

Releasing Reports and the Missouri Sunshine Law

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1

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2

Objectives

- Discuss provisions of the Sunshine Law applicable to law enforcement agencies.
- Discuss the Records Retention Schedules for the State of Missouri.
- Discuss practical applications of the Records Retention Schedules and the Sunshine Law in the context of law enforcement agency administration.

3

Sunshine Law v. Records Retention

- The Sunshine Law and the Records Retention rules often get confused with each other.
 - They deal with two different issues.
- The Sunshine Law deals with releasing records.
- The Retention Schedules deal with how long a record must be retained.

4

**LOCAL GOVERNMENT RECORDS
RETENTION SCHEDULES**

5

Retention Schedules

- The Local Records Board is chaired by the Secretary of State and is comprised of local government officials.
- RSMo. 109.255 authorizes the Local Records Board to set minimum retention periods for administrative, fiscal and legal records created by local governmental entities.

6

Retention Schedules

- The Schedules can be printed/downloaded from the Secretary of State’s website. (<https://www.sos.mo.gov/archives/localrecs/schedules>)
- Sheriff’s Offices need to pay attention to at least two schedules.
 - General Records Retention Schedule
 - Sheriff Records Retention Schedule
 - If your office is a public safety answering point, there is a schedule for PSAPs.
 - If your office ever performs coroner duties, there is a schedule for Medical Examiners/Coroners.

7

Retention Schedules

- If the type of record is not contained in one of the specific schedules the general schedule needs to be reviewed.
- Each schedule contains introductory material including definitions, information about destruction of records, preservation of records, etc.

8

Definitions

- Record – “any document, book, paper, photograph, map, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business.” RSMo. 109.210(5).
 - This includes records created, used and maintained in electronic formats.

9

Definitions

- Non-records – Not all recorded information is a record. The following are not records pursuant to RSMo. 109.210(5):
 - Library and museum material made or acquired and preserved solely for reference or exhibition purposes;
 - Extra copies of documents preserved only for convenience of reference;
 - Stocks of publications and of processed documents;
 - Identical copies of documents maintained in the same file;
 - Extra copies of printed or processed materials (official copies of which are retained by the office of record);

10

Non-records Continued

- Superseded manuals and other directives (maintained outside the office of record);
- Materials documenting employee fringe activities (blood donors, charitable funds, social and professional meetings, etc.);
- Work papers and drafts of reports or correspondence. Transcribed stenographic materials;
- Blank forms;
- Materials received from other activities that require no action (official copies of which are retained by the office of record);
- Catalogs, trade journals and other publications or paper received from government agencies, commercial firms or private institutions that require no action and are not part of an action case record;
- Survey forms
- Non-records do not require retention scheduling or destruction authorization or reporting.

11

Structure of a Schedule

- Components of a Schedule:
 - An assigned number and title;
 - "Also Called" - alternative names for the record;
 - "Functions" – describes the function of the records covered by the Schedule;
 - "Content" – what type of information the records covered by the Schedule contain;
 - "Minimum Retention" – the minimum amount of time the entity is required to maintain the record;
 - "Disposition" – what may be done with the record after the minimum retention period;
 - "Note" – Notes regarding the Schedule or types of records covered. This section may also contain cross references to other Schedules;
 - "Approval Date"

12

Sunshine Law FAQs

- What is the Sunshine Law?
- Who is subject to the Sunshine Law?
- What meetings and records are open to the public?
- What are the rules for meetings?
- What are the rules for records requests?
- How is the Sunshine Law enforced?

16

Historical Perspective

- Chapter 610 (Sunshine Law) was first enacted in 1973.
- What was going on in 1973?
 - Watergate Scandal
- MO AG: Sunshine law is probably the least complied with section of Missouri law.

17

Liberal Construction (610.011)

- Openness in government:
 - "It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies shall be open to the public unless otherwise provided by law." RSMo. 610.011.1
- Must be read broadly to favor openness.
 - If more than one provision of the Sunshine Law applies to a record and they contradict each other, the public policy statement is the tiebreaker in favor of disclosure. *Guyer v. City of Kirkwood*, 38 S.W.3d 412 (Mo. 2001).
- Exceptions must be read narrowly.

18

Does It Apply to Me?

- Applies to “public governmental bodies” -
 - basically all of state and local government:
 - State Departments/Commissions and Elected Officials;
 - County Commissions/City Councils;
 - School Boards and other Special Districts;
 - Sub-Committees and Advisory Committees;
 - “Quasi-public” bodies: Private entities when contracting with public bodies or performing public services.

19

Does It Apply to Me? (Continued)

- RSMo. 610.101.4 defines “Public Governmental Body”.
- Very extensive list of what constitutes a public governmental body.
- Missouri courts have previously held that a single elected official is a public governmental body. *Charlier v. Corum*, 774 SW2d 518 (Mo.App. 1983)
- Single member body can be a body of one and within the definition of public governmental body. *MacLachlan v. McNary*, 684 SW2d 534 (Mo.App. 1984)
 - Noted that a single member body cannot have meetings subject to the Sunshine Law, but it can have records subject to the law.

20

Rule of Thumb

- A good rule of thumb: If you are paid by public funds or the task that you’re performing is paid for by public funds. It applies.
 - Remember the law also applies to appointed committees, departments of the State, county and municipal governments, quasi-public governmental bodies, school districts, sewer districts, water districts, etc.

21

What Does the Sunshine Law Apply To?

- Any record or meeting of a public body;
- Any record retained by a public body;
- Written or electronic records;
- Email from a member of a public body - copy must be sent to the custodian: RSMo. 610.025.
- *Practice tip:* A request for information is different from a request for records. (e.g., list of business licensees vs. copies of licenses).
 - You don't have to create records you don't have but may have to release the records that contain the information.

22

What's Open to the Public?

- All meetings and records of public bodies are open to the public...
 - Unless a law specifically allows them to be closed.
 - Don't confuse your sensibilities with the law.
 - We cannot be concerned with what a person is going to do with the information. If the record is considered an open record it needs to be released.

23

What's A Meeting?

- Any meeting at which public business is discussed or decided or formulated. RSMo. 610.010.5
 - Includes all forms of communication (phone conference, internet chat, etc.).
 - Limited exception for ministerial (no discretion) or social gatherings RSMo. 610.010.5
- What is "public business?" RSMo. 610.010.3
 - All matters related in any way to the body's functions or the conduct of its business.

24

Notice RSMo. 610.020

- Notice of an open meeting must contain:
 - The date and time of meeting;
 - The place of meeting;
 - The tentative agenda of the meeting.
- The notice must be reasonably calculated to advise public of matters to be considered.
- If the meeting is held by phone or electronic means the mode in which meeting will be conducted and how public may observe, or attend must be noted. (If conducted online notice must also be posted on website).
- *Practice tip:* indicate the date and time the notice is posted.

25

Notice (Continued)

- Notice has to be given/posted at least 24 hours in advance (excluding weekends and holidays).
 - If 24-hour posting is impossible or impractical for good cause (i.e., an emergency) can be posted in less time but as soon as possible.
 - The good cause must be stated in the minutes.
- Subunit (must be formally constituted) meetings may take place without notice during noticed meeting of parent body, recess or immediately following meeting if subunit meeting is announced during noticed meeting.
 - The subject of meeting must reasonably coincide with the subjects discussed or acted on by the parent body during the noticed meeting.

26

Notice of Closed Meetings

- RSMo. 610.022.2 requires that a notice of a closed meeting must contain:
 - The date and time of meeting;
 - The place of meeting;
 - The reason for closing the meeting.
- The notice must refer to the specific provision of law that allows the meeting to be closed. RSMo. 610.022.3

27

Procedure For Closing A Meeting

- Must be announced in advance at an open meeting RSMo. 610.022.1 (If you know you're going to close it must be on the agenda).
 - Roll call vote to close the meeting;
 - Identify specific provision of law that allows meeting to be closed .
- Can only discuss business directly related to the reason given for closing the meeting, RSMo. 610.022.3
- Votes must be roll calls; each vote recorded. RSMo. 610.020.7
- Member may object to closure of a meeting, RSMo. 610.022.6

28

Closed Meetings/Records

- This presentation does not contain an all-inclusive list.
- RSMo. 610.021 provides a list of items that may be closed.
 - The statue contains 22 separate provisions .
 - RSMo. 610.021 may be overridden by other laws that require disclosure of a particular type of information.

29

Closed Meetings/Records (Continued)

- The Sunshine Law does not generally require closed meetings or records; it just gives an option to close them under certain circumstances. RSMo. 610.022.4
 - There are certain provisions of Sunshine Law require specific types of data be closed.
- Remember other laws may require confidentiality for specific records or meetings.
 - Example: Social Security Numbers, 911 calls.

30

What Meetings/Records Can Be Closed?

- Litigation; attorney-client communication
- Some personnel records and pending personnel actions
- Some pending real estate transactions
- Bidding specs until approved
- Sealed bids until opened; some pending contract negotiations
- Existing or proposed security systems
- Records otherwise specifically protected by law

31

Minutes

- A journal or minutes of open and closed meetings must be taken and retained.
- At a minimum minutes must include:
 - The date, time, location, members/officials present and absent, and a record of any votes;
 - Yea, Nay or abstinence votes must be attributed to the name of the individual casting the vote.
- Voting members must generally be physically present. In emergency situations members constituting less than a quorum may vote via phone, fax, internet or other voice/electronic means.
 - Nature of emergency and departure from normal requirements must be noted in minutes.

32

Other Meeting Requirements

- The meeting must be reasonably accessible to the public, including access for disabled individuals;
- The location of the meeting must be large enough to accommodate the anticipated attendance;
- There must be a designated location or means for the public to listen to telephone or internet meetings;
- Members of the public can record open meetings, if unobtrusive.
- Recording a closed meeting requires permission of the body.

33

Sunshine Law Requests

- Custodian of Records. RSMo. 610.023.1
 - Responds to requests;
 - Maintains records;
 - Safeguards records.
- The Custodian's name and location (address) must be available upon request.
 - Each public governmental body is to appoint a custodian.

34

Requests (Continued)

- Each body must make its records available for inspection and copying by the public.
- No person shall remove original from the office of the governmental body without written permission of the custodian.

35

Request (Continued) RSMo. 610.023

- Must respond as soon as possible and no more than three business days after custodian receives request.
 - Response and production are not necessarily the same thing. If records are capable of being released within the three days, they should be released in that time frame.
- If records are not available in that time, custodian must explain delay and state when records will be available.
 - Remember, you do not have to create records you don't already have.
 - Again, don't confuse the Sunshine Law (is it open to the public) with the Secretary of State Retention Schedules (how long you must keep a record).
- Time for providing access may exceed three days for reasonable cause.

36

What if the Information is Closed?

- If asked, the Custodian must explain in writing why records are closed.
 - Must state the specific provision of law allowing records to be closed.
 - Must provide the explanation within three business days of being asked for it.
- *Practice tip:* You must respond either way. If you're going to close a record, say it in the initial response.

37

What If It's Both Open & Closed?
RSMo.610.024

- If one record has both open and closed material, must separate and provide access to the open material.
- Must try to design records to facilitate separation of open and closed material.
- Three-day rule still applies.

38

Fees RSMo. 610.026

- Fees cannot exceed \$.10 per copy for 9 X 14 or smaller pages, plus search time.
- Research time may be billed at actual cost.
 - Be careful with pre-assembled/anticipatory response records requests.
- Hourly fee for copying may not exceed the average hourly rate for clerical staff.
 - Staff used for average must result in the lowest amount, of charges for search, research and copying.
 - Cannot charge fees for having an attorney review the request.
- People may request an estimate of the cost.
- Advance payment of fees can be requested.
- Fees may be reduced or waived in the public interest.

39

Enforcement RSMo. 610.027

- The Missouri Attorney General, prosecutors, and citizens can sue in the circuit court where the public body is located.
- Civil fines up to \$1000 for a knowing violation.
- Civil fines up to \$5000 and attorneys' fees for a purposeful violation.
 - Conscious design, intent or plan to violate law with awareness of the probable consequences (*R.L. Polk & Co. v. Mo DOR, Mo. App. W.D. 2010*).
 - A court can fine the governmental body or individual members.
- When in public interest, court can void actions taken in violation of the Sunshine Law.

40

Law Enforcement Specific Provisions

- Law Enforcement specific provision begin at RSMo. 610.100.
- Sunshine law defines various types of law enforcement records.
- Sunshine definitions do not always coincide with terminology used by law enforcement officials.

41

Arrest

- An actual restraint of the person of the defendant, or by his or her submission to the custody of the officer, under authority of a warrant or otherwise for a criminal violation which results in the issuance of a summons, or the person being booked.

42

Arrest Report

- A record of a law enforcement agency of an arrest and of any detention or confinement incident thereto together with the charge, therefor.

43

Incident Report

- A record of a law enforcement agency consisting of the date, time, specific location, name of the victim and immediate facts and circumstances surrounding the initial report of a crime or incident, including any logs of reported crimes, accidents and complaints maintained by that agency.
 - An original citizen complaint against an officer/deputy alleging criminal misconduct amounts to an incident report. *Guyer v. City of Kirkwood*, 38 S.W.3d 412 (Mo. 2001).

44

Investigative Report

- A record, other than an arrest or incident report, prepared by personnel of a law enforcement agency, inquiring into a crime or suspected crime, either in response to an incident report or in response to evidence developed by law enforcement officers in the course of their duties.
 - An internal affairs investigation qualifies as an investigative report only if it is shown that the investigation was directed to alleged criminal conduct. *Guyer v. City of Kirkwood*, 38 S.W.3d 412 (Mo. 2001).

45

Mobile Video Recorder

- Any system or device that captures visual signals that is capable of installation and being installed in a vehicle or being worn or carried by personnel of a law enforcement agency and that includes, at minimum, a camera and recording capabilities.

46

Mobile Video Recording & Non-Public Location

- Mobile Video Recording - Any data captured by a mobile video recorder, including audio, video and any metadata.
- Non-Public Location – A place where one would have a reasonable expectation of privacy, including, but not limited to a dwelling, school, or medical facility.

47

RSMo. 610.100.2

- Each LEA shall maintain records of all incidents reported to the agency, investigations and arrests made by the LEA. **All incident reports and arrest reports shall be open records.** Investigative reports and mobile video recordings are closed until the investigation inactive.
- If a person is arrested and not charged within 30 days, the arrest report becomes closed.
 - Disposition may still be accessed.

48

RSMo. 610.100.2

- Except as provided in subsections 3 and 5 of 610.100.2, a mobile video recording that was recorded in a nonpublic location is authorized to be closed, except that any person who is depicted in the recording or whose voice is in the recording, a legal guardian or parent of such person if he or she is a minor, a family member of such person within the 1st degree of consanguinity if he or she is deceased or incompetent, an attorney for such person, or insurer of such person, upon written request, may obtain a complete, unaltered and unedited copy of a recording.
 - Subsection 3 allows closure of open records (other than arrest reports) under certain situations.
 - Subsection 5 addresses how a person may gain access to a MVR or investigative report through a court order.

49

What's Inactive?

- RSMo. 610.100.1(3) – an investigation in which no further action will be taken by a law enforcement agency or officer for any of the following reasons:
 - A decision by the law enforcement agency not to pursue the case;
 - Expiration of the time to file criminal charges pursuant to the applicable statute of limitations or ten years after the commission of the offense; whichever is sooner;
 - Finality of the convictions of all persons convicted on the basis of information contained in the investigative report, by exhaustion of or expiration of all rights of appeal.

50

Closing an Open Record

- RSMo. 610.100.3 allows you to close any portion of a record or document "**OTHER THAN AN ARREST REPORT**" if it is reasonably likely to:
 - Pose a clear and present danger to the safety of any victim, witness, undercover officer or other person;
 - Jeopardize a criminal investigation (including CI identity);
 - Disclose techniques, procedures or guidelines for law enforcement investigations or prosecutions.
- **Note that RSMo. sections 610.100.4-610.100.7 contain exceptions this provision.**

51

Who gets access to closed records?

- Any person whose property was involved in an incident;
 - Their attorney, their insurer, their relative within the 1st degree if they are dead or incompetent (RSMo. 610.100.4);
 - Available for purposes of investigating a civil claim or defense;
 - Don't confuse this with discovery. If it's for a criminal defense under the Missouri Supreme Court rules and statutes the attorney needs to go through the prosecutor for discovery.
 - Can get a complete unedited copy.
 - Must produce within 30 days or file a motion with the court stating;
 - Safety of victim, witness or other individual cannot be reasonably ensured; or
 - That a criminal investigation is likely to be jeopardized.
- Persons granted access by court order (RSMo. 610.100.5-610.100.6).
- Agencies listed under RSMo. 610.120.

52

Agency Log

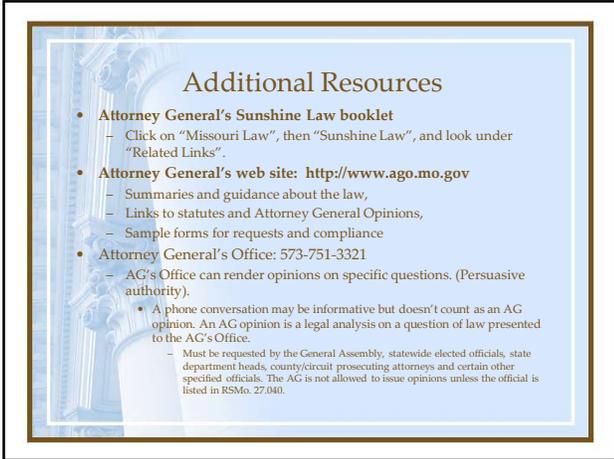
- RSMo. 610.200 - All law enforcement agencies that maintain a daily log or record that lists of suspected crimes, accidents or complaints shall make available for inspection and copying.
 - The time, substance and location of all complaints or requests for assistance received by the agency.
 - The time and nature of the agency's response to all complaints or request for assistance.
 - If the incident involves an alleged crime or infraction
 - The time, date and location of occurrence;
 - The name and age of any victim unless it's a crime under chapter 566 (sex crimes);
 - The factual circumstances surrounding the incident;
 - A general description of any injuries, property or weapons involved.

53

Other Provisions and Items of Note

- Records of firearm ownership, applications for permit, etc. are not open records under Chapter 610 and are not open for inspection or disclosure except by order of a court. (RSMo. 571.011 – Class A misdemeanor).
- In the past it was common for agencies not to disclose records they received from other agencies and would direct the requestor to the other agency. This is not correct. If a record is in your files, the courts consider it your record.
 - Remember depending on what the record is and who is the source of the record there may be other laws that would authorize or require the record to be closed.

54



Additional Resources

- **Attorney General's Sunshine Law booklet**
 - Click on "Missouri Law", then "Sunshine Law", and look under "Related Links".
- **Attorney General's web site: <http://www.ago.mo.gov>**
 - Summaries and guidance about the law,
 - Links to statutes and Attorney General Opinions,
 - Sample forms for requests and compliance
- **Attorney General's Office: 573-751-3321**
 - AG's Office can render opinions on specific questions. (Persuasive authority).
 - A phone conversation may be informative but doesn't count as an AG opinion. An AG opinion is a legal analysis on a question of law presented to the AG's Office.
 - Must be requested by the General Assembly, statewide elected officials, state department heads, county/circuit prosecuting attorneys and certain other specified officials. The AG is not allowed to issue opinions unless the official is listed in RSMo. 27.040.

55



Questions?

56
