

DUNDEE PLANNING & ZONING and TREE BOARD JOINT WORKSHOP
LOCATION: DUNDEE TOWN HALL
202 MAIN STREET, DUNDEE, FLORIDA



PLANNING & ZONING and TREE BOARD
JOINT WORKSHOP
MEETING MINUTES for
JANUARY 17, 2023

CALL TO ORDER at 5:34pm by Planning & Zoning Board Chair Ron Hall
ROLL CALL: Tandra Davis

MEMBERS PRESENT:

Ron Hall
Suzetta Henson
Jill Kitto
Michelle Smith
Sheila Aguilar
Tracy Barnhill
Jeffery Gunter

MEMBERS ABSENT:

Dre Robinson

STAFF PRESENT:

Seth Claytor, Assistant Town Attorney
Tandra Davis, Town Manager
John Vice, Public Works Director

ITEM 01: PRESENTATION BY ASSISTANT ATTORNEY, SETH CLAYTOR

Assistant Attorney Claytor explained that the presentation is intended to provide general information only. It was not intended to provide legal advice and/or guidance, only general legal concepts. During the presentation, questions are encouraged; however, specific questions arising out of official Town business and/or matters, should first be consulted with the Town Manager or Town Clerk.

FLORIDA SUNSHINE LAW

Assistant Attorney Claytor explained the Sunshine Law Requirements and Interpretations according to Section 286.0114 of the Florida Statutes.

PUBLIC RECORDS LAW

Assistant Attorney Claytor explained the Scope and Interpretation of the Public Records Law according to Chapter 119, FS.

PUBLIC ACCESS TO GOVERNMENT INFORMATION

Assistant Attorney Claytor explained how the public has access to government information and explained the record retention requirements.

QUASI-JUDICIAL ACTIONS

Assistant Attorney Claytor explained Quasi-Judicial proceedings and as they relate to the boards of the Town.

Presentation given at this joint workshop of the Planning & Zoning Board and Tree Board attached as part of the meeting minutes.

ADJOURNMENT

Meeting adjourned at 8:01 pm.

Respectfully Submitted,


Jenn Garcia, Town Clerk



Town of Dundee



**Florida's Government in the Sunshine Law
Chapter 119, Florida Statutes
§286.011, Florida Statutes**

Presentation by:
Seth B. Claytor, LL.M, Esq.
Assistant Town Attorney
Town of Dundee
Boswell & Dunlap, LLP
(863) 533-7117

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GENERAL INFORMATION

- This presentation is intended to provide general information ONLY.
- This presentation is not intended to provide legal advice and/or guidance, ONLY general legal concepts.
- During this presentation, there will be opportunities for general questions; however, if you have any specific questions arising out of official City business and/or matters, you should first consult with your department supervisor or the City Manager.
- **Government-in-the-Sunshine Manual**
 - This manual is prepared by the Florida Attorney General and published by the First Amendment Foundation.
 - This is a very useful resource in learning and/or understanding open-government in the State of Florida.

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PRESENTATION

- (1) Sunshine Law (§286.011, Florida Statutes)
- (2) Public Records Law (Ch. 119, Florida Statutes)
- (3) Electronic and Digital Media (*Do you know what you don't know*)

Note: In interpreting the Sunshine Law, the Courts have looked to the provisions of the Pubic Records Law, Chapter 119, Florida Statutes, stating that as the policy behind Chapter 119, Florida Statutes, and the policy behind Section 286.011, Florida Statutes, are similar and should be read in *pari materia*. AGO 2004-32.

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GENERAL HISTORY OF OPEN GOVERNMENT

- Florida's Government-in-the-Sunshine Law (hereafter the "Sunshine Law") was enacted in 1967.
 - Currently, the Sunshine Law regarding open government can be found in **Chapter 286** of the Florida Statutes.
 - **Chapter 286** of the Florida Statutes establishes a basic right of access to most meetings of boards, commissions and other governing bodies of state and local governmental agencies or authorities.

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Sunshine Law Requirements

- (1) Meetings must be open to the public;**
- (2) Reasonable public notice of such meetings must be given; and**
- (3) Minutes of the public meeting must be promptly prepared and open to public inspection.**

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Sunshine Law Requirements (Cont'd)

Take Note: Although not part of the Sunshine Law, Section 286.0114 of the Florida Statutes, requires, subject to limited exceptions, that public boards provide an opportunity for public comment prior to taking official action on a proposition. Boards are authorized to adopt rules or policies that provide time limits for speakers; procedures for allowing a representative of a group to speak, as opposed to all members of a large group; and procedures or forms for an individual to use to inform the board of a desire to be heard, to indicate his/her position and a representative; and designate a specified period of time for public comment.

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Purpose of the Sunshine Law

- “Government must be accountable to the people. The Florida Constitution, which sets forth our rights as citizens of this great state, provides that the public has the right to know how government officials spend taxpayer dollars and make the decisions affecting their lives. The principle of open government is one that must guide everything done in government for its public.” – Former Attorney General Pam Bondi
- The Sunshine Law must be broadly construed to effect its remedial and protective purpose of protecting the public from *closed door politics*. Pinellas County School Bd. v. Suncam, Inc., 829 So. 2d 989 (Fla. 2d DCA 2002) (holding the public’s right under Sunshine Law is virtually unfettered).
- The Sunshine Law should be construed so as to *avoid all evasive devices* and that this can only be accomplished by embracing within the terms of Section 286.011 of the Florida Statutes the inquiry and discussion stages conducted by a committee or other authority appointed and established by a governmental agency which relates to a matter on which foreseeable action will be taken. Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974).

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The Sunshine Law

- The *intent* of the Government in the Sunshine Law was to cover any gathering of some of the members of a public board where those members discussed some matters on which foreseeable official action will be taken by the Board. Canney v. Board of Public Instruction of Alachua County, 278 So. 2d 260 (Fla. 1973).
- **ALL governmental entities in Florida are subject to the requirements of the Sunshine Law unless specifically exempted.** Sarasota Citizens For Responsible Government v. City of Sarasota, 48 So. 3d 755, 762 (Fla. 2010).
- Recent Case:
Members of a city and zoning commission violated the Sunshine Law when they participated in discussions at meetings of a community improvement association which involved planning and zoning matters. City of Bradenton Beach v. Metz, No. 2017 CA 003581 (Fla. 12th Cir. Ct. 2019), amended appeal filed (Fla. 2d DCA 2019).

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The Sunshine Law (Cont'd)

- Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the **entire decision-making process** that the Legislature intended to affect by the enactment of Section 286.011 of the Florida Statutes. . . . **Every step in the decision-making process**, including the decision itself, is a necessary preliminary to formal action. **It follows that each such step constitutes an “official act,” an indispensable requisite to “formal action,” within the meaning of the Sunshine Law.** Times Publishing Company v. Williams, 222 So. 2d 470 (Fla. 2d DCA 1969).
- The *Sunshine Law* applies to *ANY* gathering of two (2) or more members of an elected or appointed public collegial board when they meet to discuss any matter which will foreseeably come before that board for action. Advisory committees can be included even though their powers are limited to making recommendations. Staff committees can be subject to the Sunshine Law if delegated some “*decision-making authority*” (e.g., the authority to screen and rank proposals) **as opposed to “mere fact-finding or information-gathering.”**

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Sunshine Law – General Rule

- **As a general rule**, if there is a question as to whether a meeting is subject to the Sunshine Law, it is advisable to comply with the requirements of the statute. See City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971) (**reasoning that, if a public official is unable to know whether by any convening of two or more officials he or she is violating the law, he or she should leave the meeting forthwith**); see also Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974) (stating that the principle to be followed is simple: when in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State).

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Sunshine Law – Interpretation(s)

- **Advisory Groups/Advisory Committees:**

- **Advisory groups** created pursuant to law or ordinance or otherwise established by public agencies are subject to the Sunshine Law **even though their recommendation(s) are NOT binding on the entities that created them.** AGO 2005-06.
- While **meetings of staff** are not ordinarily covered by the Sunshine Law, when a staff member ceases to function in a staff capacity and is appointed to a committee that is delegated the authority to make recommendations to a board or official, the staff member loses his or her identity as staff while working on the committee and the Sunshine Law applies to the committee. AGO 2005-06.
- A **community advisory committee** that is responsible for making recommendations to the City Commission on matters of concern to the residents of the City and **upon which the City Commission may foreseeably act must comply with the requirements of the Sunshine Law.** AGO 98-13.

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Sunshine Law – Interpretation(s) (Cont'd)

- **Advisory Groups/Advisory Committees:**

- However, **citizen groups** that meet to express common concerns and develop issues to be presented for consideration to the community advisory committee are not subject to the Sunshine Law as they are not governmental boards or commission within the scope of the statute. AGO 98-13.
- There is no government by delegation exception to the Sunshine Law and a public board or commission may not avoid compliance with the law by delegating its responsibilities to another group. Spillis Candela & Partners, Inc., v. Centrust Savings Bank, 535 So. 2d 694 (Fla. 3d DCA 1988).
- “The law is quite clear. An ad hoc advisory board, even if its power is limited to making recommendations to a public agency and even if it possesses no authority to bind the agency in any way, is subject to the Sunshine Law.” Spillis Candela & Partners, Inc., v. Centrust Savings Bank, 535 So. 2d 694 (Fla. 3d DCA 1988). See Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974) (**holding that such a board may be made up entirely of private citizens**).

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Sunshine Law – Interpretation(s) (Cont'd)

• Meetings w/ Board and Non-Board Members:

- The Sunshine Law applies to “any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board.” Board of Public Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969); Canney v. Board of Public Instruction of Alachua County, 278 So. 2d 260 (Fla. 1973).
- Meetings of **other boards** in which two (2) members of the city council participate and discuss matters which will be brought before the city council are subject to Section 286.011, Florida Statutes. AGO 83-70.
- Section 286.011, Florida Statutes, is applicable to any gathering where members of the Board or Commission deal with some matter upon which **foreseeable action** will be taken by the Board or Commission. See Hough v. Stembridge, 278 So. 2d 288 (Fla. 3d DCA 1973) (finding that a violation occurs when two or more public officials takes place which is violative of statute’s spirit, intent and purpose).

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Sunshine Law – Interpretation(s) (Cont'd)

• Meetings w/ Board and Non-Board Members:

- If a **non-board member** and/or City Staff is being used as an intermediary between members of the City Commission, then same will be subject to the provisions of Section 286.011 of the Florida Statutes. AGO 89-39.
- If a **non-board member** and/or **City Staff** has, in fact, been appointed as an agent of and is being designedly used by a member or members of the City Commission as or for the purpose of “**liaison**” or “**intermediary**” to calculate and/or circulate among board members the thoughts of such member or members in order to circumvent the Sunshine Law, **then such conversations might well be found by the courts to be violative of the letter and spirit of the law**. AGO 81-42.
- Delegation of Authority:
 - A single member of a board who has been delegated the authority to negotiate the terms of a lease on behalf of the board is subject to the Sunshine Law and therefore cannot negotiate in secret. AGO 074-294.

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Sunshine Law – Interpretation(s) (Cont'd)

- **Memoranda:**

- It has been concluded that the use of memoranda among members of a board and/or commission to avoid a public meeting may be a violation of the Sunshine Law, **even though two (2) members of the board or commission are not physically present.**
- **In such a situation**, if a memorandum reflecting the views of an individual board member is circulated among other board members with each indicating his or her approval or disapproval . . . the memorandum has the effect of becoming official action of the board in violation of the Government in the Sunshine Law. AGO 89-23.

- **Other – Volunteer Fire Department:** (AGO 2004-32)

- Florida Courts have stated that it was the Legislature's intent to extend application of the Sunshine Law so as to bind "every board or commission of the state, or of any county or political subdivision over which it has dominion and control; and the statute has been held applicable to **private** organizations when the private entity has been created by a public agency, when there has been a delegation of the public agency's governmental functions, or when the private organization plays an integral part in the decision-making process of the public agency. See also AGO 83-95 (county accepted services of nongovernmental committee to recodify and amend county's zoning laws, committee subject to Sunshine Laws).

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Sunshine Law – Interpretation(s)

- **Exceptions:**

- **ALL governmental entities in Florida are subject to the requirements of the Sunshine Law unless specifically exempted.** Sarasota Citizens For Responsible Government v. City of Sarasota, 48 So. 3d 755, 762 (Fla. 2010).
 - It is not a violation of the Sunshine Law for a City Manager, who is the Chief Executive Officer of the City, to meet with individual members of the city council to discuss city business. AGO 75-210 (citing AGO 074-47).
 - A limited exception to the applicability of the Sunshine Law to advisory committees has been recognized for committees established for **fact-finding only**, that is, information gathering and reporting. See Cape Publications, Inc. v. City of Palm Bay, 473 So. 2d 222 (Fla. 5th DCA 1985); Bennett v. Warden, 333 So. 2d 97 (Fla. 2d DCA 1976). However, when a committee possesses the authority not only to conduct fact-finding **but also to make recommendations**, the committee is participating in the decision-making process and is, therefore, subject to Section 286.011, Florida Statutes.
 - The Sunshine Law would **generally not** be applicable to a meeting between a commissioner and a citizen when same discuss City matters when other members of the commission are not present (i.e., fact finding). AGO, informal (January 5, 1990).

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Sunshine Law – Interpretation(s)

- **Exceptions (Continued):**

- **Section 286.011(8) – “Shade Meetings”**

- Section 286.011(8) of the Florida Statutes provides a limited exception to the general openness requirement and makes litigation strategy or settlement meetings private when they are held between a board and its attorney and the board is a party before a court or administrative agency. Fla. Att’y Gen. Informal Op. November 26, 2014.
- The statute limits the persons who may attend such a meeting, the subject of any such meeting, and the length of time the record of the meeting may be kept closed. Id.
- As an exception to the broader provisions of the Sunshine Law, section 286.011(8), Florida Statutes, **should be read strictly or narrowly to accomplish the specific purpose of the exception.** The purpose of this exception is to put local governments and state agencies on an equal footing with the other parties in a lawsuit by allowing these governmental agencies to protect their theories of litigation strategy or settlement negotiations from the opposing party during the pendency of a lawsuit. Id.

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Sunshine Law – Conclusion

CONSEQUENCES:

Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who ***knowingly violates*** the provisions of this section by attending a meeting not held in accordance with the provisions hereof is ***guilty of a misdemeanor of the second degree***, punishable as provided in s. 775.082 or s. 775.083. §286.011(3)(b), Fla. Stat. (2019).

ALWAYS REMEMBER THE GENERAL RULE!

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Public Records Law

- Since the late 1800s, Florida has had a public policy that records or documents created in the discharge of official duties belong to the public office – NOT the individual who created the record(s) – and therefore should be preserved.
- In 1909, the “Public Records Law” was created with the passage of **Chapter 119, FS**. Thereafter, in 1968, the right to access public records and meetings was guaranteed by **Fla. Const. art. 1, §24**.
- **What is a Public Record?**
 - It is the general policy of the State of Florida that all state, county and municipal records shall be open for personal inspection by any person at all times. §119.01, Fla. Stat. (2019).
 - “**Public records**” means **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**. §119.011(12), Fla. Stat. (2019).
 - The Florida Supreme Court construed this definition of “public records” and held that, for the purposes of § 119.011(1), F.S., a public record is “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.” Shevin v. Byron, Harless, Schaffner, Reid and Associates, Inc., 379 So.2d 633, 640 (Fla.1980).

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Scope of Public Records Act

Florida’s Public Records Act, Ch. 119, Florida Statutes, provides **a right of access** to the records of state and local governments **as well as to records of private entities acting on their behalf**.

It is well settled that “the general purpose of the Florida Public Records Act is to open public records so that Florida’s citizens can discover the actions of their government.” §119.07, Fla. Stat. (2019); see also City of Riviera Beach v. Barfield, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994). The policy has been described as a “cornerstone of our political culture.” Bd. Of Trustees, Jacksonville Police & Fire Pension Fund v. Lee, 189 So. 3d 120, 124 (Fla. 2016). **It is liberally construed in favor of open access to public records.** Id.

If there is any doubt as to whether a matter is a public record subject to disclosure, the doubt is to be resolved in favor of disclosure.” Morris Pub. Group, LLC v. Fla. Dept. of Educ., 133 So. 3d 957 (Fla. 1st DCA 2013).

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What is a Public Record?

- The Florida Supreme Court acknowledged that “[i]t is impossible to lay down a definition of general application that identifies all items subject to disclosure under the act.” Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633, 640 (Fla.1980). **All such materials are subject to disclosure UNLESS the Legislature has created an exemption.** Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979).
- A determination of whether a document is a public record **must be made on a case-by-case basis**.
- **ALL PUBLIC RECORDS, EVEN EXEMPT PUBLIC RECORDS**, must be retained in accordance with the retention schedules approved by the Department of State. §257.36(6), Fla. Stat. (2020).
- If there is any doubt as to whether a matter is a public record subject to disclosure, the doubt is to be resolved in favor of disclosure.” Morris Pub. Group, LLC v. Fla. Dept. of Educ., 133 So. 3d 957 (Fla. 1st DCA 2013).

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Who Makes a Public Record?

The applicability of Chapter 119 of the Florida Statutes to a particular officer, person, or entity depends on whether the individual or entity in question is an “**agency**” as defined in Section 119.011(2) of the Florida Statutes.

- “**Agency**” means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency. §119.011(2), Fla. Stat. (2019).
- **Records created by a private entity and maintained on a private database** become **PUBLIC RECORDS** when the documents are **RECEIVED** by an **AGENCY** in connection with the transaction of official business. National Collegiate Athletic Association v. Associated Press, 18 So. 3d 1201 (Fla. 1st DCA 2009), review denied, 37 So. 3d (Fla. 2010).
- The term “**received**” in public records law section defining term “public record” refers not only to a situation in which a public agent takes physical delivery of a document, **but also to one in which a public agent examines a document residing on a remote computer.** Id.
- A municipality or a municipal officer or department would come within the purview of the definition of “**agency**” in Section 119.011(2) of the Florida Statutes. Therefore, any documents or other material **made or received** pursuant to law or ordinance or in connection with the transaction of official, municipal business would constitute a public record. AGO 83-80.

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Interpretation

- A **private party cannot render public records exempt from disclosure merely by designating information it furnishes a governmental agency confidential**; the right to examine public records is a right belonging to the public, and it cannot be bargained away by a representative of the government. National Collegiate Athletic Ass'n v. Associated Press, 18 So.3d 1201 (Fla. 1st DCA 2009), *rehearing denied*, *review denied* 37 So.3d 848.
- Mere fact that city mayor's e-mail was **sent from her private e-mail account on her own personal computer was not the determining factor as to whether the e-mail was a public record**; the determining factor would be whether the e-mail was prepared in connection with official agency business and intended to perpetuate, communicate, and formalize knowledge of some kind. Butler v. City of Hallandale Beach, 68 So.3d 278 (Fla. 4th DCA 2011), *rehearing denied*.
- Telephone numbers in a school district's record of calls **made on school district telephones are public records even when the calls are personal and the employee reimburses the district for the calls**. AGO 99-74.

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ELECTRONIC RECORDS & MEDIA

"[A] computer lets you make more mistakes faster than any invention in human history – with the possible exceptions of handguns and tequila." Vince v. Rock County, 604 F.3d 391, 393 (7th Cir. 2010).

WHAT ARE THE BENEFITS TO THE TOWN?

- (1) Ability to receive and provide information in near real time and with increased frequency.
- (2) Ease of access to broad audiences.
- (3) Increased Citizen Participation (ICP).
- (4) Inexpensive.

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ELECTRONIC RECORDS & MEDIA

WHAT ARE THE PITFALLS TO THE CITY?

- (1) Compliance Issues with Sunshine Law and Public Records Law.
- (2) Increased communications = Increased Risk of Noncompliance.
- (3) Lack of Understanding of electronically stored information.
- (4) Use of Evasive Devices.
- (5) Greater potential for Misconduct/Mishandling/Destruction.
- (6) **1st AMENDMENT RIGHTS – That's right baby!!!!**

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ELECTRONIC RECORDS & MEDIA

SOURCES OF ELECTRONIC PUBLIC RECORDS?

- (1) E-mails to and from Agency e-mail addresses.
- (2) Public Records on Social Media and Other web-based accounts.
- (3) Public Records on **public agency issued** cellular phones AND public agency issued electronic devices.
- (4) Public Records *on privately owned personal cellphones, personal devices, and personal social media and other web-based accounts of the public agency's officers and EMPLOYEES.*

The United States Supreme Court reasoned that, for many, social media platforms are the *principal sources* for knowing current events, checking ads for employment, speaking and listening in **THE MODERN PUBLIC SQUARE**, and otherwise exploring the vast realms of human thought and knowledge. *Packingham v. North Carolina*, 137 U.S. 1730 (2017) (*reasoning social media as Modern Public Square*). [For purposes of 1st Amendment Protections, Social Media platforms constitute a Traditional Public Forum and receive the greatest degree of protection(s)].

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Digital Media Issues

- In 2003, the Florida Supreme Court recognized an emerging problem within the public records law realm--the use of publicly owned devices to conduct personal business, such as sending personal emails. In State v. City of Clearwater, 863 So. 2d 149, 151 (Fla. 2003), the Florida Supreme Court was presented with the question “whether personal emails are considered public records by virtue of their placement on a government-owned computer system.” Ten years after *City of Clearwater*, the First District addressed another modern challenge in the public records realm in Rhea v. District Board of Trustees of Santa Fe College, 109 So. 3d 851 (Fla. 1st DCA 2013); when the court explained that “[t]he physical format of the record is irrelevant; electronic communications, such as email, are covered just like communications on paper.”
- O’Boyle v. Town of Gulf Stream, 257 So. 3d 1036 (Fla. 4th DCA 2018):
 - Text Messages on Private Phones: A public employee or official's use of a private cellphone to conduct public business via text messaging can create a public record subject to disclosure... Chapter 119 requires that the governmental agency proceed *no differently than it would when responding to a request for written document*. The entity *must conduct a reasonable search which includes asking the employee and/or official to produce records stored on private accounts*.

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Digital Media Issues (Cont’d)

- A “**public record**,” subject to disclosure under public records law, is material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type. Braddy v. State, 219 So. 3d 803 (Fla. 2017).
- Concept of public record should be liberally construed. Weekly Planet, Inc. v. Hillsborough County Aviation Authority, 829 So.2d 970 (Fla. 2d DCA 2002).
- A city and its officers or departments constitute an “agency” within the scope of the Public Records Law. AGO 83-80.
- Agency’s official information stored on a computer is as much a “public record” as written documents in official files. Times Publishing Co. v. City of Clearwater, App. 2 Dist., 830 So.2d 844 (2002), *review granted* 841 So.2d 466, *approved* 863 So.2d 149.
- **All of the information in the computer**, not merely that which a particular program accesses, should be available for examination and copying in keeping with the public policy underlying the right-to-know statutes. Seigle v. Barry, App. 4 Dist., 422 So.2d 63 (1982), *petition for review denied* 431 So.2d 988.

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Digital Media Issues (Cont'd)

- Personal e-mails are **not** “made or received pursuant to law or ordinance or in connection with the transaction of official business” and, **therefore, do not fall within the definition of “public records” that are subject to disclosure by virtue of their placement on a government-owned computer system.** State v. City of Clearwater, 863 So.2d 149 (2003).
- Personal e-mails of city employees, which were **not created or received in connection with the official business of the city or in connection with the transaction of city’s official business**, did not qualify as “public records” subject to disclosure under public records statute. Times Publishing Co. v. City of Clearwater, App. 2 Dist., 830 So.2d 844 (2002), review granted 841 So.2d 466, approved 863 So.2d 149.
- Private or personal cellular telephone calls of five staff employees of House of Representatives, which calls were contained in billing records, were not “public records” subject to disclosure pursuant to newspapers’ request, **and therefore such information could be redacted**, where calls were not created or received in connection with the official business of the House of Representatives. Media General Operation, Inc. v. Feeney, 849 So.2d 3 (Fla. 1st DCA 2003), review denied 857 So.2d 196.
- **CAUTION IS REQUIRED – JUST BECAUSE IT IS PERSONAL DOESN’T MEAN ITS PERSONAL!**
- **QUESTION: HOW MANY PEOPLE IN ATTENDANCE TODAY HAVE RETAINED PUBLIC RECORDS STORED ON THEIR MOBILE ELECTRONIC DEVICES IN ACCORDANCE WITH THE GS-I RETENTION SCHEDULE?**

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Record Retention

- There is no single retention period that applies to electronic messages whether they are sent by e-mail, instant messaging, text messaging (SMS, Blackberry, etc.), multi-media messaging (MMS), chat messaging, social networking (Facebook, Twitter, etc.), voicemail messaging (voicemail in audio or voice-over-internet, or other format), **or any other current or future electronic messaging device....** **The retention of any particular electronic message will generally be the same as the retention for records in ANY OTHER FORMAT that document the same program function or activity.** GSI-SL, Electronic Communications (pg.13).
- City violated Public Records Law *by failing to maintain electronic communications [which were located on City Official’s private cellphone] in a manner that prevents their accidental destruction or deletion by individual City Officials.* SDE Media v. City of Doral and Daniel Espino, City Attorney, 25 F.L.W. Supp 243a (Fla. 11th Cir. Ct. May 5, 2017).

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Age of Social Media

- What about Facebook?

- The placement of material on a **City's Facebook page** would presumably be in furtherance of a municipal purpose and in connection with the transaction of official business and thus subject to the provisions of Chapter 119, Florida Statutes. AGO 09-19. [Note: Presumption is a Public Record]
- In light of the public records implications, a city, should it establish a Facebook page, may wish to post a warning regarding the application and implications of the Public Records Law. Cf. §668.6076, Fla. Stat. (2020) (requiring any agency defined in s.119.011, Florida Statutes, or legislative entity operating a website and using electronic mail to post a statement in a conspicuous location).
- **Section 257.36 of the Florida Statutes** provides that a public record may be destroyed or disposed of **ONLY** in accordance with retention schedules established by the Division of Library and Information Services of the Department of State.
- To the extent that the information on a Facebook Page constitutes a public record, **the public records retention schedules established by law must be followed. Cf. AGO 89-39 (concluding that e-mail communications are public records and must be maintained by records custodian for public inspection and copying).**

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Age of Social Media (Cont'd)

- **1st Amendment Rights:**

- **"Forum Analysis"** is applicable to **ALL social media** (based on fact specific inquiry) and **1st Amendment prohibition(s) are applicable to social media once the interactive platforms/features of an account are opened to the public at-large.** See Knight 1st Am. V. Trump, 928 F.3d 226 (2d. Cir. 2019) (finding viewpoint discrimination by blocking parties from commenting on twitter posts if views differed or criticized President Trump); see also Rojas v. City of Ocala, 315 F.Supp.3d 1256 (M.D. Fla. 2018) (finding violation of establishment clause by promoting prayer on Facebook).
- **Unilateral Speech** (statement by government – no responses allowed) does **NOT** implicate the 1st Amendment --- **[Government Speech Doctrine]**
- In Rojas v. City of Ocala, as a result of a City Officer's death while on-duty, the City's Police Department posted a letter on its Facebook Page inviting the community to attend a "Community Vigil Prayer" in the City's downtown square. **The Middle District Court of Florida held that the City organized and promoted a prayer vigil in violation of the Establishment Clause of the First Amendment.**

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Consequences

- **Section 119.12 of the Florida Statutes** authorizes an award of attorneys' fees and reasonable costs in civil actions to enforce the provisions of the Public Records Act.
- Even a **Successful Pro Se Litigant** may recover reasonable costs under Section 119.12, Florida Statutes.
- **Section 119.10(1)(b) of the Florida Statutes** states that a public officer who **knowingly** violates Section 119.07(1), Florida Statutes, is subject to suspension and removal or impeachment and commits a misdemeanor of the 1st Degree, punishable by criminal penalties (1-year in prison or \$1,000 fine – or both).
- **Section 119.10(1)(a) of the Florida Statutes** provides that a violation of any provision of Chapter 119, Florida Statutes, by a public officer is a non-criminal infraction, punishable by a fine not exceeding \$500.00.
- **Section 838.022(1)(b) of the Florida Statutes** provides that it is **unlawful for a public servant or public contractor**, to knowingly and intentionally obtain a benefit for any person or to cause unlawful harm to another, *by concealing, covering up, destroying, mutilating, or altering any official record or official document, except as authorized by law or contract, or causing another person to perform such act.*

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How to Avoid Public Records Lawsuits

- Public Records should only be disposed of in accordance with the retention schedules approved by the Division of Library and Information Services of the Florida Department of State.
 - <https://dos.myflorida.com/library-archives/records-management/general-records-schedules/>
- An Agency may pass more stringent policies for public records. See Tallahassee City Commission Policy 140, Public Records Retention & Disposition Policy (March 21, 2018).
- As related to Public Records, you should think “everything is a public record.”
- Understand the right of access to public records is virtually unfettered, except for statutory exemptions.
- Know your designated Records Custodian.
- Never ignore and/or fail to respond to a public records request.
- Follow policy for handling a public records request.

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Miscellaneous Matters

- (1) Quasi-Judicial Matters
- (2) Security Plans
- (3) Personal Notes v. Public Record

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Quasi-Judicial Action(s)

The Sunshine Law would generally not be applicable to a meeting between a commissioner and a citizen when same discuss City matters when other members of the commission are not present (i.e., **fact finding**). AGO, informal (January 5, 1990).

As a result of Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991), *review denied*, 598 So. 2d 75 (Fla. 1992) (**finding that *ex parte* communications in quasi-judicial proceedings raise a presumption that contact prejudicial to decision-making process**):

The Legislature enacted Section 286.0115, Florida Statutes, relating to access to local public officials in quasi-judicial proceedings – adopting ordinance or resolution removing presumption of prejudice (**example available**).

NOTE: In a quasi-judicial proceeding on local government land use matters, a person may not be precluded from communicating directly with a member of the decision-making board and/or commission of any state agency or authority (i.e., city council member). All decision(s) of the decision-making body in a quasi-judicial proceeding on local government land use matters **must be supported by substantial competent evidence in the record pertinent to the proceeding – irrespective of such communications.** 12A Fla. Jur 2d Counties, §185.

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