

PUBLIC RECORDS

Confidential/Exempt: What's the Difference?

MANASOTA LEAGUE OF CITIES

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CITY OF NAPLES

- PUBLIC RECORDS:
- EXEMPT/CONFIDENTIAL
- WHAT'S THE DIFFERENCE?
- PRACTICE TIPS-HOW TO HANDLE

PURPOSE

Provide guidance recognizing and dealing with production or non-production of records that may be in the custody of the public agency.

1. Is it a “public record”?

2. If it is a public record,
is it:

Confidential or Exempt from
production?

3. What (if anything) is the difference between an “exempt” public record and a “confidential and exempt” public record?

4. How does the clerk or custodian handle such records?

- Over 700 exemptions to public records production requirements
- In state and federal laws
- Sprinkled throughout wide-ranging laws

Examples:

- Medical (esp. HIPAA)
- Security
(Homeland/Domestic)
- Business(copyright, trade secrets)

Examples

- Investigative
 - Active Criminal
 - Active Internal
 - Intelligence
- Confidential Informants

Examples

- Privacy
- Social Security, Addresses
- Victims of Crime
- Victims of Sexual Crimes
- Minors
- Students
- Police, Fire, Code Enforcement, Judges, etc.

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, or employee of the state, or persons acting on their behalf, except with respect to records exempted** pursuant to this section or specifically made confidential by this Constitution.

Court Interpretation

- Shevin v. Byron, Harless, Schaffer, Reid and & Associates, Inc., 379 So.2d 633 (Fla., 1980)
- 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.

1. Is it a Public Record?

Nature of the record, not the location of the record, that matters.

Public Record?

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

Public Record?

- National Collegiate Athletic Ass'n v. Associated Press, 18 So. 3d 1201 (1st DCA 2009).
- Documents placed by NCAA on a secure Internet website used by member institutions in resolving NCAA disputes, with those documents consisting of a transcript of NCAA disciplinary proceeding involving state university...

Public Record?

...and the response of the NCAA infractions committee to the university's NCAA appeal.

- Held: These are Florida Public records regardless of where located.

Public Record?

Notes & Drafts

- Depends upon:
 - Nature:
 - Just to refresh memory or to record information
 - Circulated or uncirculated:
 - To or from anyone inside or outside of the agency

2. Confidential or Exempt

- If Confidential or Exempt, record or portion of the record does not have to be produced.
- The custodian **must** identify in writing the reason for declining to produce **AND** the citation to the statute (or case law) that provides the exemption.

3. WHAT'S THE DIFFERENCE

- Exempt records **MAY** be withheld
- Confidential records **MUST** be withheld.

3. What's the Difference?

- “Exemption” is a defined term in Section 119.011(8) Fla. Stats.:
- “Exemption” means a provision of general law which provides that a specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), s. 286.011, or s. 24, Art. I of the State Constitution.

What's the Difference?

- The term “confidential” is not defined in the chapter. Both are mentioned in Article I, S. 24 of the Florida Constitution:
- Every person has the right to inspect or copy any public record...except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.

What's the Difference?

There is a difference between records the Legislature has determined to be exempt from The Florida Public Records Act and those which the Legislature has determined to be exempt from The Florida Public Records Act and confidential. If information is made confidential in the statutes, the information is not subject to inspection by the public and may only be released to the persons or organizations designated in the statute.

What's the Difference?

- If Exempt records are produced, there is no penalty.
- If Confidential records are produced, there may be civil damages, civil fines and even criminal penalties for wrongful production by custodian.

What's the Difference?

- Not always easy to discern.
- Statutes not always clear.
- Case law often close.
- Some confidentiality/exemptions are temporary
 - Active Investigations

What's the Difference?

- Some are forever or long term
 - Social Security Numbers
 - Confidential Informants
 - Trade Secrets/Copyright
 - Privacy/HIPAA
 - Homeland/Domestic Security

What's the Difference?

- Some depend upon what agency is holding the record
 - Driver License Numbers
- Some are based upon state law and some based upon federal law. Many are based upon both. Sometimes even inconsistent.
 - Medical records
 - Homeland/Domestic Security
 - Privacy

What's the Difference?

- Some confidentiality provisions provide relatively “minor” sanctions while others provide serious and draconian sanctions.
- Consequences can be tragic
 - Rachel Morningstar Hoffman Murder.

What's the Difference?

- Some statutes require redaction of a confidential portion of the record and production of the rest
- Some statutes require withholding of entire record
 - Student information
 - Some Medical/HIPAA

What's the Difference?

- 2) Any person who willfully and knowingly violates:
- (a) Any of the provisions of this chapter commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
- (b) Section 119.105 [Protection of victims of crimes or accidents] commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Penalties

- Improperly Withholding
 - Any **public officer** who:
 - (a) Violates any provision of this chapter commits a noncriminal infraction, punishable by fine not exceeding **\$500**.
 - (b) **Knowingly** violates the provisions of s. 119.07(1) is subject to **suspension and removal or impeachment** and, in addition, commits a **misdemeanor of the first degree**, punishable as provided in s. 775.082 or s. 775.083.

Penalties

- (2) Any **person** who **willfully and knowingly** violates:
 - (a) Any of the provisions of this chapter commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
 - (b) Section 119.105 [Protection of victims of crimes or accidents] commits a **felony of the third degree**, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Penalties

- Any person denied a public record may sue in circuit court, get an immediate hearing, have the Court review the records.
- If Court finds that the records were improperly withheld, it must award damages, costs and attorneys fees against the agency.

4. HOW TO HANDLE

- PREVENTION IS BETTER THAN CURE
- HOW TO GET AHEAD OF THE CURVE:
 - IDENTIFY RECORDS THAT ARE COMPLETELY PRODUCIBLE
 - GET THOSE RECORDS EASILY AVAILABLE
 - PREFERABLY ON-LINE
 - CERTAINLY ON COMPUTERIZED SEARCH ENGINES

4. How to Handle

- HOW TO GET AHEAD OF THE CURVE
 - REVIEW AGENCY DOCUMENTS
 - EXISTING: PRE-VIEW AND REDACT WHERE NECESSARY
 - NEW: ENSURE THAT
 - FORMS ARE NECESSARY
 - INFORMATION IN FORMS IS ESSENTIAL
 - CONFIDENTIAL INFORMATION IS KEPT OFF OF FORM WHERE POSSIBLE.

HOW TO HANDLE

- COORDINATE
- Coordinate document creation, handling and production with other departments.
- Goal is to EXPEDITE, **not control**, or bureaucratize, public records production.
- Remember, the requirement for most records is to get up, go get the record and allow inspection and/or copy, on the spot. Period.

HOW TO HANDLE

- TRAIN

- No matter how much training clerks receive, or give, DO NOT ASSUME other custodians or employees understand, even the basics.
- Do not assume that the Courts will recognize that a Clerk is the sole Custodian of the Agency's records even if City policy says so, especially if that slows down production.

HOW TO HANDLE

- GET ASSISTANCE FROM CLERK &/OR FROM LEGAL WHERE UNSURE
- STAKES ARE TOO HIGH TO GUESS IN SOME CASES.

HOW TO HANDLE

- CUSTODIANS (INCLUDING ELECTED & APPOINTED OFFICIALS):
- KEEP PUBLIC RECORDS ON PUBLIC COMPUTERS, NOT PERSONAL COMPUTERS
- BEWARE OF SOCIAL MEDIA-ENSURE THAT RECORDS CAN BE RETRIEVED
- ASSUME THAT PUBLIC & PRIVATE MATERIAL WILL BE MINED AT SOME POINT

HOW TO HANDLE

- CUSTODIANS:
- DON'T PUT PUBLIC BUSINESS INTO RECORDS
- E-MAILS AND SOCIAL MEDIA
- IF RECORDS REQUESTED, GET INFORMATION TO REQUESTOR QUICKLY
- NEVER, NEVER DELETE PUBLIC RECORDS
- IF A QUESTION, GET HELP
- RESIST URGE TO BE COMBATIVE

TRENDS

- TECHNOLOGY MAKES IT PRETTY EASY TO CREATE, AND TO OBTAIN PUBLIC (OR PRIVATE) RECORDS
- COMPANIES EXIST WHO MINE RECORDS FORENSICALLY
- TESTERS ARE MAKING A LIVING FROM INCOMPETENCE OR INTRANSIGENCE BY PUBLIC OFFICIALS AND EMPLOYEES

HOW TO HANDLE

ABOVE ALL ELSE:

WATCH WHAT YOU “SAY”

WHEN YOU ARE A FISH IN A GLASS BARREL,
SWIM CAREFULLY

HOW TO HANDLE

- SOME LEGISLATION IS NEED & WARRANTED
- ESPECIALLY, TO UPDATE THE LANGUAGE TO THE COMPUTER AGE.
- HOWEVER, IT WILL NOT BE EASY, IF IT SMACKS OF REDUCTION IN TRANSPARENCY
- ALSO, THE FLORIDA CONSTITUTION IS NOT LIKELY TO UNDERGO AMENDMENT TO RESTRICT TRANSPARENCY

SUGGESTIONS

- CURRENTLY, COMPUTER PROGRAMS ARE CRUDE, FOR HANDLING MANY REQUESTS
- USE KEY WORDS
- OFTEN OVER-INCLUSIVE
- THEN GOVERNMENT TRIES TO CHARGE FOR MORE THAN NEEDED
- NEED BETTER PROGRAMS
- ALSO, NEED TO WORK HARD WITH REQUESTOR TO NARROW SCOPE