



FLORIDA'S SUNSHINE MANUAL
SUBPART 2-B: WHAT ENTITIES ARE COVERED? APPLICATION OF
THE PUBLIC RECORDS ACT TO...

Official Handbook on Public Records Laws

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Subpart 2-B

What Entities are Covered? Application of the Public Records Act
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FLORIDA SUNSHINE MANUAL

PART 2

PUBLIC RECORDS



FLORIDA'S SUNSHINE MANUAL

AUTHOR: Florida's Office of the Attorney General

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PART: 2 PUBLIC RECORDS

SUBPART: B WHAT ENTITIES ARE COVERED? APPLICATION OF THE
PUBLIC RECORDS ACT TO

SECTIONS: 2-B-1 through 2-B-6

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2-B-1 | ADVISORY BOARDS

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

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

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2-B-2 | PRIVATE ORGANIZATIONS

A more complex question is presented when a private corporation or entity provides services for, or receives funds from, a governmental body. The term "agency," as used in the Public Records Act, includes private entities "acting on behalf of any public agency." Section 119.011(2), F.S. The Florida Supreme Court has stated that this broad definition of "agency" ensures that a public agency cannot avoid disclosure by contractually delegating to a private entity that which would otherwise be an agency responsibility. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992). Cf. *Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.*, 718 So. 2d 227, 229n.4 (Fla. 3d DCA 1998) (private company operating state university bookstores is an "agency" as defined in s. 119.011[2], F.S., "[n]otwithstanding the language in its contract with the universities that purports to deny any agency relationship"); and *Schwartzman v. Merritt Island Volunteer Fire Department*, 352 So. 2d 1230 (Fla. 4th DCA 1977), cert. denied, 358 So. 2d 132 (Fla. 1978) (private nonprofit volunteer fire department, which had been given stewardship over firefighting, which conducted its activities on county-owned property, and which was funded in part by public money, was an "agency" for purposes of the Public Records Act, and its membership files, minutes of its meetings and charitable activities were subject to disclosure).

While the mere act of contracting with, or receiving public funds from, a public agency is not sufficient to subject a private entity to Ch.119, F.S., the following discussion considers when the statute has been held applicable to private entities.

a. 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, but rather the issue is whether the entity is "acting on behalf of" a public agency. The Attorney General's Office has issued numerous opinions advising that if a private entity is created by law or by a public agency, it is subject to Ch. 119 disclosure requirements. The following are some examples of such entities: Pace Property Finance Authority, Inc., created as a Florida nonprofit corporation by Santa Rosa County to provide assistance in the funding and administration of certain governmental programs,



AGO 94-34; South Florida Fair and Palm Beach County Expositions, Inc., created pursuant to Ch. 616, F.S., AGO 95-17; rural health networks established as nonprofit legal entities to plan and deliver health care services on a cooperative basis pursuant to s. 381.0406, F.S., Inf. Op. to Ellis, March 4, 1994. And see s. 20.41(8), F.S., providing that area agencies on aging, described as "nongovernmental, independent, not-for-profit corporations" are "subject to [the Public Records Act], and, when considering any contracts requiring the expenditure of funds, are subject to ss. 286.011-286.012, relating to public meetings."

b. Private Entities Contracting with Public Agencies or Receiving Public Funds

There is no single factor which is controlling on the question of when a private corporation, not otherwise connected with government, becomes subject to the Public Records Act. However, the courts have held that the mere act of contracting with a public agency is not dispositive. See, e.g., *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, supra (private corporation does not act "on behalf of " a public agency merely by entering into a contract to provide architectural services to the agency); *Parsons & Whittemore, Inc. v. Metropolitan Dade County*, 429 So. 2d 343 (Fla. 3d DCA 1983); *Stanfield v. Salvation Army*, 695 So. 2d 501, 503 (Fla. 5th DCA 1997) (contract with county to provide services does not in and of itself subject the organization to Ch. 119 disclosure requirements). And see *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970 (Fla. 2d DCA 2002) (fact that private development is located on land the developer leased from a governmental agency does not transform the leases between the developer and other private entities into public records).

Similarly, the receipt of public funds, standing alone, is not dispositive of the organization's status for purposes of Ch. 119, F.S. See *Sarasota Herald-Tribune Company v. Community Health Corporation, Inc.*, 582 So. 2d 730 (Fla. 2d DCA 1991) (mere provision of public funds to the private organization is not an important factor in this analysis, although the provision of a substantial share of the capitalization of the organization is important); and *Times Publishing Company v. Acton*, No. 99-8304 (Fla. 13th Cir. Ct. November 5, 1999), available online in the Cases database at

the open government site at myfloridalegal.com (attorneys retained by individual commissioners in a criminal matter were not "acting on behalf of " a public agency for purposes of Ch. 119, F.S., even though county commission subsequently voted to pay the legal expenses in accordance with a county policy providing for reimbursement of legal expenses to officers successfully defending charges filed against them arising out of the performance of their official duties). Cf. Inf. Op. to Cowin, November 14, 1997 (fact that nonprofit medical center is built on property owned by the city would not in and of itself be determinative of whether the medical center's meetings and records are subject to open government requirements).

The courts have relied on "two general sets of circumstances" in determining when a private entity is "acting on behalf of " a public agency and must therefore produce its records under Ch. 119, F.S. See *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002); *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008), review denied, 4 So. 3d 1220 (Fla. 2009); and *County of Volusia v. Emergency Communications Network, Inc.*, 39 So. 3d 1280 (Fla. 5th DCA 2010). Each of these circumstances or tests is discussed below.

(1) "*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" test to serve as a guide for evaluating whether a private entity is subject to Ch. 119, F.S. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992). See *New York Times Company v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993); *Wells v. Aramark Food Service Corporation*, 888 So. 2d 134 (Fla. 4th DCA 2004).

Accordingly, when a public agency contracts with a private entity to provide goods or services to facilitate the agency's performance of its duties, the courts have considered the "totality of factors" in determining whether there is a significant level of involvement by the public agency so as to subject the

private entity to Ch. 119, F.S. See *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, supra at 974.

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

- 1) the level of public funding;
- 2) commingling of funds;
- 3) whether the activity was conducted on publicly owned property;
- 4) whether the contracted services 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.

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

For example, in AGO 92-37 the Attorney General's Office, following a review of the Articles of Incorporation and other materials relating to the establishment and functions of the Tampa Bay Performing Arts Center, Inc., concluded that the center was an "agency" subject to the Public Records Act, noting that the center was governed by a board of trustees composed of a number of city and county officials or appointees of the mayor, utilized

city property in carrying out its goals to benefit the public, and performed a governmental function. See also AGOs 97-27 (documents created or received by the Florida International Museum after the date of its purchase/lease/option agreement with city subject to disclosure under Ch. 119, F.S.), 92-53 (John and Mable Ringling Museum of Art Foundation, Inc., subject to Public Records Act), and 11-01. Cf. Inf. Op. to Goodman, September 26, 2016 (in the absence of a request from the chief of the volunteer fire department or additional information making the relationship between the town and the fire department clearer, the Attorney General's Office may not respond formally to town attorney's inquiry about the application of the Public Records Act to the town's volunteer fire department).

By contrast, an architectural firm providing architectural services associated with construction of school facilities was found to be outside the scope of the Public Records Act. See *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, supra. See also *Sipkema v. Reedy Creek Improvement District*, No. CI96114 (Fla. 9th Cir. Ct. May 29, 1996), per curiam affirmed, 697 So. 2d 880 (Fla. 5th DCA 1997), review dismissed, 699 So. 2d 1375 (Fla. 1997), available online in the Cases database at the open government site at myfloridalegal.com (private security force providing services on Walt Disney World property, including traffic control and accident reports is not subject to Ch. 119), *Trepal v. State*, 704 So. 2d 498 (Fla. 1997) (soft drink company cooperating with law enforcement in the testing of soda bottles during an investigation of a poisoning death is outside the scope of the Public Records Act); and Inf. Op. to Michelson, January 27, 1992 (telephone company supplying cellular phone services to city officials for city business is not an "agency" since the company was not created by the city, did not perform a city function, and did not receive city funding except in payment for services rendered). Cf. *National Council on Compensation Insurance v. Fee*, 219 So. 3d 172, 182 (Fla. 1st DCA 2017) (trial court conclusion that insurance rating organization violated Public Records Act was erroneous because the court



"expressly declined to apply the Schwab factors" prior to making this determination).

Stated another way, "[a] private entity does not act on behalf of a public agency merely by entering a contract to provide professional services to the agency." *Holifield v. Big Bend Cares, Inc.*, 326 So. 3d 739 (Fla. 1st DCA 2021) [Emphasis supplied by the court]. Thus, the Public Records Act did not apply to a private corporation providing health care services pursuant to a contract with a state agency because the private corporation was not created pursuant to any governmental action, the amounts paid were all paid in consideration for professional services already rendered, and the agency did not delegate any decision-making authority to the corporation, nor did it control or regulate the corporation's professional activity or judgment. *Id.* And see *National Council on Compensation Insurance v. Fee*, 219 So. 3d 172, 182 (Fla. 1st DCA 2017) (trial court conclusion that insurance rating organization violated Public Records Act was erroneous because the court "expressly declined to apply the Schwab factors" prior to making this determination).

(2) Delegation of function test

While the mere act of contracting with a public agency is not sufficient to bring a private entity within the scope of the Public Records Act, 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). And see *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002).

For example, if a private 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 apply. *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418 (Fla. 5th DCA 1997), approved, 729 So. 2d 373 (Fla. 1999). And see *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, 307 (Fla. 3d DCA 2001)



(consortium of private businesses created to manage a massive renovation of an airport was an "agency" for purposes of the Public Records Act because it was created for and had no purpose other than to work on the airport contract; "when a private entity undertakes to provide a service otherwise provided by the government, the entity is bound by the Act, as the government would be"); and *Fox v. News-Press Publishing Company*, 545 So. 2d 941, 943 (Fla. 2d DCA 1989) (upholding a trial court decision finding that business records maintained by a towing company in connection with its contract with a city were public records, as the company "was clearly performing what is essentially a governmental function, i.e., the removal of wrecked and abandoned automobiles from public streets and property"). See also AGOs 08-66 (Public Records Act applies to not-for-profit corporation contracting with city to carry out affordable housing responsibilities and screening applicant files for such housing); 99-53 (while not generally applicable to homeowners associations, Ch. 119 applies to an architectural review committee of a homeowners association which is required by county ordinance to review and approve applications for county building permits as a prerequisite to consideration by the county building department); and 07-44 (property owners association, delegated performance of services otherwise performed by municipal services taxing unit, subject to Public Records Act when acting on behalf of the taxing unit). Compare AGO 87-44 (records of a private nonprofit corporation pertaining to a fund established for improvements to city parks were not public records since the corporation raised and disbursed only private funds and had not been delegated any governmental responsibilities or functions).

Thus, in *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997), the Fifth District recognized that the delegation of function test was the appropriate standard to use to determine that records generated by the Salvation Army in performing a contract to provide misdemeanor services for a county were subject to Ch. 119, F.S. As stated by the court: "Because we find the statutory and contractual delegation of governmental responsibility so compelling in this case, it is

unnecessary to engage in the factor-by-factor analysis outlined in Schwab.” Stanfield, 695 So. 2d at 503. B & S Utilities v. Baskerville-Donovan Inc., 988 So. 2d. 17, 21 (Fla. 1st DCA 2008), citing to Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373 (Fla. 1999). In Baskerville, the court recognized that while the “totality of factors” test favored a private engineering firm’s position that it was not an agency, “the fact that the City delegated its municipal engineering functions” to [the firm] “is dispositive.” Baskerville, 988 So. 2d at 22. (e.s.)

The following are other examples of private businesses and nonprofit entities which were delegated a governmental function and thus determined to be subject to the Public Records Act in carrying out that function:

Corrections company operating county jail:

Times Publishing Company v. Corrections Corporation of America, No. 91-429 CA 01 (Fla. 5th Cir. Ct. December 4, 1991), affirmed per curiam, 611 So. 2d 532 (Fla. 5th DCA 1993), available online in the Cases database at the open government site at myfloridalegal.com. And see 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) (medical services).

Employment Search Firm:

Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc. 379 So. 2d 633 (Fla. 1980). Accord AGO 92-80 (materials made or received by recruitment company in the course of its contract with a public agency to seek applicants and make recommendations to the board regarding the selection of an executive director, subject to Ch. 119).

Humane society investigating animal abuse for county: Putnam County Humane Society, Inc. v. Woodward, 740 So. 2d 1238 (Fla. 5th DCA 1999).

However, the "delegation of function" test should not be used unless there is a "clear, compelling, complete delegation of a governmental function" to the private entity. Economic Development Commission v. Ellis, 178 So. 3d 118, 123 (Fla. 5th DCA 2015). In Ellis, the Fifth District found that the trial judge should not have used the delegation test to determine whether a private economic development entity (EDC) under contract with the county to provide services was an "agency." The appellate court explained that the EDC was the county's "primary" but not its "sole" agency for economic development activity. Id. The county "continued to carry out economic development activities itself through its own paid county employees and in conjunction with other entities to the exclusion of EDC." Id. In other words, "EDC did not take over the county's role or completely assume the county's provision of economic development services." Id. Because "EDC provided services to, not in place of, the county," the trial judge should have applied the "totality of factors" test instead of the "delegation of function" test. Id.

c. Private Company Delegated Authority to Keep Certain Records

If a public agency has delegated its responsibility to maintain records necessary to perform its functions, such records have been deemed to be accessible to the public. See, e.g., Harold v. Orange County, 668 So. 2d 1010 (Fla. 5th DCA 1996) (where county hired a private company to be the construction manager on a county 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). See also Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc., 718 So. 2d 227 (Fla. 3d DCA 1998), review denied, 729 So. 2d 389 (Fla. 1999) (private company operating a campus bookstore pursuant to a contract with a state university is the custodian of public records made or received by the store in connection with university business).



d. Subcontractors

A circuit court has addressed whether a subcontractor may be subject to the Public Records Act if both the subcontractor and contractor have been delegated a public function. In *Multimedia Holdings Corporation v. CRSPE, Inc.*, No 03-3474-G (Fla. 20th Cir. Ct. December 3, 2003), available online in the Cases database at the open government site at myfloridalegal.com, the court required a consulting firm to disclose its timesheets and internal billing records generated pursuant to a subcontract with another firm (CRSPE) which had entered into a contract with a town to prepare a traffic study required by the Department of Transportation. Rejecting the subcontractor's argument that Ch. 119, F.S., did not apply to it because it was a subcontractor, not the contractor, the court found that the study was prepared and submitted jointly by both consultants; both firms had acted in place of the town in performing the tasks required by the department: "[T]he Public Records Act cannot be so easily circumvented simply by CRSPE delegating its responsibilities to yet another private entity."

e. Other Statutory Provisions Governing Records of Private Entities**(1) Contract Requirements**

Section 119.0701, F.S., mandates that all agency contracts for services must contain specific provisions requiring the contractor to comply with public records laws, including retention and public access requirements. The term "contractor" is defined to mean "an individual, partnership, corporation or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency as provided under s. 119.011(2), [F.S.]." Section 119.0701(1)(a), F.S. (e.s.). "Thus, based on the terms of section 119.0701(1)(a), Florida Statutes, the nature and scope of the services provided by a private contractor determine whether he or she is 'acting on behalf of ' an agency and thus, would be subject to the requirements of the statute." AGO 14-06. For more information on when a private entity is determined to be "acting on behalf of " a public agency for purposes of s. 119.011(2), F.S., please refer to the preceding discussion on pages 61-65.



In addition, contracts entered into or amended after July 1, 2016, must contain a statement, in the form prescribed by the statute, providing the contact information for the public agency's custodian of public records in the event that the contractor has questions about its duty to provide public records relating to the contract. Section 119.0701(2)(a), F.S. A request for records for records relating to the contract must be made directly to the public agency. Section 119.0701(3)(a), F.S. If the public agency does not possess the requested records, the public agency shall immediately notify the contractor of the request, and the contractor must provide the records to the public agency or allow the records to be inspected or copied within a reasonable time. Id. Sections 119.0701(3) and (4), F.S., establish consequences in the event of a contractor's noncompliance.

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

(2) Legislative Appropriation

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

(3) Public Funds Used for Dues

Section 119.01(3), F.S., provides that if an agency spends public funds in payment of dues or membership contributions to a private entity, then the private

entity's financial, business and membership records pertaining to the public agency are public records and subject to the provisions of s. 119.07, F.S.

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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.

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2-B-4 | LEGISLATURE

The Public Records Act does not apply to the legislative branch. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992) (definition of "agency" in the Public Records Act does not include the Legislature or its members). There is, however, a constitutional right of access to legislative records provided in Art. I, s. 24, Fla. Const., which provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body...." This right of access specifically includes the legislative branch. Article I, s. 24(a), Fla. Const. The Legislature, however, may provide by general law for the exemption of records provided that such law must state with specificity the public necessity justifying the exemption and be no broader than necessary to accomplish the stated purpose of the law. Article I, s. 24(c), Fla. Const. Each house of the Legislature is authorized to adopt rules governing the enforcement of this section for records of the legislative branch. *Id.* Any statutes providing limitations on access which were in effect on July 1, 1993, continue in force and apply to records of the legislative branch until repealed. Article I, s. 24(d), Fla. Const.

In accordance with Art. I, s. 24(c), Fla. Const., the Senate and House of Representatives have adopted rules relating to records of the legislative branch. These rules may be accessed online at www.flsenate.gov (Florida Senate) and www.myfloridahouse.gov (Florida House of Representatives).

In addition, s. 11.0431(2), F.S., lists legislative records which are exempt from inspection and copying. The text of s. 11.0431, F.S., is set forth in Appendix E. See *League of Women Voters v. Florida House of Representatives*, 132 So. 3d 135, 153 (Fla. 2013) ("We agree that the first issue to be decided is whether the draft [apportionment] plans fall within the scope of the public records exemption in section 11.0431[2][e], Florida Statutes [2012], and that this exemption should be strictly construed in favor of disclosure"). And see s. 11.26(1), F.S. (legislative employees are forbidden from revealing to anyone outside the area of their direct responsibility the contents or nature of any request for services made by any member of the Legislature except with the consent of the legislator making the request); and s. 15.07, F.S. (the journal of the executive session of the Senate shall be kept free from inspection or disclosure except upon order of the Senate itself or some court of competent jurisdiction).

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2-B-5 | GOVERNOR AND CABINET

The Governor and Cabinet have duties which derive from both the Constitution and the Legislature. Because of separation of powers principles, the legislatively created Public Records Act does not apply to records gathered in the course of carrying out a specific duty or function which has been assigned to the Governor and Cabinet by the Constitution rather than by statute. See AGO 86-50, stating that materials collected by the former Parole and Probation Commission [now known as the Florida Commission on Offender Review] pursuant to direction of the Governor and Cabinet for pardons or other forms of clemency authorized by Art. IV, s. 8(a), Fla. Const., are not subject to Ch. 119, F.S.

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

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

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2-B-6 | COMMISSIONS CREATED BY THE CONSTITUTION

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

Accordingly, the Public Records Act does not apply to the clemency investigative files and reports produced by the Florida Commission on Offender Review [formerly the Parole Commission] on behalf of the Governor and Cabinet relating to the granting of clemency; release of such materials is governed by the Rules of Executive Clemency adopted by the Governor and Cabinet, sitting as the clemency board. *Parole Commission v. Lockett*, 620 So. 2d 153 (Fla. 1993). Accord *Jennings v. State*, 626 So. 2d 1324 (Fla. 1993). And see AGO 86-50.

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

Moreover, Art. I, s. 24, Fla. Const., provides a constitutional right of access for public records of each branch of government, and "each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution." The only exceptions to the right of access are those records exempted pursuant to s. 24 or specifically made confidential by the Constitution. Article I, s. 24(a), Fla. Const. See *King v. State*, 840 So. 2d 1047 (Fla. 2003) (clemency records exempt pursuant to s. 14.28, F.S., providing that records made or received by any state entity

pursuant to a Board of Executive Clemency investigation are not subject to public disclosure).

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APPENDIX



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