



The Florida Senate

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Committee on Environmental Preservation and Conservation

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 267.076, F.S., CONFIDENTIALITY OF CERTAIN DONOR INFORMATION RELATED TO PUBLICLY OWNED HOUSE MUSEUMS DESIGNATED AS NATIONAL HISTORIC LANDMARKS

Issue Description

The Open Government Sunset Review Act provides for the review of an exemption from open records or meetings requirement five years after enactment. Section 267.076, F.S., provides that information that would identify a donor or prospective donor to a publicly owned house museum designated by the United States Department of the Interior as a National Historic Landmark who desires to remain anonymous is confidential and exempt from s. 119.07(1), F.S. and s. 24 (a) Art. 1 of the State Constitution. This section is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.

Of the two facilities that qualify for the exemption, the Marjorie Kinnan Rawlings Historic State Park reported that they have never utilized the exemption and no donor has ever requested anonymity. However, the staff reported that they were unaware of the exemptions. In contrast, the Vizcaya Museum and Gardens reported that one generous donor has requested anonymity for the past four years. Also, many of their donors and prospective donors have requested that their identities not be released. The professional fundraising staff of the Vizcaya Museum and Gardens maintains that without the exemption, the museum may experience difficulty in raising funds. Consequently, it is recommended that the Legislature reenact the public records exemption provided under s. 267.076, F.S.

Background

According to the Florida Department of State, there are only two National Historic Landmarks publicly owned house museums in Florida that are eligible for the exemption. The two houses are the Marjorie Kinnan Rawlings home in Cross Creek (between Gainesville and Ocala) that is owned by the Florida Department of Environmental Protection (DEP) and the Vizcaya Museum and Gardens (often referred to as Vizcaya) that is owned by Miami-Dade County and is located in the north Coconut Grove area of the City of Miami, overlooking Biscayne Bay.¹

After Marjorie Kinnan Rawlings graduated from the University of Wisconsin, she married fellow writer Charles Rawlings and worked as a journalist for a number of years. Marjorie Kinnan Rawlings came to rural Cross Creek in 1928 to find a home and a place to write.² Her best known work is *The Yearling* which earned her the Pulitzer Prize for fiction in 1939. Three of her books, *Cross Creek*, *The Yearling*, and *Gal Young Un'*, were made into movies. Her novels portray her affection for the land, nature, and the people of Cross Creek, Florida, which she called home.

The Marjorie Kinnan Rawlings homestead is located on the property of the Marjorie Kinnan Rawlings Historic State Park in Cross Creek, Florida. In 2006 the park was designated a National Historic Landmark. Visitors to the

¹ Vizcaya Museum and Gardens General Information. www.vizcayamuseum.com/plan-general.asp (last visited July 8, 2011).

² Marjorie Kinnan Rawlings Historic State Park History and Culture, www.floridastateparks.org/history/parkhistory.cfm?parkid=75 (last visited July 7, 2011).

park may tour the author's farmhouse, the citrus grove, the tenant house and barn, and experience the rural farm life of the 1930's. The Rawlings' cracker farmhouse has original furnishings. Visitors to the Rawlings home may find staff members, dressed in clothes and preparing dishes reflecting the time period. Although you can see the historic home at any time, access inside the house is by guided tour only. Guided tours cost \$3 for adults, \$2 for children 6-12, and admission is free for children under 6.³

Vizcaya was the winter residence of American industrialist James Deering from Christmas 1916 until his death in 1925. Deering was a Vice President of the International Harvester Company, which produced agricultural equipment for a worldwide market. He chose a bay front site in Miami for his tropical winter home because of the temperate winter climate and his appreciation of the native hardwood hammock. In addition, his father, William, had already settled in Coconut Grove and his half brother, Charles Deering, would soon develop an estate at Cutler, in what is now south Miami-Dade County. The latter is now operated as the Deering Estate at Cutler.⁴

At the time of Vizcaya's construction, Miami's population was around 10,000. More than 1,000 workers were employed in the Vizcaya project, including laborers and craftsmen from the Caribbean and Europe. In addition to the house and gardens, the complex included a farm, livestock, and a variety of other service facilities covering 180 acres on both sides of South Miami Avenue.

The house was intended to appear as an Italian estate. It has 34 decorated rooms with 15th through 19th century antique furnishings and art objects. Vizcaya Museum and Gardens is a Miami-Dade County facility that is accredited by the American Association of Museums and distinguished as a United States National Historic Landmark. Vizcaya serves approximately 174,000 local residents and tourists annually. General tours of the Main House and gardens are available by appointment any day of the week.⁵ The admission cost for adults is approximately \$15, children aged 6-12 are \$6 dollars, and children under the age of 5 are admitted free.

Public Records and Meetings

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.⁶ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.⁷ Article I, s. 24 of the State Constitution, provides that:

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

In addition to the State Constitution, the Public Records Act,⁸ which pre-dates the current State Constitution, specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

³ The Friends of Marjorie Kinnan Rawlings Farm, Inc. www.marjoriekinnanrawlings.org/parkinfo.php (lasted visited July 7, 2011).

⁴ Vizcaya Museum and Gardens History www.vizcayamuseum.org/learn-history.asp (last visited July 8, 2011).

⁵ Vizcaya Museum and Gardens Introduction www.vizcayamuseum.org/nowus-intro.asp (last visited July 8, 2011).

⁶ Section 1390, 1391 Florida Statutes. (Rev. 1892).

⁷ Article I, s. 24 of the State Constitution.

⁸ Chapter 119, F.S.

Unless specifically exempted, all agency⁹ records are available for public inspection. The term “public record” is broadly defined to mean:

. . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.¹⁰

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.¹¹ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.¹²

Article I, s. 24 of the State Constitution also provides that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the Legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution. In addition, the Sunshine Law, s. 286.011, F.S., provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

Only the Legislature is authorized to create exemptions to open government requirements.¹³ An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.¹⁴ A bill enacting an exemption¹⁵ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁶

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁷ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁸

The Open Government Sunset Review Act (the Act)¹⁹ provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Sunshine Law. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is

⁹ The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

¹⁰ s. 119.011(12), F.S.

¹¹ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

¹² *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

¹³ Art. I, s. 24(c) of the State Constitution.

¹⁴ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹⁵ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁶ Art. I, s. 24(c) of the State Constitution.

¹⁷ Attorney General Opinion 85-62.

¹⁸ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁹ s. 119.15, F.S.

required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The Act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are that the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.²⁰

The Act also requires the Legislature to consider the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Act may appear to limit the Legislature in the exemption review process, those aspects of the Act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.²¹ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

... notwithstanding s. 778.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Findings and/or Conclusions

The professional staff of the Senate Committee on Environmental Preservation and Conservation (EP or Florida Senate) surveyed the Marjorie Kinnan Rawlings Historic State Park through DEP's legislative staff to determine how often donors had requested anonymity when donating to the park. The survey also requested specifics regarding the amount of donations and if the park had a system in place to provide anonymity to its donors. Based on the completed survey provided to Florida Senate professional staff, since 2007 a park donor has never requested anonymity. However, the survey did reveal that the agency was unaware of the anonymity exemption

²⁰ s. 119.15(6)(b), F.S.

²¹ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

prior to completing the survey. The donations to the park between 2007-2010 totaled approximately \$13,000. In 2011, the park received two donations totaling approximately \$15,000.

Florida Senate professional staff also surveyed the Vizcaya Museum and Gardens. The response to the survey was prepared and submitted by the Vizcayans, Inc., the private support organization for Vizcaya Museum and Gardens. The Vizcayans describe their private support program for the publicly owned and operated museum as robust. The Vizcayans were aware of the anonymity exemption and have made their donors aware of the option. In 2010-2011 Vizcaya received approximately eight donations totaling \$483,941. According to the completed survey, between 2008-2011, one donor has asserted and consistently maintained their request for anonymity. The total amount of donation that this person/entity donated is less than \$100,000. However, it is the Vizcayan's belief that future contributions from this donor may amount to millions of dollars as long as the museum can offer the option of anonymity. Further, according to the survey, many other prospective donors have stated that they are not willing to have their identities released publicly.

The Act requires the Legislature to consider the following:

What specific records or meetings are affected by the exemption?

In both instances, the exemption would apply to any contact information/records that the museum has collected related to the solicitation or collection of donor monies. Further, there is an operational requirement for Vizcaya under the Better Business Bureau (BBB) Wise Giving Alliance Standards for Charity Accountability.²² Compliance with these standards is mandated and required under the terms of the Vizcayans' operating agreement with the Vizcaya Museum and Gardens Trust. The policy states that both new and continuing donors must have an annual option to inform the charity if they do not want their name and address shared. The charity must make the privacy policy available to donors and clearly state what information if any is shared with another organization and the charity must specify the security measures the charity has in place to protect personal information.

Whom does the exemption uniquely affect, as opposed to the general public?

The exemption only affects donors who choose to donate anonymously to the Marjorie Kinnan Rawlings Historic State Park and Vizcaya Museum and Gardens. Although, the Marjorie Kinnan Rawlings Historic State Park staff has not utilized the anonymous donor option the Vizcaya Museum and Gardens has built their fundraising campaign around this exclusive option.

What is the identifiable public purpose or goal of the exemption?

According to Vizcayans, Inc., the exemption from disclosure of information on actual or prospective donors who request anonymity was sought from the Florida Legislature to:

- ensure that Vizcaya professional staff can pursue donations unhampered;
- ensure the museum's ability to comply with donor privacy requirements of the BBB;
- and to ensure that the charitable giving program at Vizcaya could fairly compete with programs for privately owned and operated museums.

According to the Vizcaya Museum and Gardens website, the Deering's heirs attempted to make an attraction of the estate in 1933 but their efforts were unsuccessful due to a major hurricane. Finally, in 1952, Deering's heirs donated the main house and formal gardens to Dade County below market value. Through the Deering donation and the funds raised through Vizcaya's professional fundraising campaigns the public has had the opportunity to tour and enjoy the historical home. Without this partnership that opportunity might not have been possible.

²²BBB Wise Giving Alliance Standards for Charity Accountability. www.bbb.org/us/Charity-Standards (last visited July, 8, 2011).

Can the information contained in the records or discussed in the meetings be readily obtained by alternative means? If so, how?

No, the donor information cannot be obtained through alternative means. The Vizcayans organization was sued in August of 2007, on the provisions of Chapter 119, the Florida's Public Records Act, by a developer who was seeking to construct high-rise condominiums to the southeast of Vizcaya's historic gardens and wished to put pressure on Vizcaya to drop the opposition to the project. The lawsuit sought under the Florida Public Records Act all membership and donor records. Due to the exemption, the organization was able to keep the donor information anonymous. This lawsuit was defended as a Strategic Lawsuit Against Public Participation (SLAPP) suit, in which a corporation, business or developer sues an organization in an attempt to scare it into dropping protests against its actions. Ultimately, the lawsuit was dismissed by the circuit court judge for lack of prosecution by the developer.²³

Is the record or meeting protected by another exemption?

No, the exemption is not protected by another exemption.

Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

No, there are not multiple exemptions for the same type of record or meeting.

Options and/or Recommendations

Based upon the information provided to professional Senate Committee staff, the exemption should be re-enacted by the Florida Legislature. The Vizcaya Museum and Gardens has an active and successful fundraising campaign that has enabled the staff to maintain the house and gardens. Since 2006, the Museum has raised approximately \$4 million and boasts approximately 174,000 visitors annually. The fundraising formula for maintaining this National Landmark has included offering donors the option of anonymity. Further, now that the Marjorie Kinnan Rawlings Historic State Park staff is aware of the exemption, perhaps, if it is reenacted it can be utilized.

²³ *Related Group of FL Venture LT vs. Viscayans Inc.* Case No. 07-28238-CA-01.