

2-D-15 | CONFIDENTIALITY AGREEMENTS

An agency "cannot bargain away its Public Records Act duties with promises of confidentiality in settlement agreements." *The Tribune Company v. Hardee Memorial Hospital*, No. CA-91-370 (Fla. 10th Cir. Ct. August 19, 1991), available online in the Cases database at the open government site at myfloridalegal.com, (confidentiality provision in a settlement agreement which resolved litigation against a public hospital did not remove the document from the Public Records Act).

Thus, in *National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009), review denied, 37 So. 3d 848 (Fla. 2010), the court held that a confidentiality agreement entered into by a private law firm on behalf of a state university with the NCAA that allowed access to records contained on the NCAA's secure custodial website that were used by the university in preparing a response to possible NCAA sanctions, had no impact on whether such records were public records, stating that "[a] public record cannot be transformed into a private record merely because an agent of the government has promised that it will be kept private." And see *Rasier-DC, LLC v. B & L Service, Inc.*, 237 So. 3d 374 (Fla. 4th DCA 2018) (provision in license agreement between company and county which required county to maintain the confidentiality of company's trade secret information and assert its exempt status in response to a public records request could not transform information found to be a public record into a private record); *City of Pinellas Park, Florida v. Times Publishing Company*, No. 00-008234CI-19 (Fla. 6th Cir. Ct. January 3, 2001), available online in the Cases database at the open government site at myfloridalegal.com ("there is absolutely no doubt that promises of confidentiality [given to employees who were asked to respond to a survey] do not empower the Court to depart from the public records law"); and *Gadd v. News-Press Publishing Company*, 412 So. 2d 894 (Fla. 2d DCA 1982) (records of a county hospital's utilization review committee were not exempt from Ch. 119, F.S., even though the information may have come from sources who expected or were promised confidentiality).

Similarly, in *Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487, 494 (Fla. 2d DCA 1990), the court determined that a baseball organization and a city improperly attempted to circumvent the Public Records Act by agreeing to keep negotiation documents relating to use of a municipal stadium confidential and in the exclusive custody of the organization. Noting the dangers



that exist if private entities “are allowed to demand that they retain custody [and prevent inspection] of documents as a condition of doing business with a governmental body,” the court ruled that both the organization and the city violated the Public Records Act. Cf. *WPTV-TV v. State*, 61 So. 3d 1191 (Fla. 5th DCA 2011) (trial court may not require media to enter into confidentiality agreement in order to receive advance notice of information relating to jury selection in criminal case).

Additionally, s. 69.081(8), F.S., part of the Sunshine in Litigation Act, provides, subject to limited exceptions, that any portion of an agreement which has the purpose or effect of concealing 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. Settlement records must be maintained in compliance with Ch. 119, F.S. See *Inf. Op. to Barry*, June 24, 1998 (agency not authorized to enter into a settlement agreement authorizing the concealment of information relating to an adverse personnel decision from the remainder of a personnel file). Cf. s. 215.425(5), F.S. (any agreement or contract, executed on or after July 1, 2011, which involves extra compensation between a unit of government and an officer, agent, employee, or contractor may not include provisions that limit the ability of any party to the agreement or contract to discuss the agreement or contract).

Moreover, to allow the maker or sender of records to dictate the circumstances under which the records are to be deemed confidential would permit private parties as opposed to the Legislature to determine which public records are subject to disclosure and which are not. Such a result would contravene the purpose and terms of Ch. 119, F.S. *Browning v. Walton*, 351 So. 2d 380 (Fla. 4th DCA 1977) (city cannot refuse to allow inspection of records containing the names and addresses of city employees who filled out forms requesting that city maintain the confidentiality of all material in their personnel files); AGO 97-84 (architectural and engineering plans under seal pursuant to s. 481.221 or s. 471.025, F.S., that are held by a public agency in connection with the transaction of official business are subject to public inspection); and *Inf. Op. to Echeverri*, April 30, 2010 (taxpayer may not request that records submitted to value adjustment board be kept confidential).

Accordingly, it is clear that the determination as to when public records are to be deemed confidential rests exclusively with the Legislature. See *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 as confidential the material it furnishes to a state agency). See also AGO 90-104 (desire of data processing company to maintain "privacy" of certain materials filed with Department of State is of no consequence unless such materials fall within a legislatively created exemption to Ch. 119, F.S.). And see *Hill v. Prudential Insurance Company 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 its investigation of an insurance company were public records 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).

Therefore, unless the Legislature has expressly authorized the maker of records received by an agency to keep the material confidential, the wishes of the sender or the agency in this regard cannot supersede the requirements of Ch. 119, F.S. Compare, e.g., s. 377.2409(1), F.S. (information on geophysical activities conducted on state-owned mineral lands received by Department of Environmental Protection shall, on the request of the person conducting the activities, be held confidential and exempt from Ch. 119, F.S., for 10 years). And see *Morris v. Whitehead*, 588 So. 2d 1023, 1024 (Fla. 2d DCA 1991) (upholding the nondisclosure of confidential records received by housing authority from the federal government pursuant to agreement authorized by state housing law). Cf. *Doe v. State*, 901 So. 2d 881 (Fla. 4th DCA 2005) (where citizen provided information to state attorney's office which led to a criminal investigation was justified in inferring or had a reasonable expectation that he would be treated as a confidential source in accordance with statutory exemption now found at s. 119.071[2][f], F.S., the citizen was entitled to have his identifying information redacted from the closed file, even though there was no express assurance of confidentiality by the state attorney's office).

(Florida Office of the Attorney General // © March 9, 2023)

