

Guidance on Developing a Sunshine Law Policy for Your House or Senate Office

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Introduction

Amendment 1, also known as Clean Missouri, passed with nearly 62% of the vote. The measure contains several provisions. This memo only addresses the portion of the Amendment that places the “Legislative Records” and “Legislative Proceedings” into the definitions of “Public Records” and “Public Meetings” under the “Sunshine Law” of Missouri.

Amendment 1 contained the following language:

Section 19

(b) Legislative records shall be public records and subject to generally applicable state laws governing public access to public records, including the "Sunshine Law." Legislative records include, but are not limited to, all records, in whatever form or format, of the official acts of the general assembly, of the official acts of legislative committees, of the official acts of members of the general assembly, of individual legislators, their employees and staff, of the conduct of legislative business and all records that are created, stored or distributed through legislative branch facilities, equipment or mechanisms, including electronic. Each member of the general assembly is the custodian of legislative records under the custody and control of the member, their employees and staff. The chief clerk of the house or the secretary of the senate are the custodians for all other legislative records relating to the house and the senate, respectively.

(c) Legislative proceedings, including committee proceedings, shall be public meetings subject to generally applicable law governing public access to public meetings, including the "Sunshine Law." Open public meetings of legislative proceedings shall be subject to recording by citizens, so long as the proceedings are not materially disrupted.

There are two key things to recognize about this language. First, each individual Senator and Representative is responsible for making an office policy, maintaining their own active records, and responding to Sunshine Requests made to their office. Second, the amendment applies existing law to legislative records rather than creating a new open records law specifically for that type of record. Applying current law means that many of the questions and concerns that a legislator may ask have already been addressed by another State entity that maintains records under the same law. Being the custodian of their own records means that an individual Senator or Representative has significant control over the policy that will be followed by their office.

** Sharon Geuea Jones is the Deputy Director of the Missouri Association of Trial Attorneys and a licensed attorney. This memo represents the results of legal research and is meant as a helpful starting point in developing a policy for your office. You are encouraged to seek additional legal advice from the General Counsel of your chamber or caucus in addition to the information provided here. If you have any questions, you can reach Sharon at sharonjones@matanet.org or 573-635-5215.*

Many of the General Assembly offices already follow the Sunshine Law with regard to their records. The definition of “legislative records” should be carefully examined to determine what other types of communications and documents will need to fall under those policies. If no policy exists for a particular office, the custodian of records will need to create one and begin enforcing it before the end of the year.

An appendix is attached to this memo which contains the full text of the Missouri Sunshine Law and the Official Records Retention Law, the full text of Amendment 1, an index of all the Code of State Regulations that address Sunshine Law policies and confidentiality, and a sample policy suitable for a Senate or House office.

The Sunshine Law

Missouri’s Sunshine law is found primarily in Chapter 610 RSMo. The law was first passed in 1973 and has been amended over the years to reflect changing technology or to address privacy concerns. The law was put in place to provide a clear way for Missourians to request and receive documents related to the function of Government. It contains a statement of intent in §610.011. That statement also makes it clear that any question of whether a document should be considered an open public record should fall on the side of openness and availability to the public.

The law contains several exemptions to the open records requirement in §610.021. These exemptions are very specific and lengthy, but generally fall into the categories of financial business, personnel records, health information, personal information of members of the public, public safety, and property interests. There is a catch-all category as well for any record that is deemed closed by another statute or regulation. If a document or file contains a combination of closed and open records, it may be redacted pursuant to §610.024.

Any request for open records must be responded to within three business days. This response may be the requested records, an explanation of why the records have been closed, or an estimated timeline of when the records will be available. An automatic reply may not be enough to satisfy this section as it requires some specificity as to how long the retrieval process may take or why the request is being denied.

Requests made pursuant to the Sunshine Law may be subject to copying and retrieval fees under §610.026. The section lays out specific rates for several types of records. Any fees collected under this section are turned over to General Revenue (or the treasury of a political subdivision if it is not a state agency).

Violations of the Sunshine Law are punishable by fines under §610.027. The fines vary based upon the intention of the person violating the law and the seriousness of the violation. The court may also order a public governmental body to comply with the law (§610.030). Any citizen may bring an action in court to enforce the Sunshine Law. A public entity may also bring an action in court to determine whether a record may be closed or may seek an opinion from an attorney employed by the State or governmental body. The public governmental body is responsible for defending its employees and must prove that the action taken was appropriate under the law.

Law enforcement, criminal records, 911 logs, and other related records are the subject of most of the rest of the Chapter. The exceptions are §610.175 and §610.225 which deal with elected official flight plans and tax credit applications respectively.

While not directly related to the Sunshine Law, Chapter 109 RSMo does contain information about the State Archives and how information is received and maintained within that system. This Chapter may be of interest to anyone who is unfamiliar with the process of sending inactive files to the archives. Legislative documents, including committee records and draft bills, are currently kept in the Archives.

The Missouri Code of State Regulations includes many agency's policies on the Sunshine Law. This memo includes two pages from the Index of the Register listing where these policies may be found. The Missouri Attorney General's Office also contains a good deal of information about compliance with the Sunshine Law, including a public information brochure. Additionally, the Attorney General is specifically tasked with answering questions from any public governmental body on how best to comply with the law.

Policy Contents and Best Practices

Every public governmental body is responsible for having a written policy in compliance with Chapter 610 RSMo. The policy must be open to public inspection and provide contact information for the designated custodian of records. As long as an individual is in compliance with this written policy, they cannot be found in violation of the Sunshine Law. However, it is understood that if the policy itself is in violation of the Sunshine Law, the public governmental body may still be subject to fines. For these reasons, having a strong compliance policy written and in place is crucial for any member of the General Assembly.

A strong written policy will include the following elements:

- The name and contact information for the person who is responsible for maintaining records;
- Specific steps a person should take if they receive a Sunshine Request;
- A list of fees that may be charged for responding to Sunshine Requests;
- A list of the types of records that will not be disclosed;
- How records that are being maintained will be stored and labeled;
- Retention schedule for the different types of records;
- Timeline for scheduling and posting meetings and the definition of a "meeting"; and
- Guidelines for electronic communications.

A written policy must comply with the law in order to be effective. This means it uses the same words and phrases to mean the same thing as the provisions of the Constitution and Sunshine Law. A written Sunshine Law policy cannot avoid compliance by re-defining key phrases, but it can clarify how that office will interpret those phrases. Listing out specific types of records received, created, and maintained by the office and how they will be treated is a good practice. The written policy is more for the information and operation of the office and staff than it is for the public.

The members of the General Assembly, like many other public governmental bodies, receive significant amounts of correspondence from constituents. This correspondence will not necessarily be

related to official acts or legislative business. However, it should all be maintained under the Sunshine Law. Other agencies have developed specific policies on the confidentiality of different types of requests or correspondence. There is likely to be legislation or a Rule of the House/Senate proposed that would include personally identifiable information of constituents seeking information unrelated to legislative business in the list of closed records. It is likely that the majority of sensitive requests received by a member of the General Assembly would fall under one of the existing exceptions for health and mental health, welfare, or financial and security data. If a sensitive email from a constituent is received, it is a best practice to keep the email along with all other public records. If a request comes in that requires disclosing that email to a member of the public, the custodian of records may use their discretion combined with the existing state of the law to determine how much of the record should be released or redacted. In this scenario, it is important to seek specific legal advice from the general counsel for the chamber or caucus of which the Senator or Representative is a member. Even if the custodian of records determines the record (or a portion thereof) is closed, the record should be maintained as if it were a public record.

In addition to potential changes to the closed record status of constituent information, it is important to notify constituents of the public nature of any correspondence. This is easily accomplished with a disclaimer that can be included on the official website, on any email forms, and as a signature template at the bottom of any emails generated by the office. The disclaimer does not have to be long or disruptive, but should give the reader notice that the correspondence may be required to be disclosed in response to a Sunshine Request. This is especially true if the correspondence is clearly within the definition of “Legislative Record” under Amendment 1.

Records sent and received through private channels including electronic devices and email accounts may or may not be closed records. If the communication relates to official or legislative business, it is a “legislative record” and must be maintained and open to the public. This is true regardless of how the communication occurred. If the communication or record does not relate to legislative business or an official act and it did not pass through a system maintained by the legislative branch, it is not a legislative record and is not open to the public. Again, this is true regardless of how the communication occurred.

Technology is both challenging the provisions of the Sunshine Law and making the law easier to follow. Missouri law requires a copy of any electronic public record to be transmitted to the custodian of record or the official’s public office computer (§610.025). One easy way to meet this standard is to install an app or software that is able to preserve text and email communication. This allows an official to turn over public records without requiring a forensic audit of personal devices or email accounts. These apps are widely available and inexpensive. There is always the possibility of a challenge from a member of the public stating that not all records were disclosed. In that case, a search may be made of personal devices and accounts; however, only records determined by a judge in a private review to be public record will be disclosed. Most Missouri State Employees carry two phones so that all official communication goes through an official device. This does not mean that a personal phone is not subject to the Sunshine Law, however. The ongoing lawsuits against the Greitens administration for the use of the Confide App is clear evidence that the law applies to the individual record regardless of how it was created or sent. Any communication that is related to legislative business or an official act must be maintained under the Sunshine Law.

Appendices

Sample Office Policy

Amendment 1 Full Text

Chapter 610 RSMo

Chapter 109 RSMo

CSR Index Excerpts

Meetings and Open Records Request (Sunshine Law) Policy of State Senator Olive Coffey

Effective: 12/30/2018

Overview

It is the public policy of this Office that all records are open to the public, unless they are closed or otherwise confidential.

Open Records Requests

If a member of the Office staff receives, or thinks they may have received, a Sunshine Request they should immediately notify the Senator and the Chief of Staff. Only the Senator may authorize a release of records.

Access to public records can include inspection and copying of said records, but not removal from the premises of the original. Requests for access to a public record should be acted on as soon as possible and must be responded to no later than the end of the third business day following the request. An estimate of any fees that may be charged should be included in the response along with a reason for the fees.

If access is not granted by the end of the third business day following the request, the Senator shall provide a detailed explanation of the cause of the delay or denial of the request. If the request has been delayed, the Senator will also provide an estimate of when access is likely to be granted.

Upon service of a summons, petition, complaint, or claim in a civil action brought to enforce the Missouri Sunshine Law, the Office shall preserve the records in question in their current form and shall not transfer custody, alter, destroy, or otherwise dispose of said records.

If a document or file contains a combination of open and closed records, the Senator shall make a redacted copy of the document or file being sure to preserve the original in its unredacted form.

Constituent Correspondence

Any Constituent correspondence that is not directly related to a pending piece of legislation shall be labeled "Non-Legislative Constituent Correspondence" and filed in the appropriate location.

Closed Records

As provided in §610.021 RSMo, the records relating to the following areas are closed and shall be maintained as closed records and not released to the public unless otherwise required under the law.

(1) Legal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys. However, any minutes, vote or settlement agreement relating to legal actions, causes of action or litigation involving a public governmental body or any agent or entity representing its interests or acting on its behalf or with its authority, including any insurance company acting on behalf of a public government body as its insured, shall be made public upon final disposition of the matter voted upon or upon the signing by the parties of the settlement agreement, unless, prior to final disposition, the settlement agreement is ordered closed by a court after a written finding that the adverse impact to a plaintiff or plaintiffs to the action clearly outweighs the public policy considerations of section 610.011, however, the amount of any moneys paid by, or on behalf of, the public governmental body shall be disclosed; provided, however, in matters involving the exercise of the power of eminent domain, the vote shall be announced or become public immediately following the action on the motion to authorize institution of such a legal action. **Legal work product shall be considered a closed record;**

- (2) **Leasing, purchase or sale of real estate by a public governmental body where public knowledge of the transaction might adversely affect the legal consideration therefor.** However, any minutes, vote or public record approving a contract relating to the leasing, purchase or sale of real estate by a public governmental body shall be made public upon execution of the lease, purchase or sale of the real estate;
- (3) **Hiring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded.** However, any vote on a final decision, when taken by a public governmental body, to hire, fire, promote or discipline an employee of a public governmental body shall be made available with a record of how each member voted to the public within seventy-two hours of the close of the meeting where such action occurs; provided, however, that any employee so affected shall be entitled to prompt notice of such decision during the seventy-two-hour period before such decision is made available to the public. As used in this subdivision, the term "personal information" means information relating to the performance or merit of individual employees;
- (4) **The state militia or national guard or any part thereof;**
- (5) **Nonjudicial mental or physical health proceedings involving identifiable persons, including medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment;**
- (6) **Scholastic probation, expulsion, or graduation of identifiable individuals, including records of individual test or examination scores;** however, personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years;
- (7) **Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;**
- (8) **Welfare cases of identifiable individuals;**
- (9) **Preparation, including any discussions or work product, on behalf of a public governmental body or its representatives for negotiations with employee groups;**
- (10) **Software codes for electronic data processing and documentation thereof;**
- (11) **Specifications for competitive bidding,** until either the specifications are officially approved by the public governmental body or the specifications are published for bid;
- (12) **Sealed bids and related documents,** until the bids are opened; and sealed proposals and related documents or any documents related to a negotiated contract until a contract is executed, or all proposals are rejected;
- (13) **Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment,** except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such, and the names of private sources donating or contributing money to the salary of a chancellor or president at all public colleges and universities in the state of Missouri and the amount of money contributed by the source;
- (14) **Records which are protected from disclosure by law;**
- (15) **Meetings and public records relating to scientific and technological innovations in which the owner has a proprietary interest;**
- (16) **Records relating to municipal hotlines established for the reporting of abuse and wrongdoing;**

(17) **Confidential or privileged communications between a public governmental body and its auditor, including all auditor work product;** however, all final audit reports issued by the auditor are to be considered open records pursuant to this chapter;

(18) **Operational guidelines, policies and specific response plans developed, adopted, or maintained by any public agency responsible for law enforcement, public safety, first response, or public health for use in responding to or preventing any critical incident which is or appears to be terrorist in nature and which has the potential to endanger individual or public safety or health.** Financial records related to the procurement of or expenditures relating to operational guidelines, policies or plans purchased with public funds shall be open. When seeking to close information pursuant to this exception, the public governmental body shall affirmatively state in writing that disclosure would impair the public governmental body's ability to protect the security or safety of persons or real property, and shall in the same writing state that the public interest in nondisclosure outweighs the public interest in disclosure of the records;

(19) **Existing or proposed security systems and structural plans of real property owned or leased by a public governmental body, and information that is voluntarily submitted by a nonpublic entity owning or operating an infrastructure to any public governmental body for use by that body to devise plans for protection of that infrastructure, the public disclosure of which would threaten public safety:**

(a) Records related to the procurement of or expenditures relating to security systems purchased with public funds shall be open;

(b) When seeking to close information pursuant to this exception, the public governmental body shall affirmatively state in writing that disclosure would impair the public governmental body's ability to protect the security or safety of persons or real property, and shall in the same writing state that the public interest in nondisclosure outweighs the public interest in disclosure of the records;

(c) Records that are voluntarily submitted by a nonpublic entity shall be reviewed by the receiving agency within ninety days of submission to determine if retention of the document is necessary in furtherance of a state security interest. If retention is not necessary, the documents shall be returned to the nonpublic governmental body or destroyed;

(20) **The portion of a record that identifies security systems or access codes or authorization codes for security systems of real property;**

(21) **Records that identify the configuration of components or the operation of a computer, computer system, computer network, or telecommunications network, and would allow unauthorized access to or unlawful disruption of a computer, computer system, computer network, or telecommunications network of a public governmental body.** This exception shall not be used to limit or deny access to otherwise public records in a file, document, data file or database containing public records. Records related to the procurement of or expenditures relating to such computer, computer system, computer network, or telecommunications network, including the amount of moneys paid by, or on behalf of, a public governmental body for such computer, computer system, computer network, or telecommunications network shall be open;

(22) **Credit card numbers, personal identification numbers, digital certificates, physical and virtual keys, access codes or authorization codes that are used to protect the security of electronic transactions between a public governmental body and a person or entity doing business with a public governmental body.** Nothing in this section shall be deemed to close the record of a person or entity using a credit card held in the name of a public governmental body or any record of a transaction made by a person using a credit card or other method of payment for which reimbursement is made by a public governmental body;

(23) **Records submitted by an individual, corporation, or other business entity to a public institution of higher education in connection with a proposal to license intellectual property or perform**

sponsored research and which contains sales projections or other business plan information the disclosure of which may endanger the competitiveness of a business; and

(24) Records relating to foster home or kinship placements of children in foster care under section 210.498.

Legislative Records Definition

All legislative records shall be maintained by the Office as public records. Legislative records include, but are not limited to,

- all records, in whatever form or format,
 - of the official acts of the general assembly,
 - of the official acts of legislative committees,
 - of the official acts of members of the general assembly, of individual legislators, their employees and staff,
 - of the conduct of legislative business and
- all records that are created, stored or distributed through legislative branch facilities, equipment or mechanisms, including electronic.

Public Meetings

If a legislative proceeding is scheduled by this Office or is otherwise arranged by the Office staff, such meeting will be deemed a public meeting. Notice will be given a minimum of 24 hours prior to the start of the meeting. Such notice will be posted on the Official Website, in this office at a location designated for that purpose, and at any other public location where legislative proceedings are usually posted.

Records Custodian

The Senator is the custodian of records for the Office. Oversight of any open records request is the responsibility of the Senator. All records shall be maintained in an electronic format whenever possible. Records received in a non-electronic format should be converted to an electronic format whether by scanning, photography, or other means.

Fees

Copies of public records shall be provided by the Office and shall be subject to the collection of search and copy fees and shipping charges set forth in section 610.026, RSMo. Fees for duplicating other types of records and other formats including electronic data shall be based on the actual cost of search and duplication, or as otherwise provided by section 610.026, RSMo. Requesters may avoid shipping charges by picking up their requested documents at the Office of Senator Olive Coffey in the Missouri State Capitol. Requesters shall request to pick up their requested records at the time of their initial request.

In accordance with section 610.026, RSMo, the Office may furnish copies without charge or at a reduced charge when the Senator determines that waiver or reduction of the fee is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Office and is not primarily in the commercial interest of the requester.

Notices and Disclosures

In the interest of transparency with the public, this Office will provide the following notice in the contact portion of the official website and below the signature of every email sent by the Senator or a member of staff.

“NOTICE: Any email related to legislative business or official acts of this office is considered a public record. Requests to keep information private or confidential will be granted whenever possible. Sensitive personal information will not be disclosed unless required and you will be notified prior to any disclosure.”