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## 7. Ethics, Conflicts of Interest, and Abuse of Office

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Ethics is defined as “[o]f or relating to moral action, conduct, motive or character... [p]rofessionally right or befitting.”<sup>1</sup> As former Supreme Court Justice Potter Stewart once said, “Ethics is knowing the difference between what you have the right to do and what is the right thing to do.”

It is Florida law and policy that “[a] public office is a public trust. The people shall have the right to secure and sustain that trust against abuse.”<sup>2</sup> Furthermore,

It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the remuneration provided by law. The public interest, therefore, requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.<sup>3</sup>

The state “Code of Ethics” for public officers and employees is provided in Chapter 112, Part III, of the Florida Statutes. The Code of Ethics contains standards of conduct and disclosures applicable to public officers, employees, candidates, lobbyists, and others in state and local government, with the exception of judges. It sets forth several standards of conduct for public officers, including: annually filing a statement of financial interests; refraining from soliciting or accepting gifts for votes or other official action; refraining from accepting compensation for votes or other official action; refraining from accepting most honoraria; refraining from nepotism (employment of family members); and refraining from doing government business with one’s own private business.<sup>4</sup> The Code of Ethics applies to any person elected or appointed to public office, including persons serving on certain advisory boards.<sup>5</sup>

On the first day of the 2013 Legislative Session, the Florida Senate made history by unanimously passing the most comprehensive ethics reform legislation in Florida in more than 30 years. The Code of Ethics was further amended during the 2014 Legislative Session. These amendments to Chapter 112, Part III, Florida Statutes, provide the following:

1. Authorize the Commission on Ethics to investigate alleged ethics violations based upon a written referral from the Governor, Department of Law Enforcement, state attorney, or U.S. attorney;<sup>6</sup>
2. Require constitutional officers and elected municipal officers to annually complete 4 hours of training on ethics, open meetings and public records laws;<sup>7</sup>
3. Prohibit dual public employment by elected public officers except under certain circumstances, and restrict certain promotions or advancements;<sup>8</sup>
4. Give the Commission on Ethics more tools to collect unpaid fines, including wage garnishment, utilizing a collection agency, or other collection methods authorized by law;<sup>9</sup>
5. Increase the statute of limitations for collecting unpaid fines to 20 years;<sup>10</sup>

6. Prohibit gifts from political committees;<sup>11</sup> and
7. Make available online the financial disclosure forms of elected officials.<sup>12</sup>

In addition, if a person holding public office or public employment fails or refuses to file a full and public disclosure of financial interests and has accrued the maximum fine, the Commission on Ethics is to initiate an investigation and conduct a public hearing on the matter. If the Commission on Ethics determines that the person willfully failed to file the statement of financial interests, the Commission is to enter an order recommending the person to be removed from office.<sup>13</sup>

Local governments are also allowed to enact ordinances that impose standards of conduct that are in addition to, and more stringent than, those specified in the state's Code of Ethics<sup>14</sup> State law specifies that county ordinances which impose standards of conduct may provide for stiffer penalties for violations, including a fine not to exceed \$1,000, or a term of imprisonment in county jail not to exceed one year.<sup>15</sup> The types of regulations typically found in local ethics codes include: the establishment of local ethics commissions; hiring an internal inspector general to be an independent ethics "watchdog"; local lobbyist registration requirements; and penalties for violations.

In Florida there are examples of local ethics codes, and departments of county government devoted to ethics enforcement, which have been created by county charters. In Palm Beach County and Broward County, the voters approved charter amendments that expanded the jurisdiction of county ethics regulations to all of the municipalities within each county.

## FLORIDA COMMISSION ON ETHICS

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The Florida Commission on Ethics is an independent agency that was formed in 1974 to "serve as guardian of the standards of conduct" for officers and employees of state and local governments.<sup>16</sup> The Commission reviews complaints made against public officers and employees for violations of the State's Code of Ethics, issues advisory opinions in response to questions from public officials about potential conflicts of interest, and maintains the financial disclosure system. The Commission on Ethics has the "power to subpoena, audit, and investigate,"<sup>17</sup> but currently does not have the power to self-initiate complaints.

Upon receipt of a sworn, written complaint (the Commission on Ethics cannot accept anonymous complaints), the Commission follows a three-stage process.<sup>18</sup> First, in the preliminary investigation stage, the Commission determines whether the allegations made in the complaint are "legally sufficient," which means whether or not the complaint indicates that a violation of law occurred over which the Commission has jurisdiction.<sup>19</sup> If the complaint is found not to be legally sufficient, then the complaint is dismissed without an investigation. The next stage is the investigatory stage, during which Commission staff investigate the allegations contained in the complaint to determine whether there is probable cause to believe that there has been a violation of the ethics laws. If the Commission finds that there is no probable cause to believe there has been a violation, then the complaint is dismissed. Alternatively, if the Commission finds there is probable cause to believe that an ethics violation has occurred, a public hearing (akin to a trial) is held, evidence presented, and a ruling made.

The complaint must be filed with the Commission on Ethics within five years of the alleged Code of Ethics violation or other breach of the public trust. The five-year time period starts running the day after the violation allegedly occurs.<sup>20</sup>

A final ruling by the Commission on Ethics can be appealed to the district court of appeal.<sup>21</sup>

## **ETHICS TRAINING**

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County commissioners and all elected municipal officers are now required to annually complete 4 hours of training on ethics, public records, and open meetings laws.<sup>22</sup>

The Florida Commission on Ethics issued an ethics opinion to provide guidelines for ethics training, as follows:

1. A county attorney's office, other local government attorney, and any person with knowledge of the required subject may provide training.
2. The training may be satisfied through attendance of a pre-recorded program.
3. The training may be satisfied through a review of written materials, provided the materials are part of a formalized study program and not a self-directed study.
4. A 50-minute class on ethics can satisfy one credit hour.
5. Annual training means occurring between January 1 and December 31 of each and every year.<sup>23</sup>

The Commission on Ethics has also adopted rules identifying the minimum course content for the ethics portion of a training program.<sup>24</sup> Subjects that must be covered in ethics training include one or more of the following:

1. Doing business with one's own agency;
2. Conflicting employment or contractual relationships;
3. Misuse of position;
4. Disclosure or use of certain information;
5. Gifts and honoraria, including solicitation and acceptance of gifts, and unauthorized compensation;
6. Post-officeholding restrictions;
7. Restrictions on the employment of relatives;
8. Voting conflicts when the constitutional officer is a member of a collegial body and votes in his or her official capacity;
9. Financial disclosure requirements, including the fine and appeal process;
10. Commission on Ethics procedures concerning ethics complaints and referrals; and
11. The importance of and process for obtaining advisory opinions from the Commission on Ethics.<sup>25</sup>

Officials who are required to file full and public disclosure of financial interests must also certify on the disclosure form that he or she has completed the required ethics training.<sup>26</sup>

## **CONFLICTS OF INTEREST**

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Florida law provides that officers and employees of a county, city, or other political subdivision of the state, must not have any "interest, financial or otherwise, direct or indirect; engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his or her duties in the public interest."<sup>27</sup> A "conflict" or "conflict of interest" is defined as a "situation in which regard for a private interest tends to lead to disregard of a public duty or interest."<sup>28</sup>

For example, the Code of Ethics states as follows:

No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity . . . which is . . . doing business with . . . an agency of which he or she is an officer or employee . . . nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.<sup>29</sup>

Simply stated, this provision prohibits a county official from being employed by, or having a contractual relationship with, a private business entity which is doing business with the county. In addition:

No . . . public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer . . . is . . . an officer, partner, director, or proprietor . . . [n]or shall a public officer . . . , acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer's . . . own agency . . . .<sup>30</sup>

This provision prohibits one from acting in his or her official capacity as a county commissioner to rent or lease any realty, or purchase any services, for the county from a private business entity for which he or she serves as an officer, partner, director, or proprietor.

Conflicts of interest may particularly occur when local public officials are in a position to make governmental decisions that affect their personal financial interests. This is one of the reasons why public officers, candidates for public office, and certain public employees must file various financial disclosure forms. For example, by July 1 of each year, county commissioners are required to file a Full and Public Disclosure of Financial Interests (Form 6) with the Commission on Ethics. Form 6 discloses a county commissioner's net worth, assets valued at over \$1,000, liabilities in excess of \$1,000, primary and secondary sources of income, and interests in business entities.<sup>31</sup> In addition, county commissioners must file a Quarterly Client Disclosure form (Form 2), which details all clients that have been represented before any county agency for a fee by the commissioner's private business.<sup>32</sup> The various disclosure forms and instructions are available on the Florida Commission on Ethics web site (<http://www.ethics.state.fl.us>).

## VOTING CONFLICTS

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On one hand, Florida law requires board members who are present at a board meeting to vote on measures being considered by the board.<sup>33</sup> However, there is an exception to the mandatory voting requirement when "there is, or appears to be, a possible conflict of interest."<sup>34</sup>

The voting conflicts law applies to all measures that might result in a "special private gain or loss" to the official.<sup>35</sup> In other words, the existence of a conflict depends on whether or not the public official's private interests are impacted to a significantly greater (or significantly lesser) degree than the interests of other similarly situated persons. For example, the Commission on Ethics typically finds that no conflict exists when a voting official's interest in a measure constitutes one percent (1%) or less of the size of the class of similarly situated persons who are affected by the measure.<sup>36</sup> In addition, if the gain or loss resulting from the measure being voted on is so remote or speculative that the measure cannot be said to inure to the official's special private gain or loss, then a voting conflict would not be triggered.<sup>37</sup> Finally, a conflict would not exist on voting for measures which are procedural or preliminary to future actions that would result in a gain or loss.<sup>38</sup>

If there are measures which would inure to the special private gain or loss of the public officer, or the public officer's employer, business associate (partner, joint venturer, co-owner of property, etc.), or relative (father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, and daughter-in-law), then the public officer must, prior to a vote being taken on the measure, "publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting."<sup>39</sup> Within 15 days after the vote, the public official must also disclose the nature of the interest in a memorandum of voting conflict form (Commission on Ethics Form 8B), which is then filed with the person responsible for recording the minutes of the meeting, who will then incorporate the form into the minutes of the meeting.<sup>40</sup>

This also means that if a public official is unsure of the conflict of interest but believes that there "appears to be" a possible conflict of interest, then the official would be allowed to abstain from voting, and should then orally announce the conflict before the vote and file the necessary memorandum of voting conflict form within 15 days after the vote.

Even a board member who is in attendance at a board meeting, but happens to be out of chambers during the vote on an issue in which the board member has or appears to have a conflict of interest, would be required to publicly announce the basis of a conflict of interest and file a memorandum of voting conflict.<sup>41</sup> The Florida Attorney General has determined that the statutory duty to vote "may not be avoided by the 'temporary' absence of a member during the vote on a particular matter which comes before the body of which he is a member during a meeting at which he is present."<sup>42</sup>

In 2014, the Florida Legislature amended Section 286.012, Florida Statutes, to allow a board member to abstain from voting on a matter before the board if there is, or appears to be, a possible conflict of interest under a locally adopted code of ethics. If the conflict arises under the local code of ethics, then the board member is to follow the disclosure requirements specified in the local code of ethics. Further, a board member may abstain from voting on a matter in a quasi-judicial proceeding "if the abstention is to assure a fair proceeding free from potential bias or prejudice."<sup>43</sup>

A copy of the Voting Conflict Chart and instructions are located in Appendix A. Copies of the memorandum of voting conflict forms and instructions are available on the Florida Commission on Ethics web site (<http://www.ethics.state.fl.us>).

## **DUAL OFFICE-HOLDING CONFLICT OF INTEREST**

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The State Constitution provides in part that:

No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except...any officer may be a member of...statutory body having only advisory powers.<sup>44</sup>

This prohibits a person from simultaneously serving in more than one state, county, or municipal office.

The dual office-holding prohibition applies to both elected and appointed offices.<sup>45</sup> Although not defined by the Constitution, the courts have stated that the terms "office" or "officer," for purposes of the dual office-holding prohibition, implies an authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws.<sup>46</sup>

Underlying the intent of this law is the concern that conflicts of interest would arise by holding dual offices whenever the respective duties of the offices are inconsistent. On the other hand, however, the legislative designation of an officer to perform *ex officio* (by virtue of the office)<sup>47</sup> the functions of an additional office would not violate the dual office-holding prohibitions, provided the duties imposed are consistent with the duties already being exercised.<sup>48</sup>

## **PERCEIVED CONFLICTS AND DISCLOSURE OF A PERSONAL INTEREST OR RELATIONSHIP**

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Beyond the prohibited conflicts and voting conflicts discussed above is the interest or relationship that creates a perceived conflict. Even when required by state law to cast a vote, a commissioner can ensure maximum transparency in government decision making by disclosing certain relationships and interests related to the matter. For example, voting on a matter that would benefit a grandparent, long-time friend, former employer, former business associate, or favorite charity may not amount to a voting conflict under state law. But by fully disclosing the nature of these facts and relationships before the vote, the commissioner eliminates the possibility of any secret motive and can better demonstrate that the vote was made for the public good, not for private gain.

While not foolproof, full disclosure of the nature of personal interests and relationships related to a vote, even when there is no conflict under state law, best addresses the issue. Properly done, the nature of this disclosure should demonstrate that the decision is based on the best interests of the public and not secretly made to serve a private interest. Better still, this practice will further enhance transparency in local government decision making.

## **DUAL PUBLIC EMPLOYMENT**

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In 2013, new statutory provisions were enacted to prohibit dual public employment by elected public officers and candidates for office except under certain circumstances, and to restrict certain promotions or advancements.<sup>49</sup> Section 112.3125, Florida Statutes provides that a public officer (defined as a person who is elected to state or local office, or a person who is presently a candidate for state or local office) “may not accept public employment with the state or any of its political subdivisions” if the person knows, or should know, that the position is being offered for the purpose of gaining influence or other advantage based on the person’s office or candidacy.<sup>50</sup>

Further, any public employment accepted by a public officer must meet the following conditions: (a) the position was already in existence or was created by the employer without the knowledge or anticipation of the officer’s interest in the position; (b) the position was publicly advertised; (c) the officer was subject to the same application and hiring process as other candidates for the position; and (d) the officer meets or exceeds the required qualifications for the position.<sup>51</sup>

Persons who were employed by the state or any of its political subdivisions before qualifying as a public officer for his or her current term of office or the next available term of office may continue in said employment, but may not accept a promotion, advancement, additional compensation, or anything of value that the person knows, or should know, is being given as a result of the officer’s election or position, or that is otherwise inconsistent with the promotion, advancement, additional compensation, or anything of value provided or given to a similarly situated employee.<sup>52</sup>

## **MISUSE OF CONFIDENTIAL INFORMATION**

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Florida law states that:

Any public servant who, in contemplation of official action by herself or himself or by a governmental unit with which the public servant is associated, or in reliance on information to which she or he has access in her or his official capacity and which has not been made public, commits any of the following acts:

- (1) Acquisition of a pecuniary interest in any property, transaction, or enterprise or gaining of any pecuniary or other benefit which may be affected by such information or official action;
- (2) Speculation or wagering on the basis of such information or action; or
- (3) Aiding another to do any of the foregoing,

shall be guilty of a misdemeanor of the first degree.<sup>53</sup>

Further, a public servant who discloses or uses confidential criminal justice information with the intent to obstruct, impede, or prevent a criminal investigation or a criminal prosecution, when such information is not available to the general public and is gained by reason of the public servant's official position, commits a felony of the third degree.<sup>54</sup>

Meanwhile, the Code of Ethics provides the following:

**DISCLOSURE OR USE OF CERTAIN INFORMATION.**—A current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for her or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.<sup>55</sup>

There are civil sanctions for violating section 112.313(8) and criminal sanctions for violating Sections 838.21 and 839.26, Florida Statutes.

In a Florida Attorney General Opinion, the question was posed regarding whether a public officer or employee who participated in a closed meeting on labor negotiations could disclose the information that was obtained during the closed meeting. Although the statute related to closed labor negotiation meetings did not restrict the dissemination of information discussed at the closed labor negotiations, the Florida Attorney General did note that there were other state laws, namely Sections 839.26 and 112.313(8), which did prohibit the disclosure of such information under certain circumstances.<sup>56</sup>

## **GIFTS AND HONORARIA**

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The Code of Ethics contains provisions that: (1) prohibit soliciting, giving, or accepting certain gifts, honoraria, and honorarium event-related expenses; and (2) require the public disclosure of gifts, honoraria, and honorarium event-related expenses under certain circumstances.<sup>57</sup> For example, a public officer or candidate for office may not solicit or accept a “gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer... would be influenced thereby.”<sup>58</sup> In addition, public officers and their spouses and minor children must not accept anything of value when they know or should know that it was given to influence the official action of the public officer.<sup>59</sup>

“Gifts” would include: real property or the use of real property; tangible or intangible personal property or the use of same; preferential rates or terms on a debt, loan, goods, or services; forgiveness of a debt; food or beverage; membership dues; tickets to events; floral arrangements; and personal or professional services which would ordinarily require payment.<sup>60</sup> On the other hand, awards, plaques, certificates, and other similar items given in recognition for public service are not considered “gifts.”<sup>61</sup>

Accepting a gift worth more than \$100 from a lobbyist, or soliciting a gift from a lobbyist, is prohibited under the Code of Ethics.<sup>62</sup> Gifts from relatives, gifts for a charitable organization or governmental entity, and gifts from certain government agencies, are allowable.<sup>63</sup> Most gifts that are over

\$100 in value (except, for example, gifts from relatives) must be disclosed on a quarterly gift disclosure form (Form 9) which is filed with the Commission on Ethics. In addition, gifts over \$100 in value from certain governmental agencies, as well as honorarium event-related expenses paid by certain entities, must be reported annually (on Form 10) to the Commission on Ethics. However, most honoraria (such as receiving payments for giving speeches) are prohibited.<sup>64</sup>

The Code of Ethics also specifically prohibits a public official or a member of his or her immediate family (parent, spouse, child, or sibling) from soliciting or knowingly accepting gifts from political committees.<sup>65</sup> Gifts in this context mean the “purchase, payment, distribution, loan, advance, transfer of funds, or disbursement of money or anything of value that is not primarily related to contributions, expenditures, or other political activities authorized pursuant to chapter 106.”<sup>66</sup> Any person who violates this provision is subject to a civil penalty equal to three times the amount of the gift.<sup>67</sup>

## TESTIMONIALS

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A “testimonial” is defined as “any breakfast, dinner, luncheon, rally, party, reception, or other affair held to honor or raise funds on behalf of any elected public officer,” with the exception of a campaign fundraiser.<sup>68</sup> Florida law requires that any organization hosting a testimonial for an elected official must file a notice of intent with the supervisor of elections, set up a “testimonial account” in a depository, and appoint a treasurer before any money can be accepted.<sup>69</sup> A report with certain specified information must then be filed by the host organization with the supervisor of elections within 90 days after the testimonial.<sup>70</sup> A violation of this law is a first degree misdemeanor, which is punishable by one year in prison and/or a \$1000 fine.<sup>71</sup>

The Florida Attorney General was asked what types of events were subject to the reporting requirements and opined that, while the subject statute “refers to affairs that honor or raise funds on behalf of any elected public officer,” this did not mean “that the Legislature intended to encompass all events honoring a public official where no funds are being raised or payments made to attend. To read the statute so broadly could result in, for example, birthday parties held by family members for an elected public official being subject to the statute.”<sup>72</sup>

After payment of the expenses for the testimonial, any leftover funds must be donated to a charity, returned pro rata to the contributors, or deposited in the general fund of the elected official’s government entity.<sup>73</sup> Elected public officers are prohibited from receiving any leftover funds for personal use.<sup>74</sup>

## EX PARTE COMMUNICATIONS

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Certain land use approvals, such as site-specific rezonings, site plan approvals, variances, special exceptions, and voluntary annexations, require a local governing board to conduct a “quasi-judicial” hearing, which is akin to an informal trial.<sup>75</sup> Although a “quasi-judicial” hearing is not a true court proceeding, there are certain standards of basic fairness that must be adhered to in order to provide due process to the affected parties.<sup>76</sup> For example, the parties must: be provided notice of the hearing and an opportunity to be heard; be allowed to present evidence and cross-examine witnesses; and be informed of all of the facts upon which the local governing board acts.<sup>77</sup>

However, ex parte communications – “off the record” information provided by one party to a decision-making board member – are “inherently improper and are anathema to quasi-judicial



proceedings,” and should be avoided.<sup>78</sup> ex parte communications are presumed to be prejudicial to the aggrieved party until the local governing body proves otherwise.<sup>79</sup>

Disclosing ex parte communications on the record at the quasi-judicial hearing does enable all parties to be aware of all of the facts and to rebut those facts. There is a statutory procedure which allows local governments to establish a process by which ex parte communications related to land use matters may be made public, in order to remove the presumption of prejudice in quasi-judicial hearings.<sup>80</sup> However, even the disclosed ex parte communications may still be questionable, because an aggrieved party may not have the opportunity to cross examine the party that provided the information to the local official.

## **DEFENSE OF CIVIL OR CRIMINAL ACTIONS AGAINST PUBLIC OFFICERS, EMPLOYEES OR AGENTS**

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In today’s litigious society, lawsuits are an inevitable and unenviable part of public life. Charges against local government elected officials, officers, employees, and agents may be legitimate or they may be vexatious. Florida law provides that any agency of the state, or any county, municipality or political subdivision of the state is authorized to:

- 1) Provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of any of its officers, employees, or agents arising out of and in the scope of his or her employment or function.
- 2) Recover any attorney’s fees paid from public funds, should the officer, employee, or agent be found to be personally liable by virtue of acting outside the scope of his or her employment, or was acting in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.
- 3) Reimburse such person who prevails in the action for court costs and reasonable attorney’s fees, should the county be authorized to provide an attorney to defend the civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents, and the county fails to provide such attorney.<sup>81</sup>

The Florida Supreme Court has set forth the following general rule:

Florida courts have long recognized that public officials are entitled to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose. The purpose of this common law rule is to avoid the chilling effect that a denial of representation might have on public officials performing their duties properly and diligently. This entitlement to attorney’s fees arises independent of statute, ordinance, or charter. For public officials to be entitled to representation at public expense, the litigation must (1) arise out of or in connection with the performance of their official duties and (2) serve a public purpose.<sup>82</sup>

Thus, it is proper to use public funds to pay or reimburse the reasonable attorney’s fees and costs incurred by a public official in the successful defense of an ethics complaint, or even the successful defense of a felony indictment, provided the case arose from performance of the official’s official duties and while serving a public purpose.<sup>83</sup> This protection applies to both current and former public officials.<sup>84</sup>

On the other hand, if a board member successfully defends a charge arising from performance of an official duty, but the action did not serve a public purpose, then the agency is not required to pay the attorney’s fees and costs incurred in defending the case.<sup>85</sup> A counterpoint to this is that it would be

improper to refuse to pay attorney's fees and costs arising from the performance of an official's duties while serving a public purpose, simply because the agency disapproved of the particular actions of the public official.<sup>86</sup>

## THE HOBBS ACT

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The federal "Hobbs Act" was enacted in 1946 and named for U.S. Representative Samuel F. Hobbs of Alabama, who introduced the Act. The Hobbs Act provides in pertinent part that:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.<sup>87</sup>

In the Hobbs Act, extortion means "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."<sup>88</sup>

Although this law was primarily enacted to combat racketeering in labor-management disputes, it is also used in cases involving public corruption.<sup>89</sup> An example of a violation of the Hobbs Act would be the acceptance by a public official of cash and/or property from a developer, even if the public official does not have an explicit agreement with the developer to perform an official act.<sup>90</sup> In other words, a conviction under the Hobbs Act will be sustained based on proof that the public official obtained a payment in cash and/or property and *generally* intended to use his or her influence to benefit the briber as opportunities arose.<sup>91</sup>

## HONEST SERVICES FRAUD

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Public officials need to have some familiarity with the federal "honest services" act. Although federal mail fraud statutes have been around since the 1870's, the term "honest services" is not actually defined by the statute and may seem somewhat obscure at first glance.

The federal mail fraud statute, as well as the companion wire, radio or television fraud statute, provide that, "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted" by means of mail, wire, radio or television communication in interstate or foreign commerce, shall be fined or imprisoned for not more than 20 years, or both.<sup>92</sup> The phrase "scheme or artifice to defraud" is defined as a scheme or artifice to deprive another of the intangible right of "honest services."<sup>93</sup>

Although the term "honest services" is not defined, it has withstood numerous challenges for unconstitutional vagueness. Notably, in 2010, the U.S. Supreme Court issued its landmark decision in the case of *Skilling v. United States*, which involved former Enron CEO Jeffrey K. Skilling.<sup>94</sup> In the *Skilling* case, the Supreme Court held that the statute was not unconstitutionally vague when properly confined to bribery and kickback schemes. However, the Court did narrow the parameters of honest services fraud when it found that the nondisclosure of a conflict of interest (or undisclosed "self-dealing") was not a violation of the statute.

It had been widely speculated that the *Skilling* decision would greatly reduce the number of honest services fraud prosecutions throughout the country. However, the federal government has

continued to successfully utilize the federal honest services fraud statutes to prosecute public officials for bribery and kickback schemes.

## SUNSHINE LAW VIOLATIONS

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Under Florida law, all meetings of any public board or commission at which official acts are to be taken, or at which public business is to be transacted or discussed, are required to be open and noticed to the public.<sup>95</sup> This is to protect the public from “closed door” politics.<sup>96</sup>

A violation of the Sunshine Law is a non-criminal infraction, punishable by a fine not exceeding \$500.<sup>97</sup> However, if a member of a public body *knowingly* violates the Sunshine Law, then the infraction is considered a misdemeanor of the second degree.<sup>98</sup> For more information on the Sunshine Law, see Chapter 22 of this guide.

## LEAVING OFFICE

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The Code of Ethics provides that upon leaving office, an elected county or municipal officer may not lobby the governmental body or agency, of which he or she was an officer, for a period of two years after leaving office.<sup>99</sup> This is known as the “revolving door” prohibition.

In addition, upon leaving office, an elected local official is required to file a Final Full and Public Disclosure of Financial Interests form (Form 6F) with the Commission on Ethics within 60 days of leaving office.<sup>100</sup> Copies of the forms and instructions are available on the Florida Commission on Ethics web site (<http://www.ethics.state.fl.us>).

## PENALTIES FOR VIOLATIONS

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Any violation of the State Code of Ethics “shall constitute malfeasance, misfeasance, or neglect of duty in office.”<sup>101</sup> Malfeasance is the commission of an act which is “positively unlawful,” whereas misfeasance is the “improper performance of some act which a person may lawfully do.”<sup>102</sup> Depending on the violation, a public officer or employee may be punished by civil penalties, criminal penalties, impeachment, dismissal, removal from office, suspension, demotion, reduction in salary, forfeiture of salary, restitution, or public censure and reprimand.<sup>103</sup>

The Governor may by executive order suspend any elected municipal officer who is indicted for a crime until such time as the officer is acquitted.<sup>104</sup> In addition, any public officer or employee who is convicted of embezzlement of public funds, theft from his or her employer, bribery in connection with employment, and most felonies, is also subject to forfeiture of all rights and benefits under any public retirement system.<sup>105</sup>

Violations of county ethics ordinances are generally prosecuted as second degree misdemeanors, punishable by a fine of \$500, imprisonment of 60 days, or both.<sup>106</sup> However, those counties that have enacted ordinances that impose standards of conduct may exact stiffer penalties for violations, including a fine not to exceed \$1,000, or a term of imprisonment in county jail not to exceed one year. Individuals who are convicted of honest services fraud or for a violation of the Hobbs Act are subject to fines and/or imprisonment of up to 20 years in federal prison.<sup>107</sup>

## EVALUATING ETHICAL DILEMMAS

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As stated in the code of ethics developed by the National Association of Counties (NACo), “[i]ndividual and collective adherence to high ethical standards by public officials is central to the maintenance of public trust and confidence in government.”<sup>108</sup>

Public officers are agents of the people and hold their positions for the benefit of the public.<sup>109</sup> Accordingly, when faced with ethical dilemmas in public service, county officials should observe and practice the highest standards of ethics “regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern.”<sup>110</sup>

### NOTES

<sup>1</sup> *Black’s Law Dictionary* 553 (6th ed., West 1990).

<sup>2</sup> Art. II, § 8, Fla. Const.

<sup>3</sup> § 112.311(1), Fla. Stat. (2014).

<sup>4</sup> § 112.313, et seq., Fla. Stat. (2014).

<sup>5</sup> § 112.313(1), Fla. Stat. (2014).

<sup>6</sup> § 112.324(1)(b), Fla. Stat. (2014).

<sup>7</sup> § 112.3142, Fla. Stat. (2014).

<sup>8</sup> § 112.3125, Fla. Stat. (2014).

<sup>9</sup> § 112.31455, Fla. Stat. (2014).

<sup>10</sup> § 112.31455(4), Fla. Stat. (2014).

<sup>11</sup> § 112.31485, Fla. Stat. (2014).

<sup>12</sup> § 112.31445, Fla. Stat. (2014).

<sup>13</sup> § 112.3144(6), Fla. Stat. (2014).

<sup>14</sup> § 112.326, Fla. Stat. (2014).

<sup>15</sup> § 125.69(1), Fla. Stat. (2014).

<sup>16</sup> § 112.320, Fla. Stat. (2014); *See also* Art. II, §§ 8(f), 8(i)(3), Fla. Const.

<sup>17</sup> § 112.322(4), Fla. Stat. (2014).

<sup>18</sup> *See* State of Florida Commission on Ethics Form 50.

<sup>19</sup> *Id.*; § 112.324(3), Fla. Stat. (2014).

<sup>20</sup> § 112.3231, Fla. Stat. (2014).

<sup>21</sup> § 112.3241, Fla. Stat. (2014).

<sup>22</sup> § 112.3142, Fla. Stat. (2014).

<sup>23</sup> Florida Commission on Ethics Op. 13-15 (2013).

<sup>24</sup> Rule 34-7.025, F.A.C.

<sup>25</sup> Rule 34-7.025(2)(b), F.A.C.

- <sup>26</sup> § 112.3144(1), Fla. Stat. (2014).
- <sup>27</sup> § 112.311(5), Fla. Stat. (2014).
- <sup>28</sup> § 112.312(8), Fla. Stat. (2014).
- <sup>29</sup> § 112.313(7)(a), Fla. Stat. (2014).
- <sup>30</sup> § 112.313(3), Fla. Stat. (2014).
- <sup>31</sup> § 112.3144, Fla. Stat. (2014). *See also* Rule 34-8.001, et seq., F.A.C. *See also* Florida Commission on Ethics Form 6 Full and Public Disclosure of Financial Interests.
- <sup>32</sup> *See* § 112.3145(5), Fla. Stat. (2014).
- <sup>33</sup> § 286.012, Fla. Stat. (2014).
- <sup>34</sup> *Id.*
- <sup>35</sup> § 112.3143(3)(a), Fla. Stat. (2014).
- <sup>36</sup> *See* Florida Commission on Ethics Op. 00-13 (2000).
- <sup>37</sup> *See* Florida Commission on Ethics Op. 85-46 (1985).
- <sup>38</sup> *See* Florida Commission on Ethics Op. 78-74 (1978). *See also* Florida Commission on Ethics Op. 83-50 (1983).
- <sup>39</sup> § 112.3143(3)(a), Florida Statutes (2014).
- <sup>40</sup> *Id.*
- <sup>41</sup> *See* Florida Commission on Ethics Op. 88-3 (1988).
- <sup>42</sup> *See* Fla. Atty. Gen. Op. 074-289.
- <sup>43</sup> § 286.012, Fla. Stat. (2014).
- <sup>44</sup> Art. II, § 5(a), Fla. Const.
- <sup>45</sup> *See* Atty. Gen. Op. 01-28 (2001).
- <sup>46</sup> *State ex rel. Clyatt v. Hocker*, 22 So. 721 (Fla. 1897); *see also* Atty. Gen. Op. 2009-48 (2009).
- <sup>47</sup> *Black's Law Dictionary* 575 (6<sup>th</sup> ed., West 1990).
- <sup>48</sup> *See* Atty. Gen. Op. Fla. 94-66 (1994).
- <sup>49</sup> § 112.3125, Fla. Stat. (2014).
- <sup>50</sup> § 112.3125(1)-(2), Fla. Stat. (2014).
- <sup>51</sup> § 112.3125(3), Fla. Stat. (2014).
- <sup>52</sup> § 112.3125(4), Fla. Stat. (2014).
- <sup>53</sup> § 839.26, Fla. Stat. (2014).
- <sup>54</sup> § 838.21, Fla. Stat. (2014).
- <sup>55</sup> 112.313(8), Fla. Stat. (2014).
- <sup>56</sup> *See* Fla. Atty. Gen. Op. 2003-09.
- <sup>57</sup> Rule 34-13.130, Fla. Admin. Code.
- <sup>58</sup> § 112.313(2), Fla. Stat. (2014).
- <sup>59</sup> § 112.313(4), Fla. Stat. (2014).
- <sup>60</sup> § 112.312(12), Fla. Stat. (2014).

- <sup>61</sup> *Id.*
- <sup>62</sup> § 112.3148, Fla. Stat. (2014).
- <sup>63</sup> *Id.*
- <sup>64</sup> § 112.3149, Fla. Stat. (2014).
- <sup>65</sup> § 112.31485, Fla. Stat. (2014).
- <sup>66</sup> § 112.31485(1)(a), Fla. Stat. (2014).
- <sup>67</sup> § 112.31485(3), Fla. Stat. (2014).
- <sup>68</sup> § 111.012(1)(a), Fla. Stat. (2014).
- <sup>69</sup> § 111.012(2), Fla. Stat. (2014.)
- <sup>70</sup> *Id.*
- <sup>71</sup> § 111.012(2)(f), Fla. Stat. (2014).
- <sup>72</sup> Fla. Atty. Gen. Op. 2003-19.
- <sup>73</sup> § 111.012(2)(d), Fla. Stat. (2014).
- <sup>74</sup> *See* Fla. Atty. Gen. Op. 88-17.
- <sup>75</sup> *See* Gary K. Hunter, Jr. and Douglas M. Smith, *ABCs of Local Land Use and Zoning Decisions*, 84 Fla. B.J. 20, 21 and n.7 (2010).
- <sup>76</sup> *Jennings v. Dade County*, 589 So.2d 1337, 1340 (Fla. 3d DCA 1991).
- <sup>77</sup> *Id.* at 1340-41.
- <sup>78</sup> *Id.* at 1341.
- <sup>79</sup> *Id.*
- <sup>80</sup> *See* § 286.0115, Fla. Stat. (2014).
- <sup>81</sup> § 111.07, Fla. Stat. (2014).
- <sup>82</sup> *Thorner v. City of Ft. Walton Beach*, 568 So. 2d 914, 916-17 (Fla. 1990) (citations omitted).
- <sup>83</sup> *See Ellison v. Reid*, 397 So. 2d 352 (Fla. 1st DCA 1981) (successful defense of an ethics complaint); *See Lomelo v. City of Sunrise*, 423 So. 2d 974 (Fla. 4th DCA 1982) (successful defense against a felony indictment).
- <sup>84</sup> *See* Atty. Gen. Op. 98-12 (1998) (opining that a retired county officer was entitled to reimbursement of reasonable attorneys fees incurred in successfully defending a civil lawsuit for actions taken while in office).
- <sup>85</sup> *See Chavez v. City of Tampa*, 560 So. 2d 1214 (Fla. 2d DCA 1990), rev. den. 576 So. 2d 285 (Fla. 1990). *See also Maloy v. Board of County Commissioners of Leon County*, 946 So. 2d 1260, (Fla. 1<sup>st</sup> DCA 2007), rev. den. 962 So. 2d 337 (Fla. 2007) (although cleared of the alleged misconduct, the underlying activity did not serve the public interest).
- <sup>86</sup> *See Lomelo v. City of Sunrise*, 423 So. 2d 974 (Fla. 4th DCA 1982).
- <sup>87</sup> 18 U.S.C. § 1951(a).
- <sup>88</sup> 18 U.S.C. § 1951(b)(2).
- <sup>89</sup> United States Attorneys' Manual § 9-131.010 (U.S. Dept. of Justice, 1997).
- <sup>90</sup> *United States v. Abbey*, 560 F.3d 513 (6<sup>th</sup> Circ. 2009), *cert. den.* 130 S. Ct. 739 (2009).
- <sup>91</sup> *Id.*

- <sup>92</sup> 18 U.S.C. § 1341; 18 U.S.C. § 1343.
- <sup>93</sup> 18 U.S.C. § 1346.
- <sup>94</sup> 130 S. Ct. 2896 (2010).
- <sup>95</sup> Art. I, § 24(b), Fla. Const.
- <sup>96</sup> *Deerfield Beach Publishing, Inc. v. Robb*, 530 So. 2d 510, 511 (Fla. 4th DCA 1988).
- <sup>97</sup> § 286.011(3)(a), Fla. Stat. (2014).
- <sup>98</sup> § 286.011(3)(b), Fla. Stat. (2014).
- <sup>99</sup> § 112.313(14), Fla. Stat. (2014).
- <sup>100</sup> § 112.3144(7), Fla. Stat. (2014).
- <sup>101</sup> § 112.317(4), Fla. Stat. (2014).
- <sup>102</sup> *Black's Law Dictionary* 956, 1000 (6<sup>th</sup> ed., West 1990).
- <sup>103</sup> § 112.317, Fla. Stat. (2014).
- <sup>104</sup> Art. IV, § 7(c), Fla. Const.; § 112.317(5), Fla. Stat. (2014).
- <sup>105</sup> § 112.3173(3), (5), Fla. Stat. (2014).
- <sup>106</sup> *See* § 125.69(1), Fla. Stat. (2014).
- <sup>107</sup> 18 U.S.C. §§ 1341, 1343; 18 U.S.C. § 1951(a).
- <sup>108</sup> National Association of Counties, NACo Code of Ethics for County Officials, <http://www.naco.org> (1991).
- <sup>109</sup> § 112.311(6), Fla. Stat. (2014).
- <sup>110</sup> *Id.*





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## 23. *Sunshine, Public Meetings, and Open Records Law*

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*Herbert W.A. Thiele*

Under Florida law, all meetings of any agency or authority of a county, municipal corporation or political subdivision, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken, or at which public business is to be transacted or discussed, are required to be open and noticed to the public.<sup>1</sup> This law is commonly referred to as the Government in the Sunshine Law, or the Sunshine Law. In fact, resolutions, rules, and formal actions of a public board or commission are considered binding *only* if taken or made at an open, public meeting.<sup>2</sup> Providing reasonable notice to the public of all such meetings is required, and minutes of the meetings must be taken.<sup>3</sup>

In addition, Florida law has established that all state, county, and municipal records that are made or received in connection with official business are open for inspection and copying by any person.<sup>4</sup> Unless there is a specific statutory or constitutional exemption to the disclosure of a particular record, a person must be allowed to inspect or copy the record at any reasonable time, under reasonable conditions, and under the supervision of the custodian of the record.<sup>5</sup>

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### **OPEN MEETINGS**

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#### **PURPOSE OF THE SUNSHINE LAW**

It has been said that the Sunshine Law was enacted to protect the public from “closed door” politics,<sup>6</sup> to prevent the “crystallization of secret decisions to a point just short of ceremonial acceptance.”<sup>7</sup> The Sunshine Law covers “any gathering of some of the members of a public board where those members discuss some matters on which foreseeable action may be taken.”<sup>8</sup> Under the Sunshine Law, a meeting is either fully open or fully closed; there are no intermediate categories.<sup>9</sup> Rather, governmental meetings should be a “marketplace of ideas,” enabling input from those citizens who will be affected by the board’s actions.<sup>10</sup>

#### **WHAT CONSTITUTES A “MEETING” FOR PURPOSES OF THE SUNSHINE LAW?**

The Sunshine Law applies to any function where two members of the same board are present.<sup>11</sup> It applies to all assemblies or meetings, whether structured or casual, where there are discussions of matters that may foreseeably come before a board or commission.<sup>12</sup> Although board members may attend other meetings and express their views, they may not discuss or debate issues amongst themselves.<sup>13</sup>

The Sunshine Law may also apply when there is communication between two or more members of the same board, but no actual meeting. For example, in an informal opinion dated June

29, 1973, the Attorney General's Office opined that a violation of the Sunshine Law occurred when a commissioner circulated a memorandum to other commissioners for concurrence or disapproval, with the measure becoming formally approved when all concurred.

The Sunshine Law also applies to certain communications that may not necessarily involve two members of the same board. For example, a Sunshine Law violation occurs when a person acts as a liaison between two members of same board or takes an official poll.<sup>14</sup> In addition, if a single board member has been delegated decision making authority to act on behalf of his or her board, then the Sunshine Law would apply to pertinent meetings attended by that member.<sup>15</sup>

## **BOARDS AND COMMITTEES SUBJECT TO THE SUNSHINE LAW**

The Sunshine Law applies to all legislative boards and decision-making committees of the county and to the members and members-elect of such boards and committees.<sup>16</sup> The Sunshine Law equally binds all members of governmental bodies, whether they are elected officials or members of an advisory committee.<sup>17</sup> This includes boards or commissions created by Florida law or by the public agency.<sup>18</sup>

This could also include some committees that consist only of staff members. In one case, the court held that since the authority for the final approval of a development project was delegated by county ordinance to a developmental review committee, staff members who served on said committee functioned as public officials.<sup>19</sup> Thus, their committee meetings were subject to the Sunshine Law.

However, when a committee has been established strictly in an advisory capacity, and conducts only fact-finding activities such as information gathering and reporting, then those activities are not subject to the Sunshine Law. For example, there was a court decision holding that meetings of a technical review committee created by ordinance were subject to the Sunshine Law, whereas the informal, informational meetings of the pre-technical review committee were not.<sup>20</sup>

Certain private entities may also be subject to the Sunshine Law. The test to determine whether the Sunshine Law applies to a private entity is whether the entity is merely providing services to the county, or "is standing in the shoes" of the county.<sup>21</sup> For example, if a county commission dissolves its cultural affairs council and designates a nonprofit organization to fulfill that role for the county, then the nonprofit organization would be subject to the Sunshine Law.<sup>22</sup> In another case, the activities of a non-profit golf and country club were found to be subject to the Sunshine Law, because the club was specifically created to contract with the county for the operation of a public golf course on county property acquired by public funds.<sup>23</sup> However, a private corporation that performs services for a public agency and receives compensation for its services under a contract or otherwise, is not necessarily subject to the Sunshine Law, unless the public agency's governmental or legislative functions have been delegated to it.<sup>24</sup>

## **NOTICE OF MEETINGS**

"Due public notice" of regular and special meetings of the governing board of a county is required by statute.<sup>25</sup> Some meetings, such as public hearings on the adoption of county ordinances, require notice to be advertised in the local newspaper.<sup>26</sup> Otherwise, the specific type of due or reasonable notice would vary depending on the facts of the situation and the board involved. As has been suggested by the Florida Attorney General's Office, "[i]f the purpose for notice is kept in mind, together with the character of the event about which notice is to be given and the nature of the rights to be affected, the essential requirements for notice in that situation will suggest themselves."<sup>27</sup> Courts have found that three days' advance notice of a meeting was reasonable, but that notice of approximately one hour and thirty minutes in advance of a special meeting was not sufficient.<sup>28</sup>

While there is a need to provide notice of a public meeting, it is not necessary to post the agenda or to notice each agenda item to be considered at the public meeting.<sup>29</sup> In addition, the Sunshine Law does not prohibit a board or commission from taking action on a matter which has not

been placed on the agenda.<sup>30</sup> However, the Attorney General's Office has strongly recommended that a board postpone taking formal action on an added matter that is controversial, if the public has not been given prior notice of the matter.<sup>31</sup>

## **PARTICIPATING IN ABSENTIA**

Does it constitute a violation of the Sunshine Law for an elected official to "appear" at a board or commission meeting by electronic means when that elected official is not physically able to attend the meeting? Provided that there is a quorum of members physically present at the actual meeting site without counting the absent official, there is probably no violation.<sup>32</sup> For example, the Florida Attorney General has opined that an ill county commissioner could participate and vote in a commission meeting through the use of an interactive video and telephone system because the system permitted the absent commissioner, the other members of the board, and the audience to see and hear each other.<sup>33</sup> However, this type of participation in a public meeting should only be permitted in extraordinary circumstances.<sup>34</sup>

## **ACCESS TO PUBLIC MEETINGS**

Public meetings must be accessible to physically handicapped persons.<sup>35</sup> Florida law also prohibits holding public meetings at any facility or location that discriminates on the basis of sex, age, race, creed, color, origin or economic status, or that operates in such a manner as to unreasonably restrict public access.<sup>36</sup>

Furthermore, public meetings must be held at facilities within the jurisdiction of the public body. For example, the courts have held that a violation of the Sunshine Law occurred when a board workshop was held more than 100 miles from the board's headquarters.<sup>37</sup> However, for small municipalities, a new law was adopted by the Florida Legislature to allow the governing board of a municipality with a population of 500 or less residents to enact a resolution or ordinance to hold meetings within five miles of the jurisdictional boundary.<sup>38</sup>

## **PUBLIC'S RIGHT TO SPEAK**

Although the Sunshine Law provides that meetings of local governments at which official acts are taken must be noticed to the public and open to the public, the Florida Constitution and Florida Statutes are both silent as to whether members of the public have a right to speak at the meetings. In a case before the First District Court of Appeal, the issue was not whether the public entity "should give citizens an opportunity to speak and provide input at its meetings, but rather whether the Sunshine Law provides citizens the *right* to speak at public meetings."<sup>39</sup> In declining to broadly construe the Sunshine Law, the Court found that the mandate that public meetings must be open to the public did not also mean that the public had the right to speak at the meetings.<sup>40</sup>

## **INTERNET MEETINGS**

The Florida Attorney General's Office has opined that informal discussions over the Internet between members of a board are allowable if proper notice is given and interactive access afforded to the public.<sup>41</sup> However, access to the discussions must be available not only to persons possessing a computer with Internet access, but also to persons who may not have Internet access. To effectuate access to the discussions, computers with Internet access must be made available to the public, and notice indicating the location of these computers must be provided to the public.<sup>42</sup> Furthermore, in case interested persons are not comfortable with or familiar with computers, computer assistance should also be provided.<sup>43</sup>

## **E-MAILS AND MESSAGE BOARDS**

The Attorney General's Office has found that private discussions via e-mail between board members about board business are prohibited under the Sunshine Law.<sup>44</sup> Similarly, the use of a website blog or message board to solicit comments from other members of the board by their responses on issues that would come before the board triggers the requirements of the Florida Sunshine Law.<sup>45</sup>

## **WHAT ABOUT FACEBOOK AND TWITTER?**

Facebook is a social networking website under which users create profiles, interact with one another in real-time, and build networks of "friends." Twitter is a "short message" social networking service that allows brief posts by persons to be sent to subscribers or "followers." The Florida Attorney General has determined that, while there is nothing prohibiting a board or commission member from posting comments on the local government's Facebook page, members must not engage in any discussions of matters that could foreseeably come before the board or commission for official action.<sup>46</sup> Thus, engaging in an exchange of ideas or discussions on a Facebook page or Twitter site could become a violation of the Florida Sunshine Laws.

## **MINUTES**

Although tape recordings and Internet recordings may be made of the proceedings, written minutes of board and committee meetings and workshops still must be prepared and promptly recorded.<sup>47</sup>

## **EXEMPTIONS FROM THE SUNSHINE LAW**

The Florida Constitution states that the Legislature may enact laws by two-thirds vote of each house to provide for exemptions from the Sunshine Law.<sup>48</sup> However, the laws must "state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the statutory purposes of the law."<sup>49</sup>

Some examples of county meetings that are exempt from the Sunshine Law are as follows: collective bargaining discussions;<sup>50</sup> meetings conducted for a risk management program administered by the county;<sup>51</sup> portions of any public meeting which would reveal a security system plan;<sup>52</sup> and attorney-client meetings to discuss pending litigation.<sup>53</sup> In addition, in 2011 the Legislature added a new exemption for portions of county meetings regarding competitive solicitation negotiations, such as when a vendor makes an oral presentation or answers questions as part of the competitive solicitation process.<sup>54</sup>

In 1993 the Florida Legislature adopted legislation which specifically authorizes that government boards, commissions, and agencies to meet privately with their attorneys to discuss pending litigation.<sup>55</sup> To hold an attorney-client meeting, the following conditions have to be met:

- 1) The attorney shall advise the governmental entity at a public meeting that advice concerning ongoing litigation is desired.
- 2) The subject matter of the meeting must be confined to settlement negotiations or strategy.
- 3) The meeting must be recorded by a certified court reporter, who must fully transcribe the notes and file the transcript with the entity's clerk within a reasonable time after the meeting.

- 4) The entity shall give reasonable public notice of the date and time of the meeting and the names of persons who will be attending.
- 5) When the litigation has been concluded the transcript will then become a public record.<sup>56</sup>

This exemption from the Sunshine Law is strictly construed by the courts. For example, in one case, the government entity failed to state the actual names of the lawyers who were attending the meeting, and the court found that this violated the Sunshine Law.<sup>57</sup> In another case, the court held that only those people identified in the statute may attend the closed attorney-client meeting. Therefore, while attorneys (including special counsel) could attend a closed meeting regarding litigation, staff and consultants could not.<sup>58</sup> Moreover, the clerk of court is not entitled to attend closed attorney-client meetings of the board of county commissioners.<sup>59</sup>

### **SANCTIONS FOR VIOLATING THE SUNSHINE LAW**

Any public officer who violates any provision of the Sunshine Law is guilty of a non-criminal infraction punishable by a fine not exceeding \$500.<sup>60</sup> However, if a member of a public body *knowingly* violates the Sunshine Law, then the infraction is considered a misdemeanor of the second degree, which is punishable by a \$500 fine and/or imprisonment for up to 60 days.<sup>61</sup> Criminal prosecution for a Sunshine Law violation requires proof of knowledge and intent.<sup>62</sup>

Former Florida Senate president W. D. Childers is the first public official in Florida to serve actual jail time for violating the Sunshine Law. In 2003, Childers, who was serving as Chairman of the Escambia County Commission, was convicted of Sunshine Law violations for discussing public business in private with other commissioners. He was sentenced to 60 days in jail and ordered to pay a fine, court costs, and investigation and prosecution expenses.

The burden of proof in Sunshine Law cases is on the individual claiming there was a violation. The claimant has the burden of proof to establish by the greater weight of the evidence that a meeting which should have been held in the sunshine had taken place outside of the sunshine.<sup>63</sup>

Whenever a Sunshine Law action has been filed in court against a board or commission or its members, the court may assess a reasonable attorney's fee against the agency if the agency is found to have violated the Sunshine Law.<sup>64</sup> However, the court may also assess a reasonable attorney's fee against the individual filing such an action if the court finds the action was filed in bad faith or was frivolous.<sup>65</sup>

### **VALIDITY OF ACTIONS TAKEN IN VIOLATION OF THE SUNSHINE LAW**

The Sunshine Law provides that no resolution, rule or formal action shall be considered binding except as taken or made at an open meeting.<sup>66</sup> For example, in one case a zoning ordinance was declared invalid by the Florida Supreme Court because of Sunshine Law violations by the citizens planning committee.<sup>67</sup> The citizens committee held meetings outside of the "sunshine," and made recommendations to the planning commission, which held hearings and made subsequent recommendations to the town council. The town council then held public hearings and adopted an ordinance based upon these recommendations. However, despite the subsequent ratifications and public hearings, the court invalidated the ordinance, holding that an action taken in violation of the Sunshine Law was void *ab initio* (void from the beginning).<sup>68</sup>

In another case, a violation of the Sunshine Law was found to have occurred when a selection and negotiation committee excluded bidders from hearing presentations made to the committee by the other competing bidders. The committee ranked the bidders and forwarded the rankings to the board. The very next day the board approved the committee's rankings and awarded the contract. However, the court held that the committee's Sunshine Law violation invalidated the award of the contract.<sup>69</sup>

## “CURES” FOR A VIOLATION OF THE SUNSHINE LAW

An initial violation of the Sunshine Law may be cured by full, open, independent final action taken at a public meeting.<sup>70</sup> The violation can also be cured by a full and sufficient reexamination and re-discussion of the matter in an open, public meeting.<sup>71</sup> However, violations will not be cured by “perfunctory ratification” of actions taken outside of the sunshine.<sup>72</sup>

## OPEN RECORDS

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### STATE LAW

Under the public records law, all state, county, and municipal records made or received in connection with official business are open for inspection and copying by any person, except those records which are specifically exempt from disclosure by law.<sup>73</sup> The public records law also applies to private entities acting on behalf of the government agency.<sup>74</sup>

The public records law requires each governmental agency that has custody of a public record to permit inspection and copying of the record by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision of the custodian of the public record.<sup>75</sup> Custody of a public record has been described as having “supervision and control over the document or having legal responsibility for its care, keeping or guardianship.”<sup>76</sup>

In addition, the public agency having custody of a public record must provide a copy of the record in the medium (such as electronic) requested by a person, provided the agency actually maintains the record in the requested medium.<sup>77</sup> However, as a general rule, the agency is not required to reformat its records to meet a requestor’s particular preference.<sup>78</sup> In addition, an agency is not required to create records that do not presently exist.

### DEFINITION OF A PUBLIC RECORD

State law defines “public records” to mean “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.”<sup>79</sup> The courts have construed the statutory definition of a “public record” to be “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”<sup>80</sup>

### ITEMS THAT DO NOT MEET THE DEFINITION OF PUBLIC RECORDS

In some instances, handwritten notes are not considered to be public records. In a Florida Supreme Court case, one of the specific findings was that a consultant’s handwritten notes were not public records.<sup>81</sup> The court contrasted the definition of public records with those materials that were prepared as drafts or notes, mere precursors of governmental records, and which were not intended as final evidence of the knowledge to be recorded.<sup>82</sup>

Personal e-mails of government officials and employees are not considered to be public records. The Florida Supreme Court has determined that, because personal e-mails were not created or received in connection with the official business of a governmental agency, such e-mails are not public records subject to disclosure.<sup>83</sup> Furthermore, the Court held that just because the personal e-

mails were sent or received on a government-owned computer system, the personal e-mails still did not fall within the definition of public records.<sup>84</sup> As another example, a District Court held that an email sent by an elected official from a personal account using a personal computer and copied to friends and supporters, was not a public record, because the email was not made in connection with official agency business.<sup>85</sup>

In most cases, private or personal telephone records are not considered public records subject to disclosure. For example, in one court case, it was held that private or personal cellular telephone calls of governmental employees, who were provided with cellular telephones as part of their employment, were not public records subject to disclosure, and therefore could be redacted.<sup>86</sup> However, records of cellular telephone calls that are related to the agency's business are subject to disclosure.<sup>87</sup> Also, the Attorney General's Office has opined that telephone records made on an agency's telephones were public records, even if the calls were personal and the employee reimbursed the agency for the calls.<sup>88</sup>

### **PUBLIC RECORDS: EXAMPLES AND EXEMPTIONS.**

In general, all public records are open for public inspection and copying, unless the legislature has specifically exempted them from disclosure or the records have been made confidential by law. The listing below is illustrative and not exhaustive.

- **Personnel information.** Unless specifically exempted, the Florida courts have consistently held that information contained in government employee personnel files are public records subject to disclosure.<sup>89</sup> However, social security numbers of current and former employees are exempt.<sup>90</sup> Furthermore, employee medical records, medical claims records, medical reports, medical information, and employee assistance program information are exempt from disclosure.<sup>91</sup>

In addition, certain personal information (home addresses, telephone numbers, social security numbers, photographs, etc.) of judges and firefighters as well as active or former law enforcement personnel, correctional officers, code enforcement officers, animal control officers, human resource managers, state attorneys, statewide prosecutors, guardians ad litem, and public defenders, are exempt from disclosure.<sup>92</sup> In 2012, the Legislature added a new exemption for the dates of birth of these personnel.<sup>93</sup>

- All **social security numbers** held by a public agency are confidential and exempt from disclosure.<sup>94</sup>
- **Bank account numbers and debit, charge, and credit card numbers** are also exempt.<sup>95</sup>
- **Attorney work-product.** A public record prepared by an agency attorney (or prepared at the attorney's express direction) that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of same, is exempt until the conclusion of the litigation or adversarial administrative proceedings.<sup>96</sup>
- **Data processing software.** There is an exemption for certain data processing software, including sensitive agency-produced software, as well as software obtained under a licensing agreement which prohibits disclosure and which is a trade secret.<sup>97</sup>
- **Building plans.** Building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, that depict the internal layout and structural elements of a building, arena, stadium, water treatment facility, or other structure owned

or operated by an agency are exempt from disclosure.<sup>98</sup> In addition, the building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, that depict the internal layout or structural elements of a recreation facility, entertainment complex, industrial complex, or retail/office/hotel/motel developments are exempt.<sup>99</sup>

- **Security system plans** held by an agency are confidential and exempt from disclosure.<sup>100</sup>
- **Acquisition of property.** When a county seeks to acquire real property for a public purpose, the appraisals, offers, and counteroffers are exempt for a limited time.<sup>101</sup>
- **Bids.** Sealed bids, proposals, or replies received by a government agency in connection with competitive solicitations are exempt from disclosure for a limited period of time.<sup>102</sup> In addition, financial statements which an agency requires a prospective bidder to submit in order to prequalify to bid, or respond to a proposal, for a road or other public works project, are exempt from disclosure.<sup>103</sup>
- **Public library registration and circulation records,** with the exception of statistical reports, are exempt.<sup>104</sup>
- **Children participating in recreation programs or camps.** Certain identifying information of children who participate in government-sponsored recreation programs or camps is exempt from public records disclosure. This includes any information that would identify or locate the child or the child's parent or guardian.<sup>105</sup>
- Certain criminal intelligence information and criminal investigative information are exempt from disclosure, such as the identity, address, telephone numbers and personal assets of crime victims.<sup>106</sup>

## WHAT ABOUT TEXT MESSAGES, INSTANT MESSAGES AND FACEBOOK?

All state, county, and municipal agencies are required by law to comply with the public records retention schedules established by the Department of State, Division of Library and Information Services.<sup>107</sup> In an informal opinion dated March 17, 2010, from the Florida Attorney General to the Secretary of State, the Attorney General urged the Department of State to update the State's records retention schedules, so that the same rules that apply to email would also apply to electronic communications, such as text messaging and instant messaging.<sup>108</sup> The Department of State responded, and amended the General Records Schedule GS1-SL for State and Local Government Agencies, stating that "records created or maintained in electronic format must be retained in accordance with the minimum retention requirements."<sup>109</sup> This includes e-mail, instant messaging, text messaging, multimedia messaging, chat messaging, social networking, or any other current or future electronic messaging technology or device.<sup>110</sup> Printouts of these electronic communications can be retained in place of the actual electronic files.<sup>111</sup>

In an informal opinion dated June 2, 2009, the Florida Attorney General's Office opined that *private* text messages made or received by a commissioner during a city commission meeting would not appear to be public records subject to disclosure.<sup>112</sup>

With regard to a county or municipal Facebook page, the Attorney General's Office has also stated that material placed on the Facebook page that is made or received in connection with the official business of the agency would be subject to Chapter 119.<sup>113</sup> In addition, the records would have to be retained in accordance with the State's records retention schedules.<sup>114</sup>



## **DUTIES AND PROCEDURES FOR RESPONDING TO PUBLIC RECORDS REQUESTS**

A common misconception in responding to public records requests is that the request must be in writing. Although a written request may be more helpful for narrowing the request, there is no statutory requirement that a public records request must be in writing.<sup>115</sup> Rather, the request may be made either in writing or verbally. In addition, there is no requirement that the requestor must reveal his or her name, or the identity of any other person on whose behalf the requestor is acting, unless the records custodian is required by law to obtain this information.<sup>116</sup>

Public records requests must be responded to in a timely fashion. An unjustified delay in complying with a public records request, whether by intentional wrongdoing or by ineptitude, will be considered in court as an “unlawful refusal” to produce the records.<sup>117</sup>

However, the agency must only provide the records that are in the custody of the agency at the time of the request. There is no requirement that an agency must respond to so-called “standing” requests for records the agency may receive in the future.<sup>118</sup>

The records custodian is required by law to withhold from disclosure any information that is designated by law as confidential and exempt from public records disclosure. This means that the records custodian should redact or conceal *only* that portion of the record for which an exemption has been asserted and validly applies. The remainder of the record must be disclosed. Further, the records custodian must state the basis for the exemption, including the statutory citation, and if requested, should provide this in writing.<sup>119</sup>

If copies of records are requested, the provision of same can be conditioned upon the payment of the copying fee permitted by law.<sup>120</sup> The statutes also provide that a reasonable “special service charge” may be assessed, if the nature or volume of the public records requested requires extensive use of information technology resources, extensive clerical or supervisory assistance, or both.<sup>121</sup> An “extensive” public records request could be any request which requires agency personnel more than 15 minutes to locate, review for confidential information, copy, and refile the requested records.<sup>122</sup> In addition, the “labor cost” assessed as the basis for the “special service charge” may include both the salary and benefits of the employee processing the request.<sup>123</sup>

An agency is allowed to require an advance deposit before beginning work on an extensive public records request.<sup>124</sup> Furthermore, an agency may require a citizen to pay for the first batch of requested public records before compiling a second batch of requested records.<sup>125</sup>

## **RETENTION OF RECORDS**

Public records should be kept in the buildings in which they are ordinarily used<sup>126</sup> and must not be destroyed until the required retention periods have been met, in accordance with the retention schedules established by the Florida Department of State, Division of Library and Information Services.<sup>127</sup>

## **CIVIL ACTIONS RELATING TO PUBLIC RECORDS**

State law provides for an accelerated court hearing process if litigation ensues over the refusal to provide public records, thus giving the case priority over other pending cases on the court’s docket.<sup>128</sup> If the court determines that an agency unlawfully refused to permit a public record to be inspected or copied, then the court *shall* assess and award reasonable costs of enforcement, including reasonable attorneys’ fees.<sup>129</sup> Even if the agency denies access to records based on a good faith, but mistaken, belief that the documents are exempt, the intent of this statute is to reimburse the legal expenses of the party that sought permission to view the wrongfully withheld records.<sup>130</sup> Furthermore,

once litigation has commenced to enforce compliance with the public records law, subsequently providing the records sought will not avoid the assessment of costs and fees.<sup>131</sup>

## CONSEQUENCES OF FAILING TO PRODUCE PUBLIC RECORDS

Any *person* who *willfully* and *knowingly* violates any of the provisions of Chapter 119, Florida Statutes, is guilty of a misdemeanor of the first degree, which is punishable by up to one year in jail and a \$1,000 fine.<sup>132</sup> Any *public officer* who violates *any* provision of Chapter 119 is guilty of a noncriminal infraction, punishable by a fine not exceeding \$500.<sup>133</sup> However, any *public officer* who *knowingly* violates the public records law is subject to suspension and removal or impeachment and is guilty of a misdemeanor of the first degree.<sup>134</sup>

## NOTES

<sup>1</sup> Art. I, § 24(b), Fla. Const.; § 286.011(1), Fla. Stat. (2011), as amended by 2012-25, Laws of Florida.

<sup>2</sup> § 286.011(1), Fla. Stat. (2011).

<sup>3</sup> §§ 286.011(1) & (2), Fla. Stat. (2011).

<sup>4</sup> Art. I, § 24(a), Fla. Const.; § 119.01(1), Fla. Stat. (2011).

<sup>5</sup> § 119.07(1)(a), Fla. Stat. (2011).

<sup>6</sup> *Deerfield Beach Publishing, Inc. v. Robb*, 530 So. 2d 510, 511 (Fla. 4th DCA 1988).

<sup>7</sup> *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974).

<sup>8</sup> *Hough v. Steinbridge*, 278 So. 2d 288, 289 (Fla. 3d DCA 1973).

<sup>9</sup> *Zorc v. City of Vero Beach*, 722 So. 2d 891 (Fla. 4th DCA 1998), rev. den. 735 So.2d 1284 (Fla. 1999).

<sup>10</sup> *Id.*

<sup>11</sup> See Fla. Atty. Gen. Op. 86-23 (1986) (election campaign function attended by two or more members of the city council was subject to Sunshine Law); *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72 (Fla. 1984) (since no two individuals who were members of the same governing body were present at meeting, no Sunshine Law violation occurred).

<sup>12</sup> See *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969). See also Fla. Atty. Gen. Op. 00-08 (2000) (forum at which two or more members of the same district board were present and discussed matters that might foreseeably come before the board for official action, was subject to the Sunshine Law).

<sup>13</sup> Fla. Atty. Gen. Op. 98-79 (1998). See also Fla. Atty. Gen. Op. 00-68 (2000) (commissioners could attend other board meetings and comment on agenda items that may subsequently come before the commission for final action, but may not engage in discussions or debate on the issues amongst themselves).

<sup>14</sup> See *Blackford v. School Bd. of Orange County*, 375 So. 2d 578, 580 (Fla. 5th DCA 1978).

<sup>15</sup> See Fla. Atty. Gen. Op. 74-294 (1974); Fla. Atty. Gen. Op. 86-23 (1986); Fla. Atty. Gen. Op. 87-34 (1987); *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72 (Fla. 1984).

<sup>16</sup> *Hough vs. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973).

<sup>17</sup> *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 869 (Fla. 3d DCA 1994).

<sup>18</sup> *Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000), rev. den. 790 So. 2d 1105 (Fla. 2001).

- <sup>19</sup> Evergreen the Tree Treasurers of Charlotte County, Inc. v. Charlotte County Board of County Commissioners, 810 So.2d 526 (Fla. 2d DCA 2002).
- <sup>20</sup> Lyon v. Lake County, 765 So. 2d 785.
- <sup>21</sup> Fla. Atty. Gen. Op. 98-21 (1998).
- <sup>22</sup> Fla. Atty. Gen. Op. 98-49 (1998).
- <sup>23</sup> Fla. Atty. Gen. Op. 02-53 (2002).
- <sup>24</sup> See McCoy Restaurants, Inc. v. City of Orlando, 392 So. 2d 252 (Fla. 1980) (airlines are not, by virtue of a lease, public representatives subject to the Sunshine Law).
- <sup>25</sup> § 125.001, Fla. Stat. (2011).
- <sup>26</sup> § 125.66, Fla. Stat. (2011).
- <sup>27</sup> Fla. Atty. Gen. Op. 73-170 (1973).
- <sup>28</sup> Rhea v. City of Gainesville, 574 So. 2d 221 (Fla. 1st DCA 1991).
- <sup>29</sup> Yarbrough v. Young, 462 So. 2d 515 (Fla. 1st DCA 1985).
- <sup>30</sup> See Hough vs. Stembridge, 278 So. 2d 288 (Fla. 3d DCA 1973). See also Law and Information Services, Inc. v. City of Riviera Beach, 670 So. 2d 1014, 1016 (Fla. 4<sup>th</sup> DCA 1996) (whether to restrict a commission from considering a matter not on the agenda is a policy decision to be made by the legislature).
- <sup>31</sup> See Fla. Atty. Gen. Op. 03-53 (2003) (in the spirit of the Sunshine Law a commission should be sensitive to the community's concerns for advance notice and meaningful participation on controversial issues).
- <sup>32</sup> See Fla. Atty. Gen. Op. 92-44 (1992) and 2002-82 (2002); See also Fla. Atty. Gen. Op. 2009-56 (2009) (participation by electronic means does not constitute physical presence at a meeting for purposes of establishing a quorum).
- <sup>33</sup> Fla. Atty. Gen. Op. 92-44 (1992).
- <sup>34</sup> Fla. Atty. Gen. Op. 03-41 (2003).
- <sup>35</sup> § 286.26, Fla. Stat. (2011).
- <sup>36</sup> § 286.011(6), Fla. Stat. (2011).
- <sup>37</sup> Rhea v. School Bd. of Alachua County, 636 So. 2d 1383 (Fla. 1st DCA 1994). See also Bigelow v. Howze, 291 So. 2d 645 (Fla. 2d DCA 1974). See also Fla. Atty. Gen. Op. 03-03 (2003) (pending passage of a special law, commission meetings should be held at a place accessible to the public and within the commission's jurisdiction). See also Fla. Atty. Gen. Op. 2008-01 (2008) (council may not temporarily relocate the site of public meetings to an adjacent municipality).
- <sup>38</sup> § 166.0213, Fla. Stat. (2011).
- <sup>39</sup> Keesler v. Community Maritime Park Associates, Inc., 32 So. 3d 659, 660 (Fla. 1<sup>st</sup> DCA 2010).
- <sup>40</sup> *Id.* See also Kennedy v. St. Johns River Water Management District and Seminole County, 19 Fla. L. Weekly Supp. 187b (7th Judicial Circuit, Sept. 28, 2010), *aff'd* 2011 WL 5124949 (Fla. 5<sup>th</sup> DCA, Oct. 25, 2011) (as "clearly articulated in *Keesler*, the Sunshine Law does not require the public be allowed to speak.").
- <sup>41</sup> Fla. Atty. Gen. Op. 02-66 (2002); Fla. Atty. Gen. Op. 2009-56 (2009).
- <sup>42</sup> *Id.*
- <sup>43</sup> Fla. Atty. Gen. Op. 2008-65 (2008).
- <sup>44</sup> Fla. Atty. Gen. Op. 89-39 (1989).

- <sup>45</sup> Fla. Atty. Gen. Op. 08-07 (2008).
- <sup>46</sup> Fla. Atty. Gen. Op. 2009-19 (2009).
- <sup>47</sup> Fla. Atty. Gen. Op. 2008-65 (2008).
- <sup>48</sup> Art. I, § 24(c), Fla. Const.
- <sup>49</sup> Art. I, § 24(c), Fla. Const.
- <sup>50</sup> § 447.605(1), Fla. Stat. (2011).
- <sup>51</sup> § 768.28(16)(c), Fla. Stat. (2011).
- <sup>52</sup> § 281.301(1), Fla. Stat. (2011).
- <sup>53</sup> § 286.011(8), Fla. Stat. (2011).
- <sup>54</sup> §286.0113(2), Fla. Stat. (2011).
- <sup>55</sup> *Id.*
- <sup>56</sup> *Id.*
- <sup>57</sup> *City of Dunnellon v. Aran*, 662 So. 2d 1026 (Fla. 5th DCA 1995).
- <sup>58</sup> *School Bd. of Duval County v. Florida Publishing Co.*, 670 So. 2d 99 (Fla. 1st DCA 1996).
- <sup>59</sup> *Atty. Gen. Op. 01-10* (2001). *See also Zorc v. City of Vero Beach*, 722 So. 2d 891 (Fla. 4th DCA 1998), rev. den. 735 So. 2d 1284 (Fla. 1999) (attendance of city clerk and deputy city clerk at closed attorney-client meetings was improper and violated Sunshine Law).
- <sup>60</sup> § 286.011(3)(a), Fla. Stat. (2011).
- <sup>61</sup> § 286.011(3)(b), Fla. Stat. (2011). *See also* §§ 775.082(4)(b), 775.083(1)(e), Fla. Stat. (2011).
- <sup>62</sup> *See Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 699 (Fla. 1969) (construing the statute to impliedly require a charge and proof of scienter).
- <sup>63</sup> *Lyon v. Lake County*, 765 So2d 785 (Fla. 5th DCA 2000), rev. den. (Fla. 2001).
- <sup>64</sup> § 286.011(4), Fla. Stat. (2011).
- <sup>65</sup> *Id.*
- <sup>66</sup> § 286.01(1), Fla. Stat. (2011).
- <sup>67</sup> *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974).
- <sup>68</sup> *Id.*
- <sup>69</sup> *Port Everglades Authority v. International Longshoremen’s Association*, 652 So. 2d 1169 (Fla. 4th DCA 1995).
- <sup>70</sup> *Zorc v. City of Vero Beach*, 722 So. 2d 891 (Fla. 4th DCA 1998), rev. den. 735 So. 2d 1284 (Fla. 1999).
- <sup>71</sup> *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979); *Tolar v. School Board of Liberty County*, 398 So. 2d 427 (Fla. 1981).
- <sup>72</sup> *Zorc v. City of Vero Beach*, 722 So2d 891 (Fla. 4th DCA 1998), rev. den. 735 So.2d 1284 (Fla 1999).
- <sup>73</sup> § 119.01(1), Fla. Stat. (2011); Art. I, § 24(a), Fla. Const.
- <sup>74</sup> § 119.011(2), Fla. Stat. (2011); Art. I, § 24(a), Fla. Const.
- <sup>75</sup> § 119.07(1)(a), Fla. Stat. (2011).
- <sup>76</sup> Fla. Atty. Gen. Op. 08-07 (2008).

<sup>77</sup> § 119.01(2)(f), Fla. Stat. (2011).

<sup>78</sup> See *Seigle v. Barry*, 422 So. 2d 63, 66 (Fla. 4<sup>th</sup> DCA 1982), rev. den. 431 So. 2d 988 (Fla. 1982) (stating that the intent of the public records law is to make records available in a meaningful form, but not necessarily the form which the requestor prefers); Fla. Att. Gen. Op. 97-39 (1997) (concluding that the agency was not required to furnish electronic public records in an electronic format other than the standard format routinely maintained by the agency).

<sup>79</sup> § 119.011(12), Fla. Stat. (2011).

<sup>80</sup> *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>81</sup> *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633 (Fla. 1980).

<sup>82</sup> *Id.* at 640.

<sup>83</sup> *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003).

<sup>84</sup> *Id.*

<sup>85</sup> *Butler v. City of Hallandale Beach*, 68 So. 2d 278 (Fla. 4<sup>th</sup> DCA 2011).

<sup>86</sup> *Media General Operation, Inc. v. Feeney*, 849 So. 2d 3 (Fla. 1<sup>st</sup> Dist. App. 2003), rev. den. 857 So. 2d 196 (Fla. 2003).

<sup>87</sup> *Id.*

<sup>88</sup> Fla. Atty. Gen. Op. 99-74 (1999).

<sup>89</sup> *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).

<sup>90</sup> § 119.071(4)(a), Fla. Stat. (2009).

<sup>91</sup> See §§ 119.071(4)(b), 112.08(7), 125.585, 440.125, 760.50(5), Fla. Stat. (2011).

<sup>92</sup> See § 119.071(4)(d), Fla. Stat. (2011).

<sup>93</sup> Chapter 2012-149, Laws of Florida.

<sup>94</sup> §§ 119.071(4)(a); 119.071(5)(a), Fla. Stat. (2011).

<sup>95</sup> § 119.071(5)(b), Fla. Stat. (2011).

<sup>96</sup> § 119.071(1)(d), Fla. Stat. (2011).

<sup>97</sup> § 119.071(1)(f), Fla. Stat. (2011).

<sup>98</sup> § 119.071(3)(b), Fla. Stat. (2011).

<sup>99</sup> § 119.071(3)(c), Fla. Stat. (2011).

<sup>100</sup> § 119.071(3)(a), Fla. Stat. (2011).

<sup>101</sup> § 125.355, Fla. Stat. (2011).

<sup>102</sup> § 119.071(1)(b), Fla. Stat. (2011).

<sup>103</sup> § 119.071(1)(c), Fla. Stat. (2011).

<sup>104</sup> § 257.261(1),

<sup>105</sup> § 119.071(5)(c), Fla. Stat. (2009).

<sup>106</sup> § 119.071(2)(h)-(j), Fla. Stat. (2011).

<sup>107</sup> § 119.021(2)(b), Fla. Stat. (2011).

<sup>108</sup> Inf. Op. to Browning, March 17, 2010.

<sup>109</sup> Section V, State of Florida General Records Schedule GS1-SL for State and Local Government Agencies.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Inf. Op. to Trovato, June 2, 2009.

<sup>113</sup> Fla. Atty. Gen. Op. 2009-19 (2009).

<sup>114</sup> *Id.*

<sup>115</sup> Dade Aviation Consultants v. Knight Ridder, Inc., 800 So. 2d 302, 305 n.1 (Fla. 3d DCA 2001).

<sup>116</sup> See Fla. Atty. Gen. Op. 92-38 (1992).

<sup>117</sup> See Barfield v. Town of Eatonville, 675 So. 2d 223, 225 (Fla. 5th DCA 1996).

<sup>118</sup> See Inf. Op. to Worch, June 15, 1995.

<sup>119</sup> §§ 119.07(1)(b), 119.07(1)(c); 119.07(1)(d), Fla. Stat. (2011).

<sup>120</sup> § 119.07(4), Fla. Stat. (2011).

<sup>121</sup> § 119.07(4)(d) Fla. Stat. (2011).

<sup>122</sup> Florida Institutional Legal Services, Inc. v. Florida Dept. of Corrections, 579 So. 2d 267 (Fla. 1st DCA 1991), rev. den. 592 So. 2d 680 (Fla. 1991).

<sup>123</sup> Board of County Commissioners of Highlands County v. Colby, 976 So. 2d 31 (Fla. 2d DCA 2008).

<sup>124</sup> *Id.*

<sup>125</sup> Lozman v. City of Riviera Beach, 995 So. 2d 1027 (Fla. 4<sup>th</sup> DCA 2008).

<sup>126</sup> § 119.021(1)(a), Fla. Stat. (2011).

<sup>127</sup> § 257.36(6), Fla. Stat. (2011).

<sup>128</sup> § 119.11(1), Fla. Stat. (2011).

<sup>129</sup> § 119.12, Fla. Stat. (2011).

<sup>130</sup> Times Publishing Co., Inc. v. St. Petersburg, 558 So. 2d 487, 495 (Fla. 2d Dist. App. 1990). See also News and Sun-Sentinel Co. v. Palm Beach County, 517 So. 2d 743 (Fla. 4th Dist. App. 1987).

<sup>131</sup> Wisner v. City of Tampa Police Department, 601 So. 2d 296 (Fla. 2d Dist. App. 1992).

<sup>132</sup> § 119.10(2)(a), Fla. Stat. (2011).

<sup>133</sup> § 119.10(1)(a), Fla. Stat. (2011).

<sup>134</sup> § 119.10(1)(b), Fla. Stat. (2011).