I. GOVERNMENT IN THE SUNSHINE LAW

A. WHAT IS THE SCOPE OF THE SUNSHINE LAW?

Florida's Government in the Sunshine Law, commonly referred to as the Sunshine Law, provides a right of access to governmental proceedings of public boards or commissions at both the state and local levels. The law is equally applicable to elected and appointed boards and has been applied to any gathering of two or more members of the same board to discuss some matter which will foreseeably come before that board for action. There are three basic requirements of s. 286.011, F.S.:

1. meetings of public boards or commissions must be open to the public;
2. reasonable notice of such meetings must be given; and
3. minutes of the meetings must be taken and promptly recorded.

A right of access to meetings of collegial public bodies is also recognized in the Florida Constitution. Article I, s. 24, Fla. Const. was approved by the voters in the November 1992 general election and became effective July 1, 1993. Virtually all collegial public bodies are covered by the open meetings mandate of the open government constitutional amendment with the exception of the judiciary and the state Legislature which has its own constitutional provision requiring access. The only exceptions are those established by law or by the Constitution.

B. WHAT AGENCIES ARE COVERED BY THE SUNSHINE LAW?

1. Are all public agencies subject to the Sunshine Law?

The Government in the Sunshine Law applies to "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision." The statute thus applies to public collegial bodies within this state, at the local as well as state level. City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971). It is equally applicable to elected and appointed boards or commissions. AGO 73-223.

The judiciary and the Legislature are not subject to the Sunshine Law. See Locke v. Hawkes, 595 So. 2d 32 (Fla. 1992).
Federal agencies, i.e., agencies created under federal law, operating within the state do not come within the purview of the state Sunshine Law. AGO 71-191. Cf. Inf. Op. to Markham, September 10, 1996 (technical oversight committee established by state agencies as part of settlement agreement in federal lawsuit subject to Sunshine Law).

2. Are advisory boards which make recommendations or committees established for fact-finding only subject to the Sunshine Law?

a. Publicly created advisory boards which make recommendations

Advisory boards created pursuant to law or ordinance or otherwise established by public agencies may be subject to the Sunshine Law, even though their recommendations are not binding upon the agencies that create them. Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974).

The Sunshine Law can apply to committees created by a single individual as well as those created by a board subject to the Sunshine Law. See Wood v. Marston, 442 So. 2d 934 (Fla. 1983) (Sunshine Law applies to a university's search and screening committee created by the president of a state university); Silver Express Company v. District Board of Lower Tribunal Trustees, 691 So. 2d 1099, 1100 (Fla. 3d DCA 1997) (committee created by college purchasing director to “weed through” vendor proposals “to determine which were acceptable and to rank them accordingly” must comply with the Sunshine Law).

b. Fact-finding committees

A limited exception to the applicability of the Sunshine Law to advisory committees has been recognized for advisory committees established for fact-finding only. “[A] committee is not subject to the Sunshine Law if the committee has only been delegated information-gathering or fact-finding authority and only conducts such activities.” Sarasota Citizens for Responsible Government v. City of Sarasota, 48 So. 3d 755, 762 (Fla. 2010). And see Cape Publications, Inc. v. City of Palm Bay, 473 So. 2d 222 (Fla. 5th DCA 1985).

However, when a committee has been delegated a decision-making function (i.e., sorting through options and making recommendations to the governmental body), in addition to fact-finding, the Sunshine Law applies. Inf. Op. to Randolph, June 10, 2010. See also Inf. Op. to Wallace, January 7, 2019 (the fact that a committee is composed of volunteers and appointed by a single elected official as opposed to a board does not, standing alone, control the application of the Sunshine Law; instead the important consideration is whether the committee would merely have an information-gathering or fact-finding role or whether it would have the authority to go further and make recommendations as part of a greater decision-making process).
Moreover, the ‘fact-finding exception’ does not apply to boards, like school boards, that have the “ultimate decision-making authority”; thus the school board could not take a fact-finding tour without compliance with the Sunshine Law. Finch v. Seminole County School Board, 995 So. 2d 1068 (Fla. 5th DCA 2008). See Citizens for Sunshine, Inc. v. School Board of Martin County, 125 So. 3d 184 (Fla. 4th DCA 2013) (three members of school board violated Sunshine Law when they visited an adult education center without providing reasonable notice).

## 3. Are private organizations providing services to public agencies subject to the Sunshine Law?

“Generally, . . . the Government in the Sunshine Law does not apply to private organizations providing services to a state or local government, unless the private entity has been created by a public entity, there has been a delegation of the public entity’s governmental functions, or the private organization plays an integral part in the decision-making process of the public entity.” AGO 07-27. Thus, the Sunshine Law would not ordinarily apply to meetings of a homeowners' association. Inf. Op. to Fasano, June 7, 1996. Compare AGO 07-44 (property owners association subject to open government laws when it is acting on behalf of a municipal services taxing unit).

A private corporation which performs services for a public agency and receives compensation for such services pursuant to a contract or otherwise, is not by virtue of this relationship alone necessarily subject to the Sunshine Law unless the public agency's governmental or legislative functions have been delegated to it. McCoy Restaurants, Inc. v. City of Orlando, 392 So. 2d 252 (Fla. 1980) (airlines are not by virtue of their lease with the aviation authority public representatives subject to the Sunshine Law).

However, although private organizations are generally not subject to the Sunshine Law, open meetings requirements can apply if the public entity has delegated "the performance of its public purpose" to the private entity. Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation, 729 So. 2d 373, 383 (Fla. 1999). Accord Holifield v. Big Bend Cares, Inc., 326 So. 3d 739 (Fla. 1st DCA 2021). Thus, a not-for-profit corporation that contracted with a city to carry out affordable housing responsibilities and also reviewed and screened applicant files was determined to be an agency for purposes of the Sunshine Law. AGO 08-66.

Similarly, the Sunshine Law applies to a private economic development council when there has been a delegation of the county commission’s authority to conduct public business such as carrying out the terms of the county’s strategic economic development plan. AGO 10-30. See also AGO11-01 (Biscayne Park Foundation, a charitable foundation created by the Village of Biscayne Park to serve as 'the Village’s fundraising arm,' subject to the Sunshine Law. Compare Inf. Op. to Gaetz and Coley, December 17, 2009, concluding that the open government laws did not apply to Florida’s Great Northwest, Inc., a private not-for-profit corporation, since no delegation
of a public agency’s governmental function was apparent and the corporation did not appear to play an integral part in the decision-making process of a public agency.

4. **Does the Sunshine Law apply to staff?**

Meetings of staff of boards or commissions covered by the Sunshine Law are not ordinarily subject to s. 286.011, F.S. *Occidental Chemical Company v. Mayo*, 351 So. 2d 336 (Fla. 1977), *disapproved in part on other grounds, Citizens v. Beard*, 613 So. 2d 403 (Fla. 1992). Thus, a state agency did not violate the Sunshine Law when agency employees investigated a licensee’s alleged failure to follow state law, and an assistant director made the decision to file a complaint. *Baker v. Florida Department of Agriculture and Consumer Services*, 937 So. 2d 1161 (Fla. 4th DCA 2006).

Similarly, in *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 766 (Fla. 2010), the Supreme Court ruled that a deputy county administrator delegated authority to negotiate with a baseball team considering a move to the area for spring training, did not violate the Sunshine Law when he consulted with county staff because the administrator’s “so-called negotiations team only served an informational role.” *And see Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000), in which the court concluded that the Sunshine Law did not apply to informal meetings of staff where the meetings were "merely informational;" where none of the individuals attending the meetings had any decision-making authority during the meetings; and where no formal action was taken or could have been taken at the meetings; *Knox v. District School Board of Brevard*, 821 So. 2d 311, 315 (Fla. 5th DCA 2002) (“A sunshine violation does not occur when a governmental executive uses staff for a fact-finding and advisory function in fulfilling his or her duties”); and *Florida Environmental Specialists, Inc v. Florida Department of Environmental Protection*, 342 So. 3d 710 (Fla. 1st DCA 2022 (“meetings among agency staff to assess and make recommendations regarding contract management do not implicate” open meetings requirements where “there was no delegation of policy-making authority to any group of staff members at the department and the decision to terminate the contract was made by the agency official tasked with doing so”).

However, when a staff member ceases to function in a staff capacity and is appointed to a committee which is given “a policy-based decision-making function,” the staff member loses his or her identity as staff while working on the committee and the Sunshine Law applies to the committee. It is the nature of the act performed, not the makeup of the committee or the proximity of the act to the final decision, which determines whether a committee composed of staff is subject to the Sunshine Law. *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983).

For example, in *Wood v. Marston, supra*, the Court concluded that a committee composed of staff which was created for the purpose of screening applications and making recommendations for the position of a law school dean was subject to s. 286.011, F.S., since the committee members performed a decision-making function outside of their normal staff activities. By screening applicants and deciding which
applicants to reject from further consideration, the committee performed a policy-based, decision-making function delegated to it by the president of the university.

Similarly, in *Silver Express Company v. Miami-Dade Community College*, 691 So. 2d 1099 (Fla. 3d DCA 1997), the district court determined that a committee (composed of staff and one outside person) that was created by a college purchasing director to assist and advise her in evaluating contract proposals was subject to the Sunshine Law. According to the court, the committee's job was to weed through the various proposals, to determine which were acceptable and to rank them accordingly. More recently, the court relied on *Silver Express* in finding that textbook committees appointed by the superintendent pursuant to school board policy were subject to the Sunshine Law because they evaluated and ranked textbooks for approval by the school board. *Florida Citizens Alliance, Inc. v. Collier County School Board*, 328 So. 3d 22 (Fla. 2d DCA 2021). *And see AGO 05-06* (city development review committee composed of several city officials and representatives of various city departments to review and approve development applications, is subject to the Sunshine Law); and *AGO 07-54*, concluding that while post-termination hearings held before the city manager are not subject to the Sunshine Law, hearings held before a three-member panel appointed by the city manager pursuant to the city personnel policy should be held in the Sunshine.

An important factor can be whether the staff committee deliberates with the person who makes the final decision. For example, the Fourth District held that deliberations of a pre-termination panel composed of the department head, personnel director and equal opportunity director should have been held in the Sunshine. *Dascott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004). *Compare Jordan v. Jenne*, 938 So. 2d 526, 530 (Fla. 4th DCA 2006) (“Because the [group] provided only a recommendation to the inspector general and did not deliberate with the inspector general, the ultimate authority on termination, we conclude that the [group] does not exercise decision-making authority so as to constitute a ‘board’ or commission within the meaning of section 286.011, and as a result, its meetings are not subject to the Sunshine Act”); and *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 763 (Fla. 2010) (county administrator’s consultations with staff did not violate the Sunshine Law because the individuals served “an informational role;” “[t]his is not a situation where the [administrator] and the individuals he consulted made joint decisions”).

5. **Does the Sunshine Law apply to members of public boards who also serve as administrative officers or employees?**

Occasionally, members of public boards also serve as administrative officers or employees. The Sunshine Law is not applicable to discussions of those individuals when serving as administrative officers or employees, provided such discussions do not relate to matters which will come before the public board on which they serve. Thus, a board member who also serves as an employee of an agency may meet with another board member on issues relating to his or her duties as an employee provided such
discussions do not relate to matters that will come before the board for action. See AGOs 93-41 and 11-04. Cf. s. 286.01141, F.S., providing an exemption for portions of meetings of local advisory criminal justice commissions.

C. WHAT IS A MEETING SUBJECT TO THE SUNSHINE LAW?

1. Number of board members required to be present

The Sunshine Law extends to the discussions and deliberations as well as the formal action taken by a public board or commission. There is no requirement that a quorum be present for a meeting of members of a public board or commission to be subject to s. 286.011, F.S. Instead, the law is applicable to any gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which foreseeable action will be taken by the public board or commission. *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973).

Thus, two members of a civil service board violated the Sunshine Law when they held a private discussion of a pending employment appeal during a recess of the board meeting. *Citizens for Sunshine, Inc. v. City of Sarasota*, No. 2010CA4387NC (Fla. 12th Cir. Ct. February 27, 2012). Compare AGO 04-58 (“coincidental unscheduled meeting of two or more county commissioners to discuss emergency issues with staff” during a declared state of emergency not subject to s. 286.011 if the issues do not require action by the county commission).

2. Circumstances in which the Sunshine Law may apply to a single individual or where two board members are not physically present

The Sunshine Law applies to public boards and commissions, *i.e.*, collegial bodies. As discussed *supra*, s. 286.011, F.S., applies to meetings of "two or more members" of the same board or commission when discussing some matter which will foreseeably come before the board or commission.

Therefore, s. 286.011, F.S., would not ordinarily apply to an individual member of a public board or commission or to public officials who are not board or commission members. *See Deerfield Beach Publishing, Inc. v. Robb*, 530 So. 2d 510 (Fla. 4th DCA 1988) (requisite to application of the sunshine law is a meeting between two or more public officials); *City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989); *Mitchell v. School Board of Leon County*, 335 So. 2d 354 (Fla. 1st DCA 1976); and *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755 (Fla. 2010) (private one-on-one informational briefings between individual county commissioners and staff did not violate the Sunshine Law).

In some situations, however, the courts have determined that the presence of two individuals of the same board is not always necessary to trigger the application of the Sunshine Law. As stated by the Supreme Court, the Sunshine Law is to be
construed "so as to frustrate all evasive devices." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974).

a. **Written communications between board members**

A city commissioner may, outside a public meeting, send documents that the commissioner wishes other members of the commission to consider on matters coming before the commission for official action, provided that there is no response from, or interaction related to such documents among, the commissioners prior to the public meeting. AGO 07-35. In such cases, the records, which are subject to disclosure under the Public Records Act, are not being used as a substitute for action at a public meeting as there is no interaction among the commissioners prior to the meeting. AGO 89-23.

If, however, a report is circulated among board members for comments with such comments being provided to other members, there is interaction among the board members which is subject to s. 286.011, F.S. AGO 90-3. Accordingly, while a school board member may prepare and circulate an informational memorandum or position paper to other board members, the use of a memorandum to solicit comment from other board members or the circulation of responsive memoranda by other board members would violate the Sunshine Law. AGO 96-35.

Similarly, a procedure whereby a board takes official action by circulating a memorandum for each board member to sign whether the board member approves or disapproves of a particular issue, violates the Sunshine Law. Inf. Op. to Blair, May 29, 1973. *And see Leach-Wells v. City of Bradenton*, 734 So. 2d 1168, 1171 (Fla. 2d DCA 1999) (selection committee created by city council to evaluate proposals violated the Sunshine Law when the city clerk unilaterally ranked the proposals based on the committee members’ individual written evaluations; the court held that “the short-listing was formal action that was required to be taken at a public meeting”). *Compare Carlson v. Florida Department of Revenue*, 277 So. 3d 1261 (Fla. 1st DCA 2017) (agency evaluation team members who individually reviewed competing proposals and did not rank competitors or exclude any from consideration by the ultimate decider, were not required to hold public meetings).

b. **Meetings conducted over the telephone or using electronic media technology**

(1) **Discussions conducted via telephone, email, text messaging or other electronic means are not exempted from the Sunshine Law.**

As stated previously, the Sunshine Law applies to discussions between two or more members of a board or commission on some matter which foreseeably will come before that board or commission for action. The use of a telephone to conduct such discussions does not remove the conversation from the requirements of s. 286.011, F.S. *See Gilliams v. State*, 48 F.L.W. D739 (Fla. 4th DCA April 12, 2023), noting that
meetings which do not occur in person can potentially violate the Sunshine Law, and to interpret the statute as applying only to in-person meetings would lead to an absurd result); and *State v. Childers*, No. 02-21939-MMC; 02-21940-MMB (Escambia Co. Ct. June 5, 2003), *per curiam affirmed*, 886 So. 2d 229 (Fla. 1st DCA 2004) (telephone conversation during which two county commissioners and the supervisor of elections discussed redistricting violated the Sunshine Law).

Similarly, board members may not use computers to conduct private discussions among themselves about board business. AGO 89-39. Thus, while a city commissioner is not prohibited from posting comments on the city’s Facebook page, commissioners “must not engage in an exchange or discussion of matters that foreseeably will come before the board or commission for official action.” AGO 09-19. *Cf.* AGO 01-20 (a one-way e-mail communication from one city council member to another, when it does not result in the exchange of council members’ comments or responses on subjects requiring council action, does not constitute a meeting subject to the Sunshine Law; however, the emails are public records).

**2 Authority of boards to conduct public meetings via electronic media technology (e.g. telephone or video conferencing).**

A related issue is whether a board is authorized to conduct public meetings via electronic media technology (e.g., telephone or video conferencing). The answer to this question depends upon whether the board is a state or local government agency. *And see* Inf. Op. to Stebbins, December 1, 2015, noting that board member use of electronic media technology to participate in a public meeting does not necessarily raise Sunshine Law issues, “but rather implicates the ability of a board or commission to conduct public business with a quorum.”

In AGO 98-28, the Attorney General's Office concluded that s. 120.54(5)(b)2., F.S., authorizes state agencies to conduct public meetings via electronic means provided that the board complies with uniform rules of procedure adopted by the state Administration Commission. These rules contain notice requirements and procedures for providing points of access for the public. *See* Rule 28-109, Florida Administrative Code.

As to local boards, the Attorney General's Office advised that the authorization in s. 120.54(5)(b)2., F.S., to conduct public meetings entirely by communications media technology applies only to state agencies. AGO 98-28. Thus, unless the in-person requirement to constitute a quorum has been waived by law or lawfully suspended during a state of emergency, a quorum of the board must be physically present. AGO 20-03. *And see* AGO 09-56 (“[W]here a quorum is necessary for action to be taken, physical presence of the members making up the quorum is required in the absence of a statute requiring otherwise.”). Accordingly, a city may not adopt an ordinance allowing members of a city board to appear by electronic means to constitute a quorum. AGO 10-34. *See also* Inf. Op. to Myrick, January 28, 2021, noting that the statutory
requirement of an in-person quorum at a physical meeting location that applies to the school board in conducting its business also applies to a school board advisory committee in carrying out its delegated duties. See now s. 1001.43(10), F.S., effective July 1, 2021, providing that members of school district “special committee and advisory committees may attend meetings in person or through the use of telecommunications networks such as telephonic and videoconferencing.”

However, if a quorum of a local board is physically present at the public meeting site, "the participation of an absent member by telephone conference or other interactive electronic technology is permissible when such absence is due to extraordinary circumstances such as illness[,] . . . whether the absence of a member due to a scheduling conflict constitutes such a circumstance is a determination that must be made in the good judgment of the board." AGO 03-41. See also AGO 02-82, noting that physically disabled members of a city board may participate and vote at public meetings provided that a quorum of the members of the board is physically present at the meeting site.

The physical presence of a quorum has not been required, however, where electronic media technology (such as video conferencing and digital audio) is used to allow public access and participation at *workshop* meetings where no formal action will be taken. Thus, the Attorney General’s Office concluded that local boards may use electronic media technology to conduct informal discussions and workshops over the Internet, provided that proper notice is given, and interactive access by members of the public is provided. AGO 01-66. See also AGO 06-20.

However, the use of an electronic bulletin board to discuss matters over an extended period of days or weeks violates the Sunshine Law by circumventing the notice and access provisions of that law. AGO 02-32. Compare AGO 08 (city advisory boards may conduct workshops lasting no more than two hours using an on-line bulletin board if proper notice is given and interactive access to members of the public is provided and the city ensures that operating-type assistance is available where the computers for the public are located).

c. Delegation of authority to single individual

If a member of a public board is authorized only to explore various contract proposals with the applicant selected for the position of executive director, with such proposals being related back to the governing body for consideration, the discussions between the board member and the applicant are not subject to the Sunshine Law. AGO 93-78. If, however, the board member has been delegated the authority to reject certain options from further consideration by the entire board, the Attorney General’s Office has concluded that the board member is performing a decision-making function that must be conducted in the sunshine. AGOs 95-06 and 93-78. Compare Lee County v. Pierpont, 693 So. 2d 994 (Fla. 2d DCA 1997) (authorization to county attorney to make settlement offers to landowners not to exceed appraised value plus 20%, rather than a specific dollar amount, did not violate the Sunshine Law).
Accordingly, the Attorney General’s Office has advised that while the Sunshine Law would not ordinarily apply to an individual member of a public board or commission or to public officials who are not board or commission members, the Sunshine law does apply when there has been a delegation of a board’s decision-making authority. AGO 10-15.

More recently, the First District Court of Appeal ruled that a statute requiring a “committee” of a national insurance rating organization to comply with the Sunshine Law when meeting to discuss the need to alter Florida rates did not apply to an actuary who performed this function instead of a committee. *National Council on Compensation Insurance v. Fee*, 219 So. 3d 172 (Fla. 1st DCA 2017). In *Fee*, the court noted that the term “committee” has been defined as a “subordinate group,” not a single person and that “the multi-person concept of the term committee further finds support in well-established precedent construing the Sunshine Law.”

Moreover, if the individual, rather than the board, is vested by law, charter, or ordinance with the authority to take action, the discussions are not subject to s. 286.011, F.S. See, *City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989). Cf. AGO 13-14 (where contract terms regarding the police chief’s employment have been discussed and approved at a public city commission meeting, Sunshine Law does not require that the written employment contract directed by the town attorney as directed by the commission be subsequently considered and approved by the commission at another commission meeting).

d. Use of nonmembers as liaisons between board members or to conduct a de facto meeting of board members

The Sunshine Law is applicable to meetings between a board member and an individual who is not a member of the board when that individual is being used as a liaison between, or to conduct a de facto meeting of, board members. For example, in *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979), the court held that a series of scheduled successive meetings between the school superintendent and individual members of the school board were subject to the Sunshine Law. While normally meetings between the school superintendent and an individual school board member would not be subject to s. 286.011, F.S., these meetings were held in "rapid-fire succession" to avoid a public airing of a controversial redistricting problem. They amounted to a de facto meeting of the school board in violation of the Sunshine Law. *And see Transparency Florida, Inc. v. City of Port St. Lucie*, 240 So. 3d 780 (Fla. 4th DCA 2018) (trial court should not have granted city’s motion for summary judgment in Sunshine Law lawsuit arising from a series of telephone calls between the city attorney and individual city councilmembers to discuss termination of and severance pay to, the city manager).

Not all staff decisions, however, are required to be made or approved by the
board. Thus, the district court concluded in *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978), that the decision to appeal made by legal counsel to a public board after discussions between the legal staff and individual members of that board was not subject to the Sunshine Law.

D. WHAT TYPES OF DISCUSSIONS ARE COVERED BY THE SUNSHINE LAW?

1. **Investigative meetings or meetings to consider confidential material**

The Sunshine Law is applicable to investigative inquiries of public boards or commissions. The fact that a meeting concerns alleged violations of laws or regulations does not remove it from the scope of the law. AGO 74-84; *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973). The Florida Supreme Court has stated that in the absence of a statute exempting a meeting in which privileged material is discussed, s. 286.011, F.S., should be construed as containing no exceptions. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971).

Section 119.07(7), F.S., provides that an exemption from s. 119.07, F.S., "does not imply an exemption from s. 286.011. The exemption from s. 286.011 must be expressly provided." Thus, exemptions from the Public Records Act do not by implication allow a public agency to close a meeting in which exempted material is to be discussed in the absence of a specific exemption from the Sunshine Law. See AGO 91-88 (pension board). *And see* AGO 12-20 (county board designated as "appropriate local official" authorized by statute to receive and investigate whistle-blower complaints must comply with the Sunshine Law and must also “protect the confidential information it is considering at a meeting and must not disclose the name of the whistle-blower unless one of the specific circumstances listed in the [whistle-blower law] is present”).

2. **Legal matters**

In the absence of legislative exemption, discussions between a public board and its attorney are subject to s. 286.011, F.S. *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (s. 90.502, F.S., which provides for the confidentiality of attorney-client communications under the Florida Evidence Code, does not create an exemption for attorney-client communications at public meetings). Cf. s. 90.502(6), F.S., stating that a discussion or activity that is *not* a meeting for purposes of the Sunshine Law shall not be construed to waive the attorney-client privilege. (e.s)

There are statutory exemptions, however, which apply to some discussions of pending litigation between a public board and its attorney.

a. **Settlement negotiations or strategy sessions related to litigation expenditures**
Section 286.011(8), F.S., provides:

Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:

(a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.

(b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.

(c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.

(d) The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened and the person chairing the meeting shall announce the termination of the session.

(e) The transcript shall be made part of the public record upon conclusion of the litigation. (e.s.)
(1) **Is section 286.011(8), F.S., to be liberally or strictly construed?**

It has been held that the Legislature intended a strict construction of s. 286.011(8), F.S. *City of Dunnellon v. Aran*, 662 So. 2d 1026 (Fla. 5th DCA 1995); *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99 (Fla. 1st DCA 1996).

(2) **Who may call an attorney-client meeting?**

While s. 286.011(8), F.S., does not specify who calls the closed attorney-client meeting, it requires as one of the conditions that must be met that the governmental entity's attorney "shall advise the entity at a public meeting that he or she desires advice concerning the litigation."

The requirement that the board's attorney advise the board at a public meeting that he or she desires advice concerning litigation is not satisfied by a previously published notice of the closed session. AGO 04-35. Rather, such an announcement must be made at a public meeting of the board. *Id.* Cf. AGO 07-31 (a board attorney's request for a s. 286.011[8], F.S., meeting may be made at a special meeting of the board provided that the special meeting at which the request is made is open to the public, reasonable notice has been given, and minutes are taken).

(3) **Who may attend?**

Only those persons listed in the statutory exemption, *i.e.*, the entity, the entity's attorney, the chief administrative officer of the entity, and the court reporter are authorized to attend a closed attorney-client session. Other staff members or consultants are not allowed to be present. *School Board of Duval County v. Florida Publishing Company*. And see *Zorc v. City of Vero Beach*, 722 So. 2d 891, 898 (Fla. 4th DCA 1998), *review denied*, 735 So. 2d 1284 (Fla. 1999) (rejecting city's argument that charter provision requiring that city clerk attend all council meetings authorized clerk to attend closed attorney-client meeting); AGO 09-52 (attorneys representing superintendent of schools in an administrative action where the school board is a named party not authorized to meet privately with school board); and AGO 01-10 (clerk of court not authorized to attend).

However, because the entity's attorney is permitted to attend the closed session, if the school board hires outside counsel to represent it in pending litigation, both the school board attorney and the litigation attorney may attend a closed session. AGO 98-06. And see *Zorc v. City of Vero Beach* (attendance of Special Counsel authorized). In addition, a qualified interpreter may attend to interpret for hearing impaired board members without violating the Sunshine Law. AGO 08-42.

(4) **Is substantial compliance with the conditions**
established in the statute adequate?

In *City of Dunnellon v. Aran*, supra, the court said that a city council's failure to announce the names of the lawyers participating in a closed attorney-client session violated the Sunshine Law. The court rejected the city's claim that when the mayor announced that attorneys hired by the city would attend the session [but did not give the names of the individuals], his "substantial compliance" was sufficient to satisfy the statute. *Cf. Zorc v. City of Vero Beach*, at 901, noting that deviation from the agenda at an attorney-client session is not authorized; while such deviation is permissible if a public meeting has been properly noticed, "there is no case law affording the same latitude to deviations in closed door meetings."

(5) **What kinds of matters may be discussed at the attorney-client session?**

Section 286.011(8)(b), F.S., states that the subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures. Accordingly, s. 286.011(8), F.S., "simply provides a governmental entity’s attorney an opportunity to receive necessary direction and information from the government entity. No final decisions on litigation matters can be voted on during these private, attorney-client strategy meetings. The decision to settle a case, for a certain amount of money, under certain conditions is a decision which must be voted upon in a public meeting." *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99, 100 (Fla. 1st DCA 1996), *quoting* Staff of Fla.H.R.Comm. on Government Operations, CS/HB 491 (1993) Final Bill Analysis & Economic Impact Statement at 3. If a board goes beyond the "strict parameters of settlement negotiations and strategy sessions related to litigation expenditures" and takes "decisive action," a violation of the Sunshine Law results. *Zorc v. City of Vero Beach*, at 900. *And see AGO 99-37.*

Thus, "[t]he settlement of a case is exactly that type of final decision contemplated by the drafters of section 286.011(8) which must be voted upon in the sunshine." *Zorc v. City of Vero Beach*, at 901. *Accord AGO 08-17* ("any action to approve a settlement or litigation expenditures must be voted on in a public meeting"). *See also Anderson v. City of St. Pete Beach*, 161 So. 3d 548 (Fla. 2d DCA 2014) (city violated the Sunshine Law when it held closed meetings that "covered a wide range of political and policy issues not connected to settlement of the pending litigation or relating to the expenses of litigating the pending cases, which at that point were on appeal").

(6) **When is an agency a "party to pending litigation" for purposes of the exemption?**

In *Brown v. City of Lauderdale*, 654 So. 2d 302, 303 (Fla. 4th DCA 1995), the court said it could "discern no rational basis for concluding that a city is not a 'party' to pending litigation in which it is the real party in interest." *Accord AGO 09-15* (where city is a "real party in interest" of a pending lawsuit, it may conduct a closed attorney-client
session even though it is not a named party to the litigation at the time of the meeting. *And see Zorc v. City of Vero Beach*, at 900 (city was presently a party to ongoing litigation by virtue of its already pending claims in bankruptcy proceedings).

Although the *Brown* decision established that the exemption could be used by a city that was a real party in interest on a claim involved in *pending* litigation, that decision does not mean that an agency may meet in executive session with its attorney where there is only the *threat* of litigation. *See AGO 98-21* (s. 286.011[8] exemption "does not apply when no lawsuit has been filed even though the parties involved believe litigation is inevitable"). *And see AGOs 09-25* (town council that has received a pre-suit notice under the Bert J. Harris Act is not a party to pending litigation and, therefore, may not conduct a closed meeting to discuss settlement negotiations); 06-03 (exemption not applicable to pre-litigation mediation proceedings); 13-17 (exemption may not be used to conduct a closed meeting during a mandatory arbitration proceeding, when there is no pending legal proceeding in a court or before an administrative agency); and Inf. Op. to Barrett, February 17, 2016 (board not entitled to use exemption to discuss pending investigation and subpoena where there is no on-going judicial or administrative proceeding).

Accordingly, discussions between the city attorney and the city commission relating to settlement of a conflict under the Florida Governmental Conflict Resolution Act would not come within the scope of the exemption because “[n]othing in section 286.011(8), Florida Statutes, extends the coverage of the exemption to discussions of mediated disputes or to issues arising through the conflict resolution procedure whether or not litigation has been filed.” AGO 09-14.

(7) **When is litigation "concluded" for purposes of section 286.011(8)(e)?**

Section 286.011(8)(e), F.S., provides that transcripts of closed meetings “shall be made part of the public record upon conclusion of the litigation.” The exemption does not continue for “derivative claims” made in separate, subsequent litigation. AGO 13-13. For example, a transcript of a closed meeting to discuss settlement of a lawsuit became a public record upon the entry of a final judgment in that case even though the same parties were now embroiled in an inverse condemnation lawsuit. *Chmielewski v. City of St. Pete Beach*, 161 So. 3d 521 (Fla. 2d DCA 2014). *But see Everglades Law Center, Inc. v. South Florida Water Management District*, 290 So. 3d 123 (Fla. 4th DCA 2019), noting that the statutory exemptions for mediation communications applied to the transcript of the concluded attorney-client session.

However, litigation that is ongoing but temporarily suspended pursuant to a stipulation for settlement has not been concluded for purposes of s. 286.011(8), and a transcript of meetings held between the city and its attorney to discuss such litigation may be kept confidential until conclusion of the litigation. AGO 94-64. *And see AGO 94-33*; concluding that to give effect to the purpose of s. 286.011(8), a public agency may maintain the confidentiality of a record of a strategy or settlement meeting between a
public agency and its attorney until the suit is dismissed with prejudice or the applicable statute of limitations has run. Additionally, the exemption continues through the appeals segment of the litigation. Inf. Op. to Boutsis, December 13, 2012.

The release by the city council of attorney-client transcripts from meetings held pursuant to s. 286.011(8), F.S., prior to the “conclusion of litigation” would not constitute a violation of that statutory provision but would represent a waiver of the limited exemption afforded to government agencies and their attorneys to discuss pending litigation issues. AGO 13-21.

b. Risk management

Section 768.28(16)(c), F.S., states that portions of meetings and proceedings relating solely to the evaluation of claims or to offers of compromise of claims filed with a risk management program of the state, its agencies, and subdivisions, are exempt from the Sunshine Law.

This exemption is limited and applies only to tort claims for which the agency may be liable under s. 768.28, F.S. AGO 04-35. The exemption is not applicable to meetings held prior to the filing of a tort claim with the risk management program. AGO 92-82. Moreover, a meeting of a city’s risk management committee is exempt from the Sunshine Law only when the meeting relates solely to the evaluation of a tort claim filed with the risk management program or relates solely to an offer of compromise of a tort claim filed with the risk management program. AGO 04-35.

Unlike s. 286.011(8), F.S., however, s. 768.28(16), F.S., does not specify the personnel who are authorized to attend the meeting. See AGO 00-20, advising that personnel of the school district who are involved in the risk management aspect of the tort claim being litigated or settled may attend such meetings without jeopardizing the confidentiality provisions of the statute.

3. Personnel matters

Meetings of a public board or commission at which personnel matters are discussed are not exempt from the provisions of s. 286.011, F.S., in the absence of a specific statutory exemption. *Times Publishing Company v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969), *disapproved in part on other grounds, Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985). And see AGO 10-14 (collegial board created by board of directors of a charter school to oversee personnel decisions of the school is subject to the Sunshine Law).

a. Collective bargaining discussions

A limited exemption from s. 286.011, F.S., exists for discussions between the chief executive officer of the public employer and the legislative body of the public employer relative to collective bargaining. Section 447.605(1), F.S. Cf. AGO 99-27,
noting that a committee (composed of the city manager and various city managerial employees) formed by the city manager to represent the city in labor negotiations qualifies as the "chief executive officer" and thus may participate in closed executive sessions conducted pursuant to this section.

Section 447.605(1), F.S., does not directly address the dissemination of information that may be obtained at a closed labor negotiation meeting, but there is clear legislative intent that matters discussed during such meetings are not to be open to public disclosure. AGO 03-09.

The s. 447.605(1) exemption applies only when there are actual and impending collective bargaining negotiations. City of Fort Myers v. News-Press Publishing Company, Inc., 514 So. 2d 408 (Fla. 2d DCA 1987). It does not apply to other nonexempt topics which may be discussed during the same meeting. AGO 85-99.

Moreover, the collective bargaining negotiations between the chief executive officer and a bargaining agent are not exempt and, pursuant to s. 447.605(2), F.S., must be conducted in the Sunshine. See Brown v. Denton, 152 So. 3d 8 (Fla. 1st DCA 2014) (closed-door federal mediation sessions which resulted in mediation agreement changing pension benefits of city employees in certain unions constituted collective bargaining negotiations which should have been held in the Sunshine).

b. Disciplinary hearings and grievance committees

A meeting of a municipal housing authority commission to conduct an employee termination hearing is subject to the Sunshine Law. AGO 92-65. Similarly, in Dascott v. Palm Beach County, 877 So. 2d 8 (Fla. 4th DCA 2004), the court held that deliberations of pre-termination panel composed of the department head, personnel director and equal opportunity director should have been held in the Sunshine. And see Citizens for Sunshine Inc. v. City of Sarasota, No. 2010CA4387NC (Fla. 12th Cir. Ct. February 27, 2012) (two members of a civil service board violated the Sunshine Law when they held a private discussion about a pending employment termination appeal during a recess). And see AGO 07-54, concluding that while post-termination hearings held before the city manager are not required to be open, hearings held before a three-member panel appointed by the city manager pursuant to the city personnel policy should be held in the Sunshine.

The Sunshine Law applies to board discussions concerning grievances and other personnel matters. AGO 76-102. A staff grievance committee created to make nonbinding recommendations to a county administrator regarding disposition of employee grievances is also subject to s. 286.011, F.S. AGO 84-70. And see Palm Beach County Classroom Teacher's Association v. School Board of Palm Beach County, 411 So. 2d 1375 (Fla. 4th DCA 1982), in which the court affirmed the lower court's refusal to issue a temporary injunction to exclude a newspaper reporter from a grievance hearing. A collective bargaining agreement cannot be used "to circumvent the requirements of public meetings" in s. 286.011, F.S. Id. at 1376.
c. Interviews

The Sunshine Law applies to meetings of a board of county commissioners when interviewing applicants for county positions appointed by the board, when conducting job evaluations of county employees answering to and serving at the pleasure of the board, and when conducting employment termination interviews of county employees who serve at the pleasure of the board. AGO 89-37.

d. Screening advisory committees

In *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983), a committee composed of staff which was created for the purpose of screening applications for the position of a law school dean and making recommendations to the faculty senate was held to be subject to s. 286.011, F.S., since the committee performed a decision-making function outside of their normal staff activities. By screening applicants and deciding which applicants to reject from further consideration, the committee performed a policy-based, decision-making function delegated to it by the president of the university. *Cf. s. 1004.098(2), F.S.* (exemption for meetings held for identifying or vetting applicants for president of a public post-secondary institution).

However, if the sole function of the screening committee is simply to gather information for the decision-maker, rather than to accept or reject applicants, the committee's activities are outside the Sunshine Law. See *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985); *Knox v. District School Board of Brevard*, 821 So. 2d 311 (Fla. 5th DCA 2002).

4. Quasi-judicial proceedings

The Florida Supreme Court has stated that there is no exception to the Sunshine Law which would allow closed-door hearings or deliberations when a board or commission is acting in a "quasi-judicial" capacity. *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973).

5. Purchasing committees

A committee appointed by a public college’s purchasing director to consider proposals submitted by contractors was held to be subject to the Sunshine Law because its function was to “weed through the various proposals, to determine which were acceptable and to rank them accordingly.” *Silver Express Company v. District Board of Lower Tribunal Trustees*, 691 So. 2d 1099, 1100 (Fla. 3d DCA 1997). *And see Leach-Wells v. City of Bradenton*, 734 So. 2d 1168, 1171 (Fla. 2d DCA 1999) (selection committee created by city council to evaluate proposals violated the Sunshine Law when the city clerk unilaterally ranked the proposals based on the committee members' individual written evaluations; the court held that “the short-listing was formal action that was required to be taken at a public meeting”). *See now s. 286.0113(2)(b)1. and 2.,*
F.S, providing a limited exception from the Sunshine Law for certain activities conducted pursuant to a competitive solicitation; and *Carlson v. State*, 227 So. 3d 1261 (Fla. 1st DCA 2017) (discussing scope of the exemption).

6. **Real property negotiations**

   In the absence of a statutory exemption, the negotiations by a public board or commission for the sale or purchase of property must be conducted in the sunshine. See, *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971). In addition, if the authority of the public board or commission to acquire or lease property has been delegated to a single member, that member is subject to s. 286.011, F.S., and is prohibited from negotiating the acquisition or lease of the property in secret. AGO 74-294.

E. **DOES THE SUNSHINE LAW APPLY TO:**

1. **Members-elect or candidates**

   Section 286.011, F.S., applies to meetings of public boards or commissions “including meetings with or attended by any person elected to such board or commission, but who has not yet taken office . . ..” Thus, members-elect are subject to the Sunshine Law in the same manner as board members who are currently in office. See also *Hough v. Stembridge*, 278 So. 2d 288, 289 (Fla. 3d DCA 1973).

   The Sunshine Law does not apply to candidates for office, unless the candidate is an incumbent seeking reelection. AGO 92-05. A candidate who is unopposed is not considered to be a member-elect subject to the Sunshine Law until the election has been held. AGO 98-60; Inf. Op. to Popowitz, August 12, 2016.

2. **Members of different boards**

   The Sunshine Law does not apply to a meeting between individuals who are members of different boards unless one or more of the individuals has been delegated the authority to act on behalf of his board. *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72 (Fla. 1984). Accord Inf. Op. to McClash, April 29, 1992 (Sunshine Law generally not applicable to county commissioner meeting with individual member of metropolitan planning organization).

3. **A mayor and a member of the city council**

   If the mayor is a member of the council or has a voice in decision-making through the power to break tie votes, meetings between the mayor and a member of the city council to discuss some matter which will come before the city council are subject to the Sunshine Law. AGO 83-70 and Inf. Op to Ardaman, June 24, 2021.

   Where, however, the mayor is *not* a member of the city council and does not
possess any power to vote even in the case of a tie vote but only possesses the power to veto legislation, then the mayor may privately meet with an individual member of the city council without violating the Sunshine Law, provided he or she is not acting as a liaison between members and neither the mayor nor the council member has been delegated the authority to act on behalf of the council. AGOs 90-26 and 85-36. And see Inf. Op. to Cassady, April 7, 2005 (meeting between a mayor and a council member to discuss prospective employees).

4. A board member and his or her alternate

Since the alternate is authorized to act only in the absence of a board or commission member, there is no meeting of two individuals who exercise independent decision-making authority at the meeting. There is, in effect, only one decision-making official present. Therefore, a meeting between a board member and his or her alternate is not subject to the Sunshine Law. AGO 88-45.

5. Ex officio board members

An ex officio board member is subject to the Sunshine Law regardless of whether he or she is serving in a voting or non-voting capacity. AGO 05-18.

6. Community forums sponsored by private organizations

A "Candidates' Night" sponsored by a private organization at which candidates for public office, including several incumbent city council members, will speak about their political philosophies, trends, and issues facing the city, is not subject to the Sunshine Law unless the council members discuss issues coming before the council among themselves. AGO 92-5. And see AGO 94-62 (Sunshine Law does not apply to a political forum sponsored by a civic club during which county commissioners express their position on matters that may foreseeably come before the commission, so long as the commissioners avoid discussions among themselves on these issues). However, caution should be exercised to avoid situations in which private political or community forums may be used to circumvent the statute's requirements. Id. See Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974) (Sunshine Law is to be construed "so as to frustrate all evasive devices").

For example, in State v. Foster, 12 F.L.W. Supp. 1194a (Fla. Broward Co. Ct. September 26, 2005), the court rejected the argument that a private breakfast meeting at which the sheriff spoke, and city commissioners individually questioned the sheriff but did not direct comments or questions to each other, did not violate the Sunshine Law. The court held that a discussion is subject to the Sunshine Law where there is a common facilitator who is receiving comments from each commissioner in front of other commissioners. Similarly, a public forum that is hosted by a city council member with other council members invited to attend and discuss matters which may foreseeably come before the city council for action is subject to the Sunshine Law. Inf. Op. to Jove, January 12, 2009.
7. **Board members attending meetings of another public board**

The Attorney General has advised that county commissioners who are also members of a regional planning council may take part in council meetings and express their opinions without violating the Sunshine Law. AGO 07-13. “However, these officials should not discuss or debate these issues with one another outside the Sunshine as either county commissioners or as regional planning council members.” *Id. See also* AGO 00-68 (Sunshine Law does not prohibit city commissioners from attending other city board meetings and commenting on agenda items that may subsequently come before the commission for final action; however, city commissioners attending such meetings may not discuss those issues among themselves).

8. **Social events**

Members of a public board or commission are not prohibited under the Sunshine Law from meeting together socially, provided that matters which may come before the board or commission are not discussed at such gatherings. AGO 92-79. Thus, there is no *per se* violation of the Sunshine Law for a husband and wife to serve on the same public board or commission so long as they do not discuss board business without complying with the requirements of s. 286.011, F.S. AGO 89-6.

**F. WHAT ARE THE NOTICE AND PROCEDURAL REQUIREMENTS OF THE SUNSHINE LAW?**

1. **What kind of notice of the meeting must be given?**
   a. **Reasonable notice required**

   A key element of the Sunshine Law is the requirement that boards subject to the law provide "reasonable notice" of all meetings. See s. 286.011(1), F.S. Notice is required even though meetings of the board are "of general knowledge" and are not conducted in a closed door manner. *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309 (Fla. 1st DCA 1991). *And see Baynard v. City of Chiefland*, No. 38-2002-CA-00078 (Fla. 8th Cir. Ct. July 8, 2003) (reasonable notice required even if subject of meeting is "relatively unimportant").

   The type of notice that must be given is variable, however, depending on the facts of the situation. In each case, however, an agency must give notice at such time and in such a manner as will enable interested members of the public to attend the meeting. AGOs 04-44 and 80-78.

   For example, “burying a notice inside a committee application and calendar on the instructional materials page of the [school district’s] website is an unreasonable way to give public notice of a meeting” of a district textbook committee. *Florida Citizens Alliance, Inc v. School Board of Collier County*, 328 So. 3d 22 (Fla. 2d DCA 2021). Cf.
Lozman v. City of Riviera Beach, No. 502008CA027882 (Fla. 15th Cir. Ct. December 8, 2010), per curiam affirmed, 79 So. 3d 36 (Fla. 4th DCA 2012) (no violation of Sunshine Law where notice of special meeting held on Monday September 15 was posted at city hall and faxed to the media on Friday September 12, and members of the public [including the media] attended the meeting).

b. Notice requirements when quorum not present or when meeting adjourned to a later date

Reasonable public notice is required for all meetings subject to the Sunshine Law. Thus, notice is required for meetings between members of a public board even though a quorum is not present. AGO 90-56. If a meeting is to be adjourned and reconvened later to complete the business from the agenda of the adjourned meeting, the second meeting should also be noticed. Id.

c. Effect of notice requirements imposed by other statutes, codes, or ordinances

The Sunshine Law only requires that reasonable public notice be given. As stated above, the type of notice required is variable and will depend upon the circumstances. A public agency, however, may be subject to additional notice requirements imposed by other statutes, charter, or code. In such cases, the requirements of that statute, charter, or code must be strictly observed. Inf. Op. to Mattimore, February 6, 1996.

For example, a board or commission subject to Chapter 120, Florida Statutes, the Administrative Procedure Act, must comply with the notice requirements of that act. See, e.g., s. 120.525, F.S.

d. Notice of verbatim record requirement for appellate review

Section 286.0105, F.S., requires:

Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.
2. **Does the Sunshine Law require that an agenda be made available prior to board meetings or restrict the board from taking action on matters not on the agenda?**

The Sunshine Law does not mandate that an agency provide notice of each item to be discussed via a published agenda. *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973). *And see Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985) (posted agenda unnecessary); and *Law and Information Services, Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996) ("[W]hether to impose a requirement that restricts every relevant commission or board from considering matters not on an agenda is a policy decision to be made by the legislature"). *See Inf. Op. to Mattimore, February 6, 1996* (notice of each item to be discussed at public meeting is not required under s. 286.011, F.S., although other statutes, codes, or rules, such as Ch. 120, F.S., may impose such a requirement).

Thus, while Florida courts have recognized that notice of public meetings is a mandatory requirement of the Government in the Sunshine Law, the preparation of an agenda that reflects every issue that may come before the governmental entity at a noticed meeting is not. AGO 03-53. Therefore, the Sunshine Law does not prohibit a city commission from adding additional items to the agenda at a regularly noticed meeting and taking formal action on the added items. *Id. And see Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010), review denied, 47 So. 3d 1288 (Fla. 2010) (Sunshine Law does not prohibit use of consent agenda procedure). However, the Attorney General's Office has recommended that boards consider the spirit of the Sunshine Law and "postpone formal action on controversial matters coming before the board at a meeting where the public has not been given notice that such an issue will be discussed." AGO 03-53.

3. **Does the Sunshine Law limit where meetings of a public board or commission may be held?**

a. **Out-of-town meetings**

The courts have recognized that the mere fact that a meeting is held in a public room does not make it public within the meaning of the Sunshine Law. *Bigelow v. Howze*, 291 So. 2d 645, 647-648 (Fla. 2d DCA 1974). For a meeting to be "public," the public must be given advance notice and provided with a reasonable opportunity to attend. *Id. Accordingly, a school board workshop held outside county limits over 100 miles away from the board's headquarters violated the Sunshine Law where the only advantage to the board resulting from the out-of-town gathering (elimination of travel time and expense due to the fact that the board members were attending a conference at the site) did not outweigh the interests of the public in having a reasonable opportunity to attend. *Rhea v. School Board of Alachua County*, 636 So. 2d 1383 (Fla. 1st DCA 1994). *And see AGOs 08-01 and 03-03 (municipality may not hold commission meetings at facilities outside its boundaries). See now s. 166.0213, F.S., authorizing*
certain meetings outside municipal boundaries).

b. Inspection or fact-finding trips

The Sunshine Law does not prohibit advisory boards from conducting inspection trips provided that the board members do not discuss matters which may come before the board for official action. See Bigelow v. Howse, 291 So. 2d 645 (Fla. 2d DCA 1974). See also AGO 02-24 (two or more members of an advisory group created by a city code to make recommendations to the city council or planning commission on proposed development may conduct vegetation surveys without subjecting themselves to the notice and minutes requirements of the Sunshine Law, provided that they do not discuss among themselves any recommendations the committee may make to the council or planning commission, or comments on the proposed development that the committee may make to city officials).

However, the exception to the Sunshine Law for “fact-finding” missions does not apply to boards with the “ultimate decision-making authority.” See Finch v. Seminole County School Board, 995 So. 2d 1068, 1073 (Fla. 5th DCA 2008), in which the court held that a school board violated the Sunshine Law when board members, together with several school officials and two members of the media, took a bus tour of neighborhoods affected by a proposed rezoning even though there was no open discussion regarding the rezoning; no one either discussed or expressed a preference for any plan; and no decisions were made. Since the board was the ultimate decision-making body, the bus tour constituted a violation of the Sunshine Law.

4. Can restrictions be placed on the public’s attendance at, or participation in, a public meeting?

a. Exclusion of certain members of the public

The term "open to the public" as used in the Sunshine Law means open to all who choose to attend. AGO 99-53. A board's request that certain members of the public "voluntarily" leave the room during portions of a public meeting is not authorized. See Port Everglades Authority v. International Longshoremen’s Association, Local 1922-1, 652 So. 2d 1169 (Fla. 4th DCA 1995). Cf. Ribaya v. Board of Trustees of the City Pension Fund for Firefighters and Police Officers in City of Tampa, 162 So. 3d 348, 356 (Fla. 2d DCA 2015) (although there appears to be no case law "squarely resolving" whether a wrongful exclusion of one person would void all actions taken at the meeting, “there is legal support for that proposition”).

Staff of a public agency clearly are members of the public as well as employees of the agency; they cannot, therefore, be excluded from public meetings. AGO 79-01. Section 286.011, F.S., however, does not preclude the reasonable application of ordinary personnel policies, for example, the requirement that annual leave be used to attend meetings, provided that such policies do not frustrate or subvert the purpose of the Sunshine Law. Id.
b. Cameras and tape recorders

Reasonable rules and policies which ensure the orderly conduct of a public meeting and which require orderly behavior on the part of those persons attending a public meeting may be adopted by the board or commission. However, a board may not ban videotaping of an otherwise public meeting. *Pinellas County School Board v. Suncam, Inc.*, 829 So. 2d 989 (Fla. 2d DCA 2002). Similarly, a rule or policy that prohibits nondisruptive or silent tape recording devices at public meetings is invalid. AGO 77-122.

c. Meetings at facilities that discriminate or unreasonably restrict access prohibited

Section 286.011, F.S., prohibits boards or commissions subject to its provisions from holding their meetings at any facility which discriminates on the basis of sex, age, race, creed, color, origin, or economic status, or which operates in such a manner as to unreasonably restrict public access to such a facility. Section 286.011(6), F.S. Thus, a police pension board should not hold its meetings in a facility where the public has limited access and where there may be a "chilling" effect on the public's willingness to attend by requiring the public to provide identification, to leave the identification while attending the meeting and to request permission before entering the room where the meeting is held. AGO 96-55. However, security measures such as metal detectors may be imposed as a condition for entering a building. AGO 05-13. Cf. Inf. Op. to Galloway, August 21, 2008, expressing concern about holding a public meeting in a private home in light of the possible “chilling effect" on the public's willingness to attend.

If a huge public turnout is expected for a particular issue and the largest available public meeting room cannot accommodate all of those who are expected to attend, the use of video technology (e.g., a television screen outside the meeting room) may be appropriate. *See Kennedy v. St. Johns River Water Management District*, No. 2009-0441-CA (Fla. 7th Cir. Ct. September 27, 2010), *per curiam affirmed*, 84 So. 3d 331 (Fla. 5th DCA 2011) (even though not all members of the public were able to enter the meeting room, board did not violate the Sunshine Law when it held a meeting at the board’s usual meeting place and in the largest available room; the court noted, however, that the board set up a computer with external speakers so that those who were not able to enter the meeting room could view and hear the proceedings).

d. Public comment

Prior to the adoption of s. 286.0114, F.S. (2013), Florida courts had determined that s. 286.011, F.S., establishes a right to *attend* public board meetings, but does not provide a right to be heard. *See Herrin v. City of Deltona*, 121 So. 3d 1094, 1097 (Fla. 5th DCA 2013) (phrase “open to the public” as used in the Sunshine Law means that “meetings must be “properly noticed and reasonably accessible to the public, not that the public has the right to be heard at such meetings”).
However, as noted in the *Herrin* case, s. 286.0114, F.S., now mandates, subject to specified exceptions, that the public be given "a reasonable opportunity to be heard on a proposition before a board or commission." The opportunity to be heard does not have to occur at the same meeting at which the board or commission takes official action if the "opportunity occurs at a meeting that is during the decisionmaking process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action." Section 286.0114(2), F.S.

The terms “proposition” or “official action” are not defined in the statute, nor is there a distinction between official actions taken at a formal meeting versus an informal setting such as a workshop. Inf. Op. to Jacquot, April 25, 2014. “In light of the purpose of the statute to allow public participation during the decisionmaking process on a proposition, it should be liberally construed to facilitate that purpose.” *Id.*

Boards are not prohibited from “maintaining orderly conduct or proper decorum in a public meeting.” In addition, boards are authorized to adopt specified rules or policies governing the opportunity to be heard *i.e.*, time limits for speakers; procedures for designating a representative of a group or faction to address the board rather than all members of the group or faction; forms to indicate a speaker’s position on a matter; and designation of a specified period of time for public comment. Section 286.0114(4), F.S. See *Larson v. Palm Beach County*, No. 50216 (Fla. 15th Cir. Ct. September 26, 2019), *per curiam affirmed*, 311 So. 3d 853 (Fla. 4th DCA 2021), upholding a board procedural rule giving members of the public three minutes to speak on all items on the consent agenda versus three minutes on each regular agenda item; and *City of Miami v. Airbnb, Inc.*, 260 So. 3d 478 (Fla. 3d DCA 2018) (temporary injunction prohibiting city from requiring speakers at public hearings to provide their names and addresses was overbroad).

While s. 286.0114(6), F.S., authorizes a circuit court to issue injunctions for the purpose of enforcing the statute, s. 286.0114(8), F.S., states that an action taken by a board or commission which is found to be in violation of s. 286.0114, F.S., is not void as a result of that violation.

5. **Must written minutes be kept of all sunshine meetings?**

Section 286.011(2), F.S., specifically requires that minutes of a meeting of a public board or commission shall be promptly recorded and shall be open to public inspection. Thus, a city violated the Sunshine Law when it failed to provide public access to minutes until after they had been approved by the city commission. *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010), *review denied*, 47 So. 3d 1288 (Fla. 2010). See also *Jackson v. City of South Bay, Florida*, 48 F.L.W. D371 (Fla. 4th DCA February 15, 2023) (use of the term “shall” in s. 286.011 requires mandatory compliance; unlike the Public Records Law, there is no “good faith exception”). Workshop meetings are not exempted from this requirement. AGO 08-65. *And see Lozman v. City of Riviera Beach*, No. 502007CA007552XXXXMBAN (Fla.
While tape recorders may be used to record the proceedings before a public body, written minutes of the meeting must also be taken and promptly recorded. See AGO 75-45. Similarly, while a board may archive the full text of all workshop discussions conducted on the Internet, written minutes of these workshops must also be prepared and promptly recorded. AGO 08-65.

Draft minutes of a board meeting may be circulated to individual board members for corrections and studying prior to approval by the board, so long as any changes, corrections, or deletions are discussed and adopted during the public meeting when the board adopts the minutes. AGO 02-51.

Minutes of Sunshine Law meetings need not be verbatim transcripts of the meetings; rather the use of the term "minutes" in s. 286.011, F.S., contemplates a brief summary or series of brief notes or memoranda reflecting the events of the meeting. AGO 82-47. However, an agency is not prohibited from using a written transcript of the meeting as the minutes, if it chooses to do so. Inf. Op. to Fulwider, June 14, 1993.

There is no requirement that tape recordings be made by the public board or commission at each public meeting. However, once made, such recordings are public records and their retention is governed by Ch. 119, F.S., and the schedules established by the Division of Library and Information Services of the Department of State. AGO 86-21.

6. May members of a public board vote by written or secret ballot?

Board members are not prohibited from using written ballots to cast a vote as long as the votes are made openly at a public meeting, the name of the person who voted and his or her selection are written on the ballot, and the ballots are maintained and made available for public inspection in accordance with the Public Records Act. AGO 73-344.

By contrast, a secret ballot violates the Sunshine Law. See AGO 73-264 (members of a personnel board may not vote by secret ballot during a hearing concerning a public employee). Accord AGOs 72-326 and 71-32 (board may not use secret ballots to elect the chairman and other officers of the board). Thus, a judge found that a board violated the Sunshine Law when the board members’ individual written votes for each applicant were not announced at the public meeting. According to the court, “[t]he fact that the ballots are preserved as public records available for public inspection does not satisfy the requirement of openness.” Schweickert v. Citrus County Port Authority, No. 12-CA-1339 (Fla. 5th Cir. Ct. September 30, 2013).

G. WHAT ARE THE CONSEQUENCES IF A PUBLIC BOARD
OR COMMISSION FAILS TO COMPLY WITH THE SUNSHINE LAW?

1. **Criminal penalties**

   Any member of a board or commission or of any state agency or authority of a county, municipal corporation, or political subdivision who *knowingly* violates the Sunshine Law is guilty of a misdemeanor of the second degree. Section 286.011(3)(b), F.S. See *Gilliams v. State*, 48 F.L.W. D739 (Fla. 4th DCA April 12, 2023), affirming a city councilman’s conviction for violating the Sunshine Law. Conduct which occurs outside the state which constitutes a knowing violation of the Sunshine Law is a second-degree misdemeanor. Section 286.011(3)(c), F.S. Such violations are prosecuted in the county in which the board or commission normally conducts its official business. Section 910.16, F.S. The criminal penalties apply to members of advisory councils subject to the Sunshine Law as well as to members of elected or appointed boards. AGO 01-84 (school advisory council members).

2. **Removal from office**

   When a method for removal from office is not otherwise provided by the Constitution or by law, the Governor may suspend an elected or appointed public officer who is indicted or informed against for any misdemeanor arising directly out of his official duties. Section 112.52, F.S. If convicted, the officer may be removed from office by executive order of the Governor. A person who pleads guilty or nolo contendere or who is found guilty is, for purposes of s. 112.52, F.S., deemed to have been convicted, notwithstanding the suspension of sentence or the withholding of adjudication. *Cf.* s. 112.51, F.S., and Art. IV, s. 7, Fla. Const.

3. **Noncriminal infractions**

   Section 286.011(3)(a), F.S., imposes noncriminal penalties for violations of the Sunshine Law by providing that any public official violating the provisions of the Sunshine Law is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. The state attorney may pursue actions on behalf of the state against public officials for violations of s. 286.011, F.S., which result in a finding of guilt for a noncriminal infraction. *State v. Foster*, 12 F.L.W. Supp. 1194a (Fla. Broward Co. Ct. September 26, 2005). *Accord* AGO 91-38.

4. **Attorney’s fees**

   Reasonable attorney's fees will be assessed against a board or commission found to have violated s. 286.011, F.S. Such fees may be assessed against the individual members of the board except in those cases where the board sought, and took, the advice of its attorney, such fees may not be assessed against the individual members of the board. Section 286.011(4), F.S.
Section 286.011(4) also authorizes an award of appellate fees if a person successfully appeals a trial court order denying access. See School Board of Alachua County v. Rhea, 661 So. 2d 331 (Fla. 1st DCA 1995), review denied, 670 So. 2d 939 (Fla. 1996).

5. Civil actions for injunctive or declaratory relief

Section 286.011(2), F.S., states that the circuit courts have jurisdiction to issue injunctions upon application by any citizen of this state. The burden of prevailing in such actions has been significantly eased by the judiciary in sunshine cases. While normally irreparable injury must be proved by the plaintiff before an injunction may be issued, in Sunshine Law cases the mere showing that the law has been violated constitutes "irreparable public injury." Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974); Times Publishing Company v. Williams, 222 So. 2d 470 (Fla. 2d DCA 1969), disapproved in part on other grounds, Neu v. Miami Herald Publishing Company, 462 So. 2d 821 (Fla. 1985). And see Lozman v. City of Riviera Beach, No. 502007CA007552XXXXMBAN (Fla. 15th Cir. Ct. June 9, 2009) per curiam affirmed, 46 So. 3d 573 (Fla. 4th DCA 2010) (injunctive relief to enjoin city from future violations of the Sunshine Law due to a failure to record minutes of certain meetings is "appropriate" in light of City's past conduct and consistent refusal to record minutes even after being advised to do so by the City Attorney and also because the City "has continuously taken the legal position that local governments are not required by the Sunshine Law to record minutes.").

Although a court cannot issue a blanket order enjoining any violation of the Sunshine Law on a showing that it was violated in particular respects, a court may enjoin a future violation that bears some resemblance to the past violation. Port Everglades Authority v. International Longshoremen's Association, Local 1922-1, 652 So. 2d 1169, 1173 (Fla. 4th DCA 1995). The future conduct must be "specified, with such reasonable definiteness and certainty that the defendant could readily know what it must refrain from doing without speculation and conjecture." Id., quoting from Board of Public Instruction v. Doran, 224 So. 2d 693, 699 (Fla. 1969).

6. Validity of action taken in violation of the Sunshine Law and subsequent corrective action

Section 286.011, F.S., provides that no resolution, rule, regulation or formal action shall be considered binding except as taken or made at an open meeting. "Therefore, where officials have violated section 286.011, the official action is void ab initio." Sarasota Citizens for Responsible Government v. City of Sarasota, 48 So. 3d 755, 762 (Fla. 2010). And see Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974); Blackford v. School Board of Orange County, 375 So. 2d 578 (Fla. 5th DCA 1979) (resolutions made during meetings held in violation of s. 286.011, F.S., had to be re-examined and re-discussed in open public meetings); TSI Southeast, Inc. v. Royals, 588 So. 2d 309 (Fla. 1st DCA 1991) (contract for sale and purchase of real property voided because board failed to properly notice the meeting under s. 286.011) and
Grapski v. City of Alachua, 31 So. 3d 193 (Fla. 1st DCA 2010), review denied, 47 So. 3d 1288 (Fla. 2010) (city could have cured Sunshine Law violation by reconsidering the matter, but did not; accordingly, action taken in violation of the law was void)

Where, however, a public board or commission does not merely perfunctorily ratify or ceremoniously accept at a later open meeting those decisions which were made at an earlier secret meeting but rather takes "independent final action in the sunshine," the decision of the board or commission will not be disturbed. Tolar v. School Board of Liberty County, 398 So. 2d 427, 429 (Fla. 1981). See Finch v. Seminole County School Board, 995 So. 2d 1068, 1073 (Fla. 5th DCA 2008) (school board remedied inadvertent violation of the Sunshine Law when it subsequently held full, open and independent public hearings prior to adopting a rezoning plan) and Sarasota Citizens for Responsible Government v. City of Sarasota, supra (any possible violations that occurred when county commissioners circulated e-mails among each other were cured by subsequent public meetings). And see Jackson v. City of Tallahassee, 265 So. 3d 736 (Fla. 1st DCA 2019) (full and open meeting to fill a vacancy on the city commission cured any purported violation of the Sunshine Law which may have previously occurred during the commission's process of eliminating applicants for the position).

However, a school board's argument that it had cured Sunshine violations committed by its textbook committees because it held two public board meetings on the committee recommendations and also posted all the materials online, was rejected because the board failed to hold a "full and open hearing" on the recommendations. Florida Citizens Alliance, Inc. v. School Board of Collier County, 328 So. 3d 22 (Fla. 2d DCA 2021). The court found it significant that under the school board policy, the board could not choose a textbook on its own by considering other alternatives. Instead, if the board rejected a textbook, the matter would go back to the committee for a new review. And see Zorc v. City of Vero Beach, 722 So. 2d 891, 903 (Fla. 4th DCA 1998) (meeting did not cure the Sunshine defect because it was not a "full, open public hearing convened for the purpose of enabling the public to express its views and participate in the decision-making process"); and Bert Fish Foundation v. Southeast Volusia Hospital District, No. 2010-20801-CINS (Fla. 7th Cir. Ct. February 24, 2011) (series of public meetings did not “cure” Sunshine Law violations that resulted from 21 closed door meetings over 16 months; “[t]here was so much darkness for so long, that a giant infusion of sunshine might have been too little or too late”).

Moreover, “even when an illicit action is ‘cured” it does not absolve a public body of its responsibility for violating the Sunshine Law in the first instance; it simply provides a way to salvage a void act by reconsidering it in Sunshine.” Anderson v. City of St. Pete Beach, 161 So. 3d 548 (Fla. 2d DCA 2014).

7. **Damages**

“The only remedies available pursuant to the Sunshine Act are a declaration of the wrongful action as void and reasonable attorney’s fees.” Dascott v. Palm Beach
County, 988 So. 2d 47, 49 (Fla. 4th DCA 2008), review denied, 6 So. 3d 51 (Fla. 2009). Accordingly, an employee who prevailed in a lawsuit alleging that her termination violated the Sunshine Law “may not recover the equitable relief of back pay because money damages are not a remedy provided for by the Act.” Id.

II. PUBLIC RECORDS

A. WHAT IS A PUBLIC RECORD WHICH IS OPEN TO INSPECTION?

1. What materials are public records?

Section 119.011(12), Florida Statutes, 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. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633, 640 (Fla. 1980). All such materials, regardless of whether they are in final form, are open for public inspection unless the Legislature has exempted them from disclosure. Wait v. Florida Power & Light Company, 372 So. 2d 420 (Fla. 1979). Accordingly, "the form of the record is irrelevant; the material issue is whether the record is made or received by the public agency in connection with the transaction of official business." AGO 04-33.

2. When are notes or nonfinal drafts of agency proposals subject to Chapter 119, Florida Statutes?

There is no "unfinished business" exception to the public inspection and copying requirements of Chapter 119, Florida Statutes. If the purpose of a document prepared in connection with the official business of a public agency is to perpetuate, communicate, or formalize knowledge, then it is a public record regardless of whether it is in final form or the ultimate product of an agency. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633 (Fla. 1980). See also Warden v. Bennett, 340 So. 2d 977 (Fla. 2d DCA 1976) (working papers used in preparing a college budget were public records).

Accordingly, any agency document, however prepared, 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 would include interoffice memoranda, preliminary drafts of
agency rules or proposals which have been submitted for review to anyone within or outside the agency and working drafts of reports which have been furnished to a supervisor for review or approval.

In each of these cases, the fact that the records are part of a preliminary process does not detract from their essential character as public records. See Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc., 718 So. 2d 227, 229 (Fla. 3d DCA 1998) (book selection forms completed by state university instructors and furnished to campus bookstore “are made in connection with official business, for memorialization and communication purposes[,] [t]hey are public records”); and Grapski v. City of Alachua, 31 So. 3d 193 (Fla. 1st DCA 2010), review denied, 47 So. 3d 1288 (Fla. 2010) (canvassing board minutes constitute final work product of the Board, not a preliminary draft or note; therefore, city violated public records law by refusing to produce minutes until after approval by the city commission). It follows then that such records are subject to disclosure unless the Legislature has specifically exempted the documents from inspection or has otherwise expressly acted to make the records confidential. See for example, s. 119.071(1)(d), F.S., providing a limited work product exemption for agency attorneys.

Similarly, so-called “personal notes” can constitute public records if they are intended to communicate, perpetuate or formalize knowledge of some type. For example, in Miami Herald Media Company v. Sarnoff, 971 So. 2d 915 (Fla. 3d DCA 2007), the court held that a memorandum prepared by a city commissioner after a meeting with a former city official, summarizing details of what was said and containing alleged information about possible criminal activity, was a public record subject to disclosure. The court determined that the memorandum was not a draft or a note containing mental impressions that would later form part of a government record, but rather formalized and perpetuated his final knowledge gained at the meeting. See also AGO 05-23.

However, "under chapter 119 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.'" Justice Coalition v. The First District Court of Appeal Judicial Nominating Commission, 823 So. 2d 185, 192 (Fla. 1st DCA 2002). Accord Coleman v. Austin, 521 So. 2d 247 (Fla. 1st DCA 1988), holding that preliminary handwritten notes prepared by agency attorneys and intended only for the attorneys' own personal use are not public records). And see AGO 10-55. Compare, Barfield v. City of Sarasota, 21 F.L.W. Supp. 874 (Fla. 12th Cir. Ct. May 5, 2014) (those portions of police officer’s notes containing his research on homeless shelters became a public record when he made multiple references to them while answering questions during a presentation at a city commission meeting; however the unread portions of the notes did not become a public record because they were not disseminated).

3. When are records made or received “in connection with the transaction of official business?”

The determination as to whether certain records constitute “public records” can be difficult if the records are produced by a public officer or employee on
government equipment but are “personal” in nature. The Florida Supreme Court has ruled that private e-mail stored in government computers does not automatically become a public record by virtue of that storage. State v. City of Clearwater, 863 So. 2d 149 (Fla. 2003). “Just as an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of documents that fall within the definition of ‘public records,’ . . . private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer.” Id. at 154. And see Butler v. City of Hallandale Beach, 68 So. 3d 278 (Fla. 4th DCA 2011) (e-mail sent by mayor from her personal account using her personal computer and blind copied to friends and supporters did not constitute a public record because the e-mail was not made pursuant to law or ordinance or in connection with the transaction of official business); O’Boyle v. Town of Gulf Stream, 257 So. 3d 1036 (Fla. 4th DCA 2018) (public official’s use of private cell phone to conduct public business via text messaging can create a public record subject to disclosure if the communication is within the scope of his or her employment or agency); and City of Sunny Isles Beach v. Gatto, 338 So. 3d 1045 (Fla. 3 DCA 2022), noting that a “city commissioner’s text messages may be a public record,” although “a private communication by a municipal official falls outside the definition of public record.”

The Clearwater decision does not mean, however, that all records relating to personal matters which are found in agency files are outside the scope of the Public Records Act. As the Clearwater Court noted, the personal e-mails involved in that decision were not e-mails “that may have been isolated by a government employee whose job required him or her to locate employee misuse of government computers.” State v. City of Clearwater, at 151n.2.

For example, if a state inspector general is reviewing allegations of misuse of agency equipment for private purposes, the personal emails obtained by the inspector general for his or her investigation are public records and subject to disclosure in the absence of statutory exception. And see Miami-Dade County v. Professional Law Enforcement Association, 997 So. 2d 1289 (Fla. 3d DCA 2009), concluding that when the county aviation unit’s written procedures required pilots to maintain a personal flight log, the logs were subject to the Public Records Act. “The officers are thus paid by the County to make these logbook entries, and the entries are made ‘in connection with the transaction of official business’ of the aviation unit;” therefore, “[t]he entries are readily distinguishable from the purely personal e-mails at issue in State v. City of Clearwater [citation omitted].” Id. at 1290-1291. See also AGO 09-19 (2009) (because the creation of a city Facebook page must be for a municipal, not private purpose, the “placement of material on the city’s page would presumably be in furtherance of such purpose and in connection with the transaction of official business and thus subject to the provisions of Chapter 119, Florida Statutes.”).

B. WHAT AGENCIES ARE SUBJECT TO THE PUBLIC RECORDS ACT?

Section 119.011(2), Florida Statutes, 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, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

Article I, s. 24, Fla. Const., establishes a constitutional right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law pursuant to Art. 1, s. 24, or specifically made confidential by the Constitution. This right of access to public records applies to the legislative, executive, and judicial branches of government; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or by the Constitution. However, although a right of access exists under the Constitution to all three branches of government, the Public Records Act, as a legislative enactment, does not apply to the Legislature or the judiciary. See Locke v. Hawkes, 595 So. 2d 32 (Fla. 1992).

1. Advisory boards

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

2. Private organizations

A more complex question is presented when a private corporation or entity provides services for a governmental body. The term "agency" as used in the Public Records Act includes private entities "acting on behalf of any public agency." Section 119.011(2), F.S. And see s. 119.0701, F.S., mandating that all agency contracts for services with "contractors" must contain specific provisions requiring the contractor to comply with public records laws, including retention and public access requirements. The term "contractor" is defined to mean "an individual, partnership, corporation or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency as provided in s. 119.011(2), [F.S.]." See AGO 14-06.

The Florida Supreme Court has stated that this broad definition of "agency" ensures that a public agency cannot avoid disclosure by contractually delegating to a private entity that which would otherwise be an agency responsibility. News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992). Cf. Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc., 718 So. 2d 227, 229 n.4 (Fla. 3d DCA 1998), review denied, 729 So. 2d 389 (Fla. 1999) (private company operating college bookstores was an "agency" as
defined in section 119.011[2], Florida Statutes, "notwithstanding the language in its contract with the universities that purports to deny any agency relationship").

The fact that an entity is incorporated as a nonprofit corporation is not dispositive as to its status under the Public Records Act, but rather the issue is whether the entity is "acting on behalf of" a public agency. The Attorney General’s Office has issued numerous opinions advising that if a nonprofit entity is established by law or by a governmental entity, it is subject to Chapter 119 disclosure requirements. See AGO 94-34 (Pace Property Finance Authority, Inc., created as a Florida nonprofit corporation by Santa Rosa County as an instrumentality of the county to aid in the funding and administration of certain governmental programs).

a. **Receipt of public funds by private entity not dispositive**

A private corporation does not act "on behalf of" a public agency merely by entering into a contract to provide professional services to the agency. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, supra. Similarly, the receipt of public funds, standing alone, is not dispositive of the organization's status for purposes of Ch. 119, F.S. See *Sarasota Herald-Tribune Company v. Community Health Corporation, Inc.*, 582 So. 2d 730 (Fla. 2d DCA 1991), in which the court noted that the mere provision of public funds to the private organization is not an important factor in this analysis, although the provision of a substantial share of the capitalization of the organization is important.

b. **Application of Chapter 119, Florida Statutes, to private entities contracting with public agencies**

The case law has established “two general sets of circumstances” when records belonging to a private entity must be produced as public records. See *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002) and *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008); *County of Volusia v. Emergency Communications Network, Inc.*, 39 So. 3d 1280 (Fla. 5th DCA 2010). First, when a public entity contracts with a private entity to provide services to facilitate the agency’s performance of its duties and the “totality of factors” indicates a significant level of involvement by the public agency. Second, when a public entity delegates a statutorily authorized function to a private entity. Each of these situations is discussed below.

(1) **Contract to provide services and the "totality of factors" test**

Recognizing that "the statute provides no clear criteria for determining when a private entity is 'acting on behalf of' a public agency," the Supreme Court adopted a "totality of factors" approach to use as a guide for evaluating whether a private entity providing services to a public agency is subject to Ch. 119, F.S. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, supra at 1031.

The factors listed by the Supreme Court include the following:
1) the level of public funding;
2) commingling of funds;
3) whether the activity was conducted on publicly-owned property;
4) whether the contracted services are an integral part of the public agency's chosen decision-making process;
5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
6) the extent of the public agency's involvement with, regulation of, or control over the private entity;
7) whether the private entity was created by the public agency;
8) whether the public agency has a substantial financial interest in the private entity;
9) for whose benefit the private entity is functioning

See Holifield v. Big Bend Cares, Inc., 326 So. 3d 739 (Fla. 1st DCA 2021) (private entity providing health care services pursuant to contract with state agency not subject to Ch. 119 because the private corporation was not created pursuant to government action, the amounts paid were all in consideration for professional services rendered and the agency did not control or regulate the corporation’s professional activity or judgment).

(2) Delegation of statutorily authorized function to private entity

“[W]hen a public entity delegates a statutorily authorized function to a private entity, the records generated by the private entity’s performance of that duty become public records.” Weekly Planet, Inc. v. Hillsborough County Aviation Authority, 829 So. 2d 970, 974 (Fla. 2d DCA 2002).

As stated previously, the mere fact that a private entity is under contract with, or receiving funds from, a public agency is not sufficient, standing alone, to bring that agency within the scope of the Public Records Act. See Stanfield v. Salvation Army, 695 So. 2d 501, 503 (Fla. 5th DCA 1997) (contract between Salvation Army and county to provide services does not in and of itself subject the organization to Ch. 119 disclosure requirements).

However, there is a difference between a party contracting with a public agency to provide services to the agency and a contracting party which provides services in place of the public body. News-Journal Corporation v. Memorial Hospital-West Volusia, Inc., 695 So. 2d 418 (Fla. 5th DCA 1997), approved, 729 So. 2d 373 (Fla. 1999). Stated another way, business records of entities which merely provide services for an agency to use (such as legal professional services, for example) are probably not subject to the open government laws. Id. But, if the entity contracts to relieve the public body from the operation of a public obligation (such as operating a jail or providing fire protection) the open government laws do apply. Id.

Thus, in B & S Utilities, Inc. v. Baskerville-Donovan, Inc., 988 So. 2d 17 (Fla. 1st DCA 2008), review denied, 4 So. 3d 1220 (Fla. 2009), the court held that a private
engineering firm which contracted to provide engineering services for a city and acted *de facto* as the city's engineer, was an "agency" subject to Ch. 119, F.S. *And see Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302 (Fla. 3d DCA 2001) (a consortium of private businesses created to manage a massive renovation of an airport is an "agency" for purposes of the Public Records Act because it was created for and had no purpose other than to work on the airport contract; "when a private entity undertakes to provide a service otherwise provided by the government, the entity is bound by the Act, as the government would be").

However, a trial judge erred when he used the "delegation" test instead of the "totality of factors" test established in *Schwab* to determine that a nonprofit entity was an "agency" based on the entity's contract with the county to perform economic development services because there was not a "clear, compelling, complete" delegation of a governmental function to the entity. *See Economic Development Commission v. Ellis*, 178 So. 3d 118 (Fla. 5th DCA 2015).

c. Application of Chapter 119 to private entity that has been delegated authority to keep certain records

If a public agency has delegated its responsibility to maintain records necessary to perform its functions, such records will be deemed accessible to the public. AGO 98-54 (registration and disciplinary records stored in a computer database maintained by a national securities association which are used by state agency in licensing and regulating securities dealers doing business in Florida are public records). *See also Harold v. Orange County*, 668 So. 2d 1010 (Fla. 5th DCA 1996) (where a county hired a private company to be the construction manager on a renovation project and delegated to the company the responsibility of maintaining records necessary to show compliance with a "fairness in procurement ordinance," the company's records for this purpose were public records).

C. WHAT KINDS OF AGENCY RECORDS ARE SUBJECT TO THE PUBLIC RECORDS ACT?

1. *Electronic records*

In 1982, the Fourth District Court of Appeal stated that 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 . . .." *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th DCA 1982), *review denied*, 431 So. 2d 988 (Fla. 1983). Thus, the Public Records Act includes computer records as well as paper documents, tape recordings, and other more tangible materials. *See, e.g.*, AGO 98-54 (applications and disciplinary reports maintained in a computer system operated by a national securities dealers association which are received electronically by state agency for use in licensing and regulating securities dealers doing business in Florida are public records subject to Ch. 119); AGO 91-61 (computer data software disk is a public record); and AGO 89-39 (information stored in computer utilized by county commissioners to facilitate and conduct their official business is subject to Ch. 119, F.S). *Cf. Grapski v. Machen*, No.
Thus, electronic public records made or received in the course of official business 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. See National Collegiate Athletic Association v. Associated Press, 18 So. 3d 1201 (Fla. 1st DCA 2009), review denied, 37 So. 3d 848 (Fla. 2010) (public records law is not limited to paper documents but applies to documents that exist only in digital form). Cf. AGO 90-04, stating that a county official is not authorized to assign the county's right to a public record (a computer program developed by a former employee while he was working for the county) as part of a settlement of a lawsuit against the county.

E-mail messages made or received by agency employees in connection with official business are public records and subject to disclosure in the absence of a statutory exemption from public inspection. See Rhea v. District Board of Trustees of Santa Fe College, 109 So. 3d 851, 855 (Fla. 1st DCA 2013), noting that “electronic communications, such as e-mail are covered [by the Public Records Act] just like communications on paper.” And see AGO 07-14 (e-mails sent by city commissioners in connection with the transaction of official business are public records subject to disclosure even though the e-mails contain undisclosed or “blind” recipients and their e-mail addresses).

Like other public records, e-mail messages are subject to the statutory restrictions on destruction of public records, which require agencies to adopt a schedule for the disposal of records no longer needed. AGO 96-34. For example, the e-mail communication of factual background information and position papers from one official to another is a public record and should be retained in accordance with the retention schedule for other records relating to performance of the agency's functions and formulation of policy. AGO 01-20. See s. 257.36(6), F.S., stating that a public record may be destroyed only in accordance with retention schedules established by the Division of Library and Information Services of the Department of State. Id. Cf. 668.6076, F.S. (e-mail address public record disclosure statement).

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. Thus, to the extent that the information on a city’s Facebook page constitutes a public record, the city is under an obligation to follow the public records retention schedules established by law. AGO 09-19. And see 08-07 (postings relating to city business which are submitted by a city council member to a privately-owned and operated internet website are public records).

Similarly, a governmental entity which receives a public records request for text messages must proceed no differently than it would when responding to a request for written documents and other public records in the agency's possession. This obligation applies regardless of whether the records are located on public or private accounts or
devices. See O'Boyle v. Town of Gulf Stream, 257 So. 3d 1036 (Fla. 4th DCA 2018). And see Raydient LLC v. Nassau County, Florida, No. 2019-CA-OOO54 (Fla. 4th Cir. Ct. August 24, 2021) (“If public agency employees and officials transact public business on their privately-owned accounts or devices, then the agency has an affirmative duty in response to public records requests to do what is reasonably necessary to promptly retrieve any public documents from those employees or officials.”).

The determination as to whether a list or record of accounts which have been blocked from posting to or accessing an elected official’s personal Twitter feed is a public record involves mixed questions of law and fact which cannot be resolved by the Attorney General’s Office. Inf. Op. to Shalley, June 1, 2016. However, if the tweets the public official is sending are public records [because they were sent in connection with the transaction of official business] then a list of blocked accounts, prepared in connection with those public records ‘tweets’ could well be determined by a court to be a public record.” Id.

a. Formatting issues

An agency that maintains a public record in an electronic recordkeeping system must provide a copy of the record in the medium requested by the person making a Ch. 119 demand, if the agency maintains the record in that medium, and the fee charged shall be in accordance with Ch. 119, F.S. Section 119.07(2)(f), F.S. Thus, an agency violated s. 119.01(2), F.S., by refusing to provide electronic records (emails and calendar entries) in a pst. or other “electronic medium that allows [the requester] to view the records in the same way that [the agency] is able to view them on their own computer system,” and instead provided all the requested records in PDF format. Bracci v. School Board of Lee County, No. 20-CA-5205 (Fla. 20th Cir. Ct. January 12, 2021).

However, an agency is not generally required to reformat its electronic records to meet a requestor's particular needs. As stated in Seigle v. Barry, the intent of Ch. 119, Florida Statutes, is "to make available to the public information which is a matter of public record, in some meaningful form, not necessarily that which the applicant prefers." 422 So. 2d at 66. For example, the Attorney General's Office concluded that a school district was not required to furnish electronic public records in electronic format other than the standard format routinely maintained by the district. AGO 97-39. Cf. AGO 13-07 (agency not required to allow direct access to its electronic records through a hard drive provided by a requester).

Despite the general rule, however, the Seigle court recognized that an agency may be required to provide access through a specially designed program prepared by or at the expense of the applicant 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 proffered does not fairly and meaningfully represent the records; or
(4) the court determines other exceptional circumstances exist warranting this special remedy. 422 So. 2d at 66, 67.

b. Remote access

Section 119.07(2)(a), F.S., authorizes but does not require agencies to provide remote electronic access to public records. However, 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. Fees for remote electronic access provided to the general public must be in accordance with the provisions of s. 119.07(4), F.S. And see s. 119.07(2)(b), F.S., which requires the custodian to provide safeguards to protect the records from unauthorized disclosure or alteration.

2. Financial records

Many agencies prepare or receive financial records as part of their official duties and responsibilities. As with other public records, these materials are generally open to inspection unless a specific statutory exemption exists. See AGO 96-96 (financial information submitted by harbor pilots in support of a rate increase application is not exempt from disclosure requirements).

a. Bids

Section 119.071(1)(b)2., F.S., provides an exemption for "sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation" or until such time as the agency provides notice of an intended decision or until 30 days after opening, whichever is earlier. And see s. 119.071(1)(b)3., F.S., providing a temporary exemption if an agency rejects all bids, proposals or replies and concurrently provides notice of an intended decision concerning the reissued competitive solicitation or until the agency withdraws it.

b. Budgets

Budgets and working papers used to prepare them are normally subject to inspection. Bay County School Board v. Public Employees Relations Commission, 382 So. 2d 747 (Fla. 1st DCA 1980); Warden v. Bennett, 340 So. 2d 977 (Fla. 2d DCA 1976); City of Gainesville v. State ex rel. International Association of Fire Fighters Local No. 2157, 298 So. 2d 478 (Fla. 1st DCA 1974).

c. Personal financial records
In the absence of statutory exemption, financial information prepared or received by an agency is usually subject to Ch. 119, F.S. See Wallace v. Guzman, 687 So. 2d 1351 (Fla. 3d DCA 1997) (personal income tax returns and financial statements submitted by public officials as part of an application to organize a bank are subject to disclosure).

However, the Legislature has exempted some financial information from disclosure. See e.g., s. 119.071(5)(b), F.S., providing an exemption for bank account numbers and debit, charge, and credit card numbers held by an agency.

d. Trade secrets

The Legislature has created several specific exemptions from Ch. 119, F.S., for trade secrets. See e.g., s. 1004.22(2), F.S. (trade secrets produced in research conducted within state universities); and s. 570.544(8), F.S. (trade secrets contained in records of the Division of Consumer Services of the Department of Agriculture and Consumer Services).

However, s. 119.0715(2), F.S., now provides more generally that a “trade secret held by an agency” is confidential and exempt from disclosure. The term “trade secret” has the same meaning as in s. 688.002, F.S. Section 119.0715(1), F.S.

3. Litigation records

a. Attorney-client communications subject to Chapter 119, Florida Statutes

The Public Records Act applies to communications between attorneys and governmental agencies; there is no judicially created privilege which exempts these documents from disclosure. 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 Chapter 119, Florida Statutes). See also City of North Miami v. Miami Herald Publishing Company, 468 So. 2d 218 (Fla. 1985) (although s. 90.502, F.S., of the Evidence Code establishes an attorney-client privilege for public and private entities, this evidentiary statute does not remove communications between an agency and its attorney from the open inspection requirements of Ch. 119, F.S.).

Moreover, public disclosure of these documents does not violate the public agency's constitutional rights of due process, effective assistance of counsel, freedom of speech, or the Supreme Court's exclusive jurisdiction over The Florida Bar. City of North Miami v. Miami Herald Publishing Company, supra. Accord Brevard County v. Nash, 468 So. 2d 240 (Fla. 5th DCA 1984); Edelstein v. Donner, 450 So. 2d 562 (Fla. 3d DCA 1984), approved, 471 So. 2d 26 (Fla. 1985).

b. Limited statutory work product exemption

(1) Application of the exemption
The Supreme Court has ruled that the Legislature and not the judiciary has exclusive authority to exempt litigation records from the scope of Ch. 119, F.S. *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979). With the enactment of s. 119.071(1)(d), F.S., the Legislature has created a narrow exemption for certain litigation work product of agency attorneys. However, this exemption applies to attorney work product that has reached the status of becoming a public record; as discussed more extensively in the section relating to "attorney notes," certain preliminary trial preparation materials, such as handwritten notes for the personal use of the attorney, are not considered to be within the definitional scope of the term "public records" and, therefore, are outside the scope of Ch. 119, F.S. *See Johnson v. Butterworth*, 713 So. 2d 985 (Fla. 1998).

### a. 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. AGO 85-89. If the bills and invoices contain exempt work product under s. 119.071(1)(d) -- *i.e.*, "mental impression[s], conclusion[s], litigation strateg[ies], or legal theor[ies]," -- the exempt material may be deleted and the remainder disclosed. *Id.* However, information such as the hours worked or the hourly wage clearly would not fall within the scope of the exemption. *Id.*

Thus, an agency which improperly "blocked out" most notations on invoices prepared in connection with services rendered by and fees paid to attorneys representing the agency, "improperly withheld" nonexempt material when it failed to limit its redactions to those items "genuinely reflecting its 'mental impression, conclusion, litigation strategy, or legal theory.'" *Smith & Williams, P.A. v. West Coast Regional Water Supply Authority*, 640 So. 2d 216 (Fla. 2d DCA 1994). And see AGO 00-07 (records of outside attorney fee bills received by the county's risk management office for the defense of the county, as well as its employees who are sued individually, for alleged civil rights violations are public records subject to disclosure).

### b. Scope of the exemption

Section 119.071(1)(d), F.S., does not create a blanket exception to the Public Records Act for all attorney work product. AGO 91-75. The exemption is narrower than the work product privilege recognized by the courts for private litigants. AGO 85-89. The records must have been prepared "exclusively" for litigation or adversarial administrative proceedings or prepared in anticipation of imminent 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. For example, memoranda prepared by a state corrections department attorney regarding lethal injection procedures do not constitute exempt attorney work product because neither memorandum "relates to any pending litigation or appears to have been prepared 'exclusively for litigation.'" *Lightbourne v. McCollum*, 969 So. 2d 326, 333 (Fla. 2007).
Moreover, only those records which are prepared by or at the express direction of the agency attorney and reflect "a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency" are exempt from disclosure until the conclusion of the proceedings. See City of North Miami v. Miami Herald Publishing Company, 468 So. 2d 218, 219 (Fla. 1985) (noting application of exemption to "government agency, attorney-prepared litigation files during the pendency of litigation"); and City of Miami Beach v. DeLapp, 472 So. 2d 543 (Fla. 3d DCA 1985) (opposing counsel not entitled to city's legal memoranda as such material is exempt work product). Compare, Lightbourne v. McCollum, supra (memoranda do not constitute exempt work product because they appear to be "final in form" and convey "specific factual information" rather than mental impressions or litigation strategies). See also AGO 91-75 (work product exemption not applicable to documents generated or received by school district investigators, acting at the direction of the school board to investigate certain school district departments).

(2) Commencement and termination of exemption

Unlike the open meetings exemption in s. 286.011(8), F.S., for certain attorney-client discussions between a governmental agency and its attorney, s. 119.071(1)(d), F.S., is not limited to records created for pending litigation or proceedings but applies also to records prepared "in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings." See AGO 98-21, discussing the differences between the public records work product exemption in s. 119.071(1)(d), and the Sunshine Law exemption in s. 286.011(8).

However, the exemption from disclosure provided by s. 119.071(1)(d), F.S., is temporary and limited in duration. City of North Miami v. Miami Herald Publishing Co., supra. The exemption exists only until the "conclusion of the litigation or adversarial administrative proceedings" even if other issues remain. Seminole County v. Wood, 512 So. 2d 1000 (Fla. 5th DCA 1987), review denied, 520 So. 2d 586 (Fla. 1988). Thus, a school board failed to meet its burden to show that items contained in a school board litigation report were exempt from disclosure where there was no evidence that the cases in question were pending and open when the board received the public records request. Barfield v. School Board of Manatee County, 135 So. 3d 560 (Fla. 2d DCA 2014).

For example, if the state settles a claim against one company accused of conspiracy to fix prices, the state has concluded the litigation against that company. Thus, the records prepared in anticipation of litigation against that company are no longer exempt from disclosure even though the state has commenced litigation against the alleged co-conspirator. State v. Coca-Cola Bottling Company of Miami, Inc., 582 So. 2d 1 (Fla. 4th DCA 1990). And see Tribune Company v. Hardee Memorial Hospital, No. CA-91-370 (Fla. 10th Cir. Ct. Aug. 19, 1991) (settlement agreement not exempt as attorney work product even though another related case was pending, and agency attorneys feared disclosure of their assessment of the merits of the case and their litigation strategy); and Inf. Op. to Gastesi, August 27, 2015 (settlement demand furnished by plaintiff to agency).
The Legislature has, however, established specific exemptions which address disclosure of some risk management files when other related claims remain. For example, s. 768.28(16), F.S., provides an exemption for claim files maintained by agencies pursuant to a risk management program for tort liability until the termination of the litigation and settlement of all claims arising out of the same incident. See Wagner v. Orange County, 960 So. 2d 785 (Fla. 5th DCA 2007) (s. 768.28 exemption continues to apply to county’s litigation file when plaintiff pursues a portion of judgment entered against the county through the state legislative claims bill process). Cf. City of Homestead v. McDonough, 232 So. 3d 1069 (Fla. 3d DCA 2017) (court cannot order disclosure of confidential risk management file records on the basis that no prejudice would result to the city if the records were disclosed).

The exemption afforded by s. 768.28(16)(d), F.S., however, is limited to tort claims for which the agency may be liable under s. 768.28, F.S., and does not apply to federal civil rights actions under 42 U.S.C. section 1983. AGOs 00-20 (2000) and 00-07 (2000). And see AGO 92-82 (open meetings exemption provided by s. 768.28, F.S., applies only to meetings held after a tort claim is filed with the risk management program). Cf. AGO 07-47 (2007) (nothing in s. 768.28 expressly includes or excludes the "notice of claim" from the exemption and the Attorney General's Office may not conclude that all such notices are per se exempt from disclosure; it is the public agency "which must make the determination in good faith whether the notice of claim falls within the public records exemption for claims files").

c. Attorney notes

Relying on its conclusion in Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633 (Fla. 1980), the Florida Supreme Court has recognized that "not all trial preparation materials are public records." State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990). In Kokal, the Court approved the decision of the Fifth District in Orange County v. Florida Land Co., 450 So. 2d 341, 344 (Fla. 5th DCA 1984), review denied, 458 So. 2d 273 (Fla. 1984), which described certain documents as not within the term 'public records.'

Similarly, in Johnson v. Butterworth, 713 So. 2d 985 (Fla. 1998), the Court ruled that "outlines, time lines, page notations regarding information in the record, and other similar items" in the case file, did not fall within the definition of public record, and thus were not subject to disclosure. See also Lopez v. State, 696 So. 2d 725 (Fla. 1997) (handwritten notes dealing with trial strategy and cross examination of witnesses, not public records); and Atkins v. State, 663 So. 2d 624 (Fla. 1995) (notes of state attorney's investigations and annotated photocopies of decisional case law, not public records).

By contrast, documents prepared to communicate, perpetuate, or formalize knowledge constitute public records and are, therefore, subject to disclosure in the absence of statutory exemption. See Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633, 640 (Fla. 1980), in which the Court noted that "[i]nter-office memoranda and intra-office memoranda communicating information from one
Thus, in Orange County v. Florida Land Company, supra, the court concluded that trial preparation materials consisting of interoffice and intraoffice memoranda communicating information from one public employee to another or merely prepared for filing, even though not part of the agency's formal work product, were public records. As public records, such circulated trial preparation materials might be exempt from disclosure pursuant to s. 119.071(1)(d), F.S., while the litigation is ongoing; however, once the case is over the materials would be open to inspection. And see AGO 05-23.

4. Personnel records

The general rule with regard to personnel records is the same as for other public records; unless the Legislature has expressly exempted an agency's 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), F.S. Michel v. Douglas, 464 So. 2d 545 (Fla. 1985). For more information on the statutory exemptions for information contained in personnel records, please refer to the Government in the Sunshine Manual, available online at myfloridalegal.com.

a. Privacy concerns

The courts have rejected claims that constitutional privacy interests operate to shield agency personnel records from disclosure. See Michel v. Douglas, 464 So. 2d 545, 546 (Fla. 1985), holding that the state constitution "does not provide a right of privacy in public records" and that a state or federal right of disclosural privacy does not exist.

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. See News-Press Publishing Company, Inc. v. Gadd, 388 So. 2d 276 (Fla. 2d DCA 1980), stating that a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and damage to an individual or institution resulting from such disclosure.

b. Conditions for inspection of personnel records

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. Tribune Company v. Cannella, 458 So. 2d 1075 (Fla. 1984), appeal dismissed sub nom., DePerte v. Tribune Company, 105 S.Ct. 2315 (1985) (automatic 48-hour delay unauthorized by Ch. 119, F.S.).

Thus, an agency is not authorized to "seal" disciplinary notices and thereby remove such notices from disclosure under the Public Records Act. AGO 94-75. Nor
may an agency agree to remove disciplinary records from an employee’s personnel file and maintain them in separate disciplinary file for the purpose of removing such records from public access. AGO 94-54. Accord AGO 11-19 (superintendent’s failure to comply with a statutory requirement to discuss a performance evaluation with the employee before filing it in the employee’s personnel file does not change the public records status of the evaluation; the evaluation is a public record and may not be removed from public view or destroyed). Cf. s. 69.081(8)(a), F.S., providing, subject to limited exceptions, that any portion of an agreement or contract which has the purpose or effect of concealing information relating to the settlement or resolution of a claim against the state or its subdivisions is “void, contrary to public policy, and may not be enforced.” See also s. 215.425(4)(b), F.S. (on or after July 1, 2011, settlements to resolve employment disputes which result in the payment of severance pay authorized by that statute “may not include provisions that limit the ability of any party to the settlement to discuss the dispute or settlement”).

5. Social security numbers

Section 119.071(5)(a)5., F.S., states that social security numbers held by an agency are confidential and exempt from disclosure requirements. Disclosure to another governmental agency is authorized if disclosure is necessary to the performance of the receiving agency’s duties and responsibilities. Section 119.071(5)(a)6., F.S. And see AGO 19-08 (pension board authorized to disclose social security numbers to vendor conducting cyber security testing of the board’s data systems pursuant to a confidentiality agreement).

Upon verified written request which contains the information specified in the statute, a commercial entity engaged in a commercial activity as defined in the exemption may be allowed access to social security numbers, provided that the numbers will be used only in the performance of a commercial activity. Section 119.071(5)(a)7., F.S. The question of whether a particular type of activity constitutes “commercial activity” for purposes of this provision cannot be resolved by the Attorney General’s Office. AGO 10-06.

D. TO WHAT EXTENT MAY AN AGENCY REGULATE OR LIMIT INSPECTION AND COPYING OF PUBLIC RECORDS?

1. May an agency impose its own restrictions on access to or copying of public records?

Any local enactment or policy which purports to dictate additional conditions or restrictions on access to public records is of dubious validity since the legislative scheme of the Public Records Act has preempted any local regulation of this subject. See, Tribune Company v. Cannela, 458 So. 2d 1075 (Fla. 1984), appeal dismissed sub nom., DePerte v. Tribune Company, 105 S.Ct. 2315, (1985). Accord Herbits v. City of Miami, 207 So. 3d 274, 275 (Fla. 3rd DCA 2016) (“The Florida Legislature has so pervasively legislated regarding [public records] that a local government is precluded
from legislating in the same area").

2. **What agency employees are responsible for responding to public records requests?**

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." A custodian of public records 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 to inspect or copy public records. Section 119.07(1)(b), Florida Statutes.

The term “custodian" for purposes of the Public Records Act has been deemed to include all agency personnel who have it within their power to release or communicate public records. Mintus v. City of West Palm Beach, 711 So. 2d 1359 (Fla. 4th DCA 1998), citing to, Williams v. City of Minneola, 575 So. 2d 683, 687 (Fla. 5th DCA 1991). However, "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." Mintus, supra, at 1361.

3. **What individuals are authorized to inspect and receive copies of 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.) See Curry v. State, 811 So. 2d 736 (Fla. 4th DCA 2002) (defendant's conduct in making over 40 public records requests concerning victim constituted a "legitimate purpose" within the meaning of the aggravated stalking law "because the right to obtain the records is established by statute and acknowledged in the state constitution").

4. **Must an individual show a "special interest" or "legitimate interest" in public records before being allowed to inspect or copy same?**

No. 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.” Curry v. State, 811 So. 2d 736, 742 (Fla. 4th DCA 2002). 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." Microdecisions, Inc. v. Skinner, 889 So. 2d 871,875 (Fla. 2d DCA 2004), review denied, 902 So. 2d 791 (Fla. 2005).

Note, however, that s. 817.568, F.S., provides criminal penalties for unauthorized use of personal identification information for fraudulent or harassment purposes. And see s. 817.569, F.S., providing penalties for criminal use of a public record or public records information.
5. **May an agency refuse to allow inspection or copying of public records on the grounds that the request for such records is "overbroad" or lacks particularity?**

No. The custodian is not authorized to deny a request to inspect and/or copy public records because of a lack of specifics in the request. *See Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985), *review denied*, 475 So. 2d 695 (Fla. 1985), recognizing that the "breadth of such right [to inspect] is virtually unfettered, save for the statutory exemptions . . .."  *Cf. Woodard v. State*, 885 So. 2d 444 (Fla. 4th DCA 2004) (records custodian must furnish copies of records when the person requesting them identifies the portions of the record with sufficient specificity to permit the custodian to identify the record and forwards the statutory fee).

6. **When must an agency respond to a public records request?**

A 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. Section 119.07(1)(c), F.S. 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. *Id. See Raydient LLC v. Nassau County, Florida*, 2019-CA-000054 (Fla. 4th Cir. Ct. August 24, 2021) (if agency officers or employees transact public business on privately-owned devices or accounts, agency “has an affirmative duty….to do what is reasonably necessary to promptly retrieve” public records from those individuals).

The Public Records Act 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 reasonable time allowed the custodian to retrieve the record and redact those portions of the record the custodian asserts are exempt. *Tribune Company v. Cannella*, 458 So. 2d 1075 (Fla. 1984), *appeal dismissed sub nom., Deperte v. Tribune Company*, 105 S.Ct. 2315 (1985).

A municipal policy which provides for an automatic delay in the production of public records is impermissible. *Tribune Company v. Cannella*, *supra*. 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. *Tribune Company v. Cannella*, *supra*. Nor may a city delay public access to board meeting minutes until after the city commission has approved them. *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010), *review denied*, 47 So. 3d 1288 (Fla. 2010). *And see* 96-55 (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).

An agency's unjustified delay in producing public records has been determined to constitute an unlawful refusal to provide access to public records. *See Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654, 655 (Fla. 1st DCA 2014) (“Unlawful refusal . . . includes not only affirmative refusal to produce records, but also unjustified
delay in producing them”). See also Hewlings v. Orange County, Florida, 87 So. 3d 839 (Fla. 5th DCA 2012) (mere fact that county quickly responded to public records request by voicemail and fax is not dispositive of whether county unjustifiably delayed in complying with the request); and Promenade D’Iberville, LLC v. Sundy, 145 So. 3d 980, 983 (Fla. 1st DCA 2014) (agency violated the Public Records Act by “delaying access to non-exempt public records for legally insufficient reasons”). Compare Siegmeister v. Johnson, 240 So. 3d 70 (Fla. 1st DCA 2018), rejecting a requester’s contention that an assistant state attorney was required to allow the requester to view public records at a branch office when office policy required that the records be reviewed for exempt information by the records custodian at the main office.

While the custodian may reasonably restrict inspection to those hours during which his or her office is open to the public, an agency policy that restricts inspection of public records to the hours of 8:30 a.m. to 9:30 a.m., Monday through Friday with 24-hour advance notice violates the Public Records Act. Lake Shore Hospital Authority v. Lilker, 168 So. 3d 332 (Fla. 1st DCA 2015). And see AGO 81-12.

7. May an agency require that a request to examine or copy public records be made in writing or require that the requester furnish background information to the custodian?

No. Nothing in Ch. 119, F.S., requires that a requester make a demand for public records in person or in writing. 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”); and Chandler v. City of Greenacres, 140 So. 3d 1080 (Fla. 4th DCA 2014) (city not authorized to require form as a condition for production of public records). And see Inf. Op. to Cook, May 27, 2011 (agency may not require public records requester to provide physical address for mailing copies or to be physically present to inspect records).

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. See Sullivan v. City of New Port Richey, No. 86-1129CA (Fla. 6th Cir. Ct. May 22, 1987), affirmed, 529 So. 2d 1124 (Fla. 2d DCA 1988), noting that a public records requester’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.

8. Is an agency required to provide records in the medium requested?

An agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium. Section 119.02(f), F.S. Accordingly, an agency violated the Public Records Act when it referred the requester to a website instead of providing paper copies as the requester asked. Lake Shore hospital Authority v. Lilker, 168 So. 3d 332 (Fla. 1st DCA 2015). And see the discussion of formatting
issues relating to electronic records found on pages 39-40.

Thus, upon receipt of a public records request, the agency must comply by producing all non-exempt records in the custody of the agency that are responsive to the request, upon payment of the charges authorized in Ch. 119, F.S. However, this mandate applies only to those records in the custody of the agency at the time for 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 in the future. See Inf. Op. to Worch, June 15, 1995.

However, there is a difference between providing existing records in the medium requested and creating a new record in order to accommodate a request for information from the agency. For example, if an agency maintains a list of the names of officers and employees who have requested the exemption of their home addresses and telephone numbers under section 119.071(4)(d), F.S., the agency must provide the list; but the agency is not required to create a new record in order to accommodate the request. AGO 08-29. And see AGOs 92-38 (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) and 80-57.

Similarly, a clerk of court was not required to create a list of documents from a case file which may be responsive to some forthcoming request. Wootton v. Cook, 590 So. 2d 1039 (Fla. 1st DCA 1991). 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. Id. See Woodard v. State, 885 So. 2d 444, 445n.1 (Fla. 4th DCA 2004) (case remanded where agency provided only information relating to statutory fee schedule rather than total copying cost of requested records).

9. May an agency refuse to comply with a request to inspect or copy the agency’s public records on the grounds that the records are not in the physical possession of the custodian?

No. An agency is not authorized to refuse to allow inspection of public records on the grounds that the documents have been placed in the actual possession of an agency or official other than the records custodian. See Tober v. Sanchez, 417 So. 2d 1053 (Fla. 3d DCA 1982), review denied sub nom., Metropolitan Dade County Transit Agency v. Sanchez, 426 So. 2d 27 (Fla. 1983) (official 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, F.S.); and Chandler v. City of Sanford, 121 So. 3d 657, 660 (Fla. 5th DCA 2013) (City “cannot be relieved of its legal responsibility for the public records by transferring the records to another agency”).

10. May an agency refuse to allow access to public records on the grounds that the records are also maintained by another agency?
No. 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 in the absence of an applicable statutory exemption. AGO 86-69.

11. In the absence of legislative authorization, may an agency refuse to allow public records made or received in the normal course of business to be inspected or copied if requested to do so by the maker or sender of the document?

No. To allow the maker or sender of documents to dictate the circumstances under which the documents 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. See Browning v. Walton, 351 So. 2d 380 (Fla. 4th DCA 1977) (a city cannot refuse to allow inspection of records containing the names and addresses of city employees who have filled out forms requesting that the city maintain the confidentiality of all material in their personnel files). Accord Sepro Corporation v. Florida Department of Environmental Protection, 839 So. 2d 781 (Fla. 1st DCA 2003), review denied sub nom, Crist v. Department of Environmental Protection, 911 So. 2d 792 (Fla. 2005), (private party cannot render public records exempt from disclosure merely by designating information it furnishes a governmental agency confidential). Cf., Hill v. Prudential Ins. Co. of America, 701 So. 2d 1218 (Fla. 1st DCA 1997), review denied, 717 So. 2d 536 (Fla. 1998) (materials obtained by state agency from anonymous sources during the course of its investigation of an insurance company were public records and subject to disclosure in the absence of statutory exemption, notwithstanding the company's contention that the records were "stolen" or "misappropriated" privileged documents that were delivered to the state without the company's permission).

Similarly, it has been held that an agency "cannot bargain away its Public Records Act duties with promises of confidentiality in settlement agreements." Tribune Company v. Hardee Memorial Hospital, No. CA-91-370 (Fla. 10th Cir. Ct. Aug. 19, 1991), stating that a confidentiality provision in a settlement agreement which resolved litigation against a public hospital did not remove the document from the Public Records Act. Cf. s. 69.081(8), F.S., part of the "Sunshine in Litigation Act," providing, subject to certain exceptions, that any portion of an agreement which conceals information relating to the settlement or resolution of any claim or action against an agency is void, contrary to public policy, and may not be enforced, and requiring that settlement records be maintained in compliance with Ch. 119, F.S. And see National Collegiate Athletic Association v. The Associated Press, 18 So. 3d 1201 (Fla. 1st DCA 2009), review denied, 37 So. 3d 848 (Fla. 2010), holding 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”; and Inf. Op. to Barry, June 24, 1998, stating that “a
state agency may not enter into a settlement agreement or other contract which contains a provision authorizing the concealment of information relating to a disciplinary proceeding or other adverse employment decision from the remainder of a personnel file."

12. **Must an agency state the basis for its refusal to release an exempt record?**

   Yes. 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 from inspection. Section 119.07(1)(f), F.S. See *Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000) (agency’s response that it had provided all records "with the exception of certain information relating to the victim" deemed inadequate because the response "failed to identify with specificity either the reasons why the records were believed to be exempt, or the statutory basis for any exemption. Cf. *City of St. Petersburg v. Romine*, 719 So. 2d 19, 21 (Fla. 2d DCA 1998), noting 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."

   However, s.119.07(1)(e) “requires only record-by-record—not redaction-by-redaction—identification of the exemptions authorizing the redactions in each record.” *Jones v. Miami Herald Media Company*, 198 So. 3d 1143 (Fla. 1st DCA 2016). The court upheld the agency’s use of a form with checkboxes identifying the various statutory exemptions relied upon for the redactions in the records and rejected the petitioner’s contention that the agency should have specified which exemption applied to which redaction. *Accord Dettelbach v. Department of Business and Professional Regulation*, 261 So. 3d 676 (Fla. 1st DCA 2018) (agency not required to identify each document withheld as exempt attorney work product per s. 119.071(1)(d), F.S.).

13. **May an agency refuse to allow inspection and copying of an entire public record on the grounds that a portion of the record contains information which is exempt from disclosure?**

   No. Where a public record contains some information which is exempt from disclosure, s. 119.07(1)(d), F.S., requires the custodian of that document to redact only that portion of the record for which a valid exemption is asserted and to provide the remainder of the record for inspection and copying. 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). 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. AGO 99-52. Cf. AGO 02-73 (agency must redact confidential and exempt information and release the remainder of the record; agency is not authorized to release records containing confidential information, albeit anonymously.)
14. May an agency refuse to allow inspection of public records because the agency believes disclosure could violate privacy rights?

It is well established that "neither a custodian of records nor a person who is the subject of a record can claim a constitutional right of privacy as a bar to requested inspection of a public record which is in the hands of a government agency." *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991). Thus, to the extent that information on a city's Facebook page constitutes a public record within the meaning of the Public Records Act, the state constitutional privacy provision in Art. I s. 23, Fla. Const. "is not implicated." AGO 09-19.

15. What is the liability of a custodian for release of public records?

It has been held that there is nothing in Ch. 119, F.S., indicating an intent to give private citizens a right to recovery for negligently maintaining and providing information from public records. *Friedberg v. Town of Longboat Key*, 504 So. 2d 52 (Fla. 2d DCA 1987).

However, a custodian is not protected against tort liability resulting from that person *intentionally* communicating public records or their contents to someone outside the agency which is responsible for the records unless the person inspecting the records has made a bona fide request to inspect the records or the communication is necessary to the agency's transaction of its official business. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

E. WHAT IS THE LEGAL EFFECT OF STATUTORY EXEMPTIONS FROM DISCLOSURE?

1. Creation of exemptions

"Courts cannot judicially create any exceptions, or exclusions to Florida's Public Records Act." *Board of County Commissioners of Palm Beach County v. D.B.*, 784 So. 2d 585, 591 (Fla. 4th DCA 2001). *Accord Wait v. Florida Power & Light Company*, 372 So. 2d 420, 425 (Fla. 1979) (Public Records Act "excludes any judicially created privilege of confidentiality;" only the Legislature may exempt records from public disclosure).

Article I, s. 24(c), Fla. Const., authorizes the *Legislature* to enact general laws creating exemptions provided that such laws "shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." See *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999), in which the Court refused to "imply" an exemption from open records requirements, stating "we believe that an exemption from public records access is available only after the legislature has followed the express procedure provided in Article I, section 24(c) of the Florida Constitution."
2. **Exemptions are strictly construed**

The Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose. See National Collegiate Athletic Association v. Associated Press, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009), review denied, 37 So. 3d 848 (Fla. 2010); Krischer v. D’Amato, 674 So. 2d 909 (Fla. 4th DCA 1996); Seminole County v. Wood, 512 So. 2d 1000 (Fla. 5th DCA 1987), review denied, 520 So. 2d 586 (Fla. 1988). And see Halifax Hospital Medical Center v. News-Journal Corporation, 724 So. 2d 567 (Fla. 1999) (1995 exemption to the Sunshine Law for certain hospital board meetings ruled unconstitutional because it did not meet the constitutional standard for exemptions set forth in Art. 1, s. 24[b] and [c], Fla. Const.).

An agency claiming an exemption from disclosure bears the burden of proving the right to an exemption. See Barfield v. School Board of Manatee County, 135 So. 3d 560, 562 (Fla. 2d DCA 2014); Woolling v. Lamar, 764 So. 2d 765, 768 (Fla. 5th DCA 2000), review denied, 786 So. 2d 1186 (Fla. 2001); Florida Freedom Newspapers, Inc. v. Dempsey, 478 So. 2d 1128 (Fla. 1st DCA 1985).

Access to public records is a substantive right. Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation, 784 So. 2d 438 (Fla. 2001). Thus, a statute affecting that right is presumptively prospective and there must be a clear legislative intent for the statute to apply retroactively. Id. See also Baker County Press, Inc. v. Baker County Medical Services, Inc., 870 So. 2d 189, 192-193 (Fla. 1st DCA 2004) (generally, the critical date in determining whether a document is subject to disclosure is the date the public records request is made; the law in effect on that date applies).

However, if the Legislature is "clear in its intent," an exemption may be applied retroactively. Campus Communications, Inc. v. Earnhardt, 821 So. 2d 388, 396 (Fla. 5th DCA 2002), review denied, 848 So. 2d 1153 (Fla. 2003) (statute exempting autopsy photographs from disclosure is remedial and may be retroactively applied). Accord AGO 11-16 (applying exemption to a public records request received before the statute’s effective date because the legislation creating the exemption states that it “applies to information held by an agency, before, on or after the effective date of this exemption”). And see Palm Beach County Sheriff’s Office v. Sun-Sentinel Company, 226 So. 3d 969 (Fla. 4th DCA 2017).

3. **Release or transfer of confidential or exempt records**

There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Act and confidential. WFTV, Inc. v. School Board of Seminole, 874 So. 2d 48 (Fla. 5th DCA 2004), review denied, 892 So. 2d 1015 (Fla. 2004). If information is made confidential in the statutes, the information is not subject to inspection by the public and may be released only to those persons and entities designated in the statute. Id. And see AGOs 04-09 and 86-97.
On the other hand, if the records are not made confidential but are simply exempt from the mandatory disclosure requirements in s. 119.07(1)(a), F.S., the agency is not prohibited from disclosing the documents in all circumstances. See Williams v. City of Minneola, 575 So. 2d 683 (Fla. 5th DCA 1991), review denied, 589 So. 2d 289 (Fla. 1991), in which the court observed that pursuant to s. 119.07(3)(d), F.S., [now s. 119.071(2)(c), F.S.] "active criminal investigative information" was exempt from the requirement that public records be made available for public inspection. However, as stated by the court, "the exemption does not prohibit the showing of such information." 575 So. 2d at 686.

In City of Riviera Beach v. Barfield, 642 So. 2d 1135 (Fla. 4th DCA 1994), review denied, 651 So. 2d 1192 (Fla. 1995), the court stated that when a criminal justice agency transfers exempt information to another criminal justice agency, the information retains its exempt status. And see Ragsdale v. State, 720 So. 2d 203, 206 (Fla. 1998) ("the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands").

F. TO WHAT EXTENT DOES FEDERAL LAW PREEMPT STATE LAW REGARDING PUBLIC INSPECTION OF RECORDS?

The general rule is that records which would otherwise be public under state law are unavailable for public inspection only when there is an absolute conflict between federal and state law relating to confidentiality of records. If a federal statute requires particular records to be closed and the state is clearly subject to the provisions of such statute, then pursuant to the Supremacy Clause of the United States Constitution, Article VI, U.S. Const., the state must keep the records confidential. State ex rel. Cummer v. Pace, 159 So. 679 (Fla. 1935); AGOs 90-102, 85-03, 81-101, 80-31, and 74-372.

Thus, tenant records of a public housing authority are not exempt, by reason of the Federal Privacy Act, from disclosure otherwise required by the Florida Public Records Act. Housing Authority of the City of Daytona Beach v. Gomillion, 639 So. 2d 117 (Fla. 5th DCA 1994). And see Wallace v. Guzman, 687 So. 2d 1351 (Fla. 3d DCA 1997) (exemptions from disclosure in Federal Freedom of Information Act apply to documents in the custody of federal agencies; the Act is not applicable to state agencies). Cf. Miami Herald Media Company v. Florida Department of Transportation, 345 F. Supp. 3d 1349, 1356 (N.D. Fla. 2018) (state agency could not disclose records when federal safety board investigating bridge collapse took control over dissemination of records relating to the investigation and directed state agency to not disclose the information contained in those records by agreement and as authorized by federal regulation).

In the absence of statutory authorization, a public official is not empowered to obtain a copyright for material produced by his or her office in connection with the transaction of official business. AGOs 03-42 and 88-23. Thus, a property appraiser is not authorized to assert copyright protection in the Geographic Information Systems
maps created by his office. *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871 (Fla. 2d DCA 2004), *review denied*, 902 So. 2d 791 (Fla. 2005).

The federal copyright law, when read together with Florida's Public Records Act, authorizes and requires the custodian of records of the Department of State to make maintenance manuals supplied to that agency pursuant to law available for inspection. However, the reproduction and distribution of copies of the manuals which are protected under the federal copyright law is subject to the federal law. AGO 03-26. Cf. *State, Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377 (Fla. 1st DCA 1994) (agency copy of administrative hearing transcript is a public record regardless of who ordered the transcription or bore its expense; thus, agency may charge only the fees authorized in Ch. 119, F.S., even though the court reporter may have copyrighted the transcript).

G. WHAT FEES MAY LAWFULLY BE IMPOSED FOR INSPECTING AND COPYING PUBLIC RECORDS

1. When may an agency charge a fee for the mere inspection of public records?

As noted in AGO 85-03, 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. Thus, public information must be open for inspection without charge unless otherwise expressly provided by law. See *State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905).

Section 119.07(4)(d), F.S., 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. Thus, an agency may adopt a policy imposing a reasonable special service charge based on the actual labor cost for 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. AGO 00-11. 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. *Id.*

2. Is an agency required to provide copies of public records if asked, or may the agency allow inspection only?

Section 119.07(4), F.S., provides that the custodian shall furnish a copy or a certified copy of a public record upon payment of the fee prescribed by law. See *Fuller v. State ex rel. O'Donnell*, 17 So. 2d 607 (Fla. 1944) (“The best-reasoned authority in this country holds that the right to inspect public records carries with it the right to make copies.”)

3. What fees may be charged for copies?
Chapter 119 does not prohibit agencies from providing informational copies of public records without charge. AGO 90-81. An agency may, however, charge a fee for copies provided that the amount of the fee does not exceed that authorized by Ch. 119, F.S., or established elsewhere in the statutes for a particular record. 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 City of Miami Beach v. Public Employees Relations Commission, 937 So. 2d 226 (Fla. 3d DCA 2006) (labor union must pay costs stipulated in Ch. 119, F.S., for copies of documents it has requested from a public employer for collective bargaining purposes).

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 ½ inches or less. An agency may charge no more than an additional 5 cents for each two-sided duplicated copy. Section 119.07(4)(a)2., F.S. A charge of up to $1.00 per copy may be assessed for a certified copy of a public record. Section 119.07(4)(c), F.S.

For other copies, the charge is limited to the actual cost of duplication of the record. Section 119.07(4)(a)3., F.S. 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." Section 119.011(1), F.S. 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. Section 119.07(4)(b), F.S. And see the discussion on the special service charge on pages 58-59.

4. May an agency charge for travel costs, search fees, development costs and other incidental costs?

With the exception of county maps or aerial photographs supplied by county constitutional officers, the Public Records Act does not authorize the addition of overhead costs such as utilities or other office expenses to the charge for public records. AGO 99-41. Thus, an agency may not charge for travel time and retrieval costs for public records stored off-premises. AGO 90-07. And see AGO 02-37 (although an agency may contract with a private company to provide information also obtainable through the agency, it may not abdicate its duty to provide 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).

Similarly, an agency may not charge fees designed to recoup the original cost of developing or producing the records. AGO 88-23 (state attorney not authorized to impose a charge to recover part of costs incurred in production of a training program; the fee to obtain a copy of the videotape of such program is limited to the actual cost of duplication of the tape). And see State, Department of Health and Rehabilitative
5. When may an agency charge a special service charge for extensive use of clerical or supervisory labor or extensive information technology resources?

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 special service charge which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both. The special service charge applies to requests for both inspection and copies of public records when extensive clerical assistance is required. Board of County Commissioners of Highlands County v. Colby, 976 So. 2d 31 (Fla. 2d DCA 2008). The fact that a request involves the use of information technology resources is not sufficient to incur the imposition of the special service charge; rather an extensive use of such resources is required before the special service charge is authorized. AGO 13-03.

The term "labor cost" for purposes of the special service charge may include both salary and benefits. Board of County Commissioners v. Colby, supra. However, the statute requires that the special service charge be "reasonable" and based on actual costs. Id. See Carden v. Chief of Police, 696 So. 2d 772, 773 (Fla. 2d DCA 1996), stating that an "excessive charge" under s. 119.07(4)(d), F.S., "could well serve to inhibit the pursuit of rights conferred by the Public Records Act." See also Trout v. Bucher, 205 So. 3d 876 (Fla. 4th DCA 2016), rejecting Trout's contention that the supervisor of elections could charge no more than the hourly rate of the lowest paid employee who could do the work to produce ballots for his inspection.

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 (DOC) rule that defined "extensive" for purposes of the special service charge. Florida Institutional Legal Services, Inc. v. Florida Department of Corrections, 579 So. 2d 267 (Fla. 1st DCA 1991), review denied, 592 So. 2d 680 (Fla. 1991). The agency rule defined "extensive" to mean that it would take more than 15 minutes to locate, review for confidential information, copy and refile the requested material.

An agency is not ordinarily authorized to charge for the cost to review records for statutorily exempt material. AGO 84-81. 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. See Florida Institutional Legal Services, Inc. v. Florida Department of Corrections, 579 So. 2d at 267.
Florida Agency for Health Care Administration v. Zuckerman Spaeder, LLP, 221 So. 3d 1260 (Fla. 1st DCA 2017) (trial court erred by requiring production of documents prior to payment of agency’s invoices because requester “should be required to pay for the cost of searching, review, and redaction of exempted information prior to production”).

A county policy to require 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.” Board of County Commissioners v. Colby, 976 So. 2d 31, 37 (Fla. 2d DCA 2008). Accord Morris Publishing Group, LLC, 154 So. 3d 528 (Fla. 1st DCA 2015), review denied, 163 So. 3d 512 (Fla. 2015) (finding agency policy of requiring payment of a deposit before redaction and production of public records to be “facially reasonable”); City of St. Petersburg v. Dorchester Holdings, LLC, 331 So. 3d 799 (Fla. 2d DCA 2021) (prepayment of costs involved in reviewing emails for exempt material per city policy, authorized). But see Miami Dade College v. Nader + Museu I, LLLP, 47 F.L.W. D1814 (Fla. 3d DCA August 31, 2022) (trial court order denying agency’s motion to collect fees affirmed because agency failed to provide the requester with an estimate or invoice prior to production, nor did the parties agree in advance to the charges).

An agency may require that the requester pay past due fees for records compiled for a previous request before complying with the requester’s subsequent request. Lozman v. City of Riviera Beach, 995 So. 2d 1027 (Fla. 4th DCA 2008).

H. WHAT ARE THE OPTIONS IF AN AGENCY REFUSES TO PRODUCE PUBLIC RECORDS FOR INSPECTION AND COPYING?

1. Voluntary mediation program

Section 16.60, F.S., establishes the open government mediation program as a voluntary alternative for resolution of public access disputes. For more information about mediation, please contact the Attorney General’s Office at the following address and telephone number: The Capitol, PL-01, Tallahassee, Florida 32399-1050; telephone: (850) 245-0140.

2. Civil action

a. Remedies

A person who has been 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, Florida Statutes. Cf. s. 119.07(9), F.S., stating that agencies are prohibited from responding to a public records request by filing an action for declaratory relief against the requester to determine whether that record meets the definition of public record or if is confidential or exempt.

Before filing a lawsuit, the petitioner must have furnished a public records request to the agency. Villarreal v. State, 687 So. 2d 256 (Fla. 1st DCA 1996), review
denied, 694 So. 2d 741 (Fla. 1997), cert. denied, 118 S.Ct. 316 (1997) (improper to order agency to produce records before it has had an opportunity to comply).

Generally, mandamus is the appropriate remedy to enforce compliance with the Public Records Act. See Chandler v. City of Greenacres, 140 So. 3d 1080, 1083 (Fla. 4th DCA 2014); and Deeson Media, LLC v. City of Tampa, 291 So. 3d 974 (Fla. 2d DCA 2019). If the requestor's petition presents a prima facie claim for relief, an order to show cause should be issued so that the claim may receive further consideration on the merits. Gay v. State, 697 So. 2d 179 (Fla. 1st DCA 1997). Cf. Scott v. Lee County School Board, 310 So. 3d 163 (Fla. 2d DCA 2021) (petition for writ of mandamus dismissed where petitioner failed to attach anything, such as his request for the records, to the petition).

Section 119.11(1), F.S., mandates that actions brought under Ch. 119 are entitled to an immediate hearing and take priority over other pending cases. See Matos v. Office of the State Attorney for the 17th Judicial Circuit, 80 So. 3d 1149 (Fla. 4th DCA 2012) ("[a]n immediate hearing does not mean one scheduled within a reasonable time but means what the statute says: immediate"). "In an action to enforce the provisions of chapter 119, Florida Statutes, Florida law requires the trial court to hold a hearing before entering a final order." Cook v. Department of Corrections, 315 So. 3d 790 (Fla. 1st DCA 2021). See also Clay County Education Association v. Clay County School Board, 144 So. 3d 708 (Fla. 1st DCA 2014). "The purpose of the hearing is to allow the court to hear argument from the parties and resolve any dispute as to whether there are public records responsive to the request and whether an exemption from disclosure applies in whole or in part to the records." Kline v. University of Florida, 200 So. 3d 271 (Fla. 1st DCA 2016); and Rogers v. State, 271 So. 3d 79 (Fla. 3rd DCA 2019).

Mandamus is a "one time order by the court to force public officials to perform their legally designated employment duties." Town of Manalapan v. Rechler, 674 So. 2d 789, 790 (Fla. 4th DCA 1996). Thus, a trial court erred when it retained continuing jurisdiction to oversee enforcement of a writ of mandamus granted in a public records case. Id. And see Areizaga v. Board of County Commissioners of Hillsborough County, 935 So. 2d 640 (Fla. 2d DCA 2006) (circuit courts may not refer extraordinary writs to mediation; thus, trial judge should not have ordered mediation of petition for writ of mandamus seeking production of public records).

b. Procedural issues

(1) In camera inspection

Section 119.07(1)(g), F.S., provides that in any case in which an exemption to the public inspection requirements in s. 119.07(1), F.S., is alleged to exist pursuant to s. 119.071(1)(d) or (f), (2)(d), (e), or (f), or (4)(c), F.S., the public record or part of the record in question shall be submitted to the trial court for an in camera examination.

An in camera review of claimed exempt material is required even if both the petitioner and the agency have agreed to forego this procedure. Everglades Law Center, Inc. v. South Florida Water Management District, 290 So. 3d 123 (Fla. 4th DCA
And see O’Boyle v. Town of Gulf Stream, 257 So. 3d 1036 (Fla. 4th DCA 2018) (in camera review to determine whether public official’s text messages on private devices constitute public records that must be provided to petitioner); Blanco v. City of Miami, 336 So. 3d 1268 (Fla. 3d DCA 2022) (in camera review required of surveillance recordings requested by defendant because without an in camera review the judge could not determine whether the recordings fell within the security plan exemption in s. 119.071(3)(a), F.S.). Cf. Althouse v. Palm Beach County Sheriff’s Office, 89 So. 3d 288 (Fla. 4th DCA 2012) (while the trial court’s failure to conduct an in camera inspection usually constitutes reversible error, where the petitioner objected to an inspection and thereby precluded the trial judge from conducting “an intelligent review of the documents,” the appellate court was “compelled to affirm” the trial court’s denial of a petition seeking documents relating to a pending criminal investigation).

While s. 119.07(1)(g), F.S., states that an in camera inspection is “discretionary” in cases where an exemption is alleged under s. 119.071(2)(c), F.S., it has been held that an in camera inspection is necessary in order for the court to determine whether the exemption applies to the records at issue. See Woolling v. Lamar, 764 So. 2d 765 (Fla. 5th DCA 2000), review denied, 786 So. 2d 1186 (Fla. 2001).

(2) Mootness

In Puls v. City of Port St. Lucie, 678 So. 2d 514 (Fla. 4th DCA 1996), the court noted that "[p]roduction of the records after the [public records] lawsuit was filed did not moot the issues raised in the complaint." See also O’Boyle v. Town of Gulfstream, 257 So. 3d 1036 (Fla. 4th DCA 2018); and Schweikert v. Citrus County, 193 So. 3d 1075 (Fla. 5th DCA 2016). Cf. Grapski v. City of Alachua, 31 So. 3d 193 (Fla. 1st DCA 2010), review denied, 47 So. 3d 1288 (Fla. 2010) (city’s refusal to provide canvassing board minutes until they had been approved by city commission “denied any realistic access for the only purpose appellants sought to achieve—review of the Minutes before the Commission meeting[,]” accordingly, “the damage to appellants was not mooted”).

(3) Stay

If the person seeking public records prevails in the trial court, the public agency must comply with the court’s judgment within 48 hours unless otherwise provided by the trial court or such determination is stayed within that period by the appellate court. Section 119.11(2), F.S. An automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. Rule 9.310(b)(2), Florida Rules of Appellate Procedure.

(4) Attorney fees

Section 119.12, F.S., provides that if a civil action is filed against an agency to enforce the provisions of this chapter, the court shall assess and award the reasonable costs of enforcement including reasonable attorney fees against the responsible agency if the court determines that the agency unlawfully refused to permit a public record be inspected or copied; and the complainant provided written notice of the public records
request to the agency’s custodian of public records at least 5 business days before filing the civil action. Notice is not required if the agency fails to prominently post contact information as provided in the statute. See Roldan v. City of Hallandale Beach, 48 F.L.W. D705 (Fla. 4th DCA April 5, 2023) (complainant must file a separate written notice identifying the public record request before in order to recover attorney’s fees in an enforcement action).

The court must also determine whether the complainant made the public records request or participated in the civil action for an “improper purpose.” Cf. State, Department of Economic Opportunity v. Consumer Rights, LLC, 181 So. 3d 1239 (Fla. 1st DCA 2015) (s. 284.30, F.S., procedures for obtaining attorney’s fees paid by the state or any of its agencies apply to public records cases).

A successful pro se litigant is entitled to reasonable costs of enforcement. Weeks v. Golden, 764 So. 2d 633 (Fla. 1st DCA 2000). Accord: Weeks v. Golden, 846 So. 2d 1247 (Fla. 1st DCA 2003) (prevailing pro se inmate entitled to an award of costs including postage, envelopes and copying, in addition to filing and service of process fees).

Section 119.12, F.S., is designed to encourage voluntary compliance with the requirements of Ch. 119, F.S. The statute “has the dual role of both deterring agencies from wrongfully denying access to public records and encouraging individuals to continue pursuing their right to access public records.” Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee, 189 So. 3d 120, 125 (Fla. 2016). An “unlawful refusal” may include unlawful conditions or requirements for obtaining public records. Id. And, a delay in disclosing records can rise to the level of a refusal if “there was no good reason for the delay.” Consumer Rights, LLC v. Union County, 159 So. 3d 882, 885 (Fla. 1st DCA 2015), review denied, 177 So. 3d 1264 (Fla. 2015). For more information on this issue, please see the discussion on pages 47-49.

In addition to judicial remedies, s. 119.10(1)(b), F.S., provides 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 is guilty of a misdemeanor of the first degree, punishable by possible criminal penalties of one year in prison, or $1,000 fine, or both. See State v. Webb, 786 So. 2d 602 (Fla. 1st DCA 2001).

Section 119.10(1)(a), F.S., provides that a violation of any provision of Chapter 119, Florida Statutes, by a public official is a noncriminal infraction, punishable by fine not exceeding $500. A state attorney may prosecute suits charging public officials with violations of the Public Records Act, including those violations which may result in a finding of guilt for a noncriminal infraction. AGO 91-38.

I. HOW LONG MUST AN AGENCY RETAIN A PUBLIC RECORD?

1. 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 successor at the expiration of his 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. 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 see AGO 09-39 (delivery of public records to records custodian of successor agency).

2. Retention and disposal of records

Pursuant to s. 257.36(6), F.S, "[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]." This statutory mandate applies to exempt records as well as those subject to public inspection. See AGOs 94-75, 87-48, and 81-12. Questions regarding record destruction schedules should be referred to the Department of State, Bureau of Archives and Records Management.

June 14, 2023