

In November 1992, the public affirmed its approval of Florida's tradition of "government in the sunshine" by enacting a constitutional amendment to guarantee the practice.³ The amendment had the effect of including in the Florida Constitution provisions similar to those of the Public Meetings Law and the Public Records Law and of applying those provisions to all three branches of government.

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.

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 that are used to perpetuate, communicate or formalize knowledge.⁴ Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.⁵

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:

- the law creating the exemption states with specificity the public necessity justifying the exemption; and
- 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.

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government.⁶ The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.⁷

In 1995, the Legislature enacted s. 119.15, F.S., the Open Government Sunset Review Act. Essentially, the law provides that exemptions to the public meetings and public records law be repealed in the 5th year after the exemption was enacted or substantially amended, unless the Legislature acts to reenact the exemption. The law stipulates that the public has a right to have

³ Art. 1, section 24 of the State Constitution.

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

⁵ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁶ *Christy v. Palm Beach County Sheriff's Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).

⁷ *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996).

access to records unless there is significant enough reason to override the strong public policy of open government and restrict such access.

This law requires the Legislature to review the exemption before its scheduled repeal and consider as part of the review process the following:

- The specific records or meetings affected by the exemption;
- The identifiable public purpose or goal of the exemption;
- Whom the exemption uniquely affects, as opposed to the general public; and
- Whether the information contained in the records can be readily obtained by alternative means, and if so, how.

This law specifies 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. The public purpose test is satisfied if the exemption:

- Is necessary for the effective and efficient administration of 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 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, only information that would identify the individuals may be exempted; 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.

Thus, under the statute, an exemption may be created or amended only if the Legislature determines that there is a public necessity justifying the exemption and the exemption is no broader than necessary. Additionally, any law creating or amending an exemption must specifically state why the exemption is a public necessity.

Open Government Sunset Review Act

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemption, one session of the Legislature cannot bind another.⁸ The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. 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

⁸ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974)

section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Donated Archival Material

Section 257.35, F.S., creates the Division of Library and Information Services within the Department of State and Florida State Archives to preserve certain public records and other archival material determined by the division to have sufficient historical value to warrant their continued preservation and that have been accepted by the division for deposit.⁹ All public records transferred to the division are subject to public inspection and copying under s. 119.07(1), F.S., except that any public record or other record provided by law to be confidential or prohibited from inspection by the public shall be made accessible only after 50 years have elapsed from the date of the creation of the record.¹⁰ Further, any nonpublic manuscript or other archival material that is placed in the keeping of the division under special terms and conditions will only be made accessible to the public in accordance with such terms and conditions. This material is also exempt from the provisions of s. 119.07(1), F.S., to the extent necessary to meet the terms and conditions under which it was donated as a nonpublic manuscript or archival material.¹¹

Currently, municipality and county archives do not have similar provisions relating to archival material. Municipal archives keep those records sealed under the terms and conditions of the donation. Conversely, archival materials that are donated to the division are made available for public inspection 50 years after their creation notwithstanding an exemption from public records under s. 119.07(1), F.S. It has been reported that some municipal and county archives are experiencing difficulties with granting requests to view archival documents that are in their possession.

III. Effect of Proposed Changes:

Section 1 provides an exemption from the public records law for manuscripts or other archival material donated to and held by an official archive of a municipality or county if the manuscripts or material are subject to special terms and conditions that limit public disclosure. However, such manuscripts or material must be made available for inspection and copying 50 years after the date of creation of the manuscript or material, or earlier if specified in the terms and conditions or pursuant to court order. This exemption is subject to legislative review and repeal under the Open Government Sunset Review Act of 1995, and is repealed on October 2, 2009, unless reenacted by the Legislature.

Section 2 provides the following legislative findings:

- A municipality or county archive is often designated as the repository for manuscripts or other material of a private individual.
- Such manuscript or other material may be of important historical interest to the municipality or county and, therefore, should be preserved in the public interest.

⁹ S. 257.35(1), F.S.

¹⁰ S. 257.35(1)(b), F.S.

¹¹ S. 257.35(1)(b), F.S.

- 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 municipality 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.
- Although the receipt of archival material is in the public interest, the terms and conditions of the donation should not forever preclude the ability of the public to inspect and copy those materials.
- 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.
- The 50-year 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.

Section 3 provides for an effective date of October 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

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In the November 2002 election, 76.5% of voters approved a constitutional amendment concerning public records. The amendment to Article I, s. 24 of the State Constitution requires any law after the effective date of the amendment containing exemptions to public records or public meetings be passed by a two-thirds vote of each house of the Legislature. The constitution previously required a simple majority vote to enact public records exemptions.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
