

Overview of Florida Law Relating to Open Government

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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 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.

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).

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 Barbara A. Markham*, September 10, 1996 (technical oversight committee established by state agencies as part of settlement agreement in federal lawsuit subject to Sunshine Law).

Boards or commissions created by law or by a public agency are clearly subject to the provisions of section 286.011, Florida Statutes. A public officer may be an "agency" for purposes of creating a board or commission subject to section 286.011, Florida Statutes. For example, in *Krause v. Reno*, 366 So. 2d 1244 (Fla. 3d DCA 1979), the court held that a city manager was an "agency" for purposes of section 286.011, Florida Statutes. Therefore, when he

utilized an advisory group to assist him in screening applications and making recommendations for the position of chief of police, he created a "board" to which the Sunshine Law was applicable.

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 whose powers are limited to making recommendations to a public agency and which possess no authority to bind that agency in any way are subject to the Sunshine Law. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). And see, *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 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).

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

This office has recognized that private organizations which are not state or local governmental agencies or subject to the control of the Legislature and which do not serve in an advisory capacity to state or local governmental agencies, are generally not subject to section 286.011, Florida Statutes. *Op. Att'y Gen. Fla. 83-1* (1983). Thus, the Sunshine Law would not generally apply to meetings of a homeowners' association. *Inf. Op. to Honorable Mike Fasano*, June 7, 1996.

Thus, a private corporation which performs services for a public agency and receives compensation for such services pursuant to a contract or otherwise, is not by virtue of this relationship alone 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). In *Memorial*, the Supreme Court held that a private nonprofit corporation which entered into a lease with a public hospital authority to operate a hospital was subject to the open meetings requirements found in the Sunshine Law and those contained in article I, section 24(b) of the Florida Constitution.

Similarly, this office has concluded that if a county commission dissolves its cultural affairs council and designates a nonprofit organization to fulfill that role for the county, the nonprofit organization would be subject to the Sunshine Law. Op. Att'y Gen. Fla. 98-49 (1998). And see, Op. Att'y Gen. Fla. 99-53 (1999) (architectural review committee of a homeowners' association is subject to the Sunshine Law where the committee, pursuant to county ordinance, must review and approve applications for county building permits) and Op. Att'y Gen. Fla. 00-08 (2000) (meetings of the Lee County Fire Commissioner's Forum, a nonprofit entity created by fire districts as a vehicle for networking and discussion of common concerns, would be subject to the Sunshine Law if the Forum operates as a collegial body for incipient decision making)

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). 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.

However, when a staff member ceases to function in a staff capacity and is appointed to a committee which is delegated authority normally within the public board or commission, the staff member loses his or her identity as staff while working on the committee and the Sunshine Law is applicable 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).

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.

In a more recent case, 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 "governmental 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, Inf. Op. to Lewis, March 15, 1999 (panels established by state commission to create requests for proposals and evaluate vendor responses are 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).

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

The use of a written report by one commissioner to inform other commissioners of a subject which will be discussed at a public meeting is not a violation of the Sunshine Law if prior to the meeting there is no interaction related to the report among the commissioners. In such cases, the report, which is subject to disclosure under the Public Records Act, is not being used as a

substitute for action at a public meeting as there is no interaction among the commissioners prior to the meeting. Op. Att'y Gen. Fla. 89-23 (1989).

If, however, the report is circulated among board members for comments with such comments being provided to other members, there is interaction among the board members which is subject to section 286.011, Florida Statutes. Op. Att'y Gen. Fla. 90-3 (1990). See also, Op. Att'y Gen. Fla. 96-35 (1996), stating that a school board member may prepare and circulate an informational memorandum or position paper to other board members; however, the use of a memorandum to solicit comment from other board members or the circulation of responsive memoranda by other board members would violate the Sunshine Law.

b. Telephone conversations and meetings

As discussed previously, the Sunshine Law applies to the deliberations and discussions between two or more members of a board or commission on some matter which foreseeably will come before that board or commission for action. The use of a telephone to conduct such discussions does not remove the conversation from the requirements of section 286.011, Florida Statutes. Therefore, members of a board seeking to discuss board business or conduct a meeting of the board by telephone should ensure that the requirements of the Sunshine Law have been satisfied by providing notice and access to the public.

A related issue is whether a board is authorized to conduct its meetings through the use of a telephone conference call or other type of communications technology. In Op. Att'y Gen. Fla. 98-28 (1998), this 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, this office has noted that the authorization in section 120.54(5)(b)2., 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 230.17, 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. However, as long as a quorum of the board is physically present at the meeting site, the board may use electronic media technology to allow a physically absent member of the board to attend the meeting. *Id.* Compliance with the requirements of section 286.011, Florida Statutes, "would involve providing notice and access to the public at such meetings through the use of such devices as a speaker telephone that would allow the absent member to participate in discussions, to be heard by the other board members and the public and to hear discussions taking place during the meeting." Op. Att'y Gen. Fla. 94-55 (1994).

c. Use of computers

The use of computers to conduct public business is becoming increasingly commonplace. While there is no provision generally prohibiting the use of computers to carry out public business, their use by members of a public board or commission to communicate among themselves on issues pending before the board, is subject to the Sunshine Law. Op. Att'y Gen. Fla. 89-39 (1989). See also, Op. Att'y Gen. Fla. 96-34 (1996) ("E-mail" is a public record).

d. 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. And see, Leach-Wells v. City of Bradenton, 734 So. 2d 1168 (Fla. 2d DCA 1999) (committee charged with evaluating proposals violated the Sunshine Law when the city clerk unilaterally tallied the results of the committee members' individual written evaluations and ranked them; the court held that the "short-listing was formal action that was required to be taken at a public meeting"). 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).

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).

e. 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(5), Florida Statutes, provides that an exemption from section 119.07, Florida Statutes, "does not imply an exemption from or exception to section 286.011, Florida Statutes. The exemption from or exception to section 286.011, Florida Statutes, must be expressly provided." Thus, exceptions to or exemptions from Chapter 119, Florida Statutes, 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 or exception to section 286.011, Florida Statutes. Accord, Op. Att'y Gen. Fla. 95-65 (1995) (district case review committee); Op. Att'y Gen. Fla. 93-41 (1993) (county criminal justice commission); Op. Att'y Gen. Fla. 91-88 (1991) (pension board); and Op. Att'y Gen. Fla. 91-75 (1991) (school 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. Attorney-client discussions

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 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) (rejecting city's argument that charter provision requiring that city clerk attend all council meetings authorized clerk to attend closed attorney-client meeting).

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).

(3) 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."

(4) 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. 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)* (closed-meeting exemption may be used only when the attorney for a governmental entity seeks advice on settlement negotiations or strategy relating to litigation expenditures; such meetings should not be used to finalize action or discuss matters outside these two narrowly prescribed areas).

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

Thus, "[t]he settlement of a case is exactly that type of final decision contemplated by the drafters of section 286.011(8) which must be voted upon in the sunshine." *Zorc v. City of Vero Beach*, at 901. See also, *Freeman v. Times Publishing Company*, 696 So. 2d 427 (Fla. 2d DCA 1997) (discussion of methods or options to achieve continuing compliance with a long-standing federal desegregation mandate [such as whether to modify the boundaries of a school zone to achieve racial balance] must be held in the Sunshine). Compare, *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).

(5) 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." 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").

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

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(15)(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 section 286.011, Florida Statutes. The minutes of such meetings and proceedings are also exempt from public disclosure until the termination of the litigation and settlement of all claims arising out of the same incident. Section 768.28(15)(d), Florida Statutes. And see, Op. Att'y Gen. Fla. 00-20 (2000), noting application of the exemption to a risk management meeting conducted by a district school board and attended by risk management personnel that relates solely to the evaluation of a tort claim filed with the risk management program or that relates solely to an offer of compromise of a tort claim filed with the risk management program. 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)

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).

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.

The above 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.

The Legislature has, therefore, divided Sunshine Law policy on collective bargaining for public employees into two parts: when the public employer is meeting with its own side, it is exempt from the Sunshine Law; when the public

employer is meeting with the other side, it is required to comply with the Sunshine Law. *City of Fort Myers v. News-Press Publishing Company, Inc.*, supra.

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.

Where, however, a mayor as chief executive officer, rather than the city council, is responsible under the city charter for disciplining city employees, meetings between the mayor and a city employee concerning discipline of the employee are not subject to the Sunshine Law. *City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989).

c. 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).

41. 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 Honorable Joe 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).

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. 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), this office concluded that the Sunshine Law does not apply to a political forum sponsored by a private civic club during which county commissioners express their position on matters that may foreseeably come before the commission, so long as the commissioners avoid discussions among themselves on these issues. However, caution should be exercised to avoid situations in which private political or community forums may be used to circumvent the statute's requirements. Id. See, *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974) (Sunshine Law is to be construed "so as to frustrate all evasive devices").

6. Board members attending meetings of another public board

In Op. Att'y Gen. Fla. 98-14 (1998), this office was asked whether members of a metropolitan planning organization (MPO) who also serve as city council members must separately notice a MPO meeting when they plan to discuss MPO matters at an advertised city council meeting. The opinion concluded that separate notice of the MPO meeting was not required as long as the agenda of the city council mentioned that MPO business would be discussed. 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).

7. Social events

Members of a public board or commission are not prohibited under the Sunshine Law from meeting together socially, provided that matters which may come before the board or commission are not discussed at such gatherings. Thus, 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. Stembbridge*, 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).

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. 73-170* (1973) 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?

This office recommends publication of an agenda, if available, in the notice of the meeting; if an agenda is not available, subject matter summations might be used. Particularly if the item is controversial or one of critical public concern, this office advises that the public board or commission postpone taking any action on the issue until it has been noticed. Inf. Op. to Honorable Leroy Evans, Sr., June 7, 1989.

The Sunshine Law, however, does not mandate that an agency provide notice of each item to be discussed via a published agenda. Such a specific requirement has been rejected by the courts because it could effectively preclude access to meetings by members of the general public who wish to bring specific issues before a governmental body. See, *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973). And see, *Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985) (posted agenda unnecessary; public body not required to postpone meeting due to inaccurate press report which was not part of the public body's official notice efforts). Accord, *Law and Information Services 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 Michael 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).

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).

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).

c. Inspection trips

Members of a public board or commission are not prohibited under the Sunshine Law from conducting inspection trips. However, if discussions relating to the business of the board will occur between board members during an inspection trip, then the requirements of section 286.011, Florida Statutes, must be met--advance notice must be given, the public must be afforded a reasonable opportunity to attend, and minutes must be promptly recorded and made available for inspection. Op. Att'y Gen. Fla. 76-141 (1976).

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 in which the chairman asked each presenter "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. A rule or policy which prohibits the use of nondisruptive or silent tape recording devices, however, is unreasonable and arbitrary and is, therefore, invalid. Op. Att'y Gen. Fla. 77-122 (1977). A city, therefore, may not prohibit a citizen from video taping the meetings of a city council through the use of nondisruptive video recording devices. Op. Att'y Gen. Fla. 91-28 (1991). Nor may an agency adopt a policy that allows videotaping by the general public and

the media, but bars filming for commercial purposes. *Suncam, Inc. v. Worrall*, No. CI97-3385 (Fla. 9th Cir. Ct. May 9, 1997).

c. Public's right to participate in a meeting

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

Although not directly considering the Sunshine Law, the court in *Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989), recognized that "to deny the presiding officer the authority to regulate irrelevant debate and disruptive behavior at a public meeting--would cause such meetings to drag on interminably, and deny others the opportunity to voice their opinions." Thus the court concluded that a mayor's actions in attempting to confine the speaker to the agenda item in the city commission meeting and having the speaker removed when the speaker appeared to become disruptive constituted a reasonable time, place and manner regulation and did not violate the speaker's First Amendment rights.

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.

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. 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).

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). 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").

II. PUBLIC RECORDS

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

1. What materials are public records?

Section 119.011(1), 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).

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, *Times Publishing Co. v. City of St. Petersburg*, 558 So. 2d 487, 494 (Fla. 2d DCA 1990) (while the mere preparation of documents for submission to a public body does not create public records, the documents can become public records when exhibited to public officials and revised as part of a bargaining process); and *Op. Att'y Gen. Fla. 91-26* (1991) (minutes of city council meetings are public records once minutes have been prepared by clerk even though minutes have not yet been sent to city council members and have not been officially approved by the city council). It follows then that such records are subject to disclosure unless the Legislature has specifically exempted the documents from inspection or has otherwise expressly acted to make the records confidential. See, for example, section 119.07(3)(1), Florida Statutes, providing a limited work product exemption for agency attorneys.

It is important to emphasize, however, that a nonfinal document need not be communicated to anyone in order to constitute a public record. So called "personal" notes are public records if they are intended to perpetuate or formalize knowledge of some type. Stated another way, notes which are prepared for filing or otherwise intended as final evidence of knowledge obtained in the transaction of official business constitute public records. See, e.g., *Church of Scientology Flag Service Org., Inc. v. Wood*, No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997) (drafts and notes of an autopsy performed by the medical examiner are public records); and *Florida Sugar Cane League v. Florida Department of Environmental Regulation*, No. 91-4218 (Fla. 2d Cir. Ct. June 5, 1992), stating that handwritten notes of agency staff, "utilized to communicate and formulate knowledge within [the agency], are public records subject to no exemption;" and *Inf. Op. to McLean*, dated December 31, 1998 (handwritten notes prepared by a council member regarding research on a matter under discussion by the council and used as a reference in discussing the member's position are public records).

Accordingly, it is only those uncirculated materials which are merely preliminary or precursors to future documents, and which are not in and of themselves intended to serve as final evidence of the knowledge to be recorded, which fall outside the definitional scope of public records. Examples of such preliminary material cited by the Byron, Harless Court include notes to be used in preparing some other documentary material, tapes or notes taken by a secretary as dictation, and (uncirculated) rough drafts. See also, *State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990), noting that "not all trial preparation materials [of agency attorneys] are public records" and that a state attorney was not required to disclose certain trial preparation documents which were described as preliminary guides intended to aid the attorneys when they later formalized the knowledge. 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 at n.4 (Fla. 3d DCA 1998) (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").

a. Receipt of public funds by private entity not dispositive

There is no single factor which is controlling on the question of when a private corporation becomes subject to the Public Records Act. For example, a private corporation does not act "on behalf of" a public agency merely by entering into a contract to provide professional services to the agency. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, supra.

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. "Totality of factors" test

Recognizing that "the statute provides no clear criteria for determining when a private entity is 'acting on behalf of' a public agency," the Supreme Court adopted a "totality of factors" approach to use as a guide for evaluating whether a private entity is subject to Chapter 119, Florida Statutes. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, supra at 1031. *Accord, Memorial Hospital West-Volusia, Inc. v. News-Journal Corporation*, 729 So. 2d 373 (Fla. 1999) (private entities should look to the factors announced in *Schwab* to determine their possible agency status under Chapter 119 and under Article I, section 24 of the Florida Constitution).

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. Private entities created pursuant to law or by public agencies

The fact that a private entity is incorporated as a nonprofit corporation is not dispositive as to its status under the Public Records Act. The issue is whether the entity is "acting on behalf of" an agency. This office has issued numerous opinions advising that if a nonprofit entity is established by law, it is subject to Chapter 119 disclosure requirements. The following are some examples of entities created pursuant to law or ordinance which this office has determined to be subject to the Public Records Act:

Florida Windstorm Joint Underwriting Association, a private nonprofit association established pursuant to a plan adopted by rule of the Department of Insurance in accordance with statutory authorization--Op. Att'y Gen. Fla. 94-32 (1994);

South Florida Fair and Palm Beach County Expositions, Inc., created pursuant to Chapter 616, Florida Statutes--Op. Att'y Gen. Fla. 95-17 (1995);

Sunshine State One-Call of Florida, Inc, created as a not-for-profit corporation pursuant to section 556.103, Florida Statutes--Op. Att'y Gen. Fla. 94-34 (1994).

See also, Op. Att'y Gen. Fla. 99-53 (1999) (architectural review committee of a homeowners' association is subject to the Public Records Act where the committee, pursuant to county ordinance, must review and approve applications for county building permits).

d. Private entities providing services to public agencies

As stated previously, the mere fact that a private entity is under contract with, or receiving funds from, a public agency is not sufficient, standing alone, to bring that agency within the scope of the Public Records Act. See, *Stanfield v. Salvation Army*, 695 So. 2d 501, 503 (Fla. 5th DCA 1997) (contract between Salvation Army and county to provide services does not in and of itself subject the organization to 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, *Putnam County Humane Society, Inc. v. Woodward*, 740 So. 2d 1238 (Fla. 5th DCA 1999) (where county humane society assumed governmental function pursuant to statute to investigate acts of animal abuse and to seize animals, society's records that were created and maintained pursuant to its statutory authority are subject to the Public Records Act); and *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).

If a private organization contracting with a public agency is deemed to be an "agency," the terms of Chapter 119, Florida Statutes, are applicable to those materials made or received by the private organization in the course of its contract with the public agency. See, *Shevin v. Byron, Harless, Schaffer, Reid and Associates*, 379 So. 2d 633 (Fla. 1980) (private consultant retained to conduct confidential employment search for city electric authority was an "agency" for purposes of Chapter 119, Florida Statutes; thus, letters, memoranda, resumes, and travel vouchers made or received by consultant in connection with search were public records); and *Wallace v. Guzman*, 687 So. 2d 1351, 1353 (Fla. 3d DCA 1997) (public official's assumption that financial documents submitted to the agency's consultants, rather than to the agency's

staff, would be exempt from disclosure "clearly was wrong," citing to Shevin v. Byron, Harless).

e. Private company delegated authority to keep certain records

In Times Publishing Company v. City of St. Petersburg, 558 So. 2d 487, 494 (Fla. 2d DCA 1990), a private entity (the White Sox baseball organization) refused to allow access to draft lease documents and other records generated in connection with negotiations between the White Sox and 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. However, the plan to withhold the documents from public inspection failed. The court ruled that both the city and the White Sox had violated Chapter 119, Florida Statutes. 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").

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).

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. 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"

"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). Such 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. Id. 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.

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 119.083(5), 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).

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, this 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 119.085, 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(1), Florida Statutes.

Section 119.085 also requires that the custodian provide safeguards to protect the contents of the public records from unauthorized electronic access or alteration and to prevent the disclosure or modification of those portions of the records which are exempt from disclosure. See, Inf. Op. to Honorable Shirley Brown, July 21, 1993 (in providing remote electronic access, Department of Highway Safety and Motor Vehicles is required to provide certain safeguards, as required by section 320.05(2), Florida Statutes, prior to release of public motor vehicle registration information).

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 pilotage rate increase application is not exempt from disclosure requirements).

a. Audit reports

The audit report prepared by the Auditor General is a public record when it has been finalized. Section 11.45(7)(b), Florida Statutes. The audit workpapers and notes are not a public record; however, those workpapers necessary to support the computations in the final audit report may be made available by a majority vote of the Legislative Auditing Committee after a public hearing showing proper cause. Id. At the conclusion of the audit, the Auditor General provides the head of the agency being audited with a list of the adverse findings so that the agency head may explain or rebut them before the report is finalized. Section 11.45(7)(d), Florida Statutes. This list of adverse audit findings is a public record. Op. Att'y Gen. Fla. 79-75 (1979).

The audit report of an internal auditor prepared for or on behalf of a unit of local government becomes a public record when the audit becomes final. Section 119.07(3)(y), Florida Statutes. The audit becomes final when the audit report is presented to the unit of local government; until the audit becomes final, the audit workpapers and notes related to such audit report are confidential. Id. Thus, a draft audit report of a county legal department which was prepared by the clerk of court, acting in her capacity as county auditor, did not become subject to disclosure when the clerk submitted copies of her draft report to the county administrator for review and response. Nicolai v. Baldwin, 715 So. 2d 1161 (Fla. 5th DCA 1998). Pursuant to section 119.07(3)(y), Florida Statutes, the report would become "final," and hence subject to disclosure, when presented to the county commission. Id. The term "internal auditor" is not defined for purposes of section 119.07(3)(y), Florida Statutes. However, the term would appear to encompass an official within county government who is responsible under the county code for conducting an audit. Op. Att'y Gen. Fla. 99-07 (1999). Thus, the exemption would apply to the Miami-Dade Inspector General when conducting audits of county contracts pursuant to the county code. Id.

b. Bids

Section 119.07(3)(m), 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.

c. Budgets

Budgets and working papers used to prepare them are normally subject to inspection. *Bay County School Board v. Public Employees Relations Commission*, 382 So. 2d 747 (Fla. 1st DCA 1980); *Warden v. Bennett*, 340 So. 2d 977 (Fla. 2d DCA 1976); *City of Gainesville v. State ex. rel. International Association of Fire Fighters Local No. 2157*, 298 So. 2d 478 (Fla. 1st DCA 1974).

d. 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).

There are some specific exemptions, however, that are applicable to certain payment records or information. Credit card account numbers in the possession of a state agency, unit of local government, or the judicial branch are confidential and exempt. Section 215.322(6), Florida Statutes. Bank account numbers, credit card numbers and certain insurance information furnished by an individual pursuant to federal, state, or local housing assistance programs are confidential. Section 119.07(3)(cc), Florida Statutes. Bank account numbers or debit, charge, or credit card numbers given to an agency for the purpose of payment of any fee or debt owing are also exempt from public disclosure. Section 119.07(3)(z), Florida Statutes.

e. Security interests

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

f. Telephone bills

Records of telephone calls made from agency telephones are subject to disclosure in the absence of statutory exemption. See, *Crespo v. Florida Entertainment Direct Support Organization*, No. 94-4674 (Fla. 11th Cir. Ct. April 10, 1995) (telephone bills for calls made by agency official open to public inspection). Accord, *Gillum v. Times Publishing Company*, No. 91-2689-CA (Fla. 6th Cir. Ct. July 10, 1991). The telephone numbers contained in the school district's records of calls made on school district telephones are public records even when those calls may be personal and the employee pays or reimburses the school district for the calls. *Op. Att'y Gen. Fla. 99-74* (1999).

g. Trade secrets

This office has concluded that the fact that information constitutes a trade secret under section 812.081 does not, in and of itself, remove it from the requirements of the Public Records Act. *Op. Att'y Gen. Fla. 92-43* (1992).

Thus, an agency is under a duty to release public records even though such records may constitute trade secrets when there is no statute making the information confidential or exempt from disclosure under Chapter 119, Florida Statutes. Op. Att'y Gen. Fla. 95-58 (1995). See also, Op. Att'y Gen. Fla. 97-87 (1997) (building plans and building design calculations which are labeled "trade secret" and filed with a local building department are not exempt from disclosure)

In *Seta Corporation of Boca, Inc. v. Office of the Attorney General*, 756 So. 2d 1093 (Fla. 4th DCA 2000), the Fourth District upheld a trial court order requiring a corporation to produce information to the state despite the corporation's contention that the documents contained alleged trade secrets. The appellate court noted that the lower tribunal "wisely provided in the order requiring production that the state could not produce any of the information it receives pursuant to a request under the public records law without giving petitioner ten days notice to seek a court order." 756 So. 2d at 1094.

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). And see, *Caswell v. Manhattan Fire and Marine Insurance Company*, 399 F.2d 417 (5th Cir. 1968) (ordering that certain investigative records of the State Insurance Commission be produced for inspection under Chapter 119, Florida Statutes). 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); Op. Att'y Gen. Fla. 85-79 (1985) (interoffice memoranda, correspondence, inspection reports of restaurants, grocery stores and other such public premises, nuisance complaint records, and notices of violation of public health laws maintained by county public health units are subject to disclosure in the absence of any statutory exemption or confidentiality requirement); and Op. Att'y Gen. Fla. 71-243 (1971) (inspection reports made or received by a school board in connection with an official investigation constitute public records). Cf., *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973) (no quasi-judicial exception to the Sunshine Law which would allow closed door hearings or deliberations when a board or commission is acting in a "quasi-judicial" capacity).

Section 119.07(3)(b) through (i), Florida Statutes, contains limited exemptions from disclosure for specified law enforcement records which, absent statutory authority, 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 119.07(3)(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 Department of Labor and Employment Security 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) Scope of 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 119.07(3)(1), 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, in *Op. Att'y Gen. Fla. 85-89* (1985), this office concluded that a contract between a county and a private law firm for legal counsel and documentation for invoices submitted by such firm to the county do not fall within the work product exemption. If the bills and invoices contain some information exempted by section 119.07(3)(1) -- 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. Investigations

Section 119.07(3)(1), 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.

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).

Thus, a circuit judge refused to apply the exemption to tapes, witness statements and interview notes taken by police as part of an investigation of a drowning accident at a city summer camp. *Sun-Sentinel Company v. City of Hallandale*, No. 95-13528(05) (Fla. 17th Cir. Ct. October 11, 1995). The court, in the *Sun-Sentinel* case, also stated that the section 768.28[15][b], Florida Statutes, exemption for risk management files did not apply. 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 119.07(3)(1), 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 119.07(3)(1), and the Sunshine Law exemption in section 286.011.

But, the exemption from disclosure provided by section 119.07(3)(1), 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., *New Times, Inc. v. Ross*, No. 92-5795 CIV 25 (Fla. 11th Cir. Ct. March 17, 1992), holding that papers in a closed civil forfeiture file which subsequently became part of a criminal investigation were open to inspection. The court reasoned that the civil litigation materials could not be considered criminal investigative information because the file was closed prior to the commencement of the criminal investigation.

For example, if the state settles a claim against one company accused of conspiracy to fix prices, the state has concluded the litigation against that company. Thus, the records prepared in anticipation of litigation against that company are no longer exempt from disclosure even though the state has commenced litigation against the alleged co-conspirator. *State v. Coca-Cola Bottling Company of Miami, Inc.*, 582 So. 2d 1 (Fla. 4th DCA 1990). And see, *Tribune Company v. Hardee Memorial Hospital*, No. CA-91-370 (Fla. 10th Cir. Ct. 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. See, e.g. section 768.28(15), Florida Statutes, providing 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. The exemption afforded by section 768.28(15)(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 and 00-07. 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).

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

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), 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, *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 119.07(3)(1), Florida Statutes, while the litigation is ongoing; however, once the case is over the materials would be open to inspection.

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 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. 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."

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)."

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).

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

Section 119.021, Florida Statutes, provides that 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, shall be the custodian of the public records. However, this statute 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). [Emphasis supplied by the court].

Thus, the term "custodian" for purposes of the Public Records Act refers to all agency personnel who have it within their power to release or communicate public records. *Mintus v. City of West Palm Beach*, 711 So. 2d 1359 (Fla. 4th DCA 1998), citing 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 shall be open for personal inspection by any person." (e.s.) A former state citizenship requirement was deleted from the law in 1975.

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) ("Booksmart's reason for wanting to view and copy the documents is irrelevant to the issue of whether the documents are public records").

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"

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

The Public Records Act does not contain a specific time limit (such as 24 hours or 10 days) for compliance with public records requests. The Florida Supreme Court has stated that the only delay in producing records permitted under 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. Similarly, this office has advised that a board of trustees of a police pension fund may not delay release of its records until such time as the request is submitted to the board for a vote. Op. Att'y Gen. Fla. 96-55 (1996).

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).

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. 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.

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 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). 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).

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). 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.

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

Yes. Section 119.07(2)(a), 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. *Id.* 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(2)(a), Florida Statutes, requires the custodian of that document to delete or excise only that portion or portions of the record for which an exemption is asserted and to provide the remainder of the record for examination. See, *Ocala Star Banner Corp. v. McGhee*, 643 So. 2d 1196 (Fla. 5th DCA 1994) (city may redact confidential identifying information from police report but must produce the rest for inspection). 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).

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), review denied, 589 So. 2d 289 (Fla. 1991).

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), review denied, 589 So. 2d 289 (Fla. 1991).

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

1. 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).

2. Release or transfer of confidential or exempt records

It is important to note that there is a difference between those records the Legislature has determined to be exempt from the mandatory public inspection requirements of section 119.07(1), Florida Statutes, and those which are exempt and confidential. If the Legislature makes certain information confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released to anyone other than to the persons or entities designated in the statute. See, *Op. Att'y Gen. Fla. 89-12* (1989) (Department of Business and Professional Regulation prohibited from releasing patient records or information identifying a patient by name to law enforcement agency or other regulatory agency).

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), 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), 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 119.07(3)(b), 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).

In a more recent decision, an appellate court ruled that 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 1531 (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).

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(1)(b), 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(1), 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).

If no fee is prescribed elsewhere in the statutes, section 119.07(1)(a), 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 " inches or less. An agency may charge no more than an additional 5 cents for each two-sided duplicated copy. A charge of up to \$1.00 per copy may be assessed for a certified copy of a public record.

For other copies, the charge is limited to the actual cost of duplication of the record. Section 119.07(1)(a), Florida Statutes. The phrase "actual cost of duplication" is defined to mean "the cost of the material and supplies used to duplicate the record, but it does not include the labor cost and overhead cost associated with such duplication." Id. 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. Id. 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, section 119.07(1)(a), Florida Statutes, does not authorize the addition of overhead costs such as utilities or other office expenses to the charge for public records. AGO 99-41. 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)

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 section 119.07[1], Florida Statutes).

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(1)(b), 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 reasonable service charge based on the cost actually incurred by the agency for such extensive use of information technology resources or personnel. 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, the statute mandates that the special service charge be "reasonable." See, *Carden v. Chief of Police*, 696 So. 2d 772, 773 (Fla. 2d DCA 1996), stating that an "excessive charge" under section 119.07(1)(b), Florida Statutes, "could well serve to inhibit the pursuit of rights conferred by the Public Records Act."

Section 119.07(1)(b), 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 S. 2d 267 (Fla. 1st DCA), 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. Judge Zehmer dissented, saying that the rule was inconsistent with legislative intent and exceeded the agency's delegated authority under section 119.07 (1)(b), Florida Statutes.

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 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."

In *State v. Gudinas*, No. CR 94-7132 (Fla. 9th Cir. Ct. June 1, 1999), the court approved an agency's charge for providing copies in response to a large public records request based on the clerk's base rate of pay, excluding benefits. The court also concluded that an agency could charge only a clerical rate for the time spent making copies, even if due to staff shortages, a more highly paid person actually did the work.

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

1. Mediation

Several years ago, Attorney General Butterworth established an informal voluntary mediation program within the Office of the Attorney General to resolve open government disputes. In 1995, this program was codified in section 16.60, Florida Statutes. For more information about the voluntary mediation program, please contact the Office of the Attorney General at the following address: Office of the Attorney General, PL01, The Capitol, Tallahassee, Florida; telephone (850) 488-9853.

2. Civil action

a. Remedies

Any person denied the right of inspection and/or copying under Chapter 119, Florida Statutes, may institute a civil action in circuit court against an agency which has violated the provisions of Chapter 119, Florida Statutes, in order to compel compliance with that law. Pursuant to section 119.11(1), Florida Statutes, such actions, when filed, are entitled to an immediate hearing and take priority over other pending cases.

Generally, mandamus is the appropriate remedy to enforce compliance with the public records act. *Staton v. McMillan*, 597 So. 2d 940 (Fla. 1st DCA), review dismissed, 605 So. 2d 1266 (Fla. 1992). However, it has been held that mandamus is not appropriate when the language of an exemption statute requires an exercise of discretion. See, *Shea v. Cochran*, 680 So. 2d 628 (Fla. 4th DCA 1996) (mandamus was an inappropriate remedy where sheriff provided a specific reason for refusing to comply with a public records request by claiming the records were part of an active criminal investigation).

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).

b. Procedural issues

(1) In camera inspection

Section 119.07(2)(b), 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 paragraphs (c), (d), (e), (k), (l), or (o) of section 119.07(3), Florida Statutes, the public record or part of the record in question shall be submitted to the trial court for an in camera examination.

Section 119.07(2)(b), Florida Statutes, provides that if an exemption is alleged under paragraph (b) of section 119.07(3), Florida Statutes (the exemption for active criminal investigation or intelligence information), an inspection is discretionary with court. 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 a section 119.07(3)(b), Florida Statutes, exemption is asserted, it is always the better practice to conduct such an inspection in cases where an exception to the Public Records Act is in dispute. According to the court, inspection lends credence to the decision of the trial court, helps dispel public suspicion, and provides a much better basis for appellate review.

Similarly, in *Woolling v. Lamar*, 764 So. 2d 765, 768-769 (Fla. 5th DCA 2000), the Fifth District concluded that because the state attorney presented "no evidence to meet its burden that the records are exempt" under section 119.07(3)(b), Florida Statutes, an "in camera inspection by the lower court is

therefore required so that the trial judge will have a factual basis to decide if the records are exempt under [that statute]." And see, *Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000), in which the First District said: "We fail to see how the trial court can [determine whether an agency is entitled to a claimed exemption] without examining the records."

(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." The court remanded the case for an evidentiary hearing on the issue of whether, under the facts of the case, there was an unlawful refusal of access to public records. Compare, *Jacksonville Television, Inc. v. Shorstein*, 608 So. 2d 592 (Fla. 1st DCA 1992) (where public records lawsuit was determined to be moot because records were delivered to television station prior to entry of writ of mandamus, appellate court would not issue an "advisory opinion" as to whether trial court's voluntary conclusion that agency acted properly by initially withholding the records was correct).

(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(1), 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, examined, or copied, the court shall assess and award against the agency responsible the reasonable costs of enforcement including reasonable attorney's fees. See, *Florida Department of Law Enforcement v. Ortega*, 508 So. 2d 493 (Fla. 3d DCA 1987).

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 v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990).

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.*

c. Criminal penalties

In addition to judicial remedies, section 119.02, 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 also,

section 119.10, Florida Statutes, providing 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?

1. Delivery of records to successor

Section 119.05, 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); Op. Att'y Gen. Fla. 75-282 (1975) (all public records regardless of usefulness or relevancy must be turned over to the custodian's successor in office or to the appropriate division in the Department of State; documents statutorily exempt from public inspection are also included within the records which must be delivered).

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, Op. 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)487-2073.