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REWRITE OF PUBLIC RECORDS LAW, CHAPTER 119, F.S.

SUMMARY

When the Legislature first guaranteed access to records of public agencies in 1909, records were made of paper, not electronic bytes. Sixty years later, with the enactment of the Public Records Act, paper records still predominated. Even as governmental entities began increasing their reliance on computer technology in the 1980s and 1990s, the vast majority of records were still made of paper. With technology continuously modifying the way that governmental services are provided, it appears that in the 21st century electronic information will predominate. In many instances, it is likely that the only records that will be created will be electronic in nature.

The change from paper to electronic records is only one of the issues affecting public records. Concerns about privacy, identity theft, and public security have begun to reshape the public records landscape, as well. Other looming issues include the impacts on access caused by government reliance on private vendors; whether current fee levels for copies of electronic data are reasonable; and what types and methods of public access to records are appropriate for particular types of records. Finally, a growing number of exemptions to public records requirements, as well as inconsistencies in those exemptions, not only diminish open government, but complicate the ability of custodians to determine what records are available for the public to inspect and copy.

In order to facilitate the use of the Public Records Act by the governmental employees who must implement it and the public that relies on it for access, as well as to prepare for future legislative consideration of public records issues, a comprehensive revision of the act is warranted. Chapter 119, F.S., has been modified and expanded almost annually since it was enacted in 1967, but it has not been comprehensively revised since that time. As a result, the act has become disjointed and unorganized. For example, while the act has a

definition section, definitions of terms are dispersed throughout the act, making them difficult to locate. More importantly, various requirements for access, maintenance and preservation of public records, and fees for copies are not organized in a logical manner and are difficult to find and apply. A reorganized act will provide for greater clarity and simplicity, as well as assist in future topical reviews of the issues affecting public records.

After reorganizing the act, a technical review of exemptions will be recommended in order to eliminate redundancies, provide greater standardization, and create topical organization. Thereafter, the additional topics affecting public records, including copying costs, privacy protection, and public security issues, will be recommended for review.

BACKGROUND

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

In November 1992, the public approved a constitutional amendment guaranteeing and expanding public access to agency records. Article I, s. 24(a) of the State Constitution states:

Every person has the right to inspect or copy any public record made or received in connection with

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

² Chapter 67-125 (1967 L.O.F.)

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

Section 119.011(1), F.S., defines *public record* to mean:

. . . 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.

This expansive definition has been interpreted to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁴ Especially important is the recognition that not all records are made of paper. When the Legislature first enacted a law guaranteeing access to records of public agencies in 1909, records were made of paper, not electronic bytes. Sixty years later, with the enactment of the Public Records Act, paper records still predominated. Even as governmental entities began increasing their reliance on computer technology in the 1980s and 1990s, the vast majority of records were still made of paper. With technology continuously modifying the way that governmental services are provided, it appears that in the 21st century electronic information will predominate. In some instances, it is likely that the only records that will be created will be electronic in nature.

Governmental entities increasingly rely upon technology to perform their duties. Further, governmental functions are being outsourced and performed by private vendors. As a result, public records are not always physically located at an agency, if they exist in physical form at all. Examples of hybridized public-private performance of government

functions and the increased reliance on computer and Internet technology is evidenced by *PeopleFirst*, which places public employee personnel data on-line and establishes personnel functions in a private vendor. Further *MyFloridaMarketPlace* provides for on-line advertisement and bidding for government contracts. In both cases, records may be created and maintained that are solely electronic in form.

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

Article I, s. 24 (c) of the State Constitution authorizes the Legislature to provide exemptions from the public access provisions of the law and constitution by general law. Any law that creates an exemption must state with specificity the public necessity that justifies the exemption and may be no broader than necessary to comport with the stated public necessity.⁵ Further, a law that creates a public record exemption can relate only to exemptions and their enforcement. In other words, a law that creates a public records exemption may not include other substantive issues.⁶

METHODOLOGY

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

FINDINGS

Chapter 119, F.S., currently contains a definition section,⁷ but definitions of terms that are used in the act are also dispersed throughout it.⁸ As a result, it is

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

⁴ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁵ See, *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999).

⁶ Article I, s. 24(c) of the State Constitution; *State v. Knight*, 661 So.2d 344 (Fla. 4th DCA 1995).

⁷ Section 119.011, F.S.

⁸ Some additional definitions are contained in

sometimes difficult to locate definitions. Further, the terms that are in the definition section are not alphabetized. If definitions of all terms that are used in the Public Records Act were placed in the definition section and alphabetized, users could find definitions more easily. Further, some definitions in ch. 119, F.S., are specifically tied to definitions that are contained in other chapters. Given that ch. 119, F.S., provides general requirements for public records, it would be appropriate for that chapter to contain all general standards and definitions for public records and that cross-references are made to definitions in ch. 119, F.S., and not the reverse.

The Public Records Act contains a specific section for general state policy on public records,⁹ but additional policy statements are contained in other sections of the chapter. For example, s. 119.084, F.S., which relates specifically to requirements for the copyright of public records, also contains policy statements regarding common format of electronic records,¹⁰ the type of copy that must be provided to the public on request,¹¹ and a prohibition against entering into contracts which impair public access.¹² These policy statements are general in nature and should be placed in the general policy section.

In addition to public policy statements, fee requirements are also dispersed. Fees for copies of public records are contained in ss. 119.07(1)(a) and (b), 119.083(5), and 119.085, F.S. These requirements could be located in one section for ease of use and clarity. Once fee requirements are placed in one section, comparative analysis of the current fee structures will be facilitated. Additionally, co-locating fee requirements may help to establish fee consistency among agencies and encourage compliance.

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

specific requirements for maintenance and preservation of public records, would improve the act.

After the Public Records Act is reorganized, it would be appropriate to review exemptions in order to eliminate those that are duplicative. High numbers of redundant exemptions not only affect open government, but complicate the ability of custodians to determine what records are available for the public to inspect and copy.¹³ For example, currently, a number of agencies have exemptions for credit card numbers that they receive.¹⁴ There is also a general exemption for credit card numbers.¹⁵ A general exemption should suffice for all agencies and could be placed within a general exemption section in the Public Records Act. Eventually, specific but redundant exemptions could be repealed. There are likely numerous exemptions that could be enacted as general exemptions, though additional study will be necessary to identify them. Establishment of uniform exemptions, where possible, would improve implementation of the act.

The method for placement of exemptions to public records requirements is also inconsistent. The act contains a subsection that contains a litany of exemptions,¹⁶ but exemptions are placed throughout the chapter.¹⁷ Further, these exemptions are not organized by agency or type. Additionally, numerous exemptions are not located in the act, but are instead dispersed among the *Florida Statutes*. From an organizational perspective, it may be appropriate to create a specific section within the act for general exemptions that apply to all agencies.

Another option would be to reorganize those exemptions that are currently in the act according to agency or topic. This method was used in the revision of ch. 120, F.S. Section 120.80, F.S., is subdivided so that requirements that are specific to a particular agency are listed under a subsection devoted to that agency.

Alternatively, specific exemptions that apply to a single agency or under a specific circumstance could be removed from the Public Records Act and placed in specific statutes that relate topically. The vast majority

ss. 119.07(1)(a) and (b), 119.07(3)(n)(o)(y), 119.083(1)(a)(b)(c), 119.15(3)(c), F.S.

⁹ Section 119.01, F.S.

¹⁰ Section 119.083(4), F.S.

¹¹ Section 119.083(5), F.S.

¹² Section 119.093(6), F.S.

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

¹⁴ Sections 119.07(3)(cc), 215.322 (6), 338.155 (6), and 624.23, F.S.

¹⁵ Section 119.07 (3)(dd), F.S.

¹⁶ Section 119.07(3), F.S.

¹⁷ Section 119.0115, F.S.

of exemptions to public records requirements are currently dispersed throughout the *Florida Statutes*, in just this fashion. There are, however, numerous specific exemptions listed in s. 119.07(3), F.S., which could be relocated.

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

It is likely that the Legislature will continue to struggle with the impact of technology on open records, specifically, the use of computers to create and store records, and the accessibility of those records on the Internet. "E-government," the provision of government functions and services on-line, is growing in use and in popularity throughout the United States and in Florida. Nearly half of all Americans and three-quarters of American Internet users already have some experience using governmental websites.¹⁸ More than two-thirds of e-government users find that conducting transactions with government is easier over the Internet.¹⁹ This percentage is likely to increase given the convenience of e-government, as well as limited budgets. Given this trend, the traditional concept of a record that is created on paper, copied on paper, and stored on paper is rapidly facing obsolescence.

While digital records are clearly public records under Florida law, and electronic data and 24-hour a day Internet access provides superb access opportunities, a number of concerns are raised by this technology, as well. Without the proper forethought to security protocols and redaction of exempt information, e-government can facilitate identity theft, privacy invasion, fraud, and security lapses. While Americans are increasingly comfortable with the Internet, many still worry about personal information security while online.²⁰ This concern is well-placed. The number of Identify Theft Complaints registered by the U.S. Identity Theft Clearinghouse in the Federal Trade Commission recently found that almost 10 million

adults were identity theft victims in 2002.²¹ This was a 41% increase over the previous year.²² This report, however, indicated only 3% of respondents mentioned misuse of the Internet in their identify theft. Nevertheless, continued vigilance will be necessary regarding security measures, enforcement of redaction requirements. Further, a thoughtful analysis of the types of information that are made available on-line would be appropriate. A thorough reorganization of the Public Records Act that clarifies and simplifies it will assist the Legislature in this process.

RECOMMENDATIONS

Staff recommends that ch. 119, F.S., be reorganized topically and that records retention requirements be clarified. Specifically, staff recommends that:

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

¹⁸ *The New E-Government Equation: Ease, Engagement, Privacy and Protection*, p. 6, prepared by Hart-Teeter for the Council for Excellence in Government (April 2003).

¹⁹ *Ibid*, p. 11.

²⁰ *Ibid*, p. 13.

²¹ Federal Trade Commission, Identity Theft Survey Report, p. 13, September 2003.

²² *Ibid*, p. 18.