



# The Florida Senate

*Interim Report 2009-215*

*October 2008*

---

Committee on Military Affairs and Domestic Security

---

## **OPEN GOVERNMENT SUNSET REVIEW OF SECTION 119.071(3)(C), F.S., BUILDING PLANS, BLUEPRINTS, AND SCHEMATIC DRAWINGS OF AN ATTRACTIONS AND RECREATION FACILITY, ENTERTAINMENT OR RESORT COMPLEX, INDUSTRIAL COMPLEX, AND OTHER DEVELOPMENTS HELD BY AN AGENCY**

### **Issue Description**

Pursuant to s. 119.15, Florida Statutes (F.S.), the Open Government Sunset Review Act, the exemption to the public records law found at s. 119.071(3)(c), F.S., relating to building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout or structural elements of an attractions and recreation facility, entertainment or resort complex, industrial complex, retail and service development, office development, or hotel or motel development, which documents are held by an agency are exempt from s. 119.07(1), F.S., and Article I, s. 24(a) of the State Constitution.

Section 119.071(3)(c), F.S., will repeal on October 2, 2009 unless reviewed and reenacted by the Legislature.

### **Background**

#### **Florida Has a Long History of Providing Public Access to Government Records**

The Legislature enacted the first public records law in 1892.<sup>1</sup> In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> 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...

The Public Records Act<sup>3</sup> 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 so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency<sup>4</sup> records are available for public inspection. The term "A public record" is broadly defined to mean:

---

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

<sup>2</sup> Article I, s. 24 of the State Constitution

<sup>3</sup> Chapter 119, F.S.

<sup>4</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."

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>5</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>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> 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.<sup>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

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.<sup>12</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

The Open Government Sunset Review Act<sup>14</sup> provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services 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. An identifiable public purpose is served 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

---

<sup>5</sup> Section 119.011(12), F.S.

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

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

<sup>8</sup> Article I, s. 24(c) of the State Constitution.

<sup>9</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>10</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>11</sup> Art. I, s. 24(c) of the State Constitution.

<sup>12</sup> Attorney General Opinion 85-62.

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

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

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>

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 yes, how?
- (5) Is the record or meeting protected by another exemption?
- (6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?<sup>16</sup>

While the standards in the Open Government Sunset Review Act 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.<sup>17</sup> The Legislature is only limited in its review process 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 any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

### **Exempted Plans and Diagrams**

Section 119.071(3)(c), F.S., exempts the following from public disclosure: building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout or structural elements of an attractions and recreation facility, entertainment or resort complex, industrial complex, retail and service development, office development, or hotel or motel development.

The section allows disclosure to another governmental entity if disclosure is necessary for the receiving entity to perform its duties and responsibilities; to the owner or owners of the structure in question or the owner's legal representative; or upon a showing of good cause before a court of competent jurisdiction.

The section provides for definitions to include:

- An "attractions and recreation facility," defined as "any sports, entertainment, amusement, or recreation facility, including but not limited to, a sports arena, stadium, racetrack, tourist attraction, amusement park, or pari-mutuel facility." They may be classified as single performance facilities that provide single performances or provide more than 10,000 permanent spectator seats. They may also be classified as serial-performance facilities that provide serial-performances, parking spaces for more than 1,000 motor vehicles, or more than 4,000 permanent spectator seats;
- An "entertainment or resort complex," defined as "a theme park comprised of at least 25 acres of land with permanent exhibitions and a variety of recreational activities, which has at least 1 million visitors annually who pay admission fees thereto, together with any lodging, dining, and recreation facilities located adjacent to, contiguous to, or in close proximity to the theme park, as long as the owners or operators of the theme park, or a parent or related company or subsidiary thereof, have an equity interest in the lodging, dining, or recreational facilities or is in privity therewith. Close proximity includes an area within a 5-mile radius of the theme park complex";

---

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

<sup>16</sup> Section 119.15(6)(a), F.S.

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

- An “industrial complex,” defined as “any industrial, manufacturing, processing, distribution, warehousing, or wholesale facility or plant, as well as accessory uses and structures, under common ownership,” which provides onsite parking for more than 250 motor vehicles, encompasses 500,000 square feet or more of gross floor area, or occupies a site of 100 acres or more, but excluding wholesale facilities or plants that primarily serve or deal onsite with the general public;
- A “retail or service development,” defined as “any retail, service, or wholesale business establishment or group of establishments which deals primarily with the general public onsite and is operated under one common property ownership, development plan, or management,” that encompasses more than 400,000 square feet of gross floor area or provides parking spaces for more than 2,500 motor vehicles;
- An “office development,” defined as “any office building or park operated under common ownership, development plan, or management,” that encompasses 300,000 or more square feet of gross floor area; and
- A “hotel or motel development,” defined as “any hotel or motel development that accommodates 350 or more units.”

Comprehensive plans or site plans, or amendments thereto, which are submitted for approval or which have been approved under local land development regulations, local zoning regulations, or development-of-regional-impact review are excluded from the exemption.

### **The Legislature Found It Necessary to Protect Certain Building Plans and Diagrams**

In creating s. 119.071(3)(c), F.S., the Legislature found it was a public necessity to exempt certain building plans and similar documents in order to ensure the safety of the facilities and to ensure public safety.<sup>18</sup> The finding further states that such exempt information is a vital component of public safety and if it were made publicly available, the ability of persons who desire to harm individuals located in or using those structures would be increased.

The finding concludes that although some skill would be required to use such information to further an act of terrorism, ample evidence exists of the capabilities of terrorists to do so. The September 11, 2001 attack on the World Trade Center and the Pentagon, as well as the intentional spread of anthrax in this country and state, provide evidence that such capabilities exist. These events also show the crippling effect that terrorist acts can have, not only on the lives of persons in a community affected by terrorism, but also on the economy of the community, the state, and the nation.

Subsequent attempted and successful terrorist attacks since 2001 illustrate that international terrorists are as capable and motivated today as they were at the time the Legislature found the exemption necessary in 2004.

### **Sensitive Information is also Protected at the Federal Level**

The National Infrastructure Protection Plan (NIPP) is the federal government’s outline for protecting the nation’s critical infrastructure and key resources (CI/KR). It provides a coordinated approach to establish national priorities, goals and requirements for CI/KR.<sup>19</sup>

The NIPP recognizes the United States (U. S.) as an open, technologically sophisticated, highly interconnected, and complex nation with a wide array of infrastructure. This vast and diverse aggregation of highly interconnected assets, systems, and networks may also present an attractive array of targets to terrorists.<sup>20</sup>

As a part of the plan to defend targets from acts of terrorism, the NIPP calls for the protection of sensitive information. The NIPP states, “Great care must be taken by the government to ensure that sensitive infrastructure information is protected and used appropriately to enhance the protection of the Nation’s CI/KR.”<sup>21</sup>

---

<sup>18</sup> Chapter 2004-9, L.O.F.

<sup>19</sup> Department of Homeland Security, *National Infrastructure Protection Plan*, (2006), page iii.

<sup>20</sup> *Ibid.* page 10.

<sup>21</sup> *Ibid.* page 12.

From the federal perspective, Sensitive Security Information (SSI) is defined as unclassified information of a sensitive nature, that if publicly disclosed could be expected to have a harmful impact on the security of federal operations or assets, the public health or safety of the citizens of the U. S. or its residents, or the nation's long-term economic prosperity.<sup>22</sup>

The Maritime Transportation Security Act, the Aviation Transportation Security Act, and the Homeland Security Act establish protection for SSI. Further, parties accessing SSI must demonstrate a need to know. Holders of SSI must protect such information from unauthorized disclosure and must destroy the information when it is no longer needed. SSI protection pertains to government officials as well as to transportation sector owners and operators.<sup>23</sup>

### **Freedom of Information Act - Exemption of Sensitive Security Information**

In 1966, Congress passed the Freedom of Information Act (FOIA) to increase public access to federal government documents. All agencies of the Executive Branch of the U.S. Government are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from disclosure by the nine exemptions and three exclusions of the FOIA. However, the FOIA does not provide access to records held by state or local government agencies, or by private businesses or individuals. All states have their own statutes governing public access to state and local government records.<sup>24</sup>

Records of federal agencies in Florida generally are not covered by the state's Public Records Law.<sup>25</sup> Federal agency records are under the purview of federal law.

### **Cooperative Efforts Protect Critical Infrastructure**

The federal Department of Homeland Security (DHS) has designated 97 critical infrastructure sites in Florida. Many of these locations are privately owned. Through the federally funded Buffer Zone Protection Plan (BZPP), DHS agents have been working with the owners as well as state and local law enforcement and response agencies to develop best practices and proper protection. For security reasons, as determined by the federal government, the list of sites is not publicly available.

The BZPP and the NIPP are illustrative of many cooperative programs between federal, state, and local agencies to prepare for and protect against terrorist attacks.

### **Efforts to Limit Disclosure**

Prior to the attacks of 2001, widespread public access existed to information that is now routinely protected. For example, precise locations of hazardous chemicals stored on university campuses was published on the Internet to afford first responders ready access in case of emergency. Public school diagrams likewise are another example of formerly obtainable information that is now limited in publication. The need to protect similar information as it relates to certain private and public building plans was recognized and efforts have been undertaken by custodians to remove it from public access.

As a result, building plans, blueprints, schematic drawings, and diagrams exempted by s. 119.071(3)(c), F.S., are no longer readily obtainable through other public access means.

## **Findings**

1. Section 119.071(3)(c), F.S., exempts the following from public disclosure: building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal

<sup>22</sup> U. S. Department of Agriculture, Departmental Regulation 3440-002, (January 30, 2003).

<sup>23</sup> Department of Homeland Security, *National Infrastructure Protection Plan*, (2006), pages 67-68.

<sup>24</sup> U.S. Department of Justice, *Freedom of Information Act Reference Guide*, (April 2005).

<sup>25</sup> Brechner Center for Freedom of Information, College of Journalism and Communications, University of Florida, *Government in the Sunshine: A Citizen's Guide*.

layout or structural elements of an attractions and recreation facility, entertainment or resort complex, industrial complex, retail and service development, office development, or hotel or motel development.

2. Attractions and recreation facilities, entertainment or resort complexes, industrial complexes, retail and service developments, office developments, and hotel or motel developments that meet the threshold requirements described in the law will be affected if s. 119.071(3)(c), F.S., is repealed.
3. Senate professional staff could find no evidence that:
  - The information contained in the records could be readily obtained by alternative means.
  - The records are protected by another exemption.
  - There are multiple exemptions for the same type of record.
4. The identifiable public purpose of the exemption is to ensure the safety of the facilities covered in the section and to ensure public safety.

## Recommendation

Senate professional staff recommends that the exemption found in s. 119.071(3)(c), F.S., be reenacted. The exemption provided for building plans, blueprints, and schematics continues to be sufficiently compelling to override the strong public policy of open government.