



Ep. 10: Florida Public Records Laws: Avoiding the Pitfalls and Mistakes that Lead to Expensive and Costly Litigation

October 26, 2022

{Music}

Host: Welcome to RumbergerKirk's Legally Qualified podcast, where we answer important questions facing businesses today and discuss hot topics in the legal industry, from employment law to commercial litigation, product liability, and everything in between. We've got it covered.

Jeffrey Grosholz: Hello everyone. Thank you for joining us today for this episode of Legally Qualified. Today we'll be discussing Florida's public records law and what Florida's public agencies need to know to avoid common pitfalls that lead to costly litigation. Basically we're going to be talking about why Florida's public records laws are important and who needs to be aware of them.

My name is Jeffrey Grosholz. I am an associate in RumbergerKirk's Tallahassee office. I focus my practice primarily in the areas of employment law and education law, and with me today is RumbergerKirk partner Leonard Dietzen, who has more than 30 years of experience in collective bargaining, education law, labor issues for school boards and all aspects of employment law for both private and public sector employers. Welcome Leonard.

Leonard Dietzen: Thank you Jeff. I'm looking forward to our discussion today. Over the course of my career I've spent over 90% of my time working with public agencies, and I can tell you there are several traps that employees and employers fall under when they deal with public records. So today we'll try to deal with some of the pitfalls and help people understand what is and what is not a public record.

In Florida the Constitution actually governs and protects public records, and there's a broad Florida statute that grant access to the public for public records. Florida is also one of the most open states in the country on public records. So we really have to address how people get access to records and how employers and employees for public employers respond to these requests. It's really important to know, because again, it's in the Constitution and there are so many penalties that we'll discuss later when you fail to comply with a proper public records request.

Jeffrey Grosholz: Excellent. So I think we've covered the breadth of Florida's public records laws. But I guess let's start at the basics. In 60 seconds or less, can you tell me what is a public record?

Leonard Dietzen: Sure can. All materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. So that's the technical definition, but it's really if it's related to your official business as a public employee and you're creating documents or creating records, they're going to be public. The key with this is, because they're public, regardless of whether they're in final form, we have to keep them open for inspection, unless the Legislature has exempted them from disclosure.

Jeffrey Grosholz: What can agencies do in terms of holding onto public records, what should they do?

Leonard Dietzen: I think the key to agencies is they're going to have to have training of all their employees of exactly the nature of what is a public record for their specific entity

and more important, what are the exemption for their entity. Because every type of agency has not only the ability to create public records, but the Legislature has given specific exemptions. Law enforcement has exemptions. Education have exemptions. Every sort of public entity has exemptions. And so everyone in the building needs to know how to handle a request, how to get the request into proper form to the public records custodian. And then once it's in the public records custodian's hands, that's where the real work begins because sometimes people request hundreds of thousands of records, and we have to know how to handle them and how to deal with the cost of producing these records.

Jeffrey Grosholz: And we've talked so far about public agencies. But we know that often these agencies will bring in outside contractors, third parties, things of that nature. Are they also covered under Florida's public records laws?

Leonard Dietzen: Yes, that's a very key point. A lot of contractors don't realize that when they do business with a Florida entity, they could be in Vermont, but they could be providing software services or online counseling services to various school boards. They also are subject to public records. So it's very tricky, so they have to know not only are they creating public records, but how to produce them and then what are the exemptions.

So in all of my contracts we put a provision in there putting them on notice that they're subject to public records law and also putting the public on notice to put our record custodian on there. So that if someone wants a record, we also know that they're requesting those records. But actually that vendor is going to be responsible in the long run of knowing what is and what is not a public record. So it's very important for them to understand that when they're doing business in Florida, no matter if they're in California or Vermont, they're responsible for knowing our public records. And these laws change almost every year, every time the Florida Legislature meets. So it's important for them to know as well as public agencies.

Jeffrey Grosholz: I think that goes back to your earlier point about training, that training is key. And again, we're seeing just how far Florida's public records laws reach. As you said, doesn't matter if you're in California or Vermont, you're still within the umbrella of Florida law. All right, so we've discussed what public records are, and we've discussed the general foundation of Florida's public records laws. So let's dig into some common mistakes agencies and their contractors can make when complying or responding to public records requests. I know a big area of confusion is where public records live. So can you shed some light for us and tell us where do public records live?

Leonard Dietzen: Sure. In the old days it used to be documents, paper documents, maps and various things that agencies produced for citizens. Nowadays almost all public records live in computers. They also live on cell phones, which some call them smartphones. I always call them very, very, very difficult ways of communicating because most people text on their cell phones.

So two problems. One with computers, there's a lot of people working remotely now, and they sometimes have a personal laptop at home working remotely for the agency. They log in on their agency network, and they create and receive public records. Those are pretty easy to understand. However, sometimes employees communicate and they go outside their network, and they use gmail. And there's been some high profile cases where they go into their gmail account and they talk about an employment matter.

Doesn't matter whether you're using your agency network or gmail, it is the content of the message that gets you ensnared in the public records law. So key for a public custodian is, you have to ask, we want all of your communications, including anything on your private accounts. Along with that is, agencies also issue cell phones to their employees. And they believe all of the communication will be on that particular cell phone. I have a lot of public employees, higher up management, they have their agency issued cell phone, then they have their personal cell phone.

Oftentimes they will forget which is which and they will start texting from their personal cell phone. Inside that cell phone it's the content of the message, if it meets the definition of a public record, then we have a duty to preserve it. And then we also have a duty to make it available for inspection to the public. So with that comes a lot of complications because how do you get someone's personal cell phone? The key to me is, every agency needs a policy in place to say, there are no expectations of privacy when you use our computer, government computer or our government cell phone.

And one step further, if you create public records, wherever you create them you have a duty to save them and produce them when your supervisor requests them back. With that policy in place and some training, 95% of the time people will cooperate. It's very personal when you want to get someone's personal cell phone. They really don't want to hand it over. So that can become a legal battle, especially when there's a union involved.

Jeffrey Grosholz: And again, I think training is key, preservation and as they say, an ounce of prevention, worth a pound of cure. Seems like that's very applicable in this context.

Leonard Dietzen: Another thing they can do Jeff, I want to make sure I get this point in, because text messages are 90% of most communications because people are always on the run these days. I always recommend them getting the agency to buy an app for each person's phone, and that app will store the text message and send it back to the agency's computers. So that it's on their network, the record custodian can simply do a search and there's all your text messages.

That eliminates the need for going one by one by one by one, because I've actually had requests for 200 phones. That becomes a problem if you don't have an app. So there's a lot of inexpensive apps available, so that's also included in our training is,

the ability to not only find the record, but to preserve it. Because again, the goal is to let someone inspect it.

Jeffrey Grosholz: And again, I think it goes back to what you said earlier, how these laws change. The ways we communicate change, right. They used to be all in paper form. Now they're all text messages, in the cloud. Very key for these agencies to understand the nature of where these records live and how they can make sure that they are being preserved. All right, Leonard, right now I'd like to do a quick pop quiz of some common mistakes and pitfalls that an agency can make. So I will give you a brief scenario and you tell me if it falls under Florida's public records laws.

Number one, my son is in a fight on a school bus. I call my school board and say, I want the video from that fight from that bus. Is this a valid public records request?

Leonard Dietzen: Yes, there's several interesting issues here. It is a valid public records request. A request can come in anonymously. Can come in by phone. Can come in by email. Can actually come in by text message. Someone can text message the chairman of a board saying, I would like a copy of your application for employment. They can come in, in many different manners. But a verbal one is tricky because some agencies like the public to fill out forms. You don't have to fill out a form.

So first it's a valid request. One of the keys, if it goes to transportation, the transportation secretary needs to know to send this to the public records custodian. Because bus videos are tricky. They are a public record, but there is an exemption under both federal and state law. So not only would that person have to know it's a public record. They would have to send it to somebody so that the proper response would be, it is a public record. But when you say there's an exemption, you have to specifically cite to the statutes of why it's exempt.

And there's a general rule of thumb, it's a very liberal interpretation of what is a public record and a very strict interpretation of what is an exemption. And there just

are hundreds of exemptions. So this comes down to training. Fortunately for all government agencies there is a government in the Sunshine Manual that's a complete reference guide for public records and Sunshine meetings that help a lot of agencies quickly find out where to start on what is a public record and what is the exemption for their particular question.

Jeffrey Grosholz: All right, let's go to our next scenario. I'm a taxpayer in small town Florida. I hear my City is buying some property, and I want more details on this purchase. I send an email to my City asking about this purchase, but I don't sign my name. I don't give any identifying information. Is that a valid public records request?

Leonard Dietzen: Yes, again, a lot of public employers get upset when they get an email without a name. but that is a proper public records request. This happens very often where citizens want to know how much a government is paying for a particular piece of land. There was a famous case years ago in Tampa where they were going to build a baseball stadium, and there were some negotiations with the White Sox and the City manager thought it was going to be very difficult negotiation. So they kept all the documents in their lawyer's office in a private firm.

Again, the court said, the content of the messages is key. Doesn't matter where it's at. So you cannot place it in another person's building. It's still a public record. So the documents are going to be public despite the location of the documents. So there's no ability to turn them over to another entity to try to keep them from the public. Even if it's not intentional, the public has the right to review them.

There are some limited exceptions to even this rule about negotiation for land. If during the process you're actually doing the pricing of the land, for education I know there's some exemptions. Once a price is reached it goes to the board for approval, then it becomes public so as to keep the confidentiality of just the negotiations for school board land. So within every little area there are nuances that one has to be aware of.

Jeffrey Grosholz: So again, it's a case of yes, it's a public record. But depending on the circumstance there could be an exemption. So as we see training understanding, absolutely fundamental. And you've talked about the anonymous nature, how that doesn't matter. Can you expand on that a bit?

Leonard Dietzen: Yeah, there's some agencies, especially post-9/11 and also post-Marjory Stoneman Douglas where you come into the building, they immediately want your driver's license before you can go anywhere else in the building, to run a background on you to make sure it's safe for you to go in the building. We have this issue in sheriff's office, and I had a large public records request for several boxes of documents. They wanted the person's driver's license so they could come in and review the documents.

They called me and I said, "No, you cannot ask for the driver's license for that purpose." So we brought the box out in the lobby into a witness room, and we had a person sit with the person to review the documents. Because that person was allowed to remain anonymous, and you're not allowed to put any traps in the way of getting a public record. So that's just one example of how people have innocent background requirements to get in a building that can put a barrier in front of a public records person. You also can tell a person, because this is a large request, it's going to take a week and a half, two weeks to find 100,000 documents. And it may take more depending on software.

You can ask that person, how do I get back in touch with you so that we can tell you how much the potential cost of this is going to cost? Because one thing we haven't discussed yet, you can charge per page, \$0.15 per page for the public records. And you have to know who to charge. And oftentimes it's a very simple conversation of, how would you like me to get back in contact with you? And sometimes they'll just simply give a phone number and they will not give a name, or they'll give an obvious fake name.

I've had several John Q. Public and John Q. Public wants this information, and my clients on the other end are upset because they know it's a fake name. I always say, accept the public records request. Don't worry about the fake name as long as you have a legitimate contact way of getting back to him. They often get resolved. Another thing about very large requests, when you put a cost upfront of what it will cost, most requests narrow it down to exactly what they want. And that's one way of trying to control these very, very large requests.

Jeffrey Grosholz: And before we go to our final scenario, I do want to stay on this issue of being able to charge for public records requests. So you mentioned that it's \$0.15 per page. But what if I actually don't want a copy of these requests? I merely want to look at the records, maybe take some photos. Is that allowed, and does that cost me anything?

Leonard Dietzen: That's a great question. We recently had a series of lawsuits where a person with a camera around his neck would walk up to a transportation department and several school boards, and he would walk in and he would say, "I just want a picture of your transportation log on how you're repairing your buses." And half of the responders got upset and said, "No way, that's a confidential log." It was not. They wouldn't allow him access to take a picture for free. They wanted to charge him, and they were all sued.

And so yes, a person can take pictures of public records. But here's the catch, sometimes they ask to take pictures of public records and it takes seven to eight hours to get those public records properly redacted. So say they want all the personnel files of a certain section of the law enforcement shift. Someone has to go through and redact the home addresses, the social security numbers and various things for law enforcement. You're allowed to charge for a clerical fee for that time, and then you can redact it with software on a computer and black it out or with an old fashioned sharpie.

Then the person can take a picture of those records, and you're entitled to charge them for that fee. And often they don't want to pay for that fee. So you have to explain that process upfront, which again, gets back to the training of the receptionist, of the person taking the call, of the public records custodians themselves. Because some requests seem to be simple, and then some get carried away with numerous exemptions that we have to redact.

Jeffrey Grosholz: So again, we've seen just how broad and nuanced the laws are. It's not just what are public records. It's also, what is the agency entitled to charge, what do they have to provide, what is free, what has a cost with it. All right, our final scenario, I'm an attorney and I represent a public agency. My agency is being sued by an employee who has since resigned, claiming that they were the victim of some misconduct. I as the agency attorney learn that there were some communications between agency employees about the employee that has resigned. But these communications were on personal phones. One, do I have to disclose those records in response to a request? And if I do have to disclose them, two, what is the best way to go about getting them?

Leonard Dietzen: The short answer is, yes, you have to disclose these records between various employees. And this often happens when there is misconduct in the office and there is a lawsuit, we often learn there is communication with their computers. There's also communications with their cell phones, personal cell phones, texting back and forth. This gets back to my original statement that the agency really needs to advise employees, public employees, paid with, again, public tax dollars, when they're communication about work, they have to produce and save these records.

And when requested by a supervisor, they have to produce these records and forward them back to the agency records custodian. It gets difficult when you want their phone, and sometimes the policies say, produce the phone or you're subject to discipline. The worst scenario is employee just will not give you the phone and may

even quit. In that scenario you're going to have to subpoena the person, the documents and maybe even the network. I can tell you gmail, Yahoo, vendors do not like to get involved in these issues.

Verizon will not have text messages beyond a certain amount of days. So you can rest assured you will not get them from Verizon. We've tried many times. But some very high profile cases involving the last governor in Florida involved gmail, and they went all the way to California to subpoena gmail accounts. It gets very, very expensive, but it's possible.

It simply comes down to having a good policy in place. Just letting your employees know, because they're paid by taxpayer's dollars, when they create public records, they have to save them and then produce them back to the records custodian. Because if they don't, very expensive penalties that we'll discuss.

Jeffrey Grosholz: We will discuss those penalties in just a second. Again, I think harping on the importance of having a strong policy, letting them know upfront, hey, this is our policy. But even with a strong policy, sometimes as we know, these conversations can be a bit tricky. So what is - if I am the agency attorney, what is the best way for me to go about discussing with these employees, just saying, hey, I know this is your personal phone or your personal email. But I do need those records. What advice can you give us?

Leonard Dietzen: I think the agency attorney and probably the direct supervisor need to bring in the employee into their office and explain the magnitude of the problem. There is a valid request. We've already determined they're public records. We may have half of the text messages from someone else, and we know their phone is involved because we have half of them. And so they're going to have to produce it.

If they're subject to penalty or discipline, you may have to bring in their union rep to let them know that this is going to be serious if they fail to ignore hopeful strong

agency policy that's in place, but a valid request from a supervisor to turn over public records. It's the only way to do it. You just have to bring them in and tell them their responsibility. Because again, it could put the whole agency at risk, and frankly their job could be on the line if they refuse to produce their public records that are on their phone or on their gmail account, or whatever private server they're doing. Sometimes we have Instagram. We also have Facebook issues. That's the same thing. If an agency has a Facebook page, they have a duty to save all of that activity.

Jeffrey Grosholz: I think we know that the importance behind all this and having that strong policy is, as we know, it's the agency that is getting sued, right? It is not the employee. So in that regard the agency really – I think we both understand, has to do everything in its power to make sure that they get these records. And I think it just goes back to the points you've been making today about strong training, strong policy and make sure that everyone at the agency is aware. I do want to now discuss penalties. Earlier you mentioned those. So what are the consequences of not complying with a public records request, of ignoring public records requests?

Leonard Dietzen: There's several consequences and they fall into different categories. First should catch everyone's attention, that it is a first degree misdemeanor in Florida, which is up to a year imprisonment. There can be fines up to \$1000. There is also the ability to remove one from office. So if you're a public official and you're ignoring public records requests, you can be subject to removal by the governor. You could be subject to impeachment.

Those are real draconian problems facing people who completely ignore a public records request. The real issue in my opinion is the regular public records request that is just ignored. The agency itself is subject to substantial awards of attorney's fees. When you ignore these requests or you get the exemptions wrong and you're arguing with the other side or you're demanding an ID and you get sued, it's pretty close to strict liability. There's not a lot of intent required. If there is a violation, I have seen awards of attorney's fees into the high six figures.

So this becomes a very heavy litigated area of law, and the press in Florida, very good at it. The national presses in Florida, they're well aware of how to get an agency to respond to these requests properly. So one thing that has helped the agencies, they passed a law a few years ago that said, once you know there is a problem, you have to give the agency five days written notice before you can file a complaint. You used to be able to file a complaint immediately and then you're off to the races and you had very little time as a lawyer to catch your breath.

Now if in fact you advertise on the agency's website who is the public records custodian and you put it in the main place of the building of who is the public record custodian, they have to give you five days notice before they file a complaint. I have put out more than 90% of my records requests, cases now, because of this notice. This notice has really helped public employers. You no longer have a "gotcha" moment where they call the receptionist. Receptionist failed to do anything, and two weeks later you have a lawsuit on your desk.

So here is a specific example how they tried to help public employers out. But again, you have to put it on your website, your agency website, and you have to put it in the main places of where your agency does business to let the public know who is the records custodian. Because sometimes, like the person taking a picture in transportation, the real custodian in the main district's office never knew about it. And so they made a mistake. If we would have known about it in the main office, we could have fixed it within five minutes.

So that fixes some of the issues. But the real thing is some agencies, if they really mess up, there could be – I had one case over half a million dollars of attorney's fees was involved in litigating for quite a bit of time.

Jeffrey Grosholz: And I think all attorneys know that attorney's fees can quickly get out of control. So again, it's important to take these requests seriously, have clearly defined

policies and make sure you are complying. All right, Leonard, I think that's a nice place to wrap it up. We've covered a lot of ground today, and I think this has been a very constructive dialogue. I do want to thank you for your time. I think some of the key takeaways from our discussion are that Florida's public records laws are extremely broad. They cover not only agencies but their contractors, and their reach extends beyond Florida's borders. It goes to where the records themselves live.

And as we just heard, there are severe and pretty substantial penalties for not complying. These are not laws that are all bark. There's some real teeth behind these laws with both criminal and civil penalties. And if there's one point I think you've made today, it's that it's important for agencies to have strong policies, strong training and a thorough understanding of the many exemptions to make sure that they can protect themselves. Any parting thoughts for our listeners?

Leonard Dietzen: Well, I would say that the key to understanding all of the public records law is that training is necessary because Florida has a very broad interpretation of what is a public records law. And then they have a very narrow interpretation of what are the exemptions. We have a very, very large state with a wide variety of agencies, like you say, doing business with vendors throughout the nation. So it's key for every public entity to keep their employees educated and ongoing education. So every time the Legislature meets there are additional requests. There are additional laws made and additional exemptions added to those laws.

Jeffrey Grosholz: Education is key and with that Leonard, I want to thank you for all your insights and time today. I want to thank our listeners for joining us, and we truly hope you found this conversation insightful. If you do have any questions about Florida's public records laws or are interested in more information about training regarding Florida's public records laws, please email us at info@Rumberger.com. And remember, you can subscribe to Legally Qualified on Apple, Google, Spotify or Libsyn, so you don't miss a single episode. Thank you. Have a great day.

{Music}

Music & Legally Qualified Outro Voiceover: Thanks for listening to Legally Qualified, a podcast from RumbergerKirk addressing your legal business concerns. For more information about today's topic or to learn more about our attorneys and practices, please visit Rumberger.com.

Legally Qualified is presented by Rumberger, Kirk & Caldwell, P.A. and cannot be broadcast or copied without consent and all rights are reserved. The content reflects the personal views and opinions of the participants. The information provided in each episode is intended for a general audience and is not legal advice nor a substitute for the advice of competent counsel. No attorney-client relationship is being created by this podcast.