

## Missouri Sunshine Law: 10 Ways Cities Can Ensure Compliance

On Nov. 16, 2016, Missouri's State Auditor issued a report that more than 65 percent of approximately 4,000 political subdivisions she reviewed failed to comply fully with the Missouri Sunshine Law, Mo.Rev.Stat, ch. 610. Oversights included not preparing meeting minutes, failing to document reasons for closing meetings to the public, closing meetings for reasons not allowed by law, and failing to respond timely to record requests or not at all. While the Auditor only criticized this lack of compliance, the statute allows civil penalties and recovery of attorneys' fees if the Attorney General or a citizen sues and the violations are knowing or purposeful.<sup>1</sup> In extreme cases, a court could void an action taken in violation of the statute if the public interest in enforcing the Sunshine Law outweighs the public interest in sustaining the action.<sup>2</sup> Finally, a violation can result in embarrassing publicity and political repercussion.

### 1. Keep In Mind That Access Is Presumed; Exceptions Narrowly Construed

Absent good reason, public records and public meetings ought to be just that, public. With that recognition, the Sunshine Law provides a presumptive right of public access to public records, public meetings and public votes of public governmental bodies to any person, regardless of why they want access.<sup>3</sup> Exceptions to access are narrowly construed, and in most cases, not mandatory.<sup>4</sup> When in doubt, a governmental body can check the Attorney General's website, at <http://www.ago.mo.gov/missouri-law/sunshine-law>, for answers to questions about the law and how to comply. In certain cases, a governmental body can request an Attorney General opinion or bring a declaratory judgment action seeking guidance from a court.<sup>5</sup>

### 2. Designate A Records Custodian

A solution to many Sunshine Law problems is to designate a custodian who maintains the governmental body's records and is versed on the law. In fact, the statute requires this, and it requires identification of that person.<sup>6</sup> Surprisingly, the Auditor found some governmental bodies did not have or failed to identify its custodian.

### 3. Establish A Policy and Respond Timely To Record Requests

In addition to designating a custodian, governmental bodies should develop policies for responding to record requests and maintain a log of requests. A misdirected request should be promptly forwarded to the custodian.

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the remaining portions produced.<sup>8</sup> The custodian should describe generally what has been redacted<sup>9</sup> (unless the description would reveal the content of the exempted information) and “the specific provision of law” supporting redaction.<sup>10</sup> When designing a public record, a governmental body should as much as practicable separate exempt from nonexempt information.<sup>11</sup> Later headaches resulting from needing to redact can be avoided by complying with this provision.

The law requires that requests be acted upon as soon as possible, but no later than the third business day following receipt.<sup>12</sup> A common mistake is to assume records need not be produced for three days, even though readily available. The statute requires prompt response; three days is the maximum time period for responding. One court suggested that failure to respond within three days waives any non-mandatory exception to disclosure.<sup>13</sup> If records are voluminous, or require extensive research, making production within three days impractical, the statute allows additional time if the reason for needing that time is identified within the initial three days.<sup>14</sup>

Importantly, the duty to produce a record under the Sunshine Law is not based on a legal obligation to maintain the record. Absent an exception, records “retained” only temporarily must be provided if they exist when a request is received.<sup>15</sup>

## 4. Fees For Public Records

A governmental body is not required to charge for records where providing them serves the public interest.<sup>16</sup> Fees, if charged, should not exceed the cost of any electronic media on which the records are provided and for standard size paper copies \$0.10/page. For large paper copies, fees may be charged at the hourly staff rate for copying. Research and retrieval fees may be charged at lowest staff rate.<sup>17</sup> Advance payment may be required.<sup>18</sup> There is no clear guidance on whether fees may be charged for time spent redacting exempt materials, but one

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A record request need not refer to the statute, and providing it contains a reasonably understandable description of the records sought, no particular form is required. If the request seeks records in a certain format, and that format is available, the records must be

provided in that format, and the statute encourages governmental bodies to make information available in usable electronic formats as much as feasible.<sup>7</sup> Where requested records contain exempt and non-exempt materials, exempt materials must be redacted and

court has held “attorney review time is not encompassed in research time,” and may not be charged.<sup>19</sup>

## 5. Provide Notice And Agendas Of Meetings

Governmental bodies must give notice of the time, date and place of each open or closed meeting and a tentative agenda at least 24 hours in advance.<sup>20</sup> If 24-hour notice is impractical, they should provide as much notice as reasonably possible, and the meeting minutes must state the reason for shortened notice.<sup>21</sup>

Notice must be prominently posted at a place easily accessible to the public and designated for that purpose at the governmental body’s principal office. If no such office exists, it should be posted at the building where the meeting will occur.<sup>22</sup> Particularized notice must be given to members of the news media who request notice of a particular class of meetings.<sup>23</sup>

## 6. Absent An Exception, Meetings Must be Open

Unless an exception authorizes a closed meeting (or executive session), meetings of more than a quorum of members wherein public business is discussed must be open to the public and must be at a reasonable time, at a handicap accessible place sufficient to accommodate anticipated attendance.<sup>24</sup> If good cause justifies departure, it must be identified in the minutes.<sup>25</sup> Telephonic, video-conference or electronic meetings must allow reasonable means for public observation. The public may record the meeting by audio, video or electronic means.<sup>26</sup>

There is no violation of the law when members of a governmental body gather for social or ministerial (e.g. ribbon-cutting ceremony) purposes, providing public business is not discussed.<sup>27</sup> But it is a violation to purposely meet in groups with less than a quorum to discuss public business if the intent of these small group discussions is to evade the law by later meeting with other members.

## 7. Closed Meetings Must Be Publicly Voted On And Reasons Stated

Before any meeting, or portion thereof, may be closed, both the question of holding the closed meeting and the reason for closure must be voted on by roll call vote identified in publicly-available minutes.<sup>28</sup> The topics discussed in closed meetings must be limited to those where closure is authorized.<sup>29</sup>

## 8. Minutes Of All Meetings Must Be Kept

Whenever a governmental body conducts any meeting, it must take and retain meeting minutes. Minutes should include the date, time, place, members present, members absent, and a record of votes taken.<sup>30</sup> Meeting minutes should be reviewed and approved in a timely manner. Minutes must be kept for both open and closed meetings, and if any vote is taken during a closed meeting, the minutes must identify how each member voted.<sup>31</sup>

## 9. Emails Are Public Records

Under the Sunshine Law, “any member of a public governmental body who transmits any message related to public business by electronic means shall also concurrently transmit that message to either the member’s public office computer or the custodian of records in the same format,” but this is only required when the email is intended to be sent to two or more members of the body and if, counting the sender, a majority of the members are copied.<sup>32</sup> This applies to both government-related and personal email addresses and devices.

Importantly, email retained on a governmental body’s computers is a public record under the Sunshine Law. Even if retention would not otherwise be required, if present when a request is made and not exempt, email, even personal email, could be subject to the statute. For that reason, public employees should not use official email servers or addresses for personal business.

## 10. Exceptions Exist, But Are Limited And Narrowly Construed

The Sunshine Law permits, but in most cases does not require, governmental bodies to close meetings or records involving certain topics.<sup>33</sup> There are 22 identified exceptions in the statute, and a catchall exception for matters that cannot be disclosed by law.<sup>34</sup> The most common exceptions are for litigation strategy matters and attorney advice,<sup>35</sup> real estate transactions where disclosure could affect the transaction,<sup>36</sup> employment and personnel-related discussions,<sup>37</sup> and sealed bids.<sup>38</sup> Exceptions are to be narrowly construed, and there are limitations on them, discussion of which is beyond the scope of this article.

Learn more at the Attorney General’s website at <http://www.ago.mo.gov/missouri-law/sunshine-law>. 

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*Footnotes are available for this article upon request by contacting the League office at (573) 635-9134 or [info@mocities.com](mailto:info@mocities.com).*