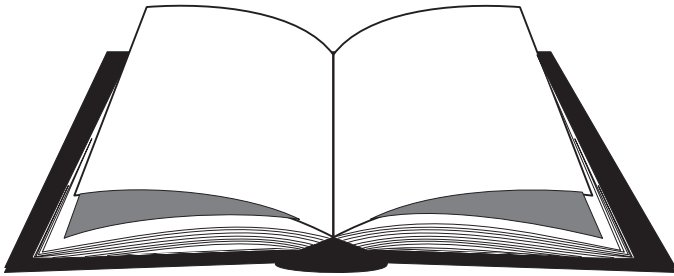


# Public Records



## A Guide For Law Enforcement Agencies



The Office of  
Attorney General Pam Bondi

2016 Edition

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## **A MESSAGE FROM ATTORNEY GENERAL PAM BONDI**

Law enforcement agencies face many challenges in carrying out their important responsibilities to investigate crimes and to secure the arrest and prosecution of those responsible for committing unlawful acts. In addition, criminal justice agencies have unique issues that arise under the Public Records Act. The Public Records Guide for Law Enforcement Agencies is designed to address these special concerns.

We are pleased, therefore, to present the 2016 edition of the Guide. This publication incorporates legislative changes through the 2016 legislative session and key court decisions and Attorney General Legal Opinions affecting the Public Records Act and law enforcement agencies. As in the past, the Guide is intended to be used in conjunction with the law enforcement agency's legal counsel, whose advice should be sought on specific issues facing the agency.

A more comprehensive analysis of the open government laws is contained in the Government in the Sunshine Manual. The Manual is prepared by the Attorney General's Office and published by the First Amendment Foundation. Information on how to obtain the Manual is available by contacting the First Amendment Foundation at (850) 224-4555. An electronic edition of the Sunshine Manual is available at the Office of the Attorney General's website at [myfloridalegal.com](http://myfloridalegal.com).

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## A. SCOPE OF THE PUBLIC RECORDS ACT

### 1. Statutory definition

Section 119.011(12), F.S., defines “public records” to include:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.<sup>1</sup> All such materials, regardless of whether they are in final form, are open for public inspection and copying unless the Legislature has exempted them from disclosure.<sup>2</sup> The records must also be retained in accordance with the applicable retention schedule adopted by the Department of State.

Portions of Ch. 119, F.S., the Public Records Act, that are discussed in this Guide may be found in the Appendix.

The term “public record” is not limited to traditional written documents. As the statutory definition states, “tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission” can all constitute public records.<sup>3</sup>

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1 *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

2 *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla.1979).

3 *Cf. Church of Scientology Flag Service Org., Inc. v. Wood*, No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997) (physical specimens relating to an autopsy are not public records because in order to constitute a “public record” for purposes of Ch. 119, “the record itself

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## 2. Drafts

Draft documents are not exempted from the Public Records Act simply because they are in draft form. If the purpose of record prepared in connection with the official business of a public agency is to perpetuate, communicate, or formalize knowledge, it is a public record, regardless of whether it is in final form or the ultimate product of an agency.<sup>4</sup>

Accordingly, any agency record, if circulated for review, comment or information, is a public record regardless of whether it is an official expression of policy or marked “preliminary” or “working draft” or similar label. Examples of such materials include interoffice memoranda and working drafts of reports which have been furnished to a supervisor for review or approval.<sup>5</sup>

It follows then that such records are subject to disclosure and retention requirements unless the Legislature has specifically exempted the records from disclosure.<sup>6</sup>

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must be susceptible of some form of copying”).

4 *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

5 The public records status of uncirculated personal notes prepared for the personal use of the writer can be more difficult to determine. Compare *The Justice Coalition v. The First District Court of Appeal Judicial Nominating Commission*, 823 So. 2d 185, 192 (Fla. 1st DCA 2002) (public employees’ notes to themselves “which are designed for their own personal use in remembering certain things do not fall within the definition of ‘public record’”); with *Miami Herald Media Co. v. Sarnoff*, 971 So. 2d 915 (Fla. 3d DCA 2007) (memorandum prepared by a city commissioner after a meeting with a former city official, summarizing details of what was said and containing alleged factual information about possible criminal activity, was a public record subject to disclosure). The agency attorney should be consulted on any question about the public records status of handwritten personal notes.

6 *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979). See, e.g., s. 119.071(1)(d), F.S., providing a limited work product exemption for agency attorneys.

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### **3. Electronic and computer records**

#### **a. Electronic databases and files**

Information stored in a public agency's computer "is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet . . . ."<sup>7</sup>

Thus, information such as electronic calendars, databases, and word processing files stored in agency computers, can all constitute public records because records made or received in the course of official business and intended to perpetuate, communicate or formalize knowledge of some type, fall within the scope of Ch. 119, F.S.<sup>8</sup>

Accordingly, electronic public records are governed by the same rule as written documents and other public records—the records are subject to public inspection unless a statutory exemption exists which removes the records from disclosure.

#### **b. E-Mail**

E-mail messages made or received by agency officers and employees in connection with official business are public records and subject to disclosure in the absence of an exemption.<sup>9</sup>

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<sup>7</sup> *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th DCA 1982). *And see National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009)(public records law is not limited to paper documents but applies to documents that exist only in digital form).

<sup>8</sup> AGO 89-39.

<sup>9</sup> As the court stated in *Rhea v. District Board of Trustees of Santa Fe College*, 109 So. 3d 851, 855 (Fla. 1st DCA 2013): "electronic communications, such as e-mail, are covered [by the Public Records Act] just like communications on paper." *Accord* AGO 01-20. *And see* s. 668.6076, F.S., requiring agencies that operate a website and use electronic mail to post the following statement in a conspicuous location on the agency website: "Under Florida law, e-mail addresses are public records. If you do not want your e-mail address released in response to a public records request, do not send electronic mail to this entity. Instead, contact this office by phone or in writing."

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Like other public records, e-mail messages are subject to the statutory restrictions on destruction of public records.<sup>10</sup>

**c. Facebook**

The Attorney General's Office has stated that the placement of material on a city's Facebook page presumably would be in connection with the transaction of official business and thus subject to Ch. 119, F.S., although in any given instance, the determination would have to be made based upon the definition of "public record" contained in s. 119.011(12), F.S.<sup>11</sup> To the extent that the information on the city's Facebook page constitutes a public record, the city is under an obligation to follow the public records retention schedules established in accordance with s. 257.36(6), F.S.<sup>12</sup>

**d. Text messages**

The Attorney General's Office advised the Department of State (which is statutorily charged with development of public records retention schedules) that the "same rules that apply to e-mail should be considered for electronic communications including Blackberry PINS, SMS communications (text messaging), MMS communications (multimedia content), and instant messaging conducted by government agencies."<sup>13</sup> In response, the department revised its records retention schedule to recognize that the retention periods for text messages and other electronic messages or communications are determined by the content, nature and purpose of the records regardless of the technology used to create and send them.<sup>14</sup>

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<sup>10</sup> See s. 257.36(6), F.S., stating that a public record may be destroyed or otherwise disposed of only in accordance with retention schedules established by the Division of Library and Information Services of the Department of State.

<sup>11</sup> AGO 09-19.

<sup>12</sup> *Id.*

<sup>13</sup> Inf. Op. to Browning, March 17, 2010.

<sup>14</sup> See General Records Schedule GS1-SL for State and Local Government Agencies, Electronic Communications available online at the Department of State website.

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#### **4. *Records made or received in connection with official business***

In evaluating whether a record is made or received in connection with the official business of an agency, “the determining factor is the nature of the record, not its physical location.” Thus, the Florida Supreme Court found that personal e-mails between government employees on government-owned computers which were not made or received in the course of official business did not constitute public records.<sup>15</sup>

Similarly, the mere fact that an e-mail is sent from a private e-mail account using a personal computer is not the determining factor as to whether it is a public record; it is whether the e-mail was prepared in connection with official agency business and intended to perpetuate, communicate or formalize knowledge of some kind.

However, in concluding that the location of e-mails on a government computer does not control the application of Public Records Act, the Court also cautioned that the case before it did not involve e-mails “that may have been isolated by a government employee whose job required him or her to locate employee misuse of government computers.”<sup>16</sup>

#### **B. AGENCIES SUBJECT TO THE PUBLIC RECORDS ACT**

Section 119.011(2), F.S., defines “agency” to include:

any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including . . . any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

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<sup>15</sup> *State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003).

<sup>16</sup> *State v. City of Clearwater*, at 151n.2.

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The term “agency” as used in Ch. 119, F.S., is not limited to governmental entities. A private entity “acting on behalf of any public agency” is also subject to the Public Records Act. 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.<sup>17</sup>

For example, a private corporation that operates and maintains a county jail pursuant to a contract with the county is “acting on behalf of” the county and must make available its records for the jail in accordance with Ch. 119, F.S.<sup>18</sup>

## **C. APPLICATION OF THE PUBLIC RECORDS ACT TO SPECIFIC RECORDS**

### **1. Arrest and crime reports and the exemption for active criminal investigative and intelligence information**

Arrest and crime reports are generally considered to be open to public inspection.<sup>19</sup> However, statutory exemptions for active

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<sup>17</sup> *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).

<sup>18</sup> *Times Publishing Company v. Corrections Corporation of America*, No. 91-429 CA 01 (Fla. 5th Cir. Ct. December 4, 1991). *And see Prison Health Services, Inc. v. Lakeland Ledger Publishing Company*, 718 So. 2d 204 (Fla. 2d DCA 1998 (medical services); *Wisner v. City of Tampa Police Department*, 601 So. 2d 296, 298 (Fla. 2d DCA 1992) (a city may not allow a private entity to maintain physical custody of polygraph chart used in police internal affairs investigation to circumvent Ch. 119, F.S.). *And note s. 119.0701, F.S.*, requiring a public agency contract for services to include a statement providing contact information for the public agency’s custodian of public records, and also providing requirements for contractors, as defined in the statute, relating to public records requests.

<sup>19</sup> AGOs 91-74 and 80-96. *And see* AGO 08-23 (officer trip sheets revealing identity of officer, location and hours of work and locations to which officers have responded for emergency and non-emergency purposes are public records).

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criminal investigative and intelligence information, confessions, juvenile offender records and certain victim information may apply to crime reports and other law enforcement records.

**a. Purpose and scope of exemption**

Section 119.071(2)(c)1., F.S., exempts active criminal intelligence information and active criminal investigative information from public inspection. To be exempt, the information must be both “active” and constitute either “criminal investigative” or “criminal intelligence” information.<sup>20</sup>

Thus, if a crime report contains active criminal investigative information, the criminal investigative information may be excised from the report.<sup>21</sup>

Criminal investigative information” is defined as information relating to “an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance.”<sup>22</sup> Similarly, an autopsy report may constitute criminal investigative information.<sup>23</sup>

“Criminal intelligence information” means information concerning “an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor

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<sup>20</sup> See *Woolling v. Lamar*, 764 So. 2d 765, 768 (Fla. 5th DCA 2000), review denied, 786 So. 2d 1186 (Fla. 2001).

<sup>21</sup> AGO 91-74. See also *Palm Beach Daily News v. Terlizzese*, No. CL-91-3954-AF (Fla. 15th Cir. Ct. April 5, 1991), holding that a newspaper was not entitled under Ch. 119, F.S., to inspect the complete and uncensored incident report (prepared following a reported sexual battery but prior to the arrest of a suspect), including the investigating officer’s narrative report of the interview with the victim, since such information was exempt from inspection as active criminal investigative information and as information identifying sexual battery victims. See s. 119.071(2)(c) and (h), F.S..

<sup>22</sup> Section 119.011(3)(b), F.S.

<sup>23</sup> AGO 78-23

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possible criminal activity.”<sup>24</sup>

The active criminal investigative and intelligence exemption is limited in scope; its purpose is to prevent premature disclosure of information when such disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection.<sup>25</sup>

Moreover, the active criminal investigative and intelligence information exemption does not prohibit the disclosure of the information by the criminal justice agency; the information is only exempt from and not subject to the mandatory inspection requirements in s. 119.07(1), F.S., which would otherwise apply. As the court stated in *Williams v. City of Minneola*, “there are many situations in which investigators have reasons for displaying information which they have the option not to display.”<sup>26</sup>

The fact that a crime or incident report may contain some active criminal investigative or intelligence information does not mean that the entire report is exempt. Section 119.07(1)(d), F.S., requires the custodian of the document to redact only that portion of the record for which an exemption is asserted and to disclose the remainder of the record.<sup>27</sup>

**b. Information that is NOT criminal investigative or intelligence information and must be disclosed unless some other exemption applies**

Section 119.011(3)(c), F.S., states that the following information is *not* criminal investigative or criminal intelligence information:

1. The time, date, location and nature of a reported crime;

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<sup>24</sup> Section 119.011(3)(a), F.S.

<sup>25</sup> See, e.g., *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994), in which the court held that a city was authorized to withhold exempt active criminal investigative records but must disclose information which is not exempt.

<sup>26</sup> 575 So. 2d 683, 687 (Fla. 5th DCA 1991). And see AGO 90-50. Cf. s. 838.21, F.S.

<sup>27</sup> *Barfield v. City of Tallahassee*, 171 So. 3d 239 (Fla. 1st DCA 2015)

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2. The name, sex, age, and address of a person arrested (but see the discussion on pages 36-41 relating to certain juvenile records) or the name, sex, age and address of the victim of a crime, except as provided in s. 119.071(3)(h), F.S. Section 119.071(2)(h), F.S., provides confidentiality for information revealing the identity of the victim of a sexual offense, child abuse, or a child victim of human trafficking. For more information on these exemptions, see the discussion on pages 26-28.
  3. The time, date and location of the incident and of the arrest;
  4. The crime charged;
  5. Documents given or required to be given to the person arrested, except as provided in s. 119.071(2)(h), F.S. [providing an exemption from disclosure for criminal intelligence or investigative information which reveals the identity of a victim of a sexual offense or of child abuse], unless the court finds that release of the information prior to trial would be defamatory to the good name of a victim or witness or jeopardize the safety of such victim or witness; and would impair the ability of the state attorney to locate or prosecute a codefendant;
  6. Information and indictments except as provided in s. 905.26, F.S. [prohibiting disclosure of finding of indictment against a person not in custody, under recognizance or under arrest].

Accordingly, since the above information does not fall within the definition of criminal intelligence or criminal investigative information, it is always subject to disclosure unless some other specific exemption applies. For example, the “time, date, and location of the incident and of the arrest” cannot be withheld from disclosure since such information is expressly excluded from

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the exemption.<sup>28</sup>

Similarly, as stated above, records which have been given or are required to be given to the person arrested cannot be withheld from public inspection as criminal investigative or intelligence information.<sup>29</sup> In other words, once the material has been made available to the defendant as part of the discovery process in a criminal proceeding, the material is ordinarily no longer considered to be exempt criminal investigative or criminal intelligence information.<sup>30</sup>

For example, in *Satz v. Blankenship*,<sup>31</sup> the court ruled that a newspaper reporter was entitled to access to tape recordings concerning a defendant in a criminal prosecution where the recordings had been disclosed to the defendant. The court concluded that a reading of the statute reflected the Legislature's belief that once the information was released to the defendant, there was no longer any need to exclude the information from the public. Thus, the tape recordings were no longer "criminal investigative information" that could be withheld from public inspection.<sup>32</sup>

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28 *Id.*

29 Section 119.011(3)(c)5., F.S.

30 See *Tribune Company v. Public Records*, 493 So. 2d 480, 485 (Fla. 2d DCA 1986) (all information given or required to be given to defendants is disclosable to the public when released to defendants or their counsel pursuant to the rules of discovery). Cf. *State v. Buenoano*, 707 So. 2d 714 (Fla. 1998) (restricted access documents provided to state attorney by federal government pursuant to a loan agreement retained their confidential status under a Florida law providing an exemption for out-of-state criminal investigative information that is shared with Florida criminal justice agencies on a confidential basis, even though the documents erroneously had been given to the defendant and placed in the court record).

31 407 So. 2d 396 (Fla. 4th DCA 1981).

32 See also *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775 (Fla. 4th DCA 1985); *News-Press Publishing Co. Inc. v. D'Alessandro*, No. 96-2743-CA-RWP (Fla. 20th Cir. Ct. April 24, 1996) (once state allowed defense counsel to listen to portions of a surveillance audiotape involving a city councilman accused of soliciting undue compensation, those portions of the audiotape became excluded from the definition of "criminal investigative information," and were subject to

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The only circumstances where criminal intelligence or investigative information can retain that status even though it has been made available to the defendant are:

- 1) If the information would reveal the identity of a victim of a sexual offense, child abuse, or certain human trafficking crimes pursuant to s. 119.071(2)(h), F.S.; or
- 2) If a court order has been issued finding that release of the information prior to trial would:
  - a) be defamatory to the good name of a victim or witness or jeopardize the safety of a victim or witness; and
  - b) impair the ability of a state attorney to locate or prosecute a codefendant.

In all other cases, material which has been made available to the defendant cannot be deemed criminal investigative or intelligence information and must be open to inspection unless some other exemption applies (e.g., s. 119.071[2][e], F.S., exempting all information “revealing the substance of a confession” by a person arrested until there is a final disposition in the case); or the court orders closure of the material in accordance with its constitutional authority to take such measures as are necessary to obtain orderly proceedings and a fair trial or to protect constitutional privacy rights of third parties.<sup>33</sup>

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public inspection). Cf. *City of Miami v. Post-Newsweek Stations Florida, Inc.*, 837 So. 2d 1002, 1003 (Fla. 3d DCA 2002).

33 See *Miami Herald Publishing Company v. Lewis*, 426 So. 2d 1 (Fla. 1982); *Florida Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32 (Fla. 1988); *Post-Newsweek Stations, Florida Inc. v. Doe*, 612 So. 2d 549 (Fla. 1992). And see *Morris Communications Company LLC v. State*, 844 So. 2d 671, 673n.3 (Fla. 1st DCA 2003) (although documents turned over to the defendant during discovery are generally public records subject to disclosure under Ch. 119, the courts have authority to manage pretrial publicity to protect the defendant’s constitutional rights as described in *Miami Herald Publishing Company v. Lewis*, *supra*). Cf. *Times Publishing Co. v. State*, 903 So. 2d 322 (Fla. 2d DCA 2005).

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Section 119.07(8), F.S., states that the public access rights set forth in s. 119.07, F.S., “are not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution or in collateral post-conviction proceedings.” Thus, a criminal defendant’s public records request for nonexempt law enforcement records relating to the defendant’s pending prosecution constitutes an election to participate in discovery and triggers a reciprocal discovery obligation.<sup>34</sup>

**c. Active versus inactive criminal investigative and intelligence information**

**(1) Active criminal investigative information**

Criminal investigative information is considered active (and, therefore, exempt from disclosure pursuant to s. 119.071[2][c], F.S.) “as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.”<sup>35</sup> Information in cases barred from prosecution by a statute of limitation is not active.<sup>36</sup>

The definition of “active” requires “a showing in each particular case that an arrest or prosecution is reasonably anticipated in the foreseeable future.”<sup>37</sup> However, the Legislature did not intend that confidentiality be limited to investigations where the outcome and an arrest or prosecution was a certainty or even a probability.<sup>38</sup>

There is no fixed time limit for naming suspects or making arrests other than the applicable statute of limitations.<sup>39</sup> The fact that investigators might not yet have decided upon a suspect does not

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34 *Henderson v. State*, 745 So. 2d 319 (Fla. 1999).

35 Section 119.011(3)(d)2., F.S.

36 *Id.*

37 *Barfield v. City of Fort Lauderdale Police Department*, 639 So. 2d 1012, 1016 (Fla. 4th DCA).

38 *Id.* at 1016-1017.

39 *See Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128 (Fla. 1st DCA 1985).

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necessarily imply that the investigation is inactive.<sup>40</sup>

Thus, an investigation will be deemed to be “active,” even though there is no immediate anticipation of an arrest, so long as the investigation is proceeding in good faith and the state attorney or grand jury will reach a determination in the foreseeable future.<sup>41</sup> Accordingly, a police department’s criminal investigation into a shooting incident involving its officers continued to be “active” even though pursuant to department policy, all police shooting cases were sent to the state attorney’s office for review by the grand jury and the department did not know if there would be an arrest in this particular case.<sup>42</sup>

Additionally, a circuit court held that a criminal investigative file involving an alleged 1988 sexual battery which had been inactive for three years, due in part to the death of the victim from unrelated causes, could be “reactivated” and removed from public view in 1992 when new developments prompted the police to reopen the case.<sup>43</sup> The court found that it was irrelevant that the 1988 file could have been inspected prior to the current investigation; the important considerations were that the file apparently had not been viewed by the public during its “inactive” status and the file was now part of an active criminal investigation and therefore exempt from disclosure as active criminal investigative information.

In another case, however, the appellate court upheld a court order unsealing an arrest warrant affidavit upon a showing of good cause by the subject of the affidavit.<sup>44</sup> The affidavit

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40 *Id.* at 1131.

41 *Barfield v. City of Fort Lauderdale Police Department, supra.*

42 *Id.* See also *News-Press Publishing Co., Inc. v. Sapp*, 464 So. 2d 1335 (Fla. 2d DCA 1985) and *Wells v. Sarasota Herald Tribune Company, Inc.*, 546 So. 2d 1105 (Fla. 2d DCA 1989).

43 *News-Press Publishing Co., Inc. v. McDougall*, No. 92-1193CA-WCM (Fla. 20th Cir. Ct. February 26, 1992).

44 *Metropolitan Dade County v. San Pedro*, 632 So. 2d 196 (Fla. 3d DCA 1994). And see *Mobile Press Register, Inc. v. Witt*, 24 Med. L. Rptr. 2336, No. 95-06324 CACE (13) (Fla. 17th Cir. Ct. May 21, 1996) (ordering that files in a 1981 unsolved murder be opened to the public

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had been quashed and no formal charges were filed against the subject. The court held that the affidavit did not constitute active criminal investigative information because there was no reasonable, good faith anticipation that the subject would be arrested or prosecuted in the near future. In addition, most of the information was already available to the subject through grand jury transcripts, the subject's perjury trial, or by discovery.

## **(2) Active criminal intelligence information**

In order to constitute exempt "active" criminal intelligence information, the information must "be of the type that will lead to the 'detection of *ongoing or reasonably anticipated criminal activities*.'"<sup>45</sup>

Thus a court ruled that that records generated in connection with a criminal investigation conducted 13 years earlier did not constitute "active" criminal intelligence information. The court noted that the exemption "is not intended to prevent disclosure of criminal files forever on the mere possibility that other potential criminal defendants may learn something from the files."<sup>46</sup>

## **(3) Pending prosecutions or appeals**

Criminal intelligence and investigative information is also considered to be "active" while such information is directly related to pending prosecutions or direct appeals.<sup>47</sup>

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because, despite recent reactivation of the investigation, the case had been dormant for many years and no arrest or prosecution had been initiated or was imminent).

45 *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1367 (Fla. 4th DCA 1997), quoting s. 119.011(3) (d)1., F.S. See *Barfield v. Orange County, Florida*, No. CI92-5913 (Fla. 9th Cir. Ct. August 4, 1992) (denying a petition for writ of mandamus seeking access to gang intelligence files compiled by the sheriff's office). See also AGO 94-48.

46 *Christy v. Palm Beach County Sheriff's Office*, *supra*.

47 Section 119.011(3)(d), F.S. See *News-Press Publishing Co., Inc. v. Sapp*, *supra*; and *Tal- Mason v. Satz*, 614 So. 2d 1134 (Fla. 4th DCA), *review denied*, 624 So. 2d 269 (Fla. 1993) (contents of prosecutorial case file must remain secret until the conclusion of defendant's direct appeal).

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Once the conviction and sentence have become final, criminal investigative information can no longer be considered to be “active.”<sup>48</sup>

Moreover, the determination as to whether investigatory records related to pending prosecutions or appeals are “active” is relevant *only* to those records which constitute criminal intelligence or investigative information. In other words, if records are excluded from the definition of criminal intelligence or investigative information, as in the case of records given or required to be given to the defendant under s. 119.011(3)(c)5., F.S., it is immaterial whether the investigation is active or inactive.<sup>49</sup>

**d. Disclosure of active criminal investigative information**

**(1) Disclosure to the public**

It has been held that the criminal investigative exemption does not apply if the information has already been made public.<sup>50</sup> As stated by one court, once the state has gone public with information which could have been previously protected from disclosure under Public Records Act exemptions, no further

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48 See *State v. Kokal*, 562 So. 2d 324, 326 (Fla. 1990); and *Osario v. State*, 34 So. 3d 98 (Fla. 3rd DCA 2010). Accord *Tribune Company v. Public Records*, 493 So. 2d 480, 483-484 (Fla. 2d DCA 1986) (actions for postconviction relief following affirmance of the conviction on direct appeal are not pending appeals for purposes of s. 119.011[3][d]2., F.S. See also *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1367 (Fla. 4th DCA 1997) (the term “pending prosecutions or appeals” in s. 119.011[3][d], F.S., applies only to ongoing prosecutions or appeals which have not yet become final).

49 See *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779n.1 (Fla. 4th DCA 1985), (“Something that is not criminal intelligence information or criminal investigative information cannot be active criminal intelligence information or active criminal investigative information.”). Accord *Staton v. McMillan*, 597 So. 2d 940, 941 (Fla. 1st DCA 1992) (active criminal investigation exemption does not apply to information for which disclosure was previously required under discovery rules even though there is a pending direct appeal).

50 *Staton v. McMillan*, 597 So. 2d 940, 941 (Fla. 1st DCA 1992).

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purpose is served by preventing full access to the desired information.<sup>51</sup>

However, the voluntary disclosure of a non-public record does not automatically waive the exempt status of other documents.<sup>52</sup> For example, release of the autopsy report and the medical examiner's public comments about the report did not mean that other records in the possession of the medical examiner relating to an active criminal investigation into the death were public; "[i]t is not unusual for law enforcement and criminal investigatory agencies to selectively release information relating to an ongoing criminal investigation in an effort to enlist public participation in solving a crime."<sup>53</sup>

## **(2) Disclosure to another criminal justice agency**

Exempt active criminal investigative information may be shared with another criminal justice agency and retain its protected status; in "determining whether or not to compel disclosure of active criminal investigative or intelligence information, the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests." Thus, a court held that exempt records of the West Palm Beach police department's active criminal investigation concerning a shooting incident involving a police officer from Riviera Beach could be furnished to the Riviera Beach police department for use in a simultaneous administrative internal affairs investigation of the officer without losing their exempt status.<sup>54</sup>

Additionally, a police department may enter into a contract with a private company that compiles raw police data and then provides informational reports to law enforcement. The release of the exempt information to the corporation for this purpose would not

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51 See *Downs v. Austin*, 522 So. 2d 931, 935 (Fla. 1st DCA 1988).

52 *Arbelaez v. State*, 775 So. 2d 909, 918 (Fla. 2000).

53 *Church of Scientology Flag Service Org., Inc. v. Wood*, No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997).

54 *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1137 (Fla. 4th DCA 1994). *Accord Ragsdale v. State*, 720 So. 2d 203, 206 (Fla.1998).



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cause such records to lose their exempt status.<sup>55</sup>

However, while the courts have recognized that active criminal investigative information may be forwarded from one criminal justice agency to another without jeopardizing its exempt status, “[t]here is no statutory exemption from disclosure of an ‘ongoing federal prosecution.’”<sup>56</sup>

The exemption for active criminal intelligence and investigative information does not exempt other public records (such as a budget for example) from disclosure simply because they are transferred to a law enforcement agency.<sup>57</sup>

Thus, public records maintained and compiled by the Office of the Capital Collateral Representative cannot be transformed into active criminal investigative information by merely transferring the records to the Florida Department of Law Enforcement.<sup>58</sup>

Similarly, otherwise disclosable public records of a housing authority are not removed from public scrutiny merely because records have been subpoenaed by and transferred to the state attorney’s office.<sup>59</sup>

The Attorney General’s Office also stated that while an individual would be prohibited from obtaining records from the internal investigation file pursuant to s. 112.533(2), F.S., while the investigation is active, public records such as overtime

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55 AGO 96-36.

56 *Woolling v. Lamar*, 764 So. 2d 765, 768 (Fla. 5th DCA 2000).

In *Woolling*, the court held that a state attorney bore the burden of establishing that state attorney files in a nolle prossed case which were furnished to the federal government for prosecution of a defendant constituted active criminal investigative information; the fact that the federal government was actively prosecuting the case was not sufficient, standing alone, to justify imposition of the exemption.

57 See, e.g., *Tribune Company v. Cannella*, 438 So. 2d 516, 523 (Fla. 2d DCA 1983), *reversed on other grounds*, 458 So. 2d 1075 (Fla. 1984), *appeal dismissed sub nom.*, *Deperte v. Tribune Company*, 105 S.Ct. 2315 (1985).

58 AGO 88-25.

59 AGO 92-78.

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slips created prior to the investigation and maintained in the law enforcement officer's personnel file would not become confidential simply because copies of such records are being used in the investigation.<sup>60</sup>

However, the exemption for active criminal investigative information may not be subverted by making a public records request for all public records gathered by a law enforcement agency in the course of an ongoing investigation; to permit such requests would negate the purpose of the exemption.<sup>61</sup>

In addition, s. 119.071(2)(c)2.a., F.S., states that a request made by a law enforcement agency to inspect or copy a public record that is in the custody of another agency and the custodian's response to the request, and any information that would identify whether a law enforcement agency has requested or received that public record are exempt from disclosure requirements, during the period in which the information constitutes active criminal investigative or intelligence information. Pursuant to s. 119.071(2)(c)2.b., F.S., the law enforcement agency that made the request must give notice to the custodial agency when the criminal intelligence information or criminal investigative information is no longer active, so that the request made by the law enforcement agency, the custodian's response to the request and information that would identify whether the law enforcement agency had requested or received that public record are available to the public.

Thus, while agency records are not exempt merely because they have been submitted to FDLE, s. 119.071(2)(c)2.a., F.S., exempts FDLE's request to inspect or copy records, as well as the agency's response, or any information that would identify the public record that was requested by FDLE or provided by the agency during the period in which the information constitutes criminal intelligence or criminal investigative information that is active.<sup>62</sup> Although a request may be made for the agency's records, such a request may not be phrased, or responded to, in terms of a

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60 Inf. Op. to Theobald, November 16, 2006.

61 AGO 01-75.

62 AGO 06-04.

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request for the specific documents asked for and received by FDLE during the course of any active criminal investigation.<sup>63</sup>

**e. Criminal investigative or intelligence information received from other states or the federal government**

Pursuant to s. 119.071(2)(b), F.S., criminal intelligence or investigative information received by a Florida criminal justice agency from a non-Florida criminal justice agency on a confidential or similarly restricted basis is exempt from disclosure.<sup>64</sup>

**f. Criminal investigative or intelligence information received prior to January 25, 1979**

Criminal intelligence or investigative information obtained by a criminal justice agency prior to January 25, 1979, is exempt from disclosure.<sup>65</sup>

**2. Autopsy records**

**a. Autopsy reports**

Autopsy reports made by a district medical examiner pursuant to Ch. 406, F.S., are public records and are open to the public for inspection in the absence of an exemption.<sup>66</sup>

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63 *Id.* See also Inf. Op. to Theobald, November 16, 2006.

64 See *State v. Wright*, 803 So. 2d 793 (Fla. 4th DCA 2001) (state not required to disclose criminal histories of civilian witnesses which it obtained from the Federal Bureau of Investigation). The purpose of this statute is to “encourage cooperation between non-state and state criminal justice agencies.” *State v. Buenoano*, 707 So. 2d 714, 717 (Fla. 1998).

65 Section 119.071(2)(a), F.S. See *Satz v. Gore Newspapers Company*, 395 So. 2d 1274, 1275 (Fla. 4th DCA 1981).

66 AGO 78-23. Cf. *Church of Scientology Flag Service Org., Inc. v. Wood*, No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997) (physical specimens relating to an autopsy are not public records).

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Although autopsy reports are subject to Ch. 119, F.S., “[d]ocuments or records made confidential by statute do not lose such status upon receipt by the medical examiner.”<sup>67</sup>

In addition, statutory exemptions from disclosure, such as the exemption for active criminal investigative information, may apply to an autopsy report.<sup>68</sup>

## **b. Autopsy photographs and recordings**

Section 406.135(2), F.S., provides that a photograph or video or audio recording of an autopsy held by a medical examiner is confidential and may not be released except as provided by court order or as otherwise authorized in the exemption.<sup>69</sup>

## **3. “Baker Act” reports prepared by law enforcement officers**

Part I, Ch. 394, F.S., is the “Baker Act,” Florida’s mental health act. The Baker Act provides for the voluntary or involuntary examination and treatment of mentally ill persons. Pursuant to s. 394.463(2)(a)2., F.S., a law enforcement officer must take a person who appears to meet the statutory criteria for involuntary examination into custody and deliver that person, or have that person delivered, to the nearest receiving facility for examination.

Section 394.463(2)(a)2., F.S., requires the officer to “execute

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<sup>67</sup> AGO 78-23. See *Church of Scientology Flag Service Org., Inc. v. Wood*, *supra* (predeath medical records in the possession of the medical examiner are not subject to public inspection).

<sup>68</sup> AGO 78-23. See also the discussion on pages 29-30 relating to s. 406.136, F.S.

<sup>69</sup> See AGOs 03-25 and 01-47, discussing the circumstances under which autopsy photographs and recordings may be viewed or copied. Compare *Sarasota Herald-Tribune v. State*, 924 So. 2d 8, 14 (Fla. 2d DCA 2005), in which the district court reversed a trial court order that had barred the media from viewing autopsy photographs that were admitted into evidence in open court during a murder trial; according to the appellate court, s. 406.135, F.S., “does not render these *court exhibits* confidential.” (e.s.)

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a written report detailing the circumstances under which the person was taken into custody, which must be made a part of the patient’s clinical record.” A patient’s clinical record is confidential. Thus, the report prepared by the officer pursuant to this statute is part of the patient’s clinical record and is confidential.

However, in an advisory opinion issued in 1993, the Attorney General’s Office advised that a separate written incident or event report prepared after a specific crime has been committed which contains information given during the initial reporting of the crime, is filed with the law enforcement agency as a record of that event, and is not made a part of the patient’s clinical record, is not confidential pursuant to Ch. 394, F.S. The opinion noted that the incident report in question was not the confidential law enforcement report required by s. 394.463(2)(a)2., but was a separate written incident or event report prepared by a deputy sheriff for filing with the sheriff’s office as an independent record of the deputy’s actions.<sup>70</sup>

#### **4. *Bank account, debit and credit card numbers***

Bank account numbers, and debit, charge, and credit card numbers held by an agency are exempt from public disclosure.<sup>71</sup>

#### **5. *Bids***

Section 119.071(1)(b), F.S., provides an exemption for “sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation” until such time as the agency provides notice of an intended decision or until 30 days after opening, whichever is earlier.

#### **6. *Body camera recordings***

A law enforcement body camera recording is confidential and

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<sup>70</sup> AGO 93-51.

<sup>71</sup> Section 119.071(5)(b), F.S.

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exempt from public disclosure when taken inside a private residence, inside a health care, mental health care or social services facility, or in a place that a reasonable person would expect to be private.<sup>72</sup>

A law enforcement agency may disclose the recording in furtherance of its official duties and responsibilities or to another governmental agency in furtherance of that agency's duties and responsibilities.<sup>73</sup> The exemption applies retroactively.<sup>74</sup>

Section 119.071(2)(l), F.S., states that the recording must be disclosed to certain individuals as set forth in the statute. However, the exemption does not supersede other public records exemptions; those portions of a recording which are protected from disclosure by another public records exemption shall continue to be exempt or confidential.

A law enforcement agency must retain a body camera recording for at least 90 days.<sup>75</sup>

## **7. Confessions**

Section 119.071(2)(e), F.S., exempts from disclosure any information revealing the substance of a confession by a person arrested until such time as the case is finally determined by adjudication, dismissal, or other final disposition.

## **8. Confidential informants**

Section 119.071(2)(f), F.S., exempts information disclosing the identity of confidential informants or sources. This exemption applies regardless of whether the informants or sources are still active or may have, through other sources, been identified as

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<sup>72</sup> Section 119.071(2)(l), F.S.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

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such.<sup>76</sup>

However, a court held that a police department should not have refused to release an entire police report on the ground that the report contained some information identifying a confidential informant. According to the court, “[w]ithout much difficulty the name of the informant, [and] the sex of the informant (which might assist in determining the identity) . . . can be taken out of the report and the remainder turned over to [the newspaper].”<sup>77</sup>

Similarly, a court ruled that information regarding payments to a confidential informant (who had been previously identified as a confidential informant during a criminal trial) is subject to disclosure as long as the records are sufficiently redacted to conceal the specific cases on which the informant worked.<sup>78</sup> The court acknowledged that the Public Records Act may not be used in such a way as to obtain information that the Legislature has declared must be exempt from disclosure, but said that “this is not a situation where someone has alleged that they know or suspect

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<sup>76</sup> *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1368 (Fla. 4th DCA 1997); *Salcines v. Tampa Television*, 454 So. 2d 639 (Fla. 2d DCA 1984); and *Rameses, Inc. v. Demings*, 29 So. 3d 418 (Fla. 5th DCA 2010). And see *State v. Natson*, 661 So. 2d 926 (Fla. 4th DCA 1995) (private citizen who provided police with tip information which led to defendant's arrest may be afforded confidential informant status). Cf. *Doe v. State*, 901 So. 2d 881 (Fla. 4th DCA 2005) (where citizen provided information to state attorney's office which led to a criminal investigation and was justified in inferring or had a reasonable expectation that he would be treated as a confidential source, the citizen is entitled to have his identifying information redacted from the closed file, even though there was no express assurance of confidentiality by the state attorney's office); *State v. Bartholomew*, No. 08-5656CF10A (Fla. 17th Cir. Ct., August 7, 2009) (even if Crimestoppers Council of Broward County were an agency for purposes of Ch. 119, F.S., information relating to the identity of informants and persons from whom they received information would be confidential under s. 119.071[2][f], F.S.).

<sup>77</sup> *Ocala Star Banner Corporation v. McGhee*, 643 So. 2d 1196 (Fla. 5th DCA 1994). Accord *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d at 1368.

<sup>78</sup> *City of St. Petersburg v. Romine ex rel. Dillinger*, 719 So. 2d 19, 21 (Fla. 2d DCA 1998).

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the identity of a confidential informant and the production of records involving that informant would confirm the person's information or suspicion."<sup>79</sup>

## **9. Crime victim information**

Although s. 119.071(2)(c), F.S., exempts active criminal investigative information from disclosure, the "name, sex, age, and address of . . . the victim of a crime, except as provided in s. 119.071(2)(h)," are specifically excluded from the definition of criminal investigative or intelligence information.<sup>80</sup> Accordingly, victim information is considered to be public record in the absence of statutory exemption. A discussion of the exemptions which apply to crime victims follows.

### **a. Addresses, telephone numbers and personal assets of domestic violence and other specified crime victims**

Section 119.071(2)(j)1., F.S. authorizes victims of *aggravated stalking, harassment, aggravated battery, or domestic violence* to file a written request for confidentiality of their addresses, telephone numbers and personal assets. Victims of sexual battery and aggravated child abuse are also included within this exemption; however, another statute — s. 119.071(2)(h)1., F.S., exempts *all* identifying information relating to the victims of these crimes; they are not required to make a written request. Thus, the requirement that the victim make a written request for confidentiality applies only to information not otherwise held confidential by law; the exemption supplements, but does not replace, other confidentiality provisions applicable to crime victims, such as the exemptions for the identity of child abuse or sexual battery victims.<sup>81</sup>

Such information shall cease to be exempt 5 years after the receipt of the written request. The exemption applies to records created prior to, as well as after, the agency's receipt of the

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<sup>79</sup> *Id.*

<sup>80</sup> *See* s. 119.011(3)(c)2., F.S.

<sup>81</sup> *See* AGO 96-82.



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victim's written request for confidentiality.<sup>82</sup>

This exemption allows a victim of the enumerated crimes to file a written request and have his or her home or employment telephone number, home or employment address, or personal assets, exempted from the police report of the crime, provided that the request includes official verification, such as a copy of the incident or offense report for one of the listed crimes, that an applicable crime has occurred.<sup>83</sup> The s. 119.071(2)(j)1., F.S., exemption is limited to the victim's address, telephone number, or personal assets; it does not apply to the victim's identity.<sup>84</sup>

There is no exception to the provisions of s. 119.071(2)(j)1., F.S., for copies of the police report that are sent to domestic violence centers; thus, the victim's address and telephone number must be deleted from the copy of the police report that is sent to a domestic violence center pursuant to s. 741.29, F.S., if the victim has made a written request for confidentiality pursuant to s. 119.071(2)(j)1., F.S.<sup>85</sup>

#### **b. Amount of stolen property**

Pursuant to s. 119.071(2)(i), F.S., criminal intelligence or

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<sup>82</sup> See AGO 96-82. See also s. 741.30(3)(b), F.S. (petitioner seeking an injunction for protection against domestic violence may furnish the petitioner's address to the court in a separate confidential filing for safety reasons); s. 787.03(6)(c) (current address and telephone number of the person taking the minor or incompetent person when fleeing from domestic violence and the current address and telephone number of the minor or incompetent person which are contained in the report made to a sheriff or state attorney under s. 787.03[6][b], F.S. are confidential and exempt from disclosure); and ss. 741.30(8) and 784.046(8), F.S.

<sup>83</sup> *Id.*

<sup>84</sup> *City of Gainesville v. Gainesville Sun Publishing Company*, No. 96-3425-CA (Fla. 8th Cir. Ct. October 28, 1996).

<sup>85</sup> AGO 02-50. Section 741.29(2), F.S. provides that a copy of the initial report of an incident of domestic violence, excluding victim/witness statements or other materials that are part of the active criminal investigation as defined in Ch. 119, F.S., must be sent to the nearest locally certified domestic violence center within 24 hours of the law enforcement agency's receipt of the report.

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investigative information that reveals the personal assets of a crime victim, which were not involved in the crime, is exempt from disclosure. However, this exemption does not apply to information relating to the amount of property stolen during the commission of a crime.<sup>86</sup>

**c. Child abuse and sexual offense victims**

Section 119.071(2)(h)1., F.S., provides confidentiality for information which would reveal the identity of victims of child abuse as defined in Ch. 827, F.S., or that reveals the identity of a person under the age of 18 who is a victim the crime of human trafficking as proscribed in s. 787.06(3)(a), F.S. Information that may reveal the identity of a person who is a victim of any sexual offense, including a sexual offense proscribed in s. 787.06(3)(b), (d), (f), or (g), or Chs. 794, 796, 800, 827 or 847, F.S., is also confidential.<sup>87</sup>

The statute specifies the circumstances when a law enforcement agency is authorized to disclose the confidential information. For example, s. 119.071(2)(h)2.c., F.S., states that disclosure is authorized “to another governmental agency in the furtherance of its official duties and responsibilities.”

Moreover, the identity of a victim who *died* from suspected abuse is not confidential.<sup>88</sup>

Section 119.071(2)(j)2., F.S., provides that information in a videotaped statement of a minor who is alleged to be or who is a victim of a sexual offense prohibited in the cited laws which

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<sup>86</sup> AGO 82-30. Note, however, that s. 119.071(2)(j)1., F.S., provides that victims of certain crimes may file a written request to exempt information revealing their “personal assets.”

<sup>87</sup> Section 119.071(2)(h)1.F.S. Thus, information revealing the identity of victims of child abuse or sexual battery must be deleted from the copy of the report of domestic violence which is sent to the nearest domestic violence center pursuant to s. 741.29(2), F.S. AGO 92-14. *And see Palm Beach County Police Benevolent Association v. Neumann*, 796 So. 2d 1278 (Fla. 4th DCA 2001).

<sup>88</sup> AGO 90-103.

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reveals the minor's identity, including, but not limited to, the minor's face; the minor's home, school, church, or employment telephone number; the minor's home, school, church, or employment address; the name of the minor's school, church, or place of employment; or the personal assets of the minor; and which identifies the minor as a victim, held by a law enforcement agency, is confidential. Access shall be provided, however, to authorized governmental agencies when necessary to the furtherance of the agency's duties.<sup>89</sup>

In addition, the photograph, videotape or image of any part of the body of a victim of a sexual offense prohibited under ss. 787.06(3)(b),(d),(f), or (g), or 810.145, F.S.; or Chs. 794, 796, 800, 827, or 847, F.S., is confidential and exempt, regardless of whether the photograph, videotape or image identifies the victim.<sup>90</sup>

A public employee or officer who has access to the photograph, name, or address of a person alleged to be a victim of an offense described in Ch. 794 (sexual battery); Ch. 800 (lewdness, indecent exposure); s. 827.03 (child abuse); s. 827.04 (contributing to delinquency or dependency of a child); or s. 827.071 (sexual performance by a child) may not willfully and knowingly disclose it to a person not assisting in the investigation or prosecution of the alleged offense or to any person other than the defendant, the defendant's attorney, a person specified in a court order entered by the court having jurisdiction over the alleged offense, to organizations authorized to receive such information made exempt by s. 119.071(2)(h), F.S., or to a rape crisis center or sexual assault counselor, as defined in s. 90.5035(1)(b), F.S., who will be offering services to the victim.<sup>91</sup>

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89 Section 119.071(2)(j)2., F.S.

90 Section 119.071(2)(h)1.c, F.S.

91 Section 794.024(1), F.S. A violation of this section constitutes a second degree misdemeanor. Section 794.024(2), F.S. Cf. *State v. Globe Communications Corporation*, 648 So. 2d 110, 111 (Fla. 1994) (statute mandating criminal sanctions for printing, publishing or broadcasting "in any instrument of mass communication" information identifying a victim of a sexual offense, ruled unconstitutional). And see s. 794.026(1), F.S.

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#### **d. Department of Children and Families abuse records**

There are statutory exemptions set forth in Ch. 415, F.S., which relate to records of abuse of vulnerable adults. Similar provisions relating to child abuse records are found in Ch. 39, F.S. The Attorney General's Office has concluded that the confidentiality provisions in these laws, i.e., ss. 415.107 and 39.202, F.S., apply to records of the Department of Children and Families (Department) and do not encompass a law enforcement agency's arrest report of persons charged with criminal child abuse, after the agency has deleted all information which would reveal the identity of the victim.<sup>92</sup>

Confidential abuse information received by law enforcement agencies from the Department retains its confidential status in the hands of the receiving agency.<sup>93</sup> However, s. 39.202(4), F.S., authorizes the Department and the investigating law enforcement agency to release certain identifying information to the public in order to help locate or protect a missing child under investigation or supervision of the Department or its contracted service providers.

#### **e. Commercial solicitation of victims**

Section 119.105, F.S., provides that police reports are public records except as otherwise made exempt or confidential and that every person is allowed to examine nonexempt or non-confidential police reports. However, a person who comes into possession of exempt or confidential information in police reports may not use that information for commercial solicitation of the victims or relatives of the victims and may not knowingly disclose such information to a third party for the purpose of such solicitation during the period of time that information remains exempt or confidential.<sup>94</sup> The statute "does not prohibit the

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<sup>92</sup> See AGO 93-54. *Accord* Inf. Op. to O'Brien, January 18, 1994. Cf. *Times Publishing Company v. A.J.*, 626 So. 2d 1314 (Fla. 1993).

<sup>93</sup> Section 39.202(1), and (2)(b), F.S. See Inf. Op. to Russell, October 24, 2001.

<sup>94</sup> Section 119.105, F.S.

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publication of such information to the general public by any news media legally entitled to possess that information or the use of such information for any other data collection or analysis purposes by those entitled to possess that information.”<sup>95</sup> A willful and knowing violation of this statute is a third-degree felony.<sup>96</sup>

**f. Documents received by a law enforcement agency**

Section 119.071(2)(j)1., F.S., exempts from disclosure any document that reveals the identity, home or employment telephone number or address, or personal assets of the victim of a crime and identifies that person as the victim of a crime, if that document is received by an agency that regularly receives information from or concerning the victims of crime.<sup>97</sup> However, this provision is limited to documents received by agencies which regularly receive information from or concerning victims of crime; it does not apply to records generated or made by these agencies. Accordingly, this exemption does not apply to police reports.<sup>98</sup>

**g. Relocated victim or witness information**

Information held by a law enforcement agency, prosecutorial agency or the Victim and Witness Protection Review Committee which discloses the identity or location of a victim or witness (or their immediate family) who has been identified or certified for protective or relocation services is confidential and exempt from disclosure.<sup>99</sup>

**h. Photographs, video and audio recordings that depict or record the killing of a person**

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<sup>95</sup> *Id.*

<sup>96</sup> Section 119.10(2)(b), F.S.

<sup>97</sup> AGO 90-80.

<sup>98</sup> *Id.* The statute also provides that “[a]ny state or federal agency that is authorized to have access to such documents by any provision of law shall be granted such access in the furtherance of such agency’s statutory duties, notwithstanding this section.”

<sup>99</sup> Section 914.27, F.S.

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Section 406.136, F.S., states that a photograph, video, or audio recording that depicts or records the killing of a person is confidential and may not be listened to, viewed, or copied, except as authorized in the exemption.<sup>100</sup>

The term “killing of a person” is defined in the 2015 statutes to mean “all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death.”<sup>101</sup>

NOTE: The 2016 Legislature amended s. 406.136, F.S., to limit the exemption to photographs, video, or audio recordings of the killing of a law enforcement officer who was acting in accordance with his or her official duties, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death. The 2016 law takes effect October 1, 2016.

## **10. Criminal history information**

### **a. Criminal history information generally**

Except where specific exemptions apply, criminal history information is a public record.<sup>102</sup>

Section 943.046, F.S., states:

- (1) Any state or local law enforcement agency may release to the public any criminal history information and other information regarding a criminal offender, including, but not limited to, public notification by the agency of the information, unless the information

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100 See also s. 406.135, F.S., relating to autopsy photographs.

101 Section 406.136(1), F.S. A circuit court has concluded that the exemption may apply to crime scene photographs of homicide victims. *State v. Schenecker*, No. 11-CF-001376A (Fla. 13th Cir. Ct. August 3, 2011), cert. denied sub. nom., *Media General Operations v. State*, 71 So. 3d 124 (Fla. 2d DCA 2011).

102 AGO 77-125; Inf. Op. to Lynn, June 1, 1990. And see AGO 97-09.

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is confidential and exempt [from disclosure]. However, this section does not contravene any provision of s. 943.053 which relates to the method by which an agency or individual may obtain a copy of an offender's criminal history record.

- (2) A state or local law enforcement agency and its personnel are immune from civil liability for the release of criminal history information or other information regarding a criminal offender, as provided by this section.

Section 943.053(2), F.S., referenced in the above statute, provides restrictions on the dissemination of criminal history information obtained from *federal* criminal justice information systems and *other states* by stating that such information shall not be disseminated in a manner inconsistent with the laws, regulations, or rules of the originating agency.<sup>103</sup>

Section 943.053(3), F.S., states that criminal history information compiled by the Criminal Justice Information Program of the Florida Department of Law Enforcement from *intrastate* sources shall be provided to law enforcement agencies free of charge and to persons in the private sector upon payment of fees as provided in the subsection.

Please refer to pages 40 and 41 for a discussion of criminal history information relating to juveniles.

## **b. Sealed and expunged records**

Access to criminal history records sealed or expunged by court order in accordance with s. 943.059 or s. 943.0585, F.S., is strictly limited.<sup>104</sup>

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<sup>103</sup> Thus, criminal history record information shared with a public school district by the Federal Bureau of Investigation retains its character as a federal record to which only limited access is provided by federal law and is not subject to public inspection. AGO 99-01.

<sup>104</sup> See, e.g., *Alvarez v. Reno*, 587 So. 2d 664 (Fla. 3d DCA 1991) (Goderich, J., specially concurring) (state attorney report and any other

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A law enforcement agency that has been ordered to expunge criminal history information or records should physically destroy or obliterate information consisting of identifiable descriptions and notations of arrest, detentions, indictments, information, or other formal criminal charges and the disposition of those charges.<sup>105</sup> However, criminal intelligence information and criminal investigative information do not fall within the purview of s. 943.0585, F.S.<sup>106</sup>

There are exceptions allowing disclosure of information relating to the existence of an expunged criminal history record to specified entities for their respective licensing and employment purposes, and to criminal justice agencies for their respective criminal justice purposes.<sup>107</sup> Similar provisions exist relative to disclosure of sealed criminal history records.<sup>108</sup>

A records custodian who has received information relating to the existence of an expunged or sealed criminal history record is prohibited from disclosing the existence of such record.<sup>109</sup>

## **11. Criminal Justice Standards and Training Commission (CJSTC)**

Section 943.1395(6)(b), F.S., provides that a report of misconduct and all records or information provided to or developed by the CJSTC during the course of its investigation are exempt, and except as otherwise provided by law, such information is subject to public disclosure only after a determination as to probable cause has been made or until the investigation becomes inactive.

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information revealing the existence or contents of sealed records is not a public record and cannot, under any circumstances, be disclosed to the public).

105 AGO 02-68.

106 *Id.* And see AGO 00-16.

107 Section 943.0585(4), F.S. And see ss. 943.0583(10)(a) and 943.0583(11)(a), F.S. (expunged criminal history record of human trafficking victim).

108 Section 943.059(4), F.S.

109 AGO 94-49.

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However, a police report of a departmental criminal investigation of an officer is a public record after the investigation has been concluded regardless of whether a copy of the report is forwarded to the CJSTC.<sup>110</sup>

## **12. Emergency records**

### **a. Emergency “911” records**

Section 365.171(12), F.S., provides, with limited exception, that any record, recording, or information, or portions thereof, obtained by a public agency for the purpose of providing services in an emergency which reveals the name, address, or telephone number or personal information about, or information which may identify any person requesting emergency service or reporting an emergency by accessing an emergency communications E911 system is confidential and exempt from s. 119.07(1), F.S.

The exemption applies only to the name, address, telephone number or personal information about or information which may identify any person requesting emergency services or reporting an emergency while such information is in the custody of the public agency or public safety agency providing emergency services.<sup>111</sup> And, identifying information derived from a criminal investigation and placed in an offense report by a law enforcement agency does not fall within the exemption.<sup>112</sup>

A tape recording of a “911” call is a public record which is subject to disclosure after the deletion of the exempt information.<sup>113</sup> This does not, however, preclude the application of another exemption to such records. Thus, if the “911” calls are received by a law enforcement agency and the county emergency management department, information which is determined by the law

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110 AGO 96-05.

111 See AGO 93-60

112 AGO 11-27. *And see* AGO 15-01 (no clear indication that the Legislature intended to include the sound of a person’s voice as information protected from disclosure).

113 AGO 93-60.

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enforcement agency to constitute active criminal investigative information may also be deleted from the tape prior to public release.<sup>114</sup>

In addition, s. 406.136, F.S., provides confidentiality for certain audio recordings of a “killing.”<sup>115</sup>

**b. Emergency evacuation plans**

Section 119.071(3)(a), F.S., provides an exemption from disclosure for a security system plan of a private or public entity that is held by an agency. The term “security system plan” includes emergency evacuation plans and sheltering arrangements.<sup>116</sup>

**c. Emergency medical services**

With limited exceptions, s. 401.30(4), F.S., provides, in relevant part, that “[r]ecords of emergency calls which contain patient examination or treatment information are confidential and exempt from the provisions of s. 119.07(1) and may not be disclosed without the consent of the person to whom they pertain.” Such records may be released only in certain circumstances and only to the persons and entities specified in the statute.<sup>117</sup>

**d. Emergency notification**

Any information furnished by a person to any agency for the

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114 AGO 95-48. *See also* Inf. Op. to Fernex, September 22, 1997 (while police department is not prohibited from entering into an agreement with the public to authorize access to its radio system, the department must maintain confidentiality of exempt personal information contained in “911” radio transmissions).

115 This statute is discussed on page 30.

116 *And see* s. 119.071(2)(d), F.S.

117 AGO 86-97. *And see* AGO 08-20 (s. 401.30[4], F.S., permits emergency medical services transportation licensee to release records of emergency calls including patient’s name, address, and pertinent medical information to local law enforcement agency that does not provide regulatory or supervisory responsibility over licensee).

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purpose of being provided with emergency notification by the agency, including the person's name, address, telephone number, e-mail address, or other electronic communication address, is exempt from disclosure requirements.<sup>118</sup>

**e. Emergency response plans**

Section 119.071(2)(d), F.S., exempts “[a]ny comprehensive inventory of state and local law enforcement resources compiled pursuant to part I, chapter 23, and any comprehensive policies or plans compiled by a criminal justice agency pertaining to the mobilization, deployment, or tactical operations involved in responding to emergencies, as defined in s. 252.34 . . . .”

For example, a court held that a city police department's Operational Plan prepared in response to intelligence reports warning of possible violence surrounding an economic summit remained exempt from disclosure after the summit ended.<sup>119</sup>

**f. Special needs registry**

Records relating to the registration of persons with special needs (i.e., persons who would need assistance during evacuations and sheltering because of physical, mental, cognitive impairment, or sensory disabilities) are confidential and exempt, except such information is available to other emergency response agencies,

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118 Section 119.071(5)(j)1., F.S. The e-mail addresses and corresponding home, school, and other “watched addresses of concern” provided for participation in the Florida Department of Law Enforcement Offender Alert System come within the scope of this exemption. AGO 11-16. *And see* s. 119.0712(2)(c)1. and 2., F.S. (emergency contact information contained in a Department of Highway Safety and Motor Vehicles motor vehicle record is confidential and exempt, and, without the express consent of the person to whom such emergency contact information applies, may be released only to law enforcement agencies for purposes of contacting those listed in the event of an emergency).  
119 *See Timoney v. City of Miami Civilian Investigative Panel*, 917 So. 2d 885 (Fla. 3d DCA 2005), The court found that the city planned to use portions of the Plan for future events and the “language of [the exemption] leads us to believe that the legislature intended to keep such security information exempt after an immediate emergency passes.”

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as determined by the local emergency management director.<sup>120</sup> Local law enforcement agencies shall be given complete shelter roster information upon request.<sup>121</sup>

### **13. Fingerprint records**

Biometric identification information is exempt from s. 119.07(1), F.S.<sup>122</sup> The term “biometric identification information” means any record of friction ridge detail, fingerprints, palm prints, and footprints.<sup>123</sup>

### **14. Forensic behavioral mental health evaluations**

Section 916.1065(1), F.S., states that a forensic behavioral health evaluation filed with the court pursuant to Ch. 916, F.S., (mentally deficient and mentally ill defendants) is confidential and exempt from public disclosure.

### **15. Juvenile offender records**

#### **a. Confidentiality and authorized disclosure**

Juvenile offender records traditionally have been considered confidential and treated differently from other records in the criminal justice system. With limited exceptions, s. 985.04(1), F.S., provides, in relevant part, that:

Except as provided in subsections (2), (3), (6), and (7) and s. 943.053, *all information obtained under this chapter* in the discharge of official duty by any judge, any employee of the court, any authorized agent of the department [of Juvenile Justice], the Florida Commission on Offender Review, the Department of Corrections, the juvenile justice circuit boards, any law enforcement agent, or any

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<sup>120</sup> Section 252.355(5), F.S.

<sup>121</sup> *Id.*

<sup>122</sup> Section 119.071(5)(g), F.S.

<sup>123</sup> *Id.*

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licensed professional or licensed community agency representative participating in the assessment or treatment of a juvenile *is confidential and exempt from [public disclosure]*. This exemption applies to information obtained before, on, or after the effective date of this exemption. (e.s)

Section 985.04(1)(b), F.S., states that such confidential and exempt information may be disclosed only to the authorized personnel of the court, the department and its designees, the Department of Corrections, the Florida Commission on Offender Review, law enforcement agents, school superintendents and their designees, any licensed professional or licensed community agency representative participating in the assessment or treatment of a juvenile, and others entitled under this chapter to receive that information, or upon order of the court.

Similarly, s. 985.04(7)(a), F.S., limits access to records in the custody of the Department of Juvenile Justice.<sup>124</sup>

Thus, as a general rule, access to records of juvenile offenders is limited.<sup>125</sup>

Confidential photographs of juveniles taken in accordance with s. 985.11, F.S., “may be shown by a law enforcement officer to

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<sup>124</sup> See s. 985.04(7)(a), F.S., providing confidentiality for records in the custody of the department regarding children. Cf. *New York Times Company v. Florida Department of Juvenile Justice*, No. 03-46-CA (Fla. 2d Cir. Ct. March 20, 2003) (if a juvenile prosecuted as an adult is transferred to serve his or her sentence in the custody of the Department of Juvenile Justice, the department’s records relating to that juvenile are not open to public inspection). And see s. 985.045(2), F.S., providing, with limited exceptions, for confidentiality of juvenile court records.

<sup>125</sup> See, e.g., Inf. Op. to Galbraith, April 8, 1992; and Inf. Op. to Wierzbecki, April 7, 1992. And see AGO 07-19, the sheriff’s office is not authorized to reveal the names and addresses of the parents of the juvenile offender in a juvenile misdemeanor case when asked for in a public records request. And see *G.G. v. Florida Department of Law Enforcement*, 97 So. 3d 268, 274 (Fla. 1st DCA 2012) (“only the arrest records of those juveniles who the legislature has designated in s. 985.04[2] have lost their confidential status”).

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any victim or witness of a crime for the purpose of identifying the person who committed such crime.”<sup>126</sup> This statute authorizes a law enforcement officer to use photographs of juvenile offenders in a photographic lineup for the purpose of identifying the perpetrator of a crime, regardless of whether those juvenile offenders are suspects in the crime under investigation.<sup>127</sup>

**b. Exceptions to confidentiality**

**(1) Child traffic violators**

All records of child traffic violations shall be kept in the full name of the violator and shall be open to inspection and publication in the same manner as adult traffic violations.<sup>128</sup>

**(2) Felony arrests and adult system transfers**

Until October 1, 1994, law enforcement agencies generally could release only the name and address of juveniles 16 and older who had been charged with or convicted of certain crimes. In 1994, the juvenile confidentiality laws were modified to eliminate the age restriction and provide enhanced disclosure. Section 985.04(2), F.S., now provides:

Notwithstanding any other provisions of this chapter, the name, photograph, address, and crime or arrest report of a child:

- (a) Taken into custody by a law enforcement officer for a violation of law which, if committed by an adult, would be a felony;
- (b) Charged with a violation of law which, if committed by an adult, would be a felony;

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<sup>126</sup> Section 985.11(1)(b), F.S.

<sup>127</sup> AGO 96-80. Cf. *Barfield v. Orange County, Florida*, No. CI92-5913 (Fla. 9th Cir. Ct. August 4, 1992) (denying petitioner’s request to inspect gang intelligence files compiled by the sheriff’s office).

<sup>128</sup> Section 985.11(3), F.S.

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- (c) Found to have committed an offense which, if committed by an adult, would be a felony; or
  - (d) Transferred to adult court pursuant to part X of Chapter 985

are not considered confidential and exempt from public disclosure solely because of the child's age.

The Attorney General's Office has stated that expanded disclosure provisions apply only to juvenile records created after October 1, 1994, the effective date of the amendments to the juvenile confidentiality laws.<sup>129</sup>

A public records custodian may choose not to electronically publish on the custodian's website the arrest or booking photographs of a child which are not confidential and exempt under this section or otherwise restricted from publication by law; however, this subparagraph does not restrict public access to records as provided by s. 119.07.<sup>130</sup>

### **(3) Mandatory notification to schools**

Section 985.04(4)(b), F.S., provides that when the state attorney charges a juvenile with a felony or a delinquent act that would be a felony if committed by an adult, the state attorney must notify the superintendent of the juvenile's school that the juvenile has been charged with such felony or delinquent act. A similar directive applies to a law enforcement agency that takes a juvenile into custody for an offense that would have been a felony if committed by an adult, or a crime of violence.<sup>131</sup>

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129 AGO 95-19. Confidential information on juveniles arrested prior to October 1, 1994 is available by court order upon a showing of good cause. *Id.*

130 Section 985.04(2)(a)2., F.S.

131 Section 985.04(4)(a), F.S. Cf. s. 985.04(4)(d), F.S. (notification by Department of Juvenile Justice of the presence of a juvenile sex offender in the care and custody or under the jurisdiction and supervision of the department). *And see* s. 984.04(1)(c), F.S. (sheriff, chiefs of police, the district school superintendent, and the Department of Justice shall enter

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A felony complaint/arrest affidavit created and maintained by school police officers for a juvenile or adult who is a student in the public schools is subject to disclosure, provided that exempt information such as active criminal investigative information is deleted prior to release.<sup>132</sup>

#### **(4) Criminal history information relating to juveniles**

Criminal history information relating to juveniles, including criminal history information consisting in whole or in part of information that is confidential and exempt shall be available to:

- (a) A criminal justice agency for criminal justice purposes on a priority basis and free of charge;
- (b) The person to whom the record relates, or his or her attorney;
- (c) The parent, guardian, or legal custodian of the person to whom the record relates, provided such person has not reached the age of majority, been emancipated by a court, or been legally married; or
- (d) An agency or entity specified in s. 943.0585(4) or s. 943.059(2), for the purpose specified therein, and to any person within such agency or entity who has direct responsibility for employment access authorization, or licensure decisions.<sup>133</sup>

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into an interagency agreement for the purpose of sharing information about juvenile offenders among all parties. The agreement must specify the conditions under which summary criminal history information is to be made available to appropriate school personnel and the conditions under which school records are to be made available to appropriate department personnel. Such agreement shall require notification to any classroom teacher of assignment to the teacher's classroom of a juvenile who has been placed in a probation or commitment program for a felony offense. The agencies entering into such agreement must comply with s. 943.0525, and must maintain the confidentiality of information that is otherwise exempt from s. 119.071(1), as provided by law.

132 AGO 01-64.

133 Section 943.053(3)(c), F.S. Cf. AGO 96-65 (subject of a juvenile



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Criminal history information relating to juveniles that is not confidential may be provided to the private sector, upon payment of fees established by rule of the Department of Law Enforcement.<sup>134</sup>

**(5) Victim access**

Section 985.036(1), F.S., allows the victim, the victim’s parent or guardian, their lawful representatives, and, in a homicide case, the next of kin, to have access to information and proceedings in a juvenile case, provided that such rights do not interfere with the constitutional rights of the juvenile offender. Those entitled to access “may not reveal to any outside party any confidential information obtained under this subsection regarding a case involving a juvenile offense, except as is reasonably necessary to pursue legal remedies.”<sup>135</sup>

**16. Litigation records**

Note: The purpose of this section is to provide general background information on disclosure of attorney-client communications and attorney work product. The discussion is not intended to be a guide for resolving specific matters. The agency attorney should be consulted on any public records issue relating to attorney-client communications, work product or litigation involving the agency.

**a. Attorney-client communications**

The Public Records Act applies to communications between

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offense record may authorize access to such records to others [such as a potential employer] by means of a release).

134 Section 985.053 (3)(c)2., F.S.

135 Section 985.036(2), F.S. *And see* ss. 985.04(3) and 960.001(8), F.S., authorizing similar disclosures to victims. *Cf. Harvard v. Village of Palm Springs*, 98 So. 3d 645 (Fla. 4th DCA 2012) (authorization in s. 985.04[3], F.S., allowing release of juvenile offense report to victim is permissive not mandatory).

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attorneys and governmental agencies; there is no judicially created privilege which exempts these documents from disclosure.<sup>136</sup>

**b. Attorney work product**

With the enactment of s. 119.071(1)(d), F.S., the Legislature created a narrow statutory exemption for certain litigation work product of agency attorneys. This statute provides that records prepared by, or at the express direction of, an agency’s attorney which reflect a mental impression, conclusion, litigation strategy, or legal theory of the attorney or agency, and which were prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings are exempt from disclosure until the conclusion of the litigation or adversarial administrative proceedings.

**(1) Attorney bills and payments**

Only those records which reflect a “mental impression, conclusion, litigation strategy, or legal theory” are included within the parameters of the work product exemption. Accordingly, a contract between a county and a private law firm for legal counsel and documentation for invoices submitted by such firm to the county do not fall within the work product exemption.<sup>137</sup>

If the bills and invoices contain some exempt work product—i.e., “mental impression[s], conclusion[s], litigation strateg[ies], or legal theor[ies],”—the exempt material may be deleted and the remainder disclosed.<sup>138</sup> However, information such as the hours worked or the hourly wage clearly would not fall within the scope of the exemption.<sup>139</sup>

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136 *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979) (only the Legislature and not the judiciary can exempt attorney-client communications from Ch. 119, F.S.).

137 AGO 85-89. *Accord* AGO 00-07.

138 AGO 85-89.

139 *Id.*

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## **(2) Investigations**

Section 119.071(1)(d), F.S., does not create a blanket exception to the Public Records Act for all attorney work product.<sup>140</sup> The exemption is narrower than the work product privilege recognized by the courts for private litigants.<sup>141</sup> In order to qualify for the work product exemption, the records must have been prepared exclusively for or in anticipation of imminent or pending *litigation or adversarial administrative proceedings*; records prepared for other purposes may not be converted into exempt material simply because they are also used in or related to the litigation.<sup>142</sup>

Thus, a circuit judge refused to apply the exemption to tapes, witness statements and interview notes taken by police as part of an investigation of a drowning accident at a city summer camp.<sup>143</sup>

## **(3) Commencement and termination of exemption**

The exemption from disclosure provided by s. 119.071(1)(d), F.S., is *temporary* and limited in duration.<sup>144</sup> The exemption exists only until the “conclusion of the litigation or adversarial administrative proceedings” even if disclosure of the information in the concluded case could negatively impact the agency’s position in related cases or claims.<sup>145</sup>

In a criminal case, the “conclusion of the litigation” for purposes of the termination of the work product exemption occurs when

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140 AGO 91-75.

141 AGO 85-89.

142 *See, e.g., Lightbourne v. McCollum*, 969 So. 2d 326, 333 (Fla. 2007). *See also* AGO 91-75.

143 *See Sun-Sentinel Company v. City of Hallandale*, No. 95-13528(05) (Fla. 17th Cir. Ct. October 11, 1995). The court also said that the exemption now found at s. 758.28[16][b], F.S., for risk management files did not apply.

144 *City of North Miami v. Miami Herald Publishing Co.*, 468 So. 2d 218 (Fla. 1985).

145 *See State v. Coca-Cola Bottling Company of Miami, Inc.*, 582 So. 2d 1 (Fla. 4th DCA 1990); *Seminole County v. Wood*, 512 So. 2d 1000 (Fla. 5th DCA 1987); and *Lightbourne v. McCollum*, *supra* (rejecting a “continuing exemption” claim by the state).

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the conviction and sentence have become final.<sup>146</sup> However, the state attorney may still claim the work product exemption for his or her current file in a pending motion for post-conviction relief because there is ongoing litigation with respect to those documents.<sup>147</sup>

## **17. Medical and patient records**

Patient records are generally protected from disclosure. For example, patient records in hospitals or surgical facilities licensed under Ch. 395, F.S., are confidential and may not be disclosed without the consent of the patient, or the patient's legal representative, except as provided in the statute.<sup>148</sup> Similarly, patient medical records made by health care practitioners may not be furnished to any person other than the patient, his or her legal representative or other health care practitioners and providers involved in the patient's care and treatment without written authorization, except as provided by ss. 440.13(4)(c) and 456.057, F.S.<sup>149</sup>

The recipient of patient records, if other than the patient or the patient's representative, may use such information only for the purpose provided and may not disclose any information to any other

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146 *State v. Kokal*, 562 So. 2d 324 (Fla. 1990).

147 *See Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993) (state attorney not required to disclose information from a current file relating to a postconviction relief motion). The Florida Supreme Court, however, has noted the state's obligation in a criminal case to "disclose any exculpatory document within its possession or to which it has access, even if such document is not subject to the public records law. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)." *Walton v. Dugger*, 634 So. 2d at 1062. *Accord Johnson v. Butterworth*, 713 So. 2d 985 (Fla. 1998).

148 Section 395.3025(4), (5), (7) and (8), F.S.

149 Section 456.057(7)(a), F.S. *See State v. Johnson*, 814 So. 2d 390 (Fla. 2002) (state attorney's subpoena power under s. 27.04, F.S., cannot override notice requirements of s. 395.3025[4][d], F.S., which provides for disclosure of confidential patient records upon issuance of subpoena and upon proper notice to the patient or the patient's legal representative).

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person or entity, unless expressly permitted by the written consent of the patient.<sup>150</sup> Thus, pre-death medical records in the possession of the medical examiner are not subject to public inspection.<sup>151</sup>

Similarly, there are strict confidentiality requirements for test results for HIV infection; such information may be released only as expressly prescribed by statute.<sup>152</sup>

## **18. Motor vehicle records**

### **a. Crash reports**

Motor vehicle crash reports are confidential for a period of 60 days after the report is filed.<sup>153</sup> However, such reports may be made immediately available to the parties involved in the crash, their legal representatives, their insurance companies and agents, prosecutorial authorities, law enforcement agencies, the Department of Transportation, county traffic operations, victim services programs, and certain print and broadcast media as described in the exemption.<sup>154</sup>

In addition, the statute provides that any local, state, or federal agency that is authorized to have access to crash reports by any provision of law shall be granted such access in the furtherance of the agency's statutory duties.<sup>155</sup>

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150 See ss. 395.3025(7) (hospital patient records), and 456.057(11), F.S. (health care practitioner patient records).

151 *Church of Scientology Flag Service Org., Inc. v. Wood*, No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997).

152 See 381.004, F.S. Any person who violates the confidentiality provisions of s. 381.004, F.S., and s. 951.27, F.S., is guilty of a first degree misdemeanor. Section 381.004(5)(b), F.S. *And see* s. 384.287, F.S.

153 Section 316.066(2)(a), F.S.

154 Section 316.066(2)(b), F.S. The owner of a vehicle involved in a crash is among those authorized to receive a copy of the crash report immediately. AGO 01-59.

155 Section 316.066(2)(c), F.S. *Cf.* AGO 06-11 (fire department that is requesting crash reports in order to seek reimbursement from the at-fault driver, does not fall within the scope of this provision authorizing immediate access to the reports).

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To access a crash report within 60 days after the report is filed, a person “must present a valid driver’s license or other photographic identification, proof of status or identification that demonstrates his or her qualifications to access that information, and file a written sworn statement with the state or local agency in possession of the information stating that information from a crash report made confidential and exempt by this section will not be used for any commercial solicitation of accident victims, or knowingly disclosed to any third party for the purpose of such solicitation, during the period of time that the information remains confidential and exempt.”<sup>156</sup>

**b. Department of Highway Safety and Motor Vehicles motor vehicle records**

Section 119.0712(2)(b), F.S., provides that personal information, including highly restricted personal information as defined in 18 U.S.C. s. 2725, contained in a motor vehicle record is confidential pursuant to the federal Driver’s Privacy Protection Act of 1994, 18 U.S.C. ss. 2721 *et seq* (DPPA). Such information may be released only as authorized by that act. The term “motor vehicle record” is defined to mean any record that pertains to a motor vehicle operator’s permit, motor vehicle title, motor vehicle registration, or identification card issued by the Department of Highway Safety and Motor Vehicles (DHSMV).<sup>157</sup>

**c. Motor vehicle information contained in law enforcement records**

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<sup>156</sup> Section 316.066(2)(d), F.S. Reports may be released without the sworn statement to third- party vendors under contract with one or more insurers, but only if the conditions set forth in the statute are stated in the contract. *Id.* Third-degree felony penalties are established for knowing unauthorized disclosure or use of confidential information in violation of this statute. *See* s. 316.066(3)(b), (c), and (d), F.S., for more information. <sup>157</sup> Section 119.0712(2)(a), F.S. *And see* s. 119.0712(2)(d), F.S., providing that the emergency contact information contained in a motor vehicle record is confidential. Section 119.0712(2)(c), F.S., provides an exemption for email addresses collected by DHSMV for motor vehicle and driver license transactions.

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The Attorney General's Office has stated that while DHSMV motor vehicle records are confidential in the hands of a law enforcement agency, to the extent information is taken from DHSMV records and used in preparing other records of the law enforcement agency or its agent, the confidentiality requirements of s. 119.0712(2)(b), F.S., do not reach those records created by subsequent users. Thus, a driver's license number that is included in a law enforcement officer's report is not confidential or exempt from disclosure and copying.<sup>158</sup>

Similarly, DPPA does not prohibit a city from disclosing to a newspaper, in response to a public records request, the violation notices the city sent to vehicle owners based on images captured by red-light cameras.<sup>159</sup>

## **19. Pawnbroker records**

All records relating to pawnbroker transactions delivered to appropriate law enforcement officials pursuant s. 539.001, F.S., the Florida Pawnbroking Act, are confidential and exempt from disclosure and may be used only for official law enforcement purposes.<sup>160</sup> However, law enforcement officials are not prohibited from disclosing the name and address of the pawnbroker, the name and address of the conveying customer, or a description of the pawned property to the alleged owner of pawned property.<sup>161</sup>

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158 AGO 10-10.

159 See also *City of Tallahassee v. Federated Publications, Inc.*, No. 4:11 cv 395- RH/CAS (N. D. Fla. August 9, 2012). Cf. s. 316.0777, F.S., enacted in 2014, providing an exemption for images and data containing or providing personal identifying information obtained through use of an automated license plate recognition system.

160 Section 539.003, F.S.

161 *Id.* And see AGO 01-51.

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## 20. Personnel records

The general rule with regard to personnel records is the same as for other public records; unless the Legislature has expressly exempted certain personnel records from disclosure or authorized the agency to adopt rules limiting access to such records, personnel records are subject to public inspection and copying under s. 119.07(1), FS.<sup>162</sup>

Therefore, an agency is not authorized to “seal” disciplinary notices and thereby remove such notices from disclosure under the Public Records Act.<sup>163</sup> Nor may an agency, absent a statutory exemption for such records, agree to remove counseling slips and written reprimands from an employee’s personnel file and maintain such documents in a separate disciplinary file for the purpose of removing such records from public access.<sup>164</sup>

If an agency uses a recruitment company to conduct an employment search for the agency, records made or received by the private company in connection with the search are public records.<sup>165</sup>

The courts have rejected claims that constitutional privacy interests operate to shield agency personnel records from disclosure.<sup>166</sup> Additionally, the judiciary has refused to deny access to personnel records based on claims that the release of such information could prove embarrassing or unpleasant for the employee.<sup>167</sup>

Public employers should note, however, that a court has held

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162 See *Michel v. Douglas*, 464 So. 2d 545 (Fla. 1985).

163 AGO 94-75. See also AGO 15-10 (agency may not “seal” job applications or request that they be submitted as “sealed” records to foreclose public access).

164 AGO 94-54. Accord AGO 11-19.

165 AGO 92-80. See also *Shevin v. Byron, Harless, Schaffer, Reid and Associates*, 379 So. 2d 633 (Fla. 1980).

166 See *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985).

167 See, e.g., *News-Press Publishing Company, Inc. v. Gadd*, 388 So. 2d 276, 278 (Fla. 2d DCA 1980).



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that an agency must provide a discharged employee with an opportunity for a post-termination name-clearing hearing when stigmatizing information concerning the employee is made a part of the public records or is otherwise published.<sup>168</sup>

An agency is not authorized to unilaterally impose special conditions for the inspection of personnel records. An automatic delay in the production of such records is invalid.<sup>169</sup>

A collective bargaining agreement may not make the personnel records of public employees confidential or exempt the same from the Public Records Act.<sup>170</sup> Thus, employee grievance records are disclosable even though classified as confidential in a collective bargaining contract because “to allow the elimination of public records from the mandate of Chapter 119 by private contract would sound the death knell of the Act.”<sup>171</sup>

Similarly, unless authorized by law, a city may not agree through collective bargaining to remove references to the initial proposed disciplinary action in an employee’s personnel file when a settlement agreement results in a reduced disciplinary action.<sup>172</sup>

**a. Annuity or custodial account activities**

Records identifying individual participants in any annuity contract or custodial account under s. 112.21, F.S. (relating to tax-sheltered annuities or custodial accounts for employees of governmental agencies) and their personal account activities are confidential and exempt from s. 119.07(1), F.S.<sup>173</sup>

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168 *Buxton v. City of Plant City, Florida*, 871 F.2d 1037 (11th Cir. 1989). See also *Garcia v. Walder Electronics, Inc.*, 563 So. 2d 723 (Fla. 3d DCA 1990). Cf. *Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1303 (11th Cir. 2001).

169 *Tribune Company v. Cannella*, 458 So. 2d 1075 (Fla. 1984) (automatic 48 hour delay unauthorized by Ch. 119, F.S.).

170 AGO 77-48.

171 *Mills v. Doyle*, 407 So. 2d 348, 350 (Fla. 4th DCA 1981).

172 AGO 94-54.

173 Section 112.21(1), F.S.

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**b. Applications for employment, references, and resumes**

Applications and resumes are subject to disclosure, after redaction of statutorily exempt information such as social security numbers.<sup>174</sup> Similarly, communications from third parties are subject to disclosure.<sup>175</sup>

**c. Complaints against law enforcement officers**

Section 112.533(2), F.S., provides that complaints filed against law enforcement officers and correctional officers, and all information obtained pursuant to the agency's investigation of the complaint, are confidential until the investigation is no longer active or until the agency head or his or her designee provides written notice to the officer who is the subject of the complaint that the agency has concluded the investigation with a finding to either proceed or not to proceed with disciplinary action or the filing of charges.<sup>176</sup>

The term "law enforcement officer" is defined as any person, other than a chief of police, who is employed full time by any municipality or the state or any political subdivision thereof and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state; and includes any person who is appointed by the sheriff as a deputy sheriff pursuant to s. 30.07, F.S.<sup>177</sup>

Complaints filed with the employing agency by any person,

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174 See *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980), and AGO 77-48.

175 *Douglas v. Michel*, 410 So. 2d 936 (Fla. 5th DCA 1982), *questions answered and approved*, 464 So. 2d 545 (Fla. 1985).

176 Also, s. 112.532(4)(b), F.S., provides for confidentiality "[n]otwithstanding s. 112.533(2)," when a law enforcement officer or correctional officer is subject to disciplinary action consisting of suspension with loss of pay, demotion, or dismissal until such time as the employing law enforcement agency makes a final determination whether or not to issue a notice of disciplinary action.

177 Section 112.531(1), F.S.

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whether within or outside the agency, are subject to the exemption.<sup>178</sup>

While s. 112.533, F.S., applies to complaints and records obtained pursuant to the law enforcement agency's investigation of the complaint, it does not transform otherwise public records (such as crime or incident reports) into confidential records simply because the actions which are described in the crime report later form the basis of a complaint filed pursuant to s. 112.533, F.S.<sup>179</sup>

Thus, a circuit judge ordered a police department to provide the media with a copy of an unredacted incident report that identified a police officer involved in the shooting of an armed suspect.<sup>180</sup>

If the officer resigns prior to the agency's completion of its investigation, the exemption from disclosure provided by s. 112.533(2), F.S., no longer applies, even if the agency is still actively investigating the complaint.<sup>181</sup> However, if the complaint has generated information which qualifies as active criminal investigative information, i.e., information compiled by a criminal justice agency while conducting an ongoing criminal investigation of a specific act, such information would be exempt while the investigation is continuing with a good faith anticipation of

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178 AGO 93-61. A court has held that the complaint must be in writing in order for the confidentiality provisions in s. 112.533, F.S. to apply. *City of Delray Beach v. Barfield*, 579 So. 2d 315 (Fla. 4th DCA 1991). However, in a later case – *Fraternal Order of Police v. Rutherford*, 51 So. 3d 485, 488 (Fla. 1st DCA 2010) – the court held that a written complaint is not necessary to trigger confidentiality afforded by s. 112.532[4][b], F.S., as that statute provides a broader confidentiality for ongoing investigations whenever a law enforcement or correctional officer faces possible dismissal, demotion, or suspension without pay until the investigating agency “completes or abandons its investigation.” 179 AGO 96-27.

180 *Morris Publishing Group, LLC v. Thomason*, No. 16-2005-CA-7052-XXXX-MA (Fla. 4th Cir. Ct. October 14, 2004). *And see* AGO 08-33 (list of law enforcement officers who have been placed on administrative duty by their employer is not confidential under s. 112.533[2][a], F.S., but is subject to inspection and copying even if information on the list will identify officers who are the subject of internal investigation).

181 AGO 91-73.

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securing an arrest or prosecution in the foreseeable future.<sup>182</sup>

The exemption is of limited duration. Section 112.533(2), F.S., establishes that the complaint and all information gathered in the investigation of that complaint generally become public records at the conclusion of the investigation or at such time as the investigation becomes inactive.<sup>183</sup>

However, the mere fact that written notice of intervening actions is provided to the officer under investigation does not signal the end of the investigation nor does such notice make this information public prior to the conclusion of the investigation.<sup>184</sup>

A complaint is presumed to be inactive, and hence subject to disclosure, if no finding is made within 45 days after the complaint is filed.<sup>185</sup>

Section 112.533(2)(b), F.S., states that the inspection provisions in that subsection do not apply to any public record which is exempt from public disclosure under Ch. 119, F.S. For example, active criminal investigative or intelligence information which is exempt pursuant to s. 119.071(2)(c), F.S., remains exempt notwithstanding the disclosure provisions set forth in s. 112.533(2)(a), F.S.<sup>186</sup> Thus, in such cases, the information would be subject to disclosure when the criminal investigative information exemption ends, rather than as provided in s. 112.533(2), F.S.<sup>187</sup>

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182 *Id.* See s. 112.533(2)(b), F.S.

183 AGO 95-59. *Neumann v. Palm Beach County Police Benevolent Association*, 763 So. 2d 1181 (Fla. 4th DCA 2000).

184 AGO 95-59. Similarly, the exemption remains in effect if an agency schedules a pre-disciplinary determination meeting with an officer to hear and evaluate the officer's side of the case because "[d]iscipline is not an accepted fact at this point." *Palm Beach County Police Benevolent Association v. Neumann*, 796 So. 2d 1278, 1280 (Fla. 4th DCA 2001).

185 Section 112.533(2)(b), F.S. See *City of Delray Beach v. Barfield*, 579 So. 2d at 318.

186 *Palm Beach County Police Benevolent Association v. Neumann*, 796 So. 2d 1278 (Fla. 4th DCA 2001). And see AGO 91-73.

187 *Cf. City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA

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Similarly, information that would reveal the identity of the victim of child abuse or the victim of a sexual offense is not subject to disclosure since the information is confidential pursuant to s. 119.071(2)(h), F.S.<sup>188</sup>

However, the state attorney's records of a closed criminal investigation are not made confidential by s. 112.533, F.S., even though an internal investigation conducted by the police department remains pending concerning the same complaint.<sup>189</sup>

Similarly, a police report of an agency's criminal investigation of a police officer is a public record in the hands of the police department after the investigation is over regardless of whether a copy of the report is forwarded to the Criminal Justice Standards and Training Commission or to the Commission on Ethics.<sup>190</sup>

Section 112.533(4), F.S., makes it a first degree misdemeanor for any person who is a participant in an internal investigation to willfully disclose any information obtained pursuant to the agency's investigation before such information becomes a public record.

However, the subsection "does not limit a law enforcement or correctional officer's ability to gain access to information under paragraph (2)(a)."<sup>191</sup> In addition, a sheriff, police chief or other head of a law enforcement agency, or his or her designee, may acknowledge the existence of a complaint, and the fact that an investigation is underway.<sup>192</sup> The Attorney General's Office has issued several advisory opinions interpreting this statute.<sup>193</sup>

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1994 (exempt active criminal investigative information may be shared with another criminal justice agency for use in a simultaneous internal affairs investigation and retain its protected status).

188 *Palm Beach County Police Benevolent Association v. Neumann*, *supra*.

189 AGO 00-66.

190 AGO 90-05.

191 Section 112.533(4), F.S.

192 *Id.*

193 *See, e.g.,* AGO 03-60. *Cf.* AGO 97-62 (confidentiality requirements prevent the participation of a citizens' board in resolving a complaint)

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However, in 2005, the 11th Circuit Court of Appeals ruled that s. 112.533(4), F.S., was unconstitutional.<sup>194</sup>

For information on the exemptions for whistleblower, discrimination, and ethics complaints directed against public officers and employees, please refer to the discussion of non-law enforcement investigative records in the Sunshine Manual which may be accessed online at [myfloridalegal.com](http://myfloridalegal.com). The Sunshine Manual also discusses s. 119.071(2)(k), F.S., enacted in 2013, and providing an exemption from public disclosure for complaints and investigative records based on alleged misconduct by agency employees.

**d. Deferred compensation**

All records identifying individual participants in any deferred compensation plan under the Government Employees' Deferred Compensation Plan Act and their personal account activities are confidential and exempt.<sup>195</sup>

**e. Direct deposit**

Direct deposit records made prior to October 1, 1986, are exempt from s. 119.07(1), F.S. With respect to direct deposit records made on or after October 1, 1986, the names of the authorized financial institutions and the account numbers of the beneficiaries are confidential and exempt.<sup>196</sup>

**f. Drug test results**

Drug test results and other information received or produced by a state agency employer as a result of a drug-testing program in accordance with s. 112.0455, F.S., the Drug-Free Workplace Act, are confidential and exempt, and may not be disclosed except as

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made against a law enforcement officer until the officer's employing agency has made its initial findings).

<sup>194</sup> See *Cooper v. Dillon*, 403 F.3d 1208, 1218-1219 (11th Cir. 2005).

<sup>195</sup> Section 112.215(7), F.S.

<sup>196</sup> Section 17.076(5), F.S.

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authorized in the statute.<sup>197</sup>

While the provisions of s. 112.0455, F.S., are applicable to state agencies and not to municipalities, ss. 440.101-440.102, F.S., may be used by a municipality or other entity that is an “employer” for purposes of these statutes, to establish a drug-free workplace program.<sup>198</sup> Section 440.102(8)(a), F.S., provides for confidentiality of drug test results or other information received as a result of a drug-testing program.<sup>199</sup>

**g. Employee assistance program (substance abuse treatment)**

An employee’s personal identifying information contained in records held by the employing agency relating to that employee’s participation in an employee assistance program is confidential and exempt from disclosure.<sup>200</sup>

**h. Evaluations of employee performance**

Evaluations of public employee performance, like other public records, are generally subject to disclosure. As the Florida Supreme Court has said: “No policy of the state protects a public employee from the embarrassment which results from his or her public employer’s discussion or action on the employee’s failure to perform his or her duties properly.”<sup>201</sup>

**i. Examination questions and answer sheets**

Examination questions and answer sheets of examinations administered by governmental entities for the purpose of

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197 Section 112.0455(11), F.S. *See also* s. 112.0455(8)(l) and(t), F.S.

198 *See* AGO 98-38.

199 AGO 13-19. *Cf.* AGO 94-51 (city not authorized to delete or remove consent forms or records of disciplinary action relating to city employees’ drug testing from personnel records when drug testing was not conducted pursuant to s. 440.102, F.S.).

200 *See* ss. 110.1091 (state employees), 125.585 (county employees), and 166.0444 (municipal employees), F.S.

201 *News-Press Publishing Company v. Wisher*, 345 So. 2d 646, 648 (Fla. 1977).

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licensure, certification, or employment are exempt from mandatory disclosure requirements.<sup>202</sup>

The exemption from disclosure in s. 119.071(1)(a), F.S., applies to examination questions and answers, and does not include the “impressions and grading of the responses” by the examiners.<sup>203</sup>

A person who has taken an examination has the right to review his or her own completed examination.<sup>204</sup> However, the examinee possesses only the right to review his or her own completed examination and may not make or obtain copies of that examination.<sup>205</sup>

**j. Home addresses, telephone numbers, photographs, dates of birth**

Section 119.071(4)(d)2., F.S., exempts certain information relating to past and present law enforcement officers and their families by excluding from public inspection:

The home addresses, telephone numbers, social security numbers, dates of birth and photographs of active or former sworn or civilian law enforcement personnel, including correctional and correctional probation officers, . . . and the names, home addresses, telephone numbers, social security numbers, photographs, dates of birth, and places of employment of the spouses and children of such personnel; and the names and locations of schools

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<sup>202</sup> Section 119.071(1)(a), F.S. See *Dickerson v. Hayes*, 543 So. 2d 836, 837 (Fla. 1st DCA 1989) (applying exemption to portions of rating sheets used by promotion board which contained summaries of applicants’ responses to oral examination questions where the oral questioning “was a formalized procedure with identical questions asked of each applicant [which] ‘tested’ the applicants’ response both as to style and content”). See also *Rush v. High Springs, Florida*, 82 So. 3d 1108 (Fla. 1st DCA 2012), (city allowed to redact questions and answers from a pre-employment polygraph report).

<sup>203</sup> See *Dickerson v. Hayes*, *supra* at 837.

<sup>204</sup> Section 119.071(1)(a), F.S. See AGO 76-210.

<sup>205</sup> AGO 81-12.



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and day care facilities attended by the children of such personnel... .

The same exemptions also apply to current or former prosecutors.<sup>206</sup>

Section 119.071(4)(d), F.S., and 119.071(5), F.S., provide similar exemptions for other professions and occupations. A listing and discussion of other covered professions and occupations may be found in the Sunshine Manual which is available online at [myfloridalegal.com](http://myfloridalegal.com) at the open government site.

### **(1) Authority to release protected information**

The purpose of the s. 119.071(4)(d), F.S., exemption is to protect the safety of the enumerated individuals and their families by removing certain information relating to such individuals from the mandatory disclosure requirements of Ch. 119, F.S.<sup>207</sup> The statute makes these records exempt from mandatory disclosure requirements, not confidential; thus, an agency is not prohibited from disclosing the information in all circumstances.<sup>208</sup> However, in determining whether to disclose the information, the agency should consider the underlying purpose of the statute, i.e., safety of the listed individuals and their families.<sup>209</sup>

In other words, a police department, in deciding whether to release photographs of law enforcement personnel, should determine whether there is a statutory or substantial policy need for disclosure.<sup>210</sup> In the absence of a statutory or other legal duty to be accomplished by disclosure, the agency should consider whether the release of such information is consistent with the purpose of the exemption afforded by s. 119.071(4)(d)2.<sup>211</sup> For

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206 Section 119.071(4)(d)2., F.S. *And see* s. 119.071(5)(i), F.S. (exemption for current or former federal prosecutors, subject to specified conditions).

207 AGO 10-37. *And see* AGOs 90-50 and 96-57.

208 AGO 10-37.

209 AGO 90-50. *See also* AGO 08-24.

210 AGO 07-21.

211 *Id.*

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example, a posting of the names, I.D. numbers and photographs of police officers in the hallway of the police department for public display would appear to be counter to the purpose of the exemption.<sup>212</sup> By contrast, information from the city personnel files which reveals the home addresses of former law enforcement personnel may be disclosed to the State Attorney's office for the purpose of serving criminal witness subpoenas by mail pursuant to s. 48.031, F.S.<sup>213</sup>

**(2) Application of s. 119.071(4)(d)2., F.S., exemption to records held by agencies that are not the employer of the designated officers or employees**

An agency that is the custodian of personal information specified in s. 119.071(4)(d)2., F.S., but is not the employer of the officer or employee, may maintain the exempt status of that information only if the officer or employee or the employing agency of the designated employee submits a written request for maintenance of the exemption to the custodial agency.<sup>214</sup>

The provisions of s. 119.071(4)(d)3., F.S., should not be read "to impose a burden on employers to know the past law enforcement employment status of employees who may work for them in other capacities."<sup>215</sup> Thus, a former law enforcement officer from one municipality who is currently employed by another municipality in a non-law enforcement capacity must make a written request pursuant to s. 119.071(4)(d)3., F.S., that his or her personal information be maintained as exempt by the current employer.<sup>216</sup>

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212 AGO 90-50.

213 Inf. Op. to Reese, April 25, 1989. *And see Henderson v. Perez*, 835 So. 2d 390, 392 (Fla. 2d DCA 2003) (trial court order compelling sheriff to produce exempt home addresses and photographs of 10 active law enforcement officers in a civil lawsuit filed by Perez predicated on his arrest, quashed because "Perez has not shown that the photographs and home addresses of the law enforcement officers are essential to the prosecution of his suit").

214 Section 119.071(4)(d)3., F.S.

215 AGO 10-37.

216 *Id.*

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### **(3) Application of exemption to agency-issued cellular telephones, prior home addresses and booking photographs**

The Attorney General's Office has advised that the cellular telephone numbers of telephones provided by the agency to law enforcement officers and used in performing law enforcement duties are not exempt from disclosure under s. 119.071(4)(d), F.S.<sup>217</sup>

In 2012, the Legislature amended s. 119.071(4)(d) to define the term "telephone numbers" as used in the exemption to include "home telephone numbers, personal cellular telephone numbers, personal pager telephone numbers, and telephone numbers associated with personal communication devices." As originally introduced, the 2012 legislation would have also included "telephone numbers associated with agency cellular telephones" within the definition of "telephone numbers."<sup>218</sup> However, this language was removed during the legislative process.

Section 119.071(4)(d)1., F.S., applies only to the current home address or addresses (including a current vacation home address) of the designated individuals. Therefore, it would not exempt property no longer used as a home by law enforcement personnel.<sup>219</sup>

Section 119.071(4)(d), F.S., exempts the photograph of a current or former law enforcement officer, whether held by the employing agency or by a nonemploying agency which has received a written request to maintain the exempt status of the record, from the provisions of s. 119.07(1), F.S.<sup>220</sup> Thus, the custodian should determine whether there is a statutory or substantial policy need for disclosure before releasing the booking photograph. In the absence of a statutory or other legal duty to be accomplished by disclosure, an agency should consider the purpose of the exemption, i.e., the safety of law enforcement officers and their

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217 Inf. Op. to Laquidara, July 17, 2003.

218 See HB629, filed November 10, 2011.

219 AGO 10-37.

220 Inf. Op. to Amunds, June 8, 2012.

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families.<sup>221</sup>

**k. Medical information**

Medical information pertaining to a prospective, current, or former officer or employee of an agency which, if disclosed, would identify that officer or employee is exempt from s. 119.07(1), F.S.<sup>222</sup>

Every employer who provides or administers health insurance benefits or life insurance benefits to its employees shall maintain the confidentiality of information relating to the medical condition or status of any person covered by such insurance benefits. Such information is exempt from s. 119.07(1), F.S.<sup>223</sup>

Patient medical records and medical claims records of current or former employees and eligible dependents enrolled in group insurance plans of specified governmental entities are confidential and exempt from s. 119.07(1), F.S.; such records shall not be furnished to any person other than the employee or the employee's legal representative, except as authorized in the subsection.<sup>224</sup>

**l. Payroll deduction records**

There is no general exemption from disclosure that applies to agency payroll deduction records.<sup>225</sup>

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221 *Id.* See also AGOs 90-50 and 07-21. Cf. AGO 94-90 (statute did not preclude release of booking photography of deputy who was not an undercover officer whose identity would otherwise be protected by s. 119.071[2][c], F.S.

222 Section 119.071(4)(b)1., F.S. Such information may be disclosed if the person or the person's legal representative provides written permission or pursuant to court order. *Id.*

223 Section 760.50(5), F.S.

224 Sections 110.123(9) (state employees) and 112.08(7) (county or municipal employees). See AGOs 91-88, 94-78 and 94-51.

225 However, public school system employee payroll deduction records are confidential. Section 1012.31(3)(a)4., F.S. See AGO 09-11.

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**m. Retiree lists**

The names and addresses of retirees are confidential and exempt from s. 119.07(1), F.S., to the extent that no state or local governmental agency may provide the names or addresses of such persons in aggregate, compiled or list form except to public agencies engaged in official business, to collective bargaining agents or to retiree organizations for official business use.<sup>226</sup>

The exemption does not apply to employees who are participants in the Deferred Retirement Option Program (DROP); DROP participants “are not retirees since they have not terminated their employment.”<sup>227</sup>

Section 119.071(4)(d), F.S. discussed on pages 56-60, provides an exemption for the home addresses of current and former law enforcement personnel.

**n. Salary records**

Salary and other information relating to compensation is subject to disclosure.<sup>228</sup>

**o. Travel records**

Travel vouchers are open to public inspection, after redaction of exempt material such as credit card account numbers (s. 119.071[5][b], F.S.) or social security numbers (ss. 119.071[4][a] and [5][a]F.S.).<sup>229</sup>

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226 Section 121.031(5), F.S. “A person may view or copy any individual’s retirement records at the Department of Management Services, one record at a time, or may obtain information by a separate written request for a named individual for which information is desired.” *Id.*

227 *Palm Beach Newspapers, Inc. v. School Board of Palm Beach County*, No. 502007CA020000XXXXMB (Fla. 15th Cir. Ct. November 28, 2007).

228 *Lewis v. Schreiber*, No. 92-8005(03) (Fla. 17th Cir. Ct. June 12, 1992). *Accord* AGO 73-30.

229 *See Shevin v. Byron, Harless, Schaffer, Reid and Associates*, 379 So. 2d 633 (Fla. 1980).

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**p. Undercover personnel**

Section 119.071(4)(c), F.S., provides that any information revealing undercover personnel of a criminal justice agency is exempt from public disclosure.<sup>230</sup>

**21. Polygraph records**

The Attorney General's Office is not aware of any statutory provision barring access to otherwise public records, simply because the records are in the form of polygraph charts.<sup>231</sup>

However, exemption from disclosure found in s. 119.071(1)(a), F.S., for employment examination questions and answers applies to questions and answers contained in pre-employment polygraph records.<sup>232</sup>

The exemption from disclosure in s. 119.071(1)(a), F.S., applies to examination questions and answers, and does not include the "impressions and grading of the responses" by the examiners.<sup>233</sup>

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230 See AGO 15-02 (discussing exemption as applied to information regarding law enforcement officers of the city who are assigned to undercover duty and whose names appear on city personnel rosters). However, in *Ocala Star Banner Corporation v. McGhee*, 643 So. 2d 1196 (Fla. 5th DCA 1994), the court held that a police department should not have refused to release an entire police report that contained some information that could lead to the identity of an undercover person, when, without much difficulty, the name or initials and identification numbers of the undercover officer and that officer's supervisor could be taken out of the report and the remainder turned over to the newspaper. *Accord Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365 (Fla. 4th DCA 1997).

231 See, e.g., *Wisner v. City of Tampa Police Department*, 601 So. 2d 296 (Fla. 2d DCA 1992) (polygraph materials resulting from polygraph examination that citizen took in connection with a closed internal affairs investigation were public records); and *Downs v. Austin*, 522 So. 2d 931 (Fla. 1st DCA 1988).

232 See *Rush v. High Springs, Florida*, 82 So. 3d 1108 (Fla. 1st DCA 2012).

233 See *Dickerson v. Hayes*, *supra* at 837.

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## **22. Prison and inmate records**

In the absence of statutory exemption, prison and inmate records are subject to disclosure under the Public Records Act.

Subject to limited exceptions, s. 945.10, F.S., states that the following records and information held by the Department of Corrections are confidential and exempt from public inspection: mental health, medical or substance abuse records of inmates; preplea, pretrial intervention, presentence or postsentence investigative records; information regarding a person in the federal witness protection program; confidential or exempt Florida Commission on Offender Review records; information which if released would jeopardize someone's safety; information concerning a victim's statement and identity; information which identifies an executioner; and records that are otherwise confidential or exempt by law.<sup>234</sup>

The Public Records Act applies to a private corporation which has contracted to operate and maintain the county jail.<sup>235</sup>

## **23. Security system information and building plans**

A security system plan or portion thereof that is held by an agency is confidential and exempt from public disclosure.<sup>236</sup> However, the information may be disclosed to the property owner or leaseholder; in furtherance of the official duties and responsibilities of the agency holding the information; to another local, state, or federal agency in furtherance of that agency's

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<sup>234</sup> See *Bryan v. State*, 753 So. 2d 1244 (Fla. 2000), in which the Florida Supreme Court upheld the constitutionality of s. 945.10, F.S. See also *Roberts v. Singletary*, No. 96-603 (Fla. 2d Cir. Ct. July 28, 1997) (portions of the Department of Corrections Execution Procedures Manual containing "highly sensitive security information" not subject to disclosure).

<sup>235</sup> *Times Publishing Company v. Corrections Corporation of America*, No. 91-429 CA 01 (Fla. 5th Cir. Ct. December 4, 1991). See also *Prison Health Services, Inc. v. Lakeland Ledger Publishing Company*, 718 So. 2d 204 (Fla. 2d DCA 1998).

<sup>236</sup> Section 119.071(3)(a), F.S. See also s. 281.301, F.S.

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official duties and responsibilities; or upon a showing of good cause before a court of competent jurisdiction.<sup>237</sup>

The term “security system plan” as used in s. 119.071(3)(a), F.S., includes: records relating directly to the physical security of the facility or revealing security systems; threat assessments conducted by an agency or private entity; threat response plans; emergency evacuation plans; sheltering arrangements; or security manuals.

In *Marino v. University of Florida*,<sup>238</sup> the court held that a university could not use the exemption to withhold the location of animal research facilities based on a determination that the nature of the public activities occurring at the facility subjects them to physical threats.

However, surveillance video captured by a city bus system “directly relates to and reveals information about a security system” and is therefore covered by the exemption.<sup>239</sup> In addition, ss. 119.071(3)(a), and 281.301, F.S., prohibit public disclosure of the name and address of applicants for security system permits, of persons cited for violations of alarm ordinances, and of individuals who are the subject of law enforcement dispatch reports for verified or false alarms.<sup>240</sup>

Section 119.071(3)(b)1., F.S. exempts building plans, blueprints, schematic drawings and diagrams of government buildings and

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<sup>237</sup> *Id.*

<sup>238</sup> 107 So. 3d 1231 (Fla. 1st DCA 2013).

<sup>239</sup> *Central Florida Regional Transportation Authority v. Post-Newsweek Stations, Orlando, Inc.*, 157 So. 3d 401 (Fla. 5th DCA 2015). And see AGO 15-06, relying on *Central Florida Regional Transportation Authority*, and applying the exemption to surveillance tapes from a security system for a public transit authority building.

<sup>240</sup> *Critical Intervention Services, Inc. v. City of Clearwater*, 908 So. 2d 1195, 1197 (Fla. 2d DCA 2005). Accord AGO 04-28. See also *Times Publishing Company v. City of Pensacola*, No. 2002-2053 (Fla. 1st Cir. Ct. November 13, 2002), *per curiam affirmed*, 869 So. 2d 547 (Fla. 1st DCA 2004) (police department records of “specialty weapons utilized for surveillance and defensive purposes, by surveillance personnel” were exempt from disclosure under s. 119.071[3][a], F.S.).



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structures. Exempt information may be disclosed to another governmental entity, to a licensed professional performing work on the building, or upon a showing of good cause to a court. In addition, AGO 02-74 concluded that the plans may be released in order to comply with competitive bidding requirements.

#### **24. Social security numbers**

Section 119.071(5)(a)5., F.S., states that social security numbers held by an agency are confidential and may not be disclosed except as authorized in the statute.<sup>241</sup> For example, disclosure to another governmental agency is authorized if disclosure is necessary to the performance of the agency's duties and responsibilities.<sup>242</sup>

#### **25. Surveillance techniques, procedures or personnel**

Information revealing surveillance techniques, procedures or personnel is exempt from public inspection pursuant to s. 119.071(2)(d), F.S.<sup>243</sup>

#### **26. Telephone records**

Records of telephone calls made from agency telephones

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241 See also s. 119.071(4)(a), FS (social security numbers of current and former employees held by the employing agency are confidential and exempt from disclosure).

242 Section 119.071(5)(a)6.b., F.S.

243 See *Rameses, Inc. v. Demings*, 29 So. 3d 418 (Fla. 5th DCA 2010) (disclosure to criminal defendant of unredacted undercover police surveillance recordings does not destroy exemption in s. 119.071[2] [d], F.S.; therefore, sheriff is only required to provide redacted recording in response to a public records request); and *State v. Bee Line Entertainment Partners Ltd.*, No. CIO 00-5358, 28 Med.L.Rptr. 2592 (Fla. 9th Cir. Ct. October 25, 2000) (videotapes created with hidden camera by law enforcement investigation showing result of investigative activity but that do not reveal confidential surveillance methods must be released once investigation is no longer active).

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are generally subject to disclosure in the absence of statutory exemption.<sup>244</sup>

## **D. PROVIDING PUBLIC RECORDS**

### **1. Validity of agency conditions on access**

Section 119.07(1)(a), F.S., establishes a right of access to public records in plain and unequivocal terms:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

The term “reasonable conditions” as used in s. 119.07(1)(a), F.S., “refers not to conditions which must be fulfilled before review is permitted but to reasonable regulations that would permit the custodian of records to protect them from alteration, damage, or destruction and also to ensure that the person reviewing

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<sup>244</sup> See *Media General Operation, Inc. v. Feeney*, 849 So. 2d 3, 6 (Fla. 1st DCA 2003), rejecting the argument that redaction of telephone numbers for calls made in the course of official business could be justified because disclosure could result in “unreasonable consequences” to the persons called; *Morris v. Publishing Group LLC v. State*, 154 So. 3d 528, 532 (Fla. 1st DCA 2015) (“No one disputes” that phone recordings of telephone calls made by the defendant while incarcerated and provided in criminal discovery were public records); and AGO 12-07 (noting the public records status of telephone recordings made by police department in the usual course of business, and commenting that such public records would be subject to any applicable exemptions). Compare *Bent v. State*, 46 So. 3d 1047 (Fla. 4th DCA 2010) (recordings of personal telephone calls between minors in jail awaiting trial and third parties made by sheriff’s office are not public records when contents of phone calls do not involve criminal activity or security breach. And see, s. 119.071(5)(d) (all recordings supplied by a telecommunications company, as defined by s. 364.02, F.S., to an agency which contain the name, address, and telephone number of subscribers are confidential and exempt).

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the records is not subjected to physical constraints designed to preclude review.”<sup>245</sup>

Accordingly, the “reasonable conditions” do not include a rule or condition of inspection which operates to restrict or circumvent a person’s right of access.<sup>246</sup> “The courts of this state have invalidated measures which seek to impose any additional burden on those seeking to exercise their rights to obtain records” under Ch. 119, F.S.<sup>247</sup>

The Public Records Act “embodies important public policy” and is designed to provide citizens with a simple and expeditious method of accessing public records.”<sup>248</sup>

A policy of a governmental agency cannot exempt it from the application of Chapter 119, F.S., a general law.<sup>249</sup> Nor may an agency impose conditions on the right of inspection of records which are not permitted by the Public Records Act.<sup>250</sup> For example, a city may not require the use of a code to review e-mail correspondence of city’s police department and human resources department.<sup>251</sup> Similarly, a policy requiring a physical address for mailing copies of requested public records or the personal appearance of the requestor would not appear to relate to the custodian’s duty to protect public records from alteration

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245 *Wait v. Florida Power & Light Company*, 372 So. 2d 420, 425 (Fla. 1979). See also *Tribune Company v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984) (the sole purpose of custodial supervision is to protect the records from alteration, damage, or destruction).

246 AGO 75-50.

247 Inf. Op. to Cook, May 27, 2011.

248 *Orange County v. Hewlings*, 152 So. 3d 812, 817 (Fla. 5th DCA 2014). Thus, an agency violated the Act when instead of complying with Hewlings’ “simple request” for records, it “chose to interpose the additional bureaucratic hurdles of forcing her to come to its offices, comb through the records, mark the records in a certain manner, wait for a written estimate of costs, then, after paying the costs, wait again for the records to be mailed to her.” *Id.*

249 *Douglas v. Michel*, 410 So. 2d 936, 938 (Fla. 5th DCA 1982), *questions answered and approved*, 464 So. 2d 545 (Fla. 1985).

250 *Tribune Company v. Cannella*, *supra* at 1077.

251 AGO 05-12.

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or destruction, but to impose additional constraints on the requestor.<sup>252</sup>

## **2. Individuals authorized to access public records**

Section 119.01, F.S., provides that “[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by *any person*.” (e.s.) A public employee is a person within the meaning of Ch. 119, F.S. and, as such, possesses the same right of inspection as any other person.<sup>253</sup>

As one court has stated, “even though a public agency may believe that a person or group are fanatics, harassers or are extremely annoying, the public records are available to all of the citizens of the State of Florida.”<sup>254</sup>

## **3. Purpose of request**

The requestor is not required to explain the purpose or reason for a public records request. “The motivation of the person seeking the records does not impact the person’s right to see them under the Public Records Act.”<sup>255</sup>

Thus, an agency is not authorized to impose conditions or limit access to public records based on a suspicion that the request may be for an improper purpose.<sup>256</sup> However, Florida Statutes impose criminal penalties for the unauthorized use of personal identification information for fraudulent or harassment purposes and for the criminal use of a public record or public records information.<sup>257</sup>

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252 Inf. Op. to Cook, May 27, 2011

253 AGO 75-175.

254 *Salvadore v. City of Stuart*, No. 91-812 CA (Fla. 19th Cir. Ct. December 17, 1991).

255 *Curry v. State*, 811 So. 2d 736, 742 (Fla. 4th DCA 2002). See also *Timoney v. City of Miami Civilian Investigative Panel*, 917 So. 2d 885, 886n.3 (Fla. 3d DCA 2005).

256 Inf. Op. to Cook, May 27, 2011.

257 See ss. 817.568 and 817.569, F.S.

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Similarly, “the fact that a person seeking access to public records wishes to use them in a commercial enterprise does not alter his or her rights under Florida’s public records law.”<sup>258</sup>

#### **4. Role of the records custodian**

Section 119.011(5), F.S., defines the term “custodian of public records” to mean “the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee.”<sup>259</sup>

The courts have said that the term “custodian” for purposes of the Public Records Act refers to all agency personnel who have it within their power to release or communicate public records. But, “the mere fact that an employee of a public agency temporarily possesses a document does not necessarily mean that the person has custody as defined by section 119.07.”<sup>260</sup> In order to have custody, one must have supervision and control over the document or have legal responsibility for its care, keeping or guardianship.<sup>261</sup>

The custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith.<sup>262</sup> A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed.<sup>263</sup>

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258 *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871, 875 (Fla. 2d DCA 2004).

259 The custodian or a person having custody of public records may designate another officer or employee of the agency to permit the inspection and copying of public records, but must disclose the identity of the designee to the person requesting records. Section 119.07(1)(b), F.S.

260 *Mintus v. City of West Palm Beach*, 711 So. 2d 1359, 1361 (Fla. 4th DCA 1998).

261 *Id.*

262 Section 119.07(1)(c), F.S.

263 *Id.*

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## **5. Requests for copies**

“It is the policy of this state that all state, county, and municipal records are open for personal inspection *and copying* by any person.” (e.s.)<sup>264</sup> In addition, s. 119.07(1)(a), F.S., provides that “[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so . . . .” Finally, s. 119.07(4), F.S., requires the custodian to “furnish a copy or a certified copy of the record upon payment of the fee prescribed by law . . . .”

Similarly, if the requestor identifies a record with sufficient specificity to permit the agency to identify it and forwards the statutory fee, the agency must furnish by mail a copy of the record.<sup>265</sup>

## **6. Status of records maintained by more than one agency**

The fact that a particular record is also maintained by another agency does not relieve the custodian of the obligation to permit inspection and copying of the records in the custodian’s agency, in the absence of an applicable statutory exemption.<sup>266</sup>

## **7. “Overbroad” public records requests**

In *Lorei v. Smith*,<sup>267</sup> the court recognized that the “breadth of such right [to gain access to public records] is virtually unfettered, save for the statutory exemptions . . . .” Accordingly, in the absence of a statutory exemption, a custodian must produce the records requested regardless of the number of records involved or possible inconvenience.

Note, however, s. 119.07(4)(d), F.S., authorizes a custodian to

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<sup>264</sup> Section 119.01(1), F.S.

<sup>265</sup> *Wootton v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991).

<sup>266</sup> AGO 86-69.

<sup>267</sup> 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985).

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charge, in addition to the cost of duplication, a reasonable service charge for the cost of the extensive use of information technology resources or of personnel, if such extensive use is required because of the nature or volume of public records to be inspected or copied.<sup>268</sup>

As one court stated, if a public records request is insufficient to identify the records sought, the city has an affirmative duty to promptly notify the requestor that more information is needed in order to produce the records; it is the responsibility of the city and not the requestor to follow up on any requests for public records.<sup>269</sup>

### **8. Written request or form requirements**

Chapter 119, F.S., does not authorize an agency to require that requests for records be in person or in writing.<sup>270</sup> As noted in AGO 80-57, a custodian must honor a request for copies of records which is sufficient to identify the records desired, whether the request is in writing, over the telephone, or in person, provided that the required fees are paid.

If a public agency believes that it is necessary to provide written documentation of a request for public records, the agency may require that the custodian complete an appropriate form or document; however, the person requesting the records cannot be required to provide such documentation as a precondition to the granting of the request to inspect or copy public records.<sup>271</sup>

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268 See AGO 92-38.

269 *Salvadore v. City of Stuart*, No. 91-812 CA (Fla. 19th Cir. Ct. December 17, 1991).

270 See *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, 305n.1 (Fla. 3d DCA 2001) (“There is no requirement in the Public Records Act that requests for records must be in writing”).

271 See *Sullivan v. City of New Port Richey*, No. 86-1129CA (Fla. 6th Cir. Ct. May 22, 1987), *per curiam affirmed*, 529 So. 2d 1124 (Fla. 2d DCA 1988), noting that a requestor’s failure to complete a city form required for access to documents did not authorize the custodian to refuse to honor the request to inspect or copy public records.

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## **9. Identification of requester**

A person requesting access to or copies of public records may not be required to disclose his or her name, address, telephone number or the like to the custodian, unless the custodian is required by law to obtain this information prior to releasing the records.<sup>272</sup>

Accordingly, a court ruled city may not require an anonymous requester who made a public records request via email to provide an “address or other identifiable source for payment of the associated costs.”<sup>273</sup>

Instead, the “city could have sent an estimate of costs through email the requestor just as it could through regular mail, had the request been made via paper by an anonymous requester.”<sup>274</sup>

## **10. Creation of new records and reformatting records**

The statutory obligation of the custodian of public records is to provide access to, or copies of, public records “at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records” provided that the required fees are paid.<sup>275</sup> However, a custodian is not required to give out *information* from the records of his or her office.<sup>276</sup> For example, the Public Records Act does not require a town to produce an employee, such as the financial officer, to answer questions regarding the financial records of the town.<sup>277</sup>

In other words, Ch. 119, F.S., provides a right of access to inspect and copy an agency’s existing public records; it does not mandate

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272 AGOs 92-38 and 91-76, and Informal Opinion to Cook, May 27, 2011. See also *Bevan v. Wanicka*, 505 So. 2d 1116 (Fla. 2d DCA 1987).

273 *Chandler v. City of Greenacres*, 140 So. 3d 1080, 1085 (Fla. 4th DCA 2014).

274 *Id.*

275 Section 119.07(1)(a) and (4), F.S.

276 AGO 80-57.

277 AGO 92-38.



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that an agency create new records in order to accommodate a request for information from the agency. Thus, the clerk of court is not required to provide an inmate with a list of documents from a case file which may be responsive to some forthcoming request.<sup>278</sup> However, in order to comply with the statutory directive that an agency provide copies of public records upon payment of the statutory fee, an agency must respond to requests by mail for information as to copying costs.<sup>279</sup>

Similarly, an agency is not ordinarily required to reformat its electronic records and provide them in a particular form as demanded by the requestor.<sup>280</sup> For example, the Attorney General's Office concluded that a school district was not required to furnish electronic records in an electronic format other than the standard format routinely maintained by the district.<sup>281</sup>

Despite the general rule, an agency may be required to provide access to electronic records through a specially designed program, prepared by or at the expense of the requestor, where:

- 1) available programs do not access all of the public records stored in the computer's data banks; or
- 2) the information in the computer accessible by the use of available programs would include exempt information necessitating a special program to delete such exempt items; or
- 3) for any reason the form in which the information is

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<sup>278</sup> *Wootton v. Cook*, 590 So. 2d 1039 (Fla. 1st DCA 1991). See also AGO 08-29 (agency not required to create list in response to request for information).

<sup>279</sup> *Wootton v. Cook*, *supra*. See also *Woodard v. State*, 885 So. 2d 444, 445n.1 (Fla. 4th DCA 2004), remanding a case for further proceedings where the custodian forwarded only information relating to the statutory fee schedule rather than the total copying cost of the requested records. Cf. *Gilliam v. State*, 996 So. 2d 956 (Fla. 2d DCA 2008) (clerk, as custodian of judicial records, had a legal duty to respond to Gilliam's request for information regarding costs).

<sup>280</sup> *Seigle v. Barry*, 422 So. 2d 63, 66 (Fla. 4th DCA 1982).

<sup>281</sup> AGO 97-39.

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proffered does not fairly and meaningfully represent the records; or

- 4) the court determines other exceptional circumstances exist warranting this special remedy.<sup>282</sup>

For the purpose of satisfying a public records request, the fee to be charged by an agency if it elects to provide a copy of a public record in a medium that is not routinely used by the agency, or if it elects to compile information that is not routinely developed or maintained by the agency or that requires a substantial amount of manipulation or programming, must be in accordance with s. 119.07(4), F.S. (authorizing imposition of a special service charge if extensive information technology resources or labor are required).<sup>283</sup>

### **11. Remote access**

Section 119.07(2)(a), F.S., states that “[a]n additional means of inspecting or copying public records,” a custodian may provide access to public records by remote electronic means, provided exempt or confidential information is not disclosed. Thus, an agency is authorized, but not required, to permit remote electronic access to public records.

Section 119.07(2)(b), F.S., requires the custodian to provide safeguards to protect the contents of the public records from unauthorized electronic access or alteration and to prevent the disclosure or modification of those portions of the records which are exempt from disclosure.

Unless otherwise required by law, the custodian may charge a fee for remote electronic access, granted under a contractual arrangement with a user, which fee may include the direct and indirect costs of providing such access. However, fees for remote electronic access provided to the general public must be in

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<sup>282</sup> *Seigle v. Barry*, 422 So. 2d at 66-67.

<sup>283</sup> Section 119.01(2)(f), F.S.

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accordance with the provisions of s. 119.07, F.S.<sup>284</sup>

## **12. Records available in more than one medium**

An agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium, and the agency may charge a fee which shall be in accordance with Ch. 119, F.S.<sup>285</sup> Thus, a custodian of public records must, if asked for a copy of a computer software disk used by an agency, provide a copy of the disk in its original format; a typed transcript would not satisfy the requirements of s. 119.07(1), F.S.<sup>286</sup>

Similarly, an agency violated the Public Records Act when it referred the requester to a website instead of providing paper copies of the records.<sup>287</sup>

## **13. Amount of time allowed for response**

The custodian of public records or his or her designee is required to acknowledge requests to inspect or copy records promptly and to respond to such requests in good faith.<sup>288</sup> The Public Records Act, however, does not contain a specific time limit (such as 24 hours or 10 days) for compliance with public records requests. The Florida Supreme Court has stated that the only delay in producing records permitted under Ch. 119, F.S., “is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.”<sup>289</sup>

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284 Section 119.07(2)(c), F.S.

285 Section 119.01(2)(f).

286 AGO 91-61. *See also Miami-Dade County v. Professional Law Enforcement Association*, 997 So. 2d 1289 (Fla. 3d DCA 2009) (fact that pertinent information may exist in more than one format is not a basis for exemption or denial of the request).

287 *Lake Shore Hospital Authority v. Lilker*, 168 So. 3d 332 (Fla. 1st DCA 2015).

288 Section 119.07(1)(c), F.S.

289 *Tribune Company v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984).

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A municipal policy which provides for an automatic delay in the production of public records is impermissible.<sup>290</sup>

Thus, an agency is not authorized to delay inspection of personnel records in order to allow the employee to be present during the inspection of his or her records.<sup>291</sup>

Similarly, the Attorney General's Office has advised that a board of trustees of a police pension fund may not delay release of its records until such time as the request is submitted to the board for a vote.<sup>292</sup>

**a. Delay in response**

An agency's unreasonable and excessive delays in producing public records can constitute an unlawful refusal to provide access to public records.<sup>293</sup>

For example, an appellate court ordered a trial judge to hold a hearing on a public records complaint challenging a state attorney's policy requiring that all public records requests to inspect or copy case files be directed to the state attorney's main office. The appellate court said that the trial judge must determine whether the policy "resulted in an unjustified delay that amounted to an unlawful refusal to comply with chapter 119," when applied to a requestor who asked to see the records at a branch office where the requestor lives and where the records were located.<sup>294</sup>

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290 *Id.* See also *Lake Shore Hospital Authority v. Lilker*, 168 So. 3d 332 (Fla. 1st DCA 2015) (agency not authorized to automatically delay production by imposing a 24-hour notice requirement).

291 *Tribune Company v. Cannella*, 458 So. 2d at 1078.

292 AGO 96-55.

293 See *Rechler v. Town of Manalapan*, No. CL 94-2724 AD (Fla. 15th Cir. Ct. November 21, 1994), *affirmed*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996), *review denied*, 684 So. 2d 1353 (Fla. 1996), finding that the town engaged in a "pattern of delays" by taking months to fully comply with the petitioner's public records requests.

294 *Johnson v. Jarvis*, 74 So. 3d 168 (Fla. 1st DCA 2011). See also *Hewlings v. Orange County*, 87 So. 3d 839 (Fla. 5th DCA 2012).

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**b. Arbitrary time for inspection**

While an agency may restrict the hours during which public records may be inspected to those hours when the agency is open to the public, a custodian is not authorized to establish an arbitrary time period during which records may or may not be inspected.<sup>295</sup> Thus, an agency policy which permits inspection of its public records only from 1:00 p.m. to 4:30 p.m., Monday through Friday, violates the Public Records Act.<sup>296</sup> There may be instances where, due to the nature or volume of the records requested, a delay based upon the physical problems in retrieving the records and protecting them is necessary; however, the adoption of a schedule in which public records may be viewed only during certain hours is impermissible.<sup>297</sup>

**c. Standing requests for production of future records**

The Attorney General's Office has stated that upon receipt of a public records request, the agency must comply by producing all non-exempt documents in the custody of the agency that are responsive to the request, upon payment of the charges authorized in Chapter 119, F.S. However, this mandate applies only to those documents in the custody of the agency at the time of the request; nothing in the Public Records Act appears to require that an agency respond to a so-called "standing" request for production of public records that it may receive or produce in the future.<sup>298</sup>

**14. Confidentiality agreements**

An agency "cannot bargain away its Public Records Act duties

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<sup>295</sup> See *Lake Shore Hospital Authority v. Lilker*, 168 So. 3d 332 (Fla. 1st DCA 2015), in which the court invalidated an agency policy that restricted public records inspection to the hours of 8:30 and 9:30 am, Monday through Friday with 24-hour advance notice.

<sup>296</sup> Inf. Op. to Riotte, May 21, 1990. See also AGO 81-12.

<sup>297</sup> *Id.*

<sup>298</sup> See Inf. Op. to Worch, June 15, 1995.

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with promises of confidentiality in settlement agreements.”<sup>299</sup>

For example, in *National Collegiate Athletic Association v. Associated Press*,<sup>300</sup> the court held that a confidentiality agreement entered into by a private law firm on behalf of a state university with the NCAA that allowed access to records contained on the NCAA’s secure custodial website that were used by the university in preparing a response to possible NCAA sanctions, had no impact on whether such records were public records, stating that “[a] public record cannot be transformed into a private record merely because an agent of the government has promised that it will be kept private.”<sup>301</sup>

Moreover, to allow the maker or sender of records to dictate the circumstances under which the records are to be deemed confidential would permit private parties, as opposed to the Legislature, to determine which public records are subject to disclosure and which are not. Such a result would contravene the purpose and terms of Ch. 119, F.S.<sup>302</sup>

Therefore, unless the Legislature has expressly authorized the maker of records received by an agency to keep the material confidential, the wishes of the sender or the agency in this regard

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299 *The Tribune Company v. Hardee Memorial Hospital*, No. CA-91-370 (Fla. 10th Cir. Ct. August 19, 1991) (confidentiality provision in a settlement agreement which resolved litigation against a public hospital did not remove the document from the Public Records Act).

300 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009).

301 See also *City of Pinellas Park, Florida v. Times Publishing Company*, No. 00-008234CI-19 (Fla. 6th Cir. Ct. January 3, 2001) (“there is absolutely no doubt that promises of confidentiality [given to employees who were asked to respond to a survey] do not empower the Court to depart from the public records law”). Cf. *WPTV-TV v. State*, 61 So. 3d 1191 (Fla. 5th DCA 2011) (trial court may not require media to enter into confidentiality agreement in order to receive advance notice of information relating to jury selection in criminal case).

302 See *Browning v. Walton*, 351 So. 2d 380 (Fla. 4th DCA 1977) (city cannot refuse to allow inspection of records containing the names and addresses of city employees who filled out forms requesting that city maintain the confidentiality of all material in their personnel files).

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cannot supersede the requirements of Ch. 119, F.S.<sup>303</sup>

Similarly, an agency is not authorized to refuse to allow inspection of public records it made or received in connection with the transaction of official business on the grounds that the documents have been furnished to another agency or official other than the records custodian.<sup>304</sup>

“Given the aggressive nature of the public’s right to inspect and duplicate public records, a governmental agency may not avoid a public records request by transferring custody of its records to another agency.”<sup>305</sup> Likewise, public records cannot be withheld from the public by transferring physical custody of the records to the agency’s attorneys.<sup>306</sup>

Similarly, in *Barfield v. Florida Department of Law Enforcement*,<sup>307</sup> the court held that an agency that received records from a private entity in the course of official business and did not make copies of the documents could not “return” them to the entity following receipt of a public records request. The court ordered the agency to demand the return of the records from the private entity so they could be copied for the requestor.<sup>308</sup>

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303 See *Sepro Corporation v. Florida Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003) (private party cannot render public records exempt from disclosure merely by designating as confidential the material it furnishes to a state agency). And see *Hill v. Prudential Insurance Company of America*, 701 So. 2d 1218 (Fla. 1st DCA 1997).

304 See *Tober v. Sanchez*, 417 So. 2d 1053 (Fla. 3d DCA 1982) (officer charged with maintenance of records may not transfer actual physical custody of records to county attorney and thereby avoid compliance with request for inspection under Ch. 119).

305 *Chandler v. City of Sanford*, 121 So. 3d 657, 660 (Fla. 5th DCA 2013).

306 *Wallace v. Guzman*, 687 so. 2d 1351 (Fla. 3d DCA 1997).

307 No. 93-1701 (Fla. 2d Cir. Ct. May 19, 1994).

308 And see *Wisner v. City of Tampa Police Department*, 601 So. 2d 296 (Fla. 2d DCA 1992) (city may not allow private entity to maintain physical custody of public records [polygraph chart used in internal investigation] “to circumvent the public records chapter”).

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## **15. Redaction of confidential or exempt information**

Section 119.07(1)(e), F.S., states that a custodian of a public record who contends that a record or part of a record is exempt from inspection must state the basis for the exemption, including the statutory citation to the exemption. Additionally, upon request, the custodian must state in writing and with particularity the reasons for the conclusion that the record is exempt or confidential.<sup>309</sup>

However, in *City of St. Petersburg v. Romine ex rel. Dillinger*,<sup>310</sup> the court cautioned that the Public Records Act “may not be used in such a way to obtain information that the legislature has declared must be exempt from disclosure.” Thus, a request for agency records may not be phrased or responded to in terms of a request for the specific documents asked for and received by a law enforcement agency during the course of an active criminal investigation.<sup>311</sup>

Where a public record contains some information which is exempt from disclosure, s. 119.07(1)(d), F.S., requires the custodian of the record to redact only that portion or portions of the record for which an exemption is asserted and to provide the remainder of the record for examination.<sup>312</sup>

## **16. Privacy rights**

It is well established in Florida that “neither a custodian of records nor a person who is the subject of a record can claim a

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309 Section 119.07(1)(f), F.S. See *Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000).

310 719 So. 2d 19, 21 (Fla. 2d DCA 1998).

311 AGO 06-04

312 See *Ocala Star Banner Corp. v. McGhee*, 643 So. 2d 1196 (Fla. 5th DCA 1994) (city may redact confidential identifying information from police report but must produce the rest for inspection). See also AGO 99-52 (the fact that an agency believes that it would be impractical or burdensome to redact confidential information from its records does not excuse noncompliance with the mandates of the Public Records Act).



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constitutional right of privacy as a bar to requested inspection of a public record which is in the hands of a government agency.”<sup>313</sup>

## **E. FEES**

### **1. Fees for inspection of public records**

Providing access to public records is a statutory duty imposed by the Legislature upon all record custodians and should not be considered a profit-making or revenue-generating operation.<sup>314</sup>

Thus, public information must be open for inspection without charge unless otherwise expressly provided by law.<sup>315</sup>

Section 119.07(4)(d), F.S., however, authorizes the imposition of a special service charge when the nature or volume of public records to be inspected is such as to require extensive use of information technology resources, or extensive clerical or supervisory assistance, or both. The charge must be reasonable and based on the labor or computer costs actually incurred by the agency. The special service charge applies to requests for both inspection and copies of public records when extensive clerical assistance is required or extensive use of information technology resources is required.<sup>316</sup>

In addition, an agency may adopt a policy imposing a reasonable special service charge based on the actual labor cost for clerical

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313 *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA). *But see Post-Newsweek Stations, Florida Inc. v. Doe*, 612 So. 2d 549 (Fla. 1992) (public’s right of access to pretrial criminal discovery materials must be balanced against a nonparty’s constitutional right to privacy).

314 AGO 85-03.

315 *See State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905). *See also* AGOs 84-03 and 76-34 (only those fees or charges which are authorized by statute may be imposed upon an individual seeking access to public records).

316 *See Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008).

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personnel who are required, due to the nature or volume of a public records request, to safeguard such records from loss or destruction during their inspection.<sup>317</sup> In doing so, however, the county's policy should reflect no more than the actual cost of the personnel's time and be sensitive to accommodating the request in such a way as to ensure unfettered access while safeguarding the records.<sup>318</sup> Moreover, it would be difficult to justify the imposition of a fee for extensive clerical or supervisory assistance if the personnel providing such assistance were simultaneously performing regular duties.<sup>319</sup>

## **2. Fees for copies of public records**

If no fee is prescribed elsewhere in the statutes, s. 119.07(4)(a)1., F.S., authorizes the custodian to charge a fee of up to 15 cents per one-sided copy for copies that are 14 inches by 8 1/2 inches or less. An agency may charge no more than an additional 5 cents for each two-sided duplicated copy.<sup>320</sup>

A charge of up to \$1.00 per copy may be assessed for a certified copy of a public record.<sup>321</sup>

For other copies, the charge is limited to the actual cost of duplication of the record.<sup>322</sup> The phrase "actual cost of duplication" is defined to mean "the cost of the material and supplies used to duplicate the public record, but does not include the labor cost and overhead cost associated with such duplication."<sup>323</sup> An exception, however, exists for copies of county maps or aerial photographs supplied by county constitutional officers which may include a reasonable charge for the labor and overhead associated with their duplication.<sup>324</sup>

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317 AGO 00-11.

318 *Id.*

319 *Id.*

320 Section 119.07(4)(a)2., F.S.

321 Section 119.07(4)(c), F.S.

322 Section 119.07(4)(a)3., F.S.

323 Section 119.011(1), F.S.

324 Section 119.07(4)(b), F.S.

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### **3. Special service charge**

#### **a. Authority to impose reasonable special service charge**

Section 119.07(4)(d), F.S., states that if the nature or volume of public records to be inspected or copied requires the extensive use of information technology resources or extensive clerical or supervisory assistance, or both, the agency may charge a reasonable service charge based on the cost actually incurred by the agency for such extensive use of information technology resources or personnel. When warranted, the special service charge applies to requests for both inspection and copies of public records.<sup>325</sup>

Thus, while an agency may not refuse to allow inspection or copying of public records based upon the number of records requested or the span of time which is covered by the public records request, if extensive use of information technology resources or clerical or supervisory personnel is needed in order to produce the requested records, the agency may impose a reasonable special service charge that reflects the actual costs incurred for the extensive use of such resources or personnel.<sup>326</sup>

Section 119.07(4)(d), F.S., does not contain a definition of the term “extensive.” In 1991, a divided First District Court of Appeal upheld a hearing officer’s order rejecting an inmate challenge to a Department of Corrections rule that defined “extensive” for purposes of the special service charge to mean that it would take more than 15 minutes to locate, review for confidential information, copy and refile the requested material.<sup>327</sup>

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<sup>325</sup> *Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008).

<sup>326</sup> See AGOs 92-38 and 90-07.

<sup>327</sup> *Florida Institutional Legal Services, Inc. v. Florida Department of Corrections*, 579 So. 2d 267 (Fla. 1st DCA 1991). And see *Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008), approving a county’s similar formula for calculating its special service charge. However, these cases do not “require” an agency to assess the special service charge after 15 minutes of labor.

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Moreover, the statute mandates that the special service charge be “reasonable.” For example, in one case a court reviewed a challenge to a service charge that exceeded \$4,000 for staff time involved in responding to a public records request, and said that an “excessive charge could well serve to inhibit the pursuit of rights conferred by the Public Records Act.”<sup>328</sup> Accordingly, the court required the agency to “explain in more detail the reason for the magnitude of the assessment.”<sup>329</sup>

“Information technology resources” is defined as data processing hardware and software and services, communications, supplies, personnel, facility resources, maintenance and training.<sup>330</sup> The term does not include a videotape or a machine to view a videotape.<sup>331</sup> The fact that the request involves the use of information technology resources is not sufficient to incur the imposition of the special service charge; rather, extensive use of such resources is required.<sup>332</sup>

**b. Costs to review and redact statutorily exempt material**

An agency is not ordinarily authorized to charge for the cost to review records for statutorily exempt material.<sup>333</sup> However, the special service charge may be imposed for this work if the volume of records and the number of potential exemptions make review and redaction of the records a time-consuming task.<sup>334</sup>

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For example, the Attorney General’s Office has chosen to not assess the special service charge until the time involved to produce requested public records exceeds 2 hours.

328 *Carden v. Chief of Police*, 696 So. 2d 772, 773 (Fla. 2d DCA 1996).  
329 *Id.*

330 Section 119.011(9), FS.

331 AGO 88-23.

332 AGO 99-41.

333 AGO 84-81.

334 *See Florida Institutional Legal Services v. Florida Department of Corrections*, 579 So. 2d at 269. *And see Herskovitz v. Leon County*, No. 98-22 (Fla. 2d Cir. Ct. June 9, 1998), noting that “it would not be unreasonable in these types of cases [involving many documents and several different exemptions] to charge a reasonable special fee for the

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**c. Calculation of labor costs**

In *Board of County Commissioners of Highlands County v. Colby*,<sup>335</sup> the court concluded that an agency's charge for labor in responding to an extensive public records request could include both the salary and benefits of the personnel providing the service. However, the charge must be reasonable and based on the actual labor costs incurred by the agency.<sup>336</sup> Similarly, a court concluded that the agency could charge only a clerical rate for the time spent making copies, even if due to staff shortages, a more highly paid person did the work.<sup>337</sup>

The term "supervisory assistance" has not been widely interpreted. In one case, the circuit judge approved a rate based on an agency attorney's salary when the attorney was required to review exempt material in a voluminous criminal case file. The court noted that "only an attorney or paralegal" could responsibly perform this type of review because of the "complexity of the records reviewed, the various public record exemptions and possible prohibitions, and the necessary discretionary decisions to be made with respect to potential exemptions . . . ." <sup>338</sup>

**d. Authority to require deposit**

Section 119.07(4)(a)1., F.S., states that the custodian of public records shall furnish a copy or a certified copy of the record "upon payment of the fee prescribed by law . . . ." <sup>339</sup>

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supervisory personnel necessary to properly review the materials for possible application of exemptions."

335 976 So. 2d 31 (Fla. 2d DCA 2008).

336 *Id.* Also, an agency is not required to add employee benefits to the charge; for example, as a matter of policy, the Attorney General's Office does not include employee benefits in the calculation of the special service charge.

337 *State v. Gudinas*, No. CR 94-7132 (Fla. 9th Cir. Ct. June 1, 1999).

338 *Id.*

339 *See Wootton v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991), stating that if a requestor "identifies a record with sufficient specificity to permit [the agency] to identify it and forwards the appropriate fee, [the agency] must furnish by mail a copy of the record." (e.s.)

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Accordingly, an agency's policy of requiring the payment of a deposit prior to redaction and delivery of hundreds of telephone recordings related to a criminal trial was determined to be "facially reasonable."<sup>340</sup>

Similarly, another court noted that a "policy of requiring an advance deposit seems prudent given the legislature's determination that taxpayers should not shoulder the entire expense of responding to an extensive request for public records."<sup>341</sup>

An agency may refuse to produce additional records if the fees for a previous request for records have not been paid by the requestor. As stated by the court in *Lozman v. City of Riviera Beach*,<sup>342</sup> s. 119.07[4], F.S., "does not require the City to do any more than what it did in this case," i.e., require Lozman to pay the bill for the first group of records he requested before the city would make any further documents available.

#### **4. Requests for information regarding costs to obtain public records**

In order to comply with the statutory directive that an agency provide copies of public records upon payment of the statutory fee, an agency must respond to requests for information as to copying costs.<sup>343</sup>

Similarly, a court said that if an agency is asked for a large number of records, the fee should be communicated to the

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340 *Morris Publishing Group, LLC v. State*, 154 So. 3d 528, 534 (Fla. 1st DCA 2015). "The reasonableness of a policy and its application – based on the facts in a particular case – guides whether an abuse of discretion is shown." 154 So. 3d at 534.

341 *Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008).

342 995 So. 2d 1027 (Fla. 4th DCA 2008).

343 *Wootton v. Cook*, *supra*. See also *Woodard v. State*, 885 So. 2d 444 (Fla. 4th DCA 2004), remanding a case for further proceedings where the custodian forwarded only information relating to the statutory fee schedule rather than the total cost to copy the requested records.

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requestor before the work is undertaken.<sup>344</sup> “If the agency gives the requesting party an estimate of the total charge, or the hourly rate to be applied, the party can then determine whether it appears reasonable under the circumstances.”<sup>345</sup>

## **5. Indigent requesters**

Chapter 119, F.S., does not contain a provision that prohibits agencies from charging indigent persons or inmates the applicable statutory fee to obtain copies of public records.<sup>346</sup>

An agency, however, is not precluded from choosing to provide informational copies of public records without charge.<sup>347</sup>

## **6. Development, travel or overhead costs**

An agency should not consider the furnishing of public records to be a “revenue-generating operation.”<sup>348</sup>

The Public Records Act does not authorize the addition of overhead costs such as utilities or other office expenses to the

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344 *Herskovitz v. Leon County*, No. 98-22 (Fla. 2d Cir. Ct. June 9, 1998).

345 *Id.*

346 *See Roesch v. State*, 633 So. 2d 1, 3 (Fla. 1993) (indigent inmate not entitled to receive copies of public records free of charge nor to have original state attorney files mailed to him in prison; prisoners are “in the same position as anyone else seeking public records who cannot pay” the required costs). *And see State, Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377, 1382n.7 (Fla. 1st DCA 1994) (indigent person “is not relieved by his indigency” from paying statutory costs to obtain public records); *and City of Miami Beach v. Public Employees Relations Commission*, 937 So. 2d 226 (Fla. 3d DCA 2006)(labor union must pay charges stipulated in Ch. 119, F.S.).

347 AGO 90-81.

348 AGO 85-03. *See also* AGO 89-93 (city not authorized to sell copies of its growth management book for \$35.00 each when the actual cost to reproduce the book is \$15.10 per copy; city is limited to charging only the costs authorized by Ch. 119, F.S.).

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charge for public records.<sup>349</sup> Similarly, an agency may not charge for travel time to obtain public records stored off-premises.<sup>350</sup> For example, if municipal pension records are stored in a records storage facility outside city limits, the city may not pass along to the public records requestor the costs to retrieve the records.<sup>351</sup>

Nor may an agency assess fees designed to recoup the original cost of developing or producing the records.<sup>352</sup>

Therefore, unless a specific request for copies requires extensive clerical or supervisory assistance or extensive use of information technology resources so as to trigger the special service charge authorized by s. 119.07(4)(d), F.S., an agency may charge only the actual cost of duplication for copies of computerized public records.<sup>353</sup> The imposition of the service charge, however, is dependent upon the nature or volume of records requested, not on the cost to either develop or maintain the records or the database system.<sup>354</sup>

## **7. Agency records held by private companies**

Although an agency may contract with private companies to provide information also obtainable through the agency, it may not abdicate its duty to produce such records for inspection and copying by requiring those seeking public records to do so only through its designee and then paying whatever fee that company may establish for its services.<sup>355</sup> The agency is the custodian of its public records and, upon request, must produce such records

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349 AGO 99-41.

350 AGO 90-07.

351 Inf. Op. to Sugarman, September 5, 1997. Cf. *Cone & Graham, Inc. v. State*, No. 97-4047 (Fla. 2d Cir. Ct. October 7, 1997) (an agency's decision to "archive" older e-mail messages on tapes so that they could not be retrieved or printed without a systems programmer was analogous to an agency's decision to store records off-premises in that the agency rather than the requestor must bear the costs for retrieving the records).

352 AGO 88-23.

353 AGO 99-41.

354 *Id.*

355 AGO 02-37.



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for inspection and copy such records at the statutorily prescribed fee.<sup>356</sup>

## **8. Sales tax**

The sales tax imposed pursuant to s. 212.05, F.S., is not applicable to the fee charged for providing copies of records under s. 119.07, F.S.<sup>357</sup>

## **9. Confidential records**

Unless another fee to obtain a particular record is prescribed by law, an agency may not charge fees that exceed those in Ch. 119, FS, when providing copies of confidential records to persons who are authorized to obtain them.<sup>358</sup>

## **10. Department of Highway Safety and Motor Vehicles crash reports**

In the absence of statutory provision, the charges authorized in s. 119.07(4), F.S., govern the fees to obtain copies of crash reports from law enforcement agencies. However, there are specific statutes which apply to fees to obtain copies of reports from the *Department of Highway Safety and Motor Vehicles*.<sup>359</sup>

## **F. REMEDIES AND PENALTIES**

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356 *Id.* Accord AGO 13-03.

357 AGO 86-83.

358 For example, AGO 03-57 advised that persons who are authorized by statute to obtain otherwise confidential autopsy photographs should be provided copies in accordance with the provisions of the Public Records Act, i.e., s. 119.07(4), F.S. The medical examiner is not authorized to charge a fee that exceeds those charges. *Id.*

359 Section 321.23(2)(a), F.S., provides that the fee to obtain a copy of a crash report from the department is \$10.00 per copy. A copy of a homicide report is \$25 per copy. Section 321.23(2)(b), F.S. Separate charges are provided for photographs. Section 321.23(2)(c), F.S.

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## **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](http://www.myfloridalegal.com).

## **2. Civil action**

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, FS. Before filing a lawsuit, the petitioner must have furnished a public records request to the agency.<sup>360</sup>

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.

Section 119.12, F.S., provides that if a civil action is filed against an agency to enforce the provisions of this chapter and the court determines that the agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award against the agency responsible the reasonable costs of enforcement including reasonable attorney's fees. A successful pro se litigant is entitled to reasonable costs under this section.<sup>361</sup>

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360 *Villarreal v. State*, 687 So. 2d 256 (Fla. 1st DCA 1996)(improper to order agency to produce records before it has had an opportunity to comply).

361 *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) (prevailing pro se inmate entitled to recover costs associated with postage, envelopes and copying, as well as filing and service of process fees, incurred in public records lawsuit); *Althouse v. Palm Beach County*

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“[A]ttorney’s fees are awardable for unlawful refusal to provide public records under two circumstances: first, when a court determines that the reason proffered as a basis to deny a public records request is improper, and second, when the agency unjustifiably fails to respond to a public records request by delaying until after the enforcement action has been commenced.”<sup>362</sup>

### **3. Criminal 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.

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.<sup>363</sup>

## **G. MAINTENANCE, STORAGE AND RETENTION OF PUBLIC RECORDS**

### **1. Maintenance and storage of records**

All public records should be kept in the buildings in which they are ordinarily used.<sup>364</sup> Moreover, insofar as practicable, a custodian of public records of vital, permanent, or archival

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*Sheriff’s Office*, 92 So. 3d 899 (Fla. 4th DCA 2012).

<sup>362</sup> *Office of the State Attorney v. Gonzalez*, 953 So. 2d 759.764 (Fla. 2nd DCA 2007). And see *Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund*, 113 So. 3d 1010 (Fla. 1st DCA 2013), *approved*, Case No. 13-1315 (Fla. April 14, 2016).

<sup>363</sup> *Cf.* s. 838.022(1)(b), F.S. (unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause harm to another, to conceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act).

<sup>364</sup> Section 119.021(1)(a), F.S.

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records shall keep them in fireproof and waterproof safes, vaults, or rooms fitted with noncombustible materials and in such arrangement as to be easily accessible for convenient use.<sup>365</sup>

Records that are in need of repair, restoration, or rebinding may be authorized by the head of the governmental entity to be removed from the building or office in which such records are ordinarily kept for the length of time required to repair, restore, or rebind them.<sup>366</sup>

Thus, as a general rule, public records may not routinely be removed from the building or office in which such records are ordinarily kept except for official purposes.<sup>367</sup> The retention of such records in the home of a public official would appear to circumvent the public access requirements of the Public Records Act and compromise the rights of the public to inspect and copy such records.<sup>368</sup>

## **2. Delivery of records to successor**

Section 119.021(4)(a), F.S., provides that whoever has custody of public records shall deliver such records to his or her successor at the expiration of his or her term of office or, if there is no successor, to the records and information management program of the Division of Library and Information Services of the Department of State.<sup>369</sup>

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365 Section 119.021(1)(b), F.S.

366 Section 119.021(1)(c), F.S.

367 AGO 93-16.

368 *Id.* And see AGO 04-43 (mail addressed to city officials at City Hall and received at City Hall should not be forwarded unopened to the private residences of the officials, but rather the original or a copy of the mail that constitutes a public record should be maintained at city offices); and AGO 07-14 (“Although the Public Records Law does not prescribe a location at which public records must be maintained, it does suggest that such records be kept where they are ordinarily used”).

369 See *Maxwell v. Pine Gas Corporation*, 195 So. 2d 602 (Fla. 4th DCA 1967) (state, county, and municipal records are not the personal property of a public officer); and AGO 98-59 (records in the files of the former city attorney which were made or received in carrying out her

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### **3. Retention and disposal of records**

#### **a. Retention schedules for public records**

Section 119.021(2)(a), F.S. requires the Division of Library and Information Services (division) of the Department of State to adopt rules establishing retention schedules and a disposal process for public records. Each agency must comply with these rules.<sup>370</sup>

Section 257.36(6), F.S., states that a “public record may be destroyed or otherwise disposed of only in accordance with retention schedules established by the division.” Thus, for example, a municipality may not remove and destroy disciplinary notices, with or without the employee’s consent, during the course of resolving collective bargaining grievances, except in accordance with the statutory restrictions on disposal of records.<sup>371</sup>

#### **b. Exempt records**

The statutory restrictions on destruction of public records apply even if the record is exempt from disclosure. For example, in AGO 81-12, the Attorney General’s Office concluded that the City of Hollywood could not destroy or dispose of licensure, certification, or employment examination question and answer sheets except as authorized by statute. An exemption only removes the records from public access requirements, it does not exempt the records from the other provisions of Ch. 119, F.S., such as those requiring that public records be kept in a safe place or those regulating the

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duties as city attorney and which communicate, perpetuate, or formalize knowledge constitute public records and are required to be turned over to her successor).

<sup>370</sup> Section 119.021(2)(b), F.S. *See generally* Chs. 1B-24 and 1B-26, Florida Administrative Code.

<sup>371</sup> AGO 94-75. *See also* AGOs 09-19 (city must follow public records retention schedules established by law for information on its Facebook page which constitutes a public record); 96-34 (e-mail messages are subject to statutory limitations on destruction of public records).

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destruction of public records.<sup>372</sup>

Moreover, if an assertion is made by the custodian that a requested record is not a public record subject to public inspection or copying, the requested record may not be disposed of for a period of 30 days after the date on which a written request to inspect or copy the record was made to the custodian; if a civil action is instituted within the 30-day period to enforce the provisions of this section with respect to the requested record, the custodian may not dispose of the record except by order of a court of competent jurisdiction after notice to all affected parties.<sup>373</sup>

**c. Evidence obtained by law enforcement agencies**

Documentary evidence obtained by a police department is a public record subject to retention schedules approved by the division.<sup>374</sup>

However, “the disposition of evidence not constituting a public record within the meaning of Chapter 119, Florida Statutes, would appear to be dependent upon an agency’s determination that it is no longer needed.”<sup>375</sup>

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372 AGO 93-86. See s. 119.021, FS.

373 Section 119.07(1)(h), FS.

374 AGO 04-51. *Accord* Inf. Op. to Blair, August 24, 2011 (evidence that constitutes a public record may be destroyed only in accordance with retention schedules established by the division and noting that the division has adopted a General Records Schedule GS2 for law enforcement agencies).

375 Inf. Op. to Blair, August 24, 2011.

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## ADDITIONAL RESOURCES

### 1. Florida Statutes

To access the Florida Statutes, visit

[www.leg.state.fl.us](http://www.leg.state.fl.us)

### 2. Records Retention

The Department of State, Bureau of Archives and Records Management maintains records retention schedules. To access the records retention schedules, visit:

[www.dos.myflorida.com/library-archives/records-management](http://www.dos.myflorida.com/library-archives/records-management)

Telephone number for questions about records retention and disposition:

**850-245-6639**

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