

## DEFINITIONS: Exempt v. Exempt and Confidential

Excerpt from Florida's 2008 *Government-In-The-Sunshine Manual*,

### 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). 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. *Cf.*, AGO 94-86, stating that if the custodian of confidential library circulation records takes the position 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., the custodian may assert the confidentiality provisions in a motion to quash the subpoena but should not ignore the subpoena for production of such records.

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.

It has been held that 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").

### 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." *See also*, AGO 90-50, noting that the

exemption from disclosure for certain information about law enforcement personnel now set forth in s. 119.071(4)(d), F.S., does not prohibit a police department from posting the names, I.D. numbers, and photographs of its police officers for public display; however, in light of the statutory purpose of the exemption (safety of law enforcement officers), such posting would appear to be inconsistent with legislative intent. The Attorney General's Office reiterated its position in AGO 07-21, stating that while s.119.071(4)(d)1., F.S., makes photographs of law enforcement personnel exempt rather than confidential, the custodian, in deciding whether such information should be disclosed, must determine whether there is a statutory or substantial policy need for disclosure. In the absence of a statutory or other legal duty to be accomplished by disclosure, the agency should consider whether the release of such information is consistent with the purpose of the exemption.

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][I], 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).