

2016 FLORIDA PUBLIC RECORDS UPDATE

2016 FACT Annual Conference

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Scope of the Public Records Act

- ❑ Florida's Public Records Act (Chapter 119, F.S.) provides a right of access to records of state and local governments as well as to private entities acting on their behalf.
- ❑ A right of access is also recognized in Article I, section 24 of the Florida Constitution, which applies to virtually all state and governmental entities including the legislative, executive, and judicial branches of government. The only exceptions are those established by law or by the Constitution.
- ❑ Start with premise that record is probably subject to disclosure – then see if any exemptions apply.

Scope of the Public Records Act

(cont'd)

- ▣ Section 119.011 (12), Florida Statutes, defines "public records" to include:
 - 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.

Scope of the Public Records Act

(cont'd)

- ▣ The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.

Shevin v. Byron, Harless, et al.,
379 So.2d 633 (Fla. 1980)

- ▣ All such materials, regardless of whether they are in final form, are open for public inspection unless the Legislature has exempted them from disclosure.

Scope of the Public Records Act

(cont'd)

- ▣ There is no “unfinished business” exception - interoffice drafts or “preliminary versions” circulated for comment are public record.

Shevin v. Byron, Harless, et al., 379 So.2d 633 (Fla. 1980)

- ▣ Document does not have to be in final form or the ultimate product of the agency.

- ▣ However, employee’s notes intended for their own personal use and not distributed, do not constitute public record.

Justice Coalition v. The First DCA Nominating Commission,
823 So.2d 180, 192 (Fla. 1st DCA 2002)

Electronic Records

- Email messages made or received by public officers or employees in connection with official business are public records and subject to disclosure in the absence of a statutory exemption.

AGO 96-34; AGO 01-20

- The Attorney General has advised that materials placed on an agency's Facebook page presumably would be in connection with official business and thus subject to Chapter 119, Florida Statutes.

AGO 09-19

- Text messages – Attorney General has advised Department of State that the same rules that apply to Email should be considered for electronic communications, including text message, instant messaging, etc.

Inf. Op. to Browning, March 17, 2010

Preserving Text Messages

- ▣ Several archiving programs available on market
 - - Archive Social – www.archivesocial.com
 - - Smarsh – www.smarsh.com
 - - Social Safe
 - - low tech, but effective:
 - screen shot the message;
 - document date, time and parties to the communication;
 - retain as a public record.

Many agencies have either disabled text function on agency phones or adopted policy prohibiting communication by text or limit to “transitory message.”

Transitory Messages

- ▣ A transitory message is something that is not for the perpetuation of knowledge; does not set policy, guidelines or procedures; do not certify a transaction or become a receipt.
- ▣ For example, Email messages with routine office announcements like “the copier is down” or “on my way.”

Computer Records

- ▣ Information stored in a public agency's computer "is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet..."
 - Information such as electronic calendars, databases, and word processing files stored in agency computers, can all constitute public records.

- ▣ A public entity can be required to produce documents in their "native" format.

Personal Email

- The Fla. Supreme Court has ruled that private Emails stored in government computers do not automatically become a public record by virtue of that storage.

State v. City of Clearwater, 863 S0. 2d 149 (Fla. 2003)

- **The logic:**

- “Just as an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of [public] documents ... private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer.”

Id. at 154

- But, public business Emails sent via personal Email accounts (hotmail, gmail, yahoo, etc.) **are public records and must be retained.**

Word of Caution re Use of Personal Computers or Email Accounts for Public Business

- ▣ In 2008, a circuit judge in Sarasota County ordered city commissioners to:
 - (1) produce private computers for public inspection, and
 - (2) personally pay to have a forensic computer expert extract deleted public Emails.

Some bills for forensic analysis of computer hard drive totaled as high as \$20,000!

Private Entities Subject to Public Records Act

- ▣ Key determination is whether the private entity is “acting on behalf of” a public agency;

- ▣ Two main categories:
 - Private entities created by law or by a public agency, i.e., non-profit corporation;

 - Private entities contracting with public agencies or receiving public funds.

Private Entities Subject to Public Records Act

(cont'd)

- Mere act of contracting with or receiving funds from a public agency does not make a private entity subject to Public Records Act.

Two Tests:

- (a) Delegation Test : has public agency delegated a statutorily authorized freedom to a private entity (i.e., operation of jail; employment search firm; ongoing engineering services;

Private Entities Subject to Public Records Act

(cont'd)

(b) Totality of Factors Test.

Some of factors include:

- Level of public funding;
- Co-mingling of funds;
- Whether activity is conducted on publicly owned property;
- Whether private entity is performing a governmental function which public agency would otherwise perform, etc.

All factors enumerated in:
News and Sun-Sentinel Company v. Schwab,
Twitty and Hanser Architectural Group, Inc.,
596 So.2d 1029 (Fla. 1992)

Private Entities Subject to Public Records Act

(cont'd)

- ❑ Section 119.0701, Florida Statutes mandates that public agency contracts for services with “contractors” include specific provisions requiring the contractor to comply with public records law.
- ❑ The term “contractor” is defined to mean an entity which has entered into a contract for services with a public agency **and** is acting on behalf of the agency.

Providing Public Records

- ❑ Section 119.07 (1)(a), Florida Statutes, provides that “[every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of public records or the custodian's designee.”
- ❑ The term “records custodian” means *all* agency personnel who have it within their power to release or communicate records.

Mintus v. City of West Palm Beach,
711 So.2d 1359, 1361 (Fla. 4th DCA 1998)

- ❑ Under statute, agency may designate specific person(s) as records custodian to permit inspection and copying of records.

§ 119.07(1)(b), F.S.

Providing Public Records

(cont'd)

- ❑ Must disclose the identity of designee to person making request.
- ❑ Custodian must promptly acknowledge requests to inspect or copy and respond to requests in good faith
- ❑ If going to designate official “custodian” best to draft policy that only said individual(s) has custody, control, duty to maintain and power to release official records.
- ❑ The Public Records Act requires no showing of purpose or "special interest" as a condition of access to public records. Unless authorized by law, an agency may not ask the requestor to produce identification as a condition to providing public records.
- ❑ The custodian is not authorized to deny a request to inspect and/or copy public records because of a lack of specifics in the request.

Providing Public Records

(cont'd)

- ❑ The Public Records Act does not contain a specific time limit (such as 24 hours or 10 days) for compliance with public records requests. The Florida Supreme Court has stated that the only delay in producing records permitted under Chapter 119, Florida Statutes, is the reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.
- ❑ Agency is not authorized to establish an arbitrary time period during which records may or may not be inspected.
- ❑ Nothing in Chapter 119, Florida Statutes, requires that a requesting party make a demand for public records in person or in writing.

Providing Public Records

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- ❑ A custodian is not required to give out *information* from the records of his or her office. For example, the Public Records Act does not require a town to produce an employee, such as the financial officer, to answer questions regarding the financial records of the town.
- ❑ No duty to “re-format” records to specifications of requestor. The Public Records Act requires that an agency produce nonexempt existing records. An agency is not required to create a new record.
- ❑ Exempt or confidential information must be redacted and the remainder of the record produced.

Providing Public Records

(cont'd)

- ❑ A custodian of a public record who contends that a record or part of a record is exempt from inspection must state the basis for the exemption, including the statutory citation to the exemption.
- ❑ Additionally, upon request, the custodian must state in writing and with particularity the reasons for the conclusion that the record is exempt from inspection.
- ❑ Public agency is not required to specify, on a redaction by redaction basis, the statutory exemption for each redaction made. The Statute does not require that procedure and courts cannot engraft their own policy judgments into the Act.
 - ❑ *Jones v. Miami Herald Media Company, et al.*,
198 So.3d 1143, (Fla. 1st DCA 2016)

Fees

- ▣ Providing access to public records is a statutory duty imposed by the Legislature upon all record custodians and should not be considered a profit-making or revenue-generating operation. Thus, public information must be open for inspection without charge unless otherwise expressly provided by law.
- ▣ Section 119.07 (4)(d), Florida Statutes, authorizes the imposition of a special service charge to inspect or copy public records when the nature or volume of public records to be inspected is such as to require extensive use of information technology resources, or extensive clerical or supervisory assistance, or both. The charge must be reasonable and based on the labor or computer costs actually incurred by the agency.

Fees

(cont'd)

- If no fee is prescribed elsewhere in the statutes, section 119.07 (4) (a) 1 ., Florida Statutes, authorizes the custodian to charge a fee of up to 15 cents per one-sided copy for copies that are 14 inches by 8 1;2 inches or less. An agency may charge no more than an additional 5 cents for each two-sided duplicated copy.
- The courts have upheld an agency's requirement of a reasonable deposit or advance payment in cases where a large number of records have been requested. In such cases, the fee should be communicated to the requestor before the work is undertaken.

Penalties

- ▣ A person who has been denied the right to inspect and/or copy public records under the Public Records Act may bring a civil action against the agency to enforce the terms of Ch. 119.
- ▣ In addition to judicial remedies, section 119.10 (1)(b), Florida Statutes, provides that a public officer who knowingly violates the provisions of section 119.07(1), Florida Statutes, is subject to suspension and removal or impeachment and is guilty of a misdemeanor of the first degree, punishable by possible criminal penalties of one year in prison, or \$1,000 fine, or both.

Attorney's Fees

- ▣ Section 119.12, Florida Statutes, provides that if a civil action is filed against an agency to enforce the Public Records Act and the court determines that the 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 attorney's fees.

Attorney's Fees

(cont'd)

- ▣ Two recent cases on attorneys' fees:
 1. Public Records Act does not require a showing that the public entity acted “unreasonably” or “in bad faith” in order for prevailing plaintiff to recover attorney's fees. If court finds that public agency unlawfully refused to allow a public record to be inspected or copied, their fee should be awarded, even if public agency acted in good faith in denying request.

Board of Trustees Jacksonville Police and Fire Pension Fund v. Lee, 189 So.3d 120 (Fla. 2016)

Attorney's Fees

(cont'd)

2. Delay in providing records in response to a vague and suspicious records request submitted via Email did not amount to an “unlawful refusal” under Act. “The public records law should not be applied in a way that encourages the maintenance of public records requests designed to obtain no response, for the purpose of generating attorney’s fees.”

Citizens Awareness Foundation v. Wantman Group, Inc., 195 So.3d 396 (Fla. 4th DCA 2016)

Practical Tips for Agencies

Here are some examples of things that should be avoided when processing Ch. 119 requests:

1. A reporter makes a request for copies of several letters and is told, “It is 3 o’clock and we close at 5, and all requests must go through the general counsel.”
2. We cannot process your request unless you put it in writing.
3. We cannot process your request until you fill out this form.
4. We cannot process your request unless you first show us your driver’s license.
5. Why do you want these records?
6. You can look at the records, but we are not going to make copies.

Practical Tips for Agencies

(cont'd)

7. You have asked for the Email you requested to be placed on a disc, but we are not going to do that; you can only get a written transcript.
8. You cannot have these records because the document you have requested is a draft and has not yet been approved by management.
9. You cannot have these records because you filed a lawsuit against this agency, and you must use the discovery process to obtain any records from this agency.
10. You cannot have these records because the employee who drafted them has stored them in his locked office, and he won't be back for 6 months.

Beware of the “Set Up”!

A public records request was submitted by Email to the contract Email address, with the additional language “DidTheyReadIt.com” attached at the end of the address. The subject line of the Email stated: “This is a public records request,” and it indicated it was sent from “An Onoma.” The body of the e-mail stated:

Custodian of Public Records for Wantman Group, Inc.

Please provide the following records:

Certificate of Insurance referenced on page 6 of 16 of the South Florida Water Management District contract 4600002690.

All responsive records should be delivered to Vendor.Contract.Publishing @Gmail.com. If for some reason Wantman Group, Inc. contends that the requested records are exempt from disclosure please explain with particularity the rational [sic] for such an assertion. Please provide a written estimate of any costs prior to such costs being incurred.

Thank you for your prompt attention to this matter.

VCP-0000-0000-0011.

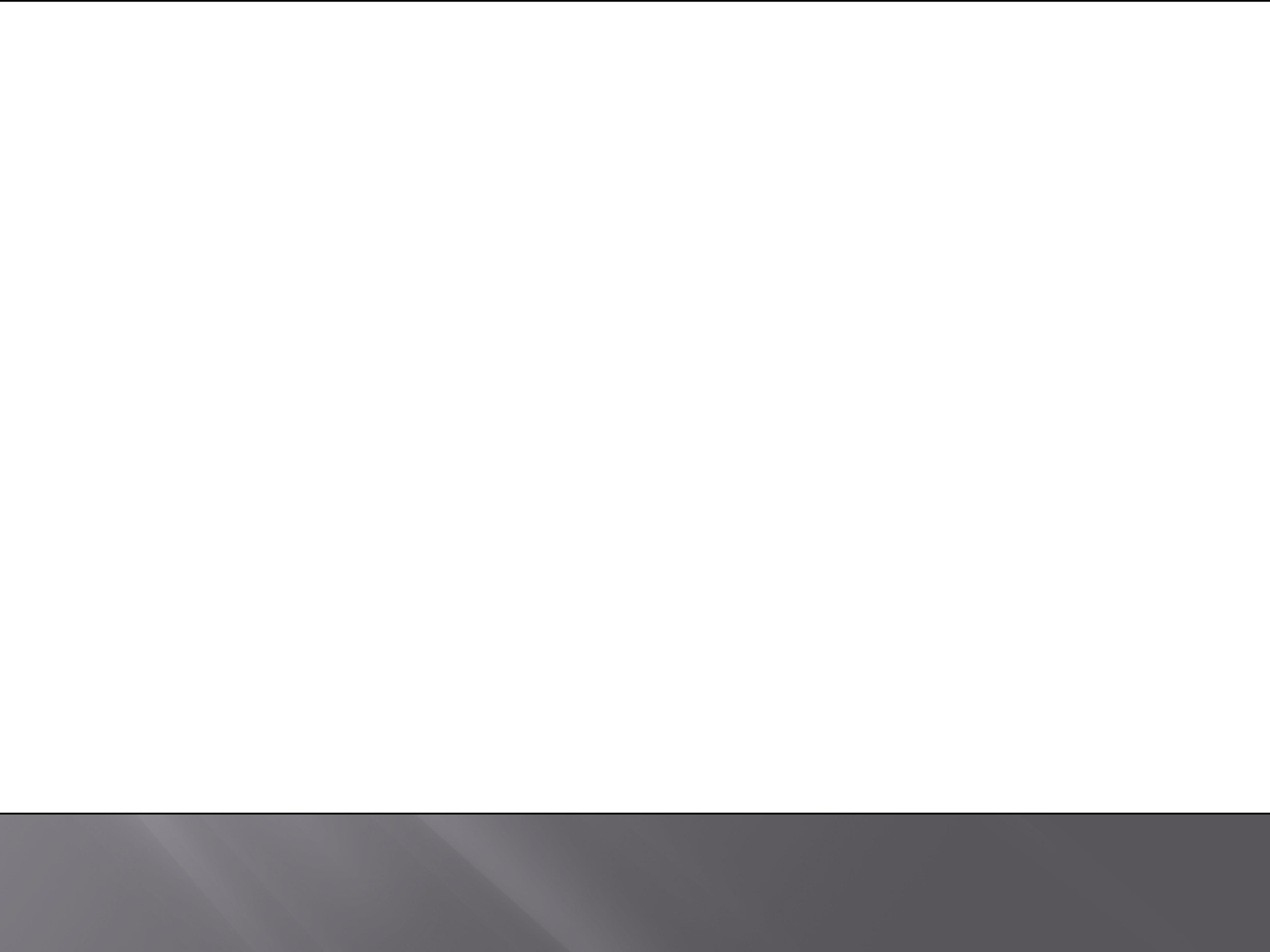
Beware of the “Set Up”!

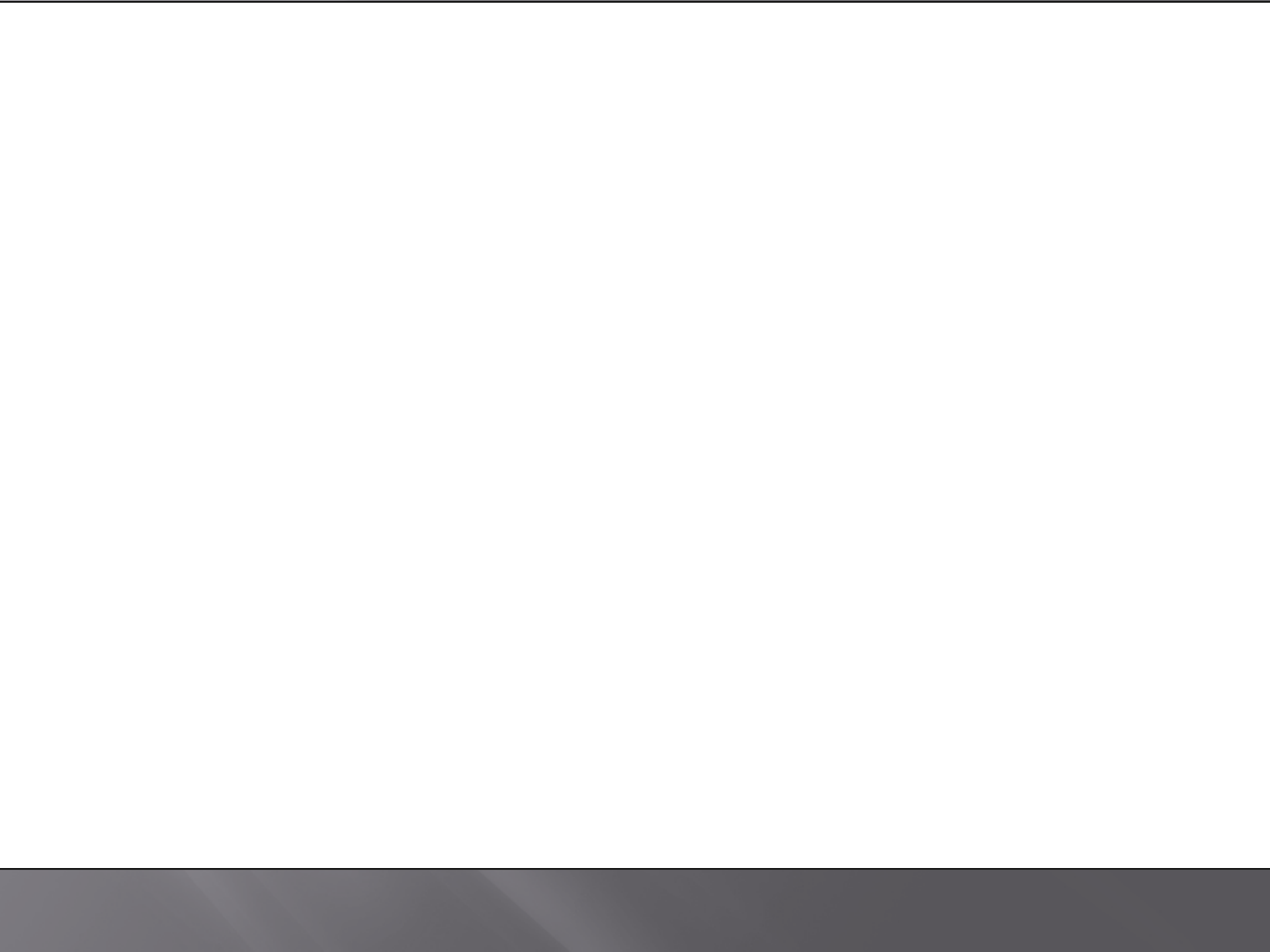
(cont'd)

Several individuals and groups have identified attorney's fee provision of Public Records Act as a lucrative revenue source and routinely engage in making predatory public records requests.

Different tactics employed:

1. ambush visit (see videos)
2. disguised Email request
3. multiple/high volume requests







Beware of the “Set Up”!

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Request made via Email sent anonymously. Sender was described as “leo.namesxxx@xxxx.” City clerk responded to Email address indicating form on City’s website had to be completed in order to make public records request

No form was completed. Five months later the request was repeated. City issued same response.

Court found that this amounted to an unlawful refusal to provide documents. City could not condition production of records on filling out form or providing identifiable source for payment.

Chandler v. City of Greenacres,
140 So. 3d 1080 (Fla. 4th DCA 2014)

Beware of the “Set Up”!

- Town of Gulf Stream, Florida
- Palm Beach County
- >1,000 residents
- >20 employees
- 2013 – 2015 - Town received more than 2,000 public records requests
- one individual made over 400 requests
- one company made over 500 requests
- since October, 2013, Town has received 42 different public records lawsuits
- Vice-Mayor estimates Town staff has spent over 4,000 hours of time processing requests
- Town has budgeted \$1 Million for legal fees, reduced its hurricane reserve and raised millage by 40% to pay anticipated costs

Additional Resources

- ▣ Office of Attorney General Pam Bondi website:
<http://www.myfloridalegal.com>
- ▣ Governor Rick Scott website:
<http://www.flgov.com>
- ▣ First Amendment Foundation website:
<http://www.floridafaf.org>

Web-based Resources at Myfloridalegal.com

1. Training PowerPoints and two hour open government audio presentation;
2. Text of circuit court and county court opinions cited in Sunshine Manual;
3. Formal and informal Attorney General Opinions;
4. Link to First Amendment Foundation and other open government websites;
5. PDF version of Sunshine Manual.

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