

Association of Florida Colleges Trustee Commission
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*Serving on a Florida College System District Board of Trustees:
Legal Questions and Answers...and Questions...*

William J. Mallowney
Vice President for Policy and General Counsel, Valencia College
bmallowney@valenciacollege.edu

I. Basic Legal Framework

- a. **Florida School Code** (Found online at <http://www.flsenate.gov/Laws/Statutes>)
 - i. Chapter 1000 – K-20 General Provisions (Mission and Guiding Principles)
 - ii. Chapter 1001 – K-20 Governance
 - 1. 1001.61- *Florida college boards of trustees; membership*
 - 2. 1001.63- *Florida college board of trustees to constitute a corporation*
 - 3. 1001.64- *Florida college boards of trustees; powers and duties*
 - 4. 1001.65- *Florida college presidents; powers and duties*
 - iii. Chapter 1002 – Student and Parental Rights and Educational Choices
 - iv. Chapter 1003 – Public K-12 Education
 - v. Chapter 1004 – Public Postsecondary Education
 - 1. 1004.65- *Florida colleges; definition, mission, and responsibilities*
 - vi. Chapter 1005 – Nonpublic Postsecondary Education
 - vii. Chapter 1006 – Support for Learning
 - viii. Chapter 1007 –Articulation and Access
 - ix. Chapter 1008 – Assessment & Accountability
 - x. Chapter 1009 – Educational Scholarships, Fees, & Financial Assistance
 - xi. Chapter 1010 – Financial Matters
 - xii. Chapter 1011 – Planning and Budgeting
 - xiii. Chapter 1012 – Personnel
 - xiv. Chapter 1013 – Educational Facilities
- b. Myriad other applicable state and federal laws and regulations
- c. **State Board of Education Rules** (Florida Administrative Code)(Found online at <https://www.flrules.org/gateway/Division.asp?DivID=195>) Based on specific statutory authority, the State Board of Education promulgates rules which affect colleges. These rules may be found primarily in sections 6A-10, 6A-14, and 6A-19 FAC.
- d. **Florida College System Institution Policies/Procedures**
 - i. **Board Rule Development** - The development and adoption of a Florida College System Institution’s Board Policies occur in compliance with applicable provisions of Chapters 120 and 286, F.S. with respect to public notice requirements and rulemaking procedures, including public hearings, meetings, and workshops.

II. Governance

- a. Nature of Florida College System Institutions
- b. Statutory Duties and authority of Board (Sec. 1001.64(1)-(48), F.S.)
- c. Full Board vs. individual roles and authority
- d. **Complementary Roles:** Strategic, policy level role of trustees vs. administrative, operational role of staff – effective governance requires avoiding micromanagement while being sufficiently informed to assess institutional effectiveness.
 - i. Sec.1001.65, F.S. states in part, “[t]he president is the chief executive officer of the community college, shall be corporate secretary of the community college board of trustees, and is responsible for the operation and administration of the ... college.”
 - ii. Sec. 1001.60 (3) states, “[e]ach institution within the Florida College System shall be governed by a local board of trustees as provided in s. 1001.64. ...” In addition, Sec. 1001.64(1) states in part, “[t]he boards of trustees shall be responsible for cost-effective policy decisions appropriate to the community college's mission, the implementation and maintenance of high-quality education...”
- e. **Stewardship Responsibilities of Trustees-** understanding what to ask and when to ask it: framing questions that are relevant and strategic supports the trustee’s fundamental duty to exercise informed, independent business judgment in a good faith manner that he/she believes to be in the best interest of the college in pursuit of mission.
 - i. **Fiduciary Duties** (budgets, facilities, financial health, campus culture/safety)
 1. Independence - avoiding conflicts of interest/loyalty
 2. Good faith
 3. Duty of care – decision-making and oversight
 - ii. **Stewardship to College Mission** (attending to primary college mission)
 - iii. **Stewardship to president and senior team** (create opportunities to do great work)
 - iv. **Stewardship to the “spirit” of the College** (Model the College’s core values - develop habits/practices that nourish the spirit of the college. Be able to “tell the story” of your college – current and twenty years from now (vision).

III. Florida's Government in the Sunshine Law

- a. Provides a right of access to governmental proceedings at both the state and local levels.

Key Point: It is the *how* and the *why* officials decided to so act which interests the public, not merely the final decision.

- b. Legal basis: A right of access to meetings of collegial public bodies is recognized in the Florida Constitution. Article I, s. 24, Fla. Const. Also, codified in s. 286.011, F.S.
- c. Equally applicable to elected and appointed boards and has been applied to *any* gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which *foreseeable action* will be taken by the public board. There is no requirement that a quorum be present for a meeting of members of a public board to be subject to s. 286.011, F.S.
- d. Applies to Florida College System District Boards of Trustees and their affiliated direct support organizations (foundations). Note: Members of a public board are not prohibited under the Sunshine Law from meeting together socially, provided that matters which may come before the board are not discussed at such gatherings.
- e. Three basic requirements of s. 286.011, F.S.
 - i. meetings of public boards or commissions must be open to the public;
 - ii. reasonable notice of such meetings must be given; and
 - iii. minutes of the meetings must be taken.
- f. There is no "government by delegation" exception to the Sunshine Law, and boards may not avoid their responsibilities or conduct the public's business in secret by use of an alter ego. Thus, the Sunshine Law is applicable to meetings between a board member and an individual who is not a member of the board when that individual is being used as a liaison between, or to conduct a de facto meeting of, board members (no shuttle diplomacy...).
- g. Board member communications to each other via email, texts, social media, or any other means, regardless of the technology used, may be subject to the Sunshine Law if the communication involves a matter on which *foreseeable action* will be taken by the public board.
- h. Exceptions: Section 286.011(8), F.S., discussion of pending litigation only among board, president and attorney, subject to procedural requirements. Section 768.28(16)(c), F.S., portions of meetings and proceedings relating solely to the evaluation of claims or to offers of compromise of claims filed with a risk management program of the state, its agencies and subdivisions, (such as the Florida College System Risk Management Consortium) are exempt from the Sunshine Law.
- i. **Consequences for Violations of Sunshine Law**
 - i. **Criminal Penalties**
 - 1. A knowing violation of the Sunshine Law is a misdemeanor of the second degree. A person convicted of a second degree misdemeanor may be sentenced to a term of imprisonment not to exceed 60 days and/or fined up to \$500.

ii. Removal from Office

1. The Governor may suspend an elected or appointed public officer who is indicted or informed against for any misdemeanor arising directly out of his or her official duties. If convicted (pleads guilty or nolo contendere or found guilty), the officer may be removed from office by executive order of the Governor.

iii. Noncriminal Infractions

1. A public officer violating the provisions of the Sunshine Law is guilty of a noncriminal infraction, punishable by a fine not exceeding \$500.

iv. Attorneys' Fees

1. Reasonable attorney's fees will be assessed against a board or commission found to have violated the Sunshine Law. Attorney's fees may be assessed against the individual board members except in those cases where the board sought and took advice of its attorney.

v. Civil Actions for Injunctive or Declaratory Relief

1. Circuit courts have jurisdiction to issue injunctions upon application by any citizen of this state. While normally irreparable injury must be proved by the plaintiff before an injunction may be issued, in Sunshine Law cases the mere showing that the law has been violated constitutes "irreparable public injury."

vi. Invalidity of Action Taken in Violation of the Sunshine Law and Required Subsequent Corrective Action

1. Section 286.011, F.S., provides that no resolution, rule, regulation or formal action shall be considered binding except as taken or made at an open meeting. Recognizing that the Sunshine Law should be construed so as to frustrate all evasive devices, the courts have held that action taken in violation of the law is void *ab initio*.

IV. Public Records

- a. Section 119.011 provides a right of access to the records of state and local governments as well as to records of private entities acting on their behalf. If material falls within the definition of "public record" it must be disclosed to the public unless there is a statutory exemption.
- b. In absence of a statutory exemption, this right of access applies to:
 - i. 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;
 - ii. made or received pursuant to law or ordinance or in connection with the transaction of official business;
 - iii. by any agency (includes a private entity "acting on behalf" of a public agency); and
 - iv. which are used to perpetuate, communicate or formalize knowledge.

- c. Electronic records, emails, texts, and social media posts may be public records when they are created or received in the transaction of official business, and are governed by the same rules as written documents and other public records, and should be retained in accordance with the retention schedule for other records relating to performance of the agency's functions and formulation of policy. With regard to the use of technology and social media, trustees are well advised to avoid any action that evades or could be construed as an attempt to evade the requirements of law.
- d. All public records must be retained in accordance with retention schedules approved by the Department of State, and Board policies. Even exempt records must be retained in accordance with a retention schedule.

e. Providing Public Records

- i. Public records cannot be withheld at the request of the sender
- ii. A requestor is not required to show a “legitimate” or “noncommercial interest” as a condition of access.
- iii. A request cannot be denied because it is “overbroad”
- iv. Unless authorized by another statute, an agency may not require that public records requests be in writing or require the requestor to identify himself or herself
- v. Records must be produced in the reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.
- vi. An agency is not required to comply with a “standing” request for records that may be created in the future.
- vii. An agency is not required to answer questions about the public records (other than information on how to obtain them, like the cost)
- viii. An agency is not required to create a new record
- ix. Chapter 119 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 additional 5 cents may be charged for two-sided copies.
- x. In addition, an agency may impose a reasonable special service charge for the actual cost of extensive labor and information technology required due to the large volume of a request.

f. Key Florida College System Public Records Exemptions

- i. **Direct Support Organization Records** – All records of the Florida College system institution direct-support organizations - other than the auditor’s report, any information necessary for the auditor’s report, any information related to the expenditure of funds, and any supplemental data requested by the board of trustees, the auditor general, and OPPAGA - are confidential and exempt from s. 119.07(1), F.S. The exemption includes donor identifying records.
- ii. **Student Records** - Public access to student education records is limited by statute. Section 1002.221(1), F.S., provides that education records (records

created or maintained by the College that directly relate to a student) are confidential and exempt” from public disclosure and may be released only as authorized in the exemption.

- iii. **Employee Limited Access Records** - Regarding Florida College system institution employees, s. 1012.81, F.S., provides that limited-access employee records are confidential and exempt from the provisions of s. 119.07(1). Limited access records include:

1. Records containing information reflecting academic evaluations of employee performance
2. Records maintained for the purposes of any investigation of employee misconduct, however, these records become public after the investigation ceases to be active for any reason.
3. Records maintained for the purposes of any disciplinary proceeding brought against an employee, however, these records shall become public after a final decision is made.
4. Records maintained for the purposes of any grievance proceeding brought by an employee for enforcement of a collective bargaining agreement or contract, however, these records shall become public after a final decision is made.

- iv. Other general exemptions include medical information, social security numbers, and lists of names and addresses of retirees.

g. Penalties for Non-Compliance with Public Records Laws

i. Criminal Penalties

1. Section 119.10(1)(b), F.S., states that a public officer who *knowingly* violates the provisions of s. 119.07(1), F.S., is subject to suspension and removal or impeachment and commits a misdemeanor of the first degree, punishable by possible criminal penalties of one year in prison, or \$1,000 fine, or both.

ii. Noncriminal Penalties

1. Section 119.10(1)(a), F.S., provides that a violation of any provision of Ch. 119, F.S., by a public officer is a noncriminal infraction, punishable by fine not exceeding \$500.

iii. Civil Actions and Attorney’s Fees

1. A person 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, F.S.
2. Injunctive relief may be available upon an appropriate showing for a violation of Ch. 119, F.S.

3. Section 119.12, F.S., provides that if a civil action is filed against an agency to enforce the provisions of this chapter 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 reasonable attorney's fees.

V. Ethics Laws: Conflicts of Interest, etc.

- a. Community college employees and trustees are subject to Florida's Ethics Laws. The "Code of Ethics for Public Officers and Employees" adopted by the Legislature is found in Chapter 112 (Part III) of the Florida Statutes. Foremost among the goals of the Code is to promote the public interest and maintain the respect of the people for their government. The Code is also intended to ensure that public officials conduct themselves independently and impartially, not using their offices for private gain other than compensation provided by law. While seeking to protect the integrity of government, the Code also seeks to avoid the creation of unnecessary barriers to public service.
- b. **Doing Business with One's Agency Prohibition**
 - i. F.S. 112.313(3) contains two prohibitions, the first of which prohibits a public officer acting in an official capacity or public employee acting in an official capacity as a purchasing agent from directly or indirectly purchasing, renting or leasing realty, goods, or services for the person's own agency from a business entity of which the person or the person's spouse or child (or combination) is an officer, partner, director, proprietor, or the owner of a "material interest." Note that neither the first nor the second prohibition of 112.313(3) prohibits a public officer's or public employee's purchase of realty, goods, or services from his or her own agency – however this type of transaction could be violative of other sections of the law, such as where it would impede the full and faithful discharge of his or her public duties, or s. 112.313(7), prohibiting conflicting employment and contractual relationships.
 - ii. The second prohibition in s. 112.313(3) is against a public officer or employee acting in a private capacity to rent, lease or sell any realty, goods or services to the person's agency. "Acting in a private capacity" includes situations where one is personally involved in the sale to the agency, as well as where one is an officer, director, or owner of more than a 5% interest in a business that is selling to the agency. There are several exceptions to this prohibition (emergency, sole source with disclosure, sealed bid with disclosure, and rotation among all qualified suppliers). Donations to one's agency do not fall within the scope of this prohibition. Also, F.S. 112.313(3) expressly "grandfathers" in certain existing contracts, including those entered into prior to qualification for elective office, appointment to public office, or beginning public employment.

- c. **Conflicting Employment and Contractual Relationships** – s. 112.313(7) prohibits a public officer or employee from having a contractual relationship or employment with an agency or business entity that is either subject to the regulation of, or doing business with, the officer’s or employee’s agency. S. 112.313(7) also prohibits a public officer or employee from having a contractual relationship or employment that will create a “continuing or frequently recurring” conflict of interest or that would “impede the full and faithful discharge” of public duties.
- i. The prohibitions against doing business with one’s agency and having conflicting employment may not apply pursuant to various specified exemptions.
 - ii. Past or possible future contractual relationships do not violate the statute; the contractual relationship or employment must exist simultaneously with the other elements of the statute.
 - iii. With regard to the prohibition of a public officer from having a contractual relationship or employment that will create a “continuing or frequently recurring” conflict of interest or that would “impede the full and faithful discharge” of public duties, the statute is entirely preventative in nature and does not require proof that the public officer or employee has failed to perform his/her responsibilities or has acted corruptly.
- d. **Misuse of Public Position Prohibition** – Public employees may not corruptly use or attempt to use their official position or any property or resource within their trust, or perform their official duties, to secure a special privilege, benefit or exemption for themselves or another. S. 112.313(6), F.S.
- e. **Prohibition Against Solicitation and Acceptance of Certain Gifts** - No public officer/employee shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public employee would be influenced by such gift. S. 112.313(2), F.S. Essentially amounts to bribery and requires a quid pro quo.
- f. **Prohibition against Unauthorized Compensation/Gifts** - No public officer/employee or his or her spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when such public employee knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the employee was expected to participate in his or her official capacity. S. 112.313(4), F.S.
- g. **Disclosure or Use of Certain Information** - Public officers and employees are prohibited from disclosing or using information not available to the public and obtained by reason of their public positions for the personal benefit of themselves or others. S. 112.313(8), F. S. This does not prohibit the use of one’s general expertise or skill, but can be violated where one would work privately regarding a particular

project or matter about which he/she gained knowledge or expertise via his/her public position.

h. Voting Conflicts Of Interest

- i. A voting conflict arises when the official is called upon to vote on any measure which would inure to the officer's special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer.
- ii. Whether a measure inures to the special private gain of an officer or his principal will turn in part on the size of the class of persons who stand to benefit from the measure. Where the class of persons is large, a special gain will result only if there are circumstances unique to the officer or principal under which he stands to gain more than the other members of the class. Where the class of persons benefiting from the measure is extremely small, the possibility of special gain is much more likely. In some situations the Commission has concluded that any gain or loss resulting from the measure would be so remote or speculative that it could not be said to inure to the official's special gain or loss.
- iii. If they do not intend to "participate" in the measure, local officials holding appointive positions (college trustees) must abstain from voting on the measure; and before the vote, publicly state to the assembly the nature of his or her interest in the matter; and within 15 days of the vote, file a memorandum of voting conflict (Commission on Ethics Form 8B) with the person responsible for recording the minutes of the meeting, who incorporates the form in the minutes. If they do intend to "participate," they must abstain but must make their disclosure before they participate. This is accomplished by either:
 1. Filing the memorandum of voting conflict (Form 8B) prior to the meeting, in which case the memorandum is to be provided immediately to the other members of the agency and is to be read publicly at the next meeting after its filing; or
 2. If the disclosure has not been made prior to the meeting at which the measure will be considered or the conflict was unknown prior to the meeting, making the disclosure orally at the meeting before "participating," followed by the written memorandum (Form 8B) within 15 days after the oral disclosure, which would be provided immediately to the other members of the agency and be read at the next meeting after its filing.

- iv. Section 286.012, F.S., provides that a member of a board (read to include College boards) present at a meeting of the body at which an official decision, ruling, or other official act is to be taken or adopted may not abstain from voting in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, unless, with respect to any such member, there is, or appears to be, a possible conflict of interest under Florida law. If there is, or appears to be, a possible conflict under applicable law, the member shall comply with the disclosure requirements of Section 112.3143, F.S.

VI. Other Key Issues of Concern to Colleges and College Trustees

- a. Compliance with myriad state and federal regulations, including:
 - i. Title IX
 - ii. Clery Act
 - iii. Violence Against Women Act (VAWA)
 1. Sexual assault, stalking, dating/domestic violence
- b. International Programs/Study Abroad
- c. Minors on Campus
- d. Campus Safety Matters (Emergency and Disaster Preparedness)
- e. Presidential contracts and compensation
- f. Other?