IN THE SUPREME COURT OF FLORIDA

Case No. 64,944

CITY OF NORTH MIAMI, a municipal corporation, of the State of Florida; TOBIAS SIMON, as City Attorney for the City of North Miami; MAYOR HOWARD NEU, JAMES DEVANEY, JOHN HAGERTY, ROBERT LIPPELMAN, and DIANE BRANNEN, as members of the City Council of the City of North Miami,

Petitioners,

vs.

THE MIAMI HERALD PUBLISHING COMPANY, a division of Knight-Ridder Newspapers, Inc., a Florida corporation,

Respondent.

QUESTION OF GREAT PUBLIC IMPORTANCE CERTIFIED BY THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

ANSWER BRIEF OF RESPONDENT THE MIAMI HERALD PUBLISHING COMPANY

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STATEMENT OF THE CASE

This case is before this Court on a question certified by the Third District Court of Appeal as a matter of great public importance:

> Does the lawyer-client privilege section of the Florida Evidence Code exempt from the disclosure requirements of the Public Records Act written communications between a lawyer and his public-entity client?[1]

The Court of Appeal certified the question in a decision issued February 14, 1984, in which it reversed the trial court's Final Order entered March 10, 1983 after remand ("Final Order") (R. 159-61). *Miami Herald Publishing Company v. City of North Miami,* ..... So.2d ....., 9 Fla.L. Wkly. 418 (Fla. 3d DCA Feb. 14, 1984) (Case No. 83-688). The prior opinion of the Third District, *Miami Herald Publishing Co. v. City of North Miami,* 420 So.2d 653 (Fla. 3d DCA 1982), vacated the original order of the trial court, reversing it in part, and remanded the cause for an *in camera* inspection of the files at issue.[2] Following its re-

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1. The Third District also certified this question in *Edelstein, et al. v. Donner,* ..... So.2d ....., slip op. (Fla. 3d DCA May 8, 1984) (Case Nos. 83-1504 and 83-2005).

2. North Miami implies that the "different panel" of the Third District which decided the prior opinion in this case believed the attorney/client privilege does create an exception to Chapter 119. This is not true. The prior opinion simply followed the rule set out in *Donner v. Edelstein,* 415 So.2d 830 (Fla. 3d DCA 1982) that before an appellate court may be asked whether a statute creates an exemption to the public records act, the trial court must first determine as a finding of fact and law whether or not the documents sought actually fall within the scope of the putative exempting statute. *See also Parsons & Whittemore, Inc. v. Metropolitan Dade County,* 429 So.2d 343 (Fla. 3d DCA 1983); *Donner v. Edelstein,* 423 So.2d 367 (Fla. 3d DCA 1982); *Tober v. Sanchez,* 417 So.2d 1053 (Fla. 3d DCA 1982), *pet. denied sub nom. Metropolitan Dade County Transit Agency v. Sanchez,* 426 So.2d 27 (Fla. 1983).

view of the records on remand, the trial court held certain of those documents produced by the City of North Miami ("North Miami," the "City" or "Petitioner") from the files of its City Attorney, to be privileged attorney/client communications under the Florida Evidence Code, Section 90.502, Florida Statutes. The trial court further ruled that this provision of the Florida Evidence Code authorizes municipal records custodians to withhold the records from members of the public seeking to inspect them. The trial court concluded that the Evidence Code provision creates a statutory exemption from the provision of the Public Records Act, Chapter 119, Florida Statutes, which requires custodians of public records to permit their inspection by the public. The Third District rejected the trial court's conclusions and on February 21, 1984 the City filed its notice invoking this Court's jurisdiction.

STATEMENT OF THE FACTS

North Miami attempts to show how simple this case is by misstating the facts, including facts which are not supported by the record,[3] and blurring legal distinctions. The City claims that this case and *State ex rel. Reno v. Neu,* 434 So.2d 1035 (Fla. 3d DCA 1983) (on certified question to this Court in *Neu, et al. v. The Miami Herald Publishing Co.,* (Fla. Sup. Ct.) (Case No. 64,151) (argued May 9, 1984) are alike and that both involve the "right of Petitioners to speak in confidence to their attorney" (Br. 1). In fact, the two cases, while both dealing with open gov-

3. Contrary to the protestations of counsel for the City, *The Miami Herald* notes that appellate counsel for North Miami was not a participant in the proceedings below. Not only have the City's factual representations been written by an attorney without personal knowledge, but counsel has not adhered to the record (Br. 4).

ernment laws, have distinct facts and legal differences. North Miami states this case involves "written communications" between the council and its lawyer while the *Neu* case involves "oral communications." But *Neu* involves only "oral communications" between members of the City Council and the City Attorney which occur *during public meetings*. All other "attorney/client" oral communications are unaffected by the Sunshine Law. The fundamental issue in *Neu* is whether the attorney/client privilege as codified in the Evidence Code *authorizes* the exclusion of the public from meetings which must otherwise be held in public and as such constitutes a legislative "reversal" of this Court's holdings in *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693, 696 (Fla. 1969) and *City of Miami Beach v. Berns*, 245 So.2d 38, 40 (Fla. 1971). *The Miami Herald* argued in *Neu* that the Evidence Code does not work such a "reversal" because (i) only express amendments to Section 286.011 or constitutional provisions may create exemptions to the Sunshine Law;[4] and (ii) the Evidence Code is exactly that, a code setting out the rules of evidence having no applicability to open

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4. At oral argument in *Neu* this argument was questioned by a member of the Court who suggested that the language of Section 286.011 does not limit the exemptions to its scope to express amendments or constitutionally-based exemptions, but rather merely reflected the existence of provisions in the Florida Constitution requiring certain proceedings to be closed.

The Miami Herald notes that the legislature has conducted itself in a manner consistent with the *Herald's* statutory construction. While more than 200 statutory exemptions to the Public Records Act have been created, there are only thirteen exemptions to Section 286.011 and each is either based on a constitutional right or an express amendment to Section 286.011: *See* Section 20.19 (6)(f)2 (constitutional); Section 27.37(6)(c) (amendment); Section 106.25(5) (amendment); Section 110.201(4) (amendment); Section 112.324(1) (amendment); Section 228.093(3)(c) (amendment); Section 230.23(4)(m)4 (amendment); Section 240.209(2) (amendment); Section 395.0115(3) (amendment); Section 447.205 (10) (amendment); Section 447.605(1) (amendment); Section 455.225(3) (amendment); Section 760.10 (constitutional). The attorney/client privilege codified in the Evidence Code does not contain any amendment to Section 286.011, nor is it based on a constitutional exemption.

meetings laws and certainly not *authorizing* the exclusion of the public from meetings. The fundamental issue in this case is whether the Evidence Code's codification of the attorney/client privilege constitutes a legislative "reversal" of this Court's opinion in *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979) (holding common law attorney/client privilege unrelated to public records demands).

Respondents therefore submit the following statement of facts to clarify and state with accuracy a more complete account of the circumstances and proceedings below.

The Public Records Requests

On July 9, 1981, *The Miami Herald,* pursuant to Chapter 119, served on North Miami a formal request to inspect public records then in the custody of the City concerning the City's dispute with the State Department of Environmental Regulation ("DER") over the clean-up of the Munisport landfill. The request covered all memoranda and documents from the beginning of 1981 to the date of the request (the "DER files") and explicitly asked that a statement of legal justification be given if any portion of the request were to be denied (R. 31).

The only recently retained City Attorney flatly denied the request in its entirety, claiming everything in his files to be exempt from inspection under Chapter 119 (contrary to Petitioner's contention that he agreed to turn over for inspection a number of his files with one "important reservation" (Br. 3)). One day after the request, on July 10, the City Attorney addressed a letter to the Mayor and members of the City Council reiterating the policy he had initiated upon taking office (on July 1, 1981), namely that he would not grant interviews to the press or open his

files to public inspection unless ordered to do so by the Supreme Court of the United States or directed by the City Council to waive its attorney/client privilege (R. 33).[5]

The City Attorney's claim of privilege was *not* based on his discovery of some compelling need for confidentiality after a careful review of the files, as he later conceded in recommending that the City Council waive its privilege as to the DER files (R. 33, 34).[6] In fact, the City Attorney asserted that all the records in his files should be exempt from public inspection irrespective of whether any particular document contained privileged information.

By letter of July 16, 1981 the City Attorney advised *The Miami Herald* that the City Council had elected to waive its privilege with respect to the DER files (R. 35-36). Those files were then made available for inspection and subsequently inspected.

On July 30, 1981, *The Miami Herald* responded to the City Attorney's letter, stating that no Florida statute recognized an attorney/client exemption to Chapter 119 and that it was not within the discretion of the City Council to withhold or disclose public records (R. 37). *The Miami Herald's* response also made reference to two Dade County Circuit Court decisions which had recently reached this same conclusion (R. 37-38).

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5. The City Attorney indicated this policy was based on the Code of Professional Responsibility, Disciplinary Rule 4-101, and the Due Process Clause of the Fourteenth Amendment which guarantees effective assistance of counsel. It was not alleged to be based on any threat to the interests of the City (R. 33).

6. In his formal request to the City Council for instruction as to whether the City would waive its privilege, the City Attorney stated, after a "cursory" examination of the files, his belief that the documents were already in the possession of other governmental agencies (R. 34).

In a letter dated August 24, 1981, the City Attorney requested the City Council's authorization to "take such steps within our judicial system as will enable me to adequately protect the City's interests . . ." regarding his files (R. 44, 47).

Thereafter on September 10, 1981, the City Attorney served on *The Miami Herald* a document styled, A Petition Within The Exclusive Jurisdiction Of The Supreme Court Of Florida (the "Petition"), seeking this Court's determination that disclosure of the files of a city attorney pursuant to Chapter 119 would violate Disciplinary Rule 4-101 (R. 76). *The Miami Herald* moved to dismiss the Petition, and on October 22, 1981 this Court dismissed the Petition. Petitioner surprisingly makes no mention of these events, apparently finding them insignificant.

Also, on September 10, 1981, *The Miami Herald* served a written request to inspect the public records held by the City Attorney, including those which are the subject of this appeal (the "Request" or the "Records"). This Request sought a second inspection of the DER files as well as access to seven litigation files (R. 10, 129).[7]

The City Attorney issued a blanket denial of the Request on September 14, 1981, again without any review of the files. This time, the City refused to produce even those files which it had previously made available, basing its refusal on the grounds set forth in its Petition to this Court (R. 12, 131).

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7. Those files are: NM 2002.1, *Kenneth Servio v. The City of North Miami;* NM 2018.1, *Clifford v. The City of North Miami;* NM 2012.1, *George and Grass v. City of North Miami and Flanigan's;* NM 2025.1, *The City of North Miami v. Marcella's Italian Commissary;* NM 2020.1, *De Luria v. The City of North Miami;* and NM 2036.1, *Schy v. The City of North Miami* (R. 10).

The Initial Proceedings In The Trial Court

The Miami Herald filed a Petition For Writ Of Mandamus in the Eleventh Judicial Circuit Court on September 28, 1981 (R. 6-12). The trial court entered an Order To Show Cause on that same day (R. 13-21). North Miami responded to the Order To Show Cause one week later claiming: (1) the Florida Evidence Code created a statutory exemption to Chapter 119 for records subject to the attorney/client privilege; (2) a construction of Chapter 119 requiring disclosure of the City Attorney's files could cause him to violate the Code of Professional Responsibility; and (3) such a construction would deny North Miami its constitutional right to effective assistance of counsel (R. 22-62). At the hearing on the Order To Show Cause, *The Miami Herald* argued: (1) the Evidence Code applies only to evidence in judicial proceedings and by its express terms creates no exemption to Chapter 119; (2) the Code of Professional Responsibility had been specifically amended to permit disclosure of otherwise privileged material where disclosure is required by law; and (3) the right to effective assistance of counsel is not relevant to this case because, among other reasons, Chapter 119 is itself a waiver of the public's attorney/client privilege.

In hearings before the trial court the City presented no evidence in support of nondisclosure. The City Attorney provided no proof that access to any of the Records would harm the City's efforts to litigate or settle the litigation. He provided no evidence showing that access to such Records in the past had injured the City and no evidence that any document in any file was "confidential" or was, in fact, an attorney/client communication. The City Attorney opposed *The Miami Herald's* request that the judge conduct an *in camera* inspection of the files.

Despite the absence of any factual predicate for the assertion of the privilege, the trial court entered an order on November 17, 1981 denying the Petition For Writ Of Mandamus. The court held the Evidence Code applies to public records requests and operates to create exemptions to the inspection right granted the public by Chapter 119. The court provided no explanation of this ruling other than its conceded reliance on *Aldredge v. Turlington,* 378 So.2d 125 (Fla. 1st DCA), *cert. denied,* 383 So.2d 1189 (Fla. 1980), a *per curiam* affirmance of a trial court decision, also without explanation, opinion, or precedential force (R. 116-117). While the court issued a Final Order dismissing the Petition in its entirety, that Order stated "[it] applies only to those matters that are subject to the attorney-client privilege" (R. 117), even though the court had made no inspection of the files, the court had made no findings of fact regarding the files, and the court did not order the disclosure of those documents or portions of documents not privileged (R. 117).

The Miami Herald's timely motion for rehearing was denied December 9, 1981 (R. 123) and a notice of appeal was filed December 17, 1981 (R. 124).

The First Appellate Proceeding

On October 19, 1982 following submission of briefs and oral argument, the Third District Court of Appeal entered an order vacating the trial court's Order dismissing the Petition For Writ Of Mandamus. That Court held, following *Donner v. Edelstein,* 415 So.2d 830 (Fla. 3d DCA 1982), that prior to addressing the issue of *whether* the common law attorney/client privilege codified in the Evidence Code applied to public records requests and created an exemption from inspection under Chapter 119, the City had the burden of proving the

documents withheld were, in fact, privileged attorney/client communications. Because the City and trial court had not had the benefit of the *Donner* ruling to guide them, the Third District remanded the issue for an *in camera* inspection of the files, rather than reversing the Order with directions to issue the Writ Of Mandamus. The Third District also ruled, in accordance with *Tober v. Sanchez,* 417 So.2d 1053 (Fla. 3d DCA 1982), *pet. denied sub nom. Metropolitan Dade County Transit Agency v. Sanchez,* 426 So.2d 27 (Fla. 1983), that all documents falling within the ambit of the attorney work-product privilege are public records which must be disclosed. Finally, the Third District stated that all the records inspected and classified by the trial court should be sealed pending the decision of the parties to seek appellate review.

On Remand To The Trial Court

The City did not submit the seven litigation files to the trial court for inspection. Instead, counsel for North Miami conducted the City's first genuine review of the voluminous files, identified fewer than 50 documents in those files that were claimed to be privileged, and produced them to the trial court. The overwhelming bulk of the files were then inspected by *The Miami Herald.* The trial judge then ordered the documents delivered for his *in camera* review (R. 181). On December 17, 1982, after both parties had submitted legal memoranda,[8] the trial court formally denied *The Miami Herald's* request for disclosure of the documents pursuant to a confidentiality order (R. 147). In addition, the court

8. *The Miami Herald* moved to supplement the record with § 90.10, a proposed statutory exemption provision, embodied in the Evidence Code, which was ultimately defeated (R. 190, 191).

denied *The Miami Herald's* request that it be allowed to conduct limited discovery, including the taking of depositions and propounding of interrogatories, regarding the scope of dissemination of the documents and their asserted "confidentiality".

Following an *in camera* inspection of the documents submitted, the court ruled that 14 of the 49 documents submitted were either work product or unprivileged because they consisted of communications which the court found were not confidential (R. 160).[9] The remaining 35 documents were held to be privileged and, as such, not subject to disclosure under Chapter 119. Each of these documents contained or referred to attorney/client communications deemed confidential by the trial judge. They were placed under seal in a file marked as Court's Exhibit I in anticipation of further appellate proceedings (R. 160, 161).

The trial court issued its Final Order denying the Petition For Writ Of Mandamus on March 10, 1983 (R. 159-161). An appeal was taken four days following entry of that Order (R. 162-163).

The Second Appellate Proceeding

The Third District reversed the trial court's order, holding in an opinion issued February 14, 1984 that the Evidence Code does not exempt from disclosure pursuant to a Chapter 119 public records request a lawyer's written communications with his public entity client, and directed

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9. North Miami readily stated its concurrence with this finding in a letter sent to the trial court on December 20, 1982, in which it agreed to provide the nonexempt documents to *The Miami Herald* (R. 150). North Miami also provided an index of the 35 documents deemed privileged and exempt from Chapter 119 by the trial court (R. 151-153).

that the Writ be issued. *Miami Herald Publishing Co. v. City of North Miami, supra.* In reaching its conclusion that the Evidence Code does not exempt the Records from disclosure under Chapter 119, the Court noted the following: (1) "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" (citing *Wait v. Florida Power & Light Co.,* 372 So.2d 420 (Fla. 1979)); (2) Section 90.502 (the attorney/client privilege of the Evidence Code) is limited in scope to judicial proceedings; (3) the inclusion of public entities in the definition of "client" in Section 90.502(1)(b) merely ensures that "privileged communications of a public entity will not be admitted into evidence in judicial proceedings"; (4) nothing indicates that the Legislature intended by enactment of the Evidence Code to abrogate Florida's preeminent public policy that all state, county and municipal records must be open for public inspection at all times; and (5) the wisdom of such a policy, which concededly places public agencies at a disadvantage (as compared to private persons) when faced with litigation claims, rests exclusively with the legislature which is free to enact an attorney/client privilege exemption to Chapter 119.[10] Because of the significance of the issue, the Third District certified pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, the question as one of great public importance.

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10. The Third District did agree with the trial court that Section 624.311(3), Florida Statutes, has no effect in this case. 9 Fla.L.Wkly. at 419 n.1.

ARGUMENT

I. THE RECORDS ARE PUBLIC RECORDS SUBJECT TO INSPECTION UNDER CHAPTER 119

In *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979), this Court held that the common law attorney/client privilege had no effect on records subject to the inspection requirements of the Public Records Act. *Id.* at 424. In addition, the Court found that *only* those public records provided by statutory law to be confidential or which are expressly exempted by general or special law are excluded from the Act. *Id.* at 425. Because the Legislature has never enacted any statute expressly exempting the Records from Chapter 119 they are public records open for personal inspection by any person. Section 119.01, Florida Statutes. As shown below, the codification of the attorney/client privilege in Section 90.502 of the Evidence Code does not disturb this Court's decision in *Wait*.

II. THE ATTORNEY/CLIENT PRIVILEGE OF THE FLORIDA EVIDENCE CODE (SECTION 90.502) DOES NOT EXEMPT WRITTEN COMMUNICATIONS BETWEEN NORTH MIAMI AND ITS LAWYER FROM DISCLOSURE UNDER CHAPTER 119

North Miami argues that the District Court erred in holding that Section 90.502, Florida Statutes (1983), does not bar public inspection of the Records for the following reasons: (1) the Court's construction of Chapter 90 violated all pertinent rules of statutory construction

recognized by Florida courts; (2) Section 90.502 supersedes Chapter 119; (3) Chapter 119 exempts from disclosure documents made confidential by laws passed subsequent to it; (4) the public has not waived North Miami's attorney/client privilege; and (5) proposed amendments to Chapter 119 are irrelevant because Section 90.502 has already secured the privilege.

In its brief, the City chooses to ignore the words of the opinion of the Third District and the actual words of Chapter 90, the statute upon which it relies. It erroneously claims Section 90.502 affords North Miami and its City Council members "the right to maintain the *confidential* nature of their attorney/client communications, and to resist and prevent *disclosure* of those 'confidential' communications to third parties" (Br. 11). The City, however, conveniently omits discussion of that threshold portion of the statute, Section 90.103(1), which limits the scope of the Evidence Code, *including the attorney/client codification, Section 90.502,* to certain proceedings defined by this Court. It is upon this provision that the Third District grounded its decision. Specifically, the Third District found the proceedings governed by the Evidence Code to be: "(1) criminal proceedings related to crimes committed on or after July 1, 1979; (2) civil actions accruing after July 1, 1979; and (3) other proceedings brought after July 1, 1979" (citing *In re Florida Evidence Code,* 376 So.2d 1161, 1162 (Fla. 1979), Section 90.103, Florida Statutes, and Black's Law Dictionary 499-500). The Third District, cognizant of the inclusion of public entities in the definition of "clients" in Section 90.502(1)(b), aptly noted that the term had been included "merely to ensure that the privileged communications of a public entity will not be admitted into evidence in judicial proceedings." 9 Fla.L.Wkly. at 419.

Moreover, it is clear that the language of Section 90.502 merely provides an evidentiary privilege to confidential communications; it does not even purport to authorize public officials to engage in communications excluding the public or to set criteria for when they may do so. The City's entire Argument fails to confront the Court's conclusions and is made in a vacuum, wholly isolated from the context of the Evidence Code itself.

A. The Evidence Code Does Not Supersede Chapter 119 Nor Are The Exemption Provisions Of Chapter 119 Applicable.

The City contends the attorney/client privilege of Section 90.502 expressly supersedes the Public Records Act, constitutes an exemption contemplated by that Act, and applies explicitly to public records requests. These contentions are erroneous and without support.

1. Correct statutory construction requires that open government laws be construed broadly while evidentiary privileges must be construed narrowly.

The City argues for twenty pages that the Third District "violated *all* the pertinent rules of statutory construction" in its reading of Chapter 90 and accuses that Court of substituting its own judgment for that of the Legislature (Br. 6-26). While the City in some cases correctly states the propositions for which it cites authority, it misapplies others. It reads cases as carelessly as statutes. For example, the City suggests the Third District rewrote the plain meaning of Section 90.502 and cites multiple cases wherein the rule against such judicial legislation is stated (Br. 9-11). Yet, it is the City which here refuses to apprehend the constraint imposed by Sec-

tion 90.103 which quite plainly limits the scope of *all* provisions of the Evidence Code. This Court, in *Heredia v. Allstate Insurance Co.*, 358 So.2d 1353, 1355 (Fla. 1978) adhered to the rule even though in that case (but not this one) the law contained shortcomings: "Notwithstanding that the plain meaning of a term used by the Legislature may not artfully harmonize one provision of a law with others in the same act . . . an adjustment is appropriately made by legislative and not judicial redrafting." *Id.* at 1355. Adhering to the plain meaning affords due deference to the separation of powers doctrine. In *Heredia,* while the Court said all provisions may not be capable of being well-harmonized, it did not abandon reading the statute as a whole to derive its "plain" meaning. *Id.*

The City misapplies many of its myriad authorities. For example, it cites *Wetmore v. Brennan,* 378 So.2d 79 (Fla. 3d DCA 1979), *cert. denied,* 388 So.2d 1119 (Fla. 1980) for the proposition that a more specific law governs over a general law dealing with the same subject (Br. 16). In fact, *Wetmore* deals with a statutory *amendment* to Chapter 95 which reduced a limitations period from 20 to five years and provided a grace period within which claimants could learn of the change. Similarly, the City claims *Liberty Mutual Insurance Co. v. Flitman,* 234 So.2d 390 (Fla. 3d DCA 1970) deals with disclosure of attorney/client confidential information at deposition rather than admissibility. The case actually states that a trial court's failure to permit a defendant to depose or subpoena the records of a plaintiff's attorney could be error (albeit not reversible), assuming the information sought was a proper subject matter for discovery: "Under the broad purposes permissible, we find that the action of the trial court in refusing to permit inquiry into this specific area amounted to harmless error at most." *Id.* at 391.

North Miami also contends that a later more specific statute controls over a previously enacted statute by implicitly repealing the earlier one when the two are in conflict, but claims there is an *express repugnancy* and *express* repeal in this case (Br. 9) (emphasis in original). This is entirely incorrect given that Chapter 90 makes no mention or allusion to Chapter 119 and does not purport to authorize exemptions.[11] Nor is Chapter 90 more specific than Chapter 119. Section 90.502 applies to all attorney/client communications, written or oral, by private or public persons while Chapter 119 applies only to written communications memorializing the public business. Moreover, Section 11.2421, Florida Statutes (1983) provides for biennial reenactment of all statutes, including the Public Records Act which therefore remains in effect without reference to Section 90.502.

Finally, the City ignores the two rules of statutory construction most crucial to this case: first, evidentiary privileges are disfavored and are to be construed as narrowly as possible. *Herbert v. Lando*, 441 U.S. 153, 175 (1979); *Burden v. Church of Scientology of California*, 526 F.Supp. 44 (M.D. Fla. 1981). By contrast, Florida

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11. The City cites *Tribune Company v. School Board of Hillsborough County*, 367 So.2d 627 (Fla. 1979) for the proposition that a subsequent statute being the "later legislative expression" creates a valid exemption to the open meeting requirements of the Sunshine Law, and argues it should control in this case (Br. 25). But North Miami's reading distorts the *Tribune* opinion wherein this Court agreed with the trial court that the later act was a special act of narrow scope and "supplementary" to the Sunshine Law. *Id.* at 628. This Court chose "to read the provisions of the general law together with the special act and harmonize them," *id.* at 629, rather than find that the later expression had superseded the former. In any event, the case has no bearing in the present instance where North Miami strains to engraft an exemption onto the Public Records Act from a general provision in the Florida Evidence Code codifying the attorney/client privilege. Unlike the special act in *Tribune*, Section 90.502 contains no specific language or intent to amend the Public Records Act itself.

courts have uniformly held statutes enhancing the public's right to open government including Chapter 119 and Section 286.011 are favored and should be liberally construed in favor of inspection. *Canney v. Board of Public Instruction of Alachua County,* 278 So.2d 260 (Fla. 1973); *City of Miami Beach v. Berns, supra,* at 40; *Board of Public Instruction of Broward County v. Doran, supra,* at 699; *Tober v. Sanchez, supra.*

The Third District clearly upheld Florida's policy that all public records should remain open for personal inspection by any person at all times. It concluded that nothing in the Evidence Code, "with its narrowly defined scope" abrogated this "preeminent public policy." (Relying also on *State of Florida, Dept. of Highway Safety & Motor Vehicles v. Kropff,* 445 So.2d 1068 (Fla. 3d DCA 1984). The balance of the City's diatribe on the role of courts and lawmakers and on language as the source of law goes wasted because of the City's failure to read *in pari materia* the provisions it purports to rely upon (See Br. 11-20).[12]

2. The Records may be exempted from Chapter 119 only by statute.

Public records may be excluded from the inspection requirements of Chapter 119 only where explicit statutory language exempts those records from Section 119.07(1)(a), the inspection provision of Chapter 119. *Rose v. D'Alessandro,* 380 So.2d 419 (Fla. 1980); *Gadd v. News-Press Publishing Co.,* 412 So.2d 894 (Fla. 2d DCA), *pet.*

12. The City's discussion of the origins and purpose for the attorney/client privilege are also not convincing in the context of this case (Br. 20-21). City officials are expected to give full and frank disclosure. Open government laws have been enacted to maintain visibility of public functions and to discourage deception by public officials.

denied, 419 So.2d 1197 (Fla. 1982) (Section 768.40(4) does not exempt public hospital utilization review files from Chapter 119); *Douglas v. Michel,* 410 So.2d 936 (Fla. 5th DCA 1982); Fla. Opin.Atty.Gen. 82-75 (Section 455.241(2) does not exempt medical information contained in public records from inspection under Chapter 119). *See also Radio Telephone Communications, Inc. v. Southeastern Telephone Co.,* 170 So.2d 577, 581 (Fla. 1964). As noted above, in *Wait v. Florida Power & Light Co., supra,* this Court held that the attorney/client privilege does not authorize the withholding of public records[13] and that such authorized exemptions to the inspection provision of Chapter 119 must be enacted by the Legislature. Thus, only the Legislature can authorize exemptions to the Public Records Act.[14]

As the Second District Court of Appeal recognized in *News-Press Publishing Co. v. Gadd,* 388 So.2d 276, 278 (Fla. 2d DCA 1980):

> Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and the damage to an individual or institution resulting from such disclosure.

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13. Although the City does not argue that litigation files are not public records—materials prepared with the intent of formalizing knowledge—one appellate court has already held that work-product or materials prepared in connection with litigation as well as pleadings and evidence, are public records subject to Chapter 119. *Hillsborough County Aviation Authority v. Azzarelli Construction Co.,* 436 So.2d 153-54 (Fla. 2d DCA 1983).

14. While Petitioner discusses interchangeably the Public Records Act and the Sunshine Law, exemptions to the latter must be based directly on a constitutional provision or an express amendment to Chapter 286.011. A statute cannot create an exemption to the Sunshine Law. § 286.011, Fla. Stat. (1983); see also *Bassett v. Braddock,* 262 So.2d 425 (Fla. 1972).

Later, in *Gadd v. News-Press Publishing Co.*, 412 So.2d 894 (Fla. 2d DCA), *pet. denied,* 419 So.2d 1197 (Fla. 1982), that Court stated that a public hospital seeking to protect its committee and personnel files from inspection under Chapter 119 "need only to persuade the legislature to add section 768.40 to the short list of statutes provided by section 119.07(3)(b) to be exempt from public inspection." *Id.* at 897. The City seems to recognize this rule of law but argues the Records are exempted from the inspection provisions of Chapter 119 by Section 90.502, Florida Statutes.

It should also be noted that *Wait v. Florida Power and Light Co., supra,* was pending before this Court throughout the period preceding the effective date of the Evidence Code, which was repeatedly postponed. This Court must be deemed to have been well aware of the Code, yet did not deny rehearing in the *Wait* case until June 23, 1979, just a few days before the Code finally became effective. In fact, the mandate did not issue in *Wait* until after the effective date of the Code. Had this Court, or any party, believed the Code was relevant and controlling, the Court could have delayed its decision on rehearing and so held.

The City also accuses *The Miami Herald* of rigidly suggesting that all exemptions to the Public Records Act must appear in the Act itself or make reference to it by name (Br. 25). The City thereafter offers a litany of statutes which indeed do provide exemptions to Chapter 119. Each of them contains explicit provisions for specific documents to be kept confidential or not open to public inspection. *The Miami Herald* has no quarrel with these statutes because Chapter 119, unlike Section 286.011, states that "public records which are presently provided by law to be confidential" are exempt. The

Evidence Code does not exempt any public records from inspection since it does not apply to public records and does not authorize or commission the creation of confidential records memorializing public business.

3. Section 90.502 of the Evidence Code does not exempt the Records from public inspection under Chapter 119.

North Miami contends the Records are "confidential attorney/client communications" privileged under Section 90.502 of the Florida Evidence Code and that this evidentiary provision applies to public records requests to create an exemption to the inspection provision of Chapter 119. North Miami argues that because Section 90.502 refers to attorney/client and other communications as "confidential" and Section 119.07(3)(a) speaks of exempting from inspection public records "presently provided by law to be confidential" the Legislature must have intended Section 90.502 to amend the Public Records Act (since the word "confidential" appears in both provisions). This position is mistaken because (1) the Evidence Code by its explicit terms is directed only to those proceedings to which the common law of evidence applied, namely to the admissibility of evidence in judicial proceedings and the availability of documents under discovery rules in litigation, and does not apply to public records requests. Aside from the explicit language of Section 90.103, Section 90.502(c) itself explicitly states that "[a] communication between lawyer and client is 'confidential' if it is *not intended* to be disclosed to third persons . . ." (emphasis added). It does not authorize public officials to engage in communications not intended for public inspection. It does not state that public records are such communications. The privilege presupposes the existence of the authority to engage in such conduct, it does not

confer it. Because the Evidence Code itself creates no right of public officials to engage in confidential expression and the Public Records Act precludes the City or its attorneys from *intending* that written communications not be disclosed, no such communications can ever be "confidential" as defined. Intent is an essential element of the definition.

4. Evidentiary privileges apply to judicial proceedings not public records requests.

The Florida Evidence Code, by its very terms, does not apply to statutory public records requests. Section 90.103(1) of the Code expressly limits its applicability: "Unless otherwise provided by statute, this code applies *to the same proceedings that the general law of evidence applied to before the effective date of this code*" (emphasis added). Since the Evidence Code was enacted in 1979, it applies only to those proceedings to which the general law of evidence applied prior to 1979. This Court, in *Wait v. Florida Power & Light Co., supra,* made it clear that common law evidentiary privileges did not apply to public records requests under Chapter 119. Thus, the Legislature did not expand the reach of the common law privileges to include public records requests; rather, it sought only a codification of their scope under the common law.

Section 90.103(2) of the Evidence Code, and the official commentary thereto, further elucidate the Code's limited purpose by stating that the proceedings to which it is applicable are "civil actions", "criminal proceedings", and "other proceedings, such as probate matters and Baker Act commitments". Commentary on 1978 Amendment, Fla.Stat.Ann. § 90.103 (1979). Section 90.501 similarly states that "[e]xcept as otherwise provided by [the

Florida Evidence Code], any other statute, or the Constitution of the United States or of the State of Florida, no person *in a legal proceeding* has a privilege to . . . (2) [r]efuse to disclose any matter . . ." (emphasis added). The Evidence Code by its express language simply has no application to a public records request. North Miami's contentions that Section 90.502 supersedes the Public Records Act because it is the later legislative expression, or constitutes an exemption contemplated by the Act are both therefore contrary to the express terms of both the Act and the Evidence Code.

Chapter 119 and Section 90.502 of the Evidence Code are not at odds. These statutes have fundamentally different purposes and were intended to create fundamentally different effects. One has no bearing on the other. The Public Records Law is a vital part of Florida's commitment to open government. Section 119.01 states that the statute's purpose is to "open all state, county and municipal records for personal inspection by any person." *Wait v. Florida Power & Light Co., supra,* at 423. By contrast, the Evidence Code provides that it be applied only in judicial proceedings. This is as it should be when the purpose of evidentiary rules is considered. Rules of evidence have evolved for the purpose of determining categories of proof for the adjudication of disputes in an adversary judicial process. Consequently, the common law of evidence had always been limited to judicial proceedings and had no application to Chapter 119 requests. *Wait v. Florida Power & Light Co., supra,* at 425. This Court has previously stated it does "not equate the acquisition of public documents under Chapter 119 with the rights of discovery afforded a litigant under judicially-created rules of procedure." *Wait, supra,* at 425. The Legislature enacted the Evidence Code to govern the

conduct of trial attorneys and judges in judicial proceedings. *See* Sections 90.103(2) and 90.501(2), Florida Statutes (1983). Admissibility in court has no relation to the reason why the Legislature chose to make records public: to foster the free flow of information and maintain public trust. Although inadmissible as evidence, a record may have crucial relevance to the public's ability to evaluate the handling or mishandling of public business, including litigation and matters pertaining to litigation. It is no argument against disclosure that such records might also be revealed to litigants with a special interest in inspecting the records. Indeed, such private litigants may prove to be the most capable and zealous guardians of the public interest notwithstanding their inability to introduce the documents into evidence in a judicial proceeding. The Public Records Act deals with the public's right to know what its government is doing. Evidentiary privileges reflect the balance of equities between two parties involved in a litigation. The Evidence Code should not be applied to public records requests.

Rules of evidence and evidentiary privileges have evolved over the centuries for the purpose of determining categories of probative evidence for the adjudication of disputes in the adversary process. Such rules apply only to the conduct of parties in judicial proceedings. Ordinary common sense makes it clear that neither private individuals nor government actors are required to consult the Evidence Code as a guide to the conduct of their daily affairs. Neither clergymen, accountants, spouses nor counselors of sexual assault victims are bound to adhere to the Code outside of judicial proceedings. And evidentiary privileges involve only the equities between *the parties to a litigation.* The Third District has stated that "[e]vidence is the means by which some fact in question

is established or disproved." *Stupner v. Cacace,* 231 So.2d 525 (Fla. 3d DCA 1970). And over forty years ago, this Court defined "evidence" as ". . . not only the spoken words of *witnesses* but documents and other exhibits which properly may be *submitted to the jury.*" *Madison v. State,* 138 Fla. 467, 189 So. 832, 835 (1939) (emphasis added). No subsequent definition has superseded this meaning.

Courts in numerous other states have utilized similar definitions, all of which confine the applicability of the law of evidence to judicial proceedings. Several have stated that "[e]vidence, as defined by lexicographers and law writers, includes all the means by which, *in a judicial trial,* it is sought to establish or disprove any material allegation of a civil or criminal *pleading.*" *O'Brien v. State,* 69 Neb. 691, 694, 96 N.W. 649, 650 (1903) (emphasis added).[15]

Since evidentiary privileges reflect only a balancing of the equities between litigants in a lawsuit, while open government involves the "most compelling" of state interests, the right of the public to know, an evidentiary privilege may not create an exemption to Chapter 119.

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15. *See also In re Fisher's Estate,* 47 Idaho 668, 674, 279 P. 291, 292 (1929) (evidence is ". . . anything . . . perceptible to the five senses, *when submitted to the court or jury* . . .") (emphasis added); *Superior Meat Products, Inc. v. Holloway,* 113 Ind.App. 320, 326, 48 N.E.2d 83, 86 (1943) (evidence is ". . . whatever may properly be *submitted to a court or jury* to elucidate an issue or prove a case") (emphasis added); *Lynch v. Rosenberger,* 121 Kan. 601, 604, 249 P. 682, 683 (1926) (evidence is "[t]he means sanctioned by law for ascertaining *in a judicial proceeding* the truth . . .") (emphasis added). A federal court long ago defined "evidence" as "those rules of law whereby we determine what *testimony* is to be admitted and what rejected *in each case,* and what is the weight to be given to *the testimony admitted.*" *Kellman v. Stoltz,* 1 F.R.D. 726, 728 (N.D. Iowa 1941) (emphasis added).

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Wood v. Marston, ... So.2d ....., 8 Fla.L.Wkly. 471 (Fla. Dec. 1, 1983) (Case No. 63,341). *See also, e.g., Burden v. Church of Scientology of California, supra,* at 45; *Florida Board of Bar Examiners Re: Applicant,* 8 Fla.L.Wkly. 430 (Fla. Nov. 3, 1983) (Case No. 63,161) (Section 90.503 must give way to state interests in investigating applicants for the Bar). A "pressing" public policy will defeat a "claim of confidentiality". *See Girardeau v. State,* 403 So.2d 513, 519 (Fla. 1st DCA), *pet. dismissed,* 408 So.2d 1093 (Fla. 1981). The United States Supreme Court, in considering a claim of presidential executive privilege wrote of privileges generally: "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon,* 418 U.S. 683, 711 (1974).

The attorney/client privilege in particular must be very closely considered before it can be employed, even in the traditional context of judicial proceedings. The privilege is "not absolute" and so the decision of whether

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Footnote continued—

Commentators have similarly limited the applicability of evidence law to judicial proceedings. The first sentence of Dean McCormick's treatise states as follows: "The Law of Evidence is the system of rules and standards by which the *admission of proof at the trial of a lawsuit* is regulated." McCORMICK, EVIDENCE § 1, at 1 (2d ed. 1972) (emphasis added). McCormick describes the attorney/client privilege as "[t]he . . . privilege against disclosure of [confidential] communications *in judicial proceedings.*" *Id.* § 87, at 177 (emphasis added). The Uniform Rules of Evidence state that the privileges and other provisions contained therein ". . . govern proceedings *in the courts.* . . ." Rule 101, Uniform Rules of Evidence (1974-75) (emphasis added), *reprinted in* 13 UNIFORM LAWS ANNOTATED 209, 218 (1980). The Florida Evidence Code is "a substantial adoption of the major provisions" of the Uniform Rules of Evidence. *Id.* at 213.

to uphold it is a "balancing process." *Burden v. Church of Scientology of California, supra,* at 45.

> In the end, the result in an individual case must turn on a balancing of society's interest in full disclosure against the policies which underlie the privilege.

Id. (*quoting In re Grand Jury Proceedings,* 517 F.2d 666, 671 n.2 (5th Cir. 1975)). Here, where the State has repeatedly made clear its commitment to a policy of disclosure and open government, a policy serving the most "compelling" state interests, *Wood v. Marston, supra,* the evidentiary attorney/client privilege—even if relevant—is far outweighed on balance.

Moreover, public officials limit their ability to take advantage of the privilege with respect to public litigation when they assume office. In *Florida Board of Bar Examiners Re: Applicant, supra,* at 432, this Court held that an applicant to the Florida Bar could not invoke the psychotherapist/patient privilege to support his refusal to provide the Bar information regarding his past "regular" psychiatric treatment. The Court found that the Board's inquiry into an applicant's treatment history furthered a legitimate state interest "since mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public." *Id.* at 432. The applicant thus "placed his mental and emotional fitness as well as his moral and educational fitness in issue when he filed his [application]." *Id.* He was, therefore, precluded from claiming the protection of the privilege. Similarly, City Council members and the City Attorney, when they elect to hold public office, effectively place in issue their fitness to hold those positions, including the integrity of their management of the public's litigation.

Cf. Laughner v. United States, 373 F.2d 326 (5th Cir. 1967) (having put substance of communication in issue, client is precluded from invoking privilege). As there is a legitimate state interest in ensuring the fitness of members of the Bar, so there is a legitimate state interest in ensuring the honesty and accountability of those members of the Bar who handle the public's litigation and who serve as public servants. Indeed, this Court has recognized this interest as among the most compelling. *Wood v. Marston, supra,* at 473. The City Council and City Attorney, having chosen to place their credibility and performance in issue, cannot now invoke the attorney/client privilege to keep from the public the very information it requires to make an informed assessment.

Chapter 119, on the other hand, implements Florida's profound commitment to open government. This commitment is articulated as well in expansive laws granting public access to governmental meetings[16] and information with respect to the personal finances of governmental officials.[17] The public may neither participate in nor evaluate governmental functions without full disclosure of information contained in public records. This is particularly significant for citizens of municipalities as evidenced by the words of Justice Terrell:

> Under our form of governmental organization, a municipality is one of the integers of democracy; the people who constitute the municipality are its owners and stockholders; its officers are nothing more than its agents. To say that the agent can deny the right of the stockholder to inspect and make copies of the

16. Sections 286.011 and 286.012, Florida Statutes (1983).

17. Sections 112.313, 112.3141, 112.3145, 112.3146, Florida Statutes (1983). *See also* Florida Constitution, Art. I § 23 (Privacy), and Art. II § 8 (Ethics in Government).

> records of the corporation would give countenance to the very evil that Jefferson warned against in his famous aphorism, "Every government degenerates when trusted to the rulers of the people alone. The people themselves are the only safe depositories". Not only this, to uphold such a doctrine would make rubbish of the well known trilogy of Abraham Lincoln and in place of government of, for, and by the people, we would have government by petty autocrats.

Fuller v. State, 17 So.2d 607 (Fla. 1944). This Court also noted in *Board of Public Instruction v. Doran, supra,* at 699: "The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country." It recognized that in prior years secrecy in public affairs had been the subject of extensive criticism, and observed "[T]erms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with 'hanky panky' in the minds of public-spirited citizens." *Id. See also City of Miami Beach v. Berns, supra,* at 41 ("[T]he evil of closed door operation of government without permitting public scrutiny and participation is what the law seeks to prohibit").

This commitment to open government reflects the inherent connection between public knowledge of governmental activities and the prerequisites of participatory democracy. This Court long ago explained that the Legislature, through the Public Records Act:

> . . . has extended to any citizen of Florida the unrestricted privilege of examination of the books and records of municipalities in order that such citizens may advise themselves concerning the operation and conduct of the public affairs which said municipalities are authorized to carry on.

State ex rel. Cummer v. Pace, 118 Fla. 496, 498, 159 So. 679, 681 (1935).

While a record may be barred from introduction in a judicial proceeding, it may nevertheless have crucial relevance to the public's ability to detect the mishandling of government business, including litigation and matters pertaining to litigation. The public cannot know whether the handling of public litigation has been fair, honest, competent, and efficient without access to the records of the City Attorney. These interests go to the heart of the policy behind Chapter 119: public agencies must divulge all public record information to foster the free flow of information. An across-the-board denial of public access cannot be jusified by a desire to exclude information from those members of the public who are pressing claims against the City in litigation or from those who might conceivably release the information to such persons. This Court has already stated that public records must be produced, irrespective of the fact that evidentiary privileges may be sacrificed, affording a private party some advantage in litigation against a public body. *Wait v. Florida Power & Light Co., supra,* at 420. This rule stands until the Legislature specifically amends the Public Records Act to the contrary. *Id.*

North Miami erroneously contends that enforcing Chapter 119 would destroy the meaning of Section 90.502. There are three reasons why this claim is wrong. First, Section 90.502 was drafted for *all* persons, not just entities subject to the Public Records Act. As previously stated, it is an evidentiary privilege which applies solely to judicial proceedings whereas only persons and entities subject to Chapter 119 are obligated to open records to public inspection. Second, Chapter 119 applies only to written records; it has no effect on oral communications.

As to such communications, the privilege remains (unless, as the Third District determined in *Neu, supra,* the communication occurs in *meetings* of public boards or commissions). Third, Chapter 119 would have no applicability to written communications unrelated to official business of an agency under the Act or records generated by a public official outside the scope of his official duties.

B. Legislative History Shows Section 90.502 Does Not Apply To Public Records Requests.

North Miami insists that failed legislative efforts are irrelevant to the construction of Section 90.502. The City argues "the failure to pass other such legislation proves either nothing or that the Legislature realized that the privilege was already secure under the Evidence Code" (Br. 29). If this were so, the Legislature would have had no reason in 1977 to pass H.B. 1107 (an amendment to the Sunshine Law to exempt attorney/client privileges which *Times Publishing Co. v. Williams,* 222 So.2d 470 (Fla. 2d DCA 1969) had held to be covered by that statute) one year after passage of the Evidence Code. Nor would it again be considering two new bills in this 1984 session. House Bill 687 and Senate Bill 70 (passed by the Senate Commerce Committee April 24, 1984) each provide for an amendment to Section 119.07(3), Florida Statutes, and would render exempt from public inspection documents prepared by attorneys employed or retained by a public agency exclusively for trial or administrative hearings or in anticipation of litigation or administrative hearings until the conclusion of the litigation or proceedings. As of May 1, 1984, both bills had been referred to respective legislative committees of the House and Senate. If Section 90.502 already provides the attorney/client exemption from Chapter 119 to cities and other public entities, why is

the Florida Legislature once again spending such a great deal of time entertaining passage of the very same exemption?

Moreover, the Legislature in prior sessions has repeatedly defeated attempts to create an attorney/client exemption to Chapter 119. In 1983 the Legislature considered and rejected a proposed attorney/client exemption offered by the Florida League of Cities (*amicus* in this case) and, in part, drafted by the North Miami City Attorney. Failed House Bill 687 in the 1982 Session, sponsored by Representative Virginia Rosen (N. Miami), attempted to create an exemption to Chapter 119 based upon the attorney/client privilege. Previously, during 1981, Representative Rosen introduced House Bill 785, which, in pertinent part, would have required parties engaged in litigation with public agencies to waive their attorney work-product privilege as a condition precedent to a request under Chapter 119. Similarly, during the 1980 Session, Representative L.J. Smith introduced House Bill 1180, which exempted public records "made or received in connection with current or pending litigation." House Bill 1180 § 1. The 1980 Legislature also saw two attorney/client privilege exemption measures introduced in the Senate, Senate Bill 1087 and Senate Bill 926. And earlier, in 1979, House Bill 1617 was introduced to prevent the Public Records Act from being used "to expand . . . the right and extent of discovery by any party in a criminal or civil action." House Bill 1617 § 1. All of these bills were defeated in the Florida Legislature.

In 1977, the Legislature did pass House Bill 1107, which created an exemption to the Sunshine Law for attorney/client communications, and which then Governor Reuben Askew vetoed. Recognizing the choice of the people of Florida to maximize public inspection of the

affairs of public bodies, even in a litigation context, Governor Askew, on June 29, 1977, vetoed the bill passed by the Legislature which would have permitted public entities to meet secretly with their attorneys. In acknowledging the liberal policy in favor of disclosure, the Governor wrote that public bodies are covered by the "Sunshine Law", and that "the people should not be excluded when litigation is discussed". He recognized that although it might appear that the "other side" enjoyed an "unfair advantage in litigation with public agencies because they are able to consult in private", the realities of modern pre-trial discovery make obsolete this perceived advantage. The Governor went on to reflect:

> I am not unappreciative of the fact that there is some merit to permitting public bodies to meet privately with their attorneys, but the potential for abuse outweighs the potential benefit.

Journal of the Florida House of Representatives, October 13, 1977, at 3. The Legislature declined to override the veto.

Governor Askew's veto is wholly consistent with two decisions in which this Court held, in the context of the Sunshine Law, that an attorney/client privilege could not create an exemption from the public's right of access to meetings between public attorneys and their clients conducted to discuss litigation. *Board of Public Instruction v. Doran,* 224 So.2d 693, 696-97 (Fla. 1969) (conferences between county board and its counsel to discuss litigation must be open to the public because of the liberal scope of the Sunshine Law); *City of Miami Beach v. Berns,* 245 So.2d 38, 40 (Fla. 1971) (all government meetings must be open and there is no exclusion for executive sessions "for the discussion of condemnation matters, personnel

matters, pending litigation or any other matter relating to city government"). "By promoting open government and citizen awareness of its workings, Chapter 119 and Section 286.011 enhance and preserve democratic processes." *Byron, Harless, Schaffer, Reid and Assoc. v. State ex rel. Schallenberg,* 360 So.2d 83, 97 (Fla. 1st DCA 1978), *quashed on other grounds, sub nom. Shevin v. Byron, Harless, Schaffer, Reid and Assoc.,* 379 So.2d 633 (Fla. 1980). *See also Krause v. Reno,* 366 So.2d 1244 (Fla. 3d DCA 1979), where the Third District adopted the same reasoning and stated "[Chapter 119 is t]he statute most analogous to the Sunshine Law." *Id.* at 1252. The Public Records Act and the Sunshine Law should be read *in pari materia* to require that the records of public attorneys' handling of public business be open to the public.

C. The Public Waived Any Attorney/Client Privilege By Enacting Chapter 119.

Even if the Evidence Code were held to apply to a public records inspection request and authorize its denial, the people of Florida have waived any attorney/client privilege for government officials in favor of public inspection of public records by their enactment of Chapter 119. The "client" here is the public. In *Times Publishing Co. v. Williams,* 222 So.2d 470 (Fla. 2d DCA 1969), the Second District explained it is the general public, not the public officials temporarily holding office, who are the privilege-holders vis-a-vis communications with attorneys acting on behalf of the public. The public has chosen to waive that privilege by enacting the Sunshine Law and Chapter 119. *Id.* at 475.

Under both statutes the public has determined that benefits flowing from public inspection of records of attorneys conducting the public's business far outweigh any

potential harm which might be precipitated by disclosure. *Id.* The people of Florida acting through the Legislature, not the transient bureaucrats of North Miami, have waived any confidentiality privileges of Florida public bodies in order to achieve open government and citizen awareness. *See Times Publishing Co. v. Williams, supra; State ex rel. Veale v. City of Boca Raton,* 353 So.2d 1194, 1197 n.1 (Fla. 4th DCA 1977), *cert. denied,* 360 So.2d 1247 (Fla. 1978). The Fourth District Court of Appeal applied the reasoning of *Times Publishing, supra,* in holding that Chapter 119 required disclosure of an investigative report prepared for a City Attorney since the latter could not "be deemed confidential by an application of the attorney/client-privilege", which had been legislatively waived by passage of Chapter 119 and the Sunshine Law. *State ex rel. Veale v. City of Boca Raton, supra,* at 1197 n.1. The reasoning of *Veale* was adopted by this Court construing Chapter 119 in *Wait v. Florida Power & Light Co., supra,* at 424.

D. The City Will Not Be Unfairly Disadvantaged In Litigation.

Asserted "unfairness" does not create an attorney/client exemption to the Public Records Act. *Wait v. Florida Power & Light, supra,* at 424-425. Still the City prevails on this Court to find that granting the public access to "privileged" documents and communications would unfairly disadvantage it in litigation. In fact, it has asserted such access would deny its "right" to effective assistance of counsel.

Contrary to the City's contention that private litigants enjoy an unfair advantage in being able to maintain private attorney/client correspondence, the City itself enjoys litigation advantages over most private litigants. For

example, North Miami has legal resources not typically available to *any* individual. Besides employing general counsel, the City may retain outside counsel, experts and utilize other expensive resources for the defense or prosecution of an action, resources beyond the financial means of most private individuals involved in litigation with the City. Because the City relies on the taxes of citizens to finance its operation, including the payment of legal fees and costs, the City may allocate from public monies whatever funds are deemed necessary for the maintenance of legal actions. Thus, North Miami can effectively outlast most of its adversaries, and in many cases its adversaries will be taxpaying citizens whose monies flow into the public coffers to finance, in part, the City's cases against them.

As a municipality created by the state, North Miami has limited tort liability by statute. No single plaintiff may recover in excess of $100,000 from the City and the City's maximum liability for aggregate damages arising out of any one incident is set at $200,000, regardless of actual damages absent the passage of a claim bill by the legislature which occurs very infrequently.[18] Section 768.28(5), Florida Statutes. Also by statute, plaintiffs cannot recover punitive damages or prejudgment interest from the City, Section 768.28(5), and plaintiffs' attorneys' fees are limited to 25% of recovery, Section 768.28(8), a sum far less than that recognized as the customary contingency fee, and a potential deterrent to the employment of particular counsel an individual might seek to retain.

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18. A recently completed legislative study of claim bills shows that only eight were passed in 1983. This number is typical, for example, only fourteen claim bills were passed in 1980 and nine were passed in 1981. INTRODUCTION OF CLAIM BILLS, POLICIES, PROCEDURES, AND INFORMATION 19-25, and Supplement 21-24, Judiciary Committee, Florida House of Representatives (1983) (Appendix).

Moreover, persons employed by or representing the City are protected against claims brought against them as a result of their connection with the City. Municipal officials, employees (including volunteer firefighters) and agents enjoy protection from personal liability incurred as a result of "any act, event, or omission of action in the scope of [their] employment or function . . ." Section 768.28(9), Florida Statutes. Such public employees and law enforcement officers may be provided legal counsel for the defense of civil actions brought against them personally in connection with their employment or function, *see* Sections 111.065, 111.07 and 768.28(9), Florida Statutes, and are granted qualified or absolute immunity from tort actions directed toward the performance of their governmental functions. *Rupp v. Bryant,* 417 So.2d 658 (Fla. 1982); *Paul v. Heritage Insurance Co.,* 363 So.2d 563 (Fla. 3d DCA 1978); *see also Rabideau v. State,* 409 So.2d 1045 (Fla. 1982). Public officials enjoy absolute or qualified immunity for their libels. *McNayr v. Kelly,* 184 So.2d 428 (Fla. 1966). And they enjoy at least qualified immunity from suits brought for their deprivation of constitutional rights. *See Imbler v. Pachtman,* 424 U.S. 409 (1976). Thus, no impediment to North Miami's ability to hire, retain and protect its employees is caused by an open records policy; on balance Florida municipalities are not terribly disadvantaged by not having the attorney/client privilege. Indeed, the Public Records Act can be viewed as an attempt to redress the unfair advantage municipalities otherwise enjoy in litigation against their constituents. In any event, open government may not be without cost. But the Legislature in enacting Chapters 286 and 119 has decided that its benefits outweigh its disadvantages.

III. DISCLOSURE OF THE RECORDS PURSUANT TO CHAPTER 119 NEITHER DENIES THE CITY ITS CONSTITUTIONAL RIGHTS NOR INTERFERES WITH SUPREME COURT JURISDICTION OVER THE BAR

North Miami offers three further reasons why Chapter 119 cannot compel it to disclose the Records: first, it claims City Council members possess a Fourteenth Amendment right to effective assistance of counsel; second, Council members would be deprived of their right to free speech; and third, the Act interferes with this Court's exclusive jurisdiction over the practice of law. Each of these arguments is wholly without merit.

A. Neither The City Nor Its Council Members Acting In Behalf Of The Public Enjoy Fourteenth Amendment Rights Vis-A-Vis The State.

By enacting the Public Records Law, the Legislature conclusively waived North Miami's privilege on behalf of the citizens of Florida. North Miami's argument that Council members have not waived their attorney/client privilege in the face of criminal prosecution is irrelevant and erroneous (Br. 30-31). Clearly, North Miami is not a "person" with Fourteenth Amendment rights vis-a-vis the state, but rather is a political subdivision of the State of Florida whose powers may be altered, amended, or abolished at the will of the Florida Legislature acting pursuant to Article VIII, Section 2 of the Florida Constitution. *Coleman v. Miller,* 307 U.S. 433, 441 (1939); *see also City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1253-55 (5th Cir. 1976).

North Miami, however, asserts that due process rights of municipalities are irrelevant, because the true client

here is not the public or the municipal corporation but each member of the City Council who may "hire", "fire" and "tell their attorney what to do and what not to do" (Br. 30). Petitioner attempts to divorce the official conduct of city officials from the abstract entity which is the "City". This does nothing to further advance its argument. Council members obviously consult the City Attorney on behalf of the citizens of the City. This is an elementary concept of representative government. Any acts performed by council members that are not in their official capacities as representatives of the public are *ultra vires* and will not give rise to official acts or public records. These are the kinds of deeds over which Petitioner expresses concern. Yet it is only for such acts and accusations of such acts that Council members conceivably may face personal liability and themselves become clients who *may* avail themselves of the personal attorney/client privilege contemplated by Section 90.502. *See also* Sections 111.065, 111.07, Florida Statutes (1983). And contrary to the City's claim, this instant case is not a criminal case at all but a declaratory judgment action. This Court is not now being asked to decide whether any individual City official should suffer criminal penalty for his *ultra vires* acts. Rather the Court has only to decide whether the Evidence Code creates an exemption to the Public Records Act.

B. The Public Records Act Safeguards The Right To Free Speech.

The City argues with great prolixity that the Public Records Act and its companion statute, the Sunshine Law (Chapter 286), by requiring public officials to meet in the open and make public their official written communications (presumably with their attorney), somehow de-

prives them of their First Amendment rights (Br. 35-46). This argument seems to rest on the outrageous assumption that open government laws have a chilling effect on public officials who will refrain from speaking at all if they are required to speak openly. The First Amendment protects freedom of speech, not the power to conduct public business in private.

C. Chapter 119 Does Not Interfere With This Court's Exclusive Jurisdiction Over The Bar.

North Miami also argues that Chapter 119 interferes with this Court's exclusive control over the practice of law in Florida by requiring public attorneys to disclose confidential communications of public clients in violation of the canons of ethics (Br. 34-35). It contends that disclosure of documents it claims to be privileged would be an unconstitutional usurpation of this Court's exclusive jurisdiction over the discipline of attorneys. The City's argument that the Legislature cannot put an attorney in a position where legislation will clearly conflict with the performance of his ethical duties under a canon is meaningless based on the law and rules of ethics in Florida today. No conflict exists because the relevant disciplinary rule, DR 4-101, mandates attorney disclosure of confidential client information in certain instances. That rule provides that a lawyer must reveal "[c]onfidences or secrets when *required by law* . . ." (emphasis added). DR 4-101(D)(1), Florida Code of Professional Responsibility (1983).[19]

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19. The letter to Tobias Simon from Florida Bar staff counsel was incorrect as a matter of law because it ignored these Disciplinary Rules in erroneously asserting that an attorney is "obligated to continue to assert the privilege on through the appellate process" (R. 50-52).

North Miami's counsel is thus clearly "required by law" (Chapter 119) to permit public inspection of the records in question. No independent ethical consideration exists which could preclude disclosure of these public records.

IV. THE COURT PROPERLY FOUND CHAPTER 624 TO BE WITHOUT EFFECT

North Miami finally contends the District Court erred by refusing to recognize the applicability of Section 624.311, Florida Statutes (1983), as a basis for maintaining the confidentiality of particular documents contained within the Records (Br. 46-48). There are three reasons why that Court's ruling was proper.

First, Section 624.311(3) became effective in October, 1982, one year after *The Miami Herald* first requested the Records and acquired vested rights to inspect the Records under Chapter 119. Since the Insurance Code specifically provides that its amendments are to be construed prospectively, absent specific and contrary legislative intent,[20] the statutory provision at issue—which language reflects no such contrary intent—cannot act retroactively to strip rights already vested. *Dade County School Board v. Miami Herald Publishing Co.*, 443 So.2d 268, 271 (Fla. 3d DCA 1983) ("the presumption is against retroactive application of a statute"); *Love v. Jacobson*, 390 So.2d 782 (Fla. 3d DCA 1980).

Secondly, North Miami waived its right to raise Section 624.311(3) as a basis for asserting the privilege by never raising it until long after the case had been re-

20. Section 624.21, Florida Statutes (1983).

manded by the District Court.[21] The trial court was not required to consider anything beyond those issues it was asked to decide on remand. *Airvac v. Ranger*, 330 So.2d 467 (Fla. 1976); *Clark v. English*, 319 So.2d 170 (Fla. 1st DCA 1975). The trial court thus entered its order based on issues already before it and used reasonable discretion in refusing to consider entirely new legal arguments.

Third, the words of Section 624.311(3) preclude its application in this case. The statute designates certain records in the custody of the Florida Department of Insurance as exempt from public inspection if those records concern "insurance claim negotiations of any state agency or political subdivision."[22] Nothing in Chapter 624 can be construed to render litigation files of North Miami (in the custody of North Miami) files of the Department of Insurance and, therefore, exempt from inspection. North Miami's status as a self-insurer (which was never raised in the trial court) renders the City the custodian of its own files and precludes City records from being considered the property of the Department of Insurance.

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21. North Miami did not include this statute, although already enacted, as a ground for decision in its first brief to the District Court or in any supplemental pleading prior to the Third District's issuing its mandate. Moreover, the City did not bring the statute to the trial court's attention in December, 1982 when that court conducted its *in camera* inspection on remand. Section 624.311(3) was never argued at all until March 2, 1983 (R. 185-195).

22. *See also* Section 624.05, Florida Statutes (1983) ("'Department' means the Department of Insurance in this state").

CONCLUSION

For the foregoing reasons the certified question should be answered in the negative, or the Petition summarily dismissed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Respondent The Miami Herald Publishing Company was served by mail this 11th day of May, 1984 upon:

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