



FLORIDA'S SUNSHINE MANUAL
SUBPART 2-F: FEDERAL LAW AND THE FLORIDA PUBLIC RECORDS
LAW

Official Handbook on Public Records Laws

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Subpart 2-F
Federal Law and the Florida Public Records Law

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FLORIDA SUNSHINE MANUAL

PART 2

PUBLIC RECORDS



FLORIDA'S SUNSHINE MANUAL

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PART: 2 PUBLIC RECORDS

SUBPART: F FEDERAL LAW AND THE FLORIDA PUBLIC RECORDS
LAW

SECTIONS: 2-F-1 through 2-F-2

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2-F-1 | APPLICATION OF FEDERAL CONFIDENTIALITY REQUIREMENTS TO FLORIDA PUBLIC RECORDS

Generally, records that 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 withheld from a public records request, and the state is clearly subject to the provisions of such statute, then pursuant to the Supremacy Clause of the United States Constitution, Art. VI, U.S. Const., the state must keep the records confidential. See *Florida Department of Education v. NYT Management Services, Inc.*, 895 So. 2d 1151 (Fla. 1st DCA 2005) (federal law prohibits public disclosure of social security numbers in state teacher certification database); AGOs 90-102 and 74-372. Compare *State ex rel. Cummer v. Pace*, 159 So. 679 (Fla. 1935); AGOs 85-03, 81-101, and 80-31. See also *Wallace v. Guzman*, 687 So. 2d 1351, 1353 (Fla. 3d DCA 1997) (exemptions from disclosure set forth in federal Freedom of Information Act apply to federal agencies but not to state agencies).

Federal confidentiality requirements may be a concern if the Florida governmental entity or officer is acting as an instrumentality or agent of the federal government. In such a case, a federal agency may assert ownership of records and assert federal jurisdiction and protection of such records. See, e.g., *U.S. v. Story County, Iowa*, 28 F. Supp. 3d 861, 872 (S.D. Iowa 2014) (emails of sheriff from his county email account were sent in his capacity of an appointed board member of an independent authority within an agency of the United States Department of Commerce, and were federal records subject to federal jurisdiction since "the subject emails were not 'produced by or originated from' [the sheriff's] role as ... Sheriff nor were they held by [the sheriff] in his official capacity as ... sheriff."). Compare *Housing Authority of the City of Daytona Beach v. Gomillion*, 639 So. 2d 117 (Fla. 5th DCA 1994) (tenant records of a state public housing authority were not protected under federal law because the federal agency was not involved in the day-to-day operations of the authority).

Records received from a federal agency may have a statutory or regulatory basis for protection. *Morris v. Whitehead*, 588 So. 2d 1023 (Fla. 2d DCA 1991) (holding confidential records received by a state run housing authority from the federal government may not be disclosed where there was a statutorily-authorized agreement between agencies that the state housing authority will maintain



the confidentiality of the materials received); *Miami Herald Media Company v. Florida Department of Transportation*, 345 F. Supp. 3d 1349, 1356 (N.D. Fla. 2018) (state agency could not disclose records when federal safety board investigating bridge collapse took control over dissemination of records relating to the investigation, designated the Florida Department of Transportation (FDOT) as a party to assist NTSB in the investigation, and directed the state agency to not disclose the information contained in those records by agreement and as authorized by federal regulation); but see *Lakeland Ledger Publishing Co. v. Sch. Bd. of Polk Co.*, GV-G-91-3803 (Fla. 10th Cir. Ct. Nov. 21, 1991), available online in the Cases database at the open government site at myfloridalegal.com (relying on *Morris v. Whitehead*, *supra*, to determine a map prepared by the U.S. Justice Department concerning desegregation of Lakeland schools and given to school district employees was a public record and open to inspection).

If litigation ensues with respect to whether the disclosure of a record is subject to federal law, under some circumstances the federal agency may be considered a real party in interest, and the matter may be removed to federal court. See e.g., *Miami Herald Media Company v. Florida Department of Transportation*, *supra*, 345 F. Supp. 3d at 1356 (denying a motion to remand case to state court after the United States removed matter to federal district court because the federal agency in the suit was a real party in interest); compare *In re Motion to Compel Compliance to Minnesota Department of Health v. All Temporaries Midwest, Inc.*, 423 F. Supp. 3d 670, 678 (D. Minn. 2019) (remanding matter to state court despite assertion of federal agency that it was a real party in interest; subpoenaed records were collected pursuant to state law and a state investigation, and thus subject to state law, notwithstanding a joint investigation by the federal agency.).

Records do not become subject to disclosure merely because they are not entitled to federal protection. *City of Miami v. Metropolitan Dade County*, 745 F. Supp. 683 (S.D. Fla. 1990) (records provided by the United States Attorney's Office to a criminal defendant were active criminal investigative records in the hands of the Florida governmental entities).

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2-F-2 | COPYRIGHTED RECORDS**a. Copyrights Held by Agencies**

In the absence of statutory authorization, a public official is not empowered to obtain a copyright for material produced by his or her office in connection with the transaction of official business. *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871 (Fla. 2d DCA 2004), review denied, 902 So. 2d 791 (Fla. 2005), cert. denied, 126 S.Ct. 746 (2005) (property appraiser not authorized to assert copyright protection for the Geographic Information System maps created by his office). Accord AGOs 03-42, 88-23, and 86-94. Cf. AGO 00-13 (in the absence of express statutory authority, state agency not authorized to secure a trademark).

Section 119.084(2), F.S., however, specifically authorizes agencies to hold a copyright for data processing software created by the agency. The agency may sell the copyrighted software to public or private entities or may establish a license fee for its use. See also s. 24.105(10), F.S., authorizing the Department of the Lottery to hold patents, copyrights, trademarks and service marks; and see ss. 286.021 and 286.031, F.S., prescribing duties of the Department of State with respect to authorized copyrights obtained by state agencies.

b. Copyrighted Material Obtained by Agencies

The federal copyright law vests in the owner of a copyright, subject to certain limitations, the exclusive right to do or to authorize, among other things, the reproduction of the copyrighted work and the distribution of the copyrighted work to the public by sale or other transfer of ownership. See AGO 97-84, citing to pertinent federal law and interpretive cases. However, the Attorney General's Office has concluded that the fact that material received by a state agency may be copyrighted does not preclude the material from constituting a public record. For example, AGO 90-102 advised that copyrighted data processing software which was not specifically designed or created for the county but was being used by the county in its official capacity for official county business fell within the definition of "public record."



Moreover, in *State, Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377, 1382-1383 (Fla. 1st DCA 1994), the court rejected a state agency's argument that a transcript of a hearing that had been copyrighted by the court reporter and filed with the agency should not be copied without the copyright holder's permission. The court stated that the agency was under a statutory obligation to preserve all testimony in the proceeding and make a transcript available in accordance with the fees set forth in Ch. 119, F.S. And see AGO 75-304 (agency may not enter into agreement with court reporter to refer all requests for copies of agency proceedings to court reporter who originally transcribed proceedings; agency must provide copies of transcripts in accordance with charges set forth in Public Records Act).

The federal copyright law, when read together with Ch. 119, F.S., authorizes and requires the custodian of records of the Department of State to make maintenance manuals supplied to that agency pursuant to law, available for examination and inspection purposes. AGO 03-26. "With regard to reproducing, copying, and distributing copies of these maintenance manuals which are protected under the federal copyright law, state law must yield to the federal law on the subject." *Id.* The custodian should advise individuals seeking to copy such records of the limitations of the federal copyright law and the consequences of violating its provisions; such notice may take the form of a posted notice that the making of a copy may be subject to the copyright law. AGOs 03-26 and 97-84. However, it is advisable for the custodian to refrain from copying such records himself or herself. AGO 03-26. But see *State v. Allen*, 14 F.L.W. Supp. 172a (Fla. 7th Cir. Ct. November 2, 2006), in which the court found that the defendant was entitled to inspect and copy copyrighted operating manual for the radar unit used by the police "pursuant to Florida Constitution, Article I section 24 and/or Defendant's fundamental right to due process of law." The court noted that if the police department declined to make copies, the defendant or his representative should be allowed reasonable access to the documents and a copy machine to make copies.

Moreover, as noted by the court in *State, Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, *supra*, once a transcript of an administrative hearing conducted by or on behalf of an agency has been filed with the agency, the



transcript becomes a public record, without regard to who ordered the transcription or bore its expense. The agency which is under a statutory obligation to preserve all testimony can charge neither the parties nor the public more than the charges authorized by Ch. 119, F.S., regardless of the fact that the court reporter may have copyrighted the transcript.

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APPENDIX



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