LEAGUE OUTLINE OF SUNSHINE LAW
2004 LEGISLATIVE CHANGES
August 2004

Background on New Sunshine Law Revisions

In recent years, there has been additional lobbying, particularly by the Missouri Press Association, to make more records open, regulate public meetings, and increase fines. While some may assume that politicians would be afraid to debate the press association, several did just that and pointed out the pitfalls of going too far when making changes. Several House and Senate members were former local officials and explained why some proposed changes simply were not beneficial.

Still, many changes to the Sunshine Law were approved and are effective on August 28, 2004.

Below are some observations regarding the politics of the new law.

1. E-Mails and Other Records

E-mails from home/office computers of elected officials must be handled in special ways. Somewhere in Missouri, there was an apparent claim that one or more elected officials would send official e-mails from their private computers and claim they were not public documents subject to the open records statute because they were on a private computer.

The new language now states that electronic messages sent to a majority of a public body, when counting the sender, are open (unless subject to a "closed" exemption). A copy must be sent to the body's custodian or the senders government computer for retention if originating on a private computer.

But is the opposite true? Are all documents sent to less than a majority not open? Are documents by an appointed official not open?

What about minor e-mails sent to a majority? Are they required to be saved for a long time? (See the Secretary of State's Record Retention Policy that follows. It seems to only require retention of significant records.)

To implement this new e-mail policy, a custodian may find that creating several folders for e-mails would help. These might be:

- Closed records
- Short term open records or non-records
- Long term open records
- Other records

Under each category (see Secretary of State Retention Policy on this website), the custodian may find it useful to create sub-folders by month, year, or other sub-category, such as sender. It may be useful to place other official staff e-mails sent to others in this same master folder, and perhaps include similar documents sent by US mail, courier or fax that are deemed to be records of one sort or another.

What is a record anyway?

While the definition of a public record in the Sunshine Law was only changed to include studies prepared by a consultant, the heavy use of e-mail (many of which are like phone conversations) caused many to debate the entire subject. Most of this debate

focuses on the issue of minor exchanges. Everyone agrees that minutes, policy papers, newsletters, financial reports, budgets, committee reports, etc. are open records. But what about a staff memo to department heads? What about a letter to a constituent? What about an e-mail to someone at another city asking a question or offering advice? Must these be saved and be open records?

Because the statute has wording in it that states that the law "shall be liberally construed," it is best to assume that most items in your files and your office hard drive are either open or closed official records. Your own city attorney should help you clarify your city policy.

In addition to examining the definition of a public record in the Sunshine Law (Chapter 610.010(6) RSMo 2004), you should examine the Secretary of State's policy on record retention. It seems to describe minor items as "non-records" when indicating the need to retain them or not. By connecting the various statutes and policies, one might conclude that most records are public, including minor items in your files or on your hard drive, but that the minor ones can be immediately eliminated.

In short, consider retaining higher level official documents and disposing of minor "non-records" rather quickly. Sensitive issues might best be handled by phone, not e-mail or memo.

The definition of "public record" in Chapter 610.010(6) indicates that some internal documents are not open unless retained or presented to a governmental meeting. We understand that this existing language was aimed at draft documents still being developed internally. However, courts could interpret this differently. The Attorney General office did issue opinion number 192-94 claiming that telephone billing records of an individual member of the General Assembly are public records. Much of this opinion is based on language that only closes certain types of documents and language that says the law shall be liberally interpreted. If the courts were to agree with this legal opinion, many minor records may be judged to be open. Your attorney might read this opinion as he/she offers advice to you.

Other Changes to the Law

2. Must be Present to Vote (If an Elected Official) – Emergency Exemption

In discussing electronic meetings (via conference calls in most cases), all legislators agreed that they should be allowed. But some felt that elected officials (not appointed officials on P&Z, etc.) must be present to vote and be counted towards a quorum. However, if the city is facing an emergency (not an emergency of the elected official), elected officials can vote via phone, etc. as long as there is a quorum physically present.

Keep in mind that "electronic meetings" must provide means for the public to listen. This can be done by using a speaker phone in the council chamber.

3. Recording of Public Meetings

A public body must allow open meetings to be recorded "by audiotape, videotape, other electronic means," according to guidelines you adopt. They can be written in a manner to prevent disruptions.

Because someone had hidden recorders in a closed session in the past, recordings of closed meetings are prohibited unless the permission of the public body is granted. It is a Class C misdemeanor if found guilty. This appears to apply to individual elected officials, not just someone else invited to a closed meeting.

4. Minutes of Closed Meeting Now Required

According to the new law, a journal or minutes are required of closed meetings and votes taken.

5. Real Estate Actions to be Made Public Immediately

The new statute removed the 72 hour waiting period for disclosing real estate actions and they are now deemed open upon execution of any agreement.

6. Final Audit Reports Open

Confidential, privileged audit material and work products of auditors may continue to be closed, but new language requires that final audit reports be open records.

7. Terrorist Policies Closed

Operational guidelines and policies responding to or preventing terrorist acts, but not expenditures or contracts, may be closed.

8. Non-Public Infrastructure Entity Information May be Closed

When a utility or other infrastructure owner submits information to a city in order to help protect it (presumably by coordinating construction activity) it can be closed. In the past, some competitive utilities did not want to put such information into public hands for fear that their competitors would have access to their plans under the Sunshine Law.

9. Voting Against Closing a Meeting Protects Officials Who Then Participate in the Closed Meeting

Under the new language, an official who states their objection to a motion to close a meeting may attend the meeting and enjoy protection from fines in the event the meeting was found be closed in violation of the law.

10. Cost of Copies

In the past, entities could calculate fair costs for reproductions. In the future, regular copies under 9 x 14 in size are limited to a charge of 10 cents per page (we believe each side is a page) and clerical time to be charged based on the average hourly rate for clerical staff. Research time can be at the actual cost to do the research.

(Fees could always be collected up front to ensure payment. We do not believe the old or new statute requires you to produce a document that you do not already have, but you must provide copies of existing items in a format requested if that format is available.)

11. Higher Penalties for Violating the Sunshine Act

After substantial debate about the amount of fines and the seriousness of violations, the legislature settled on higher penalties and mandatory payment of legal fees in severe cases.

"Knowing" violations carry fines up to $1000 with possible attorney fees awarded to the other party.

"Purposeful" violations carry fines up to $5000 and mandatory attorney fees to the other party.

In the new law, the size of the jurisdiction, seriousness of the offense, and number of past violation are to be considered when establishing a fine. Some legislators seemed to push for fines for even accidental violations, but reason prevailed.

12. Public Databases Managed by Contractors Must be Viewable and Printable by Public

This applies to contracts for data bases entered into after August 28, 2004 when this new law takes effect.

The other documents in this folder on this website are:

1. Summary of the entire statute by Municipal Attorney Kevin O'Keefe
2. Clayton's new ordinance based on the 2004 changes
3. The Secretary of State's Retention Policies – General
4. The Secretary of State's Retention Policy – Municipal
5. A copy of the 2004 Sunshine Law legislation (CCS HS HCS SCS SB 1020, 889 & 869)

Please consult your city attorney for guidance.