# 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 of two or more members of the same board to discuss some matter which will foreseeably come before that board for action.

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

- "1. 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*, 48 F.L.W. D733 (Fla. 4th DCA April 12, 2023) (J. Ciklin, concurring).

# Judge Ciklin's comments continued:

- 2. "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."

# Judge Ciklin's comments continued

- 3. "Under Florida law, there is no such thing as an "informal" conference or "unofficial" caucus or pass-you-in-the-hallway information gathering (or sharing) by two or more government officials subject to the Sunshine Law which would thereby remove such communication from the Sunshine Law's ambit. Indeed, such "innocuous" meetings have been held to be illegal and nothing short of the unlawful crystallization of secret decisions to a point just short of public discussion and ceremonial acceptance. And whether done personally or through surrogates (such as aide-to-aide), such meetings are illegal under Florida's Sunshine Law."

# Judge Ciklin's comments continued

- 4. "Any attempt to distinguish between a 'formal,' 'informal,' 'ministerial,' 'informational gathering-only,' or 'just a listening' meeting between two or more government officials – for purposes of determining whether the Sunshine Law applies—is by itself alien to the law's design, exposing it to the very evasions which it was designed to prevent."

# Electronic communications

- Board members 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. Facebook, blogs).

# 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.

# 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.

# ADVISORY BOARDS

- The Sunshine Law applies to advisory boards created pursuant to law or ordinance or otherwise established by public agencies or officials.

# STAFF MEETINGS

- Staff meetings are not normally subject to the Sunshine Law. *See Florida Environmental Regulation Specialists Inc. v. Florida Department of Environmental Protection*, 342 So. 3d 710 (Fla. 1st DCA 2022).
- However, staff committees may be subject to the Sunshine Law if they are deemed to be part of the "decision making process" as opposed to traditional staff functions like factfinding or information gathering. *See Florida Citizens Alliance, Inc. v. School Board of Collier County*, 328 So. 3d 22 (Fla. 2d DCA 2021).

# 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.

# RECORDINGS AND PHOTOS

- While boards may adopt reasonable rules and policies to ensure orderly conduct of meetings, the Sunshine law does not allow boards to ban nondisruptive videotaping, tape recording, or photography at public meetings.

# PENALTIES

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

# Judge's Ciklin's comments

- 5. "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 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

a) Public records cannot be withheld at the request of the sender
b) A requestor is not required to show a "legitimate" or "noncommercial interest" as a condition of access
c) A request cannot be denied because it is "overbroad"
d) 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 81/2 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

a) Criminal penalties
b) Civil action
c) Attorney's fees

# Contact information

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