

DRAFT
REFORMING FLORIDA'S OPEN GOVERNMENT LAWS
IN THE 21ST CENTURY

The Commission on Open Government Reform

I. INTRODUCTION

A. Purpose

Recognizing that “Florida has a long history of providing public access to the records and meetings” of its government and that the state “must continually strive to be a national leader in open government reform,” Governor Charlie Crist created the Commission on Open Government Reform (Commission) in June 2007 for the express purpose of reviewing, evaluating, and issuing “recommendations regarding Florida’s public records and public meetings laws.”¹

The purpose of this report is to examine the issues raised during the Commission’s tenure, and to make recommendations in response to the issues identified.

B. Methodology

The Commission held a series of four public hearings during which testimony from invited speakers as well as the general public was received. The hearings, held in Tallahassee, Kissimmee, Sarasota, and Ft. Lauderdale, focused on issues identified by the Governor and outlined in the Executive Order creating the Commission but were not limited to those issues. Written testimony was also solicited, and was considered in the preparation of this report. Agendas of the four hearings are available on the Commission’s website, http://www.flgov.com/og_commission_home, and are included in the Appendices.

¹ See Fla. Exec. Order 07-107, Commission on Open Government Reform, June 19, 2007 (hereinafter *Exec. Order 07-107*). (Available at http://www.flgov.com/og_commission_home.)

DRAFT

In addition, in developing this report the Commission did extensive legal research, including a thorough review of the history of Florida's open government laws, a search of current statutory law and applicable case law, and a study of laws enacted in other states.

C. Organization

This report is organized into four major sections, beginning with this introductory section. Section II is a background chapter providing an explanation of the creation of the Commission and its mission. In addition, section II contains a brief overview of Florida's open government provisions, including the constitutional right of access and the open meetings and public records laws. Section III is organized according to the issues enumerated in the order creating the Commission and those raised during the public hearings; it includes a discussion of the laws of other states when and where appropriate. Conclusions and Recommendations are found in Section IV, which is followed by the Appendices.

II. BACKGROUND

A. The Commission on Open Government Reform

Generally considered a leader in the area of open government,² Florida has a long history of providing public access to the meetings and records of its government.³ This

² See, generally, Testimony of Pat Gleason, Special Counsel, Office of Open Government, Executive Office of the Governor, at Commission Public Hearing (Tallahassee, Aug. 22, 2007). See also Thomas Peele, *California Lags Far Behind Others in Government Openness*, Contra Costa Times, Jun. 30, 2008 ("Florida's government transparency laws . . . are considered the best in the nation"); S. Albright, *Sunshine State Living Up to Its Name by Encouraging Transparency in Government*, 32 NEWS MEDIA & THE LAW 11 (2008) (Florida is "regarded as a leader among states in open records laws"); and B. Chamberlin, *The Public Records Act: Should Trade Secrets Remain in the Sunshine?*, 18 FLA. ST. U.L. REV. 559, 560 (1991).

³ See, generally, Weitzel, *The White Paper: A Narrative History of Open Government in Florida* (2006) (on file with the First Amendment Foundation, Tallahassee, FL) (hereinafter *The White Paper*). Florida's first open meetings law, ch. 5463, was enacted in 1905. However, it applied only to

DRAFT

rich tradition of open government culminated in the 1992 general election when Florida voters overwhelmingly approved a constitutional amendment guaranteeing access to the records of all three branches of state government and to “[a]ll meetings of any collegial public body of the executive branch of state government or of any . . . county, municipality, school district, or special district, at which official acts are to be taken or at which public business . . . is to be transacted or discussed.”⁴

Although both the open meetings law and the public records law have been amended since first enacted and some reforms made, never in Florida’s long history of open government have both laws been reviewed in their entirety.⁵ As a result, there are inconsistencies and redundancies in the law, and some persuasively argue that the state’s open government laws have failed to keep pace with today’s technology which has resulted in erosion of the public’s constitutional right of access to government meetings and records.⁶

Because “an open and accessible government is the key to establishing and maintaining the people’s trust and confidence in their government,” Florida Governor Charlie Crist created the Commission on Open Government Reform through Executive

municipalities and was rendered virtually meaningless by a Florida Supreme Court decision nearly 50 years later. *See Turk v. Richard*, 47 So.2d 543 (Fla. 1950). The current law, § 286.011, F.S., was enacted in 1967. Fla. Ch. No 67-356. Florida’s public records law was enacted in 1909, and is codified in ch. 119. FLA. STAT. (2007). Ch. 5492, 1909 Fla. Laws. The state’s very first public records law, though, which provided that all records of the clerks of court “shall always be open to the public . . . for the purpose of inspection thereof, and of making extracts therefrom” was enacted in 1892. FLA. REV. S. 1390 – 1391.

⁴ FLA. CONST. art. I, s. 24. It’s important to note that the meetings provision in Article I, section 24, does not apply to either the Florida courts or, more significantly, to the state legislature. There is a general right of access to court proceedings guaranteed by the U.S. Constitution; the Florida Legislature is bound by Article III, section 4(e) of the state constitution, which stipulates that certain legislative meetings must be “reasonably open to the public”. *See* FLA. CONST. art. III, s. 4(e). *See also* Office of the Att’y General, Florida’s Government-in-the-Sunshine and Public Records Law Manual 12 - 13 (Vol. 30 2008) (hereinafter *2008 Sunshine Manual*).

⁵ *See* Steve Bousquet, *A Matter of Openness*, St. Petersburg Times, Jun. 19, 2007; and Bill Kaczor, *Crist Creates Commission to Keep Government in ‘Sunshine’*, Sarasota Herald Tribune, Jun. 19, 2007.

⁶ SHT TESTIMONY, SARASOTA.

DRAFT

Order 07-107, issued on June 19, 2007.⁷ In announcing the Commission’s creation at a press conference, Governor Crist emphasized the importance of open government, stating “It’s very important that as we make decisions that may affect your lives and futures, that you have the opportunity to witness it and have a transparent window through which to understand it.”⁸

The Commission, comprised of nine members reflecting “a broad spectrum of interested parties” was created for the purpose of reviewing, evaluating, and issuing “recommendations regarding Florida’s public records and public meetings laws.”⁹

Specifically, the Commission was charged with consideration of the following issues:

- The relevance and redundancy of all exemptions to government meetings and records;
- Fees and charges imposed for inspecting and copying public records in light of advances in information technology;
- Collection, storage, retrieval, dissemination, and accessibility of public records through advanced technologies, including the internet;
- Current policies regarding the public’s right to participate at meetings subject to the open meetings law, including the public’s right to speak at such meetings; and
- Florida’s position in the national landscape, in regards to the state’s open government practices.¹⁰

⁷ See Exec. Order 07-107, note 1, *supra*.

⁸ See J. Taylor Rushing, *Crist: Raise the Political Blinds*, Jacksonville Times-Union, Jun. 20, 2007 (hereinafter *Rushing Article*).

⁹ Id. The Governor appointed Barbara Petersen, president of Florida’s First Amendment Foundation; Gerald Bailey, commissioner of the Florida Department of Law Enforcement; Bob Butterworth, secretary of the Florida Department of Children and Families and former Florida Attorney General; John Carassas, Pinellas County Judge and former member of the Florida House of Representatives; Sandy D’Alemberte, a first amendment attorney and former president of Florida State University; state Senator Paula Dockery; Jeanne Grinstead, deputy managing editor of the *St. Petersburg Times* and then president of the Florida Society of Newspaper Editors; Renee Lee, Hillsborough County Attorney; and state Representative Will Weatherford to serve on the Commission. Petersen was named as Commission Chair. See Press Release 1, June 19, 2007 (http://www.flgov.com/og_commission_home).

DRAFT

Governor Crist made it clear, however, that the Commission would not be limited to consideration of only those issues addressed in his executive order. “To put limitations on it would be counterproductive,” Crist said. “Whatever they hear from the people is important.”¹¹

The Commission held a series of four public hearings around the state, inviting speakers to provide testimony on specific topics and the issues identified in the Governor’s executive order. Testimony from the general public was also solicited, as was written testimony, and those who testified before the Commission included government agency representatives, private citizens, members of Florida’s media, and attorneys representing a wide variety of interests.¹²

In one of its first official acts, the Commission adopted a series of procedural requirements for conducting Commission business – meeting and quorum procedures, voting requirements, etc. Perhaps most importantly, Commission procedures require that any “recommendation by the Commission that would restrict the public’s right of access guaranteed under Article 1, Sec. 24, Fla. Con., including new or expanded exemptions to ch. 119, F.S., or s. 286.011, F.S., require a 2/3 majority vote of Commission

¹⁰ Exec. Order 07-107, note 1, *supra* at 2 - 3.

¹¹ Steve Bousquet, *Crist Creates a Panel for Open Government*, The St. Petersburg Times, June 20, 2007. *See also* Rushing Article, note 8, *supra*. In addition, Executive Order 07-107 specifically stated that the Commission “will consider, *but not be limited to*, the following [enumerated] issues” Exec. Order 07-107, note 5, *supra*, at 2 (emphasis added).

¹² Public hearings were held in Tallahassee (August 2007), Kissimmee (November 2007), Sarasota (February 2008), and Ft. Lauderdale (May 2008). In addition, the Commission held two public meetings, both in Tallahassee (August and October 2008). A court reporter was present at the four public hearings; transcripts are available on the Commission’s website, http://www.flgov.com/og_commission_home. Copies of all written testimony provided to the Commission are available from the Office of Open Government, Executive Office of the Governor, Tallahassee, FL.

DRAFT

members.”¹³ Suggested by Commissioner John Carassas, the two-thirds vote requirement tracks the constitutional standard for creation of new exemptions to Florida’s open government laws.¹⁴

B. The Constitutional Right of Access

BRIEF HISTORY

Arguably the broadest such provision in the nation,¹⁵ Florida’s constitutional right of access to government records guarantees “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 action of their behalf” and specifically includes all three branches of state government, including “each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or [the] Constitution.”¹⁶

The constitutional right of access to government meetings applies only to meetings of the executive branch of state government, and to all meetings “of any collegial body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business . . . is to be transacted or

¹³ Commission on Open Government Reform, Transcript of November 2007 Public Hearing Day 2, Vol. 1 at 6 (Kissimmee, FL) (hereinafter *Kissimmee Transcript*). Commission procedures can be viewed at http://www.flgov.com/pdfs/og_may_12.pdf.

¹⁴ See FLA. CONST. art. I, s. 24(c) and note XX, *infra*. See also Commission on Open Government Reform, Transcript of Tallahassee 2007 Public Hearing 289 (hereinafter *Tallahassee 2007 Transcript*). As a member of the Florida House of Representatives, Judge Carassas sponsored a joint resolution amending the constitutional standard to require the super majority vote. See Fla HJR 327 (2002). Although Carassas sponsored the legislation in the House, it was the Senate companion, SJR 1284, that passed both chambers of the Florida Legislature. See Fla. SJR 1284 (2002).

¹⁵ Although a number of states have constitutional provisions guaranteeing access to certain commissions [*see, e.g.*, PA. CONST. art. IV, § 9(b) (limited to the board of pardons)] or records [*see, e.g.*, ILL. CONST. art. VIII, § 1(c) (limited to reports and records concerning the receipt and use of public funds)], only six have specific provisions guaranteeing access to the records and meetings of government. See CAL. CONST. art. 1, § 3; LA. CONST. art. XII, § 3; N.D. CONST. art. XI, § 6; N.H. CONST. art VIII, § 1; and TENN. CONST. art. I, § 19.

¹⁶ FLA. CONST. art. I, s. 24(a).

DRAFT

discussed.”¹⁷ A right of access to certain meetings of the Florida Legislature are guaranteed under Article III, section 4(e) of the state constitution, and public access to judicial proceedings is protected by Amendment VI, of the U.S. Constitution.¹⁸

In allowing for the creation of exemptions by general law, the constitutional amendment requires the Legislature to: (1) state with specificity the public necessity justifying any exemption; (2) narrowly tailor all exemptions “to accomplish the stated purpose of the law;” and (3) provide for such exemptions in single subject bills.¹⁹ In addition, any new or expanded exemption to the constitutional right of access must “be passed by a two-thirds vote of each house.”²⁰

Any exemptions that were in effect on July 1, 1993 – the amendment’s effective date – remain in force until repealed.²¹ The same is true of all rules of court adopted prior to the November 1992 election which controlled access to judicial records. Thus, the Florida Supreme Court adopted rules restricting public access to judicial records and to the records of the Florida Bar in October 1992, and the Legislature passed a bill regulating access to its record during the 1993 Special Session B.²²

C. Florida’s Open Government Laws

The breadth of Florida’s open government laws is most apparent when the definition and interpretation of key words used in the statutes is considered. The term “public records”, for example, is broadly defined in statute as “all documents, papers,

¹⁷ FLA. CONST. art. I, s. 24(b).

¹⁸ See 2008 Sunshine Manual, note 4, *supra*, at 12 (legislative meetings) and at 12 – 16 (judicial proceedings).

¹⁹ FLA. CONST. art. I, s. 24(c).

²⁰ Id.

²¹ FLA. CONST. art. I, s. 24(d).

²² See *In re* Amendment to Rules of Judicial Admin. – Public Access to Judicial Records, No. 80-419 (Fla. Oct. 29, 1992) (amending FLA. R. JUD. ADMIN. 2.051) (subsequently amended and renumbered as FLA. R. JUD. ADMIN. 2.420); and Fla. SB 20-B (1993). **ADD INFO RE: PROPOSED CHANGES TO COURT RECORD RULES?**

DRAFT

letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission”²³ A “meeting” for the purposes of the Sunshine Law is “any gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which *foreseeable action* will be taken by the public board or commission.”²⁴

The word “person” – those who have a right of access to the records and meetings of government – is defined in §1.01(3), Florida Statutes, to include not only individuals, but also “firms, associations, joint adventures, partnerships, estates, trusts, . . . corporations, and all other groups or combinations.” Prior to 1975, the right of access to records was limited to state citizens, but today “the law provides any member of the public access to public records,”²⁵ and a requestor’s “motive in seeking access to public records is irrelevant.”²⁶ Additionally, as a general rule, a person who makes a public records request or simply attends a public meeting cannot be required to provide identification. Thus, anyone seeking access to Florida government – whether through a

²³ Fla. Stat. § 119.011(11) (2007). The Florida Supreme Court has interpreted this definition to include *any* material made or received by an agency “which is intended to perpetuate, communicate or formalize knowledge” having to do with public business. *See Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). This includes “all of the information” stored on a computer. *Seigle v. Barry*, 422 So.2d 63, 65 (Fla. 4th DCA 1982), *pet. for review denied*, 431 So.2d 988 (Fla. 1983).

²⁴ Office of the Att’y General, Florida’s Government-in-the-Sunshine and Public Records Law Manual 15 (Vol. 29 2007) [citing *Hough v. Stembridge*, 278 So.2d 288 (Fla. 3d DCA 1973); *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971); *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969); and *Wolfson v. State*, 344 So.2d 611 (Fla. 2d DCA 1977)]. (emphasis in the original)

²⁵ *Church of Scientology Flag Service Org., Inc. v. Wood*, (No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997).

²⁶ *Timoney v. City of Miami Civilian Investigative Panel*, 917 So.2d 885, 886n.3 (Fla. 3d DCA 2005). *See also* *Curry v. State*, 811 So.2d 736, 742 (Fla. 4th DCA 2002); *Staton v. McMillan*, 597 So.2d 940, 941 (Fla. 1st DCA 1992), *review denied sub nom.*, *Staton v. Austin*, 605 So.2d 1266 (Fla. 1992); *Lorei v. Smith*, 464 So.2d 1330, 1332 (Fla. 2d DCA 1985), *review denied*, 475 So.2d 695 (Fla. 1985); and *News-Press Publishing Company, Inc. v Gadd*, 388 So.2d 276, 278 (Fla. 2d DCA 1980).

DRAFT

request for public records or attendance at a public meeting – should be able to do so virtually anonymously.²⁷

Furthermore, there is a presumption of openness under Florida law – that is, we presume that all agency records are subject to public disclosure and that any meeting of two or more members of the same collegial body at which public business is to be transacted or discussed will be open to the public. Because the Florida Constitution provides that only the Legislature can create exemptions to the public records and open meetings laws, there’s no balancing of interests by a government agency or even the courts: a request for records can be denied or a meeting closed *only if* an agency has specific statutory or constitutional authority.²⁸ Section 119.15, Florida Statutes, requires that every exemption to the public records and open meetings law be reviewed five years after enactment, and contains a standard for review. If the exemption is not reenacted, it automatically “sunset” – that is, it is automatically repealed – on October 2nd of the fifth year.

Finally, Florida courts have consistently held that the right of access conferred by both the public records law and the open meetings law – which were enacted for the public benefit – must be liberally construed in favor of open government and that any exception to that right of access must be narrowly construed and strictly applied. The right of access, then, “is virtually unfettered, save only the statutory exemptions designed

²⁷ See 2008 Sunshine Manual, note 4, *supra*, at 44 (meetings) and 114 (records).

²⁸ See FLA. CONST. Art 1, § 24(c); and pp. **XX – XX**, *supra*. “Exemption” is defined as “a provision of general law which provides that a specific record or meeting, or portion thereof, is not subject to the access requirements of s. 119.071(1), s. 286.011, or s. 24, Art. I of the State Constitution.” Fla. Stat. § 119.011(8) (2007). Prior to enactment of the constitutional guarantee of access, the Florida Supreme Court had held that only the Legislature could create exemptions to the state’s open government laws. See *Wait v. Florida Power and Light Company*, 372 So.2d 420, 425 (Fla.1979). Currently, the only exemptions in effect are statutory.

to achieve a balance between an informed public and the ability of the government to maintain secrecy in the public interest.”²⁹

1. The Open Meetings Law

a. Scope

Florida’s current open meetings law, commonly referred to as the Sunshine Law, was enacted in 1967³⁰ and requires that all meetings of any government agency “be open to the public at all times” absent a specific statutory exemption.³¹ Although the word “meeting” is not defined in the statutes, the Florida courts have held that the law applies generally to any meeting between two or more members of the same board or commission at which public business is to be transacted or discussed.³²

All public agencies in the state are subject to the sunshine law – state agencies, local governments, school boards, and special districts.³³ In addition, the law applies to advisory boards and committees if such boards or committees were established to make recommendations to a public agency.³⁴ There is a limited exemption for advisory boards

²⁹ *Times Publishing Company v. City of St. Petersburg*, 558 So.2d 487, 492 (Fla. 2d DCA 1990). See also *Krischer v. D’Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied sub nom., *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987); and *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969).

³⁰ Ch. 67-356, 1967 Fla. Laws.

³¹ FLA. STAT. § 286.011(1) (2007). See also FLA. CONST. Art 1, § 24(b).

³² See 2008 Sunshine Manual, note 4, *supra*, at 19[citing *Hough v. Stembridge*, 278 So.2d 288 (Fla. 3d DCA 1973); *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971); *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969); and *Wolfson v. State* 344 So.2d 611 (Fla. 2d DCA 1977)] (emphasis in the original) For a discussion of when the law might apply to a single individual, see 2008 Sunshine Manual, note 4, *supra*, at 19 – 20.

³³ See FLA. CONST. Art 1, § 24(b). See also FLA. STAT. § 286.011(1) (2007). Although the sunshine law does not apply to the Florida Legislature or the courts, Floridians enjoy a general right of access to legislative meetings and court proceedings, both civil and criminal. See p. X, *supra*. For a full discussion of the application of Florida’s sunshine law, see 2008 Sunshine Manual, note 4, *supra*, at 5 – 18.

³⁴ See *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974).

DRAFT

and committees established only for fact-finding purposes.³⁵ Note that it is the *function* of the board or committee and not its composition that determines whether the Sunshine Law applies.³⁶

Similarly, a private company created by law or by a public agency to provide services to the agency will be subject to the meetings requirements of Florida's Sunshine Law.³⁷ In addition, a private company or organization doing business on behalf of a public agency may be bound by the requirements of the law *if* the public agency's governmental or legislative functions have been delegated to the private entity.³⁸ The question whether the law applies to a purely private organization – as compared to a private entity created by law or ordinance – is more difficult, and Florida's courts use a list of nine factors in determining whether the law will apply to the private company. This “totality of factors” test requires consideration of all the facts in each specific instance.³⁹

Staff meetings are not generally subject to the Sunshine Law.⁴⁰ However, if staff has been delegated decision-making authority, the activities of staff in carrying out that

³⁵ See *Cape Publications, Inc. v. City of Palm Bay*, 473 So.2d 222 (Fla. 5th DCA 1985). Accord, AGO 95-06. The sunshine law applies to meetings where public business is to be transacted or discussed; thus, the law does not generally apply to a fact-finding meeting or a social gathering even if two or more members are present. See 2008 Sunshine Manual, note 4, *supra*, at X (fact-finding) and 38 (social events).

³⁶ See *News-Press Publishing Company, Inc., v. Carlson*, 410 So.2d 546, 548 (Fla. 2d DCA 1982).

³⁷ See 04-44 Fla. Att’y Gen. (2004) (Sunshine Law applies to PRIDE, a nonprofit corporation created by state law to run work programs for the Department of Corrections); 92-80 Fla. Att’y Gen. (1992) (Board of Directors of Enterprise Florida, Inc., subject to the Sunshine Law); and 97-17 Fla. Att’y Gen. (1997) (Sunshine Law applies to a nonprofit corporation created by a city redevelopment agency to assist in implementation of the agency’s redevelopment plan).

³⁸ See *Memorial Hospital –West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d 373, 382-383 (Fla. 1999). In determining whether the sunshine law will apply to a private company doing business on behalf of a public agency, the court’s generally rely on the definition of “agency” under Florida’s public records law. See FLA. STAT. § 119.011(2) (2007).

³⁹ See *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 927 So.2d 961 (Fla. 5th DCA 2006) (applying the “totality of factors” test set forth in *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992)).

⁴⁰ See *Occidental Chemical Company v. Mayo*, 351 So.2d 336 (Fla. 1977), *disapproved in part on other grounds*, *Citizens v. Beard*, 613 So.2d 403 (Fla. 1992); and *School Board of Duval County v. Florida Publishing Company*, 670 So.2d 99, 101 (Fla. 1st DCA 1996).

DRAFT

authority may be subject to the law.⁴¹ Also, if staff is acting as liaison between public officials, is taking the place of a public official, or acts as an intermediary between two or more public officials, then the Sunshine Law will apply.⁴² The point is to make sure that public officials can't avoid the law by using staff to communicate with one another. The courts have stated emphatically that the Sunshine Law is to be construed "so as to frustrate all evasive devices."⁴³ This means, too, that telephones and e-mail can't be used to circumvent the law.⁴⁴

b. Procedural Requirements

Florida's Sunshine Law requires that "reasonable notice" of all meetings subject be provided to the public.⁴⁵ Again, the term "reasonable notice" is not defined in the statutes, but the Florida courts have held that notice must be sufficient so as to inform members of the public who may be interested in attending the meeting.⁴⁶ Clearly, then, what constitutes reasonable notice will depend on the circumstances, and public agencies may be subject to additional notice requirements imposed by other statutes, rules, or

⁴¹ See *Wood v. Marston*, 442 So.2d 934, 938 (Fla. 1983).

⁴² See 89-39 Op. Fla. Att'y Gen. (1989) (county commission staff is not subject to the Sunshine Law unless they have been delegated decision-making authority, are acting as liaisons between board members, or are acting place of the board members at their direction).

⁴³ See *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971); *Blackford v. School Board of Orange County*, 375 So.2d 578 (Fla. 5th DCA 1979); and *Wolfson v. State*, 344 So.2d 611 (Fla. 2d DCA 1977).

⁴⁴ See *State v. Childers*, No. 02-21939-MMC; 02-21940-MMB (Escambia Co. Ct. June 5, 2003), *per curiam affirmed*, 886 So.2d 229 (Fla. 1st DCA 2004) (discussion between two county commissioners and the supervisor of elections regarding redistricting violated the Sunshine Law); and 89-39 Op. Fla. Att'y Gen. (1989) (members of a public board cannot use computers to conduct private discussions about board business).

⁴⁵ FLA. STAT. § 286.011(1) (2007). The Sunshine Law did not contain an express notice requirement prior to 1995, but "many court decisions had stated prior to the statutory amendment that in order for a public meeting to be in essence 'public,' reasonable notice of the meeting must be given." 2008 Sunshine Manual, note 4, *supra*, at 38 (citations omitted).

⁴⁶ See *Rhea v. City of Gainesville*, 574 So.2d 221, 222 (Fla. 1st DCA 1991) (the purpose of the notice requirement is to inform the public of the pendency of matters that might affect their rights, provide them the opportunity to appear and present views, and give them a reasonable time to make an appearance if so desired) (citation omitted). See also, 04-44 Op. Fla. Att'y Gen. (2004); 80-78 Op. Fla. Att'y Gen. (1980); and 73-170 Op. Fla. Att'y Gen. (1973).

DRAFT

ordinances. In such cases, agencies must comply with those specific notice requirements.⁴⁷

Although the Sunshine Law doesn't require that an agenda be provided in the meeting notice, "[t]he Attorney General's Office recommends publication of an agenda, if available, in the notice of the meeting; if an agenda is not available, subject matter summations might be used."⁴⁸ In addition, a board or commission is not limited to discussion of only those items included on the published agenda.⁴⁹ The Attorney General's Office has recommended, however, that any formal action on an item not on the agenda be postponed until the next regularly noticed meeting, particularly if the item is controversial. "In the spirit of the Sunshine Law, [a board or commission] should be sensitive to the community's concerns that it be allowed advance notice and, therefore, meaningful participation on controversial issues coming before [the board or commission]."⁵⁰

Finally, the open meetings law requires that minutes be taken at all public meetings and that such minutes be "promptly recorded and . . . open to public inspection."⁵¹ Noting that the law does not require a verbatim transcript of a meeting, the Attorney General's Office has opined that "the use of the term 'minutes' in s. 286.011, F.S., contemplates a brief summary or series of brief notes or memoranda reflecting the

⁴⁷ See 2008 Sunshine Manual, note 4, *supra*, at 40. For example, the Administrative Procedures Act, ch. 120, F.S., includes specific notice requirements for all agencies subject to the Act. *Id.* at 41.

⁴⁸ 2008 Sunshine Manual, note 4, *supra*, at 41. Other laws or ordinance may require specific information to be included in a meeting notice. "[T]he Sunshine Law has been interpreted to require notice of *meetings*, not the individual *items* which may be considered at that meeting. However, other statutes, codes or ordinances may impose such a requirement and agencies subject to those provisions must follow them." *Id.* (emphasis in the original)

⁴⁹ See *Law and Information Services, Inc. v City of Riviera Beach*, 670 So.2d 1014, 1016 (Fla. 4th DCA 1996).

⁵⁰ 03-53 Op. Fla. Att'y Gen. (2003).

⁵¹ FLA. STAT. § 286.011(2) (2007).

DRAFT

events of the meeting.”⁵² And although the law does not generally require that a meeting be tape recorded or that a transcript be made,⁵³ if an agency elects to record or transcribe a meeting, the recordings or transcriptions are public record subject to statutory access and retention requirements.⁵⁴

c. Public Participation

Recognizing the importance of public participation at government meetings subject to the Sunshine Law, the Florida Supreme Court has stated that the public has an “inalienable right to be present and to be heard” at such meetings.⁵⁵ Generally, a member of the public cannot be asked to leave the meeting room during a public meeting.⁵⁶ However, reasonable rules which ensure the orderly progression of a meeting and which require orderly behavior of all participants may be adopted.⁵⁷ But the public can’t be prohibited from videotaping a meeting through the use of non-disruptive

⁵² 82-47 Op. Fla. Att’y Gen. (1982). It’s important to note, however, that § 286.0105, F.S., stipulates that a person wishing to appeal any decision made at a public meeting must have a verbatim transcript of the proceedings, including “the testimony and evidence upon which the appeal is to be based. FLA. STAT. § 286.0105 (2007).

⁵³ The Sunshine Law does not require a meeting to be recorded or that a transcript of a meeting be made. However, some *exemptions* to the Sunshine Law impose such requirements. *See, e.g.*, FLA. STAT. § 286.011(8) (providing an exemption for meetings regarding pending litigation and requiring a transcript of the closed meeting); FLA. STAT. § 286.0113(2) (providing an exemption for negotiations with vendors and requiring a “complete recording” of the closed meeting); *and* FLA. STAT. § 943.0314 (providing an exemption for portions of meetings of the Domestic Security Oversight Council and requiring a tape recording of such exempt portions).

⁵⁴ *See* 86-21 Op. Fla. Att’y Gen. (1986); 86-93 Op. Fla. Att’y Gen. (1986); *and* 04-15 Op. Fla. Att’y Gen. (2004).

⁵⁵ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 699 (Fla. 1969). The Court has subsequently, however, made a distinction between different types of meetings, and held that there may not be a right to participate in certain types of executive meetings. *See Wood v. Marston*, 442 So. 2d 934, 941 (Fla. 1983) (no right of public participation in executive meetings traditionally conducted without public input). For a full discussion of the public’s right to participate in government meetings, *see* 2008 Sunshine Manual, note 4, *supra*, at 43 – 45.

⁵⁶ 2008 Sunshine Manual, note 4, *supra*, at 44.

⁵⁷ *Id.* at 44, 45.

DRAFT

recording devices, and the use of cameras and tape recorders must be allowed if such use does not disrupt the meeting.⁵⁸

Because the Sunshine Law requires that public meetings “be open to the public at all times,”⁵⁹ an inaudible discussion of public business between board or commission members may be a violation of the law. “Although such a meeting is not clandestine, it nonetheless violates the letter and spirit of the law.”⁶⁰

Finally, the Sunshine Law prohibits a public agency from holding a meeting at any facility which discriminates on the basis of sex, age, race, creed, color, origin, or economic status, or which operates in such a manner as to unreasonably restrict public access.⁶¹ For meetings where a large turnout is expected, a public agency must take reasonable steps to ensure that the facilities will accommodate the anticipated turnout.⁶²

d. Exemptions

We have a presumption of openness in Florida, meaning that all meetings between two or more members of the same board or commission are presumed subject to the Sunshine Law unless there is a specific statutory exemption.⁶³ Only the legislature can create an exemption to the law,⁶⁴ and a public agency cannot close a meeting simply to discuss exempt or confidential public records unless there is a specific *statutory* exemption allowing the meeting closure.⁶⁵ The Florida Supreme Court has stated that the

⁵⁸ Id. at 44.

⁵⁹ FLA. STAT. § 286.011(1) (2007).

⁶⁰ 2008 Sunshine Manual, note 4, *supra*, at 43 [citing *Rackleff v. Bishop*, No. 89-235 (Fla. 2d Cir. Ct. March 5, 1990) and 71-159 Op. Fla. Att’y Gen (1971)(discussions of public business which are audible only to “a select few” may violate the “openness” requirement of the Sunshine Law)]

⁶¹ FLA. STAT. § 286.011(6) (2007).

⁶² 2008 Sunshine Manual, note 4, *supra*, at 43.

⁶³ See FLA. CONST. Art 1, § 24(b)(“[a]ll meetings of any collegial body . . .”) and FLA. STAT. § 286.011(1) (2007)([a]ll meetings of any board or commission . . .”). (emphasis added)

⁶⁴ FLA. CONST. Art 1, § 24(c).

⁶⁵ FLA. STAT. § 119.07(7) (2007).

DRAFT

public's right of access under the Sunshine Law should be liberally construed in favor of the public and any exception to that right in the form of an exemption must be narrowly construed.⁶⁶

Of the approximately 90 exemptions to Florida's Sunshine Line, only three are actually codified in the law itself.⁶⁷ Some of the exemptions are very broad in scope and application, while others contain strict limitations on who can attend the closed meeting or the discussions that can be held behind closed doors, and some require that a transcript or recording of the closed session be made.⁶⁸ Thus, it's necessary to read the exact statutory language to determine the application and scope of a specific exemption.

e. Enforcement and Sanctions

Section 286.011(2), F.S., provides state circuit courts the "jurisdiction to issue injunctions to enforce" the requirements of the Sunshine Law "upon application by any citizen of [the] state."⁶⁹ If the court determines that the law was violated, the court is required to assess reasonable attorney's fees against the offending board or

⁶⁶ See *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (1969).

⁶⁷ See FLA. STAT. §§ 286.011(8) (discussions of pending litigation); 286.0113(1) (portions meetings revealing security system plans); and 286.0113(2) (vendor negotiations). A database of all exemptions to the Sunshine Law and the Public Records Law is available on the First Amendment Foundation's website, <http://www.floridafaf.org>.

⁶⁸ Compare, e.g., FLA. STAT. §§ 447.605(1) (discussions relating to collective bargaining are exempt from § 286.011, F.S., but those who can attend the closed meeting is limited); and 627.175(5) (discussions between the Department of Financial Services and an insurance company relating to insurance fraud claims are exempt from § 286.011, F.S.). Section 286.011(8), F.S., providing an exemption for discussions of pending litigation is arguably the most restrictive in its application – the exemption allows for closure of the meeting provided that the five enumerated conditions are satisfied. In addition, the exemption is limited to discussion only – no action can be taken at the closed meeting – and attendance is limited to the members of the board or commission, their chief administrative or executive officer, and the entity's attorney. See 2008 Sunshine Manual, note 4, *supra*, at 26 – 30 for a full discussion of the exemption and its application.

⁶⁹ FLA. STAT. § 286.011(2) (2007). Importantly, the courts have held that a state attorney can pursue sunshine violations – even noncriminal violations – on behalf of the state. See *State v. Foster*, 121 F.L.W. Supp. 1194a (Fla. Broward Co. Ct. September 26, 2005). *Accord*, 91-38 Op. Fla. Att'y Gen (1991).

DRAFT

commission.⁷⁰ However, if the court determines that the suit was filed in bad faith or was frivolous, the court “*may* assess a reasonable attorney’s fee against the individual filing such an action.”⁷¹

The Sunshine Law stipulates that “no resolution, rule, or formal action shall be considered binding except as taken or made” at a public meeting.⁷² Thus any action taken at a meeting held in violation of the Sunshine Law is void *ab initio* – as if it never happened.⁷³ Action can be protected, however, if the offending board or commission holds what is commonly referred to as a “cure” meeting – that is, the agency holds a later meeting in compliance with the law’s requirements and takes “independent final action in the sunshine.”⁷⁴ It’s important to note “that only a full open hearing will cure the defect; a violation of the Sunshine Law will not be cured by a perfunctory ratification of the action taken outside of the sunshine.”⁷⁵

An unintentional violation of the Sunshine Law is a noncriminal infraction, punishable by a fine up to \$500.⁷⁶ A *knowing* violation of the law, however, is a second degree misdemeanor, which carries a jail term of up to 60 days and/or a fine of not more

⁷⁰ FLA. STAT. § 286.011(4). There is no automatic award of appellate attorney’s fees where a person alleges a sunshine violation at the trial level and loses but prevails on appeal, however. In such cases, “a person prevailing on appeal must file an appropriate motion in the appellate court in order to receive appellate attorney’s fees. 2008 Sunshine Manual, note 4, *supra*, at 56.

⁷¹ FLA. STAT. § 286.011(4) (2007). (emphasis added)

⁷² FLA. STAT. § 286.011(1) (2007).

⁷³ *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974); *Blackford v. School Board of Orange County*, 375 So.2d 578 (Fla. 5th DCA); and *Silver Express Company v. District Board of Lower Tribunal Trustees*, 691 So.2d 1099 (Fla. 3d DCA 1997). Section 286.011(1), F.S., states that “no resolution, rule, or formal action shall be considered binding except as taken or made” at a public meeting. FLA. STAT. § 286.011(1) (2007).

⁷⁴ *Tolar v. School Board of Liberty County*, 398 So.2d 427, 429 (Fla. 1981).

⁷⁵ 2008 Sunshine Manual, note 4, *supra*, at 59 (citing *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So.2d 694 (Fla. 3d DCA 1988)).

⁷⁶ FLA. STAT. § 286.011(3)(a) (2007).

than \$500.⁷⁷ Additionally, a public official found guilty of a misdemeanor can be suspended or removed from office.⁷⁸

2. The Public Records Law

a. Scope

As noted by former Florida Attorney General Bob Butterworth, Florida's Public Records Law

is unique in the breadth and scope of [its] guarantee of public access. No other state can match Florida's commitment to its citizens that their government will be open and accessible to all.⁷⁹

Prior to enactment of Florida's Public Records Law in 1909, citizens of the state enjoyed a common law right of inspection of governmental records if the person seeking access could demonstrate a legally recognized interest in the record sought.⁸⁰ The 1909 law codified the common law and broadened the right of access and inspection by ensuring that "all [s]tate, county, and municipal records shall at all times be open for a

⁷⁷ FLA. STAT. § 286.011(3)(b). Importantly, the sunshine law crosses state lines such that a knowing violation of the sunshine law which occurs outside the state is a second degree misdemeanor. FLA. STAT. § 286.011(3)(c). To date, only one public official has been removed from office for an intentional violation of Florida's Sunshine Law – W.D. Childers, a county commissioner from Escambia County and former state senator, was convicted of an intentional violation of Florida's sunshine law for conducting a private teleconference with another commissioner to discuss public business. Escambia Commissioner Terry Smith and Escambia Supervisor of Elections Bonnie Jones both participated in a telephone call with Childers, during which the public officials discussed redistricting. Allegedly neither Commissioner Smith nor Commissioner Childers spoke directly with each other during the call. Childers's defense, that the commissioners were merely expressing opinions and were not soliciting or receiving responses from one another, failed to sway the jurors who convicted Childers for a sunshine violation in 2002. His conviction was later affirmed by the appellate court. In 2003 Childers was sentenced to serve 60 days in jail, ultimately spending a total of 49 days behind bars. *State v. Childers*, No. 02-21939-MMC; 02-21940-MMB (Escambia Co. Ct. June 5, 2003), *per curiam affirmed*, 886 So. 2d 229 (Fla. 1st DCA 2004). *See also*, Associated Press, *Escambia Sunshine Violator is Fined*, St. Petersburg Times, Sept. 19, 2002; Associated Press, *Ex-Florida Senate President Loses Appeal*, St. Petersburg Times, Oct. 8, 2004; and Prosecutions 2004, The Brechner Center, http://brechner.org/prosecutions/db_prosecutions2004.asp. (Last visited July 15, 2008)

⁷⁸ FLA. STAT. §§ 112.52(1); (3) (2007).

⁷⁹ Office of the Att'y General, Florida's Government-in-the-Sunshine and Public Records Law Manual 8 (Vol. 13 1991).

⁸⁰ *See* B. Braverman and W. Hepler, A Practical Review of State Open Records Laws, 49 GEO. WASH. L. REV. 720, 723 (1981).

DRAFT

person inspection of any citizen of Florida.”⁸¹ A legal interest in the record was no longer required.⁸² The right of access and inspection was further enhanced by an amendment in 1975 which removed the citizenship limitation and guaranteed access to public records “by *any* person.”⁸³

Currently, Florida’s Public Records Law stipulates that “every person who has custody” of a public record must allow “any person” access to all non-exempt public records for inspection or copying “at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.”⁸⁴ An agency subject to the public records law may develop its own public record access policy implementing the law. However, such access policies must comply with the requirements of chapter 119, Florida Statutes, as well as any judicial interpretations of the statute as agencies do not have the discretion “to alter, change or place conditions” on the public’s right of access.⁸⁵

To fully understand the right of access to public records under Florida law, it’s necessary to consider certain fundamental aspects of the law: the definition of key words used in the statute; the cost of access and allowable fees; the form in which the record is maintained and requested; the content of the public record and the substance of applicable statutory exemptions; and, finally, procedures for enforcement and sanctions for violations.⁸⁶

⁸¹ Ch. 5492 § 1, 1909 Fla. Laws.

⁸² See 2008 Sunshine Manual, note 4, *supra*, at 111 (“Chapter 119, F.S., requires no showing of purpose or “special interest” as a condition of access to public records.”) (citations omitted).

⁸³ Fla. CS/SB 312 (1975). **CITE TO CHAPTER LAW**

⁸⁴ FLA. STAT. § 119.07(1)(a) (2007). (emphasis added) See, generally, 2008 Sunshine Manual, note 4, *supra*, at 110 – 111.

⁸⁵ See 90-10 Op. Fla. Att’y Gen. 2 (1990) (citation omitted); and 92-9 Op. Fla. Att’y Gen. 2 (1992). See generally, 2008 Sunshine Manual, note 4, *supra*, at 109 – 110.

⁸⁶ See Jt. Legis. Info. Tech’y Resource Comm., Electronic Records Access: Problems and Issues 43 (1994) (citing Jt. Legis. Info. Tech’y Resource Comm., Florida’s Information Policy: Problems and Issues in the Information Age (1989) (hereinafter *Electronic Records Access Report*).

b. Definition of Key Words

The scope of Florida’s Public Records Law is most apparent when the definition and interpretation of key words used in the statute are considered. The term “public record” is broadly defined in Florida law as

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁸⁷

This statutory definition has been interpreted by the Florida Supreme Court to mean “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type,”⁸⁸ including “all of the information” stored on a computer.⁸⁹

The word “agency” – those who have to provide access to public records in their custody or control – is defined as state or local agency or any other public or private entity acting on behalf of such agency.⁹⁰ And the word “person” – those who have a right to inspect and copy the records of any agency – includes not only individuals, but also “firms, associations, joint adventures, partnerships, estates, trusts, business trusts, . . . corporations, and all other groups or combinations.”⁹¹

⁸⁷ FLA. STAT. § 119.011(11) (2007). The statutory definition was amended in 1995 to specifically include “data processing software” within the definition of public record. Additionally, the phrase “or means of transition” was added to clarify that agency e-mail was a public record. See **CITE TO 1995 ELECTRONIC RECORDS BILL AND STAFF ANALYSIS**.

⁸⁸ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc.*, 379 So.2d 633, 640 (Fla. 1980).

⁸⁹ *See Seigle v. Barry*, 422 So.2d 63, 65 (Fla. 4th DCA 1982), *pet. for review denied*, 431 So.2d 988 (Fla. 1983).

⁹⁰ *See* FLA. STAT. § 119.011(2) (2007). The word “[a]gency means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including . . . any other public or private agency, person, partnership, corporation, or business entity acting on behalf of a public agency.” *Id.*

⁹¹ FLA. STAT. § 1.01(3) (2007).

DRAFT

Thus, under Florida's Public Records Law, anyone, regardless of identity or intent, can request a copy of a public record from any public agency and also any private entity doing business on behalf of a public agency.⁹²

c. Fees

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 . . .⁹³

Florida's Attorney General opined that providing access to public records is a statutory – and now constitutional – duty imposed on all agencies “and should not be considered a profit-making or revenue-generating operation.”⁹⁴ As a general rule, then, there is no fee for the mere *inspection* of a public record and fees for providing copies of such records must be statutorily authorized.⁹⁵

Section 119.07(4), Florida Statutes, requires the custodian of public records to furnish a copy of a requested record “upon payment of the fee prescribed by law.” If there is no statutorily prescribed fee, the record custodian can charge no more than 15¢ a

⁹² As a general rule, a requestor cannot be required to provide proof of identity or the reason for a request in order to obtain access to a public record “unless the custodian [of the public record] is required by law to obtain this information prior to releasing the records.” See 2008 Sunshine Manual, note 4, *supra*, at 114 (proof of identity) and 111 (reason for request). In addition, an agency cannot require a requestor to put a request in writing or to fill out a form to obtain copies of public records without specific statutory authority. *Id.* at 114. There are only a few exceptions to this general rule in current law: a commercial entity seeking access to social security numbers for a legitimate commercial purpose must provide a request in writing, verification of identity, and the purpose of the request [FLA. STAT. § 119.071(5)(a)7.b]; because the custodian of school board personnel records is required to keep on file a record of who is requesting access to such personnel, a person requesting access must show proof of identity [FLA. STAT. § 1012.31(2)(f)]; and those statutorily authorized to access the identify of victims in crash reports in the first 60 days following the accident must provide a written request and proof of identity [FLA. STAT. § 316.066(5)(d)].

⁹³ FLA. CONST. Art 1, § 24(a). (emphasis added)

⁹⁴ 2008 Sunshine Manual, note 4, *supra*, at 167 [citing 85-03 Op. Fla. Att’y Gen. (1985)].

⁹⁵ See *State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905). See also 84-03 Op. Fla. Att’y Gen. (1984); and 76-34 Op. Fla. Att’y Gen. (1976). Although an agency can’t generally charge for the mere inspection of a public record, if the amount of records to be inspected is voluminous, the agency may charge a fee pursuant to § 119.07(4)(d), F.S., for the extensive use of personnel necessary to ensure that the records to be inspected are not altered or destroyed. See 00-11 Op. Fla. Att’y Gen. (2000). See also note XX, *infra*.

DRAFT

page for paper copies up to 8½ x 14 inches, plus an additional 5¢ for a two-sided duplicated copy.⁹⁶ For copies other than paper – a CD or video-tape, for example – the custodian may charge the actual cost of duplication,⁹⁷ which is defined as the cost of the material and supplies used to duplicate the record; labor and overhead costs associated with such duplication are specifically excluded from those costs which may be recovered.⁹⁸

If a request for records requires an “extensive use” of agency resources, whether personnel or information technology or both, an agency may charge “a special service charge” in addition to the per-copy charge or the actual cost of duplication. The extensive use fee, which must be reasonable and based on actual costs incurred, cannot be automatically applied – that is, an agency may charge for the extensive use of its resources *only if* a request to inspect or copy public records requires extensive use of the agency’s resources.⁹⁹ “Extensive” is not defined in the statutes, however, and as a result state and local agencies have a great deal of flexibility in determining access policies and assessment of fees.¹⁰⁰

d. Electronic Access

A study conducted in 1994 by the Joint Committee on Information Technology of the Florida found “there is little question that an electronic record is as much a public

⁹⁶ FLA. STAT. § 119.07(4)(a)1. – 2. (2007). Only about 9 or 10 agencies have statutorily prescribed fees. **FOR EXAMPLE**

⁹⁷ FLA. STAT. § 119.07(4)(a)3.

⁹⁸ FLA. STAT. § 119.011(1).

⁹⁹ See FLA. STAT. § 119.07(4)(d). See also 90-07 Op. Fla. Att’y Gen. (1990).

¹⁰⁰ See, e.g., 2008 Sunshine Manual, note 4, *supra*, at 171 (agencies should “define ‘extensive’ in a manner that is consistent with the purpose and intent of” the public records law and in such a manner “that does not constitute an unreasonable infringement upon the public’s statutory and constitutional right of access to public records”).

DRAFT

record as its paper counterpart.”¹⁰¹ Thus, “electronic records are governed by the same rule as written documents and other public records – the records are subject to public inspection unless a statutory exemption exists which removes the records from disclosure.”¹⁰²

The issue of access to computer records was directly addressed by the Fourth District Court of Appeal in Seigle v. Barry. In holding that “access to computerized records shall be given through the use of programs currently in use by the public official responsible for maintaining public records,” the Court found that the intent of Florida’s Public Records Law is to make public records available “in some meaningful form,” but not necessarily that which is requested.¹⁰³ Noting that a record custodian has the option of complying with requests for public records in a particular form, the Court stated that in the event a record custodian refuses to permit meaningful access, a court may order access when “for any reason the form in which the information is proffered does not fairly and meaningfully represent the records.”¹⁰⁴

In accordance with Seigle, the Florida Legislature amended the public records law in 1995, stipulating that

[e]ach agency that maintains a public record in an electronic recordkeeping system shall provide to any person . . . a copy of any public record in that system which is not exempted by law from public disclosure. *An agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium*, and the agency may charge a fee in accordance with [ch. 119, F.S.]. For the purpose of satisfying a public records request, the fee to be charged by an agency if it elects to provide a copy of a public record in a medium not routinely used by the agency, or if it elects to compile information not routinely developed or maintained by the agency or that requires a substantial amount of manipulation

¹⁰¹ See Electronic Records Access Report, note 86, *supra*, at 51 – 52 (citations omitted).

¹⁰² 2008 Sunshine Manual, note 4, *supra*, at 79.

¹⁰³ 422 So.2d 63, 66 (Fla. 4th DCA 1982), *pet. for review denied*, 431 So.2d 988 (Fla. 1983).

¹⁰⁴ See *id.* at 66 – 67.

DRAFT

or programming, must be in accordance with [the general fee provision in ch. 119].¹⁰⁵

Of the eight statements of general state policy regarding access to public records found in chapter 119, F.S., the Public Records Law, six specifically address access to public records in electronic formats:

- Section 119.01(2)(a) – In recognizing that “[a]utomation of public records must not erode the right of access to those records,” requires agencies to provide “reasonable public access to records electronically maintained.”
- Section 119.01(2)(b) – Requires agencies to consider that its electronic recordkeeping systems are providing data in some common computer format when designing or acquiring such systems.
- Section 119.01(2)(c) – Prohibits agencies from entering into contracts for the creation or maintenance of public record databases if the contract “impairs the ability of the public to inspect or copy the public records of the agency, including public records that are on-line or stored in an electronic recordkeeping system used by the agency.”
- Section 119.01(2)(d) – Stipulates that agency use of proprietary software must not diminish the right of the public to inspect and copy a public record.
- Section 119.01(2)(e) – Addressing the issue of providing access to public records by remote electronic means such as the Internet, states “that agencies should strive to provide” access to public records via remote electronic means “to the extent feasible” and “in the most cost-effective and efficient manner available.”
- Section 119.01(2)(f) – Requires an agency to provide copies of public records in the format or “medium” requested if the agency maintains the record in that format.

e. Content and Exemptions

Prior to 1979, when the Florida Supreme Court held only the Legislature could create exemptions to the right of access under the Public Records Law, state courts would

¹⁰⁵ See **CITE CH. NO.**, codified as FLA. STAT. § 119.01(f) (2007). (emphasis added) Similar language regarding access to archived electronic public records can be found in a rule first promulgated by the Department of State in 1992. The rule, which applied only to electronic public records with retention schedules of 10 years or more, requires a custodian to provide a copy of the archived public record in the form requested *if* the agency currently maintains the record in that form. The rule was modified in 20XX. See FLA. ADMIN. CODE r. 1B-26.003(6)(f)3. **CHECK CITE AND RULE LANGUAGE.**

DRAFT

routinely weigh the importance of public access against the harm that might result from public disclosure and determined by court decision what records could be withheld.¹⁰⁶ Long a matter of public policy, the Supreme Court's holding is now embedded in Florida's Constitution which grants the Legislature the sole authority to create exemptions to both the public records law and sunshine law.¹⁰⁷ Over the years, the Legislature has carved out a large number of exemptions from the access requirements of the public records law – currently, there are just over 970 public record exemptions scattered throughout the Florida Statutes.¹⁰⁸

There is a presumption of openness under Florida's Public Records Law – that is, we presume that a government record is subject to the law's disclosure requirements absent a specific statutory exemption. Although the terms are not defined by statute, there is a distinction under the public records law between records or information that is “exempt: from public disclosure and that which is “confidential and exempt.”¹⁰⁹ An agency has some discretion in releasing information that is exempt from public disclosure – for example, a law enforcement agency has the authority to release active criminal investigation information which is exempt from disclosure pursuant to § 119.071(2)(a),

¹⁰⁶ See Electronic Records Access Report, note 86, *supra*, at 47 – 48 (citing *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979)). In addition, “[u]nder common law, records considered private, secret, or confidential where exempted from public disclosure.” *Id.* at 47 (citation omitted).

¹⁰⁷ See FLA. CONST. art. I, § 24(c).

¹⁰⁸ Only a handful of public record exemptions are actually codified in ch. 119, F.S. A database of all exemptions to the Sunshine Law and the Public Records Law is available on the First Amendment Foundation's website, <http://www.floridafaf.org>. In addition, the 2008 Government-in-the-Sunshine Manual contains a summarization of all open government exemptions. See 2008 Sunshine Manual, note 4, *supra*, Appendix D at 221. Interestingly, there were only 250 exemptions to the public records and sunshine laws on the books in 1985; today, there are nearly 1,100. See Editorial, Death by 1,000 Cuts, *The Florida Times-Union*, Jun. 29, 2007; Bill Kaaczor, Crist Creates Commission to Keep Government in “Sunshine”, *The Herald-Tribune*, Jun. 19, 2007; and Editorial, Right Thing to Do: Crist Acts to Repair Damage to Sunshine Law, *The Brandenton Herald*, Jun. 27, 2007.

¹⁰⁹ See *WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So.2d 1015 (Fla. 2004). It should be noted that some of the exemptions that apply to Florida's open meetings law make meetings “confidential and exempt” as well, while others simply exempt meetings from public access requires. See note XX, *infra*.

DRAFT

Florida Statutes.¹¹⁰ But if information is confidential and exempt, it cannot be released except as specified in the exemption.¹¹¹

Section 119.07(1)(e), Florida Statutes, requires that a record custodian claiming an exemption for a public record or any portion of the record state the basis for the exemption, including its statutory citation. If a record contains both exempt and non-exempt information, the custodian is required to delete – or redact – that which is exempt and provide access to the remainder.¹¹² Finally, § 119.07(1)(f) requires a custodian to “state in writing and with particularity the reasons for the conclusion that the [requested] record is exempt or confidential” if requested to do so by “the person seeking to inspect or copy the record.”

f. Enforcement and Sanctions

When denied access to a public record, a requestor has several enforcement options to consider. First, a person claiming any dispute over access to a public record can seek resolution through the public records mediation program in the Attorney General’s Office. The program is voluntary, meaning all parties to the dispute must agree to mediation, and the results reached are non-binding.¹¹³ But the service, which is provided at no cost to the participants, can be an effective alternative to litigation.¹¹⁴

¹¹⁰ See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

¹¹¹ See *WFTV, Inc.*, note 109, *supra*. For example, the identity of the victim of certain sexually-based crimes is confidential and exempt pursuant to § 119.071(2)(h)1., and can only be released by the custodial law enforcement agency in furtherance of “its official duties and responsibilities.” See FLA. STAT. § 119.07(2)(h)2.

¹¹² See FLA. STAT. § 119.07(1)(d) 2007). Section 119.01(12) defines “redact” to “mean[] to conceal from a copy of an original public record, or to conceal from an electronic image that is available for public viewing, that portion of the record containing exempt or confidential information.”

¹¹³ See FLA. STAT. § 16.60 (

¹¹⁴ [GET STATS ON CASES MEDIATED.](#)

DRAFT

Secondly, if a person believes an agency has violated the public records law, he or she can file a complaint with the local state attorney who has the authority to prosecute violations of the law, including violations which may be noncriminal.¹¹⁵

Finally, when denied access to a public record, a requestor may file suit in civil court to compel compliance. Such actions have priority over other pending cases, and courts are required to set an immediate hearing on the issue.¹¹⁶ If a court determines that the custodial agency “unlawfully refused to permit” access, the court is required to “assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorney’s fees.”¹¹⁷

There are three types of sanctions provided for violations of the Public Records Law. A public officer who knowingly violates § 119.07(1), Florida Statutes, is subject to suspension and removal or impeachment, and is guilty of a first degree misdemeanor punishable by a term of imprisonment not exceeding one year and a fine of up to \$1,000.¹¹⁸ An unintentional violation by a public officer of any provision of the public records law is “a noncriminal infraction, punishable by [a] fine not exceeding \$500.”¹¹⁹ Lastly, “[a]ny person who willfully and knowingly violates” any provision of ch. 119, Florida Statutes, is guilty of a first degree misdemeanor, punishable by up to one year in jail and a fine of not more than \$1,000.¹²⁰

III. FINDINGS

A. Exemptions

¹¹⁵ See 91-38 Op. Fla. Att’y Gen. (1991).

¹¹⁶ See FLA. STAT. § 119.11(1) (2007).

¹¹⁷ FLA. STAT. § 119.12.

¹¹⁸ FLA. STAT. § 119.10(1)(b). **ADD PARAGRAPH RE: VANETTE WEBB.**

¹¹⁹ FLA. STAT. § 119.10(1)(a).

¹²⁰ FLA. STAT. § 119.10(2)(a).

DRAFT

*The Commission will consider . . . the relevance and redundancy of all exemptions to government meetings and records.*¹²¹

1. Definitions: Exempt v. Exempt and Confidential

There is a distinction under Florida’s open government laws between public records or meetings that are exempt from disclosure requirements and those that are “confidential and exempt.”¹²² The terms are not defined in the law, however, and it’s not clear whether the distinction is clearly understood or consistently applied. For example, § 455.217(5), Florida Statutes, stipulates that meetings of the Department of Business and Professional Regulation (DBPR) held for the sole purpose of creating or reviewing licensure examination questions or potential questions are confidential and exempt. In direct contrast, portions of meetings which would reveal agency security system plans are merely exempt pursuant to § 286.0113, Florida Statutes.¹²³

Additionally, an exemption for a “photograph, videotape, or image of any part of the body of the victim of a sexual offense” created by the Florida Legislature in 2003 made such images confidential and exempt, and made no allowance for the release or sharing of such information.¹²⁴ However, pursuant to § 119.071(2)(h)1., Florida Statutes, a photograph of a victim of certain sexual offenses is *exempt* from public disclosure, allowing some discretion for release of the photograph by the custodial law enforcement

¹²¹ Exec. Order 07-107, note 1, *supra*, at 2.

¹²² See note XX, *supra*. According to the database of open government exemptions compiled by the First Amendment Foundation, there are 1,067 current exemptions to either the open meetings law or the public records law.¹²² Of those exemptions, just over half make public records or meetings confidential and exempt, while approximately 350 exempt records or meetings. See http://www.floridafaf.org/draft_exempt2.aspx. The balance of the exemptions make such meetings or records “confidential”, an archaic term not used since passage of the constitutional amendment guaranteeing access to the records and meetings of Florida government.

¹²³ A “security system plan,” defined in § 119.071(3)(a)(1), F.S., is exempt and confidential under the public records law. See FLA. STAT. § 119.071(3)(a)2.(2007).

¹²⁴ Ch. 2003-157, 2003 Fla. Laws (H.B. 453, 1st Eng. by Rep. Adams) (originally codified at § 119.07(3)(f)2.) (subsequently redesignated as s. 119.071(2)(h)2.). As noted previously, a record that is confidential and exempt cannot be released except as specifically authorized by the exemption. See note XX, *supra*.

DRAFT

agency.¹²⁵ This discrepancy was corrected in the 2007 legislative session with passage CS/SB 1618 which modified and amended § 119.07(2)(h), stipulating that all information, including photographs and other images, that would identify the victim of a sexual offense is exempt and confidential. The legislation allows disclosure of such information under specified and limited circumstances.¹²⁶

This is also a discrepancy in the protection provided for the home addresses and telephone numbers of certain government employees. As a general rule, such information is subject to public disclosure.¹²⁷ However, the Florida Legislature has created a number of exemptions to protect the home addresses and telephone numbers of some government employees whose jobs may place them at some risk of harm, including current and former police officers, code enforcement officers, firefighters, Florida Supreme Court justices, state and county judges, investigators of the Department of Children and Family Services, and tax collectors for the Department of Revenue. The home address, home telephone number, as well as the employment address of the spouses and children of such employees and the location of the schools and day care facilities attended by their children are exempt from public disclosure pursuant to § 119.071(4)(d), Florida Statutes.

A guardian ad litem, however, can invoke the protection of the exemption only if the guardian ad litem provides a written statement that he or she “has made reasonable efforts to protect such information from being accessible through other means available

¹²⁵ Section 119.071(2)(h)1., F.S., stipulates that “[a]ny criminal intelligence information or criminal investigative information including the photograph, name, address, or other fact or information which reveals the identity of the victim of” certain specified sexual crimes is exempt from public disclosure.

¹²⁶ See Ch. 2008-234, § 1, 2008 Fla. Laws (CS/SB 1618, 1st Eng. by S. Criminal Justice Committee) (codified as § 119.071(2)(h)).

¹²⁷ See 96-88 Op. Fla. Att’y Gen. (1988).

DRAFT

to the public.”¹²⁸ And the same information pertaining to hospital or surgical center employees providing direct patient care or security services is confidential and exempt pursuant to § 395.3025(10), Florida Statutes.

2. Redundant Exemptions

In reviewing the statutory exemptions to both the open meetings law and the public records law, the Commission identified a number of public record exemptions for the same or similar information spread throughout the statutes. For example, the Commission’s review found approximately 33 separate exemptions for the identity of donors to agency direct support or citizen support organizations – among many others, the identity of donors to the direct support organizations of the University of West Florida, the Florida Tourism Marketing Corporation, the Ringling Museum of Art, and the Florida Development Finance Corporation are exempt from public disclosure.¹²⁹

Arguably, given the sheer number of exemptions for the identity of donors, there is universal agreement that such exemptions are necessary and can be constitutionally justified as required under Article I, section 24(c), of the Florida Constitution. According to the public necessity statement of the most recently created exemption for the identity of donors, protecting the identity of donors to the direct support organization of the Department of Veterans’ Affairs, the purpose of the exemption is to encourage donations and it’s necessary because without such protection

¹²⁸ See FLA. STAT. § 119.071(4)(d)6. (2007). An exemption for the home addresses, etc. of general magistrates, special magistrates, judges of compensation claims, administrative law judges, and child support enforcement hearing officers, was created during the 2007 legislative session. It, too, requires such judges and magistrates to provide a written statement that they’ve made reasonable efforts to protect such information “from being accessible through other means available to the public.” See Ch. 2008-041, § 1, 2008 Fla. Laws (CS/CS/SB 766, 1st Eng. by Sen. Nan Rich) (codified as § 119.071(4)(d)1.b.)

¹²⁹ See FLA. STAT. §§ 267.1732(8) (University of West Florida); 288.1226(6) (Florida Tourism Marketing Corporation); 1004.45(2)(h) (Ringling Museum of Art); and 11.45(3)(j) (Florida Development Finance Corporation) (2007).

DRAFT

potential donors may be dissuaded from contributing to the direct-support organization for fear of being harmed by the release of sensitive financial information. Difficulty in soliciting donations would hamper the ability of the direct-support organization to carry out its education and rehabilitation activities to promote and advance a veteran's reintegration into the community through both public-sector and private-sector funding.¹³⁰

Similar justification language can be found in the public necessity statement in CS/HB 1405, passed in the 2007 legislative session and creating an exemption for the identity of donors to publicly owned house museums designated as National Historic Landmarks.¹³¹

Although the public necessity language may be similar in such exemptions, the actual breadth or scope of the exemptions is not. While the majority of the donor exemptions protect the identity of only those donors or potential donors "who desire to remain anonymous,"¹³² the identity of donors to the Scripps Florida Funding Corporation is automatically exempt, regardless whether the donor desires anonymity.¹³³ Other donor exemptions protect not only the identity of the donor, but the amount of the donation as well or protect the identity of a potential donor individually identified by the direct support or citizen support organization.¹³⁴

Other redundant exemptions identified by the Commission include:

- audit reports
- social security numbers
- medical information and/or records
- personal financial information
- trade secrets

¹³⁰ See Ch. 2008-85, § 2, 2008 Fla. Laws (CS/HB 863, 1st Eng. by Rep. Ron Reagan) (codified at § 292.055(5), F.S.).

¹³¹ See Ch. 2007-213, § 2, 2007 Fla. Laws (CS/HB 1405, 1st Eng. by Edward B. Bullard) (codified at § 267.076, F.S.).

¹³² See, e.g., FLA. STAT. §§ 267.076 (donors to the direct support organization of the DVA); 267.17(3) (donors to the citizen support organization of the Division of Historical Resources; and 11.45(3)(i) (donors to Enterprise Florida, Inc.) (2007).

¹³³ See FLA. STAT. § 288.9551(2)(c).

¹³⁴ See, e.g., FLA. STAT. §§ 265.605(2) (identity of donors and amount donated to the Cultural Endowment program trust fund); and 265.289(2) (identity of potential donors identified by state theater contract organizations).

DRAFT

- proprietary business information
- security system plans, etc.
- claims files
- appraisals, offers, counteroffers
- complaints concerning discrimination

3. Sunset Review of Open Government Exemptions

The Open Government Sunset Review Act of 1984 provided that exemptions to both the public records law and the open meetings law in existence at the time the Act was approved would automatically expire over the next ten years. The Act contained a review schedule for the existing exemptions which included an examination of 100 chapters of the statutes each year for a period of 10 years.¹³⁵ The Act was not implemented immediately, however, and significant changes were made before its enactment in 1985.¹³⁶

Under the 1985 law, each new exemption would be reviewed and reenacted every 10 years after the original enactment; if not reenacted, the exemption would automatically “sunset”.¹³⁷ In addition, the modified legislation required “a ‘compelling justification’ to close a record or a meeting, and provid[ed] the Legislature must find ‘an identifiable public purpose sufficient to override the strong presumption of open government.’”¹³⁸ There were three criteria for the finding of “an identifiable public purpose”:

- effectiveness and efficiency of government;
- protection of sensitive personal information; and

¹³⁵ See Ch. 84-298, 1984 Fla. Laws.

¹³⁶ See The White Paper, note 3, *supra*, at 109.

¹³⁷ See Ch. 85-301, 1985 Fla. Laws.

¹³⁸ The White Paper, note 3, *supra* at 110 (citing Ch. 85-301, 1985 Fla. Laws).

DRAFT

- protection of trade secrets and proprietary business information.¹³⁹

The 1985 law was later amended to enhance the review process by providing that the public purpose in support of an exemption must be “sufficiently compelling” to override the strong public policy of open government, and that the exemption could be “no broader than is necessary to meet the public purpose it serves.” The amendment also narrowed allowable exemptions for sensitive personal information to include only personal *identifying* information.¹⁴⁰ A staff analysis of the legislation amending the 1985 Act noted that the required review of open government exemptions under the Act had a beneficial effect in that many exemptions were “narrowed or made more specific as a result of the review and reenactment process.”¹⁴¹

When the 1985 Open Government Sunset Review Act itself sunsetted in 1995, the Legislature reenacted the law with one major modification: Under the 1995 Act, each new or “substantially amended” exemption to the open meetings law or public records law would be reviewed once five years after enactment, at which time the exemption would be repealed or permanently re-enacted.¹⁴²

With the exception of this one change, the 1995 Act is very much like its predecessor. For example, the Act stipulates that “[a]n exemption may be created, revised or maintained only if it serves an *identifiable public purpose*, and the exemption *may be no broader than is necessary to meet the purpose it serves.*” In addition, the 1995 Act sets forth the same three criteria for reenactment, and further stipulates that an

¹³⁹ Id.

¹⁴⁰ See Ch. 91-219 1991 Fla. Laws.

¹⁴¹ STAFF OF HOUSE COMM. ON GOVERNMENTAL OPERATIONS ANALYSIS FOR HB 1719 (Comm. Print 1991).

¹⁴² See Ch. 95-217 1995 Fla. Laws (codified at § 119.15, F.S.). Pursuant to § 119.15(4)(b), F.S., “an exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”

DRAFT

exemption can be reenacted only if “the Legislature finds that the purpose is *sufficiently compelling to override the strong public policy of open government* and cannot be accomplished without the exemption.”¹⁴³

Of the open government exemptions reviewed annually under the Open Government Sunset Review Act, many are modified and narrowed, and most are passed out of the Legislature by wide margins in each chamber.¹⁴⁴ Rarely is an exemption allowed to sunset,¹⁴⁵ even when in reviewing the exemption staff finds it unused in the five years since enactment. For example, an exemption for the identity of donors or prospective donors to the Florida Sports Foundation was reviewed in 2001 under the Open Government Sunset Review Act despite the fact that the Foundation reported “that no donor has every requested anonymity and that, in fact, the opposite is true – *donors generally want recognition for their support.*” And although the Foundation further “reported that it would not be opposed to the repeal of the exemption,” the exemption was nonetheless reenacted.¹⁴⁶

Some have suggested that the five year review period is too short to allow for an effective review and evaluation of an exemption, and that the periodic review process provided for under the 1985 Act may better support “the strong public policy of open

¹⁴³ FLA. STAT. § 119.15(6)(b) (2007). (emphasis added)

¹⁴⁴ **PROVIDE EXAMPLES**

¹⁴⁵ Section 626.97411, F.S., providing a public record exemption for credit scoring methodologies and related data contained in reports by insurers to the Office of Insurance Regulation, was scheduled for review and reenactment during the 2008 legislative session. Senate Proposed Bill 7042 would have reenacted the exemption without modification, thus saving it from automatic repeal on October 2, 2008. However, the Senate Banking & Insurance Committee failed to submit SPB 7042 as a committee bill and the exemption was not reenacted. See Fla. SPB 7042 (2008) (by S. Banking & Insurance Committee).

¹⁴⁶ See STAFF OF SEN. COMM. ON COMMERCE & ECONOMIC DEVELOPMENT ANALYSIS FOR SB 454 at 6 (Feb. 19, 2001). (emphasis added) The companion bill, HB 387, passed the Legislature and was approved by the Governor. Ch. 2001-150 2001 Fla. Laws (1st Eng. by H. State Administration Committee) (codified at § 288.12295, F.S.).

DRAFT

government in Florida.”¹⁴⁷ Additionally, legislative staff has noted “the Open Government Sunset Review Act of 1995 is a statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of [the Act] do not have to be met.” The Legislature would be bound by the review and reenactment requirements of the Act, however, if such requirements were enshrined in the Florida Constitution.¹⁴⁸

4. Investigation of Complaints Against Professionals Licensed by the Department of Business and Professional Regulation and the Department of Health

As a general rule, records relating to investigations into complaints against a government officer or employee are exempt from public disclosure until there is a probable cause finding. For example, when a complaint is filed with the Commission on Ethics, the complaint and records relating to the complaint are exempt from public disclosure pursuant to § 112.324(2)(a), Florida Statutes, until the complaint is dismissed for legally insufficiency, the subject of the complaint requests that such records be made public, or until the commission, upon investigating the complaint, determines “whether probable cause exists to believe that a violation has occurred.” After the probable cause finding is made, all records related to the complaint and the commission’s investigation become subject to public disclosure, regardless of whether there is probable cause that a violation has occurred.¹⁴⁹

¹⁴⁷ See Testimony of Senator Curt Kiser, representing the Florida Press Association and Florida Society of Newspaper Editors, at Commission on Open Government Reform Public Hearing (Sarasota, February 2008), Transcript of February 2008 Public Hearing Day 1 at 30; 34 – 36 (Sarasota, FL) (hereinafter *Sarasota Transcript*).

¹⁴⁸ STAFF OF H. COMM. ON STATE ADMINISTRATION ANALYSIS FOR HB 387 (PCB SA 01-06) (Jun. 20, 2001) at 3.

¹⁴⁹ See Testimony of Virlindia Doss, **TITLE**, Florida Commission on Ethics, at Commission on Open Government Reform Public Hearing (Tallahassee, Aug. 22, 2007), Tallahassee Transcript, note 14, *supra*, Vol. 1 at 28.

DRAFT

The same is true of complaints filed against legislators and most professionals licensed by the state, including attorneys, teachers, medical examiners, engineers, private investigators, insurance agents, mortgage brokers and law enforcement agents, among others.¹⁵⁰ In all cases, records relating to investigations into complaints against legislators and such licensed professionals become public after the investigation is over and the probable cause finding has been determined, regardless of whether it is probable cause or no probable cause.

However, the vast majority of professionals licensed by the Department of Business and Professional Regulation (DBPR) and the Department of Health (DOH) are afforded a higher level of protection than their professional peers licensed or regulated by other state entities. Records relating to a complaint against most professionals licensed by DBPR are subject to public disclosure *only if* there is a finding of probable cause; such records are exempt from public disclosure if no probable cause is found.¹⁵¹ The same is true of all professionals licensed by the DOH – records associated with investigation of complaints filed against doctors, acupuncturists, opticians, pharmacists, dentist, psychologists, etc., are exempt from public disclosure unless there is a finding of probable cause. Where no probable cause is found, the investigatory records are exempt from public disclosure.¹⁵²

According to testimony provided to the Commission by a representative of DBPR, about 70 – 75 percent of the complaints received by the department either are

¹⁵⁰ **GET CITES – SEE DOCUMENT FROM DBPR AT SARASOTA MEETING.**

¹⁵¹ **See, e.g., CITE FOR HARBOR PILOTS, GEOLOGISTS, VETERINARIANS, COSMETOLOGISTS.** Some professionals licensed by DBPR are treated differently, however. For example, complaints against community association managers (**CITE**), yacht brokers (**CITE**), and land developers (**CITE**), become public upon the Department’s receipt of the complaint.

¹⁵² **CITE AND NOTE THAT THE RECORDS ARE “CONFIDENTIAL AND EXEMPT”**

DRAFT

dismissed due to a lack of legal sufficiency or closed with a finding of no probable cause.¹⁵³ When a complaint is dismissed for lack of legal sufficiency, the complaint and associated records are subject to public disclosure under Florida's public records law; records related to an investigation of a complaint that concludes with a finding of no probable cause are exempt from public disclosure.

Statistics provided by the DOH were fairly comparable: In 2006 – 2007, the department received 15,611 complaints and 9,953 were found legally sufficient. Of the 8,098 investigations completed by DOH, 6,300 – nearly 78 percent – were closed with a finding of no probable cause; thus, the investigatory records remain exempt from public disclosure.¹⁵⁴

When a complaint filed with either DBPR or DOH is closed with a finding of no probable cause, the complainant is notified but is not told why the complaint was dismissed. And because the investigatory records of such complaints remain confidential and exempt from public disclosure, the complainant – and the public, for that matter – can't be sure the handling of the complaint and ensuing investigation was thorough and the testimony provided was accurate.¹⁵⁵ In addition, there is no opportunity for public oversight of the departments and their regulatory boards.

¹⁵³ See Testimony of April Skilling, Deputy General Counsel, Florida Department of Business and Professional Regulation, at Commission on Open Government Reform Public Hearing (Sarasota, February 2008), Saraosta Transcript, note 147, *supra*, Day 2, Vol. 2 at 197 – 201. See also Annual Report, Florida Department of Business & Professional Regulation, Divisions of Certified Public Accounting, Professions, Regulation and Real Estate, Fiscal Year 2007 – 2008. According to the report, of the 16,047 complaints determined legally sufficient for FY 2006 – 2007, no probable cause was found in approximately 81% of the cases. *Id.* at 7 – 8.

¹⁵⁴ See Testimony of Renee Alsobrook, Chief Legal Counsel, Department of Health, at Commission on Open Government Reform Public Hearing (Sarasota, February 2008), Sarasota Transcript, note 147, *supra*, Day 2, Vol. 2 at 357.

¹⁵⁵ See, e.g., Letter from Julie Matherly to Barbara Petersen, Chair, Commission on Open Government Reform, Apr. 12, 2008 (on file with the Commission, Tallahassee, FL); and Testimony of and Material Submitted by Cameron Berry at Commission on Open Government Reform Public Hearing (Kissimmee, November 2007), Kissimmee Transcript, note 13, *supra*, at XX.

5. Exemption for Economic Development Records

a. Economic Development Agencies

Section 288.075(2)(a), Florida Statutes, stipulates that “information held by an economic development agency concerning plans, intentions, or interests of [a] private corporation, partnership, or person to locate, relocate, or expand any of its business activities” in Florida is confidential and exempt upon the written request of such private entity. Such information is exempt for a period of 12 months following receipt of the request for confidentiality, but the period of confidentiality can be extended for an additional 12 months by request and upon certain specified findings by the economic development agency.¹⁵⁶

The exemption was expanded in 2001 to include an exemption for trade secrets held by an economic development agency (EDA) and was thus subject to review and reenactment under the Open Government Sunset Review Act.¹⁵⁷ In reviewing the exemption in 2006, legislative staff found that the exemption

covers a broad set of documents, which economic development agencies specify include: business plans and proposals, financial records, real estate contracts or

¹⁵⁶ See FLA. STAT. § 288.075(2)(b) (2008). “Economic development agency” is broadly defined as the Office of Tourism, Trade, and Economic Development; an industrial development authority created by law or special law; Space Florida; the public economic development agency of a county or municipality or county or municipal officers or employees assigned to promote the business or industrial interests of the county or municipality; research and development authority created by law; or “[a]ny private agency, person, partnership, corporation, or business entity” authorized to promote the business or industrial interests of the state, a county, or a municipality. *Id.* at § (1)(a).

¹⁵⁷ Ch. 2001-161 2001 Fla. Laws (HB 1541 1st Eng. by H. Economic Development & International Trade Committee) (codified at § 288.075, F.S.). The legislation also expanded the scope of the exemption to include the Florida Commercial Space Financing Corporation, and stipulated that trade secrets held by an EDA would be exempt for a period of 10 years. Additionally, as originally drafted the period of confidentiality for plans submitted to an EDA was 24 months; HB 1541 allowed for a 12 month extension of the confidentiality period. When the exemption was reenacted in 2006, the period of confidentiality was reduced from 24 to 12 months, with one 12 month extension allowed. See Ch. 2006-157 2006 Fla. Laws (HB 7017 2d Eng. by H. Governmental Operations Committee).

DRAFT

leases, building information, site requirements, marketing and business strategies, business and product information, and financial incentive applications.¹⁵⁸

The exemption, which narrowly passed the House, was reenacted with minor modification.¹⁵⁹

The First Amendment Foundation (Foundation) objected to the scope of the exemption, suggesting that it be “narrowed to better comply with the constitutional standard under Article I, section 24, of the Florida Constitution.”¹⁶⁰

Concerned about the lack of public oversight, the Foundation noted that under the exemption an EDA could prohibit public access to “virtually any information” provided to the agency without verification that “the information actually qualifies for confidential and exempt status” and thus recommended the exemption be amended to require “that any economic development agency that invokes s. 288.075(2) be required to implement reasonable procedures that will assure a determination is made regarding any information the private corporation, partnership, or person submits as confidential.”

The Foundation recommended that an EDA should be required to “provide a general statement to the public of its plans. This statement should include, at the very least, the identity of the private corporation, partnership, or person that the economic development agency is negotiating with.”¹⁶¹

¹⁵⁸ STAFF OF S. GOVERNMENTAL OVERSIGHT AND PRODUCTIVITY COMM. ANALYSIS FOR CS/SB 734 (Apr. 25, 2006) at 6.

¹⁵⁹ See Ch. 2006-157 2006 Fla. Laws (HB 7017 2d Eng. by H. Governmental Operations Committee). The original House vote was 85/32, barely above the 2/3 vote required by the state constitution. However, the House bill was amended in the Senate to reduce the confidentiality period from 24 months to 12. The bill, as amended, passed the Senate unanimously, and the House concurred with the Senate amendment, and approved the amended bill by a vote of 118/3.

¹⁶⁰ See Letter from Adria E. Gonzalez, Director, First Amendment Foundation, to Heather Williamson, Legal Analyst, House Governmental Operations Committee, re: OGSR/Section 288.075, F.S., Public Record Exemption (Aug. 8, 2005) (on file with the First Amendment Foundation, Tallahassee, FL).

¹⁶¹ Id.

DRAFT

The subject of an interim report by the Senate Commerce Committee, § 288.075, Florida Statutes, was reviewed again in 2007. The report recommended that the two exemptions relating to the promotion and administration of economic development by state and local governments – §§ 288.075 and 288.1067, Florida Statutes – be combined into one provision.¹⁶² The report recommended that proprietary business information, trade secrets and certain identification and account numbers be held confidential and exempt indefinitely.¹⁶³

In response to staff recommendations, § 288.075 was amended to include an exemption for proprietary business information held by an EDA, and the trade secret exemption was expanded to keep trade secrets provided by a business entity to an EDA exempt and confidential in perpetuity.¹⁶⁴ Also added were various exemptions for economic incentive programs formerly codified in § 288.1067, Florida Statutes.

Again, the First Amendment Foundation expressed concerns about the scope and effect of the exemption, noting that the exemption prohibits opportunity for public oversight or input on development projects that can have significant impact on their lives and communities.¹⁶⁵ These concerns were echoed in public testimony received by the

¹⁶² S. COMMERCE COMM., INTERIM PROJECT REPORT 2007-103: REVIEW OF PUBLIC RECORDS EXEMPTIONS RELATING TO ECONOMIC DEVELOPMENT AGENCIES (October 2006).

¹⁶³ *Id.* at XX.

¹⁶⁴ Ch. 207-203 2007 Fla. Laws (HB 7201 1st Eng. by H. Government Efficiency and Accountability Council) (codified at s. 288.075, F.S.). Before enactment of HB 7201, trade secrets held by an EDA were exempt for a period of 10 years or until otherwise disclosed.

¹⁶⁵ *See* Letter from Adria Gonzalez Harper, Director, First Amendment Foundation, to Senator Alex Diaz de la Portilla, Chair, Florida Senate Commerce Committee, re: SB 1182/Economic Development Agencies (Apr. 4, 2007) (on file with the First Amendment Foundation, Tallahassee, FL). *See also* Letter from Barbara A. Petersen, President, First Amendment Foundation, to Attorney General Bill McCollum, re: Comment on the City of Orlando Request for AGO/Section 288.075, F.S. (Jan. 19, 2007) (“[The] FAF receives numerous calls and complaints from journalists and citizens regarding this records exemption. Frequently, problems arise when economic development agencies transact business with local governments which critically affects a town or its citizens. Yet as a result of this exemption, the citizens routinely are prohibited access to the records of such deals and transactions until after the fact. This is usually too late as citizens lacked the opportunity to learn about – much less comment on – the deal or development because it

DRAFT

Commission at its public hearings. John Guest testified at the Kissimmee public hearing that he learned of a major economic development project only a few months earlier, even though the project had been under development for four or five years. According to Mr. Guest, the project would have a major impact on him, and had he “known ahead of time that this was going forward,” he would have had his attorney talk to the principals involved in an attempt to lessen the project's impact.¹⁶⁶

Expressing his frustration about the secrecy surrounding the same development project, Wally Krouson testified about the need for greater scrutiny, and complained that the government should “not just plunk this thing down . . . and hope [it] can fool the public into not worrying about it until it's too late, which is exactly what's going on.”¹⁶⁷

Jim Doughton, publisher of the *Gainesville Sun*, testified at the Commission's public hearing in Sarasota that the exemption for economic development agencies “is way too broad. We only find out about the benefits the government is providing at the end of the process, where [sic] there's no ability to change the public opinion.”¹⁶⁸

Members of the Commission expressed concerns regarding the economic development exemption under § 288.075, Florida Statutes, as well. Commissioner

has already been completed before the records became public. In that respect, s. 288.075, F.S., virtually precludes any opportunity for public oversight.”) (on file with the First Amendment Foundation, Tallahassee, FL).

¹⁶⁶ Testimony of John Guest at Commission on Open Government Reform Public Hearing (Kissimmee, November 2007), Kissimmee Transcript, note 13, *supra*, Day 1 at 102 – 108. Referring to the CSX project, Mr. Guest testified that transport trucks would be running in front of his house every 30 seconds or less for “24 hours a day, six and a half days a week.” *Id.* at 105.

¹⁶⁷ Testimony of Wally Krouson at Commission on Open Government Reform Public Hearing (Kissimmee, November 27), Kissimmee Transcript, note 13, *supra*, Day 1 at 116. Six citizens testified about the CSX project at the Kissimmee public hearing. In a similar vein, Ms. Anna Current testified about her concerns regarding the secrecy surrounding community redevelopment agency proceedings. *See* Testimony of Anna Current at Commission on Open Government Reform Public Hearing (Ft. Lauderdale, May 2008) Transcript of May 2008 Public Hearing Day 1 at 2 – 25 (Ft Lauderdale, FL) (hereinafter *Ft. Lauderdale Transcript*).

¹⁶⁸ Testimony of Jim Doughton, Publisher, *Gainesville Sun*, at Commission on Open Government Reform Public Hearing (Sarasota, February 2008), Sarasota Transcript, note 147, *supra*, Day 1 at 48.

Dockery questioned the justification for the exemption and suggested the Commission review the economic development exemption because “people are hiding behind the term.” She asked,

What do we really fear about the public knowing the details of economic development? That it’s really not going to create the jobs that are promised? That it’s really not going to have the benefits? That they really should have some environmental studies, or whatever it is that they’re trying to get away with not having, by throwing out the term ‘economic development’? A lot of mischievousness is happening under those two words.¹⁶⁹

Commissioner Petersen agreed, stating the economic development exemption is “a constant irritation to people in communities all around Florida because . . . it’s almost too late by the time” the information is released to the public.¹⁷⁰

b. Transportation Projects

Originally scheduled to testify before the Commission at its public hearing in Kissimmee, Thomas D’Aprile, County Commissioner for District 1, Charlotte County, was unable to testify when the meeting was rescheduled. Mr. D’Aprile, did, however, submit a recommendation to the Commission in writing. Specifically, Mr. D’Aprile requests that the Commission expand the public record exemption under § 337.168, Florida Statutes, for the official cost estimate of state transportation projects.¹⁷¹

The exemption Mr. D’Aprile refers to actually contains three separate public record exemptions:

¹⁶⁹ See Sarasota Transcript, note 147, *supra*, Day 1 at 38.

¹⁷⁰ See *id.* at 109.

¹⁷¹ See Letter from Thomas D’Aprile, County Commissioner, District 1, Charlotte County, to Commission on Open Government (Nov. 20, 2007) (on file with the Commission on Open Government Reform, Tallahassee, FL)

DRAFT

- Section 337.168(1) exempts documents or electronic files which reveal the official cost estimate of Department of Transportation projects until a contract for the project is executed or the project is no longer under active consideration;
- Section 337.168(2) provides an exemption for documents revealing the identify of those persons who have requested or obtained bid packages, plans, or specifications pertaining to any project let by the department for a specific period of time; and
- Section 337.168(3) exempts the department’s bid analysis and monitoring system.

It would appear from Mr. D’Aprile’s letter and the attached Charlotte County Resolution that the county is most interested in expanding the protection under § 337.168(1) to include the official cost estimate of similar county projects. However, there was no discussion of the issue by the Commission and no further information or testimony was offered or received.

- 6. Social Security Numbers**
- 7. Clemency Proceedings**
- 8. Department of Children and Family Services Exemptions**
- 9. Florida Department of Law Enforcement Propose Exemptions**
- 10. Barriers to Employment**
- 11. Litigation Exemptions**
- B. Fees**
- C. Electronic Access**
- D. Financial Transparency**
- E. Public Participation**
- F. Education and Training**
- G. Enforcement and Compliance**
- H. Office of Open Government**

DRAFT

I. Citizen's Bill of Rights

J. The Florida Legislature

IV. CONCLUSIONS AND RECOMMENDATIONS