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EXEMPTIONS TO THE SUNSHINE LAW AND THE PUBLIC RECORDS LAW: HAVE THEY IMPAIRED OPEN GOVERNMENT IN FLORIDA?

MARY K. KRAEMER

INTRODUCTION

There are two open government laws in Florida: the Government in the Sunshine Law¹ and the Public Records Law.² Both are broadly worded. Together, they seem to guarantee virtually complete public access to the process of governmental decisionmaking and the documents generated by that process. The Sunshine Law states "[a]ll meetings . . . are declared to be public meetings open to the public at all times."³ The Public Records Law declares "all state, county, and municipal records shall at all times be open for a personal inspection by any person."⁴

1. FLA. STAT. ch. 286 (1979).

2. FLA. STAT. ch. 119 (1979).

3. FLA. STAT. § 286.011(1) (1979). Other jurisdictions have also enacted open meeting provisions. *See, e.g.*, ALASKA STAT. § 44.62.310 (1976); ARIZ. REV. STAT. ANN. § 38-431.01 (Supp. 1979-80); ARK. STAT. ANN. § 12-2805 (1968); CAL. GOV'T CODE § 11120 (West Supp. 1967-79); COLO. REV. STAT. § 29-9-101 (1973); CONN. GEN. STAT. ANN. § 1-21 (West Supp. 1980); DEL. CODE ANN. tit. 29, § 10004 (1979); D.C. CODE ENCYCL. § 1-1503a (West Supp. 1978-79); GA. CODE ANN. § 40-3301 (Supp. 1979); HAW. REV. STAT. § 92-3 (1976); IDAHO CODE § 67-2342 (Supp. 1979); ILL. REV. STAT. ch. 102, § 42 (1975); IND. CODE ANN. § 5-14-1.5-3 (Burns Supp. 1979); IOWA CODE ANN. § 28A.3 (West Supp. 1979-80); KAN. STAT. ANN. § 75-4317 (1977); KY. REV. STAT. § 61.810 (1980); LA. REV. STAT. ANN. § 42.5 (West Supp. 1980); ME. REV. STAT. ANN. tit. 1, § 403 (1979); MD. ANN. CODE art. 41, § 14 (1957); MASS. GEN. LAWS ANN. ch. 30A, § 11A½ (West 1979); MICH. COMP. LAWS § 15.263 (West Supp. 1967-79); MINN. STAT. ANN. § 471.705 (West 1977); MISS. CODE ANN. § 25-41-5 (Supp. 1979); MO. ANN. STAT. § 610.010 (Vernon 1979); MONT. REV. CODES ANN. § 82-3402 (Supp. 1977); NEB. REV. STAT. § 84-1408 (1976); NEV. REV. STAT. § 241.020 (1979); N.H. REV. STAT. ANN. § 91-A:2 (Supp. 1975); N.J. STAT. ANN. § 10:4-12 (West 1976); N.M. STAT. ANN. § 10-15-1 (Supp. 1979); N.Y. PUB. OFF. LAW § 98 (McKinney Supp. 1979-80); N.C. GEN. STAT. § 143-318.12 (Supp. 1979); N.D. CENT. CODE § 44-04-19 (1978); OHIO REV. CODE ANN. § 121.22 (Page 1978); OKLA. STAT. ANN. tit. 25, § 301 (West Supp. 1979-80); OR. REV. STAT. § 192.630 (1977); PA. STAT. ANN. tit. 65, § 262 (Purdon Supp. 1979-80); R.I. GEN. LAWS § 42-46-3 (1977); S.C. CODE § 30-4-60 (Supp. 1979); S.D. COMPILED LAWS ANN. § 1-25-1 (1974); TENN. CODE ANN. § 8-4402 (Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1980); UTAH CODE ANN. § 52-4-3 (Supp. 1979); VT. STAT. ANN. tit. 1, § 312 (Supp. 1979); VA. CODE § 2.1-343 (1979); WASH. REV. CODE ANN. § 42.30.030 (1972); W. VA. CODE § 6-9A-3 (1979); WISC. STAT. ANN. § 19.83 (West Supp. 1979-80); WYO. STAT. § 9-11-103 (1977).

4. FLA. STAT. § 119.01 (1979). Other states have also enacted public inspection and access provisions. *See, e.g.*, ALA. CODE tit. 36, § 12-40 (1975); ALASKA STAT. § 09.25.110 (1973); ARIZ. REV. STAT. ANN. § 39-121 (1974); ARK. STAT. ANN. § 12-2804 (1968); CAL. GOV'T CODE § 6253 (West Supp. 1967-79); COLO. REV. STAT. § 24-72-203 (1973); CONN. GEN. STAT. ANN. § 1-19 (West Supp. 1980); DEL. CODE ANN. tit. 29, § 10003 (1979); D.C. CODE ENCYCL. § 1-1522 (West Supp. 1978-79); GA. CODE ANN. § 40-2701 (1975); HAW. REV. STAT. § 92-51 (1976); IDAHO CODE § 9-301 (1979); ILL. REV. STAT. ch. 116, § 43.6 (1975); IND. CODE ANN. § 5-14-1-3 (Burns 1974); IOWA CODE ANN. § 68A.2 (West 1973); KAN. STAT. ANN. § 45-201 (Supp. 1979);

Despite that broad, all-encompassing language, the scope of these laws and their applicability in a given situation are often matters of litigation.⁵ First, there are certain statutory and constitutional exemptions to the policy of full disclosure. The courts are called upon to decide how narrow these exemptions were meant to be. Second, some public officials and agencies find it difficult to comply with the laws.⁶ When meetings are closed or documents are withheld, the public is deprived of its "right to know." Accordingly, lawsuits are instituted to enforce these laws and to provide access to government processes—access that has been wrongfully withheld. Occasionally, in these situations, the courts have created judicial exemptions which denied relief. This comment examines the litigation surrounding the Sunshine and the Public Records Laws to determine whether the judicial constructions and exemptions have clouded our government "in the sunshine."

THE SUNSHINE LAW

"Red, that sunshine law, that's the sorriest, damn law you ever got passed." That assessment of Florida's Sunshine Law was directed at J. Emory "Red" Cross, the law's sponsor.⁷

KY. REV. STAT. § 61.872 (1980); LA. REV. STAT. ANN. § 44.31 (West Supp. 1980); ME. REV. STAT. ANN. tit. 1, § 408 (1979); MD. ANN. CODE art. 76A, § 2 (Supp. 1979); MASS. GEN. LAWS ANN. ch. 66, § 10 (West Supp. 1979); MICH. COMP. LAWS § 15.233 (West Supp. 1967-79); MINN. STAT. ANN. § 15-1621 (West Supp. 1979); MO. ANN. STAT. § 610.015 (Vernon 1979); MONT. REV. CODES ANN. § 59-512 (1970); NEB. REV. STAT. § 84-712 (1976); NEV. REV. STAT. § 239.010 (1979); N.H. REV. STAT. ANN. § 91-A:4 (Supp. 1975); N.J. STAT. ANN. § 47:1A-2 (West Supp. 1979-80); N.M. STAT. ANN. § 14-2-1 (1978); N.Y. PUB. OFF. LAW § 87 (McKinney Supp. 1979-80); N.C. GEN. STAT. § 132.6 (1974); N.D. CENT. CODE § 44-04-18 (1978); OHIO REV. CODE ANN. § 149.43 (Page Supp. 1979); OKLA. STAT. ANN. tit. 51, § 24 (West 1962); OR. REV. STAT. § 192.420 (1977); PA. STAT. ANN. tit. 65, § 66.2 (Purdon 1959); R.I. GEN. LAWS § 38-2-3 (Supp. 1979); S.C. CODE § 30-4-30 (Supp. 1979); S.D. COMPILED LAWS ANN. § 1-27-1 (Supp. 1979); TENN. CODE ANN. § 10-7-503 (1980); TEX. REV. CIV. STAT. ANN. art. 6252-17(a)(4) (Vernon Supp. 1980); UTAH CODE ANN. § 78-26-2 (1977); VT. STAT. ANN. tit. 1, § 315 (Supp. 1979); VA. CODE § 2.1-342 (1979); WASH. REV. CODE ANN. § 42.17.260 (Supp. 1978); W. VA. CODE § 29B-1-3 (1980); WISC. STAT. ANN. § 19.21(2) (West 1972); WYO. STAT. § 9-9-102 (1977).

5. Some commentators have cited the broad language as the cause of widespread doubt about the law's application. See, e.g., Kalil, *Florida Sunshine Law*, 49 FLA. B.J. 72 (1975). For an examination of the problems entailed by the unlimited definition of "public meetings" see Little & Tompkins, *Open Government Laws: An Insider's View*, 53 N.C.L. REV. 451 (1975). See also Wickham, *Let The Sun Shine In!*, 68 NW. L. REV. 480 (1973) for a survey of open meeting legislation and a draft of a model law.

6. *Canney v. Board of Pub. Instruction*, 278 So. 2d 260, 264 (Fla. 1973).

7. Cross attributed that statement to "some of [his] friends" in the course of a newspaper interview. Wyatt, *Sunshine Law: How It Was*, Fla. Times-Union, Feb. 20, 1977, § B, at 5, col. 5.

Cross sponsored the Sunshine Law after becoming aware of journalists' dissatisfaction with backroom wheeling and dealing. He first introduced the bill in the house of representatives in 1957. Later, as a senator, he introduced it every year from 1959 until 1967, when the bill was finally enacted.⁸ Significantly, the 1967 legislative session was the first session to meet after reapportionment, which diminished the influence of the "porkchoppers" and increased the power of urban legislators.⁹ The Sunshine Law passed unanimously.¹⁰ There was little debate on the senate floor.¹¹ Although several legislative committees considered the bill, committee files and tape recordings of the committees' discussions are unavailable.¹² Therefore, because no written record of the committees' view of the Sunshine Law exists, we can only speculate about the impact that was envisioned. The wording of the law, however, is unequivocal.

Florida's Sunshine Law applies to all public meetings "except as otherwise provided in the Constitution."¹³ In addition to that constitutional limitation, there are five statutory exemptions to the Sunshine Law that are located elsewhere in the Florida Statutes. Certain proceedings of the Commission on Ethics,¹⁴ certain proceedings of the Elections Commission,¹⁵ hearings held to challenge material in student records,¹⁶ certain collective bargaining negotiations,¹⁷ and deliberations of the Public Employees Relations Commission¹⁸ are all exempt from the operation of the law. Predictably,

8. *Id.* See ch. 67-356, 1967 Fla. Laws 1147 (current version at FLA. STAT. § 286.011(1) (1979)).

9. Wyatt, *supra* note 7, § B, at 5, col. 5.

10. FLA. S. JOUR. 1086 (Reg. Sess. 1967) (vote: 48 to 0); FLA. H.R. JOUR. 1532 (Reg. Sess. 1967) (vote: 98 to 0).

11. Wyatt, *supra* note 7, § B, at 5, col. 5.

12. Interview with B. Gene Baker, Director of Florida Division of Legislative Library Services, in Tallahassee, Fla. (May 23, 1980). Mr. Baker did not wish to rule out the possibility that these records might someday be found.

13. FLA. STAT. § 286.011(1) (1979). The entire Florida open meeting provision states:

(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

Id.

14. FLA. STAT. § 112.324(1) (1979).

15. FLA. STAT. § 106.25(5) (1979).

16. FLA. STAT. § 228.093(3)(c) (1979).

17. FLA. STAT. § 447.605(1) (1979).

18. FLA. STAT. § 447.205(10) (1979).

some of these exemptions required judicial interpretation. An exemption based on the constitutional right to bargain collectively was recognized.¹⁹ Another exemption was recognized when the supreme court gave effect to a special legislative act, thereby validating the exemption contained in the act.²⁰ A third exemption necessarily resulted from the interaction of the Public Records Law with the Sunshine Law. Because exempted records were to be discussed at a meeting, the meeting had to be closed to the public or the protection accorded to the records would be ineffective.²¹ The courts did nothing untoward by recognizing these exemptions. Each resulted from valid judicial interpretations of pertinent constitutional or statutory provisions and is limited in scope.

In other cases, however, the Florida courts went beyond interpretation and actually created judicial exemptions from the Sunshine Law. These judicial exemptions, although based on the particular facts presented in each case, are potentially unlimited in their application. Briefly, the courts have held that "quasi-judicial" actions,²² "remote" actions,²³ and certain "staff" actions²⁴ are exempt from the Sunshine Law's operation. Although most of the cases construing the Sunshine Law have required compliance with its broad mandate for open meetings, the three judicially created exemptions could seriously threaten continued public access to governmental decisionmaking.

The genesis of the constitutional and judicially created exemptions to the Sunshine Law and the particular factual situations in which each arose are discussed below. The discussion is important in two ways. First, the likelihood of further exemptions may be assessed. And second, how the exemptions may be used to close meetings becomes clearer.

The first constitutional exemption to the Sunshine Law was recognized in *Bassett v. Braddock*.²⁵ In *Bassett*, citizens sought to

19. *Bassett v. Braddock*, 262 So. 2d 425 (Fla. 1972).

20. *Tribune Co. v. School Board*, 367 So. 2d 627 (Fla. 1979), *construing* ch. 69-1146, § 5, 1969 Fla. Laws 1258.

21. *Marston v. Gainesville Sun Publishing Co.*, 341 So. 2d 783, 785 (Fla. 1st Dist. Ct. App. 1976).

22. *See, e.g., State Dep't of Pollution Control v. State Career Serv. Comm'n*, 320 So. 2d 846 (Fla. 1st Dist. Ct. App. 1975); *Canney v. Board of Pub. Instruction*, 231 So. 2d 34 (Fla. 1st Dist. Ct. App. 1970), *rev'd*, 278 So. 2d 260 (Fla. 1973).

23. *See, e.g., Krause v. Reno*, 366 So. 2d 1244 (Fla. 3d Dist. Ct. App. 1979); *Bennett v. Warden*, 333 So. 2d 97 (Fla. 2d Dist. Ct. App. 1976).

24. *See, e.g., Occidental Chem. Co. v. Mayo*, 351 So. 2d 336 (Fla. 1977); *Florida Parole and Probation Comm'n v. Thomas*, 364 So. 2d 480 (Fla. 1st Dist. Ct. App. 1978).

25. 262 So. 2d 425 (Fla. 1972). *See Comment, Government in the Sunshine: Another*

enjoin the Dade County school board negotiator from conducting private preliminary contract negotiations with teachers' representatives. The injunction also was sought to prevent the school board from privately consulting with its own negotiator about the teacher contract. The teachers intervened upon counterclaim for a declaratory decree as to teachers' collective bargaining rights.²⁶ The trial court denied the injunction and declared that the effectiveness of the constitutional right to collective bargaining would be lessened if preliminary negotiations were conducted in the sunshine.²⁷ The Florida Supreme Court affirmed.²⁸

The Florida Constitution grants employees the right to bargain collectively,²⁹ but at the time this case was decided, the legislature had not passed any implementing legislation.³⁰ The court was "hesitant" to judicially implement the constitutional provision.³¹ Nevertheless, the teachers had produced some evidence that public attendance at preliminary contract negotiations would adversely affect their collective bargaining rights. Thus, the court recognized the constitutional exemption to the Sunshine Law. To find otherwise, stated the court, "could cause a damaging case of 'sunburn.'"³²

As to whether the school board could consult with its own negotiator privately, the court held that it was in the public interest to do so as a means of equalizing positions.³³ The teachers could privately consult with their negotiators.³⁴ As the dissent pointed out, however, teachers, as public employees, do not have the right to strike. Therefore, forcing the school board to publicly consult with its negotiator would be a more realistic method of equalizing bargaining positions.³⁵ The majority held that as long as the negotiator was publicly hired, and the ultimate debate, decisions, official acts and formal actions were public, then the public's right to know would be protected.³⁶ The majority was apparently im-

Cloud on the Horizon, 25 U. FLA. L. REV. 603 (1973).

26. 262 So. 2d at 425-26.

27. *Id.* at 426.

28. *Id.* at 429.

29. FLA. CONST. art. I, § 6.

30. 262 So. 2d at 426.

31. *Id.*

32. *Id.*

33. *Id.* at 427.

34. *Id.* at 428.

35. *Id.* at 430.

36. *Id.* at 427.

pressed by the fact that the negotiator's recommendations, which were heard in a public meeting, were modified by the school board, and then only accepted by a marginal vote of one.³⁷

Two years after *Bassett*, in 1974, the legislature passed the Employees Relations Act.³⁸ In effect, the act affirmed that part of the court's decision holding that the school board could consult with its own negotiator privately, but, reversed that part of the decision holding that negotiations with the teachers could be conducted privately.³⁹ Despite the legislature's disagreement over whether preliminary collective bargaining negotiations should be in the sunshine, the court was not guilty of overreaching in *Bassett*. The court was clearly acting in accordance with the Sunshine Law's language, "except as otherwise provided by the Constitution," when it closed the negotiations. The history of the *Bassett* decision, however, is illustrative of the pattern of judicial-legislative tension which permeates the process of defining the Sunshine Law's parameters.

In *Tribune Co. v. School Board*,⁴⁰ the Florida Supreme Court had to pass on the constitutionality of a statutory exemption to the Sunshine Law. By special act, applicable only to Hillsborough County, the legislature provided that teachers could choose whether disciplinary proceedings against them would be held publicly or privately.⁴¹ When a teacher opted for privacy, the local newspaper, Tribune Company, sought injunctive and declaratory relief. The trial court denied the injunction declaring that the statutory provision was not an unauthorized delegation of legislative authority and that it was a valid exemption from the Sunshine Law.⁴² The Florida Supreme Court affirmed.⁴³ Giving the traditional presumption of constitutionality to the legislative act, the court held that since the "charged teacher neither makes law nor invokes it," but only exercises a limited option after the school

37. *Id.*

38. FLA. STAT. § 447.605 (1979).

39. The act provides in relevant part:

(1) All discussions between the chief executive officer of the public employer, or his representative, and the legislative body or the public employer relative to collective bargaining shall be exempt from s. 286.011.

(2) The collective bargaining negotiations between a chief executive officer, or his representative, and a bargaining agent shall be in compliance with s. 286.011.

FLA. STAT. § 447.605 (1979).

40. 367 So. 2d 627 (Fla. 1979).

41. *Id.* at 628. See ch. 69-1146, § 5, 1969 Fla. Laws 1258.

42. *Id.*

43. *Id.* at 629.

board has called for a hearing, the act was not an unauthorized delegation of legislative authority.⁴⁴ Therefore, the court resolved the conflict of statutes by giving effect to the later special act as "a more specific expression of the legislative will" than the earlier enacted general Sunshine Law.⁴⁵ Justice Adkins, in dissent, would have held the special act unconstitutional because it delegated a policy decision to an individual's discretion.⁴⁶ The policy decision of whether the public had a "right to know" about teacher disciplinary proceedings was too important, in light of the Sunshine Law, to so delegate. Further, under the delegation of powers doctrine, the legislature can only delegate authority to certain officials and administrative boards, not to individuals.⁴⁷

In *Bassett*, the court construed the constitution to create an exemption in the absence of legislative action; in *Tribune Co.*, the court inferred an exemption from two incongruous legislative enactments. Notwithstanding the legislature's subsequent elimination of one of the exemptions created in *Bassett*, in both cases the court was acting well within its powers.

In *Marston v. Gainesville Sun Publishing Co.*,⁴⁸ the problem of conflicting statutes rose again; this time, however, in reference to student disciplinary proceedings. As in *Tribune Co.*, the case required consideration of the issue of delegation of authority. The question in *Marston* was whether the honor court of a state university could hold closed student disciplinary hearings in order to recommend a disposition to the Board of Regents.⁴⁹ The trial court found that student discipline was a Board of Regents matter that had been delegated to the university president and further delegated to the student honor court. Since the Board of Regents would itself be required to meet "in the sunshine" to conduct disciplinary proceedings, the court held that the delegation of the proceedings to the honor court subjected it to the Sunshine Law as well.⁵⁰ The fact that the president of the university was not a proper delegate for the Board of Regents' authority was considered immaterial.⁵¹

44. *Id.* at 628.

45. *Id.* at 629.

46. *Id.* at 630.

47. *Id.* at 629-30. See Note, *Florida's Adherence to the Doctrine of Nondelegation of Legislative Power*, 7 FLA. ST. U.L. REV. 541 (1979).

48. 341 So. 2d 783 (Fla. 1st Dist. Ct. App. 1977).

49. *Id.* at 784.

50. *Id.*

51. *Id.*

The First District Court of Appeal reversed, but did not address the delegation of authority issue.⁵² Rather, the court based its reversal on the statutory exemption of certain university student records from the Public Records Law.⁵³ As in *Tribune Co.*, the *Marston* court held that a later specific law was more expressive of legislative intent than an earlier general law.⁵⁴ The legislature had limited the public's access to university student records. The Board of Regents had promulgated the complementary rule that student consent was required prior to release of student disciplinary records. Therefore, opening the disciplinary proceedings in which the exempted records would be created would subvert the "beneficial policy" of limiting access to university student records.⁵⁵ The court stated, "[T]here is little purpose in preserving from public view a [record] of a witness' testimony . . . if the public is there to hear the spoken word."⁵⁶

Unlike *Bassett*, *Tribune Co.*, and *Marston*, where the courts merely used construction powers to recognize exemptions to the Sunshine Law, in the following cases the courts actually created exemptions to the Sunshine Law.

The quasi-judicial exemption has the most interesting history. Created in *Canney v. Board of Public Instruction*,⁵⁷ by the First District Court of Appeal, it was rejected by the Florida Supreme Court, only to be resurrected in a later First District Court of Appeal case.⁵⁸ In *Canney*, a county school board recessed a student disciplinary proceeding in order to privately deliberate on its decision. The recess was challenged as violative of the Sunshine Law.⁵⁹ The first district, characterizing the school board's actions as quasi-judicial, held that the private deliberation was privileged and thus exempt from the Sunshine Law's operation.⁶⁰ The Florida Supreme Court reversed.⁶¹ The supreme court acknowledged that the school board's private deliberation was correctly categorized as a quasi-judicial function, but held that, nevertheless, the Sunshine

52. *Id.* at 786.

53. FLA. STAT. § 119.07(3)(b) (1979).

54. 341 So. 2d at 786.

55. *Id.* at 785.

56. *Id.*

57. 231 So. 2d 34 (Fla. 1st Dist. Ct. App. 1970), *rev'd*, 278 So. 2d 260 (Fla. 1973).

58. *State Dep't of Pollution Control v. State Career Serv. Comm'n*, 320 So. 2d 846 (Fla. 1st Dist. Ct. App. 1975).

59. 278 So. 2d at 262.

60. 231 So. 2d at 39.

61. 278 So. 2d at 264.

Law applied.⁶² The court based its decision on the separation of powers doctrine.⁶³ The Federal Constitution requires notice and a hearing to protect a student's due process rights.⁶⁴ The legislature has the power to delegate authority to an administrative agency to provide notice and conduct a hearing. Such a delegation, however, does not transform the administrative agency into a part of the judicial branch of the government. Notwithstanding the performance of a quasi-judicial function, the administrative agency remains a part of the legislative branch of government.⁶⁵ The legislature further has the power to mandate that all meetings conducted by the legislative branch of the government should be conducted in the sunshine. Since the legislature did not create an exemption for quasi-judicial functions, the school board's deliberations must be held in the sunshine.⁶⁶ Therefore, the court stated, "The judiciary should not encroach upon the Legislature's right to require that the activities of the School Board be conducted in the 'sunshine.'"⁶⁷

The dissent in *Canney* argued that it was no more necessary for the legislature to expressly exempt quasi-judicial functions from the Sunshine Law than it was to expressly exempt a jury's or judge's deliberations.⁶⁸ The dissent likened the public deliberation ordered by the majority to a "return to the Roman Arena for a 'thumbs up or thumbs down' result by public clamor."⁶⁹ Such a procedure violated the independence of any proceeding of a judicial character and was "a denial of due process."⁷⁰

The *Canney* dissent was echoed, although not cited, in *State Department of Pollution Control v. State Career Service Commission*.⁷¹ At issue was the Career Service Commission's reinstatement of an employee who had been terminated by the Department of Pollution Control. The employee appealed to the Commission after his dismissal, there was a hearing "in the sunshine," and the Commission reinstated the employee.⁷² The State Department of Pollu-

62. *Id.* at 262-63.

63. *Id.* at 262.

64. *Id.* at 263.

65. *Id.*

66. *Id.*

67. *Id.* at 264.

68. *Id.* at 264-65.

69. *Id.* at 264.

70. *Id.* at 265.

71. 320 So. 2d 846 (Fla. 1st Dist. Ct. App. 1975).

72. *Id.* at 847.

tion Control appealed.⁷³ Although the First District Court of Appeal vacated the Commission's order of reinstatement, it went on, at the behest of the parties, to determine "'once and for all' whether the deliberations of the . . . Commission following hearings . . . are subject to . . . the Government in the Sunshine Law."⁷⁴ The court likened the Commission's deliberations to that of a petit jury and an appellate court, and held they were a quasi-judicial exemption from the Sunshine Law.⁷⁵

The decision was in direct conflict with *Canney* which held that the judiciary could not create a quasi-judicial exemption to the Sunshine Law.⁷⁶ The only difference between the Commission's authority to review employee discipline and the school board's authority to consider student discipline, is that the legislature provided that the Commission should have thirty days in which to deliberate⁷⁷ but placed no such definite time limitation on the school board.⁷⁸ Implied in *Pollution Control* is that the legislative intent in creating a thirty-day deliberation period was to allow the Commission's deliberations to be conducted privately.⁷⁹ That implied intent is logical. However, as the Florida Supreme Court pointed out in *Canney*, the legislature had rejected an amendment to the Sunshine Law which would have exempted employee disciplinary hearings.⁸⁰ Therefore, although the district court's inference in *Pollution Control* was logical, it was not necessarily valid.

On the other hand, the supreme court's decision in *Canney*, relating to school board deliberations, is also open to question. As the First District Court of Appeal pointed out in *Marston*, the legislature has recognized a privacy right for student records.⁸¹ Arguably, in *Canney*, as in *Marston*, the entire student disciplinary proceeding could have been held privately. What the First District Court of Appeal in *Marston* did not mention, however, was that the legislature exempted student disciplinary records from the student's right of privacy for use as evidence in student expulsion

73. *Id.*

74. *Id.* at 848.

75. *Id.* at 849.

76. 278 So. 2d at 262.

77. 320 So. 2d at 848-49 (citing ch. 67-437, § 6, 1967 Fla. Laws 1382 (repealed 1979)).

78. FLA. STAT. § 228.093(3)(c)(4) (1979) provides for a "reasonable" time. *Id.*

79. 320 So. 2d at 849.

80. 278 So. 2d at 263.

81. 341 So. 2d 783, 785 (Fla. 1st Dist. Ct. App. 1977). See FLA. STAT. § 228.093(3)(d) (1979).

hearings conducted by district school boards.⁸² Whether university honor courts are sufficiently like district school boards to render *Marston* incorrect, or whether "hearings" includes the deliberation process are, thus, left uncertain. What is certain is that the first district is more willing to find an exemption to the Sunshine Law than is the supreme court, and that the district court's willingness extends to directly contradicting the supreme court's ruling about quasi-judicial actions.

In *Bennett v. Warden*,⁸³ the Second District Court of Appeal created the "remoteness" exemption from the Sunshine Law. In *Bennett*, the president of St. Petersburg Junior College appointed several employees to a Career Employees Council. Thereafter, the president and the Council met periodically, in private, to discuss working conditions, including wages and hours.⁸⁴ A labor organizer, seeking to unionize employees of the college, challenged the privately held meetings as violative of the Sunshine Law and the Employees Relations Act.⁸⁵ The labor organizer argued that since the Junior College Board of Trustees must meet in the sunshine, so also must the president and Council, as designees of the Board. The court rejected that argument.⁸⁶ The president was an executive officer, not a "board" or "commission," and thus, by definition, was not subject to the Sunshine Law.⁸⁷ Although the Council was a group to which the Sunshine Law restrictions could apply, the court declined to impose them in view of the facts of the case.⁸⁸ The court reasoned that the Council was not a policy-making body, but a fact-revealing body; that the Board of Trustees did not control it; and that the president reported the results of the meetings with the Council to an intermediary Administrative Council which, in turn, reported to the Board of Trustees.⁸⁹ Therefore, the court concluded, the Career Employees Council was "too remote in the

82. FLA. STAT. § 228.093(3)(d) 7 (1979).

83. 333 So. 2d 97 (Fla. 2d Dist. Ct. App. 1976).

84. *Id.* at 98.

85. *Id.* at 98, 100. The court found the Employees Relations Act to be inapplicable to the facts of the case. *Id.* at 100.

86. *Id.* at 98.

87. *Id.* at 99.

88. *Id.*

89. *Id.* at 100. *But cf.* *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974) (citizen planning committee appointed to consult with planning firm to revise town's zoning ordinances is alter-ego of town council and thus subject to Sunshine Law). In *Bennett*, the court distinguished the facts of *Town of Palm Beach* on the grounds that the committee had been directly appointed by the town council and that the committee was directly involved in policy making. 333 So. 2d at 99.

decision-making process" to be a designee of the Board of Trustees subject to the Sunshine Law.⁹⁰ Certainly, the court's decision was influenced by its own opinion that requiring administrators to conduct all business meetings in the sunshine would "unduly hamper the efficient operation of modern government."⁹¹ However, as the Florida Supreme Court pointed out in *Canney*, the remedy for administrative inconvenience lies with the legislature, not the judiciary.⁹²

The "remoteness" exemption was later presented to the Third District Court of Appeal in *Krause v. Reno*.⁹³ Although the remoteness exemption was held inapplicable in *Krause*, it was not discredited. On the contrary, the court accepted the validity of the exemption but merely held that the facts of the case did not fit within the definition of "remote."⁹⁴ Therefore, it is possible that other courts, on similar facts, will also use the remoteness exemption to circumvent the Sunshine Law.

In *Krause*, the city manager of Miami appointed a citizen's advisory group to screen applicants for the position of Miami Chief of Police.⁹⁵ The group had a "direct influence" on the final selection.⁹⁶ The court held the advisory group was thus a "board" within the definition of the Sunshine Law.⁹⁷ Further, through the act of appointment, the city manager became an "agency."⁹⁸ As to the latter classification, the court relied on the analogous Public Records Law, which refers to "agency,"⁹⁹ to conclude that the city manager came within the purview of the Sunshine Law.¹⁰⁰ By that same reasoning, the second district's conclusion in *Bennett* that the president was not included in the Sunshine Law can be questioned. The president in *Bennett*, like the city manager in *Krause*, appointed a group. Both the president and the city manager appointed the group to aid them in making recommendations to legislative boards subject to the Sunshine Law. Therefore, both the

90. 333 So. 2d at 100.

91. *Id.*

92. 278 So. 2d at 264.

93. 366 So. 2d 1244 (Fla. 3d Dist. Ct. App. 1979).

94. *Id.* at 1247. The court held that neither *Bennett* nor *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974), was directly on point and that the facts in *Krause* fell "somewhere between" the two. 366 So. 2d at 1247-48.

95. 366 So. 2d 1246.

96. *Id.* at 1247.

97. *Id.* at 1252.

98. *Id.*

99. See FLA. STAT. § 119.011(2) (1979), quoted at note 146 *infra*.

100. 366 So. 2d at 1252.

president and the city manager should have been classified as "agencies" within the purview of the Sunshine Law.

The third judicially created exemption to the Sunshine Law is an express approval of the *Bennett* conclusion that the president, as an executive officer, is not subject to the Sunshine Law. In *Occidental Chemical Co. v. Mayo*,¹⁰¹ the Florida Supreme Court cited *Bennett* as support for the proposition that "staff is not subject to the [Sunshine] law." In *Occidental*, the petitioner, challenging a Public Service Commission decision, contended that the decision was made in violation of the Sunshine Law. Since the Commission considered a complex twenty-seven and one-half page document for only ninety minutes, the petitioner concluded that the Commission met secretly or delegated decisionmaking authority to its staff.¹⁰² In either case, a violation of the Sunshine Law had to occur. Secret meetings, of course, are impermissible under the law.¹⁰³ And if the staff had the authority of the Commission to make decisions, its elevated rank would then subject it to the law.¹⁰⁴

In rejecting the argument that all meetings between the commissioners and their staff must be open to the public, the supreme court simply stated that "[t]he Commission's staff is not subject to the [Sunshine] law."¹⁰⁵ Since no evidence of secret meetings existed, the court refused to speculate as to what occurred regarding the preparation of the document, although it conceded that the adoption of such a long, complex document with little discussion created "an appearance of pre-judgment."¹⁰⁶ The lack of evidence, however, is easily attributed to the fact that those involved want to keep the secret meeting secret. A good "secret meeting" should leave no evidence. The court minimized this appearance of impropriety by stating that "[t]he [Sunshine] law is satisfied if the commissioners reached a mutual decision . . . when they met together in public for their 'formal action.'"¹⁰⁷ The court also noted that if members of a collegial administrative body were obliged to avoid their staff during their deliberations, "the value of staff expertise would be lost and the intelligent use of employees would be crip-

101. 351 So. 2d 336, 341 (Fla. 1977). See also 6 FLA. ST. U.L. REV. 199 (1978) for discussion of the *Occidental* decision.

102. 351 So. 2d at 341.

103. FLA. STAT. § 286.011(1) (1979).

104. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974).

105. 351 So. 2d at 341.

106. *Id.* at 341-42.

107. *Id.* at 342.

pled."¹⁰⁸ Petitioner's argument, however, was not directed toward whether the staff was present or absent during the deliberations. Instead, the assertion was that, regardless of the staff's presence, there was a private meeting among the commissioners or that an improper delegation of authority to the staff had occurred.¹⁰⁹

The precise point at which discussions between the Commission and its staff would become subject to the Sunshine Law was not determined by the court. As long as "formal actions" occur in public and there is no evidence of secret meetings at which "final decisions" are reached, advisory bodies may meet privately, even though "the robust and open public debate which advocates of open government would like" is not produced.¹¹⁰

Less than one year later, in *Florida Parole and Probation Commission v. Thomas*,¹¹¹ the First District Court of Appeal stated that "[i]t is *well settled* that frequent unpublicized meetings between an agency member and advisors, consultants or staff . . . are not meetings within the contemplation of the Sunshine Law." As support, the court cited *Occidental* and *Bennett*. When the Florida Parole and Probation Commission appealed a Division of Administrative Hearings order, appellee Thomas alleged that the decision to take the appeal was "formal action" that should have been reached in a public meeting pursuant to the Sunshine Law.¹¹² The Parole and Probation Commission never met to decide whether to take the appeal, but in its own words filed the appeal "following individual discussions between legal staff and each commissioner concerning the final order rendered."¹¹³ The *Thomas* court held that the decision to take the appeal did not trigger the operation of the Sunshine Law, stating that "[i]n the absence of a meeting" the law did not apply.¹¹⁴

Although recognizing that the spirit of the law requires a construction in favor of public access and against evasive devices, the court stated that requiring a public meeting to ratify a legal decision would "unduly hamper" the Commission and make "effective legal representation virtually impossible."¹¹⁵ The court found noth-

108. *Id.* at 342 n.10.

109. *Id.* at 338, 341.

110. *Id.* at 342.

111. 364 So. 2d 480, 482 (Fla. 1st Dist. Ct. App. 1978) (emphasis added).

112. *Id.* at 481.

113. *Id.*

114. *Id.*

115. *Id.* at 481-82.

ing improper about private discussions between the Commission and its staff.¹¹⁶ These discussions, however, help to shape the issues. Public access is important because without "robust and open debate" the issues may be ignored or subsumed by private interests. The reasons for the choice of a particular solution may reflect the requirements of influential groups. Such reasoning, of course, may not be able to withstand the scrutiny that accompanies full public access. To assure more responsible decisionmaking, these types of private discussions should be "in the sunshine."

It appears that although the judiciary is wary about creating any exemptions to the Sunshine Law, those judicial exemptions already in existence are not sufficiently limited. Some exemptions, such as the ones in *Bassett* and *Tribune Co.*, were fairly exempted from the Sunshine Law because of specific constitutional or legislative expressions. Other exemptions, such as those created in *Occidental* and *Thomas*, seem to put a premium on sophisticated evasive tactics to avoid the operation of the law. If a secret meeting can be arranged, or even better, no meeting at all, it is possible to avoid triggering the Sunshine Law.

In sum, under today's Sunshine Law, school boards may consult with their own labor negotiators privately, but must consult publicly with the teachers' bargaining agents. Junior college presidents, however, may privately discuss working conditions, hours, and wages with an appointed employee advisory group. City managers, on the other hand, must meet publicly with citizen advisory groups appointed to screen applicants for a civil post. As for disciplinary proceedings, school boards must deliberate on a student's discipline in public, but the Career Service Commission may, at least within the jurisdiction of the First District Court of Appeal, deliberate over an employee's discipline in private. University honor courts may privately discipline university students; so also may teachers be privately disciplined by a school board. In other circumstances, both teachers and students must be disciplined in public. The members of the Public Service Commission and the Parole and Probation Commission may privately consult with their staff on an individual basis. The Public Service Commission members can then meet publicly to announce the rate structures decisions that were a result of the individual consultations. The Parole and Probation Commission, however, does not have to go through the formality of a public meeting before authorizing its staff to

116. *Id.* at 482.

proceed with implementing the decision that resulted from the individual consultations.

The above exemptions from the Sunshine Law are not so numerous as to overwhelm the legislative intent. The exemptions, however, are contradictory enough to raise the spectre of a foggy future. The courts have obviously been attempting to clarify an extremely broad statute by balancing the intent of the legislature with the need for practical application of the Sunshine Law. Perhaps the emphasis on the facts of each case reflects the courts' desire to limit the scope of the exemptions to the particular case at hand. If this is so, the judiciary should be reluctant to create exemptions and should construe both the statutory and constitutional exemptions narrowly. Such a course of conduct will continue to protect the public's broad right to know under the Sunshine Law, while permitting sensible resolutions of those cases where application of the law would interfere with other important interests.

THE PUBLIC RECORDS LAW

The Public Records Law was enacted in 1909.¹¹⁷ It was substantively amended in 1967.¹¹⁸ Perhaps because the public records concept was not brand new; perhaps because the 1967 amendments did not have an immediate impact on day-to-day political processes, passage of the Public Records law did not raise the kind of stormy controversy which clouded the Sunshine Law's history. Whether there were squalls or ill winds attending the drafting of the amendments, however, is a question that cannot be answered. As is the case with the Sunshine Law, committee files and debates are unavailable.¹¹⁹

Like the Sunshine Law, the Public Records Law is facially all-inclusive: "[A]ll state, county, and municipal records shall at all times be open for a personal inspection by any person."¹²⁰ Unlike the Sunshine Law, the Public Records Law provides for the specific exemption of certain public records.¹²¹ This difference has re-

117. Ch. 5942, 1909 Fla. Laws 132 (current version at FLA. STAT. § 119.011 (1979)).

118. Ch. 67-125, 1967 Fla. Laws 254 (current version at FLA. STAT. § 119.011 (1979)).

119. Interview with B. Gene Baker, Director of Florida Division of Legislative Library Services, in Tallahassee, Fla. (May 23, 1980). Mr. Baker did not wish to rule out the possibility that these records might someday be found.

120. FLA. STAT. § 119.01 (1979).

121. FLA. STAT. § 119.07(3)(a)-(k) (1979) lists the exemptions:

(3)(a) All 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, shall be exempt from the provisions of subsection (1).

sulted in a different judicial attitude.¹²² Under the rules of statutory interpretation, enumerated exemptions are indicative of the legislative intent to leave all unmentioned items subject to the law.¹²³ Courts have less justification for creating judicial exemptions to the Public Records Law than they have for creating exemptions to the Sunshine Law. One consequence of enumerated exemptions is that the legislature can, and has, added to their number.¹²⁴

The statutory exemptions to the Public Records Law are varied and create the impression of careful execution. For example, the value of an estate that is disclosed in estate tax returns or any

(b) All public records referred to in ss. 198.09, 199.222, 228.093, 257.261, 288.075, 624.311(2), 624.319(3) and (4), 657.061(3), 658.10(3), and 794.03 are exempt from the provisions of subsection (1).

(c) Examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure, certification, or employment shall be exempt from the provisions of subsection (1). However, an examinee shall have the right to review his own completed examination.

(d) Active criminal intelligence information and active criminal investigative information are exempt from the provisions of subsection (1).

(e) Any information revealing the identity of confidential informants or sources is exempt from the provisions of subsection (1).

(f) Any information revealing surveillance techniques or procedures or personnel is exempt from the provisions of subsection (1).

(g) Any information revealing undercover personnel of any criminal justice agency is exempt from the provisions of subsection (1).

(h) Any criminal intelligence information or criminal investigative information including the photograph, name, address, or other fact or information which reveals the identity of the victim of any sexual battery as defined by chapter 794 or child abuse as defined by chapter 827 is exempt from the provisions of subsection (1).

(i) Any criminal intelligence information or criminal investigative information which reveals the personal assets of the victim of a crime, other than property stolen or destroyed during the commission of the crime, is exempt from the provisions of subsection (1).

(j) All criminal intelligence and criminal investigative information received by a criminal justice agency prior to January 25, 1979, is exempt from the provisions of subsection (1).

(k) The home addresses, telephone numbers, and photographs of law enforcement personnel; the home addresses, telephone numbers, photographs, and places of employment of the spouses and children of law enforcement personnel; and the names and locations of schools attended by the children of law enforcement personnel are exempt from the provisions of subsection (1).

122. See, e.g., *Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633 (Fla. 1980); *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

123. *State ex rel. Veale v. City of Boca Raton*, 353 So. 2d 1194, 1197 (Fla. 4th Dist. Ct. App. 1977).

124. *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 423 (Fla. 1979).

values set forth in intangible tax returns are confidential.¹²⁵ Student educational records are confidential, unless the student or a parent or guardian consents in writing to the release of the records.¹²⁶ Upon request, documents of the Division of Economic Development concerning a business' plans to expand or relocate in Florida are confidential for twenty-four months.¹²⁷

The Department of Insurance may withhold examination or investigation reports from public inspection "for so long as it deems reasonably necessary to protect the person examined" or if it would be in the public interest.¹²⁸ Most other insurance department records are open to public inspection.¹²⁹ While some credit union records are confidential, most are subject to various disclosure rules.¹³⁰ Banking records are similarly treated.¹³¹ Finally, any information that identifies a sexual offense victim is not permitted to be printed, published or broadcast.¹³²

There is also a general exemption in the law that provides, "All public records which presently are provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, shall be exempt . . ." ¹³³ One judicially created exemption, that for consultant's records, was eliminated by a legislative amendment to the Public Records Law.¹³⁴ Two other judicially created exemptions were validated by legislative amendments, thereby creating statutory exemptions for communications protected by the attorney-client privilege and for certain police records.¹³⁵ The Florida Supreme Court has imposed

125. FLA. STAT. §§ 198.09, 199.222 (1979). Inspection of the returns is permitted in three instances. The Florida Department of Revenue "may permit the Commissioner of Internal Revenue, any collector of Internal Revenue, or Internal Revenue agent of the United States, or the proper officer of any state imposing an estate tax or inheritance tax . . . to inspect the estate tax returns of any individual." FLA. STAT. § 198.09(1).

126. FLA. STAT. § 228.093(3)(d) (1979). Certain educational organizations are exempted from the consent requirement as well. *See id.* at § 228.093(3)(d)(1)-(8).

127. FLA. STAT. § 228.075 (1979).

128. FLA. STAT. § 624.319(3) (1979).

129. FLA. STAT. § 624.311(3) (1979).

130. FLA. STAT. § 657.061(1)-(5) (1979).

131. FLA. STAT. § 658.10(1)-(5) (1979).

132. FLA. STAT. § 794.03 (1979).

133. FLA. STAT. § 119.07(3)(a) (1979). The Office of the Attorney General has written a manual that lists privileged, confidential, and limited access public documents. FLORIDA OPEN GOVERNMENT LAWS MANUAL 49 (1978).

134. FLA. STAT. § 119.011(2) (1979). This amendment effectively overruled the consultant records exemption created in *State ex rel. Tindel v. Sharp*, 300 So. 2d 750 (Fla. 1st Dist. Ct. App. 1974), *cert. denied*, 310 So. 2d 745 (Fla. 1975).

135. Florida Evidence Code, FLA. STAT. § 90.502(1) (1979) (creating attorney-client privi-

a moratorium on all other judicially created and public policy exemptions.¹³⁶ The court has also rejected an exemption based upon an asserted right of disclosural privacy.¹³⁷ The development of the current judicial posture toward the creation of exemptions is traced through a discussion of the decisions construing the Public Records Law or establishing exemptions to its operation.

In *State ex rel. Tindel v. Sharp*,¹³⁸ the Duval County School Board hired Dr. Bert L. Sharp, Dean of the College of Education of the University of Florida, to recommend a new school superintendent. Dr. Sharp had performed similar consultant services for other school boards. He had over the years collected extensive personnel files on potential candidates. A news media representative, Cecil M. Tindel, was denied access to these files.¹³⁹ Tindel then petitioned for a peremptory writ of mandamus which the trial court denied.¹⁴⁰ The First District Court of Appeal affirmed.¹⁴¹

The district court held that while the recommendations and papers which Dr. Sharp actually delivered to the school board were public records, the personnel files upon which he based his recommendations were private property and thus not subject to the Public Records Law.¹⁴² The court characterized the personnel files as work product.¹⁴³ The court did not base its decision on a work product privilege however, but rather on Dr. Sharp's status as a consultant.¹⁴⁴ The Public Records Law defines public records as those materials "made or received . . . in connection with the transaction of official business by any agency."¹⁴⁵ The court held

lege exemption). FLA. STAT. § 119.07(3)(d)-(k) (1979) (creating police records exemption).

See *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979) (common law privileges must be exempted by the legislature and not by the courts). See, e.g., *Rose v. D'Alessandro*, 364 So. 2d 763 (Fla. 2d Dist. Ct. App. 1978); *Glow v. State*, 319 So. 2d 47 (Fla. 2d Dist. Ct. App. 1975) (police records exemption).

136. See, e.g., *Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633 (Fla. 1980); *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

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

138. 300 So. 2d 750, 751 (Fla. 1st Dist. Ct. App. 1974), cert. denied, 310 So. 2d 745 (Fla. 1975).

139. 300 So. 2d at 751.

140. *Id.* at 750.

141. *Id.* at 752.

142. *Id.* at 751-52.

143. *Id.* at 751.

144. *Id.*

145. FLA. STAT. § 119.011(1) (1979). The complete definition of public records provides:

- (1) "Public records" means 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

that the status of consultant was not included within the definition of "agency."¹⁴⁶ Since Dr. Sharp was not an agency, his files were not public records.¹⁴⁷ One year after *Tindel*, in 1975, the legislature amended the definition of agency to include persons "acting on behalf of any public agency."¹⁴⁸ As a result, consultants are now included in the definition, and the need for the *Tindel* exemption has been eliminated. This expansion of the Public Records Law's application is analogous to the extension of the Sunshine Law's application to citizen advisory groups.¹⁴⁹ The public's right to know cannot be circumvented by mere delegation of an agency function to a private party.

In addition to the issue of whether consultants were subject to the Public Records Law, *Tindel* also introduced two issues which were to become crucial in subsequent cases. The first issue was whether common law privileges, such as work product, were exempted from the Public Records Law. This issue is still open to debate.¹⁵⁰ The second issue was whether courts, as a matter of public policy, could judicially create an exemption to protect the confidentiality of sensitive records such as personnel files and investigative reports. This issue has been resolved in the negative.¹⁵¹ Underlying both of these issues, indeed permeating the whole subject of the public's right to know, is the competing interest of the individual's right to privacy. Ultimately, the Florida Supreme Court was faced with the necessity of reconciling these two important interests.¹⁵² In order to better understand the reconciliation, however, the pertinent judicial and legislative history should be

with the transaction of official business by any agency.

Id.

146. 300 So. 2d at 751. FLA. STAT. § 119.011(2) (1979) provides:

(2) "Agency" means 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.

147. 300 So. 2d at 751-52.

148. Ch. 75-225, § 3, 1975 Fla. Laws 637 (codified at FLA. STAT. § 119.011(2) (1979)).

149. See, e.g., *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974); *Krause v. Reno*, 366 So. 2d 1244 (Fla. 3d Dist. Ct. App. 1979).

150. Compare *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979) (no work product exemption) with *Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633 (Fla. 1980) (rough drafts, preparatory notes are not public records). See also FLA. STAT. § 119.07(5) (1979) (exemptions not intended to expand or limit discovery in a criminal proceeding); FLA. STAT. § 447.605(3) (1979) (work product developed by public employer in preparation for and during labor negotiations is exempt).

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

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

traced.

In *Wisher v. News-Press Publishing Co.*,¹⁵³ the Lee County Board of County Commissioners voted to place a warning in an employee's personnel file. The employee was not named, but was identified as a department head. The warning's contents were not disclosed, but the Board's vote followed a failed motion to terminate the employee for cause. When the local newspaper, *Fort Myers News-Press*, demanded to examine the personnel files of all Lee County department heads, its request was refused.¹⁵⁴ Subsequently, the newspaper obtained a writ of mandamus ordering the county administrator to make the records public.¹⁵⁵ The Second District Court of Appeal reversed.¹⁵⁶

The district court acknowledged that public employee's personnel files are public records within the definition of the Public Records Law.¹⁵⁷ Further, the court recognized that there was no specific statute exempting personnel files from the law's operation.¹⁵⁸ The court construed the general exemption to the law, however, as allowing courts to create exemptions as a matter of public policy.¹⁵⁹

The general exemption to the Public Records Law stated that "[a]ll public records which presently are *deemed by law* to be confidential . . . shall be exempt from the provisions of this section."¹⁶⁰ The court construed the phrase "deemed by law" to mean judicial decisions as well as statutes.¹⁶¹ The court noted that government agencies relied on recommendations of past employers in hiring civil servants. Unless these recommendations were held in confidence, they would be difficult to obtain.¹⁶² Since private employers routinely guard the confidentiality of personnel files, government's failure to do so would diminish its ability to compete with the private sector for qualified job applicants. Therefore it was in the public interest to deem personnel files confidential.¹⁶³

153. 310 So. 2d 345, 346 (Fla. 2d Dist. Ct. App. 1975), *quashed and remanded*, 345 So. 2d 646 (Fla. 1977).

154. 310 So. 2d at 346.

155. *Id.*

156. *Id.* at 349.

157. *Id.* at 347.

158. *Id.*

159. *Id.* at 349.

160. Ch. 67-125, § 7, 1967 Fla. Laws 254 (current version at FLA. STAT. § 119.07(3)(a) (1979)).

161. 310 So. 2d at 347.

162. *Id.* at 348.

163. *Id.*

Further, personnel files contained intimate, sometimes privileged, sometimes damaging, information.¹⁶⁴ To allow anyone "to rummage through the personnel files of any [public] employee . . . would be to make a mockery of" the right to privacy.¹⁶⁵ Therefore, "public policy clearly dictates that [personnel files] be deemed confidential."¹⁶⁶

In 1975, just months after the *Wisher* decision, the legislature amended the general exemption to the Public Records Law by changing the phrase "deemed by law" to read "provided by law."¹⁶⁷ It was three years, however, before the significance of that amendment was recognized by the courts.¹⁶⁸ Not even in 1977, when the Florida Supreme Court quashed the *Wisher* decision, was attention paid to the legislative amendment.¹⁶⁹

In *Wisher*, the supreme court found it inappropriate to consider the broad issue of general access to personnel files.¹⁷⁰ The document which sparked the controversy "was authored by a public body in an open public meeting."¹⁷¹ The document, that is, the warning, was thus a public record.¹⁷² Further, the Public Records Law and the Sunshine Law together precluded the county commission from conducting "personnel business" by "ruses" such as "pseudonyms or cloaked references."¹⁷³ The identity of the department head and the warning which had been placed in his personnel file were ordered to be disclosed to the *Fort Myers News-Press*.¹⁷⁴

By disposing of the case on such narrow grounds, the supreme court avoided both the broad issue of general access to personnel files and the issue of a constitutional right to privacy. Further, the supreme court found it unnecessary to construe the Public Records Law to determine whether courts could create public policy exemptions by "deeming" certain records "confidential."¹⁷⁵

164. *Id.*

165. *Id.*

166. *Id.* at 349.

167. Ch. 75-225, § 4, 1975 Fla. Laws 638 (current version at FLA. STAT. § 119.07(3)(a) (1979)).

168. *See State ex rel. Veale v. City of Boca Raton*, 353 So. 2d 1194 (Fla. 4th Dist. Ct. App. 1977).

169. *News-Press Publishing Co. v. Wisner*, 345 So. 2d 646 (Fla. 1977).

170. *Id.* at 648.

171. *Id.* at 647.

172. *Id.* at 648.

173. *Id.*

174. *Id.*

175. Prior to the quashing of *Wisher*, or to the legislative amendment of the general

In *State ex rel. Veale v. City of Boca Raton*,¹⁷⁶ the Fourth District Court of Appeal relied on the 1975 amendment to the Public Records Law's general exemption to conclude that courts could no longer create judicial exemptions by "deeming" public records "confidential." In *Veale*, the Boca Raton City Council directed its attorney to prepare a report on irregularities in the building department, and the city attorney did so. The report recommending that sanctions be taken against certain city employees was sent to the State Attorney's Office. Despite the fact that some action was taken by the City Council on the basis of the report, the City Council refused to make the report public.¹⁷⁷ The refusal was based on the attorney's advice that both the *Wisher* decision and the common law attorney-client privilege exempted the report from public disclosure.¹⁷⁸ Max Veale, the managing editor of the local newspaper, the *Boca Raton News*, petitioned for a writ of mandamus.¹⁷⁹ The trial court dismissed the proceeding.¹⁸⁰ The Fourth District Court of Appeal reversed.¹⁸¹

The court noted that the phrase "deemed by law" connoted

exemption, the Second District Court of Appeal again used public policy as the reason for "deeming" a public record "confidential." In *Glow v. State*, 319 So. 2d 47 (Fla. 2d Dist. Ct. App. 1975), a defendant in a criminal action demanded access to "all police reports made in connection with the investigation of the charges" against him. *Id.* at 48. The court "deemed" police reports "confidential," thus affirming the trial court's denial of the request. *Id.* at 49. The court stated:

If police reports are held to be public records, there would be nothing to prevent the local representatives of the Mafia from making weekly visits to the police station in order to stay abreast of current efforts being made to investigate and thwart crime. Due to the *great public interest* in protecting and safeguarding the confidentiality of the police reports, the trial court [correctly held them] not open to public inspection.

Id. (emphasis added).

Apparently, the legislature agreed with this prediction. In order to ensure that other courts would not require the disclosure of sensitive police records, the Public Records Law was amended in 1979 to provide for the exemption of police investigatory records and other information. Ch. 79-187, 1979 Fla. Laws 723 (codified at FLA. STAT. § 119.07(3)(d)-(k) (1979)). Thus, the public policy exemption for police records became a statutory as well as a judicial exemption to the law. For a discussion of the countervailing policy considerations of personal privacy, governmental secrecy, and the law enforcement exemption, see Comment, *Texas Open Records Act: Law Enforcement Agencies' Investigatory Records*, 29 Sw. L.J. 431 (1975).

176. 353 So. 2d 1194 (Fla. 4th Dist. Ct. App. 1977).

177. *Id.* at 1195.

178. *Id.* The Florida Supreme Court had not quashed *Wisher* at the time the attorney gave this advice.

179. *Id.*

180. *Id.*

181. *Id.* at 1198.

“opinions and decisions of courts and judges.”¹⁸² But, continued the court, “the term “provided by law” means provided by statute law.”¹⁸³ Therefore, the court concluded that the legislative purpose “was specifically to overrule” *Wisher*.¹⁸⁴ Courts could not create public policy exemptions to the Public Records Law. Future policy decisions would have to be made by the legislature.¹⁸⁵

In *Wait v. Florida Power & Light Co.*,¹⁸⁶ the Florida Supreme Court adopted the fourth district’s view in *Veale*. The *Wait* case arose from litigation before the United States Nuclear Regulatory Commission. Florida Power & Light Company, pursuant to the Public Records Law, requested inspection of the City of New Smyrna Beach’s records concerning the planning, operation, and maintenance of the city’s electrical system. New Smyrna Beach denied the request, claiming that its attorney would have to review the records to remove privileged or confidential documents before the records would be made public.¹⁸⁷ Florida Power & Light Company petitioned for a writ of mandamus. The trial court granted the writ. The First District Court of Appeal affirmed.¹⁸⁸

The district court faced two issues in *Wait*. The first was whether the taking of an appeal by a public agency automatically stayed the trial court’s order to disclose the disputed records.¹⁸⁹ The second issue was whether the common law privileges, such as attorney-client and work product, were waived by the enactment of the Public Records Law or were included in the general exemption section.¹⁹⁰

As to the first issue, the district court held the Public Records Law, which provided that filing of an appeal shall not operate as an automatic stay,¹⁹¹ had precedence over the Florida appellate rule¹⁹² which provided otherwise.¹⁹³ The district court reasoned that the appellate rule affected the substantive rights of the parties

182. *Id.* at 1196.

183. *Id.* (quoting *Fountain v. State*, 101 S.E. 294, 295-96 (Ga. 1919)).

184. 353 So. 2d at 1196.

185. *Id.* at 1197.

186. 372 So. 2d 420, 424 (Fla. 1979), *quashing in part and approving in part* 353 So. 2d 1265 (Fla. 1st Dist. Ct. App. 1978).

187. 353 So. 2d at 1266-67.

188. *Id.*

189. *Id.* at 1266.

190. *Id.* at 1267.

191. FLA. STAT. § 119.11(2) (1979).

192. FLA. APP. R. 5.12(1) (1979).

193. 353 So. 2d at 1267.

because disclosure would be delayed.¹⁹⁴ The Florida Supreme Court reversed on this issue, holding that the appellate rule was procedural, and thus had precedence over the Public Records Law.¹⁹⁵ Justice Sundberg dissented on this issue. He concluded that since the Public Records Law provided for discretionary stays, and only prohibited automatic stays, that it was not an intrusion into the judicial power to establish procedural rules.¹⁹⁶ Justice Sundberg would have held that the two rules were not in conflict¹⁹⁷ but since "this matter falls within the 'twilight zone' between substance and procedure, "the general policy considerations of the [appellate rule] should give way to the special policy considerations [of the Public Records Law]."¹⁹⁸

As to the second issue, the district court held that the general exemption to the Public Records Law "clearly waives any common law privilege of confidentiality which includes attorney-client communications."¹⁹⁹ The Florida Supreme Court affirmed on this issue.²⁰⁰ The Public Records Law only allows statutory exemptions "and not those documents which are confidential or privileged only as a result of the judicially created privileges of attorney-client or work product."²⁰¹ The court refused to "equate the acquisition of public documents under [the Public Records Law] with the rights of discovery afforded a litigant by judicially-created rules of procedure."²⁰²

Thus, in *Wait*, the Florida Supreme Court held that the judiciary could not create exemptions to the Public Records Law by "deeming" records "confidential" in case decisions or in procedural discovery rules.²⁰³ Only the legislature could exempt public records from the law.²⁰⁴ The courts could, however, delay disclosure under

194. *Id.*

195. 372 So. 2d at 423.

196. *Id.* at 426.

197. *Id.* at 425.

198. *Id.* at 426.

199. 353 So. 2d at 1267.

200. 372 So. 2d at 424.

201. *Id.* Justice Overton dissented to the broad language used by the majority on this issue because he feared that the opinion would be read to subject police reports to public disclosure. *Id.* at 426. Since the legislature exempted police reports before the court ever considered the issue directly, whether Justice Overton's fear would be realized is a moot question. See FLA. STAT. § 119.07(3)(d)-(k) (1979).

202. 372 So. 2d at 425.

203. *Id.* a 424-25.

204. *Id.* at 425.

the automatic stay rule.²⁰⁵

Subsequently, the Florida Evidence Code, which provides for an attorney-client privilege, became effective.²⁰⁶ In a recent case affirmed by the First District Court of Appeal, the circuit court quashed a writ of mandamus and found that the documents requested under the writ were "privileged pursuant to Section 90.502 [establishing an attorney-client privilege] and are thus exempt from the operation of [the Public Records Law]."²⁰⁷ This exemption is entirely supported by the legislative enactment of the Florida Evidence Code. The legislature's intent to create the privilege is clear. Thus, the circuit court did not create this exemption, but merely confirmed its existence by giving effect to a recent legislative expression. This type of inquiry is certainly within the domain of the judiciary.

The Florida Supreme Court in *Wait* did not consider the constitutionality of the Public Records Law as it related to the individual's right to privacy. That issue arose in *Shevin v. Byron, Harless, Schaffer, Reid & Assoc.*²⁰⁸ The facts of *Shevin* were similar to the facts in *Tindel*. The records at issue were those compiled by a consulting firm in a nation-wide search for a managing director for a municipal electric utility. Some records were handwritten notes made during interviews and others were resumes and letters from prospective applicants. The consulting firm was advised by the utility that only its written report would be a public record, and the applicants were assured that the interviews were confidential.²⁰⁹

205. *Id.* at 423.

206. The code's effective date was July 1, 1979. Ch. 78-379, 1978 Fla. Laws 1052. The Florida Evidence Code states in relevant part:

(1) For purposes of this section:

(a) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(b) A "client" is any person, *public officer*, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.

(c) A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.

2. Those reasonably necessary for the transmission of the communication.

FLA. STAT. § 90.502(1) (1979) (emphasis added).

207. *Aldredge v. Turlington*, No. 79-1023 (Fla. Cir. Ct. Leon County, Nov. 20, 1979), *aff'd*, 378 So. 2d 125 (Fla. 1st Dist. Ct. App. 1980).

208. 379 So. 2d 633 (Fla. 1980).

209. *Id.* at 635.

The First District Court of Appeal held that the consulting firm was an "agency" to which the Public Records Law applied because it was "acting on behalf of" the municipality.²¹⁰ All the records were public records since they were made "in connection with the transaction of official business."²¹¹ Under these conditions, a writ of mandamus would issue without question, since the law clearly applies. The district court, however, found that the applicants had a right of personhood, including the right of disclosural privacy, as to the information acquired by the consulting firm. Therefore, public disclosure of those records would work a deprivation of fundamental privacy rights secured by the federal and state constitutions. Accordingly, the district court reversed the issuance of the writ of mandamus.²¹²

Whether a right of privacy exists under the state or federal constitutions, rendering the Public Records Law unconstitutional, was certified to the Florida Supreme Court as a question of great public interest.²¹³ The court reviewed both the federal and state constitutional questions as well as the district court's interpretation of the definition of "public records."

Regarding the alleged federal disclosural privacy interest, the supreme court concluded that such an interest did not yet exist to prevent public access to the consulting firm's papers.²¹⁴ The general right of privacy as construed by the United States Supreme Court, stated the court, consists of three protected interests: security from unwarranted governmental surveillance and intrusion, decisional autonomy regarding personal intimate matters, and protection against the disclosure of personal matters.²¹⁵ The applicants argued that disclosure of the consulting firm's papers was prevented by the privacy interest protecting against the disclosure of personal matters.²¹⁶ The supreme court relied primarily upon *Paul v. Davis*,²¹⁷ which also involved an allegedly damaging release of information, to hold that the disclosural privacy interest was insufficient to prevent public access to the papers.²¹⁸ Charac-

210. *Id.*

211. *Id.*

212. *Id.* at 636.

213. *Id.* at 634.

214. *Id.* at 638.

215. *Id.* at 636.

216. *Id.* at 637.

217. 424 U.S. 693 (1976).

218. 379 So. 2d at 638. In *Davis*, petitioner contended that he was deprived of his constitutional right of privacy when his name and photograph were placed on a flyer of "active

terizing the interest as the newest and least defined, the Florida Supreme Court concluded that until the United States Supreme Court "breathe[s] life into the privacy interest asserted," no such privacy interest existed.²¹⁹

The supreme court also found no support for a state constitutional right of disclosural privacy in the Florida Constitution or in case law.²²⁰ Since the search and seizure provision of the constitution deals with the collection of information and not with the dissemination of information, the district court's reliance on that provision was misplaced.²²¹ The decisions cited by the district court to support its holding that a right of disclosural privacy existed were firmly distinguished by the supreme court because "none of these cases provide the needed authority for such a holding."²²²

Thus, a person who has contact with a state agency or an entity acting for a state agency cannot have an expectation of privacy regarding those contacts. Admittedly, such a result will limit the availability of certain information to state agencies, perhaps to an agency's detriment. If a potential applicant for a state position requires confidentiality, he or she cannot be accommodated. This result must be tempered with the knowledge that much information has been made confidential for convenience only and not for more compelling reasons. Should the public find that the operation of the Public Records Law is too burdensome in a particular area, then a legislative amendment should be sought.

The supreme court softened its holding to some extent by limiting the district court's definition of public records.²²³ Instead of applying the law to "almost everything generated or received by a public agency," the supreme court held that a public record "is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of

shoplifters" and distributed to local merchants. Although Paul had been arrested for shoplifting, the charges had been dismissed. 424 U.S. at 695-96.

219. 379 So. 2d at 638.

220. *Id.* at 639. See Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U.L. REV. 673, 713 (1978). A state right of privacy is discussed in the context of the proposed constitutional revision. See also Comment, *Informational Privacy and Public Records*, 8 PAC. L.J. 25 (1977).

221. 379 So. 2d at 639.

222. *Id.* Two of the cases, *Hagaman v. Andrews*, 232 So. 2d 1 (Fla. 1970) and *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944), were distinguished on the basis that they involved common law or associational rights of privacy; one other case, *In re Grand Jury Investigation*, 287 So. 2d 43 (Fla. 1973), concerned the suppression of intercepted communications, thus involving the privacy interest of freedom from unwarranted governmental intrusion.

223. 379 So. 2d at 640.

some type."²²⁴ The court distinguished rough drafts, preparatory notes and dictation tapes as nonpublic materials while stating that inter-office and intra-office memorandums constitute public records. Classification of records not clearly in one group or the other, said the court, will have to be determined on a case-by-case basis.²²⁵

Thus, the supreme court established a selective definition of public records. Once a document is formalized, it is a public record. Perhaps the only evasive device is to keep everything tentative, and to formalize nothing. Most bureaucracies do not operate in this manner, so such behavior would be conspicuous. Therefore, sensitive information will be subject to public disclosure unless the legislature creates an appropriate exemption.

The invalidation of judicially created exemptions to the Public Records Law should prevent further erosion of its scope. The enactment of the Florida Evidence Code's attorney-client privilege will serve as protection against forced disclosure of confidential communications or documents. All other public records, except those specifically exempted by the legislature, are accessible to the public at reasonable times and under reasonable conditions.²²⁶ One troublesome area is the work product privilege which has not been codified by the legislature.²²⁷ Although in *Wait* the court specifically held that judicial rules of discovery could not exempt a confidential work product from the Public Records Law, the definition of public records given in *Shevin* clearly seems to exclude work product. If one is careful not to characterize documents as "work product," but rather asserts that the documents are exempt under the *Shevin* public records definition, then the public disclosure of those documents might still be avoided.

CONCLUSION

Both the Sunshine Law and the Public Records Law have been narrowed by various exemptions. The extent to which they have been narrowed, however, is small compared to their initial breadth. The laws continue to guarantee public access without limitation in many areas of governmental decisionmaking. Fortunately, the su-

224. *Id.*

225. *Id.*

226. FLA. STAT. § 119.07(1)(a) (1979).

227. *But see* FLA. STAT. § 447.605(3) (1979) (work product developed by public employer in preparation for and during labor negotiations is exempt).

preme court has recognized, in the case of the Public Records Law, that it is the legislature that should create exemptions. And the legislature has responded to other interests in conflict with complete public access by amending this law. Although the legislature has not run rampant with such amendments, there is a danger of nullifying the effect of the law through unrestrained tinkering. Amendments to the law should be comprehensive and carefully executed, so that the Public Records Law will operate in an equitable, sensible manner.

This philosophy should also be applied to the Sunshine Law. The supreme court has not yet articulated a ban on further judicial exemptions to that law, as it has done for exemptions to the Public Records Law. The Sunshine Law should also be limited only by the legislature so that courts will be construing exemptions rather than creating them in response to a particular factual situation. In this way, open government in Florida will continue to benefit the public. Without thoughtful action by both the judiciary and the legislature, the proliferation of exemptions will surely cloud Florida's government "in the sunshine."