



# The Florida Senate

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Committee on Governmental Operations

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## OPEN GOVERNMENT SUNSET REVIEW OF S. 257.38, F.S., A PUBLIC RECORD EXEMPTION FOR DONATED MANUSCRIPTS AND ARCHIVAL MATERIAL

### Issue Description

Section 257.38, F.S., provides an exemption for a manuscript or other archival material that is donated to an official archive of a municipality or county contingent upon special terms and conditions that limit the right to inspect or copy such manuscript or other material. A manuscript or other archival material received under special terms and conditions must be made available for inspection and copying 50 years after the date of creation, at an earlier date specified in the special terms or conditions, or upon a showing of good cause before a court of competent jurisdiction.

The Open Government Sunset Review Act provides for the review and repeal of public records exemptions in the 5th year after their enactment.<sup>1</sup> By letter dated, May 19, 2008, the Division of Statutory Revision of the Office of Legislative Services certified that s. 257.38, F.S., was subject to repeal October 2, 2009, unless reenacted during the 2009 legislative session.

### Background

**Public Records** -The Legislature enacted the first public records law in 1892.<sup>2</sup> 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.<sup>3</sup> Article I, s. 24(a) of the State Constitution, provides that:

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. . . .

The Public Records Act<sup>4</sup> specifies conditions under which access must be provided to agency<sup>5</sup> records. Every person who has custody of a public record must permit it to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the records custodian.<sup>6</sup> The term “public record” is broadly defined to mean:

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>3</sup> Article I, s. 24 of the State Constitution.

<sup>4</sup> Chapter 119, F.S.

<sup>5</sup> 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.

<sup>6</sup> Section 119.071(1)(a), F.S.

...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.<sup>7</sup>

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.<sup>8</sup> Such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted.<sup>9</sup>

Only the Legislature is authorized to create exemptions.<sup>10</sup> An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.<sup>11</sup> A bill enacting an exemption<sup>12</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>13</sup>

The Open Government Sunset Review Act<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of exemptions. By June 1, the Division of Statutory Revision of the Office of Legislative Services must 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.

Under the act, 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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 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
- 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.<sup>15</sup>

While the standards in the act may appear to limit the Legislature in the review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit it because one session of the Legislature cannot bind another.<sup>16</sup> The Legislature is only limited in its review by constitutional requirements.

Further, s. 119.15(8), 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

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<sup>7</sup> Section 119.011(11), F.S.

<sup>8</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>9</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>10</sup> Article I, s. 24(c) of the State Constitution.

<sup>11</sup> *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).

<sup>12</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>13</sup> Art. I, s. 24(c) of the State Constitution.

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(6)(b), F.S.

<sup>16</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

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. 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.

**Exemption Under Review** - Section 257.38, F.S.,<sup>17</sup> states:

A manuscript or other archival material that is donated to and held by an official archive of a municipality or county contingent upon special terms and conditions that limit the right to inspect or copy such manuscript or other material, but which manuscript or archival material is not otherwise made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except as otherwise provided in the special terms and conditions. However, a manuscript or other archival material received under special terms and conditions as provided by this section shall be made available for inspection and copying 50 years after the date of the creation of the manuscript or other archival material, at an earlier date specified in the special terms or conditions, or upon a showing of good cause before a court of competent jurisdiction.

The stated public necessity for exempting donated archival and other information is based upon a legislative finding that private manuscripts or other archival material “ may be of important historical interest” to a county or municipality and “should be preserved in the public interest.” The public necessity statement notes

... The diaries of prominent historical figures, manuscripts of important writers, and personal effects of significant persons are examples of the types of archival material that could be placed in an official municipal or county archive. A private donor often makes the donation of such manuscripts or other material contingent upon special terms and conditions in order to protect private facts during the lifetime of the donor or during the lifetime of another person. If a municipal or county archive is unable to comply with the special terms and conditions, a potential donor would be unlikely to donate manuscripts or other material that is of significant archival value to the municipality or county. As a result, important historical information could be lost to the public.

The statement of public necessity also notes that special terms and conditions will not forever preclude the ability of the public to inspect and copy such manuscripts or other archival material and that the interests of the donor and the public are protected by limiting such special terms and conditions to 50 years following the date of the creation of the manuscript or other material. Such a limitation helps to protect private facts during the lifetime of an affected person and ensures the preservation of manuscripts and material beneficial to the public, while ultimately preserving public access.

## Findings and/or Conclusions

Section 257.35(1), F.S., creates the Florida State Archives within the Division of Library and Information Services of the Department of State for the preservation of public records, manuscripts, and other archival material. Current law, however, does not define the term “official archive” for local governments. Further, it is unclear how many archives there are at the local level or how many of these archives might be “official archives.” Nevertheless, a number of local government entities have what they consider to be official archives and, while small in number, they benefit from the existence of the exemption under review.

The Open Government Sunset Review Act requires consideration of a number of questions in the performance of a review under the act:

<sup>17</sup> Senate Bill 1626 by Senator Margolis (HB 1031) passed the Senate 40-0 on April 14, 2004; it passed the House 108-0 on April 30, 2004. The Governor approved the bill on May 12, 2004. Chapter 2004-50, L.O.F.

- **What specific records or meetings are affected by the exemption?** The exemption protects manuscripts or other archival material that is donated to and held by an official archive of a municipality or county contingent upon special terms and conditions that limit the right to inspect or copy the information for up to 50 years after the date of the creation of that information. Examples of “other archival material” include photographic collections, film collections, furniture and materials, archaeological materials, including human remains, newspapers, microfilm, maps, architectural drawings and books.
- **Whom does the exemption uniquely affect, as opposed to the general public?** The exemption affects private donors of manuscripts or other archival material that would not otherwise be a public record.
- **What is the identifiable public purpose or goal of the exemption?** The identifiable public purpose or goal of the exemption as stated in the statement of public necessity is to ensure the donation and preservation of private information that may have significant archival value to a municipality or county and to ensure such information is preserved.
- **Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?** It is unlikely since the protected information is from a private donor.
- **Is the record or meeting protected by another exemption?** No.
- **Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?** Possibly. Section 257.35(1)(b), F.S., contains an exemption for the Florida State Archives. That exemption contains two parts. The first provides that any public record transferred to the division is subject to the provisions of s. 119.07(1), F.S., except that any public record or other record provided by law to be confidential or prohibited from being inspected must be made accessible only after a period of 50 years from the date of the creation of the record. The second portion of s. 257.35(1)(b), F.S., exempts:

... any nonpublic manuscript or other archival material which is placed in the keeping of the division under special terms and conditions, shall be made accessible only in accordance with such law terms and conditions and shall be exempt from the provisions of s. 119.07(1) to the extent necessary to meet the terms and conditions for a nonpublic manuscript or other archival material.

The exemption under review was based upon this pre-1993 exemption and merger of the two exemptions could be possible so long as documents held by the Florida State Archives retain the same level of protection provided in current law.

## **Options and/or Recommendations**

Based upon the review, staff recommends reenactment of the exemption. Further, staff recommends that s. 257.38, F.S., and a portion of s. 257.35(1)(b), F.S., be merged in order to comply with the requirements of s. 119.15, F.S., and to reduce the number of exemptions.