

This paper is to familiarize you with the provisions of Florida's two open government laws: the Public Records Law and the Sunshine Law (Open Meetings Law).

I. Public Records Law

Virtually any document created, received or maintained by the University or by its representatives acting in their official capacities is considered a public record. Thus, most correspondence and other documents you author or receive are subject to inspection by the public.

There are several major exceptions which allow documents to be withheld from public inspection. First, documents which are the personal notes of the maker which are neither distributed to other nor filed as a permanent record are not public records. Personal notes also include notes you make of meetings you attend and which are kept solely for the purpose of refreshing your own recollection.

The second category of documents not subject to the Public Records Law include drafts which you prepare, and your administrative assistant revises, but are not circulated to others for comment. Some Florida courts have found that once circulated, the drafts become public records because they are communicate knowledge to others. For the most part, however, drafts are not public records.

The final category of documents not subject to disclosure includes documents which are confidential by law and specifically exempt from disclosure. The major exemptions for the University are student records, academic evaluation materials (such as those used for promotion and tenure, TIP), investigation records during an active investigation of employee misconduct, research information (such as proprietary information or potentially patentable information), and records of direct support organizations other than audit reports and management letters or supplemental data. In regard to this last category of documents, please note that the Chancellor has mandated that many business records of direct support organizations be made open to the public; direct support organizations must adopt disclosure policies specifying the extent of public access to documents.

The public can inspect and copy any public record which is not exempt from disclosure. The public has the right to conduct a "fishing expedition" and need not state any particularized need for the record. Public records requests need not be in writing although it is helpful from both the requestor and University's perspective to ask that they be.

The record must be provided within a reasonable period of time; the University may charge for the cost of duplication (e.g., \$.15 per copy) plus, in cases of extensive public records request, the cost for the actual labor charges attendant to gathering the document. Public records request needs to be given a priority status by law and also from a media relations perspective. Given our active media in Florida, the gathering and production of public records is no small task at the University. In addition, public records may not be disposed of except by scheduling through the University's archives process. Electronic mail

generally is considered a public record although "transitory messages" as defined by the State Division of Library and Information Services need not be retained as must other public records.

II. Sunshine Law

The Open Meetings Law is commonly referred to as the "Sunshine Law". This law mandates that any meeting of two or more members of any board or commission of a state agency be open to the public. In a university setting, "board or commission" would encompass committees with advisory or decisional functions. The Florida Supreme Court has ruled that a state university is an agency for purposes of this law when the court decided that a search committee recommending candidates for the dean of a college of law was a board or commission subject to the Sunshine Law. Any meeting of a board or commission during which decision or policy making is performed (or it is foreseeable that it will be performed) is open, including those decisions which are mere recommendations to the President or designee. In contrast, a purely fact-gathering function is not considered a decision or policy function.

The law does not apply to a meeting between a single member of a board or commission and a non-member, except when such a meeting is used as a substitute for the full meetings of the board. Any time you meet with two or more members of a board at which time you discuss business within the jurisdiction of that board, the Sunshine Law will apply.

In contrast, frequent and unpublicized meetings between you and your various advisors or staff to assist you in executing your duties are not meetings within the Sunshine Law. Courts have recognized that "[i]t would be unrealistic, indeed intolerable, to require of such professionals that every meeting, every contact, and every discussion with anyone from whom they would seek counsel or consultation to assist in acquiring the necessary information, data, or intelligence needed to advise or guide . . . be a public meeting within the disciplines of the Sunshine Law." A good rule of thumb is that most informal meetings we attend in the normal course of our daily work activities are not open to the public, whereas meetings of a committee or other formalized group performing functions delegated to it directly or indirectly by the President may well be open. When representatives of the media occasionally ask to attend meetings which are not open to the public, the person calling the meeting can decide whether to permit media attendance nevertheless as a matter of policy

As is the case the Public Records Law, there are a number of exemptions to the Sunshine Law, such as discussions about state land acquisitions and labor negotiations.

When a meeting is a public meeting, the law requires that notice of the meetings be posted and minutes be kept. Any member of the public who attends a public meeting has neither the right to participate in nor disrupt the meeting.

III. Sanctions or Penalties for Violation

Knowing violation of the Public Records or Sunshine Law can result in criminal misdemeanor charges and a fine. In addition, an aggrieved individual can bring a civil action to enforce the provisions of these laws, after which attorneys fees can be assessed against the agency. When a member of the public files a Public Records lawsuit, he or she is given almost immediate access to the courts to enforce the law.

A violation of the Sunshine Law can also result in invalidity of the action taken at that meeting.

IV. Attorney-Client Communications

Written communications between an agency attorney and client generally are not protected under the attorney-client privilege in Florida. An important exception is written communications prepared by or at the direction of the attorney which reflect mental impressions, conclusions or litigation theory or strategies of the University. These exempt communications must have been prepared exclusively for litigation or in anticipation of imminent litigation. The exemption only applies until the conclusion of the litigation. The fact that there is no general attorney-client written communication privilege in Florida means that the attorney must confer with an agency client and render advice orally in many instances to avoid sensitive written communications possibly being subject to public disclosure.

Likewise, there is no blanket attorney-client privilege for conversations between a public board or commission and its attorney. This has not been a problem at the University inasmuch as the attorney can confer with the president or a vice president as the case may be, thus never triggering the existence of a board or commission.

As one can surmise, the Public Records and Sunshine Laws in our State are two of the broadest in the nation. Because this summary is strictly an overview of the law, you will need to confer with legal and other advisors as particular questions arise concerning Florida's open government laws. In any event, it behooves the University to fully understand and respond appropriately to any requests for documents or access to meetings in order to avoid legal sanctions and, moreover, credibility loss in the eyes of our various constituents.