

2-C-14 | INVESTIGATIVE RECORDS OF NON-LAW ENFORCEMENT AGENCIES**a. Investigative Records Generally**

In the absence of a specific legislative exemption, investigative records made or received by public agencies are open to public inspection pursuant to Ch. 119, F.S. See *State ex rel. Veale v. City of Boca Raton*, 353 So.2d 1194 (Fla. 4th DCA 1977), cert. denied, 360 So. 2d 1247 (Fla. 1978) (report prepared by assistant city attorney for the city council concerning suspected irregularities in the city's building department is a public record). See also *Caswell v. Manhattan Fire and Marine Insurance Company*, 399 F.2d 417 (5th Cir. 1968) (ordering that certain investigative records of the state insurance agency be produced for inspection under Ch. 119, F.S.). Accord AGO 91-75 (documents containing information compiled by school board employees during an investigation of school district departments are open to inspection in the absence of statutory exemption); AGO 85-79 (interoffice memoranda, correspondence, inspection reports of restaurants, grocery stores and other such public premises, nuisance complaint records, and notices of violation of public health laws maintained by county public health units are subject to disclosure in the absence of any statutory exemption); and AGO 71-243 (inspection reports made or received by a school board in connection with its official investigation of the collapse of a school roof constitute public records). Cf. *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973) (Sunshine Law applies to boards acting in a "quasi-judicial" capacity).

Disclosure of records of investigative proceedings upon completion of a preliminary investigation is not violative of privacy rights arising under the state or federal Constitutions. See *Garner v. Florida Commission on Ethics*, 415 So. 2d 67 (Fla. 1st DCA 1982), review denied, 424 So. 2d 761 (Fla. 1983) (public's right to view commission files prepared in connection with investigation of alleged violations of the Code of Ethics outweighs an individual's disclosural privacy rights).

The investigative exemptions now found in paragraphs (2)(c) through (f), (h) and (i) of s. 119.071(2), F.S., limit disclosure of specified law enforcement records, and thus do not apply to investigations conducted by agencies outside the criminal justice system. See *Douglas v. Michel*, 410 So. 2d



936, 939 (Fla. 5th DCA 1982), questions answered and approved, 464 So. 2d 545 (Fla. 1985) (exemption for "information revealing surveillance techniques or procedures or personnel" [now found at s. 119.071(2)(d)] does not apply to a hospital's personnel files). See also AGO 91-75, stating that the active criminal investigation and intelligence exemption does not apply to information compiled in a school board investigation into the conduct of certain school departments; and AGO 87-51, concluding that complaints from state labor department employees relating to departmental integrity and efficiency do not constitute criminal intelligence information or criminal investigative information.

Thus, the contents of an investigative report compiled by the Inspector General for a state agency in carrying out his or her duty to determine program compliance are not converted into criminal intelligence information merely because the Florida Department of Law Enforcement also conducts an investigation or because such report or a copy thereof has been transferred to the department. Inf. Op. to Slye, August 5, 1993.

b. Statutory Exemptions

A number of exemptions exist for investigative records. For a more complete listing, please refer to Appendix D and the Index.

(1) Discrimination Investigations

Complaints and other records in the custody of any agency which relate to a complaint of discrimination based on race, color, religion, sex, national origin, age, handicap, or marital status in connection with hiring practices, position classifications, salary, benefits, discipline, discharge, employee performance evaluation, or related activities are exempt from 119.07(1), F.S., until a probable cause finding is made, the investigation becomes inactive, or the complaint or other record is made part of the record of a hearing or court proceeding. Section 119.071(2)(g)1., F.S. See AGO 96-93 (prior to completion of an investigation and a finding of probable cause, records of a county equal opportunity board are exempt from disclosure). Cf. s. 119.071(2)(k), F.S., providing for confidentiality of complaints and investigative records of employee



misconduct until the investigation is no longer active or has been concluded as set forth in the exemption.

Section 119.071(2)(g)1., F.S., was found to be inapplicable to a complaint filed against a county commissioner which listed many examples of alleged abusive behavior that would be inappropriate for one in the commissioner's position, because the complaint did not assert any form of discrimination based upon race, color, religion, sex, national origin, handicap or marital status. *Schweickert v. Citrus County Florida Board*, 193 So. 3d 1075, 1080 (Fla. 5th DCA 2016). The appellate court also rejected the county's argument that it could delay producing the complaint until after the investigation was completed because the investigator might have discovered or generated records during her investigation that could have related to discrimination based on race, color, religion, sex, national origin, handicap or marital status which would have qualified for the exemption.

Section 119.071(2)(g)2., F.S., provides that when the alleged victim chooses not to file a complaint and requests that the records of the complaint remain confidential, all records relating to an allegation of employment discrimination are confidential. But see AGO 09-10, stating that when an agency has reached a settlement with an individual who has filed a discrimination complaint, the claimant is considered to have pursued the claim and may not request confidentiality pursuant to the exemption.

Complaints and other records in the custody of any unit of local government which relate to a complaint of discrimination based on race, color, religion, sex, national origin, age, handicap, marital status, sale or rental of housing, the provision of brokerage services, or the financing of housing, are exempt from s. 119.07(1), F.S., until a probable cause finding is made, the investigation becomes inactive, or the complaint or other record is made part of the record of any hearing or court proceeding. Section 119.0713(1), F.S.

Personal identifying information of the alleged victim in an allegation of sexual harassment or the victim of sexual harassment is confidential and exempt if such



information identifies that person as an alleged victim or as a victim of sexual harassment. Confidentiality may be waived in writing by the alleged victim or the victim. The information may be disclosed to another governmental entity in the furtherance of its official duties and responsibilities. Section 119.071(2)(n), F.S. CF. s. 284.45, F.S.

(2) Employee Misconduct Investigations

For information about the exemption for complaints and active investigations of employee misconduct contained in s. 119.071(2)(k), F.S., please refer to the discussion on page 135.

(3) Ethics Investigations

The complaint and records relating to the preliminary investigation conducted by the Commission on Ethics or other specified entities are confidential and exempt until the complaint is dismissed as legally insufficient, the alleged violator requests in writing that the records be made public, or until the Commission or other listed entity determines whether probable cause exists to believe that a violation has occurred. Section 112.324(2)(a) and (e), F.S. See also s. 112.3215(8)(b) and (d), F.S. (providing confidentiality for certain records relating to Ethics Commission investigation of alleged violations of lobbying laws).

However, a police report of an investigation of a public employee that has been concluded and is in the possession of the police department is not made confidential by the fact that the same issue and the same individual are the subject of an ethics complaint pursuant to Part III, Ch. 112, F.S., or because a copy of the police report may be included in information obtained by the Ethics Commission pursuant to its powers to investigate ethics complaints. AGO 96-05. And see *Gay v. City of Madeira Beach*, No. 16-004836 (Fla. 6th Cir. Ct. May 26, 2017), available online in the Cases database at the open government site at myfloridalegal.com (city must permit inspection and copying of complaints filed with the Ethics Commission and received by the City Attorney). Cf. s. 112.324(2)(b), F.S. (written referrals to the Ethics Commission submitted pursuant to s.



112.324[1][b], F.S., records relating to such referrals held by the commission, the Governor, the Department of Law Enforcement, or a state attorney, and records relating to any preliminary investigation of such referrals held by the commission, are confidential and exempt except as provided in s. 112.324[2][e], F.S.)

(4) Local Government Inspector General Investigations

The investigative report of the inspector general prepared for or on behalf of a unit of local government becomes a public record when the investigation becomes final. Section 119.0713(2) (b), F.S. An investigation becomes final when the investigative report is presented to the unit of local government, as defined in the exemption. *Id.* Cf. *Nicolai v. Baldwin*, 715 So. 2d 1161, 1163 (Fla. 5th DCA 1998), noting that a draft audit report prepared by the clerk of court did not become "final" when it was reviewed by the county administrator; the report became "final" and subject to disclosure when presented to the county commission. Information received, produced, or derived from an investigation is confidential and exempt until the investigation is complete or when the investigation is no longer active, as defined in the exemption. *Id.*

(5) State Inspector General Investigations

Audit workpapers and reports of state agency inspectors general appointed in accordance with s. 20.055, F.S., are public records to the extent that they do not include information which has been made confidential and exempt from s. 119.07(1), F.S. Section 20.055(6)(b), F.S. However, when the inspector general or a member of the staff receives from an individual a complaint or information that falls within the definition provided in s. 112.3187(5), F.S. [whistleblower], the name or identity of the individual shall not be disclosed to anyone else without the written consent of the individual, unless the inspector general determines that such disclosure is unavoidable during the course of the audit or investigation. *Id.* And see page 135, discussing the exemption for complaints alleging employee misconduct found in s. 119.071(2)(k), F.S.



Section 112.31901(2), F.S., authorizes the Governor, in the case of the Chief Inspector General, or agency head, in the case of an employee designated as the agency inspector general under s. 112.3189, F.S., to certify that an investigatory record of the Chief Inspector General or an agency inspector general requires an exemption in order to protect the integrity of the investigation or avoid unwarranted damage to an individual's good name or reputation. If so certified, the investigatory records are exempt from s. 119.07(1), F.S., until the investigation ceases to be active, or a report detailing the investigation is provided to the Governor or the agency head, or 60 days from the inception of the investigation for which the record was made or received, whichever first occurs. Section 112.31901(1), F.S. The provisions of this section do not apply to whistle-blower investigations conducted pursuant to the whistle-blower act. Section 112.31901(3), F.S.

(6) State Licensing Investigations

Pursuant to s. 455.225(10), F.S., complaints against a licensed professional filed with the state licensing board or the Department of Business and Professional Regulation are confidential and exempt from disclosure until 10 days after probable cause has been found to exist by the probable cause panel of the licensing board or by the Department of Business and Professional Regulation, or the professional waives his or her privilege of confidentiality, whichever occurs first. A similar exemption applies to complaints and investigations conducted by the Department of Health and licensing boards within that department as provided in s. 456.073(10), F.S. See *Salameh v. Florida Department of Health*, 325 So. 3d 349 (Fla. 1st DCA 2021) (pursuant to s. 456.073[10], records of administrative complaint made public after probable cause panel found probable cause but failed to consider Dr. Salameh's exculpatory materials as required by statute, could not be maintained as confidential even though panel subsequently reconsidered the case, reviewed Salameh's submission, found no probable cause and withdrew the complaint). Complaints filed by a municipality against a licensed professional are included within the



confidentiality provisions. AGO 02-57. However, while the complaint filed by the municipality with the state licensing agency is exempt, the exemption afforded by the statute does not extend to other records held by the city related to the nature of the alleged offense by the licensed professional. Id.

(7) Whistle-Blower Investigations

(a) Whistle-Blower Identity

The Whistle-blower's Act, ss. 112.3187-112.31895, F.S., "is intended to prevent agencies, or independent contractors of agencies, from taking retaliatory action against an employee who reports violations of law on the part of a public employer or an independent contractor." AGO 12-20. It provides, with limited exceptions, for the confidentiality of the identity of a whistle-blower who discloses in good faith to the Chief Inspector General, an agency inspector general, a local chief executive officer, or other appropriate local official information that alleges that an employee or agent of an agency or independent contractor has violated or is suspected of having violated any federal, state, or local law, rule or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or has committed or is suspected of having committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty. Section 112.3188(1), F.S. See also s. 20.055(6)(b), F.S.

A complainant may waive the right to confidential treatment of his or her name or identity. AGO 95-20. However, an individual may not be required to sign a waiver of confidentiality as a condition of processing a complaint. AGO 96-40.

In order to qualify as a whistle-blower complaint, particular information must be disclosed to an "appropriate local official" or other statutorily designated officials; a general complaint of wrongdoing or a complaint to officials other than those specifically named in s. 112.3188(1), F.S.,



does not entitle the complainant to whistle-blower protection. AGO 98-37. And see AGO 99-07 (county inspector general qualifies as an "appropriate local official" for purposes of the whistle-blower law); and AGO 96-40 (town ethics commission may constitute "appropriate local official" for purposes of processing complaints under the whistle-blower law). Cf. AGO 12-20 (while county transportation board may be designated as an "appropriate local official" under s. 112.3188, F.S., such designation "may not be advisable" because board must comply with the Sunshine Law and, "[a]bsent a statutory exemption, the handling of confidential information or records during the course of public meetings does not otherwise allow meetings of the board to be closed").

(b) Active Investigations

Section 112.3188(2)(a), F.S., states that except as specifically authorized in s. 112.3189, F.S., all information received by the Chief Inspector General or an agency inspector general or information produced or derived from fact-finding or other investigations conducted by the Florida Commission on Human Relations or the Department of Law Enforcement is confidential and exempt if the information is being received or derived from allegations as set forth in s. 112.3188(1)(a) or (b), F.S., and an investigation is "active" as defined s. 112.3188(2)(c), F.S. "Thus, the act protects the identity of employees and persons who disclose information that can serve as the basis for a whistle-blower complaint, as well as information received in the course of a whistle-blower investigation." AGO 10-48.

Information received by an appropriate local official or local chief executive officer or produced or derived from fact-finding or investigations by local government pursuant to s. 112.3187(8)(b), F.S. [authorizing administrative procedures for handling whistle-blower complaints filed by local public employees] is confidential and exempt, provided that the information is being



received or derived from allegations set forth in s. 112.3188(1) and an investigation is "active" as defined in the section. Section 112.3188(2)(b), F.S. A complaint initiating an investigation into alleged mismanagement and overpayment of contractors constitutes "information received by" a proper local official and is not subject to disclosure until the investigation is no longer active. *McLendon v. Palm Beach County Office of Inspector General*, 286 So. 3d 375 (Fla. 4th DCA 2019). See also s. 119.071(2)(k), F.S., providing that complaints alleging "employee misconduct" are confidential until the investigation is no longer active or has concluded as provided in the exemption.

The exemption applies whether the allegations of wrongdoing were received from an anonymous source or a named individual; in either case information received or generated during the course of the investigation is subject to the exemption. AGO 99-07. And see AGO 10-48 (confidential information received by the county's inspector general pursuant to the county's whistle-blower act may be shared with the county's ethics commission only for the purpose of carrying out the commission's whistle-blower functions).

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