

# SUNSHINE FOR STUDENTS

## Teacher Materials

*(This document is intended to be used in conjunction with the First Amendment Foundation training DVD on open government as an educational tool for middle and high school students. The DVD can be streamed or downloaded for free from [www.floridafaf.org](http://www.floridafaf.org) under the “Sunshine for Students” tab.)*

### INTRODUCTION

**I. What is Open Government?** Florida has been a national leader in the area of open government for more than 100 years. But what does “open government” mean? Why is it important that we have an open government?

**A. What does “Open Government” Mean?** When we use the term “open government” we are generally referring to the public’s right of access to government information, whether through access to government (public) records or government meetings.

1. There are generally two equally important parts of open government: the right to inspect (look at) and copy public records; and the right to attend public meetings.

2. In Florida, there are two bases of open government. There is a *statutory* right of access to records and meetings, which is guaranteed by a *constitutional* right of access to records and meetings.

*(A short discussion about the difference between statutory rights and constitutional rights could be held here for high school students. Constitutional rights are fundamental rights and the laws enacted by the Legislature cannot violate those fundamental rights. Statutory rights can be changed more easily by the Legislature.)*

a. Public Records

1) Statutory Right: Section 119, F.S., Florida's Public Records Act, grants the right of access to the records of state agencies and local governments, but can also apply to private companies or individuals "acting on behalf of" a government agency.

<http://www.flsenate.gov/Laws/Statutes/2010/Chapter119>

(a) First codified in 1909, Florida has one of the oldest public records law in the country.

(b) Prior to codification, Florida courts recognized a common law right of access to government records.

(c) Major amendments were made in 1968, 1975, 1985 and 1995.

2) Constitutional Right: Article I, Section 24(a), Fla. Con., guarantees the right of access to the records of *all three branches* of state government: the executive (including local governments), the legislative, and the judicial.

<http://www.flsenate.gov/Laws/Constitution#A1S24>

(a) Approved by voters in the 1992 general election, and became effective July 1, 1993.

(b) Access to:

(1) State agency and local government records is controlled by ch. 119, F.S., the Public Records Act;

<http://www.flsenate.gov/Laws/Statutes/2010/Chapter119>

(2) Legislative records is controlled by s. 11.0431, F.S;

<http://www.flsenate.gov/Laws/Statutes/2010/11.0431>

(3) Judicial records are controlled by Florida Rule of Judicial Administration 2.420. <http://www.joffelaw.com/state-rules/2-420.html>

***(Note: The Sunshine for Students DVD covers only those records subject to disclosure under the Public Records Act, ch. 119, and does not include material on access to legislative or judicial records.)***

b. Public Meetings

1) Statutory Right: Florida's open meetings law, also called the Sunshine Law, grants us the right to attend any meeting of two or members of the same collegial body – a commission, a committee, a task force.

<http://www.flsenate.gov/laws/statutes/2010/286.011>

(a) Florida's Sunshine Law was created in 1967 after many years of legislative wrangling.

(b) Significant opinions from the Florida Supreme Court in the late 1960s and early 1970s gave a very broad interpretation to the application and meaning of the Sunshine Law.

2) Constitutional Right: Article I, section 24(b), Fla. Con., guarantees the right of access to the meetings of any collegial body of state agencies or local governments. <http://www.flsenate.gov/Laws/Constitution#A1S24>

(a) Approved by voters in the 1992 general election, and became effective July 1, 1993.

(b) Note that the constitutional right of access to government meetings does not include the Legislature or Florida courts.

(1) Access to legislative meetings is guaranteed by Art. III, s. 4(e), Fla. Con., which says that all prearranged meetings of more than three legislators and the purpose of which is to discuss legislative action, must be reasonably open to the public. This is a looser standard than applies to meetings of state agency or local government collegial bodies.

<http://www.flsenate.gov/Laws/Constitution#A3S04>

(2) Access to court proceedings is guaranteed by the First and Sixth Amendments of the U.S. Constitution, and while there is a presumption of openness, courts have the inherent right to close proceedings. <http://www.usconstitution.net/const.html#Am1>

<http://www.usconstitution.net/const.html#Am6>

*(Note: The Sunshine for Students DVD covers only those meetings subject to s. 286.011, F.S., the sunshine law, and does not include material on access to legislative or judicial meetings.)*

## **II. Why is “Open Government” Important?**

**A. James Madison, Father of Open Government:** James Madison, one of the Founding Fathers, recognized the importance of open government when he said, “A popular government without popular information or the means of acquiring it, is but a prologue to a farce, or a tragedy, or perhaps both.”

Madison’s birthday, March 16, is celebrated as National FOI (Freedom of Information) Day.

### **B. Oversight and Accountability**

1. Oversight: Access to public records and meetings allows us, the public, oversight of the government’s deliberative processes – we have a right to know what our government is doing, how it is spending our money (tax dollars), and importantly, why government is doing what it is doing. Access to government information through our open government laws allows us, the people, to hold our government accountable.

2. Accountability: Access to public records and meetings allows us, the public, to obtain critical information necessary if we want to hold our government and government officials, whether elected or appointed, accountable for their actions or inactions.

## **PUBLIC RECORDS**

### **I. What is a Public Record?**

A. Public records are documents relating to public business held by a government agency or a private company acting on behalf of a government agency. Public records include traditional sorts of documents and information that agencies routinely create or receive, as well as many other records and information that people may not be aware of – for example, a Facebook page

posted by a school superintendent relating to school board business is considered a public record in Florida.

B. The statutory definition of “public record” is found in s. 119.011(12), *Florida Statutes*, and is very broad, stating: “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.” <http://www.flsenate.gov/laws/statutes/2010/119.011>

1. Examples of Public Records: Government contracts, personnel files, agency memoranda, executive orders, budgets, criminal history records, accident reports, minutes of meetings, even letters or emails you write to government agencies and officials are public records.

2. The definition includes records “made or received”:

a. by a government agency, including a government official or employee, or a private agency acting on behalf of a government agency;

b. by law or ordinance; or

c. in connection with the transaction of official business.

3. The definition also includes records in formats that may not yet exist because the technology has yet to be created: “... or other material, regardless of the physical form, characteristics, or means of transmission ...”

## **II. Who Can Inspect or Copy Public Records?**

A. “Any person” has a right to inspect or copy public records held by “any agency”. <http://www.flsenate.gov/laws/statutes/2010/119.07>

B. Agency imposed restrictions are invalid, which mean that an agency can’t impose “artificial barriers” to your right of access. Such invalid restrictions would include:

1. Imposing an age limit on those wanting access to public records;
2. Requiring requestors to provide identification or the reason for the request;
3. Requiring a requestor to fill out a form or to put a request in writing;  
or
4. Limiting access to only those who reside in the county or school district, or who are residents of the state of Florida.

C. An agency can ask for identification or require that a request be made in writing only when legally authorized. This means that the agency must be able to provide a requestor with a citation to the legal authority that allows the agency to impose such requirements.

### **III. When can an agency deny a request for Public Records?**

A. Florida's constitution says only the Legislature can create an exemption to our right of access to public records. This means:

1. There's no balancing of interests by an agency in determining who has a right of access to public records; and
2. A request for public records can be denied *only if* there is a specific law protecting the requested record from inspection or copying. An agency can't deny a request for a public record only if there is specific *statutory* authority.

*(A short discussion of how the Legislature creates laws can be held here. There's a short discussion on the Florida Senate website, "How an idea becomes law" that might be helpful:*

<http://www.flsenate.gov/About/HowAnIdeaBecomesALaw>)

B. What can you do if your public record request is denied and the agency tells you that you can't have the record you requested?

1. If an agency denies a public record request, it is required to tell the requestor why it was denied and to provide the requestor with the legal authority – the statutory citation – authorizing the denial.

2. An agency is required to put a denial of a request for public records *in writing* if the requestor asks the agency to do so.

C. What are Exemptions?

1. An exemption may protect an entire record or just some of the information contained in a public record.

For example, medical records are exempt from public disclosure, as are security plans for public buildings. Social Security numbers or the home address of a law enforcement officer which are contained in a personnel record, for example, are also exempt and cannot be released unless disclosure is authorized by law.

2. What if a record contains both exempt and non-exempt information – can an agency deny the entire request? If a record contains some information that is exempt from disclosure, the agency with custody of the record must redact – delete, or mark through – the exempt parts of the record and provide access to remainder of the record for inspection and copying.

For example, if you requested a personnel file of a law enforcement officer, the agency would mark through the Social Security number and home address and other exempt information in the personnel file, and provide you with access to all other non-exempt information.

3. Only the Legislature can create exemptions to the public records law and Article I, s. 24(c) of the Florida Constitution provides a special process for the creation of all exemptions to both the public records law and the open meetings law. Bills creating an exemption must:

a. Contain only exemptions and not other types of substantive issues or law;

b. Contain a very specific statement of public necessity stating why the exemption is needed;

c. Be narrowly drafted and include *only* those records or meetings identified in the required statement of public necessity and nothing else; and

d. Receive a two-thirds vote of the members of each chamber – the Florida House of Representatives and the Florida Senate – for passage.

<http://www.flsenate.gov/Laws/Constitution#A1S24>

4. Section 119.15, F.S., the Open Government Sunset Review Act, requires that all newly-created or expanded exemptions to the public records law and open meeting law be reviewed by the Legislature five years after creation or expansion to see if they can be narrowed or repealed.

<http://www.flsenate.gov/laws/statutes/2010/119.15>

#### **IV. Can an agency charge a fee for copies of Public Records?**

**A. Statutory Fees:** A few agencies have specific statutory fee authority which allows them to charge a per record or per page fee established by the Legislature. A clerk of court, for example, is authorized to charge \$1.00 per page for copies of court records, and the Department of Highway and Motor vehicles can charge \$3.00 for a driver history record.

**B. General Fee Provision:** Most agencies, including school boards and local governments, don't have specific statutory fee authority and can charge only those fees allowed by the general fee provision in the Public Records Act. There are two different fees in the general fee provision:

1. For copies of public records, an agency can charge 15 cents a page for paper copies, plus an additional 5 cents for a two-sided copy, up to 8 ½ x 14 inches. For all other copies – bigger pieces of paper, or a copy of an electronic record copied to a CD – the agency can charge no more than the *actual cost of duplication*.

For example, you make a public record request for the school superintendent's email correspondence for the past week, and ask that those emails be provided to you in the electronic format in which they're maintained. The superintendent hands you a CD with 45 emails and charges you for the *actual cost* of the CD – probably about 50 cents. If you were to get paper copies of those same 45 emails, the cost would be \$6.75.



2. If a request requires an *extensive use* of agency resources, whether personnel or information technology or both, the agency can charge a *reasonable fee based on actual costs incurred* for the extensive use of its resources. The extensive use fee can be charged in addition to the cost of copying.

a. The law doesn't define the term "extensive" so each agency must define what is an extensive use of its resources.

b. Extensive use fees must be reasonable and based on actual costs incurred. For personnel time, an agency can charge the hourly rate of the lowest paid person capable of performing the task.

For example, you make a request for the school superintendent's emails for the past week, and she estimates that there are about 200 emails and that it will take her about an hour to pull the emails together, review them for exempt information, and to provide you a copy on a CD as you requested. The school board has defined extensive as 30 minutes or more, so the superintendent can charge for 30 minutes of extensive use time plus the cost of the CD.

**C. Fees for Inspection of Public Records:** Generally, an agency can't charge for the inspection of a public record, but if inspection requires an extensive use of agency resources, the agency is allowed to charge a reasonable fee for the extensive use of its resources.

## **V. Violations of the Public Records Law**

**A. Unintentional Violations:** An unintentional violation of any provision of the Public Records Act by a public officer is a non-criminal infraction punishable by a fine not exceeding \$500.

### **B. Intentional Violations**

1. A public officer who knowingly violates the law is subject to suspension and removal or impeachment and commits a misdemeanor of the first degree, punishable by a fine of up to \$1,000 and a jail term not exceeding one year.

2. Any other person who knowingly and willfully violates a provision of the Public Records Act commits a misdemeanor of the first degree, punishable by a fine of up to \$1,000 and a jail term not exceeding one year.

**C. Attorney Fees and Court Costs:** If a court determines that an agency violated the public records law, whether the violation was intentional or not, the agency will be required to pay the reasonable attorney fees and court costs of the person who brought the suit against the agency.

## **PUBLIC MEETINGS**

### **I. What Is a Public Meeting?**

**A. Florida’s Sunshine Law:** Section 286.011, Florida Statutes, commonly referred to as the Sunshine Law, states that

All meetings at which official act are to be taken are declared to be public meeting open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

**B. So What Is a “Meeting”?** The Florida Supreme Court has said that *any meeting of two or more members of the same collegial body* – a commission, a board, a committee, etc. – at which *public business is to be transacted or discussed* must be noticed and open to the public, regardless whether the meeting is formal or informal.

For example, if two members of the school board want to discuss whether requirements for graduation should be changed, that discussion is subject to the Sunshine Law, which requires that notice must be given and the public allowed to attend. But if one school board member meets with the school superintendent to discuss changing graduation requirements, the Sunshine Law would generally *not* apply because (1) there is only one member of the collegial body – the school board – in attendance and (2) the Sunshine Law does not generally apply to administrative personnel.

**1. Telephone Conversations:** Because the law applies to *any* discussion of public business between two or more members of the same collegial body, the Sunshine Law applies to telephone conversations. This means that two members of the school board can't discuss public business over the phone.

**2. Email:** The same is true of email conversations – the Sunshine Law prohibits discussion of public business among members of the same collegial body via email. And remember: Email is a public record subject to disclosure if it relates to public business.

## **II. Procedural Requirements**

**A. Notice:** The Sunshine Law requires *reasonable* notice of all public meetings so the public is aware that a meeting is scheduled and can attend if interested.

Examples of notice: publication in the local newspaper, or posting notice on a government website or the community bulletin board.

**B. Minutes:** The Sunshine Law requires that minutes of all meetings be taken, and although tape recordings are not required, the minutes must reflect what occurred at the meeting so that those who didn't attend can find out what happened.

**C. Public Participation:** While the public must be allowed to attend all meetings subject to the Sunshine Law, there is nothing in the law that specifically states that the public has a right to speak at such meetings. However, most government entities have rules in place that allow for public comment.

## **III. When can an agency deny access to a meeting?**

**A. Presumption of Openness:** As with the Public Records Act, there is a presumption of openness – that is, we presume that any time two or more members of a city commission, for example, or the school board, meet to discuss public business that may come before them for consideration.

**B. Exemptions:** Again, as with the Public Records Act, a collegial body can close a meeting only if there is a specific statutory exemption. The constitutional standard for creating an exemption to the Sunshine Law is the same as that for exemptions to the Public Records Act discussed above.

For example, if two or more members of the school board are meeting with the school superintendent to discuss changing graduation requirements, the meeting must be noticed and open to the public unless there's a specific statutory exemption that allows them to close the meeting. (There's not.)

#### **IV. Violations of the Sunshine Law**

**A. Unintentional Violations:** A public officer who violates any provision of the Sunshine Law is guilty of a noncriminal infraction punishable by a fine not exceeding \$500.

**B. Intentional Violations:** A member of a collegial body who knowingly or intentionally violates any provision of the Sunshine Law is guilty of a misdemeanor of the second degree, punishable by a jail term of 60 days and a fine not exceeding \$500.

**C. Voiding Action Taken:** Any action taken at a meeting held in violation of the Sunshine Law is void *ab initio* – as if it never happened.

#### **REAL WORLD SCENARIOS**

1. The city commission is opposed to a particular rock band performing at the local arena. The city commission schedules a public meeting where it votes to deny the rock band the opportunity to perform at the city's civic center because their performances are too wild and vulgar and might have a bad influence on the local youth. When some teenagers try to argue that they should have a right to attend the concert, the city commission threatens to arrest the teenagers for disrupting the meeting.

1. Did the teenagers have the right to speak at the public meeting?

2. Can the commission arrest the teenagers?

*(You can pause the DVD to discuss these issues. If the school board has a policy allowing the public to speak, the teenagers, like other persons, have a right to be present and to be heard. However, agencies are authorized to adopt reasonable rules and regulations for the orderly progression of the meeting and which require orderly behavior. Those rules must be reasonable, speaker-neutral, and uniformly applied. Merely speaking at a public meeting does not permit the city commission to arrest the teenagers.)*

2. Karla is 16 and her parents are finally letting her start dating. Tom, a guy she met at the mall, has asked her out. But Tom seems much older than Karla and Karla is a little concerned. Karla decides to Google Tom and learns that the Department of Corrections has a website listing all criminal history records. It turns out Tom is 21, way too old for Karla to date and has been arrested several times for felony theft. How else might you use criminal records to learn about someone?

*(You can pause the program to discuss this question. Criminal records are available to everyone. You can learn about neighbors or people you work with or people who might want a job where you work.)*

3. The school board is meeting to discuss the possible firing of a high school principal; however, most of the students are opposed to the firing. They think their principal, Mr. Smith, is really cool. A student sees the members of the school board sitting in the conference room and opens the door. The superintendent says the student can't attend the meeting because of the "sensitive nature" of the discussion. Can they keep the student out?

*(You can pause the program to discuss this question. School board meetings are open to the public, and can be closed only if there's a specific exemption that allows them to keep the public out. There's no balancing of interests by the school board, and even if the discussions are "sensitive" the public – including*

*students – must be allowed to attend. The school board should have provided notice that they were having a meeting.)*

4. Several middle school students are interested in protecting the environment. They have started a group that raises issues of harm to animals caused by human development. They make a public records request to the state environmental protection agency regarding the tests of pollutants in Florida's water. They also request records relating to endangered species in Florida. The agency tells them it will take too long and too much effort to get the records.

What can the students do?

*(You can pause the program to discuss this question. The Public Records Act doesn't allow an agency to deny a request because it's too broad or will take too long, so the students should first ask that the denial be made in writing – an agency must put a denial of a public records request in writing if asked to do so. Then they can call the First Amendment Foundation or the Office of the Attorney General. Their options include: filing a complaint with a local state attorney, filing suit in civil court or mediation through the Office of the Attorney General Open Government Mediation program.)*

5. Heidi is trying to decide on a future career. She would like to serve her community but she would also like to make a lot of money. One day Heidi meets Mayor Rodriguez and thinks that being mayor could be something she would like to do. Heidi decides she has to know how much a mayor gets paid first so Heidi goes to City Hall to ask for records to show how much Mayor Rodriguez gets paid. Heidi is told that she cannot get some of the information she requested because it is in a file that contains exempt information. Can the city deny Heidi's request because the file contains some information that is exempt from public disclosure?

*(You can pause the program to discuss this question. The city cannot deny Heidi's request. Personnel files, which contain some exempt information like a*

*social security number, are subject to disclosure and Heidi has the right to view all non-exempt information in the file, including the Mayor's salary. The city can only deny records or portions of records if a specific statutory exemption applies.)*

6. Your family is thinking about moving to a new house. The house is very nice, but it is much older than your current home, and the family is worried the utilities will cost more. Since you live in a city that owns the utility company, can you look up electricity use at the house and compare it with your current home or check the records of the house next door?

*(You can pause the program to discuss this question. Yes, utility records of the city-owned utility company are public records, so you may find that the house your family is thinking about moving to uses a lot more electricity than your old home. Knowing this might make your family decide not to move or at least let them know that the house might need more insulation. )*

7. At a public meeting, a member of the school board suggests that the board close several schools to save money. No schools are named but at the next school board meeting, the board votes to close your school. There has been no public discussion about why your school was chosen. One board member hints at an e-mail that discusses the pros and cons of closing different schools. Do you have a right to see the e-mail?

*(You can pause the program to discuss this question. Yes, you can make a public records request for a specific email or for emails of all board members. It is a violation of the Sunshine Law for board members and other public officials to discuss public business, such as how they will vote, by email. It's just like holding a secret meeting. In this case, because the school board voted to do something that was discussed in private, the action can be overturned and the board would have to have to have public meetings to discuss school closings.)*

**Information about the First Amendment Foundation**

[www.floridafaf.org](http://www.floridafaf.org)

**1-800-337-3518**