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Senator Nancy Argenziano, Chair

OPEN GOVERNMENT SUNSET REVIEW OF S. 267.135, F.S., DIVISION OF HISTORICAL RESOURCES

SUMMARY

Florida has been inhabited for over 10,000 years. Evidence of the presence of human beings is contained in archaeological sites located throughout the state. These sites contain human remains, artifacts, and other information that is historically, culturally, and archaeologically valuable. The Legislature has declared that historic properties are a rich and unique heritage of the state and an important legacy to be valued and conserved for present and future generations. It is state policy to record, preserve, protect, and interpret this information. The Division of Historical Resources of the Department of State presently holds approximately 28,000 archaeological site files. The Legislature has found that the state has a serious problem with archaeological looting and that the destruction of these nonrenewable historical resources will engender a significant loss to the state's quality of life, economy, and cultural environment.

Section 267.135, F.S., provides an exemption for any information identifying the location of archaeological sites contained in site files or other records maintained by the division, if the division finds that disclosure of such information will create a substantial risk of harm, theft, or destruction at a site. This exemption was made subject to s. 119.15, F.S., the Open Government Sunset Review Act of 1995, and will expire October 2, 2006, unless it is reviewed and saved from repeal.

The exemption was reviewed pursuant to the standards of the Open Government Sunset Review Act of 1995 and retention of the exemption is recommended as the exemption is narrowly-drawn to meet the stated public necessities for the exemption. Further, retention is recommended because the exemption is necessary for the effective and efficient administration of a government program.

BACKGROUND

Public Records – The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

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

In addition to the State Constitution, the Public Records Act,³ which pre-dates the State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do

¹ Section 1390, 1391 F.S. (Rev. 1892).

² Article I, s. 24 of the State Constitution

³ Chapter 119, F.S.

so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency⁴ records are available for public inspection. The term Apublic record@is broadly defined 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.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the

stated purpose of the law.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹² If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act of 1995¹⁴ provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and 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. The three statutory criteria are if the exemption:

(a) allows the state or its political subdivisions to effectively and efficiently administer a governmental

⁴ The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . 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, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.” The Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the state constitution.

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Art. I, s. 24(c) of the State Constitution.

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

program, which administration would be significantly impaired without the exemption;

(b) protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or

(c) protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁵

The act also requires consideration of the following:

- (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?

In addition to these considerations, pursuant to amendments to the section made by ch. 2005-251, L.O.F.,¹⁶ but that are not effective until October 1, 2005, consideration must also be given to the following:

- (1) Is the record or meeting protected by another exemption?
- (2) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act of 1995 may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁷

¹⁵ Section 119.15(4)(b), F.S.

¹⁶ See, Committee Substitute for Senate Bill 1144 by the Committee on Governmental Oversight and Productivity and Senator Argenziano.

¹⁷ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 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 reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Under s. 119.10(1) (a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed \$500. Further, under paragraph (b) of that section, a public officer who knowingly violates the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, commits a first degree misdemeanor penalty, and is subject to suspension and removal from office or impeachment. Any person who willfully and knowingly violates any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000.

The Department of State, Division of Historical Resources - The Florida Department of State is created in s. 20.10, F.S. The head of the department is the Secretary of State, who performs the functions conferred by the State Constitution upon the custodian of state records.¹⁸ Six divisions are established in law, including the Division of Historical Resources (the “division”).¹⁹

Chapter 267, F.S., the Florida Historical Resources Act, establishes the powers and duties of the division. Among a variety of other duties, the division is assigned the responsibility to cooperate with federal and state agencies, local governments, and private organizations and individuals to direct and conduct a

¹⁸ For example, s. 2(c), Art. XI of the State Constitution, requires the constitution revision commission to file its constitutional revision proposals with the custodian of state records.

¹⁹ The other divisions established in the Legislature include the Divisions of: (1) Elections; (2) Corporations; (3) Library and Information Services; (4) Cultural Affairs; and (5) Administration.

comprehensive statewide survey of historic resources and to maintain an inventory of those resources. Section 267.061, F.S., establishes the state policy on historic property and resources.²⁰ Subsection (1) of this section provides:

The rich and unique heritage of historic properties in this state, representing more than 10,000 years of human presence, is an important legacy to be valued and conserved for present and future generations. The destruction of these nonrenewable historical resources will engender a significant loss to the state's quality of life, economy, and cultural environment. It is therefore declared to be state policy to: (1) Provide leadership in the preservation of the state's historic resources; (2) administer state-owned or state-controlled historic resources in a spirit of stewardship and trusteeship; (3) contribute to the preservation of non-state-owned historic resources and to give encouragement to organizations and individuals undertaking preservation by private means; (4) foster conditions, using measures that include financial and technical assistance, for a harmonious coexistence of society and state historic resources; (5) encourage the public and private preservation and utilization of elements of the state's historically built environment; and (6) assist local governments to expand and accelerate their historic preservation programs and activities.

The division is required to establish, maintain, and administer a state historic preservation program meeting the requirements of an approved program under the National Historic Preservation Act of 1966, as amended,²¹ and to fulfill the responsibilities of state

²⁰ Section 267.021(3), F.S., defines the terms "historic property" and "historic resource" to mean ". . . any prehistoric or historic district, site, building, object, or other real or personal property of historical, architectural, or archaeological value, and folklife resources. These properties or resources may include, but are not limited to, monuments, memorials, Indian habitations, ceremonial sites, abandoned settlements, sunken or abandoned ships, engineering works, treasure trove, artifacts, or other objects with intrinsic historical or archaeological value, or any part thereof, relating to history, government, and culture of the state."

²¹ The National Historic Preservation Act, 16 U.S.C. 470 et. seq. Subsequent amendments to the Act include Public Law 91-243, Public Law 93-54, Public Law 94-422, Public Law 94-458, Public Law 96-199, Public Law 96-244, Public Law 96-515, Public Law 98-483, Public Law 99-514, Public Law 100-127, Public Law 102-575, Public

historic preservation programs as provided in s. 101(b) of that act. Under that act, the Secretary of the Interior is authorized to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture.²² The Federal government awards grant monies to implement the act.

Federal HFP Grant Awards FY 00-05²³		
Fiscal Year	Federal Grant Number	Amount
2000	12-00-15311	\$683,831.00
2001	12-01-16409	\$981,893.00
2002	12-02-17539	\$817,580.00
2003	12-03-18209	\$697,618.00
2004	12-04-19310	\$717,696.00
2005	12-05-20411	\$741,369.00
Total		\$4,639,987.00

Additionally, s. 267.031(5) (b), F.S., requires the division to develop a statewide comprehensive historic preservation plan. Numerous other provisions of Florida law are intertwined with this plan. Chapter 253, F.S., requires the location, identification, evaluation and protection of historic resources be considered in all state land management plans. Chapter 187, F.S., makes historic preservation an integral part of the State Comprehensive Plan. Chapter 186, F.S., provides for the implementation of the state plan through state agency functional plans and regional comprehensive plans. Chapter 163, F.S., makes historic preservation an integral part of local government comprehensive planning.

Section 267.061, F.S., also assigns other executive branch state agencies a variety of responsibilities related to historic properties, including consideration of the effect of an undertaking on any historic property that is included in, or eligible for inclusion in, the National Register of Historic Places.²⁴ Further, it encourages the establishment of programs to locate,

Law 103-437, Public Law 104-333, Public Law 106-113, Public Law 106-176, Public Law 106-208, and Public Law 106-355.

²² The Secretary, in consultation with national historic and archaeological associations, is required to establish or revise criteria for proper-ties to be included on the National Register and criteria for National Historic Landmarks under 16 U.S.C. 470a(a).

²³ Information provided by the Department of State.

²⁴ 16 U.S.C. 470a (a) provides for the National Register of Historic Places.

inventory, and evaluate all historic properties under the agency's ownership or control that appear to qualify for the National Register.

Section 267.115, F.S., also requires the division to acquire, maintain, preserve, interpret, exhibit, and make available for study objects which have intrinsic historical or archaeological value relating to the history, government, or culture of the state. The division is also required to maintain an adequate record of all objects in its custody each year which have a historical or archaeological value and must take an annual inventory of such objects.

The Bureau of Historic Preservation, a bureau of the division, maintains the most complete information on historical sites in the state. The Florida Master Site File (the "site file")²⁵ is maintained at the R.A. Gray Building, 500 S. Bronough St., in Tallahassee, Florida. There are currently more than 150,000 historical structures and archaeological sites listed in the site file, including approximately 28,000 Florida archaeological sites.²⁶ These sites represent the known physical remains of Florida's prehistoric and historic cultural heritage. Many of the archaeological sites recorded in the site file have not yet been excavated.

The site file is a paper file archive, as well as a computer data base, including GIS²⁷ and EDMS.²⁸ Files are organized alphabetically by county and resources are assigned numbers sequentially as they are recorded. Copies of survey reports are maintained as part of the site file for use by researchers. Several computerized search tools have been developed to assist file users, including searches by key words and authors. The staff assists researchers and sometimes performs limited research on request.

The artifacts in the archaeological sites recorded in the site files often have monetary value to looters. Section 267.13, F.S., prohibits practices that result in the removal or destruction of archaeological artifacts on state-owned lands, the destruction of archaeological

²⁵ Section 267.031(5) (n), F.S. See, also, Rule 1A-46, F.A.C.

²⁶ See answers to Question Nos. 1 and 3(a) of the staff survey. Roughly 18% of historic properties on the Florida Master Site File are classified as archaeological sites pursuant to the rule definition (27,561/152,177).

²⁷ Geographic Information System

²⁸ Electronic Document Management System; this system serves the general purpose of allowing accurate facsimiles of paper records to be scanned, indexed, stored, displayed, printed, and transmitted to users.

sites on state-owned lands, or the sale of artifacts from sites the seller knows are from such sites. Penalties range from a misdemeanor of the first degree to a felony of the third degree.

The division provided information regarding several recent violations of s. 267.13, F.S. For example, in May of 2004, Department of Environmental Protection agents arrested two individuals who were digging at Newnan's Lake, a site on state lands that has evidence of an Archaic American Indian occupation. According to the division, the site was heavily damaged by the digging. Sites in the area are known for "Newnan's Points," artifacts that may fetch high prices on the Internet and at artifact shows. The damage assessment totaled archaeological value, cost of the assessment and repair at \$8,960.56.

In another recent case, two individuals were arrested for unauthorized excavation and for removing arrowheads and tools at Enclave B in Pasco County. The damage assessment for looting at the site was estimated at totaled \$37,249.82.

Other recent examples of digging and looting on state-owned lands include: (a) the arrest of two individuals at the Withlacoochee State Forest in May of 2004 by Department of Agriculture and Consumer Affairs law enforcement officers; (b) the arrest of two individuals for digging at a site in the Lochloosa Wildlife Conservation Area in March 2005; and (c) the arrest of an individual in June 2005 for removing artifacts from sites in the Tomoka State Park in Volusia County.²⁹

Exemption Under Review – Section 267.135, F.S.,³⁰ provides that

[a]ny information identifying the location of archaeological sites contained in site files or other records maintained by the Division of Historical Resources of the Department of State is exempt . . . if the Division of Historical Resources finds that disclosure of such information will create a substantial risk of harm, theft, or destruction at such sites. . . .

The public necessity statement provides that it is a public necessity to exempt the location of archaeological sites because

²⁹ These examples are not a comprehensive listing of violations of s. 267.13, F.S.

³⁰ Chapter 2001-162, L.O.F.

. . . the state has a serious problem with archaeological looting. The exact location of an archaeological site should be exempt from disclosure if the Division of Historical Resources determines that disclosure of the site location will create a substantial risk of harm, theft, or destruction at the site.

Additionally, the public necessity statement notes that the lack of protection for sensitive sites puts the federal government in a difficult position, noting:

[t]he Federal Government is mandated to share site-specific information with the Florida State Historic Preservation Officer to comply with section 106 of the National Historic Preservation Act of 1966, as amended. However, section 304 of the National Historic Preservation Act of 1966, as amended, protects specific information concerning the location and character of cultural resources, which includes archaeological sites, when sharing that information could place them in jeopardy.³¹

Finally, the public necessity statement notes that new implementation guidelines for the National Historic Preservation Act of 1966, as amended, require increased consultation with federally recognized tribes. As a result, the Legislature found that managing information concerning Native American sacred sites and sites of cultural patrimony requires the exemption “. . . because credible stewardship in this area necessitates the ability to protect sensitive information from public dissemination.”

³¹ Under 16 U.S.C. 470w-3(a), the head of a Federal agency or other public official receiving grant assistance pursuant to the National Historic Preservation Act of 1966, as amended, after consultation with the Secretary, must withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may: (1) cause a significant invasion of privacy; (2) risk harm to the historic resources; or (3) impede the use of a traditional religious site by practitioners. Further, under 16 U.S.C. 470a (b), if the Secretary of the Interior determines that a major aspect of a State program is not consistent with the act, he or she must disapprove the program and suspend in whole or in part any contracts or cooperative agreements with that State and the State Historic Preservation Officer until the program is consistent, unless the Secretary determines that the program will be made consistent with the act within a reasonable period of time.

METHODOLOGY

Staff reviewed applicable state and federal statutes, surveyed the department, toured the division, examined site files, and interviewed agency personnel.

FINDINGS

The Legislature has declared that the rich and unique heritage of historic properties in this state, representing more than 10,000 years of human presence, is an important legacy to be valued and conserved for present and future generations. Further, the Legislature has found that the destruction of these nonrenewable historical resources will engender a significant loss to the state’s quality of life, economy, and cultural environment.

Records of the 28,000 known archaeological sites in the state held by the Division of Historical Resources are a valuable state asset, regardless of whether such sites are on state-owned land or private property. The cataloging of site files helps to preserve the location of sites for future archaeological excavation by qualified professionals who can study, interpret, and disseminate the knowledge obtained from those sites.

Unfortunately, location information in site records also helps looters determine where archaeological sites are located so that they can be targeted. The looting of sites results in the destruction of important archaeological evidence and information, the disturbance of burial sites, as well as the theft and sale of important artifacts.³² While it is possible, though unlikely, that some artifacts may ultimately be recovered from looted sites, important historical information is lost when sites are looted because soil layers are disturbed and mixed, which affects the ability of archaeologists to interpret the sites, date them, and to educate the public about Florida’s past. As noted by the information on site looting and arrests made during the last year, looting of archaeological sites continues to be a statewide problem. Providing road maps to known archaeological sites upon request would only intensify this problem. Thus, the identifiable public purpose or goal of the exemption under review is the preservation of important archaeological information that is a legacy of all Floridians.

³² While there is no comprehensive listing of all such looting, evidence exists that looting is occurring on state-owned lands as indicated by the arrests of looters on a variety of sites throughout the state.

The exemption under review does not protect the entire site file, but only protects “[a]ny information identifying the location of archaeological sites. . . .” Requestors may review all other information in a site file for any purpose. Thus, the exemption is narrowly-drawn to resolve the issues identified in the public necessity statement by protecting site locations only.

Further, the exemption for information that identifies the location of archeological sites is not confidential, but exempt only, thereby providing the division with some discretion in release of the information. The exemption is also a contingent exemption. The section under review does not make site location information automatically exempt in all circumstances because there are individuals and entities with bona fide reasons for obtaining site coordinates. Archaeologists, scientists, planners, and others may need location information in order to perform an excavation or research and should be permitted to obtain such locating information. According to the division, potentially any archaeological site might be placed at risk from dissemination of its location, under particular circumstances:

The risk of harm to a site from a given request depends less on the nature of the site than on other factors, of which the most important are: (1) the uses to which location data are to be put; (2) whether the location data are to be passed on to others without consultation with the Site File; and, (3) the protection or lack of it afforded to the site by the landowner. Thus, risk evaluation has to be done on a case by case basis, as information requests are made.³³

Pursuant to the terms of the exemption as written, the division must determine if a substantial risk of harm, theft, or destruction at a site would occur as a result of the disclosure in order to close access to the information. Requestors complete a data request form that solicits: (1) the exact information requested; (2) the search information needed to perform the searches requested; (3) the requestor’s affiliation, if any, to organizations that typically need such information; (4) the purpose of the request; and (5) the requestor’s signature acknowledging the limitations of the information and conditions for the ethical use of the data.

³³ Division response to Question No. 4. (b) of the staff survey.

The division reported a number of factors that may be considered when making a decision, including:

- The stated purpose of the requestor, e.g., an archaeological consulting firm which is conducting a field survey to locate unrecorded sites in a development project area; a university archaeologist performing research; the staff of the planning-zoning office of a local government with responsibility for protecting historical resources.
- The owner and the degree of physical security enforced by the owner, e.g., state lands should be safer in general because of specific policies and protections stated in law.
- The nature of the site, e.g., shipwreck sites might elicit the interest of looters due to the potential for coins or precious metals and stones.
- The relationship of the inquirer to the site or the site owners.
- The stated purpose for receiving the information.
- The possible identification of the inquirer as an individual who has vandalized sites in the past.

According to the division, in practice a negative decision is relatively uncommon.³⁴ Further, the division reported no challenges to denials.

The division has advised that the exemption is necessary for the effective and efficient administration of a government program, as required by s. 119.15, F.S. Of 16 responsibilities of the division,³⁵ at least 10 explicitly refer to the preservation of historic resources, including archaeological sites. Providing a means by which the division can protect location information if necessary to avoid risk to a site ensures the effective and efficient administration of a government program.

Further, if site location information were not protected, program administration would be hindered because it would affect the ability of the Federal Government to share site-specific information with the Florida State Historic Preservation Officer under section 106 of the

³⁴ The division reports 3 requests from distinct organizations or individuals were denied; one of the individuals made multiple requests, for a total of 5 denials.

³⁵ Section 267.031(5), F.S.

National Historic Preservation Act of 1966, as amended. Under section 304 of the National Historic Preservation Act of 1966, as amended, specific information concerning the location and character of cultural resources, which includes archaeological sites, are protected if sharing that information could place them in jeopardy. Thus, if Florida did not protect archaeological site information, the Federal Government could refuse to share site specific information, which also would significantly impair the operation of the program.

RECOMMENDATIONS

Staff recommends that the exemption for information identifying the location of archaeological sites contained in files or other records maintained by the Division of Historical Resources be retained. The exemption is narrowly-drawn to meet the public necessities identified and is necessary for the effective and efficient administration of a government program.
