



The Florida Senate

Interim Project Report 2002-135

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Committee on Governmental Oversight and Productivity

Senator Rudy Garcia, Chairman

MAKING THE MULTIPLE EXEMPTIONS TO FLORIDA PUBLIC RECORDS LAWS EASIER TO LOCATE

SUMMARY

This interim project is expected to be a multi-year project. In the initial phase of the project, a review of ch. 119, F.S., the Public Records Act, was performed. The purpose of the review was to identify redundant provisions, to group similar topics together, and to propose a committee bill to streamline and organize the chapter in a more logical fashion.

The Florida Legislature first enacted a law guaranteeing access to records of public agencies in 1909. More comprehensive legislation was adopted in 1967 with the enactment of ch. 119, F.S. Over the ensuing 35 years, the act has been modified and expanded numerous times. Furthermore, Art. I, s. 24 of the State Constitution was adopted in 1992 and raised the statutory right of access to public records to a constitutional level and expanded the scope of that right to the legislative and judicial branches.

Though numerous amendments have been made to the Public Records Act over the past three and a half decades, and a constitutional amendment was adopted which modified public records requirements, no comprehensive revision to ch. 119, F.S., has been attempted. As a result, the act has become somewhat disorganized. For example, while the Public Records Law has a definition section, definitions of terms are dispersed throughout the act, making them difficult to locate. Likewise, various requirements for access, maintenance and preservation of public records, and fees for copies are not organized in a logical manner. The proposed committee bill reorganizes the act so that similar topics are grouped topically. No changes are made to definitions or standards in the proposed committee bill unless required by Art. I, s. 24 of the State Constitution.

Once ch. 119, F.S., has been clarified and reorganized, staff will recommend specific topics for review and

possible modification during future interims and sessions of the Legislature. For example, concerns about potential conflicts between privacy and open records are increasing. As an example of the constant flux of issues related to privacy, technology, and open government, the importance of security issues was also demonstrated during the interim with the bombing of the World Trade Center. Consideration of the means to resolve these competing issues will be necessary by the Legislature. Additionally, it may be appropriate for a future session of the Legislature to review fee structures and standards to ensure that they are appropriate, clear, and applied consistently.

Another important issue facing the Legislature is the growing number of exemptions to public records requirements. An increase in the number of exemptions not only diminishes open government, but makes it increasingly difficult for the average citizen and public officials to determine if a public record is exempt or confidential. One area for future study that would help to reduce the number of exemptions, as well as help in the identification of exemptions, is the creation of exemptions that apply across agencies. For example, currently multiple agencies may have exemptions for employee social security numbers. A single exemption for social security numbers held by all state and local agencies might be substituted if such a broad exemption were found to be appropriate. It is expected that in a future project, exemptions that could be identified that might apply across governmental agencies and that a "General Exemptions" section could be created in the Public Records Act. Agency specific exemptions could be placed either in sections of the act that are specific to an agency or placed in other statutes where they fit logically.

BACKGROUND

Florida has a long history of granting public access to governmental records. This tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.¹ Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, which is contained within ch. 119, F.S., was first enacted in 1967.² The act has been amended numerous times since its enactment.

In November 1992, the public affirmed the tradition of *government-in-the-sunshine* by enacting a constitutional amendment which guaranteed and expanded the practice. Article I, s. 24(a) of the State Constitution states:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.³

The effect of adopting this amendment was to raise the statutory right of access contained in the Public Records Law to a constitutional level and of extending those provisions beyond the executive branch to the judicial and legislative branches of state government. The amendment "grandfathered" exemptions that were in effect on July 1, 1993, until they are repealed.⁴

The State Constitution, the Public Records Law and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by the Legislature according to the process and standards required in the State Constitution.

Article I, s. 24 (c) of the State Constitution authorizes the Legislature to provide exemptions from the public access provisions of the law and constitution by general law. Any law that creates an exemption must state with specificity the public necessity that justifies the exemption. An exemption may be no broader than necessary to comport with the stated public necessity. Further, a law that creates a public record exemption can relate only to exemptions and their enforcement. In other words, a law that creates a public records exemption may not include other substantive issues.

The Open Government Sunset Review Act of 1995⁵ provides for the systematic repeal of exemptions to the Public Records Law and Public Meetings Law five years after the creation of, or substantial modification to, an exemption. The repeal cycle began in 2001. The 1995 act also specifies the conditions under which a public records or public meetings exemption may be created.

By law, an exemption may be created or expanded only if the exemption:

- 1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 2) protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- 3) protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace. (See s. 119.15(4)(b), F.S.)

Thus, under the statute, an exemption may be created or amended only if the Legislature determines that there is a public necessity justifying the exemption and the exemption is no broader than necessary. Additionally, any law creating or amending an exemption must specifically state why the exemption is a public necessity.

¹ Section 1, ch. 5942, 1909; RGS 424; CGL 490.

² Chapter 67-125 (1967 L.O.F.)

³ Article I, s. 24(a) of the State Constitution.

⁴ Article I, s. 24(d) of the State Constitution.

⁵ Sections 119.15 and 286.0111, F.S.

METHODOLOGY

Staff reviewed ch. 119, F.S., and identified provisions according to topic. After all sections of the act were identified, they were re-ordered and transferred to sections based upon the topic. An initial draft was prepared and distributed to staff of the House of Representatives, the Attorney General and media representatives. Issues that were identified during the review were addressed in the drafting process.

FINDINGS

Chapter 119, F.S., currently contains a definition section,⁶ but definitions of terms that are used in the act are also dispersed throughout it.⁷ As a result, it is sometimes difficult to locate definitions. Further, the terms that are in the definition section are not alphabetized. If definitions of all terms that are used in the Public Records Act were placed in the definition section and alphabetized, the average user could find definitions more easily. Further, some definitions in ch. 119, F.S., are specifically tied to definitions that are contained in other chapters. Given that ch. 119, F.S., provides general requirements for public records, it would be appropriate for that chapter to contain all general standards and definitions for public records and that cross-references be made to definitions in ch. 119, F.S., and not the reverse.

The Public Records Act contains a specific section for general state policy on public records,⁸ but additional policy statements are contained in other sections of the chapter. For example, s. 119.084, F.S., which relates specifically to requirements for the copyright of public records, also contains policy statements regarding common format of electronic records,⁹ the type of copy that must be provided to the public on request,¹⁰ and a prohibition against entering into contracts which impair public access.¹¹ These policy statements are general in nature and should be placed in the general policy section.

In addition to public policy statements, fee requirements are also dispersed. Fees for copies of public records are contained in ss. 119.07(1)(a) and (b),

119.083(5), and 119.085, F.S. These requirements could be located in one section for ease of use and clarity. Once fee requirements are placed in one section, comparative analysis of the current fee structures will be facilitated. Additionally, co-locating fee requirements may help to establish fee consistency among agencies and encourage compliance.

Records maintenance, retention schedules, and records destruction requirements are also contained in different sections of the act. Currently, the Division of Library and Information Services of the Department of State is assigned a number of duties in these areas. The provisions that assign the Division responsibilities sometimes appear to overlap with other provisions which place duties on agencies. Clarification of duties and responsibilities, as well as reorganization of specific requirements for maintenance and preservation of public records, would improve the act.

Finally, there does not appear to be a consistent method for the location of exemptions to public records requirements. The Public Records Act contains a subsection that contains a litany of exemptions.¹² These exemptions are not organized in any particular fashion, such as by agency or type. Other sections of the act also contain exemptions. Section 119.0115, F.S., for example, exempts certain videotapes or signals from the chapter. Further, there are many exemptions that are not located in the Public Records Act, but are instead found within the statutory chapters to which they relate.

From an organizational perspective, it may be appropriate to create a specific section within the Public Records Act for general exemptions that apply to all agencies.¹³ For example, currently, a number of agencies have exemptions for credit card numbers that they receive. There is also a general exemption for credit card numbers. A general exemption should suffice for all agencies and could be placed within a general exemption section in the Public Records Act. Eventually, specific but redundant exemptions could be repealed. Another example of a potential general exemption could be social security numbers that are in the possession of state agencies. There are likely numerous exemptions that could be enacted as general exemptions, though additional study will be necessary to identify them.

⁶ Section 119.011, F.S.

⁷ Some additional definitions are contained in ss. 119.07(1)(a) and (b), 119.07(3)(n)(o)(y), 119.083(1)(a)(b)(c), 119.15(3)(c), F.S.

⁸ Section 119.01, F.S.

⁹ Section 119.083(4), F.S.

¹⁰ Section 119.083(5), F.S.

¹¹ Section 119.093(6), F.S.

¹² Section 119.07(3), F.S.

¹³ This method was used in the revision to ch. 120, F.S., which occurred in 1996. *See*, s. 120.81, F.S.

Another option would be to reorganize those exemptions that are currently in the Public Records Act according to agency or topic. This method was used in the revision of ch. 120, F.S. Section 120.80, F.S., is subdivided so that requirements that are specific to a particular agency are listed under a subsection devoted to that agency. For example, subsection (2) of the section is entitled, **DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES**. Exceptions and special requirements that apply only to that department are listed under that subsection. Other agencies with exceptions and special requirements have their own subsections within the section.

Alternatively, specific exemptions that apply to a single agency or under a specific circumstance could be removed from the Public Records Act and placed in specific statutes that relate topically. The vast majority of exemptions to public records requirements are currently dispersed throughout the *Florida Statutes*, in just this fashion. There are, however, numerous specific exemptions listed in s. 119.07(3), F.S., which could be relocated.

Ultimately, it may be determined that all three methods for organizing exemptions to public records requirements serve a purpose. In such a scenario, the Public Records Act could contain a section for general exemptions that apply to all agencies and another section that is broken down into subsections by agency. Finally, specific exemptions that relate to a particular statute could be contained in substantive law.

Once the Public Records Act has been organized topically, a review of specific issues and exemptions would be appropriate. One of the most difficult issues facing the Legislature will be striking a balance between open government and personal privacy. Due to the rapid improvement of technology, this issue has been at the forefront during recent years. Technologies that permit more efficiency in governmental operations can, in an environment of open government, also be utilized by criminal elements. Internet access to public records can facilitate identity theft and fraud, as well as undermine exemptions to public records requirements, if protective steps are not taken, such as the redaction of exempt information. The issue is, however, far more complex than the redaction of exempt information from electronic databases. The Legislature and executive agencies must carefully consider what types of information should be collected to begin with, what the purpose for that information is, and whether that information should be available to the public. Further, as was dramatically demonstrated during the interim,

public and private security issues must be considered within the context of open government, as well.

Further, it would be appropriate to begin distinguishing between information that is public and information that should be made available to the public through Internet access. For example, divorce decrees are official court documents and are recorded. As such, they are public records. They may, however, contain credit card numbers, locations where minors attend school, and other personal information. Posting documents of this sort on the Internet facilitates 24-hour a day, worldwide access to information that could be used inappropriately by third parties. As a result, it may be appropriate to begin distinguishing between the types of records that are made available electronically and those that should remain in paper form.

These, and other significant issues, should be reviewed by the Legislature in upcoming sessions.

RECOMMENDATIONS

Staff recommends that ch. 119, F.S., be reorganized topically. Specifically, staff recommends that:

- all definitions in the act be transferred to the definition section of the chapter;
- general policies on public records be placed in one section;
- fee requirements be co-located; and,
- records maintenance, retention schedule and records destruction requirements be placed in one section; and
- staff be directed to continue studying public records issues, particularly those affected by technological developments.