



# The Florida Senate

Interim Project Report 2001-033

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Committee on Commerce and Economic Opportunities

Senator George Kirkpatrick, Chairman

## REVIEW OF PUBLIC RECORDS EXEMPTION RELATING TO FLORIDA SPORTS FOUNDATION DONORS

### SUMMARY

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. Chapter 96-326, L.O.F., created a public records exemption for records held by the Florida Sports Foundation that identify donors or prospective donors to the foundation who desire to remain anonymous.

The foundation reports that no donor has ever requested anonymity and that, in fact, the opposite is true – donors generally want recognition. Nonetheless, it is possible that such anonymity may be important to future donors and that, without the exemption, the foundation could experience difficulty in fulfilling one of its statutory roles, which is to raise funds and receive gifts and property. In this respect, the exemption supports the effective and efficient administration of sports marketing and promotion programs on behalf of the state. Consequently, it is recommended that the Legislature re-enact the public records exemption provided under s. 288.12295, F.S.

public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the Florida Constitution, the Public Records Law<sup>1</sup> specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies.

The term “public records” has been defined by the Legislature in s. 119.011(1), F.S., to include:

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 the official business by any agency.

### BACKGROUND

#### Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians voted to adopt an amendment to the Florida Constitution that raised the statutory right of public access to public records to a constitutional level. Article I, s. 24, of the Florida Constitution provides:

- (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any

This definition of “public records” has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge (*Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980)). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form

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<sup>1</sup>Chapter 119, F.S.

(*Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979)).

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c), of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

### Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for exemptions to public records or meetings requirements. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2 of the fifth year, unless the Legislature acts to re-enact the exemption. Section 119.15(3)(a), F.S., requires a law that enacts a new exemption or substantially amends an existing exemption to state that the exemption is repealed at the end of five years and that the exemption must be reviewed by the Legislature before the scheduled repeal date. 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” (s. 119.15(3)(b), F.S.).

In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it must include the exemption in the following year’s certification after that determination.

Section 119.15(2), F.S., states that an exemption is to be maintained only if:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;

- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or

- (c) The exemption affects confidential information concerning an entity.

Section 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following specific questions:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Section 119.15(4)(b), F.S., provides that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes and 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:

1. The exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
2. The exemption protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this provision, only information that would identify the individuals may be exempted; or
3. The exemption protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used

to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Under s. 119.15(4)(e), F.S., notwithstanding s. 768.28, F.S., or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and re-enactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid re-enactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could preserve an exemption that does not meet the explicit standards set forth in the Open Government Sunset Review Act of 1995, so long as the requirements of Art. I, s. 24, of the State Constitution are not violated.

### The Florida Sports Foundation

Section 288.1229, F.S., authorizes the creation of a direct-support organization within the Governor's Office of Tourism, Trade, and Economic Development (OTTED) for the purpose of promoting and developing the sports industry and related industries in the state. In Florida, this direct-support organization is the Florida Sports Foundation (foundation). The foundation board members consist of 15 members appointed by the Governor and up to 15 members appointed by the existing foundation board of directors.

Funding for foundation activities is provided primarily from the private sector and from the professional sports team license plate program under s. 320.08058(9), F.S. The license tag program provides approximately \$1.1 million annually. The funds support matching grants passed through the foundation to regional sports organizations and professional sports franchise host committees in local communities. Approximately \$350,000 annually is appropriated from General Revenue for amateur sports. Finally, the administration of the funds collected from the sale of the Olympic license plates under s. 320.08058, F.S., is transferred to the foundation. Of the first \$5 million in use fees collected annually from the Olympic license plates, 50 percent goes to the U.S. Olympic Committee and 50 percent goes to fund the state amateur games, known as the Sunshine State Games. Any additional fee revenue must be deposited into the General Revenue Fund (s. 320.08058(6)(b), F.S.).

In its role as the state's official sports promotion office, the foundation serves as the primary source of

information on sports and sporting opportunities in the state. The organization produces several Florida sports guides and conducts workshops and conferences designed to increase the knowledge of, and interest in, sports as a viable revenue producer for the state. In addition to channeling grant funds to local and regional sports organizations and local governments, the foundation has been very active in assisting these entities in promoting their venues to not only professional but also major amateur competitions. In the area of amateur sports such as golf and fishing, the foundation has been active in helping to create state championship programs. Other duties of the foundation include the promotion of physical fitness and amateur sports for the citizens of Florida, the promotion of Florida as a host for national and international amateur sports competitions, and the administration of the Sunshine State Games. The foundation is responsible for the Sunshine State Games, programs to encourage participation in Florida's youth in Olympic sports and competitions, Seniors State Games, and support for Florida bid-cities or communities seeking to host the summer Olympic or Pan American Games.

Section 2 of ch. 96-326, L.O.F., created a public records exemption for certain records held by the foundation.<sup>2</sup> Specifically, s. 288.12295, F.S., provides:

The identity of a donor or prospective donor to the direct-support organization authorized under s. 288.1229 who desires to remain anonymous and all information identifying such donor or prospective donor are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Such anonymity shall be maintained in audit reports. This section expires October 2, 2001, and is subject to review by the Legislature under the Open Government Sunset Review Act of 1995 in accordance with s. 119.15 before that date.

Further, in creating the exemption, the Legislature found:

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<sup>2</sup> Florida laws relating to Government in the Sunshine have "been held to apply to private entities created by law or by public agencies, and also to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties" (Office of the Attorney General/First Amendment Foundation, *Government-In-The-Sunshine Manual*, 2000 Edition, p. 4.).

. . . a public necessity in protecting the identity of donors and prospective donors to the direct-support organizations authorized to promote entertainment<sup>3</sup> and sports-related industries in order to enable these entities to effectively and efficiently administer marketing and promotion programs on behalf of the state. The purpose of the exemptions is to honor the request for anonymity of donors or prospective donors to the not-for-profit corporations and thereby encourage donations from individuals and entities that might otherwise decline to contribute. Without the exemptions, potential donors may be dissuaded from contributing to the entertainment and sports-related direct-support organizations because such donors fear being harmed by the release of sensitive financial information. Difficulty in soliciting donations would hamper the ability of the direct-support organizations to carry out their marketing and promotion activities and would hinder fulfillment of the goal of establishing marketing and promotion operations for the state that are funded by both the public sector and the private sector.

(s. 3, ch. 96-326, L.O.F.)

## METHODOLOGY

To complete this review, the Florida Sports Foundation was surveyed on the use and need for the exemption. The survey also collected information pertaining to the volume of records covered by the exemption, the manner in which document security is maintained, the organizations or individuals affected by the exemption, and the significance of the exemption to the operation of a public program or activity.

## FINDINGS

Public records exemptions for the identities of donors or prospective donors who desire anonymity are comparatively common under the Florida Statutes.<sup>4</sup> The

<sup>3</sup> Chapter 96-326, L.O.F., also created a public records exemption for the identity of donors or prospective donors to a direct-support organization authorized to promote and develop the entertainment industry in Florida. (*See ss.* 288.1228 and 288.12285, F.S. (1997).) The statutory authority for the entertainment direct-support organization and its public records exemption were repealed effective July 1, 1999, by s. 12, ch. 99-251, L.O.F.

<sup>4</sup> *See, e.g.*, Florida Tourism Industry Marketing Corporation (s. 288.1226(6), F.S.); Historic Pensacola Preservation Board of Trustees direct-support organization (s. 266.0018(8), F.S.); Florida Prepaid College

exemption provided to the Florida Sports Foundation under s. 288.12295, F.S., uniquely affects donors or prospective donors of the foundation who desire to remain anonymous. The privilege and confidentiality provided would apply to any record revealing the identity of such donor, and such anonymity would have to be maintained in audit reports. In concept, the public records exemption appears to touch upon two of the three eligible public purposes outlined in the Open Government Sunset Review Act.

First, the exemption enables the Florida Sports Foundation to effectively and efficiently administer sport-marketing and promotion activities on behalf of the State of Florida (s. 119.15(4)(b)1., F.S.). To the extent that donors might be dissuaded from contributing to the foundation's activities in the absence of the exemption, the ability of the foundation to raise private funds would be limited. The authorizing statute for the direct-support organization provides that one of its purposes is to raise funds and receive gifts and property (s. 288.1229(2)(c), F.S.).

Secondly, the exemption protects information of a confidential nature concerning entities, release of which could injure business donors in the marketplace (s. 119.15(4)(b)3., F.S.). For example, competitors might be able to use information about a business's corporate giving to gain insight into the financial status and strategic interests of the business, which could harm an advantage that the business maintains in the marketplace.

In practice, however, the foundation reports that no donor has ever requested anonymity and that, in fact, the opposite is true – donors generally want recognition for their support of the foundation's activities. In light of this fact, the foundation reported in its survey response that it would not be opposed to the repeal of the exemption.

Nonetheless, it is possible that a future donor to the foundation might desire anonymity. If the exemption were not in place and a donor were to request anonymity, the foundation could be forced to postpone the donation and request a public records exemption from the Legislature. The exemption is narrowly drawn to apply only to those donors who desire anonymity and, therefore, appears to comply with the constitutional and statutory standards for such exemptions.

Board direct-support organization (s. 240.551(22)(d), F.S.); and Florida Intergovernmental Relations Foundation (s. 288.809(4), F.S.).

**RECOMMENDATIONS**

Donors to the Florida Sports Foundation have not requested anonymity and, according to the foundation, are unlikely to do so. Nonetheless, it is possible that such anonymity might be important to future donors, and therefore important to the effective and efficient administration of the foundation’s sports marketing and promotion program on behalf of the state.

The function, in part, of the public records exemption under s. 288.12295, F.S., is to foster and facilitate contributions to the foundation by assuring donors who

might not otherwise contribute that their identities will remain anonymous. Although there has been a lack of utilization of the exemption to date, the potential remains that future donors to the foundation will insist upon confidentiality as a condition for making gifts. Repeal of the exemption could frustrate fulfillment of one of the foundation’s purposes, which is to raise funds and receive gifts and property. It is recommended, therefore, that the Legislature re-enact the public records exemption provided under s. 288.12295, F.S.

**COMMITTEE(S) INVOLVED IN REPORT** *(Contact first committee for more information.)*

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**MEMBER OVERSIGHT**

N/A