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Leonard J. Dietzen

# School District Public Records

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# Purpose of Florida's Public Records Laws

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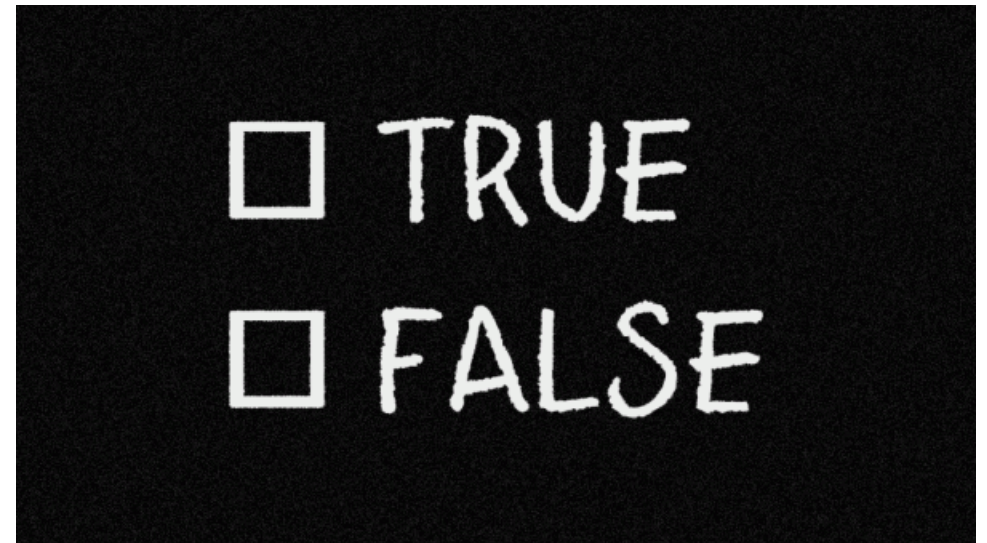


The business of the public should be conducted transparently so that the public can see what is being done and how.

# Public Records Quiz

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1. If the records custodian makes a “good faith” mistake the agency may not be subject to an award of attorney’s fees for unlawful refusal of records.
2. An agency may refuse a request because the record requested contains exempt information.



# Public Records Quiz

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3. An agency is required to answer questions regarding the contents of public records.
4. An agency is required to comply with a request for records stored on an employee's personal computer.

# Public Records Quiz

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5. The records custodian may refer a requester to agency's website.
6. An agency is allowed to charge 25 cents a page for public records.



# Public Records Quiz

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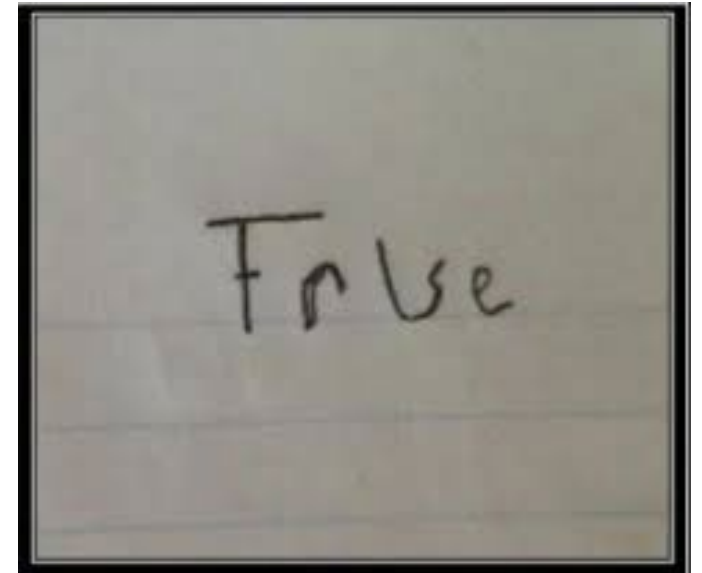


7. An agency can require a person requesting a public record to fill out a form.
8. ALL emails on an employee's work computer are public records subject to inspection under Ch. 119, F.S.

# Public Records Quiz

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9. An agency can charge a person who seeks only to inspect public records.
10. A person requesting inspection or copies of a public record is required to provide his or her real name.
11. An agency must provide a transcript of a meeting recorded digitally.





# Access to Public Records

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Guaranteed by:

Article 1, Section 24, Florida  
Constitution

Chapter 119, Florida Statutes (2021)

# Article 1, Section 24, Florida Constitution

“... every person has the right to inspect or copy any public record *made or received in connection with the official business* of any public body, officer, employee...”



# What Is a Public Record?

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- All materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.
- All such materials, regardless of whether they are in final form, are open for public inspection unless the Legislature has exempted them from disclosure.

# Ch. 119.12, Fla. Stat. (2021)

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**Attorney's fees.** – If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determine that such agency **unlawfully** refused to permit a public record to be inspected or copied, the court **shall** assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.

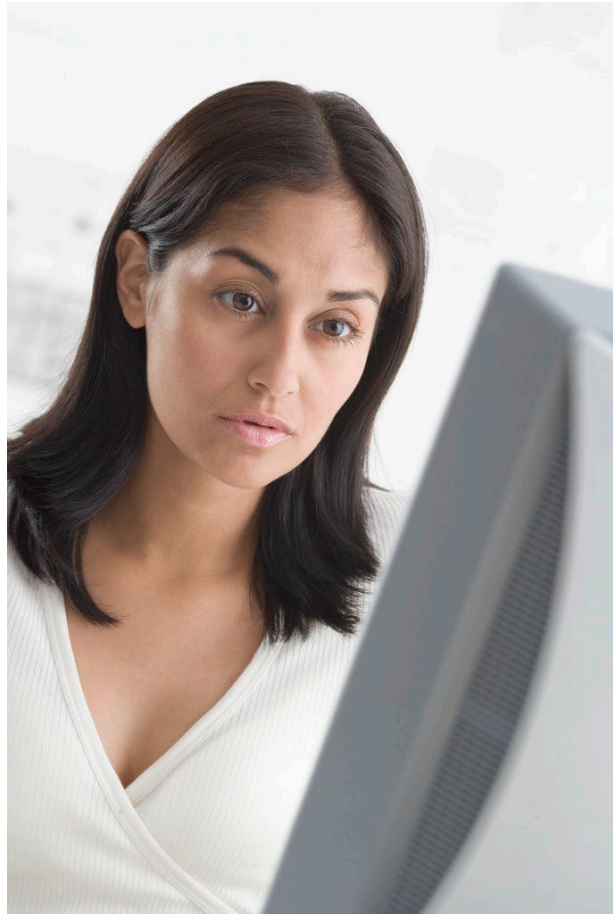
# Are Email Messages Public Records?

Email messages sent in the course of business are public records, even if they are sent from a smart phone or a personal laptop. Content of the message is key.



# Are Email Messages Public Records?

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- Personal emails may subject public employees to disciplinary action.
- Personal email messages do not fall within the definition of public records.

*State of Florida v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003)

# Are Text Messages Public Records?

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- Text messages sent in the course of business are public records.
- Public agencies have a duty to preserve public records.
- Therefore, text messages sent in the course of business must be preserved and may be produced.



# Are Text Messages Public Records?

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- AG's policy is that text messages are to be retained as public records.
- March 2010 AG letter to Sec. of State established retention schedule for texts which reads like that for emails.



# Archiving Text Messages

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There are many services for archiving text messages. Providers like Verizon and T-Mobile offer these services to corporate clients. Here are some of the options.

- AT&T Business Messaging
- Avaya
- Barracuda
- Bell Network
- CellTrust
- Global Relay
- Heritage Werks
- Intadyn Text Message Archiver
- MyRepChat
- Smarsh
- Sonar text messaging
- Telemessage
- Vircom

# Florida Public Records in the News

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- A judge ruled Lee Co. Sch. Dist. violated public records act when it allowed a request to get set aside and purged. Jan. 13, 2021
- A man is suing Hillsborough Co. Sch. Supt. after being charged \$8,020 for a public records request. Dec. 3, 2021

# Challenges for Staff

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Who determines whether a text or an email message is personal or public record?

How will text and email messages be stored?

How will text and email messages be organized for response to public records request?

Who determines whether an exemption applies?

# Requests in Any Form

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Records may be requested in person, over the phone or in writing. The person making the request is not required to give contact information or a reason for his/her request.

# Limited Exception to Anonymity

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Relating to public school employee personnel files:

Section 1012.31(f), Florida Statutes, states “The custodian of the record shall maintain a record in the file of those persons reviewing the file each time it is reviewed.”



# “Good Faith” Is Not Enough

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- In a move towards strict liability, a recent Florida Supreme Court holding allows no room for public agency error under Florida’s Public Records Act.
- On April 14, 2016, the Supreme Court of Florida issued an opinion in *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, and held that a party is entitled to attorney’s fees under the Act when a public agency unlawfully refuses access to public records, **regardless** of a public agency’s reasonable or good faith technical mistake in refusing to produce the requested records.

# General Purpose of Act

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- The purpose of the Public Records Act is to fulfill the constitutional requirement of making public records openly accessible to the public,
- to accomplish the Legislature's objectives, the Public Records Act is to be construed **liberally in favor of openness**,
- and all exemptions from disclosure are to be construed **narrowly** and **limited** in their designated purpose.

# Holding – Strict Liability

A prevailing party is entitled to statutory attorney's fees when the trial court finds that the public agency violated a provision of the Public Records Act in failing to permit a public record to be inspected or copied.





# Holding – Intent Unnecessary

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There is no additional requirement that the trial court find that the public agency did not act in good faith, acted in bad faith, or acted unreasonably.



# Relief for Public Agencies

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In 2018, former Gov. Scott signed a bill amending Ch. 119.12, F.S., which relates to awarding attorney fees and costs. Before a court can award fees and costs it must make a determination on two standards.

# Standards for Relief

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Those standards are:

1. Whether the agency unlawfully refused to permit a public records to be inspected or copied; and
2. Whether the complainant provided written notice identifying the public records request to the agency's custodian of public records at least five business days before filing the civil action.

--Chapter 119.12(1)(a) and (b), Florida Statutes

# Post the Contact Information

The law states that the five-day notice requirement only applies if the agency prominently posts its records custodian's contact information in the agency's primary administrative building in which public records are routinely created, sent, received, maintained and requested **and** on the agency' website (if the agency has a website). -Ch. 119.12(2), F.S.



# Improper Purpose

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The court shall determine whether the complainant requested...a public record... for an improper purpose. If [it] determines there was an improper purpose, the court...shall assess and award against the complainant and to the agency the reasonable costs, including reasonable attorney fees, incurred by the agency in responding to the civil action.

--Chapter 119.12(3), Florida Statutes (2021)

# Agency Fees or Charges

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Inspection is free unless otherwise provided by law. Agencies may charge for copies of records or for extensive use of records. The charge is 15 cents per one-sided copy plus 5 cents for each two sided copy.

119.07(4)(1) Fla. Stat. (2018)

# Photographs Allowed

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A requestor may photograph records instead of copying them. There is no fee for photographing records though the custodian may charge for supervising the requestor while the records are photographed if **extensive** time is needed.



# Criminal Penalties



Violation of public records law is a crime.

- First degree misdemeanor
- Up to one year imprisonment
- Up to \$1,000 fine
- Subject to suspension or removal from office
- Impeachment



# Laws Specific to Schools

Some school contractors must comply with public records laws. 119.0701, Fla. Stat. (2021)

Schools must protect personally identifiable information (PII) for applicants for and recipients of free and reduced school lunches. 595.409, Fla. Stat. (2021)



# 119.071(2)(k), Fla. Stat. (2021)

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In brief, the act makes a complaint of misconduct filed with an agency against an agency employee exempt from disclosure until either:

1. the investigation ceases to be active; or
2. the agency provides written notice to the employee who is the subject of the complaint, either personally or by mail, that the agency has either
  - a. concluded the investigation with a finding not to proceed with disciplinary action or file charges; or
  - b. concluded the investigation with a finding to proceed with disciplinary action or file charges.

# Requirements of Sunshine Law

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1. Meetings of public boards must be open to public.
2. Reasonable notice of meetings must be given.
3. Minutes of meetings must be taken, promptly recorded and open to public inspection.

# Collective Bargaining Exemption

The meeting of a school board with its own negotiation team is exempt from the Sunshine Law. Notice of meeting is **not** required.

Any bargaining meeting with the Union is required to comply with the Sunshine Law. Notice of meeting is required.



# School Security Exemption

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Documents or meetings relating to school security systems are confidential and exempt from the Public Records and Sunshine Law. 281.301, Fla. Stat. 2018

# Penalties for Violations

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Any member of a board or commission or of any state agency or authority of a county, municipal corporation, or political subdivision who *knowingly* violates the Sunshine Law is guilty of a misdemeanor of the second degree and may be removed from public office. An unintentional violation may be prosecuted as a noncriminal infraction resulting in a civil penalty up to \$500. A public agency may have to pay reasonable attorney's fees and court costs.

# AGO 2013-17 – Question about Shade Meetings

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Topic: Government in the Sunshine Law – Public Meetings – ability to meet in closed meeting when party to mandatory arbitration. s. 286.011, Fla. Stat.

Question: Does the exemption provided in section 286.011(8), Florida Statutes, allow a closed attorney-client session between the city commission and its attorney to discuss settlement negotiations or strategy related to expenditures for pending mandatory and binding arbitration to which the city is presently a party?

# AGO 2013-17 – Answer about Shade Meetings

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While the city may conduct a closed attorney-client session to discuss settlement negotiations or strategy relating to litigation expenditures when the city is a party to pending litigation before a court or an administrative agency, this office cannot say that mandatory and binding arbitration, absent an identifiable lawsuit, constitutes litigation for purposes of the exemption in section 286.011(8), Florida Statutes.



# AGO 2013-17 – Applicable Statute

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This section “may not be used to conduct a closed meeting during a mandatory arbitration proceeding, when there is no pending legal proceeding in a court or before an administrative agency.”

–Section 286.011(8), Florida Statutes

# AGO 2013-17 – Other AG Opinions

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- AGO 06-03: exemption not applicable to pre-litigation mediation proceedings
- AGO 09-14: exemption not applicable to discussion of terms of mediation in conflict resolution proceedings under the “Florida Governmental Conflict Resolution Act,” ss. 164.101-164.1061, F.S.)

# AGO 2013-17 – Other AG Opinions

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- AGO 09-25: town council which received pre-suit notice letter under the Bert J. Harris Act, s. 70.001, F.S., is not a party to pending litigation for purposes of s. 286.011[8], F.S).
- Inf. Op. to Barrett, February 17, 2016: board not authorized to use exemption to discuss pending investigation and subpoena where there is no ongoing judicial or administrative proceeding

# AGO 2016-16

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Question:

May the district reimburse a board member's attorney's fees incurred by her in responding to a public records request pertaining to her board service when no suit, claim, charge, or action has been instituted against the commissioner during the time the attorney's fees were incurred?

# AGO 2016-16

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## Applicable Statute:

“Whenever any member of any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision is charged with a violation of this section and is subsequently acquitted, the board or commission is authorized to reimburse said member for any portion of his or her reasonable attorney’s fees.”

–Section 286.011(7), Florida Statutes

# AGO 2016-16

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Answer:

“The South Broward Hospital District is not authorized to reimburse a board member for attorney’s fees incurred by her in responding to a public records request when no suit, claim, charge or action has been instituted against the commissioner during the time the attorney’s fees were incurred.”

# Hypothetical Situation (Pop Quiz!)

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A probationary teacher is discharged for an alleged crime committed against a student. The teacher is arrested. The press serves a public records request for the investigative file.

- Do you release the file?
- Do you need to notify the employee in advance?

# Resources

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- Office of Attorney General  
<http://myfloridalegal.com/>
- Governor's website  
<http://www.flgov.com/>
- First Amendment Foundation  
<http://floridafaf.org/>





# Disclaimer

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The information provided during this presentation is not intended for legal advice. The presentation, and any handouts which may accompany it, provide general information on this topic and answers to common questions about this issue. Please consult an attorney to assure that this information, and your interpretation of it, are appropriate to your particular situation.

# Thank you!

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Leonard J. Dietzen, Esquire  
Rumberger, Kirk & Caldwell, P.A.  
P.O. Box 10507  
Tallahassee, FL 32302-2507  
(850) 222-6550  
[ldietzen@rumberger.com](mailto:ldietzen@rumberger.com)