

2-B-3 | JUDICIARY**a. Public Records Act Inapplicable to Judicial Records**

Relying on separation of powers principles, the courts have consistently held that the judiciary is not an "agency" for purposes of Ch. 119, F.S. See, e.g., *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995) (the judiciary, as a coequal branch of government, is not an "agency" subject to supervision or control by another coequal branch of government); *State v. Wooten*, 260 So. 3d 1060, 1069 (Fla. 4th DCA 2018) ("Access to judicial branch records is governed by the rules and decisions of the Florida Supreme Court, not Chapter 119, Florida Statutes."); and *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Cf. s. 119.0714(1), F.S., stating that "[n]othing in this chapter shall be construed to exempt from [s. 119.07(1), F.S.] a public record that was made a part of a court file and that is not specifically closed by order of court...." (e.s.) And see *Tampa Television, Inc. v. Dugger*, 559 So. 2d 397 (Fla. 1st DCA 1990) (Legislature has recognized the distinction between documents sealed under court order and those not so sealed, and has provided for disclosure of the latter only).

However, the Florida Supreme Court has expressly recognized that "both civil and criminal proceedings in Florida are public events" and that it will "adhere to the well established common law right of access to court proceedings and records." *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 116 (Fla. 1988). See also *Russell v. Miami Herald Publishing Co.*, 570 So. 2d 979, 982 (Fla. 2d DCA 1990), in which the court stated: "[W]e recognize that the press has a general right to access of judicial records." And see *C.H.-C v. Miami Herald Publishing Co.*, 262 So. 3d 226 (Fla. 3d DCA 2018) (trial court did not abuse its discretion in finding that newspaper had proper interest in access to redacted transcript of judicial review dependency hearing involving minor children).

b. Public Access to and Protection of Judicial Branch Records, Fla. R. Gen. Prac. & Jud. Admin. 2.420**(1) Scope of the Rule**

Although the judiciary is not an "agency" for purposes of Ch. 119, F.S., there is a constitutional right of



access to judicial records established by Art. I, s. 24, of the Florida Constitution. In accordance with this directive, access to records of the judicial branch is governed by Florida Rule of General Practice and Judicial Administration 2.420, entitled "Public Access to and Protection of Judicial Branch Records." See 2.420(a), Fla. R. Gen. Prac. & Jud. Admin., providing that "[t]he public shall have access to all records of the judicial branch of government except as provided [in the rule]." Cf. *Morency v. State*, 223 So. 3d 439 (Fla. 5th DCA 2017), noting that "electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes or stenographic tapes of court proceedings" are included within the scope of the rule; and *Wright v. State*, 324 So. 3d 1282 (Fla. 1st DCA 2021) (defendant entitled to obtain electronic records of plea hearing to the extent that such records exist).

According to the Florida Supreme Court, rule 2.420 is "intended to reflect the judiciary's responsibility to perform both an administrative function and an adjudicatory function." *In re Amendments to the Florida Rules of Judicial Administration--Public Access to Judicial Records*, 608 So. 2d 472 (Fla. 1992). In its administrative role, the judiciary is a governmental entity expending public funds and employing government personnel. Thus, "records generated while courts are acting in an administrative capacity should be subject to the same standards that govern similar records of other branches of government." *Id.* at 472-473. See also *Media General Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit*, 840 So. 2d 1008, 1016 (Fla. 2003) (when an individual complains to a chief circuit judge about judicial misconduct involving sexual harassment or sexually inappropriate behavior by a judge, the records made or received by the chief judge "constitute 'judicial records' subject to public disclosure absent an applicable exemption").

An online version of Fla. R. Gen. Prac. & Jud. Admin. 2.420 is also available at: www.floridabar.org.



(2) Confidential Judicial Records

Rule 2.420(c)(1) through (6) lists confidential judicial branch records. Examples include trial and appellate court memoranda, complaints alleging misconduct against judges and other court personnel until probable cause is established, periodic evaluations implemented solely to assist judges in improving their performance, information (other than names and qualifications) about persons seeking to serve as unpaid volunteers unless made public by the court based upon a showing of materiality or good cause, and copies of arrest and search warrants until executed or until law enforcement determines that execution cannot be made.

Rule 2.420(d)(1) states that except as provided in subdivision(d)(1)(C), the clerk of court shall designate and maintain the confidentiality of any information contained within a court record that is described in subdivision (d)(1)(A) or (d)(1)(B) of the rule. Subdivision (A) references "information described by any of the subdivisions (c)(1) through (c)(6)." Subdivision (B) contains a list of specific statutory exemptions. Subdivision (d)(1)(C) states that in "civil cases" as that term is defined in the rule, the clerk shall not be required to designate and maintain information as confidential unless the filer follows the notice procedures set forth in subdivision (d)(2), the filer files a Motion to Determine Confidentiality of Court Records as set forth in subdivision (d)(3), the filing is deemed confidential by court order, or the case itself is confidential by law. Cf. s. 119.0714(2)(g), F.S., providing that the clerk of court is not liable for the release of information that is required by the Florida Rules of Judicial Administration to be identified by the filer as confidential if the filer fails to make the required identification of the confidential information to the clerk.

Although rule 2.420(c)(1)-(6) lists specific confidential records, subdivision (c)(8) of the rule provides a general exemption from disclosure for records presently deemed to be confidential by court rule, Florida Statutes, prior Florida case law, and by rules of the Judicial Qualifications Commission. See *State v.*



Buenoano, 707 So. 2d 714, 718 (Fla. 1998). In addition, Fla. R. Gen. Prac. & Jud. Admin. 2.420(c)(7) provides an exemption for "all records made confidential under the Florida and United States Constitutions and Florida and federal law."

Subdivision (c)(9)(A) of rule 2.420 establishes the grounds for determining confidentiality of a court record. The degree, duration, and manner of confidentiality ordered by the court shall be no broader than necessary to protect the interests set forth in subdivision (c)(9)(A). Fla. R. Gen. Prac. & Jud. Admin. 2.420(c)(9)(B). Cf. *Barfield v. Doe*, 47 F.L.W. D1924 (Fla. 4th DCA September 21, 2022) (while 2.420(c)(9)(A)(vi) allows a court to shield a record from public view when confidentiality is required to "avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed," litigants cannot have a reasonable expectation of privacy concerning matters that are inherent to their civil proceeding).

Procedures for judicial determinations of requests for confidentiality of court records and for obtaining access to confidential court records are referenced in rule 2.420(e)-(j). For example, rule 2.420(f)(3) states that "any motion to determine whether a court record that pertains to a plea agreement, substantial assistance agreement, or other court record that reveals the identity of a confidential informant or active criminal investigative information is confidential under subdivision (c)(9)(A)(i), (c)(9)(A)(iii), (c)(9)(A)(v), or (c)(9)(A)(vii) of this rule may be made in the form of a written motion captioned 'Motion to Determine Confidentiality of Court Records.'"

(3) Procedures for Accessing Judicial Branch Records under Rule 2.420

"Requests and responses to requests for access to records under this rule shall be made in a reasonable manner." Fla. R. Gen. Prac. & Jud. Admin. 2.420(m). Requests must be in writing and directed to the custodian. *Id.* See *Morris Publishing Group, LLC v. State*, 13 So. 3d 120 (Fla. 1st DCA 2009), in which the



court denied a Florida newspaper's records request for an audio tape related to a shooting since the request was made orally instead of in writing as required by the rule. In a commentary to the decision incorporating the written request provision, the Court cautioned that the "writing requirement is not intended to disadvantage any person who may have difficulty writing a request; if any difficulty exists, the custodian should aid the requestor in reducing the request to writing." Commentary, In re Report of the Supreme Court Workgroup on Public Records, 825 So. 2d 889, 898 (Fla. 2002).

A public records request "shall provide sufficient specificity to enable the custodian to identify the requested records. The reason for the request is not required to be disclosed." Fla. R. Gen. Prac. & Jud. Admin. 2.420(m) (1).

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

The custodian shall determine whether the requested records are subject to the rule, whether there are any exemptions, and the form in which the record is provided. Fla. R. Gen. Prac. & Jud. Admin. 2.420(m) (2). If the request is denied, the custodian shall state in writing the basis for the denial. Id.

Expedited review of denials of access to administrative records of the judicial branch shall be provided through an action for mandamus, or other appropriate relief. Fla. R. Gen. Prac. & Jud. Admin. 2.420(l). See Jacobs Keeley, PLLC v. Chief Judge of the Seventeenth Judicial Circuit, 169 So. 3d 192 (Fla. 4th DCA 2015). And see C.H.-C v. Miami Herald Publishing Co., 262 So. 3d 226 (Fla. 3d DCA 2018) (trial court did not abuse its discretion in finding that newspaper had proper interest in access to redacted transcript of judicial review dependency hearing involving minor children).



c. Discovery Material

The Florida Supreme Court has ruled that there is no First Amendment right of access to unfiled discovery materials. *Palm Beach Newspapers v. Burk*, 504 So. 2d 378 (Fla. 1987) (discovery in criminal proceedings); and *Miami Herald Publishing Company v. Gridley*, 510 So. 2d 884 (Fla. 1987), cert. denied, 108 S.Ct. 1224 (1988) (civil discovery). Cf. *Lewis v. State*, 958 So. 2d 1027 (Fla. 5th DCA 2007) (Burk applies to a request for unfiled depositions made during an ongoing, active criminal prosecution but does not extend to a defendant's request for deposition transcripts after the conviction becomes final; such transcripts must be produced in accordance with Ch. 119, F.S.). And see *SCI Funeral Services of Florida, Inc. v. Light*, 811 So. 2d 796, 798 (Fla. 4th DCA 2002), noting that even though there is no constitutional right of access to prefiled discovery materials, "it does not necessarily follow that there is a constitutional right to prevent access to discovery." (emphasis supplied by the court).

Even though unfiled discovery material is not accessible under the First Amendment, it may be open to inspection under Ch. 119, F.S., if the document is a public record which is otherwise subject to disclosure under that law. See, e.g., *Tribune Company v. Public Records*, 493 So. 2d 480, 485 (Fla. 2d DCA 1986), review denied sub nom., *Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987), in which the court reversed a trial judge's ruling limiting inspection of police records produced in discovery to those materials which were made part of an open court file because "this conflicts with the express provisions of the Public Records Act." And see *Smithwick v. Television 12 of Jacksonville, Inc.*, 730 So. 2d 795 (Fla. 1st DCA 1999) (trial court properly required defense counsel to return discovery documents once it realized that its initial order permitting removal of the documents from the court file had been entered in error because the requirements of rule 2.420 had not been met).

Thus, in *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32 (Fla. 1988), the Court noted that where pretrial discovery material developed for the prosecution of a criminal case had reached the status of a public record under Ch. 119, F.S., the material was subject to public inspection as required by that statute in the absence of a court order



finding that release of the material would jeopardize the defendant's right to a fair trial. See also *Rameses, Inc. v. Demings*, 29 So. 3d 418 (Fla. 5th DCA 2010) (government not precluded from asserting applicable statutory exemptions to public records that have been disclosed during discovery to a criminal defendant). And see *Post-Newsweek Stations, Florida, Inc. v. Doe*, 612 So. 2d 549 (Fla. 1992) (public's statutory right of access to pretrial discovery information in a criminal case must be balanced against a nonparty's constitutional right to privacy).

d. Florida Bar

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

e. Judicial Qualifications Commission and Judicial Nominating Commissions

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

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



their records shall be open to the public.” See *Inf. Op. to Frost*, November 4, 1987, concluding that correspondence between a member of a judicial nominating commission and persons wishing to obtain an application for a vacant seat on a District Court of Appeal is a public record subject to disclosure.

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

f. Jury Records

(1) Grand jury

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

Thus, a letter written by a city official to the grand jury is not subject to public inspection. AGO 73-177. Similarly, a circuit court held that the list of grand jurors is confidential. *Wood v. Childers*, No. 13-CA-000877 (Fla. 1st Cir. Ct. April 16, 2013), per curiam



affirmed, 130 So. 3d 1282 (Fla. 1st DCA 2014) available online in the case database at myfloridalegal.com. Accord Inf. Op. to Alexander, September 8, 1995. However, the clerk of court is not authorized to redact the name of a grand jury foreperson or the acting foreperson from an indictment after it has been made public. AGO 99-09.

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

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

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

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



unconstitutional insofar as they prohibit a grand jury witness from disclosing his own testimony after the term of the grand jury has ended). Cf. *In re: Final Report of the 20th Statewide Grand Jury*, 343 So. 3d 584 (Fla. 4th DCA 2022) (s. 905.395 F.S., does not prohibit statewide grand jury from including witness testimony in the report it intends to release).

(2) Trial jury

In *Kever v. Gilliam*, 886 So. 2d 263 (Fla. 1st DCA 2004), the appellate court ruled that the clerk of court was required to comply with appellant's public records request for names and addresses of trial court jurors empanelled in his trial. Accord AGO 05-61 (statute requiring Department of Highway Safety and Motor Vehicles to provide driver license information to courts for purposes of establishing jury selection lists does not operate to exempt from public disclosure jurors' names and addresses appearing on a jury list compiled by the clerk of court). Cf. *Sarasota Herald-Tribune v. State*, 916 So. 2d 904, 909 (Fla. 2d DCA 2005) (while "[t]here are unquestionably times when it might be necessary for a trial judge to impose media restrictions on the publication of juror information,..." trial court order prohibiting news media from publishing names and addresses of prospective or seated jurors in the high profile murder trial constituted a prior restraint on speech); and *WPTV-TV v. State*, 61 So. 3d 1191 (Fla. 5th DCA 2011) (given exceptional media coverage and public interest in upcoming criminal trial, trial court's decision to withhold location of jury selection until a time proximate to the start of the trial was not a material departure from essential requirements of law).

g. Sunshine in Litigation Act

The Sunshine in Litigation Act, s. 69.081, F.S., provides, with limited exceptions, that no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard. See *State v. American Tobacco Company*, No. CL 95-1466-AH (Fla. 15th Cir. Ct. July 28, 1997), available online in the Cases database at the open government site at



myfloridalegal.com (upholding constitutionality of Sunshine in Litigation Act).

Additionally, s. 69.081(8), F.S., provides, subject to certain exceptions, that any portion of an agreement which has the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against an agency is void, contrary to public policy, and may not be enforced. Settlement records must be maintained in compliance with Ch. 119, F.S. See Inf. Op. to Barry, June 24, 1998 (agency not authorized to enter into a settlement agreement authorizing the concealment of information relating to an adverse personnel decision from the remainder of a personnel file).

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

(Florida Office of the Attorney General // © March 9, 2023)

