



FLORIDA'S SUNSHINE MANUAL SUBPART 2-E: STATUTORY EXEMPTIONS

Official Handbook on Public Records Laws

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Subpart 2-E
Statutory Exemptions

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TABLE OF CONTENTS | PART 2 | SUBPART E

Item	Title	Page
2-E-1	Creation of Exemptions	5
2-E-2	Strict Construction	7
2-E-3	Retroactive Application of New Exemptions	8
2-E-4	Retroactive Application of Statutes Eliminating...	9
2-E-5	Difference between Exempt and Confidential Records	10
2-E-6	Discovery of Exempt or Confidential Records	14
-	n/a	Appendix
		16



FLORIDA SUNSHINE MANUAL

PART 2

PUBLIC RECORDS



FLORIDA'S SUNSHINE MANUAL

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PART: 2 PUBLIC RECORDS

SUBPART: E STATUTORY EXEMPTIONS

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2-E-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). Wait v. Florida Power and 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). Accord Wait v. Florida Power and 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). See s. 119.011(8), F.S., defining the term "exemption" to mean "a provision of general law which provides that a specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), s. 286.011, or s. 24, Art. I of the State Constitution."

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." "The Constitution allows for the legislature, not the courts to provide for exceptions to the public records act." Cruz v. State, 297 So. 3d 154 (Fla. 4th DCA 2019). See Halifax Hospital Medical Center v. News-Journal Corporation, 724 So. 2d 567 (Fla. 1999) (statute providing an exemption from the Sunshine Law for portions of hospital board meetings is unconstitutional because it does not meet the constitutional standard of specificity as to stated public necessity and it is broader than necessary to achieve its purpose). Compare Memorial Hospital-West Volusia 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." And see Campus Communications, Inc. v. Earnhardt, 821 So. 2d 388, 395 (Fla. 5th DCA 2002), review denied, 848 So. 2d 1153 (Fla. 2003) (statutory exemption for autopsy photographs serves identifiable public purpose and is no broader than necessary to meet that public purpose); Bryan v. State, 753 So. 2d 1244 (Fla. 2000) (statute exempting from public disclosure certain prison records satisfies the constitutional standard because the Legislature set forth the requisite public necessity [personal safety of prison officials



and inmates] for the exemption); and State, Department of Financial Services v. Danahy & Murray, P.A., 246 So. 3d 466 (Fla. 1st DCA 2018) (distinguishing Halifax and finding that a statute exempting certain information held by the Department of Financial Services under the Florida Insurance Code met the constitutional standard in Article I s. 24[c], Fla. Const.).

Laws enacted pursuant to Art. I, s. 24, Fla. Const., shall relate to one subject and must contain only exemptions or provisions governing enforcement. Cf. State v. Knight, 661 So. 2d 344 (Fla. 4th DCA 1995) (while exemptions when enacted must contain a public necessity statement, exceptions to an exemption are not required to contain such a statement; thus, a trial judge erred in overturning a statute providing a limited exception to the public records exemption for grand jury materials).

Article I, s. 24(c) also requires that laws providing exemptions from public records or public meetings requirements must be passed by a two-thirds vote of each house. The two-thirds vote requirement applies when an exemption is readopted in accordance with the Open Government Sunset Review Act, s. 119.15, F.S., as well as to the initial creation of an exemption. AGO 03-18.

In accordance with s. 24(d), all statutory exemptions in effect on July 1, 1993, are grandfathered into the statutes and remain in effect until they are repealed. Rules of court in effect on November 3, 1992, that limit access to records remain in effect until repealed. See Rule 2.420, Fla. R. Gen. Prac & Jud. Admin. (originally adopted by the Florida Supreme Court on October 29, 1992, as Rule 2.051, and subsequently renumbered in 2006 as Rule 2.420). Rule 2.420 may be accessed online at www.floridabar.org.

The Open Government Sunset Review Act, codified at s. 119.15, F.S., provides for the review and repeal or reenactment of an exemption from s. 24, Art. I, Fla. Const., and s. 119.07(1), or s. 286.011, F.S. The act does not apply to an exemption that is required by federal law or applies solely to the Legislature or the State Court System. Section 119.15(2) (a) and (b), F.S. Pursuant to the Act, in the fifth year after enactment of a new exemption or expansion of an existing exemption, the exemption shall be repealed on October 2 of the fifth year, unless the Legislature acts to reenact the exemption. Section 119.15(3), F.S.

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2-E-2 | STRICT CONSTRUCTION

The general purpose of Ch. 119, F.S., "is to open public records to allow Florida's citizens to discover the actions of their government." *Christy v. Palm Beach County Sheriff 's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997). "Because Florida's public policy favors disclosure, "the Public Records Act is construed liberally in favor of openness, and exemptions from disclosure are construed narrowly and limited to their designated purpose." *City of Miami Beach v. Miami New Times, LLC*, 314 So. 3d 562, 565 (Fla. 3d DCA 2020), quoting from *Rameses, Inc. v. Demings*, 29 So. 3d 418, 421 (Fla. 5th DCA 2010). See also *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, 911 (Fla. 4th DCA 1996); *Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), review denied sub nom., *Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987).

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); *Barfield v. City of Fort Lauderdale Police Department*, 639 So. 2d 1012, 1015 (Fla. 4th DCA), review denied, 649 So. 2d 869 (Fla. 1994); and *Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128, 1130 (Fla. 1st DCA 1985). See also *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 780n.1 (Fla. 4th DCA 1985), review denied, 488 So. 2d 67 (Fla. 1986); *Tribune Company v. Public Records*, supra, stating that doubt as to the applicability of an exemption should be resolved in favor of disclosure rather than secrecy. And see *Times Publishing Company v. City of St. Petersburg*, 558 So. 2d 487, 492, noting that the judiciary cannot create a privilege of confidentiality to accommodate the desires of government and that "[a]n open government is crucial to the citizens' ability to adequately evaluate the decisions of elected and appointed officials"; rather the "right to access public documents is virtually unfettered, save only the statutory exemptions designed to achieve a balance between an informed public and the ability of the government to maintain secrecy in the public interest." Accord AGO 80-78 ("policy considerations" do not, standing alone, justify nondisclosure of public records).

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2-E-3 | RETROACTIVE APPLICATION OF NEW EXEMPTIONS

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.* 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. *Baker County Press, Inc. v. Baker County Medical Services*, 870 So. 2d 189, 192-193 (Fla. 1st DCA 2004).

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). See also *Palm Beach County Sheriff's Office v. Sun-Sentinel Company, LLC*, 226 So. 3d 969 (Fla. 4th DCA 2017); *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986); and *Roberts v. Butterworth*, 668 So. 2d 580 (Fla. 1996). Cf. *Cebrian By and Through Cebrian v. Klein*, 614 So.2d 1209 (Fla. 4th DCA 1993) (amendment to child abuse statute limiting access to unfounded reports was remedial in nature and therefore applied retroactively); 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 AGO 94-70 (amendment to expungement statute appears to be remedial and, therefore, should be retroactively applied to those records ordered expunged prior to the effective date of the amendment).

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2-E-4 | RETROACTIVE APPLICATION OF STATUTES ELIMINATING CONFIDENTIALITY

In *Baker v. Eckerd Corporation*, 697 So. 2d 970 (Fla. 2d DCA 1997), the court held that an amendment eliminating protection against disclosure of certain records applies prospectively from the effective date of the amendment. See also AGO 95-19 (expanded disclosure provisions for juvenile records apply only to records created after the effective date of the amendment); and *Coventry First, LLC v. Office of Insurance Regulation*, 30 So. 3d 552 (Fla. 1st DCA 2010) (although intended to apply retroactively, statutory amendment imposing a time limitation on the exempt status of certain records submitted to an agency applied prospectively since retroactive application improperly deprived company of its vested property rights in records already submitted to the agency).

Records made before the date of a repeal of an exemption under s. 119.15, F.S., the Open Government Sunset Review Act, "may not be made public unless otherwise provided by law." Section 119.15(7), F.S.

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2-E-5 | DIFFERENCE BETWEEN EXEMPT AND CONFIDENTIAL RECORDS**a. Confidential 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 County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied, 892 So. 2d 1015 (Fla. 2004). And see *State v. Wooten*, 260 So. 3d 1060, 1069-1070 (Fla. 4th DCA 2018) (Ch. 119, F.S., refers to both "exempt" records and records which are "confidential and exempt").

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 08-24, 04-09 and 86-97. Thus, where a statute provided confidentiality for all records in the city's risk management claims file, the trial judge lacked authority to order the city to produce certain records based on a determination that their production would not harm the city. *City of Homestead v. McDonough*, 232 So. 3d 1069 (Fla. 4th DCA 2017). And see *City of Miami Beach v. Miami New Times*, 314 So. 3d 562 (Fla. 3d DCA 2020), concluding that confidential draft audit reports relating to towing companies did not become subject to disclosure when the companies (without the knowledge of the agency) disclosed them to a third party.

However, a statute restricting release of confidential emergency call information does not prevent the city's attorneys or other city officials who are responsible for advising the city regarding the provision of emergency medical services or for defending the city against a possible claim arising from such services, from reviewing the records related to such emergency calls that contain patient examination or treatment information. AGO 95-75.

An agency is authorized to take reasonable steps to ensure that confidential records are not improperly released. *Lee County v. State Farm Mutual Automobile Insurance Company*, 634 So. 2d 250, 251 (Fla. 2d DCA 1994) (county policy requiring the patient's notarized signature on all release forms for emergency services medical records "not unreasonable or onerous;" requirement was a valid means of protecting records



made confidential by s. 401.30[4], F.S.). Accord AGO 94-51 (agency "should be vigilant in its protection of the confidentiality provided by statute for medical records of [its] employees"). Cf. Florida Department of Revenue v. WHI Limited Partnership, 754 So. 2d 205 (Fla. 1st DCA 2000) (administrative law judge [ALJ] not authorized to mandate that agency disclose confidential records because ALJ is not a judge of a court of competent jurisdiction for purposes of statute permitting disclosure of confidential records in response "to an order of a judge of a court of competent jurisdiction"); and AGO 94-86 (if custodian of confidential library circulation records believes that such records should not be disclosed in response to a subpoena because the subpoena is not a "proper judicial order" as provided in s. 257.261, F.S., custodian may assert the confidentiality provisions in a motion to quash the subpoena but should not ignore the subpoena for production of such records). And see State Attorney's Office of the Seventeenth Judicial Circuit v. Cable News Network, Inc., 251 So. 3d 205, 214 (Fla. 4th DCA 2018) (when statute authorizes release of confidential security system records upon a showing of "good cause," the Legislature "intended the courts to apply a common law approach to 'good cause,' where meaning emerges over time, on a case-by-case basis, and courts arrive at a desirable equilibrium between the competing needs of disclosure and secrecy of government records"). Cf. Florida Department of Corrections v. Miami Herald Media Company, (Fla. 1st DCA 2019) (trial court erred when it found "good cause" for release of confidential prison video footage even though newspaper had admitted at the hearing that it no longer needed the recordings).

b. Exempt Records

If records are not made confidential but are simply exempt from the mandatory disclosure requirements in s. 119.07(1), F.S., the agency is not prohibited from disclosing the documents in all circumstances. See Williams v. City of Minneola, 575 So. 2d 683, 687 (Fla. 5th DCA), 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.



There are many situations in which investigators have reasons for displaying information which they have the option not to display." [Emphasis supplied by the Court] See also AGO 07-21 (while statute makes photographs of law enforcement personnel exempt rather than confidential, custodian, in deciding whether such information should be disclosed, must determine whether there is a statutory or substantial policy need for disclosure and in the absence of a statutory or other legal duty to be accomplished by disclosure, whether release of such information is consistent with the exemption's purpose). Accord AGO 08-24. And see AGO 17-05 (property appraiser authorized to disclose addresses that are exempt from public inspection, but not confidential, to the code inspector for the limited purpose of providing alleged code violators with the statutory notice required by s. 162.06, F.S.).

Once an agency has gone public with information which could have been previously protected from disclosure under Public Records Act exemptions, no further purpose is served by preventing full access to the desired information. *Downs v. Austin*, 522 So. 2d 931, 935 (Fla. 1st DCA 1988). Cf. AGO 01-74 (taxpayer information that is confidential in the hands of certain specified officers under s. 193.074, F.S., is subject to disclosure under the Public Records Act when it has been submitted by a taxpayer to a value adjustment board as evidence in an assessment dispute).

However, 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 held that when a criminal justice agency transfers exempt criminal investigative 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"); *Alice P. v. Miami Daily News, Inc.*, 440 So. 2d 1300 (Fla. 3d DCA 1983), review denied, 467 So. 2d 697 (Fla. 1985) (confidential birth information contained in license application submitted to state health agency not subject to disclosure); AGO 04-44 (if the prison industry agency sends exempt proprietary confidential business information to the Secretary of the Department of Corrections in his capacity as a member of the



board of directors of the prison industry agency, that information does not lose its exempt status by virtue of the fact that it was sent to the Secretary's office in the department); and AGO 94-77 (work product exception authorized in former s. 119.07[3][1], F.S. [now s. 119.071(1)(d), F.S.], will be retained if the work product is transferred from the county attorney to the city attorney pursuant to a substitution of parties to the litigation).

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2-E-6 | DISCOVERY OF EXEMPT OR CONFIDENTIAL RECORDS

An exemption from disclosure under the Public Records Act does not render the document automatically privileged for purposes of discovery under the Florida Rules of Civil Procedure or in administrative proceedings. See *Department of Health v. Poss*, 45 So. 3d 510 (Fla. 1st DCA 2010); *Department of Professional Regulation v. Spiva*, 478 So. 2d 382 (Fla. 1st DCA 1985). "Although the Rules of Civil Procedure and the Public Records Act may overlap in certain areas, they are not coextensive in scope." *Department of Highway Safety and Motor Vehicles v. Kropff*, 445 So. 2d 1068, 1069n.1 (Fla. 3d DCA 1984). See also *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So. 2d 1322 (Fla. 2d DCA 1990), review denied, 576 So. 2d 286 (Fla. 1991) (records which are exempt from public inspection may be subject to discovery in a civil action upon a showing of exceptional circumstances and if the trial court takes all precautions to ensure the confidentiality of the records). Cf. *League of Women Voters v. Florida House of Representatives*, 132 So. 3d 135, 153 (Fla. 2013) ("if the circuit court concludes, after undertaking an in camera review of any disputed documents, that draft [apportionment] plans are exempt from public records disclosure, the circuit court should still require the Legislature to produce the draft apportionment maps and supporting documents under appropriate litigation discovery rules, to the extent these documents do not contain information regarding individual legislators' or legislative staff members' thoughts or impressions").

For example, in *B.B. v. Department of Children and Family Services*, 731 So. 2d 30 (Fla. 4th DCA 1999), the court ruled that as a party to a dependency proceeding involving her daughters, a mother was entitled to discovery of the criminal investigative records relating to the death of her infant. The court found that the statutory exemption for active criminal investigative information did not "override the discovery authorized by the Rules of Juvenile Procedure." *Id.* at 34. Compare *Henderson v. Perez*, 835 So. 2d 390, 392 (Fla. 2d DCA 2003) (trial court order compelling sheriff to produce exempt home addresses and photographs of 10 active law enforcement officers in a civil lawsuit filed by Perez predicated on his arrest, quashed because "Perez has not shown that the photographs and home addresses of the law enforcement officers are essential to the prosecution of his suit"). And see *Delaurentos v. Peguero*, 47 So. 3d 879 (Fla. 3d DCA 2010) (while the exemption for employee medical information in s. 119.071[4][b] did not preclude the discovery of a police officer's pre-employment psychological



evaluation, the estate's request for the evaluation in a wrongful death case filed against the officer and county was, under the circumstances of the case, outside the scope of permissible discovery).

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APPENDIX



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