



FLORIDA'S SUNSHINE MANUAL SUBPART 2-H: REMEDIES AND PENALTIES

Official Handbook on Public Records Laws

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Subpart 2-H
Remedies and Penalties

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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: H REMEDIES AND PENALTIES

SECTIONS: 2-H-1 through 2-H-3

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2-H-1 | VOLUNTARY MEDIATION PROGRAM

Section 16.60, F.S., establishes an informal mediation program within the Office of the Attorney General as an alternative for resolution of open government disputes. For more information about the voluntary mediation program, please contact the Office of the Attorney General at the following address: The Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050; telephone (850)245-0140; or you may visit the Office of the Attorney General website: www.myfloridalegal.com.

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2-H-2 | CIVIL ACTION**a. Remedies**

A person denied the right to inspect and/or copy public records under the Public Records Act may bring a civil action against the agency to enforce the terms of Ch. 119, F.S. Cf. s. 119.07(8), F.S. (s. 119.07, F.S., may not be used by an inmate as the basis for failing to timely litigate any postconviction action).

Before filing a lawsuit, the petitioner must have furnished a public records request to the agency. *Villarreal v. State*, 687 So. 2d 256 (Fla. 1st DCA 1996), review denied, 694 So. 2d 741 (Fla. 1997), cert. denied, 118 S.Ct. 316 (1997) (improper to order agency to produce records before it has had an opportunity to comply); and *Maraia v. State*, 685 So. 2d 851 (Fla. 2d DCA 1995) (public records action dismissed where petitioner failed to file a request for public records with the records custodian before filing suit). Cf. *Coconut Grove Playhouse, Inc. v. Knight-Ridder, Inc.*, 935 So. 2d 597 (Fla. 3d DCA 2006) (trial court order departed from essential requirements of law by requiring defendant in a public records action to produce its records as a sanction for failure to respond to a discovery subpoena).

Where a multi-agency law enforcement task force had been created by a mutual aid agreement and the agreement did not indicate an intent to create a separate legal entity capable of being sued in its own name, a requestor could not sue the task force for production of records; however, as the agreement did not specify which agency would be responsible for responding to public records requests, an action could be brought against any of the member agencies to produce records in the possession of the task force. *Ramese's, Inc. v. Metropolitan Bureau of Investigation*, 954 So. 2d 703 (Fla. 5th DCA 2007).

The service of process requirements in s. 48.111, F.S., apply to civil actions to enforce the public records law. See *Department of Children and Families v. Panno*, 312 So. 3d 1275 (Fla. 2d DCA 2021), interpreting the service of process requirements found in a prior version of s. 48.111.



(1) Mandamus

Mandamus is an appropriate remedy to enforce compliance with the Public Records Act. See *Chandler v. City of Greenacres*, 140 So. 3d 1080, 1083 (Fla. 4th DCA 2014); *Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000); *Smith v. State*, 696 So. 2d 814 (Fla. 2d DCA 1997); *Donner v. Edelstein*, 415 So. 2d 830 (Fla. 3d DCA 1982). See also *Farmer v. State*, 927 So. 2d 1075 (Fla. 2d DCA 2006) (trial court should treat motion to compel production of public records as petition for writ of mandamus); *Major v. Hallandale Beach Police Department*, 219 So. 3d 856 (Fla. 4th DCA 2017) (petition for writ of mandamus filed against a governmental agency must attach a copy of any record that supports the petition). Cf. *Wilkinson v. State Attorney's Office*, 345 So. 3d 925 (Fla. 3d DCA 2022) (mandamus is an extraordinary remedy that appellate court will not entertain since petitioner has an adequate alternative remedy to enforce Ch. 119).

A petition for writ of mandamus is an appropriate vehicle to challenge the denial of a public records request, even where an exemption has been asserted. *Deeson Media, LLC v. City of Tampa*, 291 So. 3d 974 (Fla. 2d DCA 2019). Cf. *Agency for Health Care Administration v. Zuckerman Spaeder, LLP*, 221 So. 3d 1260 (Fla. 1st DCA 2017) (mandamus relief ordering agency to produce records within 48 hours and prior to requester's payment of invoices or agency's opportunity to review and redact exempt material was improper because agency's duty was not "ministerial" and requester's right to the records was not "indisputable").

If the requester's petition presents a prima facie claim for relief, an order to show cause should be issued so that the claim may receive further consideration on the merits. *Staton v. McMillan*, 597 So. 2d 940 (Fla. 1st DCA 1992). *Accord Gay v. State*, 697 So. 2d 179 (Fla. 1st DCA 1997). See *Radford v. Brock*, 914 So. 2d 1066 (Fla. 2d DCA 2005) (trial judge dismissal of a writ of mandamus directed to clerk of court and court reporter who were alleged to be records custodians was erroneous because trial judge did not issue an alternative writ of mandamus requiring the clerk and court reporter to show cause why the writ should not be issued, and because there was no

sworn evidence refuting the petitioner's allegations). Compare *Scott v. Lee County School Board*, 310 So. 3d 163 (Fla. 2d DCA 2021) (trial court properly dismissed facially insufficient petition that did not attach the requester's public records request).

Thus, a petition for writ of mandamus should not have been dismissed based on the agency's response that the requested records "would have been destroyed" in accordance with agency policy. *Brown v. State*, 152 So. 3d 739, 741 (Fla. 4th DCA 2014). Similarly, the trial judge erred in dismissing a petition seeking records relating to the chain of custody for a weapon without issuing an alternative writ of mandamus. *Tracy v. State*, 219 So. 3d 958 (Fla. 1st DCA 2017). The agency had produced an evidence card showing that the weapon in question had been destroyed; accordingly, the trial court concluded that dismissal was appropriate as there were no records to produce. However, because the petitioner contended that additional records were available, the appellate court found that "factual disputes remain." On remand, "if the [agency] fails to provide sworn evidence that all available information has been provided, the trial court must conduct an evidentiary hearing on the issue prior to denying the claim."

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), review denied, 684 So. 2d 1353 (Fla. 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.* See also *Stone v. Ward*, 752 So. 2d 100, 101 (Fla. 2d DCA 2000) ("It is well-settled that mandamus is not appropriate to control or regulate a general course of conduct for an unspecified period of time"). Cf. *Areizaga v. Board of County Commissioners of Hillsborough County*, 935 So. 2d 640 (Fla. 2d DCA 2006), review denied, 958 So. 2d 918 (Fla. 2007) (circuit courts may not refer extraordinary writs to mediation; thus, trial judge should not have ordered mediation of petition for writ of mandamus seeking production of public records).

(2) Injunction

Injunctive relief may be available upon an appropriate showing for a violation of Ch. 119, F.S. See *Daniels v. Bryson*, 548 So. 2d 679 (Fla. 3d DCA 1989) (injunctive relief appropriate where there is a demonstrated pattern of noncompliance with the Public Records Act, together with a showing of likelihood of future violations; mandamus would not be an adequate remedy since mandamus would not prevent future harm). However, an injunction is not appropriate if the acts complained of have already been committed and there is not a well-grounded probability of similar future conduct. *Id.* See *Promenade D'Iberville, LLC v. Sundy*, 145 So. 3d 980, 984 (Fla. 1st DCA 2014).

(3) Declaratory Relief Sought by Agencies

Historically, some agencies would seek guidance from the court by filing an action for declaratory relief rather than comply with a pending public records request or asserting an exemption. See, e.g., *Butler v. City of Hallandale Beach*, 68 So. 3d 278, 279 (Fla. 4th DCA 2011) ("Michael Butler appeals from a final judgment in a declaratory action filed by The City of Hallandale Beach [the City]... which sought a declaration that a list of recipients of a personal email... was not sent in connection with the discharge of any municipal duty and therefore, is not a public record under Florida's Public Records Law"). Cf. *Askew v. City of Ocala*, 348 So. 2d 308 (Fla. 1977) (trial court properly dismissed complaint for declaratory relief for failure to state a cause of action where public officials disagreed with Attorney General's advisory opinion and sought different judicial opinion).

However, s. 119.07(9), F.S., now reads: "After receiving a request to inspect or copy a record, an agency may not respond to that request by filing an action for declaratory relief against the requester to determine whether the record is a public record as defined by s. 119.011, or the status of the record as confidential or exempt from the provisions of s. 119.07(1)," F.S.

(4) Damages

Section 119.12, F.S. does not create a private right of action authorizing the award of monetary damages for a person who brings an action to enforce the provisions of Ch. 119, F.S. Section 119.12(4), F.S. Payments by the responsible agency may include only the reasonable costs of enforcement, including reasonable attorney fees, directly attributable to a civil action brought to enforce the provisions of Ch. 119, F.S. *Id.*

b. Procedural Issues

(1) Discovery

In the absence of an evident abuse of power, the trial court's exercise of discretion in matters associated with pretrial discovery in a public records action will not be disturbed. *Lorei v. Smith*, 464 So. 2d 1330, 1333 (Fla. 2d DCA 1985), review denied, 475 So. 2d 695 (Fla. 1985). In *Lorei*, the appellate court upheld the trial judge's denial of a request to permit discovery pertaining to the agency's procedures for maintaining public records. *Id.* The court noted that the interrogatories related to "the mechanics associated with the department's record maintenance, the internal policies or actions which lead to the development of files," and other matters which were not relevant to the question of whether the requested records were exempt from disclosure. *Id.*

The court cautioned, however, that "discovery in a context such as the one at hand may well be appropriate in the circumstance where a good faith belief exists that the public agency may be playing 'fast and loose' with the requesting party or the court, once its statutorily delegated authority is activated." *Id.* Cf. *Lopez v. State*, 696 So. 2d 725, 727 (Fla. 1997) (trial court's denial of motion to depose custodian affirmed because there were "no allegations that any documents had been removed"); and *Johnson v. State*, 769 So. 2d 990, 995 (Fla. 2000) (discovery not warranted based on "bare allegations" that additional records "should" exist).



(2) Hearing

Section 119.11(1), F.S., mandates that actions brought under Ch. 119 are entitled to an immediate hearing and take priority over other pending cases. See *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 124 (Fla. 2016), in which the Court observed that "an accelerated civil action plays a critical role in the enforcement of the Public Records Act as is reflected in the title of section 119.11—'Accelerated hearing; immediate compliance.'" See also *Matos v. Office of the State Attorney for the 17th Judicial Circuit*, 80 So. 3d 1149 (Fla. 4th DCA 2012) (an "immediate hearing does not mean one scheduled within a reasonable time, but means what the statute says: immediate"); and *Woodfaulk v. State*, 935 So. 2d 1225 (Fla. 5th DCA 2006) (s. 119.11, F.S., does not place specific requirements on a party requesting public records to obtain an accelerated hearing except the filing of an action to enforce the public records law).

The purpose of the hearing "is to allow the court to hear argument from the parties and resolve any dispute as to whether there are public records responsive to the request and whether an exemption from disclosure applies in whole or in part to the requested records." *Kline v. University of Florida*, 200 So. 3d 271 (Fla. 1st DCA 2016). For example, an order dismissing a public records complaint filed against a sheriff was overturned on appeal because the judge failed to hold a hearing before entering the order. "Although the sheriff may ultimately not be able to retrieve these records, because of their age or another reason, the order in this case, entered without an evidentiary hearing, was premature." *Grace v. Jenne*, 855 So. 2d 262, 263 (Fla. 4th DCA 2003). And see *Rogers v. State*, 271 So. 3d 79, 80 (Fla. 3d DCA 2019) (hearing required where "there remains a disputed factual issue as to whether the State possesses the requested records"); *Ferrier v. Public Defender's Office, Second Judicial Circuit of Florida*, 171 So. 3d 744 (Fla. 1st DCA 2015) (circuit court erred in not conducting an evidentiary hearing "on the contested issue of whether [the agency] had the requested materials in its possession"); and *Holley v. Bradford County Sheriff's Department*, 171 So. 3d 805 (Fla. 1st



DCA 2015) (because petitioner disputed the agency's "unsworn claim that it did not possess the requested records, the trial court could not deny [the] petition without conducting an evidentiary hearing on this issue"). The failure to hold a hearing may be remedied by a petition for writ of certiorari. See *Martinez v. State*, 969 So. 2d 1174, 1174-75 (Fla. 5th DCA 2007). Cf. *Paylan v. Office of the State Attorney*, 310 So. 3d 459 (Fla. 2d DCA 2020) (petitioner was denied due process when the judge issued an order scheduling a case management conference and then conducted an evidentiary hearing on the petition; the order did not give the petitioner notice that the judge would actually conduct a final evidentiary hearing and decide the petition on the merits.)

"A motion to dismiss tests the legal sufficiency of a complaint and does not resolve factual issues." *Clay County Education Association v. Clay County School Board*, 144 So. 3d 708, 709 (Fla. 1st DCA 2014). Therefore, the trial judge erred when he granted the agency's motion to dismiss based on the agency's "unsworn response... that it either had already provided the documents, did not have the information in the format requested, or could not produce the documents because they did not exist." *Id.* The appellate court remanded the case "for an immediate hearing under section 119.11[1] and, if necessary, further proceedings to resolve any factual disputes that remain between the parties' complaint and answer." *Id.*

Thus, "resolution of such disputed issues as notice and compliance must be litigated in an evidentiary setting." *Human Rights Defense Center v. Armor Correctional Health Services, Inc.*, 336 So. 3d 769 (Fla. 3d DCA 2021). See also *McDonough v. City of Homestead*, 305 So. 3d 316 (Fla. 3d DCA 2020) (absent waiver, an order denying mandamus relief without a hearing is premature); *Williams v. State*, 163 So. 3d 618 (Fla. 4th DCA 2015) (where petitioner asserted that the record produced by the agency was not the record he requested, trial judge erred by denying prison inmate's petition for writ of mandamus without issuing an alternative writ to show cause and failing to hold an evidentiary hearing to resolve disputed issues of fact). Cf. *Morgan v. Wagner*, 73 So.

3d 815 (Fla. 4th DCA 2011), in which the Fourth District said it was "compelled to affirm" the lower court order dismissing the petitioner's public records action because there was no transcript or documentation in the appendix to show that petitioner had preserved "what may have been a valid procedural argument."

(3) In Camera Inspection

Section 119.07(1)(g), F.S., provides that in any case in which an exemption is alleged to exist pursuant to s. 119.071(1)(d) or (f), (2)(d), (e), or (f), or (4)(c), F.S., the public record or part of the record in question shall be submitted to the trial court for an in camera examination. See *City of St. Petersburg v. Romine ex rel. Dillinger*, 719 So. 2d 19 (Fla. 2d DCA 1998) (in camera review mandated when confidential informant exemption now found at s. 119.071[2] [f], F.S., is asserted); *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993); *Lopez v. Singletary*, 634 So. 2d 1054 (Fla. 1993) (records claimed by state attorney to constitute exempted work product must be produced for an in camera inspection); and *Environmental Turf, Inc. v. University of Florida Board of Trustees*, 83 So. 3d 1012 (Fla. 1st DCA 2012) (in camera inspection required where university claimed that records were exempt pursuant to s. 119.071[1][d], F.S. [attorney work product] and s. 1004.22, F.S. [proprietary research records]). And see *Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2009) ("We fail to see how the trial court can [determine whether an agency is entitled to a claimed exemption] without examining the records"). Cf. *Agrosources, Inc. v. Florida Department of Citrus*, 148 So. 3d 138 (Fla. 2d DCA 2014) (trial court finding after in camera review that certain prelitigation emails were exempt attorney work product was supported by competent substantial evidence).

An in camera inspection is also required so that the trial judge can determine whether the records can be redacted to remove exempt information. See *Holley v. Bradford County Sheriff's Department*, 171 So. 3d 805 (Fla. 1st DCA 2015) (trial court must conduct an in camera inspection of the records to determine whether they could be redacted to remove information identifying confidential informants); and *Gonzalez v. State*, 240 So.



3d 99 (Fla. 2d DCA 2018) (in the absence of an in camera inspection of the requested CDs, the circuit court could not conclude that their contents are exempt from disclosure under s. 119.071(3)[a][2] or section 281.301; nor could it determine whether redaction was possible). Cf. *Executive Office of the Governor v. AHF MCO of Florida, Inc.*, 257 So. 3d 612 (Fla. 1st DCA 2018) (reversing trial judge order which found prospective information relating to Governor's detailed schedule and travel plans to be public even though the judge did not inspect the records and despite special agent's undisputed affidavit that premature disclosure of such information would reveal state law enforcement agency's "surveillance techniques, procedures, and personnel" made exempt under s. 119.071(2)(d), F.S., and jeopardize the security of the Governor and the agents who protect him). And see *City of Miami v. Blanco*, 336 So. 3d 1268 (Fla. 3d DCA 2022) (trial court departed from essential requirements of law by failing to conduct in camera review before granting defendant's motion to compel and/or for a subpoena for video camera recordings taken at police station following his arrest; without an in camera inspection, the judge could not determine whether the video recordings fell within the security plan exemptions in ss. 119.071(3)(a) and 281.301, F.S.)

Similarly, the Fourth District held that "it is fundamental error" for a trial court to decide whether a statutory exemption from disclosure for mediation communications required that such communications be redacted from the otherwise public transcript of a closed attorney client session without conducting an in camera hearing to assess whether the redactions were appropriately applied. *Everglades Law Center v. South Florida Water Management District*, 290 So. 3d 123 (Fla. 4th DCA 2019). The appellate court also observed that the trial court was "led astray by the parties' agreement that an in camera review of the transcript was not needed." *Id.*

While s. 119.07(1)(g), F.S., states that an in camera inspection is "discretionary" in cases where an exemption is alleged under s. 119.071(2)(c), F.S. (the exemption for active criminal investigative or intelligence information), it has been held that an in

camera inspection is necessary in order for the court to determine whether the exemption applies to the records at issue. For example, in *Woolling v. Lamar*, 764 So. 2d 765, 768-769 (Fla. 5th DCA 2000), review denied, 786 So. 2d 1186 (Fla. 2001), the Fifth District noted that the state attorney had not presented "evidence to meet its burden that the records are exempt" under s. 119.071(2)(c), F.S.; therefore, an "in camera inspection by the lower court is... required so that the trial judge will have a factual basis to decide if the records are exempt...." See also *Garrison v. Bailey*, 4 So. 3d 683 (Fla. 1st DCA 2009). Compare *Althouse v. Palm Beach County Sheriff's Office*, 89 So. 3d 288, 289 (Fla. 4th DCA 2012) (while trial court's failure to conduct an in camera inspection usually constitutes reversible error, in this case petitioner objected to an inspection and thereby precluded judge from conducting "an intelligent review of the documents;" accordingly, appellate court was "compelled to affirm" trial court's denial of a petition seeking documents relating to a pending criminal investigation).

Similarly, if a public records request involves electronic information stored on privately owned devices, an agency's reasons for its lack of disclosure, "whether for reasons related to relevancy, the application of possible privileges, or otherwise, necessitates a judicial review of the available communications to identify those which are subject to disclosure and any defenses to allegations of noncompliance." *O'Boyle v. Town of Gulf Stream*, 257 So. 3d 1036, 1042 (Fla. 4th DCA 2018).

(4) Mootness

In *Puls v. City of Port St. Lucie*, 678 So. 2d 514 (Fla. 4th DCA 1996), the court, noting that "[p]roduction of the records after the [public records] lawsuit was filed did not moot the issues raised in the complaint," remanded the case for an evidentiary hearing on whether there was an unlawful refusal of access to public records. See also *Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487, 491 (Fla. 2d DCA 1990) (while courts do not ordinarily resolve disputes unless a case or controversy exists, "since the instant

situation is capable of repetition while evading review, we find it appropriate to address the issues before us concerning applicability of the Public Records Act for future reference"); *Mazer v. Orange County*, 811 So. 2d 857, 860 (Fla. 5th DCA 2002) ("the fact that the requested documents were produced in the instant case after the action was commenced, but prior to final adjudication of the issue by the trial court, does not render the case moot or preclude consideration of [the petitioner's] entitlement to fees under the statute"); *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010), review denied, 47 So. 3d 1288 (Fla. 2010) (because damage occurred when city refused to produce canvassing board minutes until approved by city commission, production after the fact did nothing to mollify appellants' injury and therefore issue was not moot as city's refusal "denied any realistic access for the only purpose appellants sought to achieve--review of the Minutes before the Commission meeting."); and *Schweickert v. Citrus County, Florida Board*, 193 So. 3d 1075, 1079 (Fla. 5th DCA 2016) ("We agree that Appellant's case was not rendered moot simply because the Board produced the requested documents after the filing of the initial complaint but prior to filing the amended complaint"). Accord *O'Boyle v. Town of Gulf Stream*, 257 So. 3d 1036, 1043 (Fla. 4th DCA 2018) (public records case did not become moot after the town provided unredacted records prior to the hearing, because there were collateral issues "yet to be decided by the trial court--specifically a determination whether the Town's initial redactions... were proper and whether any reasonable attorney's fees, costs, and expenses, should be awarded"). Compare, *State v. Ingram*, 170 So. 3d 727 (Fla. 2015) (opinion of district court of appeal holding that prison inmate was entitled to unredacted version of videotaped statement of minor victim vacated following State's uncontested representation at oral argument before the Supreme Court that the videotape does not exist).

Similarly, in *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), the court found that a public records lawsuit over a

custodian's requirement that a commercial company obtain a licensing agreement before using the records did not become moot when the custodian provided the company with the requested data after the lawsuit was filed. Because the data was delivered subject to a condition that it was for personal use only, a controversy remained concerning the validity of the custodian restriction on the use of the data. And see *Southern Coatings, Inc. v. City of Tamarac*, 916 So. 2d 19 (Fla. 4th DCA 2005) (federal court's dismissal of pendent claims based on state public records law is not a judgment on the merits and, therefore, not res judicata in a subsequent lawsuit in state court).

(5) 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), F.S. An automatic stay shall exist for 48 hours after the filing of a notice of appeal for public records and public meeting cases, which stay may be extended by the lower tribunal or the court on motion. Fla. R. App. P. 9.310(b)(2). Cf. *City of Sunny Isles Beach v. Gatto*, 338 So. 3d 1045 (Fla. 3d DCA 2022) (party seeking disclosure in public records litigation in which a stay has been granted ordinarily does not have possession of the challenged documents unless and until it has been determined, with finality, that the documents are subject to disclosure).

(6) Venue

The general rule is that a lawsuit against the state or an agency of the state is proper only in the county in which the defendant maintains its principal headquarters. *Florida Department of Children and Families v. Sun-Sentinel, Inc.*, 865 So. 2d 1278, 1286 (Fla. 2004). However, there is an exemption to the "home venue privilege" for Ch. 119 actions that involve access to confidential records and a good cause petition is filed to access those records. *Id.* Cf. *Scott v. Thompson*, 326 So. 3d 123 (Fla. 1st DCA, 2021), finding that elections supervisors in eight Florida counties were

entitled to exercise the home venue privilege in litigation filed against them seeking to order the supervisors to retain digital copies of paper ballots, and distinguishing *Florida Department of Children and Families v. Sun-Sentinel Inc.*, because the lawsuit against the Department of Children and Families involved access to confidential records that could not be made public without a determination of good cause, whereas the suit against the supervisors did not.

c. Attorney Fees and Costs

Section 119.12, F.S., provides authority for an award of reasonable costs of enforcement, including reasonable attorney fees, in civil actions filed to enforce the provisions of the Public Records Act, provided that certain conditions are met. Cf. *Managed Care of North America, Inc. v. Florida Healthy Kids Corporation*, 268 So. 3d 856, 862 (Fla. 1st DCA 2019) (s. 119.12 does not provide authority to award attorney's fees to a third party intervenor in a case where the litigation involved a request for a declaratory judgment to determine whether portions of bid documents constituted trade secrets); *Department of Health and Rehabilitative Services v. Martin*, 574 So. 2d 1223 (Fla. 3d DCA 1991) (error to award attorney's fees where order requiring production of records was entered pursuant to Adult Protective Services Act, rather than the Public Records Act). See also *O'Boyle v. Town of Gulf Stream*, 341 So. 3d 335 (Fla. 4th DCA 2022) and *Downs v. Austin*, 559 So. 2d 246 (Fla. 1st DCA 1990), review denied, 574 So. 2d 140 (Fla. 1990) (s. 119.12, F.S. does not constitute authority for attorney's fees for litigating the amount of fee provided by that statute). Cf. *AGO 16-16* (hospital district not authorized to reimburse an individual board member's attorney fees incurred by her in responding to a public records request pertaining to her board service when no suit, claim, charge, or action has been instituted against the commissioner during the time the attorney fees were incurred).

A successful pro se litigant may recover reasonable costs under this section. *Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000); *Wisner v. City of Tampa Police Department*, 601 So. 2d 296 (Fla. 2d DCA 1992). And see *Weeks v. Golden*, 846 So. 2d 1247 (Fla. 1st DCA 2003) (awarding costs associated with postage, envelopes and copying, as well as filing and service



of process fees, incurred by inmate who prevailed in public records lawsuit). *Accord Yasir v. Forman*, 149 So. 3d 107 (Fla. 4th DCA 2014).

Section 119.12(1), F.S., provides that, if a civil action is filed against an agency to enforce the provisions of this chapter the court shall assess and award the reasonable costs of enforcement including reasonable attorney fees against the responsible agency if the court determines that the agency unlawfully refused to permit a public record to be inspected or copied and the complainant provided written notice of the public records request to the agency's custodian of public records at least 5 business days before filing the civil action. See *Bracci v. School Board of Lee County*, No. 20-CA-5205 (Fla. 20th Cir. Ct. January 12, 2021), available online in the Cases database at the open government site at myfloridalegal.com (complainant who provided written notice of the public records request to the records custodian 5 days before the lawsuit was filed was not required to also telephone the custodian prior to filing suit, citing to *Office of the State Attorney for the Thirteenth Judicial Circuit v. Gonzalez*, 953 So. 2d 759 [Fla. 2d DCA 2007]).

However, notice is not required if the agency fails to prominently post the contact information for the agency's custodian of public records in the agency's primary administrative building in which public records are routinely created, sent, received, maintained, and requested and on the agency's website, if the agency has a website. Section 119.12(2), F.S.

The court must also determine whether the complainant made the public records request or participated in the civil action for an improper purpose. Section 119.12(3), F.S. If the court determines that there was an improper purpose, the court may not award attorney fees or the costs of enforcement, to the complainant, and shall assess and award against the complainant and to the agency the reasonable costs, including reasonable attorney fees, incurred by the agency in responding to the civil action. *Id.* The term "improper purpose" means "a request to inspect or copy a public record or to participate in the civil action primarily to cause a violation of this chapter or for a frivolous purpose." *Id.*

Section 119.12, F.S., is designed to encourage voluntarily compliance with the requirements of Ch. 119, F.S. "If public



agencies are required to pay attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents." *New York Times Company v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993). Stated another way, the statute "has the dual role of both deterring agencies from wrongfully denying access to public records and encouraging individuals to continue pursuing their right to access public records." *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 125 (Fla. 2016). There is no additional requirement that the court find that the "public agency did not act in good faith, acted in bad faith or acted unreasonably." *Lee*, 189 So. 3d at 122.

However, as noted previously, s. 119.12, F.S., specifies other conditions which must be met prior to an award of fees and costs under this statute. And see *State, Department of Economic Opportunity v. Consumer Rights, LLC*, 181 So. 3d 1239 (Fla. 1st DCA 2015), rejecting appellee's argument that the requirements in s. 284.30, F.S. (establishing procedures to be followed by those seeking to have attorney's fees paid by the state or any of its agencies) are inapplicable to public records cases. Cf. *Woliner v. State*, 320 So. 3d 774 (Fla. 4th DCA 2021) (notice requirement in s. 284.30, F.S., does not preclude the prevailing party in a public records action from obtaining costs).

An "unlawful refusal" for purposes of s. 119.12 may include unlawful conditions or requirements imposed by an agency for obtaining public records. As the Supreme Court explained in *Lee*: "Unlawful conditions or excessive, unwarranted special service charges deter individuals seeking public records from gaining access to the records to which they are entitled.... Even if not malicious or done in bad faith, the Pension Fund's actions – which were found be unlawful – had the effect of frustrating *Lee*'s constitutional right to access public records and required him to turn to the courts to vindicate that right." *Lee*, 189 So. 3d at 129-130. Cf. *B & L Service, Inc. v. Broward County*, 300 So. 3d 1205 (Fla. 4th DCA 2020) (trial court did not err in refusing to award attorney's fees, because petitioner waived issue of whether county unlawfully refused its public records request by failing to cross-appeal the trial court's initial ruling that the county had not violated the public records law, even though the trial court



subsequently modified its prior order by granting the petitioner's motion for rehearing in part).

An "unjustified failure to respond to a public records request until after an action has been commenced to compel compliance amounts to an unlawful refusal" for purposes of s. 119.12, F.S. *Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000). See also *Mazer v. Orange County*, 811 So. 2d 857, 860 (Fla. 5th DCA 2002) ("[T]he fact that the requested documents were produced in the instant case after the action was commenced, but prior to final adjudication of the issue by the trial court, does not render the case moot or preclude consideration of [the petitioner's] entitlement to fees under the statute."); *Barfield v. Town of Eatonville*, 675 So. 2d 223, 224 (appellant entitled to attorney's fees because "[t]he evidence clearly establishes that it was only after the appellant filed a lawsuit that the documents he had previously sought by written request to the Town were finally turned over to him"); *Promenade D'Iberville, LLC v. Sundy*, 145 So. 3d 980, 984 (Fla. 1st DCA 2014) ") (an agency's "production of the records on the eve of the enforcement hearing did not cure its unjustified delay"); and *Schweickert v. Citrus County, Florida Board*, 193 So. 3d 1075, 1080 (Fla. 5th DCA 2016) (county's failure to produce a complaint alleging inappropriate conduct by a county commissioner until litigation was filed was an unlawful refusal because the exemption for records relating to an investigation of alleged discrimination did not apply to the complaint; court rejected the county's argument that the delay was justified because the investigation into the complaint might have ultimately produced records which related to discriminatory behavior).

Stated another way, a delay in disclosing records can rise to the level of a refusal if "there was no good reason for the delay." *Consumer Rights, LLC v. Union County*, 159 So. 3d 882, 885 (Fla. 1st DCA 2015), review denied, 177 So. 3d 1264 (Fla. 2015). For example, in *Barfield v. Town of Eatonville*, 675 So. 2d 223 (Fla. 5th DCA 1996), the court held that a town was liable for attorney's fees even if the delay in providing records was due to either the intentional wrongdoing or ineptitude of its clerk. And see *Office of the State Attorney for the Thirteenth Judicial Circuit of Florida v. Gonzalez*, 953 So. 2d 759 (Fla. 2d DCA 2007) (attorney's fees authorized even if failure to turn over the records was due to a mistake or ineptitude). Cf. *Hewlings v. Orange County, Florida*, 87



So. 3d 839 (Fla. 5th DCA 2012) (the mere fact that a county quickly responded to public records request via voicemail and fax is not dispositive of whether the county's 45-day delay in complying with the request was justified).

"However, it is equally clear that a delay does not in and of itself create liability under s. 119.12, F.S." *Consumer Rights, LLC v. Union County*, 159 So. 3d at 885. See also *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654, 655 (Fla. 1st DCA 2014) (where delay is the issue, the court must determine whether the delay was justified under the facts of the particular case). and *McLendon v. Palm Beach County Office of Inspector General*, 286 So. 3d 375 (Fla. 4th DCA 2019) (trial court correctly denied attorney's fees because the requested record was exempt at the time that the request was made and did not become public until the investigation conducted pursuant to s. 112.3188 (2)(b), F.S., was concluded). Cf. *Citizens Awareness Foundation, Inc. v. Wantman Group, Inc.*, 195 So. 3d 396, 401 (Fla. 4th DCA 2016) ("The public records law should not be applied in a way that encourages the manufacture of public records requests designed to obtain no response, for the purpose of generating attorney's fees.").

A lawyer may recover fees for his or her assistance of a pro se litigant before entering a notice of appearance provided that the complaint requested attorney's fees and disclosed that it was prepared with the assistance of counsel. *O'Boyle v. Town of Gulf Stream*, 341 So. 3d 343 (Fla. 4th DCA 2022). However, s. 119.12, F.S., "does not provide for (1) an award of attorney's fees for litigating the amount of the fees or (2) an award of fees attributable to the non-testifying associates of an attorney fee expert." *O'Boyle v. Town of Gulf Stream*, 341 So. 3d 335 (Fla. 4th DCA 2022). [Emphasis supplied by the court].

As to calculation of the reasonable costs of enforcement including reasonable attorney fees to which the prevailing party is entitled, "the trial judge is in a better position than the appellate court to make "a factual determination regarding the objectives sought by the [prevailing party], the extent of statutory enforcement obtained, and the time expended in achieving those results." *Daniels v. Bryson*, 548 So. 2d 679, 682 (Fla. 3d DCA 1989). And see *Grapski v. City of Alachua*, 134 So. 3d 987 (Fla. 1st DCA 2012), review denied,



118 So. 3d 220 (Fla. 2012) (the trial court's findings of fact on the issue of attorney's fees are presumed correct; the standard of review is abuse of discretion). However, where the contract between the client and attorney provided that the attorney would be compensated on a flat hourly basis regardless of the outcome at trial, the trial court erred in awarding an enhanced fee based upon a contingency risk multiplier. *Id.*

A different rule has been applied when it is unclear whether a private corporation is an "agency" for purposes of the Public Records Act. Section 119.12, F.S., "was not intended to force private entities to comply with the inspection requirements of chapter 119 by threatening to award attorney's fees against them." *New York Times Company v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993). *Accord Fox v. News-Press Publishing Company, Inc.*, 545 So. 2d 941 (Fla. 2d DCA 1989).

Thus, attorney fees "are not warranted when the [private] entity in charge of the public records at issue was reasonably and understandably unsure of its status as an agency." *Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund*, 113 So. 3d 1010 (Fla. 1st DCA 2013), approved, 189 So. 3d 120 (Fla. 2016). And see *Economic Development Commission v. Ellis*, 178 So. 3d 118, 123 (Fla. 5th DCA 2016) ("attorney's fees should not be awarded in those cases where the party refusing to provide documents acted on the good-faith belief that it was not an agent, subject to compliance with the [Public Records] Act"). Cf. s. 119.0701(4), F.S., providing for an award of attorney fees against a "contractor" as defined in s. 119.0701(a), F.S., found to have unlawfully refused to comply with a public records request within a reasonable time, provided that the plaintiff has complied with the conditions set forth in the statute.

Attorney fees may also be awarded for a successful appeal of a denial of access, provided that at the time of appeal a motion is filed in accordance with the appellate rules. *Downs v. Austin*, *supra*. And see *Office of the State Attorney v. Gonzalez*, *supra* (where motion seeking appellate attorney fees is granted by appellate court and remanded only for calculation of such fees, lower court required to follow court's mandate without further consideration); and Cf. *Johnson v. Jarvis*, 107 So. 3d 428 (Fla. 1st DCA 2012) (trial



court erred in denying motion for costs based on appellant's failure to comply with the notice requirement in s. 284.30, F.S; "[f]or purposes of appellate costs, the appellant was the prevailing party... and is entitled to an award of his costs incurred therein").

Appellate attorney fees were also considered in *State Attorney's Office of the Seventeenth Judicial Circuit v. Cable News Network, Inc.*, 254 So.3d 461 (Fla. 4th DCA 2018). In that case, the court denied the media's request for appellate attorney's fees from the state attorney's office and school board. The agencies had appealed the lower court's order allowing the media to access certain video footage taken by security cameras at a high school where a gunman killed students and staff. Although the media prevailed in the appeal, the court observed that the video footage was confidential security information under s. 119.071(3)(a), F.S. The media obtained access because a judge found "good cause" to release the video footage as authorized by a statutory exception to the confidentiality provision. Thus, the school board's conduct was not 'unlawful' for purposes of s.119.12(1)(a), F.S. Additionally, the court refused to award fees against the state attorney because the state attorney was not the custodian of the records at issue; the state attorney was only an intervenor in the lawsuit below.

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2-H-3 | CRIMINAL AND NONCRIMINAL INFRACTION PENALTIES

Section 119.10(1)(b), F.S., states that a public officer who knowingly violates the provisions of s. 119.07(1), F.S., is subject to suspension and removal or impeachment and commits a misdemeanor of the first degree, punishable by possible criminal penalties of one year in prison, or \$1,000 fine, or both. See *State v. Webb*, 786 So. 2d 602 (Fla. 1st DCA 2001) (s. 119.10[1][b] authorizes a conviction for violating s. 119.07 only if a defendant is found to have committed such violation "knowingly"; statute cannot be interpreted as allowing a conviction based on mere negligence).

Section 119.10(1)(a), F.S., provides that a violation of any provision of Ch. 119, F.S., by a public officer is a noncriminal infraction, punishable by fine not exceeding \$500. Cf. s. 838.022(1)(b), F.S. (unlawful for a public servant or public contractor, to knowingly and intentionally obtain a benefit for any person or to cause unlawful harm to another, by concealing, covering up, destroying, mutilating, or altering any official record or official document, except as authorized by law or contract, or causing another person to perform such an act).

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. AGO 91-38.

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APPENDIX



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