

1-1-1985

# Use of the Florida Public Records Act as a Discovery Tool in Tort and Administrative Litigation Against the State

Robert D. Peltz

Follow this and additional works at: <http://repository.law.miami.edu/umlr>

---

## Recommended Citation

Robert D. Peltz, *Use of the Florida Public Records Act as a Discovery Tool in Tort and Administrative Litigation Against the State*, 39 U. Miami L. Rev. 291 (1985)  
Available at: <http://repository.law.miami.edu/umlr/vol39/iss2/4>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# Use of the Florida Public Records Act as a Discovery Tool in Tort and Administrative Litigation Against the State

ROBERT D. PELTZ\*

I. INTRODUCTION	291
A. <i>Potential Application of the Act</i>	291
B. <i>The Advantages of Using the Act</i>	292
II. SCOPE OF THE ACT	294
A. <i>Specific Provisions on the Act's Applicability</i>	294
B. <i>Case Law Interpreting the Act's Scope</i>	294
III. EXEMPTIONS	297
A. <i>The Act's Specific Exemptions</i>	297
B. <i>Florida Evidence Code: Broadening the Act's Exemptions?</i>	298
C. <i>The 1984 Amendment</i>	300
D. <i>Exemption Under Section 284.40</i>	301
IV. PROCEDURE UNDER THE ACT	301
A. <i>Generally</i>	301
B. <i>The Records Custodian</i>	302
C. <i>Judicial Involvement</i>	302
D. <i>Procedure When Litigation is Pending</i>	303
V. CONCLUSION	304

## I. INTRODUCTION

Although investigative journalists have been quick to realize the value of the Florida Public Records Act (Act),<sup>1</sup> attorneys have yet to fully recognize its value as a discovery device in private tort and administrative litigation against the state or agencies acting on behalf of the state.<sup>2</sup> Expansion of governmental regulation and the Florida Supreme Court's broad interpretation of Florida's statutory waiver of sovereign immunity<sup>3</sup> has opened the proverbial "flood-gates" of tort litigation against the state. These actions have enhanced the Act's value as a discovery tool.

### A. *Potential Application of the Act*

The Act's potential application is seen in the types of cases

---

\* The author is presently a partner in the litigation firm of Rossman, Baumberger and Peltz, P.A., of Miami and a former Editor of the *University of Miami Law Review*.

1. FLA. STAT. §§ 119.01-12 (1983).

2. See *infra* notes 47-52 and accompanying text.

3. *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979).

spawned by the Florida Supreme Court's broad interpretation of Florida's statutory waiver of sovereign immunity. Since 1980, the courts have recognized causes of action against the state for failure to perform the following functions: enforce building codes<sup>4</sup> and elevator inspection regulations,<sup>5</sup> maintain existing traffic control devices and highways,<sup>6</sup> install appropriate warning devices at railroad crossings<sup>7</sup> and bridges,<sup>8</sup> properly design intersections,<sup>9</sup> inspect highway systems,<sup>10</sup> maintain sidewalks,<sup>11</sup> supervise public school students both at school and during after school activities,<sup>12</sup> hire or retain teachers,<sup>13</sup> properly design bus stops,<sup>14</sup> prevent dangerous inmates from escaping state mental hospitals,<sup>15</sup> direct traffic<sup>16</sup> and investigate traffic violations,<sup>17</sup> use reasonable care in construction and maintenance of jails,<sup>18</sup> prevent jail inmates from committing suicide,<sup>19</sup> and warn sunbathers of the lack of supervision over vehicular traffic on Daytona's beaches.<sup>20</sup>

### B. *The Advantages of Using the Act*

In each of these cases, the Florida Public Records Act offers private litigants distinct advantages over the discovery tools available under the Florida Rules of Civil Procedure. The most obvious advantage is that potential litigants may use the Act to obtain the production of valuable documents before a lawsuit is even filed.<sup>21</sup>

---

4. *Trianon Park Condominium Ass'n v. City of Hialeah*, 423 So. 2d 911 (Fla. 3d DCA 1982); *Jones v. City of Longwood*, 404 So. 2d 1083 (Fla. 5th DCA 1981).

5. *Bryan v. State*, 438 So. 2d 415 (Fla. 1st DCA 1983).

6. *Department of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982).

7. *Department of Transp. v. Webb*, 409 So. 2d 1061 (Fla. 1st DCA 1981), *cert. denied*, 419 So. 2d 1200 (Fla. 1982).

8. *Savignac v. Department of Transp.*, 406 So. 2d 1143 (Fla. 2d DCA 1981).

9. *Banta v. Rosier*, 399 So. 2d 444 (Fla. 5th DCA 1981).

10. *City of Tamarac v. Garchar*, 398 So. 2d 889 (Fla. 4th DCA 1981).

11. *City of S. Miami v. Pytel*, 412 So. 2d 938 (Fla. 3d DCA 1982).

12. *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982); *Bryant v. School Bd.*, 399 So. 2d 417 (Fla. 1st DCA 1981), *aff'd in part and rev'd in part on other grounds sub nom. Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982).

13. *Willis v. Dade County School Bd.*, 411 So. 2d 245 (Fla. 3d DCA 1982).

14. *School Bd. v. Surette*, 394 So. 2d 147 (Fla. 4th DCA 1981).

15. *Bellavance v. State*, 390 So. 2d 422 (Fla. 1st DCA 1980), *cert. denied*, 399 So. 2d 1145 (Fla. 1981).

16. *Weissburg v. City of Miami Beach*, 383 So. 2d 1158 (Fla. 3d DCA 1980).

17. *Walston v. Florida Highway Patrol*, 429 So. 2d 1322 (Fla. 5th DCA 1983).

18. *White v. Palm Beach County*, 404 So. 2d 123 (Fla. 4th DCA 1981).

19. *Overby v. Wille*, 411 So. 2d 1331 (Fla. 4th DCA 1982).

20. *Ralph v. City of Daytona Beach*, 412 So. 2d 875 (Fla. 5th DCA 1982).

21. See FLA. STAT. § 119.07(1)(a) (1983) ("Every person who has custody of public records shall permit the records to be inspected and examined by any person desiring to do

This allows the litigant the opportunity to fully prepare and build its case before its opponent even knows there is a case. The Act may also be used to obtain information from state agencies prior to filing suit against a private third party.<sup>22</sup> For example, litigants can obtain the results of investigations by police, building inspectors, and other types of law enforcement agencies; studies by the Department of Transportation; or complaints of prior accidents or defects made to a variety of state officials and departments. Moreover, because some evidence can be discovered only through the use of subpoena power or other compulsory court process, the Act gives the attorney a means of obtaining information without the risks associated with filing a lawsuit.

Another advantage of the Act is that its scope is much broader than that of traditional discovery devices. Requests under the Act are not subject to the limitations on the scope of discovery set forth in Rule 1.280(b)(1) of the Florida Rules of Civil Procedure, which limit discovery to information that is "reasonably calculated to lead to the discovery of admissible evidence."<sup>23</sup> Thus, a public record holder may not object to a request for documents on the basis that the records are irrelevant or immaterial, allowing the requesting party to go on broad "fishing expeditions" without limitation.<sup>24</sup>

Rule 1.280(c), which empowers the trial court to restrict discovery to prevent annoyance or embarrassment, does not limit disclosure under the Act. Recent cases have not only rejected the claims of exemption based upon potential embarrassment or Florida's constitutional privacy amendment<sup>25</sup> but have also held that individuals named in public records do not have the right to receive notice of the request for records.<sup>26</sup> Other differences between the scope of disclosure under the Florida Public Records Act and discovery under the Florida Rules of Civil Procedure, especially in the areas of privileges, are discussed in more detail throughout this

---

so, at reasonable times . . .") (emphasis added).

22. See *id.* § 119.011(1)-(2).

23. FLA. R. Civ. P. 1.280(b)(1).

24. See, e.g., *Orange County v. Florida Land Co.*, 450 So. 2d 341 (Fla. 5th DCA 1984) ("[A]ccess to public records is a matter of substance rather than practice and procedure and therefore the Act takes precedence over the rule of procedure.") (citing *Hillsborough County Aviation Auth. v. Azzarelli Constr. Co.*, 436 So. 2d 153 (Fla. 2d DCA 1983)).

25. *Forsberg v. Housing Auth.*, 455 So. 2d 373 (Fla. 1984) (per curiam); see also *Michel v. Douglas*, 1985 FLA. L. WEEKLY 129 (Sup. Ct. Feb. 21, 1985) ("We find, however, that the right of access to personnel records is not the right to rummage freely through public employee's personal lives.").

26. *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984).

article.<sup>27</sup>

The Act may also be used to offset delays resulting from the administrative claims procedure, a condition precedent to filing a tort action against the sovereign pursuant to section 768.28 of the Florida Statutes.<sup>28</sup> The tort claimant can use the Act to conduct discovery during the six months in which the agency has to consider the claim.<sup>29</sup>

## II. SCOPE OF THE ACT

### A. *Specific Provisions on the Act's Applicability*

Section 119.01(1) unambiguously sets forth the legislative intent in enacting the Florida Public Records Act: "It is the policy of this state that *all* state, county, and municipal records *shall at all times* be open for a personal inspection by *any person*."<sup>30</sup> The nondiscretionary nature of the Act is further emphasized by the mandatory language used in section 119.07(1)(a) which orders that: "*Every* person who has custody of public records *shall* permit the records to be inspected and examined by *any person* desiring to do so . . . ."<sup>31</sup> Section 119.02 removes any doubt concerning the mandatory nature of the Act. It states: "Any public official who shall violate the provisions of s. 119.07(1) shall be subject to suspension and removal or impeachment and, in addition, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083."<sup>32</sup> Public records subject to disclosure under the Act include "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or *in connection with* the transaction of official business by any agency."<sup>33</sup>

### B. *Case Law Interpreting the Act's Scope*

Courts construing the Act have reinforced this extremely broad definition by interpreting it to include virtually any record, regardless of form, prepared in connection with agency business

27. See *infra* notes 62, 93 and accompanying text.

28. FLA. STAT. § 768.28 (1983).

29. *Id.* § 768.28 (6)(a).

30. *Id.* § 119.01(1) (emphasis added).

31. *Id.* § 119.07(1)(a) (emphasis added).

32. *Id.* § 119.02.

33. *Id.* § 119.011(1) (emphasis added).

and intended to perpetuate, communicate, or formalize knowledge.<sup>34</sup> Courts have held that public records include accident and investigative reports,<sup>35</sup> and experts' reports;<sup>36</sup> informal intra-office memoranda,<sup>37</sup> correspondence,<sup>38</sup> budget proposals and work sheets;<sup>39</sup> personnel files of teachers, police, physicians and other county employees;<sup>40</sup> records of grievance proceedings,<sup>41</sup> grand jury presentments describing acts of police misconduct,<sup>42</sup> medical review committee minutes,<sup>43</sup> private attorneys' litigation files<sup>44</sup> and even information stored on a computer.<sup>45</sup>

The broad scope given to the statutory term "agency" has further extended the Act's applicability.<sup>46</sup> Agencies subject to the disclosure provisions of the Act 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 and any other public or *private* agency, *person*, partnership, corporation, or business entity *acting on behalf of any public agency*."<sup>47</sup> Courts have held that this definition encompasses private attorneys,<sup>48</sup> private consulting firms<sup>49</sup> and other private business entities retained to represent or assist governmental units in carrying out their functions.<sup>50</sup>

Courts have addressed the issue of when a private business en-

---

34. *Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633 (Fla. 1980).

35. *Tober v. Sanchez*, 417 So. 2d 1053 (Fla. 3d DCA 1982), *reh'g denied*, 426 So. 2d 27 (Fla. 1983); *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).

36. *Gannett Co. v. Goldtrap*, 302 So. 2d 174 (Fla. 2d DCA 1974).

37. *Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633 (Fla. 1980).

38. *Id.*

39. *City of Gainesville v. State ex rel. Int'l Ass'n of Fire Fighters, Local No. 2157*, 298 So. 2d 478 (Fla. 1st DCA 1974).

40. *News-Press Publishing Co. v. Wisher*, 345 So. 2d 646 (Fla. 1977); *Tribune Co. v. Cannella*, 438 So. 2d 516 (Fla. 2d DCA 1983), *quashed*, 458 So. 2d 1075 (Fla. 1984); *Gadd v. News-Press Publishing Co. (Gadd II)*, 412 So. 2d 894 (Fla. 2d DCA 1982).

41. *Tribune Co. v. Cannella*, 438 So. 2d 516 (Fla. 2d DCA 1983), *quashed*, 458 So. 2d 1075 (Fla. 1984).

42. *Id.*

43. *Gadd II*, 412 So. 2d 894 (Fla. 2d DCA 1982).

44. *Tober v. Sanchez*, 417 So. 2d 1053 (Fla. 3d DCA 1982), *reh'g denied*, 426 So. 2d 27 (Fla. 1983).

45. *Seigle v. Barry*, 422 So. 2d 63 (Fla. 4th DCA 1982).

46. *See infra* notes 47-52 and accompanying text.

47. FLA. STAT. § 119.011(2) (1983) (emphasis added).

48. *Donner v. Edelstein (Donner I)*, 415 So. 2d 830 (Fla. 3d DCA 1982) (per curiam).

49. *Gannett Co. v. Goldtrap*, 302 So. 2d 174 (Fla. 2d DCA 1974); *see also Fritz v. Norflor Constr. Co.*, 386 So. 2d 899 (Fla. 5th DCA 1980).

50. *Parsons & Whittemore, Inc. v. Metropolitan Dade County*, 429 So. 2d 343 (Fla. 3d DCA 1983).

tity is "acting on behalf of" a public agency, subjecting the business to the provisions of Florida's Public Records Act. These cases make it clear that merely contracting with an agency is insufficient to bring the entity within the Act.<sup>51</sup> The critical element found in each is that the services "contracted for" formed an integral part of the agency's chosen process for decisionmaking.<sup>52</sup> Even with private entities acting in this capacity, however, disclosure is only permitted as to those functions performed on behalf of the governmental agency<sup>53</sup> and not for all aspects of private business.

The courts have been quick to quash schemes designed to circumvent the Act. In *Tober v. Sanchez*,<sup>54</sup> the Third District Court of Appeal held that the custodian of the records could not avoid disclosure under the Act by transferring physical custody of the records from the agency's official records custodian to a state or county attorney.<sup>55</sup> The court went even further in the case of *Donner v. Edelstein (Donner I)*,<sup>56</sup> by holding that "an assistant city attorney of the City of Miami and a private attorney employed by the City to represent it in connection with certain pending litigation brought . . . against the City, were custodians of public records (that is, files and papers, relating to such litigation) . . . ."<sup>57</sup> A 1984 amendment to section 119.11 of the Act has codified these holdings by providing that upon the filing of a civil action to enforce disclosure, the records custodian "shall not transfer custody, alter, destroy, or otherwise dispose of the public record sought to be inspected and examined . . . ."<sup>58</sup>

The courts have also rejected agency efforts to delay the release of records. In *Tribune Co. v. Cannella*,<sup>59</sup> the Second District Court of Appeal initially struck down a Tampa Police Department policy of postponing compliance with requests under the Act for

---

51. *Id.*

52. *Id.*; see, e.g., *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974) (construing Florida's Sunshine Law); *Byron, Harless, Schaffer, Reid & Assocs., Inc. v. State ex rel. Schellenberg*, 360 So. 2d 83 (Fla. 1st DCA 1978), *rev'd on other grounds sub nom. Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633 (Fla. 1980); *Schwartzman v. Merritt Island Volunteer Fire Dep't*, 352 So. 2d 1230 (Fla. 4th DCA 1977), *cert. denied*, 358 So. 2d 132 (Fla. 1978).

53. See *Seigle v. Barry*, 422 So. 2d 63 (Fla. 4th DCA 1982).

54. 417 So. 2d 1053 (Fla. 3d DCA 1982).

55. *Id.* at 1054-55.

56. 415 So. 2d 830 (Fla. 3d DCA 1982) (per curiam).

57. *Id.* at 831 (emphasis added).

58. 1984 Fla. Laws ch. 84-298, § 6 (codified at FLA. STAT. § 119.11(4) (Supp. 1984)).

59. 438 So. 2d 516 (Fla. 2d DCA 1983) (per curiam), *quashed*, 458 So. 2d 1075 (Fla. 1984).

three days, holding that all requests must be answered within forty-eight hours.<sup>60</sup> The Florida Supreme Court quashed the district court opinion and held that any automatic delay for a specific period of time, even of only forty-eight hours, was impermissible under the Act.<sup>61</sup>

### III. EXEMPTIONS

Neither the motivation of the person seeking disclosure of public records, nor the reason for which they are being sought, may form the basis for an exemption from disclosure.<sup>62</sup> Thus, pending litigation between the record seeker and the record holder will not act to exempt the requested records. This is true even where the records are essential to the litigation and would be otherwise privileged under the applicable rules of discovery.<sup>63</sup> Even when litigation is pending, the scope of disclosure under the Florida Public Records Act is not to be equated with those documents discoverable under the Florida Rules of Civil Procedure.<sup>64</sup>

#### A. *The Act's Specific Exemptions*

Section 119.07(3)(a) of the Act spells out a number of specific types of documents generally dealing with ongoing criminal investigation or intelligence-type records and also states that "[a]ll public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, are exempt from [disclosure] . . . ."<sup>65</sup> Florida courts have construed this provision in accordance with the Act's overall intent holding that it neither recognizes nor permits *judicially* created exemptions. One court stated that "[t]he legislature intended to exempt those public records made confidential by statutory law and *not* those documents which are

---

60. *Id.* at 522.

61. *Cannella*, 458 So. 2d 1075. The court further held that employees whose records are being sought under the Act do not have the right to be present during the requested inspection nor are they even required to be notified that an inspection of their records has been requested. *Id.* at 1078.

62. See *News-Press Publishing Co. v. Gadd (Gadd I)*, 388 So. 2d 276 (Fla. 2d DCA 1980); *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); *Warden v. Bennett*, 340 So. 2d 977 (Fla. 2d DCA 1976).

63. *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979); *Tober v. Sanchez*, 417 So. 2d 1053 (Fla. 3d DCA 1982); *Donner I*, 415 So. 2d 830 (Fla. 3d DCA 1982) (per curiam); *Warden v. Bennett*, 340 So. 2d 977 (Fla. 2d DCA 1976).

64. *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

65. FLA. STAT. § 119.07(3)(a) (1983).



confidential or privileged only as a result of the judicially created privileges . . . ."<sup>66</sup>

### B. *Florida Evidence Code: Broadening the Act's Exemptions?*

Prior to the adoption of the Florida Evidence Code, case law made it clear that even where litigation was pending at the time of the request, neither the work-product nor attorney-client privileges would act to exempt documents from disclosure under the Florida Public Records Act.<sup>67</sup> In the absence of a specific statutory exemption, it has been further held that the courts may not deny disclosure based upon public policy considerations that attempt to weigh the relative significance of the public's interest in disclosure with the damage to an individual institution resulting from such disclosure.<sup>68</sup>

Some uncertainty has arisen as a result of the adoption of the Florida Evidence Code, because section 90.502 of the Code recognizes in general terms the attorney-client privilege.<sup>69</sup> The First District Court of Appeal in *City of Williston v. Roadlander*,<sup>70</sup> assumed in dicta that the adoption of the Florida Evidence Code created an exemption to disclosure for documents falling within the attorney-client privilege without specifically considering the question.<sup>71</sup> On the other hand, the Federal District Court for the Middle District of Florida in *City of Tampa v. Titan Southeast Construction Corp.*,<sup>72</sup> relying on an absence of state authority at the time, squarely held that the adoption of the Florida Evidence Code did create such an exemption.<sup>73</sup>

In three subsequent decisions, however, the Third District Court of Appeal in *Miami Herald Publishing Co. v. City of North Miami*,<sup>74</sup> *State v. Kropff*,<sup>75</sup> and *Edelstein v. Donner*<sup>76</sup> expressly

---

66. *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979) (emphasis added); see also *Gadd II*, 412 So. 2d 894, 895 (Fla. 2d DCA 1982) ("Public policy considerations, aside from statutory or constitutional rights, can no longer be urged as an exemption to the Public Records Law.").

67. *Rose v. D'Alessandro*, 380 So. 2d 419 (Fla. 1980); *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979); *Tober v. Sanchez*, 417 So. 2d 1053 (Fla. 3d DCA 1982); *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); *Gannett Co. v. Goldtrap*, 302 So. 2d 174 (Fla. 2d DCA 1974).

68. *Gadd I*, 388 So. 2d 276 (Fla. 2d DCA 1980).

69. FLA. STAT. § 90.502 (1983).

70. 425 So. 2d 1175 (Fla. 1st DCA 1983).

71. *Id.* at 1177 (dicta).

72. 535 F. Supp. 163 (M.D. Fla. 1982) (mem.).

73. *Id.* at 166.

74. 452 So. 2d 572 (Fla. 3d DCA 1984). The Supreme Court of Florida in *City of N.*

held that section 90.502 of the Evidence Code did *not* create an exemption for the disclosure of documents under the Act. In reaching its conclusion, the Third District noted that the statutory exemptions permitted under section 119.07(2)(a) and section 119.07(3)(a) of the Act relate to exemptions by that the Legislature enacted in specific response to the provisions of the Act.<sup>77</sup> Thus, they are directed solely to the nondisclosure of public records, unlike the Florida Evidence Code, which is merely a general codification of judicially created rules of evidence applicable in all civil trials.<sup>78</sup>

The Third District in *Miami Herald Publishing Co.* drew parallels between the Florida Public Records Act and the Florida Sunshine Law.<sup>79</sup> Under Florida's Sunshine Law, the Third District had previously held that a meeting between the North Miami city council and its city attorney must be opened to the public despite a claim of attorney-client privilege.<sup>80</sup> The *Miami Herald Publishing Co.* court concluded that because there was no attorney-client exception to the Sunshine Law, the Legislature intended none for its sister statute—the Florida Public Records Act through the Florida Evidence Code.<sup>81</sup>

The court in *Miami Herald Publishing Co.* finally noted that between 1979 and 1983 the Florida Legislature had rejected seven bills attempting to create an attorney-client exemption to the Florida Public Records Act.<sup>82</sup> Relying on the Florida Supreme Court's prior admonitions that exemptions to the Act could only be created by the legislature,<sup>83</sup> the Third District concluded that the legislature did not intend to bar disclosure under the attorney-client privilege.<sup>84</sup>

---

*Miami v. Miami Herald Publishing Co.*, 10 FLA. L. W. 183 (Sup. Ct. Mar. 29, 1985) answered "no" to the certified question from the district court of appeal: "Does the lawyer-client privilege section of the Florida Evidence Code exempt from the disclosure requirements of the Public Records Act written communications between a lawyer and his public-entity client?" 10 FLA. L. W. at 184; 452 So. 2d at 574.

75. 445 So. 2d 1068 (Fla. 3d DCA 1984).

76. 450 So. 2d 562 (Fla. 3d DCA 1984) (per curiam).

77. *Miami Herald Publishing Co.*, 452 So. 2d at 573; see *Edelstein*, 450 So. 2d at 562; *Kropff*, 445 So. 2d at 1069.

78. FLA. STAT. § 90.103(2) (1983).

79. *Id.* § 286.011.

80. *State ex rel. Reno v. Neu*, 434 So. 2d 1035 (Fla. 3d DCA 1983).

81. *Miami Herald Publishing Co.*, 452 So. 2d at 573.

82. *Id.* at 574 n.3.

83. *E.g.*, *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979).

84. *Miami Herald Publishing Co.*, 452 So. 2d at 573-74. The Third District's identical holdings in *Edelstein*, 450 So. 2d at 562, and *Kropff*, 445 So. 2d at 1069, were based entirely

It should also be noted that the Florida Evidence Code was initially enacted in 1976<sup>85</sup> and had an original effective date of July 1, 1977.<sup>86</sup> This was long before two supreme court decisions<sup>87</sup> and two district court decisions,<sup>88</sup> which all specifically rejected an exemption based upon the attorney-client privilege. Moreover, the decisions in *Rose* and *Gadd I* were rendered after the Florida Evidence Code's final effective date of July 1, 1979.<sup>89</sup>

### C. The 1984 Amendment

Effective October 1, 1984, the Legislature added subsection (o) to section 119.07(3) of the Act, exempting documents constituting work product from disclosure.<sup>90</sup> The amendment, however, did not provide an exemption based upon the attorney-client privilege, thus further strengthening the Third District's argument that such a claim of exemption is not recognized under the Act.<sup>91</sup> Although the definition of documents comprising "work product" under new subsection 119.07(3)(o) parallels the common law definition, it is important to note that such documents are exempt only "until the conclusion of the litigation or adversarial administrative proceedings."<sup>92</sup> In this sense, the work product privilege under the Florida Public Records Act is narrower than that recognized under the Florida Rules of Civil Procedure, because case law under the rules has held that documents constituting work product in prior litigation remain privileged as work product in subsequent litigation, even though it involves different parties.<sup>93</sup> This distinction can have important ramifications in cases where notice of a defect or prior conduct is relevant, because a plaintiff using the Act will still be able to obtain statements, experts' reports and other "work product" materials relating to prior accidents or lawsuits.

---

on *Miami Herald Publishing Co.*

85. 1976 Fla. Laws ch. 76-237, § 1 (codified at FLA. STAT. §§ 90.101-.958 (1983)).

86. *Id.* § 8.

87. *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979); *Rose v. D'Alessandro*, 380 So. 2d 419 (Fla. 1980).

88. *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); *Gadd I*, 388 So. 2d 276 (Fla. 2d DCA 1980).

89. *In re Florida Evidence Code*, 376 So. 2d 1161, 1162 (Fla. 1979).

90. 1984 Fla. Laws ch. 84-298, § 5 (codified at FLA. STAT. § 119.07(3)(o) (Supp. 1984)).

91. *See supra* notes 79-88 and accompanying text.

92. FLA. STAT. § 119.07(3)(o)(1) (Supp. 1984).

93. *See, e.g., Florida Power & Light Co. v. Limeburner*, 390 So. 2d 133 (Fla. 4th DCA 1980).

#### D. *Exemption Under Section 284.40*

Section 284.40 of the Florida Statutes pertaining to the Division of Risk Management contains another exemption applicable to tort litigation.<sup>94</sup> This exemption was first considered in *State v. Kropff*.<sup>95</sup> This statute provides that claim files maintained by the Division of Risk Management are privileged and confidential and are only for use by the Department of Insurance in fulfilling its responsibilities in providing insurance to state agencies. Although holding that this section created an exemption under the Act, the court in *Kropff* warned that the exemption only applied "within the limits prescribed by *Tober v. Sanchez*."<sup>96</sup> This reference to *Tober* referred to the portion of the Third District Court of Appeal's holding in *Tober* that custodians of public records could not avoid disclosure under the Act by transferring the physical custody of the records to some other party, such as an attorney.<sup>97</sup> Therefore *Kropff* appears to stand for the proposition that while records ordinarily maintained by the Division of Risk Management are exempt from disclosure, records held by other entities cannot be exempted from disclosure by transferring their physical possession to the Division of Risk Management.

### IV. PROCEDURE UNDER THE ACT

#### A. *Generally*

Section 119.07(1)(a) of the Act sets forth the only procedure in the Act to invoke disclosure of the public records:

Every person who has custody of public records shall permit the records to be inspected and examined by any person desiring to do so, at reasonable times, under reasonable conditions, and under supervision by the custodian of the records or his designee. The custodian shall furnish copies or certified copies of the records upon payment of fees as prescribed by law or, if fees are not prescribed by law, upon payment of the actual cost of duplication of the copies.<sup>98</sup>

The Act does not establish any specific procedures that must be followed by persons seeking disclosure. The Act does not even

---

94. FLA. STAT. § 284.40 (1983).

95. 445 So. 2d 1068 (Fla. 3d DCA 1984) (per curiam).

96. *Id.* at 1069 (citation omitted).

97. *Tober*, 417 So. 2d at 1054.

98. FLA. STAT. § 119.07(1)(a) (1983).

require that the request be in writing. Case law has further interpreted the "reasonable conditions" language of this section to prohibit creation of conditions precedent to disclosure and to allow only reasonable regulations to protect the records from alteration, damage or destruction.<sup>99</sup> Where the nature or volume of the records requires extensive clerical or supervisory assistance by agency personnel, the agency is permitted to add to the actual cost of copying a reasonable charge for the personnel providing the service.<sup>100</sup> Such a charge, however, must be based upon the actual salary rate of the personnel involved.<sup>101</sup>

### B. *The Records Custodian*

The Act sets forth the procedure to be followed by the custodian of the public records when an exemption is asserted. In such cases, the records custodian is required to produce all records requested, excepting those *portions* of specific records for which an exemption is claimed.<sup>102</sup> The records custodian is also required to state in writing the basis of the exemption "including the statutory citation . . . and, if requested . . . [in] particularity the reasons for his conclusion that the record is exempt."<sup>103</sup>

### C. *Judicial Involvement*

The Act does not provide for the judicial mechanism to be used when a dispute over disclosure arises. In practice, however, a petition for a writ of mandamus is the most common method used.<sup>104</sup> When court action is necessary to compel disclosure, section 119.12 of the Act provides that the requesting party shall recover reasonable attorney fees if the refusal to disclose records has been unreasonable.<sup>105</sup>

The Act only requires an in-camera inspection of documents by the court when the claimed exemption is based upon section 119.07(3)(e), (f), (g), or (m).<sup>106</sup> None of these exemptions, however,

---

99. *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 425 (Fla. 1979).

100. FLA. STAT. § 119.07(1)(b) (1983).

101. *Id.*

102. *Id.* § 119.07(2)(a).

103. FLA. STAT. § 119.07(2)(a) (Supp. 1984).

104. *See, e.g., Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 422 (Fla. 1979); *State ex rel. Veale v. City of Boca Raton*, 353 So. 2d 1194, 1195 (Fla. 4th DCA 1977), *cert. denied*, 360 So. 2d 1247 (Fla. 1978).

105. FLA. STAT. § 119.12 (1983).

106. *Id.* § 119.07(2)(b) (1983). The four types of exemptions that require in-camera inspection by § 119.07(2)(b) are: § 119.07(3)(e) (records revealing the identity of confidential

relates to the bulk of tort litigation. Nevertheless, in a long line of decisions beginning with *Donner I*, the Third District Court of Appeal has made such inspections mandatory in all cases.<sup>107</sup>

#### D. Procedure When Litigation is Pending

The Act does not address the procedure to request records when litigation is pending at the time of the request. It is axiomatic that when litigation is pending the attorney for one party may not ethically communicate directly with the adverse party, but instead must communicate through the adverse party's attorney.<sup>108</sup> Accordingly, the proper course under such circumstances should require that the public records requests be submitted to the agency's attorney, rather than through the agency's records custodian. This procedure would also prevent uninformed agency personnel from producing records which the attorney might intend to invoke a valid claim of exemption.

Assuming that the request in such circumstances should go directly to the agency's attorney, the next question that arises is the form of the request. Because the Act requires no specific form of request, it would appear that the records could be requested by either a request to produce or a subpoena. There are advantages to both parties in this procedure. First, it puts the agency's attorney dealing with the specific problem on immediate notice of the request. Secondly, it provides a quick and inexpensive forum to decide disputes over disclosure within the framework of the existing lawsuit. Because a prime purpose of the Act is to provide for the speedy and inexpensive disclosure of public records,<sup>109</sup> this method of proceeding through the discovery mechanism allows the requesting party to avoid the delays and costs inherent in filing a writ of mandamus in a separate lawsuit.

The only court to consider such a procedure is the Third District Court of Appeal in *State v. Kropff*.<sup>110</sup> In *Kropff*, the plaintiff filed a notice of taking deposition pursuant to Rule 1.310(b)(5),

---

informants), (f) (records revealing surveillance techniques), (g) (records revealing undercover personnel of any criminal justice agency), (m) (records revealing the substance of confessions or witness lists, until disposition of charge).

107. See, e.g., *State v. Kropff*, 445 So. 2d 1068 (Fla. 3d DCA 1984); *Miami Herald Publishing Co. v. City of N. Miami*, 420 So. 2d 653 (Fla. 3d DCA 1982); *Donner v. Edelstein (Donner II)*, 423 So. 2d 367 (Fla. 3d DCA 1982) (per curiam) (on motion for order in accordance with mandate); *Donner I*, 415 So. 2d 830 (Fla. 3d DCA 1982).

108. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(a)(1) (1980).

109. See FLA. STAT. § 119.01(1) (1983).

110. 445 So. 2d 1068 (Fla. 3d DCA 1984).

Florida Rules of Civil Procedure, which allows the "noticing" of a corporation or other entity.<sup>111</sup> The notice of deposition was accompanied by a notice of production directing the defendant Florida Highway Patrol to bring the public records, subject to disclosure under the Act, to the deposition. The court was critical of the procedure but expressly refused to decide its propriety.<sup>112</sup>

## V. CONCLUSION

State agencies have argued that the Florida Public Records Act places them at a disadvantage in situations involving litigation, but their argument ignores a number of overriding policy considerations. State agencies are given many advantages over private litigants under section 768.28 of the Florida Statutes.<sup>113</sup> Under this statute, a private litigant must undergo the expense and oftentimes substantial delay in filing an administrative claim as a condition precedent to instituting a lawsuit.<sup>114</sup> As the case law makes clear, this path is fraught with many dangers and failure to comply with technicalities can result in an absolute denial of the right to file a lawsuit. This is true, even though the state agency has suffered no prejudice as a result of the technical violation.<sup>115</sup> Section 768.28 also sets a cap on the damages that are recoverable against the state in the absence of insurance. Therefore, if a state agency decides not to insure itself, litigants will be limited to damages of \$50,000 or \$100,000, per person, depending upon the date of their accident.<sup>116</sup>

Perhaps, more importantly, the interest of the state in civil litigation cases cannot be equated with that of a private individual. When the state litigates with a private individual, it is involved with one of its own citizens and therefore the proceeding cannot be termed "adversary" in the same sense as a suit between two private individuals. In a case construing the companion Sunshine Law, the Third District Court of Appeal observed, "representative government requires that [government] be responsive to the wishes of the governed, because that is its ultimate source of consent."<sup>117</sup>

This principle is more often seen in criminal than in civil

---

111. FLA. R. CIV. P. 1.310(b)(5).

112. *Kropff*, 445 So. 2d at 1068 n.1.

113. FLA. STAT. § 768.28 (1983).

114. *Id.* § 768.28(6)(a).

115. *Levine v. Dade County School Bd.*, 419 So. 2d 808 (Fla. 3d DCA 1982).

116. FLA. STAT. § 768.28(5) (1983).

117. *Krause v. Reno*, 366 So. 2d 1244, 1250 (Fla. 3d DCA 1979).

cases. Although in the criminal context, most procedural rules are constitutionally mandated, the additional burdens placed on the state in criminal proceedings demonstrates the difference in the nature of a proceeding between private litigants and a proceeding between a private party and the state.

In criminal proceedings, for example, far broader obligations of disclosure are imposed upon the state than the defense, including the duty to disclose all material evidence that tends to negate the guilt of the accused.<sup>118</sup> In fact, it has often been observed that “[t]he state’s attorney is not an attorney of record for the state striving at all events to win a verdict of guilty. He is a quasi judicial officer whose main objective should always be to serve justice and see that every defendant received a fair trial.”<sup>119</sup> It has also been commented that “[t]he State prosecutor has an affirmative duty to correct what he knows to be false and to elicit the truth. Even though the State itself does not solicit the false evidence, it may not allow it to go uncorrected when it appears.”<sup>120</sup>

This same rationale applies to civil cases and to the role of the Florida Public Records Act. The purpose of the state is not self profit or self perpetuation, but rather the state’s purpose is to serve the broad interests of its citizens. As further observed by the Florida Supreme Court, “[a] search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics.”<sup>121</sup> It is only through the liberal construction of the disclosure requirements of the Act given by the courts to date that these purposes can be accomplished.

---

118. FLA. R. CRIM. P. 3.220(a); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103B (1980).

119. *Frazier v. State*, 294 So. 2d 691, 692 (Fla. 1st DCA 1974) (footnote omitted).

120. *Lee v. State*, 324 So. 2d 694, 697 (Fla. 1st DCA 1976) (citation and emphasis omitted).

121. *Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980).