




To: Michael Sparber

From: Bridgette N. Thornton Richard, Deputy City Attorney for the City of Coral Gables

Approved: Craig Leen, City Attorney for the City of Coral Gables 

RE: Legal Opinion Regarding Analysis Of Public Records Law Exemptions Set Forth Under Florida Statutes § 768.28(16)(B), (C), And (D)

Date: August 16, 2013

This memorandum was prepared in response to your email queries submitted on August 13th, 14th, and 15th of 2013 regarding the: 1) the claims files exemption; 2) the risk management meeting exemption; and 3) the risk management meeting minutes exemption. From your emails, it appears that you are seeking guidance as to the applicability of these exemptions to certain public records requests. As such, this memorandum shall outline, explain, and analyze the extent and contours of these exemptions in order to provide guidance on how these exemptions should be evaluated and/or asserted in response to public records requests.

As further outlined below, the applicability of these exemptions turns on the contents of the records and meetings. More specifically, a document or record in a claims file is only exempt if that document or record relates to the assessment or evaluation of a claim. Similarly, a risk management meeting and the minutes of such meetings are only exempt from the Sunshine Law and the Public Records Law if the meeting and/or minutes of such meeting relate solely to the evaluation, and/or analysis of a filed tort claim or an offer to compromise a filed tort claim. These exemptions, consequently, do not apply on a per se or automatic basis but, rather, on a case-by-case basis. Thus, in response to a public records request, the custodian of the records being requested should make a good faith evaluation of each document, meeting, set of minutes, and/or record at issue to determine the applicability of the exemptions under Section 768.28(16) (b), (c), and (d).

ANALYSIS

I. THE RECORDS OR DOCUMENTS WITHIN A CLAIMS FILE ARE NOT PER SE EXEMPT

As discussed above, the exemption for documents and records in a claims file is contained within Florida Statutes§ 768.28(16)(b). Specifically, Florida Statutes§ 768.28(16)(b) provides:

Claims files maintained by any risk management program administered by the state, its agencies, and its subdivisions are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution until termination of all litigation and settlement of all claims arising out of the same incident, although portions of the claims files may remain exempt, as otherwise provided by law. Claims files records may be released to other governmental agencies upon written request and demonstration of need; such records held by the receiving agency remain confidential and exempt as provided for in this paragraph.

Fla. Stat. § 768.28(16)(b). Unfortunately, the term "claims files" is not defined under Section 768.28. Nor could I locate any case law interpreting the term "claims files" in relation to Section 768.28(16)(b). Accordingly, resolution of this issue requires a nuanced legal analysis that takes account of the exemption as well as the dictates and purpose of Florida's Public Records Law, Chapter 119 of the Florida Statutes.

While Florida Statutes§ 768.28(16)(b) provides an exemption for claim files, it does not appear that the entire file would per se or automatically be exempt in every instance. Indeed, the Florida Attorney General, in Opinion 2007-47, tangentially addressed this issue when the Attorney General was asked whether a notice of claim was exempt under Section 768.28(16)(b). Importantly, in discussing this matter, the Attorney General stated:

Nothing within the statement of public necessity for the confidentiality of claims files in section 768.28(16)(b), Florida Statutes, nor within the legislative history of the act setting forth the exemption, however, expressly extends the exemption to the notice of a claim. In discussing what is contained in the claims files, the staff analysis of the bill creating the exemption for claims files refers to materials that are relevant to an *assessment or an evaluation of the claim. While the staff analysis refers to "legal pleadings" and "correspondence relating to tile accident or incident," those terms should be construed in light of tile other types of information referenced.* Moreover, section 768.28(6)(b), Florida Statutes, noted above, specifically states that the notice is not part of the cause of action. While the notice of a tort claim may contain information relevant to the claim, such as a discussion of the nature of the accident, it would not appear to constitute the type of information intended for exemption.

Att'y Gen. Op. 2007-47 p. 3 (citations omitted) (emphasis added). Based upon the above reasoning the Attorney General indicated that a notice of claim was not per se exempt under

Section 768.28(16)(b); however, the Attorney General chose not to make a definitive conclusion on this issue and, instead, stated:

A definitive determination of whether a specific document, such as the notice of a claim, comes within the scope of a public records exemption is beyond the authority of this office. Moreover, nothing within section 768.28, Florida Statutes, expressly includes or excludes the notice of claim from the exemption from disclosure for claims files ... Ultimately, the county must make a careful and good faith determination of whether the notice of claims would be confidential and exempt from disclosure pursuant to section 768.28(16)(b), Florida Statutes.

Id. at p. 4. Thus, the Attorney General acknowledged that there are no bright line rules regarding whether a particular document is exempt as being part of the claims file under Section 768.28(16)(b), but, rather that the municipality involved must evaluate each specific document at issue to make a good faith determination as to whether the exemption should apply.

II. RISK MANAGEMENT MEETINGS AND RISK MANAGEMENT MEETING MINUTES ARE NOT *PER SE* EXEMPT

Similar to records within a claims file, risk management meetings and the minutes derived thereby are not per se exempt from disclosure under Florida's Public Records Law. The Florida Attorney General provided an instructive analysis on this issue, in Opinion 2004-35, where the Attorney General addressed whether "meetings of the city's risk management committee, established by city ordinance to review certain proposed claim settlements under the city's risk management program, [are] subject to the Government in the Sunshine Law." Fla. Att'y Gen. Op. 2004-35, p. 1. As an initial matter, the Attorney General found that the "provisions of section 768.28(16), Florida Statutes, would appear to be more applicable to [the requester's] inquiry." *Id.* at 2. As a result, the Attorney General analyzed this question under Florida Statutes § 768.28(16) as opposed to Florida Statutes § 286.01 *et seq.* Ultimately, the Attorney General concluded that such meetings and the minutes derived thereby may be exempt pursuant to Section 768.28(16) depending upon the substantive contents of the discussion at the meeting. More specifically, the Attorney General stated:

Accordingly, I am of the opinion that pursuant to section 768.28(16), a risk management meeting conducted by a city's risk management committee is exempt from the provisions of the Government in the Sunshine Law *when such meeting relates solely to tile evaluation of a tort claim filed with the risk management program, or relates solely to an offer of compromise of a tort claim filed with the risk management program.*

Att'y Gen. Op. 2004-35, p. 4. Accordingly, the Florida Attorney General has suggested that to determine whether a risk management meeting is exempt pursuant to Section 768.28(16), a governmental entity should evaluate whether the meeting relates solely to the evaluation of a filed tort claim or an offer to compromise a filed tort claim. Indeed, this reasoning is in line with the express provisions of Florida Statutes § 768.28(16)(c) and (d), which provide as follows:

(c) Portions of meetings and proceedings conducted pursuant to any risk management program administered by the state, its agencies, or its subdivisions, *which relate solely to tire evaluation of claims filed with the risk management program or which relate solely to offers of compromise of claims* filed with the risk management program are exempt from the provisions of s. 286.0 II and s. 24(b), Art. I of the State Constitution. Until termination of all litigation and settlement of all claims arising out of the same incident, persons privy to discussions pertinent to the evaluation of a filed claim shall not be subject to subpoena in any administrative or civil proceeding with regard to the content of those discussions.

(d) Minutes of the meetings and proceedings of any risk management program administered by the state, its agencies, or its subdivisions, *which relate solely to the evaluation of claims filed with the risk management program or which relate solely to offers of compromise of claims* filed with the risk management program are exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution until termination of all litigation and settlement of all claims arising out of the same incident.

Fla. Stat. § 768.28(16)(c) and (d). The logical extension of the Attorney General's reasoning as well as the express provisions of Section 768.28(16)(c) and (d) is that where a risk management meeting does not relate solely to the evaluation of a filed tort claim or an offer to compromise a filed tort claim, then such a meeting as well as the minutes derived therefrom would not be exempt from compliance with the dictates of Florida's Sunshine Law and Florida's Public Records Law- regardless of whether the litigation in question is ongoing.

CONCLUSION

While the above cited Attorney General Opinions are not binding authority upon this Office, I find the Attorney General's reasoning to be sound and congruent with the purposes of Florida's Sunshine Law and Florida's Public Records Law. Indeed, Florida's Public Records Law, as set forth in Chapter 119 of the Florida Statutes, expressly states that "[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency." Fla. Stat. § 119.0 I (1). Thus, the Public Records Law is intended to provide open access to government. Florida

courts, moreover, have recognized that "all documents falling within the scope of the Act are subject to public disclosure *unless specifically exempted* by an act of our legislature." *NewsPress Publishing Co., Inc. v. Gadd*, 388 So. 2d 276, 278 (Fla. 2d DCA 1980) (emphasis added). And, Florida courts have repeatedly recognized that the Public Records Law is to be liberally construed in favor of open government, and exemptions from disclosure are to be construed narrowly and limited to their stated purpose. *See., e.g. Tribune Co. v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986) ("[t]he Public Records Act is to be liberally construed in favor of 'open government to the extent possible in order to preserve our basic freedom' ... Exemptions from disclosure are to be construed narrowly and limited to their stated purposes.") (quoting *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779 (Fla. 4th DCA 1985); *Miami Herald Publishing Co. v. City of North Miami*, 452 So. 2d 572, 573 (Fla. 3d DCA 1984) ("Only public records provided by statute to be confidential or which are expressly exempted by general or special law from disclosure under the Public Records Act are exempt."), *approved* 468 So. 2d 218 (Fla. 1985), (citing *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979)); *State v. Nourse*, 340 So. 2d 966, 969 (Fla. 3d DCA 1976) ("unless the right to the exception is clearly apparent in the statute, no benefits thereunder will be permitted"); *Marino v. University of Florida*, 107 So. 3d 1231, 1233 (Fla. 1st DCA 2013) ("public records exemptions are to be narrowly construed to provide for public access.") (quoting *Tribune Co.*, 493 So. 2d at 483); *Dade Aviation Consultants v. Knight Ridder*, 800 So. 2d 302, (Fla. 3d DCA 2001) ("The only records that are exempt from production under [Public Records Law] are those that are so delineated by the statute or those that are expressly exempted by general or special law."); *Lighbourne v. McCollum*, 969 So. 2d 326, 332-33 (Fla. 2007) ("[t]he public records act 'is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose.'" (quoting *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994))).

It is, therefore, my opinion that the determination of whether records in a claims file are exempt turns on whether those specific records contain or relate to assessments, evaluations, and/or analysis of claims and/or settlement issues. Meaning, records in a claims file are not per se or *automatically* exempt simply by virtue of being contained within such a file; instead, a good faith analysis must be conducted for each record contained within such a file to determine the applicability of Section 768.28(16)(b)'s exemption. Likewise, risk management meetings as well as the minutes derived from such meetings are only exempt from the Sunshine Law and the Public Records Law, if the meeting and/or minutes relate solely to the evaluation of a filed tort claim or an offer to compromise a filed tort claim. As such, an evaluation of each meeting and/or minutes from each meeting must be conducted to determine whether the provisions of Section 768.28(16)(c) or (d) apply.

In short, when responding to a public records request, the custodian of the records being requested should make a good faith evaluation of each document, meeting, set of minutes, and/or record at issue to determine the applicability of the exemptions under Section 768.28(16) (b), (c), and (d) because, again, these exemptions do not apply on a per se or automatic basis.

FROM: Bridgette N. Thornton Richard, Deputy City Attorney
TO: Michael Sparber, Risk Management Administrator
CC: Craig E. Leen, City Attorney; Yaneris Figueroa, Special Counsel to the City Attorney's Office; and Susan Franqui, Assistant to the Deputy City Attorney
DATE: August 16, 2013
RE: Analysis of Public Records Law Exemptions Set Forth Under Florida Statutes § 768.28(16)(b), (c), and (d)

This memorandum was prepared in response to your email queries submitted on August 13th, 14th, and 15th of 2013 regarding the: 1) the claims files exemption; 2) the risk management meeting exemption; and 3) the risk management meeting minutes exemption. From your emails, it appears that you are seeking guidance as to the applicability of these exemptions to certain public records requests. As such, this memorandum shall outline, explain, and analyze the extent and contours of these exemptions in order to provide guidance on how these exemptions should be evaluated and/or asserted in response to public records requests.

As further outlined below, the applicability of these exemptions turns on the *contents* of the records and meetings. More specifically, a document or record in a claims file is only exempt if that document or record relates to the assessment or evaluation of a claim. Similarly, a risk management meeting and the minutes of such meetings are only exempt from the Sunshine Law and the Public Records Law if the meeting and/or minutes of such meeting relate solely to the evaluation, and/or analysis of a filed tort claim or an offer to compromise a filed tort claim. These exemptions, consequently, do not apply on a *per se* or automatic basis but, rather, on a case-by-case basis. Thus, in response to a public records request, the custodian of the records being requested should make a good faith evaluation of each document, meeting, set of minutes, and/or record at issue to determine the applicability of the exemptions under Section 768.28(16)(b), (c), and (d).

ANALYSIS

I. THE RECORDS OR DOCUMENTS WITHIN A CLAIMS FILE ARE NOT *PER SE* EXEMPT

As discussed above, the exemption for documents and records in a claims file is contained within Florida Statutes § 768.28(16)(b). Specifically, Florida Statutes § 768.28(16)(b) provides:

Claims files maintained by any risk management program administered by the state, its agencies, and its subdivisions are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution until termination of all litigation and settlement of all claims arising out of the same incident, although portions of the claims files may remain exempt, as otherwise provided by law. Claims files records may be released to other governmental agencies upon written request and demonstration of need; such records held by the receiving agency remain confidential and exempt as provided for in this paragraph.

Fla. Stat. § 768.28(16)(b). Unfortunately, the term “claims files” is not defined under Section 768.28. Nor could I locate any case law interpreting the term “claims files” in relation to Section 768.28(16)(b). Accordingly, resolution of this issue requires a nuanced legal analysis that takes account of the exemption as well as the dictates and purpose of Florida’s Public Records Law, Chapter 119 of the Florida Statutes.

While Florida Statutes § 768.28(16)(b) provides an exemption for claim files, it does not appear that the entire file would *per se* or automatically be exempt in every instance. Indeed, the Florida Attorney General, in Opinion 2007-47, tangentially addressed this issue when the Attorney General was asked whether a notice of claim was exempt under Section 768.28(16)(b). Importantly, in discussing this matter, the Attorney General stated:

Nothing within the statement of public necessity for the confidentiality of claims files in section 768.28(16)(b), Florida Statutes, nor within the legislative history of the act setting forth the exemption, however, expressly extends the exemption to the notice of a claim. In discussing what is contained in the claims files, the staff analysis of the bill creating the exemption for claims files refers to materials that are relevant to an *assessment or an evaluation of the claim. While the staff analysis refers to “legal pleadings” and “correspondence relating to the accident or incident,” those terms should be construed in light of the other types of information referenced.* Moreover, section 768.28(6)(b), Florida Statutes, noted above, specifically states that the notice is not part of the cause of action. While the notice of a tort claim may contain information relevant to the claim,

such as a discussion of the nature of the accident, it would not appear to constitute the type of information intended for exemption.

Att'y Gen. Op. 2007-47 p. 3 (citations omitted) (emphasis added). Based upon the above reasoning the Attorney General indicated that a notice of claim was not *per se* exempt under Section 768.28(16)(b); however, the Attorney General chose not to make a definitive conclusion on this issue and, instead, stated:

A definitive determination of whether a specific document, such as the notice of a claim, comes within the scope of a public records exemption is beyond the authority of this office. Moreover, nothing within section 768.28, Florida Statutes, expressly includes or excludes the notice of claim from the exemption from disclosure for claims files . . . Ultimately, the county must make a careful and good faith determination of whether the notice of claims would be confidential and exempt from disclosure pursuant to section 768.28(16)(b), Florida Statutes.

Id. at p. 4. Thus, the Attorney General acknowledged that there are no bright line rules regarding whether a particular document is exempt as being part of the claims file under Section 768.28(16)(b), but, rather that the municipality involved must evaluate each specific document at issue to make a good faith determination as to whether the exemption should apply.

II. RISK MANAGEMENT MEETINGS AND RISK MANAGEMENT MEETING MINUTES ARE NOT *PER SE* EXEMPT

Similar to records within a claims file, risk management meetings and the minutes derived thereby are not *per se* exempt from disclosure under Florida's Public Records Law. The Florida Attorney General provided an instructive analysis on this issue, in Opinion 2004-35, where the Attorney General addressed whether "meetings of the city's risk management committee, established by city ordinance to review certain proposed claim settlements under the city's risk management program, [are] subject to the Government in the Sunshine Law." Fla. Att'y Gen. Op. 2004-35, p. 1. As an initial matter, the Attorney General found that the "provisions of section 768.28(16), Florida Statutes, would appear to be more applicable to [the requester's] inquiry." *Id.* at 2. As a result, the Attorney General analyzed this question under Florida Statutes § 768.28(16) as opposed to Florida Statutes § 286.01 *et seq.* Ultimately, the Attorney General concluded that such meetings and the minutes derived thereby may be exempt pursuant to Section 768.28(16) depending upon the substantive contents of the discussion at the meeting. More specifically, the Attorney General stated:

Accordingly, I am of the opinion that pursuant to section 768.28(16), a risk management meeting conducted by a city's risk management committee is exempt

from the provisions of the Government in the Sunshine Law *when such meeting relates solely to the evaluation of a tort claim filed with the risk management program, or relates solely to an offer of compromise of a tort claim filed with the risk management program.*

Att'y Gen. Op. 2004-35, p. 4. Accordingly, the Florida Attorney General has suggested that to determine whether a risk management meeting is exempt pursuant to Section 768.28(16), a governmental entity should evaluate whether the meeting relates solely to the evaluation of a filed tort claim or an offer to compromise a filed tort claim. Indeed, this reasoning is in line with the express provisions of Florida Statutes § 768.28(16)(c) and (d), which provide as follows:

(c) Portions of meetings and proceedings conducted pursuant to any risk management program administered by the state, its agencies, or its subdivisions, *which relate solely to the evaluation of claims filed with the risk management program or which relate solely to offers of compromise of claims* filed with the risk management program are exempt from the provisions of s. 286.011 and s. 24(b), Art. I of the State Constitution. Until termination of all litigation and settlement of all claims arising out of the same incident, persons privy to discussions pertinent to the evaluation of a filed claim shall not be subject to subpoena in any administrative or civil proceeding with regard to the content of those discussions.

(d) Minutes of the meetings and proceedings of any risk management program administered by the state, its agencies, or its subdivisions, *which relate solely to the evaluation of claims filed with the risk management program or which relate solely to offers of compromise of claims* filed with the risk management program are exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution until termination of all litigation and settlement of all claims arising out of the same incident.

Fla. Stat. § 768.28(16)(c) and (d). The logical extension of the Attorney General's reasoning as well as the express provisions of Section 768.28(16)(c) and (d) is that where a risk management meeting does not relate solely to the evaluation of a filed tort claim or an offer to compromise a filed tort claim, then such a meeting as well as the minutes derived therefrom would not be exempt from compliance with the dictates of Florida's Sunshine Law and Florida's Public Records Law — regardless of whether the litigation in question is ongoing.

CONCLUSION

While the above cited Attorney General Opinions are not binding authority upon this Office, I find the Attorney General's reasoning to be sound and congruent with the purposes of Florida's Sunshine Law and Florida's Public Records Law. Indeed, Florida's Public Records

Law, as set forth in Chapter 119 of the Florida Statutes, expressly states that “[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.” Fla. Stat. § 119.01(1). Thus, the Public Records Law is intended to provide open access to government. Florida courts, moreover, have recognized that “all documents falling within the scope of the Act are subject to public disclosure *unless specifically exempted* by an act of our legislature.” *News—Press Publishing Co., Inc. v. Gadd*, 388 So. 2d 276, 278 (Fla. 2d DCA 1980) (emphasis added). And, Florida courts have repeatedly recognized that the Public Records Law is to be liberally construed in favor of open government, and exemptions from disclosure are to be construed narrowly and limited to their stated purpose. *See., e.g. Tribune Co. v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986) (“[t]he Public Records Act is to be liberally construed in favor of ‘open government to the extent possible in order to preserve our basic freedom’ . . . Exemptions from disclosure are to be construed narrowly and limited to their stated purposes.”) (quoting *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779 (Fla. 4th DCA 1985); *Miami Herald Publishing Co. v. City of North Miami*, 452 So. 2d 572, 573 (Fla. 3d DCA 1984) (“Only public records provided by statute to be confidential or which are expressly exempted by general or special law from disclosure under the Public Records Act are exempt.”), *approved* 468 So. 2d 218 (Fla. 1985), (citing *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979)); *State v. Nourse*, 340 So. 2d 966, 969 (Fla. 3d DCA 1976) (“unless the right to the exception is clearly apparent in the statute, no benefits thereunder will be permitted”); *Marino v. University of Florida*, 107 So. 3d 1231, 1233 (Fla. 1st DCA 2013) (“public records exemptions are to be narrowly construed to provide for public access.”) (quoting *Tribune Co.*, 493 So. 2d at 483); *Dade Aviation Consultants v. Knight Ridder*, 800 So. 2d 302, (Fla. 3d DCA 2001) (“The only records that are exempt from production under [Public Records Law] are those that are so delineated by the statute or those that are expressly exempted by general or special law.”); *Lightbourne v. McCollum*, 969 So. 2d 326, 332-33 (Fla. 2007) (“[t]he public records act ‘is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose.’” (quoting *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994)).

It is, therefore, my opinion that the determination of whether records in a claims file are exempt turns on whether those specific records contain or relate to assessments, evaluations,

and/or analysis of claims and/or settlement issues. Meaning, records in a claims file are *not per se or automatically* exempt simply by virtue of being contained within such a file; instead, a good faith analysis must be conducted for each record contained within such a file to determine the applicability of Section 768.28(16)(b)'s exemption. Likewise, risk management meetings as well as the minutes derived from such meetings are only exempt from the Sunshine Law and the Public Records Law, if the meeting and/or minutes relate solely to the evaluation of a filed tort claim or an offer to compromise a filed tort claim. As such, an evaluation of each meeting and/or minutes from each meeting must be conducted to determine whether the provisions of Section 768.28(16)(c) or (d) apply.

In short, when responding to a public records request, the custodian of the records being requested should make a good faith evaluation of each document, meeting, set of minutes, and/or record at issue to determine the applicability of the exemptions under Section 768.28(16) (b), (c), and (d) because, again, these exemptions *do not* apply on a *per se* or automatic basis.