



**REFORMING FLORIDA'S
OPEN GOVERNMENT LAWS
IN THE 21ST CENTURY**

The Commission on Open Government Reform

January 2009



Barbara Petersen
Chair

STATE OF FLORIDA

Commission on Open Government Reform

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January 27, 2009

Letter from the Chairman

The Commission on Open Government Reform was created by Executive Order in June 2007, for the express purpose of reviewing, evaluating, and issuing recommendations regarding Florida's public records and public meetings laws. The Commission was tasked with preparing a report for submission to the Governor, the President of the Senate, and the Speaker of the House. The purpose of the report is to examine the issues raised during the Commission's tenure, and to make recommendations in response to the issues identified.

The nine-member Commission held four public hearings, inviting speakers to provide testimony on specific topics and the issues identified in the executive order. Testimony from the public was also solicited, as was written testimony.

In developing the report, the Commission did extensive legal research, including a thorough review of the history of Florida's open government laws, a study of current statutory law and applicable case law, and a study of laws enacted in other states.

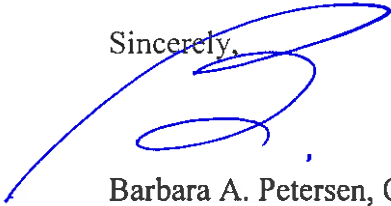
Generally considered a leader in the area of open government, Florida has a long history of providing public access to the meetings and records of its government. This rich tradition of open government culminated in the 1992 general election when Florida voters overwhelmingly approved a constitutional amendment guaranteeing access to the records of all three branches of state government and to the meetings of the collegial bodies of state agencies and local governments at which public business is to be transacted or discussed.

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Although both the open meetings law and the public records law have been amended since first enacted and some reforms made, never in Florida's long history of open government have both laws been reviewed in their entirety. As a result, there are inconsistencies and redundancies in the law, and some argue that the state's open government laws have failed to keep pace with today's technology, resulting in an erosion of the public's constitutional right of access to government meetings and records.

We respectfully submit the final report, Reforming Florida's Open Government Laws in the 21st Century, including the conclusions and recommendations, of the Commission on Open Government Reform.

Sincerely,



Barbara A. Petersen, Chair

Enclosure



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**REFORMING FLORIDA’S OPEN GOVERNMENT LAWS
IN THE 21ST CENTURY**

The Commission on Open Government Reform

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REFORMING FLORIDA'S OPEN GOVERNMENT LAWS IN THE 21ST CENTURY

The Commission on Open Government Reform

Executive Summary

Purpose and Methodology

Governor Charlie Crist created the Commission on Open Government Reform (Commission) in June 2007 for the express purpose of reviewing, evaluating, and issuing recommendations regarding Florida's public records and public meetings laws. The purpose of this report is to examine the issues raised during the Commission's tenure, and to make recommendations in response to the issues identified.

The Commission held four public hearings throughout the state to receive testimony from invited speakers and the public. In developing this report the Commission did extensive legal research, including a thorough review of the history of Florida's open government laws, a search of current statutory law and applicable case law, and a study of laws enacted in other states.

Background

A. The Commission on Open Government Reform

Generally considered a leader in the area of open government, Florida has a long history of providing public access to the meetings and records of its government. This rich tradition of open government culminated in the 1992 general election when Florida voters overwhelmingly approved a constitutional amendment guaranteeing access to the records of all three branches of state government and to the meetings of the collegial bodies of state agencies and local governments at which public business is to be transacted or discussed.

Although both the open meetings law and the public records law have been amended since first enacted and some reforms made, never in Florida's long history of open government have both laws been reviewed in their entirety. As a result, there are inconsistencies and redundancies in the law, and some argue that the state's open government laws have failed to keep pace with today's technology, resulting in an erosion of the public's constitutional right of access to government meetings and records.

The nine-member Commission held four public hearings, inviting speakers to provide testimony on specific topics and the issues identified in the Governor's executive order. Testimony from the public also was solicited, as was written testimony. Speakers included government agency representatives, private citizens, members of Florida's media, and attorneys representing a wide variety of interests.

The Commission adopted a series of procedural requirements for conducting business, including a requirement that any recommendation restricting the public's right of access, including new or expanded exemptions to public records and open meetings laws, would require a two-thirds majority vote of Commission members for passage.

B. The Constitutional Right of Access

Arguably the broadest such provision in the nation, Florida's constitutional right of access to government records guarantees the right to inspect or copy public records made or received in connection with official business, and specifically includes all three branches of state government.

The constitutional right of access to government meetings applies only to meetings of the executive branch of state government and local governments. A right of access to certain meetings of the Florida Legislature is guaranteed under Article III, section 4(e), of the state constitution, and public access to judicial proceedings is protected by Amendment VI of the U.S. Constitution.

In allowing for the creation of exemptions by general law, the constitutional amendment contains a specific standard for the creation of new exemptions to the public records and open meetings laws, including a requirement that any new or expanded exemption to the constitutional right of access needs a two-thirds vote in each chamber of the Legislature to pass.

C. Florida's Open Government Laws

1. The Open Meetings Law

a. Scope

Florida's current open meetings law, commonly referred to as the Sunshine Law, was enacted in 1967 and requires that all meetings of any government agency be open to the public at all times absent a specific statutory exemption. The law applies generally to any meeting between two or more members of the same board or commission at which public business is to be transacted or discussed.

All public agencies in the state are subject to the law. Advisory boards and committees established to make recommendations to a public agency are also subject to the law. A private company created by law or by a public agency to provide services to the agency is subject to the open meetings law, and a private company or organization doing business on behalf of a public agency may be bound by the requirements of the law if the public agency's governmental or legislative functions have been delegated to the private entity. Administrative staff is not generally subject to the law.

b. Procedural Requirements

Reasonable public notice of all meetings subject to the Sunshine Law is required. “Reasonable” means notice that is sufficient so as to inform members of the public who may be interested in attending.

The law requires that minutes be taken at all public meetings and that such minutes be promptly recorded and open to public inspection.

c. Public Participation

The Florida Supreme Court has stated that the public has an “*inalienable* right to be present and to be heard” at such meetings, but there is confusion as to the scope and applicability of the right of the public to participate. Generally, a member of the public cannot be asked to leave the meeting room during a public meeting, and reasonable rules ensuring the orderly progression of a meeting and requiring appropriate behavior of all participants may be adopted.

The public can’t be prohibited from videotaping a meeting through the use of non-disruptive recording devices, and the use of cameras and tape recorders must be allowed if such use does not disrupt the meeting.

d. Exemptions

All meetings between two or more members of the same board or commission are presumed subject to the Sunshine Law unless there is a specific statutory exemption. Only the Legislature can create an exemption to the law, and a public agency cannot close a meeting simply to discuss exempt or confidential public records unless there is a specific statutory exemption allowing the meeting closure. Currently, there are approximately 90 exemptions to the open meetings law.

e. Enforcement and Sanctions

If a court determines that an agency violated the open meetings law, it is required to assess reasonable attorney’s fees against the offending board or commission. However, if the court determines that the suit was filed in bad faith or was frivolous, the court has the authority to assess reasonable attorney’s fees against the individual filing such an action.

Any action taken at a meeting held in violation of the Sunshine Law is void. Action can be protected, however, if the offending board or commission holds what is commonly referred to as a “cure” meeting.

An unintentional violation of the Sunshine Law is a noncriminal infraction, punishable by a fine up to \$500. A *knowing* violation of the law, however, is a second degree misdemeanor, which carries a jail term of up to 60 days and/or a fine of not more

than \$500. A public official found guilty of a misdemeanor can be suspended or removed from office.

2. The Public Records Law

a. Scope

Florida's Public Records Law stipulates that "every person who has custody" of a public record must allow "any person" access to all non-exempt public records for inspection or copying.

b. Definition of Key Words

The term "public record" is broadly defined in Florida law and has been interpreted to include "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type," including "all of the information" stored on a computer.

The word "agency" is defined as any state or local agency or any other public or private entity acting on behalf of such agency, and the word "person" includes not only individuals, but also business entities and corporations.

Under Florida's Public Records Law, anyone, regardless of identity or intent, can request a copy of a public record from any public agency and also any private entity doing business on behalf of a public agency.

c. Fees

As a general rule, there is no fee for the mere inspection of a public record and fees for providing copies of public records must be statutorily authorized. The custodian of public records must furnish a copy of a requested record upon payment of the fee prescribed by law. If there is no statutorily prescribed fee, the record custodian can charge no more than 15¢ a page for paper copies up to 8½ x 14 inches, plus an additional 5¢ for a two-sided duplicated copy. For all other copies, the custodian may charge the actual cost of duplication.

If a request for records requires an "extensive use" of agency resources, whether personnel or information technology or both, an agency may charge a special service charge in addition to the per-copy charge or the actual cost of duplication. The extensive use fee, which must be reasonable and based on actual costs incurred, cannot be automatically applied. "Extensive" is not defined in the statutes and state and local agencies have a great deal of flexibility in determining access policies and assessment of fees.

d. Electronic Access

There is little question that an electronic record is as much a public record as its paper counterpart, and electronic records are subject to public inspection unless a statutory exemption exists which removes the records from disclosure. There are six statements of general state policy in chapter 119, F.S., the Public Records Law, that specifically address access to public records in electronic formats.

e. Content and Exemptions

Florida's Constitution grants the Legislature sole authority to create exemptions to both the public records and sunshine laws. Currently, there are just over 970 public record exemptions scattered throughout the Florida Statutes.

There is a presumption of openness and a public record will be subject to the public disclosure absent a specific statutory exemption. Although the terms are not defined by statute, there is a distinction under the law between records or information that is "exempt" from public disclosure and "confidential and exempt."

A record custodian claiming an exemption for a public record or any portion of the record must state the basis for the exemption, including its statutory citation. If a record contains both exempt and non-exempt information, the custodian is required to redact that which is exempt and provide access to the remainder.

f. Enforcement and Sanctions

When denied access to a public record, a requestor has several enforcement options to consider. First, a person claiming a dispute over access to a public record can seek resolution through the public records mediation program in the Attorney General's Office. Secondly, if a person believes an agency has violated the public records law, he or she can file a complaint with the local state attorney who has the authority to prosecute violations of the law, including those that may be noncriminal. Finally, when denied access to a public record, a requestor may file suit in civil court to compel compliance. If a court determines that the custodial agency "unlawfully refused to permit" access, the court is required to assess attorney's fees and court costs against the agency responsible.

A public officer who knowingly violates the public records law is subject to suspension and removal or impeachment, and is guilty of a first degree misdemeanor punishable by a term of imprisonment not exceeding one year and a fine of up to \$1,000. An unintentional violation of the law is a noncriminal infraction, punishable by a fine not exceeding \$500.

Issues

A. Exemptions

1. Definitions: Exempt v. Exempt and Confidential

There is a distinction under Florida’s open government laws between public records or meetings that are exempt from disclosure requirements and those that are “confidential and exempt.” The terms are not defined in the law, however, and it’s not clear whether the distinction is clearly understood or consistently applied.

2. Redundant Exemptions

In reviewing the statutory exemptions to both the open meetings and public records laws, the Commission identified a number of public record exemptions for the same or similar information. Redundant exemptions identified by the Commission include:

- identity of donors and potential donors
- audit reports
- social security numbers
- medical information and/or records
- personal financial information
- trade secrets
- proprietary business information
- security system plans, etc.
- claims files
- appraisals, offers, counteroffers

3. Sunset Review of Open Government Exemptions

The Open Government Sunset Review Act of 1995 Act requires that each new or “substantially amended” exemption to the open meetings or public records laws be reviewed once five years after enactment, at which time the exemption would be repealed or permanently re-enacted. The Act stipulates that exemptions may be created, revised, or maintained only if they serve an identifiable public purpose, and exemptions may be no broader than is necessary to meet the purpose they serve. The Act sets forth three criteria for reenactment and stipulates that an exemption can be reenacted only upon certain legislative findings.

Of the open government exemptions reviewed annually under the Open Government Sunset Review Act, many are modified and narrowed. Rarely is an exemption allowed to sunset, even when in reviewing the exemption staff finds it unused in the five years since enactment.

4. Investigations of Complaints Filed Against Professionals Licensed by the Department of Business and Professional Regulation and the Department of Health

As a general rule, records relating to investigations into complaints against a government officer or employee and most licensed professionals are exempt from public disclosure until there is a probable cause finding. After the probable cause finding is made, all records related to the complaint and the commission's investigation become subject to public disclosure, regardless of whether there is probable cause that a violation has occurred.

Records relating to a complaint against most professionals licensed by DBPR are subject to public disclosure *only if* there is a finding of probable cause; such records are exempt from public disclosure if no probable cause is found. The same is true of all professionals licensed by the DOH. Where no probable cause is found, the investigatory records are exempt from public disclosure. As a result, the vast majority of professionals licensed by DBPR and all those regulated by DOH are afforded a higher level of protection than their professional peers licensed or regulated by other state entities.

When a complaint filed with either DBPR or DOH is closed with a finding of no probable cause, the complainant is notified but is not told why the complaint was dismissed.

5. Exemption for Economic Development Records

Section 288.075(2)(a), Florida Statutes, provides a public record exemption for information held by an economic development agency concerning the plans or interests of a private corporation to locate, relocate, or expand any of its business activities. Such information is exempt for 12 months following receipt of a written request for confidentiality from the private entity, and the period of confidentiality can be extended for an additional 12 months. The exemption also protects proprietary business information, including trade secrets.

Concerns about the scope and effect of the exemption have been raised, most specifically that the exemption prohibits opportunity for public oversight or input on economic development projects. These concerns were echoed in public testimony received by the Commission at its public hearings. Commissioners also questioned the justification for the exemption and noted the term "economic development" may be misapplied, resulting in an abuse of process.

For traditional economic development projects, a set of incentive criteria is developed and a company must meet them. The individual incentive programs are reviewed thoroughly each year and an annual report is produced and released to the public. Importantly, funding for these types of economic development projects is appropriated and must be approved by the Legislature, providing some level of oversight and accountability.

Many of the large traditional economic development projects involve both state agencies such as Enterprise Florida or the Office of Tourism, Trade and Economic Development (OTTED) and local governments. Some economic development projects, however, are strictly local in development and implementation, and thus do not require legislative approval or appropriation of funds.

6. Transportation Projects

The Commission was asked to consider recommending expansion of the public record exemption under § 337.168, Florida Statutes, for the official cost estimate of state transportation projects to include the official cost estimate of similar county projects. There was some discussion by the Commission at its Tallahassee meeting in October 2008, but no further information or testimony was offered or received. Commissioners, while sympathetic, found it difficult to reach any conclusions on the issue without additional information.

7. Social Security Numbers

There are two general exemptions for social security numbers in chapter 119, Florida's Public Records Law.

Section 119.071(5), Florida Statutes, provides a general exemption for social security numbers, and allows release of a social security number to another agency or governmental entity. The exemption also contains a broader exception, allowing a "commercial entity" access to social security numbers for use in the performance of a "commercial activity." Access to social security numbers by a commercial entity is not automatic, however, and the exception to the exemption contains specific requirements that must be met before access can be obtained.

Section 119.071(4)(a)1., Florida Statutes, provides an exemption for the social security numbers of all current and former agency employees contained in agency employment records. The exemption stipulates that an agency that is the custodian of a social security number and that is not the employing agency shall maintain the exempt status of the social security number only if the employee or the employing agency of the employee submits a written request for confidentiality to the custodial agency.

If a commercial entity requests a government employee's social security number under § 119.071(4)(a)1., the custodial agency can release only the last four digits of the number. But if a commercial entity requests a social security number pursuant to § 119.071(5), the entire social security number is released.

8. Clemency Proceedings

In Florida, a person who has been convicted of a felony loses his or her civil rights "until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to" the state constitution. Article IV, section 8, of the

Florida Constitution grants the governor the power of executive clemency, and the governor and Cabinet sit as the Board of Executive Clemency (Clemency Board), which is administered by the Office of Executive Clemency. Clemency functions include restoration of voting rights and other civil rights, pardons, and commutation of sentence.

When a person has been released by the Department of Corrections, the Parole Commission reviews the person's records and determines either eligibility for automatic restoration of rights or whether a hearing before the Clemency Board is required. Those whose restoration was not approved must file an application with the Office of Executive Clemency.

Applications for restoration of rights or clemency are forwarded to the Florida Parole Commission for an investigation. The Parole Commission provides a case analysis report and makes a recommendation to the Board on clemency. Restoration of rights or other form of clemency is granted with the approval of the governor plus two Clemency Board members.

The Parole Commission's report and recommendation, as well as all other records developed or received pursuant to a clemency investigation, are exempt from public disclosure. The governor, however, has specific authority to approve the release of such records. A person whose application for clemency or restoration of rights has been denied has no means of determining the basis for the denial unless the governor has authorized release of the case analysis report.

In direct response to testimony received in at the Commission on Open Government Reform Public Hearing in Tallahassee in August 2007, Governor Charlie Crist exercised his authority under § 14.28, Florida Statute, and authorized release of the Parole Commission's case analysis report to a clemency applicant appearing before the Clemency Board prior to applicant's scheduled hearing. The policy change allows individuals applying for clemency access to the same information as the members of the Board of Executive Clemency.

9. Department of Children and Families Exemptions

The Department of Children and Families (DCF) is responsible for investigating allegations of abuse, abandonment, and neglect of children and vulnerable adults. All records relating to such investigations are confidential and exempt. The department's records can be publicly released only upon court order. If DCF wants to release its records, the department has to petition the court for an order allowing it to make the records public.

DCF is prohibited from releasing details or publicly commenting on its investigations, but much of the same information may be available from other public sources. This leads to the perception that DCF is trying to cover up its mistakes. In recent months, DCF has petitioned a court to release investigation reports at least five times, requiring expenditures both in time and financial resources.

To increase public oversight of the Department and its actions, DCF is supporting legislation that opens department records relating to investigations of abuse, neglect, or abandonment of a child or vulnerable adult, and provides an exemption for information that would identify the subject of the investigation as well as other, specified individuals. The proposed legislation contains a provision allowing children in the foster care system access to their own records and authorizes the necessary sharing between governmental agencies of exempt and confidential records.

10. Law Enforcement Exemptions

a. Law Enforcement Officers Convicted of Crimes

Section 119.071(4)(d)1., Florida Statutes, provides an exemption from the public records law for the home addresses, telephone numbers, social security numbers, and photographs of active or former law enforcement officers. Any agency that has custody of such information and is not the law enforcement officer's employer must maintain the exempt status of the information only if the officer submits a written request for maintenance of the exemption.

The Florida Sexual Predators Act requires persons convicted of specified sexual offenses and designated as a sexual predator to register with the Florida Department of Law Enforcement (FDLE), providing, in part, their name, social security number, age, date of birth, photograph, and home address. FDLE maintains an online database of current information regarding each sexual predator, which is a public record.

The concern is whether the home address and photograph of a former law enforcement officer convicted of a sexual offense and subsequently designated a sexual predator would be redacted from the public record, including the sexual predator's database, because of the exemption provided by § 119.071(4)(d)1., Florida Statutes.

b. Florida Department of Law Enforcement Proposed Exemptions

1) Exemption for Autopsy Photographs

Florida law provides a public record exemption for photographs of an autopsy held by a medical examiner. The photographs are confidential and exempt, and cannot be copied without the permission of the deceased's next-of-kin or upon court order and a showing of good cause. A violation of the exemption is a third degree felony.

Because of the limited exception to the autopsy photograph exemption, autopsy photographs can't be used for legitimate governmental purposes. As result, law enforcement cannot use autopsy photos that could help trainees learn what to look for at a crime scene, and medical examiners can't share the photos in seeking consultation as to cause of death. The broad exemption has severe unintended consequences.

There is also the unique problem of unidentified bodies that may be subject to autopsy. Without the authority to publish a photograph of the deceased, it's virtually impossible to obtain identification.

2) Exemption for Personal Information/E-Mail Notifications

Federal law requires states to develop an automatic sexual predator notification system for the public. FDLE maintains the Florida Offender Alert System, a free service providing automatic notification of registration information regarding sexual predators and sexual offenders to the public. Citizens can subscribe for an e-mail alert if an offender or predator moves close to any address in Florida. To register for the alert system, a person must provide an e-mail address where alerts are to be sent and the physical address or addresses to be monitored.

The information provided by a person who registers with the Florida Offender Alert System is public record and subject to disclosure. FDLE representatives expressed concern that such information could be used by a sexual offender to obtain personal information on registrants, including crime victims, and recommended creation of a public record exemption for registration information. Commissioners questioned whether there wasn't some less restrictive approach, noting the location of a registered sexual predator may be obtained by searching the FDLE sexual predator on-line database.

3) Expansion of the Non-Florida Source Exemption

Section 119.071(2)(b), Florida Statutes, allows a state criminal justice agency to maintain the protected status of criminal intelligence or criminal investigative information provided by a non-Florida criminal justice agency only on a confidential or similarly restricted basis. FDLE representatives recommended an expansion of the non-Florida source exemption to include information relevant to promoting domestic security efforts held by a non-Florida agency, person, or entity.

Commissioners expressed reservations about allowing information exempt under another state's laws to remain exempt in Florida, which has a constitutional standard different from any other state. The historical presumption of openness could be reversed if information exempt pursuant to another state's laws was allowed that same, automatic protection in Florida.

4) Exemption for Background Screening Information

FDLE representatives recommended creation of a public record exemption for information obtained in conducting background checks for slot-machine operators, arguing that much of the information obtained in conducting such checks comes from other states or private entities and may not be subject to public disclosure under the laws of other states. However, background screening information for licensed professionals in

Florida is generally subject to the state's public records law, and there was little support among commissioners for the proposal.

11. Government Attorneys and the Attorney-Client Privilege

The attorney-client privilege protects communications between an attorney and the attorney's client. This privilege is limited under Florida law when the client is a government agency.

There are two exemptions designed to protect the communications between an agency attorney and the government client: one an exemption for certain records prepared by an agency attorney for use in civil or criminal litigation or an adversarial administrative proceeding; and the second for meetings between the agency attorney and the government client. Both exemptions are limited in scope and applicability.

A subcommittee of the Florida Bar's Task Force on Attorney-Client Privilege examined the attorney-client privilege and determined that current law impedes the government attorney's ability to provide effective legal counsel to the government client. The subcommittee recommended – and the Commission was asked to consider – an expansion of the public record opinion work product exemption to include fact work product and an elimination of the requirement that the work product records are subject to disclosure at the conclusion of the litigation. A recommendation to expand the litigation meeting exemption to allow “necessary persons” to attend the closed session and to broaden the scope of allowable discussions to include any matter raised in a pending or threatened lawsuit was also submitted. The subcommittee also recommended that the transcription requirement be eliminated.

The argument for expansion of the litigation exemptions fails to take into account that the government attorney is representing a board that is ultimately responsible to the people for its actions. Two former governors made the same point in vetoing similar legislation. The public trust and the public confidence that are fostered by free and open government proceedings far outweigh any possible benefits that might be derived from expanding the attorney work product and litigation meetings exemptions.

12. Exemption for Lists of Retirees

The names and addresses of retirees are exempt from public disclosure, but only to the extent that they are provided in aggregate or list form. An individual retirement record is subject to inspection and copying one record at a time. There is an exception to the exemption that allows a bargaining agent or retiree organization a list of the names and addresses of retirees for official business use.

In noting that the names and addresses of current government employees are generally subject to public disclosure under Florida's public records law, commissioners questioned the justification for protecting the same information after an employee has retired. Apparently, the exemption was originally designed to protect retirees from mass

mailings and solicitations, but the fact that bargaining agents and retirement organizations can obtain the information in aggregate or list form severely undermines the justification.

B. Fees

The vast majority of public record requests fall under the general fee provision in chapter 119, Florida Statutes, which allows a charge of no more than 15¢ a page for paper copies or the actual cost of duplication. Agencies also can impose a special service charge if a records request requires an extensive use of agency resources. This “extensive use” fee is in addition to the cost of copying.

The Commission received a significant amount of testimony on the cost of obtaining public records, most of which focused on the extensive use provision. The term “extensive” is not defined in the statutes. Based on the testimony received, extensive use fees can vary widely, even within a given agency or for the same record requested at different agencies. Excessive fees act as a barrier to the public’s right of access and there is a perception among the public and the media that government agencies attempt to avoid compliance with the law by quoting excessively high costs to provide public records.

The redaction of exempt information in public records – whether paper records or records in electronic formats – can also drive up the cost of access, and fees for review and redaction can be prohibitive. Public access should be getting easier and the cost of providing access to records less expensive as agencies rely more heavily on computers to store and manage public records.

Technology has advanced to the point where systems with redaction capability can be created, and redaction software programs are widely available. The use of such programs can dramatically reduce the cost of redacting exempt information, but there’s little incentive to create systems that are capable of producing records with exempt information redacted automatically if agencies are allowed to pass on the cost of redaction to requestors.

C. The Impact of Advances in Information Technology on Public Records Access

1. Electronic Records and Access to Agency Databases

As a statement of general policy, state law provides that automation of public records shouldn’t erode the right of access to records electronically maintained and that agencies must provide reasonable public access to such records. But the Legislature hasn’t minimized the potential negative technological impacts on records access by requiring agencies to use specific types of technology or by permitting agencies to use only non-proprietary systems. There are persistent impediments to obtaining access to public information stored in agency databases.

Government agency use of aging computer systems and outdated formats can create significant obstacles to the public's right of access to the records stored in or managed by such systems. Equally problematic is agency use of new electronic recordkeeping systems that are poorly designed. Although state law requires agencies to consider public access in designing computer systems, there are no specific legal requirements relating to the standards an agency should use in acquiring or designing electronic recordkeeping systems. The result has been a lack of uniformity in the ability of state and local government agencies to provide access to the public records stored in such systems in an efficient and cost-effective manner.

Agency use of proprietary programs or systems can also have a negative impact on the ability to access public records. Florida law prohibits a government agency from contracting for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of the agency. Yet the use of proprietary programs – and private companies to manage such programs – is prevalent in Florida and has had a negative impact on the public's constitutional right of access to government records.

Interoperability allows software and hardware on different machines from different vendors to share data, and is the most important issue when choosing technology. Without it, agency technology can make it more difficult, if not virtually impossible, to access the agency's public records. State law encourages but does not require interoperability.

2. Increased Use of Communications Technology Including Personal Computers and Portable Handheld Devices

E-mail communications between members of a commission is public record and must be retained by law. Such discussions may violate the open meetings law, which applies to any discussion of public business between two or more members of the same board or commission. The issue is less clear if commissioners use portable handheld devices to send text or instant messages to each other. Such messages, which are transitory in nature, are analogous to the spoken word and the public records law most likely does not apply. A discussion of public business between two members of the same collegial body using text or instant messaging technology is a clear violation of the open meetings law.

E-mail relating to public business clearly falls within the statutory definition of "public record" and is subject to the same retention and access requirements as all other public records. It does not matter whether those emails are sent from – or received at – a personal e-mail account on a privately owned computer.

The use of private computers and personal e-mail accounts to conduct public business does not alter the public's right of access to the public records maintained on those computers or transmitted by such accounts.

D. Impact of Advances in Information Technology on the Sunshine Law

State agencies are authorized by law to conduct public meetings using “communications media technology” and must provide public notice and allow the public the opportunity to participate. Cost is the primary consideration in allowing state agencies to meet via telephone conference calls or video conferencing.

The authority to conduct meetings via remote electronic means applies only to state agencies, however. Local governments, as a general rule, must hold meetings within their jurisdiction and have a quorum physically present in the meeting room.

E. Financial Transparency

After passage of a federal law requiring the creation of a searchable online database of detailed information on federal expenditures, a number of states passed financial transparency laws requiring online posting of government expenditures. In some states, governors took the initiative and posted expenditures online. The Florida Legislature considered but failed to pass financial transparency legislation in 2008. The goal of financial transparency legislation is to provide increased accountability by allowing the public to have electronic access to agency expenditure information.

In Florida, financial transparency efforts have been mostly directed toward local governments, many of which provide access to their current and proposed budgets and other financial information through their websites. The information can be difficult to find and many times nearly impossible to understand. There isn't a central file or database of all government agency contracts and expenditures. After the financial transparency legislation failed, the Governor's office began working with the Department of Financial Services on a pilot project that would provide a portal linking state agency financial information.

Secrecy surrounding the budget process and government spending may not be intentional, but rather a consequence of the failure of lawmakers and government officials to take advantage of modern technologies and provide taxpayers with a web portal allowing access to a searchable database that allows detailed information on how tax dollars are being spent.

F. Citizen's Rights

1. The Right to Participate in Public Meetings

The Florida Supreme Court has stated that the public has an “inalienable right to be present and to be heard” at meetings subject to the Sunshine Law. There has been some confusion regarding the scope of the right, and some state courts have held that the public's right to participate in all open meetings is not absolute. Local governments routinely prohibit public comment during workshops and many don't provide a meaningful opportunity to participate at regular meetings. Citizens express frustration at

the inability to address elected representatives at public meetings, and some are intimidated or harassed when they insist on exercising their right to speak within the guidelines set out by the governing body.

Legislation was introduced during the 2008 session that set minimum time limits for public comment on agenda items and allowed a method by which citizens could directly place items on the agenda. Also included were standards for meeting. The legislation failed to pass.

2. Interaction with Government

Testimony before the Commission on Open Government Reform from citizens across Florida revealed common and disturbing problems encountered when interacting with their government, with citizens routinely expressing concern about the lack of respect when interacting with government and the difficulties encountered when trying to obtain public records.

Responding to these citizen concerns, Governor Crist issued an executive order requiring state agencies under the direction of the governor to adopt an Open Government Bill of Rights to guarantee that the right of access to public meetings and records is safeguarded and protected. The executive order applies only to those state agencies under the direction of the governor.

The governor's stated goal in issuing the order "is to increase access for all Floridians so they have the tools needed to hold government accountable," and to foster public trust in government.

3. The Right to Verify Personal Information Collected by Government

Government agencies collect vast amounts of personal information from individuals, and computer-based technologies are increasingly used to certify the accuracy and completeness of information before an individual receives government benefits or services. Rarely, however, are those agencies required to justify the need to collect personal information. In Florida, an individual does not have the specific right to verify the accuracy of personal information collected and maintained by government.

Over a period of 10 years the Florida Legislature regularly considered but failed to enact different variations of data protection legislation, usually in the form of a Fair Information Practices Act. A number of states have enacted data protection legislation.

Fair information practices legislation (FIPA) doesn't create a substantive right for individuals, but rather provides the right to verify the accuracy of personal information collected or maintained by a government agency that is subject to public disclosure under state law. Agencies must justify the need to collect personal information. FIPA legislation enhances the rights individuals about whom personal information is collected

or maintained by a government agency, and reduces government collection of personal information that will be subject to public disclosure.

G. Enforcement and Compliance

The burden of enforcing violations of Florida's open meetings and public records laws generally falls to citizens who have few alternatives other than seeking an injunction or filing suit in civil court to enforce compliance. An agency with questions concerning application of Florida's open meetings and public records laws may ask the Attorney General for an opinion, whether formal or informal, but citizens do not have the same right. The Office of the Attorney General operates a mediation program to resolve disputes regarding access to public records. The program is voluntary, however, and the results reached are non-binding.

The penalty provisions in Florida's open meetings and public records laws are inconsistent. They do not address the issue of an agency's willful and repeated violation of the law or an agency's intentional disregard for the public's constitutional right of access.

H. Education and Training

Failure to comply with the requirements of Florida's open government laws is frequently due to a lack of education and training on the requirements of the public records and open meetings laws, and many of the problems encountered by citizens seeking access can be resolved with additional education and training of government officials and employees.

I. Office of Open Government

Governor Crist created the Office of Open Government by Executive Order for the express purpose of assuring compliance with Florida's open government laws and to provide open government training. The authority of the Office is limited, however, to only those state agencies under the authority and control of the governor, and unless codified in law, can be decommissioned by future governors.

Florida does not have a central office with authority to assure statewide compliance with the state's open government laws and to provide training and guidance on open government requirements to the public.

J. The Florida Legislature

The Florida Legislature is subject to the constitutional right of access to records and each chamber has adopted rules effectuating that right. According to testimony received by the Commission, legislative rules may not be consistent with current policies and practices under Florida's Public Records Law.

Article III, section 4(e), of the State Constitution, requires that certain meetings between more than two members of the Legislature be reasonably open to the public. This is a far lesser standard than that imposed on state agencies and local governments, and many cities and counties have adopted resolutions recommending that the Legislature hold itself to the more rigorous standard under the Sunshine Law. Additionally, the right of access to legislative meetings is specifically subject to the sole interpretation, implementation, and enforcement by each chamber.

Conclusions and Recommendations

A. Exemptions

1. Definitions: Exempt v. Exempt and Confidential

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding the terms “exempt” and “exempt and confidential” is drawn:

- Current law does not contain a definition of the terms “exempt” and “exempt and confidential” and it not clear whether the distinction between the two terms is clearly understood or consistently applied.

Therefore, it is recommended that:

- 1) The Legislature amend chapter 119, Florida Statutes, to include definitions of the terms “exempt” and “exempt and confidential.”

2. Redundant Exemptions

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding redundant public record exemptions is drawn:

- There are a large number of redundant of public record exemptions for the same or similar information scattered throughout state statutes. The Legislature could reduce the number of exemptions by creating universal exemptions that apply to all agencies when the justification for such exemptions is generally accepted and repealing the redundant exemptions. Redundant exemptions identified by the Commission include: audit reports; social security numbers; the identity of donors; medical information and records; personal financial information; proprietary business information, including trade secrets; security system plans; claims files; appraisals, offers, counteroffers; and complaints of discrimination.

Therefore, it is recommended that:

2) The Legislature review all exemptions to chapter 119, Florida Statutes, for redundancy and create universal exemptions in chapter 119 that apply to all agencies where appropriate.

3. Sunset Review of Open Government Exemptions

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding sunset review of open government exemptions is drawn:

- The five-year review and reenactment process under the Open Government Sunset Review Act for newly created or substantially amended exemptions to the state's open government laws does not allow for an effective review and evaluation of exemptions to the public records and open meetings laws and may undermine the strong public policy of open government in Florida.

Therefore it is recommended that:

3) The Legislature amend § 119.15, Florida Statutes, the Open Government Sunset Review Act, to require review of all newly created or substantially amended exemptions to the Public Records Law and the Sunshine Law once 5 years after enactment and then every 10 years thereafter.

4. Investigations of Complaints Filed Against Professionals Licensed by the Department of Business and Professional Regulation and the Department of Health

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding exemptions for records relating to the investigation of complaints filed against professionals licensed by the Department of Business and Professional Regulation (DBPR) and the Department of Health (DOH) is drawn:

- As a general rule, records relating to investigations into complaints against a government officer or employee are exempt from public disclosure until there is a probable cause finding. However, records relating to complaints filed against most professionals licensed by DBPR and all professionals licensed by DOH are subject to public disclosure *only if* there is a finding of probable cause; such records are exempt from public disclosure if no probable cause is found. There is insufficient constitutional justification for providing a higher level of secrecy for professionals licensed by DBPR and DOH.

Therefore, it is recommended that:

4) The Legislature amend the public record exemptions for records relating to complaints filed against professionals licensed by DBPR and DOH to stipulate that such records are subject to public disclosure once the investigation is complete or no longer active.

5. Exemption for Economic Development Records

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the exemption for economic development records are drawn:

- Records relating to economic development projects are exempt from public disclosure pursuant to § 288.075, Florida Statutes, under certain specified conditions. However, there is sometimes confusion regarding what constitutes an economic development project for the purpose of invoking the exemption, and the exemption has been misapplied as a result. The term “economic development project” is not defined by law.

Therefore, it is recommended that:

5) The Legislature amend § 288.075, Florida Statutes, to include a definition of “economic development project” and to subject the exemption to review and reenactment under the Open Government Sunset Review Act.

- The scope and application of the exemption for records relating to economic development projects is frequently misunderstood by local governments involved in development projects.

Therefore, it is recommended that:

6) The Florida Economic Development Council coordinate with the Office of Open Government to provide training to local government economic development agencies on the scope and application of § 288.075, Florida Statutes.

6. Transportation Projects

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding local government transportation projects is drawn:

- The Commission was asked to review § 337.168, Florida Statutes, an exemption for state transportation projects, and recommend expansion of the exemption to include similar county projects. No further information or testimony was offered or received, and commissioners found it difficult to reach a conclusion on the issue without additional information.

Therefore, it is recommended that:

7) The Legislature review the exemption for state transportation projects under § 337.168(1), Florida Statutes, to determine whether the exemption should be expanded to include local government transportation projects.

7. Social Security Numbers

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the general exemptions for social security numbers are drawn:

- The general exemptions for social security numbers in chapter 119, Florida Statutes, provide unequal protection from disclosure requirements pursuant to the commercial activity exception depending on whether the holder of the number is a government employee. There is insufficient constitutional justification for the inconsistency in the statutory provisions protecting social security numbers.
- The lack of consistency in protection for social security numbers under the general exemptions has resulted in unnecessary complexity and confusion for agencies with custody of social security numbers.

Therefore, it is recommended that:

8) The Legislature review the general social security number exemptions under §§ 119.071(4)(a) (government employees) and 119.071(5)(a) (general public), Florida Statutes, to ensure that all social security numbers are subject to the same disclosure requirements and provided equal protection.

8. Clemency Proceedings

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the exemption for records relating to a petition for clemency are drawn:

- Because the Parole Commission's case analysis report and recommendation to the Clemency Board are exempt from public disclosure, a person whose application for clemency or restoration of rights has been denied has no means of determining the basis for the denial unless the governor has authorized release of the case analysis report.
- The secrecy surrounding the information in clemency files significantly undermines the fairness of the rights restoration process and the confidence that the applicant – and the public – have in the civil rights restoration decision-making process.
- Individuals applying for clemency should have the same information available to them as do the members of the Board of Executive Clemency.
- In exercising his authority under § 14.28, Florida Statute, Governor Crist authorized release of the Parole Commission's case analysis report to a clemency applicant appearing before the Clemency Board prior to the applicant's scheduled hearing. However, the Crist policy can be reversed by future governors.

Therefore, it is recommended that:

9) The Legislature amend § 14.28, Florida Statutes, to allow a clemency applicant appearing before the Clemency Board access to the Parole Commission's case analysis report and recommendation prior to the applicant's scheduled hearing, stipulating that certain, specified identifying information must be redacted from the report prior to its release.

9. Department of Children and Families Exemptions

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the exemption for records of the Department of Children and Families are drawn:

- Records of the Department of Children and Families (DCF) relating to its investigations into allegations of abuse, abandonment, and neglect of children and vulnerable adults are exempt from public disclosure, but much of the same information can be obtained from records that are publicly available. This leads to the perception that the department is attempting to cover up its mistakes by hiding behind confidentiality laws.
- Currently, DCF must obtain a court order allowing the department to publicly release its investigative records. This process requires significant expenditure of department resources and can result in unnecessary time delays in allowing the public access to critically important information.
- Allowing the public access to DCF investigative records will improve the department's performance and increase the public's trust in its investigations and actions.

Therefore, it recommended that:

10) The Legislature amend chapters 39 and 415, Florida Statutes, to stipulate that the records of the Department of Children and Families relating to its investigations into allegations of abuse, abandonment, and neglect of children and vulnerable adults are subject to public disclosure, except that certain specified identifying information contained in such records will be exempt.

- Children in the foster care system and young adults who have aged-out of the system are unable to access their own case files, which contain personal information. Without such information, the children and young adults have not been able to obtain the most basic government services.

Therefore, it is recommended that:

11) The Legislature amend chapter 39, Florida Statutes, to clarify that children who have been in the state foster care system have a right of access to their own records, and that such records must be maintained in a complete and accurate manner.

■ Approved foster parents, preadoptive and adoptive parents currently do not have a right of access to DCF records relating to the adoptive child, which can result in a reluctance to foster or adopt a child in the child care system.

Therefore, it is recommended that:

12) The Legislature amend chapter 39, Florida Statutes, to allow access to department records relating to children in the child care system by approved foster parents and preadoptive and adoptive parents.

10. Law Enforcement Exemptions

a. Law Enforcement Officers Convicted of Crimes

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding the exemptions for the home address of certain government employees who have been convicted of a sexual offense is drawn:

■ The public record exemptions protecting the home addresses and photographs of certain specified government employees under §§ 119.071(4)(d) and 395.3025(10) and (11), Florida Statutes, is contrary to the intent and public purpose of the Florida Sexual Predators Act when those employees have been convicted of a sexual offense and are required under the Act to register their home addresses.

Therefore, it is recommended that:

13) The Legislature amend § 119.071(4)(d) and §§ 395.3025(10) and (11), Florida Statutes, to stipulate that the home addresses and photographs of protected government employees who have been convicted of a sexual offense and are required to register as a sexual offender under the Florida Sexual Predators Act are subject to public disclosure.

b. Florida Department of Law Enforcement (FDLE) Proposed Exemptions

1) Exemption for Autopsy Photographs

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding § 406.135(9), Florida Statutes, providing an exemption for autopsy photographs are drawn:

■ Because of the limited exception to the autopsy photograph exemption, there are unintended negative consequences in that the exemption prevents the use of autopsy

photographs for legitimate governmental purposes. As a result, law enforcement cannot use such photographs in training officers, medical examiners are prohibited from sharing the photographs with other medical examiners in seeking consultation as to cause of death, and medical schools are prohibited from using autopsy photographs in training medical students.

- Prior to enactment of the exemption, law enforcement agencies routinely published autopsy photos of an unidentified deceased person in order to determine the person's identity. Such publication is effectively prohibited under the autopsy photograph exemption, making it virtually impossible to obtain identification.

Therefore, it is recommended that:

14) The Legislature amend § 406.135(9), Florida Statutes, to create an exception to the autopsy photograph exemption that would allow limited but justifiable disclosure of the exempt records for legitimate investigative, training, medical examiner, or medical school purposes.

2) Exemption for Personal Information/E-Mail Notifications

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding creation of an exemption for e-mail addresses provided to FDLE by those wishing to subscribe to the Florida Offender Alert System is drawn:

- An individual may subscribe to the Florida Offender Alert System for the purpose of obtaining an e-mail alert if an offender moves close to any address in Florida. To register, a person must provide an e-mail address where alerts are to be sent and the physical address or addresses to be monitored. However, a person interested in learning the location of a registered sexual predator can do so by searching the FDLE sexual predator online database, thereby obtaining the same information without registration. There is insufficient constitutional justification for the creation of an exemption for e-mail addresses provided to FDLE by persons who register for the sexual predator alert notification system.

Therefore, it is recommended that:

14) The law not be amended to create a public record exemption for e-mail addresses provided to FDLE for the purpose of subscribing to the Florida Offender Alert System.

3) Expansion of the Non-Florida Source Exemption

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding expansion of 119.071(2)(b), Florida Statutes, the non-Florida source exemption, are drawn:

■ While some state governments and private entities may be reluctant to provide records and information to Florida agencies, including criminal justice agencies, because of the State’s broad public records law, Florida has a constitutional standard different from any other state and the historical presumption of openness could be reversed if information exempt pursuant to another state’s laws were allowed that same, automatic protection in Florida.

■ There is insufficient constitutional justification for expanding the current exemption under § 119.071(2)(b), Florida Statutes, to include information relevant to promoting domestic security efforts that is not a public record as originally held by a non-Florida agency or person or entity and is made available to a Florida criminal justice agency on a confidential, non-public basis.

Therefore, it is recommended that:

15) The law not be amended to expand § 119.071(2)(b), Florida Statutes.

4) Exemption for Background Screening Information

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding creation of a public record exemption for background screening information is drawn:

■ Background screening information for licensed professionals in Florida is generally subject to public disclosure. There is insufficient constitutional justification creating a public record exemption for information submitted to FDLE and DBPR for background or licensing reviews of persons or entities seeking licensure for the purposes of owning, operating, managing, doing business with, or being associated with a state licensed slot gaming facility.

Therefore, it is recommended that:

16) The law not be amended to create a public record exemption for background screening information of persons or entities seeking licensure relating to state gaming facilities.

11. Government Attorneys and the Attorney-Client Privilege

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding expanding § 119.071(1)(d), Florida Statutes, the exemption for a government attorney work product, and § 286.011, Florida Statutes, the exemption for litigation meetings, are drawn:

- Because of Florida’s historical presumption of openness to the records and meetings of government, communications between an attorneys and their government clients were not protected by the attorney-client privilege.
- Florida law recognizes a limited attorney-client privilege that protects the communications between attorneys and government clients. Section 119.071(1)(d), Florida Statutes, provides limited protection for a government attorney’s work product; the exemption expires at the end of litigation. Section 286.011(8), Florida Statutes, allows government attorneys and government clients to meet behind closed doors to discuss pending litigation to which the government client is presently a party under certain, specified conditions. The meeting must be transcribed by a court reporter and the transcript becomes a public record at the conclusion of the litigation.
- To amend the work product public record exemption to include fact work product and delete the disclosure requirement at the end of litigation would effectively preclude any opportunity for public oversight and there is insufficient constitutional justification for expanding § 119.071(1)(d), Florida Statutes.
- To amend the litigation meetings exemption to allow persons other than the chief executive officer, the members of the board or commission, and the attorney to attend the closed session, to expand the allowable discussion to include any matter raised in a claim or lawsuit or anticipated lawsuit, and to delete the requirement that the transcript be made available at the end of litigation would preclude opportunity of public oversight. There is insufficient constitutional justification for expanding § 286.011(8), Florida Statutes.

Therefore, it is recommended that:

- 17) The law not be amended to expand the attorney work product exemption under § 119.071(2)(b), Florida Statutes, and the litigation meetings exemption under § 286.011(8), Florida Statutes.

12. Exemption for Lists of Retirees

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding the public record exemption for lists of retirees is drawn:

- Section 121.031(5), Florida Statutes, provides a public record exemption for the names and addresses of government retirees, but only in aggregate, compiled, or list form. However, the exemption allows bargaining agents or retiree organizations access to lists of the names and addresses of retirees for official business use. In addition, any person can review or copy an individual’s retirement record one record at a time or may obtain information by a separate written request for a named individual. The names and addresses of current employees in aggregate, compiled, or list form are subject to public disclosure and there is insufficient constitutional justification to maintain the exemption for lists of retirees under § 121.031(5), Florida Statutes.

Therefore, it is recommended that:

18) The Legislature repeal § 121.031(5), Florida Statutes.

B. Fees

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the fees for obtaining copies of public records are drawn:

■ The general fee provisions in chapter 119, Florida Statutes, allow agencies to charge 15¢ a page for paper copies or the actual cost of duplication for large-sized copies other than paper. In addition, agencies can charge a special service charge if a records request requires an extensive use of agency resources. The term “extensive” is not defined and thus each agency must determine what is an extensive use of its resources. As a result, extensive use fees vary widely, even within a given agency or for identical records requested at different agencies.

■ Excessive fees charged for accessing public records can create an effective barrier to the public’s constitutional right of access. There is a perception that agencies charge excessive fees to discourage public record requests.

■ If a requested record contains both exempt and non-exempt information, agencies are required to redact the exempt information and provide access to the remainder. The cost of redaction, however, routinely increases the cost of obtaining public records.

■ As agencies rely more heavily on computers to store and manage public records, public access should be getting easier and the cost of providing access to public records less expensive. But redaction of exempt information in electronic formats creates barriers to the public’s constitutional right of access even though technology is advancing and systems with automatic redaction capability can be created.

■ Redaction software programs are available and the use of such programs can dramatically reduce the cost of redacting exempt information. There’s little incentive to develop systems capable of automatically redacting exemption information if agencies are allowed to pass on the cost of redaction to requestors.

Therefore, it is recommended that:

19) The Legislature retain the current fee provisions in § 119.07(4)(a) – (c), Florida Statutes.

20) The Legislature amend the § 119.07(4)(d), Florida Statutes, to: (a) delete the extensive use provision; (b) stipulate that copies of public records in any medium maintained or utilized by an agency must be provided for the actual cost of duplication;

(c) allow agencies to negotiate a fee for a “specialized electronic service or product” with a definition of the term included; and (d) stipulate that redaction of exemption information is not a “specialized service or product.”

21) The Legislature amend § 119.07(4), Florida Statutes, to stipulate that fees for public records may be waived.

C. The Impact of Advances in Information Technology on Public Records Access

1. Electronic Records and Access to Agency Databases

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding electronic records and access to agency databases are drawn:

- As a statement of general policy, § 119.01(2)(a), Florida Statutes, provides that automation of public records must not erode the right of access to those records, and requires agencies to provide reasonable public access to records electronically maintained. But the Legislature has not attempted to minimize potential negative technological impacts on records access by requiring agencies to use specific types of technology or by permitting agencies to use only non-proprietary systems. There are persistent impediments to obtaining access to public information stored in agency databases.
- Although state law generally requires agencies to consider public access in designing computer systems, there are no specific legal requirements on standards an agency should use in acquiring or designing electronic recordkeeping systems. There is a lack of uniformity in the ability of state and local government agencies to provide access to the public records stored in such systems in an efficient and cost-effective manner.
- Agency use of proprietary programs or systems has a negative impact on the ability to access public records. Current law prohibits agencies from contracting for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of the agency.
- Interoperability allows software and hardware on different machines from different vendors to share data, and without it, agency technology can make it more difficult, if not impossible, to access the agency’s public records. State law encourages but does not require interoperability.

Therefore, it is recommended that:

22) The Legislature, working with the Agency for Enterprise Information Technology, create legal standards for new or redesigned agency databases, data dictionaries, and metadata to facilitate public access to electronic records.

23) The Agency for Enterprise Information Technology (a) review the issue of new or substantially redesigned agency electronic systems compliance with chapter 119, Florida Statutes, and (b) recommend language for development and procurement requirements that mandate that all new systems facilitate the timely and inexpensive redaction of exempt information. For existing agency electronic systems, (c) recommend methods to reduce the cost and time required to redact information from these systems. This is not to be considered an unfunded mandate.

24) All agencies create systems or establish processes to provide enhanced public access to all public record e-mail.

2. Increased Use of Communications Technology Including Personal Computers and Handheld Devices

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the increased use of communications technology including personal computers and handheld devices are drawn:

- The use of personal computers and/or personal internet accounts to conduct public business does not alter the public's right of access to the records maintained on such computers or transmitted via such accounts. The practice can have a negative impact on the ability of the public to access the records on those computers.
- All public records maintained on personal computers or transmitted via personal internet accounts are subject to current disclosure and retention requirements.

Therefore, it is recommended that:

25) All agencies adopt policies and procedures for ensuring that public records maintained on personal computers or transmitted via personal internet accounts are disclosed and retained according to law.

- Government officials' use of portable handheld devices or laptop computers to communicate with others about public business raises questions under both the public record and sunshine laws. The increased use of communications technology including personal computers and handheld devices has changed the nature of communication but it has not diminished the value of Florida's open government laws or the need for public officials to consistently follow the law.

Therefore, it is recommended that:

26) All agencies adopt policies that prohibit the use of text and instant messaging technologies during public meetings and/or hearings.

D. Impact of Advances in Information Technology on the Sunshine Law

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding the impact of advances in information technology on the sunshine law is drawn:

- Section 120.54(5)(b)2., Florida Statutes, authorizes state agencies to conduct public meetings subject to the open meetings law using communications media technology. Local governments do not have such authority and as a general rule must hold meetings within their jurisdiction and have a quorum physically present.

Therefore, it is recommended that:

- 27) Laws relating to agency use of communications media technology be retained without change or amendment.

E. Financial Transparency

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding financial transparency are drawn:

- Historically, citizens interested in their government's finances were required to browse through thousands of pages of budget documents, much of which is indecipherable and difficult to understand. Many local governments in Florida provide financial information through their websites. The information can be hard to find, and there isn't a central file or database of all government agency contracts and expenditures.
- Transparency of government financing results in a higher level of government accountability and public trust. Increasing transparency to government spending by providing internet access to agency contract and expenditure information help hold Florida government leaders more accountable and will build public confidence in governments at all levels.

Therefore, it is recommended that:

- 28) The Legislature enact legislation that requires all agencies to provide internet access to (a) all contracts over a fixed dollar amount and, at a minimum, (b) other information about such contracts, including the name of the agency making the expenditure; (c) the name of the person receiving the expenditure; (d) the date of the expenditure; (e) the amount of the expenditure; and (f) the purpose of the expenditure.

F. Citizen's Rights

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding citizen's rights relating to open government are drawn:

■ The Florida Supreme Court has stated that the public has an “inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.” There has been confusion regarding the scope of the right and how it is applied.

■ A meaningful opportunity to speak, to participate in the deliberations of government, is critical to a democratic society and fosters increased public trust in government. There is a direct correlation between the public’s perception of government transparency and the level of public participation allowed by government, which in turn directly affects public trust. By creating a culture that fosters public trust and confidence, government truly operates in the sunshine.

Therefore, it is recommended that:

29) The Legislature amend § 286.011, Florida Statutes, to require that all agencies adopt policies allowing for a reasonable opportunity for public participation at all meetings subject to the Sunshine Law.

■ Floridians must have the tools they need to hold government accountable. Such tools will foster public trust in government.

■ To enhance the public’s constitutional right of access to government meetings and records, agencies must recognize the need for greater ease of access to public meetings and records. Agencies also must increase the respect with which they interact with citizens, and create a culture to build the people’s trust and confidence in their government and its ability to serve the public.

Therefore, it is recommended that:

30) The Legislature amend the law to require the Department of State/Division of Information Services and the Bureau of Archives and Records Management to adopt a model rule on access to public records for use by all agencies.

31) The Office of Program Policy Analysis and Government Accountability (OPPAGA) conduct a thorough review of all open government exemptions for consistency and modernity of language, bringing all exemptions within the current constitutional standard.

32) The Legislature consolidate the sunshine law and public records law into one chapter of the Florida Statutes to allow for consistency of definitions, training requirements, enforcement, compliance, etc.

33) The Legislature codify the Citizen’s Bill of Rights as a preamble to the consolidated open government law.

- Government agencies collect and maintain vast amounts of personal information from individuals, and in Florida, an individual does not have the right to verify the accuracy of personal information collected and maintained by government.
- Agencies generally are not required to justify the need to collect personal information, which then becomes subject to public disclosure.
- Enactment of fair information practices legislation will allow for greater protection and integrity of personal information collected and maintained by government.

Therefore, it is recommended that:

34) The Legislature enact a Fair Information Practices Act to (a) require government agencies to justify the need to collect personal information; (b) provide a right of access to personal information collected by government by the subject of the information; and (c) to challenge the accuracy of the information under certain specified circumstances.

G. Enforcement and Compliance

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding enforcement and compliance are drawn:

- The burden of enforcing violations of Florida’s open meetings and public records laws falls to citizens, who have few alternatives other than seeking an injunction or filing suit in civil court to enforce compliance.
- An agency with questions concerning application of Florida’s open meetings and public records laws may ask the Attorney General for an opinion, whether formal or informal, but citizens do not have the same right.
- The Office of the Attorney General operates a mediation program to resolve disputes regarding access to public records. The program is voluntary and the results non-binding.

Therefore, it is recommended that:

35) The Legislature amend the law to allow citizens to seek an informal opinion from the Office of Open Government when denied access to public records or open meetings.

- The penalty provisions in Florida’s open meetings and public records laws do not address the issue of an agency’s willful and repeated violation of the law or an agency’s intentional disregard for the public’s constitutional right of access.

Therefore, it is recommended that:

36) The Legislature amend the open government penalty provisions to allow for additional fees to be assessed against an agency if a court determines that the agency (1) violated either the sunshine or public record law; and (2) showed intentional disregard for the public's constitutional right of access under Article I, section. 24, Florida Constitution.; or (3) the court finds a pattern of abuse of access requirements by the agency, stipulating that such fees will be used for the purpose of enhancing access to public meetings and public records.

H. Education and Training

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding education and training is drawn:

■ Failure to comply with the requirements of Florida's open government laws is frequently due to a lack of education and training on the requirements of the public records and open meetings laws. Many of the problems encountered by citizens seeking access can be resolved with additional education and training.

Therefore, it is recommended that:

37) The Legislature amend the law to require all elected and appointed government officials to undergo education and training on the requirements of Florida's open government laws.

38) All agencies provide training on the requirements of Florida's open government laws for all appropriate agency employees.

I. Office of Open Government

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the Office of Open Government are drawn:

■ The Office of Open Government was created by Executive Order for the express purpose of assuring compliance with Florida's open government laws and to provide open government training. The authority of the Office is limited to only those state agencies under the authority and control of the Governor, and unless codified in law, can be decommissioned by future governors.

■ Florida does not have a central office with authority to assure statewide compliance with the state's open government laws and to provide training and guidance on open government requirements.

Therefore, it is recommended that:

39) The Legislature codify the Office of Open Government within the Governor's Office for the purpose of providing education, information, and public outreach on open government issues.

40) The authority of the Office of Open Government be expanded to include all agencies, including local governments.

41) In five years, the Legislature consider (a) consolidation of all open government initiatives by transferring authority to operate the open government mediation program from the Attorney General's office to the Office of Open Government, and (b) elevate the Office of Open Government to an independent cabinet-level agency.

J. The Florida Legislature

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding access to the records and meetings of the Florida Legislature are drawn:

- The Florida Legislature is subject to the constitutional right of access to records and each chamber has adopted rules effectuating that right. Those rules may not be consistent with current policies and practices under Florida's Public Records Law.

- Article III, section 4(e), of the State Constitution, requires that certain meetings between more than three members of the Legislature be reasonably open to the public, a lesser standard than that imposed by Florida's Sunshine Law. The right of access to legislative meetings is specifically subject to the sole interpretation, implementation, and enforcement by each chamber.

Therefore, it is recommended that:

42) The House and Senate review their respective rules regarding access to legislative records and meetings and amend such rules to better reflect current access policies under Florida's open government laws.

REFORMING FLORIDA'S OPEN GOVERNMENT LAWS IN THE 21ST CENTURY

The Commission on Open Government Reform

I. INTRODUCTION

A. Purpose

Recognizing that “Florida has a long history of providing public access to the records and meetings” of its government and that the state “must continually strive to be a national leader in open government reform,” Governor Charlie Crist created the Commission on Open Government Reform (Commission) in June 2007 for the express purpose of reviewing, evaluating, and issuing “recommendations regarding Florida’s public records and public meetings laws.”¹

The purpose of this report is to examine the issues raised during the Commission’s tenure, and to make recommendations in response to the issues identified.

B. Methodology

The Commission held four public hearings to receive testimony from invited speakers and the general public. The hearings, held in Tallahassee, Kissimmee, Sarasota, and Ft. Lauderdale, focused on issues identified by the Governor and outlined in the Executive Order creating the Commission but were not limited to those issues. Written testimony was solicited, and was considered in the preparation of this report. Agendas of the four hearings are available on the Commission’s website,

http://www.flgov.com/og_commission_home.

¹ See Fla. Exec. Order 07-107, Commission on Open Government Reform, Jun. 19, 2007. (hereinafter *Exec. Order 07-107*) (Available at http://www.flgov.com/og_commission_home.)

In developing this report the Commission did extensive legal research, including a thorough review of the history of Florida’s open government laws, a search of current statutory law and applicable case law, and a study of laws enacted in other states.

C. Organization

This report is organized into four major sections, beginning with this introductory section. Section II is a background chapter providing an explanation of the creation of the Commission and its mission, and contains an overview of Florida’s open government provisions, including the constitutional right of access and the open meetings and public records laws. Section III is organized according to the issues enumerated in the order creating the Commission and those raised during the public hearings; it includes a discussion of the laws of other states when and where appropriate. Conclusions and Recommendations are found in Section IV.

II. BACKGROUND

A. The Commission on Open Government Reform

Generally considered a leader in the area of open government,² Florida has a long history of providing public access to the meetings and records of its government.³ This

² See, generally, Testimony of Pat Gleason, Special Counsel for Open Government, Office of the Governor, at Commission on Open Government Reform Public Hearing Tallahassee, FL (Aug. 2007) Vol. I at 73 (hereinafter *Tallahassee 2007 Transcript*). See also Thomas Peele, *California Lags Far Behind Others in Government Openness*, Contra Costa Times, Jun. 30, 2008 (“Florida’s government transparency laws . . . are considered the best in the nation”); S. Albright, *Sunshine State Living Up to Its Name by Encouraging Transparency in Government*, 32 NEWS MEDIA & THE LAW 11 (2008) (Florida is “regarded as a leader among states in open records laws”); and B. Chamberlin, *The Public Records Act: Should Trade Secrets Remain in the Sunshine?*, 18 FLA. ST. U.L. REV. 559, 560 (1991).

³ See, generally, Pete Weitzel, *The White Paper: A Narrative History of Open Government in Florida* (2006) (on file with the Commission on Open Government Reform, Tallahassee, FL) (hereinafter *The White Paper*). Florida’s first open meetings law, ch. 5463, was enacted in 1905. However, it applied only to municipalities and was rendered virtually meaningless by a Florida Supreme Court decision nearly 50 years later. See *Turk v. Richard*, 47 So.2d 543 (Fla. 1950). The current law, § 286.011, F.S., was enacted in 1967. Fla. Ch. 67-356. Florida’s public records law was enacted in 1909, and is codified in ch. 119, F.S. See Ch. 5492, 1909 Fla. Laws. The state’s very first public records law, though, which provided

rich tradition of open government culminated in the 1992 general election when Florida voters overwhelmingly approved a constitutional amendment guaranteeing access to the records of all three branches of state government and to “[a]ll meetings of any collegial public body of the executive branch of state government or of any . . . county, municipality, school district, or special district, at which official acts are to be taken or at which public business . . . is to be transacted or discussed.”⁴

Although both the open meetings law and the public records law have been amended since first enacted and some reforms made, never in Florida’s long history of open government have both laws been reviewed in their entirety.⁵ As a result, there are inconsistencies and redundancies in the law, and some persuasively argue that the state’s open government laws have failed to keep pace with today’s technology resulting in an erosion of the public’s constitutional right of access to government meetings and records.⁶

Because “an open and accessible government is the key to establishing and maintaining the people’s trust and confidence in their government,” Florida Governor Charlie Crist created the Commission on Open Government Reform through Executive

that all records of the clerks of court “shall always be open to the public . . . for the purpose of inspection thereof, and of making extracts therefrom” was enacted in 1892. FLA. REV. S. 1390 – 1391.

⁴ FLA. CONST. art. I, s. 24. It’s important to note that the meetings provision in Article I, section 24, does not apply to either the Florida courts or, more significantly, to the state legislature. There is a general right of access to court proceedings guaranteed by the U.S. Constitution; the Florida Legislature is bound by Article III, section 4(e), of the state constitution, which stipulates that certain legislative meetings must be “reasonably open to the public”. See FLA. CONST. art. III, s. 4(e). See also OFFICE OF THE ATT’Y GEN., FLORIDA’S GOVERNMENT-IN-THE-SUNSHINE AND PUBLIC RECORDS LAW MANUAL 12 - 13 (Vol. 30 2008) (hereinafter *2008 Sunshine Manual*).

⁵ See Steve Bousquet, *A Matter of Openness*, St. Petersburg Times, Jun. 19, 2007; and Bill Kaczor, *Crist Creates Commission to Keep Government in ‘Sunshine’*, Herald-Tribune, Jun. 19, 2007.

⁶ See, e.g., Testimony of Maurice Tamman, On-Line Editor, *Sarasota Herald-Tribune*, at Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Feb. 12 at 85. (hereinafter *Tamman Testimony*) (hereinafter *Sarasota Transcript*)

Order 07-107, issued on June 19, 2007.⁷ In announcing the Commission’s creation at a press conference, Governor Crist emphasized the importance of open government, stating “It’s very important that as we make decisions that may affect your lives and futures, that you have the opportunity to witness it and have a transparent window through which to understand it.”⁸

The Commission, comprised of nine members reflecting “a broad spectrum of interested parties” was created for the purpose of reviewing, evaluating, and issuing “recommendations regarding Florida’s public records and public meetings laws.”⁹

Specifically, the Commission was charged with consideration of the following issues:

- The relevance and redundancy of all exemptions to government meetings and records;
- Fees and charges imposed for inspecting and copying public records in light of advances in information technology;
- Collection, storage, retrieval, dissemination, and accessibility of public records through advanced technologies, including the internet;
- Current policies regarding the public’s right to participate at meetings subject to the open meetings law, including the public’s right to speak at such meetings; and

⁷ See Exec. Order 07-107, note 1, *supra*.

⁸ See J. Taylor Rushing, *Crist: Raise the Political Blinds*, Jacksonville Times-Union, Jun. 20, 2007 (hereinafter *Rushing Article*).

⁹ *Id.* The Governor appointed Barbara Petersen, president of Florida’s First Amendment Foundation; Gerald Bailey, commissioner of the Florida Department of Law Enforcement; Bob Butterworth, secretary of the Florida Department of Children and Families and former Florida Attorney General; John Carassas, Pinellas County Judge and former member of the Florida House of Representatives; Sandy D’Alemberte, a first amendment attorney and former president of Florida State University; state Senator Paula Dockery; Jeanne Grinstead, deputy managing editor of the *St. Petersburg Times* and then president of the Florida Society of Newspaper Editors; Renee Lee, Hillsborough County Attorney; and state Representative Will Weatherford to serve on the Commission. Petersen was named as Commission Chair. See Press Release 1, June 19, 2007 (http://www.flgov.com/og_commission_home). Secretary Butterworth later resigned from the Department of Children and Families and his successor, George Sheldon, was appointed to take his place on the Commission. See Press Release, *Governor Crist Names George Sheldon Secretary of Department of Children and Families* (Sep. 30, 2008); and Letter from Governor Charlie Crist to Secretary George Sheldon, Department of Children and Families (Oct. 6, 2008).

- Florida’s position in the national landscape, in regards to the state’s open government practices.¹⁰

Governor Crist made it clear, however, that the Commission would not be limited to consideration of only those issues addressed in his executive order. “To put limitations on [the Commission] would be counterproductive,” Crist said. “Whatever they hear from the people is important.”¹¹

The Commission held a series of four public hearings around the state, inviting speakers to provide testimony on specific topics and the issues identified in the Governor’s executive order. Testimony from the general public was also solicited, as was written testimony, and those who testified before the Commission included government agency representatives, private citizens, members of Florida’s media, and attorneys representing a wide variety of interests.¹²

In one of its first official acts, the Commission adopted a series of procedural requirements for conducting Commission business – meeting and quorum procedures, voting requirements, etc. Perhaps most importantly, Commission procedures require that any “recommendation by the Commission that would restrict the public’s right of access guaranteed under Article 1, Sec. 24, Fla. Con., including new or expanded

¹⁰ Exec. Order 07-107, note 1, *supra* at 2 - 3. Pursuant to the executive order, the Commission was to submit its final report and recommendations by December 31, 2008, but on that day the Governor extended the term of the Commission by one month. *See* Fla. Exec. Order 08-259, Extension of Executive Order 07-107, Dec. 31, 2008.

¹¹ Steve Bousquet, *Crist Creates a Panel for Open Government*, The St. Petersburg Times, Jun. 20, 2007. *See also*, Rushing Article, note 8, *supra*. In addition, Executive Order 07-107 specifically stated that the Commission “will consider, *but not be limited to*, the following [enumerated] issues” Exec. Order 07-107, note 1, *supra*, at 2 (emphasis added).

¹² Public hearings were held in Tallahassee (Aug. 2007), Kissimmee (Nov. 2007), Sarasota (Feb. 2008), and Ft. Lauderdale (May 2008). In addition, the Commission held two public meetings, both in Tallahassee (Aug. and Oct. 2008). A court reporter was present at all of the Commission’s hearings and meetings; transcripts are available on the Commission’s website, http://www.flgov.com/og_commission_home. Copies of all written testimony provided to the Commission are available from the Office of Open Government, Executive Office of the Governor, Tallahassee, FL.

exemptions to ch. 119, F.S., or s. 286.011, F.S., require a two-thirds majority vote of Commission members.”¹³ Suggested by Commissioner John Carassas, the two-thirds vote requirement tracks the constitutional standard for creation of new exemptions to Florida’s open government laws.¹⁴

B. The Constitutional Right of Access

In 1988, Paul Hawkes ran for a seat in the Florida House of Representatives against the incumbent, Dick Locke. When Locke was reelected, Hawkes filed a public records request seeking access to all records related to expenditures of state tax money allocated for the maintenance of Locke’s legislative office. Not satisfied with Locke’s response, Hawkes filed suit, claiming Locke had violated Florida’s public records law.

The trial court dismissed Hawkes’ case on the grounds that it did not have jurisdiction under the separation of powers doctrine, but also noted that if the court had jurisdiction it would find that chapter 119 could not apply to the legislative branch of government. The Fifth District Court of Appeal reversed, finding that the reference to “state officers” in the public records law included members of the Legislature.¹⁵

The Florida Supreme Court granted review and reversed, holding that the Public Records Law applied only to those agencies created by the Legislature and did not

¹³ See General Discussion at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Transcript of November 2007 Public Hearing Day 2, Vol. 1 at 6 (Kissimmee, FL) (hereinafter *Kissimmee Transcript*). Commission procedures can be viewed at http://www.flgov.com/pdfs/og_may_12.pdf.

¹⁴ See FLA. CONST. art. I, s. 24(c) and note 23, *infra*. See also Tallahassee 2007 Transcript, note 2, *supra*, Vol. II at 289. As a member of the Florida House of Representatives, Judge Carassas in 2002 sponsored a joint resolution amending the constitutional standard to require the super majority vote. See Fla. HJR 327 (2002). Although Carassas sponsored the legislation in the House, it was the Senate companion, SJR 1284, that passed both chambers of the Florida Legislature. See Fla. SJR 1284 (2002).

¹⁵ *Hawkes v. Locke*, 559 So.2d 1202 (Fla. 5th DCA 1990).

include “the constitutional officers of the three branches of government or . . . their functions.”¹⁶

In response to this opinion, the Florida Legislature passed a joint resolution proposing the creation of a constitutional right of access to the records of all three branches of state government and a right of access to meetings of the executive branch and local governments.¹⁷ The proposed amendment appeared on the ballot in November 1992 and was approved by 87 percent of the voters.

Arguably the broadest such provision in the nation,¹⁸ Florida’s constitutional right of access to government records guarantees “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 of their behalf” and specifically includes all three branches of state government, including “each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or [the] Constitution.”¹⁹

The constitutional right of access to government meetings applies to meetings of the executive branch of state government, and to all meetings “of any collegial body of a county, municipality, school district, or special district, at which official acts are to be

¹⁶ *Locke v. Hawkes*, 16 Media L. Rptr. 522 (Fla. Nov. 7, 1991), *vacated on rehearing*, 595 So.2d 32 (1992). The Court’s ruling “appeared to exclude not just the Legislature, the courts and the executive branch but also all of the state’s constitutional officers, such as sheriffs, tax assessors and county commissioners from . . . the public records law.” See The White Paper, note 3, *supra*, at 92.

¹⁷ See Fla. CS/CS/HJR 1727, 863, 2035 (1992) (creating Art. I, s. 24, Fla. Con.).

¹⁸ Although a number of states have constitutional provisions guaranteeing access to certain commissions [*see, e.g.*, PA. CONST. art. IV, § 9(b) (limited to the board of pardons)] or records [*see, e.g.*, ILL. CONST. art. VIII, § 1(c) (limited to reports and records concerning the receipt and use of public funds)], only six, including Florida, have specific provisions guaranteeing access to the records and meetings of government. See CAL. CONST. art. 1, § 3; LA. CONST. art. XII, § 3; N.D. CONST. art. XI, § 6; N.H. CONST. art VIII, § 1; and TENN. CONST. art. I, § 19.

¹⁹ FLA. CONST. art. I, s. 24(a).

taken or at which public business . . . is to be transacted or discussed.”²⁰ A right of access to certain meetings of the Florida Legislature is guaranteed under Article III, section 4(e), of the state constitution, and public access to judicial proceedings is protected by Amendment VI of the U.S. Constitution.²¹

In allowing for the creation of exemptions by general law, the constitutional amendment requires the Legislature to: (1) state with specificity the public necessity justifying any exemption; (2) narrowly tailor all exemptions “to accomplish the stated purpose of the law;” and (3) provide for such exemptions in single subject bills.²² In addition, any new or expanded exemption to the constitutional right of access must “be passed by a two-thirds vote of each house.”²³

Exemptions that were in effect on July 1, 1993 – the amendment’s effective date – remain in force until repealed.²⁴ The same is true of all rules of court adopted prior to the November 1992 election which controlled access to judicial records. Thus, the Florida Supreme Court adopted rules restricting public access to judicial records and to the records of the Florida Bar in October 1992, and the Legislature passed a bill regulating access to its record during the 1993 Special Session B.²⁵

C. Florida’s Open Government Laws

The breadth of Florida’s open government laws is most apparent when the definition and interpretation of key words used in the statutes are considered. The term

²⁰ FLA. CONST. art. I, s. 24(b).

²¹ See 2008 Sunshine Manual, note 4, *supra*, at 12 (legislative meetings) and at 12 – 16 (judicial proceedings).

²² FLA. CONST. art. I, s. 24(c).

²³ Id.

²⁴ FLA. CONST. art. I, s. 24(d).

²⁵ See *In re* Amendment to Rules of Judicial Admin. – Public Access to Judicial Records, No. 80-419 (Fla. Oct. 29, 1992) (amending FLA. R. JUD. ADMIN. 2.051) (subsequently amended and renumbered as FLA. R. JUD. ADMIN. 2.420); and Fla. SB 20-B (1993).

“public records,” for example, is broadly defined in statute as “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”²⁶ A “meeting” for the purposes of the Sunshine Law is “any gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which *foreseeable action* will be taken by the public board or commission.”²⁷

The word “person” – those who have a right of access to the records and meetings of government – is defined in §1.01(3), Florida Statutes, to include not only individuals, but also “firms, associations, joint adventures, partnerships, estates, trusts, . . . corporations, and all other groups or combinations.” Prior to 1975, the right of access to government records was limited to state citizens, but today “the law provides any member of the public access to public records,”²⁸ and a requestor’s “motive in seeking access to public records is irrelevant.”²⁹ Additionally, as a general rule, a person who makes a public records request or simply attends a public meeting cannot be required to

²⁶ FLA. STAT. § 119.011(11) (2008). The Florida Supreme Court has interpreted this definition to include *any* material made or received by an agency “which is intended to perpetuate, communicate or formalize knowledge” having to do with public business. *See Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). This includes “all of the information” stored on a computer. *Seigle v. Barry*, 422 So.2d 63, 65 (Fla. 4th DCA 1982), *pet. for review denied*, 431 So.2d 988 (Fla. 1983).

²⁷ OFFICE OF THE ATT’Y GEN., FLORIDA’S GOVERNMENT-IN-THE-SUNSHINE AND PUBLIC RECORDS LAW MANUAL 15 (Vol. 29 2007) [citing *Hough v. Stembridge*, 278 So.2d 288 (Fla. 3d DCA 1973); *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971); *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969); and *Wolfson v. State*, 344 So.2d 611 (Fla. 2d DCA 1977)]. (emphasis in the original)

²⁸ *Church of Scientology Flag Service Org., Inc. v. Wood*, (No. 97-688CI-07 (Fla. 6th Cir. Ct. February 27, 1997).

²⁹ *Timoney v. City of Miami Civilian Investigative Panel*, 917 So.2d 885, 886n.3 (Fla. 3d DCA 2005). *See also* *Curry v. State*, 811 So.2d 736, 742 (Fla. 4th DCA 2002); *Staton v. McMillan*, 597 So.2d 940, 941 (Fla. 1st DCA 1992), *review denied sub nom.*, *Staton v. Austin*, 605 So.2d 1266 (Fla. 1992); *Lorei v. Smith*, 464 So.2d 1330, 1332 (Fla. 2d DCA 1985), *review denied*, 475 So.2d 695 (Fla. 1985); and *News-Press Publishing Company, Inc. v Gadd*, 388 So.2d 276, 278 (Fla. 2d DCA 1980).

provide identification. Thus, anyone seeking access to Florida government – whether through a request for public records or attendance at a public meeting – should be able to do so virtually anonymously.³⁰

Furthermore, there is a presumption of openness under Florida law – that is, we presume that all agency records are subject to public disclosure and that any meeting of two or more members of the same collegial body at which public business is to be transacted or discussed will be open to the public. Because the Florida Constitution provides that only the Legislature can create exemptions to the public records and open meetings laws, there’s no balancing of interests by a government agency or even the courts: a request for records can be denied or a meeting closed *only if* an agency has specific statutory or constitutional authority.³¹ Section 119.15, Florida Statutes, requires that every exemption to the public records and open meetings law be reviewed five years after enactment, and contains a standard for review. If the exemption is not reenacted, it automatically “sunset” – that is, it is automatically repealed – on October 2 of the fifth year.

Finally, Florida courts have consistently held that the right of access conferred by both the public records and open meetings laws – which were enacted for the public benefit – must be liberally construed in favor of open government and that any exception to that right of access must be narrowly construed and strictly applied. The right of access, then, “is virtually unfettered, save only the statutory exemptions designed to

³⁰ See 2008 Sunshine Manual, note 4, *supra*, at 44 (meetings) and 114 (records).

³¹ See FLA. CONST. Art I, § 24(c). “Exemption” is defined as “a provision of general law which provides that a specific record or meeting, or portion thereof, is not subject to the access requirements of s. 119.071(1), s. 286.011, or s. 24, Art. I of the State Constitution.” FLA. STAT. § 119.011(8) (2008). Prior to enactment of the constitutional guarantee of access, the Florida Supreme Court had held that only the Legislature could create exemptions to the state’s open government laws. See *Wait v. Florida Power and Light Co.*, 372 So.2d 420, 425 (Fla. 1979). Currently, the only exemptions in effect are statutory.

achieve a balance between an informed public and the ability of the government to maintain secrecy in the public interest.”³²

1. The Open Meetings Law

a. Scope

Florida’s current open meetings law, commonly referred to as the Sunshine Law, was enacted in 1967³³ and requires that all meetings of any government agency “be open to the public at all times” absent a specific statutory exemption.³⁴ Although the word “meeting” is not defined in the statutes, the Florida courts have held that the law applies generally to any meeting between two or more members of the same board or commission at which public business is to be transacted or discussed.³⁵

All public agencies in the state are subject to the law – state agencies, local governments, school boards, and special districts.³⁶ In addition, the law applies to advisory boards and committees if such boards or committees were established to make recommendations to a public agency.³⁷ There is a limited exemption for advisory boards

³² *Times Publishing Company v. City of St. Petersburg*, 558 So.2d 487, 492 (Fla. 2d DCA 1990). See also *Krischer v. D’Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied sub nom., *Gillum v. Tribune Company*, 503 So.2d 327 (Fla. 1987); and *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969).

³³ Ch. 67-356, 1967 Fla. Laws.

³⁴ FLA. STAT. § 286.011(1) (2008). See also FLA. CONST. Art 1, § 24(b).

³⁵ See 2008 Sunshine Manual, note 4, *supra*, at 19 [citing *Hough v. Stembridge*, 278 So.2d 288 (Fla. 3d DCA 1973); *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971); *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969); and *Wolfson v. State* 344 So.2d 611 (Fla. 2d DCA 1977)] (emphasis in the original) For a discussion of when the law might apply to a single individual, see 2008 Sunshine Manual, note 4, *supra*, at 19 – 20.

³⁶ See FLA. CONST. Art 1, § 24(b). See also FLA. STAT. § 286.011(1) (2008). Although the sunshine law does not apply to the Florida Legislature or the courts, Floridians enjoy a general right of access to legislative meetings and court proceedings, both civil and criminal. See note 21, *supra*. For a full discussion of the application of Florida’s sunshine law, see 2008 Sunshine Manual, note 4, *supra*, at 5 – 18.

³⁷ See *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974).

and committees established only for fact-finding purposes.³⁸ Note that it is the *function* of the board or committee and not its composition that determines whether the Sunshine Law applies.³⁹

Similarly, a private company created by law or by a public agency to provide services to the agency will be subject to the requirements of Florida’s Sunshine Law.⁴⁰ In addition, a private company or organization doing business on behalf of a public agency may be bound by the requirements of the law *if* the public agency’s governmental or legislative functions have been delegated to the private entity.⁴¹ The question whether the law applies to a purely private organization – as compared to a private entity created by law or ordinance – is more difficult, and Florida’s courts use a list of nine factors in determining whether the law will apply to the private company. This “totality of factors” test requires consideration of all the facts in each specific instance.⁴²

Staff meetings are not generally subject to the Sunshine Law.⁴³ However, if staff has been delegated decision-making authority, the activities of staff in carrying out that

³⁸ See *Cape Publications, Inc. v. City of Palm Bay*, 473 So.2d 222 (Fla. 5th DCA 1985). Accord, AGO 95-06. The sunshine law applies to meetings where public business is to be transacted or discussed; thus, the law does not generally apply to a fact-finding meeting or a social gathering even if two or more members are present. See 2008 Sunshine Manual, note 4, *supra*, at 7; 17 (fact-finding) and at 38 (social events).

³⁹ See *News-Press Publishing Co., Inc. v. Carlson*, 410 So.2d 546, 548 (Fla. 2nd DCA 1982).

⁴⁰ See 04-44 Fla. Att’y Gen. (2004) (Sunshine Law applies to PRIDE, a nonprofit corporation created by state law to run work programs for the Department of Corrections); 92-80 Fla. Att’y Gen. (1992) (Board of Directors of Enterprise Florida, Inc., subject to the Sunshine Law); and 97-17 Fla. Att’y Gen. (1997) (Sunshine Law applies to a nonprofit corporation created by a city redevelopment agency to assist in implementation of the agency’s redevelopment plan).

⁴¹ See *Memorial Hospital – West Volusia, Inc. v. News-Journal Corp.*, 729 So.2d 373, 382-383 (Fla. 1999). In determining whether the sunshine law will apply to a private company doing business on behalf of a public agency, the court’s generally rely on the definition of “agency” under Florida’s public records law. See FLA. STAT. § 119.011(2) (2008).

⁴² See *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 927 So.2d 961 (Fla. 5th DCA 2006) (applying the “totality of factors” test set forth in *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992)).

⁴³ See *Occidental Chemical Co, Inc. v. Mayo*, 351 So.2d 336 (Fla. 1977), *disapproved in part on other grounds*, *Citizens v. Beard*, 613 So.2d 403 (Fla. 1992); and *School Board of Duval County v. Florida Publishing Company*, 670 So.2d 99, 101 (Fla. 1st DCA 1996).

authority may be subject to the law.⁴⁴ Also, if staff is acting as liaison between public officials, is taking the place of a public official, or acts as an intermediary between two or more public officials, then the Sunshine Law will apply.⁴⁵ The point is to make sure that public officials can't avoid the law by using staff to communicate with one another. The courts have stated emphatically that the Sunshine Law is to be construed "so as to frustrate all evasive devices."⁴⁶ This means, too, that telephones and e-mail can't be used to circumvent the law.⁴⁷

b. Procedural Requirements

Florida's Sunshine Law requires that "reasonable notice" of all meetings subject be provided to the public.⁴⁸ The term "reasonable notice" is not defined in the statutes, but the Florida courts have held that notice must be sufficient so as to inform members of the public who may be interested in attending the meeting.⁴⁹ Clearly, then, what constitutes reasonable notice will depend on the circumstances, and public agencies may be subject to additional notice requirements imposed by other statutes, rules, or

⁴⁴ See *Wood v. Marston*, 442 So.2d 934, 938 (Fla. 1983).

⁴⁵ See 89-39 Op. Fla. Att'y Gen. (1989) (county commission staff is not subject to the Sunshine Law unless they have been delegated decision-making authority, are acting as liaisons between board members, or are acting place of the board members at their direction).

⁴⁶ See *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971); *Blackford v. School Board of Orange County*, 375 So.2d 578 (Fla. 5th DCA 1979); and *Wolfson v. State*, 344 So.2d 611 (Fla. 2nd DCA 1977).

⁴⁷ See *State v. Childers*, No. 02-21939-MMC; 02-21940-MMB (Escambia Co. Ct. June 5, 2003), *per curiam affirmed*, 886 So.2d 229 (Fla. 1st DCA 2004) (discussion between two county commissioners and the supervisor of elections regarding redistricting violated the Sunshine Law); and 89-39 Op. Fla. Att'y Gen. (1989) (members of a public board cannot use computers to conduct private discussions about board business).

⁴⁸ FLA. STAT. § 286.011(1) (2008). The Sunshine Law did not contain an express notice requirement prior to 1995, but "many court decisions had stated prior to the statutory amendment that in order for a public meeting to be in essence 'public,' reasonable notice of the meeting must be given." 2008 Sunshine Manual, note 4, *supra*, at 38 (citations omitted).

⁴⁹ See *Rhea v. City of Gainesville*, 574 So.2d 221, 222 (Fla. 1st DCA 1991) (the purpose of the notice requirement is to inform the public of the pendency of matters that might affect their rights, provide them the opportunity to appear and present views, and give them a reasonable time to make an appearance if so desired) (citation omitted). See also, 04-44 Op. Fla. Att'y Gen. (2004); 80-78 Op. Fla. Att'y Gen. (1980); and 73-170 Op. Fla. Att'y Gen. (1973).

ordinances. In such cases, agencies must comply with those specific notice requirements.⁵⁰

Although the Sunshine Law doesn't require that an agenda be provided in the meeting notice, "[t]he Attorney General's Office recommends publication of an agenda, if available, in the notice of the meeting; if an agenda is not available, subject matter summations might be used."⁵¹ In addition, a board or commission is not limited to discussion of only those items included on the published agenda.⁵² The Attorney General's Office has recommended, however, that any formal action on an item not on the agenda be postponed until the next regularly noticed meeting, particularly if the item is controversial. "In the spirit of the Sunshine Law, [a board or commission] should be sensitive to the community's concerns that it be allowed advance notice and, therefore, meaningful participation on controversial issues coming before [the board or commission]."⁵³

Finally, the open meetings law requires that minutes be taken at all public meetings and that such minutes be "promptly recorded and . . . open to public inspection."⁵⁴ Noting that the law does not require a verbatim transcript of a meeting, the Attorney General's Office has opined that "the use of the term 'minutes' in s. 286.011, F.S., contemplates a brief summary or series of brief notes or memoranda reflecting the

⁵⁰ See 2008 Sunshine Manual, note 4, *supra*, at 40. For example, the Administrative Procedures Act, ch. 120, F.S., includes specific notice requirements for all agencies subject to the Act. *Id.* at 41.

⁵¹ 2008 Sunshine Manual, note 4, *supra*, at 41. Other laws or ordinances may require specific information to be included in a meeting notice. "[T]he Sunshine Law has been interpreted to require notice of *meetings*, not the individual *items* which may be considered at that meeting. However, other statutes, codes or ordinances may impose such a requirement and agencies subject to those provisions must follow them." *Id.* (emphasis in the original)

⁵² See *Law and Information Services, Inc. v City of Riviera Beach*, 670 So.2d 1014, 1016 (Fla. 4th DCA 1996).

⁵³ 03-53 Op. Fla. Att'y Gen. (2003).

⁵⁴ FLA. STAT. § 286.011(2) (2008).

events of the meeting.”⁵⁵ And although the law does not generally require that a meeting be tape recorded or that a transcript be made,⁵⁶ if an agency elects to record or transcribe a meeting, the recordings or transcriptions are public record subject to statutory access and retention requirements.⁵⁷

c. Public Participation

Recognizing the importance of public participation at government meetings subject to the Sunshine Law, the Florida Supreme Court has stated that the public has an “*inalienable* right to be present and to be heard” at such meetings.⁵⁸ Generally, a member of the public cannot be asked to leave the meeting room during a public meeting.⁵⁹ However, reasonable rules ensuring the orderly progression of a meeting and requiring orderly behavior of all participants may be adopted.⁶⁰ The public can’t be prohibited from videotaping a meeting through the use of non-disruptive recording

⁵⁵ 82-47 Op. Fla. Att’y Gen. (1982). It’s important to note, however, that § 286.0105, F.S., stipulates that a person wishing to appeal any decision made at a public meeting must have a verbatim transcript of the proceedings, including “the testimony and evidence upon which the appeal is to be based. FLA. STAT. § 286.0105 (2008).

⁵⁶ The Sunshine Law does not require a meeting to be recorded or that a transcript of a meeting be made. However, some *exemptions* to the Sunshine Law impose such requirements. *See, e.g.*, FLA. STAT. § 286.011(8) (providing an exemption for meetings regarding pending litigation and requiring a transcript of the closed meeting); FLA. STAT. § 286.0113(2) (providing an exemption for negotiations with vendors and requiring a “complete recording” of the closed meeting); *and* FLA. STAT. § 943.0314 (providing an exemption for portions of meetings of the Domestic Security Oversight Council and requiring a tape recording of such exempt portions).

⁵⁷ *See* 86-21 Op. Fla. Att’y Gen. (1986); 86-93 Op. Fla. Att’y Gen. (1986); *and* 04-15 Op. Fla. Att’y Gen. (2004).

⁵⁸ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 699 (Fla. 1969). The Court has subsequently, however, made a distinction between different types of meetings, and held that there may not be a right to participate in certain types of executive meetings. *See Wood v. Marston*, 442 So. 2d 934, 941 (Fla. 1983) (no right of public participation in executive meetings traditionally conducted without public input). For a full discussion of the public’s right to participate in government meetings, *see* 2008 Sunshine Manual, note 4, *supra*, at 43 – 45.

⁵⁹ 2008 Sunshine Manual, note 4, *supra*, at 44.

⁶⁰ *Id.* at 44, 45.

devices, and the use of cameras and tape recorders must be allowed if such use does not disrupt the meeting.⁶¹

Because the Sunshine Law requires that public meetings “be open to the public at all times,”⁶² inaudible discussions of public business between board or commission members may be a violation of the law. “Although such a meeting is not clandestine, it nonetheless violates the letter and spirit of the law.”⁶³

Finally, the Sunshine Law prohibits a public agency from holding a meeting at any facility that discriminates on the basis of sex, age, race, creed, color, origin, or economic status, or unreasonably restricts public access.⁶⁴ For meetings where a large turnout is expected, a public agency must take reasonable steps to ensure that the facilities will accommodate the anticipated turnout.⁶⁵

d. Exemptions

We have a presumption of openness in Florida, meaning that all meetings between two or more members of the same board or commission are presumed subject to the Sunshine Law unless there is a specific statutory exemption.⁶⁶ Only the legislature can create an exemption to the law,⁶⁷ and a public agency cannot close a meeting simply to discuss exempt or confidential public records unless there is a specific *statutory* exemption allowing the meeting closure.⁶⁸ The Florida Supreme Court has stated that the

⁶¹ Id. at 44.

⁶² FLA. STAT. § 286.011(1) (2008).

⁶³ 2008 Sunshine Manual, note 4, *supra*, at 43 [citing *Rackleff v. Bishop*, No. 89-235 (Fla. 2d Cir. Ct. March 5, 1990) and 71-159 Op. Fla. Att’y Gen (1971)(discussions of public business which are audible only to “a select few” may violate the “openness” requirement of the Sunshine Law)]

⁶⁴ FLA. STAT. § 286.011(6) (2008).

⁶⁵ 2008 Sunshine Manual, note 4, *supra*, at 43.

⁶⁶ See FLA. CONST. Art 1, § 24(b)(“[a]ll meetings of any collegial body . . .”) and FLA. STAT. § 286.011(1) (2008)([a]ll meetings of any board or commission . . .”). (emphasis added)

⁶⁷ FLA. CONST. Art 1, § 24(c).

⁶⁸ FLA. STAT. § 119.07(7) (2008).

public's right of access under the Sunshine Law should be liberally construed in favor of the public and any exception to that right in the form of an exemption must be narrowly applied.⁶⁹

Of the approximately 90 exemptions to Florida's Sunshine Law, only three are actually codified in the law itself.⁷⁰ Some of the exemptions are broad in scope and application, while others contain strict limitations on who can attend the closed meeting or the discussions that can be held behind closed doors, and some require that a transcript or recording of the closed session be made.⁷¹ Thus, it's necessary to read the exact statutory language to determine the application and scope of a specific exemption.

e. Enforcement and Sanctions

Section 286.011(2), Florida Statutes, provides state circuit courts the "jurisdiction to issue injunctions to enforce" the requirements of the Sunshine Law "upon application by any citizen of [the] state."⁷² If the court determines that the law was violated, the court is required to assess reasonable attorney's fees against the offending board or

⁶⁹ See *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (1969).

⁷⁰ See FLA. STAT. §§ 286.011(8) (discussions of pending litigation); 286.0113(1) (portions of meetings revealing security system plans); and 286.0113(2) (vendor negotiations). A database of all exemptions to the Sunshine Law and the Public Records Law is available on the First Amendment Foundation's website, <http://www.floridafaf.org>.

⁷¹ Compare, e.g., FLA. STAT. §§ 447.605(1) (discussions relating to collective bargaining are exempt from § 286.011, F.S., but those who can attend the closed meeting is limited); and 627.175(5) (discussions between the Department of Financial Services and an insurance company relating to insurance fraud claims are exempt from § 286.011, F.S.). Section 286.011(8), F.S., providing an exemption for discussions of pending litigation is arguably the most restrictive in its application – the exemption allows for closure of the meeting provided that the five enumerated conditions are satisfied. In addition, the exemption is limited to discussion only – no action can be taken at the closed meeting – and attendance is limited to the members of the board or commission, their chief administrative or executive officer, and the entity's attorney. See 2008 Sunshine Manual, note 4, *supra*, at 26 – 30 for a full discussion of the exemption and its application.

⁷² FLA. STAT. § 286.011(2) (2008). Importantly, the courts have held that a state attorney can pursue sunshine violations – even noncriminal violations – on behalf of the state. See *State v. Foster*, 121 F.L.W. Supp. 1194a (Fla. Broward Co. Ct. September 26, 2005). *Accord*, 91-38 Op. Fla. Att'y Gen (1991).

commission.⁷³ However, if the court determines that the suit was filed in bad faith or was frivolous, the court “*may* assess a reasonable attorney’s fee against the individual filing such an action.”⁷⁴

The Sunshine Law stipulates that “no resolution, rule, or formal action shall be considered binding except as taken or made” at a public meeting.⁷⁵ Thus any action taken at a meeting held in violation of the Sunshine Law is void *ab initio* – as if it never happened.⁷⁶ Action can be protected, however, if the offending board or commission holds what is commonly referred to as a “cure” meeting – that is, the agency holds a later meeting in compliance with the law’s requirements and takes “independent final action in the sunshine.”⁷⁷ It’s important to note “that only a full open hearing will cure the defect; a violation of the Sunshine Law will not be cured by a perfunctory ratification of the action taken outside of the sunshine.”⁷⁸

An unintentional violation of the Sunshine Law is a noncriminal infraction, punishable by a fine up to \$500.⁷⁹ A *knowing* violation of the law, however, is a second degree misdemeanor, which carries a jail term of up to 60 days and/or a fine of not more

⁷³ FLA. STAT. § 286.011(4). There is no automatic award of appellate attorney’s fees where a person alleges a sunshine violation at the trial level and loses but prevails on appeal, however. In such cases, “a person prevailing on appeal must file an appropriate motion in the appellate court in order to receive appellate attorney’s fees.” 2008 Sunshine Manual, note 4, *supra*, at 56.

⁷⁴ FLA. STAT. § 286.011(4) (2008). (emphasis added)

⁷⁵ FLA. STAT. § 286.011(1).

⁷⁶ *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974); *Blackford v. School Board of Orange County*, 375 So.2d 578 (Fla. 5th DCA); and *Silver Express Co. v. District. Boar of Lower Tribunal Trustees*, 691 So.2d 1099 (Fla. 3d DCA 1997).

⁷⁷ *Tolar v. School Board of Liberty County*, 398 So.2d 427, 429 (Fla. 1981).

⁷⁸ 2008 Sunshine Manual, note 4, *supra*, at 59 (citing *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So.2d 694 (Fla. 3d DCA 1988)).

⁷⁹ FLA. STAT. § 286.011(3)(a).

than \$500.⁸⁰ Additionally, a public official found guilty of a misdemeanor can be suspended or removed from office.⁸¹

2. The Public Records Law

a. Scope

As noted by former Florida Attorney General Bob Butterworth, Florida's Public Records Law

is unique in the breadth and scope of [its] guarantee of public access. No other state can match Florida's commitment to its citizens that their government will be open and accessible to all.⁸²

Prior to enactment of Florida's Public Records Law in 1909, citizens of the state enjoyed a common law right of inspection of governmental records if the person seeking access could demonstrate a legally recognized interest in the record sought.⁸³ The 1909 law codified the common law and broadened the right of access and inspection by ensuring that "all [s]tate, county, and municipal records shall at all times be open for a

⁸⁰ FLA. STAT. § 286.011(3)(b). Importantly, the sunshine law crosses state lines such that a knowing violation of the sunshine law which occurs outside the state is a second degree misdemeanor. FLA. STAT. § 286.011(3)(c). To date, only one public official has been removed from office for an intentional violation of Florida's Sunshine Law – W.D. Childers, a county commissioner from Escambia County and former state senator, was convicted of an intentional violation of Florida's sunshine law for conducting a private teleconference with another commissioner to discuss public business. Escambia Commissioner Terry Smith and Escambia Supervisor of Elections Bonnie Jones both participated in a telephone call with Childers, during which the public officials discussed redistricting. Allegedly neither Commissioner Smith nor Commissioner Childers spoke directly with each other during the call. Childers's defense, that the commissioners were merely expressing opinions and were not soliciting or receiving responses from one another, failed to sway the jurors who convicted Childers for a sunshine violation in 2002. His conviction was later affirmed by the appellate court. In 2003 Childers was sentenced to serve 60 days in jail, ultimately spending a total of 49 days behind bars. *State v. Childers*, No. 02-21939-MMC; 02-21940-MMB (Escambia Co. Ct. June 5, 2003), *per curiam affirmed*, 886 So. 2d 229 (Fla. 1st DCA 2004). *See also*, Associated Press, *Escambia Sunshine Violator is Fined*, St. Petersburg Times, Sept. 19, 2002; Associated Press, *Ex-Florida Senate President Loses Appeal*, St. Petersburg Times, Oct. 8, 2004; and Prosecutions 2004, The Brechner Center, http://brechner.org/prosecutions/db_prosecutions2004.asp. (Last visited July 15, 2008)

⁸¹ FLA. STAT. §§ 112.52(1); (3) (2008).

⁸² OFFICE OF THE ATT'Y GEN., FLORIDA'S GOVERNMENT-IN-THE-SUNSHINE AND PUBLIC RECORDS LAW MANUAL 8 (Vol. 13 1991).

⁸³ *See* B. Braverman and W. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 723 (1981).

person inspection of any citizen of Florida.”⁸⁴ A legal interest in the record was no longer required.⁸⁵ The right of access and inspection was further enhanced by an amendment in 1975 removing the citizenship limitation and guaranteeing access to public records “by *any* person.”⁸⁶

Currently, Florida’s Public Records Law stipulates that “every person who has custody” of a public record must allow “any person” access to all non-exempt public records for inspection or copying “at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.”⁸⁷ An agency subject to the public records law may develop its own public record access policy implementing the law. However, such access policies must comply with the requirements of chapter 119, Florida Statutes, as well as any judicial interpretations of the statute as agencies do not have the discretion “to alter, change or place conditions” on the public’s right of access.⁸⁸

To fully understand the right of access to public records under Florida law, it’s necessary to consider certain fundamental aspects of the law: the definition of key words used in the statute; the cost of access and allowable fees; the form in which the record is maintained and requested; the content of the public record and the substance of applicable statutory exemptions; and, finally, procedures for enforcement and sanctions for violations.⁸⁹

⁸⁴ Ch. 5492, § 1, 1909 Fla. Laws.

⁸⁵ See 2008 Sunshine Manual, note 4, *supra*, at 111 (“Chapter 119, F.S., requires no showing of purpose or “special interest” as a condition of access to public records.”) (citations omitted).

⁸⁶ Ch. 75-225, 1975 Fla. Laws.

⁸⁷ FLA. STAT. § 119.07(1)(a) (2008). (emphasis added) See, generally, 2008 Sunshine Manual, note 4, *supra*, at 110 – 111.

⁸⁸ See 90-10 Op. Fla. Att’y Gen. 2 (1990) (citation omitted); and 92-9 Op. Fla. Att’y Gen. 2 (1992). See generally, 2008 Sunshine Manual, note 4, *supra*, at 109 – 110.

⁸⁹ See JT. LEGIS. INFO. TECH’Y RESOURCE COMM., ELECTRONIC RECORDS ACCESS: PROBLEMS AND ISSUES 43 (1994) (citing JT. LEGIS. INFO. TECH’Y RESOURCE COMM., ELECTRONIC RECORDS ACCESS: PROBLEMS AND ISSUES IN THE INFORMATION AGE (1989) (hereinafter *Electronic Records Access Report*).

b. Definition of Key Words

The scope of Florida's Public Records Law is most apparent when the definition and interpretation of key words used in the statute are considered. The term "public record" is broadly defined in Florida law as

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.⁹⁰

This statutory definition has been interpreted by the Florida Supreme Court to mean "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type,"⁹¹ including "all of the information" stored on a computer.⁹²

The word "agency" – those who have to provide access to public records in their custody or control – is defined as any state or local agency or any other public or private entity acting on behalf of such agency.⁹³ And the word "person" – those who have a right to inspect and copy the records of any agency – includes not only individuals, but also "firms, associations, joint adventures, partnerships, estates, trusts, business trusts, . . . corporations, and all other groups or combinations."⁹⁴

⁹⁰ FLA. STAT. § 119.011(11) (2008). The statutory definition was amended in 1995 to specifically include "data processing software" within the definition of public record. Additionally, the phrase "or means of transition" was added to clarify that agency e-mail was a public record. See Ch. 95-296, § 6, 1995 Fla. Laws; and STAFF OF H. COMM. ON GOVERNMENT OPERATIONS FINAL ANALYSIS FOR CS/HB 1149 (1995).

⁹¹ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc.*, 379 So.2d 633, 640 (Fla. 1980).

⁹² See *Seigle v. Barry*, 422 So.2d 63, 65 (Fla. 4th DCA 1982), *pet. for review denied*, 431 So.2d 988 (Fla. 1983).

⁹³ See FLA. STAT. § 119.011(2). The word "[a]gency means 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 . . . any other public or private agency, person, partnership, corporation, or business entity acting on behalf of a public agency." *Id.*

⁹⁴ FLA. STAT. § 1.01(3).

Thus, under Florida's Public Records Law, anyone, regardless of identity or intent, can request a copy of a public record from any public agency and also any private entity doing business on behalf of a public agency.⁹⁵

c. Fees

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 . . .⁹⁶

Florida's Attorney General opined that providing access to public records is a statutory – and now constitutional – duty imposed on all agencies “and should not be considered a profit-making or revenue-generating operation.”⁹⁷ As a general rule, then, there is no fee for the mere *inspection* of a public record and fees for providing copies of such records must be statutorily authorized.⁹⁸

Section 119.07(4), Florida Statutes, requires the custodian of public records to furnish a copy of a requested record “upon payment of the fee prescribed by law.” If there is no statutorily prescribed fee, the record custodian can charge no more than 15¢ a page for paper copies up to 8½ x 14 inches, plus an additional 5¢ for a two-sided

⁹⁵ As a general rule, a requestor cannot be required to provide proof of identity or the reason for a request in order to obtain access to a public record “unless the custodian [of the public record] is required by law to obtain this information prior to releasing the records.” See 2008 Sunshine Manual, note 4, *supra*, at 114 (proof of identity) and 111 (reason for request). In addition, an agency cannot require a requestor to put a request in writing or to fill out a form to obtain copies of public records without specific statutory authority. *Id.* at 114. There are only a few exceptions to this general rule in current law: a commercial entity seeking access to social security numbers for a legitimate commercial purpose must provide a request in writing, verification of identity, and the purpose of the request [FLA. STAT. § 119.071(5)(a)7.b]; because the custodian of school board personnel records is required to keep on file a record of who is requesting access to such personnel, a person requesting access must show proof of identity [FLA. STAT. § 1012.31(2)(f)]; and those statutorily authorized to access the identity of victims in crash reports in the first 60 days following the accident must provide a written request and proof of identity [FLA. STAT. § 316.066(5)(d)].

⁹⁶ FLA. CONST. Art 1, § 24(a). (emphasis added)

⁹⁷ 2008 Sunshine Manual, note 4, *supra*, at 167 [citing 85-03 Op. Fla. Att’y Gen. (1985)].

⁹⁸ See *State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905). See also 84-03 Op. Fla. Att’y Gen. (1984); and 76-34 Op. Fla. Att’y Gen. (1976). Although an agency can’t generally charge for the mere inspection of a public record, if the amount of records to be inspected is voluminous, the agency may charge a fee pursuant to § 119.07(4)(d), F.S., for the extensive use of personnel necessary to ensure that the records to be inspected are not altered or destroyed. See 00-11 Op. Fla. Att’y Gen. (2000).

duplicated copy.⁹⁹ For copies other than paper – a CD or video-tape, for example – the custodian may charge the actual cost of duplication,¹⁰⁰ which is defined as the cost of the material and supplies used to duplicate the record; labor and overhead costs associated with such duplication are specifically excluded from those costs that may be recovered.¹⁰¹

If a request for records requires an “extensive use” of agency resources, whether personnel or information technology or both, an agency may charge “a special service charge” in addition to the per-copy charge or the actual cost of duplication. The extensive use fee, which must be reasonable and based on actual costs incurred, cannot be automatically applied – that is, an agency may charge for the extensive use of its resources *only if* a request to inspect or copy public records requires extensive use of the agency’s resources.¹⁰² “Extensive” is not defined in the statutes, however, and as a result state and local agencies have a great deal of flexibility in determining access policies and assessment of fees.¹⁰³

d. Electronic Access

A study conducted in 1994 by the Joint Committee on Information Technology of the Florida found “there is little question that an electronic record is as much a public

⁹⁹ FLA. STAT. § 119.07(4)(a)1. – 2. (2008). Only about 8 or 9 agencies have statutorily prescribed fees. *See, e.g.*, FLA. STAT. § 28.24 (clerks of court); FLA. STAT. § 320.05(3)(b) (DHSMV); FLA. STAT. § 943.053(b) (FDLE); FLA. STAT. § 15.09(1) (DOS); FLA. STAT. § 607.0122(23) (DOS/Division of Corporations); FLA. STAT. § 395.3025(11) (public hospitals and other licensed facilities); and FLA. STAT. § 624.501(19)(a) (DFS). In addition, § 119.07(4)(b) allows county constitutional officers to charge a fee for county maps or aerial photographs that includes labor and overhead charges associated with duplication and § 119.074(c) authorizes an agency to charge \$1.00 for a certified copy of a public record.

¹⁰⁰ FLA. STAT. § 119.07(4)(a)3.

¹⁰¹ FLA. STAT. § 119.011(1).

¹⁰² *See* FLA. STAT. § 119.07(4)(d). *See also* 90-07 Op. Fla. Att’y Gen. (1990).

¹⁰³ *See, e.g.*, 2008 Sunshine Manual, note 4, *supra*, at 171 (agencies should “define ‘extensive’ in a manner that is consistent with the purpose and intent of” the public records law and in such a manner “that does not constitute an unreasonable infringement upon the public’s statutory and constitutional right of access to public records”).

record as its paper counterpart.”¹⁰⁴ Thus, “electronic records are governed by the same rule as written documents and other public records – the records are subject to public inspection unless a statutory exemption exists which removes the records from disclosure.”¹⁰⁵

The issue of access to computer records was directly addressed by the Fourth District Court of Appeal in Seigle v. Barry. In holding that “access to computerized records shall be given through the use of programs currently in use by the public official responsible for maintaining public records,” the Court found that the intent of Florida’s Public Records Law is to make public records available “in some meaningful form,” but not necessarily that which is requested.¹⁰⁶ Noting that a record custodian has the option of complying with requests for public records in a particular form, the Court stated that in the event a record custodian refuses to permit meaningful access, a court may order access when “for any reason the form in which the information is proffered does not fairly and meaningfully represent the records.”¹⁰⁷

In accordance with Seigle, the Florida Legislature amended the public records law in 1995, stipulating that

[e]ach agency that maintains a public record in an electronic recordkeeping system shall provide to any person . . . a copy of any public record in that system which is not exempted by law from public disclosure. *An agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium*, and the agency may charge a fee in accordance with [ch. 119, F.S.]. For the purpose of satisfying a public records request, the fee to be charged by an agency if it elects to provide a copy of a public record in a medium not routinely used by the agency, or if it elects to compile information not routinely developed or maintained by the agency or that requires a substantial amount of manipulation

¹⁰⁴ See Electronic Records Access Report, note 89, *supra*, at 51 – 52 (citations omitted).

¹⁰⁵ 2008 Sunshine Manual, note 4, *supra*, at 79.

¹⁰⁶ 422 So.2d 63, 66 (Fla. 4th DCA 1982), *pet. for review denied*, 431 So.2d 988 (Fla. 1983).

¹⁰⁷ See *id.* at 66 – 67.

or programming, must be in accordance with [the general fee provision in ch. 119].¹⁰⁸

Of the eight statements of general state policy regarding access to public records found in chapter 119, Florida Statutes, the Public Records Law, six specifically address access to public records in electronic formats:

- Section 119.01(2)(a) – In recognizing that “[a]utomation of public records must not erode the right of access to those records,” requires agencies to provide “reasonable public access to records electronically maintained.”
- Section 119.01(2)(b) – Requires agencies to consider that its electronic recordkeeping systems are capable of providing data in some common computer format when designing or acquiring such systems.
- Section 119.01(2)(c) – Prohibits agencies from entering into contracts for the creation or maintenance of public record databases if the contract “impairs the ability of the public to inspect or copy the public records of the agency, including public records that are on-line or stored in an electronic recordkeeping system used by the agency.”
- Section 119.01(2)(d) – Stipulates that agency use of proprietary software must not diminish the right of the public to inspect and copy a public record.
- Section 119.01(2)(e) – Addressing the issue of providing access to public records by remote electronic means such as the Internet, states “that agencies should strive to provide” access to public records via remote electronic means “to the extent feasible” and “in the most cost-effective and efficient manner available.”
- Section 119.01(2)(f) – Requires an agency to provide copies of public records in the format or “medium” requested if the agency maintains the record in that format.

¹⁰⁸ See Ch. 95-296, 1995 Fla. Laws., now codified as FLA. STAT. § 119.01(2)(f) (2008) (see ch. 2004-335, § 2, 2004 Fla. Laws). (emphasis added) Similar language regarding access to archived electronic public records can be found in a rule first promulgated by the Department of State in 1992. The rule, which applies only to electronic public records with retention schedules of 10 years or more, requires a custodian to provide a copy of the archived public record in the form requested *if* the agency currently maintains the record in that form. The rule was last modified in 2008. See FLA. ADMIN. CODE r. 1B-26.003.

e. Content and Exemptions

Prior to 1979, when the Florida Supreme Court held only the Legislature could create exemptions to the right of access under the Public Records Law, state courts would routinely weigh the importance of public access against the harm that might result from public disclosure and determined by court decision what records could be withheld.¹⁰⁹ Long a matter of public policy, the Supreme Court’s holding is now embedded in Florida’s Constitution granting the Legislature sole authority to create exemptions to both the public records and sunshine laws.¹¹⁰ Over the years, the Legislature has carved out a large number of exemptions from the access requirements of the Public Records Law – currently, there are just over 970 public record exemptions scattered throughout the Florida Statutes.¹¹¹

There is a presumption of openness under Florida’s Public Records Law – that is, we presume that a government record is subject to the law’s disclosure requirements absent a specific statutory exemption. Although the terms are not defined by statute, there is a distinction under the law between records or information that is “exempt” from public disclosure and “confidential and exempt.”¹¹² An agency has some discretion in

¹⁰⁹ See Electronic Records Access Report, note 89, *supra*, at 47 – 48 (citing *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979)). In addition, “[u]nder common law, records considered private, secret, or confidential where exempted from public disclosure.” *Id.* at 47 (citation omitted).

¹¹⁰ See FLA. CONST. art. I, § 24(c).

¹¹¹ Only a handful of public record exemptions are actually codified in ch. 119, F.S. A database of all exemptions to the Sunshine Law and the Public Records Law is available on the First Amendment Foundation’s website, <http://www.floridafaf.org>. In addition, the 2008 *Government-in-the-Sunshine Manual* contains a summarization of all open government exemptions. See 2008 Sunshine Manual, note 4, *supra*, Appendix D at 221. Interestingly, there were only 250 exemptions to the public records and sunshine laws on the books in 1985; today, there are nearly 1,100. See Editorial, *Death by 1,000 Cuts*, The Florida Times-Union, Jun. 29, 2007; Bill Kaczor, *Crist Creates Commission to Keep Government in “Sunshine”*, Herald-Tribune, Jun. 19, 2007; and Editorial, *Right Thing to Do: Crist Acts to Repair Damage to Sunshine Law*, The Bradenton Herald, Jun. 27, 2007.

¹¹² See *WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So.2d 1015 (Fla. 2004). It should be noted that some of the exemptions that apply to

releasing information that is exempt from public disclosure – for example, a law enforcement agency has the authority to release active criminal investigation information which is exempt from disclosure pursuant to § 119.071(2)(a), Florida Statutes.¹¹³ But if information is confidential and exempt, it cannot be released except as specified in the exemption.¹¹⁴

Section 119.07(1)(e), Florida Statutes, requires that a record custodian claiming an exemption for a public record or any portion of the record state the basis for the exemption, including its statutory citation. If a record contains both exempt and non-exempt information, the custodian is required to delete – or redact – what is exempt and provide access to the remainder.¹¹⁵ Finally, § 119.07(1)(f) requires a custodian to “state in writing and with particularity the reasons for the conclusion that the [requested] record is exempt or confidential” if requested to do so by “the person seeking to inspect or copy the record.”

f. Enforcement and Sanctions

When denied access to a public record, a requestor has several enforcement options to consider. First, a person claiming a dispute over access to a public record can seek resolution through the public records mediation program in the Attorney General’s Office. The program is voluntary, meaning all parties to the dispute must agree to

Florida’s open meetings law make meetings “confidential and exempt” as well, while others simply exempt meetings from public access requires. *See* note 125, *infra*.

¹¹³ *See Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So.2d 289 (Fla. 1991).

¹¹⁴ *See WFTV, Inc.*, note 112, *supra*. For example, the identity of the victim of certain sexually-based crimes is confidential and exempt, and can only be released by the custodial law enforcement agency in furtherance of “its official duties and responsibilities.” *See* FLA. STAT. § 119.07(2)(h)2. (2008).

¹¹⁵ *See* FLA. STAT. § 119.07(1)(d). Section 119.01(12) defines “redact” as “to conceal from a copy of an original public record, or to conceal from an electronic image that is available for public viewing, that portion of the record containing exempt or confidential information.”

mediation, and the results reached are non-binding.¹¹⁶ But the service, which is provided at no cost to the participants, can be an effective alternative to litigation.¹¹⁷

Secondly, if a person believes an agency has violated the public records law, he or she can file a complaint with the local state attorney who has the authority to prosecute violations of the law, including those that may be noncriminal.¹¹⁸

Finally, when denied access to a public record, a requestor may file suit in civil court to compel compliance. Such actions have priority over other pending cases, and courts are required to set an immediate hearing on the issue.¹¹⁹ If a court determines that the custodial agency “unlawfully refused to permit” access, the court is required to “assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorney’s fees.”¹²⁰

There are three types of sanctions provided for violations of the Public Records Law. A public officer who knowingly violates § 119.07(1), Florida Statutes, is subject to suspension and removal or impeachment, and is guilty of a first degree misdemeanor punishable by a term of imprisonment not exceeding one year and a fine of up to \$1,000.¹²¹ An unintentional violation by a public officer of any provision of the public records law is “a noncriminal infraction, punishable by [a] fine not exceeding \$500.”¹²²

¹¹⁶ See FLA. STAT. § 16.60.

¹¹⁷ According to the Attorney General’s Office, there were a total of 80 public records act and sunshine law cases mediated in 2007; of those, 60 – or 75% – were resolved. See E-Mail from Anna Phillips, Attorney General’s Office to Ian Garland, First Amendment Foundation (Nov. 3, 2008) (on file with the Commission on Open Government Reform, Tallahassee, FL).

¹¹⁸ See 91-38 Op. Fla. Att’y Gen. (1991).

¹¹⁹ See FLA. STAT. § 119.11(1) (2008).

¹²⁰ FLA. STAT. § 119.12.

¹²¹ FLA. STAT. § 119.10(1)(b).

¹²² FLA. STAT. § 119.10(1)(a).

Lastly, “[a]ny person who willfully and knowingly violates” any provision of ch. 119, Florida Statutes, is guilty of a first degree misdemeanor, punishable by up to one year in jail and a fine of not more than \$1,000.¹²³

III. ISSUES

A. Exemptions

1. Definitions: Exempt v. Exempt and Confidential

There is a distinction under Florida’s open government laws between public records or meetings that are exempt from disclosure requirements and those that are “confidential and exempt.”¹²⁴ The terms are not defined in the law, however, and it’s not clear whether the distinction is clearly understood or consistently applied. For example, § 455.217(5), Florida Statutes, stipulates that meetings of the Department of Business and Professional Regulation (DBPR) held for the sole purpose of creating or reviewing licensure examination questions or potential questions are confidential and exempt. In

¹²³ FLA. STAT. § 119.10(2)(a). Only one public official has been sent to prison for an intentional violation of the public records law. Vanette Webb, a member of the Escambia County School Board from 1996 until 2000, was accused of an intentional violation of the law after refusing to comply with a series of public record requests. She was indicted for violation of Florida’s Public Records Law in December of 1998 and the following May was sentenced to 11 months and 15 days in jail, with all but 30 days of the sentence suspended. Webb served only seven days of her sentence before the conviction was thrown out by a new judge who found that the state failed to identify any specific public record that was withheld. *See State v. Webb*, 1998 MM 026048 A. On appeal by the State, the First District Court of Appeal upheld the conviction (*State v. Webb*, 786 So.2d 602 (Fla. App. 2001), the Florida Supreme Court declined to hear the appeal and the case was remanded to the trial court. *See Webb v. State*, 807 So.2d 656 (Fla. 2002). Faced with the prospect of a new trial, the State Attorney dropped the charges against Webb in July of 2003. It was determined that a new trial would be expensive and largely pointless, given that Webb had already spent time in jail, lost her bid for reelection, and filed for bankruptcy due to her enormous legal fees. *See Vanette Webb Freed of Charges*, Pensacola News Journal, Jul. 19, 2003.

¹²⁴ *See* note 112, *supra*. According to the database of open government exemptions compiled by the First Amendment Foundation, there are 1,067 current exemptions to either the open meetings law or the public records law. Of those exemptions, just over half make public records or meetings confidential and exempt, while approximately 350 exempt records or meetings. *See* http://www.floridafaf.org/draft_exempt2.aspx. The balance of the exemptions make such meetings or records “confidential”, an archaic term not used since passage of the constitutional amendment guaranteeing access to the records and meetings of Florida government.

direct contrast, portions of meetings which would reveal agency security system plans are merely exempt pursuant to § 286.0113, Florida Statutes.¹²⁵

Additionally, an exemption for a “photograph, videotape, or image of any part of the body of the victim of a sexual offense” created by the Florida Legislature in 2003 made such images confidential and exempt, and made no allowance for the release or sharing of such information.¹²⁶ However, pursuant to § 119.071(2)(h)1., Florida Statutes, a photograph of a victim of certain sexual offenses is *exempt* from public disclosure, allowing some discretion for release of the photograph by the custodial law enforcement agency.¹²⁷ This discrepancy was corrected in the 2007 legislative session with passage of CS/SB 1618 which modified and amended § 119.07(2)(h), stipulating that all information, including photographs and other images, that would identify the victim of a sexual offense is exempt and confidential. The legislation allows disclosure of such information under specified and limited circumstances.¹²⁸

There also is a discrepancy in the protection provided for the home addresses and telephone numbers of certain government employees. As a general rule, such information is subject to public disclosure,¹²⁹ but the Florida Legislature has created a number of exemptions to protect the home addresses and telephone numbers of some government employees whose jobs may place them at some risk of harm, including

¹²⁵ A “security system plan,” defined in § 119.071(3)(a)(1), F.S., is exempt and confidential under the public records law. *See* FLA. STAT. § 119.071(3)(a)2. (2008).

¹²⁶ Ch. 2003-157, 2003 Fla. Laws (H.B. 453, 1st Eng. by Rep. Adams) (originally codified at § 119.07(3)(f)2.) (subsequently redesignated as s. 119.071(2)(h)2.). As noted previously, a record that is confidential and exempt cannot be released except as specifically authorized by the exemption. *See* note 124, *supra*.

¹²⁷ Section 119.071(2)(h)1., F.S., stipulates that “[a]ny criminal intelligence information or criminal investigative information including the photograph, name, address, or other fact or information which reveals the identity of the victim of” certain specified sexual crimes is exempt from public disclosure.

¹²⁸ *See* Ch. 2008-234, § 1, 2008 Fla. Laws (CS/SB 1618, 1st Eng. by S. Criminal Justice Comm.) (codified as § 119.071(2)(h)).

¹²⁹ *See* 96-88 Op. Fla. Att’y Gen. (1988).

current and former police officers, code enforcement officers, firefighters, Florida Supreme Court justices, state and county judges, investigators of the Department of Children and Families, and tax collectors for the Department of Revenue. The home address, home telephone number, as well as the employment address of the spouses and children of such employees and the location of the schools and day care facilities attended by their children are exempt from public disclosure pursuant to § 119.071(4)(d), Florida Statutes.

A guardian ad litem, however, can invoke the protection of the exemption only if the guardian ad litem provides a written statement that he or she “has made reasonable efforts to protect such information from being accessible through other means available to the public.”¹³⁰ The same information pertaining to hospital or surgical center employees providing direct patient care or security services is confidential and exempt pursuant to § 395.3025(10), Florida Statutes.

2. Redundant Exemptions

In reviewing the statutory exemptions to both the open meetings and public records laws, the Commission identified a number of public record exemptions for the same or similar information. For example, the Commission’s review found approximately 33 separate exemptions for the identity of donors to agency direct support or citizen support organizations. Among many others, the identity of donors to the direct support organizations of the University of West Florida, the Florida Tourism Marketing

¹³⁰ See FLA. STAT. § 119.071(4)(d)6. (2008). An exemption for the home addresses, etc. of general magistrates, special magistrates, judges of compensation claims, administrative law judges, and child support enforcement hearing officers, was created during the 2007 legislative session. It, too, requires such judges and magistrates to provide a written statement that they’ve made reasonable efforts to protect such information “from being accessible through other means available to the public.” See Ch. 2008-041, § 1, 2008 Fla. Laws (CS/CS/SB 766, 1st Eng. by Sen. Nan Rich) (codified as § 119.071(4)(d)1.b.)

Corporation, the Ringling Museum of Art, and the Florida Development Finance Corporation are exempt from public disclosure.¹³¹

Arguably, given the number of exemptions for the identity of donors, there is universal agreement that such exemptions are necessary and can be constitutionally justified as required under Article I, section 24(c), of the Florida Constitution. According to the public necessity statement of the most recently created exemption for the identity of donors, which protects the identity of donors to the direct support organization of the Department of Veterans' Affairs, the purpose of the exemption is to encourage donations and it's necessary because without such protection

potential donors may be dissuaded from contributing to the direct-support organization for fear of being harmed by the release of sensitive financial information. Difficulty in soliciting donations would hamper the ability of the direct-support organization to carry out its education and rehabilitation activities to promote and advance a veteran's reintegration into the community through both public-sector and private-sector funding.¹³²

Similar justification language can be found in the public necessity statement in CS/HB 1405, passed in the 2007 legislative session and creating an exemption for the identity of donors to publicly owned house museums designated as National Historic Landmarks.¹³³

Although the public necessity language may be similar in such exemptions, the actual breadth or scope of the exemptions is not. While the majority of the donor exemptions protect the identity of only those donors or potential donors "who desire to

¹³¹ See FLA. STAT. §§ 267.1732(8) (University of West Florida); 288.1226(6) (Florida Tourism Marketing Corporation); 1004.45(2)(h) (Ringling Museum of Art); and 11.45(3)(j) (Florida Development Finance Corporation).

¹³² See Ch. 2008-85, § 2, 2008 Fla. Laws (CS/HB 863, 1st Eng. by Rep. Ron Reagan) (codified at § 292.055(5), F.S.).

¹³³ See Ch. 2007-213, § 2, 2007 Fla. Laws (CS/HB 1405, 1st Eng. by Rep. Edward B. Bullard) (codified at § 267.076, F.S.).

remain anonymous,¹³⁴ the identity of donors to the Scripps Florida Funding Corporation is automatically exempt, regardless whether the donor desires anonymity.¹³⁵ Other donor exemptions protect not only the identity of the donor, but the amount of the donation as well or protect the identity of a potential donor individually identified by the direct support or citizen support organization.¹³⁶

Other redundant exemptions identified by the Commission include:

- audit reports
- social security numbers¹³⁷
- medical information and/or records
- personal financial information
- trade secrets
- proprietary business information
- security system plans, etc.
- claims files
- appraisals, offers, counteroffers

3. Sunset Review of Open Government Exemptions

The Open Government Sunset Review Act of 1984 provided that exemptions to both the public records and open meetings laws in existence when the Act was approved would automatically expire over the next 10 years. The Act contained a review schedule

¹³⁴ See, e.g., FLA. STAT. §§ 267.076 (donors to the direct support organization of the DVA); 267.17(3) (donors to the citizen support organization of the Division of Historical Resources; and 11.45(3)(i) (donors to Enterprise Florida, Inc.) (2008).

¹³⁵ See FLA. STAT. § 288.9551(2)(c).

¹³⁶ See, e.g., FLA. STAT. §§ 265.605(2) (identity of donors and amount donated to the Cultural Endowment program trust fund); and 265.289(2) (identity of potential donors identified by state theater contract organizations).

¹³⁷ In addition to the general social security number exemptions in ch. 119, F.S., staff identified over 40 additional social security number exemptions scattered throughout the statutes. The issue of redundant social security exemptions is complicated by federal law, which does not contain a specific exemption for social security numbers collected by a government agency. However, if federal law mandates the collection of a social security number by the state, then state government must protect the social security number from public disclosure. See Testimony of Jonathan Canter, Executive Director, Office of Public Disclosure, Social Security Administration, at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, Vol. 1 at 13 – 44. For example, federal law requires Florida to obtain social security numbers for the purpose of child support enforcement; section 61.13(9)(b), F.S., provides an exemption for social security numbers collected for such purpose. Thus, in reviewing redundant social security number exemptions for repeal, those exemptions tied to a federal collection requirement must be retained.

for the existing exemptions that included an examination of 100 chapters of the statutes each year over 10 years.¹³⁸ The Act was not implemented immediately, however, and significant changes were made before its enactment in 1985.¹³⁹

Under the 1985 law, each new exemption would be reviewed and reenacted every 10 years after the original enactment; if not reenacted, the exemption would automatically “sunset”.¹⁴⁰ In addition, the modified legislation required “a ‘compelling justification’ to close a record or a meeting, and provid[ed] the Legislature must find ‘an identifiable public purpose sufficient to override the strong presumption of open government.’”¹⁴¹ There were three criteria for the finding of “an identifiable public purpose”:

- effectiveness and efficiency of government;
- protection of sensitive personal information; and
- protection of trade secrets and proprietary business information.¹⁴²

The 1985 law was later amended to enhance the review process by providing that the public purpose in support of an exemption must be “sufficiently compelling” to override the strong public policy of open government, and that the exemption could be “no broader than is necessary to meet the public purpose it serves.” The amendment also narrowed allowable exemptions for sensitive personal information to include only personal *identifying* information.¹⁴³ A staff analysis of the legislation amending the 1985 Act noted that the required review of open government exemptions had a beneficial effect

¹³⁸ See Ch. 84-298, 1984 Fla. Laws.

¹³⁹ See The White Paper, note 3, *supra*, at 109.

¹⁴⁰ See Ch. 85-301, 1985 Fla. Laws.

¹⁴¹ The White Paper, note 3, *supra* at 110 (citing Ch. 85-301, 1985 Fla. Laws).

¹⁴² *Id.*

¹⁴³ See Ch. 91-219 1991 Fla. Laws.

in that many exemptions were “narrowed or made more specific as a result of the review and reenactment process.”¹⁴⁴

When the 1985 Open Government Sunset Review Act itself sunsetted in 1995, the Legislature reenacted the law with one major modification: Under the 1995 Act, each new or “substantially amended” exemption to the open meetings or public records laws would be reviewed once five years after enactment, at which time the exemption would be repealed or permanently re-enacted.¹⁴⁵

With the exception of this one change, the 1995 Act is very much like its predecessor. For example, the Act stipulates that “[a]n exemption may be created, revised or maintained only if it serves an *identifiable public purpose*, and the exemption *may be no broader than is necessary to meet the purpose it serves.*” In addition, the 1995 Act sets forth the same three criteria for reenactment, and further stipulates that an exemption can be reenacted only 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.”¹⁴⁶

Of the open government exemptions reviewed annually under the Open Government Sunset Review Act, many are modified and narrowed, and most are passed out of the Legislature by wide margins in each chamber.¹⁴⁷ Rarely is an exemption

¹⁴⁴ STAFF OF HOUSE COMM. ON GOVERNMENTAL OPERATIONS ANALYSIS FOR HB 1719 (Comm. Print 1991).

¹⁴⁵ See Ch. 95-217 1995 Fla. Laws (codified at § 119.15, F.S.). Pursuant to § 119.15(4)(b), F.S., “an exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”

¹⁴⁶ FLA. STAT. § 119.15(6)(b) (2008). (emphasis added)

¹⁴⁷ See, e.g., Ch. 2005-37 2005 Fla. Laws (HB 1923 by H. Governmental Operations Comm.); Ch. 2006-76 2006 Fla. Laws (CS/SB 1212 by S. Agriculture Comm.); Ch. 2007-69 (CS/SB 1848 by S. Banking & Insurance Comm.); and Ch. 2008-169 (SB 1046 by S. Children, Families & Elder Affairs Comm.). All four bills passed both chambers unanimously.

allowed to sunset,¹⁴⁸ even when in reviewing the exemption staff finds it unused in the five years since enactment. For example, an exemption for the identity of donors or prospective donors to the Florida Sports Foundation was reviewed and reenacted in 2001 despite the fact that the Foundation reported “that no donor has ever requested anonymity and that, in fact, the opposite is true – *donors generally want recognition for their support.*” And although the Foundation further “reported that it would not be opposed to the repeal of the exemption,” the exemption was nonetheless reenacted.¹⁴⁹

Some have suggested that the five-year review period is too short to allow for an effective review and evaluation of an exemption, and that the periodic review process provided for under the 1985 Act may better support “the strong public policy of open government in Florida.”¹⁵⁰ Additionally, legislative staff has noted “the Open Government Sunset Review Act of 1995 is a statutory provision created by the Legislature. Accordingly, because one Legislature cannot bind another, the requirements of [the Act] do not have to be met.” The Legislature would be bound by the review and reenactment requirements of the Act, however, if such requirements were enshrined in the Florida Constitution.¹⁵¹

¹⁴⁸ Section 626.97411, F.S., providing a public record exemption for credit scoring methodologies and related data contained in reports by insurers to the Office of Insurance Regulation, was scheduled for review and reenactment during the 2008 legislative session. Senate Proposed Bill 7042 would have reenacted the exemption without modification, thus saving it from automatic repeal on October 2, 2008. However, the Senate Banking & Insurance Committee failed to submit SPB 7042 as a committee bill and the exemption was not reenacted. See Fla. SPB 7042 (2008).

¹⁴⁹ See STAFF OF S. COMM. ON COMMERCE & ECONOMIC DEVELOPMENT ANALYSIS FOR SB 454 at 6 (Feb. 19, 2001). (emphasis added) The companion bill, HB 387, passed the Legislature and was approved by the Governor. Ch. 2001-150 2001 Fla. Laws (1st Eng. by H. State Administration Comm.) (codified at § 288.12295, F.S.).

¹⁵⁰ See Testimony of Curt Kiser, representing the Florida Press Association and Florida Society of Newspaper Editors, at Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, Day 1 at 30; 34 – 36.

¹⁵¹ STAFF OF H. COMM. ON STATE ADMINISTRATION ANALYSIS FOR HB 387 (PCB SA 01-06) (Jun. 20, 2001) at 3.

4. Investigations of Complaints Filed Against Professionals Licensed by the Department of Business and Professional Regulation and the Department of Health

As a general rule, records relating to investigations into complaints against a government officer or employee are exempt from public disclosure until there is a probable cause finding. For example, when a complaint is filed with the Commission on Ethics, the complaint and records relating to the complaint are exempt from public disclosure pursuant to § 112.324(2)(a), Florida Statutes, until the complaint is dismissed for legal insufficiency, the subject of the complaint requests that such records be made public, or until the commission, upon investigating the complaint, determines “whether probable cause exists to believe that a violation has occurred.” After the probable cause finding is made, all records related to the complaint and the commission’s investigation become subject to public disclosure, regardless of whether there is probable cause that a violation has occurred.¹⁵²

The same is true of complaints filed against legislators and most professionals licensed by the state, including attorneys, teachers, engineers, private investigators, mortgage brokers, and law enforcement agents, among others.¹⁵³ In all cases, records relating to investigations into complaints against legislators and such licensed professionals become public after the investigation and the probable cause finding has been determined, regardless of whether it is probable cause or no probable cause.

The vast majority of professionals licensed by the Department of Business and Professional Regulation (DBPR) and the Department of Health (DOH) are afforded a

¹⁵² See Testimony of Virlindia Doss, Deputy Executive Director, Florida Commission on Ethics, at Commission on Open Government Reform Public Hearing, Tallahassee, FL (Aug. 2007), Tallahassee 2007 Transcript, note 2, *supra*, Vol. 1 at 28.

¹⁵³ See, e.g., FLA. STAT. §§ 1012.796(4) (teachers); 471.038(7) (engineers); 493.6121(8) (private investigators); 494.00125(1)(a) (mortgage brokers); and 112.533(2)(a) (law enforcement agents).

higher level of protection than their professional peers licensed or regulated by other state entities, however. Records relating to a complaint against most professionals licensed by DBPR are subject to public disclosure *only if* there is a finding of probable cause; such records are exempt from public disclosure if no probable cause is found.¹⁵⁴ The same is true of all professionals licensed by the DOH – records associated with investigations of complaints filed against doctors, acupuncturists, opticians, pharmacists, dentists, psychologists, etc., are exempt from public disclosure unless there is a finding of probable cause. Where no probable cause is found, the investigatory records are exempt from public disclosure.¹⁵⁵

According to testimony provided to the Commission by a representative of DBPR, about 70 – 75 percent of the complaints received by the department either are dismissed due to a lack of legal sufficiency or closed with a finding of no probable cause.¹⁵⁶ When a complaint is dismissed for lack of legal sufficiency, the complaint and associated records are subject to public disclosure under Florida’s public records law; records related to an investigation of a complaint that concludes with a finding of no probable cause are exempt from public disclosure.

Statistics provided by the DOH were fairly comparable: In 2006-07 the department received 15,611 complaints, with 9,953 found legally sufficient. Of the 8,098

¹⁵⁴ See, e.g., FLA. STAT. § 455.225(2) and ch. 310 (harbor pilots); ch. 492 (geologists).ch. 474 (veterinarians); and ch. 477 (cosmetologists). Some professionals licensed by DBPR are treated differently, however. According to information provided to the Commission by DBPR, complaints against yacht brokers , community association managers, farm labor contractors, and land developers among others are made public upon receipt of the complaint. See Letter from April Dawn M. Skilling, Department of Business & Professional Regulation, to JoAnn Carrin, Director, Office of Open Government (Mar. 4, 2008) (on file with the Commission on Open Government Reform, Tallahassee, FL).

¹⁵⁵ See FLA. STAT. § 456.073(2) (2008).

¹⁵⁶ See Testimony of April Skilling, Deputy General Counsel, Florida Department of Business and Professional Regulation, at Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, Vol. 2 at 197 – 201. See also DBPR Annual Report BY 07 – 08, note 156, *supra*. According to the report, of the 16,047 complaints determined legally sufficient for FY 2006 – 2007, no probable cause was found in approximately 81% of the cases. Id. at 7 – 8.

investigations completed by DOH, 6,300 – nearly 78 percent – were closed with a finding of no probable cause; thus the investigatory records remain exempt from public disclosure.¹⁵⁷

When a complaint filed with either DBPR or DOH is closed with a finding of no probable cause, the complainant is notified but is not told why the complaint was dismissed. And because the investigatory records of such complaints remain confidential and exempt from public disclosure, the complainant – and the public, for that matter – can't be sure the handling of the complaint and ensuing investigation was thorough and the testimony provided was accurate.¹⁵⁸ In addition, there is no opportunity for public oversight of the departments and their regulatory boards.

5. Exemption for Economic Development Records

Section 288.075(2)(a), Florida Statutes, provides that “information held by an economic development agency concerning plans, intentions, or interests of [a] private corporation, partnership, or person to locate, relocate, or expand any of its business activities” in Florida is confidential and exempt upon the written request of such private entity. The information is exempt for 12 months following receipt of a request for confidentiality, but the period of confidentiality can be extended for an additional 12

¹⁵⁷ See Testimony of Renee Alsobrook, Chief Legal Counsel, Department of Health, at Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, Vol. 2 at 357.

¹⁵⁸ See, e.g., Letter from Julie Matherly to Barbara Petersen, Chair, Commission on Open Government Reform, Apr. 12, 2008 (on file with the Commission on Open Government Reform, Tallahassee, FL); and Testimony of and Material Submitted by Cameron Berry at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, at 12.

months by request and upon certain specified findings by the economic development agency.¹⁵⁹

The exemption was amended in 1995 to prohibit a public officer from entering into a binding agreement with a corporation requesting confidentiality until 90 days after public disclosure of the confidential information.¹⁶⁰ The prohibition was significantly limited, however, by an amendment in 2001 which stipulated that public disclosure was not required

unless the public officer or employee is acting in an official capacity, the agreement does not accrue to the personal benefit of such public officer or employee, and, in the professional judgment of such officer or employee, the agreement is necessary to effectuate an economic development project.¹⁶¹

In practical terms, current law requires public disclosure of the confidential information 90 days prior to entering into a binding agreement only if a public officer or employee will personally benefit from the agreement.¹⁶²

In reviewing the exemption in 2006 under the Open Government Sunset Review Act,¹⁶³ legislative staff found that the exemption

¹⁵⁹ See FLA. STAT. § 288.075(2)(b) (2008). “Economic development agency” is broadly defined as the Office of Tourism, Trade, and Economic Development; an industrial development authority created by law or special law; Space Florida; the public economic development agency of a county or municipality or county or municipal officers or employees assigned to promote the business or industrial interests of the county or municipality; a research and development authority created by law; or “[a]ny private agency, person, partnership, corporation, or business entity “ authorized to promote the business or industrial interests of the state, a county, or a municipality. Id. at § (1)(a).

¹⁶⁰ See STAFF OF S. GOVERNMENTAL OVERSIGHT AND PRODUCTIVITY COMM. ANALYSIS FOR SB 484 (Apr. 1, 2001) at 8. According to the analysis, prior to 1995 the “prohibition applied to a public officer or employee ‘acting in his individual capacity . . . when such public officer or employee has knowledge’ that information concerning such business is confidential.” Id. (citing section 1, ch. 95-378, L.O.F.) (emphasis in the original).

¹⁶¹ See Ch. 2001-161 2001 Fla. Laws (amending § 288.075(4), F.S.).

¹⁶² See FLA. STAT. § 288.075(2)(c).

¹⁶³ The exemption was expanded in 2001 to include an exemption for trade secrets held by an economic development agency (EDA) and was thus subject to review and reenactment under the Open Government Sunset Review Act. Ch. 2001-161 2001 Fla. Laws (HB 1541 1st Eng. by H. Economic Development & International Trade Comm.) (codified at § 288.075, F.S.). The legislation also expanded the scope of the exemption to include the Florida Commercial Space Financing Corporation, and stipulated that trade secrets held by an EDA would be exempt for a period of 10 years. Additionally, as originally

covers a broad set of documents, which economic development agencies specify include: business plans and proposals, financial records, real estate contracts or leases, building information, site requirements, marketing and business strategies, business and product information, and financial incentive applications.¹⁶⁴

The exemption was reenacted with minor modification.¹⁶⁵

The subject of an interim report by the Senate Commerce Committee, the economic development agency exemption was reviewed again in 2007. The report recommended that the two exemptions relating to the promotion and administration of economic development by state and local governments – §§ 288.075 and 288.1067, Florida Statutes – be combined into one provision.¹⁶⁶ The report recommended that proprietary business information, trade secrets, and certain identification and account numbers be held confidential and exempt indefinitely.¹⁶⁷

In response to staff recommendations, § 288.075 was amended to include an exemption for proprietary business information held by an EDA, and the trade secret exemption was expanded to keep trade secrets provided by a business entity to an EDA exempt and confidential in perpetuity.¹⁶⁸ Also added were various exemptions for economic incentive programs formerly codified in § 288.1067, Florida Statutes.

drafted, the period of confidentiality for plans submitted to an EDA was 24 months; HB 1541 allowed for a 12 month extension of the confidentiality period. When the exemption was reenacted in 2006, the period of confidentiality was reduced from 24 to 12 months, with one 12 month extension allowed. *See* Ch. 2006-157 2006 Fla. Laws (HB 7017 2d Eng. by H. Governmental Operations Comm.).

¹⁶⁴ STAFF OF S. GOVERNMENTAL OVERSIGHT AND PRODUCTIVITY COMM. ANALYSIS FOR CS/SB 734 (Apr. 25, 2006) at 6.

¹⁶⁵ *See* Ch. 2006-157 2006 Fla. Laws (HB 7017 2d Eng. by H. Governmental Operations Comm.). The original House vote was 85/32, barely above the 2/3 vote required by the state constitution. However, the House bill was amended in the Senate to reduce the confidentiality period from 24 months to 12. The bill, as amended, passed the Senate unanimously, and the House concurred with the Senate amendment, and approved the amended bill by a vote of 118/3.

¹⁶⁶ S. COMMERCE COMM. INTERIM PROJECT REPORT 2007-103: REVIEW OF PUBLIC RECORDS EXEMPTIONS RELATING TO ECONOMIC DEVELOPMENT AGENCIES (Oct. 2006).

¹⁶⁷ *Id.* at 1; 7.

¹⁶⁸ Ch. 207-203 2007 Fla. Laws (HB 7201 1st Eng. by H. Government Efficiency and Accountability Council) (codified at s. 288.075, F.S.). Before enactment of HB 7201, trade secrets held by an EDA were exempt for a period of 10 years or until otherwise disclosed.

The First Amendment Foundation expressed concerns about the scope and effect of the exemption, noting that it prohibits opportunity for public oversight or input on development projects that can have significant impact on Florida residents and their communities.¹⁶⁹ According to a report prepared by the executive director of the National Freedom of Information Coalition on state economic development access laws,

[a]llowing secrecy in (economic development) negotiations keeps the public from knowing what companies government officials are courting, what property could be affected, any rezoning that might be needed, any tax breaks being considered and how the deal could affect the economy or environment of a community. Citizens have little or no input into the development of their own communities in states where government officials and developers can avoid the strictures of open government laws.¹⁷⁰

These concerns were echoed in public testimony received by the Commission at its public hearings. John Guest testified at the Kissimmee hearing that he learned of a major development project only a few months earlier even though the project had been under development for four or five years. According to Mr. Guest, the project would have a dramatic impact on him, and had he “known ahead of time that this was going

¹⁶⁹ See Letter from Adria Gonzalez Harper, Director, First Amendment Foundation, to Senator Alex Diaz de la Portilla, Chair, Florida Senate Commerce Committee, re: SB 1182/Economic Development Agencies (Apr. 4, 2007) (on file with the Commission on Open Government Reform, Tallahassee, FL). See also Letter from Barbara A. Petersen, President, First Amendment Foundation, to Attorney General Bill McCollum, re: Comment on the City of Orlando Request for AGO/Section 288.075, F.S. (Jan. 19, 2007) (“[The] FAF receives numerous calls and complaints from journalists and citizens regarding this records exemption. Frequently, problems arise when economic development agencies transact business with local governments which critically affects a town or its citizens. Yet as a result of this exemption, the citizens routinely are prohibited access to the records of such deals and transactions until after the fact. This is usually too late as citizens lacked the opportunity to learn about – much less comment on – the deal or development because it has already been completed before the records became public. In that respect, s. 288.075, F.S., virtually precludes any opportunity for public oversight.”). (on file with the Commission on Open Government Reform, Tallahassee, FL)

¹⁷⁰ Charles Davis and Aimee Edmundson, *Economic Development and Open Government Laws: Smoke-filled Rooms or Sunshine?* (citing R. James Assaf, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 CASE W. RES. 227 (1990)). (on file with the National Freedom of Information Coalition, Columbia, MO)

forward,” he would have had his attorney talk to the principals involved in an attempt to lessen the project’s impact.¹⁷¹

Expressing his frustration about the secrecy surrounding the same development project, Wally Krouson testified about the need for greater scrutiny, and complained that the government should “not just plunk this thing down . . . and hope [it] can fool the public into not worrying about it until it’s too late, which is exactly what’s going on.”¹⁷²

Jim Doughton, publisher of the *Gainesville Sun*, testified at the Commission’s public hearing in Sarasota that the exemption for economic development agencies “is way too broad. We only find out about the benefits the government is providing at the end of the process, where [sic] there’s no ability to change the public opinion.”¹⁷³

Members of the Commission expressed concerns regarding application of the economic development exemption under § 288.075, Florida Statutes, as well.

Commissioner Dockery questioned the justification for the exemption and suggested the Commission review the exemption because “people are hiding behind the (economic development) term.”¹⁷⁴ Dockery later expounded her point, stating she was specifically concerned that major projects involving “hundreds of millions of dollars of . . . taxpayer money, with very little investment from the” private companies involved were “being

¹⁷¹ Testimony of John Guest at Commission on Open Government Reform Public Hearing Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, Day 1 at 102 – 108.

¹⁷² Testimony of Wally Krouson at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, Day 1 at 116. In a similar vein, Ms. Anna Current testified about her concerns regarding the secrecy surrounding community redevelopment agency proceedings. See Testimony of Anna Current at Commission on Open Government Reform Public Hearing, Ft. Lauderdale, FL (May 2008), Fort Lauderdale Transcript, Day 1 at 2 – 25 (hereinafter *Ft. Lauderdale Transcript*).

¹⁷³ Testimony of Jim Doughton, Publisher, *Gainesville Sun*, at Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, Day 1 at 48.

¹⁷⁴ See Sarasota Transcript, note 6, *supra*, Day 1 at 38.

sold as economic development so that they can have that privacy” provided by the economic development exemption.¹⁷⁵

Commissioner Petersen agreed, noting that the problem may very well be misapplication of the term “economic development” and abuse of process. In recognizing the need “for a level of protection” of economic development initiatives, Petersen said “we have to balance that with the public’s right of oversight and some kind of public notice.” She expressed concern about the lack of public notice on many of these projects, particularly “to those people who were going to be most affected by” the project.¹⁷⁶

The problem may be most acute at the local government level. For example, in the summer of 2008, the St. Petersburg City Council voted to spend \$12.7 million as the City’s share of an incentive package designed to entice a private corporation to retain its headquarters in St. Petersburg. Members of the City Council were privately briefed on the issue by city staff and the project, dubbed “Project Extreme,” was placed on the council’s consent agenda just hours before the council was to vote. Project funding was approved by the City Council without discussion.¹⁷⁷ At least one council member expressed concern over the lack of public scrutiny of the Council’s decision, writing in an e-mail to city staffers:

While I understand there are conflicting needs to work out economic development projects behind closed doors, the public’s right to know what commitments are

¹⁷⁵ See Commission on Open Government Reform, Transcript of August 2008 Public Meeting Vol. III, at 261 (Tallahassee, FL) (hereinafter *Tallahassee August 2008 Transcript*).

¹⁷⁶ *Id.* at 277.

¹⁷⁷ See Cristina Silva and Will Van Sant, *Jabil Gets an Offer of Million in Tax Breaks*, St. Petersburg Times, Jul. 3, 2008. The City of St. Petersburg, Pinellas County, and the state offered Jabil Circuit, an electronics circuit company, a combined incentive package of \$34.4 million to retain its headquarters in St. Petersburg, with the state responsible for the majority of the incentive package. *Id.* The company announced its plan to remain in the city and expand its operations on September 8, 2008. See http://www.jabil.com/news/news_releases/2008/09122008.html. (last visited Jan. 9, 2009).

being made must be weighed. I would like a greater comfort level that we are doing as little as possible out of the sunshine to achieve our economic development goals.¹⁷⁸

Louie Laubscher, a senior administrative officer with Enterprise Florida, a public-private partnership created for the purpose of fostering economic development across the state, testified before the Commission about the economic development process, explaining that the process is defined in that it evolves “from a strategic plan that comes from public input.”¹⁷⁹ Traditionally, an economic development agency such as Enterprise Florida develops an understanding of its strengths, develops a plan, and then “works the plan.” According to Mr. Laubscher

[t]he plan generally deals with what we call economic clusters, areas of strengths, and the sections we want to build to help diversify the Florida economy. Incentives are part of that role and we use incentives. And we do the analysis for the incentives and provide that information to state government, which, in turn, makes the final decisions on incentives.¹⁸⁰

Mr. Laubscher was careful to note that “[e]conomic development activity usually has nothing to do with retail projects. And lots of the land use issues on a local level are shopping centers and things like that, and that’s sometimes called economic development, but it is not what economic developers do.”¹⁸¹

For traditional economic development projects, a set of incentive criteria is developed and a company involved in an economic development project must meet the

¹⁷⁸ See Cristina Silva, *City’s Secrecy Stirs up Critics*, St. Petersburg Times, Jul. 4, 2008. As other council members started questioning the high level of secrecy surrounding Project Extreme, the City’s mayor said he’d support “more public scrutiny when private companies come asking for tax breaks.” Stephen Nohlgren, *Mayor Yields on Incentives*, St. Petersburg Times, Jul. 16, 2008.

¹⁷⁹ See Testimony of Louis Laubscher, Senior Administrative Officers, Enterprise Florida, at Commission on Open Government Reform Public Hearing, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 175, Vol. III at 250.

¹⁸⁰ Id.

¹⁸¹ Id. at 252.

criteria.¹⁸² The individual incentive programs are reviewed thoroughly each year and an annual report is produced and released to the public that lists the various economic development projects, including the incentives provided, “what happened, where they went, who got [the] benefit, [and] what the return to Florida was.”¹⁸³ Importantly, funding for these types of economic development projects is appropriated and must be approved by the Legislature, providing some level of oversight and accountability for such projects.¹⁸⁴

The majority of large traditional economic development projects involve both state agencies such as Enterprise Florida or the Office of Tourism, Trade and Economic Development (OTTED) and local governments – the City of St. Petersburg’s Project Extreme is an example of a joint economic development project, involving local government (city and county) and state agencies. Some economic development projects, however, are strictly local in development and implementation, and thus do not require legislative approval or appropriation of funds.

For example, in 2006 representatives of the City of Orlando entered into secret talks with the Orlando Magic on how they would “share the costs and profits” of a new basketball arena. The city already had agreed to spend \$35.5 million to purchase the necessary property for the new arena and city officials and team representatives held a news conference to announce a preliminary agreement, when the City denied a public

¹⁸² According to Mr. Laubscher, once Enterprise Florida has determined that an economic development project has met the specified criteria, it presents its recommendation for funding to the Legislative Budget Commission which must approve the recommendations. *See id.* at 264.

¹⁸³ *Id.* at 256.

¹⁸⁴ *Id.* at 257. Laubscher testified that “every dollar comes from an appropriation” and that Enterprise Florida goes “to the Legislative Budget Commission or other incentive pot, that is, in fact, approved by the Legislature each and every time.” *Id.*

records request for documents relating to the negotiations from the *Orlando Sentinel*.¹⁸⁵

City officials, initially claiming the exemption prevented them from admitting the records existed – a misinterpretation clarified by Florida’s Attorney General – finally agreed to release the documents the week after the agreement with the Magic was finalized.¹⁸⁶

6. Transportation Projects

Originally scheduled to testify before the Commission at its public hearing in Kissimmee, Thomas D’Aprile, County Commissioner for District 1, Charlotte County, was unable to testify when the meeting was rescheduled. Mr. D’Aprile, did, however, submit a recommendation to the Commission in writing. Specifically, Mr. D’Aprile requested that the Commission recommend expansion of the public record exemption under § 337.168, Florida Statutes, for the official cost estimate of state transportation projects.¹⁸⁷

The exemption Mr. D’Aprile refers to actually contains three separate public record exemptions:

- Section 337.168(1) exempts documents or electronic files which reveal the official cost estimate of Department of Transportation projects until a contract for the project is executed or the project is no longer under active consideration;
- Section 337.168(2) provides an exemption for documents revealing the identify of those persons who have requested or obtained bid packages, plans, or specifications pertaining to any project let by the department for a specific period of time; and
- Section 337.168(3) exempts the department’s bid analysis and monitoring system.

¹⁸⁵ See Mark Schlueb, *Magic, City Work in Secret on How to Divvy Profits*, Orlando Sentinel, Dec. 14, 2006. Interestingly, § 288.075(2), F.S., stipulates that the exemption applies “for 12 months after the date an economic development agency receives a request for confidentiality *or until the information is otherwise disclosed, whichever occurs first.*” (emphasis added) Because both the city and the Magic held a press conference announcing a preliminary agreement, the exemption arguably did not apply.

¹⁸⁶ Id. See also 07-15 Op. Fla. Att’y Gen. (2007).

¹⁸⁷ See Letter from Thomas D’Aprile, County Commissioner, District 1, Charlotte County, to Commission on Open Government (Nov. 20, 2007) (on file with the Commission on Open Government Reform, Tallahassee, FL)

It would appear from Mr. D'Aprile's letter and the attached Charlotte County Resolution, that the county is most interested in expanding the protection under § 337.168(1) to include the official cost estimate of similar county projects. There was some discussion of the issue by the Commission at its Tallahassee meeting in October 2008 but because no further information or testimony was offered or received, commissioners, while sympathetic, found it difficult to reach any conclusions on the issue without additional information.¹⁸⁸

7. Social Security Numbers

Currently, there are at least four different exemptions for social security numbers in Florida's public records law, and the level of protection afforded by each depends on whether the holder is a government employee and where such numbers are located – public records, court records, or official records. Because the Commission declined to review public access requirements to court records¹⁸⁹ and because official records¹⁹⁰ are a small subset of public records not discussed by the Commission, this report will limit

¹⁸⁸ See General Discussion at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Oct. 2008), at 33 – 44.

¹⁸⁹ See General Discussion at Commission on Open Government Reform Public Hearing, Tallahassee, FL (Aug. 2007), Tallahassee 2007 Transcript, note 2, at 285. Section 119.0714(2)(e), F.S., stipulates that as of January 1, 2011, a clerk of court must keep social security numbers contained in court records confidential and exempt “as provided for in s. 119.071(5)(a).” Until that time, the clerk of court must redact a social security number contained in a court record *only if* redaction is requested by the holder of the number; if redaction is not requested, “such number may be included as part of the court record available for public inspection and copying.” See FLA. STAT. § 119.0714(2)(a) (2008).

¹⁹⁰ Rather than providing an express exemption for social security numbers contained in official records (those records such as a lien or birth certificate which state law requires to be recorded), § 119.0714(3), F.S., prohibits inclusion of a social security number in the official record “unless otherwise expressly required by law,” thus placing the burden of protecting the social security number on the “person who prepares or files a record for recording.” FLA. STAT. § 119.0714(3)(a). Like the provision relating to social security numbers in court records discussed in note 190, *supra*, a county recorder is required to redact a social security number contained in official records only if redaction is requested by the holder of the number. See FLA. STAT. § 119.0714(3)(b)1. As of January 1, 2011, the county recorder “must use his or her best effort” to keep social security numbers contained in *electronic* official records confidential and exempt. FLA. STAT. § 119.0714(3)(b)2.

itself to discussion of the two general exemptions for social security numbers in chapter 119, Florida's Public Records Law.

a. Section 119.071(5), Florida Statutes

In 2002, the Florida Legislature created a general exemption for social security numbers, stipulating that the numbers were confidential and exempt from public disclosure.¹⁹¹ The exemption allows release of a social security number to another agency or governmental entity “if disclosure is necessary for the receiving agency or entity to perform its duties and responsibilities.”¹⁹² The exemption also contains a broader exception, allowing a “commercial entity”¹⁹³ access to social security numbers for use in the performance of a “commercial activity” which is defined as “the provision of a lawful product or service” including:

- verification of the accuracy of personal information received in the normal course of business by the commercial entity;
- insurance purposes;
- identifying and preventing fraud;
- matching, verifying, or retrieving information; and

¹⁹¹ Ch. 2002-256, 2002 Fla. Laws (CS/HB 1673 2nd Eng. by H. Council for Smarter Government) (codified at § 119.072, F.S.) (later recodified at § 119.071(5)(a), F.S.). The exemption, subject to the Open Government Sunset Review Act, was reviewed and reenacted in 2007 with some, mostly technical, modification. Ch. 2007-251, 2007 Fla. Laws (HB 7197 by H. Government Efficiency & Accountability Council). Perhaps most significantly, the exemption was amended to require a government agency collecting social security numbers to state “in writing the purpose for its collection” and to prohibit those agencies that collect social security numbers from using such numbers “for any purpose other than the purpose provided in the written statement.” See FLA. STAT. § 119.071(5)(a)2. (2008).

¹⁹² FLA. STAT. § 119.071(5)(a)6.

¹⁹³ A “commercial entity” is defined as “any corporation, partnership, limited partnership, proprietorship, sole proprietorship, firm, enterprise, franchise, or association that performs a commercial activity” in Florida. FLA. STAT. § 119.07(5)(a)7.a.(II). The media is included within the definition of “commercial entity”. See STAFF OF H. COMM. ON STATE ADMINISTRATION FINAL ANALYSIS FOR CS/HB 1673 (Aug. 8, 2002) n. 34 (“newspapers can receive a person’s SSN” under the commercial activity exception to the exemption “in order to verify a person’s identity”).

- research activities.¹⁹⁴

Access to social security numbers by a commercial entity is not automatic, however, and the exception to the exemption contains specific requirements that must be met before access can be obtained. Contrary to general public policy regarding public record requests,¹⁹⁵ a commercial entity seeking to obtain social security numbers under § 119.071(5)(a), Florida Statutes, must make a request for the numbers in writing.

Additionally, the written request must:

- be verified as provided in § 92.525, Florida Statutes;
- be legibly signed by an officer, employee or agency of the commercial entity;
- contain the commercial entity's name, business address, and business telephone number; and
- contain a specific statement of the purpose for which the commercial entity "needs the social security numbers and how the social security numbers will be used in the performance of a commercial activity."¹⁹⁶

Each agency providing access to social security numbers is required to file an annual report with the Governor, the Senate President, and the House Speaker which lists the identity of commercial entities requesting social security numbers during the preceding calendar year and the specific purpose cited by each regarding its need for the information. An agency must file the required report even if no requests for disclosure of the social security number were received by the agency.¹⁹⁷

¹⁹⁴ See FLA. STAT. § 119.071(5)(a)7.a.(I) (2008). The term "commercial activity" specifically does not include "the display or bulk sale of social security numbers to the public or the distribution of such numbers to any customer that is not identifiable by the commercial entity." *Id.*

¹⁹⁵ Generally, absent specific statutory authority an agency cannot require a public record requestor to make a request in writing, to provide identification, or state the reason for the request. See note 95, *supra*.

¹⁹⁶ FLA. STAT. § 119.071(5)(a)7.b.

¹⁹⁷ See FLA. STAT. § 119.071(5)(a)9.

Finally, it's important to note that § 119.071(5)(a)1., Florida Statutes, specifically states that the exemption – including the exception to the exemption for commercial activity – “does not supersede any other applicable public records exemptions.” This means that if there is a specific exemption for social security numbers elsewhere in the Florida Statutes, the number remains exempt and a commercial entity cannot obtain access to the number under the commercial activity exception.¹⁹⁸

b. Section 119.071(4), Florida Statutes

Section 119.071(4)(a)1., Florida Statutes, provides an exemption for the social security numbers of “all current and former agency employees which numbers are *contained in agency employment records,*” stipulating that such numbers are exempt from public disclosure.¹⁹⁹ The exemption was amended in 2004 to add a second paragraph, § 119.071(4)(a)2., stipulating that

[a]n agency that is the custodian of a social security number *specified in subparagraph 1* and that is not the employing agency shall maintain the exempt status of the social security number only if the employee or the employing agency of the employee submits a written request for confidentiality to the custodial agency. However, upon a request by a commercial entity as provided in subparagraph (5)(a)7.b., the custodial agency shall release the last four digits of the exempt social security number²⁰⁰

The meaning of this provision is not entirely clear and may be confusing at best.

The exemption in the first paragraph applies only to a government employee's social

¹⁹⁸ For example, a person's social security number contained in a voter registration record is exempt from public disclosure pursuant to § 97.0585(1)(c), F.S., but that same number contained in a public utility record is not *specifically* exempt and thus would be subject to the general exemption afforded by § 119.071(5)(a). Thus if a commercial entity sought access to a person's social security number, the entity couldn't obtain the number from the person's voter registration record but could get the number from the person's public utility record in accordance with the commercial entity exception to the general exemption under § 119.071(5)(a).

¹⁹⁹ It should be noted that under the general exemption provided in § 119.071(5)(a), F.S., social security numbers are confidential and exempt.

²⁰⁰ See Ch. 2004-95, s. 3, 2004 Fla. Laws (CS/CS/SB 348 1st Eng. by S. Governmental Oversight and Productivity Comm.). (emphasis added) Section 119.071(4)(a)2., F.S., is subject to the Open Government Sunset Review Act and will automatically sunset on Oct. 2, 2009, unless reviewed and reenacted during the 2009 legislative session.

security number contained in an employment record held by the employing agency. The second paragraph does not contain a specific exemption but rather extends the protection of the exemption in the first paragraph by requiring a non-employing agency with custody of an employment record containing a social security number exempt pursuant to the *first* paragraph to maintain the exempt status of the number under specified conditions.

It's uncertain, however, when and why a *non-employing* agency would have custody of a government agency employee's employment file, and general practice has been to extend the exemption in § 119.071(4)(a)1., Florida Statutes, to a government employee's social security number in *all* public records if the employee has notified the custodial agency as statutorily required.²⁰¹

Adding another layer of complexity to the application of this exemption and further complicating the issue, a commercial entity seeking access to a government employee's social security number under the commercial activity exception to § 119.071(5)(a) will be provided with only the last four digits of the employee's exempt social security number.²⁰²

²⁰¹ Extension of the exemption for a government employee's social security number contained in an employment file under § 119.071(4)(a)1. to *all* public records may arguably constitute a violation of law. Florida courts have historically held that the public records law is to be broadly interpreted in favor of public access, and exemptions from disclosure requirements are to be narrowly construed and limited to their stated purpose. *See, e.g., Krischer v. D'Amato*, 674 So.2d 909 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000 (Fla. 5th DCA 1987), *review denied*, 520 So.2d 586 (Fla. 1988); and *Tribune Co. v. Pub. Records*, 493 So.2d 480 (Fla. 2nd DCA 1986), *review denied sub nom., Gilliam v. Tribune Company*, 503 So.2d 327 (Fla. 1987). Also, doubts as to the applicability of an exemption should be resolved in favor of disclosure. *Tribune Company v. Public Records*. Following this line of cases, a narrow interpretation of § 119.071(4)(a)2. would mean that the extension of the exemption for social security numbers in the custody of non-employing agencies would apply *only* to those numbers contained in an employment record held by the non-employing agency, an argument perhaps bolstered by the specific reference to "social security number[s] *specified in subparagraph 1.*" *See* FLA. STAT. § 119.071(4)(a)2. (2008).

²⁰² *See* Ch. 2004-95, s. 3, 2004 Fla. Laws (CS/CS/SB 348 1st Eng. by S. Governmental Oversight and Productivity Comm.). The CS/CS/SB 348, which provided an exemption for the home addresses, etc., of

Here's an illustration of how the social security number exemptions theoretically apply under current law:

- Jane is an employee of a public utility. Jane gets her utilities from her employer, the public utility. Jane's social security number in her employment file is exempt pursuant to § 119.071(4)(a)1. However, if a commercial entity sought access to Jane's social security number in her utility record in accordance with the commercial activity exception under § 119.071(5)(a), the commercial entity would get access to Jane's entire number.²⁰³
- John is an employee of a state agency and gets his utilities through the same public utility as Jane. John's social security number in his employment file is exempt from public disclosure pursuant to § 119.071(4)(a)1., but if a commercial entity sought access to John's social security number in his utility record in accordance with the commercial activity exception to § 119.071(5)(a), the commercial entity would get access to only the last four digits of John's number.²⁰⁴
- Julie works in the private sector and gets her utilities through the same public utility as Jane and John. Julie's social security number in her public utility record is *confidential* and exempt from public disclosure pursuant to § 119.071(5)(a). However, if a commercial entity sought access to Julie's social security number in her utility record in accordance with the commercial activity exception, the commercial entity would get access to Julie's entire number.

U.S. attorneys and judges, was amended on the House floor in the final days of session to limit access to government employees' social security numbers. The House Message Summary which summarizes the amendment, states, "[The amendment] may further complicate existing public records requirements regarding social security numbers." See CS/CS/SB 348 HOUSE MESSAGE SUMMARY by S. Committee on Judiciary (Apr. 30, 2004). The House amendment, House Amendment 1 – 153665, was filed in response to a public record request for data bases by the *Sarasota Herald-Tribune* to the Florida Department of Education (DOE). The data bases contained social security numbers which the paper needed in order to link the requested data bases and verify the identity of teachers contained therein. The DOE notified teachers about the public records request and rumors that the *Sarasota Herald-Tribune* was going to sell the social security numbers and/or post the numbers to the paper's website ran rampant. The Legislature responded by amending the law to allow a commercial entity access to only the last four digits of a government employee's social security number. See Testimony of Mike Connelly, Executive Editor, *Sarasota Herald-Tribune*, at Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, Day 1 at 77. See also, Mike Connelly, *Paper's Use of Social Security Numbers Wasn't Putting Teachers At Risk*, Herald-Tribune, May 2, 2004.; and Victor Hull, *Teacher Records Issue to be Examined*, Herald-Tribune, Apr. 27, 2004.

²⁰³ Section 119.071(4)(a)2., F.S., which limits access by a commercial entity to only the last four digits of a government employee's social security number applies to those numbers held by a *non*-employing agency. Because Jane is an employee of the public utility, § 119.071(4)(a)2. would not apply to her utility record.

²⁰⁴ Because John is employed by a government agency other than the public utility, the public utility is a non-employing agency and § 119.071(4)(a)2. applies, thus limiting a commercial entity's access to the last four digits of John's social security number.

8. Clemency Proceedings

In Florida, a person who has been convicted of a felony loses his or her civil rights “until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to” the state constitution.²⁰⁵ Article IV, section 8, of the Florida Constitution grants the Governor the power of executive clemency. Specifically,

[e]xcept in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the custodian of state records, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of two members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.²⁰⁶

The Governor and Cabinet sit as the Board of Executive Clemency (Clemency Board), which is administered by the Office of Executive Clemency, co-located within the Florida Parole Commission.²⁰⁷ “Clemency functions include restoration of voting rights and other civil rights, pardons, commutation of sentence, relief from fines and forfeitures, pardon without firearm authority, capital case review and restoration of firearm authority.”²⁰⁸

When a person has been released by the Department of Corrections, the Parole Commission reviews the person’s records and determines whether he or she is eligible for automatic restoration of rights under Rule 9 of the Rules of Executive Clemency, or whether Rule 10, allowing for restoration of rights without a hearing, applies.

²⁰⁵ FLA. STAT. § 944.292(1) (2008). A person’s basic civil rights are the right to vote, the right to serve on a jury, and the right to hold office. In addition, restoration of civil rights may allow a person to be considered for certain types of employment licenses. See Florida Parole Commission, Clemency, Frequently Asked Questions, <https://fpc.state.fl.us/FAQClemency.htm>. (last visited Jan. 9, 2009)

²⁰⁶ FLA. CONST. art. IV, s. 8(a). See also FLA. STAT. § 940.01(1) (2008). A pardon of an act of treason requires action by both the governor and the legislature. See FLA. CONST. art. IV, s. 8(b) and FLA. STAT. § 940.01(2).

²⁰⁷ See <https://fpc.state.fl.us/ClemencyAdministratin.htm>; and <https://fpc.state.fl.us/ExecutiveClemency.htm>. (last visited Jan. 9, 2009)

²⁰⁸ <https://fpc.state.fl.us/ClemencyAdministratin.htm>. See also BOARD OF EXECUTIVE CLEMENCY, RULES OF EXECUTIVE CLEMENCY (2007) (hereinafter *Rules of Executive Clemency*).

Restoration of rights for those who fall under Rule 10 must be approved by the Governor and at least two members of the Clemency Board.²⁰⁹ Those whose restoration was not approved and all others, including persons seeking a full pardon or commutation of sentence, must file an application with the Office of Executive Clemency.²¹⁰

Once an application for restoration of rights or clemency has been properly filed, the application is forwarded to the Florida Parole Commission for an investigation. The Parole Commission provides a case analysis report to the Clemency Board and makes a recommendation to the Board whether clemency should be granted or denied.²¹¹ The Clemency Board may approve the request without a hearing, known as the consent agenda. Every applicant not on the consent agenda is entitled to a hearing before the Clemency Board pursuant to Rule 11. Restoration of rights or other form of clemency is granted with the approval of the Governor plus two Clemency Board members.²¹²

It's important to note that the Parole Commission's case analysis report and recommendation on clemency, as well as all other records developed or received pursuant to a clemency investigation, are exempt from public disclosure. The governor, however, has specific authority to approve the release of such records.²¹³ Thus, a person whose application for clemency or restoration of rights has been denied has no means of determining the basis for the denial unless the governor has authorized release of the case analysis report.

Mark Hargrett testified before the Commission on Open Government Reform in Kissimmee about his own experience seeking clemency. After waiting six years for a

²⁰⁹ Rules of Executive Clemency, note 208, *supra*, Rule 10C.

²¹⁰ *See* Rules of Executive Clemency, note 208, *supra*, Rules 5 and 6.

²¹¹ *See* *Id.*, Rule 7.

²¹² *See* *Id.*, Rule 4.

²¹³ FLA. STAT. § 14.28 (2008). *See also* Rules of Executive Clemency, note 208, *supra*, Rule 16.

hearing before the Clemency Board, Mr. Hargrett learned that the Parole Commission had recommended that his civil rights not be restored. At his hearing before the Clemency Board, Mr. Hargrett asked why he had received the unfavorable recommendation so that he could

respond to any questions or concerns that the Board of Executive Clemency may have. I was told in no uncertain terms that they would not give me that information. I can't describe the feeling of futility I had at that moment: so much was at stake, and the power to restore my voting rights rested in the hands of the four members of the Clemency Board. Those elected officials were about to make a decision that would have a tremendous impact on my future, but I didn't even know the basis for their decision. . . . The secrecy surrounding the clemency investigation makes it impossible for applicants to feel that they have received a full and fair hearing.²¹⁴

Numerous people with stories like Mr. Hargrett's – their own or someone else's – testified before the Commission at its first public hearing in Tallahassee in August 2007 and at its Kissimmee hearing the following November.²¹⁵ In direct response to the testimony received in Tallahassee, Governor Charlie Crist exercised his authority under § 14.28, Florida Statute, and authorized release of the Parole Commission's case analysis report to a clemency applicant appearing before the Clemency Board prior to the applicant's scheduled hearing.²¹⁶ In making the policy change, Governor Crist said,

²¹⁴ See Testimony of Michael Hargrett at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, at 20. Mr. Hargrett's civil rights were ultimately restored.

²¹⁵ See, e.g., Testimony of Beth Cioffoletti at Commission on Open Government Reform Public Hearing, Tallahassee, FL (Aug. 2007), Tallahassee 2007 Transcript, note 2, *supra*, Vol. II at 162; Testimony of Lynda Markham, *id.* at 168; Testimony of Jewel Parham at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007) Kissimmee Transcript, note 13, *supra*, at 53; and Testimony of Elton Edwards, *id.* at 58.

²¹⁶ See GOVERNOR'S PRESS OFFICE, OFFICE OF THE GOVERNOR, GOVERNOR CRIST OPENS CLEMENCY REPORTS FOR APPLICANTS (Oct. 31, 2007). (hereinafter *Clemency Press Release*) See also Letter from Robert R. Wheeler, Assistant General Counsel, Office of the Governor, to Ms. Janet Keels, Coordinator, Office of Executive Clemency (Oct. 31, 2007). In informing Ms. Keels of the policy change that would allow applicants scheduled to appear before the Clemency Board access to their case analysis report prepared by the Parole Commission, Mr. Wheeler advised Ms. Keels that the "report should accompany the notice of the Clemency Board meeting sent to each applicant prior to the hearing. *Statements or*

“Individuals applying for clemency should have the same information available to them that decision makers on the Board of Executive Clemency have. I believe providing the clemency reports to applicants or their representatives will make our system of justice fairer.”²¹⁷

Response to the Governor’s action was immediate, with Florida’s American Civil Liberties Union issuing a statement praising the Governor’s action:

The secrecy surrounding the information in clemency files significantly undermined the fairness of the rights restoration process and the confidence that the applicant, and the public, could have in the civil rights restoration decision-making process.²¹⁸

LaRhonda Odom, representing the Florida Rights Restoration Coalition (FRRRC), also praised the Governor’s action, saying

The change will make the clemency process fairer and less burdensome on people seeking restoration of civil rights. Governor Crist’s action acknowledges that the clemency process can be fair only if the applicant has access to information contained in his or her clemency file and an opportunity to respond to or correct that information.²¹⁹

In asking the Commission on Open Government Reform to consider two additional recommendations regarding the clemency process, Ms. Odom noted that her first recommendation had been addressed by the Governor’s policy change. “The new procedure also now includes providing applicants who receive an unfavorable

information provided by the victim, judge, prosecutor or third parties who volunteer information shall be redacted from the report and remain confidential due to safety concerns.” Id. (emphasis added)

²¹⁷ Clemency Press Release, note 216, *supra*.

²¹⁸ Associated Press, *Crist Orders That Secret Clemency Reports be Opened to Applicants*, Oct. 31, 2007.

²¹⁹ Written Statement of LaRhonda Odom, Racial Justice Project Associate, ACLU of Florida, to the Commission on Open Government Reform (Nov. 27, 2007) (on file with the Commission on Open Government Reform, Tallahassee, FL). (hereinafter *Odom Written Statement*) Ms. Odom also testified before the Commission at its Kissimmee public hearing. See Kissimmee Transcript, note 13, *supra*, at 66.

recommendation from the Parole Commission the reason for the recommendation. This is also a welcome and necessary improvement to the . . . process.”²²⁰

As for her other two recommendations, Ms. Odom suggested that the Clemency Board hold its meetings in different cities throughout the state so that more clemency applicants could appear before the Board.²²¹ Currently, the Clemency Board meets in Tallahassee four times a year – March, June, September, and December – and while applicants are encouraged to attend the hearings, attendance is not required.²²²

Ms. Janet Keels, coordinator of the Office of Executive Clemency, testified that the Clemency Board had tried moving its meetings around the state in 1981 but that attendance didn’t dramatically improve. She also noted that the cost of holding clemency hearings in locations outside Tallahassee could be significant – in addition to travel for the members of the Clemency Board, she estimated at least 10 staff members would have to attend.²²³

Ms. Odom’s second recommendation, that clemency records be made more accessible to the public under the current public records law,²²⁴ was also addressed, at least in part, by Governor Crist. Under the revised policy, clemency applicants will have access to the Parole Commission’s case analysis reports. However, the public does not have access to the reports unless an applicant wishes to disclose the report. Also, Governor Crist exercised *his* authority pursuant to § 14.28, Florida Statutes, an act that

²²⁰ See Odom Written Statement, note 219, *supra*. It should be noted that others testifying before the Commission on Open Government Reform made recommendations regarding the clemency process similar, if not nearly identical, to Ms. Odom’s.

²²¹ See *id.*

²²² See Rules of Executive Clemency, note 208, *supra*, Rules 12A and 12B.

²²³ Testimony of Janet Keels, Coordinator of the Office of Executive Clemency, at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, Day 2, Vol. II at 20.

²²⁴ See Odom Written Statement, note 219, *supra*.

does not bind future governors. If the change is to be permanent, the Legislature must amend current law.

9. Department of Children and Families Exemptions

The Department of Children and Families (DCF) is responsible for investigating allegations of abuse, abandonment, and neglect of children and vulnerable adults.²²⁵ All records relating to such investigations are confidential and exempt. However, “[a]ny person or organization, *including the Department of Children and Family Services* [sic], may petition the court for an order making public the records of the Department . . . which pertain to investigations of alleged abuse, neglect, or exploitation” of a child or vulnerable adult.²²⁶

Ironically, although DCF isn’t able to release details or publicly comment on its investigations, if law enforcement is involved in that same investigation, case details may be included in the police report, which is subject to public disclosure. This “leads the public to believe that the Department is trying to hide behind confidentiality in order to cover up its mistakes, rather than protect children.”²²⁷ In recent months, DCF has petitioned a court to release investigation reports at least five times, requiring costly expenditures both in time and financial resources.²²⁸

To increase public oversight of the Department and its actions, DCF asked the Commission on Open Government Reform to consider a series of legislative proposals

²²⁵ See FLA. STAT. §§ 39.301 (children) and 415.104 (vulnerable adults) (2008). See also FLA. STAT. § 20.19(1)(a) (stated mission of DCF).

²²⁶ See FLA. STAT. §§ 39.2021 (children) and 415.1071 (vulnerable adults). (emphasis added) If a child or vulnerable adult dies as a result of abuse, abandonment or neglect, DCF is authorized to release the investigative records. See FLA. STAT. §§ 39.202(2)(o) and 415.107(3)(l).

²²⁷ See Testimony of George Sheldon, Deputy Secretary, Department of Children and Families Commission on Open Government Reform Public Hearing, Tallahassee, FL (August 2007), Tallahassee 2007 Transcript, note 2, *supra*, Vol. II at 257.

²²⁸ Id. at 258.

designed to improve its performance and regain the public's trust.²²⁹ Those proposals, outlined at the Commission's Kissimmee meeting, were endorsed by the Commission,²³⁰ and legislation was filed for consideration in the 2008 legislative session.²³¹

As originally filed, both the House bill, HB 1467, and its Senate companion, SB 2762, were virtually identical. Each contained a provision allowing DCF to release records relating to investigations of abuse, abandonment, or neglect of a child or vulnerable adult that resulted in serious mental, emotional, or physical injury if the Secretary determined release to be in the "public interest," defined as "the need for the public to know of and adequately evaluate the actions of" DCF in protecting children and vulnerable adults in its care.²³²

The legislation also allowed sharing of confidential or exempt information with other state agencies under specified conditions,²³³ and for children under the care or custody of DCF, allowed disclosure of certain information concerning the child to a prospective adoptive parent.²³⁴ Both bills also contained a provision mandating that each child under the supervision or in the custody of DCF be provided "a complete and accurate copy of his or her entire case file" upon the request of the child or the child's representative.²³⁵

²²⁹ Id. at 257.

²³⁰ See Department of Children & Families, *Legislative Recommendations to the Commission*, Nov. 28, 2007 (on file with the Commission on Open Government Reform, Tallahassee, FL) and Kissimmee Transcript, note 13, *supra*, Day 2, Vol. I at 75.

²³¹ See Fla. HB 1467 and SB 2762 (2008).

²³² See, e.g., HB 1467, lines 216 – 228 (children) and lines 377 – 390 (vulnerable adults).

²³³ See, e.g., id. at lines 82 – 100 (children) and lines 295 – 303 (vulnerable adults).

²³⁴ See, e.g., id. at lines 253 – 292.

²³⁵ See, e.g., id. at lines 41 – 53. This section was added to the legislation in response to compelling testimony by Andrea Moore, Executive Director of Florida's Children First, a private not-for-profit child advocacy group. Ms. Moore came before the Commission on behalf of Youth SHINE, a loosely-organized group of young adults who have aged-out of the foster care system who want "to ensure a safe and secure transition from dependency to independence for all foster/relative care youth." According to the information provided by Youth SHINE, children in the foster care system, as well as those young adults

Although both bills were subject to significant amendment in response to concerns raised in the respective staff analyses, neither bill passed the Legislature. Most significant were constitutional and policy questions raised in the House concerning the provision allowing the Secretary to authorize release of DCF investigative records. The House bill was amended to delete this section, and, as amended, passed the House in the final days of session.²³⁶ The Senate version, in contrast, retained the Secretary's authority, and ultimately the Senate failed to approve either bill.²³⁷

In response to the concerns raised by legislative staff and the resulting failure of the legislation, DCF presented a second proposal to the Commission at its meeting in Tallahassee in August 2008. The new proposal states that DCF records relating to investigations of abuse, neglect, or abandonment of a child or vulnerable adult are subject to public disclosure, and provides an exemption for information that would identify the subject of the investigation as well as other, specified individuals.²³⁸ Significantly, the proposed legislation doesn't include the controversial provision allowing the Secretary to authorize release of DCF investigative records.

As redrafted, the proposed legislation should address both the constitutional and policies concerns raised by legislative staff. Additionally, DCF assured the Commission

who have aged-out of the system, can't get access to their own case files which contain such basic personal information as where the children have lived, their medical and educational histories, even their own social security and Medicaid numbers. The members of Youth SHINE call this lack of access to their own records identity theft and many have not been able to obtain the most basic government services without such information. *See* Slide Presentation of Andrea Moore, Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007) (on file with the Commission on Open Government Reform, Tallahassee, FL) and Testimony of Andrea Moore, Executive Director, Florida's Children First, at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, Day 2, Vol. 1

²³⁶ *See* STAFF OF H. COMM. ON STATE AFFAIRS ANALYSIS FOR HB 1467 (Mar. 16, 2008) at 6, 8. *See also* Fla. CS/HB 1467 (2008). The Senate bill, CS/CS/CS/SB 2762 died on the Senate Calendar.

²³⁷ The Senate bill, CS/CS/CS/SB 2762 died on the Senate Calendar. *See* Fla. CS/CS/CS/SB 2762 (2008).

²³⁸ *See* Fla. SB 126 (2009) (sponsored by Sen. Paula Dockery).

that the section allowing children in the foster care system access to their own records will be contained in the new bill, as will language allowing the necessary sharing between governmental agencies of exempt and confidential records.²³⁹

10. Law Enforcement Exemptions

a. Law Enforcement Officers Convicted of Crimes

Section 119.071(4)(d)1., Florida Statutes, provides an exemption from the public records law for the home addresses, telephone numbers, social security numbers, and photographs of active or former law enforcement officers.²⁴⁰ Any agency that has custody of such information and is not the law enforcement officer's employer must maintain the exempt status of the information only if the officer submits a written request for maintenance of the exemption.²⁴¹ Notably, a law enforcement officer's home address, etc., is exempt from public disclosure rather than *confidential* and exempt. A custodial agency, then, has the discretion to disclose the information but is not statutorily obligated to do so.²⁴²

The Florida Sexual Predators Act requires persons convicted of specified sexual offenses and designated as a sexual predator to register with the Florida Department of Law Enforcement (FDLE), providing, in part, their name, social security number, age,

²³⁹ See General Discussion at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 176, *supra*, Vol. I at 141 – 143.

²⁴⁰ Section 119.071(4)(d)1., Fla. Stat., also exempts such information for correctional and correctional probation officers; certain Department of Children and Families, Department of Health and Department of Revenue personnel; firefighters; Supreme Court justices; state judges; state attorneys; and statewide prosecutors. There are similar exemptions for human resource, labor relations or employee relations directors [§ 119.071(4)(d)2.]; U.S. attorneys [§ 119.071(4)(d)3.]; federal judges [§ 119.071(4)(d)4.]; code enforcement officers [§ 119.071(4)(d)5.]; guardians ad litem [§ 119.071(4)(d)6.]; specified personnel of the Department of Juvenile Justice; and certain public hospital employees [§§ 395.3025(10); (11)]. Interestingly, the home addresses, etc. of protected hospital employees are confidential and exempt; for all other protected employees such information is merely exempt.

²⁴¹ See FLA. STAT. § 119.071(4)(d)8. (2008). The same provision applies to those protected employees enumerated in note 240, *supra*.

²⁴² See note 124, *supra*.

date of birth, photograph, and home address.²⁴³ Under the Act, the FDLE must maintain an online database of “current information regarding each sexual predator” and provide “hotline access” to such information for “state, local, and federal law enforcement agencies.”²⁴⁴

The sexual predator registration list maintained by FDLE is a public record, and “[t]he department is authorized to disseminate this public information by any means determined appropriate.”²⁴⁵ Currently, FDLE maintains a searchable database of registered sexual predators available to the public through the department’s Web site.²⁴⁶ The concern is whether the home address and photograph of a former law enforcement officer convicted of a sexual offense and subsequently designated a sexual predator would be redacted from the public record, including the sexual predator’s database, because of the exemption provided by § 119.071(4)(d)1., Florida Statutes.²⁴⁷

The issue was brought to the attention of the Commission on Open Government Reform by a resident of north Florida who had made a public record request to FDLE for records relating to a former law enforcement officer who had been convicted of a sexual offense in 1989. In providing the requested records, FDLE redacted the former officer’s

²⁴³ See FLA. STAT. § 775.21(6)(a) (2008). Registration requirements under the Act apply to only those convicted of a sexual offense after Oct. 1, 1993. Id. § 775.21(4)(a).

²⁴⁴ Id. § 775.21(6)(k)1. State law enforcement agencies must notify “members of the community and the public of a sexual predator’s presence” in the community pursuant to § 775.21(7)(a), F.S.

²⁴⁵ Id. § 775.21(6)(k)2. Additionally, the Act requires FDLE to “adopt guidelines . . . regarding the registration of sexual predators and the dissemination of” such information. Id. § 775.21(6)(k)3.

²⁴⁶ See <http://offender.fdle.state.fl.us/offender/homepage.do>.

²⁴⁷ The issue is the same for all those government employees enumerated in note 240, *supra*. According to representatives of FDLE, the department has routinely posted the home addresses of former law enforcement officers on the sexual predator database. See E-Mail from JoAnn Carrin, Director, Office of Open Government, to Barbara A. Petersen, Chair, Commission on Open Government Reform (Nov. 25, 2008). (on file with the Commission on Open Government Reform, Tallahassee, FL)

home address pursuant to § 119.071(4)(d)1., Florida Statutes.²⁴⁸ In addition, there was testimony that local law enforcement agencies have invoked the same exemption in denying public record requests for photographs of law enforcement officers arrested for committing various crimes.²⁴⁹

b. Florida Department of Law Enforcement Proposed Exemptions

At its Ft. Lauderdale meeting in May 2008, the Commission on Open Government Reform was asked to consider four recommendations relating to law enforcement records.²⁵⁰ Subsequently, however, two of the four recommendations were combined and the FDLE later requested endorsement of three “adjustments” to Florida’s public records law:

- Create a limited exception to the prohibition against publication of photos of autopsy photographs;
- Create a public record exemption for personal information submitted to FDLE for purposes of subscribing to e-mail notifications regarding the location of registered sex offenders; and
- Expand the public record exemption for material provided by non-Florida agencies to include domestic security information as well as information G71

²⁴⁸ See Letter from Linton B. Eason, Assistant General Counsel, Florida Department of Law Enforcement, to Susan E. Tisdale (Feb. 4, 2008) (on file with the Commission on Open Government Reform, Tallahassee, FL).

²⁴⁹ See Testimony of Bob Shaw, Editor, Orlando Sentinel, at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, Day 2, Vol. I at 133. According to Mr. Shaw, the Orlando Sentinel’s request for a photograph of Frank Figueroa, head of the Federal Immigration and Customs Enforcement Office, after Figueroa was arrested for exposing himself to a 16-year-old girl, was denied by the Orange County jail under the home address exemption for law enforcement officers. Similarly, the Orange County Sheriff refused to provide a photograph of a deputy who murdered two children and committed suicide over a custody dispute. *Id.* (hereinafter *Shaw Testimony*)

²⁵⁰ See Testimony of Donna Uzzell, Information Program Director, Florida Department of Law Enforcement, at Commission on Open Government Reform Public Hearing, Ft. Lauderdale, FL (May 2008), Ft. Lauderdale Transcript, note 172, *supra*, May 21 at 151. (hereinafter *Uzzell Testimony*) See also Florida Department of Law Enforcement, *Recommendations to the Commission on Open Government Reform* (May 21, 2008). (hereinafter *May 2008 FDLE Recommendations*). (on file with the Commission on Open Government Reform, Tallahassee, FL)

- obtained in performing background checks of persons to be licensed by the state.²⁵¹

1) Exemption for Autopsy Photographs

Florida law provides a public record exemption for photographs of an autopsy held by a medical examiner. The photographs are confidential and exempt, and cannot be copied without the express permission of the deceased’s next-of-kin or upon court order and a showing of good cause. A violation of the exemption is a third degree felony.²⁵²

Because of the limited exception to the autopsy photograph exemption, there are “unintended negative consequences” in that the exemption prevents the use of autopsy photographs for training purposes. The ultimate result is that law enforcement trainers cannot use autopsy photos that could help trainees learn what to look for at a crime scene. Even medical examiners cannot share photos with other medical examiners in an effort to hone their skills or seek consultation as to cause of death. The broad exemption has severe unintended consequences.”²⁵³

There is also the unique problem of unidentified bodies that may be subject to autopsy. Next-of-kin isn’t “always available to approve” copying of autopsy

²⁵¹ See Testimony of Michael Ramage, General Counsel, Florida Department of Law Enforcement, at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 176, *supra*, Vol. II at 150. (hereinafter *Ramage Testimony*) See also Florida Department of Law Enforcement, *Recommendations to the Commission on Open Government Reform* (Aug. 26, 2008). (hereinafter *August 2008 FDLE Recommendations*) (on file with the Commission on Open Government Reform, Tallahassee, FL)

²⁵² See FLA. STAT. § 405.135 (2008). Popularly referred to as the Earnhardt Family Protection Act, the exemption was first enacted in 2001, just weeks after race car driver Dale Earnhardt’s death at the Daytona 500. See Ch. 2001-1 2001 Fla. Laws (HB 1083 1st Eng. by Rep. Randy Johnson). The exemption, subject to review under the Open Government Sunset Review Act, was reenacted in 2006 with only minor technical change. See Ch. 2006-263 2006 Fla. Laws (HB 7115 by H. Governmental Operations Comm.).

²⁵³ See August 2008 FDLE Recommendations, note 251, *supra*, at 6. Interestingly, although a house analysis of the 2001 legislation noted the problem of lack of access for training purposes, the exemption was not amended to completely address the issue. See STAFF ANALYSIS OF HB 1083 BY H. COMM. ON STATE ADMINISTRATION (Mar. 15, 2001). The Medical Examiners Commission opposed the autopsy photo exemption, concerned that medical examiners would not be able to use autopsy photographs in training seminars, medical journals, and professional publications. *Id.* at 8 – 9.

photographs, and “[s]eeking court approval for each proposed use of photos is onerous.”²⁵⁴ As of March 2008, the FDLE had 638 unidentified deceased persons in their database. Prior to enactment of the exemption, law enforcement agencies routinely published autopsy photos of an unidentified deceased person in order to determine the person’s identity. Now, however, without the authority to publish a photograph of the deceased, it’s virtually impossible to obtain identification.²⁵⁵

As a possible solution to the problem, FDLE recommended creating a limited exception to the autopsy photo exemption under § 406.135(9), Florida Statutes, to allow a medical examiner to

- use autopsy photographs for case consultation with pathologists, forensic scientists, or other specialists or experts;
- release autopsy photographs to a health department in connection with its statutory duties; and
- allow the use of such photographs for the purpose of medical or scientific teaching or training; instruction or training of law enforcement personnel; instruction or training of state prosecutors; and for “conferring with medical or scientific experts on matters not related to the investigation or review of a particular case or incident”

provided that anything that would identify the individual in the photograph “is masked, removed, or modified.”²⁵⁶

²⁵⁴ See August 2008 FDLE Recommendations, note 251, *supra*, at 6.

²⁵⁵ See Uzzell Testimony, note 250, *supra*, at 161. According to Ms. Uzzell, “it’s not just the photo of the face” that can’t be published, “[t]hey can’t even publish a tattoo on the body. They can’t publish any photographs that are taken in the autopsy.” *Id.* at 163.

²⁵⁶ See August 2008 FDLE Recommendations, note 251, *supra*, at 6. Upon the recommendation of Commissioner D’Alemberte, the proposed language was broadened slightly to also allow access to the autopsy photographs for use in training medical students. See Tallahassee August 2008 Transcript, note 175, *supra*, at 153; and Florida Department of Law Enforcement, *REVISED Statutory Language Proposed to Commission on Open Government* (Aug. 27, 2008). (on file with the Commission on Open Government Reform, Tallahassee, FL) (hereinafter *Revised FDLE Recommendations*)

2) Exemption for Personal Information/E-Mail Notifications

The federal Adam Walsh Child Protection and Safety Act of 2006²⁵⁷ “imposed a number of requirements on state sexual offender registries,” including development of an automatic sexual predator notification system for the public. Section 121 of the Adam Walsh Act “requires states to establish a system through which automated notifications may be sent to those individuals and agencies mandated under the federal act.”²⁵⁸

Subsequently, legislation was passed in Florida requiring FDLE “to develop and maintain a system to provide automatic notification of registration information regarding sexual predators and sexual offenders to the public.”²⁵⁹

The Florida Offender Alert System is “a free service provided through a partnership between the Florida Department of Law Enforcement, the Florida Sheriffs Association, and the Florida Police Chiefs Association.” It allows members of the public “to subscribe for an e-mail alert in the event that an offender or predator moves close to any address in Florida” one chooses to monitor. To register for the alert system, a person must provide an e-mail address where alerts are to be sent and the physical address or addresses to be monitored, as well as a password that allows the registrant to later add or change the address to be monitored and to add offenders and/or predators to be monitored.²⁶⁰

The information provided by a person who registers with the Florida Offender Alert System is public record and thus subject to disclosure pursuant to a request under

²⁵⁷ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2007).

²⁵⁸ See S. JUDICIARY COMM. PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT FOR CS/CS/SB 1604 (Apr. 11, 2007) at 12 (citing Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 121, 120 Stat. 587 (2007)).

²⁵⁹ See Ch. 2007-209, s. 4, 2007 Fla. Laws (1st Eng. CS/CS/CS/SB 1604 by S. Judiciary Comm.) (codified at 943.44353, F.S.)

²⁶⁰ See <http://www.floridaoffenderalert.com/>. (Last visited Nov. 25, 2008)

Florida’s public records law. FDLE representatives expressed concern that such information could be used by a sexual offender to obtain personal information on registrants, including crime victims. “The exposure of personal information to the public as a cost of doing business with the state could have a chilling effect on the program and could deter [individuals] from signing up for the very service that was intended to help . . . protect Florida citizens.”²⁶¹

The FDLE thus recommended creation of a public record exemption for “any information” provided to the department by anyone other than a sexual predator or offender who registers for the Florida Offender Alert System.²⁶² After some commissioners expressed concerns with the breadth of the proposed exemption and its justification,²⁶³ the Commission was then asked to consider a more narrowly drawn provision that would exempt only the e-mail addresses of those who register for the notification system.²⁶⁴ Commissioners questioned whether there wasn’t some less restrictive approach, noting, importantly, that a person interested in learning the location of a registered sexual predator can do so by searching the FDLE sexual predators on-line database thereby obtaining the same information without registration.²⁶⁵

3) Expansion of the Non-Florida Source Exemption

Section 119.071(2)(b), Florida Statutes, allows a state criminal justice agency to maintain the protected status of criminal intelligence or criminal investigative

²⁶¹ August 2008 FDLE Recommendations, note 251, *supra*, at 5. The concern is “that a predator could take those bits and pieces of information” provided by a person who registers for the e-mail alerts, and “couple them with other types of on-line searches, Google or whatever else, and put the puzzle together to figure out a specific location for a particular [registrant].” *See* Ramage Testimony, note 251, *supra*, at 160.

²⁶² *See* August 2008 FDLE Recommendations, note 251, *supra*, at 5.

²⁶³ *See* Tallahassee August 2008 Transcript, note 175, *supra*, Vol. II at 163.

²⁶⁴ *See* Revised FDLE Recommendations, note 256, *supra*, at 1.

²⁶⁵ *See* Tallahassee August 2008 Transcript, note 175, *supra*, Vol. III at 332 – 335; 336.

information provided by a non-Florida criminal justice agency “only on a confidential or similarly restricted basis.” In such cases, “the Florida criminal justice agency may obtain and use such information in accordance with the conditions imposed by the providing agency.”²⁶⁶

At the August 2008 Commission meeting, the FDLE recommended expanding this exemption to include information used to perform background checks related to state licensing requirements, as well as “information relevant to promoting criminal intelligence, criminal investigative or domestic security efforts” when such information is provided to a Florida criminal justice agency by “any person or entity” on a “confidential, non-public, or similarly restricted basis.”²⁶⁷

Originally proposed as two separate issues – one an expansion of the non-Florida source exemption and a second on the need for a public record exemption for information obtained in conducting background checks for slot-machine operators—they were combined into a single recommendation after FDLE staff determined

that the ultimate policy determination is basically the same for both issues, which is the material was not public in the original hands of whoever submitting it or offering it to FDLE. And we felt that the ultimate policy determination is whether Florida should exact a public records toll from contributing [non-Florida] entities by allowing a public entity in Florida to take the record and, thereby, making it become public because we’ve received or compiled the information.²⁶⁸

²⁶⁶ See FLA. STAT. § 119.071(2)(b) (2008). A “criminal justice agency” is defined as any law enforcement agency, court, or prosecutor, any other agency with legally-imposed criminal enforcement duties; and any agency with custody of criminal intelligence or criminal investigative information for the purpose of assisting a law enforcement agency in active criminal investigations or prosecutions under the RICO Act; and the Department of Corrections. FLA. STAT. § 119.011(4). “Criminal intelligence information” and “criminal investigative information” are defined in § 119.011(3).

²⁶⁷ See August 2008 FDLE Recommendations, note 251, *supra*, at 4.

²⁶⁸ See Ramage Testimony, note 251, *supra*, at 166. See also May 2008 FDLE Recommendations, note 250, *supra*, at 4 – 5. Not only were the original two issues combined, the proposed exemption for background screening information was significantly broadened to protect information used in performing all background checks related to the granting of any state license. See August 2008 FDLE Recommendations, note 251, *supra*, at 4. The original proposal for background screening information applied only to those seeking licensing or employment in the state’s slot machine, or racino, operations. See May 2008 FDLE Recommendations, note 250, *supra*, at 5.

Undoubtedly the most controversial of the law enforcement recommendations, commissioners expressed serious reservations about this third proposal. Of greatest concern, perhaps, was the issue of allowing information exempt under another state's laws to retain that exempt status in Florida. For example, if teacher background screening information is exempt pursuant to Georgia law, under this third FDLE proposal the information would retain its exempt status if such information were provided to a Florida criminal justice agency. The concern

is that we end up taking the Open Government laws in Florida, which are . . . the best in the country, and dumbing them down . . . [by] taking all these other states' exemptions, which may be well founded – they have their own reason, each state makes it[s] own decision on how to do something like this – and then we end up adopting all these other exemptions, which our Legislature and our government has said no, that should be open. . . [I]t almost seems like we're opening the door [to] any exemption from any other state, in direct contradiction to what we decide as a state to have.²⁶⁹

Michael Ramage, general counsel to FDLE, explained that other state governments and many private entities are reluctant to provide records and information to Florida agencies, including criminal justice agencies, because of the State's broad public records law.²⁷⁰ In suggesting that the two issues be split into separate proposals, Commissioner Petersen noted that Florida has "a constitutional standard different from any state in the country" and the historical presumption of openness could be reversed if information exempt pursuant to another state's laws were allowed that same, automatic protection in Florida.²⁷¹

²⁶⁹ See Statement of Commissioner John Carassas at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), August 2008 Transcript, note 175, *supra*, at 187.

²⁷⁰ See Ramage Testimony, note 251, *supra* at 182 – 185.

²⁷¹ See Comments of Commissioner Barbara Petersen at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 175, *supra*, at 187 – 188.

Mr. Ramage returned with a revised proposal, splitting the two issues into separate recommendations: an expansion of the non-Florida source exemption to include “information relevant to promoting domestic security efforts” held by a non-Florida agency, person, or entity; and a narrowed public record exemption for information obtained in conducting background screening checks for slot gaming employees and operators.²⁷²

In explaining the need to expand the non-Florida source exemption, Ramage stated that information related to domestic security is coming from a broader range of sources, including non-public sources, and that such information is not necessarily criminal intelligence or criminal investigative information. “[P]ublic safety concerns are such that we need to be able to try to get as much information as we can from other sources. And if [those sources] stick to a restriction that they don’t want it to become a public record, that doesn’t mean that the information is not important or relevant to public safety or domestic security.”²⁷³ Many of the commissioners remained concerned about the breadth of the revised recommendation,²⁷⁴ and although the narrowed proposed exemption for background screening information garnered little discussion there was scant support for the recommendation.²⁷⁵

11. Government Attorneys and the Attorney-Client Privilege

The attorney-client privilege protects communications between an attorney and the attorney’s client. This privilege is limited under Florida law, however, when the client is a government agency. Currently, there are two exemptions designed to protect

²⁷² See Revised FDLE Recommendations, note 256, *supra*, at 1.

²⁷³ See Ramage Testimony, note 251, *supra*, Vol. III at 318 – 319; 320.

²⁷⁴ See Tallahassee 2008 August Transcript, note 251, *supra*, Vol. III at 321 – 325.

²⁷⁵ See *id.* at 326 – 327.

the communications between an agency attorney and the government client: one an exemption for certain public records prepared by an agency attorney for use in civil or criminal litigation or an adversarial administrative proceeding; and the second for specified meetings between the agency attorney and the government client.

Both exemptions are limited in scope and applicability, however. For example, the public record exemption, § 119.071(1)(d), Florida Statutes, applies only to the government attorney's work product and expires at the conclusion of the litigation or adversarial administrative proceeding.²⁷⁶ The meeting exemption, § 286.011(8), allows a government attorney to meet privately with the members of a government board or commission to discuss settlement negotiations or strategy sessions related to litigation expenditures. The exemption contains very strict limitations and if a government agency violates any one of those limitations, it loses the protection of the exemption.²⁷⁷

In October 2006, the Florida Bar created the Task Force on Attorney-Client Privilege (Task Force) for the purpose of examining the attorney-client privilege and identifying those "issues currently impacting the privilege and . . . to recommend resolutions to those issues." The Task Force created the Public Sector Subcommittee

²⁷⁶ Section 119.071(1)(d), F.S., provides an exemption for public records prepared by an agency attorney, or at the attorney's express direction, "that reflect[] a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings."

²⁷⁷ Specifically, the exemption (1) limits attendance at the closed door session to members of the board or commission, the chief executive officer, and the attorney; (2) requires the attorney to advise the government entity at a public meeting that the attorney desires advice; (3) applies to pending litigation to which the government entity is presently a party; (4) limits the subject of such meetings to settlement negotiations and strategy sessions related to litigation expenditures; (5) prohibits action by the board or commission; (6) requires that the entire session be recorded by a court reporter; (7) requires public notice of the attorney-client session, including the names of those persons attending the session; and (8) stipulates that the transcript of the meeting is subject to public disclosure at the conclusion of the litigation. See FLA. STAT. § 286.011(8) (2008), and 2008 Sunshine Manual, note 4, *supra*, at 26 – 30. See also Testimony of Pat Gleason, Special Counsel on Open Government, Office of the Governor, at Commission on Open Government Public Hearing, Tallahassee, FL (Aug. 2007), Tallahassee 2007 Transcript, note 2, *supra*, Vol. I, at 102. (hereinafter *Gleason 2007 Testimony*)

(Subcommittee) to study “the issues related to the erosion of the attorney-client privilege and the work product protections in the public sector in Florida.”²⁷⁸

The Subcommittee’s report and recommendations were submitted for approval to the Task Force, which “determined that revisions to the law are necessary to remove the legislative or judicial barriers that impede the government attorney’s ability to provide effective legal counsel to the government.”²⁷⁹ The Commission on Open Government Reform was subsequently asked to consider approval of the recommendations; the Florida Association of County Attorneys submitted similar recommendations for consideration by the Commission.²⁸⁰

Specifically, the Commission was asked to consider —

- Expansion of the opinion work product exemption to include fact work product: Currently, only those public records that reflect an agency attorney’s “mental impression, conclusion, litigation strategy, or legal theory” are exempt from public disclosure; an agency attorney’s determination of the facts of a particular case is not protected.²⁸¹ “Fact product” would be a record created by the agency attorney, or at the attorney’s request, that is specifically related to the litigation.²⁸²

²⁷⁸ See *Invitation to Comment on Preliminary Proposal Related to the Attorney-Client Privilege/Work Product Protections in the Public Sector*, from Marcos D. Jimenez, Chair, Task Force on Attorney-Client Privilege, to Chairs of all Florida Bar Sections, Committees, and Divisions (Jan. 25, 2008) at 2; 3 (on file with the Commission on Open Government Reform, Tallahassee, FL). (hereinafter *Invitation to Comment*)

²⁷⁹ See *id.* at 1. The Interim Report of the Public Sector Subcommittee is attached to the Invitation to Comment, note 278, *supra*, as Appendix B. (hereinafter *Subcommittee Interim Report*).

²⁸⁰ See Testimony of Marion Radson, Attorney, at Commission on Open Government Reform Public Hearing, Tallahassee, FL (Aug. 2007), Tallahassee 2007 Transcript, note 2, *supra*, Vol. II at 196, and Testimony of Herb Thiele, President, Florida Association of County Attorneys, at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2008), Kissimmee Transcript, note 13, *supra*, Day 2 Vol. II at 58.

²⁸¹ See FLA. STAT. § 119.071(1)(d) (2008). See also Comments of Commissioner Renee Lee at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee 2008 Transcript, note 175, *supra*, Vol. III at 281 – 288. (hereinafter *Lee Comments*) Commissioner Lee, County Attorney, Hillsborough County, is a member of the Florida Association of County Attorneys, and provided important background information on each of the recommendations to the Commission.

²⁸² See Testimony of Herb Thiele, President, Florida Association of County Attorneys, at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 176, *supra*, Vol. III at 298. (hereinafter *Thiele Tallahassee 2008 Testimony*) For example, if an agency attorney interviews a driver in an accident involving a government vehicle, the agency attorney’s notes about the interview would be subject to public disclosure. However, the same notes taken by an attorney representing a private client would be “absolutely privileged” according to Mr. Thiele. See *id.* at 299.

● Elimination of the requirement that an agency attorney’s opinion work product be disclosed at the conclusion of the litigation: The exemption for an agency attorney’s opinion work product expires at the conclusion of the litigation and such records are then subject to public disclosure.²⁸³ The argument in support of the recommendation is that disclosure of the work product puts the agency attorney “at a disadvantage, because not only does opposing counsel get to understand the thought processes, but the process and procedures that the public attorney has to go through.”²⁸⁴

● Protection for a government attorney’s work product from discovery in the same manner that an attorney’s work product is privileged in the civil discovery process: As noted above, an agency attorney’s work product is subject to public disclosure and can be obtained by “opposing counsel or any party through a public records request.” Agency attorneys argue this can put them and their clients at a disadvantage.²⁸⁵

● Expansion of the litigation meeting exemption to allow necessary persons to attend the attorney-client session: Only the members of the government board or commission, the chief executive officer, and the government entity’s attorney are allowed to attend a closed attorney-client session.²⁸⁶ Consultants, expert witnesses, and staff members “who may be instrumental in educating the public body” may not attend the closed session. The attorney or the chief executive officer can, however, discuss litigation issues with those who are excluded from the meeting, and provide such information to the members of the board or commission during the closed attorney-client session.²⁸⁷

● Expansion of the allowable discussion at attorney-client session to include any matter raised in a claim or lawsuit: The subject matter of discussions at a closed attorney-client sessions are limited to settlement negotiations or strategy sessions related to litigation expenditures.²⁸⁸ By expanding the scope of allowable discussions at closed sessions, agency attorneys state that they will be less constricted in providing their clients with “all of the information that they need.”²⁸⁹

● Expansion of the litigation meeting exemption to allow closed attorney-client sessions if a claim or lawsuit is threatened: Current law allows an agency attorney to

²⁸³ FLA. STAT. § 119.071(1)(d) (2008).

²⁸⁴ See Lee Comments, note 281, *supra*, at 283.

²⁸⁵ Id. According to Mr. Thiele, an agency attorney is able to use only the rules of civil procedure in attempting to obtain documents from opposing counsel. The opposing counsel, however, is not limited to a civil discovery request to the agency attorney, but can make a public records request and the scope of the agency attorney’s “ability to object to [a public records request] is significantly more narrow than” that of opposing counsel. The result, said Thiele, is an unfair advantage. See Thiele Tallahassee 2008 Testimony, note 282, *supra*, at 294.

²⁸⁶ See FLA. STAT. § 286.011(8).

²⁸⁷ See Lee Comments, note 281, *supra*, at 283 – 284. See also Thiele Tallahassee 2008 Testimony, note 282, *supra*, at 300.

²⁸⁸ FLA. STAT. § 286.011(8)(b).

²⁸⁹ See Lee Comments, note 281, *supra*, at 285. According to Commissioner Lee, an agency attorney may need to discuss what a witness might say or factual issues of the case. Current law would proscribe such discussion. See Tallahassee August 2008 Transcript, note 175, *supra*, at 307.

invoke the litigation exemption to close a meeting to discuss certain aspects of pending litigation to which the agency attorney's client is presently a party before a court or administrative judge.²⁹⁰ This restriction has been construed to apply not only to those cases where the commission or board is a named party, but also to those where the government entity is a party in interest.²⁹¹ The exemption does not apply, however, "when no lawsuit has been filed even though the parties involved believe litigation is inevitable."²⁹² The argument for expanding the exemption is that litigation can sometimes be avoided if the agency attorney is able to discuss potential problems and liability with the commission or board before a lawsuit is actually filed.²⁹³

Prior to filing suit against a government entity, a litigant must file notice of the intent to sue. Once the notice of intent has been filed, the potential litigant has a certain number of days in which to actually file the lawsuit. And once the government entity has received such notice, it has an opportunity to investigate the claim and attempt to settle. It's during this period of time that an agency attorney could possibly mitigate damages related to the potential lawsuit if discussion of the threatened litigation was allowed at a closed attorney-client session.²⁹⁴

- Elimination of the requirement that attorney-client sessions be transcribed:

Closed attorney-client sessions must be transcribed by a court reporter who must record the time the session starts and ends, all discussions, the names of all persons present at any time during the session, and the names of those persons speaking. No portion of the closed session can be off the record, and the reporter's notes must be fully transcribed and filed with the government entity's clerk "within a reasonable time after the meeting."²⁹⁵ The session transcript is subject to public disclosure at the conclusion of the litigation.²⁹⁶

- A requirement that litigants against a public agency obtain documents through the normal discovery process rather than pursuant to a public records request during the pendency of the litigation: According to agency attorneys, when a private litigant is able to obtain documents through a public records request rather than the normal discovery process, it is "distracting and disorganizing" and allows opposing counsel access to more information than they might otherwise be entitled to through the normal process.

²⁹⁰ See FLA. STAT. § 286.011(8) (2008).

²⁹¹ See *Brown v. City of Lauderhill*, 654 So.2d 302 (Fla. 4th DCA 1995).

²⁹² See 04-35 Op. Fla. Att'y Gen. (2004); and 98-21 (1998).

²⁹³ See Lee Comments, note 281, *supra*, at 288.

²⁹⁴ See FLA. STAT. § 768.28 (2008). And see Tallahassee August 2008 Transcript, note 175, *supra*, at 305 – 307. Legislation was filed in 2008 to amend and expand § 286.011(8), F.S., by defining "pending litigation" to include "any matter that is the subject to the mandatory 6-month notice of intent to initiate a tort action lawsuit" against a public entity which lawsuit has not yet been filed. The bill, SB 1510 by Sen. Steven Geller, died in committee without a hearing. See Fla. SB 1510 (2008).

²⁹⁵ FLA. STAT. § 286.011(8)(c).

²⁹⁶ Id. § 286.011(8)(e). Litigation is not concluded until the suit is dismissed with prejudice or the opportunity to appeal has tolled. See 94-33 Op. Fla. Att'y Gen. (1994).

Arguably, this “creates an uneven playing field” because during the litigation the agency attorney has to provide not only the records requested pursuant to a public records request, “but they also have to prepare the case using those same records.”²⁹⁷

Proponents of the recommendations to expand the litigation exemptions assert that adoption of the proposals would result in a restoration of the attorney-client privilege for public sector attorneys.²⁹⁸ But as Commissioner Petersen noted, because of Florida’s traditional presumption of openness, there was no attorney-client privilege for public sector attorneys prior to enactment of the current litigation exemptions.²⁹⁹

Proponents also argue that if the exemptions are expanded, agency attorneys can better represent their public sector clients because the attorney would have greater opportunities to discuss litigation issues privately and that their work product would be afforded greater protection. The agency attorneys want to create a level playing field with their opposing counsel, private attorneys who are able to meet with their clients to discuss all aspects of the litigation and whose litigation records are subject only to more narrow discovery requirements. This level playing field, they claim, will best serve the public interest.

Pat Gleason, herself a government attorney, finds “this argument fails to take into account that the government attorney is representing a board that is ultimately responsible to the people for its actions. If a city attorney settles a case against the city council, it is the people’s money that pays for a monetary settlement. Shouldn’t the people have a

²⁹⁷ See Lee Comments, note 281, *supra*, at 286 – 287.

²⁹⁸ See, e.g., Invitation to Comment, note 278, *supra*, at 3, and Subcommittee Interim Report, note 279, *supra*. See also, Written Statement of Herb Thiele, President, Florida Association of County Attorneys, to the Commission on Open Government Reform (Oct. 10, 2007). (on file with the Commission on Open Government Reform, Tallahassee, FL)

²⁹⁹ See Tallahassee 2008 Transcript, note 175, *supra*, at 291. See also *Neu v. Miami Herald*, 462 So.2d 821 (Fla. 1985). In *Neu*, the Florida Supreme Court held that neither a government agency nor the agency’s attorney could invoke the attorney-client privilege to close a meeting to discuss a lawsuit against the agency. The privilege, said the Court, belongs to the client, a public body, and Florida’s sunshine law requires that such meetings be open to the public.

right to expect that closed meetings held to discuss how to spend their money are limited and restricted in scope?”³⁰⁰ The chair of the Florida Bar Media Law and Communications committee, Sam Morley, also questioned the claimed justification for expanding the exemption, citing a published survey of public sector attorneys which found that those attorneys “felt they were able to provide effective representation in actual practice despite any perceived chilling effect caused by removal of or limit on the [attorney-client] privilege.”³⁰¹

Others who testified before the Commission on the issue of expanding the litigation exemptions questioned whether the “public would agree with restricting its right to monitor what is essentially its business,” noting that “[t]he ultimate client is, in fact, the public. That’s whose money is going to pay for whatever settlement agreement is reached.”³⁰² Former Governor Bob Martinez would seem to be in agreement with this position. In 1987, Governor Martinez vetoed an exemption to allow closed meetings to discuss pending litigation, stating “that the business of the state should remain the business of its citizens and be subject to their scrutiny.”³⁰³

³⁰⁰ Pat Gleason, *No Higher Calling*, Government Lawyer Section Reporter (Fall 2007). (hereinafter *Gleason Article*) Ms. Gleason is Director of Cabinet Affairs and Special Counsel for Open Government for Florida Governor Charlie Crist. Gleason opines that the “traditional position of government lawyers on this issue seems to be at odds with the trend towards increased transparency and openness that is changing the way state agencies do business.” *Id.*

³⁰¹ Letter from Samuel J. Morley, Chair, Florida Bar Media Law and Communications Committee, to Marcos D. Jimenez, Chair, Attorney-Client Privilege Task Force, Sep. 29, 2008 (citing Nancy Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163 (Winter 2007)). (letter on file with the Commission on Open Government Reform, Tallahassee, FL)

³⁰² See Testimony of Deanna Shulman, Attorney, Thomas & LoCicero, at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, Day 2, Vol. II at 77.

³⁰³ See Gleason Article, note 300, *supra* (citing Fla. HB 1336 (1987)). Notably, Martinez vetoed the proposed exemption six years before the constitutional guarantee of access to government records and meetings took effect.

In an article published in the *Government Lawyer Section Reporter*, Ms. Gleason quotes Governor Reubin Askew's 1977 veto message on a bill that included a provision allowing government agencies to close meetings to discuss litigation:

[T]here is some merit to permitting public bodies to meet privately with their attorneys, but the potential for abuse outweighs the potential benefit. . . While [open meetings] may cause some inconveniences in the short run, certainly we have discovered in this state this it is far better in the long run to conduct public business in the 'sunshine.' The public trust and the public confidence that are fostered by free and open government proceedings far outweigh any possible benefits that might be derived from [the proposed exemption].³⁰⁴

The Askew and Martinez veto messages relate specifically to the exemption for litigation meetings. But the public policy issues are the same regardless whether the argument is for closing meetings or restricting access to public records.

Notably, both veto messages were written years before the constitutional right of access to government records and meetings became effective and today, with the constitutional guarantee firmly entrenched in Florida, the standard for creation – or expansion – of an exemption to the right of access is even more stringent.³⁰⁵

12. Exemption for Lists of Retirees

Section 121.031(5), Florida Statutes, provides a public record exemption for the names and addresses of government retirees, stating that the information is “confidential and exempt . . . to the extent that no state or local governmental agency may provide the names or addresses of such persons in aggregate, compiled, or list form to any person except to a public agency engaged in official business.” However, the exemption does

³⁰⁴ Id. (citing Fla. HB 1107 (1977)).

³⁰⁵ In commenting on the proposed recommendations to expand the litigation exemptions, Adria Harper, director of the First Amendment Foundation, stated that the proposed expansion “eliminates the public’s [constitutional] right of oversight while expanding the exemption so much as to make them more vulnerable to abuse.” See Letter from Adria Harper, Director, First Amendment Foundation, to Marcos D. Jimenez, Chair, Attorney-Client Privilege Task Force (Sep. 15, 2008). (on file with the Commission on Open Government Reform, Tallahassee, FL)

allow a government agency to provide a list of the names and addresses of its retirees to a bargaining agent or a retiree organization “for official business use.”³⁰⁶

In addition, any person can review or copy an individual’s retirement record at the Department of Management Services (DMS), “*one record at a time*, or may obtain information by a separate written request for a named individual.”³⁰⁷ In other words, the names and addresses of retirees are generally exempt from public disclosure, but only to the extent that they are provided in aggregate or list form.

In investigating a report for the *St. Petersburg Times* about public officials who had retired from government, started collecting their retirement, and then returned to public office – commonly referred to as “double-dipping” – Senior Correspondent Lucy Morgan’s public record request for a list of elected officials and senior management officers who were double-dipping was denied.³⁰⁸ The State Division of Retirement cited § 121.031(5), Florida Statutes, as the grounds for withholding lists of retirees and Morgan was able to obtain the requested information only after Governor Crist ordered the lists released.³⁰⁹

According to Morgan,

³⁰⁶ See FLA. STAT. § 121.031(5) (2008).

³⁰⁷ Id. (emphasis added)

³⁰⁸ See Lucy Morgan, *State Retiree Loophole Costs Florida \$300M a Year*, *St. Petersburg Times*, Feb. 23, 2008 (http://www.sptimes.com/2008/02/23/State/State_retiree_loophol.shtml). Morgan became interested in the story after receiving a call about a county judge who retired from the bench and then returned to his previous position a month later without public notice. The move allowed the judge to collect a retirement benefit of \$7,700 a month in addition to his annual salary of \$145,080. Morgan subsequently found 211 elected officials double-dipping, in addition to nearly 8,000 state employees, 203 of them in senior management. See *id.*; and Testimony of Lucy Morgan, Senior Correspondent, *St. Petersburg Times*, at Commission on Open Government Public Hearing, Ft. Lauderdale (May 2008), Ft. Lauderdale Transcript, note 173, *supra*, Day 1 at 28. (hereinafter *Morgan Testimony*)

³⁰⁹ See Morgan Testimony, note 308, *supra*. Morgan first sought the opinion of Pat Gleason, Special Counsel for Open Government, Office of the Governor, who responded in writing by saying she believed the requested list included the names of formerly retired people and should be released. The Governor intervened two weeks later. *Id.* at 30.

state agencies don't like to tell us how much they're paying people, particularly when they're paying them twice, and I don't expect them to be real cheerful about giving me the information, but I would have expected better cooperation because it's our money that's being paid to them.³¹⁰

In noting that the names and addresses of current government employees are generally subject to public disclosure under Florida's public records law, commissioners questioned the justification for protecting the same information after an employee has retired.³¹¹ Apparently, the exemption was originally designed to protect retirees from mass mailings and solicitations,³¹² but the fact that bargaining agents and retirement organizations can obtain the information in aggregate or list form severely undermines the justification.

B. Fees

Under Florida law, some governmental agencies have specific statutory fee authority and § 119.07(4), Florida Statutes, requires such agencies to “furnish a copy of

³¹⁰ Id. at 38. Ms. Morgan recommended that the exemption for the names and addresses of retirees in aggregate or list form be amended to allow for greater public access and oversight of the retirement process.

³¹¹ See Tallahassee August 2008 Transcript, note 172, *supra*, Vol. II, at 209 (Commissioner Grinstead); 211 (Commissioner Dockery); and 212 (Commissioner D'Alemberte).

³¹² See *id.* at 207. A government employee may participate in either the defined benefit (DB) or defined contribution (DC) retirement plan. Under the DB plan, which is the standard retirement plan, the employing agency contributes to an employee's retirement by paying into the Florida Retirement System (FRS); the agency employee does not contribute towards his or her own retirement. Benefits are then paid by the FRS to a retired employee based on a statutorily-prescribed formula. There are no individual retirement accounts for retirees under the DB plan and the amount paid per month is subject to public disclosure but only on an individual basis – a requestor must provide the retired employee's name in order to obtain the information. In contrast, there are individual retirement accounts for those government employees who elect to participate in the FRS DC plan. These are private accounts rather than government accounts, as participants in the DC plan choose the investment firms and investment option to invest in. Under the FRS DC plan, the employing agency pays a statutorily-prescribed amount towards the employee's retirement account. Section 121.4501(19), F.S., provides a public record exemption for information identifying employees in the DC plan. See S. COMM. ON GOVERNMENTAL OPERATIONS INTERIM PROJECT REPORT 2007-210: OPEN GOVERNMENT SUNSET REVIEW OF SECTION 1214501(19), F.S., RELATING TO FRS PARTICIPANTS (October 2006).

... the record upon payment of the fee prescribed by law.”³¹³ Additionally, all agencies may charge up to a dollar per copy for certified copies of public records,³¹⁴ and county constitutional officers may include a reasonable charge for labor and overhead costs associated with copying county maps or aerial photographs.³¹⁵

The vast majority of public record requests, however, undoubtedly fall under the general fee provision in chapter 119, Florida Statutes, which has two prongs. The first, § 119.07(4)(a), Florida Statutes, allows a charge of no more than 15¢ a page for paper copies or the actual cost of duplication for large-sized copies or copies other than paper. Section 119.07(4)(d) allows agencies to charge a special service charge if a records request requires an extensive use of agency resources. This “extensive use fee” is in addition to the cost of copying.³¹⁶

The Commission received a significant amount of testimony on the cost of obtaining public records, most of which focused on the extensive use provision. The term “extensive” is not defined in the statutes, thus requiring an agency wishing to impose an extensive use fee to determine what is an extensive use of its resources. Unfortunately, there’s little guidance for agencies on how to make such a determination,³¹⁷ and based on the testimony received, fees can vary widely, even within a given agency or for the same record requested at different agencies.

³¹³ See note 99, *supra*, for information on government agencies with specific statutory fee authority.

³¹⁴ FLA. STAT. § 119.07(4)(c) (2008).

³¹⁵ FLA. STAT. § 119.07(4)(b).

³¹⁶ For a more extensive discussion of the general fee provision, see section A 2. c., *supra*.

³¹⁷ See, generally, 2008 Sunshine Manual, note 4, *supra*, at 171 – 173. To date, there only one case challenging an agency’s definition of “extensive” has come before the Florida courts. In *Florida Institutional Legal Services, Inc., v. Florida Department of Corrections*, 579 So.2d 267 (Fla. 1st DCA 1991), *review denied*, 592 So.2d 680 (Fla. 1991), the court upheld the Department of Correction’s definition of extensive as 15 minutes or more, finding that the burden was on the requestor to show that the definition was invalid under Ch. 120, F.S., the Administrative Procedures Act. Interestingly, representatives of both the media and local government officers asked the Commission to review the

For example, Matt Reed, assistant managing editor of *Florida Today*, testified that the cost for requests for the same record from a number of state universities ranged from \$675 at Florida State University to \$6,000 at the University of Central Florida. “Remarkably,” Reed said, “each UCF department, whether it was business, education, health, [or] public policy . . . had its own price for the same record in the same school. Sometimes it ranged from 25 cents per page to nearly \$2 per page with some charging for staff time, some not.”³¹⁸ Similarly, a citizen made public record requests to various counties throughout the state seeking identical records from each. At least three counties provided the records at no cost to the requestor, while other counties charged fees ranging from around \$100 to as much as \$2,242.³¹⁹

Among the media, “there is a feeling that government is getting around compliance with the law by quoting excessive costs” to provide public records.³²⁰ Mike Sallah, investigations editor for the *Miami Herald*, noted a trend over the past few years as public agencies are charging excessive fees for access to public records, fees that are

current fee provision, particularly the extensive use provision. *See, e.g.*, Testimony of Matt Reed, Assistant Managing Editor, *Florida Today*, at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, Day 1 at 33 (hereinafter *Reed Testimony*); and Testimony of Tammy Vock, President of the Florida Association of City Clerks, at Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, at 12.

³¹⁸ *See* Reed Testimony, note 317, *supra*, at 38. Reed was seeking a one-page form that every state university faculty member is required to file “any time they have any kind of outside consulting work or need to disclose a conflict of interest.” Eventually Reed was able to obtain the records from UCF for about \$3,700, significantly more than he paid for *more* documents at FSU. And interestingly, FSU produced the records within six weeks, but the University of Florida claimed that the request was “too big” and refused to provide the records. After two years, Reed finally obtained the records from UF by making record requests to the deans of each college. *Id.* at 37 – 38.

³¹⁹ *See* E-Mail from Adria Harper, Director, First Amendment Foundation, to Barbara A. Petersen, Chair, Commission on Open Government Reform (Nov. 14, 2008). (on file with the Commission on Open Government Reform, Tallahassee, FL)

³²⁰ Testimony of Gil Thelen, Executive Director, Florida Society of Newspaper Editors, at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, Day 2, Vol. II at 129. (hereinafter *Thelen Testimony*) Lucy Morgan, senior correspondent for the *St. Petersburg Times*, testified that if a requestor asks an agency “for something that they immediately know is going to leave egg on their face when [they] hand it out to you, the cost goes up, and it’s simply a fact, and it’s almost universal.” *See* Morgan Testimony, note 308, *supra*, at 68.

ted to the extensive use provision under § 119.071(4)(d). As an example, Mr. Sallah told the Commission that a government agency quoted a fee of \$165,722 in response to a public record request for agency e-mails relating to a “very questionable contract.”³²¹ While actual copying costs “are miniscule,” the cost of reviewing the records for exempt information is “where the real bulk of the fees come in.”³²²

The problem of excessive costs for providing public records is not limited to requests from the media. Miami-Dade school board member Marta Pérez was asked to pay over \$750 for school district records that would tell her how many teachers left their jobs for other positions within the district. In declining to pay the fee, Ms. Pérez asked the school board to review its policies on access to public records. “The law says that public records should be available to everyone. People should know that they can ask to see the information and avoid paying these hundreds of dollars.”³²³

Kim Bandorf, a resident of Volusia County, asked for specific e-mails from 10 county officials that had been sent over the previous four years. Because the county’s e-mail system is able to search only one month of e-mails at a time, it was estimated that the request would take 120 hours to complete. When Ms. Bandorf was told that her

³²¹ See Testimony of Mike Sallah, Investigations Editor, *Miami Herald*, at the Commission on Open Government Reform Public Hearing, Ft. Lauderdale, FL (May 2008), Ft. Lauderdale Transcript, note 173, *supra*, Day 1 at 79. (hereinafter *Sallah Testimony*)

³²² See Testimony of Rob Barry, Data Editor, *Miami Herald*, at the Commission on Open Government Reform Public Hearing, Ft. Lauderdale, FL (May 2008), Ft. Lauderdale Transcript, note 173, *supra*, Day 1 at 88. (hereinafter *Barry Testimony*) Mike Sallah testified also about a request for records from the Miami-Dade fire department, a request that the department estimated would cost approximately \$8,000 for “10 pieces of paper that would have given us information on [department] overtime.” According to Sallah, the department was going to have two fire chiefs search for the requested records and wanted to charge the paper the chiefs’ hourly salary for the time it took to locate and review the records. After extensive negotiations, the records were produced for about \$125. See Sallah Testimony, note 321, *supra*.

³²³ See Kathleen McGrory, *Public Records Fee is at Issue*, Miami Herald, Nov. 19, 2007.

public record request would cost her \$1,200, she “was horrified. I don’t want to mortgage my house for some e-mails.”³²⁴

And while the media may be able to pay some of the higher costs for obtaining public records or at least negotiate such costs down, excessive fees can act as an effective barrier to access. Matt Reed testified that *Florida Today* dropped a story because of the high cost of obtaining the necessary public records,³²⁵ and Diane McFarlin, publisher of the *Sarasota Herald-Tribune*, told the Commission that after nearly a year of negotiating “over price and access” to a Department of Education database and enlisting the help of its attorneys, the “newsroom felt it had exhausted all reasonable means of getting the record. So it found an alternative, using paper records to build its own database.” The *Herald-Tribune* spent several thousand dollars for paper copies of the individual records and then assigned three reporters who spent more than three months, working full time, to build a duplicate of the requested database.³²⁶

The redaction of exempt information in public records can also drive up the cost of obtaining those records. Florida’s Attorney General has opined that generally an agency can’t charge for the cost of reviewing records for exempt information. However,

³²⁴ See Rebecca Mahoney, *Seek Public E-Mail? It’ll Cost in Volusia*, Orlando Sentinel, Aug. 8, 2007. Prior to January 2006, Volusia County did not have a system in place to handle archived e-mail and thus approximately 65,000 county e-mails were daily dumped into a general pool with no efficient means of searching for a specific e-mail. The county purchased a proprietary e-mail system which “can take up to four minutes to find just one e-mail – meaning even a routine search can stretch into hours and lead to sizable bills.” *Id.* In Wakulla County, a county commissioner told a citizen that it would cost him \$120 for copies of the commissioner’s last 100 e-mails, claiming it would take him at least four hours to review the e-mails and “he bills at \$30 an hour.” See Thelen Testimony, note 320, *supra*, at 127 – 128.

³²⁵ See Reed Testimony, note 317, *supra*, at 40.

³²⁶ See Testimony of Diane McFarlin, Publisher, at Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, Day 1 at 43. The paper was seeking records from the Department of Education (DOE) relating to the regulation of teachers who violate ethical standards and had requested a department database of teacher misconduct cases maintained by DOE. *Id.* at 42.

if review and redaction requires an extensive use of agency resources, an agency may charge the requestor a reasonable fee under § 119.071(4)(d), Florida Statutes.³²⁷

But the fees for review and redaction can be high. For example, the Volusia County school district estimated it would take four hours of staff time at a cost of \$63 to review and redact 100 of the superintendent's e-mails.³²⁸ The Department of Education billed a newspaper \$20,000 for redaction of "a small number of cases" from a database of teacher misconduct cases. The local police department told reporters from that same paper it would cost \$7,000 in redaction fees plus the cost of programming to obtain a copy of a database the department uses to track arrests.³²⁹

As agencies rely more heavily on computers to store and manage public records, "public access should be getting easier" and the cost of providing access to public records less expensive.³³⁰ In reality, however, redaction of exempt information in electronic formats can be "a considerable barrier to the public's right of access," both in terms of time and fees, even though "technology is advancing to the point . . . where we can create systems with redaction capability." This is despite the fact that redaction software programs are widely available, including software capable of redacting a hand-written social security number.³³¹

³²⁷ See 84-81 Op. Fla. Att'y Gen. (1984).

³²⁸ See Thelen Testimony, note 320, *supra*, at 128.

³²⁹ See Testimony of Chris Davis, Investigations Editor, at the Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, at 126. (hereinafter *Davis Testimony*)

³³⁰ See Davis Testimony, note 329, *supra*, at 124. Redaction of paper records, Davis testified, was time-intensive because an agency employee "literally had to sit down, read this stuff and physically take out the information that was not public. But with a little planning, the redaction process can become almost instantaneous when you're talking about electronic records. Unfortunately, such planning has been conspicuously absent." *Id.*

³³¹ See Comments of Commissioner Petersen at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 175, *supra*, Vol. III at 340. (hereinafter *Petersen August 2008 Comments*)

The use of such programs can dramatically reduce the cost of redacting exempt information, but there's little incentive to create systems that are capable of producing records with exempt information redacted automatically if agencies are allowed to pass on the cost of redaction to requestors.³³² As Commissioner Carassas noted during a discussion of the problem of excessive fees, "sometimes incentive is good."³³³

C. The Impact of Advances in Information Technology on Public Records Access

The Commission received considerable testimony on the impact of advances in information technology on the public's constitutional right of access to government records and meetings. The testimony covered a range of issues, and although the issues are interrelated, each will be covered separately in this report.

1. Electronic Records and Access to Agency Databases

As agencies "rely more and more on computers and less on paper, public access should be getting easier" and "the shift towards storing [public] information in databases should have created a 'Golden Age' of public access."³³⁴ The Florida Legislature recognized the impact that advances in technology would have on the ability to access public records and in 1995 amended the law to address the increasing reliance by government on computers and electronic records.³³⁵ As a statement of general policy, § 119.01(2)(a), Florida Statutes, provides that

³³² See Comments of Commissioner Petersen at Commission on Open Government Reform Public Hearing, Ft. Lauderdale, FL (May 2008), Ft. Lauderdale Transcript, note 172, *supra*, Day 1 at 93. See also, Davis Testimony, note 329, *supra*, at 128 (requiring agencies to absorb the cost of redaction "will provide a financial incentive, the only incentive . . . for government agencies to plan for public records access" when creating databases.").

³³³ See Comments of Commissioner Carassas at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 176, *supra*, Vol. II at 228.

³³⁴ Davis Testimony, note 329, *supra*, at 124.

³³⁵ See, e.g., Electronic Records Access Report, note 89 *supra*.

[a]utomation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law.

However, “the Legislature has not attempted to minimize potential negative technological impacts on records access by requiring agencies to use specific types of technology or by permitting agencies only to use non-proprietary systems. Instead, it has emphasized that whatever technology is used, it may not limit or erode access to public records.”³³⁶ There are, however, persistent impediments to obtaining access to public information stored in agency databases.

Government agency use of – and dependence on – aging computer systems and outdated formats can create significant obstacles to the public’s right of access to the records stored in or managed by such systems.³³⁷ “[W]orking around these systems can result in slower response rates, may affect the format of the record provided, or possibly result in the assessment of higher charges . . . Any of [which] could result in an erosion of access to public records over time.”³³⁸

Equally problematic is agency use of new electronic recordkeeping systems that are either poorly designed or not designed “with public access requirements built in their architecture.”³³⁹ Although state law generally requires agencies to consider public access in designing computer systems, there are no specific legal requirements relating to the

³³⁶ S. COMM. ON GOVERNMENTAL OPERATIONS INTERIM PROJECT REPORT 2008-130: IMPROVING ACCESS TO PUBLIC RECORDS (November 2007) at 1. (hereinafter *Interim Project Report 2008-130*)

³³⁷ Id. at 7. See also Testimony of Dr. Jim Zingale, Interim Director, Agency for Enterprise Information Technology, at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, at 106; and Barry Testimony, note 322, *supra*, at 87.

³³⁸ Interim Project Report 2008-130, note 336, *supra*, at 7. The report notes that these issues “could be alleviated by encouraging the interoperability of technological systems” and by “coordination of the [government] entities responsible for implementing public records standards, electronic records standards, and retention standards.” Id.

³³⁹ Id. See also Davis Testimony, note 329, *supra*, at 130.

standards an agency should use in acquiring or designing electronic recordkeeping systems. The result has been a lack of uniformity in the ability of state and local government agencies to provide access to the public records stored in such systems in an efficient and cost-effective manner.³⁴⁰

In addition to poorly designed databases, agency use of proprietary programs or systems can also have a negative impact on the ability to access public records. Section 119.01(c), Florida Statutes, prohibits a government agency from entering “into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of the agency, including public records that are on-line or stored in an electronic recordkeeping system used by the agency.” Yet the use of proprietary programs – and private companies to manage such programs – is prevalent in Florida and the proscription that such use shouldn’t negatively impact public access requirements is, it seems, routinely ignored.³⁴¹

A recent statewide survey of government agencies, however, showed that a significant number of state agencies and local governments are using “open source”

³⁴⁰ See, generally, Interim Project Report 2008-130, note 336, *supra*. See also, Davis Testimony, note 3291, *supra*, at 130; and Barry Testimony, note 322, *supra*, at 87. The problem of poorly designed or antiquated systems could be ameliorated to some degree if requestors were provided access to the raw data – a data dump. Such requests “don’t need to include excessive programming costs” because it “is a relatively simple process” to copy the original data onto a CD and in most cases major programming isn’t required. See Testimony of Matt Doig, Investigative Reporter, *Sarasota Herald-Tribune*, at Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, Feb. 12 at 110 – 111. (hereinafter *Doig Testimony*)

³⁴¹ See, e.g., Doig Testimony, note 340, *supra*, at 106; Tamman Testimony, note 6, *supra*, at 89; and Testimony of Paige St. John, Investigative Reporter, *Sarasota Herald-Tribune*, Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, Feb. 12 at 133. According to Tamman, access to a public record database is virtually meaningless without access to the corresponding data dictionary which defines and identifies each of the tables within the database. Without access to the data definitions, “we lose all substantive access to public records.” The problem has increased in recent years as government agencies, particularly those at the local level, “have privatized much of their database administration to vendors who routinely claim proprietary privileges over the design of the database.” The vendors claim that the data definitions are proprietary and thus not subject to public disclosure. See Tamman Testimony, note 6, *supra*, at 87 – 89.

software that can reduce government's use of proprietary software and its reliance on private software firms.³⁴² Regardless, "for public records access purposes, interoperability of software and hardware is the most important issue when choosing technology, not whether a system is proprietary or open source." Interoperability allows software and hardware on "different machines from different vendors to share data," and without it, agency technology can make it more difficult, if not virtually impossible, to access the agency's public records. The Uniform Electronic Transactions Act "encourages and promotes" – but does not require – interoperability.³⁴³

2. Increased Use of Communications Technology Including Personal Computers and Portable Handheld Devices

Advances in communications technology are occurring rapidly and some question whether Florida law has kept pace.³⁴⁴ Government officials' use of portable handheld devices or laptop computers to communicate with others about public business raises questions under both the public record and sunshine laws.

For example, if a city commissioner uses a laptop computer to discuss via e-mail with another commissioner an item on the commission's agenda, those e-mails are public record and must be retained by law.³⁴⁵ Such discussions also violate the open meetings

³⁴² See Interim Project Report 2008-130, note 336, *supra*, at 4. In contrast to proprietary software, open source software generally has "relaxed or non-existent intellectual property restrictions." Users of open source software can, under a licensing agreement, freely modify the software's source code, "permitting users to create software content incrementally or through collaboration." *Id.* According to the report, 69% of state agencies responding to the survey currently use some open source software. Of the responding local governments, 60% of counties reported using some open source software, while only 16% of municipalities utilize some open source software. *Id.* at 7.

³⁴³ *Id.* at 5. *And see* FLA. STAT. § 668.50(19) (2008).

³⁴⁴ See, e.g., Tallahassee 2007 Transcript, note 2, *supra*, at 76 – 77.

In response to a question from Commissioner Weatherford about the impact of advances in communications technology on Florida's public records law, Pat Gleason, Special Counsel on Open Government in the Governor's Office replied that such advances are "prompting a great deal of questions and uncertainty . . . by members of the public and government alike."

³⁴⁵ Notably, a commissioner's correspondence relating to public business is a public record regardless of who is the recipient of such correspondence.

law, which applies to any discussion of public business between two or more members of the same board or commission.

The issue is less clear if the two city commissioners were using their portable handheld devices to send text or instant messages to each other about the same agenda item. Such messages, which are transitory in nature, aren't generally captured or stored, and thus are analogous to the spoken word and the public records law most likely does not apply. A discussion of public business between two members of the same collegial body using text or instant messaging technology, however, is a clear violation of the open meetings law.³⁴⁶

Another issue brought before the Commission was how the use of person computers and e-mail accounts by government officials and employees to conduct public business. E-mail relating to public business clearly falls within the statutory definition of "public record"³⁴⁷ and is subject to the same retention and access requirements as all other public records. It does not matter whether those emails are sent from – or received at – a personal e-mail account on a privately owned computer.³⁴⁸

Generally, however, when using a personal e-mail account, the official or employee "must self-select to copy" the correspondence to the government server, "which leaves open [the] question if all of the e-mail is being retained" as required by law. Testifying before the Commission at the Kissimmee hearing, Cory Lancaster, managing editor of the *Daytona Beach News-Journal*, recounted the problems a citizen

³⁴⁶ See Gleason 2007 Testimony, note 276, *supra*, at 93 – 94; and Comments of Commissioners Petersen and Carassas at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 175, *supra*, at 361; 363.

³⁴⁷ See notes 90 – 92, *supra*.

³⁴⁸ See Gleason 2007 Testimony, note 276, *supra*, at 27 ("The Public Records Law . . . applies to any communication that relates to government business, regardless of whether a home computer is used.").

had in making a public record request for a mayor's e-mail correspondence during his first six months in office. The mayor, who had been using his personal AOL account, was unable to respond to the request because AOL retained e-mail from only the last 30 days.³⁴⁹

Clearly, the use of private computers and personal e-mail accounts to conduct public business “does not alter the public’s right of access [to] the public records maintained on those computers or transmitted by such accounts.”³⁵⁰ But such practices can have a dramatic – and often negative – impact on the right of access to public records on those computers.

Anthony Lorenzo, a resident of Sarasota County, made a public records request for e-mail correspondence from Venice city officials on a controversial land-use issue. Many of those e-mails were sent from the officials’ private computers. After some officials admitted deleting or not saving all of the city-related e-mail on their personal computers, Mr. Lorenzo filed suit. The judge ordered three of the officials to turn over their computers to the court to ensure recovery of related e-mails that may have been deleted.³⁵¹

³⁴⁹ See Testimony of Cory Lancaster, Managing Editor, *Daytona Beach News-Journal*, at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, Day II, vol. 1 at 135. See also Ellen Perlman, *Delete at Your Own Risk*, *Governing.com*, Jan. 2008, <http://www.governing.com/articles/0801email.htm>. (last visited Dec. 11, 2008). Government officials and employees also can avoid public record disclosure requirements by “pinning” which “allows two people to send messages back and forth directly to each other’s PDAs, without going through the government computer network. . . . Information can be created and stored on PDAs, flash drives, hard drives and other pieces of equipment, and never reach the government system for storage.” (hereinafter *Perlman Article*)

³⁵⁰ See Petersen August 2008 Comments, note 330, *supra*, Vol. III at 358. See also Gleason 2007 Testimony, note 276, Vol. 1 at 77.

³⁵¹ Kim Hackett, *Judge Grants Access to E-Mail*, *Sarasota Herald-Tribune*, Jul. 3, 2008; and Kim Hackett, *E-Mail Search Must be Allowed in Venice Law Case*, Nov. 20, 2008. The use of private computers and personal e-mail accounts by government officials isn’t unique to Florida. See, e.g., *Perlman Article*, note 349, *supra* (“elected leaders are devising ways to escape permanent retention of e-mails by sending them through private accounts, thus making it difficult or impossible even to find them”); and Charles

“Computers, cell phones and wireless devices have changed the nature of communication, but they haven’t diminished the value of Florida’s Sunshine and Public Records laws – or the need for officials to consistently follow them.”³⁵²

D. Impact of Advances in Information Technology on the Sunshine Law

Section 120.54(5)(b)2., Florida Statutes, authorizes state agencies to conduct public meetings subject to the open meetings law using “communications media technology,” which is defined as “the electronic transmission of printed matter, audio, full-motion video, freeze-frame video, compressed video, and digital video by any method available.” State agencies using communications media technology to conduct a public meeting must provide public notice and allow the public the opportunity to participate.³⁵³

Cost is the primary consideration in allowing state agencies to meet via telephone conference calls or video conferencing. “Allowing state agencies and their boards and commissions to conduct meetings via communications media technology under specific guidelines recognizes the practicality of members from throughout the state participating in meetings of the board or commission.”³⁵⁴

The authority to conduct meetings via remote electronic means applies only to state agencies, however. Local governments, as a general rule, must hold meetings within their jurisdiction and have a quorum physically present in the meeting room:

Davis, *Elected Officials Elude Public with Private E-Mail*, Tampa Tribune, Oct. 26, 2008 (op-ed in response to news reports that Gov. Sarah Palin routinely uses private e-mail accounts to conduct public business).

³⁵² Editorial, *Private v. Public Records*, Sarasota Herald-Tribune, Jul. 3, 2008.

³⁵³ FLA. STAT. § 120.54(5)(b)2. (2008). The required notice must “state how persons interested in attending may do so and shall name locations, if any, where communications media technology facilities will be available. *Id.* And see 98-28 Op. Fla. Att’y Gen. (1998).

³⁵⁴ See 98-28 Op. Fla. Att’y Gen. (1998).

While the convenience and cost savings of allowing members from diverse geographical areas to meet electronically might be attractive to a local board or commission such as a school board, the representation on a school board is local and such factors would not by themselves appear to justify or allow the use of electronic media technology in order to assemble the members for a meeting.³⁵⁵

The Attorney General “has argued that a concern about the validity of official actions taken by a public body when less than a quorum is present requires a very conservative reading of the statutes. Thus, the [Attorney General] has concluded that, in the absence of a statute to the contrary, a quorum of the members must be physically present at a meeting in order to take action.”³⁵⁶ When a member of a local board can’t attend a meeting “due to extraordinary circumstances such as illness,” his or her participation is allowed via conference call “or other interactive electronic technology” if a quorum of the board is physically present.³⁵⁷

In 2006, the Florida Legislature approved legislation allowing the Monroe County Commission to use teleconferencing equipment to establish a quorum of board members for special meetings.³⁵⁸ A “special meeting” is defined as a meeting of the board at which official action is taken, but does not include regular monthly meetings.³⁵⁹

³⁵⁵ Id.

³⁵⁶ STAFF OF H. COMM. ON GOVERNMENTAL OPERATIONS ANALYSIS FOR HB 1335 (Mar. 29, 2006) (citations omitted). (hereinafter *HB 1335 Staff Analysis*) If a local government is holding a workshop meeting at which no formal action will be taken, electronic media technology – video conferencing, digital audio, or even interactive internet – can be used to conduct the workshop meeting so long as the public is provided the opportunity to participate. See 06-20 Op. Fla. Att’y Gen. (2006); and 01-66 Op. Fla. Att’y Gen. (2001).

³⁵⁷ See 03-41 Op. Fla. Att’y Gen. (2003).

³⁵⁸ See Ch. 2006-305, 2006 Fla. Law (HB 1335 by Rep. Ken Sorensen). The Monroe County Board of County Commissioners “consists of five members elected at large for staggered terms of four years in the November general election in even years. Regular meetings are held every three weeks on a rotating basis at Key Largo Library in the Upper Keys, the Marathon Government Center, and the Commission Chambers of the Harvey Government Center at Historic Truman School in Key West. When there are conflicting schedules, meetings are held at other locations.” See HB 1355 Staff Analysis, note 356, *supra*, at 3.

³⁵⁹ Ch. 2006-305, §1. The staff analysis for the legislation stated that “[t]he County Administrator for Monroe County has indicated that Monroe County’s geography as a 140-mile chain of islands connected by bridges and a single road necessitates the use of teleconferencing equipment to conduct public meetings.”

The county commission's authority to hold special meetings via teleconferencing equipment expired on June 30, 2007, one year after the legislation's effective date. The current assistant county administrator said commissioners invoked the authority only once or twice during the year, but have not had the need to use teleconferencing technology again.³⁶⁰

E. Financial Transparency

The Federal Funding Accountability and Transparency Act of 2006 required the creation of a searchable online database of detailed information on federal expenditures. Launched in December 2007, the "website provides for accountability in federal spending by allowing the general public to electronically track federal financial assistance and expenditure[s]" of \$25,000 or more.³⁶¹

According to the administrator, the use of teleconferencing equipment would: (1) "allow greater public access and input by residents of the county regardless of the meeting location or the location of the resident;" (2) "allow county commissioners to attend board meetings held outside their districts without the need to travel up to 100-plus miles; and" (3) "save considerable salary and travel expenses by reducing the need for staff to travel to attend board meetings." See HB 1335 Staff Analysis, note 356, *supra*, at 6. The staff analysis also noted that the legislation could, theoretically, "allow the entire county board to conduct a meeting and public business via telephone." *Id.* at 4. Pat Gleason, testifying before the Commission on Open Government reform, opined that "there's a lot of merit in allowing members of the public to be able to be in the room while their elected officials are taking actions that can affect them and their families and their communities. . . . In my view, the current situation seems to work well." See Testimony of Pat Gleason, Special Counsel on Open Government, Office of the Governor, at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 175, *supra*, Vol. I at 19 – 20.

³⁶⁰ See E-Mail from Adria Gonzalez Harper, Director, First Amendment Foundation, to Barbara Petersen, Chair, Commission on Open Government Reform (Jul. 25, 2008). (on file with the Commission on Open Government Reform, Tallahassee, FL)

³⁶¹ See STAFF OF S. TRANSPORTATION & ECONOMIC DEVELOPMENT APPROPRIATIONS COMM. ANALYSIS OF CS/CS/CS SB 392 (Apr. 7, 2008) at 1 (hereinafter *SB 392 Staff Analysis*); and Sandra Fabry, *Transparency in Government Spending: An Idea Whose Time Has Come for Florida*, The James Madison Institute, Policy Brief No. 4 (Apr. 2008) at 1. (hereinafter *Fabry Policy Brief*) The federal website can be found at www.usaspending.gov.

Eleven states – not including Florida – now also have passed financial transparency laws requiring online posting of government expenditures.³⁶² At least 17 other states had spending transparency legislation pending as of April 2008.³⁶³

In some cases, governors took action. Texas Governor Rick Perry in 2006 began posting his office expenditures online, and a year later “made transparency in government spending one of the planks of his Four Points Budget Reform Plan.”³⁶⁴ Missouri Governor Matt Blunt created the Missouri Accountability Portal (MAP) by executive order in July 2007. MAP is “a free, Internet-based searchable database of financial transactions relating to the purchase of goods and services, and the distribution of funds for state programs.”³⁶⁵ Louisiana Governor Bobby Jindal issued an executive order calling for greater transparency in government spending shortly after taking office and the state legislature approved legislation requiring the creation of a searchable website for government expenditures the following month.³⁶⁶

Understanding that greater transparency results in a higher level of government accountability, the “goal of the transparency measures is to provide increased accountability in government by allowing the public to have electronic access expenditure information.”³⁶⁷

³⁶² See David M. Dickson, *Financial Transparency Sweeps Nation*, The Washington Times (Aug. 11, 2008). Those states are Kansas, Oklahoma, Hawaii, Minnesota, Washington, Utah, Mississippi, Louisiana, Georgia, Maryland, and Arizona.

³⁶³ Fabry Policy Brief, note 361, *supra*, at 2.

³⁶⁴ Fabry Policy Brief, note 361, *supra*, at 1 (citation omitted). The Texas Legislature later enacted legislation requiring the state comptroller to post to the Internet a database of state expenditures, including contracts and grants. “The database must include the amount, date, payer and payee of expenditures, and a listing of state expenditures by category with a link to the warranty or check register level.” See SB 392 Staff Analysis, note 366, *supra*, at 2 (citation omitted).

³⁶⁵ SB 392 Staff Analysis, note 361, *supra*, at 2. The MAP website is www.mapyourtaxes.mo.gov.

³⁶⁶ See Fabry Policy Brief, note 361, *supra*, at 2.

³⁶⁷ See SB 392 Staff Analysis, note 361, *supra*, at 2. See also Grover Norquist, *Technology + Transparency = More Accountability*, 41 J. JAMES MADISON INST. 13 (Winter/Spring 2008) at 14

True transparency in government finance means achieving exactly what the current spending transparency movement has set out to do: making comprehensive information available online in a single, searchable, structured database that is available to the public at no cost. Only with these websites in place can true accountability in government spending move forward.³⁶⁸

In Florida, financial transparency “efforts have been mostly directed toward local governments,” with some level of transparency “provided through the Local Government Annual Financial Reporting website of the Department of Financial Services.”³⁶⁹ Many local governments provide access to their current and proposed budgets and other financial information through their websites. But this information can be difficult to find and many times nearly impossible to understand,³⁷⁰ and there isn’t a central file or database of all government agency contracts and expenditures.³⁷¹

Legislation was introduced during the 2008 session that would have required local governments and state agencies to electronically post specific information on all contracts over \$5,000. As originally filed, both the House bill, HB 181, and its Senate companion, SB 392, required the Department of State to create and manage a searchable website to

(hereinafter *Norquist Article*); and Statement of the Sponsor, STAFF OF H. COMM. ON AUDIT & PERFORMANCE ANALYSIS OF HB 181 (Jan. 10, 2008) at 4. (hereinafter *HB 181 Staff Analysis*).

³⁶⁸ Fabry Policy Brief, note 361, *supra*, at 3. In addition to increased transparency and accountability, Fabry notes that there is an additional benefit to fiscal transparency – the Texas comptroller “identified \$2.3 million in savings in her agency alone using information from the state’s new expenditure portal.” *Id.*

³⁶⁹ See SB 392 Staff Analysis, note 361, *supra*, at 3.

³⁷⁰ See, e.g., Testimony of Matt Walsh, Publisher, *Gulf Coast Business Review*, at Commission on Open Government Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, Day 1 at 51 – 52 (proposed budget information provided by taxing authorities “virtually worthless” and obtaining supporting documentation a “nightmare” because each county and city “reports and prepares its budget differently and presents them differently”); Norquist Article, note 367, *supra*, at 15 (in those cases where financial information is available on the Internet, “it is often hard to find, dispersed over many different websites, or impossible to understand for the layperson”); and Written Statement of Andrew Graham to the Commission on Open Government Reform (Nov. 28, 2007) at 1 (“government websites do a poor job in disclosing useful, objective information for citizens and taxpayers”). (on file with the Commission on Open Government Reform, Tallahassee, FL)

³⁷¹ HB 181 Staff Analysis, note 367, *supra*, at 1. “Currently, state agencies and local governmental entities maintain their own files of contracts for goods and services, and records of expenditures made in accordance with those contracts.” *Id.*

list all expenditures by a governmental agency to a person under contract. Each quarter the site would show the:

- name of the agency making the expenditure;
- name of the person receiving the expenditure;
- date of the expenditure;
- amount of the expenditure; and
- purpose of the expenditure.³⁷²

House Bill 181, which had only one committee hearing, failed to pass through its final committee of reference.³⁷³ Senate Bill 392, however, was approved and amended by each of its committees of reference. Although the legislation passed in the Senate 37-1, it failed after the House adopted an amendment to the bill in the final days of session. The CS/CS/CS for SB 392 died in Senate Messages.³⁷⁴

According to the staff analysis for HB 181, the Department of State (DOS) estimated a negative fiscal impact to the department of well over \$1 million, much of it non-recurring. Additionally, the analysis noted that “[m]annual data extraction from existing and future contracts, plus any resources required to convert paper documents into electronic contract files, may have a negative fiscal impact on other state agencies and . . . local government entities . . .”³⁷⁵

³⁷² See, e.g., Fla. SB 392, p. 2 lines 39 – 45 (2008). The language in both bills as originally filed was virtually identical. The legislation was sponsored by Rep. Gayle Harrell and Sen. Ronda Storms.

³⁷³ House Bill 181 died in the House Government Efficiency & Accountability Council after being temporarily deferred. Interestingly, House Speaker Marco Rubio cited increased transparency in government finance as one of his priorities for the 2008 session. “Bringing more transparency to government spending and putting it online for every Floridian to see will not only help hold Florida government leaders more accountable but will also help build confidence in governments at all levels.” Letter from Speaker of the House Marco Rubio to House Members (Feb. 26, 2008) at 1. (on file with the Commission on Open Government Reform, Tallahassee, FL)

³⁷⁴ See Fla. SB 392 (2008) (available at www.flsenate.gov)

³⁷⁵ See HB 181 Staff Analysis, note 367, *supra*, at 3.

Significant changes were made to SB 392 during the committee process. As amended, the bill required local governments with a website to post information on all contracts over \$5,000 between the government agency and any person or corporation. Rather than requiring DOS to create a website disclosing local government expenditures, the amended Senate bill required the Department of Financial Services (DFS) to develop and maintain a state portal linking local government websites. The DFS also was charged with developing a uniform format to be used by local governments when posting contract information to their respective websites.³⁷⁶

A similar posting requirement for state agencies was added, directing the Executive Office of the Governor to provide the necessary web portal linking state agency websites and contract information. As amended, CS/CS/CS/SB 392 required the Department of Financial Services to develop and maintain a contract expenditures report of state agency contracts. This report was to be in a searchable website that would allow an individual to search for expenditure reports by governmental function, state agency, or appropriation category.³⁷⁷

Interestingly, the fiscal impact for the amended Senate bill was significantly less than for its House companion: the Department of Financial Services estimated non-recurring expenses of just over \$100,000 over a two-year period, and no additional funding was required because the Executive Office of the Governor maintains a web portal for contract information.³⁷⁸

³⁷⁶ See S. Community Affairs Comm. Amendment 892856 adopted 3/19/08. The requirement for local governments was phased in over time, depending on the population of the county or city. Also, in those cases where a local government didn't have an official website, contract information was required to be maintained in an office reasonably accessible to the general public during normal business hours.

³⁷⁷ S. Governmental Operations Comm. Amendment 687448 adopted 3/27/08.

³⁷⁸ See SB 392 Staff Analysis, note 361, *supra*, at 7. The staff analysis noted that the financial impact on local governments was "indeterminate" but that they could expect to incur some costs in complying with

After the financial transparency legislation failed, the Governor's office began working with the Department of Financial Services on a pilot project that would provide a portal linking state agency financial information. The DFS maintains a website for vendors that allows them to look up payment information, and has begun replicating all non-confidential information on a website that will be available to the public by March 1, 2009.³⁷⁹ In support of the pilot project as well as the concept of financial transparency, Commissioner Dockery said, "this goes to the crux of the fact that we're spending taxpayers' money and they ought to be able to see what it's being spent on."³⁸⁰

The importance of providing "a single searchable website on which taxpayers [can] acquire details about how their tax dollars are spent"³⁸¹ can't be overstated. Commissioner Dockery, a state senator, has said there "is nothing more important to the people we serve as how we spend their money, and nothing is more secretive from the people we serve as how we spend their money."³⁸² The secrecy surrounding the budget process and government spending may not be intentional, but rather a consequence of the failure of lawmakers and government officials to take advantage of modern technologies and provide taxpayers with a web portal allowing access to a searchable database that allows detailed information on how tax dollars are being spent.

the reporting requirements for both website maintenance and staff. *Id.* The Department of Financial Services later reported that it could provide the necessary portals within the department's current budget and that no additional funding would be required. *See* Comments of Director Carrin at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 175, *supra*, at 241. (hereinafter *Carrin Comments*)

³⁷⁹ *See* Carrin Comments, note 378, *supra*, at 241; and E-Mail from Michael Carson, Department of Financial Services, to JoAnn Carrin, Director, Office of Open Government (Dec. 16, 2008). (on file with the Commission on Open Government Reform, Tallahassee, FL)

³⁸⁰ Comments of Commissioner Dockery at Commission on Open Government Reform Public Hearing, Tallahassee, FL (Aug. 2007), Tallahassee 2007 Transcript, note 2, *supra*, Vol. II at 243. . (hereinafter *Dockery Tallahassee 2007 Comments*)

³⁸¹ Norquist Article, note 367, *supra*, at 15.

³⁸² Dockery Tallahassee 2007 Comments, note 380, *supra*, at 194.

Historically, “a citizen interested in government finance was required to browse through thousands of pages of budget documents, many of them . . . indecipherable.” But with the advent of the Internet and “[i]n light of modern technology, a commitment to ‘transparency,’ which is by definition characterized by ‘visibility or accessibility of information especially concerning business practices’ – today warrants a reevaluation of the term ‘access.’”³⁸³

F. Citizen’s Rights

1. The Right to Participate in Public Meetings

In construing the right of the public to participate in meetings subject to the state’s Sunshine Law, the Florida Supreme Court has stated that the public has an “inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.”³⁸⁴ There has been some confusion, however, regarding the scope of the right and how it is to be applied.

For example, in *Wood v. Marston* the Court found that the public doesn’t have the right to speak at certain executive-type meetings at which a board or agency is carrying out executive functions traditionally conducted without public comment. The Court stated “that nothing in this decision gives the public the right to be more than spectators.”³⁸⁵ Since the *Marston* decision, some state courts have held that the public’s right to participate in all open meetings is not absolute, and

³⁸³ Norquist Article, note 367, *supra*, at 15 (citation omitted). See also Fabry Policy Brief, note 366, *supra*, at 2 (“information that is not available online is only nominally public” and “transparency in today’s digital age is defined by full and easy online access to pertinent information – [] only when this access is available, is true accountability possible”) (citation omitted).

³⁸⁴ See *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693, 699 (Fla. 1969). See also, 04-53 Fla. Op. Att’y Gen. (2004) (“The courts of this state and this office have recognized the importance of public participation in open meetings.”) (citation omitted)

³⁸⁵ 442 So. 2d 934, 941 (Fla. 1983).

[u]ntil the matter is clarified, the Attorney General’s Office has recognized that when committees are carrying out certain executive functions which traditionally have been conducted without public input (as described in the *Marston* decision), the public has the right to attend but may not have the authority to participate.³⁸⁶

If a board or agency is carrying out its legislative responsibilities, however, the public “should be afforded a meaningful opportunity to participate at each stage of the decision-making process, including workshops.”³⁸⁷

Local governments routinely prohibit public comment during workshops, and many don’t provide “a meaningful opportunity to participate” at regular meetings.³⁸⁸ Citizens express frustration at the inability to address elected representatives at public meetings, and some are intimidated or harassed when they insist on exercising their right to speak within the guidelines set out by the governing body.³⁸⁹

Legislation creating the “Vox Populi – Voice of the People” Act was introduced during the 2008 session “for the purpose of prescribing uniform requirements with respect to opportunities for citizen input and participation” at local government meetings.³⁹⁰ The legislation, HB 991 and its companion, SB 2276, set minimum time limits for public comment on agenda items and allowed a method by which citizens could

³⁸⁶ See 2008 Sunshine Manual, note 4, *supra*, at 45 (citing *Law and Information Services v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996); and *Homestead-Miami Speedway, LLC. V. City of Miami*, 828 So. 2d 411 (Fla. 3rd DCA 2002)).

³⁸⁷ *Id.* (citing Inf. Op to Thrasher, Jan. 27, 1994; and Inf. Op. to Conn, May 19, 1987).

³⁸⁸ See, e.g., Testimony of Anna Current, at Commission on Open Government Reform Public Hearing, Ft. Lauderdale, FL (May 2008), Ft. Lauderdale Transcript, note 172, *supra*, at 18; and Shaw Testimony, note 249, *supra*, at 132.

³⁸⁹ See, e.g., Bob Norman, *Targeting Citizen Lozman*, New Times (Dec. 13, 2007). See also Testimony of Gail Dickert at Commission on Open Government Reform Public Hearing, Tallahassee, FL (Aug. 2007), Tallahassee 2007 Transcript, note 2, *supra*, at 140, and Statement of Commissioner Petersen at Commission on Open Government Reform Public Hearing, Kissimmee, FL (Nov. 2007), Kissimmee Transcript, note 13, *supra*, Vol. II at 4. After a number of citizens approached Commissioner Petersen to request that the Commission hold additional public hearings for the purpose of taking more public testimony, Petersen said the citizens are “intimidated by their own local governments. They’re afraid to get up and speak before their own local government commissions or county commissions and they would like the Commission [on Open Government Reform] to take testimony.” See also Amy Keller, *State Getting Tough on Open Record Violators*, FloridaTrend.com (12/1/08).

³⁹⁰ STAFF ANALYSIS OF CS/HB 991 BY H. GOVERNMENT EFFICIENCY & ACCOUNTABILITY COUNCIL (Apr. 9, 2008) at 2.

directly place items on the agenda. Standards for meeting decorum were set, requiring the governing body to “maintain a commitment to the principles of civility, honor and dignity” and stipulating that “individuals appearing before the government body are required to observe these principles when making comments on issues before the governing body as well.”³⁹¹

While neither bill passed,³⁹² the intent of the legislation was “to give citizens an opportunity to speak, not to give them necessarily a platform, but to give them the opportunity to both respond to issues before their elected or appointed officials and to bring issues before those officials.”³⁹³ A meaningful opportunity to speak, to participate in the deliberations of government, is critical to a democratic society and, according to a recent study conducted by Florida State University, fosters increased public trust in government. According to the study, there is a direct correlation between the public’s perception of government transparency and the level of public participation allowed by government, which in turn directly affects public trust.³⁹⁴ In announcing new initiatives to enhance open government, Governor Charlie Crist stated, “By creating a culture that fosters public trust and confidence, we become a government truly operating in the sunshine.”³⁹⁵

³⁹¹ Id. at 3.

³⁹² See Fla. CS/HB 991 (sponsored by Rep. Dorothy Hukill) and SB 2276 (sponsored by Rep. Evelyn Lynn) (2008). The CS/HB 991 passed out of the House unanimously and died in Senate Messages; SB 2276 died in committee without consideration.

³⁹³ See Comments of Commissioner Petersen at Commission on Open Government Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 175, *supra*, Vol. IV at 375.

³⁹⁴ See Testimony of Dan Beverly, Neighborhood America, at Commission on Open Government Reform Public Hearing, Tallahassee, FL (Aug. 2007), Tallahassee 2007 Transcript, note 2, *supra*, Vol. 1 at 124.

³⁹⁵ See Press Release, *Governor Crist Announces New Initiatives for Open Government* (Nov. 15, 2007) (hereinafter *New Initiatives Press Release*).

2. Interaction with Government

Testimony before the Commission on Open Government Reform from citizens across Florida revealed common and disturbing problems encountered when interacting with their government. Citizens routinely express concern “about [the] lack of respect from the government, that the process of asking for information . . . can be difficult for ordinary citizens to carry out.”³⁹⁶

In recounting his difficulties obtaining records from the state universities, Matt Reed noted that his team of reporters “specializes in working with documents and data and has about 15 years each of experience in public affairs reporting,” but, he said, “imagine an ordinary taxpayer . . . trying to negotiate each one of these universities various [policies] and cost structures. It would be pretty tough” for a citizen to gain access to those same records.³⁹⁷ Bob Shaw, an editor for the *Orlando Sentinel*, reminded commissioners that

Newspapers are surrogates for the public. Newspaper reporters are known to agencies. Their companies are known to buy ink by the barrel and occasionally hire lawyers [to obtain access to records]. So if a reporter is having difficulty in accessing information, the average citizen will find accessing that [same] information virtually impossible.³⁹⁸

Responding to citizen concerns revealed in testimony at the Commission’s public hearing in Tallahassee in August 2007, Governor Crist issued Executive Order 07-242 requiring state agencies under the direction of the Governor to adopt an Open

³⁹⁶ See Gleason 2007 Testimony, note 277, *supra*, at 63.

³⁹⁷ See Reed Testimony, note 317, *supra*, at 38.

³⁹⁸ See Shaw Testimony, note 249, *supra*, at 130.

Government Bill of Rights,³⁹⁹ “to guarantee that the right of access to public meetings and records is safeguarded and protected.”⁴⁰⁰ The Executive Order recognized

the need for greater ease of access to public meetings and documents, the need to increase the respect with which our government agencies interact with our citizens, and create a culture which will build the people’s trust and confidence in their government and its ability to serve the people.⁴⁰¹

The order, which applies only to “agencies under the direction of the Governor,” stipulates that an agency’s Bill of Rights be posted both on the agency’s website and at its headquarters, and that it include the following statements:

- the public is to be treated with respect, courtesy, and professionalism;
- absent specific statutory requirements, a public records request does not have to be made in writing;
- public records requests must be acknowledged promptly and in good faith as required by law;
- fees won’t exceed the amount authorized by law;
- the public has the right to receive an itemized invoice of proposed fees or fees charged; and
- recognition that access to public records and meetings are rights secured under Florida law and the state constitution.⁴⁰²

The Governor’s stated goal in issuing the order “is to increase access for all Floridians so they have the tools needed to hold government accountable,” and to foster public trust in government.⁴⁰³

³⁹⁹ See New Initiatives Press Release, note 395, *supra*.

⁴⁰⁰ Fla. Exec. Order 07-242, Open Government Bill of Rights, Nov. 15, 2007.

⁴⁰¹ Id.

⁴⁰² Id. Although application of the order is limited to “state agencies under the direction of the Governor,” the Governor requested all other state agencies to comply. Local governments are not effected by the order.

⁴⁰³ See New Initiatives Press Release, note 395, *supra*, at 127 – 128.

3. The Right to Verify Personal Information Collected by Government

Government agencies collect vast amounts of personal information from individuals and computer-based technologies “are increasingly used to certify the accuracy and completeness of [the] information before an individual receives government benefits or services.”⁴⁰⁴ Rarely, however, are those agencies required to justify the need to collect personal information,⁴⁰⁵ and in Florida, an individual does not have the specific right to verify the accuracy of personal information collected and maintained by government.

A number of states have enacted “some type of fair information practices or data protection legislation” that typically requires “certain procedural steps to be taken in the collection, maintenance, use, and dissemination of” personal information.⁴⁰⁶ Over a period of 10 years – from 1985 to 1995 – the Florida Legislature regularly considered but failed to enact “different variations of data protection legislation, usually in the form of a Fair Information Practices Act.”⁴⁰⁷

Fair information practices legislation (FIPA) doesn’t create a substantive right for individuals, but rather provides the right to verify the accuracy of personal information collected or maintained by a government agency that is subject to public disclosure under state law. Agencies must justify the need to collect personal information, and FIPA also generally contains three basic provisions requiring agencies to (1) compile an index of their databases containing personal information; (2) allow an individual access to his or

⁴⁰⁴ See Electronic Records Access Report, note 89, *supra*, at 128 – 129.

⁴⁰⁵ See, e.g., FLA. STAT. § 119.071(5)(a)2. (2008) (requiring agencies to state in writing the purpose for collection and use of social security numbers).

⁴⁰⁶ Electronic Records Access Report, note 89, *supra*, at 137.

⁴⁰⁷ *Id.* at 142 (citations omitted).

her personal information in those databases; and (3) ensure the accuracy of personal information in cooperation with the subject of the information.⁴⁰⁸

The purpose of FIPA “is to enhance the rights of individuals about whom personal information is collected or maintained” by a government agency,⁴⁰⁹ and to reduce government collection of personal information that will be subject to public disclosure laws and is not necessary for a government duty or purpose.

G. Enforcement and Compliance

Florida’s open meetings and public records laws each contain enforcement and penalty provisions, with some notable differences. An unintentional violation of the open meetings law is a non-criminal infraction punishable by a fine not exceeding \$500.⁴¹⁰ An intentional violation of the law is a second degree misdemeanor, punishable by a fine of not more than \$500 and a jail term of up to 60 days.⁴¹¹ Additionally, under § 286.011(4), Florida Statutes, reasonable attorney fees and court costs will be assessed against an agency found to have violated the law.

The public records law contains a similar penalty provision for unintentional violations,⁴¹² but stiffer penalties for intentional violations. An intentional violation of the law is a first degree misdemeanor punishable by a fine not exceeding \$1,000 and a jail term of up to one year.⁴¹³ Section 119.12, Florida Statutes, requires a court to award attorney fees and court costs in those cases where the court determines that an agency “unlawfully refused to permit a record to be inspected or copied.”

⁴⁰⁸ See, e.g., Fla. SB 1418, s. 2 (1994).

⁴⁰⁹ Id., at 6, lines 3 – 5.

⁴¹⁰ FLA. STAT § 286.011(3)(a) (2008)

⁴¹¹ See FLA. STAT § 286.011(3)(b); and notes 79 – 81, *supra*.

⁴¹² See FLA. STAT. § 119.10(1)(a) (2008). An unintentional violation of the public records law carries a penalty of up to \$500.

⁴¹³ See FLA. STAT. §§ 119.10(1)(b); (2)(a). See also, notes 121 – 123, *supra*.

The open meetings law contains two provisions not found in the public records law. Section 286.011(4), Florida Statutes, allows a court to “assess a reasonable attorney’s fee *against the individual filing*” a lawsuit alleging a violation of the law if the court finds the suit was filed in bad faith or was frivolous.⁴¹⁴ Allowing assessment of these fees against a citizen could have a significant chilling effect as citizens trying to enforce compliance with the law may incur significant legal fees if the lawsuit is not successful.

In addition, § 286.011(2), Florida Statutes, requires that minutes of public meetings be kept and limits the right of enforcement to citizens of the state. Specifically, this section of the law provides that state circuit courts “shall have jurisdictions to enforce the purposes of this section upon application by *any citizen* of the state.”⁴¹⁵

In practice, the burden of enforcing violations of Florida’s open meetings and public records laws generally falls to citizens who have few alternatives other than seeking an injunction or filing suit in civil court to compel compliance.⁴¹⁶ These lawsuits can be costly, and although courts are required to award attorney fees and court costs to the prevailing plaintiff in such lawsuits, a citizen runs the risk of spending thousands of dollars to enforce a constitutional right of access to government records and meetings.⁴¹⁷

⁴¹⁴ Emphasis added.

⁴¹⁵ Emphasis added. The meaning and application of this provision are not clear and to date there hasn’t been litigation of the issue. See E-Mail from Pat Gleason, Special Counsel on Open Government, Office of the Governor, to Barbara Petersen, Chair, Commission on Open Government Reform, Jul. 14, 2008. (on file with the Commission on Open Government Reform, Tallahassee, FL)

⁴¹⁶ The Office of the Attorney General operates a mediation program to resolve disputes regarding access to public records. The program is voluntary, however, and results are non-binding. See FLA. STAT. § 16.60 (2008). There isn’t a corresponding program to deal with disputes over access to government meetings.

⁴¹⁷ See Testimony of Bonner Joy, Publisher, The Islander, at Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, Feb. 12 at 56. In 1999, Ms. Joy settled an open government lawsuit for \$7,000. She’s currently involved in a fee hearing related to another open government lawsuit and had spent an estimated \$70,000 in legal fees as of the time of her testimony.

An agency with questions concerning application of Florida’s open meetings and public records laws may ask the Attorney General for an opinion, whether formal or informal, but citizens do not have the same right. In direct contrast, New York’s Committee on Open Government is required to “furnish to *any person* advisory opinions or other appropriate information regarding” application of the state’s Freedom of Information Law.⁴¹⁸ Similarly, the Virginia Freedom of Information Advisory Council “shall furnish, upon request, advisory opinions or guidelines . . . regarding the Freedom of Information Act [] to *any person* or agency of state or local government, in an expeditious manner.”⁴¹⁹

Connecticut’s Freedom of Information Commission is required to investigate all violations of the state’s Freedom of Information Act and can issue orders compelling compliance. For the purpose of such investigations, the Commission is authorized to hold hearings, administer oaths, examine witnesses, and receive oral and documentary evidence. Additionally, the Commission has “the power to subpoena witnesses . . . and to require the production . . . of any books and papers which the commission deems relevant in any matter under investigation or in question.” Failure to obey a Commission subpoena “may be punished by the court as contempt thereof.”⁴²⁰

H. Education and Training

Section 257.36(g), Florida Statutes, requires the Division of Library and Information Services of the Department of State to “institute and maintain a training and information program in [a]ll phases of records and information management” as well as “[t]he requirements relating to access to public records under chapter 119.” It’s not clear,

⁴¹⁸ See N.Y. PUBLIC OFFICERS LAW § 89(1)(b) (2006). (emphasis added)

⁴¹⁹ VA. CODE ANN. § 30-179 (2008). (emphasis added)

⁴²⁰ See CONN. GEN. STAT. ANN. § 1-205(d) (2008).

however, who is to receive such training and how or how often it is to be offered,⁴²¹ and unlike many other states, Florida does not require open government training for public officials and agency employees.⁴²²

Although open government training is not legally required, elected and appointed government officials generally receive some level of training on open government requirements. However, those employees who have direct contact with the public may or may not be provided with information about how to respond to a public records request but could benefit from such training.

The need for more sunshine law education and training of government officials and employees was a common theme at the Commission's public hearings.⁴²³ Based on the testimony, it appears that failure to comply with the requirements of Florida's open government laws frequently is due to a lack of education and training, a view bolstered by a recent statewide audit of public records law compliance conducted by the Florida Society of Newspaper Editors.⁴²⁴ Most violations of the law are unintentional and could be resolved with additional education and training.

⁴²¹ Some states have a more formalized education and training programs for members and staff of government agencies. *See, e.g.*, VA. CODE ANN. § 30-179.2 (requiring the Virginia Freedom of Information Advisory Council to conduct "training seminars and educational programs for the members and staff of public bodies and other interested persons on the requirements of the Freedom of Information Act") and CONN. GEN. STAT. ANN. § 1-205(e) (requiring the Freedom of Information Commission to conduct annual training sessions on the requirements of specified sections of the state's Freedom of Information Act "for members of public agencies").

⁴²² In Maine, for example, elected officials are required to complete a training course on the state's freedom of access laws within 120 days of taking office. *See* ME. REV. STAT. ANN. tit. 1, § 412 (2007).

⁴²³ *See, e.g.*, Testimony of Rosemary Goudreau, Assistant Editor, Tampa Tribune and Vice President, Florida Society of Newspaper Editors, at Commission on Open Government Reform Public Hearing, Tallahassee, FL (Aug. 2007), Tallahassee 2007 Transcript, note 2, *supra*, Vol. 1 at 146 – 147; Reed Testimony, note 317, *supra*, at 43; Comments of Commissioner Weatherford at Commission on Open Government Reform Public Hearing, Ft. Lauderdale, FL (May 2008), Ft. Lauderdale Transcript, note 172, *supra*, at 49; and Comments of Commissioner Petersen at Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 175, *supra*, Vol. IV at 390.

⁴²⁴ *See* <http://www.fsne.org/sunshine2009/>. *See also* <http://www.fsne.org/sunshine2009/ap.shtml>. The First Amendment Foundation and the Florida Society of Newspaper Editors routinely conduct

I. Office of Open Government

Florida does not have a central office with authority to assure statewide compliance with the state's open government laws and to provide training and guidance on open government requirements to the public. Rather, responsibilities related to open government requirements "have been assigned to a number of entities."⁴²⁵ The Office of the Attorney General runs the public records mediation program,⁴²⁶ and the Division of Library and Information Services in the Department of State "is responsible for records information and management, including the development of rules for records retention."⁴²⁷

Governor Crist created the Office of Open Government for the express purpose of assuring compliance with Florida's open government laws and to provide open government training to those state agencies under the purview of the Executive Office of the Governor.⁴²⁸ Technically, the authority of the Office of Open Government, which was created by executive order, is limited to only those state agencies under the authority

statewide public record law compliance audits. Audit volunteers make routine public record requests at various government agencies and record responses received. Statewide compliance has averaged just under 50%. The most common problems encountered by volunteers is a demand for a request in writing, proof of identification, or the purpose of the request. Rarely has a request been denied or a record withheld. *See*, e.g., <http://www.fsne.org/sunshine2008/news/faf/index.shtml>; and <http://www.fsne.org/sunshine2006/news/audit/>. (last visited Jan. 9, 2009).

⁴²⁵ *See* Interim Project Report 2008-130, note 336, *supra*, at 5.

⁴²⁶ FLA. STAT. § 16.60 (2008).

⁴²⁷ Interim Project Report 2008-130, note 336, *supra*, at 5 (citations omitted).

⁴²⁸ *See* Fla. Exec. Order 07-01, Office of Open Government, Jan. 3, 2007. In addition to creating the Office of Open Government, Executive Order 07-01 directed agency secretaries to designate a person at the agency to act as the agency's public records/open government contact person. "That individual will be responsible for complying with public records/open government requests and compliance at their respective agency and will also be the primary liaison between that agency and the Office of Open Government for purposes of training and compliance." *Id.*

and control of the governor, but in practice it handles calls and questions from local governments and citizens as well.⁴²⁹

Legislation was filed in the 2008 legislative session that would have codified the Office of Open Government and expanded its authority to assist *all* agencies in complying with the requirements of the public records and open meetings laws. The bill also would have required the Office to provide training to agencies on the requirements of Florida’s open government laws.⁴³⁰

Although the legislation didn’t pass, there was considerable interest in codification of the Office of Open Government, which has become a vitally important state resource. For example, in early 2007, the Office of Open Government formed a partnership with the Florida Institute of Government for the purpose of providing open government training to state agency managers. The following year, the Office provided open government training to over 1,000 state employees in cooperation with the First Amendment Foundation.⁴³¹

J. The Florida Legislature

1. Legislative Records

Article I, section 24(a), Florida Constitution, grants “every person” the “right to inspect or copy any public record made or received in connection with the official

⁴²⁹ See General Discussion, Commission on Open Government Reform Public Meeting, Tallahassee, FL (Aug. 2008), Tallahassee August 2008 Transcript, note 175, *supra*, Vol. IV at 429 – 446.

⁴³⁰ See Fla. SB 2008, s. 3 (2008). Senate Bill 2008 specifically referenced the definition of “agency” in § 119.011(2), F.S., which includes “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 . . . 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. Because the Office of Open Government was created by executive order, it can be decommissioned by future governors unless codified in law.

⁴³¹ See E-Mail from JoAnn Carrin, Director, Office of Open Government, to Barbara Petersen, Chair, Commission on Open Government Reform, Office of Open Government Timeline, Jan. 9, 2009. (on file with the Commission on Open Government Reform, Tallahassee, FL)

business of any public body,” including the records of the legislative branch of government “and each agency or department created thereunder . . .”⁴³² Only the Legislature can create exceptions to the constitutional right of access to records and must do so “by general law passed by a two-thirds vote of each house.”⁴³³

All laws in effect on July 1, 1993 – the constitutional provision’s effective date – that limited access to public records or meetings remained in force,⁴³⁴ and the Legislature adopted various exemptions for its records during the 1992 legislative session.⁴³⁵ Subsequently, if the Legislature wishes to provide an exemption for any of its records, it must do so by general law and not by rule.

The Florida Legislature is not subject to chapter 119, Florida Statutes, and each chamber has adopted rules relative to the maintenance, control, destruction, disposal and disposition of legislative records.⁴³⁶ According to testimony received by the Commission, however, legislative rules may not be consistent with current policies and practices under Florida’s Public Records Law.⁴³⁷

2. Legislative Meetings

Article III, section 4(e), of the State Constitution, requires that “prearranged” meetings between *three or more* members of the Legislature, “the purpose of which is to agree upon formal legislative action . . . , or at which formal legislative action is taken, regarding pending legislation or amendments,” be reasonably open to the public. The

⁴³² The constitutional right of access to records applies to all three branches of Florida government – the legislative, the judicial, and the executive.

⁴³³ FLA. CONST. ART. I, s. 24(c).

⁴³⁴ See FLA. CONST. ART. I, s. 24(d).

⁴³⁵ See FLA. STAT. § 11.0431 (2008).

⁴³⁶ See FLA. 2008 – 2010 RULES OF THE SENATE, RULE 1, PART 5, § 1.444; and Fla. H.R. 10, part 14 (2008) (establishing the Rules of the House of Representatives for 2008 – 2010).

⁴³⁷ See, e.g., Testimony of Curt Kiser, Lobbyist, Florida Press Association and Florida Society of Newspaper Editors, at Commission on Open Government Reform Public Hearing, Sarasota, FL (Feb. 2008), Sarasota Transcript, note 6, *supra*, at 23 – 24; 27 – 28.

right of access to legislative meetings is subject to the sole interpretation, implementation, and enforcement by each chamber.⁴³⁸ Both the House and Senate have adopted rules relating to legislative meetings and the notice that should be provided for such meetings.⁴³⁹

In direct contrast, Article I, section 24(b), Florida Constitution, provides a right of access to any meeting of *two or more* members “of any collegial public body of the executive branch of state government or of any . . . county, municipality, school district, or special district, at which official acts are to be taken or at which public business . . . is to be transacted or discussed.” Such meetings must be opened and noticed to the public.⁴⁴⁰

The Legislature is held to a lesser standard than state agencies and local governments,⁴⁴¹ and many cities and counties throughout Florida have adopted resolutions recommending that the Legislature hold itself to the more rigorous standard under the Sunshine Law.⁴⁴²

According to former House Democratic Leader Rep. Dan Gelber, “The Florida Legislature needs to conduct more of its business in the sunshine,” and “unless the

⁴³⁸ See FLA. CONST. ART. III, s. 4(e). Meetings between the Governor and the Speaker of the House or the Senate President are also subject to the requirements of Article III, s. 4(e).

⁴³⁹ See Fla. H.R. 10, Rule 3.4; Rule 7.24; and FLA. 2008 – 2010 RULES OF THE SENATE, RULE 1, PART 5, § 1.43.

⁴⁴⁰ Florida’s open meetings law, § 286.011, F.S., contains similar requirements – meetings must be open and noticed to the public – and also requires that minutes of meetings be taken.

⁴⁴¹ See Letter from Rep. Dan Gelber, Democratic Leader, to House Speaker Marco Rubio, Feb. 13, 2008 (“the legislature has a lesser Constitutional standard for public records availability and open government requirements than state agencies and local government”) (on file with the Commission on Open Government Reform, Tallahassee, FL).

⁴⁴² See, e.g., City of Fort Walton Beach, FL, Resolution 2008-09 (Aug. 12, 2008) (a resolution supporting an amendment to Florida’s Constitution to require the Legislature to operate under the Florida Sunshine Laws) (on file with the Commission on Open Government Reform, Tallahassee, FL). See also Letter from Gary Bruhn, Mayor, Town of Windermere, to Governor Charlie Crist, Jun. 16, 2008) (on file with the Commission on Open Government Reform, Tallahassee, FL).

Legislature can demonstrate it will not abuse its exemption to the sunshine laws, it should be held to similar standards of openness as local governments.”⁴⁴³

⁴⁴³ Dan Gelber, *The Back Page: “Sunshine” Should Shine Just as Bright on Florida Legislature*, The Brechner Report, Dec. 2007. Gelber now serves in the Florida Senate representing District 35. During a series of special sessions in the fall of 2007 devoted to a plan to cut property taxes, the Legislature was roundly criticized for attempting to work out the plan’s details in secret. *See, e.g.*, J. Taylor Rushing, *Secret Deal-Makings by GOP Angers Many*, The Florida Times-Union, Oct. 8, 2007; Editorial, *Strike 3 on Legislative Secrecy*, Orlando Sentinel, Oct. 20, 2007; Jim Ash, *Not All Talk on Florida Tax Plans Done in Public*, Florida Today, Oct. 21, 2007; and Editorial, *Dealing in the Dark: Florida Lawmakers Have No Excuse for Hiding Tax Talks from Citizens*, Florida Today, Oct. 24, 2007.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Exemptions

1. Definitions: Exempt v. Exempt and Confidential

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding the terms “exempt” and “exempt and confidential” is drawn:

- Current law does not contain a definition of the terms “exempt” and “exempt and confidential” and it not clear whether the distinction between the two terms is clearly understood or consistently applied.

Therefore, it is recommended that:

- 1) The Legislature amend chapter 119, Florida Statutes, to include definitions of the terms “exempt” and “exempt and confidential.”

2. Redundant Exemptions

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding redundant public record exemptions is drawn:

- There are a large number of redundant of public record exemptions for the same or similar information scattered throughout state statutes. The Legislature could reduce the number of public record exemptions by creating universal exemptions that apply to all agencies when the justification for such exemptions is generally accepted and repealing the redundant exemptions. Redundant exemptions identified by the Commission include: audit reports; social security numbers; the identity of donors; medical information and records; personal financial information; proprietary business

information, including trade secrets; security system plans; claims files; appraisals, offers, counteroffers; and complaints of discrimination.

Therefore, it is recommended that:

2) The Legislature review all exemptions to chapter 119, Florida Statutes, for redundancy and create universal exemptions in chapter 119 that apply to all agencies where appropriate.

3. Sunset Review of Open Government Exemptions

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding sunset review of open government exemptions is drawn:

■ The five-year review and reenactment process under the Open Government Sunset Review Act for newly created or substantially amended exemptions to the state's open government laws does not allow for an effective review and evaluation of exemptions to the public records and open meetings laws and may undermine the strong public policy of open government in Florida.

Therefore it is recommended that:

3) The Legislature amend § 119.15, Florida Statutes, the Open Government Sunset Review Act, to require review of all newly created or substantially amended exemptions to the Public Records Law and the Sunshine Law once 5 years after enactment and then every 10 years thereafter.

4. Investigations of Complaints Filed Against Professionals Licensed by the Department of Business and Professional Regulation and the Department of Health

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding exemptions for records relating to the investigation of

complaints filed against professionals licensed by the Department of Business and Professional Regulation (DBPR) and the Department of Health (DOH) is drawn:

- As a general rule, records relating to investigations into complaints against a government officer or employee are exempt from public disclosure until there is a probable cause finding. However, records relating to complaints filed against most professionals licensed by DBPR and all professionals licensed by DOH are subject to public disclosure *only if* there is a finding of probable cause; such records are exempt from public disclosure if no probable cause is found. There is insufficient constitutional justification for providing a higher level of secrecy for professionals licensed by DBPR and DOH.

Therefore, it is recommended that:

4) The Legislature amend the public record exemptions for records relating to complaints filed against professionals licensed by DBPR and DOH to stipulate that such records are subject to public disclosure once the investigation is complete or no longer active.

5. Exemption for Economic Development Records

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the exemption for economic development records are drawn:

- Records relating to economic development projects are exempt from public disclosure pursuant to § 288.075, Florida Statutes, under certain specified conditions. However, there is sometimes confusion regarding what constitutes an economic development project for the purpose of invoking the exemption, and the exemption has

been misapplied as a result. The term “economic development project” is not defined by law.

Therefore, it is recommended that:

5) The Legislature amend § 288.075, Florida Statutes, to include a definition of “economic development project” and to subject the exemption to review and reenactment under the Open Government Sunset Review Act.

■ The scope and application of the exemption for records relating to economic development projects is frequently misunderstood by local governments involved in development projects.

Therefore, it is recommended that:

6) The Florida Economic Development Council coordinate with the Office of Open Government to provide training to local government economic development agencies on the scope and application of § 288.075, Florida Statutes.

6. Transportation Projects

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding local government transportation projects is drawn:

■ The Commission was asked to review § 337.168, Florida Statutes, an exemption for state transportation projects, and recommend expansion of the exemption to include similar county projects. No further information or testimony was offered or received, and commissioners found it difficult to reach a conclusion on the issue without additional information.

Therefore, it is recommended that:

7) The Legislature review the exemption for state transportation projects under

§ 337.168(1), Florida Statutes, to determine whether the exemption should be expanded to include local government transportation projects.

7. Social Security Numbers

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the general exemptions for social security numbers are drawn:

- The general exemptions for social security numbers in chapter 119, Florida Statutes, provide unequal protection from disclosure requirements pursuant to the commercial activity exception depending on whether the holder of the number is a government employee. There is insufficient constitutional justification for the inconsistency in the statutory provisions protecting social security numbers.
- The lack of consistency in protection for social security numbers under the general exemptions has resulted in unnecessary complexity and confusion for agencies with custody of social security numbers.

Therefore, it is recommended that:

8) The Legislature review the general social security number exemptions under §§ 119.071(4)(a) (government employees) and 119.071(5)(a) (general public), Florida Statutes, to ensure that all social security numbers are subject to the same disclosure requirements and provided equal protection.

8. Clemency Proceedings

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the exemption for records relating to a petition for clemency are drawn:

- Because the Parole Commission’s case analysis report and recommendation to the Clemency Board are exempt from public disclosure, a person whose application for clemency or restoration of rights has been denied has no means of determining the basis for the denial unless the governor has authorized release of the case analysis report.
- The secrecy surrounding the information in clemency files significantly undermines the fairness of the rights restoration process and the confidence that the applicant – and the public – have in the civil rights restoration decision-making process.
- Individuals applying for clemency should have the same information available to them as do the members of the Board of Executive Clemency.
- In exercising his authority under § 14.28, Florida Statutes, Governor Crist authorized release of the Parole Commission’s case analysis report to a clemency applicant appearing before the Clemency Board prior to the applicant’s scheduled hearing. However, the Crist policy can be reversed by future governors.

Therefore, it is recommended that:

9) The Legislature amend § 14.28, Florida Statutes, to allow a clemency applicant appearing before the Clemency Board access to the Parole Commission’s case analysis report and recommendation prior to the applicant’s scheduled hearing, stipulating that certain, specified identifying information must be redacted from the report prior to its release.

9. Department of Children and Families Exemptions

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the exemption for records of the Department of Children and Families are drawn:

- Records of the Department of Children and Families (DCF) relating to its investigations into allegations of abuse, abandonment, and neglect of children and vulnerable adults are exempt from public disclosure, but much of the same information can be obtained from records that are publicly available. This leads to the perception that the department is attempting to cover up its mistakes by hiding behind confidentiality laws.

- Currently, DCF must obtain a court order allowing the department to publicly release its investigative records. This process requires significant expenditure of department resources and can result in unnecessary time delays in allowing the public access to critically important information.

- Allowing the public access to DCF investigative records will improve the department's performance and increase the public's trust in its investigations and actions.

Therefore, it recommended that:

10) The Legislature amend chapters 39 and 415, Florida Statutes, to stipulate that the records of the Department of Children and Families relating to its investigations into allegations of abuse, abandonment, and neglect of children and vulnerable adults are subject to public disclosure, except that certain specified identifying information contained in such records will be exempt.

- Children in the foster care system and young adults who have aged-out of the system are unable to access their own case files, which contain personal information. Without such information, the children and young adults have not been able to obtain the most basic government services.

Therefore, it is recommended that:

11) The Legislature amend chapter 39, Florida Statutes, to clarify that children who have been in the state foster care system have a right of access to their own records, and that such records must be maintained in a complete and accurate manner.

■ Approved foster parents, preadoptive and adoptive parents currently do not have a right of access to DCF records relating to the adoptive child, which can result in a reluctance to foster or adopt a child in the child care system.

Therefore, it is recommended that:

12) The Legislature amend chapter 39, Florida Statutes, to allow access to department records relating to children in the child care system by approved foster parents and preadoptive and adoptive parents.

10. Law Enforcement Exemptions

a. Law Enforcement Officers Convicted of Crimes

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding the exemptions for the home address of certain government employees who have been convicted of a sexual offense is drawn:

■ The public record exemptions protecting the home addresses and photographs of certain specified government employees under §§ 119.071(4)(d) and 395.3025(10) and (11), Florida Statutes, is contrary to the intent and public purpose of the Florida Sexual Predators Act when those employees have been convicted of a sexual offense and are required under the Act to register their home addresses.

Therefore, it is recommended that:

13) The Legislature amend § 119.071(4)(d) and §§ 395.3025(10) and (11), Florida Statutes, to stipulate that the home addresses and photographs of protected government

employees who have been convicted of a sexual offense and are required to register as a sexual offender under the Florida Sexual Predators Act are subject to public disclosure.

b. Florida Department of Law Enforcement (FDLE) Proposed Exemptions

1) Exemption for Autopsy Photographs

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding § 406.135(9), Florida Statutes, providing an exemption for autopsy photographs are drawn:

■ Because of the limited exception to the autopsy photograph exemption, there are unintended negative consequences in that the exemption prevents the use of autopsy photographs for legitimate governmental purposes. As a result, law enforcement cannot use such photographs in training officers, medical examiners are prohibited from sharing the photographs with other medical examiners in seeking consultation as to cause of death, and medical schools are prohibited from using autopsy photographs in training medical students.

■ Prior to enactment of the exemption, law enforcement agencies routinely published autopsy photos of an unidentified deceased person in order to determine the person's identity. Such publication is effectively prohibited under the autopsy photograph exemption, making it virtually impossible to obtain identification.

Therefore, it is recommended that:

14) The Legislature amend § 406.135(9), Florida Statutes, to create an exception to the autopsy photograph exemption that would allow limited but justifiable disclosure of the exempt records for legitimate investigative, training, medical examiner, or medical school purposes.

2) Exemption for Personal Information/E-Mail Notifications

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding creation of an exemption for e-mail addresses provided to FDLE by those wishing to subscribe to the Florida Offender Alert System is drawn:

- An individual may subscribe to the Florida Offender Alert System for the purpose of obtaining an e-mail alert if an offender moves close to any address in Florida. To register, a person must provide an e-mail address where alerts are to be sent and the physical address or addresses to be monitored. However, a person interested in learning the location of a registered sexual predator can do so by searching the FDLE sexual predator online database, thereby obtaining the same information without registration. There is insufficient constitutional justification for the creation of an exemption for e-mail addresses provided to FDLE by persons who register for the sexual predator alert notification system.

Therefore, it is recommended that:

14) The law not be amended to create a public record exemption for e-mail addresses provided to FDLE for the purpose of subscribing to the Florida Offender Alert System.

3) Expansion of the Non-Florida Source Exemption

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding expansion of 119.071(2)(b), Florida Statutes, the non-Florida source exemption, are drawn:

- While some state governments and private entities may be reluctant to provide records and information to Florida agencies, including criminal justice agencies, because of the State's broad public records law, Florida has a constitutional standard different

from any other state and the historical presumption of openness could be reversed if information exempt pursuant to another state's laws were allowed that same, automatic protection in Florida.

- There is insufficient constitutional justification for expanding the current exemption under § 119.071(2)(b), Florida Statutes, to include information relevant to promoting domestic security efforts that is not a public record as originally held by a non-Florida agency or person or entity and is made available to a Florida criminal justice agency on a confidential, non-public basis.

Therefore, it is recommended that:

- 15) The law not be amended to expand § 119.071(2)(b), Florida Statutes.

4) Exemption for Background Screening Information

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding creation of a public record exemption for background screening information is drawn:

- Background screening information for licensed professionals in Florida is generally subject to public disclosure. There is insufficient constitutional justification for creating an exemption to the public records law for information submitted to FDLE and DBPR for background or licensing reviews of persons or entities seeking licensure for the purposes of owning, operating, managing, doing business with, or being associated with a state licensed slot gaming facility.

Therefore, it is recommended that:

16) The law not be amended to create a public record exemption for background screening information of persons or entities seeking licensure relating to state gaming facilities.

11. Government Attorneys and the Attorney-Client Privilege

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding expanding § 119.071(1)(d), Florida Statutes, the exemption for a government attorney work product, and § 286.011, Florida Statutes, the exemption for litigation meetings, are drawn:

- Because of Florida's historical presumption of openness to the records and meetings of government, communications between an attorneys and their government clients were not protected by the attorney-client privilege.
- Florida law recognizes a limited attorney-client privilege that protects the communications between attorneys and government clients. Section 119.071(1)(d), Florida Statutes, provides limited protection for a government attorney's work product; the exemption expires at the end of litigation. Section 286.011(8), Florida Statutes, allows government attorneys and government clients to meet behind closed doors to discuss pending litigation to which the government client is presently a party under certain, specified conditions. The meeting must be transcribed by a court reporter and the transcript becomes a public record at the conclusion of the litigation.
- To amend the work product public record exemption to include fact work product and delete the disclosure requirement at the end of litigation would effectively preclude any opportunity for public oversight and there is insufficient constitutional justification for expanding § 119.071(1)(d), Florida Statutes.

■ To amend the litigation meetings exemption to allow persons other than the chief executive officer, the members of the board or commission, and the attorney to attend the closed session, to expand the allowable discussion to include any matter raised in a claim or lawsuit or anticipated lawsuit, and to delete the requirement that the transcript be made available at the end of litigation would preclude opportunity of public oversight. There is insufficient constitutional justification for expanding § 286.011(8), Florida Statutes.

Therefore, it is recommended that:

17) The law not be amended to expand the attorney work product exemption under § 119.071(2)(b), Florida Statutes, and the litigation meetings exemption under § 286.011(8), Florida Statutes.

12. Exemption for Lists of Retirees

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding the public record exemption for lists of retirees is drawn:

■ Section 121.031(5), Florida Statutes, provides a public record exemption for the names and addresses of government retirees, but only in aggregate, compiled, or list form. However, the exemption allows bargaining agents or retiree organizations access to lists of the names and addresses of retirees for official business use. In addition, any person can review or copy an individual's retirement record one record at a time or may obtain information by a separate written request for a named individual. The names and addresses of current employees in aggregate, compiled, or list form are subject to public disclosure and there is insufficient constitutional justification to maintain the exemption for lists of retirees under § 121.031(5), Florida Statutes.

Therefore, it is recommended that:

18) The Legislature repeal § 121.031(5), Florida Statutes.

B. Fees

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the fees for obtaining copies of public records are drawn:

- The general fee provisions in chapter 119, Florida Statutes, allow agencies to charge 15¢ a page for paper copies or the actual cost of duplication for large-sized copies other than paper. In addition, agencies can charge a special service charge if a record request requires an extensive use of agency resources. The term “extensive” is not defined and thus each agency must determine what is an extensive use of its resources. As a result, extensive use fees vary widely, even within a given agency or for identical records requested at different agencies.
- Excessive fees charged for accessing public records can create an effective barrier to the public’s constitutional right of access. There is a perception that agencies charge excessive fees to discourage public record requests.
- If a requested record contains both exempt and non-exempt information, agencies are required to redact the exempt information and provide access to the remainder. The cost of redaction routinely increases the cost of obtaining public records.
- As agencies rely more heavily on computers to store and manage public records, public access should be getting easier and the cost of providing access to public records less expensive. But redaction of exempt information in electronic formats creates barriers to the public’s constitutional right of access even though technology is advancing and systems with automatic redaction capability can be created.

- Redaction software programs are available and the use of such programs can dramatically reduce the cost of redacting exempt information. There's little incentive to develop systems capable of automatically redacting exemption information if agencies are allowed to pass on the cost of redaction to requestors.

Therefore, it is recommended that:

- 19) The Legislature retain the current fee provisions in § 119.07(4)(a) – (c), Florida Statutes.
- 20) The Legislature amend the § 119.07(4)(d), Florida Statutes, to: (a) delete the extensive use provision; (b) stipulate that copies of public records in any medium maintained or utilized by an agency must be provided for the actual cost of duplication; (c) allow agencies to negotiate a fee for a “specialized electronic service or product” with a definition of the term included; and (d) stipulate that redaction of exemption information is not a “specialized service or product.”
- 21) The Legislature amend § 119.07(4), Florida Statutes, to stipulate that fees for public records may be waived.

C. The Impact of Advances in Information Technology on Public Records Access

1. Electronic Records and Access to Agency Databases

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding electronic records and access to agency databases are drawn:

- As a statement of general policy, § 119.01(2)(a), Florida Statutes, provides that automation of public records must not erode the right of access to those records, and requires agencies to provide reasonable public access to records electronically

maintained. But the Legislature has not attempted to minimize potential negative technological impacts on records access by requiring agencies to use specific types of technology or by permitting agencies to use only non-proprietary systems. There are persistent impediments to obtaining access to public information stored in agency databases.

- Although state law generally requires agencies to consider public access in designing computer systems, there are no specific legal requirements on standards an agency should use in acquiring or designing electronic recordkeeping systems. There is a lack of uniformity in the ability of state and local government agencies to provide access to the public records stored in such systems in an efficient and cost-effective manner.

- Agency use of proprietary programs or systems has a negative impact on the ability to access public records. Current law prohibits agencies from contracting for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of the agency.

- Interoperability allows software and hardware on different machines from different vendors to share data, and without it, agency technology can make it more difficult, if not impossible, to access the agency's public records. State law encourages but does not require interoperability.

Therefore, it is recommended that:

22) The Legislature, working with the Agency for Enterprise Information Technology, create legal standards for new or redesigned agency databases, data dictionaries, and metadata to facilitate public access to electronic records.

23) The Agency for Enterprise Information Technology (a) review the issue of new or substantially redesigned agency electronic systems compliance with chapter 119, Florida Statutes, and (b) recommend language for development and procurement requirements that mandate that all new systems facilitate the timely and inexpensive redaction of exempt information. For existing agency electronic systems, (c) recommend methods to reduce the cost and time required to redact information from these systems. This is not to be considered an unfunded mandate.

24) All agencies create systems or establish processes to provide enhanced public access to all public record e-mail.

2. Increased Use of Communications Technology Including Personal Computers and Handheld Devices

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the increased use of communications technology including personal computers and handheld devices are drawn:

- The use of personal computers and/or personal internet accounts to conduct public business does not alter the public's right of access to the records maintained on such computers or transmitted via such accounts. The practice can have a negative impact on the ability of the public to access the records on those computers.
- All public records maintained on personal computers or transmitted via personal internet accounts are subject to current disclosure and retention requirements.

Therefore, it is recommended that:

25) All agencies adopt policies and procedures for ensuring that public records maintained on personal computers or transmitted via personal internet accounts are disclosed and retained according to law.

■ Government officials' use of portable handheld devices or laptop computers to communicate with others about public business raises questions under both the public record and sunshine laws. The increased use of communications technology including personal computers and handheld devices has changed the nature of communication but it has not diminished the value of Florida's open government laws or the need for public officials to consistently follow the law.

Therefore, it is recommended that:

26) All agencies adopt policies that prohibit the use of text and instant messaging technologies during public meetings and/or hearings.

D. Impact of Advances in Information Technology on the Sunshine Law

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding the impact of advances in information technology on the sunshine law is drawn:

■ Section 120.54(5)(b)2., Florida Statutes, authorizes state agencies to conduct public meetings subject to the open meetings law using communications media technology. Local governments do not have such authority and as a general rule must hold meetings within their jurisdiction and have a quorum physically present.

Therefore, it is recommended that:

27) Laws relating to agency use of communications media technology be retained without change or amendment.

E. Financial Transparency

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding financial transparency are drawn:

- Historically, citizens interested in their government’s finances were required to browse through thousands of pages of budget documents, much of which is indecipherable and difficult to understand. Many local governments in Florida provide financial information through their websites. The information can be hard to find, and there isn’t a central file or database of all government agency contracts and expenditures.
- Transparency of government financing results in a higher level of government accountability and public trust. Increasing transparency to government spending by providing internet access to agency contract and expenditure information help hold Florida government leaders more accountable and will build public confidence in governments at all levels.

Therefore, it is recommended that:

28) The Legislature enact legislation that requires all agencies to provide internet access to (a) all contracts over a fixed dollar amount and, at a minimum, (b) other information about such contracts, including the name of the agency making the expenditure; (c) the name of the person receiving the expenditure; (d) the date of the expenditure; (e) the amount of the expenditure; and (f) the purpose of the expenditure.

F. Citizen’s Rights

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding citizen’s rights relating to open government are drawn:

- The Florida Supreme Court has stated that the public has an “inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.” There has been confusion regarding the scope of the right and how it is applied.

- A meaningful opportunity to speak, to participate in the deliberations of government, is critical to a democratic society and fosters increased public trust in government. There is a direct correlation between the public's perception of government transparency and the level of public participation allowed by government, which in turn directly affects public trust. By creating a culture that fosters public trust and confidence, a government truly operates in the sunshine.

Therefore, it is recommended that:

29) The Legislature amend § 286.011, Florida Statutes, to require that all agencies adopt policies allowing for a reasonable opportunity for public participation at all meetings subject to the Sunshine Law.

- Floridians must have the tools they need to hold government accountable. Such tools will foster public trust in government.

- To enhance the public's constitutional right of access to government meetings and records, agencies must recognize the need for greater ease of access to public meetings and records. Agencies also must increase the respect with which they interact with citizens, and create a culture to build the people's trust and confidence in their government and its ability to serve the public.

Therefore, it is recommended that:

30) The Legislature amend the law to require the Department of State/Division of Information Services and the Bureau of Archives and Records Management to adopt a model rule on access to public records for use by all agencies.

31) The Office of Program Policy Analysis and Government Accountability (OPPAGA) conduct a thorough review of all open government exemptions for

consistency and modernity of language, bringing all exemptions within the current constitutional standard.

32) The Legislature consolidate the sunshine law and public records law into one chapter of the Florida Statutes to allow for consistency of definitions, training requirements, enforcement, compliance, etc.

33) The Legislature codify the Citizen’s Bill of Rights as a preamble to the consolidated open government law.

- Government agencies collect and maintain vast amounts of personal information from individuals, and in Florida, an individual does not have the right to verify the accuracy of personal information collected and maintained by government.
- Agencies generally are not required to justify the need to collect personal information, which then becomes subject to public disclosure.
- Enactment of fair information practices legislation will allow for greater protection and integrity of personal information collected and maintained by government.

Therefore, it is recommended that:

34) The Legislature enact a Fair Information Practices act to (a) require government agencies to justify the need to collect personal information; (b) provide a right of access to personal information collected by government by the subject of the information; and (c) to challenge the accuracy of the information under certain specified circumstances.

G. Enforcement and Compliance

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding enforcement and compliance are drawn:

- The burden of enforcing violations of Florida’s open meetings and public records laws falls to citizens, who have few alternatives other than seeking an injunction or filing suit in civil court to enforce compliance.
- An agency with questions concerning application of Florida’s open meetings and public records laws may ask the Attorney General for an opinion, whether formal or informal, but citizens do not have the same right.
- The Office of the Attorney General operates a mediation program to resolve disputes regarding access to public records. The program is voluntary and the results non-binding.

Therefore, it is recommended that:

35) The Legislature amend the law to allow citizens to seek an informal opinion from the Office of Open Government when denied access to public records or open meetings.

- The penalty provisions in Florida’s open meetings and public records laws do not address the issue of an agency’s willful and repeated violation of the law or an agency’s intentional disregard for the public’s constitutional right of access.

Therefore, it is recommended that:

36) The Legislature amend the open government penalty provisions to allow for additional fees to be assessed against an agency if a court determines that the agency (1) violated either the sunshine or public record law; and (2) showed intentional disregard for the public’s constitutional right of access under Article I, section 24, Florida Constitution; or (3) the court finds a pattern of abuse of access requirements by the agency, stipulating that such fees will be used for the purpose of enhancing access to public meetings and public records.

H. Education and Training

Based on the findings of this report and the deliberations of the Commission, the following conclusion regarding education and training is drawn:

- Failure to comply with the requirements of Florida's open government laws is frequently due to a lack of education and training on the requirements of the public records and open meetings laws. Many of the problems encountered by citizens seeking access can be resolved with additional education and training.

Therefore, it is recommended that:

37) The Legislature amend the law to require all elected and appointed government officials to undergo education and training on the requirements of Florida's open government laws.

38) All agencies provide training on the requirements of Florida's open government laws for all appropriate agency employees.

I. Office of Open Government

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding the Office of Open Government are drawn:

- The Office of Open Government was created by Executive Order for the express purpose of assuring compliance with Florida's open government laws and to provide open government training. The authority of the Office is limited to only those state agencies under the authority and control of the Governor, and unless codified in law, can be decommissioned by future governors.

- Florida does not have a central office with authority to assure statewide compliance with the state’s open government laws and to provide training and guidance on open government requirements.

Therefore, it is recommended that:

39) The Legislature codify the Office of Open Government within the Governor’s Office for the purpose of providing education, information, and public outreach on open government issues.

40) The authority of the Office of Open Government be expanded to include all agencies, including local governments.

41) In five years, the Legislature consider (a) consolidation of all open government initiatives by transferring authority to operate the open government mediation program from the Attorney General’s office to the Office of Open Government, and (b) elevate the Office of Open Government to an independent cabinet-level agency.

J. The Florida Legislature

Based on the findings of this report and the deliberations of the Commission, the following conclusions regarding access to the records and meetings of the Florida Legislature are drawn:

- The Florida Legislature is subject to the constitutional right of access to records and each chamber has adopted rules effectuating that right. Those rules may not be consistent with current policies and practices under Florida’s Public Records Law.

- Article III, section 4(e), of the State Constitution, requires that certain meetings between more than three members of the Legislature be reasonably open to the public, a lesser standard than that imposed by Florida’s Sunshine Law. The right of access to

legislative meetings is specifically subject to the sole interpretation, implementation, and enforcement by each chamber.

Therefore, it is recommended that:

42) The House and Senate review their respective rules regarding access to legislative records and meetings and amend such rules to better reflect current access policies under Florida's open government laws.

ACKNOWLEDGEMENTS

Chairman Barbara Petersen wishes to acknowledge First Amendment Foundation legal interns Brandon Glanz, Cheryl Kluwe, and Ian Garland who provided legal research necessary for the completion of this report. In addition, law students Gabe Crafton and Justin Hemlepp provided research for the report as part of their pro bono requirements for law school. Each of these individuals went to great lengths to get the information needed for the report and richly deserves recognition of their hard work and dedication. To each, a special thank you from the Commission on Open Government Reform.

APPENDIX A: Response by Commissioner Gerald Bailey to Recommendation 20

From: Bailey, Gerald [mailto:GeraldBailey@fdle.state.fl.us]
Sent: Tuesday, January 20, 2009 9:27 AM
To: Carrin, JoAnn
Cc: Rowe, Lori; Zadra, Mark; Ramage, Michael
Subject: FDLE Open Govt Commission Report Response

JoAnn:

Thank you for allowing me to review and comment on the Commission on Open Government's Final Report. As you know, FDLE presented several issues before the Commission that were reviewed and voted on. Not all of them passed, however, we were satisfied that each issue received a sufficient review by the Commission.

There is one non-FDLE submitted issue below (#20 - Fees associated with duplication of public records) that troubles me because I do not believe sufficient testimony was received from state agencies which poses a significant negative impact to their operations and budgets.

20) The Legislature amend the § 119.07(4)(d), Florida Statutes, to: (a) delete the extensive use provision; (b) stipulate that copies of public records in any electronic medium maintained or utilized by an agency must be provided for the actual cost of duplication; (c) allow agencies to negotiate a fee for a "specialized electronic service or product" with a definition of the term included; and (d) stipulate that redaction of exemption information is not a "specialized service or product."

Therefore, I "respectfully dissent" from this Commission recommendation as presented believing the Commission did not receive the perspective of state agencies on this important issue. The report demonstrates that little or no testimony from agencies as to their practices, the sometimes significant fiscal impact of complying with Chapter 119 and the need to continue to be able to charge for "extensive use" was heard by the Commission. Footnotes 314 through 335 annotated to the report's discussion of this recommendation are devoid of any reference to input by agency personnel, but are heavily citing media representatives' perspective and suggestions on this issue. The Commission did not receive a balanced presentation on the issue of costs to agencies to comply with extensive public records requests. It assumes, without a real basis, that technological advancements should make editing of exempt information "automatic" and easily done. This is not the case, particularly when dealing with records such as those maintained by law enforcement agencies that contain numerous non-public (exempted or confidential) bits of information. Eliminating the "extensive use" fee provides an opportunity for repeated and abusive extensive records requests by persons who have an intent to harass agency personnel and interfere with an agency's mission and operations. For example, prisoners in state prison could make repeated extensive public records requests as a means of exacting their own sense of "retribution" against an agency instrumental in securing the prisoners' convictions.

At a time when the State budget is facing significant shortfalls, to propose eliminating an effective means of recouping some of the costs associated with extensive public records demands is untimely. While I respect my counterparts on the Commission, I believe the

Commission was misguided when it reached its recommendation on this issue. As an agency head, I cannot in good faith support a recommendation to eliminate the “extensive use” cost recoupment option found in Chapter 119.”

Jerry

APPENDIX B: Letter from Commissioner Renée Lee in Response to Recommendations 20, 26, and 29

Office of the County Attorney

BOARD OF COUNTY COMMISSIONERS

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January 21, 2009

Ms. JoAnn Carrin
Director, Office of Open Government
400 South Monroe Street
The Capitol, LL08
Tallahassee, Florida 32399-0001

Dear JoAnn:

Thank you for allowing me to review and comment on the Commission on Open Government's Final Report. As a member of the Commission and the Florida Association of County Attorneys, I submit the following comments:

- As it relates to public records, we continue to be disappointed that the Commission did not agree to submit recommended changes to Chapter 90 to further exempt written communications from or to local government attorneys where litigation is likely or foreseeable. Please refer to the letter from Florida Association of Counties to the Commission on Open Government dated October 11, 2007, attached hereto.
- We seriously object to the elimination of the "extensive clerical use" ability to charge for public records requests. Local governments every day experience requests for dramatic quantities of documents, and with ever increasing costs and ever decreasing staff to accomplish these requirements, this change could lead to significant problems in handling all requests in a timely fashion and has the possibility of leading to serious abuse.

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JoAnn Carrin
January 21, 2009
Page Two

- We are again disappointed that the Commission would not support the expansion of the attorney-client meeting exemption in Section 286.011(8), Florida Statutes, to include when a claim has been made and litigation is foreseeable, as well as expanding the persons permitted to attend the attorney-client closed door sessions.
- We (FACA) do agree with consolidating the Sunshine Law and Public Records Laws into an omnibus statute for easier reference, including the provisions for exemptions that are located throughout the statutes.
- Regarding recommendation #26 requiring all agencies to adopt policies that prohibit the use of text and instant messaging technologies during public meetings and/or hearings, if public business is not being discussed on the text and instant messaging technologies, then its use should not be banned.
- Recommendation #29 requires that all agencies adopt policies allowing for a reasonable opportunity for public participation at all meetings subject to the Sunshine Law. By imposing this requirement, county workshops could potentially take forever to conclude.

I hope these comments will be of assistance to you.

Sincerely,



Renée Francis Lee
County Attorney

RFL:jg

Attachment

U:/open govt.doc



October 10, 2007

The Commission on Open Government Reform
Tallahassee, FL

Re: Amendment of the Public Records Act and
Government in the Sunshine Act

Honorable Members of the Commission:

I am the President of the Florida Association of County Attorneys. I am also the County Attorney for Leon County, Florida. I write on behalf of the Florida Association of County Attorneys to broaden the exemptions from disclosure of certain records under the Florida Public Records Act and to limit the reach of Government in the Sunshine Law to protect the attorney-client privilege when a County, through its Commissioners or Employees seeks the advice of their counsel.

**EXPANSION OF THE EXEMPTION FOR WRITTEN
ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS**

The attorney-client privilege has long been upheld by the courts since the time of the common law as a means of encouraging "... full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Upjohn Company v. U.S.*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981). During the course of a county government lawyer's practice, he or she is called upon to provide advice not only to the Board of County Commissioners, sitting as a whole, but also to members of county administration itself including directors, assistant directors, chiefs, and rank and file employees. In providing this advice, the attorney must review contracts, resolutions, emails, and other documents. The attorney formulates legal strategies as to the proper course of action to be followed. He or she, at the urging of the client's employees or upon his or her own initiative, may put this advice in an email or on paper. This advice may often not relate to pending, threatened, or even likely litigation. The advice may

prevent future litigation. In order to promote good, public policy decisions based on sound legal advice, written communications, generated as part of the give and take between lawyer and employee, or lawyer and commissioners should be privileged and exempt from disclosure.

As a means of fostering full and frank discussions between attorney and client, Florida has codified the attorney-client privilege into its evidence code to preclude attorney-client privileged communications from being used in evidence unless there is a waiver. Section 90.502, Fla. Stat., sets forth the requirements for the privilege to be recognized. Section 90.502(1)(b) defines the client as including a governmental entity. Section 90.502(6) provides that discussions between a lawyer and a governmental entity that are not made at a "shade" meeting under § 286.011, Fla. Stat., do not waive the privilege. But the code does not exempt these discussions from disclosure under § 119.07. A copy of the statute is enclosed. Accompanying this letter are copies of the Oregon Public Records Act which exempts from disclosure public records and information which is privileged under Oregon law. O.R.S. § 192.52(9). An Oregon court has construed this to mean communications between client and attorney, made at any time and not just in the context of pending or anticipated litigation, are exempt. *Klamath County School District v. Teamey*, 140 P.3d 1152, 1158 (Or. App. 2006). The Mississippi Public Records Act also exempts from disclosure all communications made between the public body and the attorney during the course of an attorney-client relationship. Miss. Code Ann. § 25-1-102 (1983), copy enclosed. These jurisdictions have codified the attorney-client privilege as paramount to the interest of the general public to obtain public records so that government lawyers and their clients can freely discuss issues of local government. Florida should join Oregon and Mississippi in protecting the attorney-client privilege and extend the exemption to all communications between the lawyer and the governmental entity irrespective of the existence of pending or threatened litigation.

The Commission should consider examples where advice from lawyers are routinely given and reduced to writing:

- Advice concerning the potential legal consequences of alternative wordings of an ordinance.
- Advice concerning contemplated litigation by a county and an assessment as to the likelihood of success.
- Advice to individual members of a board of county commissioners concerning issues that may come before the board or are peculiar to that board member's district.
- Advice to code enforcement officers as to legality of pursuing certain violations or making misdemeanor arrests.

- Advice to department directors and personnel as to the legality of taking certain courses of action in performing their duties such as acquiring or disposing of real property or public purchasing.

**EXPANSION OF EXEMPTION RELATING TO OPINION
WORK PRODUCT TO INCLUDE FACT WORK-PRODUCT
WHEN LITIGATION IS FORESEEABLE OR LIKELY**

The work-product doctrine encompasses the opinions of lawyers, known as opinion work-product, and facts which are utilized by attorneys to form opinions or implement legal strategy, known as fact work-product. Both are protected in varying degrees from disclosure by statute and case law. Both types of work-product should be exempted from disclosure as they are essential to full and frank discussions between attorney and client.

As to opinion work-product, § 119.07(1)(e) provides that a document is exempt from disclosure if it was prepared by an agency attorney pursuant to § 119.071(1)(d) and reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney. However, the document must be prepared in pending or in anticipation of imminent civil or criminal litigation or in pending or in anticipation of imminent adversarial administrative proceedings. The requirement that litigation be imminent or pending limits the opportunities to promote the free flow of information between the government attorney and the client.

As to fact work-product doctrine, the courts have given it broader application than the attorney-client privilege as it extends to documents not only obtained from the client but seeks to protect documents obtained by the lawyer in order to give advice or formulate legal strategy which could include investigative materials prepared by non-lawyer, government employees. Ehrhardt, Florida Evidence, § 502.9 (2007 Ed.). As an example, the attorney for a county may obtain a report or an evaluation from an expert consultant to review data from a developer concerning density caps or fair market value of real property and then use that report to formulate advice to staff or to a board. In this situation, no litigation at that point is imminent although it may have been threatened or suggested by the developer. Under the present status of the public records law, these documents could be subject to disclosure if requested. Legal strategy or advice would then be disclosed because litigation was not imminent but only a possibility. The legal strategy crafted, based on the investigative materials or the consultant's report, might be one to avoid litigation or to recommend courses of action that were ignored or rejected by staff or the board. If these types of documents are disclosed, together with legal communications surrounding them, full and frank discussions are less likely to occur for fear of being disclosed later to be used by the

opposing party as an admission that the government entity chose the wrong legal path to travel.

Contrary to the wording of § 119.07(1)(e), the modern trend is to construe a broad definition of anticipation of litigation which has been adopted by a majority of the Florida court decisions. Ehrhardt, *Florida Evidence*, § 502.9 (2007 Ed.) Two decisions from the First District Court of Appeal have construed anticipation of litigation to protect files and documents prepared for litigation that is foreseeable which is a broader standard than "imminent." *Wal-Mart Stores, Inc. v. Ballasso*, 789 So. 2d 519, 520 (Fla. 1st DCA 2001); *McRae's, Inc. v. Moreland*, 765 So. 2d 196, 197 (Fla. 1st DCA 2000). This broader view of anticipation of litigation should be engrafted into an exemption for materials that the government attorney gathers or assembles, but also to materials gathered by agency personnel or expert consultants hired by the agency, if it is foreseeable or likely that litigation will ensue. *E.g., Federal Express v. Cantway*, 778 So. 2d 1052, 1053-54 (Fla. 4th DCA 2001) (internal investigative reports can constitute work product if prepared as the routine of an organization even though not expressly directed by an attorney).

As examples, situations arise during the course of providing legal advice to staff or the board where opinion work-product and fact work-product coalesce and both should be exempt from disclosure:

- Providing direction to staff or a board on enacting, amending, or repealing certain ordinances pertaining to restriction of land use, operation of landfills, and protection of endangered species in which expert reports are generated either by staff or by the attorney.
- Conferences with staff using documents or reports obtained by attorneys or by staff which determine how to proceed in declaring a contractor or vendor in breach of an agreement with a view toward demanding compliance with contractual obligations.
- Conferences with staff concerning the disposition or acquisition of real property.

The public's right to know is not thwarted from fact work-product being exempt from disclosure. If litigation ensues, then under the Florida Rules of Civil Procedure, a party can obtain disclosure of these materials if the substantial equivalent cannot be obtained by other means without undue hardship. Fla. R. Civ. P. 1.280.

SUNSHINE/SHADE MEETING

In its current form, § 286.011, Fla. Stat., allows only the attorneys for the board, the board itself, and the chief administrative or executive officer of the board to attend

an attorney-client session. Key department personnel below the level of chief executive as well as expert witnesses should be allowed to attend the attorney-client session to explain staff's concerns and goals as well as their knowledge of the legal and factual issues. Expert consultants hired by the attorney or by staff can provide much needed explanation of technical data and provide opinions to the board to assist it in its deliberations. A court reporter recording all communications during the attorney-client session which will be transcribed at the end of the litigation will still be available to the public, thereby, preserving the public's right to know how the board reached its decision.

In addition, these attorney-client sessions should be permitted when litigation is likely or foreseeable in addition when litigation is pending. In this way, boards can be proactive in determining their legal alternatives prior to suit being filed. Settlement can be promoted and mediation can take place before extensive costs to be borne by the taxpayer, are incurred as part of litigation.

**PUBLIC RECORDS REQUEST DURING LITIGATION
IS INCONSISTENT WITH THE SPIRIT OF THE RULES
OF DISCOVERY UNDER FLORIDA AND FEDERAL PRACTICE**

Currently, the Florida Rules of Civil Procedure and Criminal Procedure determine, during the course of litigation, how discovery of facts and documents is to take place. In federal civil litigation, the Federal Rules of Civil Procedure control discovery of documents of facts. The Florida Rules of Civil Procedure were patterned after the federal rules. The Federal Rules of Criminal Procedure have a different intent regarding discovery and are much more narrow than the Florida Rules of Criminal Procedure. However, because broad discovery is allowed under both the Florida Rules of Civil and Criminal Procedure, it is unnecessary for a party opposing the government agency to use public records requests while employing the rules of discovery. A party who is intending to sue the government agency has full freedom to make public records requests prior to engaging in litigation. However, once litigation is initiated, the Public Records Act should provide for an exemption from disclosure of records which either have already been the subject of a public records request or which have been disclosed pursuant to the Florida or Federal rules of discovery in either civil or criminal matters. In this way, government resources are not needlessly expended in search for and providing documents twice over. Once the government is in litigation, it should have the same rights and obligations as any other party.

Interestingly, under the Florida Rules of Criminal Procedure, once a defendant serves a public records request for documents, which are non-exempt because a co-defendant participated in discovery, he is deemed to have participated in discovery and now must abide by reciprocal obligations of discovery imposed on criminal defendants. Fla. R. Crim. P. 3.220(a). The converse should be true for plaintiffs or co-defendants in civil litigation: once they initiate discovery, then the public records produced during the litigation discovery process should be exempted.

CONCLUSION

The Florida Association of County Attorneys requests that the commission consider exempting from public records disclosure the following documents:

1. Exempt all documents which convey legal advice to the employees of the agency or to its board and which contain opinion work-product where litigation is foreseeable or likely.
2. Amend § 90.502(6) to exempt all communications between the agency and its attorneys from being admitted into evidence.
3. Exempt all documents containing fact work-product when used in providing legal advice to agency personnel and its board and when agency personnel or agency attorneys gather information where litigation is likely or foreseeable.
4. Exempt from disclosure all public records which are within the scope of discovery in civil or criminal litigation and have been disclosed as part of the discovery process.


The Florida Association of County Attorneys requests amendment of § 286.011, as follows:

1. Expand the attorney-client meeting to be convened when litigation is likely or foreseeable in addition to when litigation is pending.
2. Expand the persons permitted to attend the attorney-client session to include expert witnesses or consultants that have been retained to assist the agency and key staff of the agency who are knowledgeable concerning of the issues giving rise to the board's need for legal advice.

Thank you for considering these recommendations made on behalf of The Florida Association of County Attorneys.

Respectfully submitted,

FLORIDA ASSOCIATION OF COUNTY ATTORNEYS



Herbert W. A. Thiele, Esq., President

HWAT:eal

cc: FACA Officers and Members
Virginia S. Delegal, Esq., General Counsel, Florida Association of Counties
Janet Lander, Esq., President-Elect, FACA