



# Insight from Carlton Fields

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## Contracting in the Sunshine

### *The Applicability of Government in the Sunshine to Public Procurement and Public Contractors*

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Public access to and the visibility of government business are fundamental principles under Florida law. One of the first states in the nation to recognize that members of the public should have the right to review and obtain copies of government records, Florida has long been a trailblazer in the area of open government laws. Indeed, Florida is one of only a handful of states that have elevated the requirement of open government to a constitutional level. See Art. I, § 24, Fla. Const. (granting a constitutional right of access to inspect and copy public records and requiring that all meetings of government bodies be held in the open); see also “Access to Gov’t in the Computer Age,” Martha H. Chumbler, ed., ABA Publishing 2007, (providing citations and summaries of the public records laws of all 50 states). This mandate for openness in government has significant impacts both on agencies’ procurement activities and on the business operations of those that contract with government. These materials discuss the implications of both Florida’s open meetings law and its public records laws for both sectors.

#### **Open Meetings: §§ 286.011-286.0113**

Section 286.011, Florida Statutes, requires that all meetings of any collegial body of a state or local agency in the State of Florida during which any

decision is to be taken must be preceded by public notice, conducted in a public forum, and memorialized by minutes. These “Government in the Sunshine” requirements clearly apply to any meeting at which a collegial body – such as a board of county commissioners, a city council, or a school board – discusses a procurement, approves the terms of a contract solicitation, makes a contract award, or takes any other official action with respect to contracting.

Florida’s courts have broadly construed these requirements to include instances when members of the collegial body correspond on official matters in settings outside of official meetings, regardless of whether the correspondence is in person. See *Pinellas County School Bd.*, quoting *Lorei v. Smith* (“[t]he Sunshine Law was enacted to protect the public from ‘closed door’ politics.... As a result, the law ‘must be broadly construed to effect its remedial and protective purpose.’”); *Finch v. Seminole School Bd* (presence of school board members in same bus, for purpose of considering possible redrawing school attendance zones, found to violate Government in the Sunshine). When two or more members of the body communicate with one another about matters that are pending before them for action or some other decision, it is deemed to be a meeting. See, e.g., *Bigelow v. Howze* (Sunshine Act violation found

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to have occurred when two of five county commissioners traveled out of state together on a fact finding trip to investigate the possible need to procure certain services and, while still on the trip, discussed their recommendations). Thus, for example, two county commissioners who both belong to a local civic club will be regarded as violating the Government in the Sunshine Law if they discuss a pending contract award during the club's weekly lunch meeting. Board or commission members are not prohibited from attending the same functions or being members of the same civic or social organizations. Nor are they prohibited from stating their opinions at a function. However, care must be taken to avoid any and all communications between the commissioners or board members that relate to official business. See Op. Att'y Gen. 94-62 (Government in the Sunshine does not prohibit county commissioners from expressing their position on matters that may foreseeably come before the commission at a political forum sponsored by private civic club during, so long as commissioners avoid discussions or dialogue among themselves on those issues).

Email correspondence between county commissioners or exchanges via Facebook regarding a matter pending before the commission would violate section 286.011. See Op. Att'y Gen. 89-39; Op. Att'y Gen. 09-19. Unilateral messages from a single commissioner or board member to other members of the group are not considered a meeting as long as none of the other members respond. However, if a back-and-forth series of messages occurs, the communication will be regarded as a meeting. While agency staff may meet with members of the collegial body to discuss pending matters, it is not permissible for staff to act as messengers between those members. The requirements of section 286.011 also may not be evaded through the use of human messengers or couriers. See *Blackford v. School Board of Orange*

*County* (serial meetings between school superintendent and individual members of school board deemed to be an illegal evasion of the Sunshine Act).

Members of the public need not be allowed to contribute to or offer comments during the meeting, but they must be allowed to attend. *Keesler v. Community Maritime Park Ass'n*, 32 So. 3d 659 (Fla. 1st DCA 2010). However, an agency cannot prevent a member of the public from recording the meeting, as long as such recording does not disrupt the proceedings. See *Pinellas County School Bd. v. Suncam, Inc.*

Moreover, where the authority to make a decision has been delegated to a staff committee or any other group, that group becomes subject to the Sunshine Act and must comply with the same notice and public meeting requirements as would be applicable to the collegial head of a government agency. For example, if an evaluation committee has been authorized to develop a short list of the top three ranked proposals received in response to a request for proposals, the evaluation committee is subject to the Sunshine Act. See, e.g., *Silver Express Co. v. District Bd. of Lower Tribunal Trustees of Miami-Dade Community College* (holding that an evaluation committee appointed by the purchasing director was subject to the Sunshine Act). In one instance, where an evaluation committee did not meet at all—but instead individually communicated their scoring of proposals to another agency employee who tallied the scores—the court still found there to be a Sunshine Act violation. Because the evaluation committee was charged with the responsibility to develop a short-list—a task deemed to be formal action—the court determined that “a meeting was required.... And, if a meeting was required and none was held, a Sunshine Law violation occurred.” *Leach-Wells v. Bradenton*.



As is discussed in more detail in the Public Records section below, there are also instances when a private entity—because it is performing an essential government function or acting as government’s agent—may become subject to section 286.011.

Violation of these requirements may render any actions taken during the meeting a nullity and may result in civil fines or criminal misdemeanor convictions for the offending government officials. Thus, the closed door meetings of a community college’s evaluation committee, which were found to have violated Government in the Sunshine, rendered void the subsequent decision to accept the committee’s recommended selection of a contract winner. *Silver Express* (community college enjoined from entering into the contract recommended by the evaluating committee that met in private).

There are exceptions to the Sunshine Act. Specifically relevant to public procurement, section 286.0113(2), Florida Statutes (2010), created an exemption for meetings during which negotiations between government negotiators and a vendor occurred, but limited the exemption to state procurements authorized by section 287.057(1). § 13, 2010-151, Laws of Fla. The 2011 Legislature broadened the exemption by revising section 286.0113(2) to apply to any type of competitive public procurement—regardless of whether by a state or local government agency and regardless of the statutory authorization for the competitive process used. It also broadened the exemption to apply not only to negotiation sessions, but also to meetings during which the vendor makes a presentation or answers questions and meetings during which the negotiation team discusses negotiation strategies. However, a record of all such closed meetings must be made and maintained. That record becomes subject to disclosure under Florida’s Public Records Act 30 days after the bid responses are opened or when the agency gives notice of its

decision, whichever occurs first. § 2, 2011-140, Laws of Fla. (revising § 286.0113(2)).

Notably, however, these exceptions still apply only to competitive solicitations. Thus, meetings of a vendor and negotiation team involving single source procurement would not be exempt, nor would any other procurement that was not competitively awarded. Because Florida’s Sunshine Act is to be construed so as to apply broadly and the statutory exemption allowing closed sessions expressly references only one type of negotiation, it is likely that all other negotiations must be held in the open. Certainly, prior to the enactment of section 286.0113(2) in 2006, the general rule was that at least some negotiation sessions were required to be noticed and open to the public. *See Port Everglades Auth. v. International Longshoremen’s Ass’n* (holding that the Port Authority violated the Sunshine Law by excluding bidders from each others’ negotiation sessions); but see *Homestead-Miami Speedway v. City of Miami* (concluding that not all negotiation sessions need to be held in the public if it can be shown that a significant number were and that all issues were fully addressed during those sessions at which the public was invited).

Violations of the Sunshine Act can sometimes be cured. When the collegial body subsequently holds a full public hearing on the same subject and that meeting fully complies with the Sunshine Act, the resulting action is not void. *See Tolar v. School Board* (despite private meetings among board members at which abolishing a position was discussed, the board subsequent public meeting at which discussion was permitted was sufficient to satisfy the requirements of the Sunshine Act). However, the subsequent meeting cannot be merely perfunctory but must include a full airing of issues and concerns. Secret meetings cannot be used to crystallize decisions, with only the formal acceptance of those decisions



occurring at a public meeting. *Zorc v. Vero Beach* (“only a full, open hearing will cure a defect arising from a Sunshine Law violation. Such violation will not be cured by a perfunctory ratification of the action taken outside of the sunshine”); see also *Palm Beach v. Gradison* (where citizen’s advisory group met in private and formulated recommended zoning ordinance, town council’s perfunctory adoption of that recommendation at a public meeting found not to satisfy the Sunshine Act). Compare *Sarasota Citizens* (although commission members violated Government in the Sunshine by exchanging emails regarding a pending bid, subsequent open meetings where substantive discussions of bids took place cured the violations) to *Zorc* (open meeting held for the purpose of curing violation resulting from closed meeting held not sufficient to cure the violation).

### **Public Records: Chapter 119**

While there are public records act provisions scattered throughout the Florida Statutes—as well as in the Florida Constitution—the Public Records Act itself is found in chapter 119, which includes both the essential principals of Florida’s public records law, as well as many—although far from all—of its exceptions. Government procurements present a number of significant issues relating to the application of the Public Records Act.

“Public records” are defined by section 119.011(12) as

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.

One issue that frequently arises in the context of a public procurement is the applicability of this definition

to materials developed by agency employees or officials during their review or evaluation of bids. When a public employee prepares notes relating to his or her evaluation of a proposal, do those notes become a public record? The answer depends wholly upon the circumstances. However, Florida’s courts have provided the following guidelines.

To be contrasted with “public records” are materials prepared as drafts or notes, which constitute mere precursors of governmental “records” and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary in dictation.

*Shevin v. Byron, Harless, Schaffer, Reid & Assoc.* However, the *Byron, Harless* court went on to say that:

inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not part of an agency’s later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business.

*Id.* Thus, while notes or other draft materials prepared by an agency employee may not constitute a public record if used merely to assist the employee in preparing a final record, those materials will likely be considered subject to the Public Records Act if the notes or materials are transmitted to or shared with others. In addition, a memorandum “to the file”—even if not intended to be transmitted to any other person or entity—will be regarded as a public record if it supplies the final evidence of the information that it addresses. See *Miami Herald Media Co. v. Sarnoff*



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(memoranda prepared by city commissioner, for the purpose of summarizing a conversation with another city official, found to be a public record).

Another area of particular interest to public contractors is the applicability of the Public Records Act to non-governmental entities. Section 119.011(2) defines “agency” to include not only government agencies themselves, but also any “private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.” A public contractor that performs an essential governmental function, performs substantial services on behalf of government over a long period of time, or undertakes what has traditionally been a government role may, therefore, be deemed to be an “agency” and subject to the Public Records Act. See, e.g. *B&S Utilities v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (engineering firm that had been performing engineering services for city over a period of fifteen years deemed to be an agency and subject to the Public Records Act); *Booksmart Enter. v. Barnes & Noble College Bookstores* (materials prepared, received, or held by a public contractor when acting on behalf of a government agency constitute public records).

Florida’s courts have established two different sets of criteria for determining whether Florida’s open government laws apply to a private organization. The first is referred to as the “Schwab totality of factors test,” having been first enunciated in *News and Sun-Sentinel v. Schwab, Twitty & Hanser Architectural Group*. In *Schwab*, the court looked at a number of factors in their totality to determine whether a private entity should be regarded as acting on behalf of government so as to make that entity subject to either the Sunshine Law or Public Records Act. The factors include: 1) the amount of public funding provided to the private entity; 2) the extent to which public funds are commingled with private funds; 3) whether the private entity is conducting business

on publicly-owned property; 4) whether the service being provided by the private entity is an integral part of the public agency’s decision making process; 5) whether the private entity is performing a function that the public agency would otherwise perform; 6) the extent to which the public agency exercises control over or regulates the private entity; 7) whether the public agency created the private entity; 8) whether the public agency has a substantial financial interest in the private entity; and 9) who the private entity’s functioning benefits. See *Memorial Hosp.-West Volusia v. News-Journal Corp.* (reciting these *Schwab* factors). Thus, a private entity that was created for the sole purpose of performing a government contract was deemed, after consideration of a totality of the *Schwab* factors, subject to the Public Records Law. *Davis Aviation Consultants v. Knight Ridder*.

Courts have also recognized a “delegation test.” If it is determined that a governmental agency has transferred or delegated its authority to perform a function to a private entity, there is no need to consider the *Schwab* factors. Such a delegation is sufficient in and of itself, to make the private entity subject to the Public Records Law. *Putnam County Humane Society v. Woodward* (holding that a private organization was authorized to perform governmental functions and, in fact, performed those functions, thus making it subject to the Public Records Law); *Stanfield v. Salvation Army* (holding that a private organization that contracted with a local government to perform government functions was subject to the Public Records Law).

Even contractors that are not found to be an “agency” may become subject to the Public Records Act. Section 119.07(1)(a) requires that “[e]very person who has custody of a public record shall permit the record to be inspected and copied...” Thus, a public contractor with custody of documents prepared, received, or used by a government agency would likely



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be subject to the Public Records Act, at least as to those particular documents. For example, draft documents in the custody of an organization negotiating a lease with the City of St. Petersburg were regarded as public records, even though the city never took physical custody of them, because the drafts were shared with city representatives and were the subject of negotiations. *Times Publ'g Co. v. St. Petersburg*. In addition, materials posted on the NCAA's secure website were found to be public records when a public university's attorneys were given access to the materials for the purposes of preparing an appeal to proposed NCAA sanctions. *NCAA v. Associated Press*.

The Public Records Act does include exceptions that relate directly to the procurement process. For example, section 119.071(1)(b) temporarily exempts sealed bids, proposals, and replies from disclosure. The 2011 Legislature revised the exemption to extent the time period during which the exemption applies, with sealed bids, proposals, and replies now exempt either until the agency announces its intended decision or thirty days after the bids, proposals, or replies are opened, whichever occurs first. § 1, 2011-140, Laws of Fla. If the agency decides to reject all bids, proposals, or replies and to issue a new solicitation, the bid documents remain protected from public disclosure until such time as the agency announces an intended awardee, decides not to proceed with any award, or 12 months passes from the rejection decision.

While the exemption for entire bids, proposals, and replies is only temporary, there are permanent exemptions for certain confidential and trade secret materials included in submissions to government agencies. Section 812.081(1)(c) defines "trade secret" as

any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement, thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

*when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.*

(Emphasis supplied).

The italicized phrase is critical for the contractor that seeks to provide some protection for materials contained in a bid, proposal, or reply. Florida's courts have determined that the failure of a contractor to clearly mark and identify materials that it deems to be trade secret, prior to their submission to a government agency indicates a failure to take measures to prevent from disclosure – thus negating any later claim of trade secret. *SePRO v. Florida Dep't of Env'tl. Protection*. See also *Cubic Trans. Sys. v. Miami-Dade County* (finding that a conversation with an agency employee expressing the desire to keep



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information confidential is not a sufficient measure to prevent materials from becoming available).

For certain agencies, statutes require that additional justification must be provided to an agency in order to secure protection for trade secrets. See, e.g., § 381.83 (documents submitted to the Department Health relating to public health); § 403.73, Fla. Stat. (documents submitted to the Department of Environmental Protection relating to resource recovery and management). Regardless of whether such express statutory authority exists, however, government agencies frequently require that, in order to secure trade secret protection for information included in a bid, proposal, or reply, the contractor must not only label the specific information deemed confidential, but also provide an explanation of the basis for the assertion. Agencies also frequently require the bidder to provide an extra copy of their bid to the agency, with that information deemed to be confidential redacted.

### Resources

#### Cases

*B&S Utilities v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008).

*Bigelow v. Howze*, 291 So. 2d 645 (Fla. 2d DCA 1974).

*Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979)

*Booksmart Enter. v. Barnes & Noble College Bookstores*, 718 So. 2d 227 (Fla. 3d DCA 1998).

*Cubic Trans. Sys. v. Miami-Dade County*, 899 So. 2d 453 (Fla. 3d DCA 2005).

*Davis Aviation Consultants v. Knight Ridder*, 800 So. 2d 302 (Fla. 3d DCA 2001).

*Finch v. Seminole School Bd*, 995 So. 2d 1068 (Fla. 5th DCA 2008).

*Homestead-Miami Speedway v. City of Miami*, 828 So. 2d 411 (Fla. 3d DCA 2002).

*Keesler v. Community Maritime Park Ass'n*, 32 So. 3d 659 (Fla. 1st DCA 2010).

*Leach-Wells v. Bradenton*, 734 So. 2d 1168, 1171 (Fla. 2d DCA 1999).

*Memorial Hosp.-West Volusia v. News-Journal Corp.*, 927 So. 2d 961, 966 (Fla. 2006).

*Miami Herald Media Co. v. Sarnoff*, 971 So. 2d 915 (Fla. 3d DCA 2007).

*NCAA v. Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009).

*News and Sun-Sentinel v. Schwab, Twitty & Hanser Architectural Group*, 596 So. 2d 1029 (Fla. 1992).

*Palm Beach v. Gradison*, 296 So. 2d 475 (Fla. 1974).

*Pinellas County School Bd. v. Suncam, Inc.*, 829 So. 2d 989 (Fla. 2d DCA 2002).

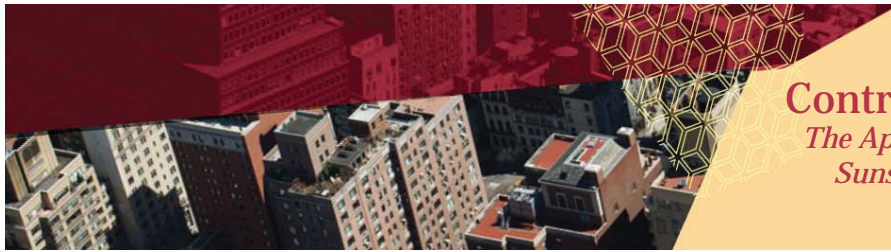
*Pinellas County School Bd.*, 829 So. 2d at 990), quoting *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985).

*Port Everglades Auth. v. International Longshoremens' Ass'n*, 652 So. 2d 1169 (Fla. 4th DCA 1995).

*Putnam County Humane Society v. Woodward*, 740 So. 2d 1238 (Fla. 5th DCA 1999).

*Sarasota Citizens*, 48 So. 3d at 766 (Fla. 2010).

*SePRO v. Florida Dep't of Env'tl. Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).



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*Shevin v. Byron, Harless, Schaffer, Reid & Assoc.*,  
379 So. 2d 633, 640 (Fla. 1980).

*Silver Express Co. v. District Bd. of Lower Tribunal Trustees of Miami-Dade Community College*, 691 So. 2d 1099 (Fla. 3d DCA 1997).

*Silver Express*, 691 So. 2d at 1101 (Fla. 3d DCA 1997).

*Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997).

*Times Publ'g Co. v. St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990).

*Tolar v. School Board*, 398 So. 2d 427 (Fla. 1981).

*Zorc v. Vero Beach*, 722 So. 2d 891 (Fla. 4th DCA 1999).

Op. Att'y Gen. 94-62.

Op. Att'y Gen. 09-19.

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### **Florida Constitution, Statutes, and Laws of Florida Citations**

Art. I, § 24, Fla. Const.

Chapter 119, Fla. Stat.

Section 286.011, Fla. Stat.

Section 286.0113(2), Fla. Stat. (2010).

Section 287.057(1), Fla. Stat.

Section 381.83, Fla. Stat.

Section 403.73, Fla. Stat.

§ 13, 2010-151, Laws of Fla.

§ 2, 2011-140, Laws of Fla.

Attorney General Opinions

Op. Att'y Gen. 89-39.