

**OVERVIEW OF THE SUNSHINE AND PUBLIC RECORDS LAWS**

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**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 of public boards or commissions 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 section 286.011, Florida Statutes:

- (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 and promptly recorded.

A right of access to meetings of collegial public bodies is also recognized in the Florida Constitution. Article I, section 24, Florida Constitution, 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.

**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. *Op. Att'y Gen. Fla. 73-223* (1973).

The judiciary and the Legislature are not subject to the Sunshine Law. *See, Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992); *Op. Att'y Gen. Fla. 83-97* (1983).

**Note: 2009 and 2010 additions are marked in bold text.**

Federal agencies, *i.e.*, agencies created under federal law, operating within the state do not come within the purview of the state Sunshine Law. Op. Att'y Gen. Fla. 71-191 (1971). *Cf.*, 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).

2. *Are advisory boards which make recommendations or committees established for fact-finding only 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 agencies that create them. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). *See also*, *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983) (Sunshine Law applies to a university's search and screening committee). *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).

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 section 286.011, Florida Statutes. *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985). However, the 'fact-finding' exception applies only to advisory committees, and does not apply to boards, like school boards, that have the "ultimate decision-making authority." *Finch v. Seminole County School Board*, 995 So. 2d 1068 (Fla. 5<sup>th</sup> DCA 2008).

3. *Are private organizations providing services to public agencies subject to the Sunshine Law?*

"Generally . . . the Government in the Sunshine Law does not apply to private organizations providing services to a state or local government, unless the private entity has been created by a public entity, there has been a delegation of the public entity's governmental functions, or the private organization plays an integral part in the decision-making process of the public entity." Op. Att'y Gen. Fla. 07-27 (2007). Thus, the Sunshine Law would not ordinarily apply to meetings of a homeowners' association. Inf. Op. to Fasano, June 7, 1996.

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 necessarily 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).

However, although private organizations are generally 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, 383 (Fla. 1999). Thus, a not-for-profit corporation that contracted with a city to carry out affordable housing responsibilities and also reviewed and screened applicant files is an agency for purposes of the Sunshine Law. Op. Att'y Gen. Fla. 08-66 (2008).

Similarly, 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. Op. Att'y Gen. Fla. 98-49 (1998). *And see*, Op. Att'y Gen. Fla. 07-44 (2007) (property owners association subject to open government laws when it is acting on behalf of a municipal services taxing unit).

#### 4. *Does the Sunshine Law apply to staff?*

Meetings of staff of boards or commissions covered by the Sunshine Law are not ordinarily subject to section 286.011, Florida Statutes. *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). Thus, 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*, 937 So. 2d 1161 (Fla. 4th DCA 2006). *And see*, *Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000), in which the court concluded that the Sunshine Law did not apply to informal meetings of staff where the meetings 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; *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"); and *Jordan v. Jenne*, 938 So. 2d 526 (Fla. 4th DCA 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).

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. 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*, 442 So. 2d 934 (Fla. 1983). *And see*, *Evergreen the Tree Treasurers of Charlotte County, Inc. v. Charlotte County Board of County Commissioners*, 810 So. 2d 526 (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).

For example, in *Wood v. Marston, supra*, the Court concluded that a committee composed of staff which was created for the purpose of screening applications and making recommendations for the position of a law school dean was subject to section 286.011, Florida Statutes, since the committee members performed a decision-making function outside of their normal staff activities. 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, Dascott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004) (meeting of pre-termination conference panel established pursuant to county ordinance is subject to Sunshine Law); and Op. Att'y Gen. Fla. 07-54 (2007), concluding that while post-termination hearings held before the city manager are not subject to the Sunshine Law, hearings held before a three member panel appointed by the city manager pursuant to the city personnel policy should be held in the Sunshine. *Compare, McDougall v. Culver*, 3 So. 3d 391, 394 (Fla. 2d DCA 2009) (circulation of memoranda by senior officials in sheriff's office which contained findings and recommendations in connection with an internal affairs investigation did not constitute a "meeting" for purposes of the Sunshine Law because the sheriff alone made the final decision on discipline; "the senior officials provided only a recommendation to the Sheriff but they did not deliberate with him nor did they have decision-making authority.").

Similarly, in *Silver Express Company v. Miami-Dade Community College*, 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. *And see*, Op. Att'y Gen. Fla. 05-06 (2005) (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).

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

There may be occasions in which 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 duties as an employee *provided* such discussions do not relate to matters that will come before the board for action. *See*, Op. Att'y Gen. Fla. 92-79 (1992).

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 section 286.011, Florida Statutes. 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). Op. Att'y Gen. Fla. 04-58 (2004) ("coincidental unscheduled meeting of two or more county commissioners to discuss emergency issues with staff" during a declared state of emergency not subject to s. 286.011 if the issues do not require action by the county commission).

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

The Sunshine Law applies to public boards and commissions, *i.e.*, collegial bodies. As discussed *supra*, section 286.011, Florida Statutes, 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, section 286.011, Florida Statutes, 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. See, *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); *City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989); *Mitchell v. School Board of Leon County*, 335 So. 2d 354 (Fla. 1st DCA 1976).

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 section 286.011, Florida Statutes. 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).

**a. Written correspondence between board members**

A city commissioner may, outside a public meeting, send documents that the commissioner wishes other members of the commission to consider on matters coming before the commission for official action, provided that there is no response from, or interaction related to such documents among, the commissioners prior to the public meeting. Op. Att'y Gen. Fla. 07-35 (2007). In such cases, the records, which are subject to disclosure under the Public Records Act, are not being used as a substitute for action at a public meeting as there is no interaction among the commissioners prior to the meeting. Op. Att'y Gen. Fla. 89-23 (1989).

If, however, a 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 section 286.011, Florida Statutes. Op. Att'y Gen. Fla. 90-3 (1990). Cf., Inf. Op. to Kessler, November 14, 2007 (procedural rule stating that a county commissioner must make a written request to the chair of the commission if he or she wishes to withdraw an item from the consent agenda does not violate the Sunshine Law).

Accordingly, 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 comment from other board members or the circulation of responsive memoranda by other board members would violate the Sunshine Law. Op. Att'y Gen. Fla. 96-35 (1996). 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 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.*

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 previously, the Sunshine Law applies to 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 section 286.011, Florida Statutes. 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, board members may not use computers to conduct private discussions among themselves about board business. Op. Att'y Gen. Fla. 89-39 (1989). Thus, while a city commissioner is not prohibited from posting comments on the city's Facebook page, commissioners "must not engage in an exchange or discussion of matters that foreseeably will come before the board or commission for official action." Op. Att'y Gen. Fla. 09-19 (2009). Cf., Inf. Op. to Galaydick, October 15, 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 Op. Att'y Gen. Fla. 01-20 (2001) (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).

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

A related issue is whether a board is authorized to conduct *public* meetings via electronic media technology (e.g., telephone or video conferencing). The answer to this question depends upon whether the board is a state or local government agency.

In Op. Att'y Gen. Fla. 98-28 (1998), the Attorney General's Office concluded that section 120.54(5)(b)2., Florida Statutes, authorizes *state* agencies to conduct 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, Florida Administrative Code.

As to *local* boards, the Attorney General's Office advised that the authorization in section 120.54(5)(b)2., Florida Statutes, to conduct meetings entirely through the use of communications media technology applies only to state agencies. Op. Att'y Gen. Fla. 98-28 (1998). Thus, since section 1001.372(2)(b), Florida Statutes, 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.*

If a quorum of the 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." Op. Att'y Gen. Fla. 03-41 (2003). *See also*, Op. Att'y Gen. Fla. 02-82 (2002) (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). However, the use of electronic media technology does not satisfy quorum requirements necessary for official action to be taken by local boards. Op. Att'y Gen. Fla. 06-20 (2006). **"[W]here a quorum is necessary for action to be taken, physical presence of the members making up the quorum is required in the absence of a statute requiring otherwise."** Op. Att'y Gen. Fla. 09-56 (2009).

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, the Attorney General's Office concluded that local boards may use electronic media technology to conduct informal discussions and workshops over the Internet, provided that proper notice is given, and interactive access by members of the public is provided. Op. Att'y Gen. Fla. 01-66 (2001). Similarly, 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. Op. Att'y Gen.

Fla. 06-20 (2006).

However, the use of an electronic bulletin board to discuss matters over an extended period of days or weeks violates the Sunshine Law by circumventing the notice and access provisions of that law. Op. Att'y Gen. Fla. 02-32 (2002). Compare, Op. Att'y Gen. Fla. 08-65 (2008) (city advisory boards may conduct workshops lasting no more than two hours using an on-line bulletin board if proper notice is given and interactive access to members of the public is provided and the city ensures that operating-type assistance is available where the computers for the public are located).

**c. Delegation of authority to single individual**

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. Op. Att'y Gen. Fla. 93-78 (1993). 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. Ops. Att'y Gen. Fla. 95-06 (1995) and Op. Att'y Gen. Fla. 93-78 (1993). And see, *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 upon which foreseeable action will be taken by the public officials, then delegates stand in the shoes of such public officials insofar as the Sunshine Law is concerned). Compare, *Lee County v. Pierpont*, 693 So. 2d 994 (Fla. 2d DCA 1997) (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).

**Thus, while the Sunshine Law 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, the Sunshine law does apply when there has been a delegation of a board's decision-making authority. Op. Att'y Gen. Fla. 10-15 (2010).**

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 section 286.011, Florida Statutes. See, *City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989).

**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. 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 section 286.011, Florida Statutes, 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 section 286.011, Florida Statutes.

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 commission was not subject to the Sunshine Law.

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

##### 1. *Investigative meetings or meetings to consider confidential material*

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. *Op. Att'y Gen. Fla. 74-84* (1974); *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973). The Florida Supreme Court has stated that in the absence of a statute exempting a meeting in which privileged material is discussed, section 286.011, Florida Statutes, should be construed as containing no exceptions. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971).

Section 119.07(7), Florida Statutes, provides that an exemption from section 119.07, Florida Statutes, "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 in which exempted material is to be discussed in the absence of a specific exemption from the Sunshine Law. *See, Ops. Att'y Gen. Fla. 10-04 (2010) (school board discussing confidential student records)*; 93-41 (1993) (county criminal justice commission); and 91-88 (1991) (pension board).

##### 2. *Legal matters*

In the absence of legislative exemption, discussions between a public board and its attorney are subject to section 286.011, Florida Statutes. *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (section 90.502, Florida Statutes, 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). *Cf.*, section 90.502(6), Florida Statutes, stating that a discussion or activity that is not a meeting for purposes of the Sunshine Law shall not be construed to waive the attorney-client privilege.

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), Florida Statutes, 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 section 286.011(8), Florida Statutes, to be liberally or strictly construed?*

It has been held that the Legislature intended a strict construction of section 286.011(8), Florida Statutes. *City of Dunnellon v. Aran*, 662 So. 2d 1026 (Fla. 5th DCA 1995); *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), Florida Statutes, 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."

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. Op. Att'y Gen. Fla. 04-35 (2004). Rather, such an announcement must be made at a public meeting of the board. *Id. Cf.*, Op. Att'y Gen. Fla. 07-31 (2007) (a board attorney's request for a section 286.011[8], Florida Statutes, meeting may be made at a special meeting of the board provided that the special meeting at which the request is made is open to the public, reasonable notice has been given, and minutes are taken).

(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. 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) (rejecting city's argument that charter provision requiring that city clerk attend all council meetings authorized clerk to attend closed attorney-client meeting); **Op. Att'y Gen. Fla. 09-52 (2009) (attorneys representing superintendent of schools in an administrative action where the school board is a named party not authorized to meet privately with school board)**; and Op. Att'y Gen. Fla. 01-10 (2001) (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. Op. Att'y Gen. Fla. 98-06 (1998). *And see, Zorc v. City of Vero Beach* (attendance of Special Counsel authorized). And, a qualified interpreter may attend to interpret for hearing impaired board members without violating the Sunshine Law. Op. Att'y Gen. Fla. 08-42 (2008).

(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*, 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) states that the subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures. Section 286.011(8)(b), Florida Statutes.

Moreover, section 286.011(8), Florida Statutes, "simply provides a governmental entity's attorney an opportunity to receive necessary direction and information from the government entity. 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." *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99, 100 (Fla. 1<sup>st</sup> DCA 1996), quoting Staff of Fla.H.R.Comm. on Government Operations, CS/HB 491 (1993) Final Bill Analysis & Economic Impact Statement at 3. 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*, at 900. *And see*, Op. Att'y Gen. Fla. 99-37 (1999).

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*, at 901. *Accord*, Op. Att'y Gen. Fla. 08-17 (2008) ("any action to *approve* a settlement or litigation expenditures must be voted on in a public meeting"). *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?*

In *Brown v. City of Lauderhill*, *supra*, 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." *Accord*, Op. Att'y Gen. 09-15 (2009) (where city is a "real party in interest" of a pending lawsuit, it may conduct a closed attorney-client session even though it is not a named party to the litigation at the time of the meeting). *And see*, *Zorc v. City of Vero Beach*, 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*, Op. Att'y Gen. Fla. 98-21 (1998) (section 286.011[8] exemption "does not apply when no lawsuit has been filed even though the parties involved believe litigation is inevitable"). *And see*, Op. Att'y Gen. Fla. 09-25 (2009) (town council that has received a pre-suit notice under the Bert J. Harris Act is not a party to pending litigation and, therefore, may not conduct a closed meeting to discuss settlement negotiations) and Op. Att'y Gen. Fla. 06-03 (2006) (closed attorney-client session may not be held to discuss settlement negotiations on an issue that is the subject of mediation conducted pursuant to a partnership agreement between the agency and others).

Accordingly, discussions between the city attorney and the city commission relating to settlement of a conflict under the Florida Governmental Conflict Resolution Act would not come within the scope of the exemption because "[n]othing in section 286.011(8), Florida Statutes, extends the coverage of the exemption to discussions of mediated disputes or to issues arising through the conflict resolution procedure whether or not litigation has been filed." Op. Att'y Gen. Fla. 09-14 (2009).

(7) *When is litigation "concluded" for purposes of section 286.011(8)(e)?*

An action or lawsuit is "pending" from its inception until the rendition of a final judgment. Op. Att'y Gen. Fla. 06-03 (2006). Thus, litigation that is ongoing but temporarily suspended pursuant to a stipulation for settlement has not been concluded for purposes of section 286.011(8), 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. Op. Att'y Gen. Fla. 94-64 (1994). *And see*, Op. Att'y Gen. Fla. 94-33 (1994), concluding that to give effect to the purpose of section 286.011(8), 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.*, Op. Att'y Gen. Fla. 96-75 (1996) (disclosure of medical records to a city council during a closed-door meeting under section 286.011[8], Florida Statutes, 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**

Section 768.28(16)(c), Florida Statutes, 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 the Sunshine Law.

This exemption is limited and applies only to tort claims for which the agency may be liable under section 768.28, Florida Statutes. Op. Att'y Gen. Fla. 04-35 (2004). The exemption is not applicable to meetings held prior to the filing of a tort claim with the risk management program. Op. Att'y Gen. Fla. 92-82 (1992). Moreover, 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. Op. Att'y Gen. Fla. 04-35 (2004).

Unlike section 286.011(8), Florida Statutes, however, section 768.28(16), Florida Statutes, does not specify the personnel who are authorized to attend the meeting. See, Op. Att'y Gen. Fla. 00-20 (2000), 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.

### 3. *Personnel matters*

Meetings of a public board or commission at which personnel matters are discussed are not exempt from the provisions of section 286.011, Florida Statutes, 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). **And see, Op. Att'y Gen. Fla. 10-14 (2010) (collegial board created by board of directors of a charter school to oversee personnel decisions of the school is subject to the Sunshine Law).**

#### a. **Collective bargaining discussions**

A limited exemption from section 286.011, Florida Statutes, exists for discussions between the chief executive officer of the public employer and the legislative body of the public employer relative to collective bargaining. Section 447.605(1), Florida Statutes. Cf., Op. Att'y Gen. Fla. 99-27 (1999), noting that a committee (composed of the city manager and various city managerial employees) formed by the city manager to represent the city in labor negotiations qualifies as the "chief executive officer" and thus may participate in closed executive sessions conducted pursuant to this section.

Section 447.605(1), Florida Statutes, does not directly address the dissemination of information that may be obtained at a closed labor negotiation meeting, but there is clear legislative intent that matters discussed during such meetings are not to be open to public disclosure. Op. Att'y Gen. Fla. 03-09 (2003).

The section 447.605(1) exemption applies only when there are actual and impending collective bargaining negotiations. *City of Fort Myers v. News-Press Publishing Company, Inc.*,

514 So. 2d 408 (Fla. 2d DCA 1987). It does not apply to other nonexempt topics which may be discussed during the course of the same meeting. Op. Att'y Gen. Fla. 85-99 (1985). Moreover, the collective bargaining negotiations between the chief executive officer and a bargaining agent are not exempt and, pursuant to section 447.605(2), Florida Statutes, must be conducted in the Sunshine.

Section 447.605, Florida Statutes, does not directly address the dissemination of information that may be obtained at a closed labor negotiation meeting, but there is clear legislative intent that matters discussed during such meetings are not to be open to public disclosure. Op. Att'y Gen. Fla. 03-09 (2003).

**b. Complaint review boards, disciplinary hearings, and grievance committees**

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. 94-2141-AC (Fla. 15th Cir. Ct. May 6, 1994). *Accord*, Op. Att'y Gen. Fla. 78-105 (1978) (police complaint review board) and Op. Att'y Gen. Fla. 80-27 (1980) (sheriff civil service board). Similarly, a meeting of a municipal housing authority commission to conduct an employee termination hearing is subject to the Sunshine Law. Op. Att'y Gen. Fla. 92-65 (1992).

The Sunshine Law applies to board discussions concerning grievances and other personnel matters. Op. Att'y Gen. Fla. 76-102 (1976). A staff grievance committee created to make nonbinding recommendations to a county administrator regarding disposition of employee grievances is also subject to section 286.011, Florida Statutes. Op. Att'y Gen. Fla. 84-70 (1984). *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. A collective bargaining agreement cannot be used "to circumvent the requirements of public meetings" in section 286.011, Florida Statutes. *Id.* at 1376.

Similarly, in *Dascott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004), the court held that 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*, 938 So. 2d 526 (Fla. 4th DCA 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). *And see, Op. Att'y Gen. Fla. 07-54 (2007)*, concluding that while post-termination hearings held before the city manager are not required to be open, hearings held before a three member panel appointed by the city manager pursuant to the city personnel policy should be held in the Sunshine. *Accord, Op. Att'y Gen. Fla. 10-14 (2010)* (while a single officer, accomplishing his or her official duties and responsibilities may not be subject to the Sunshine Law while discharging those duties, the creation of a

board or commission to accomplish these duties or the delegation of responsibility to a collegial body may implicate the Sunshine Law).

**c. 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. Op. Att'y Gen. Fla. 89-37 (1989).

**d. Screening advisory committees**

In *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983), a committee composed of staff which was created for the purpose of screening applications for the position of a law school dean and making recommendations to the faculty senate was held to be subject to section 286.011, Florida Statutes, since the committee performed a decision-making function outside of their normal staff activities. 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.

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. Op. Att'y Gen. Fla. 80-20 (1980). *Accord*, Op. Att'y Gen. Fla. 80-51 (1980). 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. *See, Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985); *Knox v. District School Board of Brevard*, 821 So. 2d 311 (Fla. 5th DCA 2002).

**4. 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).

**5. 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 (Fla. 1971). 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 section 286.011, Florida Statutes, and is prohibited from negotiating the acquisition or lease of the property in secret. Op. Att'y Gen. Fla. 74-294 (1974).

**E. DOES THE SUNSHINE LAW APPLY TO:**

**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). The Sunshine Law does not apply to candidates for office, unless the candidate is an incumbent seeking reelection. Op. Att'y Gen. Fla. 92-05 (1992).

**2. *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 board. *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72 (Fla. 1984). *Accord*, Inf. Op. to McClash, April 29, 1992 (Sunshine Law generally not applicable to county commissioner meeting with individual member of metropolitan planning organization).

**3. *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. Ops. Att'y Gen. Fla. 83-70 (1983) and 75-210 (1975).

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 only possesses 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 he or she 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. Ops. Att'y Gen. Fla. 90-26 (1990) and 85-36 (1985). *And see*, Inf. Op. to Cassady, April 7, 2005 (meeting between a mayor and a council member to discuss prospective employees).

**4. *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. Op. Att'y Gen. Fla. 88-45 (1988).

**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. Op. Att'y Gen. Fla. 05-18 (2005).

## 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. Op. Att'y Gen. Fla. 92-5 (1992).

Similarly, in Op. Att'y Gen. Fla. 94-62 (1994), 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. *See also*, Op. Att'y Gen. Fla. 08-18 (2008) (participation by two city council members in a citizens police academy does not violate the Sunshine Law; "[t]he educational course is not changed into a meeting of a board or commission . . . by the attendance and participation of members of the city council in the course work of the academy").

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 is to 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 a private breakfast meeting at which the sheriff spoke and city commissioners individually questioned the sheriff but did not direct comments or questions to each other, did not violate the Sunshine Law. The court denied the commissioners' motion for summary judgment and held that a discussion is subject to the Sunshine Law where there is a common facilitator who is receiving comments from each commissioner in front of other commissioners. **Similarly, a public forum that is hosted by a city council member with other council members invited to attend and discuss matters which may foreseeably come before the city council for action is subject to the Sunshine Law. Inf. Op. to Jove, January 12, 2009.**

## 7. *Board members attending meetings of another public board*

The Attorney General has advised that county commissioners who are also members of a regional planning council may take part in council meetings and express their opinions without violating the Sunshine Law. Op. Att'y Gen. Fla. 07-13 (2007). "However, these officials should not discuss or debate these issues with one another outside the Sunshine as either county commissioners or as regional planning council members." *Id. See also*, Op. Att'y Gen. Fla. 00-68 (2000) (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).

## 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. Op. Att'y Gen. Fla. 92-79 (1992). Thus, 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 section 286.011, Florida Statutes. Op. Att'y Gen. Fla. 89-6 (1989).

**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 key element of the Sunshine Law is the requirement that boards subject to the law provide "reasonable notice" of all meetings. See, section 286.011(1), Florida Statutes. Although section 286.011 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). 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 (Fla. 1st DCA 1991). *And see, Baynard v. City of Chiefland*, No. 38-2002-CA-00078 (Fla. 8th Cir. Ct. July 8, 2003) (reasonable notice required even if subject of meeting is "relatively unimportant").

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 interested members of the public to attend the meeting. Ops. Att'y Gen. Fla. 04-44 (2004) and 80-78 (1980). *Cf., Lyon v. Lake County*, 765 So. 2d 785 (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).

**b. Notice requirements when quorum not present or when meeting adjourned to a later date**

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. Ops. Att'y Gen. Fla. 71-346 (1971) and 90-56 (1990). 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. Op. Att'y Gen. Fla. 90-56 (1990).

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

The Sunshine Law only requires 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, charter or code. In such cases, the requirements of that statute, charter, or code must be strictly observed. Inf. Op. to Michael Mattimore, February 6, 1996.

For example, a board or commission subject to Chapter 120, Florida Statutes, the Administrative Procedure Act, must comply with the notice requirements of that act. *See, e.g.*, section 120.525, Florida Statutes.

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

Section 286.0105, Florida Statutes, 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 section 286.0105, Florida Statutes. Op. Att'y Gen. Fla. 81-06 (1981).

**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 Sunshine Law does not mandate that an agency provide notice of each item to be discussed via a published agenda. *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); and *Law and Information Services, Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996) ("[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"). *See*, Inf. Op. to Mattimore, February 6, 1996 (notice of each item to be discussed at public meeting is not required under section 286.011, Florida Statutes, although other statutes, codes, or rules, such as Chapter 120, Florida Statutes, may impose such a requirement).

Thus, while Florida courts have recognized that notice of public meetings is a mandatory requirement of the Government in the Sunshine Law, the preparation of an agenda that reflects every issue that may come before the governmental entity at a noticed meeting is not. Op. Att'y Gen. Fla. 03-53 (2003). Therefore, the Sunshine Law does not prohibit a city commission from adding additional items to the agenda at a regularly noticed meeting and taking formal action on the added items. *Id. Grapski v. City of Alachua*, 35 F.L.W. D205 (Fla. 1<sup>st</sup> DCA January 21, 2010) (Sunshine Law does not prohibit use of consent agenda procedure). However, the Attorney General's Office has advised a commission to "postpone formal action on controversial matters coming before the board at a meeting where the public has not been given notice that such an issue will be discussed." *Id.*

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

a. **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). *And see*, Ops. Att'y Gen. Fla. 08-01 (2008) and 03-03 (2003) (municipality may not hold commission meetings at facilities outside its boundaries).

b. **Meetings at facilities that discriminate or unreasonably restrict access prohibited**

Section 286.011, Florida Statutes, prohibits boards or commissions subject to its provisions 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. Section 286.011(6), Florida Statutes. 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 the such identification while attending the meeting and to request permission before entering the room where the meeting is held. Op. Att'y Gen. Fla. 96-55 (1996). The Attorney General's Office has also expressed concerns about holding a public meeting in a private home in light of the possible "chilling effect" on the public's willingness to attend. *See*, Inf. Op. to Galloway, August 21, 2008.

c. **Inspection trips**

The Sunshine Law does not prohibit advisory boards from conducting inspection trips provided that the board members do not discuss matters which may come before the board for official action. *See, Bigelow v. Howse*, 291 So. 2d 645 (Fla. 2d DCA 1974). *See also*, Op. Att'y Gen. Fla. 02-24 (2002) (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).

However, the exception to the Sunshine Law for "fact-finding" missions does not apply to boards with the "ultimate decision-making authority." *See, Finch v. Seminole County School Board*, 995 So. 2d 1068, 1073 (Fla. 5<sup>th</sup> DCA 2008), in which the court held that a school board violated the Sunshine Law when board members, together with several school officials and two members of the media, took a bus tour of neighborhoods affected by a proposed rezoning even though there was no open discussion regarding the rezoning; no one either discussed or expressed a preference for any plan; and no decisions were made. Since the board was the ultimate decision-making body, the bus tour constituted a violation of the Sunshine Law.

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

**a. Exclusion of certain members of the public**

The term "open to the public" as used in the Sunshine Law means open to *all* who choose to attend. Op. Att'y Gen. Fla. 99-53 (1999). A board's request that certain members of the public "voluntarily" leave the room during portions of a public meeting is not authorized. For example, in *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169 (Fla. 4th DCA 1995), the appellate court affirmed a lower court ruling finding that a meeting of a procurement committee where each presenter was asked "as a courtesy" to leave the meeting room while the committee considered competing presentations violated the Sunshine Law.

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. Op. Att'y Gen. Fla. 79-01 (1979). Section 286.011, Florida Statutes, 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.*

**b. 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. However, a board may not ban videotaping of an otherwise public meeting. *Pinellas County School Board v. Suncam, Inc.*, 829 So. 2d 989 (Fla.

2d DCA 2002). Similarly, a rule or policy that prohibits nondisruptive or silent tape recording devices at public meetings is invalid. Op. Att'y Gen. Fla. 77-122 (1977).

**c. Identification**

A city may not require persons wishing to attend public meetings to provide identification as a condition of attendance. Op. Att'y Gen. Fla. 05-13 (2005). This is not to say 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. Public's right to participate in a meeting**

As noted by the Attorney General, "the courts of this state and this office have recognized the importance of public participation in open meetings." See, Op. Att'y Gen. Fla. 04-53 (2004). The 2004 opinion cited to *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 699 (Fla. 1969) (specified boards and commissions . . . should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made); *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 475 (Fla. 1974); and *Krause v. Reno*, 366 So. 2d 1244, 1250 (Fla. 3<sup>rd</sup> DCA 1979) ("citizen input factor" is an important aspect of public meetings).

However, in *Wood v. Marston*, 442 So. 2d 934, 941 (Fla. 1983), the Court held that the public did not have a right to speak at a meeting of a committee appointed by a university president to recommend candidates for a university position. See also, *Law and Information Services Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4<sup>th</sup> 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; and *Homestead-Miami Speedway, LLC v. City of Miami*, 828 So. 2d 411 (Fla. 3<sup>rd</sup> DCA 2002) (city did not violate Sunshine Law when there was public participation and debate in some but not all meetings regarding a proposed contract).

Following the *Marston* decision, the Attorney General's Office advised that "until the matter is clarified" when committees [like the one created by the university president in *Marston*] are carrying out certain executive functions that traditionally have been conducted without public input, the public has a right to attend but may not have the authority to participate. On the other hand, if a board is carrying out *legislative* responsibilities, 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.

Recently, however, the First District relied on the *Marston* decision in ruling that a non-profit corporation charged by the City of Pensacola with overseeing the development of a parcel of public waterfront property must allow the public to attend its meetings but did not have to allow the public to speak. *Keesler v. Community Maritime Park Associates*, 35 F.L.W. D538 (Fla. 1<sup>st</sup> DCA March 10, 2010). See also, *Grapski v. City of Alachua*, 35 F.L.W. D205 (Fla. 1<sup>st</sup> DCA January 21, 2010) (Sunshine Law does not prohibit use of consent agenda procedure over citizen objection; the public has the right to attend open meetings, but no authority to participate in or to interfere with the decision-making

process).

Although the Attorney General's Office has not addressed public participation since the *Keesler* decision was issued, the Office has previously noted in its post-*Marston* opinions 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 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. *Cf., Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989), 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).

5. *Must written minutes be kept of all sunshine meetings?*

Section 286.011(2), Florida Statutes, specifically requires that minutes of a meeting of a public board or commission be promptly recorded and open to public inspection. Thus, a city violated the Sunshine Law when it failed to provide public access to minutes until after they had been approved by the city commission. *Grapski v. City of Alachua*, 35 F.L.W. D205 (Fla. 1<sup>st</sup> DCA January 21, 2010).

The minutes required to be kept for "workshop" meetings are no different than those required for any other meeting of a public board or commission. Op. Att'y Gen. Fla. 08-65 (2008). *And see, Lozman v. City of Riviera Beach*, No. 502007CA007552XXXXMBAN (Fla. 15<sup>th</sup> Cir. Ct. June 9, 2009) (minutes required to be kept for city council agenda review meetings).

While tape recorders may be used to record the proceedings before a public body, written minutes of the meeting must also be taken and promptly recorded. *See, Op. Att'y Gen. Fla. 75-45* (1975). Similarly, while a board may archive the full text of all workshop discussions conducted on the Internet, written minutes of these workshops must also be prepared and promptly recorded. Op. Att'y Gen. Fla. 08-65 (2008).

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. Op. Att'y Gen. Fla. 02-51 (2002).

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

Minutes of Sunshine Law meetings need not be verbatim transcripts of the meetings; rather the use of the term "minutes" in section 286.011, Florida Statutes, contemplates a brief

summary or series of brief notes or memoranda reflecting the events of the meeting. Op. Att'y Gen. Fla. 82-47 (1982). 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.

There is no requirement that tape recordings be made by the public board or commission at each public meeting. However, once made, such recordings are public records and their retention is governed by the Public Records Act and the schedules established by the Division of Library and Information Services of the Department of State. Op. Att'y Gen. Fla. 86-21 (1986).

**7. *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. Op. Att'y Gen. Fla. 73-344 (1973).

By contrast, a secret ballot violates the Sunshine Law. See, Op. Att'y Gen. Fla. 73-264 (1973) (members of a personnel board may not vote by secret ballot during a hearing concerning a public employee). Accord, Ops. Att'y Gen. Fla. 72-326 (1972) and 71-32 (1971) (board may not use secret ballots to elect the chairman and other officers of the board).

**G. 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), Florida Statutes. 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), Florida Statutes. Such violations are prosecuted in the county in which the board or commission normally conducts its official business. Section 910.16, Florida Statutes. The criminal penalties apply to members of advisory councils subject to the Sunshine Law as well as to members of elected or appointed boards. Op. Att'y Gen. Fla. 01-84 (2001) (school advisory council members).

**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 official duties. Section 112.52, Florida Statutes. If convicted, the officer may be removed from office by executive order of the Governor. A person who pleads guilty or nolo contendere or who is found guilty is, for purposes of section 112.52, Florida Statutes, deemed to have been convicted, notwithstanding the suspension of sentence or the withholding of adjudication. Cf., section 112.51, Florida Statutes,

and article IV, section 7, Florida Constitution.

### 3. *Noncriminal infractions*

Section 286.011(3)(a), Florida Statutes, imposes noncriminal penalties for violations of the Sunshine Law by providing that any public official 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 actions on behalf of the state against public officials for violations of section 286.011, Florida Statutes, which result in a finding of guilt for a noncriminal infraction. *State v. Foster*, 12 F.L.W. Supp. 1194a (Fla. Broward Co. Ct. September 26, 2005). *Accord*, Op. Att'y Gen. Fla. 91-38 (1991).

### 4. *Attorney's fees*

Reasonable attorney's fees will be assessed against a board or commission found to have violated section 286.011, Florida Statutes. Such 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), Florida Statutes.

Section 286.011(4) also authorizes an award of appellate fees if a person successfully appeals a trial court order denying access. *School Board of Alachua County v. Rhea*, 661 So. 2d 331 (Fla. 1st DCA 1995), *review denied*, 670 So. 2d 939 (Fla. 1996). However, 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.

### 5. *Civil actions for injunctive or declaratory relief*

Section 286.011(2), Florida Statutes, 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); *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). *And see*, *Lozman v. City of Riviera Beach*, No. 502007CA007552XXXXMBAN (Fla. 15<sup>th</sup> Cir. Ct. June 9, 2009) (injunctive relief to enjoin city from future violations of the Sunshine Law due to a failure to record minutes of certain meetings is "appropriate" in light of City's past conduct and consistent refusal to record minutes even after being advised to do so by the City Attorney and also because the City "has continuously taken the legal position that local governments are not required by the Sunshine Law to record minutes.").

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*, 224 So. 2d 693, 699 (Fla. 1969).

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

Section 286.011, Florida Statutes, 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 was void *ab initio*. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974), *cert. denied*, 307 So. 2d 448 (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 section 286.011, Florida Statutes, had to be re-examined and re-discussed in open public meetings); 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 section 286.011, Florida Statutes).

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). *See, Finch v. Seminole County School Board*, 995 So. 2d 1068, 1073 (Fla. 5<sup>th</sup> DCA 2008) (school board remedied inadvertent violation of the Sunshine Law when it subsequently held full, open and independent public hearings prior to adopting a rezoning plan). ***Compare, Grapski v. City of Alachua*, 35 F.L.W. D205 (Fla. 1<sup>st</sup> DCA January 21, 2010) (city could have cured Sunshine Law violation by reconsidering the matter, but did not; accordingly, action taken in violation of the law was void *ab initio*). *Cf., Zorc v. City of Vero Beach*, 722 So. 2d 891, 903 (Fla. 4th DCA 1998) (meeting did not cure the Sunshine defect because it 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").**

#### 7. *Damages*

"The only remedies available pursuant to the Sunshine Act are a declaration of the wrongful action as void and reasonable attorney's fees." *Dascott v. Palm Beach County*, 988 So. 2d 47, 49 (Fla. 4<sup>th</sup> DCA 2008), *review denied*, 6 So. 3d 51 (Fla. 2009). Accordingly, an employee who prevailed in a lawsuit alleging that her termination violated the Sunshine Law "may not recover the equitable relief of back pay because money damages are not a remedy provided for by the Act." *Id.*

## II. PUBLIC RECORDS

## A. WHAT IS A PUBLIC RECORD WHICH IS OPEN TO INSPECTION?

### 1. *What materials are public records?*

Section 119.011(11), Florida Statutes, 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). 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." Op. Att'y Gen. Fla. 04-33 (2004).

For example, personal flight logs of pilots assigned to a county aviation unit are public records because the unit's written operating policies require each pilot to maintain personal flight logs as part of the pilot's administrative duties. *Miami-Dade County v. Professional Law Enforcement Association*, 997 So. 2d 1289 (Fla. 3d DCA 2009). "The officers are thus paid by the County to make these logbook entries, and the entries are made 'in connection with the transaction of official business' of the aviation unit." *Id.* at 1290-1291. *And see*, Op. Att'y Gen. Fla. 09-19 (2009) (because the creation of a city Facebook page must be for a municipal, not private purpose, the "placement of material on the city's page would presumably be in furtherance of such purpose and in connection with the transaction of official business and thus subject to the provisions of Chapter 119, Florida Statutes.").

### 2. *When are notes or nonfinal drafts of agency proposals subject to Chapter 119, Florida Statutes?*

There is no "unfinished business" exception to the public inspection and copying requirements of Chapter 119, Florida Statutes. 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). *See also*, *Warden v. Bennett*, 340 So. 2d 977 (Fla. 2d DCA 1976) (working papers used in preparing a college budget were public records).

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, 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 *Grapski v. City of Alachua*, 35 F.L.W. D205 (Fla. 1<sup>st</sup> DCA January 21, 2010) (canvassing board minutes constitute "final work product of the Board, not a preliminary draft or note," therefore, city violated public records law by refusing to produce minutes until after approval by the city commission). 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, section 119.071(1)(d), Florida Statutes, 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. *Op. Att'y Gen. Fla. 05-23* (2005). Similarly, a memorandum to the file that a city commissioner wrote after holding a private meeting regarding city business, which memorandum contained alleged factual information about possible criminal activity, was a public record because it was drafted to formalize and perpetuate his final knowledge gained at that meeting. *Miami Herald Media Company v. Sarnoff*, 971 So. 2d 915 (Fla. 3d DCA 2007).

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). **Thus, if a city commissioner takes notes for his or her own personal use and such notes are not intended to perpetuate, communicate, or formalize knowledge, personal notes taken at a workshop or during a commission meeting would not be considered public records. Inf. Op. to Trovato, June 2, 2009. 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), Florida Statutes, 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.

Article I, section 24, Florida Constitution, 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 by law pursuant to Article I, section 24, Florida Constitution, or specifically made confidential by the Constitution. This right of access to public records applies to 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. However, although a right of access exists under the Constitution to all three branches of government, the Public Records Act, as a legislative enactment, does not apply to the Legislature or the judiciary. *See, Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992).

### 1. *Advisory boards*

The definition of "agency" for purposes of Chapter 119, Florida Statutes, 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*, Article I, section 24, Florida Constitution, 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.)

### 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), Florida Statutes.

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, 229 n.4 (Fla. 3d DCA 1998), *review denied*, 729 So. 2d 389 (Fla. 1999) (private company operating college bookstores was an "agency" as defined in section 119.011[2], Florida Statutes, "notwithstanding the language in its contract with the universities that purports to deny any agency relationship").

The fact that an entity is incorporated as a nonprofit corporation is not dispositive as to its status under the Public Records Act. The Attorney General's Office has issued numerous opinions advising that if a nonprofit entity is established by law or by a governmental entity, it is subject to Chapter 119 disclosure requirements. *See*, Op. Att'y Gen. Fla. 94-34 (1994) (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)

**a. Receipt of public funds by private entity not dispositive**

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*. 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 Chapter 119, Florida Statutes. 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. See also, *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 board of county commissioners 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).

**b. Application of Chapter 119, Florida Statutes, to private entities contracting with public agencies**

The case law has established "two general sets of circumstances" when records belonging to a private entity must be produced as public records. See, *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002) and *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008). First, when a public entity delegates a statutorily authorized function to a private entity. Second, when a public entity contracts with a private entity to provide goods or services to facilitate the agency's performance of its duties and the "totality of factors" indicates a significant level of involvement by the public agency. Each of these situations is discussed below.

**(1) Delegation of statutorily authorized function to private entity**

"[W]hen a public entity delegates a statutorily authorized function to a private entity, the records generated by the private entity's performance of that duty become public records." *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002).

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 Chapter 119 disclosure requirements).

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 (Fla. 5th DCA 1997), the court ruled that the Salvation Army was subject to the Public Records Act when it completely assumed the responsibility to provide misdemeanor probation services pursuant to a contract with Marion County. *And see, Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302 (Fla. 3d DCA 2001) (a consortium of private businesses created to manage a massive renovation of an airport is 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, in *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1<sup>st</sup> DCA 2008), *review denied*, 4 So. 3d 1220 (Fla. 2009), the court held that a private engineering firm which contracted to provide engineering services for a city and acted *de facto* as the city's engineer, was an "agency" subject to Chapter 119, Florida Statutes. "In evaluating the need for system improvements, in developing funding priorities that could shape the City's budget, as well as in acting as the City's representative in the improvement project, [the private entity] was acting 'on behalf of a[ ] public agency.'" *Id.* at 22-23. *And see*, Op. Att'y Gen. Fla. 08-66 (2008) (not-for-profit corporation that contracted with a city to carry out affordable housing responsibilities and also reviewed and screened applicant files is an agency within the scope of Chapter 119).

## (2) Contract to provide services and the "totality of factors" test

If a private entity has not undertaken the performance of a statutory function for an agency but instead has merely contracted with the agency to provide services to facilitate the performance of its duties, the private entity's records in that regard may be public if the "totality of the factors" indicates a significant level of involvement by the public entity. *See, Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002).

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 which is providing services to a public agency is subject to Chapter 119, Florida Statutes. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, *supra* at 1031. *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 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.

c. **Application of Chapter 119 to private entity that has been delegated authority to keep certain records**

In *Times Publishing Company, Inc. 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 a 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. *See also, Wisner v. City of Tampa*, 601 So. 2d 296 (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"); and *National Collegiate Athletic Association v. The Associated Press*, 18 So. 3d 1201 (Fla. 1<sup>st</sup> DCA October 1, 2009) (public records law can be enforced against any person who has custody of public records, whether that person is employed by the public agency creating or receiving the records or not; it makes "no difference that the records in question are in the hands of a private party").

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. Op. Att'y Gen. Fla. 98-54 (1998) (registration and disciplinary records stored in a computer database maintained by a national securities association which are used by the Department of Banking and Finance 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).

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

### 1. Computer 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). Thus, the Public Records Act includes computer records as well as paper documents, tape recordings, and other more tangible materials. *See, e.g.*, Op. Att'y Gen. Fla. 98-54 (1998) (applications 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 Chapter 119); Op. Att'y Gen. Fla. 91-61 (1991) (computer data software disk is a public record); Op. Att'y Gen. Fla. 89-39 (1989) (information stored in computer utilized by county commissioners to facilitate and conduct their official business is subject to Chapter 119, Florida Statutes); and Op. Att'y Gen. Fla. 85-03 (1985) (computer tapes are public records). *Cf. Grapski v. Machen*, Case No. 01-2005-CA-4005 J (Fla. 8<sup>th</sup> Cir. Ct. May 9, 2006), *affirmed per curiam*, 949 So. 2d 202 (Fla. 1<sup>st</sup> DCA 2007) (spam or bulk mail received by a public agency does not necessarily constitute a public record).

Thus, computerized 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. *See, National Collegiate Athletic Association v. The Associated Press*, 18 So. 3d 1201 (Fla. 1<sup>st</sup> DCA October 1, 2009) (public records law is not limited to paper documents but applies to documents that exist only in digital form). *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 of a lawsuit against the county.

#### a. E-Mail and Facebook messages

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 a statutory exemption from public inspection. Op. Att'y Gen. Fla. 96-34 (1996) and Op. Att'y Gen. Fla. 07-14 (2007). *And see*, Op. Att'y Gen. Fla. 08-07 (2008) (postings relating to city business which are submitted by a city council member to a privately-owned and operated internet website are public records) and Op. Att'y Gen. Fla. 09-19 (2009) (because the creation of a city Facebook page must be for a municipal, not private purpose, the "placement of material on the city's page would presumably be in furtherance of such purpose and in connection with the transaction of official business and thus subject to the provisions of chapter 119, Florida Statutes).

Like other public records, e-mail messages are subject to the statutory restrictions on destruction of public records, which require agencies to adopt a schedule for the disposal of records no longer needed. Op. Att'y Gen. Fla. 96-34 (1996). For example, 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. Op. Att'y Gen. Fla. 01-20 (2001). Similarly, "to the extent that the information on a city's Facebook page constitutes a public record, the city is under an obligation to follow the public records retention schedules established by law." Op. Att'y Gen. Fla. 09-19 (2009). See, section 257.36(6), Florida Statutes, stating that a public record may be destroyed only in accordance with retention schedules established by the Division of Library and Information Services of the Department of State. *Id. Cf.*, section 668.6076, Florida Statutes (e-mail address public record disclosure statement).

However, 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. *And see, Miami-Dade County v. Professional Law Enforcement Association*, 997 So. 2d 1289 (Fla. 3d DCA 2009), concluding that when the county aviation unit's written procedures required pilots to maintain a personal flight log, the logs were subject to the Public Records Act. "The officers are thus paid by the County to make these logbook entries, and the entries are made 'in connection with the transaction of official business' of the aviation unit;" therefore, "[t]he entries are readily distinguishable from the purely personal e-mails at issue in *State v. City of Clearwater* [citation omitted]." *Id.* at 1290-1291. *Cf., Bill of Rights, Inc. v. City of New Smyrna Beach*, No. 2009-20218-CINS (Fla. 7<sup>th</sup> Cir. Ct. April 8, 2010) (billing documents regarding personal calls made and received by city employees on city-owned or city-leased cellular telephones are public records, when those documents are received and maintained in connection with the transaction of official business; "and, the 'official business' of a city includes paying for telephone service and obtaining reimbursement from employees for personal calls").

#### b. Formatting issues

Each agency that maintains a public record in an electronic recordkeeping system shall provide to any person, pursuant to Chapter 119, a copy of any public record in that system which is not exempted by law from public disclosure. Section 119.01(2)(f), Florida Statutes. An agency that maintains a public record in an electronic recordkeeping system must provide a copy of the record in the medium requested by the person making a Chapter 119 demand, if the agency maintains the record in that medium, and the fee charged shall be in accordance with Chapter 119, Florida Statutes. *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 section 119.07(1), Florida Statutes. Op. Att'y Gen. Fla. 91-61 (1991). *Cf., Op. Att'y Gen. Fla. 06-30 (2006)*, 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*, the intent of Ch. 119, Florida Statutes, 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, the Attorney General's Office concluded that a school district was not required to furnish electronic public records in electronic format other than the standard format routinely maintained by the district. Op. Att'y Gen. Fla. 97-39 (1997).

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 applicant 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.

**c. Remote access**

Section 119.07(2)(a), Florida Statutes, authorizes but does not require agencies to provide remote electronic access to public records. However, 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. Fees for remote electronic access provided to the general public must be in accordance with the provisions of section 119.07(4), Florida Statutes. *And see*, section 119.07(2)(b), Florida Statutes, which requires the custodian to provide safeguards to protect the records from unauthorized disclosure or alteration.

**2. 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*, Op. Att'y Gen. Fla. 96-96 (1996) (financial information submitted by harbor pilots in support of a rate increase application is not exempt from disclosure requirements). *And see*, *Bill of Rights, Inc. v. City of New Smyrna Beach*, No. 2009-20218-CINS (Fla. 7<sup>th</sup> Cir. Ct. April 8, 2010) (billing documents regarding personal calls made and received by city employees on city-owned or city-leased cellular telephones

are public records, when those documents are received and maintained in connection with the transaction of official business; "and, the 'official business' of a city includes paying for telephone service and obtaining reimbursement from employees for personal calls").

**a. Bids**

Section 119.071(1)(b)1.a., Florida Statutes, 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 section 120.57(3)(a) or within 10 days after bid or proposal opening, whichever is earlier. *And see*, s. 119.071(1)(b)1.b., Florida Statutes, providing a temporary exemption if an agency rejects all bids or proposals and concurrently provides notice of its intent to reissue the invitation to bid or request for proposals.

**b. 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); *City of Gainesville v. State ex. rel. International Association of Fire Fighters Local No. 2157*, 298 So. 2d 478 (Fla. 1974).

**c. Personal financial records**

In the absence of statutory exemption, financial information prepared or received by an agency is usually subject to Chapter 119, Florida Statutes. *See, Wallace v. Guzman*, 687 So. 2d 1351 (Fla. 3d DCA 1997) (personal income tax returns and financial statements submitted by public officials as part of an application to organize a bank are subject to disclosure); Op. Att'y Gen. Fla. 04-16 (2004) (financial documents contained in licensing file).

Bank account numbers and debit, charge, and credit card numbers held by an agency are exempt from public disclosure. Section 119.071(5)(b), Florida Statutes.

**d. Trade secrets**

The Legislature has created a number of specific exemptions from Ch. 119, Florida Statutes, for trade secrets. *See, e.g.*, section 1004.78(2), Florida Statutes (trade secrets produced in technology research within community colleges); and section 365.174, Florida Statutes (proprietary confidential business information and trade secrets submitted by wireless 911 provider to specified agencies).

In addition, the First District has concluded that section 815.045, Florida Statutes, "should be read to exempt from disclosure as public records all trade secrets as defined in [section 812.081(1)c), Florida Statutes]. . . ." *Sepro Corporation v. Florida Department of Environmental Protection*, 839 So. 2d 781, 785 (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 the information 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. *Sepero*, 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," company failed adequately to protect an alleged trade secret claim). (emphasis supplied by the court). *Cf., Allstate Floridian Ins. Co. v. Office of Ins. Regulation*, 981 So. 2d 617 (Fla. 1<sup>st</sup> DCA 2008), *review denied*, 987 So. 2d 79 (Fla. 2008) (to the extent Allstate believed any documents sought by the Office of Insurance Regulation were privileged as trade secrets, Allstate was required to timely seek a protective order in circuit court).

### 3. *Investigation records of non law enforcement agencies*

In the absence of a specific legislative exemption, investigative records made or received by public agencies are open to public inspection pursuant to Chapter 119, Florida Statutes. *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). *Accord*, Op. Att'y Gen. Fla. 91-75 (1991) (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). *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).

The investigative exemptions now found in paragraphs (2)(c) through (f), (h) and (i) of section 119.071(2), Florida Statutes, 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 section 119.071(2)(d)] does not apply to a hospital's personnel files). *See also*, Op. Att'y Gen. Fla. 87-51 (1987), 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.

### 4. *Litigation records*

#### a. **Attorney-client communications subject to Chapter 119, Florida Statutes**

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 Chapter 119, Florida Statutes). *See also, City of North Miami v. Miami Herald Publishing Company*, 468 So. 2d 218 (Fla. 1985) (although section 90.502, Florida Statutes, 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 Chapter 119, Florida Statutes).

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. Accord, Brevard County v. Nash*, 468 So. 2d 240 (Fla. 5th DCA 1984); *Edelstein v. Donner*, 450 So. 2d 562 (Fla. 3d DCA 1984), *approved*, 471 So. 2d 26 (Fla. 1985).

**b. Limited statutory work product exemption**

**(1) Application of the exemption**

The Supreme Court has ruled that the Legislature and not the judiciary has exclusive authority to exempt litigation records from the scope of Chapter 119, Florida Statutes. *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979). With the enactment of section 119.071(1)(d), Florida Statutes, the Legislature has created a narrow exemption for certain litigation work product of agency attorneys.

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 the section 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 Chapter 119, Florida Statutes. *See, Johnson v. Butterworth*, 713 So. 2d 985 (Fla. 1998).

**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, 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. Op. Att'y Gen. Fla. 85-89 (1985). If the bills and invoices contain exempt work product under section 119.071(1)(d) -- *i.e.*, "mental impression[s], conclusion[s], litigation strateg[ies], or legal theor[ies]," -- the exempt material may be deleted and the remainder disclosed. *Id.* However, information such as the hours worked or the hourly wage clearly would not fall within the scope of the exemption. *Id.*

Thus, an agency which improperly "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*, 640 So. 2d 216 (Fla. 2d DCA 1994). *And see*, Op. Att'y Gen. Fla. 00-07 (2000) (records of outside attorney fee bills received by the county's risk management office 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).

b. Scope of the exemption

Section 119.071(1)(d), Florida Statutes, does not create a blanket exception to the Public Records Act for all attorney work product. Op. Att'y Gen. Fla. 91-75 (1991). The exemption is narrower than the work product privilege recognized by the courts for private litigants. Op. Att'y Gen. Fla. 85-89 (1985). In order to qualify for the work product exemption, the records must have been prepared *exclusively for or in anticipation of 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. For example, memoranda prepared by a state corrections department attorney regarding lethal injection procedures do not constitute exempt attorney work product because neither memorandum "relates to any pending litigation or appears to have been prepared 'exclusively for litigation.'" *Lightbourne v. McCollum*, 969 So. 2d 326, 333 (Fla. 2007). Similarly, in *MHM Correctional Services, Inc. v. State, Department of Corrections*, No. 2009 CA 2105 (Fla. 2d Cir. Ct. June 10, 2009), the court held that the department wrongfully withheld portions of an e-mail stream regarding the bid process as protected work product because none of the emails were prepared in contemplation of litigation as required by the statute).

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). Compare, *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 *Lightbourne v. McCollum*, *supra* (memoranda do not constitute exempt work product because they appear to be "final in form" and convey "specific factual information" rather than mental impressions or litigation strategies).

Thus, in Op. Att'y Gen. Fla. 05-23 (2005), 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 under section 119.071(1)(d)1., Florida Statutes. See also, Op. Att'y Gen. Fla. 91-75 (1991) (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).

(2) Commencement and termination of exemption

Unlike the open meetings exemption in section 286.011(8), Florida Statutes, for certain attorney-client discussions between a governmental agency and its attorney, section 119.071(1)(d), Florida Statutes, 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." See, Op. Att'y Gen. Fla. 98-21 (1998), discussing the differences between the public records work product exemption in section

119.071(1)(d), and the Sunshine Law exemption in section 286.011.

But, the exemption from disclosure provided by section 119.071(1)(d), Florida Statutes, 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 other issues remain. *Seminole County v. Wood*, 512 So. 2d 1000 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988). *Cf.*, *Lightbourne v. McCollum*, *supra* (even if memoranda might have been exempt work product at one time, the state waived the exemption by producing them as part of a public records response and filing copies in the court 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*, *The Tribune Company v. Hardee Memorial Hospital*, No. CA-91-370 (Fla. 10th Cir. Ct. Aug. 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 case and their litigation strategy). *Cf.*, *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) (private prison 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).

The Legislature has, however, established specific exemptions which address disclosure of some risk management files when other related claims remain. For example, section 768.28(16), Florida Statutes, provides an exemption for claim files maintained by agencies pursuant to a risk management program for tort liability until the termination of the litigation and settlement of all claims arising out of the same incident. *See*, *Wagner v. Orange County*, 960 So. 2d 785 (Fla. 5<sup>th</sup> DCA 2007) (section 768.28, Florida Statutes, exemption continues to apply to county's litigation file when plaintiff pursues a portion of judgment entered against the county through the state legislative claims bill process).

The exemption afforded by section 768.28(16)(d), Florida Statutes, however, is limited to tort claims for which the agency may be liable under section 768.28, Florida Statutes, and does not apply to federal civil rights actions under 42 U.S.C. section 1983. *Ops. Att'y Gen. Fla. 00-20 (2000) and 00-07 (2000)*. *And see*, *Op. Att'y Gen. Fla. 92-82 (1992)* (open meetings exemption provided by section 768.28, Florida Statutes, applies only to meetings held after a tort claim is filed with the risk management program). *Cf.*, *Op. Att'y Gen. Fla. 07-47 (2007)* (nothing in section 768.28 expressly includes or excludes the "notice of claim" from the exemption and the Attorney General's Office may not conclude that all such notices are per se exempt from disclosure; it is the public agency "which must make the determination in good faith whether the notice of claim falls within the public records exemption for claims files").

Regarding draft settlements received by an agency in litigation, a circuit court has 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. Sept. 20, 1991), *affirmed*, 606 So. 2d 1267 (Fla. 1st DCA 1992).

### c. 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.'

Similarly, in *Johnson v. Butterworth*, 713 So. 2d 985 (Fla. 1998), the Court ruled that "outlines, time lines, page notations regarding information in the record, and other similar items" in the case file, did not fall within the definition of public record, and thus were not subject to disclosure. *See also, Lopez v. State*, 696 So. 2d 725 (Fla. 1997) (handwritten notes dealing with trial strategy and cross examination of witnesses, not public records); and *Atkins v. State*, 663 So. 2d 624 (Fla. 1995) (notes of state attorney's investigations and annotated photocopies of decisional case law, 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."

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 section 119.071(1)(d), Florida Statutes, while the litigation is ongoing; however, once the case is over the materials would be open to inspection. *And see, Op. Att'y Gen. Fla. 05-23 (2005)*(notes taken by the assistant city attorney during interviews with co-workers of certain city employees which were used to communicate information to the labor attorney regarding possible future personnel actions are public records).

### 5. Personnel records

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 section 119.07(1), Florida Statutes. *Michel v.*

*Douglas*, 464 So. 2d 545 (Fla. 1985).

**a. 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 . . . 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).

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. *See, News-Press Publishing Company, Inc. v. Gadd*, 388 So. 2d 276 (Fla. 2d DCA 1980), stating that 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.

**b. 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 Chapter 119, Florida Statutes).

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. *Op. Att'y Gen. Fla. 94-54* (1994). Similarly, an agency is not authorized to "seal" disciplinary notices and thereby remove such notices from disclosure under the Public Records Act. *Op. Att'y Gen. Fla. 94-75* (1994). *Cf.*, section 69.081(8)(a), Florida Statutes, 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 a claim against the state or its subdivisions is "void, contrary to public policy, and may not be enforced."

**c. Collective bargaining**

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. *Op. Att'y Gen. Fla. 77-48* (1977). 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. 4<sup>th</sup> DCA 1981).

Section 447.605(3), Florida Statutes, provides an exemption for "work products

developed by the public employer in preparation for negotiations, and during negotiations." The exemption is limited and does not remove budgetary or fiscal information from the purview of Chapter 119, Florida Statutes. *See, Bay County School Board v. Public Employees Relations Commission*, 382 So. 2d 747, 749 (Fla. 1st DCA 1980), noting that "[r]ecords which are prepared for other purposes do not, as a result of being used in negotiations, come within the exemption of section 447.605(3)."

#### 6. *Social security numbers*

Section 119.071(5)(a)5., Florida Statutes, states that social security numbers held by an agency are confidential and exempt from disclosure requirements. Disclosure to another governmental agency is authorized if disclosure is necessary to the performance of the receiving agency's duties and responsibilities. Section 119.071(5)(a)6., Florida Statutes. *Cf., Florida Department of Education v. NYT Management Services, Inc.*, 895 So. 2d 1151 (Fla. 1st DCA 2005) (federal law does not authorize newspapers to obtain social security numbers in state teacher certification database).

Upon verified written request which contains the information specified in the statute, a commercial entity engaged in a commercial activity as defined in the exemption may be allowed access to social security numbers, provided that the numbers will be used only in the performance of a commercial activity. Section 119.071(5)(a)7., Florida Statutes. **The question of whether a particular type of activity constitutes "commercial activity" for purposes of this provision cannot be resolved by the Attorney General's Office. Op. Att'y Gen. Fla. 10-06 (2010).**

#### 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?*

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. *See, Tribune Company v. Cannella*, 458 So. 2d 1075 (Fla. 1984), *appeal dismissed sub nom., DePerte v. Tribune Company*, 105 S.Ct. 2315, (1985). *See also, James v. Loxahatchee Groves Water Control District*, 820 So. 2d 988 (Fla. 4th DCA 2002) (trial court should have held a hearing before denying a request to inspect records at the agency's offices rather than at an off-premises location).

##### 2. *What agency employees are responsible for responding to public records requests?*

Section 119.011(5), Florida Statutes, 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." A custodian of public

records or a person having custody of public records may designate another officer or employee of the agency to permit the inspection and copying of public records, but must disclose the identity of the designee to the person requesting to inspect or copy public records. Section 119.07(1)(b), Florida Statutes.

However, the statutory reference to the records custodian does not alter the "duty of disclosure" imposed by section 119.07(1), Florida Statutes, 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).

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 to*, *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." *Mintus, supra*, at 1361.

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

Section 119.01, Florida Statutes, 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.) *See, Curry v. State*, 811 So. 2d 736 (Fla. 4th DCA 2002) (defendant's conduct in making over 40 public records requests concerning victim constituted a "legitimate purpose" within the meaning of the aggravated stalking law "because the right to obtain the records is established by statute and acknowledged in the state constitution").

**4. *Must an individual show a "special interest" or "legitimate interest" in public records before being allowed to inspect or copy same?***

No. Chapter 119, Florida Statutes, requires no showing of purpose or "special interest" as a condition of access to public records. *See, 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, 228 at n.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"). "[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).

Note, however, that section 817.568, Florida Statutes, provides criminal penalties for unauthorized use of personal identification information for fraudulent or harassment purposes. *And see*, section 817.569, Florida Statutes, providing penalties for criminal use of a public record or public records information.

**5. *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. The custodian is not authorized to deny a request to inspect and/or copy public records because of a lack of specifics in the request. *See, Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985), *review denied*, 475 So. 2d 695 (Fla. 1985), recognizing that the "breadth of such right [to inspect] is virtually unfettered, save for the statutory exemptions . . . ." *Cf., Woodard v. State*, 885 So. 2d 444 (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).

#### 6. *When must an agency respond to a public records request?*

A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith. Section 119.07(1)(c), Florida Statutes. A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed. *Id.*

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 Chapter 119, Florida Statutes, is the 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 (Fla. 1984), *appeal dismissed sub nom., Deperte v. Tribune Company*, 105 S.Ct. 2315 (1985).

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 (Fla. 1984), *appeal dismissed sub nom., Deperte v. Tribune Company*, 105 S.Ct. 2315 (1985). 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 records. *Tribune Company v. Cannella, supra.* **Nor may a city delay public access to board meeting minutes until after the city commission has approved them.** *Grapski v. City of Alachua*, 35 F.L.W. D205 (Fla. 1<sup>st</sup> DCA January 21, 2010). *And see*, Ops. Att'y Gen. Fla. 05-12 (2005) (city may not require the use of a code to review email correspondence of the city's police department and human resources department) and 96-55 (1996) (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).

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 (Fla. 4th DCA 1996), *review denied*, 684 So. 2d 1353 (Fla. 1996). *See also, State v. Webb*, 786 So. 2d 602, 604 (Fla. 1st DCA 2001), in which the court held that it was error for a lower court judge to vacate a misdemeanor conviction of a records custodian who had been found guilty of willfully violating section 119.07 (1) (a), Florida Statutes, based on her "dilatatory" response to public records requests filed by a citizen.

An agency is not authorized to establish an arbitrary time period during which records may or may not be inspected. Op. Att'y Gen. Fla. 81-12 (1981).

#### 7. *May an agency require that a request to examine or copy public records*

***be made in writing or require that the requestor furnish background information to the custodian?***

No. Nothing in Chapter 119, Florida Statutes, requires that a requesting party make a demand for public records in person or 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"). 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), *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. *Cf., Williams v. Circuit Court, 18th Judicial Circuit*, 862 So. 2d 887, 888 (Fla. 5th DCA 2003) (where statute entitles executive clemency applicant to obtain certain records free of charge, clerk's policy to require requesting party to show that he is an applicant is reasonable "as it operates to discourage use of the statute as a subterfuge").

**8. *Is an agency required to give out information from public records or to otherwise produce records in a particular form as demanded by the requestor?***

A custodian is not required to give out *information* from the records of his or her office. Op. Att'y Gen. Fla. 80-57 (1980). 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. Op. Att'y Gen. Fla. 92-38 (1992).

Similarly, if an agency maintains a list of the names of officers and employees who have requested the exemption of their home addresses and telephone numbers under section 119.071(4)(d), Florida Statutes, the agency must provide the list. Op. Att'y Gen. Fla. 08-29 (2008). However, the agency is not required to reformat its records to make such a list in order to comply with a request under Chapter 119. *Id.* Nor is the clerk of court 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.* *And see, Woodard v. State*, 885 So. 2d 444, 445n.1 (Fla. 4<sup>th</sup> DCA 2004) (case remanded where agency provided only information relating to statutory fee schedule rather than total copying cost of requested records).

An agency is not ordinarily required to reformat its records and provide them in a particular form as demanded by the requestor. *Seigle v. Barry*, 422 So. 2d 63 (Fla. 2d DCA 1982). However, an agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium. Section 119.01(2)(f), Florida Statutes. *See* Op. Att'y Gen. Fla. 91-61 (1991) (if asked, custodian must provide copy of computer disk; a typed transcript would not satisfy the requirements of section 119.07[1], Florida Statutes). *Cf., Miami-Dade County v. Professional Law Enforcement Association*, 997 So. 2d 1289 (Fla. 3d DCA

2009) (the fact that pertinent information may exist in more than one format is not a basis for exemption or denial of a public records request).

Thus, upon receipt of a public records request, the agency must comply by producing all non-exempt records in the custody of the agency that are responsive to the request, upon payment of the charges authorized in Chapter 119, Florida Statutes. However, this mandate applies only to those records in the custody of the agency at the time for request; nothing in the Public Records Act appears to require that an agency respond to a so-called "standing" request for production of public records that it may receive in the future. *See*, Inf. Op. to Worch, June 15, 1995.

**9. *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*, *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 Chapter 119, Florida Statutes).

**10. *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. Op. Att'y Gen. Fla. 86-69 (1986).

**11. *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 Chapter 119, Florida Statutes. *See*, *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). *Accord*, *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 information it furnishes a governmental agency confidential). *Cf.*, *Hill v. Prudential Ins. Co. 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).

Similarly, 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. Aug. 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.*, section 69.081(8), Florida Statutes, part of the "Sunshine in Litigation Act," providing, subject to certain exceptions, that any portion of an agreement which conceals 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 Chapter 119, Florida Statutes. *And see, National Collegiate Athletic Association v. The Associated Press*, 18 So. 3d 1201 (Fla. 1<sup>st</sup> DCA October 1, 2009), holding that a confidentiality agreement entered into by a private law firm on behalf of a state university with the NCAA that allowed access to records contained on the NCAA's secure custodial website that were used by the university in preparing a response to possible NCAA sanctions, had no impact on whether such records were public records stating that "[a] public record cannot be transformed into a private record merely because an agent of the government has promised that it will be kept private"; and Inf. Op. to Barry, June 24, 1998, 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."

**12. *Must an agency state the basis for its refusal to release an exempt record?***

Yes. Section 119.07(1)(e), Florida Statutes, 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 from inspection. Section 119.07(1)(f), Florida Statutes. *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 the records were believed to be exempt, or the statutory basis for any exemption. *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 as to obtain information that the Legislature has declared must be exempt from disclosure."

**13. *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, section 119.07(1)(d), Florida Statutes, requires the custodian of that document to redact only that portion of the record for which a valid exemption is asserted and to provide the remainder of the

record for inspection and copying. *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). 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. Op. Att'y Gen. Fla. 99-52 (1999). *Cf.*, Op. Att'y Gen. Fla. 02-73 (2002) (agency must redact confidential and exempt information and release the remainder of the record; agency is not authorized to release records containing confidential information, albeit anonymously.)

**14. *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 1991), *review denied*, 589 So. 2d 289 (Fla. 1991). **Thus, to the extent that information on a city's Facebook page constitutes a public record within the meaning of the Public Records Act, the state constitutional privacy provision in Article I, section 23, Florida Constitution, "is not implicated."** Op. Att'y Gen. Fla. 09-19 (2009).

**15. *What is the liability of a custodian for release of public records?***

It has been held that there is nothing in Chapter 119, Florida Statutes, indicating an intent to give private citizens a right to recovery for negligently maintaining and providing information from public records. *Friedberg v. Town of Longboat Key*, 504 So. 2d 52 (Fla. 2d DCA 1987).

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).

**E. WHAT IS THE LEGAL EFFECT OF STATUTORY EXEMPTIONS FROM DISCLOSURE?**

**1. *Creation of exemptions***

"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 & 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).

Article I, section 24(c), Florida Constitution, 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, Inc. 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."

## 2. Exemptions are strictly construed

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 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So. 2d 1000 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988). *And see*, *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999) (1995 exemption to the Sunshine Law for certain hospital board meetings ruled unconstitutional because it did not meet the constitutional standard for exemptions set forth in article I, section 24[b] and [c], Florida Constitution). An agency claiming an exemption from disclosure bears the burden of proving the right to an exemption. *See*, *Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128 (Fla. 1st DCA 1985).

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.* *See also*, *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 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). *But see*, *Coventry First, LLC v. Office of Insurance Regulation*, 35 F.L.W. D383 (Fla. 1<sup>st</sup> DCA February 12, 2010) (even though Legislature intended that a statutory amendment imposing a time limitation on the confidential and exempt status of certain records submitted to the Office of Insurance Regulation (OIR) be applied retroactively, the trial court erred in applying the amendment to records submitted to OIR before the effective date of the amendment).

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).

## 3. Release or transfer of confidential or exempt 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*, 874 So. 2d 48 (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*, *Ops. Att'y Gen. Fla. 04-09* (2004) and 86-97 (1986).

On the other hand, if the records are not made confidential but are simply exempt from the mandatory disclosure requirements in section 119.07(1)(a), Florida Statutes, the agency is not prohibited from disclosing the documents in all circumstances. See, *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991), in which the court observed that pursuant to section 119.07(3)(d), Florida Statutes, [now section 119.071(2)(c), Florida Statutes] "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." 575 So. 2d at 686.

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 stated that when a criminal justice agency transfers exempt 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").

#### **F. TO WHAT EXTENT DOES FEDERAL LAW PREEMPT STATE LAW REGARDING PUBLIC INSPECTION OF RECORDS?**

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, Article VI, section 2, United States Constitution, the state must keep the records confidential. *State ex rel. Cummer v. Pace*, 159 So. 679 (Fla. 1935); Ops. Att'y Gen. Fla. 90-102 (1990), 85-3 (1985), 81-101 (1981), 80-31 (1980), 74-372 (1974), and 73-278 (1973). *And see, 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). *And see, Wallace v. Guzman*, 687 So. 2d 1351 (Fla. 3d DCA 1997) (exemptions from disclosure in Federal Freedom of Information Act apply to documents in the custody of federal agencies; the Act is not applicable to state 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. Ops. Att'y Gen. Fla. 03-42 (2003) and 88-23 (1988). Thus, a property appraiser is not authorized to assert copyright protection in the Geographic Information Systems maps created by his office. *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871 (Fla. 2d DCA 2004), *review denied*, 902 So. 2d 791 (Fla. 2005).

The federal copyright law, when read together with Florida's 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. 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. Op. Att'y Gen. Fla. 03-26 (2003). Cf., *State, Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377 (Fla. 1<sup>st</sup> DCA 1994) (agency copy of administrative hearing transcript is a public record regardless of who ordered the transcription or bore its expense; thus, agency can charge only the fees authorized in Chapter 119, Florida Statutes, regardless of the fact that the court reporter may have copyrighted the transcript).

## **G. 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 Op. Att'y Gen. Fla. 85-03 (1985), 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).

Section 119.07(4)(d), Florida Statutes, 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 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. Op. Att'y Gen. Fla. 00-11 (2000). 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?***

Section 119.07(4), Florida Statutes, provides that the custodian shall furnish a copy or a certified copy of a public record upon payment of the fee prescribed by law. 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.")

### **3. *What fees may be charged for copies?***

Chapter 119 does not prohibit agencies from providing informational copies of public records without charge. Op. Att'y Gen. Fla. 90-81 (1990). An agency may, however, charge a fee for copies provided that the amount of the fee does not exceed that authorized by Chapter 119, Florida Statutes, or established elsewhere in the statutes for a particular record. 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); and *City of Miami Beach v. Public Employees Relations Commission*, 937 So. 2d 226 (Fla. 3d DCA 2006) (labor union must pay costs stipulated in Chapter 119, Florida Statutes, for copies of documents it has requested from a public employer for collective bargaining purposes).

If no fee is prescribed elsewhere in the statutes, section 119.07(4)(a)1., Florida Statutes, authorizes the custodian to charge a fee of up to 15 cents per one-sided copy for copies that are 14 inches by 8 ½ 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., Florida Statutes. 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), Florida Statutes.

For other copies, the charge is limited to the actual cost of duplication of the record. Section 119.07(4)(a)3., Florida Statutes. 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), Florida Statutes. 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), Florida Statutes. *And see*, the discussion on the special service charge.

**4. *May an agency charge for travel costs, search fees, development costs and other incidental costs?***

With the exception of county maps or aerial photographs supplied by county constitutional officers, 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. *Op. Att'y Gen. Fla. 99-41 (1999)*. Thus, an agency may not charge for travel time and retrieval costs for public records stored off-premises. *Op. Att'y Gen. Fla. 90-07 (1990)*. *And see*, *Op. Att'y Gen. Fla. 02-37 (2002)* (although an agency may contract with a private company to provide information also obtainable through the agency, it may not abdicate its duty to provide 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).

Similarly, an agency may not charge fees designed to recoup the original cost of developing or producing the records. *Op. Att'y Gen. Fla. 88-23 (1988)* (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).

**5. *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), Florida Statutes, 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 special service charge which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both. The special service charge applies to requests for both inspection and copies of public records when extensive clerical assistance is required. *Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008).

**a. Labor costs may include salary and benefits but must be reasonable**

The term "labor cost" for purposes of the special service charge may include both salary and benefits. *Board of County Commissioners v. Colby*, *supra*. However, the statute requires that the special service charge be "reasonable" and based on actual costs. *Id.* See, *Carden v. Chief of Police*, 696 So. 2d 772, 773 (Fla. 2d DCA 1996), stating that an "excessive charge" under section 119.07(4)(d), Florida Statutes, "could well serve to inhibit the pursuit of rights conferred by the Public Records Act." 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). Moreover, in *State v. Gudinas*, No. CR 94-7132 (Fla. 9th Cir. Ct. June 1, 1999), the court 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 did the work. See also, *Board of County Commissioners of Highlands County v. Colby*, *supra*, in which the court approved a charge based on the salary of the director's assistant, even though the director actually handled the request.

**b. What is an "extensive" use of labor or information technology resources?**

Section 119.07(4)(d), Florida Statutes, 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 (DOC) 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.

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.

An agency is not ordinarily authorized to charge for the cost to review records for statutorily exempt material. Op. Att'y Gen. Fla. 84-81 (1984). 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, Inc. 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."

**c. May an agency require an advance deposit?**

A county policy to require an advance deposit "seems prudent given the legislature's determination that taxpayers should not shoulder the entire expense of responding to an extensive request for public records." *Board of County Commissioners v. Colby*, 976 So. 2d 31, 37 (Fla. 2d DCA 2008). Similarly, an agency may require that a public records requestor pay past due fees for records compiled for a previous request before complying with the requestor's subsequent request. *Lozman v. City of Riviera Beach*, 995 So. 2d 1027 (Fla. 4<sup>th</sup> DCA 2008).

**H. WHAT ARE THE OPTIONS IF AN AGENCY REFUSES TO PRODUCE PUBLIC RECORDS FOR INSPECTION AND COPYING?**

**1. Voluntary mediation program**

Section 16.60, Florida Statutes, establishes the open government mediation program as a voluntary alternative for resolution of public access disputes. For more information about mediation, please contact the Attorney General's Office at the following address and telephone number: The Capitol, PL-01, Tallahassee, Florida 32399-1050; telephone: (850) 245-0140.

**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, Florida Statutes. 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 see, *Hillier v. City of Plantation*, 935 So. 2d 105 (Fla. 4th DCA 2006) (trial court ruling finding that city had complied with Hillier's public records requests was supported by competent, substantial evidence). Cf., *Coconut Grove Playhouse, Inc. v. Knight-Ridder, Inc.*, 935 So. 2d 597 (Fla. 3d DCA 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), Florida Statutes, 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). *And see, Martinez v. State*, 969 So. 2d 1174 (Fla. 5<sup>th</sup> DCA 2007) (trial court order denying access to public records reversed because court failed to hold a hearing before issuing the order).

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). 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).

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). 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.* However, it has been recognized that injunctive relief may be available upon an appropriate showing for a violation of Chapter 119, Florida Statutes. *See, Daniels v. Bryson*, 548 So. 2d 679 (Fla. 3d DCA 1989). *And see, Areizaga v. Board of County Commissioners of Hillsborough County*, 935 So. 2d 640 (Fla. 2d DCA 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).

## **b. Procedural issues**

### **(1) *In camera* inspection**

Section 119.07(1)(g), Florida Statutes, provides that in any case in which an exemption to the public inspection requirements in section 119.07(1), Florida Statutes, is alleged to exist pursuant to section 119.071(1)(d) or (f), (2)(d), (e), or (f), or (4)(c), Florida Statutes, the public record or part of the record in question shall be submitted to the trial court for an *in camera* examination. If an exemption is alleged under section 119.071(2)(c), Florida Statutes (the exemption for active criminal investigation or intelligence information), an inspection is discretionary with the court. *Id.* However, in *Tribune Company v. Public Records*, 493 So. 2d 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. *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." *Accord, Garrison v.*

*Bailey*, 4 So. 3d 683 (Fla. 1<sup>st</sup> DCA 2009) (where Department of Law Enforcement asserted that records requested by petitioner were exempt from disclosure, trial judge erred when he denied relief without first inspecting the records at issue to determine whether the records were exempt from disclosure under the statutory exemption claimed by Department).

### (2) *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." See also, *Mazer v. Orange County, Florida*, 811 So. 2d 857 (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 *Grapski v. City of Alachua*, 35 F.L.W. D205 (Fla. 1<sup>st</sup> DCA January 21, 2010) (city's refusal to provide canvassing board minutes until they had been approved by city commission "denied any realistic access for the only purpose appellants sought to achieve—review of the Minutes before the Commission meeting[;]" accordingly, "the damage to appellants was not mooted"). Cf., *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).

### (3) *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), Florida Statutes. An automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. Rule 9.310(b)(2), Florida Rules of Appellate Procedure.

### (4) *Attorney's fees*

Section 119.12, Florida Statutes, 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. A successful pro se litigant is entitled to reasonable costs of enforcement. *Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000). And see, *Weeks v. Golden*, 846 So. 2d 1247 (Fla. 1st DCA 2003) (prevailing pro se inmate entitled to an award of costs including postage, envelopes and copying, in addition to filing and service of process fees).

"[A]ttorney's fees are awardable for unlawful refusal to provide public records under two circumstances: first, when a court determines that the reason proffered as a basis to deny a public records request is improper, and second, when the agency unjustifiably fails to respond to a public records request by delaying until after the enforcement action has been commenced." *Office of the State Attorney v. Gonzalez*, 953 So. 2d 759, 764 (Fla. 2d DCA 2007). Thus,

attorney's fees are recoverable even where access is denied on a good faith but mistaken belief that the documents are exempt from disclosure. *News and Sun-Sentinel Company v. Palm Beach County*, 517 So. 2d 743 (Fla. 4th DCA 1987); *Times Publishing Company, Inc. v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990). **But see, *Greater Orlando Aviation Authority v. Nejame*, 4 So. 3d 41 (Fla. 5<sup>th</sup> DCA 2009), in which the court relied on two earlier decisions in denying a request for attorney's fees because the agency "did not act unreasonably or in bad faith in refusing production."**

Similarly, an agency that misplaced a public records request and thus failed to produce the documents until a lawsuit was filed more than 90 days after the request was made, was required to pay fees. *Office of the State Attorney v. Gonzalez, supra*. And see, *Weeks v. Golden*, 798 So. 2d 848 (Fla. 1st DCA 2001)(where prison inmate made public records request and state attorney offered no reason for failing to respond to request, trial judge erred in refusing to award costs to inmate). Cf., *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").

Attorney's fees may also be awarded for a successful appeal of a denial of access. *Downs v. Austin*, 559 So. 2d 246 (Fla. 1st DCA 1990). However, in order to obtain appellate fees, a motion must be filed in the appellate court. *Id.* When the appellate court grants a motion seeking attorney's fees and remands only for the purpose of calculating the amount of the fees, the circuit court is required to follow the appellate court's mandate without further consideration. *Office of the State Attorney v. Gonzalez, supra*,

### **c. Criminal penalties**

In addition to judicial remedies, section 119.10(1)(b), Florida Statutes, provides that a public officer who knowingly violates the provisions of section 119.07(1), Florida Statutes, is subject to suspension and removal or impeachment and is guilty of 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).

Section 119.10(1)(a), Florida Statutes, provides that a violation of any provision of Chapter 119, Florida Statutes, by a public official is a noncriminal infraction, punishable by fine not exceeding \$500. 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. Op. Att'y Gen. Fla. 91-38 (1991).

## **I. HOW LONG MUST AN AGENCY RETAIN A PUBLIC RECORD?**

### **I. *Delivery of records to successor***

Section 119.021(4)(a), Florida Statutes, provides that whoever has custody of public records shall deliver such records to his successor at the expiration of his 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). *And see, Op. Att'y Gen. Fla. 09-39 (2009) (delivery of public records to records custodian of successor agency).*

2. *Retention and disposal of records*

Pursuant to section 257.36(6), Florida Statutes, "[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 of the Department of State]."

This statutory mandate applies to exempt records as well as those subject to public inspection. *See, Ops. Att'y Gen. Fla. 94-75 (1994), 87-48 (1987) and 81-12 (1981).* Questions regarding record destruction schedules should be referred to the Department of State, Bureau of Archives and Records Management at (850) 245-6750.

April 30, 2010.