

## **FLORIDA'S PUBLIC RECORDS LAW**

**by John W. Bowen  
School Board Attorney  
School Board of Manatee County**

Florida's government-in-the-sunshine laws are some of the strongest in the country, guaranteeing the public's access to the meetings of governmental bodies and their records. With respect to the records of governmental bodies, article I §24 (a) of the Florida Constitution provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee... ." The Legislature has implemented this section in chapter 119, Florida Statutes (2008).

While the Constitution broadly defines a "public record" as any record "made or received in connection with the official business of any public body," the Legislature went even further in section 119.011 (12), Florida Statutes (2008) stating that "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.

Florida's Supreme Court has expanded the definition to include records made or received by an agency in connection with official business that are used to perpetuate, communicate or formalize knowledge. Preliminary drafts and personal notes can be public records if they were created in connection with official business and intended to perpetuate, communicate or formalize knowledge. A public official's calendar and a teacher's lesson plans are included within the definition of public records as interpreted by the Supreme Court.

The news media can use the broad definition of public records to investigate public officials. One newspaper requested the cellular phone records of two school board members. Those records were received by the school district in connection with providing elected school board members the ability to communicate about the official business of the school district. The reporter discovered that the two school board members made numerous and lengthy calls to each other on their cell phones on the day of each school board meeting but very few calls on other days. They insisted that they did not discuss any school district business before their meetings.

The definition of "agency" to which the law applies, likewise is very broad. Section 119.011 (2), Florida Statutes (2008) states that "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.

It is clear that a school district is an agency that is subject to the public records laws.

To inspect a public record, all a person needs to do is ask the person who has custody of the record for access to it. The custodian cannot ask the requester to explain why he or she wants the record. Nor can the custodian require that the requester identify themselves. One exception to that is with respect to persons requesting to review the personnel files of public school district employees. The custodian of those personnel files is required by statute to maintain in the employee's file a list of the names of people who have reviewed the file.

It is best to have the request for public records in writing so as to have a record of exactly what was requested, however a person cannot be required to make the request in writing. If the requester refuses to make the request in writing, the custodian of the record should document the request by filling out an appropriate form.

Some requesters confuse a public records request with a request for information. This confusion likely stems from the title of the federal public records law (Freedom of Information Act), which is sometimes cited when making a request for information. The federal law does not apply to Florida agencies. Florida's public records law does not require agencies to research records to provide requested information. For example, if a person requests a list of the names of the agency's employees who have received a letter of reprimand in the past year, such a record may not exist. Nevertheless, that information could be compiled by asking all supervisors to submit a list of employees to whom they have given a written reprimand in the last year; however, the law does not require that an agency compile information and create the requested record.

Once a proper request is made, the person who has custody of the requested public record is required to promptly acknowledge the request and respond to it in good faith. That includes making reasonable efforts to determine if another officer or employee has the requested record and where it can be located. The acknowledgment should occur immediately upon receipt of the request so that the requester knows that he or she has not been ignored. Production of the record may come later.

The custodian of the record must allow inspection and copying "at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records." What constitutes a "reasonable time" is not defined. Surely, a reasonable time would be during normal business hours of the public agency, but what about an automatic delay in producing the records? The Florida Supreme Court has ruled that a county policy of requiring a requester to wait 24 hours before inspection of county personnel

records was a violation of the law. If the record can be produced immediately, then it should be.

On the other hand, a lengthy delay may be reasonable based on the nature and volume of the materials requested. In one case, a court found the delay of several weeks in producing 9,000 pages to be reasonable because of the location of the records and the need for close supervision of the review of those records for possible exemptions.

An agency may charge \$.15 per page for one-sided copies or \$.20 for two-sided copies of no more than 14" x 8.5" for the copies produced. For larger copies, such as maps or aerial photographs, the agency can charge the actual cost of duplication including a reasonable charge for labor and overhead associated with the duplication.

If complying with a request for public records will "require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved or both," the agency can require that the requester reimburse the agency for such costs. These costs include the salary and benefits of the persons involved in complying with the request.

What constitutes "extensive" is not defined in the law. One agency defined "extensive" by rule to mean that it would take more than 15 minutes to locate, review for confidential information, copy and refile the requested material. That rule was upheld on appeal because the requester failed to show that it was invalid, although the dissenting judge questioned its validity as inconsistent with the legislative intent of the public records statute. Florida's Attorney General recommends that agencies define "extensive" in a manner "that does not constitute an unreasonable infringement upon the public's statutory and constitutional right of access to public records." Given that, agencies may want to adopt a rule that considers more than 15 minutes as part of its definition of "extensive."

When an agency determines that due to the nature or volume of the public records requested, extensive time and resources will be required, the agency may require the requester to pay a deposit before initiating any activities to comply with the request. The amount of the deposit should be based upon a reasonable estimate of the time required and the number of pages that will be produced as the amount of the deposit may generate litigation challenging it. The request for the deposit should identify how the amount was computed and inform the requester that additional amounts may be requested if the time spent exceeds the estimate. Conversely, the requester should be assured that if the deposit exceeds the actual cost, the excess will be refunded.

Before producing public records, the agency should determine whether the record falls into any statutorily exempt category or if it contains confidential information in parts of the record. Many exemptions are identified in section 119.071, Florida Statutes (2008), although there are other exemptions throughout the volumes of Florida Statutes. Section 119.071 has eight full pages of exemptions broken down into five categories. Those categories are: (1) agency administration; (2) agency investigations; (3) security; (4) agency personnel information; and (5) other personal information.

There are very few exceptions to the public record law with respect to school district records. The most notable exception is student records. Under the federal Family Educational Rights and Privacy Act (FERPA), any record that contains personally identifiable information about a student is confidential and, with limited exceptions, cannot be released without parental permission. Florida had its own lengthy version of a student record statute until section 1002.22 was amended this year and now simply incorporates by reference the provisions of FERPA. New section 1002.221 (1) provides that student records as defined in FERPA are confidential and exempt from the public records law.

Public school employees' personnel files are specifically declared to be subject to the public records law. The term "personnel file" is broadly defined in section 1012 .31 (4) to include

...all records, information, data, or materials maintained by a public school system, in any form or retrieval system whatsoever, with respect to any of its employees, which is uniquely applicable to that employee whether maintained in one or more locations.

It is important to note that the "personnel file" is not just the formal personnel file housed in the human resources department. There may be separate investigatory files but they are by definition part of the "personnel file." Any documents maintained by a supervisor at the worksite relating to a particular employee are part of the "personnel file" and thus, a public record.

There are some exceptions concerning information in the personnel file. Employee evaluations are exempt from the public records law "until the end of the school year immediately following the school year in which the evaluation was made." All other evaluations are public records except evaluations prior to July 1, 1983, which are all exempt. Also exempt are social security numbers, employee payroll deduction records, medical records (including psychiatric and psychological records), criminal history records obtained from the FBI and derogatory materials until 10 days after the employee has been notified of the materials.

All of the exemptions from the public records law can be found in the Government-in-the-Sunshine Manual and its appendices. The Manual can be purchased for \$15.95 by contacting the First Amendment Foundation at (800) 337-3518. An abridged electronic version of the Manual can be accessed via the Internet at <http://www.myflsunshine.com>. The Manual is prepared by Florida's Attorney General and is updated annually. The format is in an easy to use question-and-answer style with a user friendly table of contents and comprehensive index.

If all or part of the requested public record is exempt from inspection and copying, the custodian must "state the basis of the exemption that he or she contends is applicable to

the record, including the statutory citation to an exemption created or afforded by statute." If the requester asks for the reasons in writing, the custodian "shall state in writing and with particularity the reasons for the conclusion that the record is exempt or confidential." If only part of a requested record is exempt, the custodian must "redact that portion of the record to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and copying."

It is possible that a record sent or received by a public officer or employee will not be considered a public record. For example, the St. Petersburg Times sued the City of Clearwater to gain access to e-mail records stored on a city-owned computer, claiming that anything on that computer was a public record. The City claimed that there were personal e-mails sent or received by the public officer or employee that were not in connection with official business and, therefore, were not public records. The Supreme Court agreed with the City and ordered a review of all the e-mails by the officer or employee and requiring the production of only those e-mails that were in connection with official business.

Those personal e-mails, however, could become a public record. If an employee is accused of using a publicly owned computer for personal business or private gain, an investigation may be initiated to determine if the employee is guilty. That investigation would necessarily involve a search of the e-mails stored on or deleted from the publicly owned computer. Copies of those e-mails will be part of the investigation file. The investigation file is exempt from the public records act, but only until the investigation is closed and the employee receives the contents of the file. The investigation file, including the personal e-mails, becomes a public record 10 days after the employee receives a copy of its contents. This can be very embarrassing for an employee who is found to have sent and received love e-mails to a coworker or who has stored pornography on the publicly owned computer.

When access to public records is denied for whatever reason, there are a number of avenues to enforce the law. First, informal mediation is available through the Office of the Attorney General. That can be initiated by a telephone call to (850) 245-0157.

If informal mediation fails, the requester can bring a civil suit in state court against the agency, seeking an order from the court to produce the records. The statute provides for an immediate hearing giving the case priority over other pending cases. The court will determine if the requested records are public records and whether or not there is an applicable exemption. If the court rules against the agency, the agency must produce the records within 48 hours unless a stay order is issued by an appellate court within the 48-hour period. If the court determines that the agency unlawfully withheld access to a public record, it is required to order the agency to pay the requester's costs and reasonable attorneys fees.

Additionally, there are individual penalties for public officers and employees who violate the law. Any public official or employee who knowingly violates the public records law is subject to suspension and removal or impeachment from office. Also, a knowing

violation of the law is a misdemeanor of the first degree punishable by possible incarceration of up to one year in prison or a \$1,000 fine, or both. One school board member found out how serious a violation was when she failed to comply with a public records request for nearly 7 months. She was convicted, sentenced to jail and removed from office.

Finally, the news media acts as an enforcer with their annual public records test of public officials and agencies. They send reporters to public agencies around the state making public records requests. Even though it is an annual event, published stories year after year tell about agencies requiring identification, delaying providing records that are easily produced, requiring the request be in writing and requiring a reason for the request.

In conclusion, Florida courts will liberally construe the law in favor of open government. Employees of governmental agencies need to be informed of the agency's procedure for responding to public records requests. Acknowledging public records requests should be immediate and the record should be provided as soon as reasonably possible. When in doubt, consult your attorney.