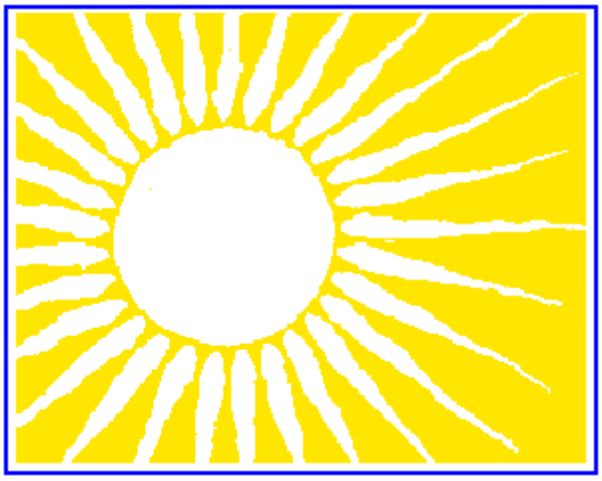
GOVERNMENT-IN-THE-SUNSHINE MANUAL



2007 Electronic Edition

A Reference For Compliance
with Florida's Public Records
and Open Meetings Laws

Volume 29

A Public Policy of Open Government

TABLE OF CONTENTS

A Public Policy of Open Government

INTRODUCTION

The Florida Constitution safeguards every Floridian's right of access to government meetings and records. The comprehensive breadth and scope of our sunshine laws have served for many years as a model for the rest of the nation. In Florida, disclosure is the standard, unless the Legislature concludes that the public necessity compels an exemption from our strong open government laws.

The best way to ensure that government truly represents the people it serves is to keep the government open and accessible to those people. For several decades now, Florida has shown that openness is the key to building and maintaining public trust in the institutions of government. The Attorney General's Office is committed to maintaining and building upon this tradition of openness.

The Government in the Sunshine Manual is prepared on an annual basis by the Florida Attorney General's Office to serve as a guide to those seeking to become familiar with the requirements of the open government laws. It is intended for both governmental agencies and the citizens they serve.

This year's edition of the Manual incorporates court decisions, Attorney General Opinions, and legislation in place as of October 1, 2006.

Additional information about the Sunshine Law, including answers to frequently asked questions, is available through the Office of the Attorney General’s website, http://myfloridalegal.com.

Suggestions from users of this manual are welcomed and appreciated. Please forward comments to: The Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; telephone number (850) 245-0140.

Legislative Highlights

The following are some of the more significant actions which occurred during the 2005 special legislative session and the 2006 regular legislative session relating to the public's right of access to meetings and records.

Brain Research Center –- The following information held by the Florida Center for Brain Tumor Research is confidential and exempt from disclosure requirements: An individual's medical record and any information received from an individual from another state or nation or the federal government that is otherwise confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law. **Chapter 06-259, Laws of Florida, creating s. 381.8531, F.S.**

Concealed weapons licenses -– Personal identifying information of an individual who has applied for or received a license to carry a concealed weapon or firearm held by the Division of Licensing of the Department of Agriculture and Consumer Services is confidential and exempt from disclosure requirements. Information made confidential and exempt shall be disclosed with express written consent of the applicant or licensee, by court order, or upon request by a law enforcement agency in connection with the performance of lawful duties. **Chapter 06-102, Laws of Florida, creating s. 790.0601, F.S.**

Court monitors -– A court order appointing a court monitor is confidential and exempt from public disclosure requirements. Reports of a court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt. The reports may be subject to inspection as determined by the court or upon a showing of good cause. Court determinations relating to a finding of no probable cause and court orders finding no probable cause are confidential; however, such determinations and findings may be subject to inspection as determined by the court or upon a showing of good cause. **Chapter 06-129, Laws of Florida, creating s. 744.1076, F.S.**

E-mail address public record disclosure –- An agency as defined in s. 119.011, F.S., or legislative entity that operates a website and uses electronic mail shall post the following statement in a conspicuous location on its website:

> Under Florida law, e-mail addresses are public records. If you do not want your e-mail address released in response to a public-records request, do not send electronic mail to this entity. Instead, contact this office by phone or in writing.

Chapter 06-232, Laws of Florida, **creating s. 668.6076**, F.S.

Fingerprint records –- Biometric identification information is exempt from s. 119.07(1), F.S. The term "biometric identification information" means any record of friction ridge detail, fingerprints, palm prints, and footprints. **Chapter 06-181, Laws of Florida, amending s. 119.071(5), F.S.**

Juvenile Justice department employee personal information –- The home address, telephone numbers, and photographs of certain current or former Department of Juvenile Justice employees as well as the names and other personal information about their spouses and children, are exempt from s. 119.07(1), F.S. **Chapter 06-180, Laws of Florida, amending s. 119.071(4)(d), F.S.**

Lobbyist investigation records -- Records relating to an audit of a lobbying firm lobbying the executive branch or an investigation of violations of the lobbying compensation reporting laws and any meetings held pursuant to the investigation or at which such an audit is discussed are exempt from public records and meetings requirements either until the lobbying firm requests in writing that such records and meetings be made public or until the Commission on Ethics determines there is probable cause that the audit reflects a violation of the reporting laws. **Chapter 05-361, Laws of Florida, amending s. 112.3215(8), F.S.**

Monroe County teleconferencing –- The Monroe County Commission is authorized to use teleconferencing equipment to qualify for a quorum for a special meeting. A special meeting means a public meeting of the board at which official action is taken, but does not include regular monthly meetings of the board. The statute is repealed effective June 30, 2007. **Chapter 06-350, Laws of Florida.**

Rejected bids or proposals –- The statute providing a temporary exemption from disclosure for sealed bids was amended to add a temporary exemption if an agency rejects all bids or proposals submitted in response to an invitation to bid or request for proposals and the agency concurrently provides notice of its intent to reissue the invitation to bid or request for proposals; a temporary exemption for a competitive sealed reply in response to an invitation to negotiate, as defined in s. 287.012, F.S.; and a temporary exemption if an agency rejects all competitive sealed replies in response to an invitation to negotiate and concurrently provides notice of its intent to reissue the invitation to negotiate and reissues the invitation to negotiate as provided in the exemption. **Chapter 06-284, Laws of Florida, amending s. 119.071(1)(b), F.S.**

Sale of public hospital -– A "complete sale", as defined in the statute, of a public hospital to a private purchaser shall not be construed as (1) a transfer of governmental function to the private purchaser; (2) constituting a financial interest of the public seller in the private purchaser; (3) making the private purchaser an "agency" as that term is used in statutes; (4) making the private purchaser an integral part of the public seller's decision making process; or (5) indicating that the private purchaser is "acting on behalf of" an "agency" as that term is used in statute. **Chapter 06-170, Laws of Florida, amending s. 155.40, F.S.**

State Board of Administration alternative investments –- "Proprietary confidential business information", as defined in the exemption, that is held by the State Board of Administration regarding alternative investments is confidential and exempt for a period of 10 years after the termination of the alternative investment unless disclosure is permitted under the circumstances set forth in the exemption. **Chapter 06-163, Laws of Florida, amending s. 215.44(8), F.S.**

Statewide Public Guardianship Office donors -– The identity of a donor or prospective donor of funds or property to the direct-support organization of the Statewide Public Guardianship Office who wishes to remain anonymous and all information identifying the donor or prospective donor is confidential and exempt from disclosure requirements, and that anonymity must be maintained in any publication concerning the direct-support organization. **Chapter 06-179, Laws of Florida, creating s. 744.7082(6), F.S.**

Vendor negotiation meetings –- A meeting at which a negotiation with a vendor is conducted pursuant to s. 287.057(3), F.S., is exempt from open meetings requirements. However, a complete recording shall be made of any such exempt meeting. The recording is exempt until such time as the agency provides notice of a decision or intended decision pursuant to s. 120.57(3), F.S., or until 20 days after the final competitive sealed replies are all opened, whichever occurs first. **Chapter 06-284, Laws of Florida, amending s. 286.0113, F.S.**

PART I
GOVERNMENT IN THE SUNSHINE LAW

A. WHAT IS THE SCOPE OF THE SUNSHINE LAW?

Florida's Government in the Sunshine Law, commonly referred to as the Sunshine Law, provides a right of access to governmental proceedings at both the state and local levels. The law is equally applicable to elected and appointed boards and has been applied to any gathering of two or more members of the same board to discuss some matter which will foreseeably come before that board for action. There are three basic requirements of s. 286.011, F.S.:

(1) meetings of public boards or commissions must be open to the public;
(2) reasonable notice of such meetings must be given; and
(3) minutes of the meetings must be taken.

The complete text of the Government in the Sunshine Law and related statutes may be found in Appendix B.

A right of access to meetings of collegial public bodies is also recognized in the Florida Constitution. *See, Frankenmuth Mutual Insurance Company v. Magaha,* 769 So. 2d 1012, 1021 (Fla. 2000), noting that the Sunshine Law "is of both constitutional and statutory dimension." Article I, s. 24, Fla. Const., was approved by the voters in the November 1992 general election and became effective July 1, 1993. Virtually all collegial public bodies are covered by the open meetings mandate of the open government constitutional amendment with the exception of the judiciary and the state Legislature, which has its own constitutional provision requiring access. The only exceptions are those established by law or by the Constitution. The complete text of the amendment may be found in Appendix A of this manual.

The requirements of the Sunshine Law and Art. I, s. 24, Fla. Const., are discussed in detail in Part I. Please refer to the Table of Contents or the Index for a listing of the specific subjects.

B. WHAT AGENCIES ARE COVERED BY THE SUNSHINE LAW?

1. Are all public agencies subject to the Sunshine Law?

The Government in the Sunshine Law applies to "any board or

commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision." The statute thus applies to public *collegial* bodies within this state, at the local as well as state level. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971). It is equally applicable to elected and appointed boards or commissions. AGO 73-223.

Florida courts have stated that it was the Legislature's intent to extend application of the Sunshine Law so as to bind "every 'board or commission' of the state, or of any county or political subdivision over which it has dominion and control." *Times Publishing Company v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969), *disapproved in part on other grounds*, *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985). *And see, Turner v. Wainwright,* 379 So. 2d 148, 155 (Fla. 1st DCA 1980), *affirmed and remanded*, 389 So. 2d 1181 (Fla. 1980) (rejecting a board's argument that a legislative requirement that certain board meetings must be open to the public implies that the board could meet privately to discuss other matters).

Based upon the specific terms of the statute and the "dominion and control" test approved by the courts, the following are some of the entities which the Attorney General's Office has concluded are subject to the Sunshine Law:

civil service boards--AGOs 79-63, 73-370, 71-29 (municipal) and 80-27 (sheriff);

county and municipal boards--AGOs 04-35 (city risk management committee), 85-55 (downtown redevelopment task force), 83-43 (board of adjustment), 76-230 (beautification committee), and 73-366 (board of governors of municipal country club);

interlocal agreement boards--AGOs 84-16 (five-county consortium created pursuant to Florida Interlocal Cooperation Act), 82-66 (regional sewer facility board), 76-193 (Central Florida Commission on the Status of Women), and Inf. Op. to Nicoletti, November 18, 1987 (Loxahatchee Council of Governments, Inc.);

regulatory boards--AGOs 76-225 (accountancy), and 74-84 (dentistry);

special district boards--AGOs 74-169 (fire control district), and 73-08 (mosquito control district).

2. Are advisory boards which make recommendations or committees established only for fact-finding subject to the Sunshine

Law?

a. Publicly created advisory boards which make recommendations

Advisory boards created pursuant to law or ordinance or otherwise established by public agencies are subject to the Sunshine Law, even though their recommendations are not binding upon the entities that create them. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). *Accord*, *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So. 2d 694 (Fla. 3d DCA 1988). "[T]he Sunshine Law equally binds all members of governmental bodies, be they advisory committee members or elected officials." *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 869 (Fla. 3d DCA 1994). *And see, Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000) (Sunshine Law applies to site plan review committee created by county commission to serve in an advisory capacity to the county manager).

The Attorney General's Office has issued numerous opinions discussing the application of the Sunshine Law to advisory committees. The following are some of the advisory committees which have been found to be subject to the Sunshine Law:

community issues advisory bodies--AGOs 98-13 (citizen advisory committee appointed by city council to make recommendations to the council regarding city government and city services), 93-41 (criminal justice commission established by county ordinance to develop and make recommendations on criminal justice issues in the county), and 85-55 (community certification committee organized for the purpose of qualifying city as a blue chip community under a program of the Department of Commerce);

employee or personnel advisory bodies--AGOs 96-32 (employee advisory committee), 92-26 (committee responsible for making recommendations to city council on personnel matters), and 84-70 (grievance committees);

education advisory bodies--AGOs 03-28 (business assistance center advisory council created by community college board of trustees), 01-84 (school advisory councils created pursuant to former s. 229.58 [now s. 1001.452], F.S.), and 74-267 (Council of Deans appointed by state university president);

legislation implementation advisory bodies--AGOs 92-79 (advisory committee appointed to assist state agency with the implementation of legislation), and 85-76 (ad hoc

committee appointed by mayor for purpose of making recommendations concerning legislation);

planning or property acquisition advisory bodies--AGOs 05-07 (lake restoration council created by the Legislature within a water management district to advise district governing board), 02-24 (vegetation committee created by city code to make recommendations to city council and planning department regarding vegetation and proposed development), 87-42 (ad hoc committee appointed by mayor to meet with Chamber of Commerce to discuss a proposed transfer of city property), and 86-51 (land selection committee appointed by water management district to evaluate and recommend projects for acquisition).

The Sunshine Law applies to advisory committees that are appointed by a single public official as well as those appointed by a collegial board. *See, e.g., Wood v. Marston*, 442 So. 2d 934 (Fla. 1983) (Sunshine Law applies to an ad hoc advisory committee appointed by university president to screen applications and make recommendations for the position of dean of the law school); *Silver Express Company v. District Board of Lower Tribunal Trustees*, 691 So. 2d 1099 (Fla. 3d DCA 1997) (committee established by community college purchasing director to consider and rank various contract proposals must meet in the Sunshine); and *Krause v. Reno*, 366 So. 2d 1244 (Fla. 3d DCA 1979) (Sunshine Law governs advisory group created by city manager to assist him in screening applications and making recommendations for the position of chief of police). *Accord*, AGO 05-05 (advisory group created by police chief to make recommendations regarding various issues affecting the police department is subject to the Sunshine Law). *And see*, Inf. Op. to Lamar, August 2, 1993, regarding the application of the Sunshine Law to a transition team made up of citizens appointed by a mayor to make recommendations on the reorganization of city government.

b. Fact-finding committees

A limited exception to the applicability of the Sunshine Law to advisory committees has been recognized for advisory committees established for fact-finding only. When a committee has been established strictly for, and conducts only, fact-finding activities, *i.e.*, strictly information gathering and reporting, the activities of that committee are not subject to s. 286.011, F.S. *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985). *Accord*, AGO 95-06 (when a group, on behalf of a public entity, functions solely as a fact-finder or information gatherer with no decision-making authority, no "board or commission" subject to the Sunshine Law is created).

For example, the court in *Bennett v. Warden*, 333 So. 2d 97 (Fla. 2d DCA 1976), held that a fact-finding committee appointed by a community college president to report to him on employee working conditions was not subject to the Sunshine Law. Later, in *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983), the Supreme Court approved the holding in *Bennett* that such fact-finding consultations are not subject to s. 286.011, F.S. *And see, Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000) (Sunshine Law did not apply to informal meetings of staff where the discussions were "merely informational," where none of the individuals attending the meetings had any decision-making authority during the meetings, and where no formal action was taken or could have been taken at the meetings).

However, when a committee has a decision-making function in addition to fact-finding, the Sunshine Law is applicable. For example, in *Wood v. Marston*, the Court recognized that a "search and screen" committee appointed by a university president which was responsible for soliciting and compiling applications for a position "had an admitted 'fact-gathering' role in the solicitation and compilation of applications." 442 So. 2d at 938. But, because the committee "had an equally undisputed decision-making function in screening the applicants," the Sunshine Law was applicable. *Id*. *And see, Roscow v. Abreu*, No. 03-CA-1833 (Fla. 2d Cir. Ct. August 6, 2004), in which the circuit judge relied on *Wood* in finding that a committee created by the state department of transportation and composed of officials from state, local and federal agencies was subject to the Sunshine Law because the committee was responsible for screening and evaluation of potential corridors and alignments for a possible expansion of the Suncoast Parkway.

Similarly, in AGO 94-21, the Attorney General's Office advised that the Sunshine Law governed the meetings of a negotiating team that was created by a city commission to negotiate with a sports organization on behalf of the city. Even though the resolution creating the team provided that the negotiations were subject to ratification and approval by the city commission, the team was authorized to do more than mere fact-finding in that it would be "participating in the decision-making process by accepting some options while rejecting others for presentment of the final negotiations to the city commission." *Id*.

3. Are private organizations subject to the Sunshine Law?

A more difficult question is presented with private organizations which are providing services to state or local government. The Attorney General's Office has recognized that private organizations generally are not subject to the Sunshine

Law unless the private organization has been delegated the authority to perform some governmental function. *See, e.g.*, Inf. Op. to Fasano, June 7, 1996 (Sunshine Law does not apply to meetings of a homeowners' association board).

Thus, the Sunshine Law does not apply to a private nonprofit corporation established by local business people to foster economic development where no delegation of legislative or governmental functions by any local governmental entity has occurred and the corporation does not act in an advisory capacity to any such entity. Inf. Op. to Hatcher and Thornton, September 15, 1992. *And see*, Inf. Op. to Armesto, September 18, 1979, concluding that meetings of political parties are not subject to s. 286.011, F.S.

However, the Sunshine Law has been held to apply to private entities created by law or by public agencies, and also to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties. Each of these circumstances is discussed more fully below.

a. Private entities created pursuant to law or by public agencies

Florida case law provides that the Sunshine Law should be liberally construed to give effect to its public purpose. *See, e.g.*, *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983); *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969) (statute should be broadly construed to effect its remedial and protective purposes). Thus, the Supreme Court stated that "[t]he Legislature intended to extend application of the 'open meeting' concept so as to bind every 'board or commission' of the state, or of any county or political subdivision over which [the Legislature] has dominion or control." *City of Miami Beach v. Berns,* 245 So. 2d 38, 40 (Fla. 1971). Similarly, an entity that acts on behalf of a governmental entity in the performance of its public duties may also be subject to open meetings requirements. *See, Town of Palm Beach v. Gradison*, 296 So. 2d 473, 478 (Fla. 1974) (Sunshine Law applies to an advisory committee that was established by a city council and was "active on [its] behalf").

Applying these principles, the Attorney General's Office concluded that the Board of Directors of Enterprise Florida, Inc., must comply with the Sunshine Law. AGO 92-80. Even though the organization was acting as a nonprofit corporation, it was created by a statute which also prescribed its membership, powers and duties. *Id. And see*, AGO 04-44 (Sunshine Law applies to

Prison Rehabilitative Industries and Diversified Enterprises [PRIDE], the nonprofit corporation established by state law to manage correctional work programs of the Department of Corrections).

Similarly, in AGO 97-17, the Attorney General's Office advised that the Sunshine Law applied to a not-for-profit corporation created by a city redevelopment agency to assist in the implementation of the agency's redevelopment plan. *See also,* AGO 98-55 (meetings of the board of directors of the Council on Aging of St. Lucie, Inc., a nonprofit organization incorporated pursuant to the "Community Care for the Elderly Act," must comply with the Sunshine Law); AGO 98-42 (Florida High School Activities Association, Inc., having been legislatively designated as the governing organization of athletics in Florida public schools, is subject to the Sunshine Law); and AGO 98-01 (Sunshine Law applies to board of trustees of insurance trust fund created pursuant to collective bargaining agreement between city and employee union).

A community college direct-support organization, as defined in s. 1004.70, F.S., is subject to the Sunshine Law. AGO 05-27. *See also*, AGO 92-53 (John and Mable Ringling Museum of Art Foundation, Inc., established pursuant to statute as a not-for-profit corporation to assist the museum in carrying out its functions by raising funds for the museum, subject to Sunshine Law); and Inf. Op. to Chiumento, June 27, 1990 (direct-support organization, created pursuant to statute for the purpose of assisting a district school board in carrying out the educational needs of its students, governed by Sunshine Law).

b. Private entities providing services to public agencies

Much of the litigation regarding the application of the open government laws to private organizations providing services to public agencies has been in the area of public records. *E.g.*, *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992). The courts, however, have looked to Ch. 119, F.S., in determining the applicability of the Sunshine Law. *See*, *Cape Coral Medical Center, Inc. v. News-Press Publishing Company, Inc.*, 390 So. 2d 1216, 1218 n.5 (Fla. 2d DCA 1980) (inasmuch as the policies behind Ch. 119, F.S., and s. 286.011, F.S., are similar, they should be read together); *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983); and *Krause v. Reno*, 366 So. 2d 1244, 1252 (Fla. 3d DCA 1979).

Accordingly, as the courts have emphasized in analyzing the application of Ch. 119, F.S., to entities doing business with governmental agencies, the mere receipt of public funds by private corporations, is not, standing alone, sufficient to bring

the organization within the ambit of the open government requirements. *See, News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc., supra* (records of private architectural firm not subject to Ch. 119, F.S., merely because firm contracted with school board); and *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997) (contract between Salvation Army and county to provide services does not in and of itself subject the organization to the Public Records Act). *Cf.*, *Campus Communications, Inc. v. Shands Teaching Hospital and Clinics, Inc.*, 512 So. 2d 999 (Fla. 1st DCA 1987), *review denied*, 531 So. 2d 1352 (Fla. 1988).

Thus, a private corporation which performs services for a public agency and receives compensation for such services pursuant to a contract or otherwise, is not by virtue of this relationship alone subject to the Sunshine Law unless the public agency's governmental or legislative functions have been delegated to it. *McCoy Restaurants, Inc. v. City of Orlando*, 392 So. 2d 252 (Fla. 1980) (airlines are not by virtue of their lease with the aviation authority public representatives subject to the Sunshine Law); AGO 98-47 (Sunshine Law does not apply to private nongovernmental organization when the organization counsels and advises private business concerns on their participation in a federal loan program made available through a city); and AGO 80-45 (the receipt of Medicare, Medicaid, government grants and loans, or similar funds by a private nonprofit hospital does not, standing alone, subject the hospital to the Sunshine Law).

However, although private organizations generally are not subject to the Sunshine Law, open meetings requirements can apply if the public entity has delegated "the performance of its public purpose" to the private entity. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation,* 729 So. 2d 373, 382-383 (Fla. 1999). *And see*, *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 927 So. 2d 961 (Fla. 5th DCA 2006), in which the Fifth District applied the "totality of factors" test set forth in *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., supra*, and determined that a private corporation that purchased a hospital it had previously leased from a public hospital authority was not "acting on behalf of" a public agency and therefore was not subject to the Public Records Act or the Sunshine Law.

Thus, in AGO 00-03, the Attorney General's Office found that meetings of the board of directors of the Family Services Coalition, Inc., an entity performing services for the Department of Children and Family Services pursuant to statute, which services would normally be performed by the department, were subject to the Sunshine Law. *And see*, AGO 04-32 (Sunshine Law applies to meetings of boards of directors of volunteer fire

departments that provide firefighting services to the county and use facilities and equipment acquired with county funds). *Cf.*, AGO 96-43 (Astronauts Memorial Foundation, a nonprofit corporation, is subject to the Government in the Sunshine Law when performing those duties funded under the General Appropriations Act); and Inf. Op. to Bedell, December 28, 2005 (private nonprofit organization which entered into an agreement with a city to operate a theater, received city funding in the form of a loan for this purpose, and leased property from the city, should comply with the Sunshine Law when holding discussions or making decisions regarding the theater).

Additionally, the Attorney General's Office concluded that if a county commission dissolves its cultural affairs council and designates a nonprofit organization to fulfill that role for the county, the nonprofit organization would be subject to the Sunshine Law. AGO 98-49. As noted in the opinion, the nonprofit organization would be providing services in place of the county council and would receive the public funding formerly provided to the council to carry out that purpose. *Id*. *And see*, AGO 02-53 (Martin County Golf and Country Club, a not-for-profit corporation which was specifically created to contract with the county for the operation of a public golf course on county property acquired by public funds, is subject to open records and open meetings requirements); AGO 85-55 (even though a downtown redevelopment task force was not appointed by the city commission, the task force's actions in analyzing methods for downtown improvement would be subject to the Sunshine Law because it, in effect, stood in place of the city commission when considering downtown improvement issues); AGO 83-95 (nongovernmental advisory committee, which had been impliedly delegated the authority to act on behalf of the county commission in a review of the zoning code, is subject to the Sunshine Law); and AGO 77-43 (a committee selected by a county bar association on behalf of the school board to screen applicants and make recommendations for the position of school board attorney must comply with s. 286.011, F.S.).

On the other hand, meetings of a county volunteer firefighters association for the purpose of providing a forum for county volunteer fire departments to meet and discuss common county firefighting concerns and issues are not subject to the Sunshine Law. AGO 04-32. *Cf*., AGO 00-08 (meetings of the Lee County Fire Commissioner's Forum, a nonprofit entity created by fire districts as a vehicle for networking and discussion of common concerns, would be subject to the Sunshine Law if the Forum operates as a collegial body for incipient decision making); and Inf. Op. to Wiles, February 14, 2002 (if the State University Presidents Association operates as a collegial body for incipient decision-making, then the association would be

subject to the Sunshine Law; if the association, however, merely provides an opportunity to network and discuss common concerns, the association would not necessarily be subject to the Sunshine Law).

c. Homeowners' associations

The Sunshine Law does not generally apply to meetings of a homeowners' association board of directors. Inf. Op. to Fasano, June 7, 1996. Other statutes govern access to records and meetings of these associations. *See, e.g.*, s. 720.303(2), F.S. (homeowners' association board of directors); s. 718.112(2)(c), F.S. (condominium board of administration); s. 719.106(1)(c), F.S. (cooperative board of administration); and s. 723.078(2)(c), F.S. (mobile home park homeowners' association board of directors). *Cf.*, AGO 99-53 (an architectural review committee of a homeowners' association is subject to the Sunshine Law where that committee, pursuant to county ordinance, must review and approve applications for county building permits).

4. Are federal agencies subject to the Sunshine Law?

Federal agencies, *i.e.*, agencies created under federal law, operating within the state, do not come within the purview of the state Sunshine Law. AGO 71-191. *See also, Cincinnati Gas and Electric Company v. General Electric Company,* 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1171 (1989) (public has no right of access to negotiations leading to settlement of a case in federal court).

Thus, meetings of a federally-created private industry council are not subject to s. 286.011, F.S. AGO 84-16. *Cf.*, Inf. Op. to Knox, January 6, 2005 (St. Johns River Alliance, Inc., a non-profit corporation formed to help carry out the federal American Heritage Rivers Initiative and the associated intergovernmental Partnership Agreement among state, local and federal governmental entities, is subject to s. 286.011, F.S., requirements); Inf. Op. to Green, December 11, 1998 (tri-state river commission established pursuant to *state and* federal law is subject to the Sunshine Law); and Inf. Op. to Markham, September 10, 1996 (technical oversight committee established by *state* agencies as part of settlement agreement in federal lawsuit subject to Sunshine Law).

5. Does the Sunshine Law apply to the Governor and Cabinet?

The courts have limited the application of s. 286.011, F.S., to those functions of the Governor and Cabinet which are statutory responsibilities as opposed to duties arising under the

Constitution. Thus, the Governor and Cabinet in dispensing pardons and the other forms of clemency authorized by Art. IV, s. 8(a), Fla. Const., are not subject to s. 286.011, F.S. *Cf.*, *In re Advisory Opinion of the Governor*, 334 So. 2d 561 (Fla. 1976) (Constitution sufficiently prescribes rules for the manner of exercise of gubernatorial clemency power; legislative intervention is, therefore, unwarranted).

Section 286.011, F.S., however, does apply to the Governor and Cabinet sitting in their capacity as a board created by the Legislature, such as the Board of Trustees of the Internal Improvement Trust Fund. In such cases, the Governor and Cabinet are not exercising powers derived from the Constitution but are subject to the "dominion and control" of the Legislature.

Moreover, Art. I, s. 24, Fla. Const., requires that meetings of "any collegial public body of the executive branch of state government" be open and noticed to the public. The only exceptions to this constitutional right of access are those meetings which have been exempted by the Legislature pursuant to Art. I, s. 24, Fla. Const., or which are specifically closed by the Constitution. *And see*, Art. III, s. 4(e), Fla. Const., providing, in relevant part, that "all prearranged gatherings, between . . . the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public."

6. Does the Sunshine Law apply to commissions created by the Constitution?

The courts have determined that boards or commissions created by the Constitution which prescribes the manner of the exercise of their constitutional powers are not subject to s. 286.011, F.S., when carrying out such constitutionally prescribed duties. *See*, *Kanner v. Frumkes*, 353 So. 2d 196 (Fla. 3d DCA 1977) (judicial nominating commissions are not subject to s. 286.011, F.S.). *Cf., In re Advisory Opinion of the Governor*, 334 So. 2d 561 (Fla. 1976) (clemency power does not exist by virtue of legislative enactment; rather Constitution sufficiently prescribes rules for the manner of exercise of the power); and AGO 77-65 (Ch. 120, F.S., inapplicable to Constitution Revision Commission established by Art. XI, s. 2, Fla. Const.). *Compare*, *Turner v. Wainwright*, 379 So. 2d 148 (Fla. 1st DCA), *affirmed and remanded*, 389 So. 2d 1181 (Fla. 1980), holding that the Parole Commission, which Art. IV, s. 8(c), Fla. Const., recognizes may be created by *law*, is subject to s. 286.011, F.S.

However, Art. I, s. 24, Fla. Const., establishes a constitutional right of access to meetings of any collegial public body of the executive branch of state government by providing that such meetings must be open and noticed to the public unless exempted by the Legislature pursuant to Art. I, s. 24, Fla. Const., or specifically closed by the Constitution.

7. Does the Sunshine Law apply to the Legislature?

Article I, s. 24, Fla. Const., requires that meetings of the Legislature be open and noticed as provided in Art. III, s. 4(e), Fla. Const., except with respect to those meetings exempted by the Legislature pursuant to Art. I, s. 24, Fla. Const., or specifically closed by the Constitution.

Pursuant to Art. III, s. 4(e), Fla. Const., the rules of procedure of each house of the Legislature must provide that all legislative committee and subcommittee meetings of each house and joint conference committee meetings be open and noticed. Such rules must also provide:

> [A]ll prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public. All open meetings shall be subject to order and decorum. This section shall be implemented and defined by the rules of each house, and such rules shall control admission to the floor of each legislative chamber and may, where reasonably necessary for security purposes or to protect a witness appearing before a committee, provide for the closure of committee meetings. Each house shall be the sole judge for the interpretation, implementation, and enforcement of this section.

The votes of members during the final passage of legislation pending before a committee and, upon request of two members of a committee or subcommittee, on any other question, must be recorded. Article III, s. 4(c), Fla. Const.

8. Does the Sunshine Law apply to the judiciary?

The open meetings provision found in Art. I, s. 24, Fla. Const., does not include meetings of the judiciary. In addition, separation of powers principles make it unlikely that the

Sunshine Law, a legislative enactment, could apply to the courts established pursuant to Art. V, Fla. Const. AGO 83-97. Thus, questions of access to judicial proceedings usually arise under other constitutional guarantees relating to open and public judicial proceedings, Amend. VI, U.S. Const., and freedom of the press, Amend. I, U.S. Const. However, a circuit conflict committee established by the *Legislature* to approve attorneys handling conflict cases is subject to the Sunshine Law, even though the chief judge or his or her designee is a member, because the "circuit conflict committees are created by the Legislature, subject to its dominion and control." AGO 83-97. *And see, Canney v. Board of Public Instruction of Alachua County,* 278 So. 2d 260 (Fla. 1973) (Sunshine Law applies to quasi-judicial functions; a board exercising quasi-judicial functions is not a part of the judicial branch of government).

a. Criminal proceedings

A court possesses the inherent power to control the conduct of proceedings before it. *Miami Herald Publishing Company v. Lewis*, 426 So. 2d 1 (Fla. 1982); and *State ex rel. Miami Herald Publishing Company v. McIntosh*, 340 So. 2d 904 (Fla. 1977). A three-pronged test for criminal proceedings has been developed to provide "the best balance between the need for open government and public access, through the media, to the judicial process, and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury." *Lewis*, *supra* at 7. Closure in criminal proceedings is acceptable only when:

1) it is necessary to prevent a serious and imminent threat to the administration of justice;
2) no alternatives are available, other than change of venue, which would protect the defendant's right to a fair trial; and
3) closure would be effective in protecting the defendant's rights without being broader than necessary to accomplish that purpose.

And see, *Bundy v. State*, 455 So. 2d 330, 339 (Fla. 1984), noting that the trial court properly used a combination of alternative remedies for possible prejudicial effects of pretrial publicity instead of barring public access to pretrial proceedings.

Article I, s. 16(b), Fla. Const., provides that victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused. *See*, *Sireci v.*

State, 587 So. 2d 450 (Fla. 1991), *cert. denied*, 112 S.Ct. 1500 (1992) (court did not err by allowing the wife and son of the victim to remain in the courtroom after their testimony). *See also,* s. 960.001(1)(e), F.S., restricting exclusion of victims, their lawful representatives, or their next of kin.

b. Civil proceedings

Stressing that *all* trials, civil and criminal, are public events and that there is a strong presumption of public access to these proceedings, the Supreme Court in *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988), set forth the following factors which must be considered by a court in determining a request for closure of civil proceedings:

1) a strong presumption of openness exists for all court proceedings;
2) both the public and news media have standing to challenge any closure order with the burden of proof being on the party seeking closure;
3) closure should occur only when necessary
    a) to comply with established public policy as set forth in the Constitution, statutes, rules or case law;
    b) to protect trade secrets;
    c) to protect a compelling governmental interest;
    d) to obtain evidence to properly determine legal issues in a case;
    e) to avoid substantial injury to innocent third parties; or
    f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.
4) whether a reasonable alternative is available to accomplish the desired result and if none exists, the least restrictive closure necessary to accomplish its purpose is used;
5) the presumption of openness continues through the appellate review process and the party seeking closure continues to have the burden to justify closure.

In a more recent decision, the Court reiterated its support for the *Barron* standards and explained that "public access to court proceedings and records [is] important to assure testimonial trustworthiness; in providing a wholesome effect on all officers of the court for purposes of moving those officers

to a strict conscientiousness in the performance of duty; in allowing nonparties the opportunity of learning whether they are affected; and in instilling a strong confidence in judicial remedies, which would be absent under a system of secrecy." *Amendments to the Florida Family Law Rules of Procedure*, 723 So. 2d 208, 209 (Fla. 1998).

c. Depositions

While the courts have recognized that court proceedings are public events and the public generally has access to such proceedings, the general public and the press do not have a right under the First Amendment or the rules of procedure to attend discovery depositions. *See*, *Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378, 380 (Fla. 1987), *cert. denied*, 108 S.Ct. 346 (1987), stating that while discovery depositions in criminal cases are judicially compelled for the purpose of allowing parties to investigate and prepare, they are not judicial proceedings. *Accord*, *Post-Newsweek Stations, Florida, Inc. v. State*, 510 So. 2d 896 (Fla. 1987) (media not entitled to notice and opportunity to attend pretrial discovery depositions in criminal cases); and *SCI Funeral Services of Florida, Inc. v. Light,* 811 So. 2d 796 (Fla. 4th DCA 2002) (upholding protective order closing depositions to the media based on privacy concerns).

d. Florida Bar grievance proceedings

An attorney's claim that the Florida Bar violated the Sunshine Law by refusing to allow him to attend a grievance committee meeting of the Bar was rejected in *Florida Bar v. Committe,* 916 So. 2d 741 (Fla. 2005). The Court stated: "The grievance committee meetings of the Bar are private, and therefore the Bar is justified in prohibiting [the attorney] from attendance." *Id*. at 744-745. In *Committe*, the Court reviewed prior case law involving the application of the open government laws to the Bar, and reiterated its holding in *The Florida Bar: in re Advisory Opinion,* 398 So. 2d 446, 447 (Fla. 1981), that "[n]either the legislature nor the governor can control what is purely a judicial function."

e. Grand juries

Section 905.24, F.S., provides that "[g]rand jury proceedings are secret," thus, these proceedings are not subject to s. 286.011, F.S. *See*, *Clein v. State*, 52 So. 2d 117, 120 (Fla. 1951) (it is the policy of the law to shield the proceedings of grand juries from public scrutiny); *In re Getty*, 427 So. 2d 380, 383 (Fla. 4th DCA 1983) (public disclosure of grand jury

proceedings "could result in a myriad of harmful effects"); and AGO 73-177, stating that it is the public policy of the state to keep secret the proceedings of the grand jury. The grand jury has also been referred to as a "coordinate branch of the judiciary, and as an arm, appendage, or adjunct of the circuit court." *State ex rel. Christian v. Rudd*, 302 So. 2d 821, 828 (Fla. 1st DCA 1974). *Cf.*, *Butterworth v. Smith*, 110 S.Ct. 1376 (1990), striking down a Florida statute to the extent that it prohibited a witness from disclosing his own testimony before a grand jury after the grand jury's term has ended.

In addition, hearings on certain grand jury procedural motions are closed. The procedural steps contemplated in s. 905.28(1), F.S., for reports or presentments of the grand jury relating to an individual which are *not* accompanied by a true bill or indictment, are cloaked with the same degree of secrecy as is enjoyed by the grand jury in the receipt of evidence, its deliberations, and final product. Therefore, a newspaper has no right of access to grand jury procedural motions and to the related hearing. *In re Grand Jury, Fall Term 1986*, 528 So. 2d 51 (Fla. 2d DCA 1988). *And see*, *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559 (11th Cir. 1989), stating that while a court must hold a hearing and give reasons for closure of criminal court proceedings, a court is not required to give newspapers a hearing and give reasons for closure of grand jury proceedings.

f. Judicial nominating commissions/Judicial Qualifications Commission

Judicial nominating commissions for the Supreme Court of Florida, the district courts of appeal, or for a judicial circuit for the trial courts within the circuit are not subject to the Sunshine Law. *Kanner v. Frumkes*, 353 So. 2d 196 (Fla. 3d DCA 1977). The Florida Constitution, however, requires that except for its deliberations, the proceedings of a judicial nominating commission and its records are open to the public. Article V, s. 11(d), Fla. Const. While the deliberations of a commission are closed, such a limitation would appear to be applicable to that point in the proceedings when the commissioners are weighing and examining the reasons for and against a choice. Inf. Op. to Russell, August 2, 1991.

The statewide judicial nominating commission for workers' compensation judges, however, is not a judicial nominating commission as contemplated by the Constitution. Thus, the statewide judicial nominating commission created pursuant to the workers' compensation law is subject to s. 286.011, F.S. AGO 90-76.

Proceedings of the Judicial Qualifications Commission are confidential. However, upon a finding of probable cause and the filing of formal charges against a judge or justice by the commission with the Clerk of the Supreme Court, all further proceedings of the commission are public. Article V, s. 12(a)(4), Fla. Const.

g. Mediation proceedings

Court-ordered mediation and arbitration are to be conducted according to the rules of practice and procedure adopted by the Florida Supreme Court. Sections 44.102(1) and 44.103(1), F.S. Florida Rule of Civil Procedure 1.720(e) provides that the mediator may meet and consult privately with any party or parties or their counsel.

Public access to mediation proceedings involving governmental agencies was raised in *News-Press Publishing Company, Inc. v. Lee County, Florida,* 570 So. 2d 1325 (Fla. 2d DCA 1990). The case involved litigation between two cities and a county. As the litigation progressed, the trial judge ordered the parties to participate in mediation. In its initial order appointing a mediator, the judge required the parties to have present a representative "with full authority to bind them." After the news media protested the closure of the mediation proceeding to the public, the judge entered an amended order that limited the authority of the representatives so that no final settlement negotiations, decisions, or actual settlement could be made during the mediation conference.

The news media appealed the amended order, but the district court noted that no two members of any of the public boards would be present at the mediation proceedings. And, the narrow scope of the mediation proceedings in the case did not give rise to a substantial delegation affecting the decision-making function of the boards so as to require that the mediation proceeding be open to the public. 570 So. 2d at 1327. *See also, O'Connell v. Board of Trustees*, 1 F.L.W. Supp. 285 (Fla. 7th Cir. Ct. Feb. 9, 1993) (as to public agencies, mediation is subject to the Sunshine Law; thus, no more than one member of a collegial body should attend the mediation conference). *And see*, Fla. R. Civ. P. 1.720(b), stating that "[i]f a party to mediation is a public entity required to conduct its business pursuant to chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity." *Cf.*, AGO 06-03 (closed attorney-client session may not be held to discuss settlement negotiations on an issue that is the subject of ongoing mediation pursuant to a partnership

agreement between a water management district and others); and Inf. Op. to McQuagge, February 13, 2002 (mediation meetings conducted pursuant to the Florida Governmental Conflict Resolution Act, ss. 164.101-164.1061, F.S., which involve officials or representatives of local governmental entities who have the authority to negotiate on behalf of that governmental entity are subject to the Sunshine Law).

9. Does the Sunshine Law apply to staff?

Meetings of staff of boards or commissions covered by the Sunshine Law are not ordinarily subject to s. 286.011, F.S. *Occidental Chemical Company v. Mayo*, 351 So. 2d 336 (Fla. 1977), *disapproved in part on other grounds*, *Citizens v. Beard*, 613 So. 2d 403 (Fla. 1992). *See also*, *School Board of Duval County v. Florida Publishing Company,* 670 So. 2d 99, 101 (Fla. 1st DCA 1996) (staff personnel not subject to the Sunshine Law); and AGO 89-39 (aides of county commissioners are not subject to the Sunshine Law unless they have been delegated decision-making functions outside of the ambit of normal staff functions, are acting as liaisons between board members, or are acting in place of the board members at their direction).

However, when a staff member ceases to function in a staff capacity and is appointed to a committee which is given "a policy-based decision-making function," the staff member loses his or her identity as staff while working on the committee and the Sunshine Law applies to the committee. *See, Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983). In *Wood*, the Florida Supreme Court concluded that the Sunshine Law applied to a faculty committee charged with seeking applicants for a position to be appointed by the university president. By screening applicants and deciding which of the applicants to reject from further consideration, the committee performed a policy-based decision-making function delegated to it by the president of the university. *Id.* Even though the faculty as a whole had the authority to review and reject the decisions of the committee, this factor "did not render the committee's function any less policy-based or decision-making." *Id.* at 938-939.

Accordingly, it is the nature of the act performed, not the makeup of the committee or the proximity of the act to the final decision, which determines whether a committee composed of staff is subject to the Sunshine Law. *Wood v. Marston, supra*. *See, News-Press Publishing Company, Inc. v. Carlson*, 410 So. 2d 546, 548 (Fla. 2d DCA 1982), concluding that it would be "ludicrous" to hold that "a certain committee is governed by the Sunshine Law when it consists of members of the public, who are presumably acting for the public, but hold a committee may escape the Sunshine Law if it consists of individuals who owe their

allegiance to, and receive their salaries from, the governing authority."

Thus, in *Silver Express Company v. District Board of Lower Tribunal Trustees,* 691 So. 2d 1099 (Fla. 3d DCA 1997), the district court determined that a committee (composed of staff and one outside person) that was created by a college purchasing director to assist and advise her in evaluating contract proposals was subject to the Sunshine Law.

According to the court, the committee's job was to "weed through the various proposals, to determine which were acceptable and to rank them accordingly." This function was sufficient to bring the committee within the scope of the Sunshine Law because "[g]overnmental advisory committees which have offered up structured recommendations such as here involved--at least those recommendations which eliminate opportunities for alternative choices by the final authority, or which rank applications for the final authority--have been determined to be agencies governed by the Sunshine Law." 691 So. 2d at 1101. *See also,* AGO 05-06 (city development review committee composed of several city officials and representatives of various city departments to review and approve development applications, is subject to the Sunshine Law); and AGO 86-51 (land selection committee appointed by water management district to evaluate and recommend projects for acquisition must comply with Sunshine Law "even though such committee may be composed entirely of district staff and its decisions and recommendations are subject to further action by the district's governing board").

Similarly, in *Dascott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004), the court held that a meeting of a pre-termination conference panel established pursuant to a county ordinance and composed of a department head, personnel director and equal opportunity director should have been held in the Sunshine. Even though the county administrator had the sole authority to discipline employees, that authority had been delegated to the department head who in turn chose to share that authority with the other members of the panel. "Because it is undisputed that the staff gave advice on the ultimate decision to terminate" an employee during a closed-door session held following the pre-termination hearing, the closing of the deliberations violated the Sunshine Law. *Id.* at 14. *Compare, Jordan v. Jenne*, 31 F.L.W. D1975 (Fla. 4th DCA July 26, 2006), in which a divided Fourth District Court of Appeal held that the Sunshine Law did not apply to a professional standards committee (PSC) responsible for reviewing charges against a sheriff's deputy and making recommendations to the inspector general as to whether the charges should be sustained, dismissed, or whether the case should be deferred for more information. The majority

distinguished *Dascott* because the inspector general made the "ultimate decision" on discipline and did not deliberate with the PSC. *Id.* at D1976.

On the other hand, a committee composed of staff which is merely responsible for informing the decision-maker through fact-finding consultations is not subject to the Sunshine Law. *Bennett v. Warden,* 333 So. 2d 97 (Fla. 2d DCA 1976) (fact-finding committee appointed by community college president to report to him on employee working conditions not subject to Sunshine Law). *And see, Knox v. District School Board of Brevard*, 821 So. 2d 311, 315 (Fla. 5th DCA 2002) ("A Sunshine violation does not occur when a governmental executive uses staff for a fact-finding and advisory function in fulfilling his or her duties.").

Thus, in *Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000), the appellate court ruled that the Sunshine Law did not apply to informal meetings of staff where the discussions were "merely informational," where none of the individuals attending the meetings had any decision-making authority during the meetings, and where no formal action was taken or could have been taken at the meetings.

Similarly, a state agency did not violate the Sunshine Law when agency employees conducted an investigation into a licensee's alleged failure to follow state law, and an assistant director made the decision to file a complaint. *Baker v. Florida Department of Agriculture and Consumer Services*, 31 F.L.W. D2271 (Fla. 4th DCA September 1, 2006). "Communication among administrative staff in fulfilling investigatory, advisory, or charging functions does not constitute a 'Sunshine' Law violation. *Id.* *And see, Molina v. City of Miami,* 837 So. 2d 462, 463 (Fla. 3d DCA 2002) (police department discharge of firearms committee, composed of three deputy chiefs, is not subject to the Sunshine Law because the committee "is nothing more than a meeting of staff members who serve in a fact-finding advisory capacity to the chief"); and *J.I. v. Department of Children and Families,* 922 So. 2d 405 (Fla. 4th DCA 2006) (Sunshine Law does not apply to Department of Children and Families permanency staffing meetings conducted to determine whether to file a petition to terminate parental rights). *Compare*, *Evergreen the Tree Treasurers of Charlotte County, Inc. v. Charlotte County Board of County Commissioners,* 810 So. 2d 526, 531-532 (Fla. 2d DCA 2002) (when public officials delegate their fact-finding duties and decision-making authority to a committee of staff members, those individuals no longer function as staff members but "stand in the shoes of such public officials" insofar as the Sunshine Law is concerned).

10. Does the Sunshine Law apply to members of public boards who also serve as administrative officers or employees?

In some cases, members of public boards also serve as administrative officers or employees. The Sunshine Law is not applicable to discussions of those individuals when serving as administrative officers or employees, provided such discussions do not relate to matters which will come before the public board on which they serve. Thus, a board member who also serves as an employee of an agency may meet with another board member on issues relating to his or her duties as an employee *provided* such discussions do not relate to matters that will come before the board for consideration or action. *See*, AGO 92-79 (when two or more members of a public board are participating in other meetings or functions unconnected with the board, they must refrain from discussing matters on which foreseeable action may be taken by the board but are not otherwise restricted in their actions).

For example, the Sunshine Law would not apply to meetings between the mayor and city commissioners where a mayor performs the duties of city manager and the city commissioners individually serve as the head of a city department when the meeting is held solely by these officers in their capacity as department heads for the purpose of coordinating administrative and operational matters between executive departments of city government for which no formal action by the governing body is required or contemplated. Those matters which normally come before, or should come before, the city commission for discussion or action must not, however, be discussed at such meetings. AGO 81-88. *Accord*, AGOs 83-70 and 75-210 (mayor may discuss matters with individual city council member which concern his administrative functions and would not come before the council for consideration and further action).

Similarly, a conversation between a state attorney and sheriff about a specific criminal investigation involving an assault related to a youth gang would not violate the Sunshine Law even though both officials are members of a county criminal justice commission and the commission is studying and making recommendations on the problem of youth gangs in the community. AGO 93-41. Discussions between the sheriff and the state attorney of matters which may foreseeably come before or are currently being considered by the criminal justice commission, would be subject to the Sunshine Law. However, to the extent that these discussions relate to an ongoing criminal case or investigation or relate to factual inquiries or matters upon which the commission is not required to act, these discussions would not fall within s. 286.011, F.S. *Id.*

The Attorney General's Office has also issued informal opinions regarding the application of the Sunshine Law to members of school advisory councils created pursuant to former s. 229.58 [now s. 1001.452], F.S., who also serve as faculty members, school administrative officials or who are parents. For example, the Sunshine Law would not ordinarily apply to a meeting of school faculty simply because two or more members of the school advisory council who are also faculty members attend the faculty meeting, as long as the council members refrain from discussing matters that may come before the council for consideration. Inf. Op. to Hughes, February 17, 1995; and Inf. Op. to Boyd, March 14, 1994.

C. WHAT IS A MEETING SUBJECT TO THE SUNSHINE LAW?

1. Number of board members required to be present

The Sunshine Law extends to the discussions and deliberations as well as the formal action taken by a public board or commission. There is no requirement that a quorum be present for a meeting of members of a public board or commission to be subject to s. 286.011, F.S. Instead, the law is applicable 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 or commission. *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973). *And see*, *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969); and *Wolfson v. State*, 344 So. 2d 611 (Fla. 2d DCA 1977). Thus, discussions between two members of a three-member complaint review board regarding their selection of the third member of the board must be conducted in accordance with the Sunshine Law. AGO 93-79. *Cf*., AGO 04-58 ("coincidental unscheduled meeting of two or more county commissioners to discuss emergency issues with staff" during a declared state of emergency is not subject to s. 286.011 if the issues do not require action by the county commission).

It is the how and the why officials decided to so act which interests the public, not merely the final decision. Thus, the court recognized in *Times Publishing Company v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969), *disapproved in part on other grounds, Neu v. Miami Herald Publishing Company,* 462 So. 2d 821 (Fla. 1985):

> Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire *decision-making process*

that the legislature intended to affect by the enactment of the statute before us.

2. Circumstances in which the Sunshine Law may apply to a single individual or where two board members are not physically present

Section 286.011, F.S., applies to meetings of "two or more members" of the same board or commission when discussing some matter which will foreseeably come before the board or commission. Therefore, the statute would not ordinarily apply to an *individual* member of a public board or commission or to public officials who are not board or commission members. Inf. Op. to Dillener, January 5, 1990 (Sunshine Law not normally applicable to meeting of town council member with private citizens). *See*, *City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989); *Deerfield Beach Publishing, Inc. v. Robb*, 530 So. 2d 510 (Fla. 4th DCA 1988) (requisite to application of the Sunshine Law is a meeting between two or more public officials); and *Mitchell v. School Board of Leon County*, 335 So. 2d 354 (Fla. 1st DCA 1976). *But cf.*, *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), *review denied*, 598 So. 2d 75 (Fla. 1992), stating that *ex parte* (*i.e.*, from one side only) communications in quasi-judicial proceedings raise a presumption that the contact was prejudicial to the decision-making process; and s. 286.0115, F.S., enacted in response to the *Jennings* case, relating to access to local public officials in quasi-judicial proceedings. *Compare, City of Hollywood v. Hakanson*, 866 So. 2d 106 (Fla. 4th DCA 2004) (comments made at a public city commission meeting which related to a terminated employee who had a pending appeal did not constitute an offending *ex parte* communication simply because a civil service board member was in the audience).

Certain factual situations, however, have arisen where, in order to assure public access to the decision-making processes of public boards or commissions, it has been necessary to conclude that the presence of two individuals of the same board or commission is not necessary to trigger application of s. 286.011, F.S. As stated by the Supreme Court, the Sunshine Law is to be construed "so as to frustrate all evasive devices." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974). *And see, State v. Childers,* No. 02-21939-MMC; 02-21940-MMB (Escambia Co. Ct. June 5, 2003), *per curiam affirmed*, 886 So. 2d 229 (Fla. 1st DCA 2004) (county commissioner violated the Sunshine Law when he expressed his opinion on a commission issue to two other commissioners at an unannounced meeting in the office of a county administrator).

a. Written correspondence between board members

The use of a written report by one commissioner to inform other commissioners of a subject which will be discussed at a public meeting is not a violation of the Sunshine Law if prior to the meeting, there is no interaction related to the report among the commissioners. In such cases, the report, which is subject to disclosure under the Public Records Act, is not being used as a substitute for action at a public meeting as there is no response from or interaction among the commissioners prior to the meeting. AGO 89-23. *And see*, AGO 01-20 (e-mail communication of factual background information from one city council member to another is a public record and should be maintained by the records custodian for public inspection and copying; however, such communication of information, when it does not result in the exchange of council members' comments or responses on subjects requiring council action, does not constitute a meeting subject to the Sunshine Law).

If, however, the report is circulated among board members for comments with such comments being provided to other members, there is interaction among the board members which is subject to s. 286.011, F.S. AGO 90-03. *See also*, AGO 96-35, stating that a school board member may prepare and circulate an informational memorandum or position paper to other board members; however, the use of a memorandum to solicit comments from other board members or the circulation of responsive memoranda by other board members would violate the Sunshine Law.

Thus, if a memorandum reflecting the views of a board member on a pending board issue is circulated among the board members with each indicating his or her approval or disapproval and, upon completion of the signatures, the memorandum has the effect of becoming the official action of the board, there is a violation of the Sunshine Law. Inf. Op. to Blair, June 29, 1973. *And see,* AGO 01-21, noting that a process whereby city council members distribute their own position papers to other council members is "problematical" and would violate the Sunshine Law to the extent that any such communication is a response to another council member's statement. Thus, the city council's discussions and deliberations on matters coming before the council must occur at a duly noticed city council meeting and the circulation of position statements must not be used to circumvent the requirements of the statute. *Id.*

Similarly, a board that is responsible for assessing the performance of its chief executive officer (CEO) should conduct the review and appraisal process in a proceeding open to the public as prescribed by s. 286.011, F.S., instead of using a review procedure in which individual board members evaluate the

CEO's performance and send their individual written comments to the board chairman for compilation and subsequent discussion with the CEO. AGO 93-90.

b. Meetings conducted over the telephone or using electronic media technology

(1) Discussions conducted via telephones, computers, or other electronic means are not exempted from the Sunshine Law

As discussed in this manual, the Sunshine Law applies to the deliberations and discussions between two or more members of a board or commission on some matter which foreseeably will come before that board or commission for action. The use of a telephone to conduct such discussions does not remove the conversation from the requirements of s. 286.011, F.S. *See, State v. Childers,* No. 02-21939-MMC; 02-21940-MMB (Escambia Co. Ct. June 5, 2003), *per curiam affirmed*, 886 So. 2d 229 (Fla. 1st DCA 2004) (telephone conversation during which two county commissioners and the supervisor of elections discussed redistricting violated the Sunshine Law).

Similarly, members of a public board may not use computers to conduct private discussions among themselves about board business. AGO 89-39. *Cf*., Inf. Op. to Galaydick, October 19, 1995, advising that school board members may share a laptop computer even though the hard drive of the computer contains information reflecting the ideas of an individual member as long as the computer is not being used as a means of communication between members; and AGO 01-20 (a *one-way* e-mail communication from one city council member to another, when it does not result in the exchange of council members' comments or responses on subjects requiring council action, does not constitute a meeting subject to the Sunshine Law; however, such e-mail communications are public records and must be maintained by the records custodian for public inspection and copying).

(2) Authority of boards to conduct *public* meetings via electronic media technology (e.g., telephone or video conferencing)

(a) State boards

In AGO 98-28, the Attorney General's Office concluded that s. 120.54(5)(b)2., F.S., authorizes *state* agencies to conduct public meetings via electronic means provided that the board complies with uniform rules of procedure adopted by the state Administration Commission. These rules contain notice requirements and procedures for providing points of access for the public. *See*, Rule 28-109, F.A.C. *Cf*., s. 456.011(3), F.S.

(licensing boards within the Department of Health must conduct meetings through teleconferencing or other technological means, except for certain disciplinary hearings or "controversial" rule hearings or unless otherwise approved in advance by the director of the Division of Medical Quality Assurance).

(b) Local boards

As to *local* boards, the Attorney General's Office has noted that the authorization in s. 120.54(5)(b)2., to conduct workshop and official meetings entirely through the use of communications media technology applies only to state agencies. AGO 98-28. Thus, since s. 1001.372(2)(b), F.S., requires a district school board to hold its meetings at a "public place in the county," a quorum of the board must be physically present at the meeting of the school board. *Id. But see,* Ch. 06-350, Laws of Florida, authorizing the Monroe County Commission to use teleconferencing equipment to qualify for a quorum for a special meeting.

If a quorum of a local board is physically present, "the participation of an absent member by telephone conference or other interactive electronic technology is permissible when such absence is due to extraordinary circumstances such as illness[;] . . . [w]hether the absence of a member due to a scheduling conflict constitutes such a circumstance is a determination that must be made in the good judgement of the board." AGO 03-41. *See also*, AGO 94-55 (when a quorum of the board is physically present at the public meeting site in Florida, a museum board may allow an out-of-state member with health problems to participate and vote in board meetings by telephone; compliance with the requirements of s. 286.011, F.S., "would involve providing notice and access to the public at such meetings through the use of such devices as a speaker telephone that would allow the absent member to participate in discussions, to be heard by the other board members and the public and to hear discussions taking place during the meeting.").

Similarly, in AGO 92-44, a county commission was advised that the Sunshine Law would permit an ill county commissioner to participate and vote in commission meetings through use of an interactive video and telephone system that permitted her to see and hear the other members of the board and audience, provided that a legal quorum of the commission meet in a public place in the county, as required by statute. *See also*, AGO 02-82 (physically-disabled members of a city advisory committee may participate and vote by electronic means as long as a quorum of the committee members is physically present at the meeting site).

The physical presence of a quorum has not been required, however, where electronic media technology (such as video

conferencing and digital audio) is used to allow public access and participation at *workshop* meetings where no formal action will be taken. Thus, in AGO 06-20, the Attorney General's Office concluded that an advisory board composed of representatives from several county metropolitan planning organizations may use electronic media technology to link simultaneously held public meetings of citizens' advisory committees in each of its participating counties, so as to allow all members of the committees and the public to hear and participate at workshops. The use of electronic media technology, however, does not satisfy quorum requirements necessary for official action to be taken. *Id.*

Similarly, airport authority members may conduct informal discussions and workshops over the Internet, provided proper notice is given, and interactive access by members of the public is provided. AGO 01-66. Such interactive access must include not only public access via the Internet but also designated places within the authority boundaries where the airport authority makes computers with Internet access available to members of the public who may not otherwise have Internet access. *Id*. For meetings, however, where a quorum is necessary for action to be taken, physical presence of the members making up the quorum would be required in the absence of a statute providing otherwise. *Id.* Internet access to such meetings, however, may still be offered to provide greater public access. *Id.*

However, the use of an electronic bulletin board to discuss matters over an extended period of days or weeks, which does not permit the public to participate online, violates the Sunshine Law by circumventing the notice and access provisions of that law. AGO 02-32. *Accord,* Inf. Op. to Ciocchetti, March 23, 2006 (even though the public would be able to participate online, a town commission's proposed use of an electronic bulletin board to discuss matters that may foreseeably come before the commission over an extended period of time would not comply with the spirit or letter of the Sunshine Law because the burden would be on the public to constantly monitor the site in order to participate meaningfully in the discussion).

c. Delegation of authority

"The Sunshine Law does not provide for any 'government by delegation' exception; a public body cannot escape the application of the Sunshine Law by undertaking to delegate the conduct of public business through an alter ego." *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353, 359 (Fla. 4th DCA 1973), *certified question answered sub nom., Town of Palm*

Beach v. Gradison, 296 So. 2d 473 (Fla. 1974). *See also, News-Press Publishing Company, Inc. v. Carlson*, 410 So. 2d 546, 547-548 (Fla. 2d DCA 1982) (when public officials delegate de facto authority to act on their behalf in the formulation, preparation, and promulgation of plans on which foreseeable action will be taken by those public officials, those delegated that authority stand in the shoes of such public officials insofar as the Sunshine Law is concerned). *Cf., Leach-Wells v. City of Bradenton*, 734 So. 2d 1168, 1171 (Fla. 2d DCA 1999) (committee charged with evaluating proposals violated the Sunshine Law when the city clerk unilaterally tallied the results of the committee members' individual written evaluations and ranked them; the court held that the "short-listing was formal action that was required to be taken at a public meeting").

Thus, the Attorney General's Office has concluded that a single member of a board who has been delegated the authority to act on behalf of the board in negotiating a lease "is subject to the Sunshine Law and, therefore, cannot negotiate for such a lease in secret." AGO 74-294. A meeting between representatives of a private organization and a city commissioner appointed by the city commission to act on its behalf in considering the construction and funding of a cultural center and performing arts theater would also be subject to s. 286.011, F.S. AGO 84-54.

Similarly, when an individual member of a public board, or a board member and the executive director of the board, conducts a hearing or investigatory proceeding on behalf of the entire board, the hearing or proceeding must be held in the sunshine. AGOs 75-41 and 74-84. *Cf.*, *State, Department of Management Services v. Lewis*, 653 So. 2d 467 (Fla. 1st DCA 1995), stating that the issuance of an order of reconsideration by a board chair did not violate the Sunshine Law where the purpose of the order was to provide notice to the parties and allow them an opportunity to provide argument on the issue.

On the other hand, if a board member or designee has been authorized only to gather information or function as a fact-finder, the Sunshine Law does not apply. AGO 95-06. For example, if a member of a public board is authorized only to explore various contract proposals with the applicant selected for the position of executive director, with such proposals being related back to the governing body for consideration, the discussions between the board member and the applicant are not subject to the Sunshine Law. AGO 93-78.

If, however, the board member has been delegated the authority to reject certain options from further consideration by the entire board, the board member is performing a decision-making function that must be conducted in the sunshine. AGOs 95-

06 and 93-78. For example, in AGO 90-17, the Attorney General's Office stated that it is not a violation of the Sunshine Law for a city council member to meet with a private garbage contractor if the purpose of the meeting is essentially information gathering. But, if the board member has been authorized, formally or informally, to exercise any decision-making authority on behalf of the board, such as approving or rejecting certain contract provisions, the board member is acting on behalf of the board and the meetings are subject to s. 286.011, F.S.

Where a statute requires that the county commission approve a lease-purchase agreement, the commission's approval "must be made 'in the Sunshine.'" *Frankenmuth Mutual Insurance Company v. Magaha,* 769 So. 2d 1012, 1021 (Fla. 2000). *And see, Broward County v. Conner*, 660 So. 2d 288, 290 (Fla. 4th DCA 1995), *review denied*, 669 So. 2d 250 (Fla. 1996) (since Sunshine Law provides that actions of a public board are not valid unless they are made at an open public meeting, a county's attorneys would not be authorized to enter into a contract on the commission's behalf "without formal action by the county commission at a meeting as required by the statute"). *Compare, Lee County v. Pierpont*, 693 So. 2d 994 (Fla. 2d DCA 1997), *affirmed*, 710 So. 2d 958 (Fla. 1998) (authorization to county attorney to make settlement offers to landowners not to exceed appraised value plus 20%, rather than a specific dollar amount, did not violate the Sunshine Law).

It must be recognized, however, that the applicability of the Sunshine Law relates to the discussions of a single individual who has been delegated decision-making authority on behalf of a board or commission. If the individual, rather than the board, is vested by law, charter or ordinance with the authority to take action, such discussions are not subject to s. 286.011, F.S.

For example, in *City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989), the court held that since the mayor was responsible under the city charter for disciplining city employees and since the mayor was not a board or commission and was not acting for a board, meetings between the mayor and a city employee concerning the employee's duties were not subject to s. 286.011, F.S.

d. Use of nonmembers as liaisons between board members

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. *See*, AGO 74-47 (city manager is not a member of the city council and thus, may meet with individual council members; however, the manager may not act as a liaison for board members by circulating information and

thoughts of individual council members). *Compare*, AGO 89-39 (aides to county commissioners would not be subject to the Sunshine Law unless they have been delegated decision-making functions outside of the ambit of normal staff functions, are acting as liaisons between board members, or are acting in place of the board or its members at their direction).

For example, in *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979), the court held that a series of scheduled successive meetings between the school superintendent and individual members of the school board were subject to the Sunshine Law. While normally meetings between the school superintendent and an individual school board member would not be subject to s. 286.011, F.S., these meetings were held in "rapid-fire succession" in order to avoid a public airing of a controversial redistricting problem. They amounted to a *de facto* meeting of the school board in violation of s. 286.011, F.S.

Similarly, in *Sentinel Communications Company v. School Board of Osceola County*, No. CI92-0045 (Fla. 9th Cir. Ct. April 3, 1992), the court found that a series of private meetings between a school superintendent and individual school board members which were scheduled by the superintendent to present and consider staff recommendations concerning the administrative structure of the school system and to privately address any objections or concerns that the board might have, should have been held in the sunshine. The court said that its decision should not be construed to prohibit individual board members from meeting privately with staff or the superintendent for informational purposes or on an ad hoc basis. However, "[i]t shall be construed to prohibit the scheduling of a series of such meetings which concern a specific agenda." Thus, the court enjoined the board and its superintendent "from holding any further closed door meetings to formulate Board policy, discuss matters where Board action is contemplated, or otherwise conduct the public's business."

In *Citizens for a Better Royal Palm Beach, Inc. v. Village of Royal Palm Beach*, No. CL 91-14417 AA (Fla. 15th Cir. Ct. May 14, 1992), the court invalidated a contract for the sale of municipal property when it determined that after the proposal to sell the property which had been discussed and approved at a public meeting collapsed, the city manager met individually with council members and from those discussions the property was sold to another group. The circuit court found that these meetings resulted in a substantial change in the terms of sale and that the execution of the contract, therefore, violated the Sunshine Law.

Thus, a city manager should refrain from asking each

commissioner to state his or her position on a specific matter which will foreseeably be considered by the commission at a public meeting in order to provide the information to the members of the commission. AGO 89-23. *See also*, AGO 75-59 (the spirit, if not the letter, of the Sunshine Law requires official decisions to be made in public after a full discussion by the board members; thus, the board's director should refrain from calling each member of the board separately and asking each member to state his or her position on a matter which will foreseeably be presented for consideration to the entire board in open session). *Cf.*, AGO 81-42 (the fact that a city council member has expressed his or her views or voting intent on an upcoming matter to a news reporter prior to the scheduled public meeting does not violate the Sunshine Law so long as the reporter is not being used by the member as an intermediary in order to circumvent the requirements of s. 286.011, F.S.).

Not all decisions taken by staff, however, need to be made or approved by a board. Thus, the district court concluded in *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978), that the decision to appeal made by legal counsel to a public board after discussions between the legal staff and individual members of the board was not subject to the Sunshine Law. *Accord,* Inf. Op. to Biasco, July 2, 1997 (administrative officers or staff who serve public boards should not poll board members on issues which will foreseeably come before the board in order to avoid being used as a liaison between board members, although an administrative officer is not precluded from contacting individual board members for their views on a matter when the officer, and not the board, has been vested with the authority to take action).

D. WHAT TYPES OF DISCUSSIONS ARE COVERED BY THE SUNSHINE LAW?

1. Informal discussions, workshops

As discussed in s. C.1., *supra*, the Sunshine Law applies 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 or commission. As the Florida Supreme Court said, "collective inquiry and discussion stages" are embraced within the terms of the statute. *Town of Palm Beach v. Gradison*, 296 So. 2d 474, 477 (Fla. 1974). With these principles in mind, the Attorney General's Office has stated that the following gatherings are subject to the Sunshine Law: "executive work sessions" held by a board of commissioners of a housing authority to discuss policy matters, AGO 76-102; "conciliation conferences" of a human relations board, AGO 74-358; "workshop meetings" of a planning

and zoning commission, AGO 74-94; "conference sessions" held by a town council before its regular meetings, AGO 74-62; discussions of preaudit reports of the Auditor General by the governing body of a special district, AGO 73-08. *And see*, *Ruff v. School Board of Collier County*, 426 So. 2d 1015 (Fla. 2d DCA 1983) (organizational meeting of task force subject to s. 286.011, F.S.).

The Sunshine Law is, therefore, applicable to all functions of covered boards and commissions, whether formal or informal, which relate to the affairs and duties of the board or commission. "[T]he Sunshine Law does not provide that cases be treated differently based upon their level of public importance." *Monroe County v. Pigeon Key Historical Park, Inc*., 647 So. 2d 857, 868 (Fla. 3d DCA 1994). *And see*, Inf. Op. to Nelson, May 19, 1980 (meeting with congressman and city council members to discuss "federal budgetary matters which vitally concern their communities" should be held in the sunshine because "it appears extremely likely that discussion of public business by the council members [and perhaps decision making] will take place at the meeting").

2. Investigative meetings or meetings to consider confidential material

a. Investigative meetings

The Sunshine Law is applicable to investigative inquiries of public boards or commissions. The fact that a meeting concerns alleged violations of laws or regulations does not remove it from the scope of the law. AGO 74-84; and *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973).

A number of statutory exemptions to the Sunshine Law have been enacted to close meetings of some agencies (usually state agencies) when those agencies are making investigatory determinations. *See*, *e.g*, s. 112.324(2)(a), F.S. (Florida Commission on Ethics proceedings relating to investigation of ethics complaints confidential until the complaint is dismissed, until the alleged violator requests that the proceedings be made public, or until commission determines whether probable cause exists); and s. 455.225(4), F.S. (meetings of probable cause panels of the Department of Business and Professional Regulation confidential until 10 days after probable cause is found to exist or until confidentiality waived by subject of investigation).

For additional information regarding exemptions from s. 286.011, F.S., that relate to investigatory proceedings, please consult Appendix D and the Index.

b. Meetings to consider confidential material

The Florida Supreme Court has stated that in the absence of a statute exempting a meeting in which privileged material is discussed, s. 286.011, F.S., should be construed as containing no exceptions. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971).

The Public Records Act was amended in 1991 after several district courts held that certain proceedings could be closed when considering confidential material. *See*, *e.g.*, *The Tribune Company v. D.M.L.*, 566 So. 2d 1333 (Fla. 2d DCA 1990), *review denied,* 577 So. 2d 1330 (Fla. 1991); *Florida Society of Newspaper Editors, Inc. v. Florida Public Service Commission*, 543 So. 2d 1262 (Fla. 1st DCA), *review denied*, 551 So. 2d 461 (Fla. 1989); *Capeletti Brothers, Inc. v. Department of Transportation*, 499 So. 2d 855 (Fla. 1st DCA 1986), *review denied*, 509 So. 2d 1117 (Fla. 1987); and *Marston v. Gainesville Sun Publishing Company, Inc.*, 341 So. 2d 783 (Fla. 1st DCA 1976), *cert. denied*, 352 So. 2d 171 (Fla. 1977).

Section 119.07(8), F.S., now clearly provides that an exemption from s. 119.07, F.S., "does not imply an exemption from s. 286.011. The exemption from s. 286.011 must be expressly provided." Thus, exemptions from the Public Records Act do not by implication allow a public agency to close a meeting where exempt records are to be discussed in the absence of a specific exemption from the Sunshine Law. *See*, AGOs 04-44 (PRIDE), 95-65 (district case review committee), 93-41 (county criminal justice commission), 91-88 (pension board) and 91-75 (school board). *And see,* AGO 05-03 (confidentiality provisions of cited federal law do not authorize child abuse death review committee to close its meetings although the committee should take steps to ensure that identifying information is not disclosed at such meetings).

In AGO 96-75, the Attorney General's Office advised that because the transcript of a closed attorney-client session held pursuant to s. 286.011(8), F.S., is open to public inspection upon conclusion of the litigation, the city and its attorney should be sensitive to any discussions of confidential medical reports that are reviewed during such a meeting and "should take precautions to protect the confidentiality of an employee's medical reports and condition such that when the transcript of the closed-door meeting is made a part of the public record, the privacy of the employee will not be breached." *Cf*., AGO 96-40 (a town may not require a complainant to sign a waiver of confidentiality before accepting a whistle-blower's complaint for processing since the Legislature has provided for confidentiality

of the whistle-blower's identity).

3. Legal matters

In the absence of a legislative exemption, discussions between a public board and its attorney are subject to s. 286.011, F.S. *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (s. 90.502, F.S., which provides for the confidentiality of attorney-client communications under the Florida Evidence Code, does not create an exemption for attorney-client communications at public meetings; application of the Sunshine Law to the discussions of a public commission with its attorney does not usurp the constitutional authority of the Supreme Court to regulate the practice of law, nor is it at odds with Florida Bar rules providing for attorney-client confidentiality). *Cf.*, s. 90.502(6), F.S., stating that a discussion or activity that is *not* a meeting for purposes of s. 286.011, F.S., shall not be construed to waive the attorney-client privilege. *And see, Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978), stating that all decisions taken by legal counsel to a public board need not be made or approved by the board; thus, the decision to appeal made by legal counsel after private discussions with the individual members of the board did not violate s. 286.011, F.S.

There are statutory exemptions, however, which apply to some discussions of pending litigation between a public board and its attorney.

a. Settlement negotiations or strategy sessions related to litigation expenditures

Section 286.011(8), F.S., provides:

> Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, *provided that the following conditions are met:*
>
> (a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.

(b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.

(c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.

(d) The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened and the person chairing the meeting shall announce the termination of the session.

(e) The transcript shall be made part of the public record upon conclusion of the litigation. (e.s.)

(1) Is s. 286.011(8) to be liberally or strictly construed?

It has been held that the Legislature intended a strict construction of s. 286.011(8), F.S. *City of Dunnellon v. Aran,* 662 So. 2d 1026 (Fla. 5th DCA 1995). "The clear requirements of the statute are neither onerous nor difficult to satisfy." *Id.* at 1027. *Accord*, *School Board of Duval County v. Florida Publishing Company,* 670 So. 2d 99 (Fla. 1st DCA 1996).

(2) Who may call an attorney-client meeting?

While section 286.011(8), F.S., does not specify who calls

the closed attorney-client meeting, it requires as one of the conditions that must be met that the governmental entity's attorney "shall advise the entity at a public meeting that he or she desires advice concerning the litigation." Thus, the exemption merely provides a governmental entity's attorney an opportunity to receive necessary direction and information from the governmental entity regarding pending litigation. AGO 04-35. Accordingly, one of the conditions that must be met prior to holding a closed attorney-client meeting is that the city attorney must indicate to the city council at a public meeting that he or she wishes the advice of the city council regarding the pending litigation to which the city is presently a party before a court or administrative agency. Inf. Op. to Vock, July 11, 2001. "If the city attorney does not advise the city council at a public meeting that he or she desires the council's advice regarding the litigation, the city council is not precluded from providing such advice to the city attorney but it must do so at a public meeting." *Id.*

The requirement that the board's attorney advise the board at a public meeting that he or she desires advice concerning litigation, is not satisfied by a previously published notice of the closed session. AGO 04-35. Rather, such an announcement must be made at a public meeting of the board. *Id.*

(3) Who may attend?

Only those persons listed in the statutory exemption, *i.e.*, the entity, the entity's attorney, the chief administrative officer of the entity, and the court reporter are authorized to attend a closed attorney-client session. Other staff members or consultants are not allowed to be present. *School Board of Duval County v. Florida Publishing Company,* 670 So. 2d at 101. *And see, Zorc v. City of Vero Beach*, 722 So. 2d 891, 898 (Fla. 4th DCA 1998), *review denied*, 735 So. 2d 1284 (Fla. 1999) (city charter provision requiring that city clerk attend all council meetings does not authorize clerk to attend closed attorney-client session; municipality may not authorize what the Legislature has expressly forbidden); and AGO 01-10 (clerk of court not authorized to attend).

However, because the entity's attorney is permitted to attend the closed session, if the school board hires outside counsel to represent it in pending litigation, both the school board attorney and the litigation attorney may attend a closed session. AGO 98-06. *And see*, *Zorc v. City of Vero Beach,* 722 So. 2d at 898 (attendance of Special Counsel authorized).

In rejecting the argument that the exemption should be construed so as to allow staff to attend closed attorney-client

sessions, the courts have noted that *individual* board members are free to meet privately with staff at any time since "staff members are not subject to the Sunshine Law." *Zorc v. City of Vero Beach*, 722 So. 2d at 899. *Accord, School Board of Duval County v. Florida Publishing Company,* 670 So. 2d at 101. *Cf.*, AGO 95-06 (s. 286.011[8], F.S., does not authorize the temporary adjournment and reconvening of meetings in order for members who are attending such a session to leave the room and consult with others outside the meeting). *And see,* s. C.2.d., *supra*, regarding the application of the Sunshine Law to meetings between individual board members and staff, if staff is being used as a liaison between, or to conduct a *de facto* meeting of, board members.

(4) Is substantial compliance with the conditions established in the statute adequate?

In *City of Dunnellon v. Aran*, *supra*, the court said that a city council's failure to announce the names of the lawyers participating in a closed attorney-client session violated the Sunshine Law. The court rejected the city's claim that when the mayor announced that attorneys hired by the city would attend the session (but did not give the names of the individuals), his "substantial compliance" was sufficient to satisfy the statute. *Cf., Zorc v. City of Vero Beach*, 722 So. 2d at 901, noting that deviation from the agenda at an attorney-client session is not authorized; while such deviation is permissible if a *public* meeting has been properly noticed, "there is no case law affording the same latitude to deviations in closed door meetings."

(5) What kinds of matters may be discussed at the attorney-client session?

Section 286.011(8)(b), F.S., states that the subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures. If a board goes beyond the "strict parameters of settlement negotiations and strategy sessions related to litigation expenditures" and takes "decisive action," a violation of the Sunshine Law results. *Zorc v. City of Vero Beach,* 722 So. 2d at 900. *And see*, AGO 99-37 (closed-meeting exemption may be used only when the attorney for a governmental entity seeks advice on settlement negotiations or strategy relating to litigation expenditures; such meetings should not be used to finalize action or discuss matters outside these two narrowly prescribed areas). *Accord*, AGO 04-35.

The legislative history of the exemption indicates that it was intended to apply only to discussions, rather than final

action, relating to settlement negotiations or litigation expenditures. *See*, Staff of Fla. H.R. Comm. on Gov't Operations, CS/HB 491 (1993) Final Bill Analysis & Economic Impact Statement 2 (Fla. State Archives), noting at p. 3: "No final decisions on litigation matters can be voted on during these private, attorney-client strategy meetings. The decision to settle a case, for a certain amount of money, under certain conditions is a decision which must be voted upon in a public meeting."

Thus, "[t]he settlement of a case is exactly that type of final decision contemplated by the drafters of section 286.011(8) which must be voted upon in the sunshine." *Zorc v. City of Vero Beach,* 722 So. 2d at 901. *See also, Freeman v. Times Publishing Company,* 696 So. 2d 427 (Fla. 2d DCA 1997) (discussion of methods or options to achieve continuing compliance with a long-standing federal desegregation mandate [such as whether to modify the boundaries of a school zone to achieve racial balance] must be held in the sunshine). *Compare, Bruckner v. City of Dania Beach,* 823 So. 2d 167, 172 (Fla. 4th DCA 2002) (closed city commission meeting to discuss various options to settle a lawsuit involving a challenge to a city resolution, including modification of the resolution, authorized because the commission "neither voted, took official action to amend the resolution, nor did it formally decide to settle the litigation"); and *Brown v. City of Lauderhill*, 654 So. 2d 302, 303 (Fla. 4th DCA 1995) (closed-door session between city attorney and board to discuss claims for attorney's fees, authorized).

(6) When is an agency a party to "pending litigation" for purposes of the exemption?

Section 286.011(8) permits an entity to use the exemption if the entity "is presently a party before a court or administrative agency . . . ." A city council and its attorney may, therefore, hold a closed-door meeting pursuant to this statute to discuss settlement negotiations or strategy related to litigation expenditures for pending litigation involving a workers' compensation claim where a petition for benefits as prescribed in s. 440.192, F.S., has been filed. AG0 96-75. The system prescribed in Ch. 440, F.S., operates as a means of adjudicating workers' compensation claims before an administrative tribunal and would be considered litigation before an administrative agency that falls within the purview of s. 286.011(8), F.S. *Id*.

In *Brown v. City of Lauderhill*, 654 So. 2d 302 (Fla. 4th DCA 1995), the court said it could "discern no rational basis for concluding that a city is not a 'party' to pending litigation in which it is the real party in interest." *And see, Zorc v. City of Vero Beach,* 722 So. 2d at 900 (city was presently a party to ongoing litigation by virtue of its already pending claims in

bankruptcy proceedings).

Although the *Brown* decision established that the exemption could be used by a city that was a real party in interest on a claim involved in *pending* litigation, that decision does not mean that an agency may meet in executive session with its attorney where there is only the *threat* of litigation. *See*, AGOs 04-35 and 98-21 (s. 286.011[8] exemption "does not apply when no lawsuit has been filed even though the parties involved believe litigation is inevitable"). *Cf.*, AGO 06-03 (exemption not applicable to pre-litigation mediation proceedings).

(7) When is litigation "concluded" for purposes of s. 286.011(8)(e)?

Litigation that is ongoing but temporarily suspended pursuant to a stipulation for settlement has not been concluded for purposes of s. 286.011(8), F.S., and a transcript of meetings held between the city and its attorney to discuss such litigation may be kept confidential until conclusion of the litigation. AGO 94-64. *And see*, AGO 94-33, concluding that to give effect to the purpose of s. 286.011(8), F.S., a public agency may maintain the confidentiality of a record of a strategy or settlement meeting between a public agency and its attorney until the suit is dismissed with prejudice or the applicable statute of limitations has run. *Cf.*, AGO 96-75 (disclosure of medical records to a city council during a closed-door meeting under s. 286.011[8], F.S., does not affect the requirement that the transcript of such a meeting be made a part of the public record at the conclusion of the litigation).

b. Risk management exemption

Section 768.28(16)(c), F.S., states that 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, are exempt from s. 286.011, F.S. The minutes of such meetings and proceedings are also exempt from public disclosure until the termination of the litigation and settlement of all claims arising out of the same incident. Section 768.28(16)(d), F.S.

This exemption is limited and applies only to tort claims for which the agency may be liable under s. 768.28, F.S. AGO 04-35. The exemption is not applicable to meetings held prior to the filing of a tort claim with the risk management program. AGO 92-82. Morever, a meeting of a city's risk management committee is exempt from the Sunshine Law only when the meeting relates solely to the evaluation of a tort claim filed with the risk management program or relates solely to an offer of compromise of a tort

claim filed with the risk management program. AGO 04-35.

Unlike s. 286.011(8), F.S., however, s. 768.28(16), F.S., does not specify the personnel who are authorized to attend the meeting. *See*, AG0 00-20, advising that personnel of the school district who are involved in the risk management aspect of the tort claim being litigated or settled may attend such meetings without jeopardizing the confidentiality provisions of the statute.

c. Notice of settlement of tort claim

A governmental entity, except a municipality or county, that settles a claim in tort which requires the expenditure of more than $5,000 in public funds, is required to provide notice pursuant to Ch. 50, F.S., of the settlement in the county in which the claim arose within 60 days of entering into the settlement. No notice is required if the settlement has been approved by a court of competent jurisdiction. Section 69.081(9), F.S.

4. Personnel matters

Meetings of a public board or commission at which personnel matters are discussed are not exempt from the provisions of s. 286.011, F.S., in the absence of a specific statutory exemption. *Times Publishing Company v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969), *disapproved in part on other grounds*, *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985). As the court in that case recognized, personnel matters are not legally privileged or insulated from legislative control.

a. Collective bargaining discussions

(1) Strategy sessions

A limited exemption from s. 286.011, F.S., exists for discussions between the chief executive officer of the public employer, or his or her representative, and the legislative body of the public employer relative to collective bargaining. Section 447.605(1), F.S. A similar exemption is contained in s. 110.201(4), F.S., for discussions between the Department of Management Services and the Governor, and between the department and the Administration Commission or agency heads, or between any of their respective representatives, relative to collective bargaining.

A duly-appointed labor negotiating committee of a city that does not have a city manager or city administrator qualifies as

the "chief executive officer" for purposes of s. 447.605(1), F.S., and may use the exemption when meeting with the city council to discuss collective bargaining. AGO 85-99. *And see*, AGO 99-27, concluding that a committee (composed of the city manager and various city managerial and supervisory employees) formed by the city manager to represent the city in labor negotiations may participate in closed executive sessions conducted pursuant to s. 447.605(1), F.S. The exemption also extends to meetings of the negotiating committee itself which are held to discuss labor negotiation strategies. *Id*. Thus, during active negotiations, the committee may adjourn to hold a caucus among its members to determine the strategy to be employed in ongoing negotiations. *Id*.

However, if a school superintendent's responsibility to conduct collective bargaining on behalf of the school board has been completely delegated to a separate labor negotiating committee and the superintendent does not participate in the collective bargaining negotiations, the exemption afforded by s. 447.605(1), F.S., applies to discussions between the labor negotiating committee and the school board only and does not encompass discussions among the committee, school board and superintendent. AGO 98-06.

The exemption afforded by s. 447.605(1), F.S., applies only in the context of actual and impending collective bargaining negotiations. AGO 85-99. The exemption does not allow private discussions of a proposed "mini-PERC ordinance" or discussions regarding the attitude or stance a public body intends to adopt in regard to unionization and/or collective bargaining. AGO 75-48. Moreover, a public body may not conduct an entire meeting outside the Sunshine Law merely by discussing one topic during the course of that meeting which may be statutorily exempt from s. 286.011, F.S. AGOs 85-99 and 75-48.

Section 447.605(1), F.S., does not directly address the dissemination of information that may be obtained at the closed meeting, but there is clear legislative intent that matters discussed during such meetings are not to be open to public disclosure. AGO 03-09.

(2) Negotiations

The collective bargaining *negotiations* between the chief executive officer and a bargaining agent are not exempt and, pursuant to s. 447.605(2), F.S., must be conducted in the sunshine. Once the collective bargaining process begins, whenever one side or any of its representatives at any time, whether before or after the declaration of an impasse, meets with the other side or any of its representatives to discuss anything

relevant to the terms and conditions of the employer-employee relationship, such a meeting is subject to the Sunshine Law. *City of Fort Myers v. News-Press Publishing Company, Inc.,* 514 So. 2d 408, 412 (Fla. 2d DCA 1987). *Accord*, AGO 99-27. As with other meetings subject to s. 286.011, F.S., minutes of the negotiation meeting must be kept. Inf. Op. to Fulwider, June 14, 1993.

The Legislature has, therefore, divided Sunshine Law policy on collective bargaining for public employees into two parts: when the public employer is meeting with its own side, it is exempt from the Sunshine Law; when the public employer is meeting with the other side, it is required to comply with the Sunshine Law. *City of Fort Myers v. News-Press Publishing Company, Inc.*, 514 So. 2d at 412; and AGO 76-102.

Prior to the enactment of the Public Employees Collective Bargaining Act, Part II, Ch. 447, F.S., the Florida Supreme Court determined that a constitutional exception to the Sunshine Law existed for collective bargaining under Art. I, s. 6, Fla. Const. *Bassett v. Braddock*, 262 So. 2d 425 (Fla. 1972). The purpose of Ch. 447, F.S., is to provide statutory implementation of Art. I, s. 6, Fla. Const. Therefore, to the extent that *Bassett* directly conflicts with s. 447.605(2), F.S., the statute appears to control. *See, City of Fort Myers v. News-Press Publishing Company, Inc.*, *supra*.

b. Complaint review boards, disciplinary proceedings and grievances

A complaint review board of a city police department is subject to the Government in the Sunshine Law. *Barfield v. City of West Palm Beach*, No. CL94-2141-AC (Fla. 15th Cir. Ct. May 6, 1994). *Accord*, AGO 78-105 (police complaint review boards convened pursuant to s. 112.532[2], F.S., are subject to the Sunshine Law). *And see,* AGO 93-79 (discussions between two members of a three-member complaint review board regarding their selection of the third member of the board must be conducted in accordance with s. 286.011, F.S.). *Compare, Molina v. City of Miami,* 837 So. 2d 463 (Fla. 3d DCA 2002 (Sunshine Law does not apply to a Discharge of Firearms Review Committee, composed of three deputy chiefs of police, because the committee is nothing more than a meeting of staff members who serve in a fact-finding advisory capacity to the chief).

A meeting of a commission to conduct an employee termination hearing is subject to the Sunshine Law. AGO 92-65. *And see, News-Press Publishing Company v. Wisher*, 345 So. 2d 646, 647-648 (Fla. 1977), in which the Court disapproved of a county's use of

"pseudonyms or cloaked references" during a meeting held to reprimand an unnamed department head. *Cf.*, Inf. Op. to Gerstein, July 16, 1976, noting that a discussion between two city councilmen and the city manager regarding the city manager's resignation was subject to the Sunshine Law.

The Sunshine Law also applies to board discussions concerning grievances. AGO 76-102. *And see*, *Palm Beach County Classroom Teacher's Association v. School Board of Palm Beach County*, 411 So. 2d 1375 (Fla. 4th DCA 1982), in which the court affirmed the lower tribunal's refusal to issue a temporary injunction to exclude a newspaper reporter from a grievance arbitration hearing. A collective bargaining agreement cannot be used "to circumvent the requirements of public meetings" in s. 286.011, F.S. *Id*. at 1376. *See also, Dascott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004) (grievance committee hearings subject to Sunshine Law). *Cf*., AGO 84-70 (Sunshine Law applies to staff grievance committee created to make nonbinding recommendations to a county administrator regarding disposition of employee grievances).

A meeting of a municipal housing authority commission to consider an employee's appeal of his or her dismissal by the executive director must be open to the public. AGO 92-65. *See also*, AGO 77-132 (personnel council composed of citizens appointed by members of county commission to hear appeals from county employees who have been disciplined not authorized to deliberate in secret); and AGO 80-27 (civil service board created by special act to administer a civil service system for deputy sheriffs and employees of the office of the sheriff is subject to s. 286.011, F.S.). *And see, Dascott v. Palm Beach County*, *supra* (deliberations of pre-termination panel composed of the department head, personnel director and equal opportunity director should have been held in the Sunshine). *Cf., Deininger v. Palm Beach County,* 922 So. 2d 1102 (Fla. 4th DCA 2006) (reversing trial court's order denying class certification to plaintiffs who alleged that pre-termination panel meetings used by county to terminate or demote employees, violated the Sunshine Law). *Compare*, *Jordan v. Jenne*, 31 F.L.W. D1975 (Fla. 4th DCA July 26, 2006) (Sunshine Law not applicable to a professional standards committee responsible for reviewing charges against a sheriff's deputy and making recommendations to the inspector general as to whether the charges should be sustained, dismissed, or whether the case should be deferred for more information).

Where, however, a mayor as chief executive officer, rather than the city council, is responsible under the city charter for disciplining city employees, meetings between the mayor and a city employee concerning discipline of the employee are not subject to the Sunshine Law. *City of Sunrise v. News and Sun-*

Sentinel Company, 542 So. 2d 1354 (Fla. 4th DCA 1989).

c. Evaluations

Meetings of a board to evaluate employee performance are not exempt from the Sunshine Law. *See*, AGO 89-37 (Sunshine Law applies to meetings of a board of county commissioners when conducting job evaluations of county employees).

A board that is responsible for assessing the performance of its chief executive officer (CEO) should conduct the review and appraisal process in a proceeding open to the public as prescribed by s. 286.011, F.S., instead of using a review procedure in which individual board members evaluate the CEO's performance and send their individual written comments to the board chairman for compilation and subsequent discussion with the CEO. AGO 93-90. However, meetings of individual school board members with the superintendent to discuss the individual board members' evaluations do not violate the Sunshine Law when such evaluations do not become the board's evaluation until they are compiled and discussed at a public meeting by the school board for adoption by the board. AGO 97-23.

d. Interviews

The Sunshine Law applies to meetings of a board of county commissioners when interviewing applicants for county positions appointed by the board, when conducting job evaluations of county employees answering to and serving at the pleasure of the board, and when conducting employment termination interviews of county employees who serve at the pleasure of the board. AGO 89-37. *And see*, AGO 75-37 (state commission must conduct interviews relating to hiring of its lawyer in public); and AGO 71-389 (district school board conducting employment interviews for district school superintendent applicants would violate the Sunshine Law if such interviews were held in secret).

e. Selection and screening committees

The Sunshine Law applies to advisory committees created by an agency to assist in the selection process. For example, in *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983), a committee created to screen applications and make recommendations for the position of a law school dean was held to be subject to s. 286.011, F.S. By screening applicants and deciding which applicants to reject from further consideration, the committee performed a policy-based, decision-making function delegated to it by the president of the university. *And see*, *Dore v. Sliger*, No. 90-1850 (Fla. 2d Cir. Ct. July 11, 1990) (faculty of university law school prohibited

from conducting secret ballots on personnel hiring matters).

A selection committee appointed to screen applications and rank selected applicants for submission to the city council was determined to be subject to the Sunshine Law even though the city council was not bound by the committee's rankings. AGO 80-20. *Accord*, AGO 80-51.

However, if the sole function of the screening committee is simply to gather information for the decision-maker, rather than to accept or reject applicants, the committee's activities are outside the Sunshine Law. Thus, in *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985), the district court considered whether certain activities of the city and the city manager violated the Sunshine Law. The city charter placed sole responsibility for the selection of the police chief in the city manager. However, when it became necessary to select a new chief of police, the city manager asked several people to sit in on the interviews. The only function of this group was to assist the city manager in acquiring information on the applicants he had chosen by asking questions during the interviews and then discussing the qualifications of each candidate with the city manager after the interview.

Similarly, a group of staff assembled by a school official to interview candidates for a middle school principal position was determined to be outside the scope of the Sunshine Law. *Knox v. District School Board of Brevard,* 821 So. 2d 311 (Fla. 5th DCA 2002). The court noted that the interview team was composed of staff and was selected by an area superintendent, not the county school superintendent who was responsible under state law for making personnel recommendations to the school board. "Although the team made recommendations, all the applications went to the superintendent and he decided which applicants to interview and nominate to the school board." *Id*. at 314. "A Sunshine violation does not occur when a governmental executive uses staff for a fact-finding and advisory function in fulfilling his or her duties." *Id.* at 315.

For more information on this subject, please refer to the discussion on advisory bodies found in s. B.2., *supra.*

5. Purchasing or bid evaluation committees

A committee appointed by a college's purchasing director to consider proposals submitted by contractors was deemed to be subject to the Sunshine Law because its function was to "weed through the various proposals, to determine which were acceptable and to rank them accordingly." *Silver Express Company v. District Board of Lower Tribunal Trustees,* 691 So. 2d 1099, 1100

(Fla. 3d DCA 1997). *Accord,* Inf. Op. to Lewis, March 15, 1999 (panels established by state agency to create requests for proposals and evaluate vendor responses are subject to the Sunshine Law). *And see, Leach-Wells v. City of Bradenton*, 734 So. 2d 1168, 1171 (Fla. 2d DCA 1999) (selection committee created by city council to evaluate proposals violated the Sunshine Law when the city clerk unilaterally ranked the proposals based on the committee members' individual written evaluations; the court held that "the short-listing was formal action that was required to be taken at a public meeting"). *Cf.*, s. 286.0113(2), F.S., enacted in the 2006 legislative session, providing an exemption from the Sunshine Law for meetings at which a negotiation with a vendor is conducted pursuant to s. 287.057(3), F.S.

In *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169, 1170 (Fla. 4th DCA 1995), the court ruled that a board's selection and negotiation committee violated the Sunshine Law by excluding other competing bidders from the committee meeting during presentations by competitors. The board argued that the procurement officer did not exclude the competing presenters from the public meeting, but merely requested that the competing presenters voluntarily excuse themselves. However, the court found that the committee's actions "amounted to a *de facto* exclusion of the competitors, especially since the 'request' was made by an official directly involved with the procurement process." *Cf.*, *Pinellas County School Board v. Suncam, Inc.,* 829 So. 2d 989 (Fla. 2d DCA 2002) (school board violated the Sunshine Law when it refused to permit videotaping of a public meeting held to evaluate general contractor construction proposals).

6. Quasi-judicial proceedings

The Florida Supreme Court has stated that there is no exception to the Sunshine Law which would allow closed-door hearings or deliberations when a board or commission is acting in a "quasi-judicial" capacity. *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973). *See also*, *Occidental Chemical Company v. Mayo*, 351 So. 2d 336, 340 n.7 (Fla. 1977), *disapproved in part on other grounds, Citizens v. Beard*, 613 So. 2d 403 (Fla. 1992), in which the Supreme Court noted that the characterization of the Public Service Commission's decision-making process as "quasi-judicial" did not exempt it from s. 286.011, F.S. *And see*, *Palm Beach County Classroom Teacher's Association v. School Board of Palm Beach County*, 411 So. 2d 1375 (Fla. 4th DCA 1982), in which the court affirmed the lower court's refusal to issue a temporary injunction to exclude a newspaper reporter from a grievance hearing.

The Attorney General's Office has concluded that deliberations of the following boards or commissions are subject to s. 286.011, F.S., notwithstanding the fact that the boards or commissions are acting in a "quasi-judicial" capacity: municipal housing authority, AGO 92-65; municipal board of adjustment, AGO 83-43; personnel council created to hear appeals of disciplined employees, AGO 77-132; assessment administration review commission, AGO 75-37; civil service board, AGOs 73-370 and 71-29; fair housing and employment appeals board, Inf. Op. to Beare, April 20, 1977.

7. Real property negotiations

In the absence of a statutory exemption, the negotiations by a public board or commission for the sale or purchase of property must be conducted in the sunshine. *See*, *City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971) (city commission not authorized to hold closed sessions to discuss condemnation issues). In addition, if the authority of the public board or commission to acquire or lease property has been delegated to a single member, that member is subject to s. 286.011, F.S., and is prohibited from negotiating the acquisition or lease of the property in secret. AGO 74-294.

Advisory committees charged with land acquisition responsibilities are also subject to the Sunshine Law. *See*, AGOs 87-42 (ad hoc committee appointed by mayor to meet with the Chamber of Commerce to discuss a proposed transfer of city property); and 86-51 (land selection committee appointed by water management district to evaluate and recommend projects for acquisition).

A limited exemption from the Public Records Act, Ch. 119, F.S., exists for certain records pertaining to the purchase of real property by counties, municipalities, and school boards. Sections 125.355, 166.045, and 1013.14, F.S. Each statute, however, provides that "[n]othing in this section shall be interpreted as providing an exemption from, or an exception to, s. 286.011." *See*, AGO 95-06 (s. 166.045, F.S., does not authorize a city or its designee to conduct negotiations for purchase of property outside the Sunshine Law or to keep records other than those specifically designated in the statute from public disclosure). *Accord*, Inf. Op. to Garvey, October 21, 1993.

E. DOES THE SUNSHINE LAW APPLY TO:

1. members-elect or candidates;
2. meetings between members of different boards;

3. meetings between a mayor and a member of the city council;
4. meetings between a board member and his or her alternate;
5. meetings between an ex officio, non-voting board member and a voting member of the board;
6. community forums sponsored by private organizations;
7. board members attending meetings of another public board;
8. social events; or
9. a husband and wife serving on the same board?

1. Members-elect or candidates

Members-elect of boards or commissions are subject to the Sunshine Law. *See*, *Hough v. Stembridge*, 278 So. 2d 288, 289 (Fla. 3d DCA 1973), stating that an individual, upon election to public office, loses his or her status as a private individual and acquires a position more akin to that of a public trustee; thus, such individuals as members-elect to a public board or commission are subject to s. 286.011, F.S. *And see*, AGO 74-40 (members-elect may be liable for "sunshine" violations).

However, the Sunshine Law does not apply to a briefing session between a retiring mayor and the mayor-elect who is not an incumbent council member since the mayor and the mayor-elect do not, and will not once the mayor-elect takes office, serve together on the city council. AGO 93-04. Nor does the Sunshine Law apply to candidates for office, unless the candidate is an incumbent seeking reelection. AGO 92-05. *And see*, AGO 98-60 (although a candidate running for city commission may be unopposed, he or she is not considered to be elected until the election has been held; therefore, the candidate is not a member-elect for purposes of the Government in the Sunshine Law until that time).

2. Meetings between members of different boards

The Sunshine Law does not apply to a meeting between individuals who are members of *different* boards *unless* one or more of the individuals has been delegated the authority to act on behalf of his or her board. *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72 (Fla. 1984). *Accord*, AGO 84-16 (meeting between the chair of a private industry council created pursuant to federal law and the chair of a five-county employment and training consortium created pursuant to state law not subject to Sunshine Law, unless there is a delegation of decision-making authority to the chair of the consortium); and Inf. Op. to McClash, April 29, 1992 (Sunshine Law generally not applicable to

county commissioner meeting with individual member of metropolitan planning organization). *And see, News-Press Publishing Company, Inc. v. Lee County, Florida,* 570 So. 2d 1325 (Fla. 2d DCA 1990) (Sunshine Law not applicable to mediation proceeding attended by individual members of city and county boards who were in litigation because only one member of each board was present at the proceedings and no final settlement negotiations, decisions, or actual settlement could be made during the mediation conference).

An individual city council member may, therefore, meet privately with an individual member of the municipal planning and zoning board to discuss a recommendation made by that board since two or more members of either board are not present, provided that no delegation of decision-making authority has been made and neither member is acting as a liaison. AGO 87-34. *And see*, AGO 99-55 (school board member meeting with member of advisory committee established by school board); and AGO 97-52 (discussions between individual member of community college board of trustees and school board member regarding acquisition of property by school board).

3. Meetings between a mayor and a member of the city council

If the mayor is a member of the council or has a voice in decision-making through the power to break tie votes, meetings between the mayor and a member of the city council to discuss some matter which will come before the city council are subject to the Sunshine Law. AGOs 83-70 and 75-210. *And see*, AGO 92-26 (if the mayor and city administrator are both members of a committee which is responsible for making recommendations to the city council on personnel matters, discussions between the mayor and city administrator on matters which foreseeably will come before the personnel committee for action are governed by s. 286.011, F.S.).

Where, however, the mayor is *not* a member of the city council and does not possess any power to vote even in the case of a tie vote but possesses only the power to veto legislation, then the mayor may privately meet with an individual member of the city council without violating the Sunshine Law, provided the mayor is not acting as a liaison between members and neither the mayor nor the council member has been delegated the authority to act on behalf of the council. AGOs 90-26 and 85-36. *And see*, Inf. Op. to Cassady, April 7, 2005 (mayor who is not a member of the city council and cannot vote even in the event of a tie, may meet with an individual council member to discuss the mayor's recommendations to the council concerning prospective appointments of staff or members of city boards).

If a decision falls within the administrative functions of the mayor and would not come before the city council for consideration, discussions between an individual member of the city council and the mayor are not subject to the Sunshine Law since such discussions do not relate to a matter which will foreseeably come before the city council for action. AGOs 83-70 and 75-210. *See*, s. B.10., *supra*. *Cf.*, *City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989) (since mayor was responsible under the city charter for disciplining city employees, mayor in carrying out this function was not subject to s. 286.011, F.S.).

4. Meetings between a board member and his or her alternate

Since the alternate is authorized to act only in the absence of a board or commission member, there is no meeting of two individuals who exercise independent decision-making authority at the meeting. There is, in effect, only one decision-making official present. Therefore, a meeting between a board member and his or her alternate is not subject to the Sunshine Law. AGO 88-45.

5. Meetings between an ex officio, non-voting board member and a voting member of the board

Meetings between a voting member of a board and a non-voting member who serves as a member of the board in an ex officio, non-voting capacity, are subject to the Sunshine Law. AGO 05-18.

6. Community forums sponsored by private organizations

A "Candidates' Night" sponsored by a private organization at which candidates for public office, including several incumbent city council members, will speak about their political philosophies, trends, and issues facing the city, is not subject to the Sunshine Law unless the council members discuss issues coming before the council among themselves. AGO 92-05.

Similarly, in AGO 94-62, the Attorney General's Office concluded that the Sunshine Law does not apply to a political forum sponsored by a private civic club during which county commissioners express their position on matters that may foreseeably come before the commission, so long as the commissioners avoid discussions among themselves on these issues.

However, caution should be exercised to avoid situations in which private political or community forums may be used to circumvent the statute's requirements. *Id*. *See*, *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974) (Sunshine Law

must be construed "so as to frustrate all evasive devices"). For example, in *State v. Foster*, 12 F.L.W. Supp. 1194a (Fla. Broward Co. Ct. September 26, 2005), the court rejected the argument that the Sunshine Law permitted city commissioners to attend a private breakfast meeting at which the sheriff spoke and the commissioners individually questioned the sheriff but did not direct comments or questions to each other. The court denied the commissioners' motion for summary judgment and ruled that the discussion should have been held in the Sunshine because the sheriff was a "common facilitator" who received comments from each commissioner in front of the other commissioners.

7. Board members attending meetings of another public board

In AGO 98-14, the Attorney General's Office was asked whether members of a metropolitan planning organization (MPO) who also serve as city council members must separately notice an MPO meeting when they plan to discuss MPO matters at an advertised city council meeting. The opinion concluded that separate notice of the MPO meeting was not required as long as the agenda of the city council meeting mentioned that MPO business would be discussed. *See also*, AGO 00-68 (Sunshine Law does not prohibit city commissioners from attending other city board meetings and commenting on agenda items that may subsequently come before the commission for final action; however, city commissioners attending such meetings may not discuss those issues among themselves); AGO 99-55 (a school board member may attend a public meeting of an advisory committee without prior notice of his or her attendance; if, however, it is known that two or more members of the school board are planning to be in attendance and participate, it would be advisable to note their attendance in the notice of the advisory committee meeting); AGO 98-79 (city commissioner may attend a community development board meeting held to consider a proposed city ordinance and express his or her views on the proposed ordinance even though other city commissioners may be in attendance; however, the city commissioners in attendance may not engage in a discussion or debate among themselves). *And see*, AGOs 05-59, 91-95 and 77-138.

8. Social events

Members of a public board or commission are not prohibited under the Sunshine Law from meeting together socially, provided that matters which may come before the board or commission are not discussed at such gatherings. Thus, when two or more members of a public board are attending or participating in meetings or other functions unconnected with their board, they must refrain from discussing matters on which foreseeable action may be taken by the board but are not otherwise restricted in their actions.

AGO 92-79.

A luncheon meeting held by a private organization for members of a public board or commission at which there is no discussion among such officials on matters relating to public business would not be subject to the Sunshine Law merely because of the presence of two or more members of a covered board or commission. AGO 72-158. *Accord*, Inf. Op. to Batchelor, May 27, 1982 (Sunshine Law inapplicable when the gathering of two or more members of a board or commission is entirely for social purposes and no public business is discussed).

9. A husband and wife serving on the same board

There is no *per se* violation of the Sunshine Law for a husband and wife to serve on the same public board or commission so long as they do not discuss board business without complying with the requirements of s. 286.011, F.S. AGO 89-06.

F. WHAT ARE THE NOTICE AND PROCEDURAL REQUIREMENTS OF THE SUNSHINE LAW?

1. What kind of notice of the meeting must be given?

a. Reasonable notice required

A vital element of the Sunshine Law is the requirement that boards subject to the law provide "reasonable notice" of all meetings. *See*, s. 286.011(1), F.S. Although s. 286.011, F.S., did not contain an express notice requirement until 1995, many court decisions had stated prior to the statutory amendment that in order for a public meeting to be in essence "public," reasonable notice of the meeting must be given. *Hough v. Stembridge*, 278 So. 2d 288, 291 (Fla. 3d DCA 1973). *Accord*, *Yarbrough v. Young*, 462 So. 2d 515, 517 (Fla. 1st DCA 1985).

Reasonable public notice is required for all meetings subject to the Sunshine Law. Thus, notice is required for meetings between members of a public board even though a quorum is not present. AGOs 90-56 and 71-346. *And see*, *Baynard v. City of Chiefland, Florida,* No. 38-2002-CA-000789 (Fla. 8th Cir. Ct. July 8, 2003) (reasonable notice required even if subject of meeting is "relatively unimportant").

Notice is required even though meetings of the board are "of general knowledge" and are not conducted in a closed door manner. *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309, 310 (Fla. 1st DCA 1991). "Governmental bodies who hold unnoticed meetings do so at their peril." *Monroe County v. Pigeon Key Historical Park, Inc.*,

647 So. 2d 857, 869 (Fla. 3d DCA 1994).

The type of notice that must be given is variable, however, depending on the facts of the situation and the board involved. In some instances, posting of the notice in an area set aside for that purpose may be sufficient; in others, publication in a local newspaper may be necessary. In each case, however, an agency must give notice at such time and in such a manner as will enable the media and the general public to attend the meeting. AGOs 04-44, 80-78 and 73-170. *And see, Rhea v. City of Gainesville,* 574 So. 2d 221, 222 (Fla. 1st DCA 1991), citing to AGO 73-170, and stating that the purpose of the notice requirement is to apprise the public of the pendency of matters that might affect their rights, afford them the opportunity to appear and present their views, and afford them a reasonable time to make an appearance if they wish. *Cf., Lyon v. Lake County*, 765 So. 2d 785, 790 (Fla. 5th DCA 2000) (where county attorney provided citizen with "personal due notice" of a committee meeting and its function, it would be "unjust to reward" the citizen by concluding that a meeting lacked adequate notice because the newspaper advertisement failed to correctly name the committee). *And see*, *Suncam, Inc. v. Worrall,* No. CI97-3385 (Fla. 9th Cir. Ct. May 9, 1997) (Sunshine Law requires notice to the general public; agency not required to provide "individual notice" to company that wished to be informed when certain meetings were going to occur).

While the Attorney General's Office cannot specify the type of notice which must be given in all cases, it has suggested the following notice guidelines:

1. The notice should contain the time and place of the meeting and, if available, an agenda (or if no agenda is available, subject matter summations might be used);
2. the notice should be prominently displayed in the area in the agency's offices set aside for that purpose, *e.g.*, for cities, in city hall;
3. emergency sessions should be afforded the most appropriate and effective notice under the circumstances and special meetings should have at least 24 hours reasonable notice to the public; and
4. the use of press releases and/or phone calls to the wire services and other media is highly effective. On matters of critical public concern such as rezoning, budgeting, taxation, appointment of public officers, etc., advertising in the local newspapers of general circulation would be appropriate.

The notice procedures set forth above should be considered as suggestions which will vary depending upon the circumstances of

each particular situation. *See*, AGO 73-170 ("If the purpose for notice is kept in mind, together with the character of the event about which notice is to be given and the nature of the rights to be affected, the essential requirements for notice in that situation will suggest themselves.").

Thus, in *Rhea v. City of Gainesville*, 574 So. 2d 221 (Fla. 1st DCA 1991), the court held that a complaint alleging that members of the local news media were contacted about a special meeting of the city commission one and one-half hours before the meeting stated a sufficient cause of action that the Sunshine Law had been violated. *Compare*, *Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985) (three days' notice of special meeting deemed adequate); and *News and Sun-Sentinel Company v. Cox*, 702 F. Supp. 891 (S.D. Fla. 1988) (no Sunshine Law violation occurred when on March 31, a "general notice" of a city commission meeting scheduled for April 5 was posted on the bulletin board outside city hall). *And see, Yarbrough v. Young*, *supra*, at 517n.1 (Sunshine Law does not require city council to give notice "by paid advertisements" of its intent to take action regarding utilities system improvements, although the Legislature "has required such notice for certain subjects," *see e.g.,* 166.041[3][c], F.S.).

The determination as to who will actually prepare the notice or agenda is essentially "an integral part of the actual mechanics and procedures for conducting that meeting and, therefore, aptly relegated to local practice and procedure as prescribed by . . . charters and ordinances." *Hough*, 278 So. 2d at 291.

b. Notice requirements when meeting adjourned to a later date

If a meeting is to be adjourned and reconvened later to complete the business from the agenda of the adjourned meeting, the second meeting should also be noticed. AGO 90-56.

However, in *State v. Adams*, No. 91-175-CC (Fla. Sumter Co. Ct. July 15, 1992), the county court held that s. 286.011, F.S., was not violated by a brief discussion as to whether commission members could make an inspection trip to an industrial facility without violating s. 286.011, F.S., when the discussion took place immediately after the adjournment of a duly noticed commission meeting. The court found that the room remained open during the discussion, no member of the public relied to their detriment on the adjournment by leaving the proceedings, and there was no allegation that the alleged adjournment was utilized as a tool to avoid the public scrutiny of governmental meetings. *And see*, *Greenbarg v. Metropolitan Dade County Board of County*

Commissioners, 618 So. 2d 760 (Fla. 3d DCA 1993) (no impropriety in county commission continuing its meeting until the early morning hours).

c. Notice requirements when board acting as quasi-judicial body or taking action affecting individual rights

Section 286.0105, F.S., requires:

> Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

Where a public board or commission acts as a quasi-judicial body or takes official action on matters that affect individual rights of citizens, in contrast with the rights of the public at large, the board or commission is subject to the requirements of s. 286.0105, F.S. AGO 81-06.

d. Effect of notice requirements imposed by other statutes, codes or ordinances

The Sunshine Law requires only that *reasonable* public notice be given. As stated above, the type of notice required is variable and will depend upon the circumstances. A public agency, however, may be subject to additional notice requirements imposed by other statutes, charters or codes. *See*, *e.g.*, s. 189.417(1), F.S., providing notice requirements for meetings of the governing bodies of special districts. In such cases, the requirements of that statute, charter, or code must be strictly observed. Inf. Op. to Mattimore, February 6, 1996. *And see, Yarbrough v. Young*, 462 So. 2d 515, 517, n.1 (Fla. 1st DCA 1985) (Sunshine Law does not require city council to give notice "by paid advertisements" of its intent to take action regarding utilities system improvements, although the Legislature "has required such notice for certain subjects," *see e.g.,* 166.041[3][c], F.S.).

Thus, a board or commission subject to Ch. 120, F.S., the Administrative Procedure Act, must comply with the notice requirements of that act. *See*, *e.g.*, s. 120.525, F.S. Those requirements, however, are imposed by Ch. 120, F.S., not s. 286.011, F.S., although the notice of a board or commission published in the Florida Administrative Weekly [FAW] pursuant to Ch. 120, F.S., also satisfies the notice requirements of s. 286.011, F.S. *Florida Parole and Probation Commission v. Baranko*, 407 So. 2d 1086 (Fla. 1st DCA 1982).

2. Does the Sunshine Law require that an agenda be made available prior to board meetings or restrict the board from taking action on matters not on the agenda?

The Attorney General's Office recommends publication of an agenda, if available, in the notice of the meeting; if an agenda is not available, subject matter summations might be used. However, the courts have held that the Sunshine Law does not *mandate* that an agency provide notice of each item to be discussed via a published agenda. Such a specific requirement has been rejected because it could effectively preclude access to meetings by members of the general public who wish to bring specific issues before a governmental body. *See, Hough v. Stembridge,* 278 So. 2d 288 (Fla. 3d DCA 1973). *And see*, *Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985) (posted agenda unnecessary; public body not required to postpone meeting due to inaccurate press report which was not part of the public body's official notice efforts). Thus, the Sunshine Law has been interpreted to require notice of *meetings*, not of the individual *items* which may be considered at that meeting. However, other statutes, codes or ordinances may impose such a requirement and agencies subject to those provisions must follow them.

Accordingly, the Sunshine Law does not require boards to consider only those matters on a published agenda. "[W]hether to impose a requirement that restricts every relevant commission or board from considering matters not on an agenda is a policy decision to be made by the legislature." *Law and Information Services, Inc. v. City of Riviera Beach,* 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996).

For example, s. 120.525(2), F.S., requires that agencies subject to the Administrative Procedure Act must prepare an agenda in time to ensure that a copy may be received at least seven days before the event by any person in the state who requests a copy and who pays the reasonable cost of the copy. After the agenda has been made available, changes may be made only for good cause. *Id.*

Therefore, agencies subject to the Administrative Procedure Act must follow the requirements in that statute. *See,* Inf. Op. to Mattimore, February 6, 1996 (notice of each item to be discussed at public meeting is not required under s. 286.011, F.S., although other statutes, codes, or rules, such as Ch. 120, F.S., may impose such a requirement).

Moreover, even though the Sunshine Law does not prohibit a board from adding topics to the agenda of a regularly noticed meeting, the Attorney General's Office has advised boards to postpone formal action on any added items that are controversial. AGO 03-53. "In the spirit of the Sunshine Law, the city commission should be sensitive to the community's concerns that it be allowed advance notice and, therefore, meaningful participation on controversial issues coming before the commission." *Id*.

3. Does the Sunshine Law limit where meetings of a public board or commission may be held?

a. Inspection trips

Members of a public board or commission are not prohibited under the Sunshine Law from conducting inspection trips provided that they do not discuss matters which may come before the board or commission for official action. *See, Bigelow v. Howze,* 291 So. 2d 645 (Fla. 2d DCA 1974). In *Bigelow*, the court said that where two of five commissioners, as members of a fact-finding committee, went on an inspection trip to Tennessee, they should not have discussed what recommendations the committee would make while they were still on their trip, but should have waited until such discussion could occur at a meeting held in compliance with the Sunshine Law.

Similarly, two or more members of an advisory group created by a city code to make recommendations to the city council or planning commission on proposed development may conduct vegetation surveys without subjecting themselves to the notice and minutes requirements of the Sunshine Law, provided that they do not discuss among themselves any recommendations the committee may make to the council or planning commission, or comments on the proposed development that the committee may make to city officials. AGO 02-24. *See also,* Inf. Op. to Kreidler, February 20, 1996 (the mere presence of two members of a human rights advocacy committee during an investigation of a group home does not make the Sunshine Law applicable, provided that the members avoid discussion between themselves of issues that may come before the committee for official action).

b. Luncheon meetings

Public access to meetings of public boards or commissions is the key element of the Sunshine Law and public agencies are advised to avoid holding meetings in places not easily accessible to the public. The Attorney General's Office, therefore, has suggested that public boards or commissions avoid the use of luncheon meetings to conduct board or commission business. These meetings may have a "chilling" effect upon the public's willingness or desire to attend. People who would otherwise attend such a meeting may be unwilling or reluctant to enter a public dining room without purchasing a meal and may be financially or personally unwilling to do so. Inf. Op. to Campbell, February 8, 1999; and Inf. Op. to Nelson, May 19, 1980.

In addition, discussions at such meetings by members of the board or commission which are audible only to those seated at the table may violate the "openness" requirement of the law. AGO 71-159. Public boards or commissions are, therefore, advised to avoid holding meetings at places where the public and the press are effectively excluded. AGO 71-295. *Cf.*, *City of Miami Beach v. Berns*, 245 So. 2d 38, 41 (Fla. 1971), in which the Florida Supreme Court observed: "A secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public."

c. Meetings at facilities that discriminate or unreasonably restrict access prohibited

Section 286.011(6), F.S., prohibits boards or commissions subject to the Sunshine Law from holding their meetings at any facility which discriminates on the basis of sex, age, race, creed, color, origin, or economic status, or which operates in such a manner as to unreasonably restrict public access to such a facility. *And see*, s. 286.26, F.S., relating to accessibility of public meetings to the physically handicapped.

Thus, a police pension board should not hold its meetings in a facility where the public has limited access and where there may be a "chilling" effect on the public's willingness to attend by requiring the public to provide identification, to leave such identification while attending the meeting and to request permission before entering the room where the meeting is held. AGO 96-55. *And see*, AGO 05-13, concluding that a city may not require persons wishing to attend public meetings to provide identification as a condition of attendance. This is not to say, however, that an agency may not impose certain security measures on members of the public entering a public building, such as requiring the public to go through metal detectors. *Id*.

d. Out-of-town meetings

The courts have recognized that the mere fact that a meeting is held in a public room does not make it public within the meaning of the Sunshine Law. *Bigelow v. Howze*, 291 So. 2d 645, 647-648 (Fla. 2d DCA 1974). For a meeting to be "public," the public must be given advance notice and provided with a reasonable opportunity to attend. *Id*.

Accordingly, a school board workshop held outside county limits over 100 miles away from the board's headquarters violated the Sunshine Law where the only advantage to the board resulting from the out-of-town gathering (elimination of travel time and expense due to the fact that the board members were attending a conference at the site) did not outweigh the interests of the public in having a reasonable opportunity to attend. *Rhea v. School Board of Alachua County*, 636 So. 2d 1383 (Fla. 1st DCA 1994). The court refused to adopt a rule prohibiting any board workshops from being held at a site more than 100 miles from its headquarters; instead, the court held that a balancing of interests test is the most appropriate method to determine which interest predominates in a given case. As stated by the court, "[t]he interests of the public in having a reasonable opportunity to attend a Board workshop must be balanced against the Board's need to conduct a workshop at a site beyond the county boundaries." *Id*. at 1385.

In addition, there may be other statutes which limit where board meetings may be held. *See*, *e.g.*, s. 125.001, F.S. (meetings of the board of county commissioners may be held at any appropriate public place in the county); s. 1001.372, F.S. (school board meetings may be held at any appropriate public place in the county). *And see*, AGOs 03-03 and 75-139 (municipality may not hold commission meetings at facilities outside its boundaries).

Conduct which occurs outside the state which would constitute a knowing violation of the Sunshine Law is a second degree misdemeanor. Section 286.011(3), F.S. Such violations are prosecuted in the county in which the board or commission normally conducts its official business. Section 910.16, F.S.

4. Can restrictions be placed on the public's attendance at, or participation in, a public meeting?

a. Public's right to attend or record meeting

(1) Size of meeting facilities

The Sunshine Law requires that meetings of a public board or commission be "open to the public." For meetings where a large turnout of the public is expected, public boards and commissions should take reasonable steps to ensure that the facilities where the meeting will be held will accommodate the anticipated turnout. Meetings held at a facility which can accommodate only a small number of the public attending, when a large public turnout can reasonably be expected, may violate the public access requirement of s. 286.011, F.S., by unreasonably restricting access to the meeting. If a huge public turnout is anticipated for a particular issue and the largest available public meeting room cannot accommodate all of those who are expected to attend, the use of video technology (*e.g.*, a television screen outside the meeting room) may be appropriate. In such cases, as with other open meetings, reasonable steps to provide an opportunity for public participation in the proceedings should also be considered.

(2) Inaudible discussions

A violation of the Sunshine Law may occur if, during a recess of a public meeting, board members discuss issues before the board in a manner not generally audible to the public attending the meeting. Although such a meeting is not clandestine, it nonetheless violates the letter and spirit of the law. *Rackleff v. Bishop*, No. 89-235 (Fla. 2d Cir. Ct. March 5, 1990). *And see*, AGO 71-159, stating that discussions of public business which are audible only to "a select few" who are at the table with the board members may violate the "openness" requirement of the law.

(3) Exclusion of certain members of the public

The term "open to the public" as used in the Sunshine Law means open to *all* persons who choose to attend. AGO 99-53. In *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169, 1170 (Fla. 4th DCA 1995), the court ruled that a board violated the Sunshine Law by requesting that bidders voluntarily excuse themselves from each others' presentations. The court found that the board's actions "amounted to a *de facto* exclusion of the competitors, especially since the 'request' was made by an official directly involved with the procurement process."

Staff of a public agency clearly are members of the public as well as employees of the agency; they cannot, therefore, be excluded from public meetings. AGO 79-01. Section 286.011, F.S., however, does not preclude the reasonable application of ordinary personnel policies, for example, the requirement that annual leave be used to attend meetings, provided that such

policies do not frustrate or subvert the purpose of the Sunshine Law. *Id*.

Although not directly addressing the open meeting laws, courts of other states have ruled that in the absence of a compelling governmental interest, agencies may not single out and exclude a particular news organization or reporter from press conferences. *See, e.g., Times-Picayune Publishing Corporation v. Lee,* 15 Media L. Rep. 1713 (E.D. La. 1988); *Borreca v. Fasi,* 369 F. Supp. 906 (D. Hawaii 1974); *Quad-City Community News Service, Inc. v. Jebens,* 334 F. Supp. 8 (S.D. Iowa 1971); and *Southwestern Newspapers Corporation v. Curtis,* 584 S.W.2d 362 (Tex. Ct. App. 1979).

(4) Cameras and tape recorders

Reasonable rules and policies which ensure the orderly conduct of a public meeting and which require orderly behavior on the part of those persons attending a public meeting may be adopted by the board or commission. A rule or policy which prohibits the use of nondisruptive or silent tape recording devices, however, is unreasonable and arbitrary and is, therefore, invalid. AGO 77-122.

Moreover, the Legislature in Ch. 934, F.S., appears to implicitly recognize the public's right to silently record public meetings. AGO 91-28. Chapter 934, F.S., the Security of Communications Act, regulates the interception of oral communications. Section 934.02(2), F.S., however, defines "[o]ral communication" to specifically exclude "any public oral communication uttered at a public meeting." *See also*, Inf. Op. to Gerstein, July 16, 1976, stating that public officials may not complain that they are secretly being recorded during public meetings in violation of s. 934.03, F.S.

Similarly, a school board's refusal to allow unobtrusive videotaping of a public meeting violated the Sunshine Law. *Pinellas County School Board v. Suncam, Inc.,* 829 So. 2d 989 (Fla. 2d DCA 2002). *Accord,* AGO 91-28.

b. Public's right to participate in a meeting

(1) Importance of public participation

A recent Attorney General's Opinion notes that "the courts of this state and this office have recognized the importance of public participation in open meetings." *See*, AGO 04-53 and cases cited at footnote 6. In *Evergreen the Tree Treasurers of Charlotte County, Inc. v. Charlotte County Board of County*

Commissioners, 810 So. 2d 526 (Fla. 2d DCA 2002), the court held that a county development review committee was subject to the Sunshine Law, and should have allowed public comment before making its decision on a project. *Cf*., s. 286.0115(2)(b), F.S., providing that "[i]n a quasi-judicial proceeding on local government land use matters, a person who appears before the decisionmaking body who is not a party or a party-intervenor shall be allowed to testify before the decisionmaking body, subject to control by the decisionmaking body, ..."

However, the Supreme Court has indicated that with regard to certain types of executive meetings, there may not be a right under s. 286.011, F.S., for a member of the public to participate. In *Wood v. Marston*, 442 So. 2d 934, 941 (Fla. 1983), the Court examined the applicability of the Sunshine Law to a staff committee delegated the authority by the university president to recommend candidates for a university position. Reviewing the activities of a committee carrying out executive functions traditionally conducted without public input, the Court stated:

> This Court recognizes the necessity for the free exchange of ideas in academic forums, without fear of governmental reprisal, to foster deep thought and intellectual growth. . . . We hasten to reassure respondents that nothing in this decision gives the public the right to be more than spectators.

Until the matter is clarified, the Attorney General's Office has recognized that when committees are carrying out certain executive functions which traditionally have been conducted without public input (as described in the *Marston* decision), the public has the right to attend but may not have the authority to participate. *See, Law and Information Services v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996), citing *Marston* for the principle that the public does not have a right to speak on all issues prior to resolution of the issue by the board; *Homestead-Miami Speedway, LLC. v. City of Miami*, 828 So. 2d 411 (Fla. 3d DCA 2002) (city did not violate Sunshine Law where there was public participation and debate in some but not all of the meetings concerning a proposed contract).

On the other hand, if a committee or board is carrying out legislative responsibilities, the Attorney General's Office has advised that the public should be afforded a meaningful opportunity to participate at each stage of the decision-making process, including workshops. *See*, Inf. Op. to Thrasher, January 27, 1994; and Inf. Op. to Conn, May 19, 1987.

(2) Authority to adopt reasonable rules

In providing an opportunity for public participation, the Attorney General's Office has advised that reasonable rules and policies, which ensure the orderly conduct of a public meeting and which require orderly behavior on the part of those persons attending, may be adopted by a public board. For example, a rule which limits the amount of time an individual may address the board could be adopted provided that the time limit does not unreasonably restrict the public's right of access.

Although not directly considering the Sunshine Law, the court in *Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989), recognized that "to deny the presiding officer the authority to regulate irrelevant debate and disruptive behavior at a public meeting--would cause such meetings to drag on interminably, and deny others the opportunity to voice their opinions." Thus, the court concluded that a mayor's actions in attempting to confine the speaker to the agenda item in the city commission meeting and having the speaker removed when the speaker appeared to become disruptive constituted a reasonable time, place and manner regulation and did not violate the speaker's First Amendment rights. *And see, Rowe v. City of Cocoa*, 358 F. 3d 800 (11th Cir. 2004) (city council's regulation limiting speech of nonresidents during its meetings is viewpoint-neutral and does not violate the First or Fourteenth Amendment rights of nonresidents). *Compare*, AGO 04-53 (statute requiring special district board to hold "a public hearing at which time qualified electors of the district may appear and be heard" does not prohibit nonqualified electors from participating).

5. May the members of a public board use codes or preassigned numbers in order to avoid identifying individuals?

Section 286.011, F.S., requires that meetings of public boards or commissions be "open to the public at all times." If at any time during the meeting the proceedings become covert, secret or not wholly exposed to the view and hearing of the public, then that portion of the meeting violates the portion of s. 286.011, F.S., requiring that meetings be "open to the public at all times." Thus, in *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985), the Court disapproved of a procedure by which representatives of the media would be permitted to attend a city council meeting provided that they agreed to "respect the confidentiality" of certain matters. "Under the Sunshine Law, a meeting is either fully open or fully closed; there are no intermediate categories." *Id*. at 823.

Accordingly, the use of preassigned numbers or codes at public meetings to avoid identifying the names of applicants

violates s. 286.011, F.S., because "to permit discussions of applicants for the position of a municipal department head by a preassigned number or other coded identification in order to keep the public from knowing the identities of such applicants and to exclude the public from the appointive or selection process would clearly frustrate or defeat the purpose of the Sunshine Law." AGO 77-48. *Accord*, AGO 76-240 (Sunshine Law prohibits the use of coded symbols at a public meeting in order to avoid revealing the names of applicants for the position of city manager). *And see, News-Press Publishing Company v. Wisher*, 345 So. 2d 646 (Fla. 1977), in which the Supreme Court held that the procedure used by a county commission to reprimand a department head contravened the Sunshine Law. "The public policy of this state as expressed in the public records law and the open meetings statute eliminate any notion that the commission was free to conduct the county's personnel business by pseudonyms or cloaked references." *Id*. at 648.

6. May members of a public board vote by written or secret ballot?

Board members are not prohibited from using written ballots to cast a vote as long as the votes are made openly at a public meeting, the name of the person who voted and his or her selection are written on the ballot, and the ballots are maintained and made available for public inspection in accordance with the Public Records Act. *See*, AGO 73-344. *Cf.*, AGO 78-117 (in the absence of statutory authority, proxy voting by board members is not allowed).

By contrast, a secret ballot violates the Sunshine Law. *See*, AGO 73-264 (members of a personnel board may not vote by secret ballot during a hearing concerning a public employee). *Accord*, AGOs 72-326 and 71-32 (board may not use secret ballots to elect the chairman and other officers of the board).

7. Are board members authorized to abstain from voting?

Section 286.012, F.S., provides:

> No member of any *state, county or municipal* governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may abstain from voting . . . a vote *shall be* recorded or counted for each such member present, except when, with respect to any such member, there is, or appears to be, a possible

> conflict of interest under . . . s. 112.311, s. 112.313, or s. 112.3143, F.S. (e.s.)

Section 286.012, F.S., thus, prohibits a member of a state, county or municipal board who is present at a meeting from abstaining from voting unless there is, or appears to be, a possible conflict of interest under ss. 112.311, 112.313 or 112.3143, F.S., of the Code of Ethics for Public Officers and Employees. *And see*, AGO 02-40 (s. 286.012 applies to advisory board appointed by a county commission).

Failure of a member to vote, however, does not invalidate the entire proceedings. *City of Hallandale v. Rayel Corporation*, 313 So. 2d 113 (Fla. 4th DCA 1975), *cause dismissed sua sponte*, 322 So. 2d 915 (Fla. 1975) (to rule otherwise would permit any member to frustrate official action merely by refusing to participate).

Section 286.012, F.S., applies *only* to state, county and municipal boards. AGO 04-21. Special district boards are not subject to its provisions and may adopt their own rules regarding abstention, subject to s. 112.3143, F.S. AGOs 04-21, 85-78 and 78-11.

Section 112.3143(3)(a), F.S., prohibits a county, municipal, or other local public officer from voting on any measure which inures to his or her special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal or parent organization or subsidiary of a corporate principal, other than a public agency, by whom he or she is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the officer. An exception exists for a commissioner of a community redevelopment agency created or designated pursuant to s. 163.356, F.S., or s. 163.357, F.S., or an officer of an independent special tax district elected on a one-acre, one-vote basis. Section 112.3143(3)(b), F.S.

For those local officials subject to s. 112.3143(3)(a), F.S., however, no exception exists even though the abstention has the effect of preventing the local legislative body from taking action on the matter. AGO 86-61. Prior to the vote being taken, the local officer must publicly state the nature of his or her interest in the matter from which he is abstaining. Within 15 days of the vote, the officer must disclose the nature of his or her interest in a memorandum filed with the person responsible for recording the minutes of the meeting who shall incorporate the memorandum in the minutes. Section 112.3143(3)(a), F.S.

State public officers, however, are not required to abstain from voting because of a conflict of interest. Section

112.3143(2), F.S. *But see*, s. 120.665(1), F.S., applicable to agencies subject to Ch. 120, F.S., the Administrative Procedure Act, stating that "[n]otwithstanding the provisions of s. 112.3143, any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding."

If the state officer votes, however, on a matter which would inure to his or her special private gain or loss, or to the special gain or loss of any principal or parent organization or subsidiary of a corporate principal by which the officer is retained, or to the special private gain or loss of a relative or business associate, the officer is required to disclose the nature of his or her interest in a memorandum. The memorandum must be filed within 15 days after the vote with the person responsible for recording the minutes of the meeting who shall incorporate the memorandum in the minutes. *See*, s. 112.3143(2), F.S.

Although a member of a *state* board or commission is authorized to abstain from voting on a question in which he or she is personally interested, the member is not disqualified from voting; the member may, therefore, be counted for purposes of computing a quorum for a vote on that question. Once a quorum is present, a majority of those members actually voting is sufficient to decide the question. AGO 75-244.

When a member of a *local* board is *required* to abstain pursuant to s. 112.3143(3), F.S., the local board member is disqualified from voting and may not be counted for purposes of determining a quorum. AGOs 86-61 and 85-40.

Questions as to what constitutes a conflict of interest under the above statutes should be referred to the Florida Commission on Ethics.

8. Is a roll call vote required?

While s. 286.012, F.S., requires that each member present cast a vote either for or against the proposal under consideration by the public board or commission, it is not necessary that a roll call vote of the members present and voting be taken so that each member's specific vote on each subject is recorded. The intent of the statute is that all members present cast a vote and that the minutes so reflect that by either recording a vote *or* counting a vote for each member. *Ruff v. School Board of Collier County*, 426 So. 2d 1015 (Fla. 2d DCA 1983) (roll call vote so as to *record* the individual vote of each

such member is not necessary). *Cf*., s. 20.052(5)(c), F.S., requiring that minutes, including a record of all votes cast, be maintained for all meetings of an advisory body, commission, board of trustees, or other collegial body adjunct to an executive agency.

9. Must written minutes be kept of all sunshine meetings?

Section 286.011, F.S., specifically requires that minutes of a meeting of a public board or commission be promptly recorded and open to public inspection. While tape recorders may also be used to record the proceedings before a public body, written minutes of the meeting must be taken and promptly recorded. AGO 75-45. The minutes required to be kept for "workshop" meetings are not different than those required for any other meeting of a public board or commission. AGO 74-62.

Draft minutes of a board meeting may be circulated to individual board members for corrections and studying prior to approval by the board, so long as any changes, corrections, or deletions are discussed and adopted during the public meeting when the board adopts the minutes. AGOs 02-51 and 74-294. The minutes are public records when the person responsible for preparing the minutes has performed his or her duty even though they have not yet been sent to the board members or officially approved by the board. AGO 91-26.

Section 286.011, F.S., does not specify who is responsible for taking the minutes of public meetings. This appears to be a procedural matter which the individual boards or commissions must resolve. Inf. Op. to Baldwin, December 5, 1990.

10. In addition to minutes, does the Sunshine Law also require that meetings be transcribed or tape recorded?

The Attorney General's Office has concluded that the minutes of Sunshine Law meetings need not be verbatim transcripts of the meetings; rather the use of the term "minutes" in s. 286.011, F.S., contemplates a brief summary or series of brief notes or memoranda reflecting the events of the meeting. AGO 82-47. *And see*, *State v. Adams*, No. 91-175-CC (Fla. Sumter Co. Ct. July 15, 1992) (no violation of Sunshine Law where minutes failed to reflect brief discussion concerning a proposed inspection trip). However, an agency is not prohibited from using a written transcript of the meeting as the minutes, if it chooses to do so. Inf. Op. to Fulwider, June 14, 1993.

The Sunshine Law does not require that public boards and commissions tape record their meetings. AGO 86-21. However, once made, such recordings are public records and their retention

is governed by schedules established by the Division of Library and Information Services of the Department of State in accordance with s. 257.36(6), F.S. *Id. Accord,* AGO 86-93 (tape recordings of school board meetings subject to Public Records Act even though written minutes are required to be prepared and made available to the public). *And see,* AGO 04-15 (tape recordings of staff meetings made at the request of the executive director by a secretary for use in preparing minutes of the meeting are public records).

G. WHAT ARE THE STATUTORY EXCEPTIONS TO THE LAW?

1. Sunshine Law to be liberally construed while exceptions to the law to be narrowly construed

As a statute enacted for the public benefit, the Sunshine Law should be liberally construed to give effect to its public purpose while exemptions should be narrowly construed. *See*, *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969).

The courts have recognized that the Sunshine Law should be construed so as to frustrate all evasive devices. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979); *Wolfson v. State*, 344 So. 2d 611 (Fla. 2d DCA 1977). As the Florida Supreme Court stated:

> Various boards and agencies have obviously attempted to read exceptions into the Government in the Sunshine Law which do not exist. Even though their intentions may be sincere, such boards and agencies should not be allowed to circumvent the plain provisions of the statute. The benefit to the public far outweighs the inconvenience of the board or agency. If the board or agency feels aggrieved, then the remedy lies in the halls of the Legislature and not in efforts to circumvent the plain provisions of the statute by devious ways in the hope that the judiciary will read some exception into the law. *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260, 264 (Fla. 1973).

If a board member is unable to determine whether a meeting is subject to the Sunshine Law, he or she should either leave the meeting or ensure that the meeting complies with the Sunshine Law. *See*, *City of Miami Beach v. Berns*, *supra* at 41; *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974) ("The principle to be followed is very simple: When in doubt, the

members of any board, agency, authority or commission should follow the open-meeting policy of the State.").

2. Creation and review of exemptions

Article I, s. 24(b), Fla. Const., requires that all meetings of a collegial public body of the executive branch of state government or of local government, at which official acts are to be taken or at which the public business of such body is to be transacted or discussed, be open and noticed to the public. All laws in effect on July 1, 1993, that limit access to meetings remain in force until they are repealed. Article I, s. 24(d), Fla. Const.

The Legislature is authorized to provide by general law passed by two-thirds vote of each house for the exemption of meetings, provided such law states with specificity the public necessity justifying the exemption and is no broader than necessary to accomplish the stated purpose of the law. Article I, s. 24(c), Fla. Const. *See,* s. 119.011(8), F.S., defining the term "exemption" to include a provision of general law which provides that a "specified . . . meeting, or portion thereof, is not subject to the access requirements" in s. 286.011, F.S., or Art. I, s. 24. *And see*, *Halifax Hospital Medical Center* v. *News-Journal Corporation,* 724 So. 2d 567 (Fla. 1999), finding an open meetings exemption for certain hospital board meetings to be unconstitutional because the law did not meet the constitutional standard of specificity as to stated public necessity and limited breadth to accomplish that purpose. *Compare, Baker County Press, Inc. v. Baker County Medical Services, Inc.,* 870 So. 2d 189, 195 (Fla. 1st DCA 2004), upholding a more recent public meetings exemption because "the constitutional concerns expressed by the Florida Supreme Court in *Halifax*" were met due to a more specific legislative justification accompanied by adequate findings to support the breadth of the exemption.

Section 119.15, F.S., the Open Government Sunset Review Act, provides for legislative review of exemptions from the open government laws. Pursuant to the Act, in the fifth year after enactment of a new exemption or expansion of an existing exemption, the exemption shall be repealed on October 2 of the fifth year, unless the Legislature acts to reenact the exemption. Section 119.15(3), F.S. The two-thirds vote requirement for enactment of exemptions set forth in Art. I, s. 24(c), Fla. Const., applies to re-adoption of exemptions as well as initial creation of exemptions. AGO 03-18.

3. Statutory exemptions

There are a number of exemptions to the Government in the Sunshine Law. This section, although by no means comprehensive, summarizes some of the more significant exemptions which have formed the basis of inquiries to this office by governmental agencies and the public, or which have been the subject of recent Attorney General Opinions or court decisions. For a more complete listing, please see Appendix D and the Index.

a. Abuse meetings

Portions of meetings of the State Child Abuse Death Review Committee or local committees at which information made confidential by s. 383.412(1) is discussed are exempt from open meetings requirements. Section 383.412(2), F.S. Portions of meetings of domestic violence fatality review teams regarding domestic violence fatalities and their prevention, during which confidential or exempt information, the identity of the victim, or the identity of the victim's children is discussed, are exempt from s. 286.011, F.S. Section 741.3165(2), F.S.

Portions of meetings of the statewide or local advocacy councils which relate to the identity of clients, which relate to the identity of individuals providing information about abuse or alleged violation of rights, or where testimony is provided relating to records otherwise made confidential by law are not subject to open meetings requirements. Sections 402.165(8)(c) and 402.166(8)(c), F.S. *See,* AGO 06-34 (members of local advocacy council, who are attending a closed session of the statewide advocacy council during the discussion of one of the local council's cases, may not remain in the closed session when the statewide advocacy council is considering cases from other advocacy councils which are unrelated to the local advocacy council's cases).

b. Collective bargaining strategy sessions

For more information on this topic, please refer to the discussion in s. D.4.a, *supra*.

c. Economic development meetings

Although s. 288.075(2), F.S., allows a private corporation to request confidentiality for certain records relating to its plans to locate or relocate in Florida, this exemption "applies only to records and does not constitute an exemption from the provisions of the Government in the Sunshine Law . . . ." AGO 04-19. *Accord*, AGO 80-78. *Compare*, s. 288.9551(3), F.S. (Scripps Florida Funding Corporation); s. 288.982(2), F.S. (Governor's Advisory Council on Base Realignment and Closure); and s.

331.326, F.S. (Space Florida), providing limited exemptions from the Sunshine Law for certain discussions of confidential records. *Cf.*, s. 286.0113(2), F.S., providing an exemption from the Sunshine Law for a meeting at which a negotiation with a vendor is conducted pursuant to s. 287.057(3), F.S., and providing that a complete recording must be made of any exempt meeting.

d. Education meetings

Section 1002.22(3)(c), F.S., provides that hearings held in order to challenge material found in student records are exempt from s. 286.011, F.S., if requested by the parent or student. Student expulsion hearings are exempt from the Sunshine Law although the student's parent must be given notice of the provisions of s. 286.011, F.S., and may elect to have the hearing held in compliance with that section. Section 1006.07(1)(a), F.S. *See*, AGO 93-03.

Hearings on an exceptional student's placement or denial of placement in a special education program are exempt from s. 286.011, F.S., except to the extent that the State Board of Education adopts rules establishing other procedures. Section 1003.57(1)(e), F.S.

e. Hearings involving minors

Dependency adjudicatory hearings are open except on special order of the judge, who may close any hearing to the public upon determining that the public interest or the welfare of the child is best served by so doing. Section 39.507(2), F.S. *And see*, *Mayer v. State*, 523 So. 2d 1171 (Fla. 2d DCA), *review dismissed*, 529 So. 2d 694 (Fla. 1988) (former version of this statute which required all such hearings to be closed did not violate First Amendment freedom of press rights). Hearings for the appointment of a guardian advocate are confidential and closed to the public. Section 39.827(4), F.S.

All hearings involving termination of parental rights are confidential. Section 39.809(4), F.S. *See, Natural Parents of J.B. v. Florida Department of Children and Family Services,* 780 So. 2d 6 (Fla. 2001), upholding the constitutionality of the statute. *And see, J.I. v. Department of Children and Families,* 922 So. 2d 405 (Fla. 4th DCA 2006) (Sunshine Law does not apply to Department of Children and Families permanency staffing meetings conducted to determine whether to file petition to terminate parental rights). *Cf., Stanfield v. Florida Department of Children and Families,* 698 So. 2d 321 (Fla. 3d DCA 1997) (trial court not authorized to issue a "gag" order preventing a woman from discussing a termination of parental rights case

because "[t]he court cannot prohibit citizens from exercising their First Amendment right to publicly discuss knowledge that they have gained independent of court documents even though the information may mirror the information contained in court documents").

Hearings held under the Florida Adoption Act are closed. Section 63.162(1), F.S. *See*, *In re Adoption of H.Y.T.*, 458 So. 2d 1127 (Fla. 1984) (statute providing that all adoption hearings shall be held in closed court is not unconstitutional).

Except as provided in s. 918.16(2), the judge shall clear the courtroom, except for listed individuals, in a criminal or civil trial when any person under 16 years of age or any person with mental retardation is testifying concerning any sex offense. Section 918.16(1), F.S. When the victim of a sex offense is testifying concerning that offense, the court shall clear the courtroom, except for listed individuals, upon request of the victim, regardless of the victim's age or mental capacity. Section 918.16(2), F.S. *Cf., Pritchett v. State*, 566 So. 2d 6 (Fla. 2d DCA), *review dismissed*, 570 So. 2d 1306 (Fla. 1990) (where a trial court failed to make any findings to justify closure, application of s. 918.16, F.S., to the trial of a defendant charged with capital sexual battery violates the defendant's constitutional right to a public trial). *Accord*, *Kovaleski v. State*, 854 So. 2d 282 (Fla. 4th DCA 2003), *cause dismissed,* 860 So. 2d 978 (Fla. 2003).

All hearings conducted in accordance with a petition for a waiver of the notice requirements pertaining to a minor seeking to terminate her pregnancy, shall remain confidential and closed to the public, as provided by court rule. Section 390.01114(4)(e), F.S.

f. Hearings to obtain HIV test results

While the test results for human immunodeficiency virus infection are confidential and may be released only as prescribed by statute, a person may be allowed access to the results by court order if he or she demonstrates a compelling need for the results which cannot be accommodated by other means. The court proceedings in these cases are to be conducted *in camera* unless the person tested agrees to a hearing in open court or the court determines that a public hearing is necessary to the public interest and the proper administration of justice. Section 381.004(3)(e)9., F.S.

g. Hospitals

(1) Public hospitals and health facilities

The meetings of peer review panels, committees and governing bodies of hospitals or ambulatory surgical centers licensed in accordance with Ch. 395, F.S., which relate to disciplinary actions and are held to achieve the objectives of such panels, committees, or governing boards, are exempt from s. 286.011, F.S. Section 395.0193(7), F.S. The meetings of the committees and governing board of a licensed facility held solely for the purpose of achieving the objectives of risk management are not open to the public. Section 395.0197(14), F.S. *See*, AGO 92-29, stating that to the extent a meeting of the board of directors and the medical staff's quality assurance committee deals with carrying out cited risk management statutes, the meeting is exempt from the open meeting requirements of s. 286.011, F.S.

Similar exemptions for portions of meetings which relate solely to patient care quality assurance are found in ss. 381.0055(3) (Department of Health and local health agencies); 394.907(7) (community mental health centers); and 395.51(3), F.S. (trauma agencies). *And see*, ss. 400.119(2)(a) (long-term care facilities); 401.425(5) (emergency medical services); 766.101(7)(c) (medical review committee proceedings); and 945.6032(3), F.S. (medical review committee created by Correctional Medical Authority or Department of Corrections). *Cf*., s. 381.0273(4), F.S. (Florida Patient Safety Corporation).

Those portions of a meeting of a public hospital's governing board at which negotiations for contracts with nongovernmental entities occur or are reported on when such negotiations concern services that are or are reasonably expected to be provided by the hospital's competitors are exempt from public meetings requirements. Section 395.3035(3), F.S. However, governing board meetings at which the board is scheduled to vote on contracts, except managed care contracts, are open. *Id.* In addition, those portions of meetings at which certain written strategic plans are considered are exempt from open meetings requirements. Section 395.3035(4), F.S. However, a hospital may not approve a binding agreement to implement a strategic plan at any closed meeting. Section 395.3035(8), F.S.

That portion of a public meeting which would reveal information contained in a comprehensive emergency management plan that addresses the response of a hospital to an act of terrorism is exempt from open meetings requirements. Section 395.1056(4), F.S.

Any portion of the meeting of the governing board, peer review panel, or committee meeting of a university health services support organization during which a confidential and

exempt contract, document, record, marketing plan, or trade secret is discussed is exempt from s. 286.011, F.S. Section 1004.30(3), F.S. *And see,* s. 409.91196(2), F.S. (that portion of a meeting of the Medicaid Pharmaceutical and Therapeutics Committee at which the rebate amount, percent of rebate, manufacturer's pricing, or supplemental rebate, or other trade secrets that the Agency for Health Care Administration has identified for use in negotiations, are discussed is exempt from open meetings requirements).

That portion of a long term care ombudsman council meeting in which the council discusses information that is confidential and exempt from s. 119.07(1), F.S., is closed to the public. Section 400.0077(2), F.S. *And see,* s. 641.68, F.S. (managed care ombudsman committee).

(2) Private or nonprofit corporations operating public health facilities

Section 395.3036, F.S., provides that meetings of the governing board of a private corporation that leases a public hospital or health care facility are exempt from open meetings requirements when the public lessor complies with the public finance accountability provisions of s. 155.40(5), F.S., with respect to the transfer of any public funds to the private lessee and when the private lessee meets at least three of the five criteria set forth in the exemption. *See, Indian River County Hospital District v. Indian River Memorial Hospital Inc.,* 766 So. 2d 233 (Fla. 4th DCA 2000). *See also, Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (exemption is constitutional). *Cf., Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 927 So. 2d 961 (Fla. 5th DCA 2006) (private corporation that purchased hospital from public hospital authority is not subject to open government requirements). *And see*, s. 155.40(8), F.S., describing and construing the term "complete sale" as applied to the purchase of a public hospital by a private entity.

Meetings of the governing body of the not-for-profit corporation operating the H. Lee Moffitt Cancer Center and Research Institute, or its subsidiaries, are also exempt except that meetings at which expenditures of dollars appropriated to the corporation by the state are discussed must remain open to the public, unless made confidential or exempt by law. Section 1004.43(9), F.S. *And see*, s. 1004.4472(3), F.S. (portions of meetings of the Florida Institute for Human and Machine Cognition, Inc., at which confidential and exempt information is presented may be closed).

h. Insurance meetings

Proceedings and hearings relating to the actions of the Office of Insurance Regulation regarding an insurer's risk-based capital plan or report are exempt from s. 286.011, F.S., except as otherwise provided in the section. Section 624.40851(2), F.S. Portions of meetings of the Citizens Property Insurance Corporation and of the Florida Automobile Joint Underwriting Association where confidential underwriting files or confidential open claims files are discussed are closed to the public. Sections 627.351(6)(w)2. and 627.311(4)(b), F.S. Meetings of the subscriber assistance panel are open to the public unless the provider or subscriber whose grievance will be heard requests a closed meeting or the Agency for Health Care Administration or the Department of Financial Services determines that information relating to subscriber medical history or to internal risk management programs may be revealed, in which case that portion of the meeting is exempt from the Sunshine Law. Section 408.7056(14)(b), F.S.

That portion of a meeting of the Florida Commission on Hurricane Loss Projection Methodology or of a rate proceeding on an insurer's rate filing at which a confidential trade secret is discussed is exempt from open meetings requirements. Section 627.0628(3)(e)2., F.S.

Discussions involving officials of the Department of Financial Services and an insurance company relating to investigation of fraudulent insurance claims are confidential and exempt from s. 286.011, F.S. Section 633.175(5), F.S. *And see,* ss. 631.724 (certain negotiations or meetings of the Florida Life and Health Insurance Guaranty Association); 631.932 (negotiations between an insurer and the Florida Workers' Compensation Insurance Guaranty Association); and 440.3851(3), F.S. (portions of meetings of board of directors of Florida Self-Insurers Guaranty Association, Incorporated, at which confidential records are discussed).

i. Investigative meetings

For more information on this topic, please refer to the discussion in s. D.2.a., *supra.*

j. Litigation meetings

For more information on this topic, please refer to the discussion in s. D.3., *supra.*

k. Security and criminal justice meetings

Meetings relating to the security systems for any property owned by or leased to the state or any of its political subdivisions or for any privately owned or leased property which is in the hands of an agency are exempt from s. 286.011, F.S. Section 281.301, F.S. This statute exempts meetings of a board when the board discusses issues relating to the security systems for any property owned or leased by the board or for any privately owned or leased property which is in the possession of the board. The statute does not merely close such meetings; it exempts the meetings from the requirements of s. 286.011, F.S., such as notice. AGO 93-86. *And see*, s. 286.0113(1), F.S., stating that the portion of a meeting that would reveal a security system plan or portion thereof made confidential and exempt by s. 119.071(3)(a), F.S. (providing an exemption from the Public Records Act for a "security system plan") is exempt from open meetings requirements.

The Florida Violent Crime and Drug Control Council may close portions of meetings during which the council will hear or discuss active criminal investigative information or active criminal intelligence information, provided that specified conditions are met as set forth in the exemption. Section 943.031(7)(c), F.S. *And see,* s. 943.0314, F.S. (Domestic Security Oversight Council).

l. Workforce Florida, Inc., meetings

That portion of a meeting held by the Department of Children and Family Services, Workforce Florida, Inc., or a regional workforce board or local committee created pursuant to s. 445.007, F.S., at which personal identifying information contained in records relating to temporary cash assistance is discussed is exempt from open meetings requirements if the information identifies a participant, a participant's family, or a participant's family or household member. Section 414.106, F.S.

4. Special act exemptions

Prior to July 1, 1993, exemptions from the Sunshine Law could be created by special act. For example, a special act giving a teacher the option of an open or closed hearing during a disciplinary proceeding was held by the Florida Supreme Court to constitute a valid legislative exception to s. 286.011, F.S. *Tribune Company v. School Board of Hillsborough County*, 367 So. 2d 627 (Fla. 1979).

Article I, s. 24, Fla. Const., however, now limits the Legislature's ability to enact an exemption from the

constitutional right of access to open meetings established thereunder. While exemptions in effect on July 1, 1993, remain in force until repealed, the Constitution requires that exemptions enacted after that date must be by general law. Such law must state with specificity the public necessity for the exemption and be no broader than necessary to accomplish that stated purpose.

H. WHAT ARE THE CONSEQUENCES IF A PUBLIC BOARD OR COMMISSION FAILS TO COMPLY WITH THE SUNSHINE LAW?

1. Criminal penalties

Any member of a board or commission or of any state agency or authority of a county, municipal corporation, or political subdivision who *knowingly* violates the Sunshine Law is guilty of a misdemeanor of the second degree. Section 286.011(3)(b), F.S. 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. Sections 775.082(4)(b) and 775.083(1)(e), F.S. *Cf.*, *Wolfson v. State*, 344 So. 2d 611 (Fla. 2d DCA 1977) (indictment charging that defendant, while serving as an elected city commissioner, met with other commissioners at a nonpublic meeting was sufficient to allege a violation of s. 286.011, F.S., even though it did not allege defendant attended such meetings as a member of the commission). The criminal penalties apply to members of advisory councils subject to the Sunshine Law as well as to members of elected or appointed boards. AGO 01-84 (school advisory council members).

Conduct which occurs outside the state which constitutes a knowing violation of the Sunshine Law is a second degree misdemeanor. Section 286.011(3)(c), F.S. Such violations are prosecuted in the county in which the board or commission normally conducts its official business. Section 910.16, F.S.

2. Removal from office

When a method for removal from office is not otherwise provided by the Constitution or by law, 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. Section 112.52(1), F.S. If convicted, the officer may be removed from office by executive order of the Governor. Section 112.52(3), F.S. A person who pleads guilty or nolo contendere or who is found guilty is, for purposes of s. 112.52, F.S., deemed to have been convicted, notwithstanding the suspension of sentence or the withholding of adjudication. *Id*. *Cf.*, s. 112.51, F.S., and Art. IV, s. 7, Fla. Const.

3. Noncriminal infractions

Section 286.011(3)(a), F.S., imposes noncriminal penalties for violations of the Sunshine Law by providing that any public officer violating the provisions of the Sunshine Law is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. The state attorney may pursue such actions on behalf of the state. *State v. Foster*, 12 F.L.W. Supp. 1194a (Fla. Broward Co. Ct. September 26, 2005). *Accord,* AGO 91-38.

If a nonprofit corporation is subject to the Sunshine Law, the members of the corporation's board of directors constitute "public officers" for purposes of s. 286.011(3)(a), F.S. AGO 98-21.

4. Attorney's fees

Reasonable attorney's fees will be assessed against a board or commission found to have violated the Sunshine Law. Section 286.011(4), F.S. *See*, *Indian River County Hospital District v. Indian River Memorial Hospital, Inc.,* 766 So. 2d 233, 235 (Fla. 4th DCA 2000), concluding that the trial court erred by failing to assess attorney's fees against a nonprofit hospital corporation found to have violated the Sunshine Law. The appellate court said that even though it could "appreciate the trial court's sentiment that the 'fairest resolution' is for each party to bear its own attorney's fees because both parties are public entities, section 286.011[4] requires attorney's fees to be assessed against [the corporation]."

Section 286.011(4), F.S., however, does not constitute authorization for the trial court to award appellate attorney's fees in a case where a person alleges a Sunshine Law violation, loses at the trial court level but then prevails on appeal. *School Board of Alachua County v. Rhea,* 661 So. 2d 331 (Fla. 1st DCA 1995), *review denied*, 670 So. 2d 939 (Fla. 1996). This statute "does not supersede the appellate rules, nor does it authorize the trial court to make an initial award of appellate attorney's fees." *Id.* at 332. Thus, a person prevailing on appeal must file an appropriate motion in the appellate court in order to receive appellate attorney's fees.

If a board appeals an order finding the board in violation of the Sunshine Law, and the order is affirmed, "the court shall assess a reasonable attorney's fee for the appeal" against the board. Section 286.011(5), F.S.

Attorney's fees may be assessed against the individual members of the board except in those cases where the board sought, and took, the advice of its attorney, such fees may not

be assessed against the individual members of the board. Section 286.011(4) and (5), F.S.

If a member of a board or commission is charged with a violation of s. 286.011, F.S., and is subsequently acquitted, the board or commission is authorized to reimburse that member for any portion of his or her reasonable attorney's fees. Section 286.011(7), F.S. This subsection does not authorize the reimbursement of attorney's fees incurred during an investigation of alleged sunshine violations when no formal charges were filed, although common law principles may permit such reimbursement, provided the agency has made a specific finding that the member's actions arose from the performance of his or her official duties and that such actions served a public purpose. AGO 86-35.

Reasonable attorney's fees may be assessed *against* the individual filing an action to enforce the provisions of s. 286.011, F.S., if the court finds that it was filed in bad faith or was frivolous. Section 286.011(4), F.S. The fact that a plaintiff may be unable to prove that a secret meeting took place, however, does not necessarily mean that attorney's fees will be assessed.

For example, in *Bland v. Jackson County*, 514 So. 2d 1115, 1116 (Fla. 1st DCA 1987), the court reversed an award for attorney's fees for maintaining a frivolous action, holding that a justiciable issue had been presented as to whether there was a privately agreed upon result reached in a nonpublic meeting. Although the plaintiff was unable to prove such a meeting took place, the evidence showed that the county commission unanimously voted on the issue in an open public meeting without identifying what they were voting on and without any discussion: "Under these circumstances one of several inferences reasonable people might draw could be that the Commissioners had no need to discuss the action being taken because they had already discussed and decided the issue before the public meeting."

5. Civil actions for injunctive or declaratory relief

Section 286.011(2), F.S., states that the circuit courts have jurisdiction to issue injunctions upon application by any citizen of this state. The burden of prevailing in such actions has been significantly eased by the judiciary in sunshine cases. 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." *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974); and *Times Publishing Company v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969), *disapproved in part on other grounds, Neu v. Miami Herald Publishing Company*, 462 So. 2d 821

(Fla. 1985). The plaintiff's burden is to "establish by the greater weight of the evidence" that a meeting which should have been held in the sunshine took place on the date alleged. *Lyon v. Lake County*, 765 So. 2d 785, 789 (Fla. 5th DCA 2000).

In order to state a cause of action for injunctive relief, a complaint must allege by name or sufficient description the identity of the public official with whom the defendant public official has violated the Sunshine Law. *Deerfield Beach Publishing, Inc. v. Robb*, 530 So. 2d 510 (Fla. 4th DCA 1988). *And see*, *Forehand v. School Board of Gulf County, Florida*, 600 So. 2d 1187 (Fla. 1st DCA 1992) (court rejected plaintiff's argument that she was denied a fair and impartial hearing because the board only briefly deliberated in public before a vote was taken, stating that there was no evidence that the board had privately deliberated on this issue); and *Law and Information Services v. City of Riviera Beach,* 670 So. 2d 1014 (Fla. 4th DCA 1996) (patent speculation, absent any allegation that a nonpublic meeting in fact occurred, is insufficient to state a cause of action).

Future violations may be enjoined by the court where one violation has been found and it appears that the future violation will bear some resemblance to the past violation or that the danger of future violations can be anticipated from the course of conduct in the past. *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969). *See*, *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983) (trial court's permanent injunction affirmed). *Compare, Leach-Wells v. City of Bradenton*, 734 So. 2d 1168, 1170n.1 (Fla. 2d DCA 1999), in which the court noted that had a citizen appealed the trial court's denial of her motion for temporary injunction based on a selection committee's alleged violation of the Sunshine Law, the appellate court "would have had the opportunity to review this matter before the project was completed and to direct that the City be enjoined from entering into a final contract with the developer until after such time as the ranking of the proposals could be accomplished in compliance with the Sunshine Law."

Although a court cannot issue a blanket order enjoining any violation of the Sunshine Law on a showing that it was violated in particular respects, a court may enjoin a future violation that bears some resemblance to the past violation. *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169, 1173 (Fla. 4th DCA 1995). The future conduct must be "specified, with such reasonable definiteness and certainty that the defendant could readily know what it must refrain from doing without speculation and conjecture." *Id.*, quoting from *Board of Public Instruction v. Doran*, *supra* at 699.

Declaratory relief is not appropriate where no present dispute exists but where governmental agencies merely seek judicial advice different from that advanced by the Attorney General and the state attorney, or an injunctive restraint on the prosecutorial discretion of the state attorney. *Askew v. City of Ocala*, 348 So. 2d 308 (Fla. 1977).

6. Validity of action taken in violation of the Sunshine Law and subsequent corrective action

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*. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974); *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979) (resolutions made during meetings held in violation of s. 286.011, F.S., had to be re-examined and re-discussed in open public meetings); *Silver Express Company v. District Board of Lower Tribunal Trustees*, 691 So. 2d 1099 (Fla. 3d DCA 1997) (agency enjoined from entering into a contract based on a ranking established by a selection committee that did not meet in accordance with the Sunshine Law); and *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309 (Fla. 1st DCA 1991) (contract for sale and purchase of real property voided because board failed to properly notice the meeting under s. 286.011, F.S.).

A violation of the Sunshine Law need not be "clandestine" in order for a contract to be invalidated, because "the principle that a Sunshine Law violation renders void a resulting official action does not depend upon a finding of intent to violate the law or resulting prejudice." *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169, 1171 (Fla. 4th DCA 1995). *But see*, *Killearn Properties, Inc. v. City of Tallahassee*, 366 So. 2d 172 (Fla. 1st DCA 1979), *cert. denied*, 378 So. 2d 343 (Fla. 1979) (city which had received benefits under contract was estopped from claiming contract invalid as having been entered into in violation of the Sunshine Law).

Where, however, a public board or commission does not merely perfunctorily ratify or ceremoniously accept at a later open meeting those decisions which were made at an earlier secret meeting but rather takes "independent final action in the sunshine," the decision of the board or commission will not be disturbed. *Tolar v. School Board of Liberty County*, 398 So. 2d

427, 429 (Fla. 1981). Sunshine Law violations "can be cured by independent, final action completely in the Sunshine." *Bruckner v. City of Dania Beach*, 823 So. 2d 167, 171 (Fla. 4th DCA 2002). *And see*, *Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985); *B.M.Z. Corporation v. City of Oakland Park*, 415 So. 2d 735 (Fla. 4th DCA 1982) (where no evidence that any decision was made in private, subsequent formal action in sunshine was not merely perfunctory ratification of secret decisions or ceremonial acceptance of secret actions). *Cf., Board of County Commissioners of Sarasota County v. Webber,* 658 So. 2d 1069 (Fla. 2d DCA 1995) (no evidence suggesting that board members met in secret during a recess to reconsider and deny a variance and then perfunctorily ratified this decision at the public hearing held a few minutes later).

Thus, in a case involving the validity of a lease approved by a board of county commissioners after an advisory committee held two unnoticed meetings regarding the lease, a court held that the Sunshine Law violations were cured when the board of county commissioners held open public hearings after the unnoticed meetings, an effort was made to make available to the public the minutes of the unnoticed meetings, the board approved a lease that was markedly different from that recommended by the advisory committee, and most of the lease negotiations were conducted after the advisory committee had concluded its work. *Monroe County v. Pigeon Key Historical Park, Inc*., 647 So. 2d 857, 860-861 (Fla. 3d DCA 1994). The court also said that the adoption of the open government constitutional amendment, found at Art. I, s. 24 of the Florida Constitution, did not overrule the *Tolar* "standard of remediation." *Id.* at 861.

It must be emphasized, however, that only a full open hearing will cure the defect; a violation of the Sunshine Law will not be cured by a perfunctory ratification of the action taken outside of the sunshine. *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So. 2d 694 (Fla. 3d DCA 1988). For example, in *Zorc v. City of Vero Beach,* 722 So. 2d 891, 903 (Fla. 4th DCA 1998), *review denied*, 735 So. 2d 1284 (Fla. 1999), the Fourth District explained why a subsequent city council meeting did not cure the council's prior violation of the Sunshine Law:

> It is evident from the record that the meeting was not a full reexamination of the issues, but rather, was merely the perfunctory acceptance of the City's prior decision. This was not a full, open public hearing convened for the purpose of enabling the public to express its views and participate in the decision-making process. Instead, this was merely a Council meeting which was then opened to the public for comment at the City's request. There was no

> significant discussion of the issues or a discourse as to the language sought to be included. The City Councilmen were provided with transcripts of the hearings, but none reviewed the language previously approved, and the Council subsequently voted to deny reconsideration of the wording.

Similarly, a public hearing held by a county commission following an advisory committee's violation of the Sunshine Law failed to cure the "Sunshine Law problem" because the county commission did not "review the complete deliberative process fully in the sunshine." *Florida Keys Aqueduct Authority v. Board of County Commissioners, Monroe County, Florida*, No. CA-K-00-1170 (Fla. 16th Cir. Ct. May 16, 2001). "Where there are secret or non-public meetings by an advisory board . . . the problem can be cured, but only by scheduling a new meeting of an appropriate deliberative body which will cover the same subject matter previously covered in violation of the Sunshine Law." *Id.*

PART II
PUBLIC RECORDS

A. WHAT IS A PUBLIC RECORD WHICH IS OPEN TO INSPECTION AND COPYING?

1. What materials are public records?

Section 119.011(11), F.S., defines "public records" to include:

> 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, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980). All such materials, regardless of whether they are in final form, are open for public inspection unless the Legislature has exempted them from disclosure. *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979). The complete text of Ch. 119, F.S., the Public Records Act, is found in Appendix C.

The term "public record" is not limited to traditional written documents. As the statutory definition states, "tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission" can all constitute public records. Accordingly, "the form of the record is irrelevant; the material issue is whether the record is made or received by the public agency in connection with the transaction of official business." AGO 04-33. *Compare, Rogers v. Hood*, 906 So. 2d 1220, 1223 (Fla. 1st DCA 2005), in which the court ruled that unused or unvoted punch card ballots from the 2000 presidential election in Florida do not constitute public records because they do not "perpetuate, communicate, or formalize knowledge." By contrast, a voted ballot becomes a public record once it is voted because at that point, "the voted ballot, as received by the supervisor of elections in a given county, has memorialized the act of voting." *Id*.

Clearly, as technology changes the means by which agencies communicate, manage, and store information, public records will take on increasingly different forms. Yet, the comprehensive scope of the term "public records" will continue to make the information open to inspection, unless exempted by law.

The broad definition of the term "public record" can be seen in numerous Attorney General Opinions and court decisions. The following are examples of materials which have been found to constitute public records:

> Anonymous letters sent to city officials containing allegations of misconduct by city employees--AGO 04-22;
>
> Audit of guardianship files prepared by clerk of court--AGO 04-33;
>
> Computer tapes produced by a state commission that contain the names and addresses of subscribers to a magazine published by the agency--AGO 85-03;
>
> Salary records of assistant state attorneys--AGO 73-30;
>
> Tape recording of staff meeting--AGO 04-15;
>
> Travel itineraries and plane reservations for use of state aircraft--AGO 72-356;
>
> Videotaped training film--AGO 88-23.

Article I, s. 24, Fla. Const., establishes a constitutional right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted pursuant to Art. I, s. 24, Fla. Const., or specifically made confidential by the Constitution. *See, State ex rel. Clayton v. Board of Regents*, 635 So. 2d 937 (Fla. 1994) ("[O]ur Constitution requires that public officials must conduct public business in the open and that public records must be made available to all members of the public."). The complete text of Art. I, s. 24, Fla. Const., the Public Records and Meetings Amendment, may be found in Appendix A.

2. When are notes or nonfinal drafts of agency proposals subject to Ch. 119, F.S.?

There is no "unfinished business" exception to the public inspection and copying requirements of Ch. 119, F.S. If the

purpose of a document prepared in connection with the official business of a public agency is to perpetuate, communicate, *or* formalize knowledge, then it is a public record regardless of whether it is in final form or the ultimate product of an agency. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980). "Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business." 379 So. 2d at 640. *Cf.*, *Gannett Corporation, Inc. v. Goldtrap*, 302 So. 2d 174 (Fla. 2d DCA 1974) (county's concern that premature disclosure of a report could be harmful to the county does not make the document confidential).

Accordingly, any agency document, however prepared, if circulated for review, comment or information, is a public record regardless of whether it is an official expression of policy or marked "preliminary" or "working draft" or similar label. Examples of such materials would include interoffice memoranda, preliminary drafts of agency rules or proposals which have been submitted for review to anyone within or outside the agency, and working drafts of reports which have been furnished to a supervisor for review or approval.

In each of these cases, the fact that the records are part of a preliminary process does not detract from their essential character as public records. *See*, *Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990) (while the mere preparation of documents for submission to a public body does not create public records, the documents can become public records when exhibited to public officials and revised as part of a bargaining process)*; Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.,* 718 So. 2d 227, 229 (Fla. 3d DCA 1998) (book selection forms completed by state university instructors and furnished to campus bookstore "are made in connection with official business, for memorialization and communication purposes[;] [t]hey are public records"); and AGO 91-26 (minutes of city council meetings are public records once minutes have been prepared by clerk even though minutes have not yet been sent to city council members and have not been officially approved by the city council). It follows then that such records are subject to disclosure unless the Legislature has specifically exempted the documents from inspection or has otherwise expressly acted to make the records confidential. *See*, for example, s. 119.071(1)(d), F.S., providing a limited work product exemption for agency attorneys.

Similarly, so-called "personal" notes can constitute public records if they are intended to communicate, perpetuate or formalize knowledge of some type. For example, the handwritten notes prepared by the assistant city labor attorney during her interviews with city personnel are public records when those notes are used to communicate information to the labor attorney regarding possible future personnel actions. AGO 05-23. *See also*, *City of Pinellas Park, Florida v. Times Publishing Company,* No. 00-008234CI-19 (Fla. 6th Cir. Ct. January 3, 2001) (rejecting city's argument that employee responses to survey are "notes" which are not subject to disclosure because "as to each of the employees, their responses were prepared in connection with their official agency business and they were 'intended to perpetuate, communicate, or formalize knowledge' that they had about their department"); and *Florida Sugar Cane League, Inc. v. Florida Department of Environmental Regulation*, No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992), stating that handwritten notes of agency staff, "utilized to communicate and formulate knowledge within [the agency], are public records subject to no exemption."

However, "under chapter 119 public employees' notes to themselves *which are designed for their own personal use* in remembering certain things do not fall within the definition of 'public record.'" (e.s). *The Justice Coalition v. The First District Court of Appeal Judicial Nominating Commission*, 823 So. 2d 185, 192 (Fla. 1st DCA 2002). *Accord*, *Coleman v. Austin*, 521 So. 2d 247 (Fla. 1st DCA 1988), holding that preliminary handwritten notes prepared by agency attorneys and intended only for the attorneys' own personal use are not public records.

B. WHAT AGENCIES ARE SUBJECT TO THE PUBLIC RECORDS ACT?

Section 119.011(2), F.S., defines "agency" to include:

> any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

In addition, Art. I, s. 24(a), Fla. Const., establishes a constitutional right of access to "any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to those records exempted

pursuant to this section or specifically made confidential by this Constitution." The right of access includes the legislative, executive, and judicial branches of government; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or by the Constitution.

1. Advisory boards

The definition of "agency" for purposes of Ch. 119, F.S., is not limited to governmental entities. A "public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency" is also subject to the requirements of the Public Records Act. *See also*, Art. I, s. 24(a), Fla. Const., providing that the constitutional right of access to public records extends to "any public body, officer, or employee of the state, *or persons acting on their behalf* . . . ." (e.s.)

Thus, the Attorney General's Office has concluded that the records of an employee advisory committee, established pursuant to special law to make recommendations to a public hospital authority, are subject to Ch. 119, F.S., and Art. I, s. 24(a), Fla. Const. AGO 96-32. *And see* Inf. Op. to Nicoletti, November 18, 1987, stating that the Loxahatchee Council of Governments, Inc., formed by eleven public agencies to study and make recommendations on local governmental issues was an "agency" for purposes of Ch. 119, F.S. *Cf.*, *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974) (advisory committees subject to Sunshine Law).

2. Private organizations

A more complex question is posed when a private corporation or entity, not otherwise connected with government, provides services for a governmental body. The term "agency" as used in the Public Records Act includes private entities "acting on behalf of any public agency." Section 119.011(2), F.S.

The Florida Supreme Court has stated that this broad definition of "agency" ensures that a public agency cannot avoid disclosure by contractually delegating to a private entity that which would otherwise be an agency responsibility. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992). *Cf., Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.*, 718 So. 2d 227, 229n.4 (Fla. 3d DCA 1998) (private company operating state university bookstores is an "agency" as defined in s. 119.011(2), F.S., "[n]otwithstanding the language in its contract with the

universities that purports to deny any agency relationship").

a. Receipt of public funds by private entity not dispositive

There is no single factor which is controlling on the question of when a private corporation becomes subject to the Public Records Act. For example, a private corporation does not act "on behalf of" a public agency merely by entering into a contract to provide professional services to the agency. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, *supra*. *Accord*, *Parsons & Whittemore, Inc. v. Metropolitan Dade County*, 429 So. 2d 343 (Fla. 3d DCA 1983). *And see Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970 (Fla. 2d DCA 2002) (fact that private development is located on land the developer leased from a governmental agency does not transform the leases between the developer and other private entities into public records).

Similarly, the receipt of public funds, standing alone, is not dispositive of the organization's status for purposes of Ch. 119, F.S. *See*, *Sarasota Herald-Tribune Company v. Community Health Corporation, Inc.*, 582 So. 2d 730 (Fla. 2d DCA 1991), in which the court noted that the mere provision of public funds to the private organization is not an important factor in this analysis, although the provision of a substantial share of the capitalization of the organization is important; and *Times Publishing Company v. Acton,* No. 99-8304 (Fla. 13th Cir. Ct. November 5, 1999) (attorneys retained by individual county commissioners in a criminal matter were not "acting on behalf of" a public agency so as to become subject to the Public Records Act, even though the county commission subsequently voted to pay the legal expenses in accordance with a county policy providing for reimbursement of legal expenses to individual county officers who successfully defend criminal charges filed against them arising out of the performance of their official duties). *And see* Inf. Op. to Cowin, November 14, 1997 (fact that nonprofit medical center is built on property owned by the city would not in and of itself be determinative of whether the medical center's meetings and records are subject to open government requirements).

b. "Totality of factors" test

Recognizing that "the statute provides no clear criteria for determining when a private entity is 'acting on behalf of' a public agency," the Supreme Court adopted a "totality of factors" approach to use as a guide for evaluating whether a private entity is subject to Ch. 119, F.S. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, *supra* at

1031. *Accord*, *New York Times Company v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993) (private entities should look to the factors announced in *Schwab* to determine their possible agency status under Ch. 119). *Cf., Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So. 2d 373, 381 (Fla. 1999), noting that the "totality of factors" test presents a "mixed question of fact and law"; thus, the appellate court "correctly reviewed the legal effect of the undisputed facts in this case." *And see Wells v. Aramark Food Service Corporation,* 888 So. 2d 134 (Fla. 4th DCA 2004) (trial judge should have applied totality of factors analysis rather than denying petition for writ of mandamus seeking to require Aramark to provide a copy of the food service contract between it and the Department of Corrections).

The factors listed by the Supreme Court in *Schwab* include the following:

1) the level of public funding;
2) commingling of funds;
3) whether the activity was conducted on publicly-owned property;
4) whether services contracted for are an integral part of the public agency's chosen decision-making process;
5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
6) the extent of the public agency's involvement with, regulation of, or control over the private entity;
7) whether the private entity was created by the public agency;
8) whether the public agency has a substantial financial interest in the private entity;
9) for whose benefit the private entity is functioning.

In explaining the totality test, the Court cited to several earlier district court opinions. For example, the Fourth District held that a private nonprofit volunteer fire department, which had been given stewardship over firefighting, which conducted its activities on county-owned property, and which was funded in part by public money, was an agency and its membership files, minutes of its meetings and charitable activities were subject to disclosure. *Schwartzman v. Merritt Island Volunteer Fire Department*, 352 So. 2d 1230 (Fla. 4th DCA 1977), *cert. denied*, 358 So. 2d 132 (Fla. 1978). *And see Fox v. News-Press Publishing Company, Inc.*, 545 So. 2d 941 (Fla. 2d DCA 1989) (towing company under contract to remove motor vehicles from public streets is performing a governmental function and is subject to Ch. 119). *Compare, Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation,* 927 So. 2d 961 (Fla. 5th DCA

2006), in which the Fifth District applied the totality test and determined that a private corporation that purchased a hospital it had previously leased from a public hospital authority was not "acting on behalf of" a public agency and therefore was not subject to the Public Records Act or the Sunshine Law.

Thus, the application of the totality of factors test will often require an analysis of the statutes, ordinances or charter provisions which establish the function to be performed by the private entity as well as the contract, lease or other document between the governmental entity and the private organization.

For example, in AGO 92-37, following a review of the Articles of Incorporation and other materials relating to the establishment and functions of the Tampa Bay Performing Arts Center, Inc., the Attorney General's Office concluded that the center was an "agency" subject to the Public Records Act. It was noted that the center, which was governed by a board of trustees composed of a number of city and county officials or appointees of the Mayor of Tampa, utilized city property in carrying out its goals to benefit the public and performed a governmental function. *See also,* AGO 97-27 (documents created or received by the Florida International Museum after the date of its purchase/lease/option agreement with city subject to disclosure under Ch. 119, F.S.); and AGO 92-53 (John and Mable Ringling Museum of Art Foundation, Inc., subject to Public Records Act).

Similarly, in AGO 99-53, the Attorney General's Office advised that the Public Records Act applied to an architectural review committee of a homeowners' association that was required by county ordinance to review and approve applications for county building permits as a prerequisite to consideration by the county building department. *Compare*, AGO 87-44 (records of a private nonprofit corporation pertaining to a fund established for improvements to city parks were not public records since the corporation raised and disbursed only private funds and had not been delegated any governmental responsibilities or functions).

c. Private entities created pursuant to law or by public agencies

The fact that a private entity is incorporated as a nonprofit corporation is not dispositive as to its status under the Public Records Act. The issue is whether the entity is "acting on behalf of" an agency. The Attorney General's Office has issued numerous opinions advising that if a nonprofit entity is created by law, it is subject to Ch. 119 disclosure requirements. The following are some examples of entities created pursuant to law or ordinance which have been found to be subject to the Public

Records Act:

> Pace Property Finance Authority, Inc., created as a Florida nonprofit corporation by Santa Rosa County as an instrumentality of the county to provide assistance in the funding and administration of certain governmental programs--AGO 94-34;
>
> Rural health networks, established as nonprofit legal entities organized to plan and deliver health care services on a cooperative basis pursuant to s. 381.0406, F.S.--Inf. Op. to Ellis, March 4, 1994;
>
> South Florida Fair and Palm Beach County Expositions, Inc., created pursuant to Ch. 616, F.S.--AGO 95-17.

d. Private entities providing services in place of public agencies

As stated previously, the mere fact that a private entity is under contract with, or receiving funds from, a public agency is not sufficient, standing alone, to bring that agency within the scope of the Public Records Act. *See, Stanfield v. Salvation Army,* 695 So. 2d 501, 503 (Fla. 5th DCA 1997) (contract between Salvation Army and county to provide services does not in and of itself subject the organization to Ch. 119 disclosure requirements). *And see* Inf. Op. to Michelson, January 27, 1992, concluding that a telephone company supplying cellular phone services to city officials for city business was not an "agency" since the company was not created by the city, did not perform a city function, and did not receive city funding except in payment for services rendered.

However, there is a difference between a party contracting with a public agency to provide services *to* the agency and a contracting party which provides services *in place of* the public body. *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc.,* 695 So. 2d 418 (Fla. 5th DCA 1997), *approved*, 729 So. 2d 373 (Fla. 1999). Stated another way, business records of entities which merely provide services for an agency to use (such as legal professional services, for example) are probably not subject to the open government laws. *Id.* But, if the entity contracts to relieve the public body from the operation of a public obligation (such as operating a jail or providing fire protection), the open government laws do apply. *Id.*

Thus, in *Stanfield v. Salvation Army*, 695 So. 2d 501, 502-503 (Fla. 5th DCA 1997), the court ruled that the Salvation Army was subject to the Public Records Act when providing misdemeanor

probation services pursuant to a contract with Marion County. *See also, Putnam County Humane Society, Inc. v. Woodward,* 740 So. 2d 1238 (Fla. 5th DCA 1999) (where county humane society assumed the governmental function to investigate acts of animal abuse pursuant to statutory authority, the records created and maintained in connection with this function were governed by the Public Records Act). *And see Dade Aviation Consultants v. Knight Ridder, Inc.,* 800 So. 2d 302, 307 (Fla. 3d DCA 2001) (a consortium of private businesses created to manage a massive renovation of an airport was an "agency" for purposes of the Public Records Act because it was created for and had no purpose other than to work on the airport contract; "when a private entity undertakes to provide a service otherwise provided by the government, the entity is bound by the Act, as the government would be").

Similarly, a private company under contract with a sheriff to provide medical services for inmates at the county jail must release its records relating to a settlement agreement with an inmate. Since these records would normally be subject to the Public Records Act if in the possession of the public agency, they are likewise covered by that law even though in the possession of the private corporation. *Prison Health Services, Inc. v. Lakeland Ledger Publishing Company*, 718 So. 2d 204 (Fla. 2d DCA 1998), *review denied*, 727 So. 2d 909 (Fla. 1999).

More recently, in *Multimedia Holdings Corporation Inc. v. CRSPE, Inc.,* No. 03-CA-3474-G (Fla. 20th Cir. Ct. December 3, 2003), the circuit court required a consulting firm to disclose its time sheets and internal billing records generated pursuant to a subcontract with another firm (CRSPE) which had entered into a contract with a town to prepare a traffic study required by the Department of Transportation (DOT). The court rejected the subcontractor's argument that the Public Records Act did not apply to it because it was a subcontractor, not the contractor. The court found that the study was prepared and submitted jointly by both consultants; both firms had acted in place of the Town in performing the tasks required by DOT. "[T]he Public Records Act cannot be so easily circumvented simply by CRSPE delegating its responsibilities to yet another private entity," the court said.

The following are additional examples of entities performing functions for public agencies whose records were found to be subject to disclosure under the Public Records Act:

> **Campus bookstore:** *Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.,* 718 So. 2d 227 (Fla. 3d DCA 1998), *review denied*, 729 So. 2d 389 (Fla. 1999) (private company operating a campus bookstore pursuant to a contract with a state university is the custodian of public records

made or received by the store in connection with university business).

Corrections corporation: *Times Publishing Company v. Corrections Corporation of America,* No. 91-429 CA 01 (Fla. 5th Cir. Ct. December 4, 1991), *affirmed per curiam*, 611 So. 2d 532 (Fla. 5th DCA 1993) (private corporation that operates and maintains county jail pursuant to contract with the county is "acting on behalf of" the county and must make available its records for the jail in accordance with Ch. 119). *See also*, *Prison Health Services, Inc. v. Lakeland Ledger Publishing Company,* 718 So. 2d 204 (Fla. 2d DCA 1998), *review denied*, 727 So. 2d 909 (Fla. 1999).

Employment search firm: *Shevin v. Byron, Harless, Schaffer, Reid and Associates, supra. Accord*, AGO 92-80 (materials made or received by recruitment company in the course of its contract with a public agency to seek applicants and make recommendations to the board regarding the selection of an executive director, subject to Ch. 119)

The following are examples of businesses or organizations whose records were determined to be outside the scope of the Public Records Act:

Architectural firm: *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.,* 596 So. 2d 1029 (Fla. 1992) (architectural firm under contract with a school board to provide architectural services associated with the construction of school facilities is not "acting on behalf of" the school board).

Private security force: *Sipkema v. Reedy Creek Improvement District,* No. CI96-114 (Fla. 9th Cir. Ct. May 29, 1996), *per curiam affirmed,* 697 So. 2d 880 (Fla. 5th DCA 1997), *review dismissed*, 699 So. 2d 1375 (Fla. 1997) (reports prepared by Walt Disney World's private security force regarding incidents on roads within the Disney property are not public records even though Disney contracted to provide some security services for a public entity, the Reedy Creek Improvement District).

Soft drink company: *Trepal v. State*, 704 So. 2d 498 (Fla. 1997) (Coca-Cola Company is not required to allow a death-sentenced defendant convicted of poisoning victims with thallium-laced bottles of Coca-Cola to obtain access to records allegedly held by the company concerning lab testing requested by law enforcement agencies).

e. Private company delegated authority to keep certain records

In *Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487, 494 (Fla. 2d DCA 1990), a private entity (the White Sox baseball organization) refused to allow access to draft lease documents and other records generated in connection with negotiations between the White Sox and the city for use of a municipal stadium. The court determined that both the White Sox and the city improperly attempted to circumvent the Public Records Act by agreeing to keep all negotiation documents confidential and in the custody of the White Sox. However, the plan to withhold the documents from public inspection failed. The court ruled that both the city and the White Sox had violated Ch. 119, F.S.

Similarly, in *WFTV, Inc. v. School Board of Palm Beach County*, No. CL 94-8549-AD (Fla. 15th Cir. Ct. March 29, 1995), *affirmed per curiam*, 675 So. 2d 945 (Fla. 4th DCA 1996), the court held that a school board which hired a marketing firm to conduct a survey, then reviewed and commented upon survey questionnaires designed by the firm but avoided taking possession of the documents, unlawfully refused a public records request for the documents and was liable for attorney's fees. The court noted that the school board "could have obtained the records from [the marketing research firm] and produced them to the petitioners, but it elected not to do so, choosing instead to try to avoid disclosure by noting that it did not have possession of the records and arguing that [the firm] was not acting on its behalf." *See also*, *Wisner v. City of Tampa Police Department*, 601 So. 2d 296, 298 (Fla. 2d DCA 1992) (city may not allow a private entity to maintain physical custody of public records [polygraph chart used in police internal affairs investigation] "to circumvent the public records chapter").

Thus, if a public agency has delegated its responsibility to maintain records necessary to perform its functions, such records will be deemed accessible to the public. AGO 98-54 (registration and disciplinary records stored in a computer database maintained by a national securities association which are used by a state agency in licensing and regulating securities dealers doing business in Florida are public records). *See also*, *Harold v. Orange County*, 668 So. 2d 1010 (Fla. 5th DCA 1996) (where a county hired a private company to be the construction manager on a renovation project and delegated to the company the responsibility of maintaining records necessary to show compliance with a "fairness in procurement ordinance," the company's records for this purpose were public records).

f. Other statutory provisions

(1) Legislative appropriation

Section 11.45(3)(e), F.S., states that all records of a nongovernmental agency, corporation, or person with respect to the receipt and expenditure of an appropriation made by the Legislature to that entity "shall be public records and shall be treated in the same manner as other public records are under general law." *Cf.*, AGO 96-43 (Astronauts Memorial Foundation, a nonprofit corporation, is subject to the Sunshine Law when performing those duties funded under the General Appropriations Act).

(2) Public funds used for dues

Section 119.01(3), F.S., provides that if an agency spends public funds in payment of dues or membership contributions to a private entity, then the private entity's financial, business and membership records pertaining to the public agency are public records and subject to the provisions of s. 119.07, F.S.

(3) State contracts

Section 287.058(1)(c), F.S., requires, with limited exceptions, that every procurement for contracted services by a state agency be evidenced by a written agreement containing a provision allowing unilateral cancellation by the agency for the contractor's refusal to allow public access to "all documents, papers, letters, or other material made or received by the contractor in conjunction with the contract, unless the records are exempt" from disclosure.

3. Judiciary

a. Public Records Act inapplicable to judicial records

Relying on separation of powers principles, the courts have consistently held that the judiciary is not an "agency" for purposes of Ch. 119, F.S. *See, e.g.*, *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995) (the judiciary, as a coequal branch of government, is not an "agency" subject to supervision or control by another coequal branch of government) and *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). *Cf.*, s. 119.07(6), F.S., stating that "[n]othing in this chapter shall be construed to exempt from [s. 119.07(1), F.S.] a public record that was made a part of a court file *and that is not specifically closed by order of court* . . . ." (e.s.). *And see*, *Tampa Television, Inc. v. Dugger*, 559 So. 2d 397 (Fla. 1st DCA 1990) (Legislature has recognized the distinction between documents sealed under court order and those not so sealed, and has provided for disclosure of

the latter only).

However, the Florida Supreme Court has expressly recognized that "both civil and criminal proceedings in Florida are public events" and that it will "adhere to the well established common law right of access to court proceedings and records." *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 116 (Fla. 1988). *See also, Russell v. Miami Herald Publishing Co.,* 570 So. 2d 979, 982 (Fla. 2d DCA 1990), in which the court stated: "[W]e recognize that the press has a general right to access of judicial records."

Moreover, even though the judiciary is not an "agency" for purposes of Ch. 119, F.S., there is a constitutional right of access to judicial records established by Art. I, s. 24 of the Florida Constitution. This provision states that the public has a right of access to records in the judicial branch of government, except for those records exempted in the Constitution, records exempted by law in effect on July 1, 1993, records exempted pursuant to court rules in effect on November 3, 1992 [the date of adoption of the constitutional amendment], and records exempted by law in the future in accordance with the procedures specified in s. 24(c), Fla. Const. *See*, *Amendments to the Florida Family Law Rules of Procedure,* 723 So. 2d 208, 209 (Fla. 1998), noting that under Art. I, s. 24, Fla. Const., "any person has the right to inspect court files unless those files are specifically exempted from public inspection."

b. Public access to judicial branch records, Fla. R. Jud. Admin. 2.051

(1) Scope of the rule

In accordance with the directive in Art. I, s. 24, Fla. Const., access to records of the judicial branch is governed by Florida Rule of Judicial Administration 2.051, entitled "Public Access to Judicial Branch Records." The rule was initially adopted in 1992 and has been amended several times since then. *See*, *In re Amendments to the Florida Rules of Judicial Administration--Public Access to Judicial Records,* 608 So. 2d 472 (Fla. 1992); *In re Amendments to Rule of Judicial Administration 2.051--Public Access to Judicial Records,* 651 So. 2d 1185 (Fla. 1995); and *In re Report of the Supreme Court Workgroup on Public Records*, 825 So. 2d 889 (Fla. 2002).

According to the Florida Supreme Court, rule 2.051 is "intended to reflect the judiciary's responsibility to perform both an administrative function and an adjudicatory function." *In re Amendments to the Florida Rules of Judicial Administration-*

-Public Access to Judicial Records, 608 So. 2d 472 (Fla. 1992). In its administrative role, the judiciary is a governmental entity expending public funds and employing government personnel. Thus, "records generated while courts are acting in an administrative capacity should be subject to the same standards that govern similar records of other branches of government." *Id*. at 472-473. *See also, Media General Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit,* 840 So. 2d 1008, 1016 (Fla. 2003) (when an individual complains to a chief circuit judge about judicial misconduct involving sexual harassment or sexually inappropriate behavior by a judge, the records made or received by the chief judge "constitute 'judicial records' subject to public disclosure absent an applicable exemption").

"Records of the judicial branch" are defined to include "all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the transaction of official business by any judicial branch entity" and consist of "court records" and "administrative records." Fla. R. Jud. Admin. 2.051(b)(1).

The term "judicial branch" means "the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, The Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all other entities established by or operating under the authority of the supreme court or the chief justice." Fla. R. Jud. Admin. 2.051(b)(2).

The complete text of Fla. R. Jud. Admin. 2.051, is included as Appendix E to this Manual.

(2) Confidential judicial records

In the absence of exemption, judicial records are subject to disclosure. *See, Tedesco v. State,* 807 So. 2d 804 (Fla. 4th DCA 2002), noting that the files in criminal cases are included within the definition of "judicial records" contained in Florida Rule of Judicial Administration 2.051(b), and that there is no exemption in the rule which would preclude release of the progress docket or the clerk's minutes from a criminal case. *Id*. *And see Friend v. Friend*, 866 So. 2d 116, 117 (Fla. 3d DCA 2004) (denial of access to records in dissolution of marriage case "may not be based solely upon the wishes of the parties to the litigation").

Rule 2.051(c) contains a listing of the judicial branch records which are confidential. Examples include trial and appellate court memoranda, complaints alleging misconduct against

judges and other court personnel until probable cause is established, periodic evaluations implemented solely to assist judges in improving their performance, information (other than names and qualifications) about persons seeking to serve as unpaid volunteers unless made public by the court based upon a showing of materiality or good cause, and copies of arrest and search warrants until executed or until law enforcement determines that execution cannot be made. Fla. R. Jud. Admin. 2.051(c)(1) through (6).

Although rule 2.051 contains specific exemptions from disclosure, as set forth above, subdivision (c)(8) of the rule provides a general exemption from disclosure for records deemed to be confidential by court rule, Florida Statutes, prior Florida case law, and by rules of the Judicial Qualifications Commission. Thus, an executed search warrant could be withheld from disclosure pursuant to the statutory exemption for active criminal investigative material even though subdivision (c)(6) of the rule exempts only *un*executed search warrants. *Florida Publishing Company v. State*, 706 So. 2d 54 (Fla. 1st DCA 1998), *review dismissed*, 717 So. 2d 531 (Fla. 1998). *Accord*, *State v. Buenoano*, 707 So. 2d 714, 718 (Fla. 1998) (documents that are exempt from public access under Ch. 119, F.S., are likewise exempt under rule 2.051). *And see* Fla. R. Jud. Admin. 2.051(c)(7) providing an exemption for "all records made confidential under the Florida and United States Constitutions and Florida and federal law."

Subdivision (c)(9) of rule 2.051 incorporates the holdings in *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113 (Fla. 1988), and *Miami Herald Publishing Company v. Lewis*, 426 So. 2d 1 (Fla. 1982) by "establishing that confidentiality [of court records] may be required to protect the rights of defendants, litigants, or third parties; to further the administration of justice; or to otherwise promote a compelling governmental interest." *Commentary*, *In re Amendments to Rule of Judicial Administration 2.051.--Public Access to Judicial Records,* 651 So. 2d 1185, 1191 (Fla. 1995).

The degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to protect these interests. Fla. R. Jud. Admin. 2.051(c)(9)(B). *And see Smithwick v. Television 12 of Jacksonville, Inc.*, 730 So. 2d 795 (Fla. 1st DCA 1999) (trial court properly required defense counsel to return discovery documents once it realized that its initial order permitting removal of the documents from the court file had been entered in error because the requirements of rule 2.051 had not been met).

"The burden of proof . . . shall always be on the party

seeking closure." *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 118 (Fla. 1988). "Our reasons for placing the burden on the party seeking closure and maintaining closure remains the same today as it did when we issued *Barron* in 1988; that is, the strong presumption of openness of court proceedings, and the fact that those challenging the closure order will generally have little or no knowledge of the specific grounds requiring closure." *Amendments to the Florida Family Law Rules of Procedure,* 853 So. 2d 303, 306 (Fla. 2003). *Commentary, supra* at 1191. *See, In re: Guardianship of Cosio,* 841 So. 2d 693, 694 (Fla. 2d DCA 2003), in which the court stated that "[a]ccess to court records may be restricted to protect the interests of litigants only after a showing that the following three-prong test has been met: (1) the measure limiting or denying access (closure or sealing of records or both) is necessary to prevent a serious and imminent threat to the administration of justice; (2) no less restrictive alternative measures are available which would mitigate the danger; and (3) the measure being considered will in fact achieve the court's protective purpose."

(3) Notice of closure of court records

Except as otherwise provided by law or rule of court, reasonable notice must be given to the public of any order closing a court record. Fla. R. Jud. Admin. 2.051(c)(9)(D). "Court records" are defined to include "the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes or depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings." Fla. R. Jud. Admin. 2.051(b)(1)(A).

Unlike the closure of court *proceedings*, which has been held to require notice and hearing *prior* to closure, *see Miami Herald Publishing Company v. Lewis,* 426 So. 2d 1 (Fla. 1982), "the closure of court *records* has not required prior notice." *Commentary, In re Amendments to Rule of Judicial Administration 2.051.--Public Access to Judicial Records,* 651 So. 2d 1185, 1191 (Fla. 1995). "Requiring prior notice of closure of a court record may be impractical and burdensome in emergency circumstances or when closure of a court record requiring confidentiality is requested during a judicial proceeding[;] [p]roviding reasonable notice to the public of the entry of a closure order and an opportunity to be heard on the closure issue adequately protects the competing interests of confidentiality and public access to judicial records." *Id.*

However, this provision "does not preclude the giving of prior notice of closure of a court record, and the court may elect to give prior notice in appropriate cases." *See also*, *WESH Television, Inc. v. Freeman,* 691 So. 2d 532 (Fla. 5th DCA 1997) (once audio and videotapes in criminal case were turned over to the defendant during discovery, they were *public records* subject to disclosure under Ch. 119, F.S.; only after an evidentiary hearing with the media participating and *in camera* review of the tapes, may the court enter an order limiting access to the records based on constitutional considerations). *And see, Media General Operations, Inc. v. State,* 933 So. 2d 1199 (Fla. 2d DCA 2006) (news media entitled to notice of and opportunity to be heard on defendant's motion to seal discovery).

(4) Procedures for accessing judicial branch records under rule 2.051

"Requests and responses to requests for access to records under this rule shall be made in a reasonable manner." Fla. R. Jud. Admin. 2.051(e). Requests must be in writing and directed to the custodian. *Id*. In a commentary to the decision incorporating the written request provision, the Court cautioned that the "writing requirement is not intended to disadvantage any person who may have difficulty writing a request; if any difficulty exists, the custodian should aid the requestor in reducing the request to writing." *Commentary, In re Report of the Supreme Court Workgroup on Public Records,* 825 So. 2d 889, 898 (Fla. 2002).

A public records request "shall provide sufficient specificity to enable the custodian to identify the requested records. The reason for the request is not required to be disclosed." Fla. R. Jud. Admin. 2.051(e)(1).

The custodian "is required to provide access to or copies of records but is not required either to provide information from records or to create new records in response to a request." *Commentary, In re Report of the Supreme Court Workgroup on Public Records,* 825 So. 2d 889, 898 (Fla. 2002).

The custodian shall determine whether the requested records are subject to the rule, whether there are any exemptions, and the form in which the record is provided. Fla. R. Jud. Admin. 2.051(e)(2). If the request is denied, the custodian shall state in writing the basis for the denial. *Id.*

(5) Review of denial of access to judicial records

Expedited review of denials of access to records of the

judicial branch shall be provided through an action for mandamus, or other appropriate appellate remedy. Fla. R. Jud. Admin. 2.051(d). *See, Mathis v. State,* 722 So. 2d 235, 236 (Fla. 2d DCA 1998) (petition for writ of mandamus "is the proper vehicle to seek review of the denial of access to judicial records"). *See also*, *T.T. v. State*, 689 So. 2d 1209, 1210 (Fla. 3d DCA 1997) (petition for writ of certiorari seeking to quash trial court order denying access to court records treated as a petition for writ of mandamus by appellate court); and *Bostic v. State*, 875 So. 2d 785 (Fla. 2d DCA 2004) (petition for certiorari review of trial court order denying petitioner's writ of mandamus seeking a copy of his arrest warrant treated as an appeal by district court). *Cf., Lifecare International, Inc. v. Barad*, 573 So. 2d 1044 (Fla. 3d DCA 1991) (a two-month delay in ruling on a motion to unseal a file constitutes a denial of access to the file for that period of time and is subject to expedited review by the appellate court).

Where a judge who has denied a request for access to records is the custodian, the action shall be filed in the appellate court. Fla. R. Jud. Admin. 2.051(d)(1). Upon order issued by the appellate court, the judge denying access to records shall file a sealed copy of the requested records with the appellate court. *Id.* All other actions shall be filed in the circuit court where the denial of access occurred. Fla. R. Jud. Admin. 2.051(d)(2).

c. Discovery material

The Florida Supreme Court has ruled that there is no First Amendment right of access to unfiled discovery materials. *Palm Beach Newspapers v. Burk,* 504 So. 2d 378 (Fla. 1987) (discovery in criminal proceedings); and *Miami Herald Publishing Company v. Gridley*, 510 So. 2d 884 (Fla. 1987), *cert. denied*, 108 S.Ct. 1224 (1988) (civil discovery). *But see*, *SCI Funeral Services of Florida, Inc. v. Light*, 811 So. 2d 796, 798 (Fla. 4th DCA 2002), noting that even though there is no constitutional right of access to prefiled discovery materials, "it does not necessarily follow that there is a constitutional right to *prevent* access to discovery." (emphasis supplied by the court).

Even though unfiled discovery material is not accessible under the First Amendment, it may be open to inspection under Ch. 119, F.S., if the document is a public record which is otherwise subject to disclosure under that law. *See, e.g., Tribune Company v. Public Records*, 493 So. 2d 480, 485 (Fla. 2d DCA 1986), *review denied sub nom., Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987), in which the court reversed a trial judge's ruling limiting inspection of police records produced in discovery to

those materials which were made part of an open court file because "this conflicts with the express provisions of the Public Records Act." *Cf.*, *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32 (Fla. 1988), in which the Court noted that where pretrial discovery material developed for the prosecution of a criminal case had reached the status of a public record under Ch. 119, F.S., the material was subject to public inspection as required by that statute in the absence of a court order finding that release of the material would jeopardize the defendant's right to a fair trial. *And see Post-Newsweek Stations, Florida, Inc. v. Doe,* 612 So. 2d 549 (Fla. 1992) (public's statutory right of access to pretrial discovery information in a criminal case must be balanced against a nonparty's constitutional right to privacy).

d. Florida Bar

"Given that The Florida Bar is 'an official arm of the court,' *see* R. Regulating Fla. Bar, Introduction, [the Florida Supreme] Court has previously rejected the Legislature's power to regulate which Florida Bar files were subject to public records law . . . ." *The Florida Bar v. Committe,* 916 So. 2d 741, 745 (Fla. 2005). *See also*, *The Florida Bar, In re Advisory Opinion Concerning the Applicability of Ch. 119, Florida Statutes*, 398 So. 2d 446, 448 (Fla. 1981) (Ch. 119, F.S., does not apply to unauthorized practice of law investigative files maintained by the Bar). *Cf., Florida Board of Bar Examiners Re: Amendments to the Rules of the Supreme Court of Florida Relating to Admissions to the Bar*, 676 So. 2d 372 (Fla. 1996) (no merit to argument that, under open government constitutional amendment found at Art. I, s. 24, Fla. Const., *all* records in possession of Board of Bar Examiners should be open for inspection by applicant and the public).

e. Judicial Qualifications Commission and judicial nominating commissions

The proceedings by or before the Judicial Qualifications Commission are confidential until formal charges against a justice or judge are filed by the Commission with the clerk of the Florida Supreme Court; upon a finding of probable cause and the filing of such formal charges with the clerk, the charges and all further proceedings before the Commission are public. *See*, Art. V, s. 12(a)(4), Fla. Const; *Media General Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit,* 840 So. 2d 1008 (Fla. 2003).

With regard to judicial nominating commissions, Art. V, s. 11(d), Fla. Const., provides that "[e]xcept for deliberations of

the . . . commissions, the proceedings of the commissions and their records shall be open to the public." *See*, Inf. Op. to Frost, November 4, 1987, concluding that correspondence between a member of a judicial nominating commission and persons wishing to obtain an application for a vacant seat on a District Court of Appeal is a public record subject to disclosure. *Accord*, Inf. Op. to Russell, August 2, 1991 (documents made or received by a judicial nominating commission in carrying out its duties are open to inspection).

However, records pertaining to voting, including vote sheets, ballots, and ballot tally sheets "are clearly part of the deliberation process" and, therefore, are not subject to public disclosure. *The Justice Coalition v. The First District Court of Appeal Judicial Nominating Commission*, 823 So. 2d 185, 192 (Fla. 1st DCA 2002). In addition, personal notes of individual commission members made during the deliberation process are not subject to disclosure because they are mere "precursors" of governmental records, and thus fall outside the definition of "public record." *Id.*, *citing to Shevin v. Byron, Harless, Schaffer, Reid and Associates Inc.*, 379 So. 2d 633 (Fla. 1980).

f. Jury records

(1) Grand jury

Proceedings before a grand jury are secret; therefore, records prepared for use of the grand jury during the regular performance of its duties are not subject to s. 119.07(1), F.S. *See*, *Buchanan v. Miami Herald Publishing Company*, 206 So. 2d 465 (Fla. 3d DCA 1968), *modified*, 230 So. 2d 9 (Fla. 1969) (grand jury proceedings are "absolutely privileged"); and *In re Grand Jury, Fall Term 1986*, 528 So. 2d 51 (Fla. 2d DCA 1988), affirming a trial court order barring public disclosure of motions filed in accordance with s. 905.28, F.S., to repress or expunge stemming from a grand jury presentment not accompanied by a true bill or indictment. *See also*, AGO 90-48 (as an integral part of the grand jury proceeding to secure witnesses, grand jury subpoenas would fall under the "absolute privilege" of the grand jury and not be subject to disclosure under Ch. 119, F.S.).

Thus, a letter written by a city official to the grand jury is not subject to public inspection. AGO 73-177. Nor are the names and addresses of the members of the grand jury subject to public disclosure under s. 119.07(1), F.S., because this information is privileged as part of the grand jury proceedings. Inf. Op. to Alexander, September 8, 1995. However, the clerk of court is not authorized to redact the name of a grand jury foreperson or the acting foreperson from an indictment after it

has been made public. AGO 99-09.

It is important to emphasize, however, that the exemption from disclosure for grand jury records does not apply to those records which were prepared by a public agency independent of a grand jury investigation. In other words, public records which are made or received by an agency in the performance of its official duties do not become confidential simply because they are subsequently viewed by the grand jury as part of its investigation. As the court stated in *In re Grand Jury Investigation, Spring Term 1988*, 543 So. 2d 757, 759 (Fla. 2d DCA 1989):

> Nor can we allow the grand jury to become a sanctuary for records which are otherwise accessible to the public. The mere fact that documents have been presented to a grand jury does not, in and of itself, cloak them in a permanent state of secrecy.

Accordingly, it has been held that a state attorney and sheriff must provide public access to investigative records regarding a judge that were compiled independently of and prior to a grand jury's investigation of the judge. *In re Grand Jury Investigation, Spring Term 1988*, *supra*. *See also*, *In re Subpoena To Testify Before Grand Jury*, 864 F.2d 1559 (11th Cir. 1989) (trial court's authority to protect authority of grand jury process enabled court to prevent disclosure of materials prepared for grand jury proceedings; however, court not empowered to prohibit disclosure of documents assembled independent of grand jury proceedings).

There are a number of statutes which relate to secrecy of grand jury proceedings. *See*, ss. 905.24-905.28, F.S., and s. 905.395, F.S. (statewide grand jury). *But see*, *Butterworth v. Smith*, 110 S.Ct. 1376 (1990) (provisions of s. 905.27, F.S., which prohibit "a grand juror . . . reporter . . . or any other person" appearing before a grand jury from ever disclosing testimony before the grand jury except pursuant to a court order were unconstitutional insofar as they prohibit a grand jury witness from disclosing his own testimony after the term of the grand jury has ended).

(2) Trial jury

In *Kever v. Gilliam,* 886 So. 2d 263 (Fla. 1st DCA 2004), the appellate court ruled that the clerk of court was required to comply with appellant's public records request for names and addresses of *trial court* jurors empaneled in his trial. *Accord,* AGO 05-61 (statute requiring Department of Highway Safety and

Motor Vehicles to provide driver license information to courts for purposes of establishing jury selection lists does not operate to exempt from public disclosure jurors' names and addresses appearing on a jury list compiled by the clerk of court). *Cf., Sarasota Herald-Tribune v. State*, 916 So. 2d 904, 909 (Fla. 2d DCA 2005) (while "[t]here are unquestionably times when it might be necessary for a trial judge to impose media restrictions on the publication of juror information, . . ." trial court order prohibiting news media from publishing names and addresses of prospective or seated jurors in the high profile murder trial constituted a prior restraint on speech).

g. Sunshine in Litigation Act

The Sunshine in Litigation Act, s. 69.081, F.S., provides, with limited exceptions, that no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard. *See, Jones v. Goodyear Tire & Rubber Company,* 871 So. 2d 899 (Fla. 3d DCA 2003), *review denied,* 886 So. 2d 227 (Fla. 2004) (jury finding in favor of mechanic who was injured by an exploding tire established that the tire was a "public hazard" for purposes of the Sunshine in Litigation Act; thus, reversal of pretrial confidentiality order was required). *See also, State v. American Tobacco Company*, No. CL 95-1466-AH (Fla. 15th Cir. Ct. July 28, 1997) (Sunshine in Litigation Act is constitutional).

Additionally, s. 69.081(8), F.S., provides that any portion of an agreement which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against an agency is void, contrary to public policy, and may not be enforced. Settlement records must be maintained in compliance with Ch. 119, F.S. *See*, Inf. Op. to Barry, June 24, 1998, citing to s. 69.081(8)(a), and stating that "a state agency may not enter into a settlement agreement or other contract which contains a provision authorizing the concealment of information relating to a disciplinary proceeding or other adverse employment decision from the remainder of a personnel file." However, this subsection does not apply to trade secrets protected under Ch. 688, F.S., proprietary confidential business information, or other information that is confidential under state or federal law. Section 69.081(8), F.S.

4. Legislature

The Public Records Act does not apply to the legislative branch. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). In *Locke*,

the Court ruled that the definition of "agency" in the Public Records Act does not include the Legislature or its members.

However, there is a constitutional right of access to legislative records provided in Art. I, s. 24, Fla. Const. Pursuant to this provision, "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body . . . ." The right of access specifically includes the legislative branch. Article I, s. 24(a), Fla. Const. The Legislature, however, may provide by general law for the exemption of records provided that such law must state with specificity the public necessity justifying the exemption and be no broader than necessary to accomplish the stated purpose of the law. Article I, s. 24(c), Fla. Const. Each house of the Legislature is authorized to adopt rules governing the enforcement of this section in relation to records of the legislative branch. *Id*. Any statutes providing limitations on access which were in effect on July 1, 1993, continue in force and apply to records of the legislative branch until repealed. Article I, s. 24(d), Fla. Const.

Section 11.0431(2), F.S., lists legislative records which are exempt from inspection and copying. The text of s. 11.0431, F.S., is set forth in Appendix F. *See, Media General Operation, Inc. v. Feeney,* 849 So. 2d 3, 6 (Fla. 1st DCA 2003), in which the court rejected the argument that records containing telephone numbers for calls made by legislative employees in connection with official business could be redacted because disclosure of the numbers could result in "unreasonable consequences to the persons called"; however, under the circumstances of the case, employees could redact those portions of the records reflecting personal calls.

There are several other statutory provisions which are applicable to legislative records. *See*, *e.g.*, s. 11.26(1), F.S. (legislative employees are forbidden from revealing to anyone outside the area of their direct responsibility the contents or nature of any request for services made by any member of the Legislature except with the consent of the legislator making the request); and s. 15.07, F.S. (the journal of the executive session of the Senate shall be kept free from inspection or disclosure except upon order of the Senate itself or some court of competent jurisdiction).

5. Governor and Cabinet

The Governor and Cabinet have duties which derive from both the Constitution and the Legislature. Because of separation of powers principles, the legislatively created Public Records Act does not apply to records gathered in the course of carrying out

a specific duty or function which has been assigned to the Governor and Cabinet by the Constitution rather than by statute. *See*, AGO 86-50, stating that materials collected by the Parole and Probation Commission pursuant to direction of the Governor and Cabinet for pardons or other forms of clemency authorized by Art IV. s. 8(a), Fla. Const., are not subject to Ch. 119, F.S.

The Public Records Act, however, does apply to the Governor and Cabinet when sitting in their capacity as a board created by the Legislature such as the Board of Trustees of the Internal Improvement Trust Fund. In such cases, the Governor and Cabinet are not exercising powers derived from the Constitution but are subject to the "dominion and control" of the Legislature.

In addition, Art. I, s. 24, Fla. Const., establishes a constitutional right of access by providing that "every person" shall have a right of access to public records of the executive branch and of "each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution" except as otherwise provided in this section or specifically made confidential in the Constitution.

6. Commissions created by the Constitution

A board or commission created by the Constitution is not subject to Ch. 119, F.S., inspection requirements when such board or commission is carrying out its constitutionally prescribed duties. *See*, AGO 86-50 (Ch. 119, F.S., is not applicable to materials gathered by the Parole and Probation Commission regarding an application for clemency since the clemency power is exclusively constitutional). *Cf., Kanner v. Frumkes*, 353 So. 2d 196 (Fla. 3d DCA 1977) (judicial nominating commissions are not subject to s. 286.011, F.S.), and AGO 77-65 (Ch. 120, F.S., is inapplicable to Constitution Revision Commission established by Art. XI, s. 2, Fla. Const., because the commission is authorized in that section to adopt its own rules of procedure).

Accordingly, the Florida Supreme Court has ruled that the Public Records Act does not apply to the clemency investigative files and reports produced by the Parole Commission on behalf of the Governor and Cabinet relating to the granting of clemency. Release of such materials is governed by the Rules of Executive Clemency adopted by the Governor and Cabinet, sitting as the clemency board. *Parole Commission v. Lockett*, 620 So. 2d 153 (Fla. 1993). *Accord*, *Jennings v. State*, 626 So. 2d 1324 (Fla. 1993).

It should be emphasized, however, that there is a difference between the status of a commission created by the Constitution which exercises constitutional duties and a commission whose

creation is merely authorized by the Constitution and whose duties are established by law. While the former is not subject to the Public Records Act, it has been held that a commission performing duties assigned to it by the Legislature must comply with the open government laws. *See*, *Turner v. Wainwright*, 379 So. 2d 148 (Fla. 1st DCA 1980), *affirmed and remanded*, 389 So. 2d 1181 (Fla. 1980), holding that the Parole Commission, which Art. IV, s. 8(c), Fla. Const., recognizes may be created by law, is subject to s. 286.011, F.S., in carrying out its statutory duties and responsibilities relating to parole.

Moreover, Art. I, s. 24, Fla. Const., provides a constitutional right of access for public records of each branch of government, and "each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution." The only exceptions to the right of access are those records exempted pursuant to s. 24 or specifically made confidential by the Constitution. Article I, s. 24(a), Fla. Const. *See, King v. State,* 840 So. 2d 1047 (Fla. 2003) (clemency records exempt pursuant to s. 14.28, F.S., providing that records made or received by any state entity pursuant to a Board of Executive Clemency investigation are not subject to public disclosure).

C. WHAT KINDS OF AGENCY RECORDS ARE SUBJECT TO THE PUBLIC RECORDS ACT?

1. Computer records

a. Computer records are public records

In 1982, the Fourth District Court of Appeal stated that information stored in a public agency's computer "is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet . . . ." *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th DCA 1982), *review denied*, 431 So. 2d 988 (Fla. 1983).

Numerous Attorney General Opinions have cited *Seigle* for the principle that the Public Records Act includes computer records as well as paper documents, tape recordings, and other more tangible materials. *See, e.g.*, AGO 98-54 (application and disciplinary reports maintained in a computer system operated by a national securities dealers association which are received electronically by state agency for use in licensing and regulating securities dealers doing business in Florida are public records subject to Ch. 119); AGO 91-61 (agency must provide copy of computer disk in response to Ch. 119 request); and AGO 85-03 (computer tape subject to disclosure).

Thus, information such as electronic calendars, databases, and word processing files stored in agency computers, can all constitute public records because records made or received in the course of official business and intended to perpetuate, communicate or formalize knowledge of some type, fall within the scope of Ch. 119, F.S. AGO 89-39. *Compare*, AGO 85-87 (to the extent that "machine-readable intermediate files" may be intended to "communicate" knowledge, any such communication takes place completely within the data processing equipment and in such form as to render any inspection pursuant to Ch. 119, F.S., unintelligible and, except perhaps to the computer itself, meaningless; therefore, these files are analogous to notes used to prepare some other documentary material, and they are not public records).

Moreover, the definition of "public records" specifically includes "data processing software" and establishes that a record made or received in connection with official business is a public record, regardless of physical form, characteristics, "or means of transmission." *See*, s. 119.011(11), F.S. "Providing access to public records is a duty of each agency." Section 119.01(1), F.S. "Automation of public records must not erode the right of access to those records." Section 119.01(2)(a), F.S. "As each agency increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law." *Id*.

Accordingly, electronic public records are governed by the same rule as written documents and other public records--the records are subject to public inspection unless a statutory exemption exists which removes the records from disclosure. *Cf.*, AGO 90-04, stating that a county official is not authorized to assign the county's right to a public record (a computer program developed by a former employee while he was working for the county) as part of a settlement compromising a lawsuit against the county.

b. "E-Mail"

"E-mail" messages made or received by agency employees in connection with official business are public records and subject to disclosure in the absence of an exemption. AGO 96-34. Such messages are subject to the statutory restrictions on destruction of public records. *See*, s. 257.36(6), F.S., stating that a public record may be destroyed or otherwise disposed of only in accordance with retention schedules established by the Division of Library and Information Services (division) of the Department of State; and s. 119.021(2)(b), F.S., providing that each agency

shall comply with rules establishing retention schedules and disposal processes for public records which are adopted by the records and information management program of the division. *And see In re Amendments to Rule of Judicial Administration 2.051.--Public Access to Judicial Records*, 651 So. 2d 1185, 1186 (Fla. 1995) (definition of "judicial records" in Rule 2.051 of the Rules of Judicial Administration, "includes information transmitted by an e-mail system").

The nature of information--that is, that it is electronically generated and transferred--has been determined not to alter its character as a public record under the Public Records Act. AGO 01-20. Thus, the e-mail communication of factual background information and position papers from one official to another is a public record 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. *Id.*

(1) Personal e-mail

The Florida Supreme Court has ruled that private e-mail stored in government computers does not automatically become a public record by virtue of that storage. *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003). "Just as an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of documents that fall within the definition of 'public records,' . . . private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer." *Id*. at 154. The Court cautioned, however, that the case before it did not involve e-mails "that may have been isolated by a government employee whose job required him or her to locate employee misuse of government computers." *Id.* at 151n.2.

(2) E-mail address public records disclosure statement

Section 668.6076, F.S., enacted by the 2006 Legislature, requires that any agency as defined in s. 119.011(1), F.S., or legislative entity that operates a website and uses electronic mail must post the following statement in a conspicuous location on its website:

> Under Florida law, e-mail addresses are public records. If you do not want your e-mail address released in response to a public records request, do not send electronic mail to this entity. Instead, contact this office by phone or in writing.

c. Formatting issues

Each agency that maintains a public record in an electronic recordkeeping system shall provide to any person, pursuant to Ch. 119, F.S., a copy of any public record in that system which is not exempted by law from public disclosure. Section 119.01(2)(f), F.S. An agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium, and the agency may charge a fee which shall be in accordance with Ch. 119, F.S. *Id.* Thus, a custodian of public records must, if asked for a copy of a computer software disk used by an agency, provide a copy of the disk in its original format; a typed transcript would not satisfy the requirements of s. 119.07(1), F.S. AGO 91-61. *Cf*., AGO 06-30, in which the Attorney General's Office stated that an agency may respond to a public records request requiring the production of thousands of documents by composing a static web page where the responsive public documents are posted for viewing if the requesting party agrees to the procedure and agrees to pay the administrative costs, in lieu of copying the documents at a much greater cost.

However, an agency is not generally required to reformat its records to meet a requestor's particular needs. As stated in *Seigle v. Barry*, *supra,* the intent of Ch. 119, F.S., is "to make available to the public information which is a matter of public record, in some meaningful form, not necessarily that which the applicant prefers." 422 So. 2d at 66. Thus, in AGO 97-39, the Attorney General's Office concluded that a school district was not required to furnish electronic public records in an electronic format other than the standard format routinely maintained by the district.

Despite the general rule, however, the *Seigle* court recognized that an agency may be required to provide access through a specially designed program, prepared by or at the expense of the requestor, where:

1) available programs do not access *all* of the public records stored in the computer's data banks; or

2) the information in the computer accessible by the use of available programs would include exempt information necessitating a special program to delete such exempt items; or

3) for any reason the form in which the information is proffered does not fairly and meaningfully represent the records; or

4) the court determines other exceptional circumstances exist warranting this special

remedy. 422 So. 2d at 66-67.

For the purpose of satisfying a public records request, the fee to be charged by an agency if it elects to provide a copy of a public record in a medium that is not routinely used by the agency, or if it elects to compile information that is not routinely developed or maintained by the agency or that requires a substantial amount of manipulation or programming, must be in accordance with s. 119.07(4), F.S. (authorizing imposition of a special service charge if extensive information technology resources or labor are required). Section 119.01(2)(f), F.S.

When designing or acquiring an electronic recordkeeping system, an agency must consider whether such system is capable of providing data in some common format such as, but not limited to, the American Standard Code for Information Interchange. Section 119.01(2)(b), F.S. An agency may not enter into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of that agency, including public records that are on-line or stored in an electronic recordkeeping system used by the agency. Section 119.01(2)(c), F.S.

The importance of ensuring public access to computer records is recognized in the electronic recordkeeping rules of the Division of Library and Information Services of the Department of State. *See*, s. 257.14, F.S., establishing rulemaking authority of the Division regarding records management. Rule 1B-26.003(6)(g)3., F.A.C., provides that "[e]ach agency shall ensure that current and proposed electronic recordkeeping systems adequately provide for the rights of the public to access public records under Chapter 119, F.S." *Cf.*, Inf. Op. to Moore, October 19, 1993, noting that an agency considering the acquisition of computer software should be responsive to the need for preserving public access to the information through use of the computer's software and that "[t]he design and development of the software, therefore, should ensure that the system has the capability of redacting confidential or exempt information when a public records request is made."

d. Remote access

Section 119.07(2)(a), F.S., states that "[a]s an additional means of inspecting or copying public records," a custodian may provide access to public records by remote electronic means, provided exempt or confidential information is not disclosed. Thus, an agency is authorized but not required to permit remote electronic access to public records. *And see* s. 119.01(2)(e), F.S., establishing that "[p]roviding access to public records by remote electronic means is an additional method of access that

agencies should strive to provide to the extent feasible"; and, that agencies providing remote access should do so "in the most cost-effective and efficient manner available to the agency providing the information." *Cf., Rea v. Sansbury*, 504 So. 2d 1315, 1317-1318 (Fla. 4th DCA 1987), *review denied*, 513 So. 2d 1063 (Fla. 1987) (while county possesses statutory authority to facilitate inspection of public records by electronic means, this "does not mean that every means adopted by the county to facilitate the work of county employees ipso facto requires that the public be allowed to participate therein").

Section 119.07(2)(b), F.S., requires the custodian to provide safeguards to protect the contents of the public records from unauthorized electronic access or alteration and to prevent the disclosure or modification of those portions of the records which are exempt from disclosure.

Unless otherwise required by law, the custodian may charge a fee for remote electronic access, granted under a contractual arrangement with a user, which fee may include the direct and indirect costs of providing such access. However, fees for remote electronic access provided to the general public must be in accordance with the provisions of s. 119.07, F.S. Section 119.07(2)(c), F.S.

e. Security exemptions

Risk analysis information relative to security threats to data and information technology resources of an agency is confidential and exempt. Section 282.318(2)(a)2., F.S. Internal policies and procedures to assure the security of the data and information technology resources which, if disclosed, could facilitate the unauthorized modification, disclosure, or destruction of data or information technology resources are confidential and exempt. Section 282.318(2)(a)3., F.S. Results of periodic internal audits and evaluations of a security program for an agency's data and information technology resources are confidential and exempt except that the information shall be available to the Auditor General for his or her postauditing duties. Section 282.318(2)(a)5., F.S.

f. Software created by an agency

(1) Copyrighted agency-created software

Section 119.084(2), F.S., authorizes agencies to hold and enforce copyrights for data processing software created by the agency. The agency may sell or license the copyrighted software and may establish a license fee for its use. The prices or fees

for the sale or licensing of the copyrighted software may be based on market considerations.

However, the price or fee for providing agency-created and copyrighted data processing software to an individual solely for application to data or information maintained or generated by the agency that created the software must be limited to the fees prescribed in s. 119.07(4), F.S. Thus, while s. 119.084, F.S., allows public agencies to copyright software which they have created and to charge a fee based on market considerations, if the public must use the software in order to access agency public records, the agency must charge the fee provided in s. 119.07(4), F.S., and not the market-based fee.

(2) "Sensitive" agency-created software

Agency-produced data processing software which is sensitive is exempt from disclosure. Section 119.071(1)(f), F.S. Section 119.011(13), F.S., defines the term "sensitive" to mean "only those portions of [agency-produced] data processing software, including the specifications and documentation" which are used to collect, process, store and retrieve exempt information, financial management information such as payroll and accounting records, or to control and direct access authorizations and security measures for automated systems. *See,* AGO 90-104, applying the exemption to agency-produced software used to process voter registration information.

g. Trade secret exemptions

The Legislature has created an exemption for data processing software which has been obtained by an agency under a licensing agreement prohibiting its disclosure and which is a trade secret as defined in s. 812.081, F.S. Section 119.071(1)(f), F.S. In order for the exemption to apply, two conditions must be present: The licensing agreement must prohibit disclosure of the software, and the software must meet the statutory definition of "trade secret" found in s. 812.081, F.S. *See*, AGOs 90-104 and 90-102.

Section 815.04(3)(a), F.S., provides that data, programs, or supporting documentation which is a trade secret as defined in s. 812.081, F.S., which resides or exists internal or external to a computer, computer system, or computer system network is confidential and exempt from s. 119.07(1), F.S. This exemption applies to trade secrets marked as confidential and sent via electronic mail to an agency. *Sepro Corporation v. Department of Environmental Protection*, 839 So. 2d 781, 785 (Fla. 1st DCA 2003), *review denied sub nom., Crist v. Department of Environmental Protection,* 911 So. 2d 792 (Fla. 2005).

2. Election records

a. Ballots

Election records are generally open to public inspection. An individual or group is entitled to inspect the ballots and may take notes regarding the number of votes cast. AGO 93-48. The notes or count taken by the individual or group do not constitute a recount of ballots for purposes of the Florida Election Code. *Id*. *See also, Rogers v. Hood*, 906 So. 2d 1220, 1223 (Fla. 1st DCA 2005) (voted ballots are public records because they have "memorialized the act of voting").

Section 119.07(5), F.S., prohibits any person other than the supervisor of elections or the supervisor's employees from touching the ballots. *And see* s. 101.572, F.S. (no persons other than the supervisor, supervisor's employees, or the county canvassing board shall handle any official ballot or ballot card). However, this restriction does not prohibit the supervisor from producing copies of optically scanned ballots which were cast in an election in response to a public records request. AGO 04-11. *And see* AGO 01-37 (supervisor of elections required to segregate overvote and undervote ballots by use of the county's optical scanning equipment pursuant to a public records request even though the overvote and undervote ballots had already been segregated manually, provided that the requestor pays for the costs of the mechanical segregation in accordance with the Public Records Act).

b. Voter registration and voter records

Each supervisor of elections shall maintain for at least two years and make available for public inspection and copying, all records concerning implementation of registration list maintenance programs and activities conducted pursuant to ss. 98.065 and 98.075, F.S. Section 98.045(3), F.S. The records must include lists of the name and address of each person to whom a notice was sent and information as to whether each such person responded to the mailing, but may not include any information that is confidential or exempt from public records requirements under the Election Code. *Id.*

Section 97.0585, F.S., states that the following information concerning voters and voter registration is confidential and exempt from public disclosure requirements and may be used only for purposes of voter registration: declinations to register to vote; information relating to the place where a person registered to vote or updated a voter registration; the social security

number, driver's license number, and the Florida identification number of a voter registration applicant or voter. The signature of a voter registration applicant or a voter may not be copied and is exempt for that purpose from disclosure requirements. *Id. And see* s. 741.465(2), F.S., providing an exemption for the names, addresses, and telephone numbers of participants in the Address Confidentiality Program for Victims of Domestic Violence contained in voter registration and voting records.

However, verified petition cards submitted by a *candidate* qualifying by the alternative method are not registration records subject to restrictions on inspection and copying under the Florida Election Code. AGO 02-63. *See also*, AGO 02-67 (designation that a change of address has occurred does not make a candidate petition card a voter registration record). *Compare*, AGO 04-18, concluding that the supervisor of elections must maintain the confidentiality of personal information (home address, telephone number) for certain officers and employees which appears in petitions or campaign papers if the affected employee or officer or his or her employing agency has filed a written request for confidentiality to the supervisor as authorized in s. 119.07(3)(i)4., F.S. [see now s. 119.071(4)(d)8., F.S.].

3. Financial records

Many agencies prepare or receive financial records as part of their official duties and responsibilities. As with other public records, these materials are generally open to inspection unless a specific statutory exemption exists. *See,* AGO 96-96 (financial information submitted by harbor pilots in support of a pilotage rate increase application is not exempt from disclosure requirements).

a. Audit reports

(1) Auditor General audits

The audit report prepared by the Auditor General is a public record when it has been finalized. Section 11.45(4)(c), F.S. The audit workpapers and notes are not a public record; however, those workpapers necessary to support the computations in the final audit report may be made available by a majority vote of the Legislative Auditing Committee after a public hearing showing proper cause. *Id*. *And see* AGO 79-75 ("the term 'audit work papers and notes' should be construed narrowly and limited to such 'raw data' as is commonly considered to constitute the work papers of an accountant").

At the conclusion of the audit, the Auditor General provides the head of the agency being audited with a list of the adverse findings so that the agency head may explain or rebut them before the report is finalized. Section 11.45(4)(d), F.S. This list of adverse audit findings is a public record. AGO 79-75.

(2) Local government audits

The audit report of an internal auditor prepared for or on behalf of a unit of local government becomes a public record when the audit becomes final. Section 119.0713(3), F.S. The audit becomes final when the audit report is presented to the unit of local government; until the audit becomes final, the audit workpapers and notes related to such audit report are confidential. *Id.*

Thus, a draft audit report of a county legal department which was prepared by the clerk of court, acting in her capacity as county auditor, did not become subject to disclosure when the clerk submitted copies of her draft report to the county administrator for review and response. *Nicolai v. Baldwin*, 715 So. 2d 1161, 1163 (Fla. 5th DCA 1998). According to the exemption, the report would become "final," and hence subject to disclosure, when presented to the county commission. *Id.*

The term "internal auditor" is not defined for purposes of this exemption. However, the term would appear to encompass an official within county government who is responsible under the county code for conducting an audit. AGO 99-07. Thus, the exemption would apply to the Miami-Dade Inspector General when conducting audits of county contracts pursuant to the county code. *Id*. *Compare,* AGO 04-33 (exemption does not apply to audit of guardianship files prepared by clerk of court because that audit "is not an internal audit performed by or on behalf of any of the specified units of local government").

(3) State agency inspector general audits

Section 20.055, F.S., requires each state agency to appoint an inspector general to conduct audits of the agency and prepare audit reports of the findings. Such audit reports and workpapers are public records to the extent that they do not include information which has been made confidential and exempt from disclosure. Section 20.055(5)(b), F.S. *Compare*, s. C.4.b.(4), *infra*, relating to whistle-blower investigations.

b. Bids

Section 119.071(1)(b)1.a, F.S., provides an exemption for

"sealed bids or proposals received by an agency pursuant to invitations to bid or requests for proposals" until such time as the agency provides notice of a decision or intended decision pursuant to s. 120.57(3)(a), F.S., or within 10 days after bid or proposal opening, whichever is earlier. *And see* s. 119.071(1)(b)1.b., F.S., providing a temporary exemption if an agency rejects all bids or proposals submitted in response to an invitation to bid or request for proposals and the agency concurrently provides notice of its intent to reissue the invitation to bid or request for proposals; s. 119.071(1)(b)2.a., F.S., providing a temporary exemption for a competitive sealed reply in response to an invitation to negotiate, as defined in s. 287.012, F.S.; and s. 119.071(1)(b)2.b., F.S., providing a temporary exemption if an agency rejects all competitive sealed replies in response to an invitation to negotiate and concurrently provides notice of its intent to reissue the invitation to negotiate and reissues the invitation to negotiate as provided in the exemption. *Cf.*, AGO 84-37, issued prior to the adoption of the exemption for sealed bids, noting that in the absence of statute it cannot be stated that bids or proposals received by a county are exempt from disclosure.

Any financial statement that an agency requires a prospective bidder to submit in order to prequalify for bidding or for responding to a proposal for a road or any other public works project is exempt from disclosure requirements. Section 119.071(1)(c), F.S. *See also*, s. 119.0713(4), F.S., providing a limited exemption for materials used by municipal utilities to prepare bids.

c. Budgets

Budgets and working papers used to prepare them are normally subject to inspection. *Bay County School Board v. Public Employees Relations Commission*, 382 So. 2d 747 (Fla. 1st DCA 1980); *Warden v. Bennett*, 340 So. 2d 977 (Fla. 2d DCA 1976); and *City of Gainesville v. State ex. rel. International Association of Fire Fighters Local No. 2157*, 298 So. 2d 478 (Fla. 1st DCA 1974). *Accord*, Inf. Op. to Pietrodangelo, Nov. 29, 1972 (financial operating budget of athletic department of state university constitutes a public record). *Cf.*, *News-Press Publishing Company, Inc. v. Carlson*, 410 So. 2d 546, 548 (Fla. 2d DCA 1982), holding that the preponderant interest in allowing public participation in the budget process justified the inclusion of an agency's internal budget committee within the provisions of the Government in the Sunshine Law.

The exemption afforded by s. 447.605(3), F.S., for work products developed by the public employer in preparation for collective bargaining negotiations does not remove the working

papers used in preparing an agency budget from disclosure. *Warden v. Bennett*, *supra.* *See also*, AGO 92-56 (budget of a public hospital would not, in and of itself, appear to constitute either a trade secret or marketing plan for purposes of a statutory exemption for documents revealing a hospital's marketing plan or trade secrets).

d. Economic development records

(1) Convention center booking business records

Booking business records of a public convention center, sports facility, or auditorium are exempt from public disclosure. Section 255.047(2), F.S. The statute defines "booking business records" to include "client calendars, client lists, exhibitor lists, and marketing files." Section 255.047(1)(a), F.S. The term does not include "contract negotiation documents, lease agreements, rental rates, event invoices, event work orders, ticket sales information, box office records, attendance figures, payment schedules, certificates of insurance, accident reports, incident reports, or correspondence specific to a confirmed event." *Id.*

(2) Business location or expansion plans

Section 288.075(2), F.S., provides that upon written request from a private entity, information held by an economic development agency concerning the plans, intentions, or interests of such entity to locate or expand its business activities in Florida is confidential and exempt from disclosure for 12 months after the date an economic development agency receives a request for confidentiality or until the information is otherwise disclosed, whichever occurs first. Confidentiality may be extended for up to an additional 12 months upon the written request of the private entity if the agency finds that the private entity is still actively considering locating or expanding its business activities in Florida. Section 288.075(3), F.S.

Development plans, financial records, financial commitment letters and draft memoranda of understanding between a Florida city and a company that is interested in locating its business activities in the city and developing a large project there would appear to be "records which contain or would provide information concerning plans, intentions, or interests of such private corporation . . . to locate, relocate, or expand any of its business activities" in Florida. AGO 04-19. However, the burden is on the economic development agency "to carefully and in good faith distinguish between those documents clearly covered by the

exemption and those not covered." *Id.*

Trade secrets, as defined in s. 812.081, F.S., contained in the records of the economic development agency relating to the plans, intentions, or interests of a private entity which has requested confidentiality, remain confidential for 10 years after the date an agency receives a request for confidentiality or until otherwise disclosed, whichever occurs first. Section 288.075(4), F.S. *Cf.*, AGO 80-78 (county industrial development authority permitted to withhold access only to those records "clearly falling" within the exemption provided in s. 288.075; "policy considerations" do not justify nondisclosure of public records).

The term "economic development agency" means the state Office of Tourism, Trade, and Economic Development, an industrial development authority, Space Florida, the public economic development agency of a county or municipality, or a research and development authority. The term also includes private persons or agencies authorized by the state, a county or a municipality to promote the general business interests of the state or that municipality or county. Section 288.075(1), F.S. *Cf.*, s. 288.1067, F.S., providing an exemption for specified business information received under various tax credit, tax refund, and incentive programs for qualified businesses; and s. 288.9551, F.S. (Scripps Florida Funding Corporation).

(3) Tourism promotion records

There are several statutes which exempt certain information obtained or held by state or local tourism agencies. For example, s. 125.0104(9)(d)1., F.S., exempts information given to a county tourism promotion agency, which, if released, would reveal the identity of those who provide information in response to a sales promotion, advertisement, or research project or whose names, addresses, meeting or convention plan information or accommodations or other visitation needs become booking or reservation list data.

Section 125.0104(9)(d)2., F.S., provides an exemption for the following records when held by a county tourism promotion agency: booking business records, as defined in s. 255.047, F.S.; a trade secret as defined in s. 812.081, F.S.; trade secrets and commercial or financial information gathered from a person and privileged or confidential, as defined and interpreted under cited federal law. *See also*, ss. 288.1224(7) and 288.1226(8), F.S. (confidentiality of certain data submitted as part of marketing or advertising research projects undertaken by state tourism agencies).

e. Personal financial records

In the absence of statutory exemption, financial information prepared or received by an agency is usually subject to Ch. 119, F.S. *See, Wallace v. Guzman,* 687 So. 2d 1351 (Fla. 3d DCA 1997) (personal income tax returns and financial statements submitted by housing finance authority members as part of the authority's application to organize a bank are subject to disclosure).

For example, county records of payments made by individuals for waste collection services are public records. AGO 88-57. *See also*, AGO 04-16 (financial documents contained in licensing file); AGO 92-09 (customer delinquency information held by a utilities commission is subject to disclosure); and Inf. Op. to Lovelace, April 3, 1992 (records identifying mortgage recipients held by a bank acting as agent of a housing finance authority in granting mortgages funded by the authority are public records). *Cf.*, AGO 73-278 (reports submitted to agency in connection with permit application open to inspection unless submitted by a consumer reporting agency whose reports are subject to nondisclosure provisions in federal law; in that event, reports are subject to public inspection only as authorized in federal law).

There are some specific exemptions, however, that are applicable to certain payment records or information. Bank account numbers and debit, charge, and credit card numbers held by an agency are exempt from public disclosure. Section 119.071(5)(b), F.S. *See also*, s. 215.322(6), F.S. (credit card account numbers in the possession of a state agency, unit of local government, or the judicial branch are confidential and exempt).

Health or property insurance information furnished by an applicant for or participant in federal, state, or local housing assistance programs is confidential. Section 119.071(5)(f), F.S. *And see* s. 717.117(8), F.S. (financial account numbers contained in unclaimed property reports held by the Department of Financial Services are confidential); and s. 624.23, F.S. (personal financial information of a consumer held by the Department of Financial Services or the Office of Insurance Regulation or their service providers, relating to a consumer's complaint or inquiry is confidential).

Section 338.155(6), F.S., provides an exemption for personal identifying information obtained by the Department of Transportation, a county, or an expressway authority relating to payment of tolls by credit card, charge card, or check. *And see* s. 414.295(1), F.S. (personal identifying information of a temporary cash assistance program participant is confidential).

f. Security interests

Records regarding ownership of, or security interests in, registered public obligations are not open to inspection. Section 279.11, F.S.

g. Taxpayer records

There are a number of statutes providing for confidentiality of taxpayer records held by the Department of Revenue. Unless otherwise specified by law, Florida taxpayers have the right to have tax information kept confidential. Section 213.015(9), F.S. *See*, *e.g.*, s. 213.053(2)(a), F.S. (all information contained in returns, reports, accounts, or declarations received by the Department of Revenue, including investigative reports and information and letters of technical advice, is confidential except for official purposes and exempt from s. 119.07[1], F.S.); s. 213.21(3), F.S. (records of compromises of taxpayer liability not subject to disclosure); and s. 213.27(6), F.S. (confidential information shared by the Department of Revenue with debt collection or auditing agencies under contract with the department is exempt from public disclosure and such debt collection or auditing agencies are bound by the same confidentiality requirements as the department).

In light of the position taken by the Department of Revenue that its form entitled "Original Application for Ad Valorem Tax Exemption" constitutes a "return," such form should be treated as a "return" that is confidential pursuant to s. 193.074, F.S. AGO 05-04. *Accord*, AGO 95-07. However, taxpayer information that is confidential in the hands of certain specified officers under s. 193.074, F.S., is subject to disclosure under the Public Records Act when it has been submitted by a taxpayer to a value adjustment board as evidence in an assessment dispute. AGO 01-74. Similarly, absent a specific statutory exemption for assessment rolls and public information cards, such documents made or received by the property appraiser are public records subject to the Public Records Act, regardless of the confidentiality of a return that may contain information used in their creation. AGO 05-04.

h. Telephone bills

Records of telephone calls made from agency telephones are subject to disclosure in the absence of statutory exemption. *See, Gillum v. Times Publishing Company*, No. 91-2689-CA (Fla. 6th Cir. Ct. July 10, 1991). *See also, Media General Operation, Inc. v. Feeney,* 849 So. 2d 3, 6 (Fla. 1st DCA 2003), in which the court rejected an agency's argument that redaction of telephone

numbers for calls made in the course of official business could be justified because disclosure could result in "unreasonable consequences" to the persons called. *Cf.*, AGO 97-05 (exemption now found in s. 119.071[5][d], F.S., for records supplied by a telecommunications company to a state or local governmental agency which contain the name, address, and telephone number of subscribers, applies to telecommunications records of a city-operated telecommunications company when the records are supplied by the city to another state or local governmental agency).

The Attorney General's Office has advised that telephone numbers in a school district's records of calls made on agency telephones are public records even when those calls may be personal and the employee pays or reimburses the school district for the calls. AGO 99-74. *Cf., Media General Operation, Inc. v. Feeney, supra,* in which the court held that under the circumstances of that case (involving access to records of cellular phone service provided by a political party for legislative employees), records of personal or private calls of the employees fell outside the definition of public records.

i. Trade secrets

The Legislature has created a number of specific exemptions from Ch. 119, F.S., for trade secrets. *See*, *e.g.*, s. 1004.78(2), F.S. (trade secrets produced in technology research within community colleges); s. 365.174, F.S. (proprietary confidential business information and trade secrets submitted by wireless 911 provider to specified agencies); s. 570.544(7), F.S. (trade secrets contained in records of the Division of Consumer Services of the Department of Agriculture and Consumer Services); and s. 627.6699(8)(c), F.S. (trade secrets involving small employer health insurance carriers).

In addition, the First District has concluded that s. 815.045, F.S., "should be read to exempt from disclosure as public records all trade secrets as defined in [s. 812.081(1)c), F.S.]. . . ." *Sepro Corporation v. Florida Department of Environmental Protection,* 839 So. 2d 781, 785-787 (Fla. 1st DCA 2003), *review denied sub nom., Crist v. Florida Department of Environmental Protection,* 911 So. 2d 792 (Fla. 2005). In *Sepro*, the court ruled that while "a conversation with a state employee is not enough to prevent [alleged trade secrets] from being made available to anyone who makes a public records request," documents submitted by a private party which constituted trade secrets as defined in s. 812.081, and which were stamped as confidential at the time of submission to a state agency, were not subject to public access. *Sepro*, at 784. *And see Cubic Transportation Systems, Inc. v. Miami-Dade County,* 899 So. 2d 453, 454 (Fla. 3d DCA 2005) (where a company supplied documents

to an agency and failed to mark them as "confidential" and "continued to supply them without asserting even a [legally ineffectual] *post*-delivery claim to confidentiality for some thirty days after it had once attempted to do so by informing County staff," the company failed adequately to protect an alleged trade secret claim). (emphasis supplied by the court). *Cf., Seta Corporation of Boca, Inc. v. Office of the Attorney General*, 756 So. 2d 1093 (Fla. 4th DCA 2000).

For more information on computer trade secrets, please refer to the discussion on that topic in s. C.1.g., *supra.*

4. Investigation records of non law enforcement agencies

a. Investigative records subject to Ch. 119, F.S., in absence of legislative exemption

In the absence of a specific legislative exemption, investigative records made or received by public agencies are open to public inspection pursuant to Ch. 119, F.S. *State ex rel. Veale v. City of Boca Raton,* 353 So. 2d 1194 (Fla. 4th DCA 1977), *cert. denied,* 360 So. 2d 1247 (Fla. 1978). *And see Caswell v. Manhattan Fire and Marine Insurance Company*, 399 F.2d 417 (5th Cir. 1968) (ordering that certain investigative records of the State Insurance Commission be produced for inspection under Ch. 119, F.S.). *Accord*, AGO 91-75 (documents containing information compiled by school board employees during an investigation of school district departments are open to inspection in the absence of statutory exemption); AGO 85-79 (interoffice memoranda, correspondence, inspection reports of restaurants, grocery stores and other such public premises, nuisance complaint records, and notices of violation of public health laws maintained by county public health units are subject to disclosure in the absence of any statutory exemption or confidentiality requirement); and AGO 71-243 (inspection reports made or received by a school board in connection with its official investigation of the collapse of a school roof constitute public records). *Cf.*, *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973) (no quasi-judicial exception to the Sunshine Law which would allow closed door hearings or deliberations when a board or commission is acting in a "quasi-judicial" capacity).

Disclosure of records of investigative proceedings is not violative of privacy rights arising under the state or federal Constitutions. *See*, *Garner v. Florida Commission on Ethics*, 415 So. 2d 67 (Fla. 1st DCA 1982), *review denied*, 424 So. 02d 761 (Fla. 1983) (public's right to view commission files prepared in connection with investigation of alleged violations of the Code

of Ethics outweighs an individual's disclosural privacy rights). For more information on privacy issues, please see s. D.15., *infra*.

The investigative exemptions now found in paragraphs (2)(c) through (f), (h) and (i) of s. 119.071(2), F.S., limit disclosure of specified *law enforcement* records, and thus do not apply to investigations conducted by agencies outside the criminal justice system. *See*, *Douglas v. Michel,* 410 So. 2d 936, 939 (Fla. 5th DCA 1982), *questions answered and approved,* 464 So. 2d 545 (Fla. 1985) (exemption for "information revealing surveillance techniques or procedures or personnel" [now found at s. 119.071(2)(d)] does not apply to a hospital's personnel files). *See also*, AGO 91-75, stating that the active criminal investigation and intelligence exemption does not apply to information compiled in a school board investigation into the conduct of certain school departments; and AGO 87-51, concluding that complaints from employees of the state labor department relating to departmental integrity and efficiency do not constitute criminal intelligence information or criminal investigative information.

Thus, the contents of an investigative report compiled by the Inspector General for a state agency in carrying out his duty to determine program compliance are not converted into criminal intelligence information merely because the Florida Department of Law Enforcement also conducts an investigation or because such report or a copy thereof has been transferred to the department. Inf. Op. to Slye, August 5, 1993.

b. Statutory exemptions

A number of exemptions exist for certain investigatory records. For a more complete listing, please refer to Appendix D and the Index.

(1) Commission on Ethics investigations

The complaint and records relating to the complaint or to any preliminary investigation of the Ethics Commission are confidential and exempt until the complaint is dismissed as legally insufficient, until the alleged violator requests in writing that such records be made public, or until the commission determines, based on such investigation, whether probable cause exists to believe that a violation has occurred. Section 112.324(2)(a), F.S. *See also*, s. 112.3215(8)(b) and (d), F.S. (providing confidentiality for certain records relating to Ethics Commission investigation of alleged violations of lobbying laws).

However, nothing in s. 112.324, F.S., provides confidentiality for similar or identical information in the possession of other agencies of government. AGO 96-05. Thus, a police report of an investigation of a public employee that has been concluded and is in the possession of the police department is not made confidential by the fact that the same issue and the same individual are the subject of an ethics complaint pursuant to Part III, Ch. 112, F.S., or because a copy of the police report may be included in information obtained by the Ethics Commission pursuant to its powers to investigate complaints of ethics violations. *Id*.

(2) State inspector general investigations

Audit workpapers and reports of state agency inspectors general appointed in accordance with s. 20.055, F.S., are public records to the extent that they do not include information which has been made confidential and exempt from s. 119.07(1), F.S. Section 20.055(5)(b), F.S.

However, s. 112.31901(2), F.S., authorizes the Governor, in the case of the Chief Inspector General, or agency head, in the case of an employee designated as the agency inspector general under s. 112.3189, F.S., to certify that an investigatory record of the Chief Inspector General or an agency inspector general requires an exemption in order to protect the integrity of the investigation or avoid unwarranted damage to an individual's good name or reputation. If so certified, the investigatory records are exempt from s. 119.07(1), F.S., until the investigation ceases to be active, or a report detailing the investigation is provided to the Governor or the agency head, or 60 days from the inception of the investigation for which the record was made or received, whichever first occurs. Section 112.31901(1), F.S. The provisions of this section do not apply to whistle-blower investigations conducted pursuant to the whistle-blower act. Section 112.31901(3), F.S. *Cf.*, s. 943.03(2), F.S., providing for confidentiality of Department of Law Enforcement records relating to an active investigation of official misconduct.

(3) State licensing investigations

Pursuant to s. 455.225(10), F.S., complaints against a licensed professional filed with the state licensing board or the Department of Business and Professional Regulation are confidential and exempt from disclosure until 10 days after probable cause has been found to exist by the probable cause panel of the licensing board or by the Department of Business and Professional Regulation, or the professional waives his or her privilege of confidentiality whichever occurs first. A similar

exemption applies to complaints and investigations conducted by the Department of Health and licensing boards within that department as provided in s. 456.073(10), F.S.

Complaints filed by a municipality against a licensed professional are included within the confidentiality provisions. AGO 02-57. However, while the complaint filed by the municipality with the state licensing agency is exempt, the exemption afforded by the statute does not extend to other records held by the city related to the nature of the alleged offense by the licensed professional. *Id.*

(4) Whistle-blower investigations

Section 112.3188(1), F.S., provides, with limited exceptions, for the confidentiality of the identity of a whistle-blower who discloses in good faith to the Chief Inspector General, an agency inspector general, a local chief executive officer, or other appropriate local official information that alleges that an employee or agent of an agency or independent contractor has violated or is suspected of having violated any federal, state, or local law, rule or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or has committed or is suspected of having committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty. A complainant may waive the right to confidential treatment of his or her name or identity. AGO 95-20. However, an individual may not be required to sign a waiver of confidentiality as a condition of processing a complaint. AGO 96-40.

In order to qualify as a whistle-blower complaint, particular information must be disclosed to the statutorily designated officials; a general complaint of wrongdoing to officials other than those specifically named in s. 112.3188(1) does not entitle the complainant to whistle-blower protection. AGO 98-37. *And see* AGO 99-07 (county inspector general qualifies as an "appropriate local official" for purposes of the whistle-blower law); and AGO 96-40 (town ethics commission constitutes "appropriate local official" for purposes of processing complaints under the whistle-blower law).

Section 112.3188(2)(a), F.S., states that except as specifically authorized in s. 112.3189, F.S., all information received by the Chief Inspector General or an agency inspector general or information produced or derived from fact-finding or other investigations conducted by the Florida Commission on Human Relations or the Department of Law Enforcement is confidential and exempt if the information is being received or derived from allegations as set forth in s. 112.3188(1)(a) or (b), F.S., and

an investigation is "active" as defined s. 112.3188(2)(c), F.S.

Information received by an appropriate local official or local chief executive officer or produced or derived from fact-finding or investigations by local government pursuant to s. 112.3187(8)(b), F.S. [authorizing administrative procedures for handling whistle-blower complaints filed by local public employees] is confidential and exempt, provided that the information is being received or derived from allegations set forth in s. 112.3188(1) and an investigation is active as defined in the section. Section 112.3188(2)(b), F.S. The exemption applies to records received by a municipality conducting an active investigation of a whistle-blower complaint, and is not limited to records received as part of an active investigation of a complaint of retaliation against a whistle-blower. AGO 98-37. The exemption applies whether the allegations of wrongdoing were received from an anonymous source or a named individual; in either case information received or generated during the course of the investigation is subject to the exemption. AGO 99-07.

However, while the name or identity of the individual disclosing this information is confidential, the initial report of wrongdoing received by the municipality is a public record, since that information was received before an investigation began. AGO 98-37.

5. Litigation records

a. Attorney-client communications

The Public Records Act applies to communications between attorneys and governmental agencies; there is no judicially created privilege which exempts these documents from disclosure. *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979) (only the Legislature and not the judiciary can exempt attorney-client communications from Ch. 119, F.S.). *See also*, *City of North Miami v. Miami Herald Publishing Company*, 468 So. 2d 218 (Fla. 1985) (although s. 90.502, F.S., of the Evidence Code establishes an attorney-client privilege for public and private entities, this evidentiary statute does not remove communications between an agency and its attorney from the open inspection requirements of Ch. 119, F.S.).

Moreover, public disclosure of these documents does not violate the public agency's constitutional rights of due process, effective assistance of counsel, freedom of speech, or the Supreme Court's exclusive jurisdiction over The Florida Bar. *City of North Miami v. Miami Herald Publishing Company*, *supra*. *And see Seminole County, Florida v. Wood*, 512 So. 2d 1000, 1001 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988)

(the rules of ethics provide that an attorney may divulge a communication when required by law; the Legislature has plenary authority over political subdivisions and can require disclosure of otherwise confidential materials); and AGO 98-59 (records in the files of the former city attorney, who served as a contract attorney for the city, which were made or received in carrying out her duties as city attorney and which communicate, perpetuate, or formalize knowledge constitute public records and are required to be turned over to her successor).

On the other hand, the Florida Supreme Court has ruled that files in the possession of the Capital Collateral Representative (CCR) in furtherance of its representation of an indigent client are not subject to public disclosure under Ch. 119, F.S. The Court noted that the files are not governmental records for purposes of the public records law but are the "private records" of the CCR client. *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990). *And see Times Publishing Company v. Acton*, No. 99-8304 (Fla. 13th Cir. Ct. November 5, 1999) (private attorneys *retained by individual county commissioners in a criminal case* were not "acting on behalf" of a public agency so as to become subject to the Public Records Act, even though the board of county commissioners subsequently voted to pay the commissioners' legal expenses in accordance with a county policy providing for reimbursement of legal expenses to individual county officers who successfully defend criminal charges filed against them arising out of the performance of their official duties).

b. Attorney work product

The Supreme Court has ruled that the Legislature and not the judiciary has exclusive authority to exempt litigation records from the scope of Ch. 119, F.S. *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979). *See also*, *Edelstein v. Donner*, 450 So. 2d 562 (Fla. 3d DCA 1984), *approved*, 471 So. 2d 26 (Fla. 1985), noting that in the absence of legislation, a work product exemption is "non-existent;" and *Hillsborough County Aviation Authority v. Azzarelli Construction Company*, 436 So. 2d 153, 154 (Fla. 2d DCA 1983), stating that the Supreme Court's decision in *Wait* "constituted a tacit recognition that work product can be a public record."

c. Statutory work product exemption

With the enactment of s. 119.071(1)(d), F.S., the Legislature created a narrow exemption for certain litigation work product of agency attorneys. *See, City of Orlando v. Desjardins*, 493 So. 2d 1027, 1029 (Fla. 1986), in which the Court noted that the exemption was enacted because of "developing case law affording

public entities no protection under either the work product doctrine or the attorney-client privilege . . . ."

Section 119.071(1)(d)1., F.S., states:

> A public record that was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt [from disclosure] until the conclusion of the litigation or adversarial administrative proceedings. For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

Note that this statutory exemption applies to attorney work product that has reached the status of becoming a public record; as discussed more extensively in s. C.5.e., of this Manual, relating to "attorney notes," certain preliminary trial preparation materials, such as handwritten notes for the personal use of the attorney, are not considered to be within the definitional scope of the term "public records" and, therefore, are outside the scope of Ch. 119, F.S. *See, Johnson v. Butterworth*, 713 So. 2d 985 (Fla. 1998).

Under the terms of the statute, the work product exemption "is not waived by the release of such public record to another public employee or officer of the same agency or any person consulted by the agency attorney." Section 119.071(1)(d)2., F.S. *See also*, AGO 94-77, in which the Attorney General's Office concluded that the work product exemption continues to apply to records prepared by the county attorney when these records are transferred to the city attorney pursuant to a transfer agreement whereby the city is substituted for the county as a party to the litigation.

An agency asserting the work product exemption must identify

the potential parties to the litigation or proceedings. Section 119.071(1)(d)2., F.S. If a court finds that the record was improperly withheld, the party seeking the record shall be awarded reasonable attorney's fees and costs in addition to any other remedy ordered by the court. *Id*. As one court has noted, the inclusion of an attorney's fee sanction "was prompted by the legislature's concern that government entities might claim the work product privilege whenever public access to their records is demanded." *Smith & Williams, P.A. v. West Coast Regional Water Supply Authority*, 640 So. 2d 216, 218 (Fla. 2d DCA 1994).

(1) Scope of exemption

(a) Attorney bills and payments

Only those records which reflect a "mental impression, conclusion, litigation strategy, or legal theory" are included within the parameters of the work product exemption. Accordingly, in AGO 85-89, the Attorney General's Office concluded that a contract between a county and a private law firm for legal counsel and documentation for invoices submitted by such firm to the county do not fall within the work product exemption. *Accord,* AGO 00-07 (records of outside attorney fee bills for the defense of the county, as well as its employees who are sued individually, for alleged civil rights violations are public records subject to disclosure).

If the bills and invoices contain some exempt work product--*i.e.*, "mental impression[s], conclusion[s], litigation strateg[ies], or legal theor[ies],"--the exempt material may be deleted and the remainder disclosed. AGO 85-89. However, information such as the hours worked or the hourly wage clearly would not fall within the scope of the exemption. *Id. And see Herskovitz v. Leon County,* No. 98-22 (Fla. 2d Cir. Ct. June 9, 1998) ("Obviously, an entry on a [billing] statement which identifies a specific legal strategy to be considered or puts a specific amount of settlement authority received from the client, would fall within the exemption. On the other hand, a notation that the file was opened, or that a letter was sent to opposing counsel, would not.").

Thus, an agency which "blocked out" most notations on invoices prepared in connection with services rendered by and fees paid to attorneys representing the agency, "improperly withheld" nonexempt material when it failed to limit its redactions to those items "genuinely reflecting its 'mental impression, conclusion, litigation strategy, or legal theory.'" *Smith & Williams, P.A. v. West Coast Regional Water Supply Authority*, *supra*. *And see Davis v. Sarasota County Public*

Hospital Board, 480 So. 2d 203 (Fla. 2d DCA 1985), *review denied*, 488 So. 2d 829 (Fla. 1986), holding in part that a citizen seeking to examine records of a public hospital board concerning the payment of legal fees was entitled to examine actual records, not merely excerpts taken from information stored in the hospital's computer.

(b) Investigations

Section 119.071(1)(d), F.S., does not create a blanket exception to the Public Records Act for all attorney work product. AGO 91-75. The exemption is narrower than the work product privilege recognized by the courts for private litigants. AGO 85-89. In order to qualify for the work product exemption, the records must have been prepared exclusively for or in anticipation of imminent or pending *litigation or adversarial administrative proceedings*; records prepared for other purposes may not be converted into exempt material simply because they are also used in or related to the litigation.

Moreover, only those records which are prepared by or at the express direction of the *agency attorney* and reflect "a mental impression, conclusion, litigation strategy, or legal theory *of the attorney or the agency*" are exempt from disclosure until the conclusion of the proceedings. (e.s.) *See, City of North Miami v. Miami Herald Publishing Company,* 468 So. 2d 218, 219 (Fla. 1985) (noting application of exemption to "government agency, attorney-prepared litigation files during the pendency of litigation"); and *City of Miami Beach v. DeLapp*, 472 So. 2d 543 (Fla. 3d DCA 1985) (opposing counsel not entitled to city's legal memoranda as such material is exempt work product). *Compar*e, *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986) (trial court must examine city's litigation file in accident case and prohibit disclosure only of those records reflecting mental impression, conclusion, litigation strategy or legal theory of attorney or city); and *Jordan v. School Board of Broward County*, 531 So. 2d 976, 977 (Fla. 4th DCA 1988) (record did not constitute exempt work product because it "was not prepared at an attorney's express direction nor did it reflect a conclusion and mental impression of appellee").

Thus, a circuit judge refused to apply the exemption to tapes, witness statements and interview notes taken by police as part of an investigation of a drowning accident at a city summer camp. *See, Sun-Sentinel Company v. City of Hallandale*, No. 95-13528(05) (Fla. 17th Cir. Ct. October 11, 1995). The judge also concluded that the exemption, now found at s. 768.28(16)(b), F.S., for risk management files did not apply. Similarly, in AGO 05-23, the Attorney General's Office advised that notes taken by

the assistant city attorney during interviews with co-workers of certain city employees in order to ascertain if employee discipline was warranted are not exempt from disclosure. *See also,* AGO 91-75 (work product exemption not applicable to documents generated or received by school district investigators, acting at the direction of the school board to conduct an investigation of certain school district departments). *Cf., Tober v. Sanchez*, 417 So. 2d 1053, 1055 (Fla. 3d DCA 1982), *review denied sub nom., Metropolitan Dade County Transit Agency v. Sanchez*, 426 So. 2d 27 (Fla. 1983) (documents which are given by a client to an attorney in the course of seeking legal advice are privileged in the attorney's hands only if the documents were privileged in the client's hands; thus, otherwise public records made or received by agency personnel do not become privileged merely by transferring them to the agency attorney).

(2) Commencement and termination of exemption

Unlike the open meetings exemption in s. 286.011(8), F.S., for certain attorney-client discussions between a governmental agency and its attorney, s. 119.071(1)(d), F.S., is not limited to records created for pending litigation or proceedings, but applies also to records prepared "in *anticipation* of imminent civil or criminal litigation or imminent adversarial administrative proceedings." (e.s.) *See,* AGO 98-21, discussing the differences between the public records work product exemption in s. 119.071(1)(d) and the Sunshine Law exemption in s. 286.011.

But, the exemption from disclosure provided by s. 119.071(1)(d), F.S., is *temporary* and limited in duration. *City of North Miami v. Miami Herald Publishing Co., supra*. The exemption exists only until the "conclusion of the litigation or adversarial administrative proceedings" even if disclosure of the information in the concluded case could negatively impact the agency's position in related cases or claims. *State v. Coca-Cola Bottling Company of Miami, Inc.,* 582 So. 2d 1 (Fla. 4th DCA 1990)*; Seminole County v. Wood*, 512 So. 2d 1000 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988). *And see New Times, Inc. v. Ross*, No. 92-5795 CIV 25 (Fla. 11th Cir. Ct. March 17, 1992), holding that papers in a closed civil forfeiture file which subsequently became part of a criminal investigation were open to inspection. The court reasoned that the civil litigation materials could not be considered criminal investigative information because the file was closed prior to the commencement of the criminal investigation. *Cf., State v. Coca-Cola Bottling Company of Miami, Inc., supra* (although state cannot claim work product exemption for litigation records after conclusion of litigation, Ch. 119 does not cover oral testimony; thus, opposing counsel not entitled to take *depositions* of state representatives

regarding the concluded litigation).

(a) Settlement records

Settlement documents are normally subject to release once litigation is over between the parties, even if other issues remain, because the work product exemption does not apply once the litigation is no longer pending. *And see* s. 69.081(8)(a), F.S., stating, subject to limited exceptions, that "[a]ny portion of an agreement or contract which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against the state, its agencies or subdivisions or against any municipality or constitutionally created body or commission is void, contrary to public policy, and may not be enforced;" and Inf. Op. to Barry, June 24, 1998, citing to s. 69.081(8)(a), and stating that a state agency may not enter into a settlement agreement or other contract which contains a provision authorizing the concealment of information relating to a disciplinary proceeding or other adverse employment decision from the remainder of a personnel file.

For example, if the state settles a claim against one company accused of conspiracy to fix prices, the state has concluded the litigation against that company. Thus, the records prepared in anticipation of litigation against that company are no longer exempt from disclosure even though the state has commenced litigation against the alleged co-conspirator. *State v. Coca-Cola Bottling Company of Miami, Inc.*, 582 So. 2d 1 (Fla. 4th DCA 1990). *And see Tribune Company v. Hardee Memorial Hospital*, No. CA-91-370 (Fla. 10th Cir. Ct. August 19, 1991) (settlement agreement not exempt as attorney work product even though another related case was pending, and agency attorneys feared disclosure of their assessment of the merits of the settled case and their litigation strategy would have a detrimental effect upon the agency's position in the related case). *Cf., Prison Health Services, Inc. v. Lakeland Ledger Publishing Company,* 718 So. 2d 204, 205 (Fla. 2d DCA 1998)*, review denied*, 727 So. 2d 909 (Fla. 1999) (private company under contract with sheriff to provide medical services for inmates at county jail must release records relating to a settlement agreement with an inmate because all of its records that would normally be subject to the Public Records Act if in the possession of the public agency, are likewise covered by that law, even though in the possession of the private corporation).

Regarding draft settlements received by an agency in litigation, a circuit court held that draft settlement agreements furnished *to* a state agency by a federal agency were public records despite the department's agreement with the federal agency to keep such documents confidential. *Florida Sugar Cane*

League, Inc. v. Department of Environmental Regulation, No. 91-2108 (Fla. 2d Cir. Ct. September 20, 1991), *per curiam affirmed*, 606 So. 2d 1267 (Fla. 1st DCA 1992). *And see Florida Sugar Cane League, Inc. v. Florida Department of Environmental Regulation,* No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992) (technical documents or data which were not prepared for the purpose of carrying litigation forward but rather were jointly authored among adversaries to promote settlement are not exempted as attorney work product).

(b) Criminal cases

In a criminal case, the "conclusion of the litigation" for purposes of the termination of the work product exemption occurs when the conviction and sentence have become final. *State v. Kokal*, 562 So. 2d 324 (Fla. 1990). However, the state attorney may still claim the work product exemption for his or her current file in a pending motion for postconviction relief because there is ongoing litigation with respect to those documents. *See*, *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993) (state attorney not required to disclose information from a current file relating to a postconviction relief motion).

However, the Florida Supreme Court has also noted the state's obligation in a criminal case to "disclose any exculpatory document within its possession or to which it has access, even if such document is not subject to the public records law. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)." *Walton v. Dugger*, 634 So. 2d at 1062. *Accord*, *Johnson v. Butterworth,* 713 So. 2d 985 (Fla. 1998).

d. Other statutory exemptions relating to litigation records

Section 768.28(16)(b), F.S., provides an exemption for claim files maintained by agencies pursuant to a risk management program for tort liability until the termination of all litigation and settlement of all claims arising out of the same incident.

The exemption afforded by s. 768.28(16), F.S., is limited to tort claims for which the agency may be liable under s. 768.28, F.S., and does not apply to federal civil rights actions under 42 U.S.C. s. 1983. AGOs 00-20 and 00-07. Moreover, the exemption does not include outside attorney invoices indicating hours worked and amount to be paid by the public agency, even though the records may be maintained by the agency's risk management office pursuant to a risk management program. AGO 00-07. *And see* AGO 92-82 (open meetings exemption provided by s. 768.28, F.S., applies only to meetings held *after* a tort claim is filed

with the risk management program).

Section 624.311(2), F.S., provides that the "records of insurance claim negotiations of any state agency or political subdivision are confidential and exempt [from disclosure] until termination of all litigation and settlement of all claims arising out of the same incident." A county's self-insured workers compensation program is the legal equivalent of "insurance" for purposes of this exemption. *Herskovitz v. Leon County,* No. 98-22 (Fla. 2d Cir. Ct. June 9, 1998). *And see* AGO 85-102 (s. 624.311, F.S., exemption includes correspondence regarding insurance claims negotiations between a county's retained counsel and its insurance carriers until termination of litigation and settlement of claims arising out of the same incident). *Compare,* s. 284.40(2), F.S. (claim files maintained by the risk management division of the Department of Financial Services are confidential, shall be only for the use of the department, and are exempt from disclosure); and s. 1004.24(4), F.S. (claim files of self-insurance program adopted by State Board of Education are confidential and exempt).

e. Attorney notes

Relying on its conclusion in *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980), the Florida Supreme Court has recognized that "not all trial preparation materials are public records." *State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990). In *Kokal*, the Court approved the decision of the Fifth District in *Orange County v. Florida Land Co.*, 450 So. 2d 341, 344 (Fla. 5th DCA 1984), *review denied*, 458 So. 2d 273 (Fla. 1984), which described certain documents as not within the term "public records" because they were not used to perpetuate, formalize, or communicate knowledge:

> Document No. 2 is a list in rough outline form of items of evidence which may be needed for trial. Document No. 9 is a list of questions the county attorney planned to ask a witness. Document No. 10 is a proposed trial outline. Document No. 11 contains handwritten notes regarding the county's sewage system and a meeting with Florida Land's attorneys. Document No. 15 contains notes (in rough form) regarding the deposition of an anticipated witness. These documents are merely notes from the attorneys to themselves designed for their own personal use in remembering certain things. They seem to be simply *preliminary* guides intended to aid the attorneys when they later formalized the knowledge. We cannot imagine that the Legislature,

> in enacting the Public Records Act, intended to include within the term 'public records' this type of material. [Emphasis supplied by the Court]

Similarly, in *Johnson v. Butterworth*, 713 So. 2d 985, 987 (Fla. 1998), the Court ruled that "outlines, time lines, page notations regarding information in the record, and other similar items" in the case file, do not fall within the definition of public record, and thus are not subject to disclosure. *See also*, *Patton v. State,* 784 So. 2d 380, 389 (Fla. 2000) (prosecutor's personal notes, *i.e.*, handwritten details of specific questions to ask jurors during voir-dire, notes on potential jurors, a time-line of events, or specific detailed questions for witnesses, are not public records); *Scott v. Butterworth,* 734 So. 2d 391, 393 (Fla. 1999) (handwritten notes and drafts of pleadings are not public records); *Ragsdale v. State,* 720 So. 2d 203, 205 (Fla. 1998) ("attorney's notes and other such preliminary documents are not public records and are never subject to public records disclosure"); *Valle v. State,* 705 So. 2d 1331, 1335 (Fla. 1997) (documents consisting of prosecutors' notes to themselves for their own personal use, including outlines of opening and closing arguments and notes of witness depositions are not public records); *Lopez v. State,* 696 So. 2d 725, 727 (Fla. 1997) (handwritten notes dealing with trial strategy and cross-examination of witnesses are not public records); and *Atkins v. State*, 663 So. 2d 624, 626 (Fla. 1995) (notes of state attorney's investigations and annotated photocopies of decisional case law are not public records).

By contrast, documents prepared to communicate, perpetuate, or formalize knowledge constitute public records and are, therefore, subject to disclosure in the absence of statutory exemption. *See*, *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.,* 379 So. 2d 633, 640 (Fla. 1980), in which the Court noted that "[i]nter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business."

For example, in *Coleman v. Austin*, 521 So. 2d 247, 248 (Fla. 1st DCA 1988), the court observed that "although notes from attorneys to themselves might not be public records when intended for their own personal use, inter-office and intra-office memoranda may constitute public records even though encompassing trial preparation materials." *And see Hillsborough County Aviation Authority v. Azzarelli Construction Company*, 436 So. 2d 153 (Fla. 2d DCA 1983) (rejecting an agency's contention that

when a public body is engaged in litigation, the pleadings and evidence it presents in court constitute the formal agency statement on the subject matter and all else is merely preliminary or preparatory and, therefore, not a Ch. 119, F.S., public record).

Thus, in *Orange County v. Florida Land Company*, *supra*, the court concluded that trial preparation materials consisting of interoffice and intraoffice memoranda communicating information from one public employee to another or merely prepared for filing, even though not part of the agency's formal work product, were public records. As public records, such circulated trial preparation materials might be exempt from disclosure pursuant to s. 119.071(1)(d), F.S., while the litigation is ongoing; however, once the case is over the materials would be open to inspection. *And see* AGO 05-23 (notes taken by city's assistant labor attorney and used to communicate information to the labor attorney regarding possible future personnel actions were public records available for inspection).

6. Personnel records

a. Personnel records open to inspection unless exempted by law

The general rule with regard to personnel records is the same as for other public records; unless the Legislature has expressly exempted an agency's personnel records from disclosure or authorized the agency to adopt rules limiting access to such records, personnel records are subject to public inspection and copying under s. 119.07(1), F.S. *Michel v. Douglas*, 464 So. 2d 545 (Fla. 1985). *And see Alterra Healthcare Corporation v. Estate of Shelley,* 827 So. 2d 936, 940n.4 (Fla. 2002) ("only the custodian of such records can assert any applicable exemption; not the employee").

In accordance with this principle, the following are some of the personnel records which have been determined to be subject to disclosure:

Applications for employment--AGOs 77-48 and 71-394;

Communications from third parties--*Douglas v. Michel*, 410 So. 2d 936 (Fla. 5th DCA 1982), *questions answered and approved*, 464 So. 2d 545 (Fla. 1985);

Grievance records--*Mills v. Doyle*, 407 So. 2d 348 (Fla. 4th DCA 1981);

Resumes--*Shevin v. Byron, Harless, Schaffer, Reid and*

Associates, Inc., 379 So. 2d 633 (Fla. 1980);

Salary information--*Lewis v. Schreiber*, No. 92-8005(03) (Fla. 17th Cir. Ct. June 12, 1992), *per curiam affirmed*, 611 So. 2d 531 (Fla. 4th DCA 1992); AGO 73-30;

Travel vouchers--*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, *supra*; *Lewis v. Schreiber*, *supra*.

Accordingly, an agency should assume that all information in a personnel file is subject to inspection unless a specific statutory exemption exists which would permit withholding a particular document from disclosure. For more information on the exemptions applicable to law enforcement officers, please refer to the discussion of law enforcement personnel records found at s. F.11., *infra.* Exemptions that pertain to personnel records of educators are discussed in s. I.2., *infra*.

b. Employment search or consultant records

"[D]ocuments provided to a consultant in relation to his acting on behalf of a public agency are public documents." *Wallace v. Guzman*, 687 So. 2d 1351, 1353 (Fla. 3d DCA 1997). Thus, if an agency uses a recruitment company to conduct an employment search for the agency, records made or received by the private company in connection with the search are public records. AGO 92-80. *See also*, *Shevin v. Byron, Harless, Schaffer, Reid and Associates*, 379 So. 2d 633 (Fla. 1980) (firm of consultants hired to conduct an employment search for position of managing director of a public agency was "acting on behalf of" a public agency and thus letters, memoranda, resumes, and travel vouchers made or received by consultants as part of search were public records).

c. Privacy concerns

The courts have rejected claims that constitutional privacy interests operate to shield agency personnel records from disclosure. *See*, *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985), holding that the state constitution "does not provide a right of privacy in public records" and that a state or federal right of disclosural privacy does not exist.

"Absent an applicable statutory exception, pursuant to Florida's Public Records Act (embodied in chapter 119, Florida Statutes), public employees (as a general rule) do not have privacy rights in such records." *Alterra Healthcare Corporation*

v. Estate of Shelley, 827 So. 2d 936, 940n.4 (Fla. 2002). *See also*, *Forsberg v. Housing Authority of City of Miami Beach*, 455 So. 2d 373 (Fla. 1984); *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, *supra*; and *Mills v. Doyle*, *supra*. *But see*, *Fadjo v. Coon*, 633 F.2d 1172, 1175n.3 (5th Cir. 1981), noting that "it is clear that the legislature cannot authorize by statute an unconstitutional invasion of privacy." For additional information on general privacy issues, please refer to the discussion in s. D.15., *infra*.

Additionally, the judiciary has refused to deny access to personnel records based on claims that the release of such information could prove embarrassing or unpleasant for the employee. As the Florida Supreme Court pointed out in *News-Press Publishing Company v. Wisher*, 345 So. 2d 646, 648 (Fla. 1977):

> No policy of the state protects a public employee from the embarrassment which results from his or her public employer's discussion or action on the employee's failure to perform his or her duties properly.

See also, *News-Press Publishing Company, Inc. v. Gadd*, 388 So. 2d 276, 278 (Fla. 2d DCA 1980), stating that absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and damage to an individual or institution resulting from such disclosure; *Browning v. Walton*, 351 So. 2d 380 (Fla. 4th DCA 1977), stating that a city cannot refuse to allow inspection of records containing the names and addresses of city employees who have filled out forms requesting that the city maintain the confidentiality of their personnel files; and AGO 87-48, concluding that a statute prohibiting the placement of anonymous materials in the personnel file of a school district employee, does not create an exemption to Ch. 119, F.S., so as to render such materials confidential and exempt from public inspection. *Cf.*, *United Teachers of Dade v. School Board of Dade County*, No. 92-17803 (01) (Fla. 11th Cir. Ct. Nov. 30, 1992) (home telephone numbers and addresses of school district employees not protected by constitutional right to privacy; only the Legislature can exempt such information).

Public employers should note, however, that a court has held that an agency must provide a discharged employee with an opportunity for a post-termination name-clearing hearing when stigmatizing information concerning the employee is made a part of the public records or is otherwise published. *Buxton v. City of Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989). *See also*, *Garcia v. Walder Electronics, Inc.*, 563 So. 2d 723 (Fla. 3d DCA 1990), *review denied*, 576 So. 2d 287 (Fla. 1990), noting that

a public employer has an affirmative duty to inform a discharged employee of his right to seek a post-termination name-clearing hearing. *Cf., Cannon v. City of West Palm Beach,* 250 F.3d 1299, 1303 (11th Cir. 2001) (failure to provide name-clearing hearing to employee who alleged that he was denied a promotion due to stigmatizing information in his personnel file does not violate the employee's due process rights, because "in this circuit a 'discharge or more' is required").

d. Conditions for inspection of personnel records

An agency is not authorized to unilaterally impose special conditions for the inspection of personnel records. An automatic delay in the production of such records is invalid. *Tribune Company v. Cannella*, 458 So. 2d 1075 (Fla. 1984), *appeal dismissed sub nom., DePerte v. Tribune Company*, 105 S.Ct. 2315 (1985) (automatic 48 hour delay unauthorized by Ch. 119, F.S.).

(1) Presence of employee

In the absence of express legislative authority, the inspection of personnel records may not be delayed in order to allow the employee to be notified or present during the inspection of the public records relating to that employee. As stated by the Supreme Court, the "[Public Records] Act does not provide that the employee be present during the inspection, nor even that the employee be given notice that an inspection has been requested or made." *Tribune Company v. Cannella*, 458 So. 2d at 1078. *Compare*, s. 1012.31(3)(a)3., F.S., in which the Legislature has expressly provided that no material derogatory to a public school employee may be inspected until 10 days after the employee has been notified by certified mail or personal delivery as provided in s. 1012.31(2)(c), F.S.

(2) Separate files

An agency is not authorized to maintain personnel records of its employees under two headings, one open and one confidential, in the absence of statutory authorization. AGO 73-51.

Absent a statutory exemption for such records, a city may not agree to remove counseling slips and written reprimands from an employee's personnel file and maintain such documents in a separate disciplinary file. AGO 94-54. Similarly, an agency is not authorized to "seal" disciplinary notices and thereby remove such notices from disclosure under the Public Records Act. AGO 94-75. *Cf.*, s. 69.081(8)(a), F.S., providing, subject to limited exceptions, that any portion of an agreement or contract which has the purpose or effect of concealing information relating to

the settlement or resolution of any claim or action against an agency is "void, contrary to public policy, and may not be enforced;" and Inf. Op. to Barry, June 24, 1998, citing to s. 69.081(8)(a), and stating that "a state agency may not enter into a settlement agreement or other contract which contains a provision authorizing the concealment of information relating to a disciplinary proceeding or other adverse employment decision from the remainder of a personnel file."

e. Collective bargaining

(1) Relationship of collective bargaining agreement to personnel records

A collective bargaining agreement between a public employer and its employees may not validly make the personnel records of public employees confidential or exempt the same from the Public Records Act. AGO 77-48. Thus, employee grievance records are disclosable even though classified as confidential in a collective bargaining contract because "to allow the elimination of public records from the mandate of Chapter 119 by private contract would sound the death knell of the Act." *Mills v. Doyle*, 407 So. 2d 348, 350 (Fla. 4th DCA 1981). *Cf.*, *Palm Beach County Classroom Teacher's Association v. School Board of Palm Beach County*, 411 So. 2d 1375, 1376 (Fla. 4th DCA 1982) (collective bargaining agreement cannot be used "to circumvent the requirements of public meetings" in s. 286.011, F.S.).

Similarly, unless authorized by law, a city may not agree through collective bargaining to remove references to the initial proposed disciplinary action in an employee's personnel file when a settlement agreement results in a reduced disciplinary action. AGO 94-54. *Accord*, AGO 94-75 (municipality may not remove and destroy disciplinary notices, with or without the employee's consent, during the course of resolving collective bargaining grievances, except in accordance with the established retention schedule approved by the Division of Library and Information Services of the Department of State).

(2) Collective bargaining work product exemption

Section 447.605(3), F.S., provides:

> All work products developed by the public employer in preparation for negotiations, and during negotiations, shall be confidential and exempt from the provisions of s. 119.07(1), F.S.

The above exemption is limited and does not remove budgetary or fiscal information from the purview of Ch. 119, F.S. *See*, *Bay County School Board v. Public Employees Relations Commission*, 382 So. 2d 747, 749 (Fla. 1st DCA 1980), noting that records which are prepared for other purposes do not, as a result of being used in negotiations, come within the s. 447.605(3) exemption; and *Warden v. Bennett*, 340 So. 2d 977 (Fla. 2d DCA 1976), ordering that working papers used in preparing a college budget be produced for inspection by a labor organizer.

Thus, proposals and counter proposals presented during the course of collective bargaining would appear to be subject to public disclosure. However, written notes taken by the representative of a fire control district during collective bargaining sessions which are taken for use in preparing for subsequent bargaining sessions and which reflect the impressions, strategies and opinions of the district representative are exempt pursuant to s. 447.605(3), F.S. Inf. Op. to Fulwider, June 14, 1993.

f. Statutory exemptions

As emphasized in the preceding discussion, the exclusive authority to exempt personnel records from disclosure is vested in the Legislature. A number of exemptions have been enacted relating to various kinds of personnel records. The following are examples of some of the exemptions provided by statute. For a more complete listing of exemptions, please see Appendix D or the Index.

(1) Annuity or custodial account activities

Records identifying individual participants in any annuity contract or custodial account under s. 112.21, F.S. (relating to tax-sheltered annuities or custodial accounts for employees of governmental agencies) and their personal account activities are confidential and exempt from s. 119.07(1), F.S. Section 112.21(1), F.S.

(2) Complaints

Complaints filed against law enforcement officers and all information obtained pursuant to the investigation of the complaints are confidential and exempt from s. 119.07(1), F.S., until the investigation is no longer active or the officer has been provided with written notice of the agency's decision as to whether the agency will or will not proceed with disciplinary action or file charges. Section 112.533(2)(a), F.S. *See,* s. F.11., *infra,* for a more detailed discussion.

Any complaint against a public school system employee and material relating to the investigation of a complaint against an employee is confidential and exempt from s. 119.07(1), F.S., until the conclusion of the preliminary investigation or until the preliminary investigation ceases to be active. Section 1012.31(3)(a)1., F.S. *See,* s. I.2., *infra*, for a more detailed discussion.

When an alleged victim chooses not to file a complaint and requests that records of the complaint remain confidential, all records relating to an allegation of employment discrimination are confidential and exempt from s. 119.07(1), F.S. Section 119.071(2)(g), F.S.

Complaints and other records in the custody of a unit of local government which relate to a complaint of discrimination are exempt from s. 119.07(1), F.S., until a finding is made relating to probable cause, the investigation becomes inactive, or the complaint or other record is made a part of the official record of any hearing or court proceeding. Section 119.0713(1), F.S. *See*, *City of St. Petersburg v. St. Petersburg Junior College*, No. 93-0004210-CI-13 (Fla. 6th Cir. Ct. January 3, 1994) (exemption no longer applicable once city has issued a "letter of cause" determination following its investigation of a discrimination complaint). *And see* AGO 96-93 (prior to completion of an investigation and a finding of probable cause, records of the Metropolitan Dade County Equal Opportunity Board are exempt from disclosure).

Complaints and other records in the custody of an agency in the executive branch of state government which relate to a complaint of discrimination in connection with employment are exempt from s. 119.07(1), F.S., until a finding is made relating to probable cause, the investigation becomes inactive, or the complaint or other record is made a part of the official record of any hearing or court proceeding. Section 119.0711(1), F.S.

(3) Criminal history information

In some cases, criminal or juvenile records information obtained by specific agencies as part of a background check required for certain positions has been made confidential and exempt from s. 119.07(1), F.S., or use of the information is restricted. *See*, *e.g.*, s. 110.1127(3)(d) and (e), F.S. (positions in programs providing care to children, the developmentally disabled, or vulnerable adults, or positions having access to abuse records); s. 1002.36(7)(d), F.S. (School for the Deaf and the Blind); and s. 39.821, F.S. (guardian ad litem).

Federal confidentiality provisions may also apply to criminal history information received from the U.S. government. *See*, AGO 99-01 (criminal history information shared with a public school district by the Federal Bureau of Investigation retains its character as a federal record to which only limited access is provided by federal law and is not subject to public inspection under Florida's Public Records Act).

Sections 943.0585 and 943.059, F.S., prohibit a records custodian who has received information relating to the existence of an expunged or sealed criminal history record from disclosing the existence of such record. AGO 94-49.

(4) Deferred compensation

All records identifying individual participants in any deferred compensation plan under the Government Employees' Deferred Compensation Plan Act and their personal account activities shall be confidential and exempt from s. 119.07(1), F.S. Section 112.215(7), F.S.

(5) Department of the Lottery

Department of the Lottery employee personnel information unrelated to compensation, duties, qualifications, or responsibilities of employees, which the Department has deemed confidential by rule in accordance with the terms and conditions of the subsection is confidential and exempt from s. 119.07(1), F.S. Section 24.105(12)(a), F.S.

(6) Direct deposit

Direct deposit records made prior to October 1, 1986, are exempt from s. 119.07(1), F.S. With respect to direct deposit records made on or after October 1, 1986, the names of the authorized financial institutions and the account numbers of the beneficiaries are confidential and exempt. Section 17.076(5), F.S.

(7) Drug test results

In AGO 94-51, the Attorney General's Office concluded that a city was not authorized to delete or remove consent forms or records of disciplinary action relating to drug testing of city employees contained in personnel records, as the personnel records are public records and the Public Records Act "contains no express exemption for such information." However, drug test results and other information received or produced by a state agency employer as a result of a drug-testing program in

accordance with s. 112.0455, F.S., the Drug-Free Workplace Act, are confidential and exempt from s. 119.07(1), F.S., and may not be disclosed except as authorized in the statute. Section 112.0455(11), F.S. *See also*, s. 112.0455(8)(l) and (u), F.S.

The provisions of s. 112.0455, F.S., are applicable to state agencies and not to municipalities, but the provisions of ss. 440.101-440.102, F.S., may be used by a municipality or other entity that is an "employer" for purposes of these statutes, to establish a drug-free workplace program. *See*, AGO 98-38. Section 440.102(8)(a), F.S., provides for confidentiality of drug test results or other information received as a result of a drug-testing program. *Cf.*, Inf. Op. to McCormack, May 13, 1997 (s. 440.102[8], F.S., applies to public employees and not to drug test results of public assistance applicants). *And see* s. 443.1715(3), F.S., relating to confidentiality of drug test information and limited disclosure in proceedings conducted for purposes of determining compensability under the unemployment compensation law.

In AGO 96-58, the Attorney General's Office advised that the medical director for a city fire and rescue department may submit drug test results to the state health department pursuant to s. 401.265(2), F.S. Section 401.265(2) requires a medical director to report to the department any emergency medical technician or paramedic who may have acted in a manner constituting grounds for discipline under the licensing law.

(8) Employee assistance program

An employee's personal identifying information contained in records held by the employing agency relating to that employee's participation in an employee assistance program is confidential and exempt from disclosure. *See*, ss. 110.1091 (state employees), 125.585 (county employees), and 166.0444 (municipal employees), F.S.

(9) Evaluations of employee performance

There are exemptions from s. 119.07(1), F.S., for evaluations of employee performance contained in limited access records which are prescribed by a hospital or other facility licensed under Ch. 395, F.S., for employees of the facility, s. 395.3025(9), F.S.; or prescribed by the State Board of Education for community college personnel, s. 1012.81, F.S.; or prescribed by a university board of trustees for its employees, s. 1012.91, F.S. Employee evaluations of public school system employees are confidential until the end of the school year immediately following the school year during which the evaluation was made; however, no evaluations made prior to July 1, 1983, shall be made

public. Section 1012.31(3)(a)2., F.S.

For more information on this subject, please refer to s. H.3.a.(1), *infra* (hospital records) and s. I.2., *infra* (education personnel records).

(10) Examination questions and answer sheets

Examination questions and answer sheets of examinations administered by governmental entities for the purpose of licensure, certification, or employment are exempt from mandatory disclosure requirements. Section 119.071(1)(a), F.S. *See*, *Dickerson v. Hayes*, 543 So. 2d 836, 837 (Fla. 1st DCA 1989) (applying exemption to portions of rating sheets used by promotion board which contained summaries of applicants' responses to oral examination questions where the oral questioning "was a formalized procedure with identical questions asked of each applicant [which] 'tested' the applicants' response both as to style and content").

A person who has taken an examination has the right to review his or her own completed examination. Section 119.071(1)(a), F.S. *See*, AGO 76-210, stating that an examinee has the right to inspect the results of a completed civil service promotional examination, including question and answer sheets, after the examination has been completed. However, the examinee possesses only the right to *review* his or her own completed examination and may not make or obtain copies of that examination. AGO 81-12.

The exemption from disclosure in s. 119.071(1)(a), F.S., applies to examination questions and answers, and does not include the "impressions and grading of the responses" by the examiners. *See, Dickerson v. Hayes*, *supra*, at 837. *See also*, *Gillum v. Times Publishing Company,* No. 91-2689-CA (Fla. 6th Cir. Ct. July 10, 1991) (newspaper entitled to access to employment polygraph records "to the extent such records consist of polygraph machine graph strips and examiners' test results, including the bottom portion of the machine graph denoted 'Findings and Comments' or similar designation"; however, agency could redact "any examinee's actual answers to questions or summaries thereof"). *Compare*, s. 455.229(1), F.S., providing confidentiality for "examination questions, answers, papers, grades, and grading keys" used in licensing examinations administered by the Department of Business and Professional Regulation.

(11) Home addresses and telephone numbers, photographs, family information

As a rule, home addresses and telephone numbers of public officers and employees are not exempt from disclosure. *See*, AGO 96-88 (home addresses and telephone numbers and business addresses and telephone numbers of members of state and district human rights advocacy committees are public records).

Section 119.071(4)(d), F.S., however, contains a number of exemptions for specified categories of public officials and employees and their families by providing an exemption from disclosure for the home addresses, telephone numbers, photographs, and social security numbers of: active or former law enforcement personnel, including correctional and correctional probation officers; personnel of the Department of Children and Family Services whose duties include the investigation of abuse, neglect, exploitation, fraud, theft, or other criminal activities; and personnel of the Department of Health whose duties are to support the investigation of child abuse or neglect. Home addresses, telephone numbers, photographs, and social security numbers of current or former state attorneys, assistant state attorneys, statewide prosecutors, or assistant statewide prosecutors are also included. The exemption also applies to firefighters certified in compliance with s. 633.35, F.S., as well as to current or former federal prosecutors and judges. Section 119.071(4)(d)1., 3., and 4., F.S.

The home addresses, telephone numbers, social security numbers, photographs, and places of employment of the spouses and children of such officers and personnel and the names and locations of the schools and day care facilities attended by their children are also covered by the exemption. *Id.*

The exemption also applies to personnel of the Department of Revenue or local governments whose responsibilities include revenue collection *and* enforcement or child-support enforcement. AGO 96-57.

Home addresses and telephone numbers of Florida Supreme Court justices and district court of appeal, circuit court, and county judges are exempt as are the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges and the names and locations of the schools and day care facilities attended by their children. Section 119.071(4)(d)1., F.S.

Home addresses, telephone numbers, and photographs of current or former human resource, labor relations, or employee relations directors, assistant directors, managers, or assistant managers of any local government agency or water management district whose duties include hiring and firing employees, labor contract

negotiation, administration, or other personnel-related duties are exempt. Section 119.071(4)(d)2., F.S. The same information relating to current or former code enforcement officers is also exempt. Section 119.071(4)(d)5., F.S. Current and former juvenile probation and detention officers and supervisors, as well as house parents and supervisors, group treatment leaders and supervisors, rehabilitation therapists, and social services counselors of the Department of Juvenile Justice, are included within this exemption. Section 119.071(4)(d)7., F.S. The names, home addresses, telephone numbers, and places of employment of spouses and children of such officers and personnel and the names and locations of the schools and day care facilities attended by their children are also exempt. Sections 119.071(4)(d)2., 5., and 7., F.S.

The home addresses, telephone numbers, places of employment, and photographs of current or former guardians ad litem, as defined in s. 39.820, F.S., as well as the names and other identifying information about the spouses and children of such persons, are exempt from disclosure requirements, if the guardian ad litem provides a written statement that he or she has made reasonable efforts to protect such information from being accessible through other means available to the public. Section 119.071(4)(d)6., F.S.

An agency that is the custodian of the personal information specified above but is not the employer of the officer, employee, justice, judge or other person, shall maintain the exempt status of the personal information only if the officer, employee, judge, other person, or the employing agency of the designated employee submits a written request for maintenance of the exemption to the custodial agency. Section 119.071(4)(d)8., F.S. *See,* AGOs 04-20 (request submitted to property appraiser), 04-18 (supervisor of elections), and 97-67 (clerk of court). *And see* AGO 05-38 (exemption "governs the protection of identifying information and does not discriminate as to the documents and records in which the information may be found").

The cellular telephone numbers of telephones provided to law enforcement officers and used in performing law enforcement duties are not exempt from disclosure under this exemption. Inf. Op. to Laquidara, July 17, 2003.

Section 395.3025(10), F.S., establishes that the home addresses, telephone numbers, and photographs of hospital or surgical center employees who provide direct patient care or security services, as well as specified information about the spouses and children of such employees, are confidential and exempt from disclosure requirements. The same information must also be held confidential by the facility upon written request by

other employees who have a reasonable belief, based upon specific circumstances that have been reported in accordance with the procedure adopted by the facility, that release of the information may be used to threaten, intimidate, harass, inflict violence upon, or defraud the employee or any member of the employee's family. Section 395.3025(11), F.S.

(12) Medical information

Medical information pertaining to a prospective, current, or former officer or employee of an agency which, if disclosed, would identify that officer or employee is exempt from s. 119.07(1), F.S. Section 119.071(4)(b), F.S. Such information may be disclosed if the person or the person's legal representative provides written permission or pursuant to court order. *Id. See*, AGO 98-17 (exemption "appears to extend to governmental employees the protection for personal medical records that is generally enjoyed by private sector employees").

Every employer who provides or administers health insurance benefits or life insurance benefits to its employees shall maintain the confidentiality of information relating to the medical condition or status of any person covered by such insurance benefits. Such information is exempt from s. 119.07(1), F.S. Section 760.50(5), F.S.

Patient medical records and medical claims records of current or former state or water management district employees and eligible dependents enrolled in group insurance plans of the state or a water management district are confidential and exempt from s. 119.07(1), F.S.; such records shall not be furnished to any person other than the employee or the employee's legal representative, except as authorized in the subsection. Sections 110.123(9) (state employees) and 112.08(8) (water management district employees), F.S.

Section 112.08(7), F.S., provides that all medical records and medical claims records of current or former county or municipal employees and eligible dependents enrolled in a county or municipal group insurance plan are confidential and exempt from s. 119.07(1), F.S.; such records may not be furnished to any person other than the employee or his legal representative, except as authorized in the subsection. The exemption applies broadly and is not limited solely to medical records filed in conjunction with an employee's participation in a group insurance plan; rather, the exemption applies to all medical records relating to employees enrolled in a group insurance plan. AGO 91-88, citing to *News-Press Company, Inc. v. Kaune,* 511 So. 2d 1023 (Fla. 2d DCA 1987). *And see* AGO 94-78 (monthly printout of medical claims paid under city group health insurance plan that

identifies the public employees who obtained medical services and the amounts of the claims, together with some account information, is exempt from public inspection); and AGO 94-51 (agency "should be vigilant in its protection of the confidentiality provided by statute for medical records of [its] employees").

Public school system employee medical records are confidential and exempt from s. 119.07(1), F.S. Section 1012.31(3)(a)5., F.S.

If a city owns and operates a medical clinic for the use and benefit of its employees, the patient records at the clinic are confidential and may be released only upon the written consent of the patient or under the specific circumstances provided under Florida law. AGO 01-33. Under its duty to ensure the confidentiality of such records, the city may allow access to such records to city employees whose duties are related to the furnishing of medical services to the patient/employee. *Id*.

(13) Retiree names and addresses

The names and addresses of retirees are confidential and exempt from s. 119.07(1), F.S., to the extent that no state or local governmental agency may provide the names or addresses of such persons in aggregate, compiled or list form except to public agencies engaged in official business, to collective bargaining agents or to retiree organizations for official business use. Section 121.031(5), F.S. *And see* s. 121.4501(19), F.S. (personal identifying information regarding participants in the Public Employee Optional Retirement Program is exempt).

(14) Ridesharing information

Any information provided to an agency for the purpose of forming ridesharing arrangements, which reveals the identity of an individual who has provided his or her name for ridesharing, as defined in s. 341.031, F.S., is exempt from public disclosure requirements. Section 119.071(5)(e), F.S.

7. Social security numbers

Section 119.071(5)(a)3., F.S., states that all social security numbers held by an agency are confidential and exempt from public disclosure requirements. Disclosure to another governmental agency is authorized if disclosure is necessary to the performance of the agency's duties and responsibilities. Section 119.071(5)(a)4., F.S. The receiving agency must maintain the confidential and exempt status of the numbers. *Id. Cf.,*

Florida Department of Education v. NYT Management Services, Inc., 895 So. 2d 1151 (Fla. 1st DCA 2005) (federal law does not authorize newspaper to obtain social security numbers in state teacher certification database). *And see* AGO 05-37, concluding that the clerk of court, in recording documents in the Official Records that are required to contain social security numbers, may not redact social security numbers or other confidential information upon receipt; however, the clerk is required to maintain the confidentiality of that information.

Upon verified written request, a commercial entity engaged in a "commercial activity" is allowed access for a "legitimate business purpose" as those terms are defined in the exemption. Section 119.071(5)(a)5., F.S. *See*, AGO 04-16 (state agency must release social security numbers contained in licensing file to qualified commercial entity when the agency "is assured that this information will only be used in the normal course of business for legitimate business purposes." *And see Express Track Data, L.L.C. v. Town of Orange Park,* No. 03-858-CA (Fla. 4th Cir. Ct. January 20, 2004) (social security exemption not intended to prevent "data aggregators" from receiving public records which contain social security numbers). However, this authorization does not permit release to a private company that intends to enter the social security numbers into a computer database and sell access to the database to other entities and individuals. AGO 03-23.

Morever, 119.071(5)(a)10., F.S., states that the provisions of this exemption do not supersede any other applicable public records exemptions existing prior to May 13, 2002, or created thereafter. *See, e.g.,* s. 193.114(5), F.S., providing that the social security number submitted on an application for a tax exemption is confidential.

Social security numbers of current and former agency employees which numbers are contained in agency employment records are exempt from disclosure. Section 119.071(4)(a)1., F.S. An agency that is the custodian of an employee social security number, and that is not the employing agency shall maintain the exempt status of the social security number only if the employee or the employing agency of the employee submits a written request for confidentiality to the custodial agency. However, upon a request by a commercial entity as provided in s. 119.071(5)(a)5., F.S., the custodial agency shall release the last four digits of the exempt social security number, except that a social security number provided in a lien filed with the Department of State shall be released in its entirety. Section 119.071(4)(a)2., F.S.

D. TO WHAT EXTENT MAY AN AGENCY REGULATE OR LIMIT INSPECTION AND

COPYING OF PUBLIC RECORDS?

1. May an agency impose its own restrictions on access to or copying of public records?

a. Agency-imposed restrictions invalid

Section 119.07(1)(a), F.S., establishes a right of access to public records in plain and unequivocal terms:

> Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

A custodian of public records may not impose a rule or condition of inspection which operates to restrict or circumvent a person's right of access. AGO 75-50. *See also*, *Davis v. Sarasota County Public Hospital Board*, 480 So. 2d 203 (Fla. 2d DCA 1985), *review denied*, 488 So. 2d 829 (Fla. 1986), stating that a person making a public records request under s. 119.07(1), F.S., was entitled to see the actual nonexempt records of legal fees paid by the hospital board and not merely extracts from such records. *And see State v. Webb,* 786 So. 2d 602 (Fla. 1st DCA 2001) (requirement that persons with custody of public records allow records to be examined "at any reasonable time, under reasonable conditions" is not unconstitutional as applied to public records custodian who was dilatory in responding to public records requests).

The custodian "is at all times responsible for the custody of the [public] records but when a citizen applies to inspect or make copies of them it is his duty to make provision for this to be done in such a manner as will accommodate the applicant and at the same time safeguard the records." *Fuller v. State ex rel. O'Donnell*, 17 So. 2d 607 (Fla. 1944). Thus, the right of inspection may not be frustrated or circumvented through indirect means such as the use of a code book. *State ex rel. Davidson v. Couch,* 158 So. 103, 105 (Fla. 1934) (right of inspection was "hindered and obstructed" by city "imposing conditions to the right of examination which were not reasonable nor permissible under the law"). *Accord*, AGO 05-12 (city may not require the use of a code to review e-mail correspondence of city's police department and human resources department).

Accordingly, the "reasonable conditions" referred to in s. 119.07(1), F.S., do not include anything that would hamper or

frustrate, directly or indirectly, a person's right of inspection and copying. The term "refers not to conditions which must be fulfilled before review is permitted but to reasonable regulations that would permit the custodian of records to protect them from alteration, damage, or destruction and also to ensure that the person reviewing the records is not subjected to physical constraints designed to preclude review." *Wait v. Florida Power & Light Company*, 372 So. 2d 420, 425 (Fla. 1979). *See also*, *State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905); and *Tribune Company v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984), *appeal dismissed sub nom.*, *DePerte v. Tribune Company*, 105 S.Ct. 2315 (1985) (the sole purpose of custodial supervision is to protect the records from alteration, damage, or destruction).

Any local enactment or policy which purports to dictate additional conditions or restrictions on access to public records is of dubious validity since the legislative scheme of the Public Records Act has preempted any local regulation of this subject. *Tribune Company v. Cannella*, *supra* at 1077. A policy of a governmental agency cannot exempt it from the application of Ch. 119, F.S., a general law. *Douglas v. Michel*, 410 So. 2d 936, 938 (Fla. 5th DCA 1982), *questions answered and approved,* 464 So. 2d 545 (Fla. 1985). *Accord*, AGO 92-09 (utilities commission not authorized to alter terms of Ch. 119, F.S.); and AGO 75-50 (local agency has no discretion to alter Ch. 119, F.S., requirements because the state possesses exclusive control over access, maintenance, retention and disposal of public records). *And see* AGO 90-04 (county official not authorized to assign county's rights to a public record as part of a settlement agreement compromising a lawsuit against the county).

b. Mail procedures

The Public Records Act is applicable to letters or other documents received by a public official in his or her official capacity. AGO 77-141. As with other public records, upon receipt of a public records request for correspondence, the custodian should retrieve the records, review them for exemptions and allow public inspection of the nonexempt material. Mail addressed to the mayor or a city council member at City Hall and received at City Hall should not be forwarded unopened to the private residence of the mayor or council member, but rather the original or a copy of the mail that constitutes a public record should be maintained at city offices. AGO 04-43.

c. Inspection at off-premises location

A trial court erred when it failed to hold a hearing before

denying a request to require a district to permit inspection at the district offices, rather than at an off-premises location. *James v. Loxahatchee Groves Water Control District*, 820 So. 2d 988 (Fla. 4th DCA 2002). The agency argued that it would be "disruptive" to require that the records inspection be conducted at its offices. *Id*. However, the appeals court ruled that a hearing should have been held to determine whether the requestor, who was in litigation with the district, should be allowed to view the records at the district offices, and if so, under what conditions. *Id.*

2. What individuals are authorized to inspect and receive copies of public records?

Section 119.01, F.S., provides that "[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by *any person*." (e.s.) A former state citizenship requirement was deleted from the law in 1975. A public employee is a person within the meaning of Ch. 119, F.S. and, as such, possesses the same right of inspection as any other person. AGO 75-175. Likewise, a county is "any person" who is allowed to seek public records under Ch. 119, F.S. *Hillsborough County, Florida v. Buccaneers Stadium Limited Partnership*, No. 99-0321 (Fla. 13th Cir. Ct. February 5, 1999), *affirmed per curiam*, 758 So. 2d 676 (Fla. 2d DCA 2000).

Thus, "the law provides any member of the public access to public records, whether he or she be the most outstanding civic citizen or the most heinous criminal." *Church of Scientology Flag Service Org., Inc. v. Wood,* No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997). "[A]s long as the citizens of this state desire and insist upon 'open government' and liberal public records disclosure, as a cost of that freedom public officials have to put up with demanding citizens even when they are obnoxious as long as they violate no laws." *State v. Colby*, No. MM96-317A-XX (Fla. Highlands Co. Ct. May 23, 1996). "Even though a public agency may believe that a person or group are fanatics, harassers or are extremely annoying, the public records are available to all of the citizens of the State of Florida." *Salvadore v. City of Stuart*, No. 91-812 CA (Fla. 19th Cir. Ct. December 17, 1991). *And see Curry v. State*, 811 So. 2d 736, 741 (Fla. 4th DCA 2002) (defendant's conduct in making over 40 public records requests concerning victim constituted a "legitimate purpose," and thus cannot violate the stalking law "because the right to obtain the records is established by statute and acknowledged in the state constitution").

3. Must an individual show a "special interest" or "legitimate interest" in public records before being

allowed to inspect or copy same?

No. Chapter 119, F.S., requires no showing of purpose or "special interest" as a condition of access to public records. "The motivation of the person seeking the records does not impact the person's right to see them under the Public Records Act." *Curry v. State,* 811 So. 2d 736, 742 (Fla. 4th DCA 2002). *See also, Timoney v. City of Miami Civilian Investigative Panel,* 917 So. 2d 885, 886n.3 (Fla. 3d DCA 2005) ("generally, a person's motive in seeking access to public records is irrelevant"); *Staton v. McMillan,* 597 So. 2d 940, 941 (Fla. 1st DCA 1992), *review dismissed sub nom.*, *Staton v. Austin*, 605 So. 2d 1266 (Fla. 1992) (petitioner's reasons for seeking access to public records "are immaterial"); *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985), *review denied*, 475 So. 2d 695 (Fla. 1985) (legislative objective underlying the creation of Ch. 119 was to insure to the people of Florida the right freely to gain access to governmental records; the purpose of such inquiry is immaterial); and *News-Press Publishing Company, Inc. v. Gadd*, 388 So. 2d 276, 278 (Fla. 2d DCA 1980) ("the newspaper's motives [for seeking the documents], as well as the hospital's financial harm and public harm defenses, are irrelevant in an action to compel compliance with the Public Records Act").

"[T]he fact that a person seeking access to public records wishes to use them in a commercial enterprise does not alter his or her rights under Florida's public records law." *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871, 875 (Fla. 2d DCA 2004), *review denied*, 902 So. 2d 791 (Fla. 2005). *See also, State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905) (abstract companies may copy documents from the clerk's office for their own use and sell copies to the public for a profit); *Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.*, 718 So. 2d 227, 228n.2 (Fla. 3d DCA 1998), *review denied*, 729 So. 2d 389 (Fla. 1999) ("Booksmart's reason for wanting to view and copy the documents is irrelevant to the issue of whether the documents are public records"). *Cf.*, Fla. R. Jud. Admin. 2.051(e)(1), stating that a person requesting records of the judicial branch is not required to disclose the reason for the request. *Accord*, *Tedesco v. State*, 807 So. 2d 804, 806 (Fla. 4th DCA 2002) (no requirement that any person show a "need" in order to obtain public records of the judicial branch).

Section 817.568, F.S., provides criminal penalties for the unauthorized use of personal identification information for fraudulent or harassment purposes. Criminal use of a public record or public records information is proscribed in s. 817.569, F.S.

4. What agency employees are responsible for responding to public records requests?

Section 119.011(5), F.S., defines the term "custodian of public records" to mean "the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee." However, the courts have concluded that the statutory reference to the records custodian does not alter the "duty of disclosure" imposed by s. 119.07(1), F.S., upon "*[e]very person* who has custody of a public record." *Puls v. City of Port St. Lucie,* 678 So. 2d 514 (Fla. 4th DCA 1996). [Emphasis supplied by the court].

Thus, the term "custodian" for purposes of the Public Records Act refers to all agency personnel who have it within their power to release or communicate public records. *Mintus v. City of West Palm Beach*, 711 So. 2d 1359 (Fla. 4th DCA 1998) (*citing Williams v. City of Minneola*, 575 So. 2d 683, 687 [Fla. 5th DCA 1991]). But, "the mere fact that an employee of a public agency temporarily possesses a document does not necessarily mean that the person has custody as defined by section 119.07." *Id.* at 1361. In order to have custody, one must have supervision and control over the document or have legal responsibility for its care, keeping or guardianship. *Id. And see Alterra Healthcare Corporation v. Estate of Shelley,* 827 So. 2d 936, 940n.4 (Fla. 2002), noting that "only the custodian" of agency personnel records may assert any applicable statutory exemption to disclosure; "not the employee."

5. May an agency refuse to comply with a request to inspect or copy the agency's public records on the grounds that the records are not in the physical possession of the custodian?

No. An agency is not authorized to refuse to allow inspection of public records on the grounds that the documents have been placed in the actual possession of an agency or official other than the records custodian. *See*, *Wallace v. Guzman,* 687 So. 2d 1351 (Fla. 3d DCA 1997) (public records cannot be hidden from the public by transferring physical custody of the records to the agency's attorneys); *Tober v. Sanchez*, 417 So. 2d 1053 (Fla. 3d DCA 1982), *review denied sub nom.*, *Metropolitan Dade County Transit Agency v. Sanchez*, 426 So. 2d 27 (Fla. 1983) (official charged with maintenance of records may not transfer actual physical custody of records to county attorney and thereby avoid compliance with request for inspection under Ch. 119, F.S.); and AGO 92-78 (public housing authority not authorized to withhold its records from disclosure on the grounds that the records have been subpoenaed by the state attorney and

transferred to that office).

Thus, in *Barfield v. Florida Department of Law Enforcement*, No. 93-1701 (Fla. 2d Cir. Ct. May 19, 1994), the court held that an agency that received records from a private entity in the course of official business and did not make copies of the documents could not "return" them to the entity following receipt of a public records request. The court ordered the agency to demand the return of the records from the private entity so they could be copied for the requestor.

Similarly, in *Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487, 492-493 (Fla. 2d DCA 1990), the court found that both the city and a private entity violated the Public Records Act when, pursuant to a plan to circumvent Ch. 119, F.S., the city avoided taking possession of negotiation documents reviewed and discussed by both parties and instead left them with the private entity's attorney. The court determined that although city officials may have intended merely to "avoid" the law, the effect of their actions was to "evade the broad policy of open government." *See also*, *Wisner v. City of Tampa Police Department*, 601 So. 2d 296, 298 (Fla. 2d DCA 1992), stating that a city may not allow a private entity to maintain physical custody of public records (polygraph chart used in internal investigation) "to circumvent the public records chapter."

However, in AGO 88-26, it was concluded that Ch. 119, F.S., does not require a county to transport microfilmed copies of public records maintained in a storage facility outside the county to the county courthouse when the originals are available at the courthouse. The microfilmed copies, however, must be available for copying at their location outside the county. *See also*, AGO 92-85, stating that individual school board members are not required to retain copies of public records which are regularly maintained in the course of business by the clerk of the school board in the school board administrative offices.

Pursuant to the Public Records Act, public records may routinely be removed from the building or office in which such records are ordinarily kept only for official purposes. AGO 93-16. The retention of such records in the home of a public official would appear to circumvent the public access requirements of the Public Records Act and compromise the rights of the public to inspect and copy such records. *Id*. *See*, s. 119.021, F.S. *And see* AGO 04-43 (mail addressed to city officials at City Hall and received at City Hall should not be forwarded unopened to the private residences of the officials, but rather the original or a copy of the mail that constitutes a public record should be maintained at city offices).

If municipal pension records are stored in a records storage facility outside city limits, the city may not pass along to the public records requestor the costs to retrieve the records. Inf. Op. to Sugarman, September 5, 1997. Any delay in production of the records beyond what is reasonable under the circumstances may subject the custodian to liability for failure to produce public records. *Id. And see* AGO 02-37 (agency not authorized to require that production and copying of public records be accomplished only through a private company that acts as a clearinghouse for the agency's public records information pursuant to a contract between the agency and the private company).

6. May an agency refuse to allow access to public records on the grounds that the records are also maintained by another agency?

No. The fact that a particular record is also maintained by another agency does not relieve the custodian of the obligation to permit inspection and copying in the absence of an applicable statutory exemption. AGO 86-69. If information contained in the public record is available from other sources, a person seeking access to the record is not required to make an unsuccessful attempt to obtain the information from those sources as a condition precedent to gaining access to the public records. *Warden v. Bennett*, 340 So. 2d 977, 979 (Fla. 2d DCA 1976).

7. May an agency refuse to allow inspection or copying of public records on the grounds that the request for such records is "overbroad" or lacks particularity?

No. In *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985), *review denied*, 475 So. 2d 695 (Fla. 1985), the court recognized that the "breadth of such right [to gain access to public records] is virtually unfettered, save for the statutory exemptions . . . ." Accordingly, in the absence of a statutory exemption, a custodian must produce the records requested regardless of the number of documents involved or possible inconvenience. Note, however, that pursuant to s. 119.07(4)(d), F.S., the custodian is authorized to charge, in addition to the cost of duplication, a reasonable service charge for the cost of the extensive use of information technology resources or of personnel, if such extensive use is required because of the nature or volume of public records to be inspected or copied. *See*, AGO 92-38 (agency may not restrict access to and copying of public records based upon the amount requested or the span of time which is covered by the public records; however, if extensive use of information technology resources or clerical or supervisory personnel is needed for retrieval of such records,

the agency may impose a reasonable service charge pursuant to former s. 119.07[1][b] [now s. 119.07(4)(d), F.S.], based upon the actual costs incurred for the use of such resources or personnel).

Thus, a person seeking to inspect "all" financial records of a municipality may not be required to specify a particular book or record he or she wishes to inspect. *State ex rel. Davidson v. Couch*, 156 So. 297, 300 (Fla. 1934). In *Davidson*, the Florida Supreme Court explained that if this were the case, "one person may be required to specify the book, while another and more favored one, because of his pretended ignorance of the name of the record might be permitted examination of all of them." *Id.* Such a result would be inconsistent with the mandate in the Public Records Act that public records are open to all who wish to inspect them. *Id.* *Cf.*, *Salvadore v. City of Stuart*, No. 91-812 CA (Fla. 19th Cir. Ct. December 17, 1991), stating that if a public records request is insufficient to identify the records sought, the city has an affirmative duty to promptly notify the requestor that more information is needed in order to produce the records; it is the responsibility of the city and not the requestor to follow up on any requests for public records. *Compare*, *Woodard v. State*, 885 So. 2d 444, 446 (Fla. 4th DCA 2004) (records custodian must furnish copies of records when the person requesting them identifies the portions of the record with sufficient specificity to permit the custodian to identify the record and forwards the statutory fee).

8. May an agency require that a request to examine or copy public records be made in writing?

Chapter 119, F.S., does not authorize an agency to require that requests for records must be in writing. *See, Dade Aviation Consultants v. Knight Ridder, Inc.,* 800 So. 2d 302, 305n.1 (Fla. 3d DCA 2001) ("There is no requirement in the Public Records Act that requests for records must be in writing"). As noted in AGO 80-57, a custodian must honor a request for copies of records which is sufficient to identify the records desired, whether the request is in writing, over the telephone, or in person, provided that the required fees are paid.

If a public agency believes that it is necessary to provide written documentation of a request for public records, the agency may require that the *custodian* complete an appropriate form or document; however, the person requesting the records cannot be required to provide such documentation as a precondition to the granting of the request to inspect or copy public records. *See*, *Sullivan v. City of New Port Richey*, No. 86-1129CA (Fla. 6th Cir. Ct. May 22, 1987), *per curiam affirmed*, 529 So. 2d 1124 (Fla. 2d DCA 1988), noting that a demandant's failure to complete a city

form required for access to documents did not authorize the custodian to refuse to honor the request to inspect or copy public records.

However, a request for records of the *judicial* branch (which is not subject to Ch. 119, F.S., *see Times Publishing Company v. Ake,* 660 So. 2d 255 [Fla. 1995]), must be in writing. Rule 2.051(e)(1), Fla. R. Jud. Admin. In its commentary accompanying the rule change that incorporated the written request requirement, the Court said that the "writing requirement is not intended to disadvantage any person who may have difficulty writing a request; if any difficulty exists, the custodian should aid the requestor in reducing the request to writing." *In re Report of the Supreme Court Workgroup on Public Records*, 825 So. 2d 889, 898 (Fla. 2002).

9. May an agency require that the requestor furnish background information to the custodian?

A person requesting access to or copies of public records may not be required to disclose his or her name, address, telephone number or the like to the custodian, unless the custodian is required by law to obtain this information prior to releasing the records. AGOs 92-38 and 91-76. *See also*, *Bevan v. Wanicka*, 505 So. 2d 1116 (Fla. 2d DCA 1987) (production of public records may not be conditioned upon a requirement that the person seeking inspection disclose background information about himself or herself). *Cf.*, s. 1012.31(2)(f), F.S., providing that the custodian of public school employee personnel files shall maintain a record in the file of those persons reviewing an employee personnel file each time it is reviewed.

10. Is an agency required to: answer questions about its public records; create a new record in response to a request for information; or reformat its records in a particular form as demanded by the requestor?

The statutory obligation of the custodian of public records is to provide access to, or copies of, public records "at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records" provided that the required fees are paid. Section 119.07(1)(a) and (4), F.S. However, a custodian is not required to give out *information* from the records of his or her office. AGO 80-57. The Public Records Act does not require a town to produce an employee, such as the financial officer, to answer questions regarding the financial records of the town. AGO 92-38. *Cf., In re Report of the Supreme Court Workgroup on Public Records,* 825 So. 2d 889, 898 (Fla. 2002) (the custodian of judicial records "is required to

provide access to or copies of records but is not required either to provide information from records or to create new records in response to a request").

In other words, Ch. 119, F.S., provides a right of access to inspect and copy an agency's existing public records; it does not mandate that an agency create new records in order to accommodate a request for information from the agency. Thus, the clerk of court is not required to provide an inmate with a list of documents from a case file which may be responsive to some forthcoming request. *Wootton v. Cook*, 590 So. 2d 1039 (Fla. 1st DCA 1991). However, in order to comply with the statutory directive that an agency provide copies of public records upon payment of the statutory fee, an agency must respond to requests by mail for information as to copying costs. *Id*. *See also, Woodard v. State,* 885 So. 2d 444, 445n.1 (Fla. 4th DCA 2004), remanding a case for further proceedings where the custodian forwarded only information relating to the statutory fee schedule rather than the total copying cost of the requested records.

Similarly, an agency is not ordinarily required to reformat its records and provide them in a particular form as demanded by the requestor. As explained in *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th DCA 1982), *review denied*, 431 So. 2d 988 (Fla. 1983):

> If the health department maintains a chronological list of dog-bite incidents with rabies implications [a] plaintiff, bitten by a suspect dog, may not require the health department to reorder that list and furnish a record of incidents segregated by geographical areas. Nothing in the statute, case law or public policy imposes such a burden upon our public officials.

11. When must an agency respond to a public records request?

The Public Records Act does not contain a specific time limit (such as 24 hours or 10 days) for compliance with public records requests. The Florida Supreme Court has stated that the only delay in producing records permitted under Ch. 119, F.S., "is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt." *Tribune Company v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984), *appeal dismissed sub nom.*, *DePerte v. Tribune Company*, 105 S.Ct. 2315 (1985).

a. Automatic delay impermissible

A municipal policy which provides for an automatic delay in the production of public records is impermissible. *Tribune Company v. Cannella,* 458 So. 2d 1075, 1078-1079 (Fla. 1984), *appeal dismissed sub nom.*, *Deperte v. Tribune Company*, 105 S.Ct. 2315 (1985). *See also*, *Michel v. Douglas*, 464 So. 2d 545, 546 at n.2 (Fla. 1985), wherein the Supreme Court noted that a county resolution imposing a 24-hour waiting period before allowing inspection of county personnel records which had been upheld in an earlier appellate decision [*Roberts v. News-Press Publishing Company, Inc.*, 409 So. 2d 1089 (Fla. 2d DCA), *review denied*, 418 So. 2d 1280 (Fla. 1982)], was no longer enforceable in light of subsequent judicial decisions.

Thus, an agency is not authorized to delay inspection of personnel records in order to allow the employee to be present during the inspection of his or her records. *Tribune Company v. Cannella*, 458 So. 2d at 1078. *Compare*, s. 1012.31(3)(a)3., F.S., in which the Legislature has expressly provided that no material derogatory to a public school employee may be inspected until 10 days after the employee has been notified as prescribed by statute.

Similarly, the Attorney General's Office has advised that a board of trustees of a police pension fund may not delay release of its records until such time as the request is submitted to the board for a vote. AGO 96-55.

b. Delay in response

An agency's unreasonable and excessive delays in producing public records can constitute an unlawful refusal to provide access to public records. *Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996), *review denied,* 684 So. 2d 1353 (Fla. 1996) (mandamus is an appropriate remedy to compel the timely production of public records requested under Ch. 119). In *Town of Manalapan*, the appellate court affirmed the lower court's finding that the town engaged in a "pattern of delays" by taking months to fully comply with the petitioner's public records requests. *See, Rechler v. Town of Manalapan*, No. CL 94-2724 AD (Fla. 15th Cir. Ct. November 21, 1994).

Similarly, in *State v. Webb*, 786 So. 2d 602, 604 (Fla. 1st DCA 2001), the court held that it was error for a lower court judge to vacate a misdemeanor conviction of a records custodian (Webb) who had been found guilty of willfully violating s. 119.07(1)(a), F.S., based on her "dilatory" response to public records requests filed by a citizen (Watson):

> Evidence was presented that Webb took one and one-half months to respond to Watson's initial public-

> records request; that it was nearly four months before Webb attempted to schedule a time for Watson to review documents responsive to the requests; that Webb gave Watson one hour to review a ten-inch stack of documents and then allowed only two additional one-hour sessions five weeks later; that Webb terminated Watson's review after this third session; and that Webb did not provide all of her public records until she received a request from the grand jury nearly seven months after Watson's request.

By contrast, in *Lang v. Reedy Creek Improvement District*, No. CJ-5546 (Fla. 9th Cir. Ct. October 2, 1995), *affirmed per curiam*, 675 So. 2d 947 (Fla. 5th DCA 1996), the circuit court rejected the petitioner's claim that the agency should have produced requested records within 10, 20 and 60-day periods. The court determined that the agency's response to numerous (19) public records requests for 135 categories of information and records filed by the opposing party in litigation was reasonable in light of the cumulative impact of the requests and the fact that the requested records contained exempt as well as nonexempt information and thus required a considerable amount of review and redaction. *And see Herskovitz v. Leon County*, No. 98-22 (Fla. 2d Cir. Ct. June 9, 1998), in which the court said that in view of the "nature and volume of the materials requested [over 9000 pages], their location, and the need for close supervision by some knowledgeable person of the review of those records for possible exemptions," the amount of time expended by the county to produce the records (several weeks) to opposing counsel was not unreasonable.

c. Arbitrary time for inspection

While an agency may restrict the hours during which public records may be inspected to those hours when the agency is open to the public, a custodian is not authorized to establish an arbitrary time period during which records may or may not be inspected. AGO 81-12. Thus, an agency policy which permits inspection of its public records only from 1:00 p.m. to 4:30 p.m., Monday through Friday, violates the Public Records Act. Inf. Op. to Riotte, May 21, 1990. There may be instances where, due to the nature or volume of the records requested, a delay based upon the physical problems in retrieving the records and protecting them is necessary; however, the adoption of a schedule in which public records may be viewed only during certain hours is impermissible. *Id*.

12. In the absence of express legislative authorization, may an agency refuse to allow public records made or received in the normal course of business to be inspected or copied if

requested to do so by the maker or sender of the document?

No. To allow the maker or sender of documents to dictate the circumstances under which the documents are to be deemed confidential would permit private parties as opposed to the Legislature to determine which public records are subject to disclosure and which are not. Such a result would contravene the purpose and terms of Ch. 119, F.S. *See*, *Gadd v. News-Press Publishing Company*, 412 So. 2d 894 (Fla. 2d DCA 1982) (records of a utilization review committee of a county hospital were not exempt from Ch. 119, F.S., even though the information may have come from sources who expected or were promised confidentiality); *Browning v. Walton*, 351 So. 2d 380 (Fla. 4th DCA 1977) (a city cannot refuse to allow inspection of records containing the names and addresses of city employees who have filled out forms requesting that the city maintain the confidentiality of all material in their personnel files); *City of Pinellas Park, Florida v. Times Publishing Company,* No. 00-008234CI-19 (Fla. 6th Cir. Ct. January 3, 2001) ("there is absolutely no doubt that promises of confidentiality [given to employees who were asked to respond to a survey] do not empower the Court to depart from the public records law"). *And see Hill v. Prudential Insurance Company of America*, 701 So. 2d 1218 (Fla. 1st DCA 1997), *review denied*, 717 So. 2d 536 (Fla. 1998) (materials obtained by state agency from anonymous sources during the course of its investigation of an insurance company were public records and subject to disclosure in the absence of statutory exemption, notwithstanding the company's contention that the records were "stolen" or "misappropriated" privileged documents that were delivered to the state without the company's permission). *Compare, Doe v. State*, 901 So. 2d 881 (Fla. 4th DCA 2005) (where citizen provided information to state attorney's office which led to a criminal investigation, and he was justified in inferring or had a reasonable expectation that he would be treated as a confidential source in accordance with statutory exemption now found at s. 119.071[2][f], F.S., the citizen was entitled to have his identifying information redacted from the closed file, even though there was no express assurance of confidentiality by the state attorney's office).

Thus, it has been held that an agency "cannot bargain away its Public Records Act duties with promises of confidentiality in settlement agreements." *The Tribune Company v. Hardee Memorial Hospital*, No. CA-91-370 (Fla. 10th Cir. Ct. August 19, 1991), stating that a confidentiality provision in a settlement agreement which resolved litigation against a public hospital did not remove the document from the Public Records Act. *Cf.*, s. 69.081(8), F.S., part of the "Sunshine in Litigation Act," providing, subject to certain exceptions, that any portion of an agreement which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against an agency

is void, contrary to public policy, and may not be enforced, and requiring that settlement records be maintained in compliance with Ch. 119, F.S. *And see* Inf. Op. to Barry, June 24, 1998, citing to s. 69.081(8)(a), and stating that "a state agency may not enter into a settlement agreement or other contract which contains a provision authorizing the concealment of information relating to a disciplinary proceeding or other adverse employment decision from the remainder of a personnel file."

Accordingly, it is clear that the determination as to when public records are to be deemed confidential rests exclusively with the Legislature. *See*, *Sepro Corporation v. Florida Department of Environmental Protection,* 839 So. 2d 781 (Fla. 1st DCA 2003), *review denied sub nom., Crist v. Department of Environmental Protection,* 911 So. 2d 792 (Fla. 2005) (private party cannot render public records exempt from disclosure merely by designating as confidential the material it furnishes to a state agency). *See also*, AGO 90-104 (desire of data processing company to maintain "privacy" of certain materials filed with Department of State is of no consequence unless such materials fall within a legislatively created exemption to Ch. 119, F.S.); AGO 71-394 (reports received and marked "confidential" or "return to sender" must be open to public inspection unless exempted from disclosure by the Legislature); and AGO 97-84 (architectural and engineering plans under seal pursuant to s. 481.221 or s. 471.025, F.S., that are held by a public agency in connection with the transaction of official business are subject to public inspection).

Therefore, unless the Legislature has expressly authorized the maker of documents received by an agency to keep the material confidential, the wishes of the sender in this regard cannot supersede the requirements of Ch. 119, F.S. *Compare*, *e.g.*, s. 377.2409(1), F.S. (information on geophysical activities conducted on state-owned mineral lands received by Department of Environmental Protection shall, on the request of the person conducting the activities, be held confidential and exempt from Ch. 119, F.S., for 10 years).

13. Must an agency state the basis for its refusal to release an exempt record?

Yes. Section 119.07(1)(c), F.S., states that a custodian of a public record who contends that a record or part of a record is exempt from inspection must state the basis for the exemption, including the statutory citation to the exemption. Additionally, upon request, the custodian must state in writing and with particularity the reasons for the conclusion that the record is exempt or confidential. Section 119.07(1)(d), F.S. *See, Weeks v. Golden,* 764 So. 2d 633 (Fla. 1st DCA 2000) (agency’s response that

it had provided all records "with the exception of certain information relating to the victim" deemed inadequate because the response "failed to identify with specificity either the reasons why records were believed to be exempt, or the statutory basis for any exemption"); and *Langlois v. City of Deerfield Beach, Florida*, 370 F. Supp 2d 1233 (S.D. Fla. 2005) (city fire chief's summary rejection of request for employee personnel file violated the Public Records Act because the chief gave no statutory reason for failing to produce the records). *Cf., City of St. Petersburg v. Romine,* 719 So. 2d 19, 21 (Fla. 2d DCA 1998), noting that the Public Records Act "may not be used in such a way to obtain information that the legislature has declared must be exempt from disclosure." *Accord*, AGO 06-04 (request for agency records may not be phrased or responded to in terms of a request for the specific documents asked for and received by a law enforcement agency during the course of an active criminal investigation).

It has been held that a *federal* agency subject to the federal Freedom of Information Act must, in addition to providing a detailed justification of the basis for claimed exemptions under the Act, specifically itemize and index the documents involved so as to show which are disclosable and which are exempt. *See*, *Vaughn v. Rosen*, 484 F.2d 820, 827-828 (D.C. Cir. 1973), *cert. denied,* 94 S.Ct. 1564 (1974). However, a Florida court refused to apply the *Vaughn* requirements to the state Public Records Act, stating "we reject appellants' suggestion that we engraft upon the Act the wholly pragmatic devices of 'specificity, separation, and indexing,' which the United States Court of Appeals for the District of Columbia perceived in *Vaughn v. Rosen* [citations omitted] to be necessary to the administration of the Freedom of Information Act, 5 U.S.C. s. 552 (FOIA)." *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985), *review denied*, 475 So. 2d 695 (Fla. 1985). *And see Lopez v. State*, 696 So. 2d 725 (Fla. 1997) (state attorney's contention that requested records were work product and not subject to public records disclosure was sufficient to identify asserted statutory exemptions).

14. May an agency refuse to allow inspection and copying of an entire public record on the grounds that a portion of the record contains information which is exempt from disclosure?

No. Where a public record contains some information which is exempt from disclosure, s. 119.07(1)(b), F.S., requires the custodian of the record to delete or excise only that portion or portions of the record for which an exemption is asserted and to provide the remainder of the record for examination. *See*, *Ocala Star Banner Corp. v. McGhee*, 643 So. 2d 1196 (Fla. 5th DCA 1994) (city may redact confidential identifying information from police report but must produce the rest for inspection); *City of Riviera*

Beach v. Barfield, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995) (police department authorized to withhold criminal investigative information which is statutorily exempt from disclosure, but must allow inspection of nonexempt portions of the records); and AGO 95-42 (statute providing for confidentiality of certain audit information did not make the entire report confidential and exempt from disclosure; the portions of the report which do not contain exempt information must be released).

The fact that an agency believes that it would be impractical or burdensome to redact confidential information from its records does not excuse noncompliance with the mandates of the Public Records Act. AGO 99-52. *Cf*., AGO 02-73 (agency must redact confidential and exempt information and release the remainder of the record; agency not authorized to release records containing confidential information, albeit anonymously).

A custodian of records containing both exempt and nonexempt material may comply with s. 119.07(1)(b), F.S., by any reasonable method which maintains and does not destroy the exempted portion while allowing public inspection of the nonexempt portion. AGO 84-81. *And see* AGO 97-67 (clerk is under a duty to prevent the release of confidential material that may be contained in the Official Records; the manner by which this is to be accomplished rests within the sound discretion of the clerk). *Accord*, AGO 05-37.

Section 119.011(12), F.S., defines the term "redact" to mean "to conceal from a copy of an original public record, or to conceal from an electronic image that is available for public viewing, that portion of the record containing exempt or confidential information." *And see* AGO 02-69 (statute providing for redaction of certain information in court records available for public inspection does not authorize clerk of court to permanently remove or obliterate such information from the original court records).

15. May an agency refuse to allow inspection of public records because the agency believes disclosure could violate privacy rights?

It is well established in Florida that "neither a custodian of records nor a person who is the subject of a record can claim a constitutional right of privacy as a bar to requested inspection of a public record which is in the hands of a government agency." *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991).

In reaching the conclusion that public records must be open to public inspection unless the Legislature provides otherwise, the courts have rejected claims that the constitutional right of privacy bars disclosure. Article I, s. 23, Fla. Const., provides:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. *This section shall not be construed to limit the public's right of access to public records and meetings as provided by law*. (e.s.)

Accordingly, the Florida Constitution "does not provide a right of privacy in public records"; a state or federal right of disclosural privacy does not exist. *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985). *See also*, *Forsberg v. Housing Authority of City of Miami Beach*, 455 So. 2d 373 (Fla. 1984); *Wallace v. Guzman,* 687 So. 2d 1351 (Fla. 3d DCA 1997)*; Garner v. Florida Commission on Ethics*, 415 So. 2d 67 (Fla. 1st DCA 1982), *pet. for rev. denied*, 424 So. 2d 761 (Fla. 1983); *Mills v. Doyle*, 407 So. 2d 348 (Fla. 4th DCA 1981). "[I]n Florida the right to privacy is expressly subservient to the Public Records Act." *Board of County Commissioners of Palm Beach County v. D.B.*, 784 So. 2d 585, 591 (Fla. 4th DCA 2001). *But see, Post-Newsweek Stations, Florida Inc. v. Doe*, 612 So. 2d 549 (Fla. 1992) (public's right of access to pretrial criminal discovery materials must be balanced against a nonparty's constitutional right to privacy).

However, in *Times Publishing Company v. A.J.*, 626 So. 2d 1314 (Fla. 1993), the Supreme Court blocked the release of a sheriff's initial incident report of alleged child abuse that was referred to the child welfare department for investigation pursuant to state child protection laws. Noting that the department found no probable cause, the Court held that the confidentiality provisions in Ch. 415, F.S. 1990 [now found in Ch. 39, F.S.], are intended to accommodate the privacy rights of those involved in these cases "during the initial stages of an investigation before probable cause has been found." *Id.* at 1315. Additionally, the Court held that a member of the class the exception was intended to protect--*i.e.,* the minor children who were the subject of the child abuse incident report--had standing to assert a statutory exception. *Cf., Alterra Healthcare Corporation v. Estate of Shelley*, 827 So. 2d 936, 940n.4 (Fla. 2002), noting that "only the custodian" of agency personnel records "can assert any applicable exemption; not the employee."

The Court also held that although the statutes did not require the sheriff to notify third parties about the public records request for the incident report, it could not fault the sheriff

for providing such notification. *Times Publishing Company v. A.J.*, *supra*, at 1316. *Cf.*, *Tribune Company v. Cannella*, *supra* (automatic delay in production of personnel records to allow employees time to assert constitutional privacy interests invalid).

In a lengthy footnote, the Court cautioned that its ruling addressed only the factual question of a statutory exception relating to child abuse, and did not necessarily apply in any other context. *Times Publishing v. A.J.*, *supra*, at 1315n.1. *Cf.*, AGO 94-47, regarding the application of the *Times Publishing Company* standard to complaints of abuse filed with a human rights advocacy committee.

16. What is the liability of a custodian for release of public records?

It has been held that there is nothing in Ch. 119, F.S., indicating an intent to give private citizens a right to recovery for negligently maintaining and providing information from public records. *City of Tarpon Springs v. Garrigan*, 510 So. 2d 1198 (Fla. 2d DCA 1987); *Friedberg v. Town of Longboat Key*, 504 So. 2d 52 (Fla. 2d DCA 1987). *Cf., Layton v. Florida Department of Highway Safety and Motor Vehicles,* 676 So. 2d 1038 (Fla. 1st DCA 1996) (agency has no common law or statutory duty to citizen to maintain accurate records). *Accord, Hillsborough County v. Morris,* 730 So. 2d 367 (Fla. 2d DCA 1999).

However, a custodian is not protected against tort liability resulting from that person *intentionally* communicating public records or their contents to someone outside the agency which is responsible for the records unless the person inspecting the records has made a bona fide request to inspect the records or the communication is necessary to the agency's transaction of its official business. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991). On appeal, after remand, the Fifth District held the claim against the city was barred on the basis of sovereign immunity. *Williams v. City of Minneola*, 619 So. 2d 983 (Fla. 5th DCA 1993). *See*, s. 768.28(9)(a), F.S., providing that the state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his or her employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. *Cf.*, AGO 97-09 (law enforcement agency's release of sexual offender records for purposes of public notification is consistent with its duties and responsibilities).

E. WHAT IS THE LEGAL EFFECT OF STATUTORY EXEMPTIONS FROM DISCLOSURE?

1. How are exemptions created?

"Courts cannot judicially create any exceptions, or exclusions to Florida's Public Records Act." *Board of County Commissioners of Palm Beach County v. D.B.*, 784 So. 2d 585, 591 (Fla. 4th DCA 2001). *Accord, Wait v. Florida Power and Light Company,* 372 So. 2d 420, 425 (Fla. 1979) (Public Records Act "excludes any judicially created privilege of confidentiality;" only the Legislature may exempt records from public disclosure). *See*, s. 119.011(8), F.S., defining the term "exemption" to mean "a provision of general law which provides that a specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), s. 286.011, or s. 24, Art. I of the State Constitution."

Article I, s. 24(c), Fla. Const., authorizes the *Legislature* to enact general laws creating exemptions provided that such laws "shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." *See, Memorial Hospital-West Volusia v. News-Journal Corporation,* 729 So. 2d 373, 380 (Fla. 1999), in which the Court refused to "imply" an exemption from open records requirements, stating "we believe that an exemption from public records access is available only after the legislature has followed the express procedure provided in article I, section 24(c) of the Florida Constitution." *Accord*, *Indian River County Hospital District v. Indian River Memorial Hospital, Inc.,* 766 So. 2d 233, 237 (Fla. 4th DCA 2000) ("Only after the legislature provided by general law for the exemption of records, stating with specificity the public necessity for the exemption and providing that the law was no broader than necessary, would an exemption from public records access be available."). *And see Campus Communications, Inc. v. Earnhardt,* 821 So. 2d 388, 395 (Fla. 5th DCA 2002), *review denied,* 848 So. 2d 1153 (Fla. 2003) (statutory exemption for autopsy photographs serves identifiable public purpose and is no broader than necessary to meet that public purpose*); Bryan v. State,* 753 So. 2d 1244 (Fla. 2000) (statute exempting from public disclosure certain prison records satisfies the constitutional standard because the Legislature set forth the requisite public necessity [personal safety of prison officials and inmates] for the exemption). *Compare, Halifax Hospital Medical Center v. News-Journal Corporation,* 724 So. 2d 567 (Fla. 1999) (statute providing an exemption from the Sunshine Law for portions of hospital board meetings is unconstitutional because it does not meet the constitutional standard of specificity as to stated public necessity and it is broader than necessary to

achieve its purpose).

Laws enacted pursuant to Art. I, s. 24, Fla. Const., shall relate to one subject and must contain only exemptions or provisions governing enforcement. *Cf., State v. Knight,* 661 So. 2d 344 (Fla. 4th DCA 1995) (while exemptions when enacted must contain a public necessity statement, exceptions to a public records exemption are not required to contain such a statement; thus, a trial judge erred in overturning a statute providing a limited exception to the public records exemption for grand jury materials).

Article I, s. 24(c) also requires that laws providing exemptions from public records or public meetings requirements must be passed by a two-thirds vote of each house. The two-thirds vote requirement applies when an exemption is readopted in accordance with the Open Government Sunset Review Act, s. 119.15, F.S., as well as to the initial creation of an exemption. AGO 03-18.

In accordance with s. 24(d), all statutory exemptions in effect on July 1, 1993, are grandfathered into the statutes and remain in effect until they are repealed. Rules of court in effect on November 3, 1992, that limit access to records remain in effect until repealed. *See*, Rule 2.051, Public Access to Judicial Records, Fla. R. Jud. Admin., adopted by the Florida Supreme Court on October 29, 1992. The text of this rule is set forth in Appendix E.

The Open Government Sunset Review Act, codified at s. 119.15, F.S., provides for the review and repeal or reenactment of an exemption from s. 24, Art. I, Fla. Const., and s. 119.07(1), or s. 286.011, F.S. The act does not apply to an exemption that is required by federal law or applies solely to the Legislature or the State Court System. Section 119.15(2)(a) and (b), F.S.

Pursuant to the Act, in the fifth year after enactment of a new exemption or expansion of an existing exemption, the exemption shall be repealed on October 2 of the fifth year, unless the Legislature acts to reenact the exemption. Section 119.15(3), F.S.

2. Exemptions are strictly construed

The general purpose of Ch. 119, F.S., "is to open public records to allow Florida's citizens to discover the actions of their government." *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997). The Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they

are limited to their stated purpose. *Krischer v. D'Amato,* 674 So. 2d 909, 911 (Fla. 4th DCA 1996*); Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988)*; Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom*., *Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987).

The "right to access public documents is virtually unfettered, save only the statutory exemptions designed to achieve a balance between an informed public and the ability of the government to maintain secrecy in the public interest." *Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487, 492 (Fla. 2d DCA 1990). *See also*, *Southern Bell Telephone and Telegraph Company v. Beard*, 597 So. 2d 873, 876 (Fla. 1st DCA 1992) (Public Service Commission's determination that statutory exemption for proprietary confidential business information should be narrowly construed and did not apply to company's internal self-analysis was "consistent with the liberal construction afforded the Public Records Act in favor of open government").

An agency claiming an exemption from disclosure bears the burden of proving the right to an exemption. *See*, *Woolling v. Lamar,* 764 So. 2d 765, 768 (Fla. 5th DCA 2000), *review denied*, 786 So. 2d 1186 (Fla. 2001); *Barfield v. City of Fort Lauderdale Police Department*, 639 So. 2d 1012, 1015 (Fla. 4th DCA), *review denied*, 649 So. 2d 869 (Fla. 1994); and *Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128, 1130 (Fla. 1st DCA 1985). *See also*, *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 780n.1 (Fla. 4th DCA 1985), *review denied*, 488 So. 2d 67 (Fla. 1986); *Tribune Company v. Public Records*, *supra*, stating that doubt as to the applicability of an exemption should be resolved in favor of disclosure rather than secrecy; and *Times Publishing Company v. City of St. Petersburg*, *supra*, at 492, noting that the judiciary cannot create a privilege of confidentiality to accommodate the desires of government and that "[a]n open government is crucial to the citizens' ability to adequately evaluate the decisions of elected and appointed officials." *Accord*, AGO 80-78 ("policy considerations" do not, standing alone, justify nondisclosure of public records).

3. Do newly-created exemptions apply retroactively?

Access to public records is a substantive right. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001). Thus, a statute affecting that right is presumptively prospective and there must be a clear legislative intent for the statute to apply retroactively. *Id.* In *Memorial*, the Supreme Court ruled that a statute providing an exemption from open government requirements for meetings and records of private

corporations leasing hospitals from public taxing authorities did not apply to records created prior to the effective date of the statute. *See also, Baker County Press, Inc. v. Baker County Medical Services,* 870 So. 2d 189, 192-193 (Fla. 1st DCA 2004) (generally, the critical date in determining whether a document is subject to disclosure is the date the public records request is made; the law in effect on that date applies).

However, if the Legislature is "clear in its intent," an exemption may be applied retroactively. *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388, 396 (Fla. 5th DCA 2002), *review denied,* 848 So. 2d 1153 (Fla. 2003) (statute exempting autopsy photographs from disclosure is remedial and may be retroactively applied). *See also*, *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986); *and Roberts v. Butterworth,* 668 So. 2d 580 (Fla. 1996). *Cf.*, AGO 94-70 (amendment to expungement statute appears to be remedial and, therefore, should be retroactively applied to those records ordered expunged prior to the effective date of the amendment).

4. Do statutes eliminating confidentiality apply retroactively?

In *Baker v. Eckerd Corporation,* 697 So. 2d 970 (Fla. 2d DCA 1997), the court held that an amendment *eliminating* protection against disclosure of any unfounded reports of child abuse applies *prospectively* from the effective date of the amendment. *See also*, AGO 95-19 (expanded disclosure provisions for juvenile records apply only to records created after the effective date of the amendment).

Records made before the date of a repeal of an exemption under s. 119.15, F.S., the Open Government Sunset Review Act, "may not be made public unless otherwise provided by law." Section 119.15(7), F.S.

5. Are records which are confidential and exempt from disclosure treated differently from those which are merely exempt from disclosure requirements?

a. Confidential records

There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Act and confidential. *WFTV, Inc. v. School Board of Seminole County,* 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004). If information is made confidential in the statutes, the information is not subject to inspection by the public and may be released only to those persons and entities designated in the

statute. *Id*. *And see* AGOs 04-09 and 86-97. *Cf.,* AGO 94-86, stating that if the custodian of confidential library circulation records takes the position that such records should not be disclosed in response to a subpoena because the subpoena is not a "proper judicial order" as provided in s. 257.261, F.S., the custodian may assert the confidentiality provisions in a motion to quash the subpoena but should not ignore the subpoena for production of such records.

However, a statute restricting release of confidential emergency call information does not prevent the city's attorneys or other city officials who are responsible for advising the city regarding the provision of emergency medical services or for defending the city against a possible claim arising from such services, from reviewing the records related to such emergency calls that contain patient examination or treatment information. AGO 95-75.

It has been held that an agency is authorized to take reasonable steps to ensure that confidential records are not improperly released. *Lee County v. State Farm Mutual Automobile Insurance Company*, 634 So. 2d 250, 251 (Fla. 2d DCA 1994) (county policy requiring the patient's notarized signature on all release forms for emergency services medical records "not unreasonable or onerous;" requirement was a valid means of protecting records made confidential by s. 401.30[4], F.S.). *Accord*, AGO 94-51 (agency "should be vigilant in its protection of the confidentiality provided by statute for medical records of [its] employees"). *Cf., Florida Department of Revenue v. WHI Limited Partnership*, 754 So. 2d 205 (Fla. 1st DCA 2000) (administrative law judge [ALJ] not authorized to mandate that agency disclose confidential records because ALJ is not a judge of a court of competent jurisdiction for purposes of statute permitting disclosure of confidential records in response "to an order of a judge of a court of competent jurisdiction").

b. Exempt records

If records are not made confidential but are simply exempt from the mandatory disclosure requirements in s. 119.07(1), F.S., the agency is not prohibited from disclosing the documents in all circumstances. *See*, *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991), in which the court observed that pursuant to s. 119.07(3)(d), F.S., [now s. 119.071(2)(c), F.S.] "active criminal investigative information" was exempt from the requirement that public records be made available for public inspection. However, as stated by the court, "the exemption does not *prohibit* the showing of such information. There are many situations in which investigators have reasons for displaying information which they have the option

not to display." *See also*, AGO 90-50, noting that the exemption from disclosure for certain information about law enforcement personnel now set forth in s. 119.071(4)(d), F.S., does not prohibit a police department from posting the names, I.D. numbers, and photographs of its police officers for public display; however, in light of the statutory purpose of the exemption (safety of law enforcement officers), such posting would appear to be inconsistent with legislative intent.

Once an agency has gone public with information which could have been previously protected from disclosure under Public Records Act exemptions, no further purpose is served by preventing full access to the desired information. *Downs v. Austin*, 522 So. 2d 931, 935 (Fla. 1st DCA 1988). *Cf*., AGO 01-74 (taxpayer information that is confidential in the hands of certain specified officers under s. 193.074, F. S., is subject to disclosure under the Public Records Act when it has been submitted by a taxpayer to a value adjustment board as evidence in an assessment dispute).

However, in *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995), the court held that when a criminal justice agency transfers exempt criminal investigative information to another criminal justice *agency*, the information retains its exempt status. *And see Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998) ("the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands"); *Alice P. v. Miami Daily News, Inc.,* 440 So. 2d 1300 (Fla. 3d DCA 1983), *review denied*, 467 So. 2d 697 (Fla. 1985) (confidential birth information contained in license application submitted to state health agency not subject to disclosure); AGO 04-44 (if the prison industry agency sends exempt proprietary confidential business information to the Secretary of the Department of Corrections in his capacity as a member of the board of directors of the prison industry agency, that information does not lose its exempt status by virtue of the fact that it was sent to the Secretary's office in the department); and AGO 94-77 (work product exception authorized in former s. 119.07[3][l], F.S. [now s. 119.071(1)(d), F.S.], will be retained if the work product is transferred from the county attorney to the city attorney pursuant to a substitution of parties to the litigation).

6. Are exempt records discoverable?

It has been held that an exemption from disclosure under the Public Records Act does not render the document automatically privileged for purposes of discovery under the Florida Rules of Civil Procedure. *Department of Professional Regulation v. Spiva*, 478 So. 2d 382 (Fla. 1st DCA 1985). *Cf., State, Department of*

Highway Safety and Motor Vehicles v. Kropff, 445 So. 2d 1068, 1069n.1 (Fla. 3d DCA 1984) ("Although the Rules of Civil Procedure and the Public Records Act may overlap in certain areas, they are not coextensive in scope.").

For example, in *B.B. v. Department of Children and Family Services*, 731 So. 2d 30 (Fla. 4th DCA 1999), the court ruled that as a party to a dependency proceeding involving her daughters, a mother was entitled to discovery of the criminal investigative records relating to the death of her infant. The court found that the statutory exemption for active criminal investigative information did not "override the discovery authorized by the Rules of Juvenile Procedure." *Id*. at 34. *And see State, Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So. 2d 1322 (Fla. 2d DCA 1990), *review denied*, 576 So. 2d 286 (Fla. 1991) (records which are exempt from public inspection may be subject to discovery in a civil action upon a showing of exceptional circumstances and if the trial court takes all precautions to ensure the confidentiality of the records). *Compare, Henderson v. Perez*, 835 So. 2d 390, 392 (Fla. 2d DCA 2003) (trial court order compelling sheriff to produce exempt home addresses and photographs of 10 active law enforcement officers in a civil lawsuit filed by Perez predicated on his arrest, quashed because "Perez has not shown that the photographs and home addresses of the law enforcement officers are essential to the prosecution of his suit").

However, in some cases, legislative confidentiality requirements provide an express privilege from discovery. *See, e.g.*, *Cruger v. Love*, 599 So. 2d 111 (Fla. 1992) (records of medical review committees are statutorily privileged from discovery). *See also, Department of Health v. Grinberg,* 795 So. 2d 1136 (Fla. 1st DCA 2001).

F. WHAT ARE THE STATUTORY EXEMPTIONS RELATING TO LAW ENFORCEMENT AND SECURITY RECORDS?

1. Active criminal investigative and intelligence information exemption

a. Purpose and scope of exemption

Arrest and crime reports are generally considered to be open to public inspection. AGOs 91-74 and 80-96. However, s. 119.071(2)(c)1., F.S., exempts active criminal intelligence information and active criminal investigative information from public inspection. To be exempt, the information must be both "active" *and* constitute either "criminal investigative" or "criminal intelligence" information. *See, Woolling v. Lamar*, 764

So. 2d 765, 768 (Fla. 5th DCA 2000), *review denied*, 786 So. 2d 1186 (Fla. 2001) (in order for a record to constitute exempt active criminal investigative information, "the claimant must show that the record is both 'active' and that it constitutes 'criminal investigative information'").

Thus, if a crime report contains active criminal investigative information, the criminal investigative information may be excised from the report. AGO 91-74. *See also*, *Palm Beach Daily News v. Terlizzese*, No. CL-91-3954-AF (Fla. 15th Cir. Ct. April 5, 1991), holding that a newspaper was not entitled under Ch. 119, F.S., to inspect the complete and uncensored incident report (prepared following a reported sexual battery but prior to the arrest of a suspect), including the investigating officer's narrative report of the interview with the victim, since such information was exempt from inspection as active criminal investigative information and as information identifying sexual battery victims. *See*, s. 119.071(2)(c) and (h), F.S.

The active criminal investigative and intelligence exemption is limited in scope; its purpose is to prevent premature disclosure of information when such disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. *See*, *Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987).

Moreover, the active criminal investigative and intelligence information exemption does not *prohibit* the disclosure of the information by the criminal justice agency; the information is exempt from and not subject to the mandatory inspection requirements in s. 119.07(1), F.S., which would otherwise apply. As the court stated in *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991), "[t]here are many situations in which investigators have reasons for displaying information which they have the option not to display." *And see* AGO 90-50. *Cf*., s. 838.21, F.S., providing that it is unlawful for a public servant, with intent to obstruct, impede, or prevent a criminal investigation or a criminal prosecution, to disclose active criminal investigative or intelligence information or to disclose or use information regarding either the efforts to secure or the issuance of a warrant, subpoena, or other court process or court order relating to a criminal investigation or criminal prosecution when such information is not available to the general public and is gained by reason of the public servant's official position.

The law enforcement agency seeking the exemption has the burden of proving that it is entitled to it. *Christy v. Palm Beach County Sheriff's Office,* 698 So. 2d 1365 (Fla. 4th DCA

1997); and *Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128 (Fla. 1st DCA 1985).

b. What is active criminal investigative or intelligence information?

"Criminal intelligence information" means information concerning "an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity." Section 119.011(3)(a), F.S.

Criminal intelligence information is considered "active" as long "as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities" or "is directly related to pending prosecutions or appeals." Section 119.011(3)(d), F.S.

"Criminal investigative information" is defined as information relating to "an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance." Section 119.011(3)(b), F.S. *See*, *Rose v. D'Alessandro,* 380 So. 2d 419 (Fla. 1980) (complaints and affidavits received by a state attorney in the discharge of his investigatory duties constitute criminal intelligence or criminal investigative information).

Such information is considered "active" as long "as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future" or "is directly related to pending prosecutions or appeals." Section 119.011(3)(d), F.S.

"Criminal justice agency" is defined to mean any law enforcement agency, court, prosecutor or any other agency charged by law with criminal law enforcement duties or any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting such law enforcement agencies in the conduct of active criminal investigation or prosecution or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt Organization Act, during the time that such agencies are in possession of criminal intelligence information or criminal investigative information pursuant to their criminal law enforcement duties. The term also includes the Department of Corrections. Section 119.011(4), F.S.

c. What information is *not* considered to be criminal investigative or intelligence information and must be released unless some other exemption applies?

Section 119.011(3)(c), F.S., states that the following information is not criminal investigative or criminal intelligence information:

1. The time, date, location and nature of a reported crime;

2. The name, sex, age, and address of a person arrested (but see s. F.10., *infra*, regarding confidentiality of juvenile records) or

   The name, sex, age and address of the victim of a crime, except for a victim of a sexual offense or of child abuse, as provided in s. 119.071(2)(h), F.S.;

3. The time, date and location of the incident and of the arrest;

4. The crime charged;

5. Documents given or required to be given to the person arrested, except as provided in s. 119.071(2)(h), F.S. [providing an exemption from disclosure for criminal intelligence or investigative information which reveals the identity of a victim of a sexual offense or of child abuse], unless the court finds that release of the information prior to trial would be defamatory to the good name of a victim or witness or jeopardize the safety of such victim or witness; and would impair the ability of the state attorney to locate or prosecute a codefendant;

6. Informations and indictments except as provided in s. 905.26, F.S. [prohibiting disclosure of finding of indictment against a person not in custody, under recognizance or under arrest].

Accordingly, since the above information does not fall within the definition of criminal intelligence or criminal investigative information, it is always subject to disclosure unless some other specific exemption applies. For example, the "time, date, and location of the incident and of the arrest" cannot be withheld from disclosure since such information is expressly exempted from the definitions of criminal intelligence and criminal

investigative information. *See*, s. 119.011(3)(c)3., F.S.

d. Are records released to the defendant considered to be criminal investigative or intelligence information?

Except in limited circumstances, records which have been given or are required to be given to the person arrested cannot be withheld from public inspection as criminal investigative or intelligence information. *See*, s. 119.011(3)(c)5., F.S. In other words, once the material has been made available to the defendant as part of the discovery process in a criminal proceeding, the material is ordinarily no longer considered to be exempt criminal investigative or criminal intelligence information. *See*, *Tribune Company v. Public Records*, 493 So. 2d 480, 485 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company,* 503 So. 2d 327 (Fla. 1987) (all information given or required to be given to defendants is disclosable to the public when released to defendants or their counsel pursuant to the rules of discovery). *Accord*, *Times Publishing Company v. State*, 903 So. 2d 322, 325 (Fla. 2d DCA 2005)("we begin with the important general principle that once criminal investigative or intelligence information is disclosed by the State to a criminal defendant that information becomes a nonexempt public record subject to disclosure pursuant to section 119.07[1]"); *Staton v. McMillan*, 597 So. 2d 940, 941 (Fla. 1st DCA 1992), *review dismissed sub nom., Staton v. Austin*, 605 So. 2d 1266 (Fla. 1992) (active criminal investigation exemption does not apply to information for which disclosure was previously required under the rules of discovery). *Cf., State v. Buenoano*, 707 So. 2d 714 (Fla. 1998) (restricted access documents provided to state attorney by federal government pursuant to a loan agreement retained their confidential status under a Florida law providing an exemption for out-of-state criminal investigative information that is shared with Florida criminal justice agencies on a confidential basis, even though the documents erroneously had been given to the defendant and placed in the court record).

For example, in *Satz v. Blankenship*, 407 So. 2d 396 (Fla. 4th DCA 1981), *review denied*, 413 So. 2d 877 (Fla. 1982), the court ruled that a newspaper reporter was entitled to access to tape recordings concerning a defendant in a criminal prosecution where the recordings had been disclosed to the defendant. The state attorney's argument that he could withhold disclosure of the tape recordings because they were not "documents" was rejected as inconsistent with legislative intent. The court concluded that a reading of the statute reflected the Legislature's belief that once information was released to the defendant, there was no longer any need to exclude the information from the public. Thus, the tape recordings were no longer "criminal investigative information" that could be withheld from public inspection. *See*

also, News-Press Publishing Co. Inc. v. D'Alessandro, No. 96-2743-CA-RWP (Fla. 20th Cir. Ct. April 24, 1996) (once state allowed defense counsel to listen to portions of a surveillance audiotape involving a city councilman accused of soliciting undue compensation, those portions of the audiotape became excluded from the definition of "criminal investigative information," and were subject to public inspection). *Cf., City of Miami v. Post-Newsweek Stations Florida, Inc.,* 837 So. 2d 1002, 1003 (Fla. 3d DCA 2002), *review dismissed*, 863 So. 2d 1190 (Fla. 2003) (where defendant filed request for discovery, but withdrew request before state attorney provided discovery materials to defendant, requested materials were not "given or required by law . . . to be given to the person arrested" and thus did not lose their exempt status as active criminal investigative information).

Similarly, in *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775 (Fla. 4th DCA 1985), *review denied*, 488 So. 2d 67 (Fla. 1986), the court upheld a trial judge's order requiring the state attorney to release to the news media all information furnished to the defense counsel in a criminal investigation. The state attorney had argued that the documents could be withheld because the criminal investigation was still "active" and "active" criminal investigative information is exempt from disclosure. However, the court rejected this contention by concluding that once the material was given to the defendant pursuant to the rules of criminal procedure, the material was excluded from the statutory definition of criminal investigative information. Therefore, it was no longer relevant whether the investigation was active or not and the documents could not be withheld as active criminal investigative information. *Id*. at 779n.1.

Moreover, it has been held that Ch. 119's requirement of public disclosure of records made available to the defendant does not violate the attorney disciplinary rule prohibiting extrajudicial comments about defendants as long as the state attorney does not put an interpretation on the record that prejudices the defendant or exposes witnesses. *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d at 780.

The only circumstances where criminal intelligence or investigative information can retain that status even though it has been made available to the defendant are:

1) If the information would reveal the identity of a victim of a sexual offense or child abuse pursuant to s. 119.071(2)(h), F.S.; or

2) If a court order has been issued finding that release of the information prior to trial would:

a) be defamatory to the good name of a victim or witness or jeopardize the safety of a victim or witness; and

b) impair the ability of a state attorney to locate or prosecute a codefendant.

In all other cases, material which has been made available to the defendant cannot be deemed criminal investigative or intelligence information and must be open to inspection unless some other exemption applies (*e.g.*, s. 119.071(2)(e), F.S., exempting all information "revealing the substance of a confession" by a person arrested until there is a final disposition in the case); or the court orders closure of the material in accordance with its constitutional authority to take such measures as are necessary to obtain orderly proceedings and a fair trial or to protect constitutional privacy rights of third parties. *See, Miami Herald Publishing Company v. Lewis,* 426 So. 2d 1 (Fla. 1982); *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32 (Fla. 1988); *Post-Newsweek Stations, Florida Inc. v. Doe*, 612 So. 2d 549 (Fla. 1992). *And see Morris Communications Company LLC v. State,* 844 So. 2d 671, 673n.3 (Fla. 1st DCA 2003) (although documents turned over to the defendant during discovery are generally public records subject to disclosure under Ch. 119, the courts have authority to manage pretrial publicity to protect the defendant's constitutional rights as described in *Miami Herald Publishing Company v. Lewis, supra). Cf., Times Publishing Co.* v. *State*, 903 So. 2d 322 (Fla. 2d DCA 2005) (while the criminal discovery rules authorize a nonparty to file a motion to restrict disclosure of discovery materials based on privacy considerations, where no such motion has been filed, the judge is not authorized to prevent public access on his or her own initiative).

e. When is criminal investigative and intelligence information considered inactive and thus no longer exempt from disclosure?

(1) Active criminal investigative information

Criminal investigative information is considered active (and, therefore, exempt from disclosure pursuant to s. 119.071(2)(c), F.S.) "as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future." Section 119.011(3)(d)2., F.S. Information in cases barred from prosecution by a statute of limitation is not active. *Id*.

The definition of "active" requires "a showing in each particular case that an arrest or prosecution is reasonably anticipated in the foreseeable future." *Barfield v. City of Fort Lauderdale Police Department*, 639 So. 2d 1012, 1016 (Fla. 4th

DCA), *review denied*, 649 So. 2d 869 (Fla. 1994). However, the Legislature did not intend that confidentiality be limited to investigations where the outcome and an arrest or prosecution was a certainty or even a probability. *Id*. at 1016-1017.

There is no fixed time limit for naming suspects or making arrests other than the applicable statute of limitations. *See*, *Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128 (Fla. 1st DCA 1985). The fact that investigators might not yet have decided upon a suspect does not necessarily imply that the investigation is inactive. *Id*. at 1131.

Thus, an investigation will be deemed to be "active," even though there is no immediate anticipation of an arrest, so long as the investigation is proceeding in good faith, and the state attorney or grand jury will reach a determination in the foreseeable future. *Barfield v. City of Fort Lauderdale Police Department*, *supra*. Accordingly, a police department's criminal investigation into a shooting incident involving its officers continued to be "active" even though pursuant to department policy, all police shooting cases were sent to the state attorney's office for review by the grand jury and the department did not know if there would be an arrest in this particular case. *Id*.

Similarly, in *News-Press Publishing Co., Inc. v. Sapp*, 464 So. 2d 1335 (Fla. 2d DCA 1985), the court held that in view of an ongoing investigation by the state attorney and the convening of a grand jury in the very near future to consider a shooting incident by deputy sheriffs during an undercover drug transaction, documents consisting of the sheriff's completed internal investigation of the incident constituted "active criminal investigative information" and were, therefore, exempt from disclosure. *See also*, *Wells v. Sarasota Herald Tribune Company, Inc.*, 546 So. 2d 1105 (Fla. 2d DCA 1989) (investigative files of the sheriff and state attorney were not inactive where an active prosecution began shortly after the trial judge determined that the investigation was inactive and ordered that the file be produced for public inspection).

Additionally, a circuit court held that a criminal investigative file involving an alleged 1988 sexual battery which had been inactive for three years, due in part to the death of the victim from unrelated causes, could be "reactivated" and removed from public view in 1992 when new developments prompted the police to reopen the case. The court found that it was irrelevant that the 1988 file could have been inspected prior to the current investigation; the important considerations were that the file apparently had not been viewed by the public during its "inactive" status and the file was now part of an active criminal

investigation and therefore exempt from disclosure as active criminal investigative information. *News-Press Publishing Co., Inc. v. McDougall*, No. 92-1193CA-WCM (Fla. 20th Cir. Ct. February 26, 1992).

In another case, however, the appellate court upheld a court order unsealing an arrest warrant affidavit upon a showing of good cause by the subject of the affidavit. The affidavit had been quashed and no formal charges were filed against the subject. The court held that the affidavit did not constitute active criminal investigative information because there was no reasonable, good faith anticipation that the subject would be arrested or prosecuted in the near future. In addition, most of the information was already available to the subject through grand jury transcripts, the subject's perjury trial, or by discovery. *Metropolitan Dade County v. San Pedro*, 632 So. 2d 196 (Fla. 3d DCA 1994). *And see Mobile Press Register, Inc. v. Witt*, 24 Med. L. Rptr. 2336, No. 95-06324 CACE (13) (Fla. 17th Cir. Ct. May 21, 1996) (ordering that files in a 1981 unsolved murder be opened to the public because, despite recent reactivation of the investigation, the case had been dormant for many years and no arrest or prosecution had been initiated or was imminent).

(2) Active criminal intelligence information

In order to constitute exempt "active" criminal intelligence information, the information must "be of the type that will lead to the 'detection of *ongoing or reasonably anticipated criminal activities.*'" *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1367 (Fla. 4th DCA 1997), *quoting* s. 119.011(3)(d)1., F.S. *See, Barfield v. Orange County, Florida*, No. CI92-5913 (Fla. 9th Cir. Ct. August 4, 1992) (denying a petition for writ of mandamus seeking access to gang intelligence files compiled by the sheriff's office). *See also*, AGO 94-48 (information contained in the statewide integrated violent crime information system established by the Florida Department of Law Enforcement constitutes active criminal intelligence information; even though some of the information may have come from closed investigations, the information is collected to "anticipate, prevent, and monitor criminal activity and to assist in the conduct of ongoing criminal investigations").

By contrast, in *Christy* v. *Palm Beach County Sheriff's Office*, *supra*, the court ruled that records generated in connection with a criminal investigation conducted 13 years earlier did not constitute "active" criminal intelligence information. The court noted that the exemption "is not intended to prevent disclosure of criminal files forever on the mere possibility that other potential criminal defendants may learn something from the files." *Id.*

(3) Pending prosecutions or appeals

Criminal intelligence and investigative information is also considered to be "active" while such information is directly related to pending prosecutions or direct appeals. Section 119.011(3)(d), F.S. *See*, *News-Press Publishing Co., Inc. v. Sapp*, *supra*; and *Tal-Mason v. Satz*, 614 So. 2d 1134 (Fla. 4th DCA), *review denied*, 624 So. 2d 269 (Fla. 1993) (contents of prosecutorial case file must remain secret until the conclusion of defendant's direct appeal).

Once the conviction and sentence have become final, criminal investigative information can no longer be considered to be "active." *State v. Kokal*, 562 So. 2d 324, 326 (Fla. 1990). *Accord*, *Tribune Company v. Public Records*, 493 So. 2d 480, 483-484 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company,* 503 So. 2d 327 (Fla. 1987) (actions for postconviction relief following affirmance of the conviction on direct appeal are not pending appeals for purposes of s. 119.011[3][d]2., F.S.); *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1367 (Fla. 4th DCA 1997) (the term "pending prosecutions or appeals" in s. 119.011[3][d], F.S., applies only to ongoing prosecutions or appeals which have not yet become final).

It should be emphasized that the determination as to whether investigatory records related to pending prosecutions or appeals are "active" or not is relevant *only* to those records which constitute criminal intelligence or investigative information. In other words, if records are excluded from the definition of criminal intelligence or investigative information, as in the case of records given or required to be given to the defendant under s. 119.011(3)(c)5., F.S., it is immaterial whether the investigation is active or inactive. *See*, *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779n.1 (Fla. 4th DCA 1985), *review denied*, 488 So. 2d 67 (Fla. 1986) ("Something that is not criminal intelligence information or criminal investigative information cannot be active criminal intelligence information or active criminal investigative information."). *Accord*, *Staton v. McMillan*, 597 So. 2d 940, 941 (Fla. 1st DCA 1992), *review dismissed sub nom.*, *Staton v. Austin*, 605 So. 2d 1266 (Fla. 1992) (active criminal investigation exemption does not apply to information for which disclosure was previously required under discovery rules even though there is a pending direct appeal).

f. Does a criminal defendant's public records request trigger reciprocal discovery?

Section 119.07(9), F.S., states that the public access rights set forth in s. 119.07, F.S., "are not intended to expand or limit

the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution or in collateral postconviction proceedings." Thus, a criminal defendant's public records request for nonexempt law enforcement records relating to the defendant's pending prosecution constitutes an election to participate in discovery and triggers a reciprocal discovery obligation. *Henderson v. State*, 745 So. 2d 319 (Fla. 1999).

g. Does the active criminal investigative information exemption apply if the information has already been made public?

It has been held that the criminal investigative exemption does not apply if the information has already been made public. *Staton v. McMillan*, 597 So. 2d 940, 941 (Fla. 1st DCA 1992), *review dismissed sub nom.*, *Staton v. Austin*, 605 So. 2d 1266 (Fla. 1992). *See also*, *Downs v. Austin*, 522 So. 2d 931, 935 (Fla. 1st DCA 1988) (once state has gone public with information which could have been previously protected from disclosure under Public Records Act exemptions, no further purpose is served by preventing full access to the desired information).

However, the voluntary disclosure of a non-public record does not automatically waive the exempt status of *other* documents. *Arbelaez v. State,* 775 So. 2d 909, 918 (Fla. 2000). *Accord*, *Church of Scientology Flag Service Org., Inc. v. Wood,* No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997) (release of the autopsy report and the medical examiner's public comments about the report did not mean that other records in the possession of the medical examiner relating to an active criminal investigation into the death were public; "[i]t is not unusual for law enforcement and criminal investigatory agencies to selectively release information relating to an ongoing criminal investigation in an effort to enlist public participation in solving a crime").

h. May active criminal investigative information be shared with another criminal justice agency without losing its protected status?

It has been held that exempt active criminal investigative information may be shared with another criminal justice agency and retain its protected status, because in "determining whether or not to compel disclosure of active criminal investigative or intelligence information, the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests." *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995). In *City of Riviera Beach*, *supra*, the court held that exempt records of the West Palm Beach

police department's active criminal investigation concerning a shooting incident involving a police officer from Riviera Beach could be furnished to the Riviera Beach police department for use in a simultaneous administrative internal affairs investigation of the officer without losing their exempt status. *Accord, Ragsdale v. State,* 720 So. 2d 203, 206 (Fla. 1998) (applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record).

Additionally, a police department may enter into a contract with a private company that compiles raw police data and then provides informational reports to law enforcement. The release of the exempt information to the corporation for this purpose would not cause such records to lose their exempt status. AGO 96-36.

However, while the courts have recognized that active criminal investigative information may be forwarded from one criminal justice agency to another without jeopardizing its exempt status, "[t]here is no statutory exemption from disclosure of an 'ongoing federal prosecution.'" *Woolling v. Lamar*, 764 So. 2d 765, 768 (Fla. 5th DCA 2000), *review denied*, 786 So. 2d 1186 (Fla. 2001). In *Woolling,* the court held that a state attorney bore the burden of establishing that state attorney files in a nolle prossed case which were furnished to the federal government for prosecution of a defendant constituted active criminal investigative information; the fact that the federal government was actively prosecuting the case was not sufficient, standing alone, to justify imposition of the exemption.

i. Do other public records become exempt from disclosure simply because they are transferred to a criminal justice agency?

The exemption for active criminal intelligence and investigative information does not exempt other public records from disclosure simply because they are transferred to a law enforcement agency. *See*, *e.g.*, *Tribune Company v. Cannella*, 438 So. 2d 516, 523 (Fla. 2d DCA 1983), *reversed on other grounds*, 458 So. 2d 1075 (Fla. 1984), *appeal dismissed sub nom.*, *Deperte v. Tribune Company*, 105 S.Ct. 2315 (1985) (assistant state attorney could not withdraw public records from public scrutiny by asserting that he "compiled" the records simply because he subpoenaed them; thus, law enforcement personnel records compiled and maintained by the employing agency prior to a criminal investigation did not constitute criminal intelligence or criminal investigative information).

For example, in *New Times, Inc. v. Ross*, No. 92-5795 CIV 25 (Fla. 11th Cir. Ct. March 17, 1992), it was held that papers in a closed civil forfeiture file which subsequently became part of a

criminal investigation were open to inspection. The court reasoned that the civil litigation materials could not be considered criminal investigative information because the file was closed prior to the commencement of the criminal investigation.

Thus, public records maintained and compiled by the Office of the Capital Collateral Representative cannot be transformed into active criminal investigative information by merely transferring the records to the Florida Department of Law Enforcement (FDLE). AGO 88-25. *Accord*, Inf. Op. to Slye, August 5, 1993, concluding that the contents of an investigative report compiled by a state agency inspector general in carrying out his duty to determine program compliance are not converted into criminal intelligence information merely because FDLE also conducts an investigation or because such report or a copy thereof has been transferred to that department. *And see Sun-Sentinel, Inc. v. Florida Department of Children and Families*, 815 So. 2d 793 (Fla. 3d DCA 2002).

Similarly, in AGO 92-78, the Attorney General's Office concluded that otherwise disclosable public records of a housing authority are not removed from public scrutiny merely because records have been subpoenaed by and transferred to the state attorney's office.

However, the exemption for active criminal investigative information may not be subverted by making a public records request for all public records gathered by a law enforcement agency in the course of an ongoing investigation; to permit such requests would negate the purpose of the exemption. AGO 01-75.

In addition, a request of a law enforcement agency to inspect or copy a public record that is in the custody of another agency, the custodian's response to the request, and any information that would identify the public record that was requested by the law enforcement agency or provided by the custodian are exempt from disclosure requirements, during the period in which the information constitutes active criminal investigative or intelligence information. Section 119.071(2)(c)2., F.S. The law enforcement agency must give notice to the custodial agency when the criminal intelligence information or criminal investigative information is no longer active, so that the custodian's response to the request and information that would identify the public record requested are available to the public. *Id*.

Thus, while agency records are not exempt merely because they have been submitted to FDLE, s. 119.071(2)(c)2., F.S., exempts FDLE's request to inspect or copy records, as well as the agency's response, or any information that would identify the public record that was requested by FDLE or provided by the agency during the period in which the information constitutes criminal intelligence

or criminal investigative information that is active. AGO 06-04. Thus, while a request may be made for the agency's records, such a request may not be phrased, or responded to, in terms of a request for the specific documents asked for and received by FDLE during the course of any active criminal investigation. *Id*.

j. Is an entire report exempt if it contains some active criminal investigative or intelligence information?

The fact that a crime or incident report may contain some active criminal investigative or intelligence information does not mean that the entire report is exempt from disclosure. Section 119.07(1)(b), F.S., requires the custodian of the document to delete only that portion of the record for which an exemption is asserted and to provide the remainder of the record for examination. *See, e.g.*, *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995), in which the court held that a city was authorized to withhold exempt active criminal investigative records but "must comply with the disclosure requirements of sections 119.07(2) [now s. 119.07(1)(b)] and 119.011(3)(c) by making partial disclosure of certain non-exempt information contained in the records including, *inter alia*, the date, time and location of the incident."

k. When is criminal investigative or intelligence information received from other states or the federal government exempt from disclosure?

Pursuant to s. 119.071(2)(b), F.S., criminal intelligence or investigative information received by a Florida criminal justice agency from a non-Florida criminal justice agency on a confidential or similarly restricted basis is exempt from disclosure. *See, State v. Wright*, 803 So. 2d 793 (Fla. 4th DCA 2001), *review denied*, 823 So. 2d 125 (Fla. 2002) (state not required to disclose criminal histories of civilian witnesses which it obtained from the Federal Bureau of Investigation). The purpose of this statute is to "encourage cooperation between non-state and state criminal justice agencies." *State v. Buenoano*, 707 So. 2d 714, 717 (Fla. 1998). Thus, confidential documents furnished to a state attorney by the federal government remained exempt from public inspection even though the documents inadvertently had been given to the defendant and placed in the court record in violation of the conditions of the federal loan agreement. *Id.*

l. Is criminal investigative or intelligence information received prior to January 25, 1979, exempt from disclosure?

Criminal intelligence or investigative information obtained by a criminal justice agency prior to January 25, 1979, is exempt from disclosure. Section 119.071(2)(a), F.S. *See, Satz v. Gore Newspapers Company*, 395 So. 2d 1274, 1275 (Fla. 4th DCA 1981) ("All criminal intelligence and criminal investigative information received by a criminal justice agency prior to January 25, 1979, is specifically exempt from the requirements of public disclosure.").

2. Autopsy records

a. Autopsy reports

Autopsy reports made by a district medical examiner pursuant to Ch. 406, F.S., are public records and are open to the public for inspection in the absence of an exemption. AGO 78-23. *Cf.*, *Church of Scientology Flag Service Org., Inc. v. Wood,* No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997) (physical specimens relating to an autopsy are not public records, although drafts and notes taken during an autopsy as well as laboratory reports and photographs are public records). *And see Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 777 (Fla. 4th DCA 1985), *review denied*, 488 So. 2d 67 (Fla. 1986), noting that a former statutory exemption precluding release of autopsy reports had been repealed.

Although autopsy reports are subject to Ch. 119, F.S., "[d]ocuments or records made confidential by statute do not lose such status upon receipt by the medical examiner." AGO 78-23. *See, Church of Scientology Flag Service Org., Inc. v. Wood*, *supra* (predeath medical records in the possession of the medical examiner are not subject to public inspection). In addition, statutory exemptions from disclosure, such as the exemption for active criminal investigative information, may also apply to portions of the autopsy report itself. AGO 78-23. *See*, *Williams v. City of Minneola,* 575 So. 2d 683 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991), noting the application of the active criminal investigative information exemption to information contained in autopsy records.

b. Autopsy photographs and recordings

Prior to the enactment of s. 406.135, F.S., autopsy photographs were subject to disclosure under the Public Records Act. *See, Williams v. City of Minneola*, *supra.*

However, s. 406.135(2), F.S., now provides that a photograph or video or audio recording of an autopsy held by a medical examiner is confidential and may not be released except as provided by court order or as otherwise authorized in the

exemption. *See,* AGOs 03-25 and 01-47, discussing circumstances under which autopsy photographs and recordings may be viewed or copied. *Cf., Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. 5th DCA 2002), *review denied,* 848 So. 2d 1153 (Fla. 2003) (upholding trial court finding that newspaper failed to establish good cause for release of autopsy photographs of race car driver). *Compare, Sarasota Herald-Tribune v. State,* 924 So. 2d 8, 14 (Fla. 2d DCA 2005), *review denied*, 918 So. 2d 293 (Fla. 2005), *cert. dismissed*, 126 S. Ct. 1139 (2006), in which the district court reversed a trial court order that had barred the media from viewing autopsy photographs that were admitted into evidence in open court during a murder trial; according to the appellate court, s. 406.135, F.S., "does not render these *court exhibits* confidential." (e.s.)

3. "Baker Act" reports

Part I, Ch. 394, F.S., is the "Baker Act," Florida's mental health act. The Baker Act provides for the voluntary or involuntary examination and treatment of mentally ill persons. Pursuant to s. 394.463(2)(a)2., F.S., a law enforcement officer must take a person who appears to meet the statutory criteria for involuntary examination into custody and deliver that person, or have that person delivered, to the nearest receiving facility for examination.

Section 394.463(2)(a)2., F.S., requires the officer to "execute a written report detailing the circumstances under which the person was taken into custody, and the report shall be made a part of the patient's clinical record." A patient's clinical record is confidential. Section 394.4615(1), F.S.

However, in AGO 93-51, the Attorney General's Office noted that a written incident or event report prepared after a specific crime has been committed which contains information given during the initial reporting of the crime, which is filed with the law enforcement agency as a record of that event and is not made a part of the patient's clinical record, is not confidential pursuant to Ch. 394, F.S. The opinion noted that the incident report in question was not the confidential law enforcement report required by s. 394.463(2)(a)2., *supra*, but was a separate written incident or event report prepared by a deputy sheriff for filing with the sheriff's office as an independent record of the deputy's actions.

4. Confessions

Section 119.071(2)(e), F.S., exempts from disclosure any information revealing the substance of a confession by a person

arrested until such time as the case is finally determined by adjudication, dismissal, or other final disposition. *See*, *Times Publishing Co. v. Patterson*, 451 So. 2d 888 (Fla. 2d DCA 1984) (trial court order permitting state attorney or defendant to designate affidavits, depositions or other papers which contained "statements or substance of statements" to be sealed was overbroad because the order was not limited to those statements revealing the substance of a "confession").

In AGO 84-33, the Attorney General's Office advised that only such portions of the complaint and arrest report in a criminal case file which reveal the "substance of a confession," *i.e.*, the material parts of a statement made by a person charged with the commission of a crime in which that person acknowledges guilt of the essential elements of the act or acts constituting the entire criminal offense, are exempt from public disclosure. *But see*, *Times Publishing Company v. State*, 827 So. 2d 1040, 1042 (Fla. 2d DCA 2002), in which the appellate court held that a trial judge's order sealing portions of records of police interviews with the defendant did not constitute a departure from the essential requirements of law; however, portions of the interview transcript and tape which did not "directly relate to [the defendant's] participation in the crimes" did not contain the substance of a confession pursuant to s. 119.071(2)(e), F.S., and must be released.

5. Confidential informants

Section 119.071(2)(f), F.S., exempts information disclosing the identity of confidential informants or sources. This exemption applies regardless of whether the informants or sources are still active or may have, through other sources, been identified as such. *Christy v. Palm Beach County Sheriff's Office,* 698 So. 2d 1365, 1368 (Fla. 4th DCA 1997); and *Salcines v. Tampa Television*, 454 So. 2d 639 (Fla. 2d DCA 1984). *And see State v. Natson,* 661 So. 2d 926 (Fla. 4th DCA 1995) (private citizen who provided police with tip information which led to defendant's arrest may be afforded confidential informant status). *Cf., Doe v. State*, 901 So. 2d 881 (Fla. 4th DCA 2005) (where citizen provided information to state attorney's office which led to a criminal investigation, and he was justified in inferring or had a reasonable expectation that he would be treated as a confidential source, the citizen is entitled to have his identifying information redacted from the closed file, even though there was no express assurance of confidentiality by the state attorney's office).

However, in *Ocala Star Banner Corporation v. McGhee*, 643 So. 2d 1196 (Fla. 5th DCA 1994), the court held that a police

department should not have refused to release an entire police report on the ground that the report contained some information identifying a confidential informant. According to the court, "[w]ithout much difficulty the name of the informant, [and] the sex of the informant (which might assist in determining the identity) . . . can be taken out of the report and the remainder turned over to [the newspaper]." *Id.* at 1197. *Accord, Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d at 1368.

Moreover, in *City of St. Petersburg v. Romine*, 719 So. 2d 19, 21 (Fla. 2d DCA 1998), the court ruled that information regarding payments to a confidential informant (who had been previously identified as a confidential informant during a criminal trial) is subject to disclosure as long as the records are sufficiently redacted to conceal the specific cases on which the informant worked. The court acknowledged that the Public Records Act may not be used in such a way as to obtain information that the Legislature has declared must be exempt from disclosure, but said that "this is not a situation where someone has alleged that they know or suspect the identity of a confidential informant and the production of records involving that informant would confirm the person's information or suspicion." *Id.*

6. Criminal history information

a. Criminal history information generally

Except where specific exemptions apply, criminal history information is a public record. AGO 77-125; Inf. Op. to Lymn, June 1, 1990. *And see* AGO 97-09 (a law enforcement agency may, without a request, release nonexempt information contained in its public records relating to sexual offenders; the agency's authority to release such information is not limited to those offenders who are designated as "sexual predators").

Section 943.046, F.S., states:

> (1) Any state or local law enforcement agency may release to the public any criminal history information and other information regarding a criminal offender, including, but not limited to, public notification by the agency of the information, unless the information is confidential and exempt [from disclosure]. However, this section does not contravene any provision of s. 943.053 which relates to the method by which an agency or individual may obtain a copy of an offender's criminal history record.
>
> (2) A state or local law enforcement agency and its personnel are immune from civil liability for the release of criminal history information or other

information regarding a criminal offender, as provided by this section.

Section 943.053(2), F.S., referenced in the above statute, provides restrictions on the dissemination of criminal history information obtained from *federal* criminal justice information systems and *other states* by stating that such information shall not be disseminated in a manner inconsistent with the laws, regulations, or rules of the originating agency. Thus, criminal history record information shared with a public school district by the Federal Bureau of Investigation retains its character as a federal record to which only limited access is provided by federal law and is not subject to public inspection. AGO 99-01.

Section 943.053(3), F.S., states that criminal history information compiled by the Criminal Justice Information Program of the Florida Department of Law Enforcement from *intrastate* sources shall be provided to law enforcement agencies free of charge and to persons in the private sector upon payment of fees as provided in the subsection.

b. Sealed and expunged records

Access to criminal history records which have been sealed or expunged by court order in accordance with s. 943.059 or s. 943.0585, F.S., is strictly limited. *See, e.g., Alvarez v. Reno,* 587 So. 2d 664 (Fla. 3d DCA 1991) (Goderich, J., specially concurring) (state attorney report and any other information revealing the existence or contents of sealed records is not a public record and cannot, under any circumstances, be disclosed to the public).

A law enforcement agency that has been ordered to expunge criminal history information or records should physically destroy or obliterate information consisting of identifiable descriptions and notations of arrest, detentions, indictments, informations, or other formal criminal charges and the disposition of those charges. AGO 02-68. However, criminal intelligence information and criminal investigative information do not fall within the purview of s. 943.0585, F.S. *Id. And see* AGO 00-16 (only those records maintained to formalize the petitioner's arrest, detention, indictment, information, or other formal criminal charge and the disposition thereof would be subject to expungement under s. 943.0585).

There are exceptions allowing disclosure of information relating to the existence of an expunged criminal history record to specified entities for their respective licensing and employment purposes, and to criminal justice agencies for their respective criminal justice purposes. Section 943.0585(4), F.S.

Similar provisions exist relative to disclosure of sealed criminal history records. Section 943.059(4), F.S. A records custodian who has received information relating to the existence of an expunged or sealed criminal history record is prohibited from disclosing the existence of such record. AGO 94-49.

7. Emergency "911" voice recordings

Section 365.171(15), F.S., provides that any record, recording, or information, or portions thereof, obtained by a public agency for the purpose of providing services in an emergency which reveals the name, address, or telephone number or personal information about, or information which may identify any person requesting emergency service or reporting an emergency by dialing "911" is confidential and exempt from s. 119.07(1), F.S. The exemption applies only to the name, address, telephone number or personal information about or information which may identify any person requesting emergency services or reporting an emergency while such information is in the custody of the public agency or public safety agency providing emergency services. *Id.*

A tape recording of a "911" call is a public record which is subject to disclosure after the deletion of the exempt information. AGO 93-60. If the "911" calls are received by a law enforcement agency and the county emergency management department, information which is determined by the law enforcement agency to constitute active criminal investigative information may also be deleted from the tape prior to public release. AGO 95-48. *See also,* Inf. Op. to Fernez, September 22, 1997 (while police department is not prohibited from entering into an agreement with the public to authorize access to its radio system, the department must maintain confidentiality of exempt personal information contained in "911" radio transmissions).

8. Fingerprint records

Biometric identification information is exempt from s. 119.07(1), F.S. Section 119.071(5)(g)1., F.S. The term "biometric identification information" means any record of friction ridge detail, fingerprints, palm prints, and footprints. *Id.*

9. Firearms records

Section 790.335(2), F.S., states that no governmental agency "or any other person, public or private, shall knowingly and willfully keep or cause to be kept any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of those firearms." Exceptions to the prohibition are

included in s. 790.335(3), F.S., and include, among other things, records of firearms used in committing a crime and records relating to any person who has been convicted of a crime. *See also*, s. 790.065(4), F.S., providing that specified information relating to a buyer or transferee of a firearm who is not prohibited by law from receipt or transfer of a firearm is confidential and may not be disclosed by the Department of Law Enforcement to any other person or agency. *Cf*., AGO 04-52 (prohibition against maintaining list of firearms and firearms owners not applicable to paper pawn transaction tickets).

Personal identifying information of an individual who has applied for or received a license to carry a concealed weapon or firearm pursuant to s. 790.06, F.S., held by the Department of Agriculture and Consumer Services is confidential and exempt from public disclosure requirements. Section 790.0601(1), F.S. Such information shall be disclosed with the express written consent of the applicant or licensee or his or her legally authorized representative, by court order upon a showing of good cause, or upon request by a law enforcement agency in connection with the performance of lawful duties. Section 790.0601(2), F.S.

10. Juvenile offender records

a. Confidentiality

Juvenile offender records traditionally have been considered confidential and treated differently from other records in the criminal justice system. With limited exceptions, s. 985.04(1), F.S., provides, in relevant part, that:

> *all information obtained under this chapter* in the discharge of official duty by any judge, any employee of the court, any authorized agent of the department [of Juvenile Justice], the Parole Commission, the Department of Corrections, the juvenile justice circuit boards, any law enforcement agent, or any licensed professional or licensed community agency representative participating in the assessment or treatment of a juvenile *is confidential and may be disclosed only to* the authorized personnel of the court, the department and its designees, the Department of Corrections, the Parole Commission, law enforcement agents, school superintendents and their designees, any licensed professional or licensed community agency representative participating in the assessment or treatment of a juvenile, and others entitled under this chapter

to receive that information, or upon order of the court. (e.s.)

Similarly, s. 985.04(7)(a), F.S., limits access to records in the custody of the Department of Juvenile Justice. With the exception of specified persons and agencies, juvenile records in the custody of that agency "may be inspected only upon order of the Secretary of Juvenile Justice or his or her authorized agent by persons who have sufficient reason and upon such conditions for their use and disposition as the secretary or his or her authorized agent deems proper." *And see* s. 985.045(2), F.S., providing, with limited exceptions, for confidentiality of juvenile court records. *Cf*., s. 943.053(3), F.S., governing release of "[c]riminal history information, including information relating to minors" compiled by the Florida Department of Law Enforcement).

Thus, as a general rule, access to records of juvenile offenders is limited. *See*, *e.g.,* Inf. Op. to Galbraith, April 8, 1992 (city's risk manager and attorney representing city in unrelated civil lawsuit not among those authorized to have access); and Inf. Op. to Wierzbicki, April 7, 1992 (domestic violence center not among those authorized to receive juvenile information).

However, the subject of juvenile offense records may authorize access to such records to others (such as a potential employer) by means of a release. AGO 96-65. And, juvenile confidentiality requirements do not apply to court records of a case in which a juvenile is prosecuted as an adult, regardless of the sanctions ultimately imposed in the case. AGO 97-28. However, if a juvenile prosecuted as an adult is transferred to serve his or her sentence in the custody of the Department of Juvenile Justice, the department's records relating to that juvenile are not open to public inspection. *New York Times Company v. Florida Department of Juvenile Justice*, No. 03-46-CA (Fla. 2d Cir. Ct. March 20, 2003). *See*, s. 985.04(7)(a), F.S., providing confidentiality for records in the custody of the department regarding children.

Confidential photographs of juveniles taken in accordance with s. 985.11, F.S, "may be shown by a law enforcement officer to any victim or witness of a crime for the purpose of identifying the person who committed such crime." Section 985.11(1)(b), F.S. This statute authorizes a law enforcement officer to use photographs of juvenile offenders in a photographic lineup for the purpose of identifying the perpetrator of a crime, regardless of whether those juvenile offenders are suspects in the crime under investigation. AGO 96-80. *Cf., Barfield v. Orange County, Florida*, No. CI92-5913 (Fla. 9th Cir. Ct. August 4, 1992) (denying petitioner's request to inspect gang intelligence files compiled

by the sheriff's office).

b. Exceptions to confidentiality

(1) Child traffic violators

All records of child traffic violations shall be kept in the full name of the violator and shall be open to inspection and publication in the same manner as adult traffic violations. Section 985.11(3), F.S.

(2) Felony arrests and adult system transfers

Until October 1, 1994, law enforcement agencies generally could release only the name and address of juveniles 16 and older who had been charged with or convicted of certain crimes. In 1994, the juvenile confidentiality laws were modified to eliminate the age restriction and provide enhanced disclosure. Section 985.04(2), F.S., now provides:

> Notwithstanding any other provisions of this chapter, the name, photograph, address, and crime or arrest report of a child:
> (a) Taken into custody if the child has been taken into custody by a law enforcement officer for a violation of law which, if committed by an adult, would be a felony;
> (b) Found by a court to have committed three or more violations of law which, if committed by an adult, would be misdemeanors;
> (c) Transferred to the adult system under s. 985.557, indicted under s. 985.56, or waived under s. 985.556;
> (d) Taken into custody by a law enforcement officer for a violation of law subject to the provisions of s. 985.557(2)(b) or (d); or
> (e) Transferred to the adult system but sentenced to the juvenile system pursuant to s. 985.565
>
> shall not be considered confidential and exempt from . . . s. 119.07(1) solely because of the child's age.

Thus, a court ruled that a surveillance videotape which showed an altercation between children on a school bus was a student record and initially was exempt from disclosure pursuant to student confidentiality laws. *In the Interest of D.P., etc.*, No. 97-4001 (Fla. 18th Cir. Ct. November 6, 1997). However, some of the students were subsequently arrested on felony charges and the tape was shown to defense counsel. Because of this, the judge ordered that the tape be publicly released with the faces of the

non-charged students and the victims excised from view. *Id.*

The expanded disclosure provisions apply only to juvenile records created after October 1, 1994, the effective date of the amendments to the juvenile confidentiality laws. AGO 95-19. Confidential information on juveniles arrested prior to October 1, 1994, is available by court order upon a showing of good cause. *Id*. *Cf., In the Interest of Gay, etc.,* Petition No. 94-8481 (Fla. 6th Cir. Ct. Juv. Div. December 30, 1994), allowing a newspaper to view "the entire juvenile court files," with the exception of psychological reports, relating to juveniles facing felony charges.

(3) Mandatory notification to schools

Section 985.04(4)(b), F.S., provides that when the state attorney charges a juvenile with a felony or a delinquent act that would be a felony if committed by an adult, the state attorney must notify the superintendent of the juvenile's school that the juvenile has been charged with such felony or delinquent act. A similar directive applies to a law enforcement agency that takes a juvenile into custody for an offense that would have been a felony if committed by an adult, or a crime of violence. Section 985.04(4)(a), F.S.

In addition, s. 1006.08(2), F.S., requires the court, within 48 hours of the finding, to notify the appropriate school superintendent of the name and address of a student found to have committed a delinquent act, or who has had an adjudication of a delinquent act withheld which, if committed by an adult, would be a felony, or the name and address of any student found guilty of a felony. *And see* s. 985.04(4)(c), F.S., requiring the Department of Juvenile Justice to disclose to the school superintendent the presence of a juvenile sexual offender in the care and custody or under the jurisdiction and supervision of the department.

(4) Victim access

Section 985.036(1), F.S., allows the victim, the victim's parent or guardian, their lawful representatives, and, in a homicide case, the next of kin, to have access to information and proceedings in a juvenile case, provided that such rights do not interfere with the constitutional rights of the juvenile offender. Those entitled to access "may not reveal to any outside party any confidential information obtained under this subsection regarding a case involving a juvenile offense, except as is reasonably necessary to pursue legal remedies." *Id. And see* ss. 985.04(3) and 960.001(8), F.S., authorizing similar disclosures to victims.

11. Law enforcement personnel records

In the absence of an express legislative exemption, law enforcement personnel records are open to inspection just like those of other public employees. *See*, *Tribune Company v. Cannella*, 438 So. 2d 516, 524 (Fla. 2d DCA 1983), *quashed on other grounds*, 458 So. 2d 1075 (Fla. 1984), *appeal dismissed sub nom.*, *Deperte v. Tribune Company*, 105 S.Ct. 2315 (1985) (law enforcement personnel records compiled and maintained by the employing agency "can never constitute criminal investigative or intelligence information within the meaning of the Public Records Act even if subpoenaed by another law enforcement agency at some point after their original compilation by the employing agency"). However, there are some exemptions which apply specifically to law enforcement personnel records.

a. Complaints filed against law enforcement officers

(1) Scope of exemption and duration of confidentiality

Section 112.533(2)(a), F.S., provides that complaints filed against law enforcement officers and correctional officers, and all information obtained pursuant to the agency's investigation of the complaint, are confidential *until* the investigation is no longer active *or* until the agency head or his or her designee provides written notice to the officer who is the subject of the complaint that the agency has concluded the investigation with a finding to either proceed or not to proceed with disciplinary action or the filing of charges. *See also*, s. 112.531(1), F.S., which defines "law enforcement officer" as any person, other than a chief of police, who is employed full time by any municipality or the state or any political subdivision thereof and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state; and includes any person who is appointed by the sheriff as a deputy sheriff pursuant to s. 30.07, F.S.

Complaints filed with the employing agency by any person, whether within or outside the agency, are subject to the exemption. AGO 93-61. However, the complaint must be in writing in order for the confidentiality provisions to apply. *City of Delray Beach v. Barfield,* 579 So. 2d 315 (Fla. 4th DCA 1991).

Moreover, s. 112.533, F.S., applies to complaints and records obtained pursuant to the agency's investigation of the complaint; the statute does not transform otherwise public records (such as crime or incident reports) into confidential records simply because the actions which are described in the crime report later form the basis of a complaint filed pursuant to s. 112.533, F.S.

AGO 96-27. Thus, a circuit judge ordered a police department to provide the media with a copy of an unredacted incident report that identified a police officer involved in the shooting of an armed suspect. *Morris Publishing Group, LLC v. Thomason*, No. 16-2005-CA-7052-XXXX-MA (Fla. 4th Cir. Ct. October 14, 2004).

If the officer resigns prior to the agency's completion of its investigation, the exemption from disclosure provided by s. 112.533(2), F.S., no longer applies, even if the agency is still actively investigating the complaint. AGO 91-73. However, if the complaint has generated information which qualifies as active criminal investigative information, *i.e.,* information compiled by a criminal justice agency while conducting an ongoing criminal investigation of a specific act, such information would be exempt while the investigation is continuing with a good faith anticipation of securing an arrest or prosecution in the foreseeable future. *Id. See,* s. 112.533(2)(b), F.S., providing that the disclosure provisions do not apply to any public record [such as active criminal investigative information exempted in s. 119.071(2)(c), F.S.] which is exempt from disclosure pursuant to Ch. 119, F.S.

The exemption is of limited duration. Section 112.533(2), F.S., establishes that the complaint and all information gathered in the investigation of that complaint generally become public records at the conclusion of the investigation or at such time as the investigation becomes inactive. AGO 95-59. Thus, a court ruled that the exemption ended once the sheriff's office provided the accused deputy with a letter stating that the investigation had been completed, the allegations had been sustained, and that the deputy would be notified of the disciplinary action to be taken. *Neumann v. Palm Beach County Police Benevolent Association*, 763 So. 2d 1181 (Fla. 4th DCA 2000).

However, the mere fact that written notice of intervening actions is provided to the officer under investigation does not signal the end of the investigation nor does such notice make this information public prior to the conclusion of the investigation. AGO 95-59. Similarly, the exemption remains in effect if an agency schedules a pre-disciplinary determination meeting with an officer to hear and evaluate the officer's side of the case because "[d]iscipline is not an accepted fact at this point." *Palm Beach County Police Benevolent Association v. Neumann,* 796 So. 2d 1278, 1280 (Fla. 4th DCA 2001).

Moreover, notwithstanding the provisions of s. 112.533(2), F.S., if an officer is subject to disciplinary action consisting of suspension with loss of pay, demotion, or dismissal, the officer shall, upon request, be provided with a complete copy of the investigative report and supporting documents and be given the

opportunity to address the findings in the report with the employing agency prior to the imposition of such disciplinary action. Section 112.532(4)(b), F.S. "The contents of the complaint and investigation shall remain confidential until such time as the employing law enforcement agency makes a final determination whether or not to issue a notice of disciplinary action consisting of suspension with loss of pay, demotion, or dismissal." *Id*.

A complaint is presumed to be inactive, and hence subject to disclosure, if no finding is made within 45 days after the complaint is filed. Section 112.533(2)(b), F.S. *See, City of Delray Beach v. Barfield*, 579 So. 2d at 318 (trial court's finding that complaint was inactive, despite contrary testimony of law enforcement officers conducting the investigation, comes to appellate court "clothed with its own presumption of correctness--especially, as here, where there is other record evidence which sustains it").

(2) Law enforcement officer's access

Section 112.533(2)(a), F.S., states that the confidential nature of the complaint does not preclude the officer who is the subject of the complaint, along with legal counsel or any other representative of his or her choice, from reviewing the complaint and all statements, regardless of form, made by the complainant and witnesses immediately prior to the beginning of the investigative interview. If a witness is incarcerated in a correctional facility and may be under the supervision of, or have contact with, the officer under investigation, only the names and statements of the complainant and nonincarcerated witnesses may be reviewed by the officer. *Id.*

Thus, the officer who is the subject of the complaint may have access to confidential information prior to the time that such information becomes available for public inspection. AGO 96-27. However, s. 112.533(2)(b) F.S., qualifies the officer's right of access by stating that the disclosure provisions do not apply to any record that is exempt from disclosure under Ch. 119, F.S., such as active criminal investigative information.

The limited access to the complaint and witness statements provided by s. 112.533(2)(a), F.S., does not restrict the officer's (or the public's) access to otherwise public records, such as incident reports because "[t]here is no indication in section 112.533 . . . that the Legislature intended to make public records that are open to public inspection and copying unavailable to a law enforcement officer who is the subject of a complaint under investigation by a law enforcement agency." AGO 96-27.

Moreover, notwithstanding the provisions of s. 112.533(2), F.S., if an officer is subject to disciplinary action consisting of suspension with loss of pay, demotion, or dismissal, the officer shall, upon request, be provided with a complete copy of the investigative report and supporting documents and be given the opportunity to address the findings in the report with the employing agency prior to the imposition of such disciplinary action. Section 112.532(4)(b), F.S. "The contents of the complaint and investigation shall remain confidential until such time as the employing law enforcement agency makes a final determination whether or not to issue a notice of disciplinary action consisting of suspension with loss of pay, demotion, or dismissal." *Id*.

(3) Limitations on disclosure

Section 112.533(2)(b), F.S., states that the inspection provisions in that subsection do not apply to any public record which is exempt from public disclosure under Ch. 119, F.S. For example, active criminal investigative or intelligence information which is exempt pursuant to s. 119.071(2)(c), F.S., continues to remain exempt notwithstanding the disclosure provisions set forth in s. 112.533(2)(a), F.S. *Palm Beach County Police Benevolent Association v. Neumann*, 796 So. 2d 1278 (Fla. 4th DCA 2001). *And see* AGO 91-73. Thus, in such cases, the information would be subject to disclosure when the criminal investigative information exemption ends, rather than as provided in s. 112.533(2), F.S. *And see City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994), *review denied*, 651 So. 2d 1192 (Fla. 1995) (exempt active criminal investigative information may be shared with another criminal justice agency for use in a simultaneous internal affairs investigation and retain its protected status).

Similarly, information which would reveal the identity of the victim of child abuse or the victim of a sexual offense is not subject to disclosure since that information is exempt pursuant to s. 119.071(2)(h), F.S. *Palm Beach County Police Benevolent Association v. Neumann*, *supra.*

However, the state attorney's records of a *closed* criminal investigation are not made confidential by s. 112.533, F.S., even though an internal investigation conducted by the police department remains pending concerning the same complaint. AGO 00-66. *Cf.,* AGO 96-05, noting that a police report of an agency's criminal investigation of a police officer is a public record in the hands of the police department after the investigation is over regardless of whether a copy of the report is forwarded to the Criminal Justice Standards and Training Commission or to the Commission on Ethics.

(4) Unauthorized disclosure penalties

Section 112.533(4), F.S., makes it a first degree misdemeanor for any person who is a participant in an internal investigation to willfully disclose any information obtained pursuant to the agency's investigation before such information becomes a public record. However, the subsection "does not limit a law enforcement or correctional officer's ability to gain access to information under paragraph (2)(a)." Section 112.533(4), F.S. In addition, a sheriff, police chief or other head of a law enforcement agency, or his or her designee, may acknowledge the existence of a complaint, and the fact that an investigation is underway. *Id.*

The Attorney General's Office has issued several advisory opinions interpreting this statute. *See, e.g.*, AGO 03-60 (while public disclosure of information obtained pursuant to an internal investigation prior to its becoming a public record is prohibited, s. 112.533[4], F.S., "would not preclude intradepartmental communications among those participating in the investigation"); and AGO 96-18 (statute does not preclude a chief of police from discussing information obtained from an active internal investigation with his or her supervisory staff within the police department in carrying out the internal investigation). *Cf.,* AGO 97-62 (confidentiality requirements prevent the participation of a citizens' board in resolving a complaint made against a law enforcement officer until the officer's employing agency has made its initial findings). *But see, Cooper v. Dillon*, 403 F. 3d 1208 (11th Cir. 2005), in which the 11th Circuit Court of Appeals ruled that s. 112.533(4), F.S., was unconstitutional. In its 2005 decision, the Court of Appeals concluded that "[b]ecause the curtailment of First Amendment freedoms by Fla. Stat. ch. 112.533(4) is not supported by a compelling state interest, the statute fails to satisfy strict scrutiny and unconstitutionally abridges the rights to speak, publish, and petition government." *Cooper v. Dillon*, *supra*, at 1218-1219.

b. Home addresses, telephone numbers, etc.

Section 119.071(4)(d)1., F.S., contains a specific exemption for certain information relating to past and present law enforcement officers and their families, by excluding from public inspection:

> The home addresses, telephone numbers, social security numbers, and photographs of active or former law enforcement personnel, including correctional and correctional probation officers . . . ; the home addresses, telephone numbers, social security numbers, photographs, and places of employment of the spouses and children of such

> personnel; and the names and locations of schools and day care facilities attended by the children of such personnel . . . .

The same exemptions also apply to current or former state attorneys, statewide prosecutors, and U.S. attorneys, as well as to current and former assistant state attorneys, assistant statewide prosecutors, and assistant U.S. attorneys. Section 119.071(4)(d)1. and 3., F.S. *And see*, s. 119.071(4)(d)7., F.S. (applying exemption to certain employees of the Department of Juvenile Justice).

The purpose of the s. 119.071(4)(d) exemption is to protect the safety of law enforcement officers and their families by removing certain information relating to such individuals from the mandatory disclosure requirements of Ch. 119, F.S. AGO 90-50. Accordingly, a posting of the names, I.D. numbers and photographs of police officers in the hallway of the police department for public display would appear to be counter to the purpose of the exemption. *Id.*

The Attorney General's Office has advised that s. 119.071(4)(d)1., F.S., does not exempt from disclosure booking photographs of law enforcement and correctional officers who have been arrested, and who are not undercover personnel whose identity would otherwise be protected by s. 119.071(4)(c), F.S. AGO 94-90. However, if the officer has filed a written request for confidentiality as provided in former s. 119.07(3)(i)2., F.S. [*see now*, s. 119.071(4)(d)8., F.S.], the booking photograph may not be released. *Fraternal Order of Police, Consolidated Lodge 5-30, Inc. v. The Consolidated City of Jacksonville*, No. 2000-4718-CA (Fla. 4th Cir. Ct. December 21, 2001). *And see Sarasota Herald-Tribune Co. v. Sarasota County Sheriff's Office,* No. 96-1026-CA-01 (Fla. 12th Cir. Ct. March 13, 1996) (denying newspaper's request for booking photograph of sheriff's deputy who had filed a written request for confidentiality).

While s. 119.071(4)(d)1., F.S., exempts the home addresses, telephone numbers, social security numbers and photographs from the mandatory disclosure requirements of the Public Records Act, it does not prohibit the city from maintaining the names and addresses of its law enforcement officers. AGO 90-50. *See also*, Inf. Op. to Reese, April 25, 1989 (information from the city personnel files which reveals the home addresses of former law enforcement personnel may be disclosed to the State Attorney's office for the purpose of serving criminal witness subpoenas by mail pursuant to s. 48.031, F.S.). *And see* Inf. Op. to Laquidara, July 17, 2003, advising that the cellular telephone numbers of telephones provided by the agency to law enforcement officers and used in performing law enforcement duties are not exempt from

disclosure under this exemption.

An agency that is the custodian of personal information specified in s. 119.071(4)(d), F.S., but is not the past or present employer of the officer or employee, must maintain the exempt status of the information only if the officer or employee or the employing agency of the designated employee submits a written request for maintenance of the exemption to the custodial agency. Section 119.071(4)(d)8., F.S. *See*, AGO 04-18 (applying exemption when requested to petitions and campaign papers filed with supervisor of elections), and AGO 97-67 (Official Records maintained by clerk of court). A property appraiser is precluded from making technology available to the public that would enable a user to view a map on the Internet showing the physical location of a law enforcement officer's home, even though the map does not contain the actual home address of the officer, if the property appraiser has received a written confidentiality request from the officer. AGO 04-20.

Section 119.071(4)(d), F.S., does not contain a definition of "law enforcement personnel." Thus, the scope of the exemption is not clear. The Attorney General's Office has noted this problem and has recommended that the Legislature clarify the statute. Inf. Op. to Morgan, September 28, 1992. In the interim, it has been informally suggested that agencies, faced with implementing the provisions of s. 119.071(4)(d), F.S., consider utilizing the definition of "law enforcement officer" contained in s. 784.07, F.S. *Id*. This statute, which imposes increased penalties for assault and battery on law enforcement officers, has a purpose similar to that of s. 119.071(4)(d), in that it seeks to protect the safety of such individuals. "Law enforcement officer" is defined for purposes of s. 784.07, F.S., to include:

> [A] law enforcement officer, a correctional officer, a correctional probation officer, a part-time law enforcement officer, a part-time correctional officer, an auxiliary law enforcement officer, and an auxiliary correctional officer, as those terms are respectively defined in s. 943.10, and any county probation officer; employee or agent of the Department of Corrections who supervises or provides services to inmates; officer of the Parole Commission; and law enforcement personnel of the Fish and Wildlife Conservation Commission, the Department of Environmental Protection, or the Department of Law Enforcement.

c. Polygraph records

The Attorney General's Office is not aware of any statutory provision barring access to otherwise public records, simply because the records are in the form of polygraph charts. *See, e.g., Wisner v. City of Tampa Police Department,* 601 So. 2d 296 (Fla. 2d DCA 1992) (polygraph materials resulting from polygraph examination that citizen took in connection with a closed internal affairs investigation were public records); and *Downs v. Austin*, 522 So. 2d 931 (Fla. 1st DCA 1988) (because state had already publicly disclosed the results of polygraph tests administered to defendant's accomplice, the tests were not exempt criminal investigative or intelligence information and were subject to disclosure to the defendant).

However, a circuit court has noted that the exemption from disclosure found in s. 119.071(1)(a), F.S., for employment examination questions and answers could exempt some information contained in pre-employment polygraph records. *See*, *Gillum v. Times Publishing Company,* No. 91-2689-CA (Fla. 6th Cir. Ct. July 10, 1991) (newspaper entitled to access to employment polygraph records "to the extent such records consist of polygraph machine graph strips and examiners' test results, including the bottom portion of the machine graph denoted 'Findings and Comments' or similar designation;" however, agency could redact "any examinee's actual answers to questions or summaries thereof" pursuant to the exemption for employment examination questions and answer sheets that is now found at s. 119.071[1][a], F.S.).

d. Undercover personnel

Section 119.071(4)(c), F.S., provides that any information revealing undercover personnel of any criminal justice agency is exempt from public disclosure. *But see, Ocala Star Banner Corporation v. McGhee*, 643 So. 2d 1196 (Fla. 5th DCA 1994), in which the court held that a police department should not have refused to release an entire police report that contained some information that could lead to the identity of an undercover person, when, without much difficulty, the name or initials and identification numbers of the undercover officer and that officer's supervisor could be taken out of the report and the remainder turned over to the newspaper. *Id*. at 1197. *Accord, Christy v. Palm Beach County Sheriff's Office,* 698 So. 2d 1365 (Fla. 4th DCA 1997).

12. Motor vehicle records

a. Crash reports

Motor vehicle crash reports are confidential for a period of 60 days after the report is filed. Section 316.066(5)(a), F.S.

However, such reports may be made immediately available to the parties involved in the crash, their legal representatives, their insurance companies and agents, prosecutorial authorities, victims services programs, and certain print and broadcast media as described in the exemption. *Id.* The owner of a vehicle involved in a crash is among those authorized to receive a copy of the crash report immediately. AGO 01-59.

In addition, the statute provides that any local, state, or federal agency that is authorized to have access to crash reports by any provision of law shall be granted such access in the furtherance of the agency's statutory duties. Section 316.066(5)(c), F.S. *Cf*., AGO 06-11 (fire department that is requesting crash reports in order to seek reimbursement from the at-fault driver, does not fall within the scope of this provision authorizing immediate access to the reports).

"As a condition precedent to accessing a crash report within 60 days after the date the report is filed, a person must present a valid driver's license or other photographic identification, proof of status or identification that demonstrates his or her qualifications to access that information, and file a written sworn statement with the state or local agency in possession of the information stating that information from a crash report made confidential and exempt by this section will not be used for any commercial solicitation of accident victims, or knowingly disclosed to any third party for the purpose of such solicitation, during the period of time that the information remains confidential and exempt." Section 316.066(5)(d), F.S. Reports may be released without the sworn statement to third-party vendors under contract with one or more insurers, but only if the conditions set forth in the statute are stated in the contract. *Id*. Third-degree felony penalties are established for knowing unauthorized disclosure or use of confidential information in violation of this statute. *See,* s. 316.066(6)(b), (c), and (d), F.S., for more information.

b. Department of Highway Safety and Motor Vehicles records

Section 119.0712(2), F.S., provides, with specified exceptions, that personal information contained in a motor vehicle record that identifies the subject of that record is exempt from public disclosure requirements. *See*, Inf. Op. to Dickinson, November 15, 2005 (Department of Highway Safety and Motor Vehicles not authorized to release personal information from motor vehicle records for use in mass commercial solicitation of clients for ligation against motor vehicle dealers). The term "personal information" does not include information relating to vehicular crashes, driving violations, and driver status. Section 119.0712(2), F.S.

The term "motor vehicle record" is defined to mean any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by the Department of Highway Safety and Motor Vehicles. *Id*. Thus, the exemption applies only to personal information contained in motor vehicle records of the department and does not authorize a sheriff's office to exempt such personal information from its records. AGO 04-54. *And see* s. 316.066(5)(a), F.S., providing limitations on access to crash reports for a period of 60 days after the report is filed; and s. 322.142(4), F.S., restricting access to reproductions of color photographic or digital imaged driver's licenses.

13. Pawnbroker records

All records relating to pawnbroker transactions delivered to appropriate law enforcement officials pursuant s. 539.001, F.S., the Florida Pawnbroking Act, are confidential and exempt from disclosure and may be used only for official law enforcement purposes. Section 539.003, F.S. However, law enforcement officials are not prohibited from disclosing the name and address of the pawnbroker, the name and address of the conveying customer, or a description of the pawned property to the alleged owner of pawned property. *Id. And see* AGO 01-51. In addition, the statutory prohibition against maintaining a list of firearms and firearms owners is not applicable to paper pawn transaction tickets. AGO 04-52.

14. Prison and inmate records

In the absence of statutory exemption, prison and inmate records are subject to disclosure under the Public Records Act. *Cf*., *Williams v. State*, 741 So. 2d 1248 (Fla. 2d DCA 1999) (order imposing offender's habitual offender sentence and documents showing his qualifying convictions, subject to disclosure under Ch. 119). A discussion of some of the exemptions from disclosure follows; for a complete listing of exemption summaries, please refer to Appendix D and the Index.

Subject to limited exceptions, s. 945.10, F.S., states that the following records and information held by the Department of Corrections are confidential and exempt from public inspection: mental health, medical or substance abuse records of inmates; preplea, pretrial intervention, presentence or postsentence investigative records; information regarding a person in the federal witness protection program; confidential or exempt Parole Commission records; information which if released would jeopardize someone's safety; information concerning a victim's statement and identity; information which identifies an executioner; and records

that are otherwise confidential or exempt by law. *See, Bryan v. State*, 753 So. 2d 1244 (Fla. 2000), in which the Florida Supreme Court upheld the constitutionality of s. 945.10. *See also, Roberts v. Singletary,* No. 96-603 (Fla. 2d Cir. Ct. July 28, 1997) (portions of the Department of Corrections Execution Procedures Manual containing "highly sensitive security information" not subject to disclosure). *Cf.*, s. 951.27, F.S. (limited disclosure of infectious disease test results, including HIV testing pursuant to s. 775.0877, F.S., of inmates in county and municipal detention facilities).

The Public Records Act applies to a private corporation which has contracted to operate and maintain the county jail. *Times Publishing Company v. Corrections Corporation of America,* No. 91-429 CA 01 (Fla. 5th Cir. Ct. December 4, 1991), *per curiam affirmed,* 611 So. 2d 532 (Fla. 5th DCA 1993). *See also, Prison Health Services, Inc. v. Lakeland Ledger Publishing Company,* 718 So. 2d 204 (Fla. 2d DCA 1998), *review denied*, 727 So. 2d 909 (Fla. 1999) (records of private company under contract with sheriff to provide health care to jail inmates are subject to Ch. 119 just as if they were maintained by a public agency).

15. Resource inventories and emergency response plans

Section 119.071(2)(d), F.S., exempts "[a]ny comprehensive inventory of state and local law enforcement resources compiled pursuant to part I, chapter 23, and any comprehensive policies or plans compiled by a criminal justice agency pertaining to the mobilization, deployment, or tactical operations involved in responding to emergencies, as defined in s. 252.34(3) . . . ." *See, Timoney v. City of Miami Civilian Investigative Panel*, 917 So. 2d 885 (Fla. 3d DCA 2005), in which the court held that a city police department's Operational Plan prepared in response to intelligence reports warning of possible violence surrounding an economic summit remained exempt from disclosure after the summit ended. The court found that the city planned to use portions of the Plan for future events and the "language of [the exemption] leads us to believe that the legislature intended to keep such security information exempt after an immediate emergency passes." *Id*. at 887. *And see,* s. 119.071(3)(a)1., F.S., which includes "emergency evacuation plans" and "sheltering arrangements" within the definition of a "security system plan" that is confidential and exempt from public disclosure.

16. Security system information and blueprints

a. Security system information

Information relating to the security systems for any property

owned by or leased to the state or any of its political subdivisions is confidential and exempt from disclosure. Section 281.301, F.S. Exempt information includes all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to or revealing such security systems or information. *Id*. The exemption extends to information relating to or revealing the security systems for property owned or leased by the state or its political subdivisions, and also to security information concerning privately owned or leased property which is in the possession of an agency. AGOs 01-75 and 93-86. *See also*, s. 331.22, F.S. (airport security plans) and s. 311.13, F.S. (seaport security plans).

Section 119.071(3)(a), F.S., provides a similar exemption from disclosure for a security system plan that is held by an agency. However, the information may be disclosed to the property owner or leaseholder as well as to another state or federal agency to prevent, detect, or respond to an attempted or actual act of terrorism or for prosecution of such attempts or acts. *Id*.

The term "security system plan" includes: records relating directly to the physical security of the facility or revealing security systems; threat assessments conducted by an agency or private entity; threat response plans; emergency evacuation plans; sheltering arrangements; or security manuals. *Id. Cf.,* s. 381.95, F.S., providing an exemption for information identifying the name, location, pharmaceutical cache, contents, capacity, equipment, physical features, or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained, or regulated by the Department of Health as part of the state's plan of defense against terrorism; and s. 395.1056, F.S., providing an exemption for those portions of a comprehensive emergency management plan that address the response of a public or private hospital to an act of terrorism.

Sections 281.301 and 119.071(3)(a), F.S., prohibit public disclosure of the name and address of applicants for security system permits, of persons cited for violations of alarm ordinances, and of individuals who are the subject of law enforcement dispatch reports for verified or false alarms "because disclosure would imperil the safety of persons and property." *Critical Intervention Services, Inc. v. City of Clearwater,* 908 So. 2d 1195, 1197 (Fla. 2d DCA 2005). *Accord,* AGO 04-28.

b. Blueprints

Section 119.071(3)(b), F.S., exempts building plans, blueprints, schematic drawings, and diagrams of government

buildings. Exempt information may be disclosed to another governmental entity, to a licensed professional performing work on the building, or upon a showing of good cause to a court. *Id*. Exempt documents may also be released in order to comply with competitive bidding requirements. AGO 02-74. However, the entities or persons receiving such information must maintain its exempt status. *Id*. *And see* s. 119.071(3)(c), F.S. (exemption for blueprints of various attractions, retail, resort, office, and industrial complexes and developments when the documents are held by an agency).

17. Surveillance techniques, procedures or personnel

Information revealing surveillance techniques, procedures or personnel is exempt from public inspection pursuant to s. 119.071(2)(d), F.S.

18. Victim information

Although s. 119.071(2)(c), F.S., exempts active criminal investigative information from disclosure, the "name, sex, age, and address of . . . the victim of a crime, except as provided in s. 119.071(2)(h)," are specifically excluded from the definition of criminal investigative or intelligence information. *See*, s. 119.011(3)(c)2., F.S. Accordingly, victim information is considered to be public record in the absence of statutory exemption. A discussion of the exemptions which apply to crime victims generally, and those which apply to the victims of certain crimes, follows. For a discussion of the exemptions that apply to records of juvenile offenders, please refer to s. F.10, *supra.*

a. Amount of stolen property

Pursuant to s. 119.071(2)(i), F.S., criminal intelligence or investigative information that reveals the personal assets of a crime victim, which were not involved in the crime, is exempt from disclosure. However, the Attorney General's Office has stated that this exemption does not apply to information relating to the amount of property stolen during the commission of a crime. AGO 82-30. Note, however, that s. 119.071(2)(j)1., F.S., provides that victims of certain crimes may file a written request to exempt information revealing their "personal assets."

b. Commercial solicitation of victims

Section 119.105, F.S., provides that police reports are public records except as otherwise made exempt or confidential. Every person is allowed to examine nonexempt or nonconfidential police reports. However, a person who comes into possession of exempt or

confidential information in police reports may not use that information for commercial solicitation of the victims or relatives of the victims and may not knowingly disclose such information to a third party for the purpose of such solicitation during the period of time that information remains exempt or confidential. *Id*. The statute "does not prohibit the publication of such information to the general public by any news media legally entitled to possess that information or the use of such information for any other data collection or analysis purposes by those entitled to possess that information." *Id.* A willful and knowing violation of this statute is a third-degree felony. Section 119.10(2)(b), F.S. *Cf., Los Angeles Police Department v. United Reporting Publishing Corporation*, 120 S.Ct. 483 (1999) (California statute that imposes conditions on public access to addresses of arrestees is not facially unconstitutional; the law does not abridge anyone's right to engage in speech but simply regulates access to information in the hands of the police department).

By contrast, s. 316.066(5)(a), F.S., restricts access to crash reports required by that section for a period of 60 days after the report is filed. However, such reports may be made immediately available to the parties involved in the crash and other entities as set forth in the exemption. *Id*. For more information about access to crash reports, please refer to the discussion on that topic in s. F.12(a), *supra*, in this manual.

c. Documents regarding victims which are *received* by an agency

Section 119.071(2)(j)1., F.S., exempts from disclosure any document that reveals the identity, home or employment telephone number or address, or personal assets of the victim of a crime and identifies that person as the victim of a crime, if that document is *received* by an agency that regularly receives information from or concerning the victims of crime. However, this provision is limited to documents *received* by agencies which regularly receive information from or concerning victims of crime; it does not apply to records generated or made by these agencies. AGO 90-80. Accordingly, this exemption does not apply to police reports. *Id.* Additionally, the exemption does not apply to documents revealing the identity of a victim of crime which are contained in a court file not closed by court order. AGO 90-87.

Section 119.071(2)(j)1., F.S., also provides that "[a]ny state or federal agency that is authorized to have access to such documents by any provision of law shall be granted such access in the furtherance of such agency's statutory duties, notwithstanding this section." *See*, Inf. Op. to McCabe, November 27, 1995 (state attorney authorized to release materials received during an

investigation of a domestic violence incident to a police department for use in the department's internal affairs investigation).

d. Home or employment address, telephone number, assets

Victims of specified crimes listed in s. 119.071(2)(j)1., F.S., are authorized to file a written request for confidentiality of their addresses, telephone numbers and personal assets as follows:

> Any information not otherwise held confidential or exempt [from disclosure] which reveals the home or employment telephone number, home or employment address, or personal assets of a person who has been the victim of *sexual battery, aggravated child abuse, aggravated stalking, harassment, aggravated battery, or domestic violence* is exempt [from disclosure] *upon written request by the victim* which must include official verification that an applicable crime has occurred. Such information shall cease to be exempt 5 years after the receipt of the written request. (e.s.)

The preceding exemption is not limited to documents *received* by an agency, but exempts specified information in records--whether generated or received by--an agency. Thus, a victim of the enumerated crimes may file a written request and have his or her home or employment telephone number, home or employment address, or personal assets, exempted from the police report of the crime, provided that the request includes official verification that an applicable crime has occurred as provided in the statute. *Criminal Law Alert*, Office of the Attorney General, June 29, 1995. The exemption is limited to the victim's address, telephone number, or personal assets; it does not apply to the victim's identity. *City of Gainesville v. Gainesville Sun Publishing Company*, No. 96-3425-CA (Fla. 8th Cir. Ct. October 28, 1996).

The incident report or offense report for one of the listed crimes may constitute "official verification that an applicable crime has occurred." *Criminal Law Alert*, Office of the Attorney General, June 29, 1995. In addition, the requirement that the victim make a written request for confidentiality applies only to information not otherwise held confidential by law; thus, the exemption supplements, but does not replace, other confidentiality provisions applicable to crime victims. *Id.* The exemption applies to records created prior to, as well as after, the agency's receipt of the victim's written request for confidentiality. AGO 96-82.

There is no exception to the provisions of s. 119.071(2)(j)1., F.S., for copies of the police report that are sent to domestic violence centers; thus, the victim's address and telephone number must be deleted from the copy of the police report that is sent to a domestic violence center pursuant to s. 741.29, F.S., if the victim has made a written request for confidentiality pursuant to s. 119.071(2)(j)1., F.S. AGO 02-50.

e. Information revealing the identity of victims of sex offenses and of child abuse

(1) Law enforcement and prosecution records

Section 119.071(2)(h)1., F.S., provides a comprehensive exemption from disclosure for information which would reveal the identity of victims of sexual offenses prohibited in Chs. 794, 800 and 827, F.S., or of child abuse as proscribed in Ch. 827, F.S. The exemption includes the "photograph, name, address, or other fact or information" which would reveal the identity of the victim of these crimes. The exemption applies to "any criminal intelligence information or criminal investigative information or other criminal record, including those portions of court records and court proceedings," which may reveal the victim's identity. *Id.*

In addition, the photograph, videotape, or image of any part of the body of a victim of a sexual offense prohibited under Chs. 794, 800, or 827, F.S., is confidential and exempt, regardless of whether the photograph, videotape, or image identifies the victim. Section 119.071(2)(h)2., F.S.

Section 119.071(2)(j)2., F.S., provides that identifying information in a videotaped statement of a minor who is alleged to be or who is a victim of a sexual offense prohibited in the cited laws which reveals the minor's identity, including, but not limited to, the minor's face; the minor's home, school, church, or employment telephone number; the minor's home, school, church, or employment address; the name of the minor's school, church, or place of employment; or the personal assets of the minor; and which identifies the minor as a victim, held by a law enforcement agency, is confidential. Access shall be provided, however, to authorized governmental agencies when necessary to the furtherance of the agency's duties. *Id*.

Thus, information revealing the identity of victims of child abuse or sexual battery must be deleted from the copy of the report of domestic violence which is sent by a law enforcement agency to the nearest domestic violence center pursuant to s. 741.29(2), F.S. AGO 92-14. *And see Palm Beach County Police*

Benevolent Association v. Neumann, 796 So. 2d 1278 (Fla. 4th DCA 2001), applying exemption to information identifying a child abuse victim which was contained in files prepared as part of an internal investigation conducted in accordance with s. 112.533, F.S.

However, the identity of a child abuse victim who *died* from suspected abuse is not confidential. AGO 90-103.

A public employee or officer having access to the photograph, name, or address of a person alleged to be a victim of an offense described in Ch. 794 (sexual battery); Ch. 800 (lewdness, indecent exposure); s. 827.03 (child abuse); s. 827.04 (contributing to delinquency or dependency of a child); or s. 827.071 (sexual performance by a child) may not willfully and knowingly disclose it to a person not assisting in the investigation or prosecution of the alleged offense or to any person other than the defendant, the defendant's attorney, a person specified in a court order entered by the court having jurisdiction over the alleged offense, to organizations authorized to receive such information made exempt by s. 119.071(2)(h), F.S., or to a rape crisis center or sexual assault counselor, as defined in s. 90.5035(1)(b), F.S., who will be offering services to the victim. Section 794.024(1), F.S. A violation of this section constitutes a second degree misdemeanor. Section 794.024(2), F.S. *Cf.*, *State v. Globe Communications Corporation*, 648 So. 2d 110, 111 (Fla. 1994) (statute mandating criminal sanctions for "print[ing], publish[ing], or broadcast[ing] in any instrument of mass communication" information identifying a victim of a sexual offense, ruled unconstitutional).

An entity or individual who communicates to others, prior to open judicial proceedings, the name, address, or other specific identifying information concerning the victim of any sexual offense under Ch. 794 or Ch. 800 shall be liable to the victim for all damages reasonably necessary to compensate the victim for any injuries suffered as a result of such communication. Section 794.026(1), F.S. The victim, however, may not maintain a cause of action unless he or she is able to show that such communication was intentional and was done with reckless disregard for the highly offensive nature of the publication. Section 794.026(2), F.S. *Cf.*, *Cox Broadcasting Corp. v. Cohn*, 95 S.Ct. 1029 (1975); and *Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374 (Fla. 1989), *appeal dismissed*, 110 S.Ct. 296 (1989).

The Crime Victims' Services Office in the Attorney General's Office is authorized to receive confidential records from law enforcement and prosecutorial agencies. Section 960.05(2)(k), F.S. *And see* AGO 92-51 (city victim services division, as a governmental agency which is part of the city's criminal justice

system, may receive identifying information about victims of sex offenses, for the purpose of advising the victim of available services pursuant to s. 960.001, F.S., requiring distribution of victim support information).

(2) Court records

The Legislature intended to make the identity of a victim of a sexual offense confidential in court records. AGO 03-56. *See*, s. 119.07(6), F.S., stating that nothing in this section shall be construed to exempt from disclosure a public record which was made a part of a court file and not closed by court order except "information or records that may reveal the identity of a person who is a victim of a sexual offense"; and s. 119.071(2)(h)1., F.S., providing an exemption for information in criminal records, "including those portions of court records and court proceedings, which may reveal the identity of" a victim of a sexual offense.

Section 92.56, F.S., provides that court records, including witnesses' testimony, that reveal the photograph, name or address of a victim of an alleged offense described in Ch. 794, or Ch. 800, F.S., or an act of child abuse or sexual performance as described in Ch. 827, F.S., are confidential and exempt from disclosure and may not be made public if, upon a showing to the trial court with jurisdiction over the alleged offense, certain factors are demonstrated by the state or victim as set forth in the statute. Section 92.56(1), F.S. A person who willfully and knowingly violates the court order is subject to contempt proceedings. Section 92.56(6), F.S.

(3) Department of Children and Family Services abuse records

As discussed in s. J. of this manual, there are statutory exemptions set forth in Ch. 415, F.S., which relate to records of abuse of vulnerable adults. Similar provisions relating to child abuse records are found in Ch. 39, F.S. The Attorney General's Office has concluded that the confidentiality provisions in these laws, *i.e.*, ss. 415.107 and 39.202, F.S., apply to records of the Department of Children and Family Services and do not encompass a law enforcement agency's *arrest* report of persons charged with criminal child abuse, after the agency has deleted all information which would reveal the identity of the victim. *See*, AGO 93-54. *Accord*, Inf. Op. to O'Brien, January 18, 1994. *Cf.*, *Times Publishing Company v. A.J.*, 626 So. 2d 1314 (Fla. 1993), holding that a sheriff's incident report of alleged child abuse that was forwarded to the state child welfare department for investigation pursuant to Ch. 415, F.S. 1990 [*see now*, Part II, Ch. 39, F.S., entitled "Reporting Child Abuse"], should not be released. The Court noted that the department had found no probable cause and that child protection statutes accommodate privacy rights of those

involved in these cases "by providing that the supposed victims, their families, and the accused should not be subjected to public scrutiny at least during the initial stages of an investigation, before probable cause has been found." *Id.* at 1315.

Section 39.202(1), and (2)(b), F.S., authorizes criminal justice agencies to have access to confidential abuse, abandonment, or neglect records held by the Department of Children and Family Services and provides that the exemption from disclosure for department abuse records also applies to department records and information in the possession of the agencies granted access. *See*, Inf. Op. to Russell, October 24, 2001.

f. Relocated victim or witness information

Information held by a law enforcement agency, prosecutorial agency, or the Victim and Witness Protection Review Committee which discloses the identity or location of a victim or witness who has been identified or certified for protective or relocation services is confidential and exempt from disclosure. The identity and location of immediate family members of such victims or witnesses are also protected, as are relocation sites, techniques or procedures utilized or developed as a result of the victim and witness protective services. Section 914.27, F.S.

G. WHAT ARE THE STATUTORY EXEMPTIONS RELATING TO BIRTH AND DEATH RECORDS?

A number of exemptions exist for adoption, birth, and death records. For a complete listing, please refer to Appendix D and the Index.

1. Birth and adoption records

Except for birth records over 100 years old which are not under seal pursuant to court order, all birth records are considered to be confidential documents and exempt from public inspection; such records may be disclosed only as provided by law. Section 382.025(1), F.S.; AGO 74-70. *Cf.*, s. 383.51, F.S. (the identity of a parent who leaves a newborn infant at a hospital, emergency medical services station, or fire station in accordance with s. 383.50, F.S., is confidential).

Adoption records are confidential and may not be disclosed except as provided in s. 63.162, F.S. An unadopted individual, however, has the right to obtain his or her birth records which include the names of the individual's parents from the hospital in which he or she was born. *Atwell v. Sacred Heart Hospital of Pensacola*, 520 So. 2d 30 (Fla. 1988).

In the absence of court order issued for good cause shown, the name and identity of a birth parent, an adoptive parent, or an adoptee may not be disclosed unless the birth parent authorizes in writing the release of his or her name; the adoptee, if 18 or older, authorizes in writing the release of his or her name; or, if the adoptee is less than 18, written consent is obtained from an adoptive parent to disclose the adoptee's name; or the adoptive parent authorizes in writing the release of his or her name. Section 63.162(4), F.S. *And see* s. 63.165(1), F.S. (state adoption registry); and s. 63.0541, F.S. (putative father registry).

2. Death certificates

Information relating to cause of death in all death and fetal death records, and the parentage, marital status, and medical information of fetal death records are confidential and exempt from s. 119.07(1), F.S., except for health research purposes as approved by the Department of Health. Section 382.008(6), F.S. *Cf.*, *Yeste v. Miami Herald Publishing Co.*, 451 So. 2d 491 (Fla. 3d DCA 1984), *review denied*, 461 So. 2d 115 (Fla. 1984) (medical certification of the cause of death in the death certificate is confidential). *And see* s. 382.025(2)(a), F.S., providing for the issuance of a certified copy of a death or fetal death certificate, excluding the portion that is confidential pursuant to s. 382.008, F.S., and specifying those persons and governmental agencies authorized to receive a copy of a death certificate that includes the confidential portions. All portions of a death certificate shall cease to be exempt 50 years after the death. Section 382.025(2)(b), F.S.

By contrast, autopsy reports prepared by a district medical examiner pursuant to Ch. 406, F.S., have been held to be subject to public inspection. *See, Church of Scientology Flag Service Org., Inc. v. Wood,* No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997); and AGO 78-23. For more information about autopsy reports, please refer to s. F.2, of this Manual.

H. WHAT ARE THE STATUTORY EXEMPTIONS RELATING TO HOSPITAL AND MEDICAL RECORDS?

There are many exemptions for hospital and medical records. For a more complete listing, please refer to the exemption summaries contained in Appendix D or the Index.

1. Communicable or infectious disease reports

A number of exemptions exist for communicable or infectious

disease reports. *E.g.*, s. 381.0031(4), F.S. (information submitted in public health reports to Department of Health is confidential and is to be made public only when necessary to public health); s. 384.29, F.S. (sexually transmissible diseases); s. 466.041(3), F.S. (reports of hepatitis B carrier status filed by a dentist). *See, Ocala Star-Banner v. State*, 697 So. 2d 1317 (Fla. 5th DCA 1997) (upholding court order sealing portions of a battery prosecution case file pertaining to transmission of sexually transmissible diseases to victims due to s. 384.29, F.S., confidentiality requirements). However, notwithstanding any other provision of law to the contrary, the Department of Health, the Department of Children and Family Services, and the Agency for Persons with Disabilities may share confidential information on any individual who is or has been the subject of a program within the jurisdiction of each agency. Sections 381.0022 and 402.115, F.S. The shared information remains confidential or exempt as provided by law. *Id*. *See*, AGO 98-52.

Results of screenings for sexually transmissible diseases conducted by the Department of Health in accordance with s. 384.287, F.S., may be released only to those persons specified in the exemption. Section 384.287(5), F.S. A person who receives the results of a test pursuant to this section, which results disclose human immunodeficiency virus (HIV) infection and are otherwise confidential pursuant to law, shall maintain the confidentiality of the information received and the identity of the person tested as required by s. 381.004, F.S.; violation of this subsection is a first degree misdemeanor. Section 384.287(6), F.S.

Notification to an emergency medical technician, paramedic or other person that a patient they treated or transported has an infectious disease must be done in a manner to protect the confidentiality of patient information and shall not include the patient's name. Section 395.1025, F.S.

There are strict confidentiality requirements for test results for HIV infection; such information may be released only as expressly prescribed by statute. *See*, s. 381.004, F.S. Any person who violates the confidentiality provisions of s. 381.004, F.S., and s. 951.27, F.S., is guilty of a first degree misdemeanor. Section 381.004(6)(b), F.S. *And see* s. 381.004(6)(c), F.S., establishing felony penalties for disclosure in certain circumstances. Thus, information received by the clerk of court indicating that an individual has complied with an order to be tested for HIV and the attendant test results "would appear to be confidential and should be maintained in that status." AGO 00-54.

HIV tests performed on persons charged with certain offenses

may not be disclosed to any person other than the defendant, and upon request, the victim or the victim's legal guardian, or if the victim is a minor, the victim's parent or legal guardian, and to public health agencies pursuant to s. 775.0877, F.S., except as expressly authorized by law or court order. If the alleged offender is a juvenile, the test results shall also be disclosed to the parent or guardian. Section 960.003, F.S. *See also*, s. 951.27, F.S. (limited disclosure of infectious disease test results, including HIV testing pursuant to s. 775.0877, F.S., of inmates in county and municipal detention facilities, as provided in statute).

2. Emergency medical services

With limited exceptions, s. 401.30(4), F.S., provides, in relevant part, that "[r]ecords of emergency calls which contain patient examination or treatment information are confidential and exempt from the provisions of s. 119.07(1) and may not be disclosed without the consent of the person to whom they pertain." Such records may be released only in certain circumstances and only to the persons and entities specified in the statute. AGO 86-97. Thus, a city commissioner is not authorized to review records of an emergency call by the city's fire-rescue department when those records contain patient examination and treatment information, except with the consent of the patient. AGO 04-09. *See*, *Lee County v. State Farm Mutual Automobile Insurance Company*, 634 So. 2d 250 (Fla. 2d DCA 1994), upholding the county's right to require the patient's notarized signature on all release forms, to ensure that these confidential records are not improperly released.

However, s. 401.30(4), is not violated by the city attorney, or an attorney under contract to the city, and other city officials having access to the city fire-rescue department's records of emergency calls that contain patient information when such access is granted to such individuals in carrying out their official duties to advise and defend, or assess the liability of, the city in a possible or anticipated claim against the city arising out of the provision of such care. AGO 95-75.

Reports to the Department of Health from service providers that cover statistical data are public except that the names of patients and other patient-identifying information contained in such reports are confidential and exempt from s. 119.07(1), F.S. Section 401.30(3), F.S.

3. Hospital records

a. Public hospitals

Like other governmental agency records, public hospital records are subject to disclosure in the absence of a statutory exemption. AGO 72-59. For example, the court in *Tribune Company v. Hardee Memorial Hospital*, No. CA 91-370 (Fla. 10th Cir. Ct. August 19, 1991), held that a settlement agreement entered in a lawsuit against the public hospital alleging that the hospital had swapped babies was a public record. The court held that the agreement was subject to disclosure despite a confidentiality provision contained within the agreement and claims by the hospital that it constituted work product.

In recent years, however, an increasing number of exemptions have been created for hospital records. A discussion of exemptions follows:

(1) Employee evaluations and personal identification information

Section 395.3025(9), F.S., authorizes hospitals to prescribe the content of limited access employee records which are not available for disclosure for 5 years after such designation. Such records are limited to evaluations of employee performance, including records forming the basis for evaluation and subsequent actions. *See, Times Publishing Company v. Tampa General Hospital*, No. 93-03362 (Fla. 13th Cir. Ct. May 27, 1993) (s. 395.3025[9] exemption does not apply to list of terminated hospital employees; hospital ordered to allow newspaper to inspect list and personnel files of those persons named in list after "limited access" documents have been removed).

Home addresses, telephone numbers, and photographs of certain hospital employees, as well as specified personal information about the spouses and children of such employees, are also confidential. *See*, ss. 395.3025(10) and (11), F.S.

(2) Proprietary business records

The following public hospital records and information are confidential and exempt from disclosure: contracts for managed care arrangements under which the public hospital provides health care services and any documents directly relating to the negotiation, performance, and implementation of such contracts; certain strategic plans; trade secrets as defined in s. 688.002; documents, offers, and contracts (not including managed care contracts) that are the product of negotiations with nongovernmental entities for the payment of services when such negotiations concern services that are or may reasonably be expected to be provided by the hospital's competitors, provided that if the hospital's governing board is required to vote on the documents, this exemption expires 30 days prior to the date of the meeting when the vote is scheduled to take place. Section

395.3035(2), F.S. *Cf.*, AGO 92-56, concluding that the exemptions must be strictly construed.

(3) Quality assurance records

Quality assurance records are generally confidential and not subject to disclosure. *See*, *e.g.*, s. 394.907(7), F.S. (community mental health centers and facilities); s. 397.419(7) (substance abuse service providers); s. 401.425(5), F.S. (emergency medical services); s. 641.55(5)(c), F.S. (health maintenance organizations). *See also*, *e.g.*, s. 395.0193(7), F.S. (records of peer review panels, committees, governing bodies, or agent thereof, of hospitals or ambulatory surgical centers which relate to disciplinary proceedings against staff not subject to s. 119.07[1], F.S.); s. 395.0197(7), F.S. (adverse incident report submitted to the Agency for Health Care Administration shall not be available to the public); s. 395.4025(12), F.S. (patient care quality assurance reports made pursuant to enumerated statutes shall be held confidential by the Department of Health or its agent); and s. 400.119(1) and (2)(b), F.S. (specified incident reports and records of meetings of a risk management and quality assurance committee of a long-term care facility are confidential).

b. Private hospitals/private organizations operating public hospitals

A private organization leasing the facilities of a public hospital is acting on behalf of a public agency and thus constitutes an agency subject to open records requirements in the absence of statutory exemption. *See, Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So. 2d 373 (Fla. 1999). *See also*, s. B.2., of this Manual, discussing the applicability of the Public Records Act to private organizations providing services to public agencies.

Section 395.3036, F.S., provides that records of a private corporation that leases a public hospital or other public health care facility are confidential and exempt from disclosure when the public lessor complies with the public finance accountability provisions of s. 155.40(5), F.S., with respect to the transfer of any public funds to the private lessee and when the private lessee meets at least three of five criteria set forth in the exemption. *See, Indian River County Hospital District v. Indian River Memorial Hospital, Inc.,* 766 So. 2d 233 (Fla. 4th DCA 2000) (nonprofit corporation leasing hospital from hospital district is exempt from the open government laws). *And see Baker County Press, Inc. v. Baker County Medical Services, Inc.,* 870 So. 2d 189 (Fla. 1st DCA 2004), upholding the constitutionality of the

exemption. *Cf.*, *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 927 So. 2d 961 (Fla. 5th DCA 2006) (private corporation that *purchased* hospital from public hospital authority not subject to Public Records Act) and s. 155.40(8), F.S., describing and construing the term "complete sale" as applied to a purchase of a public hospital by a private entity.

4. Patient records

Patient records are generally protected from disclosure. For example, patient records in hospitals or ambulatory surgical centers licensed under Ch. 395, F.S., are confidential and may not be disclosed without the consent of the patient except as provided in the statute. Section 395.3025(4), (5), (7) and (8), F.S. *And see* s. 400.022(1)(m), F.S. (nursing home residents' medical and personal records); s. 400.611(3), F.S. (hospice)*;* and s. 383.32(3), F.S. (birth centers). *See, State v. Johnson*, 814 So. 2d 390 (Fla. 2002) (state attorney's subpoena power under s. 27.04, F.S., cannot override notice requirements of s. 395.3025(4)(d), F.S., which provides for disclosure of confidential patient records upon issuance of subpoena and upon proper notice to the patient or the patient's legal representative).

Patient medical records made by health care practitioners may not be furnished to any person other than the patient, his or her legal representative or other health care practitioners and providers involved in the patient's care and treatment without written authorization except as provided by ss. 440.13(4)(c) and 456.057, F.S. Section 456.057(7)(a), F.S.

The recipient of patient records, if other than the patient or the patient's representative, may use such information only for the purpose provided and may not disclose any information to any other person or entity, unless expressly permitted by the written consent of the patient. *See,* ss. 395.3025(7)(hospital patient records) and 456.057(12), F.S. (health care practitioner patient records). Thus, predeath medical records in the possession of the medical examiner are not subject to public inspection. *Church of Scientology Flag Service Org., Inc. v. Wood,* No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997).

Patient clinical records are also protected. *See*, *e.g.*, s. 393.13(4)(i)1., F.S. (central client records of persons with developmental disabilities); s. 394.4615(1), F.S. (clinical records of persons subject to "The Baker Act"); s. 397.501(7), F.S. (clients of substance abuse service providers); s. 916.107(8), F.S. (forensic clients). Such records maintain their confidentiality even when disclosed to another agency such as the clerk of the circuit court. AGO 91-10. *And see Sarasota Herald-*

Tribune v. Department of Children and Families, No. 2001-CA-002445 (Fla. 2d Cir. Ct. April 8, 2002) (confidentiality of clinical record is maintained even though Department of Children and Families may have filed portions of the records in court proceedings throughout the state; department has no authority to waive confidentiality of clinical records).

Except as provided in the exemption, all personal identifying information, contained in records relating to an individual's personal health or eligibility for health-related services held by the Department of Health is confidential and exempt. Section 119.0712(1), F.S. *And see* s. 119.0713(2), F.S. (personal identifying information contained in records relating to a person's health held by local governmental entities for purposes of determining eligibility for paratransit services under the Americans with Disabilities Act); and s. 408.7056(14), F.S. (subscriber-identifying information contained in records held by the subscriber assistance panel, Department of Financial Services, or state health care agency). *Cf.*, AGO 01-69 (documents submitted to the statewide provider and managed care organization claim dispute resolution program pursuant to s. 408.7057, F.S., found to be subject to disclosure after redaction of patient-identifying information).

I. WHAT ARE THE STATUTORY EXEMPTIONS RELATING TO EDUCATION RECORDS?

There are statutory exemptions which remove some education records from disclosure. A discussion of exemptions relating to education records follows; for a more complete listing of exemption summaries, please refer to Appendix D and the Index.

1. Direct-support organizations

Several statutes exempt information identifying donors to direct-support organizations associated with education agencies. The identity of donors to a direct-support organization of the Department of Education or of a district school board, and all information identifying such donors and prospective donors, are confidential and exempt from the provisions of s. 119.07(1), F.S.; that anonymity is required to be maintained in the auditor's report. *See*, s. 1001.24(4), F.S. (Department of Education direct-support organization); s. 1001.453(4), F.S. (district school board direct-support organization).

The identity of donors to a university or community college direct-support organization *who wish* to remain anonymous is protected by statute which also requires that such anonymity be maintained in the auditor's report. Sections 1004.28(5) and

1004.70(6), F.S. *And see* s. 1004.71(6), F.S. (statewide community college direct-support organization); s. 1009.983(4), F.S. (Florida Prepaid College Board).

In addition, other records of such organizations are made confidential by statute. All records of university direct-support organizations, other than the auditor's report, management letter, and any supplemental data requested by the State Board of Education, the Auditor General, board of trustees, and the Office of Program Policy Analysis and Government Accountability (OPPAGA) are confidential and exempt from s. 119.07(1), F.S. Section 1004.28(5), F.S. *And see* s. 1001.24(4), F.S. (records of a direct-support organization of the Department of Education). However, all records of a district school board direct-support organization, other than donor-identifying information, are expressly made subject to Ch. 119, F.S. *See*, s. 1001.453(4), F.S.

Records of community college 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. Section 1004.70(6), F.S. *See*, *Palm Beach Community College Foundation, Inc. v. WFTV*, 611 So. 2d 588 (Fla. 4th DCA 1993) (direct-support organization's expense records are public records subject to deletion of donor-identifying information). *Cf.,* AGO 05-27 (Sunshine Law applies to community college direct-support organization as defined in s. 1004.70, F.S.).

Information received by the direct-support organization of the Florida Prepaid College Program that is otherwise confidential or exempt shall retain such status and any sensitive, personal information regarding contract beneficiaries, including their identities, is exempt from disclosure. Section 1009.983(4), F.S.

2. Education personnel records

In the absence of statutory exemption, personnel records of educators are subject to public inspection. For example, the judiciary is not authorized to create an exemption for the home addresses and home telephone numbers of public school system personnel. *United Teachers of Dade v. School Board of Dade County*, No. 92-17803 (01) (Fla. 11th Cir. Ct. Nov. 30, 1992). However, there are a number of statutory exemptions which apply to school personnel records. *See, Florida Department of Education v. NYT Management Services, Inc.,* 895 So. 2d 1151 (Fla. 1st DCA 2005) (federal law does not authorize newspaper to obtain social security numbers in state teacher certification database).

a. Public school personnel

Complaints against a teacher or administrator and all information obtained by the Department of Education pursuant to its investigation of the complaint shall be exempt from s. 119.07(1), F.S., until the conclusion of the preliminary investigation, until such time as the investigation ceases to be active, or until such time as otherwise provided by s. 1012.798(6), F.S. Section 1012.796(4), F.S. The complaint and material assembled during the investigation, however, may be inspected and copied by the individual under investigation or his designee after the investigation is concluded but prior to the determination of probable cause. *Id*. Information obtained by the recovery network program within the Department of Education from a treatment provider which relates to a person's impairment and participation in the program is confidential and exempt from s. 119.07(1), F.S. Section 1012.798(9), F.S.

Public school system employee personnel files, like those of other government employees, are generally open to public inspection, subject to certain exceptions as set forth in s. 1012.31(3), F.S. For example, complaints against public school system employees and material relating to the complaint are confidential until the preliminary investigation is either concluded or ceases to be active. Section 1012.31(3)(a)1., F.S. *See*, AGO 91-75 (exemption does not provide a basis for withholding documents compiled in a general investigation of school departments; exemption applies when a complaint against a district employee has been filed and an investigation of the complaint against that employee ensues). *Cf.*, *Johnson v. Deluz*, 875 So. 2d 1 (Fla. 4th DCA 2004) (student identifying information must be redacted from public report of investigation of school principal).

Employee evaluations prepared pursuant to cited statutes are confidential and exempt from disclosure until the end of the school year immediately following the school year during which the evaluation was made, provided that no evaluations made prior to July 1, 1983, shall be made public. Section 1012.31(3)(a)2., F.S. However, information obtained from evaluation forms circulated by the local teacher's union to its members that is provided unsolicited to the superintendent is not exempt under this statute. AGO 94-94. And, written comments and performance memoranda prepared by individual school board members regarding an appointed superintendent are not exempt from disclosure. AGO 97-23.

Employee payroll deduction records and medical records are confidential and exempt. Section 1012.31(3)(a)4. and 5., F.S. However, the personnel file is open at all times to school board members, the superintendent, or the principal, or their respective

designees in the exercise of their duties, and to law enforcement personnel in the conduct of a lawful criminal investigation. Section 1012.31(3)(b) and (c), F.S.

No material derogatory to a public school employee shall be open to inspection until 10 days after the employee has been notified as prescribed by statute. Section 1012.31(3)(a)3., F.S. While s. 1012.31(1)(b), F.S., prohibits placing anonymous letters and material in an employee's personnel file, the statute does not prevent a school board from investigating the allegations contained in an anonymous letter nor does it permit the school board to destroy the anonymous material absent compliance with statutory restrictions on destruction of public records. AGO 87-48.

Criminal history record information shared with a public school district pursuant to s. 231.02, F.S., [now s. 1012.32, F.S.] by the Federal Bureau of Investigation retains its character as a federal record to which only limited access is provided by federal law and is not subject to public inspection. AGO 99-01. However, information developed by the school district from further inquiry into references in the federal criminal history record information is a public record which should be included in a school district employee's personnel file. *Id.*

b. University and community college personnel

Limited-access records maintained by a state university on its employees are confidential and exempt from s. 119.07(1), F.S., and may be released only upon authorization in writing from the employee or upon court order. Without such authorization, access to the records is limited to university personnel as specified in the statute. Section 1012.91, F.S.

Until July 1, 1995, state universities were authorized to prescribe the content and custody of limited-access records maintained on their employees, provided that such records were limited to information reflecting evaluations of employee performance. *See*, *Cantanese v. Ceros-Livingston*, 599 So. 2d 1021 (Fla. 4th DCA 1992), *review denied*, 613 So. 2d 2 (Fla. 1992) (copies of minutes and other documentation indicating votes on tenure or promotion applications of university employees are exempt); and *Tallahassee Democrat, Inc. v. Florida Board of Regents*, 314 So. 2d 164 (Fla. 1st DCA 1975) (investigative report about university athletic staff held confidential).

In 1995, however, the law was amended to specify that "limited-access records" are limited to: information reflecting academic evaluations of employee performance that are open to inspection only by the employee and university officials

responsible for supervision of the employee; records relating to an investigation of employee misconduct which records are confidential until the conclusion of the investigation or the investigation ceases to be active as defined in the law; and records maintained for the purpose of any disciplinary proceeding against the employee or records maintained for any grievance proceeding brought by an employee for enforcement of a collective bargaining agreement or contract until a final decision is made. For sexual harassment investigations, portions of the records that identify or reasonably could lead to the identification of the complainant or a witness also constitute limited-access records. Records which comprise the common core items contained in the State University System Student Assessment of Instruction instrument may not be prescribed as limited-access records. Section 1012.91(4), F.S. These provisions apply to records created after July 1, 1995. Section 1012.91(5), F.S.

Regarding community college personnel, s. 1012.81, F.S., states that rules of the State Board of Education shall prescribe the content and custody of limited-access records maintained by a community college on its employees. Such records "shall be limited to information reflecting evaluations of employee performance and shall be open to inspection only by the employee and by officials of the college who are responsible for supervision of the employee." The limited-access records are confidential and exempt and may be released only as authorized in the statute.

3. Examination materials

Testing materials are generally exempt from the disclosure provisions of s. 119.07(1), F.S. *See*, *e.g.*, s. 1008.345(8)(h), F.S. (tests and related documents developed to measure and diagnose student achievement of college-level communication and mathematics skills); s. 1012.56(8)(e), F.S. (state-developed educator certification examination, developmental materials and workpapers); s. 1012.56(8)(g), F.S. (examination instruments, including related developmental materials and workpapers, prepared or administered pursuant to s. 1012.56, F.S., relating to educator certification); and s. 1008.23, F.S. (examination and assessment instruments, including developmental materials and workpapers directly related to such instruments, which are prepared or administered pursuant to cited statutes). *Cf., Florida Department of Education v. Cooper*, 858 So. 2d 394 (Fla. 1st DCA 2003) (Florida Comprehensive Achievement Test [FCAT] test instruments, consisting of the test booklet and questions, as distinguished from the test score, are confidential and do not constitute "student records" which must be provided to student, parent, or guardian upon request).

4. Student records

Access to student records is limited by statute. Section 1002.22(3)(d), F.S., guarantees every student a right of privacy with respect to his or her educational records. Thus, formal orders entered in university student conduct code cases are confidential records and reports within the meaning of s. 1002.22(3)(d), F.S. [formerly s. 228.093(3)(d), F.S.] and may be released only as authorized in that statute. *Florida State University v. Hatton*, 672 So. 2d 576 (Fla. 1st DCA 1996). *See also, Tampa Television v. School Board of Hillsborough County,* 659 So. 2d 331 (Fla. 2d DCA 1995) (Parker, J., specially concurring) (videotapes made of students riding on school buses constitute an exempt "student records and reports" because such recordings could be utilized to produce "verified reports of serious or recurrent behavior patterns," which are included in the list of materials comprising a student record). *See,* s. 1002.22(2)(c), F.S. *Accord, WFTV, Inc. v. School Board of Seminole County,* 874 So. 2d 48 (Fla. 5th DCA 2004), *review denied,* 892 So. 2d 1015 (Fla. 2004) (media not entitled to copies of school bus surveillance videotapes and student discipline reports even if personal identifying information is redacted). *Cf.,* Inf. Op. to Stabins, June 12, 1997 (teacher grade books are not student "records" or "reports" for purposes of statutory provision, now found at s. 1002.22[3][a], F.S., establishing that a student or parent has a right to be shown any "record or report relating to such student").

Only those persons and entities enumerated in s. 1002.22(3)(d), F.S., are authorized to have access to student records. *Human Rights Advocacy Committee v. Lee County School Board,* 457 So. 2d 522 (Fla. 2d DCA 1984). *See also*, *F.A.T. v. State*, 690 So. 2d 1347 (Fla. 1st DCA 1997) (record of school absences protected from public disclosure); and AGO 85-50 (school records maintained on students participating in federal job training program are not subject to public inspection).

Student identifying information must also be redacted from other school district records. For example, student identifying information must be redacted from an investigative report regarding misconduct of a school principal; teachers referenced in the report are not entitled to an unredacted copy. *Johnson v. Deluz,* 875 So. 2d 1 (Fla. 4th DCA 2004). *And see*, AGO 06-21 (school district must redact student identifying information from litigation records relating to lawsuits brought by students against the district). *Cf.*, s. 119.071(5)(c), F.S., providing an exemption for identifying information relating to children participating in government-sponsored recreation programs or camps; disclosure authorized by court order upon a showing of good

cause).

However, a felony complaint/arrest affidavit created and maintained by school police officers for a juvenile or adult who is a student in the public schools is a law enforcement record subject to disclosure, provided that exempt information such as active criminal investigative information is deleted prior to release. AGO 01-64.

5. Charter schools

Section 1002.33(16)(b), F.S., provides that charter schools are subject to the Public Records Act and the Sunshine Law. The open government laws apply regardless of whether the charter school operates as a public or private entity. AGO 98-48. The records and meetings of a not-for-profit corporation granted charter school status are subject to the requirements of Ch. 119, F.S., and s. 286.011, F.S., even though the charter school has not yet opened its doors to students. AGO 01-23.

6. School readiness programs

Early learning coalitions (formerly known as school readiness coalitions) created pursuant to s. 411.01(5), F.S., are subject to the Public Records Act and the Sunshine Law. AGO 01-86. Individual records of children enrolled in school readiness programs provided under s. 411.01, held by an early learning coalition or the Agency for Workforce Innovation are confidential. Section 411.011, F.S. *And see* s. 1002.72, F.S. (records of children enrolled in the Voluntary Prekindergarten Education Program).

J. WHAT ARE THE STATUTORY EXEMPTIONS RELATING TO ABUSE RECORDS?

There are confidentiality statutes which apply to records of abuse of children or vulnerable adults which are received by the Department of Children and Family Services. A discussion of exemptions relating to abuse records follows; for a more complete listing of exemption summaries, please refer to Appendix D and the Index.

1. Records of abuse of children and vulnerable adults

a. Confidentiality of abuse records

Generally, reports of abused children or vulnerable adults which are received by the Department of Children and Family Services (DCF) are confidential and exempt from disclosure, except as expressly provided by statute. *See*, ss. 39.202(1) and

415.107(1), F.S. (abuse reports confidential).

Thus, a union representative may not attend that portion of an investigatory interview between the DCF inspector general and an employee requiring the discussion of information taken from a child abuse investigation that is confidential under s. 39.202, F.S. AGO 99-42. *And see* s. 383.412(1)(a), F.S., providing that information that reveals the identity of the surviving siblings, family members, or others living in the home of a deceased child who is the subject of review by, and which information is held by, the State Child Abuse Death Review Committee, or a local committee or panel is confidential and exempt from disclosure requirements.

All records and reports of the child protection team of the Department of Health are confidential and exempt, and shall not be disclosed, except, upon request, to the state attorney, law enforcement, DCF, and necessary professionals in furtherance of the treatment or additional evaluative needs of the child, by court order, or to health plan payors, limited to that information used for insurance reimbursement purposes. Section 39.202(6), F.S. *Cf., Records of the Children's Advocacy Center of Southwest Florida Relating to Michele Fontanez*, No. 06-DR-001850 (Fla. 20th Cir. Ct. June 16, 2006) (newspaper granted access to records of child protection team relating to child in care of DCF who died from injuries sustained from a sexual battery allegedly committed by her stepfather because "[a]ccess to the records will allow the public to fully evaluate the circumstances of [the child's] death").

Information related to the best interests of a child, as determined by a guardian ad litem (GAL), which is held by a GAL, including medical, mental health, substance abuse, child care, education, law enforcement, court, social services, and financial records; and any other information maintained by a GAL which is identified as confidential information under Ch. 39, F.S., is confidential and exempt and may not be disclosed except as provided in the exemption. Section 39.0132(4)(a)2., F.S. *And see* s. 744.7081, F.S., providing for confidentiality of records held by the Statewide Public Guardianship Office relating to the medical, financial, or mental health of vulnerable adults, persons with a developmental disability, or persons with a mental illness; s. 744.1076, F.S. (except as provided in the exemption, reports of a court monitor which relate to the medical condition, financial affairs, or mental health of a ward are confidential); and s. 744.708(2), F.S. (no disclosure of the personal or medical records of a ward of a public guardian shall be made, except as authorized by law).

b. Release of abuse records

Section 39.2021(1), F.S., authorizes any person or organization, including DCF, to petition the court to make public DCF records relating to its investigation into alleged abuse, neglect, exploitation or abandonment of a child. The court shall determine if good cause exists for public access to the records and, in making this determination, is required to balance the best interest of the child who is the focus of the investigation and the interests of the child's siblings, together with the privacy rights of other persons identified in the reports against the public interest. *Id.*

This statute establishes a "balancing process" which "requires the trial court to weigh the harm to the child against the benefit to the public that would potentially result from the disclosure of the records at issue." *In re Records of the Department of Children and Family Services*, 873 So. 2d 506, 513 (Fla. 2d DCA 2004). In order to perform this function, the trial court must conduct an *in camera* review because "[i]t is impossible to judge the potential impact of the disclosure of information contained in records without knowing what that information is." *Id.* at 514. *But see*, *Department of Health and Rehabilitative Services v. Gainesville Sun Publishing Company*, 582 So. 2d 725 (Fla. 1st DCA 1991), holding that the trial court was not required to hold a hearing before finding good cause to release the department's records relating to a child abuse investigation, where shortly after the department's investigation, the individual who had been investigated killed the victim, the victim's family, and himself.

In cases involving serious bodily injury to a child, DCF may petition the court for immediate public release of records pertaining to the protective investigation. Section 39.2021(2), F.S. The court has 24 hours to determine if good cause exists for public release of the records. If no action is taken by the court in that time, DCF may, subject to specified exceptions, release summary information including a confirmation that an investigation has been conducted concerning the victim, the dates and a brief description of procedural activities undertaken in the investigation, and information concerning judicial proceedings. *Id*.

Similar procedures are established in Ch. 415, F.S., for access to DCF records relating to investigations of alleged abuse, neglect, or exploitation of a vulnerable adult. *See*, s. 415.1071, F.S.

The petitioner seeking public access to the records must formally serve DCF with the petition. *Florida Department of Children and Families v. Sun-Sentinel,* 865 So. 2d 1278 (Fla. 2004). A "very narrow" exception to the home venue privilege

applies when a petition is filed seeking to make DCF records public. *See, Sun-Sentinel, supra* at 1289, adopting the exception in cases "where a party petitions the court for an order to gain access to public records, and where the records sought are by law confidential and cannot be made public without a determination by the court, pursuant to the petition, that good cause exists for public access."

Section 39.202(2)(o), F.S., provides that access to child abuse records shall be granted to any person in the event of the child's death due to abuse, abandonment, or neglect. However, any information identifying the person reporting abuse, abandonment, or neglect, or any information that is otherwise made confidential or exempt by law shall not be released. *Id*. Section 415.107(3)(l), F.S., provides for similar release of records in the event of the death of a vulnerable adult. *And see* s. 39.202(4), F.S., authorizing DCF and the investigating law enforcement agency to release certain identifying information to the public in order to help locate or protect a missing child under investigation or supervision of the department or its contracted service providers.

c. Licensure and quality assurance records

Records relating to licensure of foster homes, or assessing how the Department of Children and Family Services is carrying out its duties, including references to incidents of abuse, abandonment, or neglect, contained in such records, do not fall within the parameters of s. 39.202, F.S. AGO 01-54. Such reports are in the nature of quality assurance reports that do not substitute for the protective investigation of child abuse, abandonment, or neglect; to the extent that such incident reports reference an occurrence of abuse, abandonment, or neglect, identifying information that reveals the identity of the victim contained in the reference should be redacted. *Id*. *Cf.,* s. 409.175(16), F.S., providing an exemption for certain personal information about licensed foster parents, foster parent applicants, and their families. *And see Boyles v. Mid-Florida Television Corp.*, 431 So. 2d 627, 637 (Fla. 5th DCA 1983), *approved*, 467 So. 2d 282 (Fla. 1985) (summary report compiled during a licensing investigation of a residential facility for developmentally disabled persons, subject to disclosure pursuant to statute [now found at s. 393.067(9), F.S.] providing for public access to inspection reports of such facilities).

2. Domestic violence

Information about clients received by the Department of Children and Family Services or by authorized persons employed by

or volunteering services to a domestic violence center, through files, reports, inspection or otherwise, is confidential and exempt from disclosure except as provided by statute. Section 39.908, F.S. Information about the location of domestic violence centers and facilities is also confidential. *Id.*

A petitioner seeking an injunction for protection against domestic violence may furnish the petitioner's address to the court in a separate confidential filing for safety reasons. Section 741.30(3)(b), F.S. *See also,* s. 119.071(2)(j)1., F.S. (domestic violence victim may file written request, accompanied by official verification that a crime has occurred, to have his or her home or employment address, home or employment telephone number, or personal assets exempt from disclosure); and s. 787.03(6)(c), F.S. (current address and telephone number of the person taking the minor or incompetent person when fleeing from domestic violence and the current address and telephone number of the minor or incompetent person which are contained in the report made to a sheriff or state attorney under s. 787.03[6][b], F.S., are confidential and exempt from disclosure).

The addresses, telephone numbers, and social security numbers of participants in the Address Confidentiality Program for Victims of Domestic Violence (program) are exempt from disclosure, except as provided in the exemption. Section 741.465(1), F.S. A similar exemption is provided for the names, addresses, and telephone numbers of program participants contained in voter registration and voting records. Section 741.465(2), F.S.

Any information in a record created by a domestic violence fatality review team that reveals the identity of a domestic violence victim or the identity of the victim's children is confidential and exempt from disclosure. Section 741.3165, F.S.

For information regarding the status of abuse records compiled by law enforcement agencies in the course of a criminal investigation, please refer to the discussion in s. F.18.e., *supra*, relating to victim information contained in crime reports.

K. TO WHAT EXTENT DOES FEDERAL LAW PREEMPT STATE LAW REGARDING PUBLIC INSPECTION OF RECORDS?

1. Under what circumstances will a federal statute operate to make agency records confidential?

The general rule is that records which would otherwise be public under state law are unavailable for public inspection only when there is an absolute conflict between federal and state law relating to confidentiality of records. If a federal statute

requires particular records to be closed and the state is clearly subject to the provisions of such statute, then pursuant to the Supremacy Clause of the United States Constitution, Art. VI, U.S. Const., the state must keep the records confidential. *State ex rel. Cummer v. Pace*, 159 So. 679 (Fla. 1935); AGOs 90-102, 85-03, 81-101, 80-31, 74-372, and 73-278. *See also, Wallace v. Guzman,* 687 So. 2d 1351, 1353 (Fla. 3d DCA 1997) (exemptions from disclosure set forth in federal Freedom of Information Act apply to federal agencies but not to state agencies). *Compare, Florida Department of Education v. NYT Management Services, Inc.,* 895 So. 2d 1151 (Fla. 1st DCA 2005) (federal law prohibits public disclosure of social security numbers in state teacher certification database).

Thus, tenant records of a public housing authority are not exempt, by reason of the Federal Privacy Act, from disclosure otherwise required by the Florida Public Records Act. *Housing Authority of the City of Daytona Beach v. Gomillion*, 639 So. 2d 117 (Fla. 5th DCA 1994). The housing authority argued that it was an agency of the federal government, and thus subject to the Federal Privacy Act, because of controls and regulations established by the U.S. Department of Housing and Urban Development. In rejecting this argument, the court concluded that although the authority received federal funds and was subject to some oversight, the federal government was not involved in the day-to-day operations of the authority and the records produced and submitted to the federal government were simply "monitoring devices." *See now,* s. 119.071(5)(f), F.S., providing confidentiality for medical history records and certain insurance information provided by applicants for or participants in government housing assistance programs. *Cf., Florida Department of Children and Family Services v. Florida Statewide Advocacy Council*, 884 So. 2d 1162, 1164 (Fla. 2d DCA 2004) (rejecting state agency's contention that federal regulations adopted pursuant to the Health Insurance Portability and Accountability Act of 1996 [HIPAA] prohibited a trial judge from issuing an "access warrant" requiring the agency to provide client records to the advocacy council; the appellate court found that the federal regulations expressly authorized such disclosures if made to another agency pursuant to court order).

Similarly, since federal law did not clearly require that documents received by a state agency in the course of settlement negotiations to resolve a federal lawsuit be kept confidential, such documents were found to be open to inspection under Ch. 119, F.S. *Florida Sugar Cane League, Inc. v. Florida Department of Environmental Regulation*, No. 91-2108 (Fla. 2d Cir. Ct. September 20, 1991), *per curiam affirmed*, 606 So. 2d 1267 (Fla. 1st DCA 1992). *Accord*, *Lakeland Ledger Publishing Corporation v. School Board of Polk County*, No. GC-G-91-3803 (Fla. 10th Cir. Ct.

November 21, 1991) (map prepared by U.S. Justice Department concerning desegregation of Lakeland schools and given to school district employees was a public record and open to inspection). *Cf*., *State v. Buenoano,* 707 So. 2d 714 (Fla. 1998) (materials furnished to state attorney by federal government were not subject to public inspection even though erroneously furnished to defendant in criminal case because Florida law provides an exemption from disclosure for criminal investigative information received from a non-Florida criminal justice agency on a confidential or restricted basis); *Morris v. Whitehead*, 588 So. 2d 1023, 1024 (Fla. 2d DCA 1991) (upholding nondisclosure of confidential records received by housing authority from the federal government pursuant to agreement authorized by state housing law); and *City of Miami v. Metropolitan Dade County*, 745 F.Supp. 683 (S.D. Fla. 1990) (while the actions of the State of Florida in releasing documents are subject to the mandates of Ch. 119, F.S., the actions of the federal government in a criminal prosecution undertaken by the Office of the United States Attorney are not).

2. To what extent is copyrighted material in possession of an agency subject to public inspection and copying?

a. Copyrights held by agencies

In the absence of statutory authorization, a public official is not empowered to obtain a copyright for material produced by his or her office in connection with the transaction of official business. *Microdecisions, Inc. v. Skinner,* 889 So. 2d 871 (Fla. 2d DCA 2004), *review denied*, 902 So. 2d 791 (Fla. 2005) (property appraiser not authorized to assert copyright protection for the Geographic Information System maps created by his office). *Accord*, AGOs 03-42, 88-23, and 86-94. *Cf*., AGO 00-13 (in the absence of express statutory authority, state agency not authorized to secure a trademark).

Section 119.084(2), F.S., however, specifically authorizes agencies to hold a copyright for data processing software created by the agency. The agency may sell the copyrighted software to public or private entities or may establish a license fee for its use. *See also*, s. 24.105(10), F.S., authorizing the Department of the Lottery to hold copyrights, trademarks and service marks; *and see* ss. 286.021 and 286.031, F.S., prescribing duties of the Department of State with respect to authorized copyrights obtained by state agencies.

b. Copyrighted material obtained by agencies

The federal copyright law vests in the owner of a copyright,

subject to certain limitations, the exclusive right to do or to authorize, among other things, the reproduction of the copyrighted work and the distribution of the copyrighted work to the public by sale or other transfer of ownership. *See,* AGO 97-84, citing to pertinent federal law and interpretive cases. However, the Attorney General's Office has concluded that the fact that material received by a state agency may be copyrighted does not preclude the material from constituting a public record. For example, AGO 90-102 advised that copyrighted data processing software which was not specifically designed or created for the county but was being used by the county in its official capacity for official county business fell within the definition of "public record."

Moreover, in *State, Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377, 1382-1383 (Fla. 1st DCA 1994), the court rejected a state agency's argument that a transcript of a hearing that had been copyrighted by the court reporter and filed with the agency should not be copied without the copyright holder's permission. The court stated that the agency was under a statutory obligation to preserve all testimony in the proceeding and make a transcript available in accordance with the fees set forth in Ch. 119, F.S. *And see* AGO 75-304 (agency may not enter into agreement with court reporter to refer all requests for copies of agency proceedings to court reporter who originally transcribed proceedings; agency must provide copies of transcripts in accordance with charges set forth in Public Records Act). *Cf.*, AGO 95-37 (fee prescribed in s. 119.07, F.S., applies to the duplication of copyrighted materials contained in a county law library when such reproduction is permissible under the federal copyright law).

The federal copyright law, when read together with the Florida Public Records Act, authorizes and requires the custodian of records of the Department of State to make maintenance manuals supplied to that agency pursuant to law, available for examination and inspection purposes. AGO 03-26. "With regard to reproducing, copying, and distributing copies of these maintenance manuals which are protected under the federal copyright law, state law must yield to the federal law on the subject." *Id.* The custodian should advise individuals seeking to copy such records of the limitations of the federal copyright law and the consequences of violating its provisions; such notice may take the form of a posted notice that the making of a copy may be subject to the copyright law. AGOs 03-26 and 97-84. However, it is advisable for the custodian to refrain from copying such records himself or herself. AGO 03-26.

L. WHAT FEES MAY LAWFULLY BE IMPOSED FOR INSPECTING AND COPYING PUBLIC RECORDS?

1. When may an agency charge a fee for the mere inspection of public records?

As noted in AGO 85-03, providing access to public records is a statutory duty imposed by the Legislature upon all record custodians and should not be considered a profit-making or revenue-generating operation. Thus, public information must be open for inspection without charge unless otherwise expressly provided by law. *See*, *State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905). Accordingly, an agency is not authorized to impose a fee upon persons who wish to listen to tape recordings of city commission meetings. AGO 75-50 (agency may not precondition the inspection of a public document on the payment of a fee; the fact that the record sought to be inspected is a tape recording as opposed to a written document is of no import insofar as the imposition of a fee for inspection is concerned). *And see* AGOs 84-03 and 76-34 (only those fees or charges which are authorized by statute may be imposed upon an individual seeking access to public records).

Section 119.07(4)(d), F.S., authorizes the imposition of a special service charge when the nature or volume of public records to be inspected is such as to require *extensive* use of information technology resources, or *extensive* clerical or supervisory assistance, or both. The charge must be reasonable and based on the labor or computer costs actually incurred by the agency. Thus, an agency may adopt a policy imposing a reasonable special service charge based on the actual labor cost (base hourly salary) for clerical personnel who are required, due to the nature or volume of a public records request, to safeguard such records from loss or destruction during their inspection. AGO 00-11. In doing so, however, the county's policy should reflect no more than the actual cost of the personnel's time and be sensitive to accommodating the request in such a way as to ensure unfettered access while safeguarding the records. *Id.*

2. Is an agency required to provide *copies* of public records if asked, or may the agency allow inspection only?

"It is the policy of this state that all state, county, and municipal records are open for personal inspection *and copying* by any person." Section 119.01(1), F.S. (e.s.) In addition, s. 119.07(1)(a), F.S., provides that "[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so . . . ." Finally, s. 119.07(4), F.S., requires the custodian to "furnish a copy or a certified copy of the record upon payment of the fee prescribed by law . . . ." *And see Fuller v. State ex rel. O'Donnell,* 17 So. 2d 607 (Fla. 1944) ("The best-reasoned authority in this country

holds that the right to inspect public records carries with it the right to make copies."); *Winter v. Playa del Sol, Inc.*, 353 So. 2d 598, 599 (Fla. 4th DCA 1977) (right to inspect public records would in many cases be valueless without the right to make copies); *Schwartzman v. Merritt Island Volunteer Fire Department*, 352 So. 2d 1230, 1232n.2 (Fla. 4th DCA 1977) (Public Records Act requires custodian to furnish copies). *Cf., Wootton v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991) (if the requestor identifies a record with sufficient specificity to permit the agency to identify it and forwards the appropriate fee, the agency must furnish by mail a copy of the record).

In order to comply with the statutory directive that an agency provide copies of public records upon payment of the statutory fee, an agency must respond to requests for information as to copying costs. *Wootton v. Cook*, *supra*. *See also, Woodard v. State,* 885 So. 2d 444 (Fla. 4th DCA 2004), remanding a case for further proceedings where the custodian forwarded only information relating to the statutory fee schedule rather than the total cost to copy the requested records. *Cf., Mathis v. State*, 722 So. 2d 235 (Fla. 2d DCA 1998) (petitioner seeking writ of mandamus to compel court reporter to inform him of the cost to obtain a transcript of trial court proceedings was entitled to a show cause order as he showed a prima facie basis for relief under Rule 2.051[d], Fla. R. Jud. Admin.).

3. Does Ch. 119, F.S., exempt certain individuals (such as indigent persons or inmates) from paying statutory fees to obtain copies of public records?

Chapter 119, F.S., does not contain a provision that prohibits agencies from charging indigent persons or inmates the applicable statutory fee to obtain copies of public records. *See*, *Roesch v. State*, 633 So. 2d 1, 3 (Fla. 1993) (indigent inmate not entitled to receive copies of public records free of charge nor to have original state attorney files mailed to him in prison; prisoners are "in the same position as anyone else seeking public records who cannot pay" the required costs); *Potts v. State*, 869 So. 2d 1223 (Fla. 2d DCA 2004) (no merit to inmate's contention that Ch. 119, F.S., entitles him to free copies of all records generated in his case); *Alexis v. State,* 732 So. 2d 46 (Fla. 3d DCA 1999) (indigent defendant not entitled to public records free of charge); and *Yanke v. State*, 588 So. 2d 4 (Fla. 2d DCA 1991), *review denied,* 595 So. 2d 559 (Fla. 1992), *cert. denied,* 112 S.Ct. 1592 (1992) (prisoner must pay copying and postage charges to have copies of public records mailed to him).

Similarly, a labor union must pay the costs stipulated in Ch. 119, F.S., for copies of documents it has requested from a public

employer for collective bargaining purposes because "[a] labor union seeking information from the employer with whom it is locked in collective bargaining negotiations is not exempt from the Florida Public Records Act." *City of Miami Beach v. Public Employees Relations Commission*, 31 F.L.W. D2289 (Fla. 3d DCA September 1, 2006). *And see State, Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377, 1382n.7 (Fla. 1st DCA 1994) (indigent person "is not relieved by his indigency" from paying statutory costs to obtain public records). *Compare,* AGO 90-81, noting that an agency is not precluded from choosing to provide informational copies of public records without charge.

4. Are members of an advisory council entitled to copies of public records free of charge?

A school district is under no statutory obligation to provide copies of public records free of charge to individual members of a school advisory council, but a school district may formulate a policy for the distribution of such records. AGO 99-46. If it is found that the *advisory council* needs certain school records in order to carry out its statutory functions, such records should be provided to the *council* in the same manner that records related to agenda items are provided to school board members. *Id.*

5. What are the statutory fees to obtain copies of public records?

If no fee is prescribed elsewhere in the statutes, s. 119.07(4)(a)1., F.S., authorizes the custodian to charge a fee of up to 15 cents per one-sided copy for copies that are 14 inches by 8½ inches or less. An agency may charge no more than an additional 5 cents for each two-sided duplicated copy. Section 119.07(4)(a)2., F.S. *And see* s. 119.011(7), F.S., defining the term "duplicated copies" to mean "new copies produced by duplicating, as defined in s. 283.30", F.S. "Duplicating" means "the process of reproducing an image or images from an original to a final substrate through the electrophotographic, xerographic, laser, or offset process or any combination of these processes, by which an operator can make more than one copy without rehandling the original." Section 283.30(3), F.S.

A charge of up to $1.00 per copy may be assessed for a certified copy of a public record. Section 119.07(4)(c), F.S.

For other copies, the charge is limited to the actual cost of duplication of the record. Section 119.07(4)(a)3., F.S. The phrase "actual cost of duplication" is defined to mean "the cost of the material and supplies used to duplicate the public record,

but does not include the labor cost and overhead cost associated with such duplication." Section 119.011(1),F.S. An exception, however, exists for copies of county maps or aerial photographs supplied by county constitutional officers which may include a reasonable charge for the labor and overhead associated with their duplication. Section 119.07(4)(b), F.S. *And see* the discussion on the special service charge.

6. May an agency charge for travel costs, search fees, development costs and other incidental costs?

An agency should not consider the furnishing of public records to be a "revenue-generating operation." AGO 85-03. *See also*, AGO 89-93 (city not authorized to sell copies of its growth management book for $35.00 each when the actual cost to reproduce the book is $15.10 per copy; city is limited to charging only the costs authorized by Ch. 119, F.S.).

The Public Records Act does not authorize the addition of overhead costs such as utilities or other office expenses to the charge for public records. AGO 99-41. Similarly, an agency may not charge for travel time and retrieval costs for public records stored off-premises. AGO 90-07. Nor may an agency assess fees designed to recoup the original cost of developing or producing the records. AGO 88-23 (state attorney not authorized to impose a charge to recover part of costs incurred in production of a training program; the fee to obtain a copy of the videotape of such program is limited to the actual cost of duplication of the tape). *And see State, Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377, 1382 (Fla. 1st DCA 1994) (once a transcript of an administrative hearing is filed with the agency, the transcript becomes a public record regardless of who ordered the transcript or paid for the transcription; the agency can charge neither the parties nor the public a fee that exceeds the charges authorized in the Public Records Act). *Cf.*, s. 119.07(4)(b), F.S., providing that the charge for copies of county maps or aerial photographs supplied by county constitutional officers may also include a reasonable charge for the labor and overhead associated with their duplication.

Therefore, unless a specific request for copies requires extensive clerical or supervisory assistance or extensive use of information technology resources so as to trigger the special service charge authorized by s. 119.07(4)(d), F.S., an agency may charge only the actual cost of duplication for copies of computerized public records. AGO 99-41. The imposition of the service charge, however, is dependent upon the nature or volume of records requested, not on the cost to either develop or maintain the records or the database system. *Id*.

7. May an agency require that production and copying of public records be accomplished only through a private company that acts as a clearinghouse for the agency's public records?

No. Although an agency may, for its convenience, contract with private companies to provide information also obtainable through the agency, it may not abdicate its duty to produce such records for inspection and copying by requiring those seeking public records to do so only through its designee and then paying whatever fee that company may establish for its services. AGO 02-37. The agency is the custodian of its public records and, upon request, must produce such records for inspection and copy such records at the statutorily prescribed fee. *Id. And see* AGO 05-34 (while the property appraiser may provide public records, excluding exempt or confidential information, to a private company, the property appraiser may receive only those fees that are authorized by statute and thus may not, in the absence of statutory authority, enter into an agreement with the private company where the property appraiser provides such records in exchange for either in-kind services or a share of the profits or proceeds from the sale of the information by the private company).

8. Should an agency charge sales tax when providing copies of public records?

No. In AGO 86-83, the Attorney General's Office advised that the sales tax imposed pursuant to s. 212.05, F.S., is not applicable to the fee charged for providing copies of records under s. 119.07, F.S. *See*, s. 5(a) of Department of Revenue Rule 12A-1.041, F.A.C., stating that "[t]he fee prescribed by law, or the actual cost of duplication, for providing copies of public records . . . under Chapter 119, F.S., is exempt from sales tax."

9. Does s. 119.07(4), F.S., prescribe the fee that an agency may charge for furnishing a copy of a record to a person who is authorized to access an otherwise confidential record?

Unless another fee to obtain a particular record is prescribed by law, an agency may not charge fees that exceed those in Ch. 119, F.S, when providing copies of confidential records to persons who are authorized to obtain them. For example, in AGO 03-57, the Attorney General's Office advised that persons who are authorized by statute to obtain otherwise confidential autopsy photographs should be provided copies in accordance with the provisions of the Public Records Act, *i.e.*, s. 119.07(4), F.S. The medical examiner is not authorized to charge a fee that exceeds those charges. *Id*.

10. What are the charges if the requestor makes his or her own

copies (*i.e.*, provides his or her own copying machine and makes the copies himself or herself)?

Section 119.07(3)(a), F.S., provides a "right of access to public records for the purpose of making photographs of the record while such record is in the possession, custody, and control of the custodian of public records." This subsection "applies to the making of photographs in the conventional sense by use of a camera device to capture images of public records but excludes the duplication of microfilm in the possession of the clerk of the circuit court" if the clerk can provide a copy of the microfilm. Section 119.07(3)(b), F.S.

The copying is to be done in the room where the public records are kept. Section 119.07(3)(d), F.S. However, if in the custodian's judgment, this is impossible or impracticable, the copying shall be done in another room or place, as close as possible to the room where the public records are kept. *Id.* Where provision of another room or place is necessary, the expense of providing the same shall be paid by the person who wants to copy the records. *Id.* The custodian may charge the person making the copies for supervision services. Section 119.07(4)(e)2., F.S. In such cases the custodian may not charge the copy charges authorized in s. 119.07(4)(a), F.S., but may charge only the supervision service charge authorized in s. 119.07(4)(e)2., F.S. *See*, AGO 82-23.

11. When may an agency charge a special service charge for *extensive* use of clerical or supervisory labor or *extensive* information technology resources?

Section 119.07(4)(d), F.S. [formerly s. 119.07(1)(b), F.S.], states that if the nature or volume of public records to be inspected or copied requires the extensive use of information technology resources or extensive clerical or supervisory assistance, or both, the agency may charge a reasonable service charge based on the cost actually incurred by the agency for such extensive use of information technology resources or personnel. *See*, AGO 90-07, stating that a municipal police department may not ordinarily charge for travel time and retrieval costs for public records stored off-premises; however, if the nature or volume of the records requested, rather than the location of the records, is such as to require extensive clerical or supervisory assistance or extensive use of information technology resources, a reasonable service charge may be imposed); and AGO 92-38 (town may not restrict access to and copying of public records based upon the amount requested or the span of time which is covered by the public records; however, if extensive use of information technology resources or clerical or supervisory personnel is

needed for retrieval of such records, the town may impose a reasonable service charge, based upon the actual costs incurred for the use of such resources). *Cf.*, *Cone & Graham, Inc. v. State*, No. 97-4047 (Fla. 2d Cir. Ct. October 7, 1997) (an agency's decision to "archive" older e-mail messages on tapes so that they could not be retrieved or printed without a systems programmer was analogous to an agency's decision to store records off-premises in that the agency rather than the requestor must bear the costs for retrieving the records and reviewing them for exemptions).

Unless the nature or volume of public records to be inspected or copied requires "extensive" use of information technology resources or "extensive" clerical or supervisory assistance, the special service charge is not authorized. If authorized due to the nature or volume of a request, the reasonable service charge should not be routinely imposed, but should reflect the information technology resources or labor costs actually incurred by the agency. AGO 90-07. *And see* AGOs 92-38, 86-69 and 84-81.

a. What is the meaning of the term "extensive" as used in the statute?

Section 119.07(4)(d), F.S., does not contain a definition of the term "extensive." In 1991, a divided First District Court of Appeal upheld a hearing officer's order rejecting an inmate challenge to a Department of Corrections rule that defined "extensive" for purposes of the special service charge. *Florida Institutional Legal Services, Inc. v. Florida Department of Corrections*, 579 So. 2d 267 (Fla. 1st DCA 1991), *review denied*, 592 So. 2d 680 (Fla. 1991). The agency rule defined "extensive" to mean that it would take more than 15 minutes to locate, review for confidential information, copy and refile the requested material. The court agreed with the hearing officer that the burden was on the challenger to show that the administrative rule was invalid under Ch. 120, F.S, and the record did not indicate that the officer's ruling was "clearly erroneous" in this case. Judge Zehmer dissented, saying that the rule was inconsistent with legislative intent and exceeded the agency's delegated authority.

In light of the lack of clear direction in the statute as to the meaning of the term "extensive" and the possible limited application of the *Institutional Legal Services* case, it may be prudent for agencies to define "extensive" in a manner that is consistent with the purpose and intent of the Public Records Act and that does not constitute an unreasonable infringement upon the public's statutory and constitutional right of access to public records.

Moreover, the statute mandates that the special service charge

be "reasonable." *See, Carden v. Chief of Police*, 696 So. 2d 772, 773 (Fla. 2d DCA 1996), in which the court reviewed a challenge to a service charge that exceeded $4,000 for staff time involved in responding to a public records request, and said that an "excessive charge could well serve to inhibit the pursuit of rights conferred by the Public Records Act." Accordingly, the court remanded the case and required the agency to "explain in more detail the reason for the magnitude of the assessment." *Id*.

b. What is meant by the term "information technology resources" as used in the statute?

"Information technology resources" is defined as data processing hardware and software and services, communications, supplies, personnel, facility resources, maintenance and training. Section 119.011(9), F.S. The term does not include a videotape or a machine to view a videotape. AGO 88-23. The fact that the request involves the use of information technology resources is not sufficient to incur the imposition of the special service charge; rather, *extensive* use of such resources is required. AGO 99-41.

c. What is meant by the term "clerical or supervisory assistance" as used in the statute?

(1) May an agency charge for the cost to review records for exempt information?

An agency is not ordinarily authorized to charge for the cost to review records for statutorily exempt material. AGO 84-81. However, the special service charge may be imposed for this work if the volume of records and the number of potential exemptions make review and redaction of the records a time-consuming task. *See, Florida Institutional Legal Services v. Florida Department of Corrections*, 579 So. 2d at 269. *And see Herskovitz v. Leon County,* No. 98-22 (Fla. 2d Cir. Ct. June 9, 1998), noting that "it would not be unreasonable in these types of cases [involving many documents and several different exemptions] to charge a reasonable special fee for the supervisory personnel necessary to properly review the materials for possible application of exemptions."

(2) How should the labor cost be calculated?

In *State v. Gudinas*, No. CR 94-7132 (Fla. 9th Cir. Ct. June 1, 1999), the court approved an agency's charge for providing copies in response to a large public records request based on the clerk's base rate of pay, excluding benefits. The court also concluded that an agency could charge only a clerical rate for the time spent making copies, even if due to staff shortages, a more highly

paid person actually did the work.

The term "supervisory assistance" has not been widely interpreted. In *Gudinas*, the circuit judge approved a rate of $35 per hour for an agency attorney's review of exempt material in a voluminous criminal case file. The court noted that "only an attorney or paralegal" could responsibly perform this type of review because of the "complexity of the records reviewed, the various public record exemptions and possible prohibitions, and the necessary discretionary decisions to be made with respect to potential exemptions . . . ." *And see Herskovitz v. Leon County,* concluding that an appropriate charge for supervisory review is "reasonable" in cases involving a large number of documents that contain some exempt information.

d. May an agency require a reasonable deposit or advance payment or must the agency produce the records and then ask for payment?

Section 119.07(4)(a)1., F.S., states that the custodian of public records shall furnish a copy or a certified copy of the record "upon payment of the fee prescribed by law . . . ." *See, Wootton v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991), stating that if a requestor "identifies a record with sufficient specificity to permit [the agency] to identify it *and forwards the appropriate fee*, [the agency] must furnish by mail a copy of the record." (e.s.).

In *Malone v. City of Satellite Beach*, No 94-10557-CA-D (Fla. Cir. Ct. Brevard Co. December 15, 1995), *per curiam affirmed,* 687 So. 2d 252 (Fla. 5th DCA 1997), the court noted that a city's requirement of an advance deposit was contemplated by the Public Records Act. *See*, s. 119.07(4)(d), F.S. According to the court, the city "was authorized to require the payment of an advance deposit under the facts of this case before proceeding with the effort and cost of preparing the voluminous copies requested by the plaintiff." *And see Herskovitz v. Leon County,* No. 98-22 (Fla. 2d Cir. Ct. June 9, 1998), in which the court said that if an agency is asked for a large number of records, the fee should be communicated to the requestor before the work is undertaken. "If the agency gives the requesting party an estimate of the total charge, or the hourly rate to be applied, the party can then determine whether it appears reasonable under the circumstances." *Id. Cf.,* AGO 05-28 (custodian authorized to bill the requestor for any shortfall between the deposit and the actual cost of copying the public records when the copies have been made and the requesting party subsequently advises the city that the records are not needed).

12. Fee issues relating to specific records

a. Clerk of court records

(1) County records

Pursuant to s. 125.17, F.S., the clerk of the circuit court serves as the ex officio clerk to the board of county commissioners. Records maintained by the clerk which relate to this function (*e.g.*, county resolutions, budgets, minutes, etc.) are public records which are subject to the copying fees set forth in Ch. 119, F.S., and not the service charges set forth in Ch. 28, F.S. AGO 85-80. *Accord*, AGO 94-60 (documents such as minutes of public meetings, which are in the custody of the clerk as *ex officio* clerk of the board of county commissioners, are not subject to the $1.00 per page charge prescribed in Ch. 28). *See also,* AGO 82-23 (when members of the public use their own photographic equipment to make their own copies, the clerk is not entitled to the fees prescribed in s. 28.24, F.S., but is entitled only to the supervisory service charge now found in s. 119.07[4][e]2., F.S.).

(2) Judicial records

When the clerk is exercising his or her duties derived from Article V of the Constitution, the clerk is not subject to legislative control. *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995). Thus, when the clerk is acting in his or her capacity as part of the judicial branch of government, access to the judicial records under the clerk's control is governed exclusively by Fla. R. Jud. Admin. 2.051, Public Access to Judicial Records. *Id. See*, Fla. R. Jud. Admin. 2.051(b)(2), defining the term "judicial branch" for purposes of the rule, to include "the clerk of court when acting as an arm of the court."

Florida Rule of Judicial Administration 2.051(e)(3) states that "[f]ees for copies of records in all entities in the judicial branch of government, *except for copies of court records,* shall be the same as those provided in section 119.07, Florida Statutes." (e.s.). The fees to obtain copies of court records are set forth in s. 28.24, F.S. This statute establishes fees that are generally higher than those in Ch. 119, F.S. For example, the charge to obtain copies of court records is $1.00 per page, rather than 15 cents per page as established in s. 119.07(4)(a)1., F.S. *See also*, *WFTV, Inc. v. Wilken,* 675 So. 2d 674 (Fla. 4th DCA 1996) (the $1.00 per page copying charge in s. 28.24, F.S., applies to all court documents, whether unrecorded or recorded).

b. Traffic reports

In the absence of statutory provision, the charges authorized in s. 119.07(4) govern the fees to obtain copies of crash reports. However, there are specific statutes which apply to fees to obtain copies of reports from the Department of Highway Safety and Motor Vehicles. Section 321.23(2)(a), F.S., provides that the fee to obtain a copy of a crash report from the department is $2.00 per copy. A copy of a homicide report is $25 per copy. Section 321.23(2)(b), F.S. Separate charges are provided for photographs. Section 321.23(2)(c), F.S.

Pursuant to s. 316.066(4)(a), F.S., one or more counties may enter into an agreement with the appropriate state agency to be certified by the agency to have a traffic records center for the purpose of tabulating and analyzing countywide traffic crash reports. Fees for copies of public records provided by a certified traffic records center are $2.00 per copy for a crash report, $25 per copy for a homicide report, and 50 cents per copy for a uniform traffic citation. Section 316.066(4)(c), F.S.

M. WHAT ARE THE OPTIONS IF AN AGENCY REFUSES TO PRODUCE PUBLIC RECORDS FOR INSPECTION AND COPYING?

1. Voluntary mediation program

Section 16.60, F.S., establishes an informal mediation program within the Office of the Attorney General as an alternative for resolution of open government disputes. For more information about the voluntary mediation program, please contact the Office of the Attorney General at the following address: The Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050; telephone (850)245-0157; or you may visit the Office of the Attorney General website: http://myfloridalegal.com.

2. Civil action

a. Remedies

A person who has been 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. *See, Radford v. Brock,* 914 So. 2d 1066 (Fla. 2d DCA 2005) (trial judge dismissal of a writ of mandamus directed to clerk of court and court reporter who were alleged to be records custodians was erroneous because trial judge did not issue a show cause order to the clerk of court and court reporter, and because there was no sworn evidence refuting the petitioner's allegations).

Before filing a lawsuit, the petitioner must have furnished a

public records request to the agency. *Villarreal v. State,* 687 So. 2d 256 (Fla. 1st DCA 1996), *review denied*, 694 So. 2d 741 (Fla. 1997), *cert. denied*, 118 S.Ct. 316 (1997) (improper to order agency to produce records before it has had an opportunity to comply); and *Maraia v. State,* 685 So. 2d 851 (Fla. 2d DCA 1995) (public records action dismissed where petitioner failed to file a request for public records with the custodian of the records before filing suit). *See also, Mills v. State*, 684 So. 2d 801 (Fla. 1996) (no abuse of discretion in trial court's failure to order sheriff's department to produce certain requested records where there was no demonstration that the records exist; and *Hillier v. City of Plantation*, 31 F.L.W. D2096 (Fla. 4th DCA August 9, 2006) (trial court finding that city had complied with petitioner's public records requests was supported by competent, substantial evidence). *Cf., Coconut Grove Playhouse, Inc. v. Knight-Ridder, Inc.*, 31 F.L.W. D2102 (Fla. 3d DCA August 9, 2006) (trial court order departed from essential requirements of law by requiring defendant in a public records action to produce its records as a sanction for failure to respond to a discovery subpoena).

Section 119.11(1), F.S., mandates that actions brought under Ch. 119 are entitled to an immediate hearing and take priority over other pending cases. *See, Salvador v. Fennelly*, 593 So. 2d 1091 (Fla. 4th DCA 1992) (the early hearings provision reflects a legislative recognition of the importance of time in public records cases; such hearings must be given priority over more routine matters, and a good faith effort must be made to accommodate the legislative desire that an immediate hearing be held). Expedited review of denials of access to judicial records or to the records of judicial agencies shall be provided through an action for mandamus, or other appropriate appellate remedy. Rule 2.051(d), Fla. R. Jud. Admin. *Cf.,* s. 119.07(9), F.S. (s. 119.07, F.S., may not be used by an inmate as the basis for failing to timely litigate any postconviction action).

(1) Mandamus

Generally, mandamus is the appropriate remedy to enforce compliance with the Public Records Act. *Staton v. McMillan*, 597 So. 2d 940 (Fla. 1st DCA 1992), *review dismissed sub nom., Staton v. Austin*, 605 So. 2d 1266 (Fla. 1992). *See also*, *Weeks v. Golden,* 764 So. 2d 633 (Fla. 1st DCA 2000); *Smith v. State,* 696 So. 2d 814 (Fla. 2d DCA 1997); *Donner v. Edelstein*, 415 So. 2d 830 (Fla. 3d DCA 1982); *Mills v. Doyle*, 407 So. 2d 348 (Fla. 4th DCA 1981). If the requestor's petition presents a prima facie claim for relief, an order to show cause should be issued so that the claim may receive further consideration on the merits. *Staton v. McMillan*, *supra*. *Accord, Gay v. State,* 697 So. 2d 179 (Fla. 1st DCA 1997).

However, it has been held that mandamus is not appropriate when the language of an exemption statute requires an exercise of discretion. In *Florida Society of Newspaper Editors, Inc. v. Public Service Commission*, 543 So. 2d 1262 (Fla. 1st DCA 1989), the court found that discretion would be required to determine whether certain records of the Public Service Commission constituted "proprietary confidential business information;" thus, mandamus would not lie to compel disclosure of the records. *Accord, Shea v. Cochran,* 680 So. 2d 628 (Fla. 4th DCA 1996) (mandamus was an inappropriate remedy where sheriff provided a specific reason for refusing to comply with a public records request by claiming the records were part of an active criminal investigation). *And see Skeen v. D'Alessandro*, 681 So. 2d 712 (Fla. 2d DCA 1995) (mandamus not a proper remedy if there is no evidence, presented or proffered, that the requested document existed at the time of the mandamus hearing); and *Hall v. Liebling*, 890 So. 2d 475 (Fla. 2d DCA 2004) (mandamus cannot be used to compel a former assistant public defender who is now in private practice to release documents to his former client because the attorney is now a private citizen, not a government official).

Mandamus is a "one time order by the court to force public officials to perform their legally designated employment duties." *Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996), *review denied,* 684 So. 2d 1353 (Fla. 1996). Thus, a trial court erred when it retained continuing jurisdiction to oversee enforcement of a writ of mandamus granted in a public records case. *Id. Cf., Areizaga v. Board of County Commissioners of Hillsborough County,* 31 F.L.W. D2167 (Fla. 2d DCA August 16, 2006) (circuit courts may not refer extraordinary writs to mediation; thus, trial judge should not have ordered mediation of petition for writ of mandamus seeking production of public records).

(2) Injunction

It has been recognized that injunctive relief may be available upon an appropriate showing for a violation of Ch. 119, F.S. *See*, *Daniels v. Bryson*, 548 So. 2d 679 (Fla. 3d DCA 1989) (injunctive relief appropriate where there is a demonstrated pattern of noncompliance with the Public Records Act, together with a showing of likelihood of future violations; mandamus would not be an adequate remedy since mandamus would not prevent future harm).

(3) Declaratory relief sought by agencies

Occasionally the question arises as to whether an *agency*, when faced with a demand for public records, may seek guidance from the court in the form of a complaint for declaratory judgment instead of complying with the request for public records or asserting an

exemption. It has been held that such requests for general declaratory relief are not appropriate. *See*, *Sarasota Herald-Tribune Company, Inc. v. Schaub*, No. CA87-2949 (Fla. 12th Cir. Ct. July 20, 1988), *per curiam affirmed*, 539 So. 2d 478 (Fla. 2d DCA 1989) (state attorney cannot litigate a declaratory judgment action to obtain judicial advice on how to perform his public duties under the Public Records Act); *Wille v. McDaniel*, 18 Med. L. Rptr. 2144, No. CL-91-154-AE (Fla. 15th Cir. Ct. February 18, 1991) (sheriff's stated purpose in litigating declaratory judgment action [to avoid being assessed attorney's fees under the Public Records Act] is insufficient to support a declaratory action). *See also*, *Askew v. City of Ocala*, 348 So. 2d 308 (Fla. 1977) (trial court properly dismissed complaint for declaratory relief for failure to state a cause of action where public officials disagreed with Attorney General's advisory opinion and sought different judicial opinion).

In *WFTV, Inc. v. Robbins*, 625 So.2d 941 (Fla. 4th DCA 1993), the court held that a supervisor of elections who denied a public records request to inspect certain election results on the grounds that a court order entered in another case involving the election prohibited disclosure, "unlawfully refused" access to public records. The court determined that the supervisor herself had sought the confidentiality order by means of a motion seeking "directions" from the court in the election lawsuit. The supervisor was thus liable for payment of attorney's fees incurred by the requestor in the subsequent public records action pursuant to s. 119.12, F.S., providing for an assessment of attorney's fees and costs if an agency unlawfully refuses to permit examination and inspection of documents under the Public Records Act. *See also*, *City of St. Petersburg v. St. Petersburg Junior College*, No. 93-0004210-CI-13, *Order Awarding Attorney's Fees* (Fla. 6th Cir. Ct. March 25, 1994), in which a city that had initially filed an action for declaratory relief as to whether records requested under Ch. 119 were confidential under federal law was ultimately determined to be liable for attorney's fees under s. 119.12, F.S., after the party seeking the records filed a counterclaim and the judge determined that the records were not exempt.

b. Procedural issues

(1) Discovery

In the absence of an evident abuse of power, the trial court's exercise of discretion in matters associated with pretrial discovery in a public records action will not be disturbed. *Lorei v. Smith*, 464 So. 2d 1330, 1333 (Fla. 2d DCA 1985), *review denied*, 475 So. 2d 695 (Fla. 1985). In *Lorei*, the appellate court upheld the trial judge’s denial of a request to permit discovery

pertaining to the agency's procedures for maintaining public records. *Id*. The court noted that the interrogatories related to "the mechanics associated with the department's record maintenance, the internal policies or actions which lead to the development of files," and other matters which were not relevant to the question of whether the requested records were exempt from disclosure. *Id*.

The court cautioned, however, that "discovery in a context such as the one at hand may well be appropriate in the circumstance where a good faith belief exists that the public agency may be playing 'fast and loose' with the requesting party or the court, once its statutorily delegated authority is activated." *Id. Cf., Lopez v. State*, 696 So. 2d 725, 727 (Fla. 1997) (trial court's denial of motion to depose custodian affirmed because there were "no allegations that any documents had been removed"); and *Johnson v. State*, 769 So. 2d 990, 995 (Fla. 2000) (discovery not warranted based on "bare allegations" that additional records "should" exist).

(2) Hearing

An order dismissing a public records complaint filed against a sheriff was overturned by the Fourth District because the judge failed to hold a hearing before entering the order. "Although the sheriff may ultimately not be able to retrieve these records, because of their age or another reason, the order in this case, entered without an evidentiary hearing, was premature." *Grace v. Jenne,* 855 So. 2d 262, 263 (Fla. 4th DCA 2003).

(3) *In camera* inspection

Section 119.07(1)(e), F.S., provides that in any case in which an exemption is alleged to exist pursuant to s. 119.071(1)(d) or (f), (2)(d), (e), or (f), or (4)(c), F.S., the public record or part of the record in question shall be submitted to the trial court for an *in camera* examination. *See, City of St. Petersburg v. Romine*, 719 So. 2d 19 (Fla. 2d DCA 1998) (*in camera* review mandated when confidential informant exception now found at s. 119.071[2][f], F.S., is asserted). *See also*, *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993); *Lopez v. Singletary*, 634 So. 2d 1054 (Fla. 1993) (records claimed by state attorney to constitute exempted work product must be produced for an *in camera* inspection; only the judge can determine whether particular documents are public records which must be disclosed to death penalty defendant in postconviction proceedings).

However, the trial court's failure to conduct an *in camera* inspection of a file containing alleged exempt attorney work

product was deemed to be an invalid basis for a new trial when neither party requested an *in camera* inspection, and the agency's attorney made no objection at trial to the evidentiary matters flowing from the exempt material. *Jordan v. School Board of Broward County*, 531 So. 2d 976 (Fla. 4th DCA 1988).

Section 119.07(1)(e), F.S., also states that if an exemption is alleged under s. 119.071(2)(c), F.S. (the exemption for active criminal investigative or intelligence information), an inspection is discretionary with the court. However, in *Tribune Company v. Public Records*, 493 So. 2d 480, 484 (Fla. 2d DCA 1986), *review denied sub nom., Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987), the court stated that notwithstanding the trial court's discretion to provide an *in camera* examination if the active criminal investigative information exemption is asserted, it is always the better practice to conduct such an inspection in cases where an exception to the Public Records Act is in dispute. According to the court, inspection lends credence to the decision of the trial court, helps dispel public suspicion, and provides a much better basis for appellate review.

Similarly, in *Woolling v. Lamar*, 764 So. 2d 765, 768-769 (Fla. 5th DCA 2000), *review denied*, 786 So. 2d 1186 (Fla. 2001), the Fifth District concluded that because the state attorney presented "no evidence to meet its burden that the records are exempt" under s. 119.071(2)(c), F.S., an "in camera inspection by the lower court is therefore required so that the trial judge will have a factual basis to decide if the records are exempt under [that statute]." *And see Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000), in which the First District said: "We fail to see how the trial court can [determine whether an agency is entitled to a claimed exemption] without examining the records."

(4) Mootness

In *Puls v. City of Port St. Lucie,* 678 So. 2d 514 (Fla. 4th DCA 1996), the court noted that "[p]roduction of the records after the [public records] lawsuit was filed did not moot the issues raised in the complaint." The court remanded the case for an evidentiary hearing on the issue of whether, under the facts of the case, there was an unlawful refusal of access to public records. *See also, Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487, 491 (Fla. 2d DCA 1990) (although courts do not ordinarily resolve disputes unless a case or controversy exists and resolution would have some practical purpose, "since the instant situation is capable of repetition while evading review, we find it appropriate to address the issues before us concerning applicability of the Public Records Act for future reference"); *Mazer v. Orange County,* 811 So. 2d 857, 860

(Fla. 5th DCA 2002) ("the fact that the requested documents were produced in the instant case after the action was commenced, but prior to final adjudication of the issue by the trial court, does not render the case moot or preclude consideration of [the petitioner's] entitlement to fees under the statute"); and *WFTV, Inc. v. Robbins*, 625 So. 2d 941 (Fla. 4th DCA 1993). *Compare*, *Jacksonville Television, Inc. v. Shorstein*, 608 So. 2d 592 (Fla. 1st DCA 1992) (where public records lawsuit was determined to be moot because records were delivered to television station prior to entry of writ of mandamus, appellate court would not issue an "advisory opinion" as to whether trial court's voluntary conclusion that agency acted properly by initially withholding the records was correct).

Similarly, in *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871 (Fla. 2d DCA 2004), *review denied*, 902 So. 2d 791 (Fla. 2005), the court found that a public records lawsuit over a custodian's requirement that a commercial company obtain a licensing agreement before using the records did not become moot when the custodian provided the company with the requested data after the lawsuit was filed. Because the data was delivered subject to a condition that it was for personal use only, a controversy remained concerning the validity of the custodian restriction on the use of the data. *And see, Southern Coatings, Inc. v. City of Tamarac*, 916 So. 2d 19 (Fla. 4th DCA 2005) (federal court's dismissal of pendent claims based on state public records law is not a judgment on the merits and, therefore, not res judicata in a subsequent lawsuit in state court).

(5) Stay

If the person seeking public records prevails in the trial court, the public agency must comply with the court's judgment within 48 hours unless otherwise provided by the trial court or such determination is stayed within that period by the appellate court. Section 119.11(2), F.S. An automatic stay shall exist for 48 hours after the filing of a notice of appeal for public records and public meeting cases, which stay may be extended by the lower tribunal or the court on motion. Fla. R. App. P. 9.310(b)(2). *See, Wait v. Florida Power & Light Company,* 372 So. 2d 420 (Fla. 1979), finding a former provision in s. 119.11 providing that the filing of a notice of appeal shall not operate as an automatic stay to be an unconstitutional legislative intrusion into matters of procedure reserved to the Court; and *The Florida Bar Re: Rules of Appellate Procedure*, 463 So. 2d 1114, 1115 (Fla. 1984), stating that it was necessary to modify Rule 9.310(b)(2) to "implement the public policy evidenced by section 119.11(2) . . . to provide for a 48-hour automatic stay in public meeting and public record cases."

c. Attorney's fees

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. *Cf.*, *Smith & Williams, P.A. v. West Coast Regional Water Supply Authority*, 640 So. 2d 216 (Fla. 2d DCA 1994) (assessment of attorney's fees authorized if a record has been "improperly withheld" as attorney work product pursuant to exemption now found at s. 119.071[1][d], F.S.); and *Department of Health and Rehabilitative Services v. Martin*, 574 So. 2d 1223 (Fla. 3d DCA 1991) (error to award attorney's fees where order requiring production of records was entered pursuant to Adult Protective Services Act, rather than the Public Records Act). *And see Downs v. Austin*, 559 So. 2d 246 (Fla. 1st DCA 1990), *review denied*, 574 So. 2d 140 (Fla. 1990) (s. 119.12, F.S., does not constitute authority for the award of attorney's fees for efforts expended to obtain the fee provided by that statute).

A successful pro se litigant is entitled to reasonable costs under this section. *Weeks v. Golden,* 764 So. 2d 633 (Fla. 1st DCA 2000); *Wisner v. City of Tampa Police Department*, 601 So. 2d 296 (Fla. 2d DCA 1992). *And see Weeks v. Golden*, 846 So. 2d 1247 (Fla. 1st DCA 2003) (prison inmate entitled to recover costs associated with postage, envelopes and copying, as well as filing and service of process fees, incurred in the course of litigation when he filed a pro se public records lawsuit and prevailed).

An "unjustified failure to respond to a public records request until after an action has been commenced to compel compliance amounts to an unlawful refusal" for purposes of s. 119.12, F.S. *Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000). "[T]he fact that the requested documents were produced in the instant case after the action was commenced, but prior to final adjudication of the issue by the trial court, does not render the case moot or preclude consideration of [the petitioner's] entitlement to fees under the statute." *Mazer v. Orange County,* 811 So. 2d 857, 860 (Fla. 5th DCA 2002). *Accord, Barfield v. Town of Eatonville,* 675 So. 2d at 224 (appellant entitled to attorney's fees because "[t]he evidence clearly establishes that it was only after the appellant filed a lawsuit that the documents he had previously sought by written request to the Town were finally turned over to him"). *And see Wisner v. City of Tampa Police Department*, *supra*; *Brunson v. Dade County School Board*, 525 So. 2d 933 (Fla. 3d DCA 1988).

Section 119.12, F.S., "is designed to encourage public

agencies to voluntarily comply with the requirements of chapter 119, thereby ensuring that the state's general policy is followed." *New York Times Company v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993). "If public agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents." *Id*. *Cf.*, *Downs v. Austin, supra* (appellate attorney's fees may be awarded for successful appeal of denial of access in accordance with the appellate rules; s. 119.12, F.S., does not authorize trial court to make an initial award of appellate attorney's fees).

Attorney's fees are recoverable even where access is denied on a good faith but mistaken belief that the documents are exempt from disclosure. *WFTV, Inc. v. Robbins*, 625 So. 2d 941 (Fla. 4th DCA 1993); *Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990); *News and Sun-Sentinel Company v. Palm Beach County*, 517 So. 2d 743 (Fla. 4th DCA 1987). A town's defense that the delay in production of records was caused by either the intentional wrongdoing or ineptitude of its clerk is not a valid basis for denying recovery of attorney's fees and costs under s. 119.12, F.S. *Barfield v. Town of Eatonville*, 675 So. 2d 223 (Fla. 5th DCA 1996). *But see, Alston v. City of Riviera Beach*, 882 So. 2d 436 (Fla. 4th DCA 2004) (denial of attorney's fee claim affirmed because "[t]he record supports the trial court's conclusion that the city had a good faith and reasonable belief that Alston's request applied only to documents under the control of the parks and recreation department and that Alston failed to establish that the city unlawfully withheld police department records").

As to calculation of the "reasonable costs of enforcement including reasonable attorneys' fees" to which the prevailing party is entitled, the trial judge is in a better position than the appellate court to make "a factual determination regarding the objectives sought by the [prevailing party], the extent of statutory enforcement obtained, and the time expended in achieving those results." *Daniels v. Bryson*, 548 So. 2d 679, 682 (Fla. 3d DCA 1989). However, where the contract between the client and attorney provided that the attorney would be compensated on a flat hourly basis regardless of the outcome at trial, the trial court erred in awarding an enhanced fee based upon a contingency risk multiplier. *Id*.

A different rule has been applied when it is unclear whether a private corporation is an "agency" for purposes of the Public Records Act. In such cases, the private entity's "swift" action to seek declaratory relief to obtain judicial clarification of its status under the law, rather than immediately comply with a

request for public documents, has not been considered an "unlawful refusal" to release documents for purposes of the assessment of attorney's fees even though the corporation is ultimately determined to be an "agency" for purposes of Ch. 119, F.S., disclosure requirements. *See*, *New York Times Company v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993). *Accord*, *Fox v. News-Press Publishing Company, Inc.*, 545 So. 2d 941 (Fla. 2d DCA 1989).

In a later case, the 5th District Court of Appeal expanded the *PHH* holding by determining that attorney's fees would not be assessed against a private company, even though the prevailing party had sued to obtain the records after being refused access. *Harold v. Orange County,* 668 So. 2d 1010, 1012 (Fla. 5th DCA 1996). The court noted:

> Although the *P.H.H.* court commented on the fact that in that case the private entity had acted swiftly to clarify its status by filing a declaratory judgment action, we do not find that the failure to independently seek such clarification in this case (considering the swiftness of appellant's action), renders an otherwise good faith--even if incorrect--refusal to disclose records an unlawful act.

However, where the entity did not have a "reasonable" or "good faith" belief in the soundness of its position in refusing production, a trial court abused its discretion in failing to award fees and costs. *Knight Ridder, Inc. v. Dade Aviation Consultants,* 808 So. 2d 1268, 1269 (Fla. 3d DCA 2002). Thus, an opinion of independent counsel upon which an entity relied to support its claim that records should not be released to the media requestor did not meet the good faith standard because the entity did not provide "full and complete disclosure" of the operative facts to counsel. *Id*. at 1270.

3. Criminal penalties

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. *See, State v. Webb*, 786 So. 2d 602 (Fla. 1st DCA 2001) (s. 119.10[2] authorizes a conviction for violating s. 119.07 only if a defendant is found to have committed such violation "knowingly,"; statute cannot be interpreted as allowing a conviction based on mere negligence). *And see* s. 119.10(1)(a), F.S., providing 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. *Cf.*, s. 838.022(1)(b), F.S. (unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause harm to another, to conceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act).

A state attorney may prosecute suits charging public officials with violations of the Public Records Act, including those violations which may result in a finding of guilt for a noncriminal infraction. AGO 91-38.

N. HOW LONG MUST AN AGENCY RETAIN A PUBLIC RECORD?

1. Delivery of records to successor

Section 119.021(4)(a), F.S., provides that whoever has custody of public records shall deliver such records to his or her successor at the expiration of his or her term of office or, if there is no successor, to the records and information management program of the Division of Library and Information Services of the Department of State. *See*, *Maxwell v. Pine Gas Corporation*, 195 So. 2d 602 (Fla. 4th DCA 1967) (state, county, and municipal records are not the personal property of a public officer); AGO 98-59 (records in the files of the former city attorney which were made or received in carrying out her duties as city attorney and which communicate, perpetuate, or formalize knowledge constitute public records and are required to be turned over to her successor); and AGO 75-282 (public records regardless of usefulness or relevancy must be turned over to the custodian's successor in office or to the Department of State). *And see* s. 119.021(4)(b), F.S., providing that "[w]hoever is entitled to custody of public records shall demand them from any person having illegal possession of them, who must forthwith deliver the same to him or her."

In the absence of contrary direction in the legislation dissolving a special taxing district, the district's records should be delivered to the Department of State. AGO 95-03. *Cf.*, s. 257.36(2)(b), F.S., specifying procedures for disposition of agency records stored in the state records center in the event that the agency is dissolved or its functions are transferred to another agency.

2. Retention and disposal of records

Section 119.021(2)(a), F.S. requires the Division of Library and Information Services (division) of the Department of State to adopt rules establishing retention schedules and a disposal process for public records. Each agency must comply with these

rules. Section 119.021(2)(b), F.S. *And see* s. 119.021(2)(c), F.S., providing that public officials must "systematically dispose" of records no longer needed, subject to the consent of the division in accordance with s. 257.36, F.S.

The division "shall give advice and assistance to public officials to solve problems related to the preservation, creation, filing and public accessability of public records in their custody." Section 119.021(2)(d), F.S. Public officials shall assist the division by preparing an inclusive inventory of categories of public records. *Id*. The division shall establish a time period for the retention or disposal of each series of records. *Id. And see* s. 119.021(3), F.S., stating that notwithstanding the provisions of Chs. 119 or 257, F.S., certain orders that comprise final agency action must be permanently maintained. *Cf*., Fla. R. Jud. Admin. 2.075, establishing retention schedules for court records.

Section 257.36(6), F.S., states that a "public record may be destroyed or otherwise disposed of only in accordance with retention schedules established by the division." The division is required to adopt reasonable rules relating to destruction and disposition of records. *Id*. *See generally*, Chs. 1B-24 and 1B-26, F.A.C. An affected party seeking to challenge an agency's approved records retention schedule may be entitled to a hearing pursuant to Ch. 120, F.S. *L.R. v. Department of State, Division of Archives, History and Records Management*, 488 So. 2d 122 (Fla. 3d DCA 1986). *And see* AGO 04-51, regarding the application of the retention schedules to materials obtained by law enforcement agencies which become evidence in criminal investigations and prosecutions; and Inf. Op. to Matthews, July 12, 2004, noting the division's statutory responsibility to adopt rules establishing standards for reproduction or duplication of audio or audiovisual tape recordings.

Thus, for example, a municipality may not remove and destroy disciplinary notices, with or without the employee's consent, during the course of resolving collective bargaining grievances, except in accordance with the statutory restrictions on disposal of records. AGO 94-75. *See also*, AGO 98-54 (registration and disciplinary records which are stored in a national association securities dealers database and which are used by the state banking department for regulatory purposes are public records and may not be destroyed merely because an arbitration panel of the national association has ordered that they be expunged; such records are subject to statutory mandates governing destruction of records); AGO 96-34, stating that as public records, "e-mail" messages are subject to the statutory limitations on destruction of public records; and AGO 75-45, concluding that tape recordings of proceedings before a public body must be preserved in

compliance with statutory record retention and disposal restrictions. *Cf.*, AGO 91-23 (clerk of circuit court not authorized to expunge a court order from the Official Records, in the absence of a court order directing such action). *Accord*, Inf. Op. to Hernandez, July 1, 2003 (agency not authorized to purge or expunge documents which it created while carrying out what it perceived to be its official duty based upon an accusation that the agency may have been mistaken in such an assessment).

The statutory restrictions on destruction of public records apply even if the record is exempt from disclosure. For example, in AGO 81-12, the Attorney General's Office concluded that the City of Hollywood could not destroy or dispose of licensure, certification, or employment examination question and answer sheets except as authorized by statute. Similarly, in AGO 87-48, it was concluded that the statutory prohibition against placing anonymous materials in the personnel file of a school district employee did not permit the destruction of such materials received in the course of official school business, absent compliance with statutory restrictions on destruction of records. An exemption only removes the records from public access requirements, it does not exempt the records from the other provisions of Ch. 119, F.S., such as those requiring that public records be kept in a safe place or those regulating the destruction of public records. AGO 93-86. *See*, s. 119.021, F.S.