ User identification and passwords held by the Department of State pursuant to electronic filing of solicitation and campaign contributions
- ▶ All campaign reporting records until report is finally submitted
- ▶ Sworn complaint regarding campaign financing until determination of probable cause or other subsequent proceeding

LIST OF EXEMPT RECORDS:

- ▶ Minimum security procedures are not exempt EXCEPT as pertains to the part that may contain:
 - ▶ Data processing software either as a trade secret or agency produced data processing software that is sensitive. (All voting software filed with the state).
- ▶ Software prepared by the state is NOT exempt from Chapter 119 Florida Statute.

LIST OF EXEMPT RECORDS:

- ▶ Information relating to security systems and plans (that would include any information that would compromise the security of the voting system by facilitating modification, disclosure or destruction of data or information technology resources (e.g. IP addresses, passwords, list of those with access etc.)
- ▶ The release of such information coupled with other information in public domain could directly or indirectly be used to figure out how to decode the security system. The public disclosure of modem numbers could be used to tie up phone lines leading to a collapse with a computer system.

LIST OF EXEMPT RECORDS:

- ▶ Work products developed by the public employer during or in preparation for collective bargaining negotiations - Fla. Stat. §447.605
- ▶ Documents exchanged between the District and its attorney when there is pending or threatening litigation - Fla. Stat. 119.071
- ▶ Complaints relating to discrimination, discipline, employee performance until a finding is made as to a probable cause, the complaint is inactive, or the complaint is made part of a court proceeding - Fla. Stat. 119.071
- ▶ Sealed competitive bids or proposals until the agency provides either notice of a decision or within 10 days after bid opening (whichever is earlier) - Fla. Stat. 119.071

PUBLIC RECORDS MANAGEMENT

- ▶ Law requires retention, record-keeping, storage and disposition
- ▶ Oversight by the Division of Library and Information Service oversight/Bureau of Records Management
- ▶ Promotes efficient, effective and economical management of public records (space savings, increased efficiency of information and document retrieval especially for responding to public records, better identification and protection of records, control over creation of new records).

PUBLIC RECORDS MANAGEMENT

Retention

- ▶ Retention schedule: establishes minimum time you must keep public records. If there is no applicable schedule item, you must keep the records until a specific one is created. Adhere to the schedule: you cannot produce what you no longer legally have. Corollary: you have to produce what you do still have (even if the retention period has passed or you don't know where the record is).

PUBLIC RECORDS MANAGEMENT

Unique records - Email

- ▶ Examine the content, purpose, or nature of public record to determine applicable retention schedule.
- ▶ See also Retention Schedule of State and Local Government at:
 - ▶ <http://dlis.dos.state.fl.us/barm/genscyhedules/GS1-SL.pdf>

PUBLIC RECORDS MANAGEMENT

Originals - Paper versus Electronic

- ▶ Master Record can consist of scanned or electronic copy of the original public record - scanning must comply with imaging requirements and electronic recordkeeping rules and verification for completeness and accuracy of electronic records - See Rules 1B-24, 1B-26.003, FAC
- ▶ Electronic/scanned version has same force and effect as original for evidentiary purposes or authentication
- ▶ Disposition/destruction form must state that “paper records are duplicates of electronic records “master record”

WHO DO PUBLIC RECORDS LAWS APPLY TO?

- ▶ Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of public records or the custodians designee.

Section 119.07(1)(a), Florida Statutes

WHEN DOES THE DISTRICT HAVE TO RESPOND TO A PUBLIC RECORDS REQUEST?

- ▶ The records custodian of the agency or his/her designee is responsible for making public records available for inspection and/or copying **“at any reasonable time, under reasonable condition.” Fla. Statute §119.07**
- ▶ The Public Records Act does not contain a specific time limit.

WHAT ABOUT EXCESSIVE OR OVERBROAD REQUESTS?

- ▶ Districts cannot refuse to produce records because the request is excessive or overbroad.
- ▶ Fees may be charged for copying costs and special service charges for “extensive use” of clerical or supervisory labor, or “extensive” information technology.

HOW AND WHEN TO COMPLY?

- ▶ Acknowledge receipt of the public records request
- ▶ Respond in good faith. That includes making reasonable efforts to determine from other agency officers and employees whether record exists and how to access.
- ▶ Provide estimated time to respond and cost to produce
- ▶ Allow for inspection and copying at any reasonable time under reasonable conditions and under custodian's supervision.
- ▶ Identify any applicable exemptions
- ▶ Provide in reasonable time under reasonable circumstances.

WHAT TO PROVIDE?

- ▶ Public records except what is exempt under law (not an excuse not to give if you have copy of record but you are not official custodian).
- ▶ What already exists in a format maintained. You are under no obligation to create a record or reformat a record just to respond to a request.
- ▶ You may be required to create or provide access through specifically designed programs, at the requester's expense if:
 - ▶ Records stored in the computer are not accessible in existing computer program format
 - ▶ Current format does not protect confidential and exempt information
 - ▶ Current format does not fairly or meaningfully represent the record
 - ▶ Court decides exceptional circumstances exist

HOW MUCH CAN I CHARGE?

- ▶ Fees for duplication: Actual cost
- ▶ Copying document fees: 15 cents per one-sided page and 20 cents for two-sided page, unless law says otherwise
- ▶ Fees for Certified Copies: \$1.00 per copy of record
- ▶ Special Service Charge: If the nature or volume of public records requested to be inspected or copied is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or both, the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the 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 or attributable to the agency** for the clerical and supervisory assistance required, or both.

WHAT IF THERE IS A DISPUTE?

- ▶ Attempt to resolve it
- ▶ Participate in voluntary mediation with the Attorney Generals Office
- ▶ Expect judicial action by the requestor if not resolvable
- ▶ Request an opinion from the Attorney General's Office regarding an interpretation of a public records provision

PENALTIES

- ▶ What are the penalties for violation?
 - ▶ If one violates, fined up to \$500.00
 - ▶ If one KNOWINGLY violates, subject to removal from office and may be charged with a 1st degree misdemeanor

WORDS OF ADVICE

- ▶ “DON’T GET BURNED” (sometimes you just have to sweat through the public records request)
- ▶ Respond to the public records request in a reasonable and timely manner.
- ▶ Establish and maintain good records management procedures.
- ▶ Ask for clarification or guidance if you are uncertain:
 - ▶ Florida Department of State’s Records Management Center
 - ▶ Divisions of Elections/General Counsel’s Office/Florida Department of State
 - ▶ Attorney General’s Office for Advisory Opinions

WORDS OF ADVISE

- ▶ If you have a District issued email account, then use it. Try not to use your personal email account if you can avoid it!
- ▶ If you are using your own personal email account, then make sure you always copy the Records Custodian on your communications
- ▶ Until record retention can be ensured, adopt a policy that prohibits the use of “texting”, “pinning”, or social networking for District business
- ▶ When in doubt about whether a communication is subject to Sunshine and Public Records Laws, consult your legal counsel.