

Public Records Law

John J. Fumero & Carlyn H. Kowalsky

Law Firm of Nason, Yeager, Gerson, Harris & Fumero



The Sunshine State: Florida Public Records Law



Florida has a rich and impressive history of commitment to open records.

Florida is known as the home of “Government-in-the-Sunshine” laws, which promote a policy of open government meetings and records. The policy has been described as a “cornerstone of our political culture.”

History

Since the late 1800s, Florida public policy that records created in the discharge of official duties belong to the public office — not the individual who created the records — and should be preserved

Florida Supreme Court stated in 1889: “[W]henever a written record of the transactions of a public officer is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty, to keep that written memorial, . . . and, when kept, it becomes a public document — a public record — belonging to the office, and not to the officer.”

The Florida Constitution

In 1968, the right to access public records and meetings was guaranteed by Fla. Const. art. 1, 24, which provides in relevant part:

“(a) 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 [c]onstitution. This section specifically includes the legislative, executive and judicial branches of government....”



Florida's Public Records Act

Chapter 119, Florida statutes.

It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.



Scope of the Public Records Act

Florida's Public Records Act, Chapter 119, Florida Statutes, is very broad and all-encompassing. It provides a right of access to records of state and local governments as well as to private entities acting on their behalf.

Any private entities, including but not limited to contractors and consultants, who are retained, and/or compensated, by local government fall within the realm of Florida's public records act.

Public Records Act Case Law



has established that...

“the general purpose of the Florida Public Records Act is to open public records so that Florida’s citizens can discover the actions of their government.”

“...the general purpose of the Florida Public Records Act is to open public records so that Florida’s citizens can discover the actions of their government.”

“If there is any doubt as to whether a matter is a public record subject to disclosure, the doubt is to be resolved in favor of disclosure.”

Statutory Definition

Section 119.011(12), F.S., defines “public records” to include:

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.

A Three-part Test

1. 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 Facebook postings, text messages, emails, blog, vlog, tweets).
2. Made or received pursuant to law or ordinance or in connection with the transaction of official business.
3. By any local government which is used to perpetuate, communicate or formalize knowledge or information.

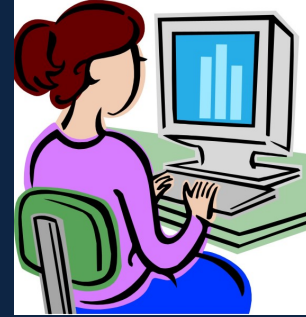
Public Records



Term “public record” is not limited to traditional written documents. Definition states, “tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission” can all constitute public records.

The public records act is construed in favor of openness while exemptions are construed narrowly and limited.

Public Records



- If it is unclear whether something is a public record or falls within specific exemption of public records laws, there is a higher likelihood that the record will be public than not.
- If a person seeks disclosure of agency records, the burden is on the agency to show that a record is exempt from disclosure.

Records made or received in connection with official business

In evaluating whether record is made or received in connection with the official business of agency, “the determining factor is the nature of the record, not its physical location.” Thus, the Florida Supreme Court found that personal e-mails between government employees on government-owned computers which were not made or received in the course of official business did not constitute public records.

Records made or received in connection with official business

Similarly, mere fact that e-mail is sent from private e-mail account using personal computer is not determining factor as to whether it is public record -- it is whether e-mail was prepared in connection with official agency business and intended to perpetuate, communicate or formalize knowledge of some kind.

The Modern Realities

- Conducting governmental business using non-governmental equipment or devices.
- Public records stored on private computers and/or cell phones.
- Public records send or received on private email accounts.



Case Law Addressing Modern Realities

The First DCA addressed a modern challenge in public records realm in *Rhea v. District Board of Trustees of Santa Fe College*, 109 So. 3d 851 (Fla. 1st DCA 2013), when the court explained that –

“[t]he physical format of the record is irrelevant; electronic communications, such as email, are covered just like communications on paper.”

Case Law Addressing Modern Realities

The facts: In *Rhea*, a college professor brought an action against his employer, a public college, seeking a writ of mandamus to compel the college to reveal the name of a student who sent an email complaining about the professor's teaching style, and for a declaration of the professor's rights under the college's rule regarding student complaints. The college refused to comply with Rhea's repeated requests to disclose the student's name on the basis that the student's identity was protected from disclosure under the Family Educational Rights and Privacy Act.

Case Law Addressing Modern Realities

The First DCA concluded that “the email at issue is a communication that was sent to, and received by, the [c]ollege in connection with the transaction of its official business, [so Rhea] has sufficiently pled that it is a Florida public record subject to disclosure in the absence of a statutory exemption.”



Practice Pointer

Regardless of whether the record is in digital or physical form and regardless of where the record is physically located, the nature of the document is the ultimate factor in determining whether the public has a right to access that record.

There is no expectation of privacy on the internet. There is no such thing as a true DELETION of information. Privacy settings are not a safeguard to protect what you post. Information is stored FOREVER. In general, if you would be embarrassed or ashamed to see it on a billboard, do not write it or post it.

Electronic Databases and Files

Information stored in a public agency's computer "is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet"

Information such as electronic calendars, databases, and word processing files stored in agency computers, can all constitute public records because records made or received in the course of official business and intended to perpetuate, communicate or formalize knowledge of some type, fall within the scope of Ch. 119, F.S.

E-mail messages made or received by agency officers and employees in connection with official business are public records and subject to disclosure in the absence of an exemption.

Social Media Postings

The Attorney General's Office has stated that the placement of material on a city's FACEBOOK or TWITTER page presumably would be in connection with the transaction of official business and thus is subject to Ch. 119, F.S.

To the extent that the information on the city's Facebook page constitutes a public record, the city is under an obligation to follow the public records retention schedules established in accordance with s. 257.36(6), F.S.

Text Messages

The Attorney General's Office advised the Department of State (which is statutorily charged with development of public records retention schedules) that the "same rules that apply to e-mail should be considered for electronic communications including Blackberry PINS, SMS communications (text messaging), MMS communications (multimedia content), and instant messaging conducted by government agencies.



Draft Documents

Draft documents are not exempted from Public Records Act simply because they are in draft form. If purpose of record prepared in connection with official business of agency is to perpetuate, communicate, or formalize knowledge, it is a public record, regardless of whether it is final form or the ultimate product of agency.



What is Not a Public Record

In 2003, the Florida Supreme Court recognized an emerging problem within the public records law realm — the use of publicly owned devices to conduct personal business, such as sending personal emails.

In *State v. City of Clearwater*, 863 So. 2d 149, 151 (Fla. 2003), the Florida Supreme Court was presented with the question “whether personal emails are considered public records by virtue of their placement on a government-owned computer system.”

What is Not a Public Record

The court reviewed the history and intent of Florida's public records policy and opined that *"it cannot merely be the placement of the emails on the [c]ity's computer system that makes the emails public records. Rather, the emails must have been prepared 'in connection with official agency business' and be 'intended to perpetuate, communicate, or formalize knowledge of some type.'"*

The court went on to state "common sense...opposes a mere possession rule." The court held that *"private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer. The determining factor is the nature of the record, not its physical location."*

What is Not a Public Record

Florida Supreme Court held that personal handwritten notes of a consultant hired by an agency who conducted interviews and used those notes to later formalize the information were considered precursors to public records

You can use personal notes and drafts when creating files or documents relating to official agency business, however, if you communicate those notes to another, they become public records.

Or if you add that note or draft to a file as the document describing an event or an issue relating to official agency business, that note or draft will likely be considered a public record as it is being used to perpetuate, communicate or formalize knowledge.

What is Not a Public Record

- Personal notes, records, or e-mails related to your personal life, and not related to official agency business are not public records.
- Personal e-mails sent from, or received at, the agency email system are not public records. Take care, however, because those e-mails could be subject to review to ensure that all public records regarding an issue have been disclosed

Exempt Records

- In order for an agency to withhold a record from disclosure, it must be under statutory exemption.
- Only the Florida Legislature is authorized to create exemptions — courts may not do so.

Examples of Exempt Records

- Records related to health care delivery to a person, such as patient records, emergency records that identify the person seeking care, and infectious disease reports, including HIV/AIDS records, are all exempt from disclosure.
- Record that identifies the victim of a crime is exempt from disclosure. Includes records received by the agency from another source that identifies the victim of a crime.
- Bank account records, credit card numbers, social security numbers are all exempted.

Exempt Records

- If records custodian asserts exemption applies to part of the record, then the custodian must “redact that portion of the record to which an exemption has been asserted and validity applies,” and produce remaining record.
- If requesting person wants additional explanation on exemption, then records custodian required to “*state in writing and with particularity the reasons for the conclusion that the record is exempt or confidential.*”
- If a record, or portion of a record, is withheld due to an exemption, the agency must specifically identify the statute that exempts the record from disclosure.

Confidential Records



- Different set of rules apply to “confidential” records. If information IS confidential by a statute, the information is not subject to inspection by public and may only be released to the person/organization designated in statute.
- Agency has discretion to disclose exempt records, but does not have discretion to disclose confidential records.

Confidential Records



- Confidential information is not subject to inspection by the public and may only be released to those persons and entities designated in the statute.
- Exempt records are not subject to the mandatory disclosure requirements of the Public Records Law; an agency, however, is not prohibited from disclosing such records.

Penalties for Public Records Violations

- A public officer who violates public records laws can be subject to a \$500.00 fine. A public officer who knowingly violates public records laws is subject to suspension or removal.
- Knowingly violating public records laws is a crime, a first degree misdemeanor punishable by up to one year in prison, a \$1,000.00 fine or both.

Penalties For Public Records Violations

- Person seeking disclosure of public record has a right to an immediate hearing. If the court rules in favor of disclosing record, agency must obey the court order within 48 hours, unless order specifies a different timeframe for compliance.
- Person seeking disclosure of public record may receive court costs and attorney's fees if they prevail.

Penalties for Violations

- Violations of the Public Records Act carry penalties ranging from a fee (not to exceed \$500) to a third-degree felony.
- The act can be violated in a variety of ways. For example, in *Lake Shore Hospital Authority v. Lilker*, 168 So. 3d 332 (Fla. 1st DCA 2015), the First DCA determined that Hospital records custodian violated act when it hampered a requesting party's right to inspect a record by limiting access to the records to a single hour on weekday mornings and requiring 24-hour notice before inspection.

See Section 119.10 Florida Statutes

Penalties for Violations

Violations of the Public Records Act carry penalties ranging from a fee (not to exceed \$500) to a third-degree felony.

Penalties for violating the Public Records Act are outlined in F.S. 119.10. The act can be violated in a variety of ways. For example, in *Lake Shore Hospital Authority v. Lilker*, 168 So. 3d 332 (Fla. 1st DCA 2015), the First DCA determined that Hospital records custodian violated act when it hampered a requesting party's right to inspect a record by limiting access to the records to a single hour on weekday mornings and requiring 24-hour notice before inspection.

Miami Herald

Sitting Martin County commissioner accused of failing to surrender emails in lawsuit

MIAMI HERALD

NOVEMBER 28, 2017

A Martin County commissioner pleaded not guilty to a charge pertaining to her response to public records requests Tuesday in Stuart.

Penalties for Violations

Additionally, in *Promenade D'Iberville, LLC v. Sundy*, 145 So. 3d 980 (Fla. 1st DCA 2014), the First DCA discussed other pitfalls by explaining that although delay in making records available is not violation in certain circumstances, unjustified delay in making nonexempt public records available is a violation.

Examples of a justified delay include when a records custodian needs time to determine whether the records exist; when the custodian believes that some or all of the records are exempt under the act; and if the requesting party fails to remit appropriate fees.

Attorney's Fees

Courts are authorized to assess prevailing party attorneys' fees for challenges before the court. The Florida Supreme Court has explained that:

[A] prevailing party is entitled to statutory attorneys' fees under the Public Records Act when the trial court finds that the public agency violated a provision of the Public Records Act in failing to permit a public record to be inspected or copied. There is no additional requirement, before awarding attorneys' fees under the Public Records Act that the trial court find that the public agency did not act in good faith, acted in bad faith, or acted unreasonably.



Attorney's Fees

In *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120 (Fla. 2016), the Florida Supreme Court explained that “[u]nlawful conditions or excessive, unwarranted special service charges deter individuals seeking public records from gaining access to the records to which they are entitled.” The court elaborated that even if not malicious or done in bad faith, the record custodians’ actions had “the effect of frustrating” the requestor’s constitutional right to access public records, which required the requestor to turn to the courts to vindicate that right.

Attorney's Fees



Thus, F.S. 119.12 has “the dual role of both deterring agencies from wrongfully denying access to public records and encouraging individuals to continue pursuing their right to access public records.”

Failing to adhere to the Public Records Act is both illegal and can be costly

Public Records Retention

- All public records must be retained in accord with retention schedules approved by the Florida Department of State.
- Section 257.36, Florida Statutes, vests authority in the Florida Department of State to establish retention schedules and records management procedures.
- Exempt records must also be retained.

Public Records Retention

- Retention of any electronic message will generally be same as the retention for records in any other format that document the same program function or activity.
- For instance, electronic communications might fall under a correspondence series, a budget records series, or one of numerous other series, depending on the content, nature and purpose of each message.
- Electronic communications that are created primarily to communicate information of short-term value, such as messages reminding employees about scheduled meetings or appoints, or most voice mail messages, might fall under the “Transitory Messages” series.

City of Tallahassee's Public Records Template

- Some local governments do not have document retention policy — rely on the Public Records Act. Local governments should have a plan beyond the outline of the act.
- Policy defines “public record” as defined by 119.011(12), and states that it should be interpreted liberally. The definition specifically includes “email and text messages created or transmitted in connection with the transaction of official business, regardless if the communications were sent from a [c]ity-owned device or a privately owned device.”

City of Tallahassee's Public Records Template

- Regarding **emails**, policy prohibits use of non-city email servers to conduct city business (e.g., @gmail.com, @yahoo.com, etc.).
- Establishes duty for each employee, if receive unsolicited communication on private account, to “preserve and retain all communications meeting the definition of a ‘public record’ and to promptly transfer those records to the custody of the [c]ity.”

City of Tallahassee's Public Records Template

- City-issued phone contains software that automatically retains all communications. Employees are allowed to transmit messages from a personally owned phone to a city phone only to preserve record.
- Prohibits transmitting/receiving electronic communications concerning city business on personally owned devices. Establishes duty for employee, if receive unsolicited communication on privately owned device, to preserve it if public record.

City of Tallahassee's Public Records Template

- Prohibits instant messaging, personal messaging, and social media, such as Facebook, Twitter, Instagram, Skype, etc.
- Violations of the city's policy are grounds for termination

Requesting Records

Section 119.07(1)(a), Florida Statutes, provides that:

"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."

Any person may request a public record.

Request may be verbal or in writing. Completing public records request form cannot be mandated.

Requesting Records

A person does not need to provide a reason for requesting records, they don't need to explain their purpose, they don't need to give a justification

The agency can charge reasonable fees for providing the records, but cannot require a person requesting records to explain why they want them.

Public Records Act provides statutory right to **inspect** records, not just to obtain copies. Be sure to explore the inspection option, particularly if the responsive records are voluminous or unfamiliar

Fees for Records

The following fees are authorized:

- Section 119.07(4)(a)1 permits local governments to **charge** up to 15 cents per one-sided **copy** for paper **copies** that are 14 inches by 8.5 inches or less and an additional 5 cents for two-sided **copies**.
- For all other copies, the actual cost of duplication of the public record.
- Charge for copies of maps or aerial photographs may also include a reasonable charge for the labor and overhead associated with their duplication.

Fees for Records



Charge up to \$1 per copy for a certified copy of a public record.

IF nature or volume of public records requested requires extensive use of IT resources or extensive clerical or supervisory assistance, the agency may charge, in addition to actual cost of duplication, a **special service charge**, based on actual cost incurred for extensive IT resources or clerical and supervisory assistance required, or both.

Fees for Records



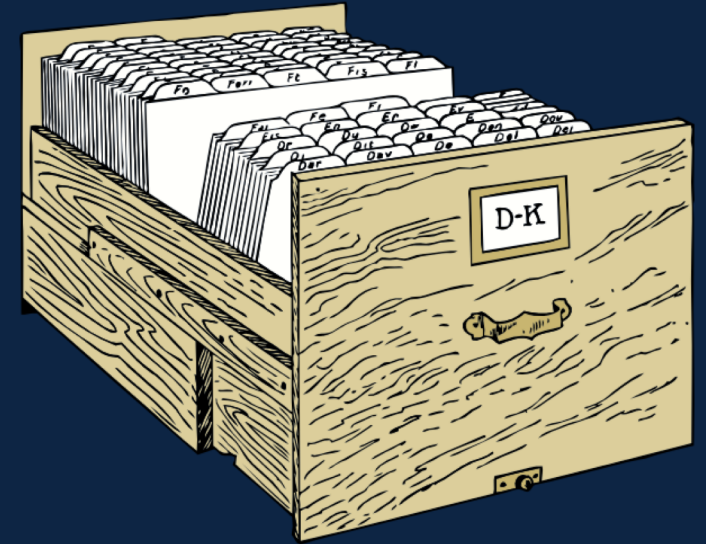
"any person shall have the right of access to public records for the purpose of making photographs of the record while such record is in the possession, custody, and control of the custodian of public records."

Section 119.07(3)(a), Florida Statutes

Practice Tips

A public record is defined by the **nature of the document** ---

meaning the purpose that it was created or information that is conveying, not by where the document is located, *i.e.*, government-owned device versus a personally owned device.



Practice Tips

- IF a government official uses his or her personal device for business, those texts, emails, or other business documents or communications are subject to Public Records Act, unless exempt or confidential.
- Local governments should understand how the Public Records Act applies and either update or create a document retention policy that is relevant to the realities of modern communication.

Practice Tips

- Consider each e-mail a public record. If you keep that in mind when e-mailing, you won't risk putting things there that you do not want disclosed.
- If your e-mail message is about known exemption to the public records law, such as confidential information, be sure to label and/or encrypt it.



Practice Tips

- Don't mix personal records and agency records. Keep your personal life and the agency's business separate.
- Because text messages regarding official business are public records, try to avoid using texts for official business
- Be careful with notes, and do not destroy public records.

In the news....

Did Martin Commissioner Sarah Heard break public-records law or is she a victim of harassment?

Melissa E. Holsman, Treasure Coast Newspapers

Published April 9, 2019



Martin County Commissioner Sarah Heard (right) talks with her attorneys (from left) Jordan Wagner and Barbara Kibbey Wagner, as they prepare for jury selection for Commissioner Heard's misdemeanor trial at the Martin County Courthouse on Monday, April 8, 2019, in Stuart. Commissioner Heard is charged with two first-degree misdemeanor offenses of violating public records laws. The trial under Senior Judge James David Langford is expected to last through the week. (Photo: ERIC HASERT/TCPALM)

STUART — Martin County Commissioner Sarah Heard is either guilty of failing to properly maintain public records in violation of state law, or she's been wrongly accused in a sustained attempt to harass and ruin her reputation.

In the news....

Charges dropped against two former Martin County commissioners



By Jon Shainman | August 20, 2019

MARTIN COUNTY, Fla. — Criminal charges have been dropped against two former Martin County Commissioners accused of public records violations.

"There is quite a bit of relief. Now, I don't have to go home and read more papers at night," said Ed Fielding Monday.

Fielding will no longer stand trial, 21 months after a grand jury indictment determined he and two other commissioners had allegedly violated public records laws. Fielding's attorney says his client was unfairly singled out.

Prosecutors released a memo outlining why they decided to drop the cases against the former commissioners. Among the reasons, what happened during the one trial that took place involving a sitting commissioner.

Sarah Heard was found not guilty in April on similar charges. It took a jury only 30 minutes to reach that verdict.

In the memo, the state says rulings regarding evidence in Heard's case convinced prosecutors they didn't think they would be able to prove the cases against Fielding and former commissioner Anne Scott beyond a reasonable doubt to a jury.

