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City of Bartow v. Public Employees Relations Commission, 341 So. 2d 1000 (Fla. 1st Dist. Ct. App. 1976)

Mary Eleanor Sweet

CASE COMMENTS

Labor Law—PUBLIC RECORDS ACT—DOCUMENTS ACCUMULATED DURING PRELIMINARY UNFAIR LABOR PRACTICE PROCEEDINGS NEED NOT BE DISCLOSED, UNDER PUBLIC RECORDS ACT, UNTIL SUCH TIME AS CHARGES ARE EITHER FORMALIZED OR DISMISSED—*City of Bartow v. Public Employees Relations Commission*, 341 So. 2d 1000 (Fla. 1st Dist. Ct. App. 1976)*

On January 19, 1976, Teamsters Local Union No. 444 of Bartow, Florida, filed a charge with the Florida Public Employees Relations Commission alleging that the City of Bartow had engaged in an unfair labor practice by withholding overtime and holiday pay from police department employees actively supporting the union.[1] A Commission staff member undertook a preliminary investigation of the allegations to determine whether there was substantial evidence indicating a prima facie violation of the applicable unfair labor practice provision.[2] The investigator compiled affidavits, as well as other documents and notes relating to the charge, from police department employees. Three months later, while the preliminary investigation was still in progress, counsel for the City asked the investigator to furnish copies of these documents, in accordance with the Public Records Act.[3] The investigator declined to produce the documents, stating in a letter that to do so would impede the Commission's investigative ability and violate assurances of confidentiality given to affiants. The City's attorney then directed a similar request to the chairman of the Commission, noting that the City needed the documents for evaluation and preparation of its defense to the pending charges, and assuring that no action was contemplated against any employees based on information in the documents. The matter

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1. Case No. 8H-CA-766-2008, Public Employees Relations Commission (PERC), filed January 19, 1976. FLA. STAT. § 447.501 (1977) bars public employers from engaging in unfair labor practices.

2. FLA. STAT. § 447.503(1) (1977) requires the Commission to make a preliminary investigation.

3. FLA. STAT. § 119.01 (1977) provides, generally, for free access to all public records by anyone desiring to examine them. The various exemptions from this provision are listed in FLA. STAT. § 119.07(2) (1977). During the 1977 legislative session, FLA. STAT. § 119.07(2)(b) (1975) was amended to exempt from disclosure certain educational records (ch. 77-60, 1977 Fla. Laws 85); certain records of the Division of Economic Development (ch. 77-75, 1977 Fla. Laws 128); certain classes of bank and trust company records (ch. 77-94, 1977 Fla. Laws 193); and specified credit union records (ch. 77-156, 1977 Fla. Laws 665).

was taken before the entire Commission, which denied access to the documents.[4] The City then petitioned the Supreme Court of Florida for issuance of an alternative writ of mandamus compelling disclosure of the documents. The court directed the Commission either to comply with the petition or to show cause why it should not comply,[5] and transferred the case to the First District Court of Appeal.[6] On December 21, 1976, the district court of appeal, with Judge Smith writing the opinion, denied the City's petition for a writ of mandamus, holding that while the documents involved were public records subject to inspection, it was appropriate for the Commission to postpone disclosure until the preliminary investigation was completed and the charges were either formalized or dismissed.[7]

The resolution of the legal question in this case—whether the Commission is required by the Public Records Act to disclose the affidavits and documents sought by the City—necessitates a consideration of very basic, yet competing, public policies. Generally a limited right to examine public records exists at common law,[8] and good public policy is said to require liberality in the right of inspection.[9] In some jurisdictions the right may be limited to persons who can demonstrate an "interest" in the materials sought to be examined;[10] in others, the individual's right to inspect will be weighed

4. The basis for the unanimous vote of the Commission was the need to protect employees from possible retaliation by the employer at the preliminary stage of the investigation, thus guaranteeing that the right of any employee to participate fully in the bargaining process would not be impaired. *See* Order Denying Respondent's Request for Production of Affidavits, Records, Papers, and Notes, PERC No. 8H-CA-766-2008 at 2-5, June 24, 1976. The right to organize and bargain collectively is secured by FLA. CONST. art. I, § 6, which provides in relevant part: "The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged."

5. City of Bartow v. Public Employees Relations Comm'n, No. 50,104 (Fla. October 1, 1976) (Alternative Writ of Mandamus).

6. "When the jurisdiction of an appellate court has been improvidently invoked, that court may . . . enter an order transferring it to the court having jurisdiction." FLA. APP. R. 2.1(5)(d).

7. City of Bartow v. Public Employees Relations Comm'n, 341 So. 2d 1000 (Fla. 1st Dist. Ct. App. 1976). The City's petition for rehearing was denied.

8. Gibson v. Peller, 181 N.E.2d 376 (Ill. App. 1962); Nowack v. Fuller, 219 N.W. 749 (Mich. 1928); Halloran v. McGrath, 67 P.2d 838 (Mont. 1937).

9. Gibson v. Peller, 181 N.E.2d at 378.

10. *See generally* Nowack v. Fuller, 219 N.W. at 750-55, which contains an interesting discussion of the early English common law doctrine of "right of inspection," effectively allowing an individual access to official documents only if he could demonstrate a need for the information in maintaining or defending an action. *See also* MacEwan v. Holm, 359 P.2d 413, 417 (Ore. 1961). Although a showing of such a specific interest is generally not required in American jurisdictions before inspection of records is allowed, in Holcombe v. Chandler, 200 So. 739, 744 (Ala. 1941), the Alabama Supreme Court held that a person seeking access may be properly required to show that he has some direct interest in the document sought and that inspection is for a legitimate purpose. Often an individual's status as a citizen or

against any countervailing public interest in nondisclosure.[11]

In Florida and most other jurisdictions, the right to inspect public records is governed by statute.[12] Section 119.01, Florida Statutes, provides that "[i]t is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person."[12.1] This is a sweeping declaration, appearing to bestow an absolute right on *any* person wishing to examine *any* public record at *any* time, without imposing limitations of any sort. While a review of succeeding sections of the Act demonstrates that limitations on the public's right of access do exist,[13] there can be little doubt that Florida's statute is a forceful affirmation of the right of the citizenry freely to examine public documents.

The original Public Records Act, enacted in 1909,[14] did not define

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taxpayer is sufficient to show his "interest" in inspection. *See, e.g.*, Gibson v. Peller, 181 N.E.2d 376 (Ill. App. 1962); Nowack v. Fuller, 219 N.W. 749 (Mich. 1928); Halloran v. McGrath, 67 P.2d 838 (Mont. 1937).

11. *See, e.g.*, Mathews v. Pyle, 251 P.2d 893 (Ariz. 1952).

12. Forty-six states currently have public records acts in force: ALA. CODE tit. 41, § 145 (1958); ALASKA STAT. §§ 09.25.100-.120 (1962); ARIZ. REV. STAT. ANN. § 39-121 (1956 & Supp. 1976-77); ARK. STAT. ANN. § 12-2804 (1968); CAL. GOV'T CODE § 6253 (West Supp. 1976); COLO. REV. STAT. ANN. §§ 24-72-201 to -206 (1973); CONN. GEN. STAT. ANN. § 1-19 (West Supp. 1976); FLA. STAT. §§ 119.01-.12 (1977); GA. CODE ANN. §§ 40-2701 to -2703 (1975); HAW. REV. STAT. §§ 92-21, -50 to -52 (Supp. 1975); IDAHO CODE § 9-301 (1947) and §§ 59-1009, -1011 (1976); ILL. ANN. STAT. ch. 116, §§ 43.4-.7, .101-.113 (Smith-Hurd Supp. 1977); IND. CODE ANN. § 5-14-1-1 to -6 (1974); IOWA CODE ANN. § 68A.1-.9 (West 1973 & Supp. 1977); KAN. STAT. ANN. §§ 45-201 to -203 (1973 & Supp. 1976); KY. REV. STAT. § 61.870-.884 (Supp. 1976); LA. REV. STAT. ANN. §§ 44:1-:9, :31-:39 (West 1950 & Supp. 1977); ME. REV. STAT. ANN. tit. 1, §§ 401-410 (Supp. 1976-77); MD. ANN. CODE art. 76A, §§ 1-5 (1975 & Supp. 1976); MASS. GEN. LAWS ANN. ch. 66, § 10 (West Supp. 1977-78); MICH. COMP. LAWS ANN. § 750.492 (Supp. 1977-78); MINN. STAT. ANN. § 15.17 (West 1977); MO. ANN. STAT. §§ 109.180-.190 (Vernon 1966); MONT. REV. CODES ANN. § 59-512 (1970); NEB. REV. STAT. § 84-712 to -712.03 (1976); NEV. REV. STAT. § 239.010 (1973); N.H. REV. STAT. ANN. § 91-A:4 to :8 (Supp. 1975); N.J. STAT. ANN. § 47:1A-1 to -4 (West Supp. 1977-78); N.M. STAT. ANN. § 71-5-1 to -3 (1961 & Supp. 1975); N.Y. PUB. OFF. LAW §§ 85-89 (McKinney Supp. 1976-1977); N.C. GEN. STAT. § 132-1 to -9 (1974 & Supp. 1975); N.D. CENT. CODE § 44-04-18 (Supp. 1977); OHIO REV. CODE ANN. § 149.43 (Page 1969); OKLA. STAT. ANN. tit. 51, § 24 (West 1962); OR. REV. STAT. § 192.410 to .500 (1975); 65 PA. CONS. STAT. ANN. § 66.1 to .4 (Purdon 1959 & Supp. 1977-78); S.C. CODE §§ 30-3-20 to -50 (1976 & Supp. 1977); S.D. COMPILED LAWS ANN. §§ 1-27-1 to -3 (1974); TENN. CODE ANN. §§ 15-304 to -308 (1973 & Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1976-77); UTAH CODE ANN. §§ 78-26-1 to -3 (1977); VT. STAT. ANN. tit. 1, §§ 315-320 (1977); VA. CODE §§ 2.1-340 to -342, -345 to -346.1 (1973 & Supp. 1977); WASH. REV. CODE ANN. §§ 42.17.250-.340 (Supp. 1976); WIS. STAT. ANN. §§ 16.61, 19.21 (West 1975 & Supp. 1977-78); WYO. STAT. §§ 9-692.1 to .5 (Supp. 1975). For analysis of the public records statutes of selected other states, *see generally* Brown, *The Right to Inspect Public Records in Ohio*, 37 OHIO ST. L.J. 518 (1976); Guy & McDonald, *Government in the Sunshine: The Status of Open Meetings and Open Records Laws in North Dakota*, 53 N.D. L. REV. 51 (1976); 1975 ARIZ. ST. L.J. 111; 64 KY. L.J. 165 (1975-76); 53 ORE. L. REV. 354 (1974); 7 PAC. L.J. 105 (1976); 29 S.W.L.J. 431 (1975).

12.1. (1977).

13. *See* FLA. STAT. § 119.07 (1977).

14. Ch. 5942, 1909 Fla. Laws 132.

the term "public record." But the Florida Supreme Court subsequently held that only those records "required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done" should be deemed "public" for purposes of the statute.[15] This definition was somewhat restrictive of a citizen's right of inspection, since it could effectively operate to exempt from disclosure unofficial working papers, as well as materials which were in the possession of a government agency but retention of which was not mandated by law. The current definition of "public records" is somewhat different: " 'Public records' means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."[16] The addition of the phrase, "or in connection with the transaction of official business by any agency," was a significant broadening of the previous judicially formulated definition of a public record,[17] bringing the actual operation of the statute in line with the declared legislative policy.[18]

The Public Records Act specifically exempts three categories of documents from disclosure.[19] The first somewhat generalized exception provides that "[a]ll public records which presently are provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law," are immune from disclosure.[20] This wording has been interpreted to include not only records exempted from disclosure by statute, but also documents deemed confidential by common law[21] and public

15. Amos v. Gunn, 94 So. 615, 634 (Fla. 1922).

16. FLA. STAT. § 119.011(1) (1977).

17. 1974 FLA. ATT'Y GEN. OP. 074-215, at 2.

18. It should be noted that in 1975 the legislature amended FLA. STAT. § 119.011(2) to define "agency" to include "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law *and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.*" Ch. 75-225, 1975 Fla. Laws 637 (emphasis added). After this revision, even a private person performing contract services for an agency would have to make his records available for inspection. *Compare* Tindel v. Sharp, 300 So. 2d 750 (Fla. 1st Dist. Ct. App. 1974), *cert. denied*, 310 So. 2d 745 (Fla. 1975). In this case, decided before the 1975 revision, the Florida First District Court of Appeal held that a consultant employed by the Duval County School Board to seek candidates for a school superintendent position was not an "agency" within the contemplation of the Act, and thus his files were not public records subject to disclosure.

19. FLA. STAT. § 119.07(2)(a)-(c) (1977).

20. *Id.* § 119.07(2)(a). Examples of such statutory exemptions are found at *id.* §§ 231.29(3) (assessment files of teaching personnel) and 447.605(3) (negotiations work product).

21. *See* 1972 FLA. ATT'Y GEN. OP. 072-168 and 1973 FLA. ATT'Y GEN. OP. 073-166 for

policy.[22] Next, the Act exempts from disclosure those public records referred to in certain specifically enumerated sections of the Florida Statutes.[23] Finally, the Act protects the confidentiality of the questions and answers of licensure, certification, or employment examinations administered by governmental agencies.[24] While new exceptions continue to be carved out,[25] the limited statutory exemptions in the Act, along with a firm legislative policy of openness in governmental proceedings,[26] combine to create a strong implication that additional exclusions were not intended and should be avoided.[27]

In 1974 the legislature enacted part II of chapter 447, Florida Statutes,[28] providing statutory implementation of Florida public employees' constitutional right to organize and bargain collectively.[29] Although meaningful collective bargaining ordinarily takes place in closed-door sessions,[30] the Florida Legislature, in keeping

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discussion of exemption by common law (investigatory police records). In Florida, general common law is in force by statute. FLA. STAT. § 2.01 (1977).

22. For good discussions of public policy exemptions from disclosure, see Lee v. Beach Publishing Co., 173 So. 440 (Fla. 1937); Wisher v. News-Press Publishing Co., 310 So. 2d 345 (Fla. 2d Dist. Ct. App. 1975). The latter case dealt with the question of whether the personnel files of government employees are open to inspection under the Public Records Act. The court held that public policy clearly dictates that these records should be deemed confidential and thus not open to public inspection by the citizens of the state. The court noted that "the right to know must occasionally be circumscribed when the potential damages far outweigh the possible benefits." *Id.* at 348.

23. FLA. STAT. § 119.07(2)(b) (1977) exempts from disclosure: records of sexual offenses; records of adoption proceedings; applications for bank charters and investigations; results of domestic insurer examinations; intangible and estate tax returns; certain educational records; credit union records; documents on file with the Division of Economic Development; and specific bank and trust company records on file with the Department of Banking and Finance. *See* note 3 *supra.*

24. FLA. STAT. § 119.07(2)(c) (1977).

25. *See* note 3 *supra.*

26. *See* FLA. STAT. § 286.011(1) (1977). This section—"Government in the Sunshine"—provides:

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

27. The Florida attorney general, for instance, in 1974 FLA. ATT'Y GEN. OP. 074-215, at 3, noted that in Copeland v. Cartwright, 38 Fla. Supp. 6 (Cir. Ct. Broward County 1972), the circuit court had expressly rejected the "work product" exemption from disclosure as unduly infringing upon the public's right of access. In agreeing with the reasoning in that decision, the attorney general retreated from several previous opinions insofar as they had declared a valid exception for preliminary or work product materials.

28. Ch. 74-100, 1974 Fla. Laws 134.

29. FLA. CONST. art. I, § 6.

30. *See* Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972). In this case, decided before passage of Florida's public employee collective bargaining act, the supreme court affirmed a

with the state's commitment to openness in government, expressly provided that formal negotiating sessions would be open to the public, thus protecting the public's right to observe a significant governmental activity. At the same time, the Act allowed the public employer to meet with its chief negotiator in private strategy sessions,[31] and specifically exempted the negotiations work product materials prepared by the public employer from disclosure under the Public Records Act.[32] Thus, this portion of the public employees bargaining act capsulizes the struggle to balance the right of public access to all the activities of government against the need to protect the public interest in the sensitive areas of the public employee collective bargaining process. The case under discussion here arose in just such a context of competing public policies.

The single issue presented in the *Bartow* case is whether the Public Records Act requires the Public Employees Relations Commission to produce for inspection, upon request by an interested party and before a formal charge is filed, affidavits and other documents secured by a Commission investigator in the process of investigating an unfair labor practice charge. The First District Court of Appeal disposed summarily of the basic questions—it found that the Commission was a state agency created by statute; that the investigator was the agent of the Commission, performing a statutory function;[33]

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lower court holding that a school board representative could engage in preliminary or tentative contract negotiations with teachers' representatives in private meetings without violating the "sunshine law." The court noted the presence of *"impressive, uncontroverted testimony by respectable national authorities in the field,* that meaningful collective bargaining in the circumstances here would be destroyed if full publicity were accorded at each step of the negotiations." *Id.* at 426 (emphasis added). *See also* Recchie, *Government in the Sunshine: Open Meeting Legislation in Ohio,* 37 OHIO ST. L.J. 497, 511 (1976), in which the author observes that "[m]eaningful collective bargaining could be seriously hampered if each step of the negotiations had to be taken publicly," and notes that Ohio's open meetings act allows the public body to hold an executive session in order to prepare for, conduct, or review bargaining sessions with public employees. In 1975 ARIZ. ST. L.J. 111, 129 (1975), a discussion of public access to meetings and documents in Arizona, the commentator noted that "[c]ollective bargaining is another situation where there is a recognized need for secrecy." Under Maine's public access statutes, bargaining materials are specifically exempted from disclosure and executive sessions are allowed for the purpose of conducting contract negotiations, unless both parties agree to bargain in public. ME. REV. STAT. ANN. tit. 1, §§ 401-410 (Supp. 1976-77). New York similarly specifies that public bodies may conduct collective bargaining in executive sessions. N.Y. PUB. OFF. LAW §§ 90-101 (Supp. 1976-77).

31. *See generally* Bassett v. Braddock, 262 So. 2d at 428. In *Bassett,* the Florida Supreme Court declared that such private strategy sessions were necessary if the public employer was not to be at a great disadvantage in actual contract negotiations.

32. FLA. STAT. § 447.605(1)-(3) (1977).

33. FLA. STAT. § 447.503(1) (1977) provides that the Commission or its agent "shall conduct a preliminary investigation to determine if there is substantial evidence indicating a prima facie violation of the applicable unfair labor practice provision."

and that the documents thus "made or received pursuant to law"[34] were encompassed by the Public Records Act.[35] The City contended that, as public records, the documents were subject to examination by anyone at reasonable times and under reasonable conditions.[36] The Commission argued that disclosure of the records would jeopardize the ongoing investigation and create a substantial risk of retaliatory or coercive measures by the employer against the employees. Thus, it urged that such records should be exempt from inspection on public policy grounds.[37]

The court had little Florida case law to provide guidance in this area. Public employee bargaining, as well as litigation under the Public Employees Relations Act, was new to the state. However, a significant case concerning the Commission's statutory duty to permit examination of union authorization cards signed by public employees seeking representation—*School Board of Marion County v. Public Employees Relations Commission*—had been decided by the Florida Supreme Court in June, 1976.[38] In that case a union had filed a petition with the Commission seeking certification as the bargaining agent for certain employees of the School Board of Marion County. Pursuant to Florida law,[39] signed authorization cards representing at least thirty percent of the proposed bargaining unit accompanied the petition. The school board sought access to these cards under the Public Records Act and additionally alleged an absolute right of access under section 447.307(2), Florida Statutes.[40] The Commission denied inspection on grounds of public policy, arguing that unlimited access to authorization cards is not permitted in other jurisdictions or under the National Labor Relations Act, and that to allow it would have a "chilling" effect on the exercise of bargaining rights by public employees.[41] In an opinion written by Justice England, the Florida Supreme Court rejected the Commission's assertion that the cards were absolutely exempt from disclosure absent factual proof before the Commission of collusion or

34. FLA. STAT. § 119.011(1) (1977).

35. 341 So. 2d at 1002.

36. *Id.* at 1001.

37. *Id.* at 1002.

38. School Bd. of Marion County v. Public Employees Relations Comm'n, 334 So. 2d 582 (Fla. 1976).

39. FLA. STAT. § 447.307(2) (1977).

40. The school board based its contention on the following statutory language: "Any employee, employer, or employee organization having sufficient reason to believe any of the employee signatures were obtained by collusion, coercion, intimidation, or misrepresentation, or are otherwise invalid, shall be given a reasonable opportunity to verify and challenge the signatures appearing on the petition." *Id.* § 447.307(2).

41. 334 So. 2d at 583 n.3.

other specified grounds for review. Rather, the court held that if the employer alleges one of the statutory grounds for review of the cards, then access to them must be granted. In the absence of such an allegation, the Commission may properly deny the right to inspect. The decision resulted in denial of access since the School Board had merely made a general request to examine the cards and had not charged that they were insufficient on the basis of collusion, intimidation, coercion, or misrepresentation. The court specifically noted that the statute calls for a hearing for purposes of employer challenge if the petition, after Commission investigation, appears sufficient on its face,[42] and observed that "the right of challenge would be meaningless if an employer who alleges one of the statutory grounds for invalidation is denied access until the hearing is held."[43]

The *Marion* decision was based on statutory interpretation of the bargaining law itself. However, Justice England observed in a footnote that because the bargaining statute provides for access to the cards only on a limited basis and to a narrowly defined class of interested persons, it may actually operate as a new exemption to the Public Records Act.[44]

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42. FLA. STAT. § 447.307(3)(a) (1977).

43. 334 So. 2d at 584.

44. *Id.* at 584-85 n.10. The bargaining statute itself expressly provides for two exceptions from public inspection under the Public Records Act: the work products developed by the employer in preparation for and during negotiations need not be disclosed, FLA. STAT. § 447.605(3) (1977), and the draft orders developed by PERC in preparation for or preliminary to the issuance of a final written order are exempt from disclosure under the Act, *id.* § 447.205(10). However, as Justice England observed, the plain language of FLA. STAT. § 447.307(2) (1977) would seem to restrict access to the employee authorization cards to interested parties only, in the context of a verification proceeding. It follows from that interpretation that the general public would be denied access to the authorization petitions, thus creating a further exception to the Public Records Act.

See also United Faculty of Florida v. Branson, 350 So. 2d 489 (Fla. 1st Dist. Ct. App. 1977) (Smith, J.). In *Branson* the court was required to decide, *inter alia*, whether professors seeking access to faculty signature cards were improperly denied inspection under the bargaining statute and the Public Records Act. Finding that the demand of the professors was untimely, and thus that it was proper for the Commission to deny access, the court also commented on the reasoning in *Marion:*

> [T]he Supreme Court held . . . that the Marion County School Board had not satisfied formal requirements of Section 447.307(2) for inspection of signature cards, and so denied the School Board's request for inspection without prejudice to renewal in proper form. The Court denied the Marion County School Board's claim to free access under Chapter 119, saying "[t]o this extent section 447.307(2) *may* actually operate as an exemption to section 119.01 as recognized in section 119.07(2)(a)." (emphasis added) While the Court's language was tentative, its denial of relief under Chapter 119 was unequivocal. Thus, signature cards discoverable under PERC restrictions are exempt from the free access provided by the Public Records Law, Chapter 119.

Id. at 492 (footnote omitted).

Although the *Bartow* case involved a different portion of the bargaining statute, the unfair labor practice section,[45] the court was obviously influenced strongly by the reasoning in *Marion*. It rejected out of hand a blanket exemption for sensitive investigatory materials on the basis of confidentiality and public policy, noting, as did Justice England in *Marion*, that any abuses flowing from the employer's access to the records could themselves be remedied under the unfair labor practice portion of the Act.[46] The district court of appeal also adopted reasoning similar to that of the supreme court regarding the statutory guarantee of an appeal by the charging party if the charge is dismissed.[47] The court of appeal interpreted the statute to mean that a charging party whose charge was dropped "must have access to the investigatory materials in order to present a meaningful appeal . . . ."[48] This was similar to the supreme court's characterization in *Marion* of an employer's right to challenge the validity of signatures on authorization cards at a hearing as "meaningless if an employer who alleges one of the statutory grounds for invalidation is denied access until the hearing is held."[49] The cases seem firmly in agreement, then, that where a hearing or an appeals procedure statutorily provides for review of the sufficiency of either a representation petition or an unfair labor practice charge, the parties must have full access to relevant documents in advance of the hearing if the procedure is to have any real value.

But the *Bartow* court departed from the *Marion* approach and returned to the Public Records Act as the basis of its decision.[50] The court noted that there is a need to release investigative materials when a disappointed charging party wishes to appeal the dismissal of an unfair labor practice charge, or after a formal charge is filed, based on evidence of a prima facie violation. Under these circumstances, the court said, there is no reason not to release such materi-

45. FLA. STAT. § 447.503 (1977).

46. 341 So. 2d at 1003, *citing* School Bd. of Marion County v. Public Employees Relations Comm'n, 334 So. 2d at 585.

47. FLA. STAT. § 447.503(3) (1977) states: "A charging party whose charge is thus dismissed may appeal to the commission, and, if the commission finds substantial evidence of a meritorious charge, that charge shall be reinstated . . . ."

48. 341 So. 2d at 1002.

49. 334 So. 2d at 584.

50. The *Marion* decision was based on interpretation of the bargaining statute. The rationale employed did not require the *Marion* court to determine whether the statute had, in effect, amended the public records law by creating a new exemption. Justice England raised the question in a footnote, but left the issue unanswered since such a finding was not required for resolution of the case. 334 So. 2d at 584-85 n.10. *See also* note 42 *supra*; United Faculty of Florida v. Branson, 350 So. 2d 489 (Fla. 1st Dist. Ct. App. 1977) (signature cards discoverable under PERC restrictions exempt from *free* access provided by public records act).

als.[51] It might be assumed that the court, seemingly proceeding in the direction of absolute disclosure, would open to full scrutiny all records accumulated by the Commission agent in the course of the preliminary unfair labor practice investigation. But this was not the result.

The court instead looked to that language of the Public Records Act which provided that public records should be made available to anyone desiring to see them "at reasonable times, under reasonable conditions, and under supervision by the custodian of the records."[52] The court concluded that this wording was sufficient to protect the investigator from work interruptions by individuals wishing to inspect every note or affidavit contemporaneous with its making. The court pointed out that this preliminary investigatory process was nonadversary and should not be unduly compromised or encumbered by demands for disclosure by either party. The court held:

> To preserve the integrity of the sensitive investigatory process, while giving full effect to statutory policy favoring disclosure, it is appropriate for the Commission and its investigating agent to postpone public disclosure of investigatory materials for *a reasonable time* until the Commission or investigating agent has either dismissed the charge as groundless or has determined there is substantial evidence of a prima facie violation.[53]

The court explained that at the point indicated for disclosure, the proceeding would have become an adversary one and release of the information would not threaten the completed investigation. Further, remedies were available under statute[54] if an investigation was unreasonably delayed and disclosure of public records was thereby thwarted.[55] By invoking the statutory limitation of "reasonableness" on a party's right to inspect certain public records, the court found a method of protecting a sensitive area of the public employee

51. 341 So. 2d at 1002-03.

52. FLA. STAT. § 119.07(1) (1977).

53. 341 So. 2d at 1003 (emphasis added).

54. FLA. STAT. § 120.68 (1977) (Florida Administrative Procedure Act). The Act provides that a party who is adversely affected by final agency action is entitled to judicial review of that decision.

55. In the *Bartow* court's hypothetical, if a preliminary investigation were extended over an unreasonable length of time, without disclosure of the investigative documents, the party seeking access to the materials would apply to the Commission for their disclosure. If the Commission should refuse to divulge the records, its action would be reviewable by the appropriate district court of appeal upon petition by the aggrieved party. *See* 341 So. 2d at 1003; FLA. STAT. § 120.68 (1977).

bargaining process, while at the same time preserving the ultimate right of the parties and the public to inspect official documents.

Whether governed by statutory or common-law rules, the right of access to public documents is generally subject to reasonable rules and regulations as to when, where, and how the inspection may be made in order to avoid undue disruption of the functioning of the office in which the records are maintained.[56] These limitations were recognized in an early Florida case, *Davis v. McMillan*,[57] which held that the citizen's statutory right of access to records must be exercised in a reasonable and orderly manner, at reasonable hours and times, and with due regard to the official rights of the custodian of the records. However, the legislature did not incorporate "at reasonable times" into the statutory language until 1967, and did not include the phrase "under reasonable conditions" until the 1975 amendments.[58] Cases which have dealt with the "reasonableness" of restrictions on access have focused, almost exclusively, on the right of the custodian to allow access to public documents only during reasonable hours—generally the regular office hours of the agency[59]—and only under those conditions which will insure the physical safety of the records and prevent disruption of the agency.[60] It follows that the concept of reasonableness as a qualification on a person's right of access to public documents is basically procedural, designed both to prevent public officials from arbitrarily restricting times and facilities for inspection, and to deter citizens from destroying records or unnecessarily interfering with the regular duties of the public agency.

The *Bartow* court, however, has given statutory "reasonableness" restrictions a substantive, rather than procedural, cast.[61] In this

56. *See, e.g.*, Holcombe v. Chandler, 200 So. 739 (Ala. 1941); Bruce v. Gregory, 423 P.2d 193 (Cal. 1967); Pressman v. Elgin, 50 A.2d 560 (Md. 1947); Halloran v. McGrath, 67 P.2d 838 (Mont. 1937). Of the forty-six states having public records statutes (*see* note 12 *supra*), twenty-four statutes employ the terms "reasonable" or "proper" in qualifying the times at which records are accessible, or the rules by which the records custodian may limit inspection. Eighteen statutes simply provide that records are accessible during regular office hours. Four statutes provide a general, unqualified grant of access.

57. 38 So. 666 (Fla. 1905).

58. Ch. 67-125, 1967 Fla. Laws 254; ch. 75-225, 1975 Fla. Laws 637.

59. *E.g.*, Upton v. Catlin, 31 P. 172 (Colo. 1892); Davis v. McMillan, 38 So. 666 (Fla. 1905); Pressman v. Elgin, 50 A.2d 560 (Md. 1947).

60. Bruce v. Gregory, 423 P.2d 193, 199 (Cal. 1967), held that the statutory right of inspection is "subject to an implied rule of reason," and that the records custodian must act to prevent "chaos" in the record archives. Marsh v. Sanders, 34 So. 752, 755 (La. 1903), held that a sheriff could make reasonable rules governing records inspection to protect his office from "vexatious" interference.

61. *Compare* Butcher v. Civil Serv. Comm'n, 61 A.2d 367 (Pa. Super. Ct. 1948), a case

decision, the "reasonable times" language is used to prevent disclosure of the documents until such time as the unfair labor practice proceeding is dismissed or becomes adversary in nature,[62] rather than to compel inspection during the regular office hours of the Commission or its investigator. The court did not cite any decisions, from either Florida or other jurisdictions, interpreting the concept of "reasonableness" as a positive limitation on the citizen's right to inspect public records open for inspection "at all times."[63] It is also noteworthy that neither party's brief mentioned the "reasonable times, reasonable conditions" section of the statute as being of any interest or significance.

In 1972, in *Copeland v. Cartwright,*[64] the Broward County Circuit Court held in a sweeping opinion that there was no general "work product" exemption in Florida which would preclude a petitioner from examining preliminary site plan reviews prepared by a municipal planning technician. The court expressly rejected the reasoning in prior Florida Attorney General Opinions upholding a work product exemption,[65] considering it too restrictive of the public's right to know. Instead, the court embraced a broad definition of public records as "all writings which are in the custody of public servants."[66] In a later opinion on the validity of the "work product" exception to the Public Records Act,[67] the attorney general recognized that Florida's statute, unlike the Federal Freedom of Information Act (FOIA),[68] granted no specific exemption for work papers. Acknowledging that statutes providing access to public records should be liberally construed in favor of inspection,[69] and that exemptions from public examination should be narrow,[70] the attorney general applauded the reasoning and result in *Copeland* and receded from his previous opinions recognizing a general work product

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which employed similar reasoning to that of *Bartow.* In *Butcher,* the court held that where the right to inspect old civil service examinations was subject to reasonable regulations as to the time of inspection, an applicant for the examination was not entitled to request the previous examination copy on the eve of the test.

62. 341 So. 2d at 1003.

63. *Id.* n.4.

64. 38 Fla. Supp. 6 (Cir. Ct. Broward County 1972).

65. 1961 FLA. ATT'Y GEN. OP. 061-102, 1966 FLA. ATT'Y GEN. OP. 066-88, 1971 FLA. ATT'Y GEN. OP. 071-376, and 1972 FLA. ATT'Y GEN. OP. 072-323 all recognized exceptions to the Public Records Act for preliminary or work product materials.

66. 38 Fla. Supp. at 12.

67. 1974 FLA. ATT'Y GEN. OP. 074-215.

68. 5 U.S.C. § 552(b)(5) (1970).

69. *Citing* Gibson v. Peller, 181 N.E.2d 376 (Ill. App. 1962).

70. *Citing* Caswell v. Manhattan Fire & Marine Ins. Co., 399 F.2d 417 (5th Cir. 1968).

exception.[71] In *Gannett Co. v. Goldtrap,*[72] a mandamus proceeding brought to compel disclosure of a written appraisal in connection with negotiations for a landfill site, the Second District Court of Appeal held that the appraisal report was a public record neither exempted from inspection by statute nor confidential under common law; thus it had to be made available for public inspection, even if this was harmful to ongoing negotiations. At the time of the *Bartow* decision, then, Florida law did not recognize a general "work product" exception to the Public Records Act.

The *Bartow* court distinguished the *Gannett* holding, upon which the City relied heavily, by stating that it would only have been controlling if the *Gannett* court had ordered the disclosure of the appraiser's field notes, computations, and records of interviews with property owners, rather than his finished product. Thus, the *Bartow* decision has revived the issue of whether a valid "work product" exception to the Public Records Act exists, the question which *Gannett* had previously appeared to answer in the negative.

The *Bartow* court exhibited a certain ambiguity in its attitude toward the need for confidentiality in investigatory proceedings. Under Florida law some records "must be kept secret and free from common inspection" on public policy grounds.[73] These records have been deemed to include information obtained from investigations of criminal matters by police and state attorneys.[74] The First District Court of Appeal declared that the investigation of an unfair labor practice charge was not analogous to such criminal investigations, relying on the supreme court decision in *Marion* and the presence of a statutory remedy for abuse of access within the bargaining statute. Yet the language of the entire *Bartow* opinion is permeated by an awareness of the sensitive nature of the investigation and a recognition of the need to protect the investigatory process from compromise or undue interference by interested parties. By invoking the "reasonable times" limitation on disclosure, the court shielded the preliminary investigation from view as effectively as if the Public Records Act contained a specific statutory exemption for preliminary investigatory files compiled for enforcement of statutory provisions relating to unfair labor practices.[75]

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71. 1974 FLA. ATT'Y GEN. OP. 074-215 at 3.

72. 302 So. 2d 174 (Fla. 2d Dist. Ct. App. 1974).

73. Lee v. Beach Publishing Co., 173 So. 440, 442 (Fla. 1937).

74. 1976 FLA. ATT'Y GEN. OP. 076-156; 1973 FLA. ATT'Y GEN. OP. 073-166; 1972 FLA. ATT'Y GEN. OP. 072-168.

75. Several states have provided a general statutory exemption from disclosure for investigatory records compiled for enforcement proceedings. *E.g.*, KY. REV. STAT. § 61.878(f) (Supp. 1976); MD. ANN. CODE art. 76A, § 3 (1975); N.J. STAT. ANN. § 1A-3 (West Supp. 1977-78);

The result in *Bartow* is consistent with a recent, similar case cited in the Commission brief involving the National Labor Relations Board (NLRB). In *Title Guarantee Co. v. NLRB,*[76] employee statements obtained by the NLRB prior to a hearing on an unfair labor practice charge were deemed exempt from disclosure. The circuit court found that such documents fell within the Freedom of Information Act (FOIA) exemption for investigatory records compiled for law enforcement purposes, since production of such records could compromise the law enforcement proceedings.[77] The Second Circuit expressly construed the exemption as narrowly as possible, noting that the thrust of the Federal FOIA has been to provide for disclosure in the absence of an established exemption, but also expressing its conviction that if employee statements were prematurely disclosed in such a factual setting, interference with the investigation could result. The court said, "Absent a clearer indication of contrary congressional intent, we are not prepared to hold that disclosure may be required under the FOIA in connection with an ongoing unfair labor practice enforcement proceeding."[78]

Although Judge Smith did not cite the *Title Guarantee* case in his *Bartow* opinion, and although *Bartow* is based on a different disclosure statute from the statute construed in *Title Guarantee,* the result is the same. Both cases protect similar records from disclosure; even the language and thrust of the opinions are similar.[79] Such similarity hints strongly that the NLRB decisions may well influence the thinking and the decisions of Florida courts in the area of labor relations.

What, then, is the effect of this decision? Are the holding and the reasoning in *Bartow* destined to encourage, on the basis of "reasonableness," widespread limitations on public access to records? It is possible, if not likely, that some public entities interested in preserving their operational privacy may attempt to invoke the rationale of *Bartow.* But this case can and should properly be

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N.Y. PUB. OFF. LAW § 88 (McKinney Supp. 1976-77); OR. REV. STAT. § 192.500(h) (1975). The Kentucky statute prohibits disclosure only if the disclosure would harm the agency law enforcement effort, and further provides that the files shall be open after the enforcement proceedings are concluded, or after a decision is made to take no action.

76. 534 F.2d 484 (2d Cir. 1976).

77. The FOIA contains a specific exemption for investigatory records compiled for law enforcement purposes, to the extent that disclosure would prejudice the enforcement proceeding. 5 U.S.C. § 552(b)(7) (1970).

78. 534 F.2d at 491.

79. Judge Smith reasoned: "Nothing short of an explicit statutory imperative should require the Commission's preliminary investigation to be so compromised. The Public Records Act does not mandate such intrusions into the Commission's preliminary investigation . . . ." 341 So. 2d at 1003.

limited to its particular factual situation in the public employee bargaining context. The state is committed to a public policy of openness and governmental accessibility, and it is unlikely that the courts will lightly turn away from this tradition by extending the rule in *Bartow* to other areas.

The *Bartow* court was caught in the crossfire between competing public policies of great strength: a commitment to protect the rights of public employees to organize and bargain collectively guaranteed by the Florida Constitution and an obligation to uphold the public's right of access to all records in the possession of public officials and agencies. The court succeeded in *Bartow* in balancing these policies judiciously. The special problems and considerations inherent in the public employee collective bargaining process may well require future weighing and balancing efforts in the courts and the legislature, both in the context of the Public Records Act and in other statutory areas.

MARY ELEANOR SWEET